

**Enhancing the Realisation of the Right to Development Through Devolution
in Kenya**

by

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ABSTRACT

The Right to Development (RTD) is not a new issue in human rights practice, having received recognition as an inalienable human right by the United Nations Declaration on the Right to Development (UNDRTD) in 1986, more than 30 years ago. The RTD has also featured in past and recent agreed international policy documents such as; the 1993 Vienna Declaration and Programme of Action and the 2030 Agenda for Sustainable Development (SDGs) among others.

Despite its international recognition as a human right, the schism between the global North and the global South has made it difficult for the UN to adopt a binding international human rights treaty on the RTD. The UN only released the first draft of the international human rights treaty on the RTD in January 2020. This thesis makes a case for the realisation of the RTD through devolution, as an appropriate national development policy in Kenya while international consensus on the RTD is still being sought.

This thesis argues that devolution in Kenya is designed to support the realisation of the RTD. This hypothesis is anchored on the argument that devolution in Kenya and the RTD share certain common elements such as; participation of the people, equity and the realisation of all human rights including the right to self-determination. This commonality therefore makes it possible for devolution in Kenya to augment the realisation of the RTD.

This thesis also argues that devolution in Kenya led to the birth of a development paradigm that is compliant with the RTD. This is discernible by delineating the features of devolution that support the realisation of the RTD. This thesis practically demonstrates how devolution has influenced equitable development, participatory development and the realisation of all human rights in Kenya as evidence of a RTD compliant development paradigm.

The decentralisation experiences of Ethiopia, South Africa and Germany indicate that while a decentralized system of government invariably activates the elements of the RTD such as equity and participation, deliberate policy and legislative steps have to be undertaken to align development programmes with the RTD. Additionally,

the normative and institutional design of the decentralised system of government is key in securing the elements of the RTD.

For Kenya, this means that more has to be done beyond the normative and institutional structures of devolution in Kenya to make the RTD a reality in Kenya. Deliberate efforts have to be taken to align development praxis at county level in Kenya. Some of the recommendations to this end include making devolution functional, devolving human rights practice and raising awareness about the RTD.

Keywords:

The Right to Development; Human Rights; Solidarity rights; Socio-economic rights; Human rights based development; Development; Democracy; Accountability; Devolution; Decentralisation; Federalism; Counties; County government; National government; Equity; Participation; Kenya.

DECLARATION

I, **Andrew Barney Khakula**, declare that the thesis, "**Enhancing the realisation of the right to development through devolution in Kenya**", is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the thesis to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at University of South Africa (UNISA) for another qualification or at any other higher education institution.

A handwritten signature in blue ink, appearing to read 'A. Khakula', is written over a light blue circular stamp.

1st January 2022

SIGNATURE

DATE

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LIST OF ACRONYMS AND ABBREVIATIONS

The various acronyms and abbreviations used in this thesis are explained below:

ACHPR	African Charter on Human and Peoples Rights
APRM	African Peer Review Mechanism
ASALs	Arid and Semi-Arid Lands
ASEAN	Association of South East Asian Nations
AHRD	ASEAN Human Rights Declaration
BRICS	Brazil, Russia, India, China and South Africa
CDD	Community Driven Development
CDF	Constituency Development Fund
CEC	County Executive Committee
CGA	County Government Act
CIDPs	County Integrated Development Plans
COG	Council of Governors
EAC	East African Community
ECDC	Early Childhood Development Centre
ECOSOC	Economic and Social Council
EPRDF	Ethiopian Peoples' Revolutionary Democratic Front
FDRE	Federal Democratic Republic of Ethiopia
FFC	Fiscal and Financial Commission
GDP	Gross Domestic Product
HLTF	High-Level Task Force
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IE	Independent Expert
IEBC	Independent Electoral and Boundaries Commission
LDCs	Least Developed Countries
LGNF	Local Government Negotiating Forum
LGTA	Local Government Transition Act
MCA	Member of County Assembly
MGDs	Millennium Development Goals
MOFED	Ministry of Finance and Economic Development
M.P	Member of Parliament

NEPAD	New Partnership for Africa's Development
OECD	Organisation for Economic Cooperation and Development
OEWG	Open-Ended Working Group
PSC	Public Service Commission
PSCBP	Public Sector Capacity Building Program
PPPs	Public Private Partnerships
RTD	Right to Development
SDGs	Sustainable Development Goals
SDPRP	Sustainable Development and Poverty Reduction Program
TSC	Teachers' Service Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRTD	United Nations Declaration on the Right to Development
UPEACE	United Nations Mandated University for Peace

CHAPTER 1: GENERAL INTRODUCTION

1.1 Background

This thesis investigates the extent to which the right to development (RTD) can be realised through devolution in Kenya. The linkage between the RTD and devolution can be found in elements such as participatory development and equity in resource distribution, which are visibly present in both the RTD and devolution. This commonality, therefore, provides a foundation for the argument that the RTD and devolution in Kenya are mutually supportive.

1.2 Brief Definitions of Key Terms

1.2.1 The Right to Development (RTD)

The *United Nations Declaration on the Right to Development* (hereinafter the UNDRTD) defines the RTD as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised”. The UNDRTD further provides that “the RTD also implies the full realisation of peoples' right to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources”.¹

The UNDRTD marked the beginning of international recognition of the existence of the right and its attainment of formal status.² The United Nations General Assembly adopted the ground-breaking document on the 4th December 1986, in which the RTD was described as “an inalienable human right”.³

¹ Articles 1 and 2 of the *United Nations Declaration on the Right to Development* (UNDRTD) UN Doc A/RES/41/128 adopted on 4th December 1986. For its text see http://www.ohchr.org/Documents/Issues/Development/DeclarationRightDevelopment_en.pdf (Date of use: 22 March 2017) (hereinafter referred to as UNDRTD).

² Articles 1 and 2 of the UNDRTD.

³ Article 1 of the UNDRTD.

Inalienable rights can be defined as "rights that may not be alienated even with consent".⁴ A good example is the famous Thomas Jefferson's American declaration of independence that cites a triad of inalienable rights, namely; the right to life, liberty and pursuit of happiness.⁵ The inalienable status of the RTD means that it cannot be taken away by any government, State or any other actor even if there is some form of consent from the parties. This is crucial because the beneficiaries of this collective right are "the people", while the national governments have a legal obligation to formulate an enabling environment for the realisation of the right, through appropriate laws, policies and international cooperation.⁶ Therefore, governments cannot abdicate their responsibility to secure the RTD for their citizens.

The RTD can also be found in international human rights treaties⁷ such as the *Universal Declaration of Human Rights* (hereinafter the UDHR),⁸ the *International Covenant on Civil and Political Rights* (hereinafter the ICCPR),⁹ and the *International Covenant on Economic Social and Cultural Rights* (hereinafter the ICESCR).¹⁰ The implication here is that the RTD can be realised by enforcing the provisions of major human rights treaties such as the UDHR, ICCPR and ICESCR by State parties. For instance, the right to self-determination, found in Article 1 of the ICCPR,¹¹ is provided for in Article 1(2) of the UNDRTD, which states that the RTD implies full realisation of the right to self-determination. This reinforces the principle of complementarity and interconnectivity of human rights.

1.2.2 Devolution

Defining the term "devolution" is crucial because the fulcrum of this thesis is the argument that "devolution supports the realisation of the RTD in Kenya". The term

⁴ Ellerman 2010 *L & Phil* 571-599.

⁵ Jefferson <https://uscode.house.gov/download/annualhistoricalarchives/pdf/OrganicLaws2006/decind.pdf> (Date of use: 20 August 2021).

⁶ Fukuda-Parr 2012 *Soc Res* 839. "RTD commitments have implications for numerous questions of public expenditure priorities, incentive policies, and regulation. They extend to both national and international domains, and apply to cooperative action with other states in areas of trade, migration, finance, technology transfer, environmental commons, peace and security".

⁷ UNDRTD paras 3 and 4 of the preamble and article 1(2).

⁸ UNGA Res 217A (III) UN Doc A/810 at 71 (1948).

⁹ UNGA Res 2200 (XXI) of 16 December 1966 entered into force on 23rd March 1976.

¹⁰ UNGA Res 2200A (XXI) of 16 December 1966 entered into force on 3rd January 1976.

¹¹ Article 1 of the *International Covenant on Civil and Political Rights* (ICCPR): All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

"devolution" must be understood from a particular country's constitutional and legislative context. After all, the devolution in the United Kingdom is not the same as the one in Uganda, South Africa, or even Kenya.¹²

A basic understanding of devolution is that it is a form of decentralisation of State power. According to Homme, the term "decentralisation is an ambiguous concept, and its borders are not well defined".¹³ This means that there are different models of decentralisation of State power, and devolution happens to be one of them.

The nature, form, or model of "devolution" depends on a particular country's laws. According to Mutakha, in the Kenyan context, devolution is:

“... a system of multilevel government under which the Constitution creates two distinct and interdependent levels of government - the national and county - that are required to conduct their mutual relations in a consultative and cooperative manner”.¹⁴

Devolution generally refers to a system of government in which “decision-making and implementation powers, functions, responsibilities, and resources” are transferred to “legally constituted and popularly elected local governments”.¹⁵ Devolution, in essence, involves giving the democratically “elected sub-national units the power to raise revenue to carry out specified development and governance functions in their legally defined jurisdictions”.¹⁶

De Visser refers to devolution as the location of decision making-power to autonomous sub-national governments.¹⁷ Kanyinga offers clarity to the difference between devolution and other forms of decentralisation of State power. He argues that the term "devolution" is often referred to as "political decentralisation" or "democratic decentralisation" because of it ensures that the power for decision-making is effectively vested in popularly elected self-governing local governments

¹² Mutakha *Constitutional framework for devolution* 32.

¹³ Prud'homme *On the dangers of decentralization* 2.

¹⁴ Mutakha *Constitutional framework for devolution* 32.e

¹⁵ *Hand Book on Devolution* 5 <https://devolutionhub.or.ke/resource/devolution-handbook> (Date of use: 6 July 2016) (hereinafter referred to as *Hand Book on Devolution*).

¹⁶ Cheema and Rondinelli "From government decentralization to decentralized governance" as cited by Kanyinga 2016 *Afr Stud Rev* 157.

¹⁷ De Visser *Developmental Local Government* 30.

while creating systems that make the local governments accountable to the people.¹⁸

Therefore, devolution in the Kenyan context involves the dispersion of power and responsibilities from the national or central government to mainly locally managed units in the form of county governments.¹⁹ In a devolved system of government, the subnational units, to which power is devolved are independent of each other.²⁰ In other words, a sub-national government is not under any obligation to refer to or seek authority from the national or central government in order to perform functions that fall within its jurisdiction by law. The sub-national units' geographical boundaries within which they exercise their authority are clearly defined in law.²¹

Other models of decentralisation of power include delegation and de-concentration.²² De-concentration refers to the "delegation of specific decision-making powers to lower provincial or local levels of the central government".²³ Decision-making and managerial roles are delegated to the lower levels of government, which remain dependent on the central government for funding of appointments and remuneration.²⁴ Critics have argued that this is the weakest form of decentralisation used in most unitary States such as Kenya, before adopting the new Constitution in 2010.²⁵ This is because the lower levels of government are often susceptible to central government interference, which retains total control over them, thus reducing them to mere figureheads.

On the other hand, delegation refers to a governance model where "responsibility for decision-making is transferred to semi-autonomous organisations or units that are not entirely under government control".²⁶ However, the central government retains extensive control over the semi-autonomous units because their relationship

¹⁸ Kanyinga 2016 *Afr Stud Rev* 157.

¹⁹ Kaburu 2013 *Afr Naz Univ L J* 76-77.

²⁰ Ribot *African Decentralization* 7.

²¹ Mbondenyi and Lumumba "Conceptual and Historical Overview" 13-14.

²² Mbondenyi and Lumumba "Conceptual and Historical Overview" 13-14; Mutakha *Constitutional framework for devolution* 34-35; Bosire *Devolution for development* 14-16.

²³ Cheema and Rondinelli *Decentralization and Development* 19.

²⁴ Boko *Decentralization and Reform* 13.

²⁵ Mbondenyi and Lumumba "Conceptual and Historical Overview" 12.

²⁶ Oyugi 2002 *Reg Dev Dialogue* 3.

is more or less a "principal-agent" relationship and the semi-autonomous units remain accountable to the central government.

Critics have argued that delegation is a more effective form of decentralisation than de-concentration, and performs the function of balancing local and national interests better.²⁷ This is because the semi-autonomous units can make decisions that better address the local needs of the populace much more easily than the national government, which may be far removed and inaccessible from the unique socio-economic, political and cultural issues of the locals.

Elements that distinguish devolution from delegation are; "permanent placement of power at sub-national units, and the devolved powers become "original" powers in that they are vested in the sub-national governments". The enabling norm for these elements is usually the constitutional or legislative provisions.²⁸ In Kenya, the Constitution entrenches devolution into Kenya's governance structure. Devolution is a national value and principle of governance by virtue of the express provisions of the Constitution of Kenya 2010.²⁹ This will be discussed in detail in Chapter 4 of this thesis.

Therefore, for purposes of this thesis, devolution refers to a decentralised system of government, where popularly elected local governments known as county governments exercise administrative, fiscal and political powers within their respective jurisdictions as provided in law. The county governments derive their powers and functions directly from the Constitution and operate independently from the national government. The county governments, however, work cooperatively with the national government in discharging some of their functions.

1.3 The Thesis

The thesis identifies the linkage between the RTD and devolution and proceeds to demonstrate how devolution; a system of governance where resources are decentralized to autonomous sub-national governments, has and can play a critical role in the realisation of the RTD in Kenya. The thesis ultimately makes a case for

²⁷ Mbondenye and Lumumba "Conceptual and Historical Overview" 13.

²⁸ De Visser *Developmental Local Government* 15.

²⁹ Article 10 of the Constitution of Kenya 2010.

the realisation of the RTD through devolution in Kenya, arguing that the normative framework around devolution provides a development model or paradigm conducive for the incubation and realisation of the RTD.

1.4 Problem Statement, Objectives and Justification of Thesis

1.4.1 Problem Statement

The subject matter of this thesis is enhancing the realisation of the RTD through devolution in Kenya. The research seeks to establish the link between the RTD and devolution and subsequently argue that devolution can be used to enhance the realisation of the RTD in Kenya.

According to the experts' statement on UNDRTD's 31st anniversary in Geneva, there is a need to advance the realisation of the RTD using sustainable development.³⁰ The statement is evidence that, generally, the realisation of the RTD is still problematic on a global scale. Kenya is a rapidly developing country³¹ ranked 2nd in Sub-Saharan Africa and placed 85th globally in the Global Innovation Index 2021.³² This high level of innovation undoubtedly spurs accelerated economic development.³³ An enquiry as to whether the developmental framework offered under the devolved system of government can be used to enhance the realisation of the RTD in Kenya is appropriate.

As Kenya develops rapidly, the State, in keeping with its obligation to ensure the realisation of the RTD, has to come up with relevant national development policies that aim to improve the lives of its citizens based on their active, free and meaningful participation in development. The State also has to ensure that the people receive a fair distribution of the benefits of such development.³⁴

³⁰ UN experts "Urgent need to speed up world action to realise Right to Development" <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22474&LangID=E> (Date of use: 31 December 2017).

³¹ World Bank Group "Kenya - Country Economic Memorandum" 1.

³² https://www.wipo.int/edocs/pubdocs/en/wipo_pub_gii_2021_exec.pdf (Date of use: 12 June 2022).

³³ World Bank Group "Kenya - Country Economic Memorandum" (iii). The report recommends "accelerating growth to meet Kenya's development goals requires technological advances and innovation that raise firms' productivity". This is a clear indication that innovation stimulates economic growth.

³⁴ Article 2(3) of the UNDRTD.

Professor Viljoen aptly argues that currently, development-focused approaches are increasingly getting interwoven with the human rights paradigm. While “the first five decades since the adoption of the UDHR (1948 to 1998) have witnessed the growth and rise of human rights, the last two decades (1998 to 2018) have seen a definite shift towards framing those issues previously viewed through a human rights lens, as issues of development”.³⁵

One of the reasons why the realisation of the RTD remains problematic internationally is the lack of consensus among States as to how the UNDRTD should be implemented.³⁶ This has persisted despite the Independent Expert (IE) reports and the High-Level Task Force (HLTF)³⁷ appointed in 1998 and 2004, respectively, by the Commission on Human Rights.³⁸

In a bid to secure realisation of the RTD, the Commission on Human Rights in 1998 adopted by consensus a resolution recommending to the Economic and Social Council (ECOSOC) the creation of a follow-up mechanism consisting of an Open-Ended Working Group(OEWG) and an Independent Expert (IE). The work of the OEWG was to monitor and review progress made in the promotion and implementation of the RTD as provided for in the UNDRTD at the national and international levels. The OEWG was also tasked with analysing hurdles to the realisation of the RTD, give recommendations and with an annual focus on specific commitments in the declaration. The IE furthermore was directed prepare reports on progress made in the realisation of the RTD for discussion by the WG.³⁹

The lack of a binding international treaty on the RTD is evidence of failure of the highly contested nature of the RTD. Despite the intense efforts of the OEWG and

³⁵ Viljoen "Preface" vi.

³⁶ Arts and Tamo 2016 *Neth Int'l L Rev* 222.

³⁷ “Commission on Human Rights in its resolution in 2004/7 as passed by the ECOSOC in its decision 2004/249. The terms of reference for the High-Level Task Force were set out in a Report of the Working Group on the Right to Development on its fifth session (Geneva, 11-20 February 2004) E/CN.4/2004/23, 18th March 2004, paras 44-51. The HLTF replaced the IE in 2004 after Dr Arjun Sengupta's term as IE from 2000 to 2004 came to an end. The HLTF was requested by the OEWG in 2004 to look into the following issues and advise; (a) the obstacles and challenges to the implementation of the MDGs in relation to the RTD; (b) social impact assessments in the areas of trade and development at the national and international levels; (c) best practices in the implementation of the RTD”. See E/CN 4/2004/23 para 49.

³⁸ Iqbal 2007 *Pol Pers* 34.

³⁹ Commission on Human Rights Resolution 1998/72 of 22 April 1998, adopted without a vote, para 10. The Economic and Social Council endorsed this resolution in its decision 1998/269.

the IE, a legally binding international treaty on the RTD has not been crafted to date. The RTD remains in the realm of soft law relegating its implementation to the goodwill of States. The effect is that implementation of the RTD remains weak internationally.

According to Kamga, the “lack of consensus on the status of the RTD” is not only limited to academia but also within the United Nations (UN), the main platform for intergovernmental debates. He argues that “it has been twenty (24) years since the UN General Assembly formally recognised the RTD, seventeen (17) years since an agreement involving all governments was reached on the RTD, four (4) and twelve (12) years since the establishment of an OEWG and the designation of an IE on the RTD and six (6) years since the UN High-Level Task Force (HTLF) on the implementation of the RTD was established”. Nonetheless, despite all these efforts, the international community has failed to agree on a binding treaty on the RTD.⁴⁰

Stephen Marks notes that the politics of the RTD is a major obstacle that stands in the “way of transforming the aspirations of the UNDRTD into reality for the hundreds of millions of people for whom development remains an empty promise”.⁴¹ The great political schism between and within the developed nations like the United States of America, Denmark, Sweden, Finland and the Germany, among others on one side and developing countries on the other side about “the exact substance and implications of the RTD” otherwise known as the politics of the RTD have hampered concrete implementation of the UNDRTD.⁴²

This is because first world countries have perpetually rejected an attempt to construe the RTD to give rise to a legal obligation to give development aid to particular "developing" countries. They have also resisted any attempts to interpret the UNDRTD as anything beyond soft law or even creating a binding international treaty on the RTD.⁴³ On the other hand, developing countries continue to demand “for more international cooperation, including development assistance and

⁴⁰ Kamga *Human rights in Africa* 16.

⁴¹ Marks *Obstacles to the right to development* 1.

⁴² Arts and Tamo 2016 *Neth Int'l L Rev* 222.

⁴³ Arts and Tamo 2016 *Neth Int'l L Rev* 224.

concessions, a fairer global trade climate, access to technology and debt relief from "developed" countries".⁴⁴

In this regard, Stephen Marks laments that a careful observation of what transpires during the meetings of the various working groups on the RTD and the Commission on Human Rights reveals that there is hardly any practical dialogue on the implementation of the RTD. Most of the political discussions are characterized by "the posturing of predictable positions rather than practical dialogue on the implementation of the RTD".⁴⁵

The global North (who control the means of development) have been concerned that the RTD may become a valid basis for the global South to claim legal entitlements from the North in terms of contribution of development resources.⁴⁶ The politics of the RTD therefore made consensus at the international level illusory, hence negatively affecting implementation of the right as some States have remained sceptical about the RTD. Rights are effectively and efficiently implemented if there is consensus among the State parties.⁴⁷

However, it is worth noting that in recent times, there have been some developments in the politics of the RTD, highlighted by Marks and Malhotra. They argue that the politics of the RTD in the UN cannot be reduced to only the old North versus South or developed versus developing nations divisions. They assert that it was evident when the report of the HLTF in 2010 was viewed favourably by Organisation for Economic Cooperation and Development (OECD) countries, which consist of developed nations, while the developing countries that traditionally supported the recommendations of the HRLF viewed the recommendations negatively.⁴⁸ This is attributed to the emergence of the BRICS countries, which caused a shift in global economic power⁴⁹ and therefore countries that used to be active in promoting the

⁴⁴ Arts and Tamo 2016 *Neth Int'l L Rev* 224.

⁴⁵ Marks *Obstacles to the right to development* 2.

⁴⁶ Okafor " 'Righting' the Right to Development" 53.

⁴⁷ De Feyter "Towards a Framework Convention". The author argues that "drafting a framework convention on the RTD seems to be the best action for accommodating the concerns of the different political groups, as it allows for step-by-step approach allowing states that have expressed consent to be bound by it".

⁴⁸ Marks and Malhotra "Introduction" 8.

⁴⁹ The acronym "BRICS" refers to Brazil, Russia, India, China and South Africa coined by economist Jim O'Neill in 2001 in a study that analysed economies of countries which represented a remarkable share of the world's production and population.

RTD have become silent as they grow rapidly.⁵⁰ The reality of poverty and increased inequality in developed countries⁵¹ can also be attributed to this shift in politics of the RTD.

Arne Vandebogaerde notes that the RTD has been controversial among “States and scholars” since its proclamation.⁵² He attributes this state of affairs to its lack of conceptual clarity evident in the inability of States “to agree on a common conceptual framework to develop the RTD”, which in turn has harmed the normative validity of the right.⁵³ Consequently, the RTD is still in “murky waters, not cast in an international legally binding document and still not a justiciable right at the international level”.⁵⁴

This lack of conceptual clarity has undermined consensus among the States regarding realisation and/or implementation of the RTD. From an implementation point of view, it would be more effective to have a legally binding treaty on the RTD than a soft law. This explains why steps were taken to explore the possibility of coming up with a binding treaty on the RTD.⁵⁵

However, creating international agreements is an elaborate process that involves multi-level political processes; therefore, agreements are most likely to be successful when there is political goodwill from States. Without political goodwill, even a well-designed agreement will fail.⁵⁶ The UNDRTD is an example of an agreement that's been plagued by a lack of political goodwill.

According to Bunn, extracting the exact substance of the RTD in the UNDRTD has been the subject matter of broad legal discourse. “The often vague language reflects both the complexity of the subject matter and the demands of political compromise”.⁵⁷ In this regard, Bunn identifies three issues; the appropriateness of

https://www.brics.unipr.it/wedit/uploads/contenuti/97/twq_13summer_pant.pdf (Date of use: 20 January 2018).

⁵⁰ Marks and Malhotra "Introduction" 8.

⁵¹ Salverda *et al* (eds) *Changing Inequalities in Rich Countries* 30.

⁵² Vandebogaerde 2013 *Neth QHR* 188.

⁵³ Vandebogaerde 2013 *Neth QHR* 188.

⁵⁴ Vandebogaerde 2013 *Neth QHR* 188. It is soft law meaning that its implementation depends on the goodwill of the State parties.

⁵⁵ See UN Doc A/HRC/WG.2/21/2/Add 1, 20 January 2020, which contains the Draft Convention on the Right to Development.

⁵⁶ O'Brien and Gowan *What Makes International Agreements Work* 3.

⁵⁷ Bunn 2000 *Am U Int'l L Rev* 1434.

the right within the body of human rights law; identification of the beneficiaries and duty holders of the right; and enforcement and justiciability of the right.⁵⁸

To summarize Bunn's assertion, it has been argued that the content of the RTD is vague and does not specify who the duty bearers of the right are. The value of the concept of a right is that it creates entitlements, which become easy to enforce if the beneficiaries are clearly defined.⁵⁹ Brownlie agrees that “the content of the UNDRTD reveals a problem of identity, and the result is to blur the conceptual profile perhaps and make the task of promulgation of the right the more difficult”.⁶⁰

Another author has claimed that the debate about the RTD “marks a crisis in legal theory because it encompasses a determined attempt to place material content before form and yet retain whatever advantages are supposed to attach to the use of legal language”.⁶¹ This author based his assertion on the fact that despite the recognition of the RTD as a human right, countries are still trying to reach consensus on the exact substance of the RTD and what needs to be done to realise the right. Therefore, this state of affairs makes justiciability and enforcement of the RTD difficult as it remains in the realm of theoretical debate rather than in the realm of practicality.

In view of the challenges mentioned above for the realisation of the RTD, countries need to create national conditions favourable for the full realisation of the RTD in line with Article 3(1) of the UNDRTD. There is also a need for individual States to pursue national policies that promote the realisation of the RTD, like devolution in the Kenyan context (as argued in this paper), rather than waiting for international consensus on how best the RTD can be realised.⁶² National efforts to realise the RTD should be viewed as building blocks towards international realisation of the

⁵⁸ Bunn 2000 *Am U Int'l L Rev* 1435.

⁵⁹ Ghai and Pao *Whose Human Right to Development?*

⁶⁰ Brownlie *The Human Right to Development*.

⁶¹ Carty 1984 *Third World Legal Studies* 75.

⁶² Article 10 of the *Vienna Declaration and Programme of Action* provides that lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level. See UN General Assembly *Vienna Declaration and Programme of Action* (hereinafter the *Vienna Declaration*) 14-25 June 1993 A/Conf 157/23 12 July 1993.

right and not an attempt to ignore or deprioritize the international dimension of the RTD.

Ibhawoh asserts that although the UNDRTD and related policy documents are clear about both the national and international dimensions of the realisation of the RTD, a lot of emphasis has been put on the international dimension of the right. There has been very little focus on the role of individual States to realise the RTD through appropriate domestic laws and policies.⁶³

Therefore, this thesis seeks to investigate the role devolution has played or can play in the realisation of the RTD in Kenya. The thesis focuses on Kenya as a country and draws relevant examples from other jurisdictions such as South Africa, which has a devolved system of government.⁶⁴ The Kenyan Constitution borrowed a great deal from the South African Constitution⁶⁵; thus, some lessons can be learned from the South African model of devolution that can add value to this thesis.⁶⁶ For instance, in South Africa, devolution has created a legal platform for rates payers to demand services from the municipalities through withholding payments of rates.⁶⁷ In the context of the RTD, this indicates that devolution puts the human person at the centre of the development matrix where they become both an active participant and beneficiary of the process,⁶⁸ thus giving them the right to demand accountability from the government as a right.

⁶³ Ibhawoh 2011 *HRG* 94.

⁶⁴ See generally, De Visser *Developmental Local Government* where the author discusses at length the devolved structure of government versus development in South Africa. See also Steytler and Ghai "Devolution" 442. The authors note that Kenya and South Africa adopted devolution as a partial answer to the conflicts that ravaged the two countries. Although the driving forces were significantly different, the objectives were similar; to promote peace through some level of accommodation of diversity (ethnicity, language, culture); to limit the level of centralized powers by creating sub-national centres of power; to promote development through equitable distribution of resources and by allowing people at subnational level to determine and implement their priorities; and to deepen democracy through multiple centres of governance (allowing multiparty democracy) and facilitating governance.

⁶⁵ Steytler and Ghai "Devolution" 442.

⁶⁶ Section 40 of the Constitution of the Republic of South Africa Act 108 of 1996 provides for a "three tiered" form of devolution that creates distinct, independent and interrelated national, provincial and local governments that operate within a cooperative framework of government.

⁶⁷ See generally, May <http://ggln.org.za/media/k2/attachments/SoLG.2011-Community-Law-Centre.pdf> (Date of use: 21 October 2018).

⁶⁸ Article 2 of the UNDRTD.

1.4.2 Objective of the Thesis

The RTD is one of the most contested and controversial human rights whose implementation and operationalization have been curtailed largely by controversy and practical considerations.⁶⁹ Undeniably, there are a host of other reasons why RTD has remained mainly in the realm of theory than practice, which will be discussed in the proceeding chapters of this thesis.

Internationally, the right continues to be plagued by the politics of the RTD, which has negatively affected the realisation of the right. Consequently, this thesis investigates a practical way of realising the RTD in Kenya without engaging in RTD controversies in the international sphere. This thesis advances an argument that it is possible to realise the RTD in Kenya without getting into the "murky waters" in the international sphere.

Further, the thesis also advances the argument that it is possible to realise the RTD in Kenya without creating additional normative frameworks through legislation. This thesis is anchored on the argument that devolution, which at its core has RTD features that already supports the realisation of RTD.

In the international sphere, the RTD has been about 'righting' the global economic order by addressing the lopsided or imbalanced relationship between the global North and global South.⁷⁰ This is the genesis of the "politics of the RTD", also known as the North and South debate, where "developed" countries have resisted the adoption of an interpretation of the RTD that would legally compel them to give development aid to "developing" countries, The "developing" countries instead continue to push for "international cooperation, including development assistance and concessions, a fairer international trade climate, access to technology and debt relief from "developed" countries".⁷¹

This paper will argue that in the Kenyan context, the RTD seeks to correct the historical injustices that resulted in present socio-economic inequity in Kenya. Historical injustice refers to "those harms and wrongs committed by individuals,

⁶⁹ Arts and Tamo 2016 *Neth Int'l L Rev* 224.

⁷⁰ Villaroman 2011 *Neth QHR* 4; Stokke *The UN and development* 7-10.

⁷¹ Arts and Tamo 2016 *Neth Int'l L Rev* 224.

groups and institutions (including rulers and regime elite) against other individuals and groups who may be deceased but whose descendants are living".⁷² The British colonialists committed these historical injustices and the successive governments further perpetuated it after independence in 1963.⁷³

This thesis will also trace the historical and theoretical origins of the RTD, including the normative structure of this right both at international, regional and national spheres to better understand the issues surrounding the realisation of the right. The thesis will equally trace the historical origins of devolution in Kenya and assess the impact of a devolved system of government on the RTD to emphasise the linkage between the RTD and devolution.

This thesis will also assess the impact devolution has had on development issues in Kenya over eight (8) years as devolution has been in operation in Kenya since around August 2013. The purpose of this thesis is purely to establish a linkage between devolution and the RTD as discussed above; any other purpose would be outside the scope of the study.

1.4.3 Justification of the Thesis

1.4.3.1 The Context

Implementation and realisation of the RTD in the international sphere has remained problematic even though the UNDRTD is now over thirty (30) years old.⁷⁴ According to Arts and Tamo, "seventy (70) years after the UN Charter and thirty (30) years after adopting the UNDRTD, still very little actual RTD implementation practice has been achieved".⁷⁵ The above mentioned can be attributed to, among other factors, the politicisation of the RTD,⁷⁶ which has hampered international cooperation towards the realisation of the RTD.⁷⁷

⁷² CRA http://devolutionhub.or.ke/file/4ef1130cd1d003e806_1520e4d784e647.pdf (Date of use: 20 February 2018) 11.

⁷³ Constitution of Kenya Review Commission (CKRC) "The main Report of the Constitution of Kenya Review Commission" (2002) 18 (hereinafter referred to as the CKRC Report).

⁷⁴ UN experts <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22474&LangID=E> (Date of use: 31 December 2017).

⁷⁵ Arts and Tamo 2016 *Neth Int'l L Rev* 237.

⁷⁶ Marks *Obstacles to the right to development* 2.

⁷⁷ Article 4 of the UNDRTD requires state cooperation.

Internationally, the inability of States to agree on a common conceptual framework to develop the RTD has dramatically affected the normative validity of the right,⁷⁸ thus whittling down any realisation efforts at the international level. According to Sakiko Fukuda-Parr, the UNDRTD has been widely criticized for being too poorly written, with ambiguity over fundamental issues. For instance, is the RTD a collective or an individual right? This clarity is important for purposes of “defining a conceptually robust human right that would have significant meaning for improving human welfare”.⁷⁹

The African Charter on Human and Peoples Rights (ACHPR) recognizes the RTD as a legally binding and justiciable right in Africa.⁸⁰ The Charter does not provide any comprehensive blueprint on how the RTD should be realised by member States. Article 22(2) merely provides that States shall have the duty, individually or collectively, to ensure the exercise of the RTD but does not provide the practical steps States ought to take to ensure the exercise of the RTD. This has, therefore, negatively affected the realisation of the RTD.

Okafor has noted that article 22 of the ACHPR “remains obscure as to the nature of the concept of development as no detailed developmental programme can be deciphered from its reading”.⁸¹ Mbondenyei also notes that the ACHPR “fails to precisely state the scope and duty to ensure the realisation and exercise of the RTD”.⁸² Additionally, Article 22 and the other documents that provide for the RTD in Africa do not clearly articulate the features of an appropriate development paradigm which is compatible with the RTD in the African context.⁸³

All these factors have prevented the RTD from gaining the prominence it deserves in Africa, and since member States to the ACHPR do not have clear guidelines on what it takes to ensure the realisation of the right.

There has been very little jurisprudence from the African Commission or the African Court on the RTD apart from the *Ogoni* case, the *Ogiek* case and the *Endorois* case,

⁷⁸ Vandenbogaerde 2013 *Neth QHR* 188.

⁷⁹ Fukuda-Parr 2012 *Soc Res* 845.

⁸⁰ OAU <https://www.refworld.org/docid/3ae6b3630.html> (Date of use: 19 June 2018).

⁸¹ Okafor "A regional perspective" 377.

⁸² Mbondenyei *Int'l Hum Rts* 212.

⁸³ Ouguergouz *The African Charter on Human and Peoples' Rights* 307.

meaning that Article 22 has not been exhaustively interpreted. Consequently, many elements of right remain vague, limiting the realisation of the right.⁸⁴

The foregoing demonstrates that the RTD still faces numerous challenges that have negatively affected its realisation both at the international and regional levels. form. There is a need to find creative ways of realising the RTD to make the right a reality. This thesis seeks to offer a local or national solution to the realisation of the RTD in Kenya.

1.4.3.2 Motivation and Importance of the Thesis

This thesis is critical because it will demonstrate that through a devolved structure of government, Kenya has already put necessary measures at the national level for the realisation of the RTD, owing to the linkage between devolution and the RTD. This mirrors article 10 of the UNDRTD, which requires States to formulate and implement policy, legislative and other measures to ensure the realisation of the RTD.

This thesis will show how devolution puts people at the centre of the development matrix by creating various avenues for participatory development. This impacts positively on the RTD because the RTD similarly prioritizes the human person in the development matrix. The RTD aims to improve "the well-being of the entire population and all individuals based on the active, free and meaningful participation in development and in the fair distribution of the resulting benefits."⁸⁵

The thesis is important because it will also create awareness regarding the realisation of RTD in Kenya through devolution. This will ultimately augment overall access to and enjoyment of human rights in Kenya since the realisation of the RTD also guarantees the realisation and enjoyment of civil and political rights (CPRs) and economic, social and cultural rights (ESCRs).⁸⁶ Bedjaoui illustrates this point by

⁸⁴ Kamga *Human rights in Africa* 217-237.

⁸⁵ Malhotra "Towards operational criteria and monitoring framework" 390.

⁸⁶ The RTD is defined as the mere sum total of the already recognized rights. See Sengupta 2002 *HRQ* 873. See also Article 6 of the UNDRTD provides that human rights are indivisible.

asserting that the RTD is the foundational right from which other rights emerge. He calls it the "alpha and omega of human rights".⁸⁷

This thesis will highlight the factors that have hampered the realisation of the RTD in Kenya and argue that devolution under the Constitution of Kenya 2010 creates a development paradigm that is compatible with the RTD. Munene alluding to the transformative nature of the Constitution of Kenya 2010, argues that the pre-2010 Constitution was designed to provide for the regulatory framework of the State with scanty provisions on social transformation.⁸⁸ The 2010 Constitution on the other hand has features that propel social transformation such as an expanded bill of rights whose net effect is to lay a foundation for the realisation of the RTD.⁸⁹ Understanding challenges facing the realisation of the RTD then provides the basis for which devolution is proposed as the vehicle for the realisation of the RTD in Kenya.

1.4.4 Conclusion

The quest to investigate the linkage between the RTD and devolution in Kenya forms a very interesting subject worthy of research. The argument in this thesis is that the linkage between devolution and the RTD creates a conducive legal framework for the realisation of the RTD in Kenya. This thesis argues strongly for creating national conditions favourable for the full realisation of the RTD in line with Article 3(1) of the UNDRTD. Such conditions include decentralisation through a constitutional design that provides for devolution. The thesis argues that this should be the first line of intervention in realising the RTD due to lack of international consensus over the RTD, thus its soft law status. Kenya is used as a case study to test this hypothesis. Not much research has been done in this area, thus making this thesis worthwhile.

1.5 Research Methodology

The thesis is based on critical review and analysis of secondary literature relevant to the research.⁹⁰ Desk research forms the core of the research methodology

⁸⁷ Bedjaoui "The Right to Development" 1177-1182.

⁸⁸ Munene 2013 *Afr Naz ULJ* 56.

⁸⁹ Munene 2013 *Afr Naz ULJ* 56.

⁹⁰ Mouton *How to succeed in your Master's and Doctoral studies* 155.

because there is a lot of published literature by organisations, researchers and scholars touching on the RTD and decentralisation or devolution albeit as separate topics. The secondary sources of information that are used in this thesis include reports of national, regional and international institutions like the World Bank, the UN, IMF, AU, the Council of Governors (COG), the Kenya Bureau of Statistics, and the Ministry of Devolution and Planning among others, treaties, declarations and resolutions. These are critical in defining the RTD and establishing the link between the RTD and devolution.

The relevant provisions of the UNDRTD and the ACHPR are also referred to, including UN general comments and observations on State parties' reports. Reports on the implementation of a devolved system of government in Kenya are also analysed for purposes of drawing conclusions on how devolution has impacted the RTD in Kenya. The reports also inform the enquiry as to and whether devolution can be used as a catalyst for the realisation of the RTD in Kenya.⁹¹

Other secondary sources include; textbooks, journal articles, newspapers, conference papers, conference reports and internet sources. The data from these sources is critical in demystifying the normative foundations and current legal and theoretical debates surrounding the RTD. The secondary sources also help shed some light on the history of devolution in Kenya to show the linkage between devolution and the RTD.

The research methodology is time-saving because one re-analyses data that other researchers have already collected. Complicated and time-intensive activities like oral interviews, raw data analysis and ethical considerations are therefore curtailed. The downside is that the data may contain errors, especially if the objective of the primary investigator is misunderstood or skewed to achieve a particular finding.

⁹¹ These reports are available from the Council of Governors, Ministry of Devolution and Planning, UNDP, Civil Society, among others. For instance, World Bank *World Development Report 1999/2000*; 3rd Annual Devolution Conference Report 2016 (The Promise of Devolution: Consolidating the Gains After Transition and Looking into the Future, Celebrating Devolution); UNDP http://www.ke.undp.org/content/kenya/en/home/library/democratic_governance/making-devolution-work.html (Date of use: 6 April 2017).

1.6 Research Questions

The research seeks to answer the following research questions:

1. Is the RTD applicable in Kenya?
2. Is there a link between devolution as a Constitutional model of governance and development in Kenya and the realisation of the RTD?
3. Does devolution augment the realisation of the RTD in Kenya?
4. Are there any legal, policy and or institutional reforms that should be implemented so as to make the realisation of the RTD through devolution in Kenya more effective?

1.7 Scope and limitation of the Thesis

1.7.1 Scope of the Thesis

The thesis revolves around the realisation of the RTD through the devolved structure of government in Kenya. In other words, the thesis seeks to address development issues through a human rights-based approach using devolution and the RTD as the key parameters. To do this, the thesis will show the linkage between the RTD and devolution in Kenya and then proceed to argue that devolution can be used to realise the RTD in Kenya. The thesis will ultimately give recommendations on how to implement devolution in such a way that it augments the realisation of the RTD.

Therefore it will be essential to address the various definitions of the term “development” right from the industrial revolution in Europe, the definitions adopted by the Bretton-Woods Institutions⁹² and finally, the definition adopted by the UNDRTD, which is more of a human rights perspective to development.⁹³ Development has been defined as synonymous with modernisation⁹⁴ simultaneously; it has also been perceived in the traditional understanding as the accumulation of wealth and is measured by the Gross Domestic Product (GDP).⁹⁵

⁹² Yusuf *et al* *Development Economics through the Decades* 3-6.

⁹³ The Preamble of the UNDRTD.

⁹⁴ Seers 1969 *Int'l Dev Rev* 2.

⁹⁵ Kamga *Human rights in Africa* 60.

On the other hand, the World Bank has defined development to be “multi-dimensional, encompassing better education, higher standards of health and nutrition, less poverty, a cleaner environment, more equality of opportunity, greater individual freedom and a more prosperous cultural life”.⁹⁶

Understanding what development entails in the context of this thesis is important because there is a strong link between human rights and development. The achievement of lasting progress in the implementation of human rights depends on sound and effective national and international economic and social development policies.⁹⁷ This means that development plays a significant role in realising human rights, thus the need to illustrate how development affects the RTD in this thesis. This link is further emphasized by the fact that the UNDRTD also defines what development entails.⁹⁸

The historical origins of the RTD and its evolution over time will also be addressed to understand the nature of this right and the challenges facing its realisation. Since its conception, the RTD has been a controversial right; developing countries have “based their claim for resources transfer on the RTD perceived as a fundamental right while developed countries believe that the right is a myth”.⁹⁹ This politicisation of the RTD has made its realisation difficult mainly because the international community not been able to agree on the exact formula for realising the right.¹⁰⁰

There has been much discourse internationally about the RTD, mostly referring to the nature of this right and whether it is a human right that can be realised.¹⁰¹ Munene notes that many intergovernmental conferences that followed the *Vienna Declaration* seem to have put to rest the debate on whether the right to development exists as a human right.¹⁰² There have been debates on whether an international

⁹⁶ World Bank *World Development Report* 4.

⁹⁷ See the *Proclamation of Teheran*, para 13 in final Act of the International Conference on Human Rights, UN doc A/CONF 32/41 (1968).

⁹⁸ The UNDRTD in its preamble defines development as a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

⁹⁹ Nwauche and Nwobike 2005 *IJHR* 93.

¹⁰⁰ Arts and Tamo 2016 *Neth Int'l L Rev* 224.

¹⁰¹ See generally, Vandenbogaerde 2013 *Neth QHR* 188.

¹⁰² Munene 2013 *Afr Naz Univ L J* 61.

legally binding treaty on the RTD should be in place¹⁰³ and 2007, the UN General Assembly passed a resolution that a legal standard of a binding nature on the RTD should develop.¹⁰⁴ In 2020 the UN Working Group on the RTD released the first draft international human rights treaty on the RTD¹⁰⁵ All these are efforts towards the implementation of the RTD. These arguments will be instrumental in appreciating the complexities around the implementation of the RTD internationally hence the need for member States to put in place effective development policies at the national level that will result in the realisation of the RTD.

The normative origins of the RTD will be analysed and discussed to understand why States have not been able to achieve consensus on the implementation of the UNDRTD internationally.

The thesis will also discuss article 22 of the ACHPR, which provides for the RTD and analyse the jurisprudence of the African Commission regarding article 22 to provide an understanding of the RTD from the African standpoint. As indicated earlier, the ACHPR forms part of the law of Kenya under article 2(6) of the Constitution of Kenya. It is therefore vital to illustrate how the RTD fits into the Kenyan Constitutional architecture.

As stated earlier, devolution in its current form is a relatively new concept in Kenya¹⁰⁶ and thus a historical background of devolution in Kenya will be undertaken. This will be important in interpreting the constitutional aims and objectives of the devolution. This analysis will provide an in-depth understanding the "spirit of devolution" and, in the process, establish the linkage between devolution and the RTD in the Kenyan context.

The South African, Ethiopian and German experience with decentralised government systems will be included to give the study a comparative angle. Ethiopia, South Africa and Germany are preferred because of the following reasons:

¹⁰³ Schrijver "Many Roads Lead to Rome" 127-129.

¹⁰⁴ UNGA Res 62/161 adopted on the 18th of December 2007.

¹⁰⁵ See UN Doc A/HRC/WG.2/21/2/Add 1, 20 January 2020, which contains the Draft Convention on the Right to Development, with commentaries.

¹⁰⁶ Note that the post independence 1963 constitution provided for majimboism which was a form of devolution but the system was abolished shortly after independence and replaced with a centralized government see Steytler and Ghai "Devolution" 74.

Ethiopia embraced federalism, which is similar to devolution¹⁰⁷ in 1991.¹⁰⁸ Ethiopia crafted her form of devolution around the need to accommodate an ethnically diverse society with a political history of ethnic domination.¹⁰⁹ Certain ethnic groups of peoples were marginalized in Ethiopia, and devolution sought to give these people a voice.

A comparative study of South Africa is undertaken because the county has practised devolution in its current form since 1997.¹¹⁰ De Visser commenting on the South African experience states that in terms of enhancing peoples' choices, decentralisation "enhances the government's capacity to gauge peoples' needs and strengthens the link between the State and society".¹¹¹ The South African experience may be useful when analysing whether devolving development resources has significantly augmented the realisation of the RTD in South Africa.

Mutakha notes that Kenya's devolution borrowed heavily from the South African Constitution¹¹² albeit with certain modifications such as the structure of the devolved units.¹¹³ He further argues¹¹⁴ that because of South Africa's apartheid past, the South African Constitutional Court has interpreted the mandate of local government liberally, broadly and generously¹¹⁵ because of the need for a strong central government and local governments that would be catalysts for equitable development.¹¹⁶ The same view is echoed by De Visser.¹¹⁷

Bosire, similarly argues that Kenyan Courts are "inclined towards the jurisprudence that takes a liberal, broad and generous interpretation to give effect to devolution given its central position in the Kenyan Constitutional design".¹¹⁸ Jill Cottrel-Ghai

¹⁰⁷ Bosire *Devolution for development* 19.

¹⁰⁸ Maru "Devolution of Power in Ethiopia" 11.

¹⁰⁹ Maru "Devolution of power in Ethiopia" 11.

¹¹⁰ Constitution of the Republic of South Africa 108 of 1996 date of promulgation 18th December 1996 and date of commencement 4th February 1997.

¹¹¹ De Visser *Developmental Local Government* 256.

¹¹² Mutakha *Constitutional framework for devolution* 461.

¹¹³ The Kenyan structure is two-tiered consisting of the National government and the County government while the South African structure is three-tiered consisting of the Provincial, Municipal and Local governments.

¹¹⁴ Mutakha *Constitutional framework for devolution* 462.

¹¹⁵ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (2) BCLR 157 (SCA) (DFA) para 49.

¹¹⁶ Mutakha *Constitutional framework for devolution* 463.

¹¹⁷ De Visser *Developmental Local Government* 57-73.

¹¹⁸ Bosire *Devolution for development* 408-409.

and other authors have argued that devolution is a mechanism for bringing greater benefits to minorities and the marginalized sections of Kenyan society.¹¹⁹

Looking at Mutakha, Cottrel-Ghai and Bosire's arguments above, devolution in South Africa and Kenya seems to have a common strand. The strand can be summarized as creating access to socio-economic goods and services to minorities and marginalized groups through equitable development. This commonality, among others, therefore makes South Africa an appropriate jurisdiction for a comparative study.

Germany is used as a case study in this thesis because it successfully used federalism to bridge the gap between East and West Germany after the collapse of the iron curtain and the Berlin Wall on the 9th of November 1989.¹²⁰ Germany's decentralisation experience provides lessons on how fiscal decentralisation can be used to address equity in a country that had to grapple with unifying a "poor ex-communist East Germany" and a "rich capitalist West Germany". For Kenya, Germany illustrates the potential of fiscal equalization under the Constitution of Kenya 2010 to realise the RTD.

In a bid to formulate an argument in favour of devolution as a vehicle to provide the much-needed impetus for the realisation of the RTD in Kenya, it will be necessary to assess the developmental gains of devolution and the level of peoples' participation in the process of development. Malhotra identifies the first attribute to the RTD as a focus on holistic human-centred development.¹²¹ Devolution makes this attribute a reality by putting people in the centre of the development through public participation. For instance, article 174(c) of the Constitution of Kenya provides that one of the objects of devolution is "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". An enquiry whether devolution has created a bigger space for participatory development as an attribute of the RTD will thus be apt.

¹¹⁹ Cottrel-Ghai *et al Taking Diversity Seriously* 7.

¹²⁰ See generally, Bastuck 1991 *International Lawyer* 251-266.

¹²¹ Malhotra "Towards operational criteria and monitoring framework" 390.

The preceding analysis will then create a basis for formulating an argument in favour of devolution as a catalyst for the realisation of the RTD in Kenya.

1.7.2 Limitations of the Thesis

The thesis has various limitations:

Firstly, this thesis is about the impact of devolution on the RTD in Kenya. Its primary focus is Kenya as a country, and thus expected that the research be concentrated on Kenya with relevant comparative studies from other similar jurisdictions.¹²² South Africa, Ethiopia and Germany are some countries that have devolved government structures. Relevant research and experiences from these jurisdictions will be incorporated in this thesis.

The second limitation is the period of assessment. As much as the Constitution was promulgated in 2010, devolution has only been in operation in Kenya from 2013,¹²³ meaning that the assessment period is, therefore, approximately four (4) to seven (7) years. It is accurate to argue that this period may not be sufficient to accurately and conclusively assess the impact of devolution on the RTD in Kenya. This is because some development plans are long term and require substantial budgetary allocations, and thus, their effects can only be assessed over an extended period and not the four (4) to seven (7) year period.

The third limitation that flows from the preceding limitation is that the research will use the amount of budgetary allocation to development projects to form the basis of assessing the impact of devolution on the RTD. Therefore, the research assumes that the amount of investment in a specific sector will automatically result in growth or improvement in the expected outcomes. For instance, if a subnational government (county government) has built fifty clinics over four years, the expected outcome will be better access to quality health care and improved quality of life

¹²² Countries like Nigeria, Canada, South Africa and Germany have some form of decentralized system of government and thus we shall draw examples from such jurisdictions.

¹²³ The first general elections conducted by new Independent Electoral and Boundaries Commission (IEBC) under the Constitution of Kenya 2010 were 4 March 2013. The elections marked the roll out of devolution with the first County Governors taking office. https://en.wikipedia.org/wiki/Kenyan_general_election,_2013 (Date of use: 4 May 2017).

which leads to the realisation of socio-economic rights such as the right to health¹²⁴ and ultimately the RTD.¹²⁵

This assumption ignores other variables; for instance, the sub-national government may not have a budget to hire more health workers, meaning that more clinics may not necessarily translate into immediate better access to quality medical care for the people.¹²⁶

The fourth limitation relates to the Constitutional architecture and design, which demarcates the clear roles of the county governments and national government regarding matters of development. This means that the developmental role played by the county governments is limited to some degree. The national government still retains the bigger development budget like national roads, education, security, international trade, power generation, railways, and public investment.¹²⁷ Certain government functions that have a direct impact on the RTD that are not devolved,¹²⁸ and thus the role of the devolved units in development is limited to functions that are devolved, for instance, health, some aspects of infrastructure like county roads, among others.¹²⁹

¹²⁴ Article 43(1) of the Constitution of Kenya provides: "Every person has the right—
(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;"

¹²⁵ The UNDRTD in its preamble provides that human rights are indivisible and interrelated meaning that realisation of the RTD is a process of realising civil and political as well as social, economic and cultural rights. See the *Vienna Declaration*.

¹²⁶ For instance, during the 2015/16 financial year the county governments received Kshs 508 million result based conditional grant from the World Bank to incentivize health workers in Arid and Semi-Arid Lands (ASALs) to perform and deliver results for realisation of SDGs but one of the challenges faced by the health workers at the counties is some of the hospitals inherited from the central government were in dilapidated conditions. In some cases, hospitals and health centres did not have water supply, beds and medical staff. This means that counties have to rehabilitate infrastructure and build more health facilities something that will take a long time to achieve before the real impact of access to quality health care can be seen in the beneficiary communities. See "The Promise of Devolution: Consolidating the Gains after Transition and Looking into the Future" (3rd Annual Devolution Conference Report 19-23 April 2016) 28.

¹²⁷ Schedule 4 of the Constitution of Kenya lists the functions of the national and county governments.

¹²⁸ For instance, security is a national government function and yet security is key determinant in the enforcement and realisation of human rights.

¹²⁹ The 4th schedule Part 2 of the Constitution of Kenya 2010 provides for functions of the county governments as Agriculture, including crop and animal husbandry, livestock sale yards, county abattoirs (slaughterhouses), plant and animal disease control, and fisheries; County health services, including, in particular – county health facilities and pharmacies, ambulance services, promotion of primary health care, licensing and control of undertakings that sell food to the public, veterinary services (excluding regulation of the profession which is a

The challenge with this is that assessing development at the county level while ignoring development at a national level may not capture the overall national State of affairs. However, a national assessment of development is outside the scope of the thesis since research is focused on the direct role devolution plays in realising the RTD in Kenya.

The research will also focus on Nairobi county, Kiambu county, Makueni county, Mombasa county, and Pokot county as case studies. Nairobi county is the most populous county in Kenya the seat of Kenya's capital city; thus, a lot of business activities and government operations are centred in the said county while Kiambu county is the second most populous county in Kenya. Makueni county has been ranked as one of the best-managed counties in Kenya, while Mombasa county is a cosmopolitan county by being a hub for tourism in Kenya. Pokot county, located in a remote part of Kenya, has suffered marginalisation by the government since Kenya gained independence from Britain. These specific counties have been selected for their ability to provide unique data relevant to this research.

The research will not cover all forty-seven (47) counties since they are different in terms of their social, economic and cultural set-up. For instance, when assessing developmental projects touching on agriculture, the research may focus only on the

national government function), cemeteries, funeral parlours and crematoria, and refuse removal, refuse dumps and solid waste disposal; Control of air pollution, noise pollution, other public nuisances, and outdoor advertising; Cultural activities, public entertainment and public amenities, including – betting, casinos and other forms of gambling, racing, liquor licensing, cinemas, video shows and hiring, libraries, museums, sports and cultural activities and facilities, and county parks, beaches and recreation facilities; County transport, including – County roads (Class D, E and Unclassified Roads), street lighting, traffic and parking, public road transport, and ferries and harbours (excluding the regulation of international and national shipping and matters related thereto); Animal control and welfare, including – licensing of dogs, and facilities for the accommodation, care, and burial of animals; Trade development and regulation, including – markets, trade licences (excluding regulation of professions), fair trading practices, local tourism, and cooperative societies; County planning and development, including – statistics, land survey and mapping, boundaries and fencing, housing, and electricity and gas reticulation and energy regulation; Education – only pre-primary education (ECD), village polytechnics, home craft centres and childcare facilities; Implementation of specific national government policies on natural resources and environmental conservation, including soil and water conservation, and forestry; County public works and services, including – storm water management systems in built-up areas, and water and sanitation services; Fire-fighting services and disaster management; Control of drugs and pornography; Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

top five counties with the highest budgetary allocation.¹³⁰ An attempt to undertake a case study of the forty-seven (47) counties would make this research voluminous and impossible to complete.

Finally, corruption and misuse of public funds among the devolved units or sub-national governments have been rife. This means that budgetary allocations towards specific projects in the counties have been misused and mismanaged, leading to a failure to achieve the desired outcomes. Therefore, this thesis will assume that, to a large extent, all the budgetary allocations prepared by the County Governments were utilised correctly.¹³¹

1.8 Literature Review

The RTD is not a novel issue. It has generated a great deal of research since it was formally recognized as a distinct human right. The RTD's realisation is the subject of debate by many scholars, primarily because of the controversial nature of the right itself and lack of international unanimity on how this right can be realised.

This research argues that there is a strong link between RTD and devolution. This linkage provides a theoretical and normative framework that can be used to realise the RTD in Kenya. No concrete studies have been done on this subject, thus this thesis will build on existing literature on RTD and devolution to establish this argument.

Most of the existing literature on the RTD revolves around the history of the RTD, its legal standing and the challenges facing its realisation in contemporary times. On the other hand, most of the existing literature on devolution focuses on defining devolution, its unique place in Kenya's history and its link to development.

1.8.1 Thematic areas in the Reviewed Literature

Donnelly has aptly captured controversial nature of RTD in his article *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, wherein

¹³⁰ The top five counties in terms of budgetary allocations to agriculture were Lamu county 14.1%, Tharakanithi county 12.4%, Nyamira county 8.6%, Vihiga county 8.6% and Turkana county 8.5%. See The 3rd Annual Devolution Conference Report (2016) 3.

¹³¹ Ng'ang'a <https://www.standardmedia.co.ke/article/2001362366/mt-kenya-roots-for-one-man-one-vote-one-shilling> (Date of use: 20 July 2020).

he provides an in-depth criticism of the RTD disqualifying it as a valid human right.

He states that:

A philosopher is a person who goes into a dark room on a moonless night to look for a non-existent black cat. A theologian is one who comes out claiming to have found the cat. A human rights lawyer, after such an on-sight visit, sends a complaint to the commission on human rights, and a member of the commission leaves the room drafting a resolution on the treatment of black cats. I readily joined the quest for the right to development but came up empty-handed. I did, however, come upon the idea of turning on the light; the room was proved empty."¹³²

In a nutshell, Donnelly argues that his quest to find the RTD came to nought because the RTD is not a human right. Among many other arguments presented, he avers that the RTD implies States that have human rights are incomprehensible and distorts the nature of human rights¹³³ since human rights are those rights that one enjoys by virtue of their humanness.¹³⁴

Alston, however, punches holes in Donnelly's critique of the RTD and justifies the existence of RTD by stating that "the RTD is neither a black cat which Donnelly portrays to be nor the white cat which some commentators might imply. In law, it is more than a kitten. If it grows as it should, it will become not a pure white Angora cat but a multi-coloured one with good and bad points and perhaps a somewhat mixed pedigree".¹³⁵

Alston means that the RTD is an "emerging right" and thus has to undergo a process of identification in the spectrum leading to the status of positive law.¹³⁶ In other words, the RTD is still evolving and can be likened to a kitten that is still growing into a cat. Alston also argues that Donnelly fails to examine the notion of the State as the medium through which rights of individuals are effectively ascertained *vis a vis* the international community¹³⁷ and the more significant role the State plays in recognising human rights.¹³⁸

¹³² Donnelly 1985 *Calif West Int'l L J* 473.

¹³³ Donnelly 1985 *Calif West Int'l L J* 499.

¹³⁴ Mubangizi 2004 *AHRJ* 94; Ambrose *Democratisation and the process of human* 29; Azinge "Milestone decisions on human rights" 196.

¹³⁵ Alston 1985 *Calif West Int'l L J* 510-518.

¹³⁶ Alston 1985 *Calif West Int'l L J* 513.

¹³⁷ Alston 1985 *Calif West Int'l L J* 512.

¹³⁸ Alston 1985 *Calif West Int'l L J* 516.

Vandenbogaerde, in *Right to Development in International Human Rights Law; a call for its Dissolution*, gives a thorough critique of the RTD and argues for an abolishment of the RTD in contemporary times. He justifies his stance that the RTD is a duplication of what socio-economic rights are already addressing.¹³⁹ Ghai adds his voice to the critics of the RTD by arguing that the RTD does not clearly define who the right and duty bearers are, and thus it is not a human right.¹⁴⁰ Ghai's argument may not hold water in the present dispensation because the current debate around the RTD is not whether the RTD is indeed a human right but rather the formal process elaborating the contents of the right.¹⁴¹

Vandenbogaerde's indictment of the RTD is rather harsh and extreme because he views the RTD as utterly unnecessary in light of the controversy surrounding the right. He asserts the notion that the RTD is "the *alpha* and *omega*" of human rights thus seems "simplistic and is condescending to the potential of existing human rights".¹⁴² This is because the RTD remains contested while the other human rights such as civil and political rights and socio-economic and cultural rights have gained wide acceptance evidenced by the existing international treaties regarding these rights.

While most of the problems identified earlier on associated with the RTD have been settled, and there is consensus on the existence of the RTD as a human right.¹⁴³ The Donnelly *versus* Alston debate and other critiques to the RTD lay a good foundation for the appreciation of the controversial nature of the RTD. This literature may be of limited application to this thesis because the question as to whether the RTD is a human right or not does fall under the scope of this research. This research assumes that the RTD is a valid human right by virtue of its regional and international recognition. The bulk of the literature reviewed herein, therefore, revolves around the realisation of the RTD.

The realisation of the RTD has remained problematic in contemporary times. As discussed above the North versus South divide is the most notorious impediment to

¹³⁹ Vandenbogaerde 2013 *Neth QHR* 187-209.

¹⁴⁰ Ghai and Pao *Whose Human Right to Development?* 29.

¹⁴¹ Alston "Development and the Rule of Law" 106.

¹⁴² Vandenbogaerde 2013 *Neth QHR* 206.

¹⁴³ Consensus was achieved in the *Vienna Declaration* regarding the status of the RTD.

the realisation of the RTD. Arts and Tamo, in their article, *The Right to Development in International Law: New Momentum Twenty years down the line?*¹⁴⁴ trace the development of the RTD from UNDRTD to its 30th anniversary. Their article provides a thorough historical journey of the RTD and gives proposals on how the realisation of the right can be enhanced in recent times.

Arts and Tamo's proposals towards revitalizing the realisation of RTD include; "better understanding of the law on international cooperation and related obligations, especially as taken up by UN human rights treaty bodies; creating accountability processes, which include monitoring the extent to which States perform their RTD obligations; and learning from regional experiences on concretising the RTD, such as the ones thus far gained most notably in the African regional system". The authors also suggest that the RTD stands a better chance of being revitalised through alternative means like the sustainable development goals (SDGs) other than trying to bridge the "North versus South" divide which, continues to plague the RTD at the international level. Unfortunately, they fail to offer any concrete solutions to the "North versus South" divide.

Sengupta looks at the contents of the RTD and its realisation through the lens of the 21st century.¹⁴⁵ He proposes inculcating the RTD in development policies and practices both at international and national levels as a way of realising the right in the 21st century. Some of the proposed development policies include the realisation of the RTD through an international economic law perspective. This involves different institutions and stakeholders that create development policy at that level, including the UN, the IMF and the World Bank.¹⁴⁶

The approach suggested by Sengupta and Bunn has registered some success evidenced by the UN's adoption of the SDGs.¹⁴⁷ However, the challenge with this approach is that it may take a very long time to get all these key policymakers to read from the same script as far as the RTD is concerned. This is because both the

¹⁴⁴ Arts and Tamo 2016 *Neth Int'l L Rev* 221-249.

¹⁴⁵ Sengupta "Conceptualizing the right to development" 67-82.

¹⁴⁶ Bunn 2000 *Am U Int'l L Rev* 1436-1439.

¹⁴⁷ Kanade "Advancing Peace, Rights and Well-being" 2.

developing and developed countries have representation in these institutions and will always root for positions that favour their development agenda.¹⁴⁸

Regional efforts towards the realisation of the RTD cannot be ignored. The most notable one is the jurisprudence arising out of the ACHPR, a binding human rights treaty with express provisions on the RTD.¹⁴⁹ Notable jurisprudence includes the *Ogoni case*¹⁵⁰ and the *Endorois case*.¹⁵¹ Kamaga and Fombad argue that in the *Endorois case*, the African Commission “ceased to play the “ostrich game” with the concept of “peoples” finding a violation of the RTD by Kenya and applying the principle of immediate realisation of the RTD as secured in the ACHPR”.¹⁵² In these cases, the justiciability of the RTD as guaranteed under article 22 of the ACHPR was affirmed.

The African experience can be used to fuel the debate on creating a binding international treaty on the RTD. Okafor argues that if an internationally binding treaty on the RTD were to be formulated, lessons learnt from article 22 of the ACHPR can help shape the character of such a treaty.¹⁵³ For instance, the proposed treaty must clearly define right holders and duty bearers, right holders must include sub-state groups and right bearers should go beyond countries to include federal units, the U.N, International Financial Institutions, among others.¹⁵⁴

Basing on the lessons learnt from the ACHPR, Tadeq proposes that it for the realisation of the RTD to be meaningful, there is need to create an international treaty on the RTD that is legally binding, whose provisions enumerate with clarity the obligations on the duty bearers.¹⁵⁵ Tadeq does not provide insight into how the contentious issues around RTD, such as the “North and South divide”, can be

¹⁴⁸ An evocative example is when poor countries expressed reservations against the IMF and the World Bank because they felt that these institutions were part of the debt burden problem in developing countries and not part of the solution. See Bunn 2000 *Am U Int'l L Rev* 1455.

¹⁴⁹ Article 22.

¹⁵⁰ *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria (the Ogoni case)* Communication 155/96, Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V).

¹⁵¹ *Communication 276/2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council versus Kenya*.

¹⁵² Kamaga and Fombad 2013 *J Afr L* 196.

¹⁵³ Okafor "A regional perspective" 373-383.

¹⁵⁴ Okafor "A regional perspective" 373-383.

¹⁵⁵ Tadeq 2010 *AHRLJ* 322-344.

resolved before an acceptable legally binding international treaty on the RTD can materialize.

Mbondenyi, on the other hand, argues that article 22 of the ACHPR fails to precisely state the scope and duty of the RTD and how this right can be exercised.¹⁵⁶ He argues that the ACHPR does not elaborate on the contours of the RTD, implying that there is still a lot to be done in interpreting article 22 of the ACHPR. He, however, argues that it is up to the African States to be innovative in realising the RTD and suggests New Partnership for Africa's Development (NEPAD) as a platform through which article 22 can be made a reality in Africa.¹⁵⁷

In the same vein, Kamga argues that it is possible to use NEPAD as a platform for the realisation of the RTD in Africa.¹⁵⁸ One of NEPAD's objectives is the protection of democracy and Human Rights.¹⁵⁹ The African Peer Review Mechanism (APRM) under NEPAD commits to the betterment of human lives by promoting macro-economic policies that support sustainable development¹⁶⁰ and sound public finance management¹⁶¹ among others. All these initiatives ultimately have a positive impact on the RTD.

The Constitution of Kenya does not expressly provide for the RTD. Despite the lack of express provisions on the RTD in the Kenyan Constitution, this thesis argues at 1.2.2 above that RTD can be inferred from various provisions of the Constitution of Kenya. Kenya has also ratified the ACHPR, and by the provisions of Article 2(6) of the Constitution of Kenya, the ACHPR forms part of the laws of Kenya.

Some scholars have criticized the ACHPR because it falls short of providing the scope and duty of the RTD and how this right can be exercised.¹⁶² Others like Okafor argued that African Commission in its jurisprudence on the RTD failed to answer all questions regarding proper dimensions of the RTD under the African Charter.¹⁶³ Sing'oei and Shepherd argued that the African Commission in the *Endorois* case

¹⁵⁶ Mbondenyi *International Human Rights* 212.

¹⁵⁷ See generally, Kamga *Human rights in Africa*.

¹⁵⁸ Kamga *Human rights in Africa* 221-310.

¹⁵⁹ Rukato *Future Africa* 51.

¹⁶⁰ Kamga *Human rights in Africa* 250.

¹⁶¹ Kamga *Human rights in Africa* 250.

¹⁶² Mbondenyi *International Human Rights* 212.

¹⁶³ Okafor "A regional perspective" 377.

did not "outline the contours of a development process which supports the RTD and at the same time compatible with the State's aspirations of modernisation and economic development".¹⁶⁴

Given the politics of the RTD at the international level and the lack of clarity as to how the RTD should be realised under the ACHPR, each State must find its innovative way of realising the RTD within its national policy and legal frameworks as a starting point towards the full realisation of the RTD. This research argues there is a link between the RTD and devolution, and because of this link, devolution can be implemented in such a way that it supports the realisation of the RTD in Kenya.

There have been other efforts to realise the RTD in Kenya, which need to be highlighted. Munene identifies the Millennium Development Goals (MDGs), African Peer Review Mechanism (APRM), and Kenya Vision 2030 as ways to realise the RTD in Kenya.¹⁶⁵ Waris asserts that the constituency development fund (CDF) provides a suitable framework for realising the RTD in Kenya.¹⁶⁶ Munene and Waris' work demonstrates the different ways through which the RTD has been realised in Kenya and forms a good foundation for the subject of this thesis, that is, "Enhancing the Realisation the Right to Development through Devolution in Kenya".

De Visser defines the concept of devolution as "the location of decision-making power with autonomous subnational governments". He contrasts devolution with delegation by arguing that devolution means a "permanent placement of power at a particular level"¹⁶⁷ whilst delegation is a temporary placement of power at a particular level. As a matter of fact, the empowering attribute of devolution was exemplified in the South African case of *Agri Eastern Cape and Others v MEC for the Department of Roads and Public Works and Others*,¹⁶⁸ where the Constitutional Court held that the provincial government could be held liable for losses suffered by farmers as a result of damaged roads after many years of neglect.

¹⁶⁴ Sing'oei and Shepherd 2010 *Buffalo HRLR* 81.

¹⁶⁵ Munene 2013 *Afr Naz Univ L J* 56-75.

¹⁶⁶ Waris *Tax and Development* 15.

¹⁶⁷ Waris *Tax and Development* 15.

¹⁶⁸ *Agri Eastern Cape and Others v MEC for the Department of Roads and Public Works and Others* (3928/2015) [2017] ZAECGHC 20.

Public participation puts the people at the epicentre of development and makes them beneficiaries of the same. The *Agri Eastern Cape* case illustrates that devolution gives people a more significant say as to how they are governed and how development is implemented. An empowered populace can then demand a number of services from their local government.

Mutakha, in his LLD thesis, *An Interpretation of the Constitutional framework for Devolution in Kenya: A Comparative Approach*, while interpreting the objects of devolution under the Constitution of Kenya, argues that devolution enables communities to manage their affairs and further their development, thus developing themselves.¹⁶⁹ This interpretation can be mirrored with the UNDRTD requirement that development should be people-centred, and the people must benefit from the fruits of such development,¹⁷⁰ thus cementing the link between devolution and the RTD.

In his article *Restructuring the Kenyan State*, Ghai argues that devolution promotes economic and social development and equitable distribution of resources.¹⁷¹ In that regard, Kabau and Mamboleo argue that the constitutional and statutory framework under devolution effectively includes the core elements of distributive justice as proposed under the RTD. One of the goals that the RTD seeks to achieve is equity in development. These are; affirmation of development as a legitimate claim, emphasis on public participation and requirements of equity and a particular focus on the marginalised in the development process.¹⁷²

According to the *Hand Book on Devolution*, a publication of ICJ Kenya,¹⁷³ public participation is a key pillar of devolution. Under section 87 of the County Governments Act,¹⁷⁴ citizens' participation is based on "reasonable access to the process of formulating and implementing law and regulations, including approval of development proposals, projects and budgets, among others". This ties in with the RTD's characteristic of securing the right to participation.

¹⁶⁹ Mutakha *Constitutional framework for devolution* 142.

¹⁷⁰ Article 2(1) of the UNDRTD.

¹⁷¹ Ghai 2008 *J East Afr Stud* 211-226.

¹⁷² Kabau and Mamboleo "Distributive Justice in Kenya's Development Process" 170.

¹⁷³ *Hand Book on Devolution* 5.

¹⁷⁴ Act 17 of 2012.

Bosire links devolution to development in his PhD thesis, *Devolution, conflict resolution and limiting control power, an analysis of the constitution of Kenya*.¹⁷⁵ He argues that “the devolved system of government in Kenya is primarily designed to pursue a developmental purpose”. This is evident from the constitutional provisions on the objectives of devolution, where six of the nine objectives address issues germane to development.¹⁷⁶ At the core of RTD is the development of the human person by increasing their capabilities¹⁷⁷ thus, the argument herein that RTD and devolution share a common thread.

In a bid to answer the question "why devolution?", Steytler and Ghai argue in their book *Kenyan-South African dialogue on Devolution*,¹⁷⁸ that, devolution in both Kenya and South Africa was intended to address historical injustices like marginalisation of certain communities. They note that while race was the basis of discrimination in South Africa, marginalization based on ethnicity, culture and language was a major issue that Constitutional reform in Kenya sought to address. Therefore, devolution may lead to marginalised communities gaining increased access to goods and services such as health care, shelter and education,¹⁷⁹ which positively impacts the realisation of the RTD.

The World Bank has been at the forefront in advocating for decentralisation. *The World Bank Report 1999/2000* highlights the typical design features of devolution, such as decentralisation models in Uganda and South Africa. The report notes that 95% of democracies have elected sub-national governments in response to the demand for greater self-determination and influence in the decisions of their government.¹⁸⁰ The report provides grounds to justify the devolution of power and connect the same to the RTD by recognizing common features such as self-determination and participation. The report is therefore crucial in answering the question "why devolution?".

¹⁷⁵ Bosire *Devolution for development* 388.

¹⁷⁶ Bosire *Devolution for development* 388.

¹⁷⁷ Sen *The Idea of Justice* 253-290. Sen's capability theory.

¹⁷⁸ Ghai "Devolution in Kenya" in Steytler and Ghai (eds) *Kenyan-South African Dialogue on Devolution* 78.

¹⁷⁹ Steytler and Ghai "Devolution" 472.

¹⁸⁰ World Bank *World Development Report 1999/2000* 107.

1.8.2 Gaps in the Literature

The fact that devolution has been in existence from the 2013 means that there is very little literature that contains concrete reports on the successes and failures of devolution from a developmental perspective. For instance, Mutakha¹⁸¹ and Bosire's¹⁸² research papers are primarily theoretical because they lack practical examples that clearly indicate how devolution has impacted development in Kenya.

There is not much scholarly research on the relationship between devolution and the RTD in Kenya. Kabau and Mamboleo¹⁸³ do not offer any real or specific examples of how devolution has impacted distributive justice in Kenya.

It has been argued that devolution supports peoples' participation in development. The reviewed literature does not help us to answer the question as to whether public participation has been effective in practice. For instance, it does not give us concrete examples of where county governments have had to alter or altogether change development plans to accommodate the views of the people collected during the process of public participation.

Finally, most of the reviewed literature premised on the assumption that the devolved units, that is, county governments in Kenya, are perfect units of devolution immune from vices such as corruption and poor governance, resulting in wastage and loss of resources. Chapter 5 of the thesis identified corruption and poor governance as threats to devolution.

1.8.3 Conclusion

This thesis shall therefore attempt to address some of these gaps in the existing literature. This is done within the four corners of the study's scope, objectives and aims. It may not be possible to fill in all the gaps in the literature in a thesis of this magnitude. Some of the gaps in the literature shall therefore remain for further investigation or research.

¹⁸¹ See generally; Mutakha *Constitutional framework for devolution*.

¹⁸² See generally; Bosire *Devolution for development*.

¹⁸³ Kabau and Mamboleo "Distributive Justice in Kenya's Development Process" 170.

1.9 Organization of Chapters

This study is divided into seven chapters:

Chapter 1 is a general introduction to the thesis and lays a background for the same. It sheds light on the background of the thesis and defines the RTD and devolution, the two key concepts in this thesis; it discusses the research problem, outlines the objective and justification for the research, states the research questions, describes the research methodology, including scope and limitation of the thesis and reviews the available literature on the subject of the study.

Chapter 2 traces the historical origins of the RTD and its normative frameworks both internationally and regionally. The chapter highlights the current intellectual debates on the RTD and efforts to realise the right. The concept of development within the context of the RTD is discussed. The regional recognition of the RTD in Africa, the Americas, Europe, and the Asian and Arab regions will be discussed before the normative underpinning of the right is situated in Kenya. The researcher will analyse the relevant provisions of the Constitution of Kenya 2010.

Chapter 3 discusses the concept of development in Kenya. The chapter is divided into sections that deal with the concept of development in the colonial and post-colonial periods in Kenya. The concept of development in these periods is tested against the elements of the RTD. A general conclusion is drawn that Kenya's development paradigm from the colonial period up to the period before the promulgation of the Constitution of Kenya was not compatible with the principles of the RTD.

Chapter 4 traces the history of devolution in Kenya, its current normative and institutional framework and its constitutional principles and objectives. The chapter provides a crucial foundation in understanding why Kenya adopted a devolved system of government under the Constitution of Kenya 2010. The chapter also identifies the particular problems that devolution under the Constitution of Kenya 2010 was meant to address. The objectives of devolution in Kenya, such as equity and participation are linked with the elements of the RTD hence the basis for the argument that devolution creates a framework for a new development paradigm that is compatible with the RTD in Kenya.

Chapter 5 of this thesis involves an analysis of the practical impact of devolution on the RTD in Kenya. This is achieved by mirroring the effects of devolution with the elements of the RTD. The chapter demonstrates that devolution has undoubtedly had a positive impact on the RTD in Kenya and thus can enhance the realisation of the RTD in Kenya without resorting to the creation of other normative structures. The chapter also highlights the possible shortcomings and challenges of using devolution to realise the RTD.

Chapter 6 is a comparative study of the decentralisation experience in South Africa, Germany and Ethiopia. The chapter demonstrates that decentralisation is advantageous for the realisation of the RTD. The decentralisation experience of the said countries activates popular participation, equity, the realisation of all human rights and the exercise of the right to self-determination. All these elements lead to the realisation of the RTD. The chapter reinforces this thesis' argument that devolution, a form of decentralisation in Kenya, augments the realisation of the RTD.

Chapter 7 will be the final chapter and will discuss conclusions to the thesis, recommendations and identify areas of further research.

CHAPTER 2: TRACING THE ORIGINS AND NORMATIVE FRAMEWORK OF THE RIGHT TO DEVELOPMENT

2.1 Introduction

The RTD is not a new topic or new issue. The challenge it faces is that it is little understood or applied even though the right has existed for over 30 years. In fact, on the 4th of December 2017, the UNDRTD marked its 31st anniversary. On the 30th of November 2017, a group of human rights experts issued a joint statement marking the 31st anniversary of the UNDRTD.¹ The experts stressed the critical need to speed up world action to realise the RTD through sustainable development.

The experts emphasized that the principle of equality and justice has to be the core of the development process and that the essence of the RTD is participation, transparency, inclusivity, non-discrimination and fairness. It can be inferred from their statement that 31 years later, more needs to be done to make the RTD a reality in the world. The statement, in conclusion, emphasizes the need to apply the RTD further and fast track its realisation globally.

The RTD has continued to remain controversial, and there is not much consensus globally on how this right may be realised.² Even within the African human rights system, where the RTD is binding and justiciable,³ there isn't much information on how this right could be realised.⁴

This chapter will discuss the historical underpinnings and contemporary conceptualization of the RTD thus shedding light on why the RTD remains a contested and little understood right more than thirty years after it was declared as

¹ UN experts <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22474&LangID=E> (Date of use: 31 December 2017).

² Arts and Tamo 2016 *Neth Int'l L Rev* 221-249; Vandenhoele 2003 *L & Pol in Afr, Asia & Lat Am* cited in Vandembogaerde 2013 *Neth QHR* 188.

³ Article 22 of the *African Charter on Human and Peoples Rights (Banjul Charter)* adopted on June 27th 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force Oct 21, 1986. Kamga and Fombad argue that the African human rights system comprises "the regional African Union based system and sub-regional systems, such as the Southern African Development Community or the Economic Community of West Africa systems including national systems". For this argument see Kamga and Fombad 2013 *J Afr L* 1.

⁴ Mbondenyi *International Human Rights* 212.

a human right. The chapter will also highlight some of the debates that make the RTD a highly contested and controversial human right.

This chapter aims to discuss what the RTD stands for, show how the right has evolved from its proclamation to its current status. Further, the chapter covers some of the issues that have negatively affected the realisation of the right laying a foundation for the proposition offering devolution as the possible framework for the realisation of the RTD in Kenya.

1.2 Deconstructing the Right to Development (RTD)

The RTD is “an inalienable human right by virtue of which every human person and all peoples have the right to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised”. The RTD also “implies the full realisation of people’s right to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources”.⁵

The normative content of the RTD, its justiciability and realisation has, however been the subject of wide scholarly debate and no clear consensus has been reached even on the fundamental issues.⁶ This is attributed to the different positions taken by the global North and South on the RTD. According to Professor Margot Salomon, the global South campaigns for “equality in the international financial system, greater participation of developing countries in global decision making on economic policy, and fair trade regimes”. On the other hand, the North campaigns for “domestic conditions suitable for development in developing countries”. These include, “good governance, democracy and responsible economic management”.⁷ This kaleidoscopic view of the RTD has negatively affected the global realisation of

⁵ Articles 1 and 2 of the UNDRTD UN Doc A/RES/41/128 adopted on 4th December 1986, for its text see http://www.ohchr.org/Documents/Issues/Development/DeclarationRightDevelopment_en.pdf (Date of use: 22 March 2017).

⁶ Vandenhoele 2003 *L & Pol in Afr, Asia & Lat Am* cited in Vandembogaerde 2013 *Neth QHR* 188.

⁷ Salomon *Global Responsibility for Human Rights* 99.

the right, hence the emphasis in this thesis on the realisation of the RTD nationally as a starting point for universal realisation.

Bunn notes that "a measure of political and academic controversy has long accompanied the emergence of the RTD". One group of scholars has tried to show that the RTD does not exist on moral and/or philosophical grounds.⁸ Another group has examined its legal status, the content and duty of right bearers of the RTD and has failed to come up with consistent and useful conceptualization.⁹ This controversy, which Kamga refers to as "the skirmishes on the RTD",¹⁰ depicts the RTD as a distortion of human rights by third world countries in an attempt to link human rights to their "utopian aspiration for a new international economic order".¹¹ This state of affairs diminishes the stature of the RTD in human rights discourse, and thus the right is not treated with the seriousness it deserves.

Bunn further notes that the "debate on the legal significance of the right ranges from hailing it as a major breakthrough in the history of human rights to debunking it as a distracting if not dangerous ideological initiative".¹² Is this debate genuine? Ibhawoh argues that the debate on the RTD demonstrates how "the legitimising language of human rights was used to press for goals that have more to do with the international politics of power and resistance, and the interests of regimes, than with welfare and empowerment of ordinary citizens".¹³ Based on Ibhawoh's argument, it is right to assert that building a bridge across the North-South divide may not result in any serious realisation of the RTD since the whole narrative is founded upon international politics and selfish interests of regimes and not a genuine need to realise human rights.

This state of affairs also suggests that the global North is unlikely to cede its position on the RTD in favour of the global South because of the concern that the RTD will give rise to legally binding international obligations in order to provide development aid to the South. Another reality that the North is grappling with is that the RTD can also be used as a road map to push for reduction of global inequality, the

⁸ Vandenhoele 2003 *L & Pol in Afr, Asia & Lat Am* 378.

⁹ Vandenhoele 2003 *L & Pol in Afr, Asia & Lat Am* 378.

¹⁰ Kamga *Human rights in Africa* 142.

¹¹ Alston 1988 *Harv HRY* 20.

¹² Bunn 2000 *Am U Int'l L Rev* 1426.

¹³ Ibhawoh 2011 *HRG* 104.

introduction of “fair international trade rules, technology transfer from the North to the South and debt cancellation”¹⁴ hence the North's determination to deal with the RTD at arm's length.

Despite the lack of consensus among different schools of thought on whether the RTD is a real human right capable of realisation,¹⁵ it is now widely accepted that the RTD has been recognised as a human right. This can be attributed to the efforts of various actors, including the UN, to implement the right¹⁶ and the "jurispotency" of the right to development can no longer be in doubt.¹⁷

This is evidenced by the consensus expressed in the *Vienna Declaration* which was adopted by 171 Countries including countries such as the United States of America and other Western countries that had previously given the idea of RTD as a human right a “lukewarm” reception. The declaration reaffirmed the RTD as “a universal and inalienable right and an integral part of fundamental human rights”.¹⁸

In light of the soft law status of the UNDRTD, there has been considerable debate as to whether the declaration gives rise to legally binding and enforceable obligations. Professor Bilder argues that the United Nations General Assembly has, in practice, declaratory authority as to what constitutes a human right and what does not.¹⁹ However, Okafor cautions that whether such declared human rights will entail legally binding obligations in international law is a separate and distinct question.²⁰ This means that probably not all UN declarations translate to legally binding obligations. This thesis agrees with the position that some UN declarations, including the UNDRTD, have become new sources of the law of nations, having gained the status of customary international law or *opinio juris*.²¹

This thesis also identifies with Garcia-Amador's argument that the UNDRTD is viewed as one of the initiatives to promote "higher standards of living, full

¹⁴ Kamga *Human rights in Africa* 146.

¹⁵ For arguments by RTD skeptics, see Donnelly 1985 *Calif West Int'l L J* 473; Vandenbogaerde 2013 *Neth QHR* 188-209; Irish 2005 *ILJ of Civil Society* 6.

¹⁶ For a detailed discussion see Bunn 2000 *Am U Int'l L Rev* 1436-1439.

¹⁷ Okafor 1995 *AJICL* 878; Okafor "A regional perspective" 374

¹⁸ Paragraph 10 of the *Vienna Declaration*.

¹⁹ Bilder 1969 *Wiscon L Rev* 175. See also Downs 1993 *Duke JCIL* 351; Alston 1984 *Amer J Int'l L* 607 as cited in Okafor 1995 *AJICL* 871.

²⁰ Okafor 1995 *AJICL* 871.

²¹ Okafor 1995 *AJICL* 872.

employment and conditions of economic and social progress and development" among member States of the UN in accordance with the provisions of article 55 of the UN Charter. Article 56 of the same charter legally binds all member organisations to take joint and separate action in cooperation with the UN to achieve the purpose set out in article 55. Therefore, all UN member States are legally bound to cooperate with the UN in realising the RTD as declared in the UNDRTD.²²

Article 1 of the UNDRTD defines the RTD by separating three strands of the right; (a) it is an inalienable human right; (b) it entails a process of economic, social, cultural and political development which is conducive to the realisation of all human rights and fundamental freedoms; (c) it is a human right that entitles every human person and all peoples to participate in, contribute to and enjoy that particular process of development.²³

From the foregoing definition, five main pillars of the RTD are discernible. They are; (i) the RTD is inalienable; (ii) participation; (iii) a process in which all human rights and fundamental freedoms should be realised; (iv) an individual and group or solidarity right and (v) the right of people to self-determination.²⁴ These pillars are significant because, firstly, they elucidate the salient features of the RTD hence provide a deeper understanding of the right. Secondly, some of the pillars provide the link between the RTD and devolution. For instance, participation and the right to self-determination are common in both the RTD and devolution. However, the link between devolution and the RTD will be discussed in detail in a different chapter herein.

2.2.1 The Inalienable Nature of the RTD

The RTD is an "inalienable right", as described in the first paragraph of the UNDRTD. This section explores the meaning of an "inalienable right" in the context of the RTD and whether the use of the word "inalienable" confers any special or unique legal status on the right.

²² Garcia-Amador *The Emerging International Law of Development* 66.

²³ Kirchmeier *The right to development* 9.

²⁴ Kamga *Human rights in Africa* 119.

The word "inalienable"²⁵ in the first paragraph of the UNDRTD means that "the RTD cannot be encroached upon, surrendered or bargained away".²⁶ This means that every human being is entitled to the RTD in its entirety. Any attempt by a government or any other entity to suspend, limit or water down the RTD is considered untenable and a violation of the right. According to Sengupta, the RTD is absolute and cannot be negotiated²⁷, while other scholars have likened the RTD to a birth right,²⁸ an innate quality in every human being.

Inalienable rights derive from the natural law theory²⁹ propounded by philosophers like John Locke, Montesquieu and Jefferson, among others.³⁰ Thomas Aquinas, one of the early proponents of the theory, "perceived natural law as part of the law of God that confers certain immutable rights upon individuals".³¹ These immutable rights is also referred to as inalienable rights. Human rights are defined as "those entitlements individuals possess by virtue of being human".³² The idea of immutable rights endowed by the creator inspired the wording in the second paragraph of the *1776 US Declaration of Independence*:

We hold these truths to be self-evident; that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.

Going by the above exposition, the natural law school of thought, therefore, perceives inalienable rights as rights vested in a person due to being human such as life and liberty. Therefore, the RTD's inalienable status places it in the category of rights that are naturally vested in every human being and is not granted by the State or legislation.

This position was brought out in the case of *Powell v Pennsylvania*. The U.S Supreme Court held that right to pursue happiness in the *Declaration of*

²⁵ Inalienable refers to that which is incapable of being bought, sold or transferred to one individual to another. Lehman and Phelps *West's Encyclopedia of American law*.

²⁶ Garner (ed) *Black's Law Dictionary* 1437. Inalienable rights are also known as inherent rights. Sengupta 2002 *Dev & Change* 558.

²⁷ Ngang and Kamga "O Cameroon, though cradle of our fathers..." 188.

²⁸ Kamga *Human rights in Africa* 121. See also Garner (ed) *Black's Law Dictionary* 1437.

²⁹ See Roux "Natural Law Theories" 25-61. The theory is attributed to philosophers of old such as; St Thomas Aquinas, Plato, Aristotle, Sophocles, Callicles, St. Augustine, William Ockham, Thomas Hobbes and Stoic.

³⁰ Aquinas *Summa Theologica* lib II part II (1475) cited in Eno *The African Commission on Human and Peoples Rights* 6.

³¹ Ambrose *Democratisation and the Protection of Human Rights* 29.

Independence is an inalienable right and not “by grace of emperors or kings, or through force of legislative or constitutional enactment, but by the creator”.³³ Even in a state of emergency such as war, when rights are limited by law, the limitation should not be arbitrary but it should be proportionately weighed against the problem it seeks to address.³⁴ The European Court of Rights in *Ireland v the United Kingdom* was also in the same position.³⁵

Based on the foregoing, it is arguable that the use of the word "inalienable" in describing the RTD connotes that the RTD has not been granted to men by the State, but it is innate, inherent or inborn. Therefore, the role of the State is to ensure that political, social, economic and even cultural conditions are conducive to the realisation of the RTD put in place.³⁶

The International Conference on Population and Development 1994 (ICPD) known as the Cairo Conference,³⁷ reaffirmed the inalienable character of the RTD³⁸, which puts the human person as the central subject of development.³⁹ The conference also noted that while development augments the realisation of all human rights, under-development may not be used as a reason to justify failure to realise internationally recognized human rights.⁴⁰ The RTD must be fulfilled to make equitable and sustainable development a reality.⁴¹ This means that the RTD’s

³³ 127 US 678, 8 S Ct 127, 32 L Ed 253 (1888).

³⁴ Kamga *Human rights in Africa* 50.

³⁵ *Ireland v United Kingdom* (1978) ECHR.

³⁶ Article 3(1) and 4(1) of the UNDRTD.

³⁷ It is important to note that the Cairo Conference moved population policy and programmes away from a focus on human numbers to a focus on human lives. It put emphasis on improving the lives of individuals and increasing respect for their human rights. The ICPD Programme of Action agreed on by 179 countries attending the conference underscored the connection between population and development. It advocated for the empowerment of women both as a highly important end in itself and as a key to improving the quality of life for everyone. See Programme of Action https://www.unfpa.org/sites/default/files/event-pdf/PoA_en.pdf (Date of use: 20 September 2018).

³⁸ Chapter II Principle 3 of the 1994 International Conference on Population and Development (ICPD) A/CONF 171/13.

³⁹ Chapter II Principle 3 of the 1994 International Conference on Population and Development (ICPD) A/CONF 171/13.

⁴⁰ Chapter II Principle 3 of the 1994 International Conference on Population and Development (ICPD) A/CONF 171/13.

⁴¹ Chapter II Principle 3 of the 1994 International Conference on Population and Development (ICPD) A/CONF 171/13. Also noteworthy is that at paragraph 10 of the *Vienna Declaration*, the World Conference on Human Rights reaffirmed the right to development, as established in the *Declaration on the Right to Development*, as a universal and inalienable right and an integral part of fundamental human rights.

realisation cannot be postponed by the State because of lack of resources since this will result in the violation of all the other human rights.

In this context, Kamga asserts that the RTD cannot be suspended or “ignored for any reason, including the lack of development”.⁴² Reiterating the provisions of chapter II principle 3 of the ICPD document, the right is inherent to the nature of mankind and should be fulfilled sustainably; thus, the rejection of the theory of “developmentalism”⁴³ which deprioritises human beings in the development matrix while elevating “profit-seeking,” yet, human beings are in fact the subject of development.⁴⁴

Kamga's argues that development is not about an increase in GDP and revenues. Development should be about improving the lives of people by increasing their opportunities and capabilities. Without doubt, the UNDRTD defines development “as a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals based on their active, free and meaningful participation in development and in the fair distribution of benefits resulting thereof”.⁴⁵ The RTD therefore puts the human person as the primary beneficiary of development.

In conclusion, the RTD is an important human right in contemporary times under its inalienable status. Governments are under the obligation to ensure the realisation of the right. States cannot abdicate their duty to ensure the realisation of the RTD. The RTD cannot also be deprioritised, watered down or compromised away.

2.2.2 The RTD as a Process of Securing the Right to Participation

The principles of participation and accountability are central to the RTD.⁴⁶ Participation of the people has been used for defining both development⁴⁷ and the

⁴² Kamga *Human rights in Africa* 121.

⁴³ Baxi *Human rights in a posthuman world* 132 cited in Kamga *Human rights in Africa* 121.

⁴⁴ Kamga *Human rights in Africa* 121.

⁴⁵ Paragraph 2 of the preamble of the UNDRTD.

⁴⁶ Piovesan "Active free and meaningful participation in development" 104.

⁴⁷ Paragraph 2 of the preamble of the UNDRTD. Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and *meaningful participation* in development and in the fair distribution of benefits resulting therefrom. (Emphasis mine)

RTD.⁴⁸ Both definitions place the human person as the central subject of development as a participant and a beneficiary. Every development policy has to ensure that people are incorporated in development both as participants and beneficiaries to make them the central subject of the process.⁴⁹

Participation (public) can be “any process that directly engages the public in decision-making and gives full consideration to public input in making that decision”.⁵⁰ Participation is a process that “affords stakeholders (those that have an interest or a stake in an issue, such as individuals, interest groups, communities) the opportunity to influence decisions that affect their lives”. Participation is not a single event but a process.⁵¹

Participation can be defined as the “organized efforts to increase control over resources and regulative institutions in given social situations of groups and movements hitherto excluded from such control”.⁵² Participation is also “a process through which stakeholders influence and share control over development initiatives and the decisions and resources which affect them”.⁵³

In the context of development, the involvement of people in decision making and control of resources yields participatory development. The test for participatory development is whether people who have been previously treated as pawns can now actively play a critical role in development thereby becoming subjects of their social destiny.⁵⁴ They thus move from a culture of silence to become active

⁴⁸ Article 1 of the UNDRTD. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to *participate in*, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised. (Emphasis mine)

⁴⁹ Paragraph 12 of the preamble of the UNDRTD. Recognizing that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development.

⁵⁰ US EPA <https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation> (Date of use: 11 October 2018).

⁵¹ US EPA <https://www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation> (Date of use: 11 October 2018).

⁵² Wolfe and UNRIFS Development *Participation: The View from Above 2*.

⁵³ Hayward, Simpson and Wood 2004 *Sociologia Ruralis* 98; World Bank *The World Bank Participation Sourcebook* (xi).

⁵⁴ Freire *Pedagogy of the Oppressed* cited in Waris *Tax and Development* 154.

participants in the development matrix and largely take control of their development destiny.⁵⁵

Participation is an element of within “a broader approach that seeks strong accountability as the critical variable in social empowerment and emancipation”.⁵⁶ Accountability has been defined as “vertical mechanisms that enable superiors to impose performance standards and financial probity on subordinates”. In other words, “the users have absolute, though not necessarily direct, control over the agencies that provide their services”.⁵⁷ Accountability therefore implies some level of participation “but not necessarily one involving direct control or even consultation”.⁵⁸

Participatory processes must be integrated with functional systems that will yield accountability “from agencies to the users if inefficiency and malfeasance are to be avoided”⁵⁹ since successful, strong participatory systems give users a powerful voice.⁶⁰ Accountability will continually re-focus the service providers to the users being the key beneficiaries, thus empowering the users to demand certain minimum standards in providing services.

Article 2 of the UNDRTD states that “the human person is the central subject of development and should be an active participant and beneficiary of development”. Active free and meaningful participation implies the voicing of and taking the people’s opinion into account in the political process regarding their right to development.⁶¹ Thus, the RTD becomes not so much a right to improve material conditions, but the right to have a say and share control over the economic environment yet within the limitation imposed by budgeting constraints and state legislative procedures.⁶²

⁵⁵ Freire *Pedagogy of the Oppressed* cited in Waris *Tax and Development* 154.

⁵⁶ Brett 2003 *J Dev Stud* 19.

⁵⁷ Brett 2003 *J Dev Stud* 19.

⁵⁸ Brett 2003 *J Dev Stud* 20.

⁵⁹ Hirschman *Exit, Voice and Loyalty* cited by Brett 2003 *The Journal of Development Studies* 16.

⁶⁰ Brett 2003 *J Dev Stud* 16.

⁶¹ Waris *Tax and Development* 155.

⁶² Barsh 1991 *HRQ* 329.

The right to participation builds on article 21 of the UDHR, which provides for the right of persons to participate in the affairs of their country⁶³ and entrenches sovereignty of the people as the justification for government.⁶⁴ The African Alternative Framework to Structural Adjustment Programmes for Socio-Economic Recovery and Transformation captures this idea by conceptualizing a dynamic collaboration between the government and the people through their various national, local, and grassroots levels.⁶⁵ In this set-up, the people themselves must develop strategies tailored to meet their own local requirements and needs; thus, participation becomes the basic mechanism for identifying development strategies and objectives.⁶⁶

Participation must be meaningful since its nature is to educate the people of what is expected, enable them register reservations, concerns, fears, and even make demands. Participation, therefore, gives legitimacy to any democratic State.⁶⁷ Meaningful participation is a demonstration of the peoples' exercise of their sovereign power in matters concerning their development.⁶⁸ Meaningful participation reflects peoples' ability to voice their opinions in institutions that exercise public power, recognising public authority comes from the people.⁶⁹

Article 11 of the 1990 African Charter on Popular Participation in Development and Transformation (the Arusha Charter)⁷⁰ defines popular participation as "the empowerment of the people to effectively involve themselves in creating the structures and in designing policies and programmes that serve the interests of all

⁶³ Article 21(1) of the UDHR provides "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives".

⁶⁴ Kamga *Human rights in Africa* 122.

⁶⁵ UN ECA 1990 "African Alternative Framework to Structural Adjustment Programmes for Socio-Economic Recovery and Transformation (AAF-SAP)" E/ECA/CM 15/6/Rev 3 paras 118, 123 and 124.

⁶⁶ UN "Global Consultation on the Right to Development as a Human Right" E/CN 4/1990/9/Rev I 26 September 1990 paras 150, 155-156 and 179.

⁶⁷ *Republic v Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR 168. The court also stated that when a decision is made without consulting the public the result can never be an informed decision. The court cited with approval the dictum in the South African case of *Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 Others* (CCT86/08) [2010] at para 33.

⁶⁸ Piovesan "Active free and meaningful participation in development" 106.

⁶⁹ Piovesan "Active free and meaningful participation in development" 106.

⁷⁰ Adopted at the International Conference on Popular Participation in the Recovery and Development Process in Africa, held in Arusha Tanzania in 1990.

as well as to effectively contribute to the development process and share equitably in its benefits". In other words, participation ought to offer members of the public and all interested parties knowledge about the issues at hand and allow them to have an adequate say in the matter.⁷¹

The non-binding⁷² charter was an initiative by African States and other stakeholders to address Africa's severe deterioration in human and economic conditions.⁷³ It recognized the lack of progress in achieving popular participation and appreciation of the role of participation in the development process in Africa.⁷⁴ The role of participation in development is aptly captured, follows in the charter:

We, therefore, have no doubt that at the heart of Africa's development objectives must lie the ultimate and overriding goal of a human-centred development that ensures the overall well-being of the people through sustained improvement in their living standards and the full and effective participation of the people in charting their development policies, programmes and processes and contributing to their realisation.⁷⁵

The provisions of the African Charter on Popular Participation in Development and Transformation confirm that participation and development are inextricably intertwined.⁷⁶ Participation, therefore, activates "the empowering quality" inherent in the RTD which increase the capabilities of people, who are the direct beneficiaries of development. Once their capabilities are elevated, it becomes possible for other human rights to be realised.⁷⁷

The language in the Arusha Charter is couched in recommendations or suggestions,⁷⁸ giving governments the discretion to develop their blueprints for meeting charter obligations such as promoting development based on popular

⁷¹ Sachs J in *Minister of Health v New Clicks South Africa (Pty) Ltd* CCT/59/2004) [2005] para 630.

⁷² Nyamu "Rural Women in Kenya" 302.

⁷³ Paragraph 3 of the preamble of the *African Charter for Popular Participation for Development and Transformation*.

⁷⁴ Paragraph 3 of the preamble of the *African Charter for Popular Participation for Development and Transformation*.

⁷⁵ Article 8 of the *African Charter for Popular Participation for Development and Transformation*.

⁷⁶ The provisions of the *African Charter for Popular Participation for Development and Transformation* actually mirror the provisions of articles 1, 2, 3 and paragraph 2 of the preamble of the UNDRTD.

⁷⁷ See Amartya Sen's capability theory where he likens development to the removal of obstacles that leave people with little choice and little opportunity of exercising their reasoned agency. Sen *Development as Freedom* 366.

⁷⁸ Kufuor 2000 *Neth QHR* 10.

participation and consensus.⁷⁹ This clearly shows that the charter is soft law. However, the importance of soft law has been reinforced by the repeated adoption of soft law international declarations such as the UDHR, the UNDRTD and the SDGs, among others, by the international community.⁸⁰ It is on this basis that it is argued that the Arusha Charter is authoritative and significant.⁸¹

One can also argue that the Arusha Charter is an African expression of global consensus that the human person should and must be a direct participant and beneficiary of development as captured in international human rights documents such as the ICCPR⁸² and the UNDRTD.⁸³ Arguably, the Charter is an initiative to "Africanize" the idea of participatory development.

The importance of participation in the context of indigenous groups was highlighted in the *Endorois* case.⁸⁴ In this case, the African Commission held that the failure by the government of Kenya to ensure meaningful participation and a portion of the revenue from the game reserve, or other forms of adequate compensation, to the Endorois community, amounted to a violation of their RTD.⁸⁵

The African Commission further noted that it was well within the rights of the Endorois community to obtain a just compensation because benefit sharing is key to the developmental process in the 1990 African Charter on Popular Participation in Development and Transformation. The right to obtain "just compensation" in the spirit of the African Charter translates into a right of the members of the Endorois community to reasonably share in the benefits made "as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and those natural resources necessary for their survival".⁸⁶

A vital component of the Endorois claim had been based on their exclusion from participating national development plans. According to Sing'oei and Shepherd, the

⁷⁹ Article 23(a)(2) of the Charter.

⁸⁰ Kufuor 2000 *Neth QHR* 10.

⁸¹ Kufuor 2000 *Neth QHR* 10.

⁸² Article 25.

⁸³ Paragraphs 2 and 12 of the Preamble, articles 1, 2 and 8 of the UNDRTD.

⁸⁴ Communication 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Welfare Council versus Kenya*.

⁸⁵ Paragraph 228 of the decision.

⁸⁶ Paragraph 295 of the decision.

'Endorois case' contribution to the elaboration of the RTD is, perhaps, "to resist pre-determined targets and focus instead on the need for creating spaces for community participation".⁸⁷ Participation, therefore, makes people the drivers of their own development through decision making.⁸⁸

With regard to what constitutes participation, the Inter-American Commission on Human Rights (IACmHR) in the case of *Mary and Currie Dan versus the USA* noted that "convening meeting with the affected community 14 years after the title extinguishment proceedings began constituted neither prior nor effective participation". The members of the community should have been clearly and most candidly informed about the pros and cons of the process and afforded the chance to participate individually or corporately.⁸⁹ This echoes the finding of the Kenyan constitutional court in the *NASA* case, where the court stated that "when a decision is made without consulting the public, the result can never be an informed decision".⁹⁰

The African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development⁹¹ is an AU charter that seeks to protect, promote and catalyse decentralisation through participatory democracy and empowerment of citizens and the community.⁹² The charter aims to encourage decentralisation as a governance framework through which the African peoples' welfare can be improved.⁹³ It was the first international document to provide a decentralisation model framework for local government for the African continent.⁹⁴

⁸⁷ Sing'oei and Shepherd 2010 *Buffalo HRLR* 82.

⁸⁸ De Feyter "Indigenous peoples" 163.

⁸⁹ *Mary and Carrie Dann v United States*, Case 11.140, Report No 75/02, Inter-Am CHR. Also see generally, Schaaf and Fishel 2002 *Tulane ELJ* 175-186.

⁹⁰ *Republic v Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR para 33.

⁹¹ Adopted by The Assembly "Twenty-Third Ordinary Session of the Assembly" held in Malabo, Equatorial Guinea 26-27 June 2014.

⁹² See generally, article 2 of the Charter.

⁹³ Chigwata and Ziswa 2018 *The Hague J Rev L* 295.

⁹⁴ Chigwata and Ziswa 2018 *The Hague J Rev L* 295.

The Charter was inspired by the *Yaounde Declaration* 2005,⁹⁵ which stressed the importance of participatory democracy where the people design their own appropriate development programmes and manage the same.⁹⁶

The Charter defines decentralisation as the transfer of power, responsibilities, capacities and resources from national to all sub-national levels of government to strengthen the latter's ability to both foster peoples participation and delivery of quality services.⁹⁷ The Charter highlights the importance of the peoples' participation in development initiatives.⁹⁸ Community-based participation and inclusiveness with respect for human and peoples' rights is listed as its core values.⁹⁹

The impact of the African Charter on decentralisation in Africa is unknown because of the slow pace of ratification of the Charter by member States of the AU.¹⁰⁰ As of the 29th of June 2020, only six African countries; Benin, Burkina Faso, Burundi, Madagascar, Mali and Namibia, had ratified the Charter.¹⁰¹ Ratification does mean that the Charter becomes operational within the domestic legal systems of a State party. Whether the member State is monist or dualist, a process of domesticating the Charter may need to be done for it to become part of municipal law.¹⁰² This further complicates the application of the Charter within the domestic legal systems of countries that have ratified it.

According to Chigwata and Ziswa, the slow pace of ratification was attributed to complicated ratification processes in member States of the AU,¹⁰³ such as the domestication of international treaties to make them part of municipal law. For

⁹⁵ The preamble of the *Yaounde Declaration* part B (1) provides that The African Union should encourage more effective interaction between different levels of government within Africa. In addition, national governments should implement a process of effective decentralisation, which will guarantee administrative, political, financial, social and material empowerment of those at local government level. Without this, community development possibilities will be limited. To achieve this, communities need to be empowered to; determine their own priorities, initiate their own projects; and manage local decision-making in a way which is transparent, based on need and not on partisan views.

⁹⁶ Chigwata and Ziswa 2018 *The Hague J Rev L* 295.

⁹⁷ Article 1 of the Charter.

⁹⁸ Article 2(i) of the Charter.

⁹⁹ Article 4(a) and (c).

¹⁰⁰ Chigwata and Ziswa 2018 *The Hague J Rev L* 295.

¹⁰¹ African Union "OAU/AU Treaties, Conventions, Protocols and Charters" (African Union, 2020) <https://au.int/en/treaties> (Date of use: 29 June 2020).

¹⁰² See generally, Franck and Thiruvengadam 2003 *Chinese J Int'l L* 470.

¹⁰³ Chigwata and Ziswa 2018 *The Hague J Rev L* 295.

instance, in Kenya, under the Treaty Making and Ratification Act, parliament has to give its approval before the government of Kenya ratifies an international treaty.¹⁰⁴

The slow pace of ratification of the African Charter on Decentralisation has been blamed on lack of clear understanding of the meaning and importance of the decentralisation framework under the Charter.¹⁰⁵ The Charter is not specific on the type of decentralisation design countries ought to adopt. Article 5(1) of the Charter provides that State parties shall enact domestic laws/regulations recognizing different levels of government but leaves the specifics to State parties to craft. Critics have argued that this may result in weak decentralized systems open to manipulation and control by the national government.¹⁰⁶

The UN Guidelines on Decentralisation recognize the importance of protecting decentralised units and strongly recommends constitutional recognition of local government institutions.¹⁰⁷ Constitutional protection of decentralised units, such as the design adopted in the Constitution of Kenya 2010,¹⁰⁸ provides better protection since the amendment of a constitution is an arduous task requiring broad-based consultations and consensus-building and depending on the constitutional design, a national referendum may be necessary.

It was argued that the slow pace of ratification of the African Charter on Decentralisation can be attributed to the fact that some African countries are unwilling to decentralise resources, power and authority by relinquishing it to local governments.¹⁰⁹ At the same time, other countries such as Kenya and South Africa have already developed constitutional frameworks for decentralisation thus lack the motivation to ratify the African Charter on Decentralisation.¹¹⁰

¹⁰⁴ Section 9 of Act 45 of 2012.

¹⁰⁵ Section 9 of Act 45 of 2012.

¹⁰⁶ Chigwata and Ziswa 2018 *The Hague J Rev L* 300.

¹⁰⁷ Section C 1(1) and (2) United Nations Human Settlements Programme (UN-HABITAT) 2007 "International Guidelines on Decentralisation and The Strengthening of Local Authorities" 9.

¹⁰⁸ Article 6 of the Constitution of Kenya 2010 recognises decentralised (devolved) units by providing that the territory of Kenya is divided into counties and that the governments at national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation. Further, under article 255(1)(d) and (i) any amendment to the Constitution that touches on devolution must be subjected to a national referendum. It is arguable that these constitutional provisions protect decentralisation from interference by other entities such as the national government.

¹⁰⁹ Chigwata and Ziswa 2018 *The Hague J Rev L* 295.

¹¹⁰ Chigwata and Ziswa 2018 *The Hague J Rev L* 295.

Arguably, the African Charter on Values and Principles of Decentralisation demonstrates the linkage between decentralisation and the RTD. It is argued that political decentralisation, for instance, allows for a more direct political accountability.¹¹¹ This means that decentralisation directly grants the citizens of each region the power to constitute their local government leadership without any influence from the national or central government.¹¹² Decentralisation ultimately fosters peoples' participation in development which is a key component in the realisation of the RTD.

The UNDRTD is the only international instrument that “makes the nature of participation in development so explicit”, emphasising that States should “promote and ensure free meaningful and active involvement of all individuals and groups in the design, implementation and monitoring of development policies”.¹¹³

It has been argued in this thesis that devolution of power, a form of decentralisation, creates an institutional and normative framework that allows the citizens to be closely involved in the creation and implementation of development policies. This occurs through participatory development under section 115 of the County Governments Act,¹¹⁴ which makes public participation mandatory in county planning. This makes the peoples' involvement in development planning active, free and meaningful, thus resulting in the realisation of the RTD.

The right to free, active and meaningful participation nationally demands the expansion of the universe of those entitled to participate in development. Expansion of participatory arenas is relevant to those who are allowed to participate and how they ought to participate based on principles of transparency and accountability and focus on human beings as agents of democracy.¹¹⁵ Devolution¹¹⁶ expands this

¹¹¹ Seabright 1996 *European Economic Review* 61.

¹¹² Nupia <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.570.3877&rep=rep1&type=pdf> (Date of use: 30 January 2020) 2.

¹¹³ Piovesan "Active free and meaningful participation in development" 105.

¹¹⁴ Act 17 of 2012.

¹¹⁵ Act 17 of 2012.

¹¹⁶ Devolution is defined as the process of transferring decision-making and implementation powers, functions, responsibilities and resources to legally constituted, and popularly elected local governments in a bid to decentralize governmental power. See *Hand Book on Devolution* 5.

universe by creating normative frameworks that obligate county governments to involve the people in development through public participation.¹¹⁷

Participation of the people is not optional in development. This is because the people's devolution of power and participation are among the national values and principles of governance in Kenya.¹¹⁸ These values and principles of governance bind all State organs, State officers, public officers and all persons relevant to application or interpretation of the Constitution, enactment, application or interpretation of any law and implementation of public policy decisions.¹¹⁹

Inculcating these values and principles (particularly participation of the people and devolution) in development processes in Kenya makes the human person the centre of development and a direct beneficiary of the same. Nevertheless, the people are given a voice in decision-making, for instance, through the creation of county development plans where the public must be considered.¹²⁰ Participation and devolution, therefore, engender the realisation of the RTD.

2.2.3 A Process in which all Human Rights and Fundamental Freedoms are Realised

This section expounds on the RTD as a process that facilitates the realisation and enjoyment of human rights. In this context, Bedjaoui and others have referred argued that the RTD is the source of all other human rights hence the "alpha and omega of human rights"¹²¹ This section discusses this unique and intriguing feature of the RTD in a bid to offer a deeper understanding of what the right entails.

The RTD ascribes to the recognized position that human rights are interdependent, indivisible and mutually reinforcing.¹²² Sustainable development demands the integration of human rights in development. According to Stephen Marks, one of the ways to do this is through the holistic approach.¹²³ The holistic approach avoids the

¹¹⁷ For instance, section 115 of the County Governments Act makes public participation mandatory.

¹¹⁸ Article 10(2)(a) of the Constitution of Kenya 2010.

¹¹⁹ Article 10(1)(a), (b) and (c) of the Constitution of Kenya 2010.

¹²⁰ Section 115 of the County Governments Act.

¹²¹ Bedjaoui "The difficult advance of human rights towards universality" 32-47; Bedjaoui "The Right to Development" 1177-1182.

¹²² Paragraph 5 of the *Vienna Declaration* UNGA Res 48/121 adopted on 20 December 1993.

¹²³ Marks "The Human Rights Frameworks for Development" 1.

categorising human rights and stresses the indivisibility and interrelatedness of all human rights.¹²⁴ The UNDRTD in article 6 emphasizes the holistic approach by providing that “all human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights”.¹²⁵

RTD is “the right to participate in, contribute and enjoy economic, ,social-cultural and political development in which all human rights and fundamental freedoms can be fully realised.¹²⁶ In other words, it is an entitlement to a process of development that leads to the full realisation of economic, social and cultural rights and civil and political rights. This is a core norm that is derived from the UNDRTD”.¹²⁷

The *Vienna Declaration*, captures what Kamga refers to as "the composite character" of the RTD, which means that in reaffirming the indivisibility of human rights, the RTD is multi-faceted and does not concentrate on one particular human right.¹²⁸ The RTD insists on the parallel realisation of all recognised human rights:¹²⁹ social, economic, cultural and civil and political rights. For example, the realisation of one right, like the property right, should be part of a larger agenda for realising all other rights.¹³⁰

From the foregoing, it emerges that the UNDRTD recognizes that the RTD means a process of development in which all human rights are realised. Therefore, the RTD is made up of different elements that comprise all human rights, thus its composite nature. The *Vienna Declaration* underscores the universal, indivisible, interdependent and interrelated nature of human rights.¹³¹ Simply put, no human right can be enjoyed in the isolation of others. Human rights should be enjoyed as

¹²⁴ UNDP "Integrating Human Rights" 16.

¹²⁵ Article 6(2) of the UNDRTD.

¹²⁶ Article 1 of the UNDRTD.

¹²⁷ Vandenbogaerde 2013 *Neth QHR* 193.

¹²⁸ Kamga *Human Rights in Africa* 125. He argues that development is a conglomerate of all fundamental rights and freedoms. In other words, all the three generations of rights are the substance of the RTD.

¹²⁹ Andreassen 2010 *The Bangladesh Dev Stud* 322.

¹³⁰ Andreassen 2010 *The Bangladesh Dev Stud* 322.

¹³¹ Paragraph 5 of the *Vienna Declaration*.

a complete package of rights cutting across the three generations of human rights, viz; first, second and third-generation rights.

The RTD can be viewed through the lens of Amartya Sen's capability theory which depicts the RTD as “an empowering right through which other human rights is realised”.¹³² Here the RTD creates an avenue to enable persons to realise all other human rights and freedoms. Amartya Sen's capability theory brings out the empowering role of development in that it expands a person's ability to do different activities, which improves the quality of their lives.

He proposes a radical “shift in the focus of attention from the means of living” which has more to do with elements of macroeconomics such as, inflation, GDP and unemployment, to “the actual opportunities a person has”¹³³ which has more to do with developing the human person by expanding their opportunities. For instance, a vibrant economy may result in numerous job opportunities. This means that one can choose among several jobs and select the one that suits them best, thus securing their socio-economic rights by having a steady income. However, a vibrant economy requires a stable government, which is representative in nature and engages with its citizens through public participation. All these factors result in increased opportunities for the citizens, thus the realisation of the RTD.

Arjun Sengupta's description of the RTD as a "vector of all the rights" vividly captures the composite nature of the RTD as follows:

The right to development as a right to a particular process of development can be best described as a "vector" of all the different rights and freedoms. Each element of the vector is a human right just as the vector itself is a human right. They all will have to be implemented following fully the human rights standards. Furthermore, all the elements are interdependent, both at any point in time and over a period of time. They are interdependent in the sense that the realisation of one right, for example the right to health, depends on the level of realisation of other rights, such as the right to food, or to housing, or to liberty and security of the person, or to freedom of information, both at the present time and in the future.¹³⁴

¹³² Sen *The Idea of Justice* 253-290.

¹³³ Sen *The Idea of Justice* 253.

¹³⁴ Sengupta 2002 *HRQ* 868.

Sengupta's expression "vector of rights" refers to the whole corpus of human rights, the three generations of rights. Therefore, the composite nature of the RTD makes it "an empowering right through which other human rights is realised".

From the foregoing, it is correct to assert that the RTD entails a process of development that puts the human person at the centre. It increases a person's opportunities and choices, thus realising, all other human rights and fundamental freedoms. Indeed, Bedjaoui summarizes the composite character of the RTD by stating that the RTD is the most important human right necessary for the achievement of all other human rights.¹³⁵

2.2.4 The RTD as an Individual and Collective Right

The RTD is a unique right that is enjoyed by both individuals and groups of people hence its individual and collective nature. This section will discuss the RTD as both an individual and a collective right to provide a deeper understanding of its practical application.

The RTD not only impacts individuals, but affects communities as well. Abi-Saab explains this by arguing that "the right to self-determination gives nations full sovereignty over all their national wealth and resources, but that has to be exercised to benefit their citizens".¹³⁶ This means that the right holder could be a nation, but the beneficiary of the exercise of the right is an individual.¹³⁷ In many instances, developmental rights are realised in a collective sense and so a nation's right to develop means the realisation of RTD for individuals.¹³⁸

The collective and individual nature of the RTD can be found in UNDRTD makes direct reference to "human person and peoples" as beneficiaries of the RTD.¹³⁹ A "human person" can be understood to mean an individual, while the term "peoples" refers to groups of people. Therefore, RTD is both an individual and a collective

¹³⁵ Bedjaoui "The difficult advance of human rights towards universality" 32-47.

¹³⁶ Abi-Saab "The Legal Formulation of a Right to Development" 159, 164.

¹³⁷ Sengupta 2002 *HRQ* 863.

¹³⁸ Sengupta 2002 *HRQ* 863.

¹³⁹ Article 1(1) of the UNDRTD. The right to development is an inalienable human right by virtue of which *every human person* and *all peoples* are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

right. Individuals, peoples, and even the State are all beneficiaries of the right, which is a significant departure from the traditional position where individuals are the right holders or beneficiaries of human rights.¹⁴⁰

Further, the UNRTD defines development as a process that aims at "the constant improvement of the well-being of the entire population and of all individuals...".¹⁴¹ Bedjaoui sums up the collective nature of the RTD by arguing that the RTD "is a right of the human race in general".¹⁴² Going by Bedjaoui's argument, "the human race in general", can be interpreted as, individuals as well as groups of people like communities and States. This is a clear demonstration of the fact that the RTD is indeed an individual and collective right.

It is worth pointing out that the meaning of the term "people" in regard to the RTD has been controversial and unclear. Actually, "this was among the controversial issues in the preparatory steps of UNDRTD".¹⁴³ Looking at contemporary and current jurisprudence on the RTD, unanimity of the exact meaning of the term "people" has not been developed as yet.¹⁴⁴ Understanding the exact meaning of the term "peoples" then helps one answer the question, "who are the exact beneficiaries of the RTD?".

On the regional level, the "concept of people remains vague, unclear and constantly changing".¹⁴⁵ Hence Ougergouz equates it to "a chameleon-like concept".¹⁴⁶ Olowa argues that the African Commission plays "the ostrich game" with issues of "peoples"¹⁴⁷ evident in the case of *Social Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria (SERAC)*.¹⁴⁸ In this case, the African Commission did not clarify the concept of "peoples" in Article 21 and 22 of the ACHPR by "failing to investigate whether the Ogoni community could qualify as

¹⁴⁰ Kamga *Human rights in Africa* 188.

¹⁴¹ Preamble of the UNDRTD.

¹⁴² Bedjaoui "The difficult advance of human rights towards universality".

¹⁴³ Yeneabat 2015 *Int'l J Polit Sci Dev* 450.

¹⁴⁴ Yeneabat 2015 *Int'l J Polit Sci Dev* 450.

¹⁴⁵ The African Commission itself has acknowledged the controversy around the word 'peoples' in the case of *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) para 3 where it stated that "all peoples have a right to self-determination. There may, however, be controversy as to the definition of peoples and the content of the right".

¹⁴⁶ Ougergouz *The African Charter on Human and Peoples' rights* 204, 211.

¹⁴⁷ Olowu *An integrative rights-based approach* 155.

¹⁴⁸ *SERAC & Another v Nigeria*, ACHPR, 2001, 15th Annual Activity of the African Commission 2001, 2002. Banjul, the Gambia.

a specific group to be identified as specific peoples”¹⁴⁹ hence beneficiaries of the RTD who then would be eligible to be right holders of the RTD.¹⁵⁰

Kamga and Fombad argue that “in avoiding the concept of "peoples", the African Commission mistakenly considered the Niger Delta to be "Ogoni land" and failed to investigate whether the "Ogoni communities" could qualify as a distinct group to be identified as a "people" who could be right holders of the RTD”.¹⁵¹ The Commission ought to have defined the concept of peoples because it stated in passing that the Ogonis' RTD was violated in the context of the right to food. This finding is somewhat a grey area in the decision because identification of right holders must be undertaken in a decision involving a violation of the RTD. In other words, the Commission should have found that the Ogoni community are a distinct group to be identified as peoples hence beneficiaries of the RTD.

Kamga and Fombad have further argued that, all the rights alleged to have been violated in the *SERAC* case were building blocks for the RTD. Unfortunately, the African Commission did not find a violation of the right to food inferred in the RTD. Therefore, the Commission missed out on a great opportunity to distil a dynamic interpretation of the law to secure the RTD.¹⁵²

Kamga and Fombad questioned the logic the Commission used to find “a violation of the right to shelter (is not provided in the African Charter) through a combination of protection of rights to health, property and family”. Why did the Commission elect to use same logic to find a violation of the right to food and not the RTD?¹⁵³ Arguably, the Commission did not want to engage in the rigours of defining the term "peoples", and therefore, they opted for a softer landing which was a violation of the right to food and a violation of the RTD as *obiter dictum*.¹⁵⁴

¹⁴⁹ Olowu *An integrative rights-based approach* 155.

¹⁵⁰ Kamga 2011 *De Jure* 389.

¹⁵¹ Kamga and Fombad 2013 *J Afr L* 18.

¹⁵² Kamga and Fombad 2013 *J Afr L* 18.

¹⁵³ Kamga and Fombad 2013 *J Afr L* 18.

¹⁵⁴ See para 64 of the decision where the Commission in mentions in passing that there is a violation of the RTD in the context of the right to food.

In the case of *Kevin Mgwanga Gumne et al. v Cameroon* (the *Gumne* case),¹⁵⁵ where the RTD is discussed, the term "peoples" is defined with little clarity.¹⁵⁶ Having acknowledged controversial nature of the word "people",¹⁵⁷ the Commission stated in the Banjul Charter, the term "peoples" is closely associated with solidarity rights found in Articles 19 to 24 of the Charter. The beneficiaries of these rights may be "people, bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds".¹⁵⁸

However, the Commission refused to find in favour of the people of Southern Cameroon as much as they qualified to be referred to as "peoples".¹⁵⁹ Their reasoning is based on the need to discourage secession as a form of self-determination for Southern Cameroon since it would jeopardize the territorial integrity of the Republic of Cameroon.¹⁶⁰ This reasoning presented two problems. Firstly, it meant that "recognition of distinct identities of minorities constitutes a threat to national unity and undermines the objective of nation-building".¹⁶¹ Secondly, the decision meant that national unity superseded the protection of peoples' rights,¹⁶² meaning that the RTD is not an inalienable right.

Interpreting the right to self-determination in such a restrictive way, akin to putting the right in a "strait-jacket", negatively impacted the realisation of the RTD. This is because the RTD implies the full realisation of the right to self-determination. There was a need for clarity in what constitutes "people" to accurately determine the beneficiaries of the RTD in light of its individual and collective nature.

However, in the *Endorois* case,¹⁶³ the African Commission making headway in shedding light on the controversial term "peoples". The Commission went ahead to

¹⁵⁵ Communications, 266/2003; 26th Annual Activity Report of the African Commission.

¹⁵⁶ The Commission noted that the people of Southern Cameroon "qualify to be referred to as a "people" because they manifest numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection, and political outlook. More importantly they identify themselves as a people with a separate and distinct identity.

¹⁵⁷ Paragraph 169 of the decision.

¹⁵⁸ Paragraph 171 of the decision.

¹⁵⁹ Paragraph 179 of the decision.

¹⁶⁰ Paragraph 180 of the decision.

¹⁶¹ Morel 2004 *Essex Hum Rts Rev* 55.

¹⁶² Kamga 2011 *De Jure* 388.

¹⁶³ Communication 276/2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Welfare Council versus Kenya*.

clarify the meaning of peoples in the context of indigenous groups.¹⁶⁴ It highlighted the identification criteria for indigenous people as, “occupation and use specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups and an experience of subjugation, marginalization, dispossession, exclusion or discrimination”.¹⁶⁵

This decision explains the collective nature of the RTD. The African Commission was able to identify indigenous communities such as the Endorois as "peoples". It also stated that “their continued existence as "peoples" is closely connected to the possibility of them influencing their fate and living according to their cultural patterns, social institutions and religious systems”.¹⁶⁶ Their unique recognition as "peoples" secures their right to participation culminating in a shift from a culture of silence to active participants in and beneficiaries of development.

In the *Ogiek* case,¹⁶⁷ The African Court on Human and Peoples Rights also clarified the term "peoples". The term was defined to include “ethnic groups or communities identified as forming part of the said population, provided such groups do not question the sovereignty and territorial integrity of the State without the latter's consent”.¹⁶⁸ In other words the term "peoples" in the Charter refers to all those groupings of people that constitute a State.¹⁶⁹

This was a vastly improved definition of the word "peoples" because it gave clarity as to the identity of the right holders (communities constituting a State) and the duty bearers of the RTD (the government of Kenya or the State). This has been a sound decision in that it demonstrated the African Court's willingness to end the "ostrich game" with the term "peoples" so far attributed to the Commission and affirmed the collective nature of the RTD.

¹⁶⁴ Kamga and Fombad 2013 *J Afr L* 19.

¹⁶⁵ *Endorois* case para 150.

¹⁶⁶ Paragraph 157 of the decision.

¹⁶⁷ *African Commission on Human and Peoples Rights versus The Republic of Kenya Application No 006/2012* judgment delivered on 26th May 2017.

¹⁶⁸ *African Commission on Human and Peoples Rights versus The Republic of Kenya Application No 006/2012* judgment delivered on 26th May 2017 paras 198 and 199.

¹⁶⁹ *African Commission on Human and Peoples Rights versus The Republic of Kenya Application No 006/2012* judgment delivered on 26th May 2017 para 208.

However, it is important to note that the *Endorois* and *Ogiek* cases did not give a comprehensive definition of the term "peoples". This is because cases revolved around the rights of indigenous communities, thus the term "peoples" was defined in that context. It is predicted that the term would continue evolving as more cases involving peoples' rights are submitted to the Commission and the African Court for adjudication. A comprehensive definition is necessary because people's rights are not only limited to indigenous people or ethnic groups. Other groups of "communities constituting a State", such as religious groups among others, ought to be able to claim peoples' rights.

Internationally, the most accepted meaning of "people" seems to point towards viewing them as distinct collectives that constitute a fraction of the population of a country.¹⁷⁰ This is an agreeable definition because it distinguishes between "peoples" and the State. It is important to distinguish between the two to avoid a situation where the rights of a "State" override the rights of a group within a particular State because the State should always act in the best interests of its people.¹⁷¹

The Open-Ended Working Group (OEWG) on the RTD has used the word "people" when referencing the RTD of different groups such as migrants, persons with disabilities and children, among others.¹⁷² Internationally, the RTD was recognized as a right accruing to individuals and groups of persons reaffirming its collective and individual nature.

Khurshid notes that despite the common usage of the term "rights of peoples, nations and groups" in international human rights documents and academia, there is no clarity nor unanimity in the definition of the terms even in the context of the RTD.¹⁷³ However, Okafor rightly argues that at the African level, there seems to be more clarity as to the meaning of the term "peoples" than at international level.¹⁷⁴

¹⁷⁰ Report on the Global Consultation on the right to development CHR RES 1989/45 para 80.

¹⁷¹ Dersso 2006 *AHRLJ* 370. He argues that in the context of the *Ogoni* decision, the state should not be equated to its people. The state is instead an agent of its people and must act in their best interests.

¹⁷² Report of the Open-Ended Working Group on the Right to Development E/CN.4/2001/26 at 41.

¹⁷³ Iqbal *The right to development in international law* 55.

¹⁷⁴ Okafor "A regional perspective" 370.

This is because article 22 is clear in its identification of "peoples" (as opposed to individuals) as the subjects/holders of the RTD.¹⁷⁵ On the other hand, the wording of the UNDRTD refers to holders of RTD as "every human person and peoples".¹⁷⁶

Therefore, in the context of devolution, the community residing within a county qualifies to be referred to as "peoples" both in the UNDRTD¹⁷⁷ and the ACHPR.¹⁷⁸ It is further analysed that the community includes; marginalized persons, children, senior citizens and persons with disabilities, religious groups, ethnic groups, and indigenous groups. The fluidity in the meaning of the word "peoples" may not negatively affect the realisation of the RTD in the context of devolution. This is because the beneficiaries of devolution are collectively the residents of a county. It is thus the thrust of this thesis that devolution supports the realisation of the RTD.

2.2.5 The RTD and the Right to Self Determination

This section explores the relationship between the RTD and the right to self-determination. The UNDRTD and the ACHPR refer to the right to self-determination as an intricate part of the RTD. Establishing this relationship, therefore, becomes important because the right to self-determination was considered one of the RTD pillars.¹⁷⁹

The right to self-determination refers to "the rights of peoples to freely determine their political status and freely pursue their economic, social and cultural development".¹⁸⁰ Comprehensive reading of the provisions of Article 1(2) of the UNDRTD points to the conclusion that the RTD will never be a reality in the absence of the right to self-determination, meaning that the right to self-determination is a cornerstone of the RTD.¹⁸¹ When people can fully exercise their rights over their natural wealth and resources without any external interference, they stand a better

¹⁷⁵ Okafor "A regional perspective" 370.

¹⁷⁶ Article 1(1) of the UNDRTD.

¹⁷⁷ Article 2.

¹⁷⁸ Article 22.

¹⁷⁹ Kamga *Human rights in Africa* 119.

¹⁸⁰ Article 2 of the *UN Declaration on the Granting of Independence to Colonial Countries and Peoples* UNGA RES 1514(XV) of 14/12/1960.

¹⁸¹ Kamga *Human rights in Africa* 131.

chance of benefiting from the exploitation of such resources leading to an improvement in their standard of living hence the realisation of the RTD.

Article 1(2) of the UNDRTD provides that the RTD implies the full realisation of people's right to self-determination. This occurs when the people can exercise their full sovereignty over all their natural wealth and resources, subject to the relevant provisions of both the ICCPR and the ICESCR.¹⁸² In situations where people are denied their right to self-determination, the RTD becomes a mirage. Viewed from a different perspective, the right to self-determination can be realised for the RTD to be a reality.

The exercise of the right to self-determination partly allows people to play a significant role in the development process. This can be through participation which puts the people at the centre of the process of development. Donnelly suggested that the RTD is unnecessary because its contents are already firmly established by the right to self-determination allowing people to choose their own economic and social systems without interference.¹⁸³ Donnelly was able to identify the "golden thread" that links the right to self-determination to the RTD. This thread is the empowering quality of both rights which gives the people the freedom to chart their development path.

While Donnelly's argument that the RTD is unnecessary and maybe disagreed with since he intended to deny that the RTD is a real human right, his argument, on the other hand reaffirms the right to self-determination, is part and parcel of the RTD. He confirms that RTD is part of the right to self-determination.

Who are the beneficiaries of the right to self-determination? The State, as well as "peoples" or "community", can be beneficiaries.¹⁸⁴ The African struggle for

¹⁸² UNDRTD article 1(2).

¹⁸³ Donnelly 1985 *Calif West Int'l L J* 473.

¹⁸⁴ UN HRC *UN Human Rights Committee: Concluding Observations: Canada*, 7 April 1999, CCPR/C/79/Add 105 <http://www.refworld.org/docid/3df378764.html> (Date of use: 31 December 2017) para 7 where reference is made to the concept of self-determination as applied by Canada to the aboriginal peoples. See also Communication No 547/1993 *Makuika et al v New Zealand* (27th October 2000) where the right to self-determination was viewed as an individual human right.

independence from its colonial masters provides a clear example of the State being a beneficiary of the right to self-determination.

The *Endorois* case¹⁸⁵ is an example of "peoples" being beneficiaries of the right to self-determination according to the findings of the African Commission. In the said case, indigenous resource rights were connected with the most important and fundamental human rights including the right to life and the right to self-determination, among others.¹⁸⁶ The African Commission found a violation of the Endorois' right to property¹⁸⁷ and the right to development¹⁸⁸ and, by extension, a violation of their right to self-determination. The fact that the Commission could link indigenous property rights to other rights like the right to life and the right to self-determination reaffirms the position that human rights are interrelated and interdependent.

The right to self-determination is, therefore, a key pillar of the RTD. It affirms the multifaceted nature of the RTD as a human right comprising civil and political rights as well as socio-economic and cultural rights. It also reaffirms the principle of universality, interdependency and indivisibility of human rights.¹⁸⁹

2.3 Development in the Context of the RTD

This section discusses the meaning of development in the context of the RTD. This is because development has been viewed through different lenses over time, thus raising pertinent questions; Is modernization development? Is an increase in the GDP of a country development? Is construction of infrastructures such as roads and buildings development? Going back in history, colonialism in Africa was justified because it was a civilizing mission whose objective was to spread 'development' to that part of the world that had remained outside of history.¹⁹⁰ In light of diverse views about the meaning of development, defining the term in the context of the RTD, becomes necessary.

¹⁸⁵ Communication 276/2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Welfare Council versus Kenya*.

¹⁸⁶ Paragraph 212 of the Commission's decision.

¹⁸⁷ Article 14 of the ACHPR.

¹⁸⁸ Article 22 of the ACHPR.

¹⁸⁹ Kamga *Human rights in Africa* 132-133.

¹⁹⁰ Lushaba <https://www.ascleiden.nl/Pdf/workingpaper69.pdf> (Date of use: 16 January 2020).

The UNDRTD views development as a holistic economic, social, cultural and political process.¹⁹¹ Development is viewed in the UNDRTD as “aiming at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom”.¹⁹² Development as a process entails inculcating values of equity and justice when engaging with the community, who may be left out of the development matrix. Development subsequently strengthens their capacity to improve their individual living standards and that of the entire population.¹⁹³

In other words, development is an all-encompassing human-centred process where “people are able to freely enjoy a sustainable improvement of economic, social, cultural and political well-being through the creation of appropriate national and international infrastructure”.¹⁹⁴ Such “a concept of development entails the establishment of a world order characterised by global justice”.¹⁹⁵

The meaning of the term "development" has mutated over history.¹⁹⁶ It is defined as synonymous with modernisation,¹⁹⁷ simultaneously, it has also been perceived in the traditional approach as the accumulation of wealth and is measured by the Gross Domestic Product (GDP).¹⁹⁸ Over time, the definition has changed from this traditional approach to a “concept of sustainable human development promoted by the United Nations Development Programme (UNDP) human development index (HDI)”.¹⁹⁹ This approach places people at the centre of the development matrix by involving them in participatory and transformative processes that focus on material growth and the sustainable well-being of all human beings.²⁰⁰ This definition that

¹⁹¹ The Preamble of the UNDRTD para 2.

¹⁹² The Preamble of the UNDRTD para 2.

¹⁹³ Sengupta "Conceptualizing the right to development" 69.

¹⁹⁴ Kamga *Human rights in Africa* 66.

¹⁹⁵ Kamga *Human rights in Africa* 66.

¹⁹⁶ Yusuf *et al Development Economics through the Decades* 3.

¹⁹⁷ Seers 1969 *Int'l Dev Rev* 2.

¹⁹⁸ Kamga *Human rights in Africa* 60.

¹⁹⁹ UNDP "Decentralised Governance for Development" 5 explains that "the concept of human development is development that is pro-poor, pro-women, pro-environment and taking into consideration the long term".

²⁰⁰ Scheepers *A practical guide to law and development* 6

has been adopted in this thesis. It is important to note that the definition mirrors the UNDTRD, which focuses on increasing the capabilities of the human person.

On the other hand, the World Bank has defined development to be “multi-dimensional, encompassing better education, higher standards of health and nutrition, less poverty, a cleaner environment, more equality of opportunity, greater individual freedom and ,more prosperous cultural life”.²⁰¹ This definition resonates with the UNDP's sustainable human development index approach by focusing on improving the quality of life of human beings.

The UNDRTD, a soft law instrument,²⁰² makes provision for the pursuit of human rights based development. Thus, the declaration makes State contribution to development policies and development a right rather than an act of benevolence.²⁰³ This requires international cooperation and a duty to cooperate.²⁰⁴ Consequently, development issues is transformed into rights that obligate the State to meet popular participation and equity²⁰⁵ conditions as it implements its development policies.

Therefore, development in the context of the RTD refers to the process that elevates the human person to be the central subject in the development process and the primary beneficiary of the same.²⁰⁶

2.4 Controversies around the RTD: A Summary of the Dramatis Personae

Chapter 1 of this thesis indicates that the RTD is a controversial right pitting the South against the North. One of the glaring effects of this controversy is the failure by the international community to invent a binding international treaty on the RTD. The great political divisions prevailing between and within the developed nations like the United States of America, Federal Republic of Germany, Denmark, Sweden, and Finland, to mention a few, on one side and developing countries on the other

²⁰¹ World Bank *World Development Report 4*.

²⁰² See Dupuy 1991 *Mich J Int'l L* 420 for a deeper discussion of the term 'soft law'.

²⁰³ Arts and Tamo 2016 *Neth Int'l L Rev* 222.

²⁰⁴ Kamga *Human rights in Africa* 163. According to Article 3 of the UNDRTD the State bear the primary responsibility of realising the RTD. Other duty bearers are the international community, multinational organisations, individuals, individual legal persons and multilateral bodies like the WTO and the IMF.

²⁰⁵ Article 8(1) of the UNDRTD.

²⁰⁶ The preamble of the UNDRTD. Also see Jha 2012 *J Pol & Gov* 18; Salomon 2013 *Int'l Comp L Q* 50; Nagan 2013 *Cadmus J* 50.

side regarding the substantive elements and implications of the RTD have hampered concrete implementation of the UNDRTD.²⁰⁷ This section sheds light on this controversy.

The RTD as we know it today is attributed to a Senegalese jurist known as Judge K'eba M'baye in 1972, who argued that development should be viewed as a right.²⁰⁸ The right later received universal acceptance by adopting the UNDRTD by the United Nations General Assembly in 1986.²⁰⁹ The declaration is reinforced by the *Vienna Declaration* of 1993,²¹⁰ the 2000 *Millennium Declaration*²¹¹ and the *Durban Declaration and Programme of Action*,²¹² of which affirmed the RTD as a universal and inalienable human right. The effect of these key declarations was to effectively end the debate as to whether or not the RTD is a human right. The RTD is currently recognised as an inalienable human right.

According to Stephen Marks, "the RTD has been part of the international debate on human rights for over thirty (30) years but has not entered the practical realm of development planning and implementation".²¹³ Many developed countries tend to pay lip service to the RTD,²¹⁴ perhaps because of the controversies surrounding the right. Building on Marks observations, Arts and Tamo argue that seventy (70) years after adopting the UN Charter and thirty (30) years after the adoption of the

²⁰⁷ Arts and Tamo 2016 *Neth Int'l L Rev* 222.

²⁰⁸ Judge Kéba Mbaye, lecture at the International Institute of Human Rights in 1972, see Mbaye 1972 *Revue des droits de l'homme* 505-534.

²⁰⁹ The UNDRTD Doc A/RES/41/128 adopted on 4th December 1986.

²¹⁰ *Vienna Declaration*. Para 10 provides that the RTD is an inalienable human right.

²¹¹ The *UN Millennium Declaration* of 2000 UN Doc RES /55/22 adopted on 8th September 2000. Para 11 states: "We are committed to making the right to development a reality for everyone and to freeing the entire human race from want." The *Declaration* also states at para 24 that "We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development".

²¹² United Nations *Durban Declaration and Plan of Action* adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Violence, 8th September 2001, endorsed by UNGA RES 56/266 of 15 May 2002. Para 11.5 recalls the commitment of the *Millennium Declaration* "to make the right to development a reality for everyone" and para 19 and affirms "the solemn commitment of all states to promote universal respect for, and observance and protection of, all human rights, economic, social, cultural, civil and political, including the right to development, as a fundamental factor in the prevention and elimination of racism, racial discrimination, xenophobia and related intolerance." Judge Kéba Mbaye, lecture at the International Institute of Human Rights in 1972, see Mbaye 1972 *Revue des droits de l'homme* 505-534.

²¹³ Marks 2004 *Harv HRJ* 137.

²¹⁴ Marks 2004 *Harv HRJ* 137.

UNDRTD, “very little actual RTD implementation practice has been achieved internationally”.²¹⁵

On the 30th of November 2017, a group of human rights experts issued a joint statement marking the 31st anniversary of the UNDRTD.²¹⁶ The experts stressed the critical need to accelerate world action to realise the RTD through sustainable development. In 2020, about 34 years after the adoption of the UNDRTD, the UN Working Group on the RTD released the first draft international human rights treaty on the RTD²¹⁷ in an effort to achieve international consensus on the enforcement and implementation of the RTD.

Therefore, it is presented that these observations strongly indicate that the RTD remained mainly in the theoretical realm of development, and little of it has been seen in the practical sphere.

2.4.1 A Historical Perspective of the Controversy

Historically, the RTD controversial human right because of the North versus South divide,, thus pitting the believers in the right against the non- believers.²¹⁸ One of the non-believers, Abi Saab, comments as follows:

The right to development is little more than a rhetorical exercise designed to enable the Eastern European countries to score points on disarmament and collective rights (and that) it also permits the Third World to 'distort' the issues of human rights by affirming the equal importance of economic, social and cultural rights and by linking human rights in general to its 'utopian aspiration for a new international economic order'.²¹⁹

Abi Saab views the RTD as a tool by third world countries to redress the inequities of the international trade system. He perceives the RTD not as a human right but a veiled attempt to tackle global problems such as fair trade practices and donor aid, and yet these issues are remote to human rights.

²¹⁵ Arts and Tamo 2016 *Neth Int'l L Rev* 237.

²¹⁶ UN experts "Urgent need to speed up world action to realise Right to Development" <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22474&LangID=E> (Date of use: 31 December 2017).

²¹⁷ See UN Doc A/HRC/WG.2/21/2/Add 1, 20 January 2020, which contains the Draft Convention on the Right to Development, with commentaries.

²¹⁸ The developed countries being the unbelievers and the developing or third world countries being the believers. See Arts and Tamo 2016 *Neth Int'l L Rev* 222.

²¹⁹ Alston 1988 *Harv HRY* 20.

The discourse and controversy around the RTD dates back to the 1970s when the New International Economic Order (NIEO)²²⁰ created with the support of the Non-Aligned Movement (NAM). The declaration sought to eradicate developmental injustice and make it possible for third world countries to enjoy the direct benefits of development.²²¹ The move created two opposing camps; the developed countries and developing countries on another side.²²²

Developing countries complained of poverty and under development, unfavourable and unfair development cooperation and inability to participate in the globalization.²²³ This claim was not acceptable to developed countries like the USA,²²⁴ who believed this was an attempt by emerging countries to demand more development aid from the developed countries hence the North versus South divide.

The North-South divide is described a global community where “20% of the population (the North) control and enjoy about 80% of its resources whilst 80% of the population (the South) control but enjoy less than 20% of said resources”.²²⁵ The North comprises countries like the U.S.A, Denmark, Germany and Japan, while the South comprises poor third-world countries consisting of most African countries.

The schism between the North and South was aptly captured in the 2003 US delegation's submissions to the UN Commission on Human Rights in the following words:

In our estimation the right to development (RTD) is not a 'fundamental', 'basic', or 'essential' human right. The realisation of economic, social and cultural rights is progressive and aspirational. We do not view them as entitlements that require correlated legal duties and obligations. States therefore have no obligation to provide guarantees for implementation of any purported "right to development"²²⁶

In 2003, forty-seven (47) countries voted for a resolution towards creating an international legally binding instrument on the RTD while the USA, Australia and

²²⁰ *Declaration for the establishment of the New International Economic Order* UNGA RES/S-6/3201 of 12th December 1974.

²²¹ Kamga *Human rights in Africa* 147.

²²² Kamga *Human rights in Africa* 66.

²²³ UNGA RES 56/160.

²²⁴ Kamga *Human rights in Africa* 147.

²²⁵ Rubin 1986 *Am UJ Int'l L & Pol'y* 67, 75.

²²⁶ United States Government, Statement at the UN Commission on Human Rights, 59th Session, Comment on the Working Group on the Right to Development (Feb 10 2003) (transcript on file with the author) cited in Marks 2004 *Harv Hum Rev J* 147.

Japan voted against it, three abstentions has been recorded.²²⁷ The USA was strongly opposed to the part of the resolution considering the option of an international legal standard of a binding nature which stand influenced the votes of Australia, Canada, Japan and Sweden on the issue.²²⁸ Joe Danies, USA's representative to the UN Human Rights, attributed the USA's negative vote on failure to agree on an internationally acceptable definition of the RTD.²²⁹ This demonstrates how the North versus South schism has negatively impacted international efforts to realise the RTD.

Commenting on the book "Development as Human Right",²³⁰ Whyte disagrees with the postulation of the RTD as a human right by asserting that "intellectual chaos" abounds in the book,²³¹ explains and warns that anyone who devotes himself to "polish such a turd is sure to get his hands dirty".²³² He bases his warning on "the excruciatingly dull intellectual machinations of the human rights clergy" that abound in the book. For instance, he points out that Sen's digression from the principle that rights exist concomitantly with obligations is problematic because a claim ideally crystallises into a legal right when a there is a clear identification of the duty bearer's obligations. According to Whyte, this kind of thinking makes the idea of rights more of wishful thinking than a reality.²³³

Whyte also criticizes Sengupta's ideas regarding the RTD as "a formalization of nonsense,"²³⁴ argues none of the scholars in the said book attempted to answer the

²²⁷ UN Documentation *Economic and Social Council Official Records*, UN Commission on Human Rights, 59th Session Supplement No 3 at UN Doc E/2003/23/E/CN.4/2003/135 (2003) available at [https://undocs.org/pdf?symbol=en/E/2003/23\(supp\)](https://undocs.org/pdf?symbol=en/E/2003/23(supp)) (Date of use: 3 May 2019).

²²⁸ UN Documentation *Economic and Social Council Official Records*, UN Commission on Human Rights, 59th Session Supplement No 3 at UN Doc E/2003/23/E/CN.4/2003/135 (2003) available at [https://undocs.org/pdf?symbol=en/E/2003/23\(supp\)](https://undocs.org/pdf?symbol=en/E/2003/23(supp)) (Date of use: 3 May 2019).

²²⁹ Statement by Joel Danies US Representative to the UN Human Rights Commission, Comment on the Working Group on the Right to Development, 59th Session (2003) cited in Marks 2004 *Harv Hum Rts J* 148.

²³⁰ Andreassen and Marks *Development as a Human Right*.

²³¹ Whyte 2000 *Elec J Sust Dev* 47.

²³² Whyte 2000 *Elec J Sust Dev* 47.

²³³ Whyte 2000 *Elec J Sust Dev* 48.

²³⁴ Whyte 2000 *Elec J Sust Dev* 48.

question "of what good is the RTD?" but instead focused on those who already bought into the idea that the RTD is a real human right.²³⁵

While Whyte may have a point, it is worth noting that "the existence of the RTD is a *fait accompli*". Alston correctly argues that reservations expressed by various parties as to the legal status, practicality or utility of the RTD should be forgotten and in their place, "efforts to ensure the formal process of elaborating the contents of the right".²³⁶ His view is supported by recent efforts to realise the RTD by the international community discussed in this chapter.

Bedjaoui and others, on the other hand, view the RTD as the foremost human right that is a precondition for the realisation of other human rights, the "alpha and omega of human rights"²³⁷ or as a "right to rights",²³⁸ as a "basic right".²³⁹ Louise Arbour, the former UN High Commissioner for Human Rights, refers to the book "Development as a Human Right" as an excellent piece of scholarly writing.²⁴⁰

The views by these scholars bring to the fore the RTD's checkered past. Sceptics continue to persist, but the global consensus now unequivocally confirms that the RTD is an inalienable human right.²⁴¹ The debate has now shifted to how the right may be realised nationally and internationally.

2.4.2 Recent Developments on the RTD

Several recent international policy documents have positively influenced the international recognition and acceptance of the RTD as an inalienable human right. This section aims to highlight key international policy documents and understanding the RTD. This section will also demonstrate that the RTD is not merely caught in the conventional scholarly debates highlighted in the preceding section but is now globally accepted as a human right.

²³⁵ Whyte 2000 *Elec J Sust Dev* 47.

²³⁶ Alston "Development and the Rule of Law" 106.

²³⁷ Bedjaoui "The difficult advance of human rights towards universality" 32-47; Bedjaoui "The Right to Development" 1177-1182.

²³⁸ Dimitrievic "Is there a right to development?".

²³⁹ Shue *Basic rights* 19-20.

²⁴⁰ Andreassen and Marks *Development as a Human Right* iii.

²⁴¹ Paragraph 10 of the *Vienna Declaration*.

In 2015, the RTD was officially recognised in four internationally agreed policy documents.²⁴² These are the Addis Ababa Action Agenda of the Third International Conference on Financing for Development,²⁴³ The Sendai Framework for Disaster Risk Reduction 2015 -2030,²⁴⁴ Transforming our World: the 2030 Agenda for Sustainable Development (SDGs)²⁴⁵ and the Paris Agreement on Climate Change.²⁴⁶

The Addis Ababa Agenda was the culmination of the 2015 Third International Conference on Financing for Development, held in Addis Ababa, Ethiopia, where the UN dispatched 174-member State delegates. It highlighted the “commitment of the world leaders to end poverty and hunger and achieve sustainable development in its three dimensions, namely; promoting inclusive economic growth, protecting the environment and promoting social inclusion”. The respect to all human rights including the RTD was also pledged by the nations of the world.²⁴⁷

The Sendai Framework for Disaster Risk Reduction 2015-2030 adopted at the Third United Nations Conference on Disaster Risk Reduction held from 14th to 18th March 2015. The conference targeted preventing, fighting and managing disasters worldwide.²⁴⁸ The Sendai Framework continued previous initiatives, namely; the Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation and its Plan of Action²⁴⁹ and the Hyogo Framework for Action.²⁵⁰

Under the Sendai Framework, managing the risk of disasters seeks to “protect persons and their property, health, livelihoods and productive assets, and cultural and environmental assets while promoting and protecting all human rights, including

²⁴² See the Report on the Special Rapporteur on the Right to Development UN Doc. A/HRC/36/49.

²⁴³ Addis Ababa Action Agenda of the Third International Conference on Financing for Development UN Doc A/RES/69/313 adopted on 27th July 2015 para 1.

²⁴⁴ Sendai Framework for Disaster Risk Reduction 2015-2030 para 19(c) https://www.unisdr.org/files/43291_sendaiframeworkfordrren.pdf (Date of use: 30 April 2019).

²⁴⁵ Transforming Our World: the 2030 Agenda for Sustainable Development UN Doc. A/RES/70/1 adopted in September 2015 para 1.

²⁴⁶ Paris Agreement on Climate Change https://unfccc.int/sites/default/files/english_paris_agreement.pdf para 11 of the preamble (Date of use: 30 April 2019).

²⁴⁷ Paragraph 1 of the Addis Ababa Agenda.

²⁴⁸ See the Preamble of the Sendai Framework para 1.

²⁴⁹ UN Doc A/CONF 172 / 9 Chap1 Res 1 Annex I.

²⁵⁰ Hyogo Framework for Action 2005–2015: Building the Resilience of Nations and Communities to Disasters, UN Doc A/CONF 206/6 and Corr 1 Chap 1 Res 2.

the RTD".²⁵¹ The Sendai Framework is a non-binding and voluntary agreement, thus soft law.²⁵²

Paragraph 10 of The 2030 Agenda on Sustainable Development provides that the 2030 Agenda is grounded in the UDHR, international human rights treaties, *Millennium Declaration* of 2005 and other instruments such as the UNDRTD. This document confirms that sustainable development and the RTD are inextricably linked. Similarly, the Agenda 2030 declaration is soft law.²⁵³

The Paris Agreement on Climate Change aims to maintain a global temperature rise in this century well below 2 degrees Celsius as a way of combating climate change.²⁵⁴ The Agreement acknowledges the fact that climate change is a universal concern, and the respect, promotion and consideration of human rights obligations by State parties should be factored in their efforts to address climate change. These include the right to health, the rights of indigenous peoples, the RTD and intergenerational equity among others.²⁵⁵

Another significant development worth noting is the latest attempt to advocate for the adoption of the binding international treaty on the RTD. In 2020 the UN Working Group on the RTD released the first draft international human rights treaty on the RTD²⁵⁶ "prepared by Dr Mihir Kanade of the UN University for Peace, who heads a Drafting Group established by the United Nations Office of the High Commissioner for Human Rights".²⁵⁷ The draft treaty is a milestone in the drive for enforcement of the RTD internationally.

In recent times, reference to the RTD in all the foregoing internationally agreed policy documents is undeniably significant, notwithstanding their soft law status. The recent draft international treaty on the RTD is also significant. These developments demonstrate that the RTD has gained international recognition and acceptance as

²⁵¹ Paragraph 19(c) of the Sendai Framework.

²⁵² UNDRR <https://www.unisdr.org/we/coordinate/sendai-framework> (Date of use: ??).

²⁵³ Karlsson-Vinkhuyzen, Dahl and Persson 2018 *Environ Plan C: Politics Space* 1383.

²⁵⁴ UNCC <https://unfccc.int/process-and-meetings/the-paris-agreement/what-is-the-paris-agreement> (Date of use: ??).

²⁵⁵ Paragraph 11 of the preamble of the Paris Agreement.

²⁵⁶ See UN Doc A/HRC/WG.2/21/2/Add 1, 20 January 2020, which contains the Draft Convention on the Right to Development, with commentaries.

²⁵⁷ Schrijver 2020 *Neth QHR* 89.

an inalienable human right despite its checkered past. It also implies that internationally, the focus is on the realisation of the RTD and the question as to whether the RTD is a real human right is now a moot point.

2.4.3 A Shift in the Global Politics of the RTD

The global politics of the RTD revolves around the unwillingness of developed countries to accept interpretations of the RTD that legally oblige them to offer development aid to countries of the global South. Consequently, developed countries have resisted any attempts to interpret the UNDRTD as giving rise to any legal obligations or even creating a binding international treaty on the RTD.²⁵⁸ On the other hand, developing countries continue to demand “for more international cooperation, including development assistance and concessions, a fairer global trade climate, access to technology and debt relief from "developed" counties”.²⁵⁹

Stephen Marks and Rajeev Malhotra point out that in 2010, the politics of the RTD within the UN shifted after the debate on the report of the HLTF's report. In the past, developing countries used to support the recommendations of the HLTF with lukewarm support or opposition from Organisation for Economic Cooperation and Development (OECD) countries (developed countries). In 2010 the OECD countries instead fully supported the recommendation of the HLTF, although the task force had continued to prioritise the interests of developing countries against the excessive advantages of the developed countries.²⁶⁰ This shift indicates that developed countries are gradually becoming more open to pursuing the implementation of the RTD internationally even if such efforts would favour the developing countries more.

Marks and Malhotra further argue that the political landscape in the U.N now reflects a shift in the economic power towards emerging markets along with the BRICS, and nations that used to vigorously promote the RTD have become silent as they grow at a rapid pace.²⁶¹ Marks and Malhotra's observation implies that some of the countries that had initially been part of the "global South" have since moved out of

²⁵⁸ Arts and Tamo 2016 *Neth Int'l L Rev* 224.

²⁵⁹ Arts and Tamo 2016 *Neth Int'l L Rev* 224.

²⁶⁰ Marks and Malhotra " Introduction".

²⁶¹ Marks and Malhotra " Introduction".

that cluster because of rapid economic growth. These countries now have the clout to negotiate for fairer trade international practices in the global market without invoking human rights claims. The politicisation of the RTD has become irrelevant because such countries can come up with national policies for the realisation of the RTD without placing too much reliance on the international community.

Marks and Malhotra also note that poverty, inequality and unemployment have become a reality in some developed countries²⁶² while the pace of growth and development in several so-called developing countries far exceeds that of Europe and North America.²⁶³ This state of affairs has resulted in a shift of positions and alliances within the traditional North-South tug of war.

Therefore, it is no longer accurate to view the politicisation of the RTD solely through the lens of the old North-South divide.²⁶⁴ The RTD has gained overwhelming support and acceptance internationally. The U.N has affirmed validity of the RTD in several significant declarations endorsed by the majority of nations of the world. The words of the great French author of the 19th century, Victor Hugo, correctly illustrates the current status of the RTD; "no force on earth can stop an idea whose time has come". The RTD cannot be ignored or wished away. Therefore, one can have the right to argue that the North-South *entente* continues to lose relevance while the RTD remains affirmed internationally.

2.5 Regional Recognition of the RTD

This section will illustrate how the RTD has gained regional recognition and acceptance in some of the world's major regions such as Africa, Europe, the Americas, and Asia. The importance of the RTD as a human right was underscored by such regional recognition, thus illustrating that the RTD is not just a quixotic idea by developing nations but an inalienable human right that ought to be realised by people all over the world.

The RTD has attained regional recognition and acceptance through the following documents; The African Charter on Human and Peoples Rights (ACHPR or Banjul

²⁶² Salverda *et al* (eds) *Changing Inequalities in Rich Countries*.

²⁶³ Marks and Malhotra "Introduction" 9.

²⁶⁴ Marks and Malhotra "Introduction" 9.

Charter), the Charter of the Organisation of American States,²⁶⁵ The Arab Charter on Human Rights,²⁶⁶ The Association of South Asian Nations Human Rights Declaration (ASEAN Human Rights Declaration)²⁶⁷ and the European Union Action Plan on Human Rights and Democracy 2015 – 2019.²⁶⁸

2.5.1 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples Rights (ACHPR) is an African human rights treaty that provides for civil and political rights, socio-economic rights and solidarity rights.²⁶⁹ The RTD is recognized in the ACHPR as a justiciable right since the charter is binding upon the State parties. Kamga and Fombad²⁷⁰ argue that is the ACHPR is the only human rights framework in which the RTD is legally binding. therefore Consequently, there is no doubt that the RTD enjoys juridical standing within the context of African regional international law.²⁷¹

Obiora Okafor identifies with the argument that the concept of the RTD has its origins in Africa because it was first proclaimed in Algiers in 1967 by Doudou Thiam, the then Minister of Foreign Affairs of Senegal.²⁷² Thiam referred to the RTD as a right that must be proclaimed "loud and clear for the Nations of the Third World".²⁷³ Later another prominent African jurist K`eba M'baye, the Chief Justice of the Supreme Court of Senegal, added his voice to the idea of the RTD, thus laying a firm foundation for its international recognition as an inalienable human right.²⁷⁴

Article 22 of the ACHPR provides that:

All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common

²⁶⁵ Organization of American States (OAS) *Charter of the Organisation of American States* (30 April 1948) <https://www.refworld.org/docid/3ae6b3624.html> (Date of use: 17 June 2019).

²⁶⁶ League of Arab States *Arab Charter on Human Rights* (15 September 1994) <https://www.refworld.org/docid/3ae6b38540.html> (Date of use: 17 June 2019).

²⁶⁷ Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration* (18 November 2012) <https://www.refworld.org/docid/50c9fea82.html> (Date of use: 17 June 2019).

²⁶⁸ Council of the European Union https://eeas.europa.eu/sites/eeas/files/eu_action_plan_on_human_rights_and_democracy_en_2.pdf (Date of use: 17 June 2019).

²⁶⁹ Dlamini 1991 *CILSA* 194.

²⁷⁰ Kamga and Fombad 2013 *J Afr L* 9.

²⁷¹ Benedek "Human rights in a multi-cultural perspective" 153.

²⁷² Okafor "A regional perspective" 374.

²⁷³ Ouguergouz *The African Charter on Human and Peoples' Rights* 298.

²⁷⁴ Judge Kéba Mbaye, lecture at the International Institute of Human Rights in 1972, see Mbaye 1972 *Revue des droits de l'homme* 505-534.

heritage of mankind. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

The ACHPR gives rise to legally binding obligations.²⁷⁵ This means that the RTD as provided for under article 22 is not aspirational but requires African States either individually or collectively to ensure that the RTD is realised. It sets obligatory standards that cannot be negotiated or bargained away, that must be fulfilled through national policy and practice.²⁷⁶

Under article 22, the RTD includes “political, economic, social and cultural processes aimed at the constant improvement of the well-being of all individuals”²⁷⁷ and “guarantees the peoples' free participation in the economic, social and cultural processes of their States and the fair distribution of the proceeds”.²⁷⁸ This means that the main beneficiaries of any development policies must be the people²⁷⁹ and African governments have to realise this aspiration.

It is, however, unfortunate that development in Africa has never been about the people. The beneficiaries of development in Africa have always been a clique of individuals close to those who control the politics of a nation. They share the spoils of development with so-called "foreign investors" and ultimately leave the citizens of a country poorer than they were initially.²⁸⁰

How does the ACHPR apply to Kenya? The provisions of article 22 of the ACHPR are binding on Kenya because Kenya has ratified this particular regional human rights treaty.²⁸¹ Kenya does not have to domesticate the treaty for it to be

²⁷⁵ *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) para 115–116 where the Commission calls Nigeria's non-compliance a 'blot' on its legal system, and reiterates that the country is 'legally bound' by the Charter's provisions. Also see Baldwin and Morel "Group rights" in Evans and Murray (eds) *The African Charter on Human and Peoples' Rights* 244 at 270. The RTD is binding in the African Charter (art 22) as well as in its protocol on the rights of women in Africa (art 19 provides for the right to sustainable development for women).

²⁷⁶ Kamga and Fombad 2013 *J Afr L* 9.

²⁷⁷ Swanson 1991 *N Y L Sch J Int'l Ccomp L* 317.

²⁷⁸ Mbondenyei *International Human Rights* 212.

²⁷⁹ De Feyter *World Development Law* 22.

²⁸⁰ See generally, Burgis *The Looting Machine*. The author argues that Africa has 30% of the world's minerals, 14% of the world's population yet 43% of the world's poor live in Africa. He attributes this to development that amounts to looting the continent's resources instead of benefiting its people.

²⁸¹ Adopted June 27, 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force Oct 21, 1986. Kenya ratified the treaty on 23 January 1992 <http://www.achpr.org/instruments/achpr/ratification/> (Date of use: 17 July 2017).

enforceable on the national plane.²⁸² It is argued that by dint of article 2(6)²⁸³ of the Constitution of Kenya, the Republic of Kenya was transformed from a dualist State to a monist State.²⁸⁴ An international or regional treaty ratified by Kenya now applies directly to the country without the process of domestication as was the practice under the repealed constitution of Kenya.²⁸⁵ Therefore, Kenya must ensure that it gives effect to the provisions of article 22 of the ACHPR domestically.

The obligation to give effect to article 22 was addressed in the *Endorois* case.²⁸⁶ In this authoritative decision, the African Commission found that Kenya had violated article 22 of the ACHPR.²⁸⁷ The main complaint by the of the Endorois community was the failure of the Kenyan government to adequately involve them in the lake Bogoria game reserve project. The community blamed the government for neither consulting before the major development project that impacted their lifestyle was embarked upon, nor compensating them for the loss of their land and its adverse consequences on their traditional lifestyle.²⁸⁸

The Commission found in favour of the Endorois and placed the burden of "creating conditions favourable to a people's development" on the government of Kenya.²⁸⁹ The Commission concurred with the applicants' arguments that recognizing the right to development requires fulfilling five main criteria: "equity, non-discrimination, participation, accountability, and transparency, with equity and choice as important,

²⁸² Kabau and Njoroje 2011 *CILSA* 293-310.

²⁸³ Article 2(6) of the Constitution of Kenya provides that "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution".

²⁸⁴ Viljoen *International human rights law* 522; Killander and Adjolohoun "Introduction" 11. "Dualism envisages the complete separation of national and international legal systems, and that for rules of international law to apply in the national legal system, they must be transformed, through domestication, and thus apply as part of domestic national law and not as international law. Monism, on the other hand, envisages international law and national law as part of one legal system, and that international law is directly incorporated into the national legal system without any difficulty in its application as international law within the domestic legal system". Cited in Orago 2013 *AHRLJ* 416.

²⁸⁵ Orago 2013 *AHRLJ* 419.

²⁸⁶ Communication 276/2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council versus Republic of Kenya*.

²⁸⁷ Kamga 2011 *De Jure Law* 382.

²⁸⁸ De Feyter "Indigenous Peoples" 166.

²⁸⁹ Communication 276/2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council Versus Republic of Kenya* para 298.

over-arching themes in the right to development”.²⁹⁰ The binding nature of article 22 of the ACHPR was confirmed. The decision also shed some light on the role of the government in realising the RTD.

Okafor argues that this decision did not answer all the “proper dimensions of the right to development under the African Charter”.²⁹¹ He argues that the African Commission did not “outline the contours of a development process which runs counter to the State's aspirations of modernization and economic development”.²⁹² In other words, the specifics of the development model that is compatible with the RTD in Africa has not been outlined by the African Commission.

This does not diminish the status of the RTD in Africa, nor does it affect the legal obligation placed upon African governments to ensure the realisation of the right. Perhaps more litigation around article 22 will clarify the specifics of the acceptable development model that the African Commission alluded to in the *Endorois* case.

However, it is asserted that the courts finding that the Endorois community was entitled to procedural rights of participation and consultation, as well as equity and choice, is intended to provide space for an appropriate development paradigm under article 22.²⁹³ Therefore the decision was a step in the right direction since it set the pace as far as interpretation of the RTD in the African Charter is concerned.

The African Charter was the first and currently the only international human rights instrument that recognizes the RTD as a legally binding right.²⁹⁴ Noteworthy is that the drafters of the charter went one step further than the United Nations General Assembly by ensuring that State parties are treaty-bound to protect, promote and fulfil the RTD.²⁹⁵ Evans and Murray have observed that the African Charter is “unique in codifying a legally binding right to development upon States”.²⁹⁶ It departs

²⁹⁰ Communication 276/2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council Versus Republic of Kenya* para 277.

²⁹¹ Okafor "A regional perspective" 377.

²⁹² Sing'oei and Shepherd 2010 *Buff Hum Rts L Rev* 81.

²⁹³ Sing'oei and Shepherd 2010 *Buff Hum Rts L Rev* 81.

²⁹⁴ Browning <http://kenyalaw.org/kl/index.php?id=1900> (Date of use: 22 March 2017) 5; Tadeo 2010 *AHRLJ* 327.

²⁹⁵ The UNDRTD is not a legally binding document while the Banjul Charter is binding upon a member State that has ratified the treaty. See Tadeo 2010 *AHRLJ* 327.

²⁹⁶ Baldwin and Morel "Group rights" in Evans and Murray (eds) *The African Charter on Human and Peoples' Rights* 270.

from the soft law approach adopted by the UNDRTD, which relegates the realisation of the RTD to the goodwill of the State parties.

Therefore, one can argue that in light of the decision in the *Endorois* case, it is possible to have a workable binding international treaty on the RTD as a way of bolstering its realisation. The case is evidence that the RTD is a justiciable right and not the pious wishes of poor countries that need development assistance from the rich countries.

2.5.2 The Charter of the Organisation of American States

The Charter of the Organisation of American States²⁹⁷ is a Pan-American treaty that sets out the creation of the Organisation of American States (OAS). Signed on 30th April 1948 in Bogota, Columbia, the treaty came into effect on the 13th of December 1951. The OAS was developed by the American States to “achieve an order of peace and justice, promote their solidarity, strengthen their collaboration, and defend their sovereignty, territorial integrity, and independence”.²⁹⁸

The Charter of the OAS expressly provides for the right of each State to develop its cultural, political and economic life fully and naturally.²⁹⁹ In the exercise of this right, each State party must “respect the rights of the individual and principles of universal morality”.³⁰⁰

The OAS Charter does not expressly recognize the RTD but the term “integral development” is used to marshal State parties to embrace certain shared values such as social justice, democratic governance and respect for human rights, among others while pursuing developmental objectives.³⁰¹ Unlike the UNDRTD, the term “development” is not defined in the OAS Charter and thus has to be understood in the context of “integral development”.

Using Haiti as a case study for the application of the OAS to the RTD, Jeffery M Brown argues that the OAS has not been able to effectively guarantee the

²⁹⁷ Organization of American States (OAS), *Charter of the Organisation of American States* (30 April 1948) <https://www.refworld.org/docid/3ae6b3624.html> (Date of use: 17 June 2019).

²⁹⁸ Article 1 of the OAS Charter.

²⁹⁹ Article 13 of the OAS Charter later amended to become Article 17.

³⁰⁰ Article 13 of the OAS Charter later amended to become Article 17.

³⁰¹ Brown 2011 *Intercul Hum Rts L Rev* 233.

realisation of the RTD for the people of Haiti as they struggle to recover from the effects of the 2010 earthquake. He argues that “the "integral development" framework under the charter failed to identify with sufficient clarity what values enjoy primacy and where the process of integral development should begin in Haiti”.³⁰² Brown contends that there appears to be a major disconnect between donor funding and development. In other words, donor funding has failed to spur human development. His argument resonates with the situation prevailing in most African nations that receive a lot of donor funding yet there is little or nothing to show for it.³⁰³

He further argues that “the right to integral development involves the robust participation of the Haitian people as part of the development process”.³⁰⁴ Using this approach, it is possible to clearly identify the legal and particular “rights recognized by and obligations undertaken by both donor and beneficiary States under the RTD” and would “greatly benefit Haitian reconstruction and development efforts”.³⁰⁵ However, this can only be realised if the OAS is used to facilitate the gradual realisation of the RTD and the right to integral development through a dynamic initiatives at regional level activities touching on both human rights and economic integration.³⁰⁶

The lesson learnt from Haiti is that the OAS Charter indeed provides an excellent normative foundation for the realisation of the RTD among the OAS countries. But for this to be achieved, serious cooperation and engagement between member States to achieve common developmental goals based on common principles must be undertaken.

³⁰² Brown 2011 *Intercul Hum Rev L Rev* 233.

³⁰³ See generally, Moss, Pettersson Gelandner and Van de Walle "An aid-institutions paradox?"; Mario Einaudi Center for International Studies Working Paper No 11-05. Available at SSRN: <https://ssrn.com/abstract=860826> or <http://dx.doi.org/10.2139/ssrn.860826> (Date of use: 20 January 2020).

³⁰⁴ Brown 2011 *Intercul Hum Rev L Rev* 221.

³⁰⁵ Brown 2011 *Intercul Hum Rev L Rev* 236.

³⁰⁶ Brown 2011 *Intercul Hum Rev L Rev* 240.

2.5.3 The Arab Charter on Human Rights

The Arab Charter on Human Rights³⁰⁷ adopted by the League of Arab States³⁰⁸ in May 2004 and affirmed the principles contained in the UN Charter, the UDHR and the International Human Rights Covenants (the ICCPR and the ICESCR) and the *Cairo Declaration on Human Rights in Islam*.³⁰⁹ The Arab Charter provides “that all peoples have the right of self-determination and control over their natural wealth and resources and, accordingly, they have the right to determine the form of their political system freely and pursue their economic, social and cultural development freely”.³¹⁰

The Charter also recognises the RTD as a fundamental human right, and all States are required to design development programs and take appropriate measures for the realisation of the RTD.³¹¹ Further, States have to apply the values of solidarity and cooperation regionally and internationally to realised economic, social, cultural and political development as well as poverty eradication.³¹² The RTD gives every citizen the right to participate in the realisation of development and enjoy the benefits and fruits thereof.³¹³

Despite clearly articulating the RTD, the Arab Charter has not been effective in realising human rights and the RTD in particular because of two reasons. Firstly, the Charter has a fragile compliance system. The Arab Human Rights Committee has the power only to consider State reports. It does not receive complaints, nor can it take action against a member State that violates charter provisions.³¹⁴ Secondly, article 53 of the Charter allows countries to make reservations about any article of the Charter. Allam argues that this discretion is so vast to the extent that it may defeat the purpose of the Charter altogether.³¹⁵

³⁰⁷ League of Arab States <https://www.refworld.org/docid/3ae6b38540.html> (Date of use: 17 June 2019).

³⁰⁸ League of Arab States <https://www.refworld.org/docid/3ae6b3ab18.html> (Date of use: 17 June 2019).

³⁰⁹ OIC <https://www.refworld.org/docid/3ae6b3822c.html> (Date of use: 17 June 2019).

³¹⁰ Article 1 of the Arab Charter.

³¹¹ Article 37 of the Arab Charter.

³¹² Article 37 of the Arab Charter.

³¹³ Allam 2014 *Arab L* Q 48.

³¹⁴ Allam 2014 *Arab L* Q 62.

³¹⁵ Allam 2014 *Arab L* Q 59.

It is argued that these weaknesses have negatively impacted the ability of the Arab Charter to guarantee and realise the RTD. There has been great controversy as to whether the Arab Charter is compatible with universal human rights and norms and whether it can peaceably handle issues involving neighbouring states.³¹⁶ Looking at the poor enforcement mechanism under the Charter, one can argue that the debate is valid. This debate is, however, beyond the scope of this research.

2.5.4 The ASEAN Intergovernmental Commission on Human Rights

The ASEAN Intergovernmental Commission on Human Rights³¹⁷ was established by the Association of Southeast Asian Nations (ASEAN)³¹⁸ in 2009 to promote human rights in the ASEAN countries.³¹⁹ The *ASEAN Human Rights Declaration* (AHRD), was adopted unanimously by ASEAN members at its meeting in Phnom Penh, Cambodia, on the 18th of November 2012 after being drafted by the Commission.

The Declaration details the State parties' commitment to human rights for its 600 million people. It pronounces the RTD as an inalienable human right³²⁰ and calls for the adoption of meaningful – people-oriented and gender-sensitive development programs.³²¹ The document also acknowledges that the implementation of the RTD requires “policies at the national level and equitable economic relations, international cooperation and a favourable international economic environment”.³²²

Many human rights issues have not been resolved, and even HR violations have worsened. The ASEAN Intergovernmental Commission on Human Rights (AICHR), the monitoring body under the Charter, has been criticised as cosmetic, inefficacious and a ‘public relations document’ to demonstrate State parties’ committed to

³¹⁶ Lessard and Lebuis 2008 *Inter-Am & Eur Hum Rts J* as cited in Sarkin 2008 *Inter-Am & Eur Hum Rts J* 209.

³¹⁷ Association of Southeast Asian Nations (ASEAN) *Terms of Reference of ASEAN Intergovernmental Commission on Human Rights* (July 2009) <https://www.refworld.org/docid/4a6d87f22.html> (Date of use: 17 June 2019).

³¹⁸ Association of Southeast Asian Nations (ASEAN) *Charter of the Association of Southeast Asian Nations* (20 November 2007) <https://www.refworld.org/docid/4948c4842.html> (accessed 17 June 2019).

³¹⁹ ASEAN countries include Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. ASEAN countries <http://worldpopulationreview.com/countries/asean-countries/> (Date of use: 18 June 2019).

³²⁰ Article 35.

³²¹ Article 37.

³²² Article 37.

human.³²³ The institution has failed to move forward from a promotional stage to a protection stage.³²⁴ Traditionally, ASEAN countries have kept international human rights treaty monitoring systems at arm's length³²⁵ thus, countries have been reluctant to give the AICHR extensive powers to carry out a protective mandate.³²⁶

The AHRD has been criticized by because of its application of cultural relativism to human rights theory and practice through by embracing "Asian Values". The cultural relativism school of thought argues that human rights are not universal but subject to culture.³²⁷ Asian values stress on "a consensual approach, communitarianism rather than individualism, social order and harmony, respect for elders, discipline, a paternalistic State and the primary role of government in economic development, linked to the premise that there are values and patterns of behaviour that are common to Asian countries and peoples".³²⁸

On the other hand, civil society organisations have rejected the declaration because some of its problematic general principles will justify human rights violations within the jurisdiction of ASEAN governments.³²⁹ An example is the non-intervention policy³³⁰ which supports the diverse political systems in ASEAN, ranging from democracies to military systems³³¹ creates a loophole for governments to violate charter rights. In a nutshell, the AHRD still has a long way to go in terms of promoting and protecting the RTD. There is a need for many legal and institutional reforms like giving the AICHR authority.³³²

³²³ Hara 2019 *Revista Brasileira de Política Internacional* 1.

³²⁴ Hara 2019 *Revista Brasileira de Política Internacional* 1.

³²⁵ Renshaw 2013 *Hum Rts L Rev* 577.

³²⁶ Hara 2019 *Revista Brasileira de Política Internacional* 15.

³²⁷ Renshaw 2013 *Hum Rts L Rev* 578.

³²⁸ Sung-Joo "Forward and Asian values" in Sung-Joo (ed) *Changing Values in* cited by Boll 2001 *International Review of the Red Cross* 47. "The advocates of Asian particularism allow internal heterogeneity within the region, but in the framework of a collective concern for the community, respect for hierarchies, social order and discipline, and a mistrust of political liberalism, regarded as typical of the Western culture, particularly Greek and Roman, and of the Christian tradition".

³²⁹ Renshaw 2013 *Hum Rts L Rev* 559.

³³⁰ Hara 2019 *Revista Brasileira de Política Internacional* 2.

³³¹ Renshaw 2013 *Hum Rts L Rev* 577.

³³² See generally, Bui 2016 *Asian J Comp L* 111-140; Petcharamesree 2013 *The Equal Rts Rev* 46-60.

2.5.5 The European Union Action Plan on Human Rights and Democracy 2015-2019

The European Union Action Plan on Human Rights and Democracy 2015 – 2019³³³ is a strategic plan for the EU to achieve its overall goal of promoting peace and stability and building a world founded upon respect for human rights, democracy and the rule of law.³³⁴

In the strategic plan, the EU undertakes to explore the possibility of further operationalising a rights-based approach into non-development related external activities; contribute to discussions on the RTD; assess the implications for human rights of the post-2015 Development Agenda by the year 2017.³³⁵ Being a "strategic plan," it does not translate into a legally binding document but is merely aspirational in nature. However, it is an important policy document because it shows the level of priority that the EU has given to the realisation of the RTD.

2.5.6 Conclusion

The preceding section has elucidated that the RTD has indeed featured prominently in the social, political and economic agendas of some of the prominent regions of the world, albeit with limitations. This is a clear indication that the RTD has continued to gain the support of legal experts, politicians, governments and policymakers against the backdrop of the controversies that have dogged it internationally. Therefore, it is submitted that all these pronouncements amount to an endorsement of the RTD as a valid human right.

This state of affairs strongly indicates that the RTD is here to stay. It may not be easy to achieve international consensus on how the right can be realised, but there seems to be more flexibility within the regional sphere on how RTD may be inculcated into development practice.

³³³ CEU https://eeas.europa.eu/sites/eeas/files/eu_action_plan_on_human_rights_and_democracy_en_2.pdf (Date of use: 17 June 2019).

³³⁴ CEU https://eeas.europa.eu/sites/eeas/files/eu_action_plan_on_human_rights_and_democracy_en_2.pdf (Date of use: 17 June 2019) 9.

³³⁵ CEU https://eeas.europa.eu/sites/eeas/files/eu_action_plan_on_human_rights_and_democracy_en_2.pdf (Date of use: 17 June 2019) 41.

2.6 General Conclusions

This chapter defined the RTD by unveiling its foundational pillars such as; the RTD is inalienable; participation of the people; a process in which all human rights and fundamental freedoms should be realised; an individual and collective right and the right of people to self-determination.

Some of the arguments that come to the fore are that the RTD is an inalienable right and is not negotiable. The RTD denotes a process in which all fundamental rights are realised collectively and individually, reaffirming that human rights are interrelated and indivisible. The RTD also secures the right to participate by providing that the human person is the central subject of development and should be an active participant and beneficiary of development. Finally, the right to self-determination is part and parcel of the RTD. This is because the right to self-determination empowers the people to have a say over governance, providing them with controls that ensure that development is people-centred.

This chapter also shed some light on the concept of development. Development is viewed as a process that places people at the centre of the development process by involving them in participatory and transformative processes that focus on material growth and the sustainable well-being of all human beings. This ultimately results in the realisation of the RTD because of the human empowerment aspect.

This chapter discussed the RTD controversies and questions analysed around the acceptability of the RTD as a justiciable human rights. It is concluded that the current controversy centres around how the right should be realised or enforced internationally and not whether the RTD is a real human right. This is because the RTD has gained a lot of acceptance and recognition internationally, forming the subject of various human rights and policy documents. The right is also recognized in major regions of the world, such as the African region, the South Asian States, Europe and the Arab States.

This chapter also highlighted the recent developments around the politics of the RTD. Notably is the shift in the old North-South animus because of changing economic times in the so-called rich nations and the entry of new players in the

world economy such as the BRICS. It is being argued that this has significantly changed the perception of the RTD internationally.

The next chapter conceptualizes the RTD in Kenya by identifying its normative underpinnings and unpacking Kenya's development paradigm from the colonial era to the post-colonial period.

CHAPTER 3: CONCEPTUALISING DEVELOPMENT IN KENYA: AN ANALYSIS OF KENYA'S DEVELOPMENT PARADIGM AND ITS COMPATIBILITY WITH THE RIGHT TO DEVELOPMENT

3.1 Introduction

This thesis asserts that the RTD is justiciable in Kenya as a result of the provisions of the UNDRTD, the Banjul Charter and the Constitution of Kenya 2010. The thesis further argues that devolution in Kenya, creates a development model that is compatible with the principles of the RTD, or, one that will result in the realisation of the RTD. This proposition sets the stage for an enquiry into the conceptualisation and application of the idea of development in Kenya over time with the objective of ascertaining whether such development was compatible with the RTD.

To achieve the foregoing, this chapter seeks to first of all 'find the RTD in Kenya' by identifying the normative underpinnings of the RTD in Kenya. Relevant legal provisions, both domestic and international, that make the RTD applicable in Kenya are discussed in detail. This will in essence, clarify the legal status of the RTD in Kenya.

Upon clarifying the legal status of the RTD in Kenya, the chapter proceeds to trace and interrogate Kenya's development paradigm(s) from a historical perspective with a view of establishing whether the same was compatible with the principles of the RTD. This involves analysing the contours of Kenya's development paradigm(s) through the lens of the UNDRTD's conceptualisation of development. Under the UNDRTD, development was conceptualized as:

... a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.¹

A historical exposition of Kenya's development paradigm is crucial because it lays a basis for the hypothesis that devolution under the Constitution of Kenya 2010 heralds a radical shift in Kenya's development paradigm; a shift from one that had its foundations in colonial development injustice to one that is compatible with the

¹ The Preamble of the UNDRTD.

principles of the RTD. This ties in with the overall argument that Kenya can leverage the normative and institutional structures under a devolved system of government to realise the RTD.

The chapter finally analyses the different development paradigm(s) that Kenya has pursued since the colonial period until the enactment of the Constitution of Kenya on the 27th of August 2010 and draws relevant conclusions.

The chapter is divided into sections that address the concept of development in the colonial and post-colonial periods in Kenya. A general conclusion is finally made that Kenya's development paradigm from the colonial period up to the period before the promulgation of the Constitution of Kenya was not compatible with the principles of the RTD.

3.2 Finding the RTD in Kenya and its Applicability

The subject of this research is "Enhancing the Realisation of the RTD through Devolution in Kenya". Therefore, it is crucial from the onset to situate the RTD within the Kenyan legal system to lay a foundation for a case for its realisation through devolution. The Constitution of Kenya 2010, being the "grund norm"² and supreme law³ of Kenya will be the starting point for the quest to situate the RTD within the Kenyan legal system.

This section seeks to answer the question whether the RTD is expressly provided for in the laws of Kenya and whether there has been any domestic litigation around the RTD. These questions will be answered within the context of constitutional provisions on the RTD and international law. Identification of the normative underpinnings of the RTD in Kenya is important in understanding the applicability and justiciability of the right in Kenya.

² *Dennis Mogambi Mong'are v Attorney General & 3 Others* [2014] eKLR. Justice Otieno-Odek referred to the Constitution of Kenya 2010 as the grund norm - the norm that gives validity to all other norms in the legal system.

³ Article 2 of the Constitution of Kenya 2010.

3.2.1 The Constitution of Kenya 2010

The Constitution of Kenya 2010 does not make any express reference to the RTD. The process of identifying the RTD in the Kenyan Constitution must begin with article 2(6) of the Constitution of Kenya, which provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya. Article 22 of the ACHPR expressly provides for the RTD as discussed in 2.4.3.1 above. Kenya ratified the ACHPR on the 23rd of January 1992.⁴ Therefore, the impact of such ratification means the ACHPR is part of the law of Kenya and thus a source of the RTD.

The Constitution of Kenya also broadens the bundle of rights that one can enjoy beyond the rights expressly provided for in the bill of rights, quite an advanced feature in the Constitution of Kenya. The bill of rights includes other rights and fundamental freedoms not found in the bill of rights but recognized or conferred by law except to the extent of their inconsistency with the Constitution.⁵ The ACHPR, which expressly provides for the RTD in article 22, is deemed part of Kenya's law as argued above. T, Therefore, RTD finds its place in the Constitution of Kenya under the provisions of articles 19 and 2(6) of the Constitution of Kenya.

While the RTD not expressly provided for in the Constitution of Kenya, certain group rights in the Constitution contain elements of the RTD. Article 56, for instance, provides for the rights of minorities and the marginalized.⁶ According to Gay McDougall, a UN Independent Expert on minority issues, poverty within minority communities is caused by of lack of access to rights, opportunities, and social advancement available to those communities.⁷ The Constitution of Kenya addresses this problem by providing minorities and marginalized groups with affirmative action rights (such as the rights in article 56) that will enable them to

⁴ Adopted June 27, 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force Oct 21, 1986. Kenya ratified the treaty on 23/01/1992. <http://www.achpr.org/instruments/achpr/ratification/> (Date of use: 17 July 2017).

⁵ Article 19(3)(b) of the Constitution of Kenya 2010.

⁶ Article 56 of the Constitution of Kenya provides; The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—

(a) participate and are represented in governance and other spheres of life; (b) are provided special opportunities in educational and economic fields; (c) are provided special opportunities for access to employment; (d) develop their cultural values, languages and practices; and (e) have reasonable access to water, health services and infrastructure.

⁷ UNDP *Marginalised minorities* 1.

increase their opportunities and advance socially. Increasing opportunities resonates Sen's ideas on development⁸, which was linked to the realisation of the RTD by some scholars.⁹

Article 56 of the Constitution of Kenya seeks to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life. Participation is one of the pillars of the RTD.¹⁰ It is noted that marginalised groups do not get proper representation in political structures and decision-making forums meaning that they invariably have little say in decisions that affect them. Lacking a voice in shaping their circumstances, they are vulnerable to neglect,¹¹ which amounts to a violation of their RTD. Article 56 of the Constitution of Kenya seeks to remedy this problem by giving minorities a platform to participate in developmental matters, thus promoting the realisation of the RTD. This is consistent with the African Commission's position in the *Endorois* case that freedom of choice must be present as part of the RTD, and thus, governments must ensure active, free and meaningful participation of all individuals.¹²

Minority groups often lack equal access to education, "evidenced by lower levels of educational advancement, fewer resources to schools in areas where minorities live and segregation of minority children in mainstream schools".¹³ Education is vital in protecting minority identity¹⁴ because the learning materials and the quality of instruction education can result in discriminatory attitudes against them.¹⁵ Consequently, article 56 of the Constitution of Kenya requires the State to ensure that minorities and marginalized groups are provided with exclusive opportunities in educational and economic fields.

Amartya Sen defined the RTD as "a conglomeration of a collection of claims, varying from basic education, health care and nutrition to political liberties, religious

⁸ See generally, Sen "Human Rights and Development"; Sen *Development as Freedom*; Sen *The Idea of Justice* 253-290.

⁹ Sengupta 2002 *Hum Rts Q* 837-889; Peleg 2013 *Int'l J Child's Rts* 523-542; Stewart 1989 *HRQ* 347-374; Villaroman 2010 *Neth J Int'l L* 299-332.

¹⁰ Piovesan "Active free and meaningful participation in development" 104.

¹¹ UNDP *Marginalised minorities* 1.

¹² Ashamu 2011 *J Afr L* 310.

¹³ UNDP *Marginalised minorities* 1.

¹⁴ UNDP *Marginalised minorities* 19.

¹⁵ UNDP *Marginalised minorities* 19.

freedoms and civil rights for all."¹⁶ Sen also defined "development" as the "expansion of substantive freedom or capabilities of persons to lead the kind of lives they value or have reason to value."¹⁷ Using Sen's argument, education broadens the choices and opportunities of minorities, thus resulting in the realisation of the RTD.

The State is expected to implement affirmative action initiatives with the objective of creating special for access to employment, development of cultural values, languages and practices for minorities.¹⁸ These programmes ensure special groups are catered for whenever persons are being recruited for employment positions in government¹⁹ or whenever government invites persons to bid for the provision of goods and services.²⁰ Affirmative action programmes result in increased opportunities and choices, thus a realisation of the RTD.

The State has to assist marginalized groups and minorities to have reasonable access to water, health services and infrastructure.²¹ This assistance could be through the equalization fund established under article 204 of the Constitution of Kenya. This affirmative action fund is meant to last twenty years with the option of parliament extending the period.²² The national government administers the fund as a trustee but is allocated to the county governments as conditional grants.²³ The fund allocates more resources to areas inhabited by this particular group so that county governments can undertake development projects aimed at improving the lives of marginalized groups.²⁴

¹⁶ Sen "Human Rights and Development" 1-5.

¹⁷ Sen *Development as Freedom* cited in Villaroman 2010 *Neth J Int'l L* 306.

¹⁸ Article 56 (c) and (d).

¹⁹ *John Mining Temoi & Another v Governor of Bungoma County & 17 Others* [2014] eKLR it was held that the rights of the Bongomek people under article 56 of the Constitution of Kenya had been violated by the county government of Bungoma when it failed to take into account that the Bongomek was a minority group during the process of recruitment of county officers.

²⁰ The government of Kenya encourages Youth, Women and Persons with Disability owned enterprises to be pre-qualified and registered so that they can access government tenders and contracts. Government tenders amount to billions each year; it is a great opening for the Youth, Women and Persons with Disability <https://agpo.go.ke/> (Date of use: 6 May 2018).

²¹ Article 56(e).

²² Mutakha *Constitutional framework for devolution* 310.

²³ Mutakha *Constitutional framework for devolution* 310.

²⁴ The equalization fund created under Article 204 of the Constitution of Kenya seeks to create equity in development. The national government is mandated to use the fund to provide basic services including water roads, health facilities and electricity to marginalized areas to the

Recognition of minorities, therefore, facilitates equity in leading to peaceful coexistence among communities²⁵ because all the different groups in the community will feel included in the development. Recognition also fosters democratic governance, participation and the State's recognition of the different communities that constitute the polity.²⁶ Equity and participation in development are key pillars of the RTD that support the RTD's realisation.

The rights of minorities and marginalized groups provided under article 56 of the Constitution of Kenya enable these groups to participate in, contribute to and enjoy their economic, social, cultural and political development, which, results in the realisation of all human rights and fundamental freedoms.²⁷ In *National Association for the Advancement of Coloured People (NAACP) v Button*, US Supreme Court Justice William J Brennan argued that:

Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts and under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances... For such a group, association for litigation may be the most effective form of political association.²⁸

Securing the rights of minorities and marginalized groups in the constitution is crucial in a democracy to avoid emasculation of such groups by the majority.

Implementing article 56 in the context of development demands that the State ensure that its developmental policies are participatory, non-discriminative, equitable, transparent and accountable, all of which are the hallmarks of the RTD.²⁹ These qualities ensure that all the stakeholders, including minorities and marginalized groups, are included in the development process, thus making participation a reality. The right to participation emphasises on the need for a development process that is transparent, accountable and non-discriminatory.³⁰

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.

²⁵ UNDP *Marginalised minorities* 16.

²⁶ UNDP *Marginalised minorities* 16.

²⁷ This is the essence of the RTD in article 1(1) of the UNDRTD.

²⁸ 371 US 415.

²⁹ See the findings of the African Commission in the *Endorois* case.

³⁰ Kamga *Human rights in Africa* 122.

The RTD is undeniably present in the Constitution of Kenya when viewed in the context as "an enabling right" that creates a conducive environment for the enjoyment of all other human rights.³¹ The Constitution of Kenya guarantees all rights contained in the bill of rights by granting that these rights belong to each individual and not to the State.³² The Constitution also provides that the bill of rights does not exclude other rights and fundamental freedoms not expressly contained in the bill of rights but recognized or conferred by law except to the extent that they are inconsistent with the bill of rights.³³ The Constitution of Kenya, therefore, acknowledges the interrelated and interdependent nature of human rights. This key concept reflected in the UNDRTD³⁴ hence the argument that RTD is present in the Constitution of Kenya.

Notably, the bill of rights in the Constitution of Kenya expressly provides for justiciable civil, political, economic, social and cultural rights.³⁵ Sengupta argues that RTD is a human right that integrates economic, social and cultural rights with civil and political rights.³⁶ This argument is in line with the established position that human rights are interrelated and interdependent; one cannot enjoy one group/class of rights at the expense of others.³⁷ Further, the essence of the RTD is people's right to a national and global enabling environment conducive to the enjoyment of their human rights.³⁸ Protection of human rights in the Constitution of Kenya, therefore, guarantees the realisation of the RTD. The wording of the *Vienna Declaration* is anchored on this position, which provides that the realisation of the

³¹ Vandenbergarde 2013 *Neth QHR* 193. The author argues that the RTD is an enabling right that leads to the realisation of all other groups of human rights.

³² Article 19(3)(a) of the Constitution of Kenya 2010.

³³ Article 19(3)(b) of the Constitution of Kenya 2010.

³⁴ Kunanayakam "The Declaration on the Right to Development" 17-18.

³⁵ Muigua <http://kmco.co.ke/wp-content/uploads/2018/08/Access-to-Energy-as-a-Constitutional-Right-in-Kenya-NOVEMBER-2013.pdf> (Date of use: 30 January 2020).

³⁶ Sengupta "Conceptualizing the right to development" 72.

³⁷ This is the official position of the United Nations supported by both the General Assembly and office of the High Commissioner for Human Rights. See the 1968 Proclamation of the Teheran International Conference on Human Rights 13 U.N Doc A/CONF 32/42 (1968) http://legal.un.org/avl/pdf/ha/fatchr/Final_Act_of_TehranConf.pdf (Date of use: 22 March 2016; also see Mureinik 1992 *SAJHR* 464; *Vienna Declaration*; UN GAOR, World Conference on Human Rights 48th session, 22nd plenary meeting part 1,5 UN Doc A/CONF 157/24 (1993).

³⁸ Vandenbergarde 2013 *Neth QHR* 193.

RTD by persons entails accessibility to and enjoyment of their complete bundle of human rights.³⁹

Enclosed within Article 10 of the Constitution of Kenya; the RTD reflects its national values and governance principles.⁴⁰ Equality, participation, protection of the marginalised and non-discrimination⁴¹ are relevant examples of values and principles that reflect the RTD. It is a constitutional requirement that these values and principles infuse any judicial, policy or legislative process undertaken by the State.⁴²

Under article 8 of the UNDRTD document, states provide equal opportunity for persons to access resources, education, health services, food, housing, employment and the fair distribution of income; hence the RTD is realised.⁴³ Equality of opportunity for one to access basic resources opens up an avenue for participation in development. It also eradicates social injustice and discrimination of special groups like minorities and marginalized groups in development since no one is left behind. Therefore, it is arguable that equality of opportunity guaranteed under Articles 10 and 56 of the Constitution of Kenya 2010 culminates in the realisation of the RTD in Kenya.

It is arguable that in Article 69 of the Constitution of Kenya; the RTD can also be found.⁴⁴ Article 69 places a duty on the State to take a wide range of measures to

³⁹ Article 74 of the *Vienna Declaration* provides that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.

⁴⁰ Munene 2019 *Afr Naz Univ L J* 64-85.

⁴¹ Article 10(2)(b) of the Constitution of Kenya.

⁴² In the matter of the *Mui Coal Basin Local Community* [2015] eKLR (a matter regarding participation of the people as a constitutional value in article 10 of the Constitution of Kenya) it was held that courts will strike down any laws or public acts or projects that do not comply with article 10 of the Constitution of Kenya 2010.

⁴³ Under Article 8 of the UNDRTD States are required to undertake all necessary measures for the realisation of the right to development and shall ensure, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process and appropriate economic and social reforms should be carried out with a view to eradicating all social injustices. Popular participation in all spheres must be encouraged as an important factor in development and in the full realisation of all human rights.

⁴⁴ Article 69 provides for obligations in respect of the environment and states as follows:
(1) The State shall—(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable

ensure that the environment and natural resources are protected, conserved, managed and utilized properly and equitably for the benefit of the people of Kenya. Fatma Zohra Ksentini, a UN Special Rapporteur on Human Rights and the Environment, linked environmental rights to development.⁴⁵ She argued that the RTD is recognized as a human right by several international texts. She affirmed the link between poverty, underdevelopment, and serious environmental damage by stating that “it is impossible to separate the claim to the right to a healthy and balanced environment from the claim to the right to sustainable development”.⁴⁶

Going by Ksentini's arguments, elements of the RTD are evident from the fact that Article 69 of the Constitution of Kenya requires the State to ensure that the beneficiaries of any exploitation of natural resources must be the people of Kenya, and executed sustainably. The Constitution also demands equitable sharing of these benefits. Equitable sharing puts the people at the centre of development, which is a key element of the RTD.⁴⁷

History has shown that whenever the State or State-sanctioned investors implement major development programmes, the local communities find themselves disadvantaged⁴⁸ and marginalized in the development process. This is very

sharing of the accruing benefits; (b) work to achieve and maintain a tree cover of at least ten percent of the land area of Kenya; (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; (d) encourage public participation in the management, protection and conservation of the environment; (e) protect genetic resources and biological diversity; (f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment; (g) eliminate processes and activities that are likely to endanger the environment; and (h) utilise the environment and natural resources for the benefit of the people of Kenya.

- (2) Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

⁴⁵ Human Rights and the Environment: Preliminary report by Mrs Fatma Zohra Ksentini, Special Rapporteur, pursuant to Sub-Commission resolutions 1990/7 and 1990/27, UN ESCOR, Hum Rts Comm, Subcomm on Prevention of Discrimination and Protection of Minorities, 43rd Session at 3, UN Doc E/CN.4/Sub.2/1991/8 (1991) cited in Shelton 1991 *Stan J Int'l L* 130.

⁴⁶ Shelton 1991 *Stan J Int'l L* 130.

⁴⁷ Article 2 of the UNDRTD provides that the human person is the central subject of development and should be the active participant and beneficiary of the right to development.

⁴⁸ *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (the *Ogoni* case) Communication 155/96, Fifth Annual Activity Report of the African Commission on Human and Peoples' Rights (Annex V) which addressed environmental and socio-economic rights of the Ogoni people in Nigeria. The African Commission held that the Nigerian government had violated Article 21 of the ACHPR because the government had allowed multinational oil

common in cases of exploitation of natural resources by non-State actors or the State itself.⁴⁹ The *Ogoni (SERAC)* decision by the African Commission (discussed above) typifies this unfortunate situation.

However, the Kenyan people are afforded constitutional protection under the provisions of Articles 42⁵⁰ and 69 of the Constitution, which provide for the right to benefit from a process of development that is friendly to the environment and natural resources as well. The government of Kenya must formulate appropriate national development policies that aim to constantly improve the well-being of the entire population and all individuals in compliance with the provisions of the Constitution of Kenya.

Therefore, it is submitted that the RTD can be found in the Constitution of Kenya 2010. The environmental rights under Articles 42 and 69 and rights of minorities and marginalized groups under Article 56 of the Constitution of Kenya, all augment the realisation of the RTD in Kenya.

3.2.2 International Law

International law is also a source of RTD Kenya. Kenya is part of the international community by virtue of having subscribed to international customary law and ratified international human rights treaties⁵¹ like the ICCPR⁵² and the ICESCR.⁵³ Kenya being a monist state, does not have to enact local legislation to domesticate international treaties that it has ratified.⁵⁴ Constitutionally any international treaty or

companies to carry out commercial activities that negatively affected the lives and livelihood of the Ogoni people.

⁴⁹ Communication 276/2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council versus Kenya* (the *Endorois* case) the African Commission held that the Kenyan government had violated the Endorois property rights and RTD among other rights when it converted their ancestral land into a gazetted game reserve without compensating them.

⁵⁰ Article 42 provides that: "every person has the right to a clean and healthy environment, which includes the right—(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and (b) to have obligations relating to the environment fulfilled under Article 70".

⁵¹ *Mary Rono v Jane Rono & Another* [2005] eKLR 8.

⁵² Kenya ratified the convention on 1 May 1972 https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN (Date of use: 30 January 2020).

⁵³ Kenya ratified the convention on 1 May 1972 https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=90&Lang=EN (Date of use: 30 January 2020).

⁵⁴ Orago 2013 *AHRLJ* 416.

convention that has been ratified by Kenya automatically becomes part of the law of Kenya.⁵⁵ This provision was expounded on earlier in this thesis when discussing the ACHPR and its application to Kenya. It was argued that the article 22 of the ACHPR is binding on Kenya because Kenya has ratified this particular regional human rights treaty.⁵⁶

Additionally, the Constitution of Kenya also provides that general rules of international law shall form part of the law of Kenya.⁵⁷ "General rules of international law" were defined as "peremptory norms", "*jus cogens*", or "customary international law" by the Court of Appeal in Kenya in the case of *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others*.⁵⁸ The court differentiated between general rules of international law and rules of international law. It stated that the rules of international law that had achieved the status of customary international law, i.e., general rules of international law, are directly applicable in Kenya.⁵⁹

In *Rono v Rono*⁶⁰ the Court of Appeal (the highest court in Kenya in terms of hierarchy) stated that Kenya subscribed to international customary law and ratified international treaties as a member of the international community. Further, Kenya specifically subscribes to the UDHR, also known as the international bill of rights.⁶¹

In context of the RTD, even though the UNDRTD is not a binding treaty, it can be viewed as *jus cogens*⁶² because of its endorsement by the UN in several declarations and policy documents as well as its widespread acceptance

⁵⁵ Article 2(6) of the Constitution of Kenya. See also *David Macharia v Republic* [2011] eKLR; *Beatrice Wanjiku & Another v Attorney General & Others* [2012] eKLR; *Kenya Section of the International Commission of Jurists v Attorney General & Another* [2011] eKLR; *Re Zipporah Wambui* [2010] eKLR.

⁵⁶ Adopted June 27, 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force Oct 21, 1986. Kenya ratified the treaty on 23 January 1992 <http://www.achpr.org/instruments/achpr/ratification/> (Date of use: 17 July 2017).

⁵⁷ Article 2(5).

⁵⁸ [2016] eKLR para 116.

⁵⁹ [2016] eKLR para 116.

⁶⁰ *Mary Rono v Jane Rono & Another* [2005] eKLR 8.

⁶¹ *Mary Rono v Jane Rono & Another* [2005] eKLR 8.

⁶² Manchak 2010 *Boston College Third World Law Journal* 418. The author argues that the RTD is consistently invoked by States as a rule of international law. The right is so fundamental, so inviolable, and so broadly accepted, it may even be properly considered a *jus cogens* norm. See also Bunn 2000 *Am U Int'l L Rev* 1425.

internationally. This position makes international customary law one of the sources of the RTD in Kenya, giving rise to binding legal obligations.

Okafor argues that the RTD's legal status affirmed by the global South has links to the endorsement of some United Nations General Assembly resolutions, including the UNDRTD, as new sources of the law of nations or 'as evidence of widespread *opinio juris* and/or usage'. He also argues that, some of the UN resolutions may generate enough energy to be transformed in due course into customary international law.⁶³

Going by the court's reasoning in the *Mitu-bell case*, *Rono v Rono* and Okafor's argument, it is therefore submitted that the status of the UNDRTD in Kenya is that of customary international law and legally binding on Kenya.

3.3 Unpacking Kenya's Development Paradigm

Why is it important to unpack Kenya's development paradigm? This thesis argues that devolution provides a normative framework through which Kenya can align its development paradigm with the RTD. This is because the objects of devolution, such as equity and participation of the people, align with features of the RTD such as distributive justice (equity) and participation of the people. An analysis of Kenya's development paradigm will therefore make it possible to evaluate whether the development paradigm aligns with the elements to the RTD.

Development does not happen by fluke; it involves deliberate actions by authorities such as governments to achieve certain results, usually the improvement of the socio-economic conditions of the populace.⁶⁴ Unpacking Kenya's development paradigm will therefore involve an analysis of some of the policies adopted by the government of Kenya in pursuit of development. The objective behind this "unpacking" is to determine whether these policies were compatible with the principles of the RTD. It justifies the argument that devolution under the 2010 Constitution heralded the birth of a development paradigm that is compatible with the principles of the RTD in Kenya.

⁶³ Okafor 1995 *AJICL* 872.

⁶⁴ Bellù *Development and Development Paradigms* 2.

Using Mureinik's words while referring to the South African Constitution,⁶⁵ it is argued that devolution, under the Constitution of Kenya 2010, is "a historic bridge between a past" of developmental injustice and a future of "development opportunities" for all Kenyans. This use of imagery calls for a clear understanding of "what it is a bridge from and what a bridge to", which can only be achieved by tracing and analysing the historical underpinnings of Kenya's development paradigm(s).

It is submitted that colonialism played a pivotal role in shaping Kenya's development paradigm(s) hence the need to analyse the developmental concept from colonial times. The relationship between the RTD and colonialism is not a novel issue. The RTD historically amalgamated voices of resistance against the elaborate schemes of economic domination and systematic exploitation (neo-colonialism), which reappeared in the wake of the dissolution of colonial forms of power in the 1970s.⁶⁶ As stated in Chapter two, the emergence of the NIEO⁶⁷ was driven by the need to eliminate world injustice so that third world countries enjoy the direct benefits of development.⁶⁸ Many third-world countries had been colonized by the western world, thus this thesis views the RTD in Kenya through the lens of colonialism and its aftermath.

Interestingly while addressing the Economic Conference of the Group of 77 developing countries in Algiers, Algeria in October 1967, Senegalese Minister of Foreign Affairs, Doudou Thiam called for a break from the "the old colonial past, of which the present is merely an extension" and a proclamation of the RTD for all the nations of the Third World".⁶⁹ Thiam's declaration meant that the RTD can be claimed by Third World countries as of right because the right emanated from the development injustices linked to their colonial past.⁷⁰ Thiam's remarks confirm that one cannot separate Kenya's colonial past from her development paradigm(s)

⁶⁵ Mureinik 1994 *SAJHR* 31.

⁶⁶ Akinsanya and Davies 1984 *Int'l Comp L Q* 208. See also Rajagopal "Global governance: old and new challenges" 172 cited in Miyawa 2016 *Transnat Hum Rts Rev* 42.

⁶⁷ *Declaration for the establishment of the New International Economic Order* UNGA RES/S-6/3201 of 12th December 1974.

⁶⁸ Kamga *Human rights in Africa* 147.

⁶⁹ Ouguergouz *The African Charter on Human and Peoples' Rights* 298; Okafor "A regional perspective" 39.

⁷⁰ Ngang *The Right to Development in Africa* 170.

hence the need to analyse the realisation of the RTD in Kenya through the lens of colonialism.

Development in the context of the colonial and post-colonial phases in Kenya's history will be discussed under three themes; participation, access to land and equitable development. These themes make it possible to identify and unpack Kenya's development paradigm(s). Justification for the use of the three themes are provided in the next section.

3.3.1 Participation

Participation is used to analyse Kenya's development paradigm because the principle is central to the RTD.⁷¹ Participation of the people has been used in defining both development⁷² and the RTD.⁷³ Both definitions place the human person as the central subject of development both as a participant and a beneficiary. A determination as to whether Kenya's development paradigm is compatible with the principles of the RTD must involve an enquiry as to whether the said development model allows the people to exercise their participatory rights.

Participation relates to the commitment to a particular concept of development that aims to realise all human rights by involving the people in the process of development. A right of participation means that individuals and people can collectively determine their needs, priorities, rights, and interests. Through participation they can ensure the protection and advancement of their rights. They can also influence access to and distribution of resources needed for basic needs and opportunities.

A good development model has to ensure that people are incorporated in development both as participants and beneficiaries to make them the central subject

⁷¹ Piovesan "Active free and meaningful participation in development" 104.

⁷² Paragraph 2 of the preamble of the UNDRTD. Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and *meaningful participation* in development and in the fair distribution of benefits resulting therefrom. (Emphasis mine)

⁷³ Article 1 of the UNDRTD. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to *participate in*, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised. (Emphasis mine)

of the process⁷⁴ , which then leads to the realisation of all their human rights and fundamental freedoms. In terms of the RTD, participation becomes an important yardstick in determining whether Kenya's development paradigm is compatible with the principles of the RTD hence its use herein.

3.3.2 Access to Land

The second theme is access to land. Why is this theme critical in analyzing Kenya's development paradigm? Kenya's economy has been supported mainly by agriculture.⁷⁵ This implies that Kenya's development paradigm partly defined by understanding historical issues around access to and ownership of land. Access to land determines the socio-economic development of people⁷⁶ in countries with agriculture-based economies such as Kenya. Holdsworth rightly illustrated this when he stated:

The rules which regulate the manner in which land can be owned, and used, and disposed of, must always be of great importance to the State. The suitability of the State and the well-being of its citizens at all times depend to no small extent on its land law.⁷⁷

Agriculture is the backbone of Kenya's economy,⁷⁸ contributing to 26% of the GDP and another 27% of the GDP indirectly through linkages with other sectors. The sector employs more than 40% of the population and accounts for 65% of Kenya's export earnings.⁷⁹ These statistics indicate that land occupies an essential place in Kenya's development discourse and plays a pivotal role in shaping the county's development paradigm. Therefore, it is arguable that access to land invariably determines the opportunities for development available to the average person in Kenya. A historical analysis of access to land will demonstrate the impact this phenomenon has had on the realisation of the RTD in Kenya.

⁷⁴ Paragraph 12 of the preamble of the UNDRTD. Recognizing that the human person is the central subject of the development process and that development policy should therefore make the human being the main participant and beneficiary of development.

⁷⁵ Boitt *et al* 2015 *J Agric Informs* 23; Nyaga 2015 *Q J Int'l Agric* 245.

⁷⁶ Ghai *Kenya's Constitution: An Instrument for Change* 76.

⁷⁷ Holdsworth *An Historical Introduction to Land Law* cited by McAuslan "Control of Land and Agricultural Development in Kenya and Tanzania" in Sawyerr (ed) *East African Law and Social Change* 172-257.

⁷⁸ Boitt *et al* 2015 *J Agric Inform* 23; Nyaga 2015 *Q J Int'l Agric* 245.

⁷⁹ FAO in Kenya <http://www.fao.org/kenya/fao-in-kenya/kenya-at-a-glance/en/> (Date of use: 10 April 2020).

In seeking to define Kenya's development paradigm using access to land, some of the questions that will form part of the enquiry are "what level of access did Kenyans have to land?", "was the level of access to and use of land in Kenya equitable and participatory?" and "to what extent has that level of access to land impacted on the right of Kenyans to pursue their socio-economic, political and cultural development?" Answers to these questions will justify the argument that devolution introduced a new development model in Kenya and that the said model augments the realisation of the RTD by incorporating elements such as equity and participation of the people in the process of development.

3.3.3 Equity in Development.

The third and final theme is equity in development. The use of this theme's explanation is anchored on the fact that development, as conceptualized under the UNDRTD, must entail elements of participation and equity.⁸⁰ Equity in this sense relates to the distributional outcomes of the development process, which include; social justice and fair distribution of the benefits of development.⁸¹ In the context of the RTD, development has to entail distributive justice. Governments are required to eradicate inequalities among people and provide an opportunity to access basic resources.

This thesis argues that devolution creates a new development paradigm that is compatible with the principles of the RTD considering that equity is both a principle of the RTD and an objective of devolution in Kenya. A determination on whether Kenya's development paradigm is compatible with the principles of the RTD must involve an enquiry as to whether the said development model accommodates inequity in the distribution of both development resources and the outcomes of development.

Equity in development will therefore be analysed from the colonial period to the - post-colonial period to delineate the contours of the development paradigm that shaped Kenya's development until August 2010, when Kenya's Constitution 2010 was promulgated. This is important because it is argued herein that the devolved

⁸⁰ The Preamble of the UNDRTD.

⁸¹ Report of the High-Level Task Force on the Implementation of the Right to Development on its sixth session, 8 March 2010, A/HRC/15/WG.2/TF/2/Add.2 para 18.

system of government introduced by the Constitution of Kenya 2010 heralded the birth of a new development paradigm that augments the realisation of the RTD.

A development model that is compatible with the principles of the RTD has to ensure that development resources and the outcomes of development is equitably distributed among the people leading to the realisation of their human rights and fundamental freedoms. Equity is, therefore, an important yardstick in determining whether a country's development paradigm is compatible with the principles of the RTD.

3.4 Conceptualising Development During the Colonial Period in Kenya

Before Kenya was declared a British protectorate in June 1895, there was no formal legal system or government in existence.⁸² However, communities that lived in the territory known as Kenya had “peculiar forms of socio-political arrangements that could be termed broadly as government”.⁸³ The communities interacted with each other informally through activities between them⁸⁴ and other economic activities⁸⁵ without necessarily having in place a political arrangement that brought them together. Leadership and protection of communal rights were community-based and was the prerogative of local councils of elders.⁸⁶ Most communities had a simple and relatively informal and traditional government systems which functioned within their jurisdictions.⁸⁷

The colonial period is significant in terms of defining Kenya's development paradigm. This period marked the advent of a "formal development policy", which was applied uniformly nationwide. The British colonialists created a territory with specific geographical boundaries called Kenya and began to establish laws and institutions that would enable them to govern the region. All the different communities that lived in Kenya before this period suddenly found themselves operating within systems and governance laws that transcended beyond their

⁸² Mbondenyi 2011 *J Afr L* 39.

⁸³ See generally, El-Obaid and Appaiagyei-Attua 1996 *McGill L J* 821.

⁸⁴ Ndege "Colonialism and its legacies in Kenya".

⁸⁵ Rogers 1979 *J Afr Hist* 255.

⁸⁶ Bubba and Lamba 1991 *Environ & Urban* 37.

⁸⁷ Ojwang *Constitutional Development in Kenya* 21.

territorial borders. A "systemized" approach to development therefore emerged because of the colonial government's development policies and laws.

From the onset, the British agenda in Kenya was a "civilizing mission", describing Africa as a "dark continent".⁸⁸ The British believed that they were endowed with "a higher civilization" and had a moral obligation to educate, uplift and develop resources for the natives of humankind.⁸⁹ In this context, a British author, Ruark, paints a grim picture of Africa, depicting the natives as endowed with "impulsive savagery that is greater than anything we civilized people have encountered in two centuries".⁹⁰ Though a fictional account of the Mau Mau rebellion in Kenya, Ruark's book was touted as "the best-known account of the Mau Mau".⁹¹ The book clearly illustrates that the British colonizers perceived the natives as "undeveloped", and their responsibility was to introduce "development" in Kenya.

To enable the British to fulfil their civilizing mission, they were determined to firmly assert their "civilization" on Kenyan natives without any compromise. Therefore, the British had to systematically dismantle all social, political, economic and cultural systems that existed in pre-colonial Kenya and replace them with "civilized systems" that would facilitate the realisation of their objectives in the colony. They did so without any regard to the natives' idea of development. In that context, Ngang and other scholars have rightly argued that colonization disrupted Africa's development by introducing a concept of development that was foreign to the colonized peoples.⁹² The effect of this is a continent that is presently struggling to overcome poverty and underdevelopment.⁹³

This section examines the development paradigm(s) that emerged or developed during the colonial period in Kenya in a bid to ascertain whether the same was compatible or compliant with the principles of the RTD. Development will be discussed within the context of participatory rights, access to land and equity. This analysis will help define the contours of the development model that emerged during

⁸⁸ See generally, Stanley *Through the dark continent*.

⁸⁹ Izuakor 1988 *Transafr J Hist* 35-36.

⁹⁰ Ruark *et al Something of Value* forward.

⁹¹ Clough *Mau Mau Memoirs* 38.

⁹² Ngang *The Right to Development in Africa* 18-25.

⁹³ Ngang *The Right to Development in Africa* 18-25.

the colonial period in Kenya make a finding on the extent to which this development paradigm was compatible with the principles of the RTD.

3.4.1 Participation

As conceptualized by the UNDRTD, development should involve the human person both as a contributor and beneficiary of the development. For this to be actualized, the government must open up platforms for citizen participation in socio-economic and political arenas. It was argued that these participation platforms have to be anchored in law for participation to have the desired impact. The key issue for examination herein is whether the development paradigm created and pursued by the colonial government in Kenya was participatory and compatible with RTD principles.

Research shows that the colonial development paradigm was not participatory but exclusionary and engineered to further the interests of the colonizers.⁹⁴ The foundations of the exclusion of certain groups of citizenry in development and governance was laid as early 1886 when arrangements for future British control over Kenya was "secured by agreements with other colonial powers without any reference to the desires or views of the people who were most likely to be affected."⁹⁵ In 1884 Chancellor Bismarck of Germany summoned a conference of European nations "to establish rules for recognizing spheres of commercial suzerainty."⁹⁶ Consequently, Kenya came under British rule in the aegis of British East Africa Protectorate.⁹⁷

The colonial administration in Kenya was not participatory, and this had to do with how the British consolidated their rule in the colony. It is important to note that the protectorate had no legislature, and thus all the laws emanated from Britain and were conveyed as royal instructions known as orders-in-council.⁹⁸ This meant that

⁹⁴ Juma 2002 *Tulsa J Comp Int'l L* 476-477 where he observes that 'through conquests, deliberate annexation of territory and lopsided treaties, the British coalesced the ethnic groups and the minority settler populations into a Nation State'; Mutakha "Regional inequalities in Kenya" 125; Ghai and McAuslan *Public Law and Political Change in Kenya* 3-258.

⁹⁵ Ghai and McAuslan *Public Law and Political Change in Kenya* 5.

⁹⁶ Nmehielle *The African Human Rights System* 17.

⁹⁷ Mbondenyi 2011 *J Afr L* 40.

⁹⁸ Mbondenyi 2011 *J Afr* 40.

natives were stripped of their sovereignty and subjected to laws the British passed without their involvement. Participatory rights require the participation of the people in processes that touch on their socio-economic and political welfare, which includes the creation of laws and policies. It is argued the enactment of laws and regulations without the involvement of the natives in Kenya during the colonial period amounted to violation of their participatory rights.

Apart from enacting laws, the British also set up administrative structures that would enable them to govern the protectorate without the natives' participation. The Queen of England appointed a Commissioner to vide the East Africa Order in Council of 1897 as administrator of the territory with the mandate to create administrative structures within the territory.⁹⁹ Through the Queen's Regulations, the Commissioner established a court for the protectorate based in Mombasa with an appellate court in Zanzibar. He also established other courts, including native courts, which had exclusive criminal jurisdiction and established a police force for purposes of law and order in the protectorate.¹⁰⁰ The British constituted these administrative structures without the participation of the natives.

The Commissioner had unfettered discretion to create a provincial administration for ease of governance. He was accountable to the British colonial secretary because the regulations he created had to be approved by the secretary, albeit with a lot of unfettered internal powers.¹⁰¹ The Kenyan natives were also excluded in creating these administrative units, yet they were meant to govern the natives. There was a disconnect between the "government" and the people, which is inimical to the *raison d'etre* of the State. In *Christopher Ndarathi Murungaru v Standard Limited & 2 others*,¹⁰² it was stated that:

The *raison d'etre* of the State is to facilitate and enhance the individual's self-fulfilment and advancement, recognizing the individual's rights and freedoms as inherent in humanity. Protection of the fundamental human rights therefore is a primary objective of every democratic Constitution, and as such is an essential characteristic of democracy.

⁹⁹ Mutakha *Constitutional framework for devolution* 93.

¹⁰⁰ Ghai and McAuslan *Public Law and Political Change in Kenya* 37.

¹⁰¹ Mutakha *Constitutional framework for devolution* 96.

¹⁰² Civil Suit No 513 of 2011 [2012] eKLR.

It is ironic that the Commissioner was accountable to the British Colonial Secretary and not the people he purportedly governed. In chapter 2 of this thesis, it was argued that in a democracy, rulers are not free to do as they please. They must always act in the best interests of the governed.¹⁰³ It is argued that participation is a key factor in accountability systems. This impacts development for when the government is not accountable to the people, its development programmes will not be in the best interests of its people.

The British colonialists continued to create more legislation to tighten their grip over Kenya without the participation of the natives. In 1902 another Order in Council was passed. This replaced the 1887 Order in Council with significant changes. The Commissioner freed from constant restrictions from London, permitting him to divide the country into districts and provinces for administrative purposes.¹⁰⁴ However the Commissioner remained under the control of the colonial office, and the districts and provinces created were merely administrative outposts under his command, leaving the system essentially centralized.¹⁰⁵ It was argued that this created the foundation of centralization in Kenya. This foundation negatively influenced Kenya's development paradigm straight into the post-colonial era.

The Commissioner was further empowered to exercise executive, legislative and judicial powers enabling him to appoint chiefs or headmen.¹⁰⁶ All this was done without due regard to the participatory rights of the natives. Collective decision making by Councils of Elders in most communities was discontinued, with the appointment of chiefs or headmen.¹⁰⁷ In effect, this colonial administrative structure created a system of direct accountability to the colonial authorities by chiefs and headmen, thus rendering the community elders irrelevant.¹⁰⁸ The "participatory rights" exercised by pre-colonial states through Council of Elders were rendered otiose further disconnecting government from the people.

¹⁰³ Schmitter and Karl 1991 *J Democ* 114.

¹⁰⁴ Mutakha *Constitutional framework for devolution* 96.

¹⁰⁵ Ghai and McAuslan *Public Law and Political Change in Kenya* 41.

¹⁰⁶ Ghai and McAuslan *Public Law and Political Change in Kenya* 40.

¹⁰⁷ Republic of Kenya: Report of the Commission of Enquiry on Local Authorities in Kenya: A strategy for Local Government Reform in Kenya (1665) 5-6.

¹⁰⁸ Odinga *Not yet Uhuru* 15.

It is important to note that the British were on a "civilising mission" when they came to Kenya, and thus the creation of laws and institutions of governance discussed above was ostensibly geared towards "developing" the natives. The development policy adopted by the colonial government was crafted without the participation of the natives meaning that the emergent development paradigm fell short of the participatory threshold under the RTD.

The quest for participation in governance began around 1900, during the tenure of Sir Charles Elliot, Kenya's first Commissioner. White settlers formed a quasi-political movement which "advocated for the recognition of liberties of its members as afforded to every British citizen".¹⁰⁹ The same group demanded representation in the administration of Kenya by presenting a petition to the British Secretary of State for the Colonies in 1905.¹¹⁰ It is worth noting that this push for participatory rights was of no relevance to Africans because it was a White settlers' initiative to champion their development. The right of the natives to enjoy participatory development was further violated.

Even with this modest progress towards participation in government, natives still had no voice in governance to enable them to pursue their socio-economic and political development. It was evident in 1906 when an Order in Council was passed to create an executive council headed by the Governor (formerly Commissioner) to assist in the colony's administration. Even with the creation of the executive council, Africans were still denied their right to participation. They had no constructive role in creating development policies and the general development process seeing that there was no African representation in the council.

The Legislative Council (LegCo) was founded in August 1907.¹¹¹ Africans were not appointed to the legislative body since the appointments were done by the governor, who handpicked "his people".¹¹² It was ironic that Africans could not join a body that was supposed to legislate on matters concerning them. According to Chanan Singh, the objective behind denying Africans their right to participation was to make Kenya

¹⁰⁹ Mbondenyi 2011 *J Afr L* 40.

¹¹⁰ Mbondenyi 2011 *J Afr L* 40.

¹¹¹ Mbondenyi 2011 *J Afr L* 40.

¹¹² Singh 1965 *Int'l Comp L Q* 892-893.

a White man's country.¹¹³ This state of affairs meant that development was not participatory because it shut out Africans and favoured the colonialists.

Anderson states that in the early 1950s, "Kenya's White settlers cast envious glances towards Rhodesia and South Africa" with the hope of creating White minority-dominated territories that would strengthen and steer the economies of Kenya, Uganda and Tanganyika.¹¹⁴ The European settlers, therefore, resisted any form of enhanced political representation for Africans. They aimed to secure their privileged political position and, in the process, suppress the advancement or development of Africans.¹¹⁵

In a sense, the Devonshire White Paper of 1923 tried to introduce a different approach to development in colonial Kenya by arguing that the interests of the natives have to be put to the fore when it comes to development. The paper declared Kenya an African territory in which the affairs of native Kenyans should be paramount¹¹⁶ and stated that " Her Majesty's Government had decided that the policy of segregation as between Europeans and Asians in the townships must be abandoned".¹¹⁷ The paper hardly registered any impact on the rights of the Africans to participate in governance seeing that it inspired the nomination of a White clergyman to the LegCo in 1924 to represent the interests of the Africans.

Arguably, the decision to incorporate African representation in the LegCo was self-defeating and amounted to a violation of their participatory rights and their right to self-determination for three reasons. Firstly, the decision to nominate a White clergyman to represent Africans in the LegCo had been predicated on the belief that Africans are incapable of governing their affairs and could not be entrusted with any responsibility in LegCo or anywhere else.¹¹⁸ Secondly, Africans were not allowed to choose their representative to the LegCo; instead, a representative was "imposed" on them. Thirdly, Africans who were the majority in Kenya were under-represented at the LegCo. Taking into account these anomalies, it is beyond belief that inclusion of Africans in the LegCo had any significant impact on their rights to

¹¹³ Singh 1965 *Int'l Comp L Q* 892-893.

¹¹⁴ Anderson *Histories of the Hanged* 3.

¹¹⁵ Anderson *Histories of the Hanged* 3.

¹¹⁶ Munene 2002 *AHRJ* 137.

¹¹⁷ Singh 1965 *Int'l Comp L Q* 909.

¹¹⁸ Mbondenyei 2011 *J Afr L* 42.

participate in and benefit from the process of development. The principle of non-segregation was introduced in all matters, including development, but unfortunately, segregation continued in practice.¹¹⁹ It was submitted that the nomination of a White clergyman to represent Africans in the LegCo was, therefore, "a smokescreen" aimed at misleading Africans into believing that they had been granted participatory rights by the colonial government.

In 1919, the introduction of Asian (a minority group in Kenya) members to the LegCo generated much controversy.¹²⁰ Nonetheless, it set a precedent in the journey towards reducing the European majority in the LegCo. Despite allowing Asian participation in the LegCo, African natives were still locked out until 1944, when the first African member of the LegCo was appointed, marking the beginning of the end of the domination of an immigrant racial group.¹²¹

It is submitted that the appointment of Asians to the LegCo had minimal impact on the development of Africans because the colonial government had long set the foundations of a non-participatory development paradigm. Africans were already marginalized by colonial development policies. Notably, African participation in governance matters increased gradually due to the enactment of several 1950s colonial constitutions.

The 1954 Lyttleton Constitution established the journey to equal participation in government by all races.¹²² It created a council of ministers consisting twelve (12) individuals from all races.¹²³ Africans were still displeased that their council representatives were being chosen for them by the colonial administration,¹²⁴ contrary to democratic principles where people choose their leaders. It is also possible that these representatives were not able to advocate for the interests of the Africans because they felt accountable to the appointing authority. It is unlikely that this model guaranteed any real participatory rights for Africans.

¹¹⁹ Singh 1965 *Int'l Comp L* Q 909.

¹²⁰ Singh 1965 *Int'l Comp L* Q 901.

¹²¹ Singh 1965 *Int'l Comp L* Q 902.

¹²² Muigai 1990 *Lesotho LJ* 113.

¹²³ Munene 2002 *AHRJ* 138.

¹²⁴ Mbondenyi 2011 *J Afr L* 42.

In 1955 the Legislative Council (Amendment) Ordinance of 1924 was amended to allow the election of 8 African representative members.¹²⁵ This was major a step towards the realisation of participatory rights by Africans. It meant that they could influence the colonial government's development policy to a small extent. Unfortunately, Africans were still under-represented; they only had eight (8) representatives in the LegCo even though they were the majority group in Kenya. Because of under-representation, it is unlikely that the resultant development policies favoured Africans.

In 1958 the Lennox-Boyd Constitution provided for an expanded Council of Ministers comprising 16 individuals. In this instance, half of the ministers were elected to be members of the LegCo. Additionally, the number of Africans in the LegCo increased to 14, equal to that of Europeans.¹²⁶ This Constitution did not garner the support of the African politicians because the policy of multi-racialism and specially elected members to the LegCo did not sit well with them.¹²⁷ At the same time, Africans who were the majority of the population were still under-represented *vis-a-vis* the settlers who were the minority.¹²⁸ This meant that Africans could not fully exercise their right to participation.

The McLeod Constitution, which was born out of the first 1960 Lancaster House Conference, increased the LegCo to 65 people and provided for the interests of the minority by reserving 20 seats for racial minorities¹²⁹ and a Council of Ministers with majority of Africans.¹³⁰ The significant effect of the McLeod Constitution was that it opened up democratic space by allowing the formation of multiple political parties by people of all races,¹³¹ thus increasing the space for participation in government for Africans more than ever before.

Both Europeans and Africans were still not satisfied with the McLeod Constitution. Europeans felt that their interests were not adequately protected, while Africans had

¹²⁵ Mbondenyi 2011 *J Afr L* 42.

¹²⁶ Muigai 1990 *Lesotho L J* 113.

¹²⁷ Mbondenyi 2011 *J Afr L* 42.

¹²⁸ Munene 2002 *AHRJ* 139.

¹²⁹ Munene 2002 *AHRJ* 139.

¹³⁰ Singh 1965 *Int'l Comp L Q* 893-895.

¹³¹ Muigai 1990 *Lesotho LJ* 115.

reservations about the conditions imposed on them to register as voters.¹³² This led to the second Lancaster House Conference in February 1962, where a justifiable framework for a new constitution was agreed on.¹³³

The second Lancaster House Conference constitutional framework resulted from a compromise between the dominant political parties of the day, that is, KANU and KADU.¹³⁴ The constitutional framework was more representative than the previous ones, it inspired the 1963 independence constitution.¹³⁵ In substance, it established “a form of Westminster government and provided for a bi-cameral legislature. The country was divided into seven (7) regions, each with its legislature and executive to enhance citizens' participation in government”¹³⁶ and protect the interest of minority groups that were incapable of marshalling a majority in an election. In terms of development, these changes gave native Kenyans an opportunity to fully pursue their socio-economic, political and cultural development because of increased participatory rights.

From the above, it is obvious that native Kenyans were denied the right to participate in governance during the colonial period and did not have a say in decision-making. This meant that development was biased and favoured the minority White settlers to the detriment of the majority African natives. The development paradigm that emerged and/or developed by the colonial government was not compatible with the principles of the RTD because it failed to realise the constant improvement of the well-being of the entire population of all the people of Kenya through development. It made native Kenyans be "enablers" or "facilitators" of the colonizers' development and not their own development.

3.4.2 Access to Land

In this section, access to land was viewed as a crucial enabler of development in a country whose economy depends heavily on agriculture. In the preceding discourse, it will be apparent that even the colonial government considered land an essential factor in development. From the onset, the colonial government created policies and

¹³² Mbondenyi 2011 *J Afr L* 42.

¹³³ Mbondenyi 2011 *J Afr L* 42.

¹³⁴ Munene "Constitutional Development in Kenya" 56.

¹³⁵ Mbondenyi 2011 *J Afr L* 43.

¹³⁶ Mbondenyi 2011 *J Afr L* 43.

laws that would enable it to acquire large tracts of land from the natives for large scale farming. The colonial government also restricted the acquisition of these farms and the cultivation of cash crops such as tea and coffee to White settlers only, thus creating a foundation for inequitable access to this crucial resource.

Land unequivocally played a major role in shaping the colonial development paradigm, favouring European settlers at the expense of the African natives and other minority groups like Asians and Arabs. It is submitted that colonial land policies disrupted and negatively affected the socio-economic and political development of native Kenyans. It also argued that some of the development injustices that plague Kenya today can trace back to this colonial period. This section unpacks the colonial development paradigm in the context of access to land and demonstrates that the same was not compatible with the principles of the RTD.

Smokin Wanjala succinctly provides a synopsis of the effect of colonialism on access to land in Kenya.¹³⁷ He notes that three main events characterized the period of colonialism in Kenya; "alienation of land, imposition of English property law, and transformation of customary land law and tenure". This implies that access to land, as a resource for development, was significantly altered during the colonial period in Kenya. There was a shift from communal ownership and land usage to individual tenure, restricted access and control by the colonial government. This gave the colonial government monopoly over access and acquisition to land. The native Kenyans found themselves squatters or tenants in their own land¹³⁸ hence negatively affecting their development.

The British colonialists' declaration of protectorate status over Kenya in 1885 was followed by a gradual process of alienating large parcels of land and dispossessing the natives of their land.¹³⁹ It was submitted that dispossession of land became an obstacle to development since it amounted to limiting the capabilities of the

¹³⁷ Wanjala "Land Ownership and Use in Kenya" in Wanjala (ed) *Essays on Land Law* 27.

¹³⁸ Youé 1988 *J of the Royal Afr Soc* 394; Okoth-Ogendo *Tenants of the Crown* cited by Ojienda *Land Law and Conveyancing* 16.

¹³⁹ Mweseli "Centrality of Land in Kenya" in Wanjala (ed) *Essays on Land Law* 3.

indigenous people whose lives had since time immemorial revolved around their land.¹⁴⁰

The British government needed to predicate its actions in the law, but the declaration of protectorate status did not suffice to confer legal jurisdiction for land alienation.¹⁴¹ For instance, the British extended the Indian Land Acquisition Act of 1894 to enable the colonial government to acquire land in the 10-mile coastal strip leased from the Sultan of Zanzibar¹⁴² for public purposes.¹⁴³ This amounted to the imposition of laws on native Kenyans without their participation.

In a bid to legitimize colonial acquisition of land in Kenya, in 1899, a legal opinion by the Law Officers of the Crown stated that since there was no "settled form of government" in the East African Protectorate, Her Majesty's Government could obtain radical title to the land.¹⁴⁴ The British did not recognize the existing political systems among different tribes in East Africa as "governments". It also meant that the concept of development in pre-colonial Kenya was immaterial; the pre-colonial laws or rules that applied to access to land among the indigenous communities was disregarded by a colonial government that now enjoyed radical title to land.

The natives' access to land was further affected by the colonial government's need to attract White settlers who would help build an economy that could support the colonial administration in Kenya. In 1897, laws were created authorizing the commissioner to issue short term leases of occupancy of 21 years.¹⁴⁵ The East Africa (Lands) Order in Council of 1901, refined the 1897 laws by empowering the commissioner to dispose or sell or lease wasted and unoccupied land in the protectorate.¹⁴⁶ This proves that the colonial government was not concerned about the development of the indigenous communities in Kenya. It was focused on

¹⁴⁰ The natives used their land to sustain their economic activities which involved crop cultivation and livestock keeping. See generally, Youé 1988 *J of the Royal Afr Soc* 394.

¹⁴¹ Ojienda *Land Law and Conveyancing* 12.

¹⁴² For a detailed historical account of the 10 mile coastal strip land issue in Kenya, see Singh 1965 *Int'l Comp L Q* 878-949.

¹⁴³ Ojienda *Land Law and Conveyancing* 12.

¹⁴⁴ Mweseli "Centrality of Land in Kenya" in Wanjala (ed) *Essays on Land Law* 27.

¹⁴⁵ Sorrenson *Origin of European Settlement in Kenya* 49.

¹⁴⁶ Kanyinga *Re-Distribution from Above* 36.

creating a development model conducive to the settlers by controlling access to land.

In 1902, the Crown Lands Ordinance was enacted to provide for sales of land and leases to settlers in a bid to give them the security of tenure over acquired land.¹⁴⁷ The ordinance provided that the crown had original title to land. The African (Lands) Order in Council of 1901, which revised the opinion of 1899, was incorporated in the Crown's Land Ordinance of 1902.¹⁴⁸ The theory of eminent domain (an English common law concept) was extended to Kenya by the 1902 Ordinance.¹⁴⁹ In this context, Okoth-Ogendo asserts that "the concept that land in Kenya was *terra nullius* and its citizens tenants at the will of the crown" was at the heart of the colonial land tenure system".¹⁵⁰ As the age-old adage goes; "he who pays the piper calls the tune", the colonialists were able to disrupt and control the development of native Kenyans by making them "tenants at the will of the crown" since access to land was at the centre of their socio-economic, political and even cultural development.

The Land Titles Ordinance of 1908 had been passed to enable colonial authorities to expropriate land on the coast of Kenya, which, negatively affected the development of coastal communities such as the Mijikenda.¹⁵¹ The ordinance provided for the registration of private interests on land based on claims that had been proved.¹⁵² This meant that all the residual unclaimed land in the 10-mile coastal strip was regarded as crown land and could be allocated by the colonial government.

The purpose of the ordinance was to exclude the indigenous Mijikenda groups and ex-slaves from owning land on the coast because the customary tenure of land ownership (communal rights and claims) was not recognized.¹⁵³ About 25% of the

¹⁴⁷ Sorrenson *Origin of European Settlement in Kenya* 55; Okoth-Ogendo *Tenants of the Crown* cited in Ojienda *Land Law and Conveyancing* 16.

¹⁴⁸ Kanyinga *Re-Distribution from Above* 37; Ojienda *Land Law and Conveyancing* 15.

¹⁴⁹ Ojienda *Land Law and Conveyancing* 15.

¹⁵⁰ Okoth-Ogendo *Tenants of the Crown* cited in Ojienda *Land Law and Conveyancing* 16.

¹⁵¹ See generally, Kanyinga *Re-Distribution from Above*.

¹⁵² Kanyinga *Re-Distribution from Above* 57.

¹⁵³ Kanyinga *Re-Distribution from Above* 58.

Mijikenda people lost land that they had lived on for aeons.¹⁵⁴ This meant that the community was generally left behind in development.

The Crown Lands Ordinance of 1915 introduced land zoning for settlers and natives. The ordinance declared all "waste and unoccupied" land in the protectorate to be crown land and therefore subject to the governor's power to claim and allocate.¹⁵⁵ It defined crown lands to include all land occupied by natives, and all that the governor had reserved for use. It also created African reserves separate from European settlements.¹⁵⁶ This marked the onset of Mamdani's typology; 'citizens' (settlers) and 'subjects' (natives).¹⁵⁷ The settlers seemed to have more rights than the natives. The right to own land was the preserve of the settlers hence the descriptive identities; "citizens" and "subjects". Without a doubt, the "subjects" could not have developed under these circumstances given that the system was designed to ensure that the "subjects" support the development of the "citizens".

By 1934 the natives' ability to develop had been severely limited by the colonial government's policy on land which favoured white settlers. For instance, a third of the arable land in Kenya was held by European settlers who represented less than a quarter or 1% of the Kenyan population.¹⁵⁸ To further exacerbate the situation, the 1934 Carter Commission (it was to advise the government on land policy) concluded in its report that Africans had little (if any) claim to the highlands and further, if there were any claims at all, compensation ought to be paid rather than giving the land to the claimants. The commission further recommended that, all customary rights should be extinguished forever upon such payment.¹⁵⁹

In 1939 Kenya (Highlands) Order in Council further limited the natives' access to land by guaranteeing the security of White settlers of land ownership in the White highlands and refining the concept of land zoning. Africans were moved out of the highlands and settled in areas designated as "native reserves". The Kenya (Native Areas) Order in Council of 1939 set up a newly constituted Native Trust Board to

¹⁵⁴ Kanyinga *Struggles of Access to Land*; Cooper *From Slaves to Squatters* 192.

¹⁵⁵ Kanyinga *Re-Distribution from Above* 37.

¹⁵⁶ Kanyinga *Re-Distribution from Above* 37.

¹⁵⁷ Mamdani *Citizen and Subject*.

¹⁵⁸ Berman *Control and Crisis in Colonial Kenya* 189.

¹⁵⁹ Ojienda *Land Law and Conveyancing* 14.

hold land in the African reserves in trust for the natives.¹⁶⁰ This would further affect the development of the natives because land in the highly populated reserves was limited and could not meet the needs of everyone.

Land access was further restricted by legal provisions that subjected transfers of land between races (Africans, Europeans, Asians, Arabs and others) to the Governor's veto¹⁶¹ to ensure that the colonial policy of separate development for the different races was implemented. This law was later amended to prohibit the acquisition of shares by non-Europeans in companies holding land in the highlands and the appointment of non-European farm managers.¹⁶² In 1939, the Highlands Order in Council set up a Highlands Board to control transactions in land based in the highlands. This Board was composed wholly of Europeans, and it ensured that the land appropriated from the government by a European was not later transferred to a non-European.¹⁶³ This meant that Africans were left behind in development.

Most ethnic groups in Kenya were victims of land loss. For instance, the Maasai were moved from their traditional grazing grounds in central Rift Valley in 1904 to two other reserves. In 1911, they were moved again to another location at gunpoint and against their will to facilitate the creation of White highlands.¹⁶⁴ The colonial government's actions violated the Maasai community's right to develop because, as a pastoralist community, they relied on land to graze their herds, and thus no access to their traditional grazing lands disrupted their development.

The Kikuyu is an example of another native Kenyan community that was hit hard by excisions of land by Britain. Over 60,000 hectares of Kikuyu land in Kiambu was converted into European coffee farms.¹⁶⁵ This led to the commercialization of the Kikuyu economy resulting in the emergence of a wealthy land-owning class after independence in 1963 to the detriment of the larger poor and landless class.¹⁶⁶ These land excisions disrupted the development of the Kikuyu since many of them

¹⁶⁰ Ojienda *Land Law and Conveyancing* 14.

¹⁶¹ Crown Lands Ordinance of 1915.

¹⁶² Singh 1965 *Int'l Comp L* Q 909.

¹⁶³ Singh 1965 *Int'l Comp L* Q 909.

¹⁶⁴ Lotte Hughes 2007 *Conservation and Society* 310.

¹⁶⁵ Ojienda *Land Law and Conveyancing* 14.

¹⁶⁶ Berman *Control and Crisis in Colonial Kenya* 189.

found themselves living in crowded African reserves while others had to move to White farms as squatters to supply cheap labour.¹⁶⁷

In conclusion, the colonial period in Kenya saw Africans being dispossessed of and denied access to land. The colonial government violated their basic human rights, and fundamental freedoms rights such as the right to property, freedom of association and political rights. Subsequently, their socio-economic and cultural rights such as; the right to food, adequate shelter, clean water and the right to participate in their cultural life were also violated.

It is argued that the colonial government's development paradigm that denied native Kenyans access to land was not compatible with the principles of the RTD. The development paradigm focused on developing the settlers and not the indigenous Kenyan. Land was crucial in the realisation of the RTD for the indigenous Kenyan communities, and it was incumbent upon the government to provide access to this resource. Instead, the colonial government erected obstacles by limiting access to land, which made it difficult for these communities to develop.

This section demonstrated that the indigenous Kenyan was neither participant nor beneficiary of development under the colonial era. This conclusion has been drawn from an analysis of the colonial government's development paradigm as defined by access to land. Land, a critical resource for development, was controlled by the colonial government to ensure the development of the settlers and not the natives. It is, therefore, apparent that the RTD could not be realised under these circumstances.

3.4.3 Equity in Development

This section discusses the development in colonial Kenya to determine whether the colonial development model espoused equity in the distribution of development resources and outcomes. This analysis interrogates the colonial development paradigm through the lens of equity to ascertain whether the said development paradigm was compatible with the principles of the RTD.

¹⁶⁷ Kangu *Constitutional Law of Kenya on Devolution* 67.

The colonial government structure did not provide for equity in development because Africans were marginalized politically, socially and economically. For instance, the creation of the White highlands and African reserves placed Africans at a disadvantage.¹⁶⁸ In this context, Juma argues that the scramble for Africa was aimed at “expanding commercial opportunities and informed by imperial policies based on conquest and the subjugation of natives”.¹⁶⁹

Colonialism also impacted the social and economic structures of the African communities, seriously disrupting the rhythm of their lives. Political, social and economic forces drove society in new directions, leading to the uneven development of groups and regions.¹⁷⁰ The “basis of traditional egalitarianism destroyed by the market and administrative practices leading to differentiation among and within communities”.¹⁷¹

Equity in development addresses inequalities among different groups in society and seeks to ensure that the disadvantaged groups can get the same opportunities as the "privileged groups" to pursue their development. Therefore, it is unlikely that a development paradigm that seeks to advance commercial opportunities for settlers at the expense of the developmental rights of the natives would be compatible with the principles of the RTD. The RTD puts the human person at the centre of development and demands their participation and a fair distribution of the fruits of development.

The colonial civil service also perpetuated inequity in development because it was structured to discriminate against non-Europeans. It was divided into "three watertight compartments; the European service, Asian service and African service". Asian salaries were about 55% of European salaries and African salaries about 55% of Asian salaries. All senior officers were Europeans, Asians, some Europeans and a small number of Africans occupied middle ranks. The lowest positions were

¹⁶⁸ Bosire *Devolution for development* 90-96.

¹⁶⁹ Juma 2002 *Tulsa J Comp Int'l L* 476-477 where he observes that 'through conquests, deliberate annexation of territory and lopsided treaties, the British coalesced the ethnic groups and the minority settler populations into a Nation State'.

¹⁷⁰ Ghai "Devolution in Kenya " in Steytler and Ghai (eds) *Kenyan-South African Dialogue on Devolution* 58.

¹⁷¹ Ghai "Devolution in Kenya " in Steytler and Ghai (eds) *Kenyan-South African Dialogue on Devolution* 58.

occupied exclusively by Africans¹⁷² meaning that Africans did not have the same development opportunities as Europeans.

After 1945, the compartmentalisation of the civil service was re-branded in a bid to introduce some form of equity. The services began to be called A, B and C, instead of European, Asian and African. A limited scope for promotion from scale to scale was allowed. Consequently, few Africans were promoted to B scale and another small number of Asians and Africans to A scale. A few non-Europeans were also promoted into senior ranks of service but was given 60% of the European salary.¹⁷³ These changes did not significantly impact achieving equity in the civil service because firstly, the policy of differentiation between Europeans, Asians and Africans was maintained. Secondly, very few native Kenyans had the requisite educational or professional qualifications to move to the senior ranks.

The economic and developmental policies created by the colonial government were not meant to serve the welfare of the native Kenyans but calculated to serve the selfish, narrow interests of the European settlers and business people.¹⁷⁴ The country divided into "native" and settler areas which led to implementing the doctrine of "separate development" with separate policies for the two areas.¹⁷⁵ For instance, economic restrictions placed on Africans, such as the ban on growing cash crops.¹⁷⁶ The result was a dual economy meant to serve White settlers exclusively.¹⁷⁷ It was submitted that this inequitable system denied native Kenyans the opportunity to pursue their socio-economic, political and cultural development.

The natives also experienced inequity in the education sector in two ways. The first is how schools were set up, and the second is the policy of segregation implemented by the colonial government. Most schools set up by Christian missionaries did not focus on areas dominated by people who professed the Muslim faith because of their resistance to Christianity. Over time, such areas were marginalized because

¹⁷² Singh 1965 *Int'l Comp L* Q 906-907.

¹⁷³ Singh 1965 *Int'l Comp L* Q 907.

¹⁷⁴ Mutakha "Regional inequalities in Kenya" 125.

¹⁷⁵ Oyugi "Local government in Kenya" 1-2.

¹⁷⁶ Overton 1988 *Afr Stud Rev* 109.

¹⁷⁷ Ghai and McAuslan *Public Law and Political Change in Kenya* 3-258.

the colonial economy was created to give people opportunities with formal education propagated by the Christian missionaries.¹⁷⁸

The colonial government pursued a segregation policy in education in that separate schools were established for the various racial groups. The quality of facilities provided at these schools was different, the scales of fees were different, and three different preliminary examinations were administered based on the three races, Africans, Europeans, and Asians.¹⁷⁹

It is submitted that this segregation policy in education denied indigenous Kenyans an opportunity to acquire skills that would enable them to pursue their development. It also put them at a disadvantage in terms of competing for developmental opportunities such as jobs. Their European and Asian counterparts were more advantaged because the educational opportunities offered to them were more superior than those offered to Africans.

In providing health services, the same inequitable policy of separate development for the races was zealously pursued and implemented by the colonial government. For instance, the Europeans had their own Health Authority¹⁸⁰ which set a precedent for establishing similar authorities for Asians and Arabs.¹⁸¹ Africans had been excluded from such arrangements until January 1964, when Africans were allowed to take membership of the Kenya Hospital Fund.¹⁸² This affected the health rights of Africans. The RTD entails the realisation of all human rights, meaning that a violation of one group of rights, such as health rights in this context, is a breach of

¹⁷⁸ Mutakha "Regional inequalities in Kenya" 125.

¹⁷⁹ Singh 1965 *Int'l Comp L* Q 911.

¹⁸⁰ Hospital Treatment Relief (European) Ordinance (Cap 249) came into force on June 14, 1951, and established the European Hospital Fund Authority. Membership of the Fund was restricted to persons "of European origin or descent". This meant in effect that the richest section of the population paid for its own hospital services. The Government enabled it to do it by the use of the coercive agency of law and encouraged it by making contributions from public revenues. The implications of this for social policy were serious. First, the Asian community which was relatively poor was also expected to pay for its own hospital services. Secondly, the African community which was the poorest of the three and which could not possibly pay for its own hospital services had to do with whatever little was provided out of the inadequate funds of the Government'. Cited in Singh 1965 *Int'l Comp L* Q 912.

¹⁸¹ Hospital Treatment Relief (Asian and Arab) Ordinance (Cap 250) became effective on Jan. 1, 1960. It covered persons originating in the area of pre-Partition India (called "Asians") and Arabs' as cited in Singh 1965 *Int'l Comp L* Q 912.

¹⁸² Singh 1965 *Int'l Comp L* Q 912.

the RTD. It is argued that the colonial policy on the provision of health services was not compatible with the principles of the RTD because it marginalized Africans.

From the foregoing, it is evident that the distribution of development resources during the colonial era in Kenya was not equitable. It was biased in favour of the settler minority. There was no distributive justice in the allocation of resources as required under the RTD. Therefore, the native Kenyan was denied the right to a process of development that was equitable, meaning that they had been left behind in their social, economic, political and cultural development.

The salient features of the colonial development paradigm indicate that the paradigm fell short of the requirement of equity in development. The paradigm did not facilitate the collective development of all people of Kenya but sought to offer Africans "the crumbs that fell off the dinner table after the settlers had eaten to their fill". This development paradigm was therefore incompatible with the principles of the RTD.

3.4.4 General Observations

The foregoing discourse revealed that the development paradigm in colonial Kenya was not participatory because the indigenous Kenyan communities had not been involved in governance matters and, by extension, development processes. They played the role of "supporting" development policies and programmes that were calculated to benefit the minority White settler community. The colonial development paradigm also restricted access to land for the indigenous Kenyan communities. The White settlers enjoyed almost unfettered access to the bulk of the economically productive land. This meant that the natives' opportunities to increase their capabilities was severely curtailed.

The colonial development paradigm also failed to provide equity in development since it was biased favouring the White settlers who got the lion's share of development resources. In a nutshell, the development paradigm pursued by the colonial regime in Kenya was incompatible with the RTD.

3.5 Conceptualising Development During the Post-Colonial Period in Kenya

The preceding section has demonstrated that the development paradigm pursued by the colonial government was not compatible with the principles of the RTD. It fell short of crucial elements of the RTD, such as participation and equity. The colonial development policy also ensured that native Kenyans did not access key development resources such as land. The overall effect of this colonial development paradigm was that native Kenyans were denied the right to pursue their socio-economic and political development. It is submitted that these violations contributed to the push for independence from colonial domination in Kenya.

This section analyses the development paradigm that Kenya pursued after gaining self-rule or independence from the British colonial government up to August 2010 when Kenya enacted its current Constitution. This analysis is significant for this thesis because it answers the question as to whether development in independent Kenya was compatible with the principles of the RTD. The section also lays a foundation for justification of the argument that devolution under the Constitution of Kenya 2010 creates a normative and institutional framework for development that is compatible with the principles of the RTD.

This section demonstrates that the post-colonial governments in Kenya were unable to dismantle the colonial development paradigm. Instead, they built on the flawed foundations of the colonial development paradigm that limited the capabilities of the native Kenyan hence violating their right to develop. It was argued that problems such as inequitable development, lack of participation in development and landlessness continued to thrive in independent Kenya because of the development foundations that the colonial government created.

This phenomenon is not uniquely Kenyan; it is a common problem in most countries colonized by foreign powers. Professor Olooko, while interrogating this phenomenon in the context of the African continent, rightly argued that:

Nearly half a century after most countries on the continent attained independence, so many of them continue to utilize colonial laws governing political association, public health, education and free expression. The consequence is that their very claim to

having made a difference in the human rights reality of the people they govern is effectively negated.¹⁸³

Olooka argues that self-rule in Africa did not translate into protection, promotion and realisation of human rights. Post-colonial governments in Africa used state power to pursue their selfish interests by maintaining and perfecting the colonial systems of oppression, discrimination and human rights abuse.¹⁸⁴ This explains why the immediate post-colonial regimes in Kenya failed to yield a development paradigm compatible with the RTD.

Understanding the circumstances under which Kenya gained her independence from Britain sheds light on why there was no radical shift in Kenya's development paradigm after independence. It is submitted that since Kenya's independence was a negotiated one, the nationalists ceded some ground and met the British midway. An example is the land question. Africans demanded land expropriation without compensation, while the White settlers demanded compensation for their land or a willing seller and buyer exchange in any event. The reality was that agriculture was the backbone of Kenya's young economy, therefore the land question, needed to be handled with "kid gloves" to avoid adverse effects on the economy.¹⁸⁵ Eventually, land compensation was agreed on as a compromise.

It has been argued that there was a need for a revolution for Kenya to have broken free from colonialism. This, in the real sense, meant "breaking and reducing to ash all aspects of the colonial State" before such independence could be achieved.¹⁸⁶ Therefore, negotiated independence meant that some of the vestiges of the colonial development paradigm were retained and used by the independent governments further to drive the country towards the wrong development trajectory. These arguments will be discussed in detail in the proceeding sections that unpack post-

¹⁸³ Oloka-Onyango http://hdr.undp.org/sites/default/files/joseph_oloka-onyango1.pdf (Date of use: 10 May 2021) 4.

¹⁸⁴ Welch Jr 1999 *Buff Hum Rts L Rev* 105.

¹⁸⁵ See Anderson *Histories of the Hanged* 331. The author notes that Kenya's economy briefly plummeted in 1960 with the new of the transition from white minority rule to majority rule. See also Speich 2009 *Diplomatic History* 452. The author notes that when the end of colonial rule seemed inevitable, settlers started to move out of Kenya and in 1960 a severe economic crisis hit the country because of the large amounts of capital flowing out of the economy.

¹⁸⁶ Gustafson 1995 *Brigham Young U L Rev* 654.

colonial Kenya's development paradigm under the themes of participation, access to land and equity in development.

3.5.1 Participation

This section analyses the concept of development in post-colonial Kenya up to August 2010, when the Constitution of Kenya 2010 was promulgated using participation as the yardstick to gauge the level of compliance with the principles of the RTD. It is arguable that at independence, participation of the people was fairly secured within the country's governance structure, as discussed below.

The 1963 Constitution created regional governments that derived their mandate directly from the people, a tactic the British employed to manage nationalist politics¹⁸⁷ (herein earlier referred to as regionalism or *majimbo*). Arguably, the normative and institutional design of regionalism supported a development paradigm that was compatible with the principles of the RTD because of two reasons. Firstly, it created a political system that yielded grass-root representation through the regional assemblies potentially more participatory than a heavily centralized representative system.

Secondly, democratic principles such as transparency and accountability were easier to entrench in governance because of the peoples' proximity to political institutions within the structure of the regional governments. A government that is "close to the people" can easily be held accountable in development matters through participatory decision-making.

Unfortunately, these regional governments did not last for long. Their efficacy in service delivery and representation of the people was never tested. There is no historical data available to test the hypothesis that regionalism would have led to the emergence of a development paradigm that was compatible with the principles of the RTD in Kenya. Soon after independence, the government of the late Jomo Kenyatta, the founding president of the Republic of Kenya, embarked on dismantling

¹⁸⁷ Stamp 1986 *Afr Stud Rev* 10.

regional governments. *Majimbo* was viewed as "unworkable and politically inappropriate: a tactic of divide and rule by the British."¹⁸⁸

The Kenyatta government delayed the operationalization of the regional assemblies.¹⁸⁹ It also ensured that the regional governments did not receive the funds they needed to operate,¹⁹⁰ and thus "by July 1964, all the bank accounts of the regional assemblies were empty".¹⁹¹ The provincial administration (a relic of colonialism) played an instrumental role in frustrating the operations of the regional government. The Provincial Commissioners, who were supposed to be Civil Secretaries or heads of the civil service in the regions, were kept as agents of central government.¹⁹² The central government ensured that civil servants, who were supposed to be under the regional governments, were directly accountable to it such that the regional governments could grind to a halt.¹⁹³

The dismantling of regionalism had a significant impact on Kenya's development. This marked the institutionalization and legitimacy of a development paradigm that was not participatory due to the centralization of political power. It is submitted that regionalism potentially provided an avenue for the citizens to participate in decision making and distribution of development resources through the regional governments. By doing so, the people can play a more significant role in the development¹⁹⁴ and ultimately become direct beneficiaries of development,¹⁹⁵ which is the essence of the RTD.

Arguably, regionalism presented an excellent opportunity for Kenya to create a development paradigm that would be participatory and equitable if it was not sacrificed at the altar of politics. In that context, Mutakha laments that if regionalism had "been honestly implemented, the history of Kenya would perhaps be different today".¹⁹⁶

¹⁸⁸ Gertzel *Politics of Independent Kenya* 1-7.

¹⁸⁹ Stamp 1986 *Afr Stud Rev* 25.

¹⁹⁰ Odinga *Not yet Uhuru* 233-234; Ochieng "Structural and Political Changes" 92-97.

¹⁹¹ Branch *Kenya: Between Hope and Despair* 15.

¹⁹² Oyugi "Local government in Kenya" 1-2.

¹⁹³ Oyugi *Local Government and Development* 20-21.

¹⁹⁴ Article 174(d) of the Constitution of Kenya 2010.

¹⁹⁵ Article 174(h) of the Constitution of Kenya 2010.

¹⁹⁶ Mutakha "Regional inequalities in Kenya" 130.

Kenya was transformed into a *de facto* one-party state after KADU was absorbed by KANU and the regional governments dismantled.¹⁹⁷ This created a fertile ground for the government to pursue socio-economic and political policies that were not participatory. The Kenyatta government worked to consolidate power under the guidance of the powerful attorney general Charles Njonjo. Opposition parties such as the Kenya People's Union (KPU) under Jaramogi Odinga Oginga were banned, and its leaders were arrested.¹⁹⁸ Other political dissidents were fought using repressive methods such as assassinations, arrests, detention without trial, and loss of parliamentary seats, to name but a few.¹⁹⁹

All this was done to ensure that the political power was centralized around a powerful presidency. That meant platforms through which Kenyans could exercise their participatory rights were destroyed. The development paradigm that emerged was not participatory because there was minimal involvement of the citizens either directly or through their representatives in development. Unfortunately, the independent government adopted the same tactics that the colonial government employed to ensure that those who opposed its policies were silenced. In this context, Mueller aptly commented:

It appears that many of the tools of repression which were articulated under colonialism and then refined by a new ruling class after independence are still being used to consolidate the state against its detractors.²⁰⁰

Therefore, participation in government was largely the preserve of those who either belonged to the president's tribe or were his pledged loyalists.²⁰¹ Kenyatta ruled the country surrounded by his cabal, mainly from his ethnic Kikuyu, who eventually locked out other ethnic groups from the political and economic order during his presidential term (1963-1978).²⁰²

Daniel Arap Moi, who succeeded Kenyatta in 1978, continued with this trend. Moi embarked on "taming" the Kikuyu by surrounding himself with his ethnic Kalenjin.²⁰³

¹⁹⁷ Anderson 2005 *J Contemp Hist* 563.

¹⁹⁸ Opondo 2014 *Afr J Hist & Cult* 62-64.

¹⁹⁹ Opondo 2014 *Afr J Hist & Cult* 62-64.

²⁰⁰ Mueller 1984 *J Mod Afr Stud* 399.

²⁰¹ Mbondenyi 2011 *J Afr L* 49.

²⁰² Opondo 2014 *Afr J Hist & Cult* 62-64.

²⁰³ Opondo 2014 *Afr J Hist & Cult* 63.

Mwai Kibaki, who succeeded Moi in 2003, also monopolized power by appointing senior government officials who were mainly from his ethnic Kikuyu to the chagrin of his coalition partners.²⁰⁴

It is submitted that the above state of affairs led to the birth of a development paradigm that was not participatory. It was centred around political patronage and rewarding "politically friendly regions" with development resources. This development paradigm was definitely incompatible with the principles of the RTD.

Rigged elections also violated the people's right to participate in government because the leaders who won elections were not "true representatives". They owed their allegiance to the political forces that rigged them to office. A good example is the shambolic "*mulolongo*" or queue voting system set up in 1988, where any candidate who garnered 70% in the nomination process was considered to have been elected unopposed.²⁰⁵ The objective was to ensure a majority of Moi loyalists in parliament and consolidate the president's power in Kenya.²⁰⁶

It is submitted that without proper representation, the people were "cut off" from the development process; there were no normative structures that could yield meaningful participation in development and fair distribution of benefits resulting thereof. People's representatives could not legitimately articulate the peoples' concerns in the matters of development because of influence from a powerful presidency.

Institutions such as parliament and the judiciary, which play a significant role in protecting the peoples' participatory rights in modern democracies, became victims of state capture and were reduced to institutions subservient to the executive personified in the imperial presidency. Their role of checks and balances was rendered otiose.²⁰⁷ The late Abdul Majid Cokar, retired chief justice of Kenya 1994 to 1997, noted that the president (Moi) had no hesitation in suggesting that he was ready and available to offer advice to the chief justice or the judiciary "regarding the

²⁰⁴ Opondo 2014 *Afr J Hist & Cult* 65.

²⁰⁵ Mwaura "Political succession and related conflicts in Kenya".

²⁰⁶ Opondo 2014 *African Journal of History and Culture* 64.

²⁰⁷ Mutakha *Constitutional framework for devolution* 99.

probable consequences of any legal or factual decisions on sensitive tribal and land matters".²⁰⁸ This was a clear demonstration of the loss of judicial independence.

Scholars have attributed this unapologetic interference with judicial independence to a weak constitutional structure that gave the president immense powers, including the powers to appoint key judicial officers such as the chief justice and judges of the superior courts.²⁰⁹ It is submitted that Kenyans were unable to realise their participatory rights because of the inherent weaknesses in institutions such as the judiciary and parliament, which failed to check on a powerful presidency.

Perhaps the boiling point of continuous violation of the people's right to participation was the 2007 elections which ended with post-election violence that saw more than 1,300 Kenyans lose their lives and over 300,000 others displaced and forced to live in IDP camps.²¹⁰ The violence was a by-product of decades of manipulated electoral processes, ethnicisation and betrayal by the Kenyatta regime on land allocation in the Rift Valley.²¹¹ The violence also had been attributed to underdevelopment, economic competition and historical injustices.²¹² The Electoral Commission of Kenya's chairperson, the late Samuel Kivuitu, confirmed that the elections had not been free and fair when he went on record to state that he did not know who won the presidential elections in 2007.²¹³

In the wake of the 2007-2008 post-election violence, an independent commission of inquiry headed by Justice Johann C Kriegler as retired judge of the South African Constitutional Court was constituted by President Kibaki. Its terms of reference were to enquire into the aspects of the 2007 elections, particularly the presidential election. Among the raft of measures recommended by the Kriegler Report was an overhaul of the constitutional and legal framework around elections to guarantee free, fair and peaceful elections.²¹⁴ This led to the birth of the Constitution of Kenya

²⁰⁸ Cockar *Doings, non-doings and mis-doings* 214.

²⁰⁹ Mutua 2001 *HRQ* 96-118; Ojwang "The independence of the judiciary in Kenya"; Ally 2016 *Athens J L* 137-158; Oseko *Judicial Independence in Kenya*.

²¹⁰ Opondo 2014 *Afr J Hist & Cult* 65.

²¹¹ Opondo 2014 *Afr J Hist & Cult* 65.

²¹² Opondo 2014 *Afr J Hist & Cult* 65.

²¹³ Ochami and Ombati <https://www.standardmedia.co.ke/article/2000031666/kivuitu-feared-kibaki-wanted-ally-at-eck-helm> (Date of use: 03 May 2020).

²¹⁴ See generally, Independent Review Commission <http://kenyalaw.org/kl/fileadmin/CommissionReports/Report-of-the-Independent-Review-Commission-on-the-General-Elections-held-in-Kenya-on-27th-December-2007.pdf> (Date of use: 05 May 2020).

2010, which entrenched participatory rights in law as both a fundamental right²¹⁵ and a national value and principle of governance.²¹⁶

A constitutional commission known as the Independent Electoral and Boundaries Commission (IEBC) was created to ensure that elections are free, fair and transparent to reflect the volition of people in elections.²¹⁷ The IEBC is an independent constitutional commission that is accountable to the Constitution and functions independently from other arms of government.²¹⁸

The post-colonial period saw the right to participate being violated and severely restricted by governments fixated on consolidating, and centralising executive and political power. Therefore, it is doubtful whether any meaningful progress was made towards the realisation of the RTD in its development initiatives. Arguably, participatory rights were at a bare minimum until 2010 when a new Constitution passed in Kenya.

Participation is a key principle of the RTD. It requires that people have to meaningfully partake in the development process both as agents and beneficiaries. Arguably, participatory development has a tangible impact on the socio-economic status of the people because it addresses their most dire needs. In other words, participatory development prioritizes the citizens' needs and allows them to work with the government to meet these needs. Non-participatory development, on the other hand, may yield "irrelevant" development; for instance, a tarmac road constructed in an area where the citizens' development priority was access to clean water.

Centralisation of political power in the persona of a powerful executive was not good for Kenya. It made development synonymous with political patronage. Therefore, it is submitted that the development model pursued by the Kenyan government during the post-colonial period until August 2010, when Kenya enacted a new Constitution, was not participatory and was, therefore, incompatible with the principles of RTD.

²¹⁵ Article 38 of the Constitution of Kenya 2010.

²¹⁶ Article 10 of the Constitution of Kenya 2010.

²¹⁷ Article 88 of the Constitution of Kenya 2010.

²¹⁸ Chapter 15 of the Constitution of Kenya 2010.

3.5.2 Access to Land

This section will analyse Kenya's development paradigm(s) during the post-colonial period up to August 2010, when the new Constitution is enacted. The analysis seeks to determine whether the said development paradigm was compatible with the principles of the RTD. This is because under the UNDRTD states are required to design national development policies whose objective is to constantly improve the welfare of its people, based on their active, free and meaningful participation in development and in the fair distribution of the benefits resulting thereof.

This duty requires the government to ensure that its citizens actively, meaningfully and freely participate in development by creating appropriate national development policies. An appropriate national development policy should guarantee access to vital development resources such as land.

Land is a vital factor in Kenya's development process since Kenya's economy is primarily supported by agriculture.²¹⁹ Access to land is also a critical factor in defining Kenya's development paradigm during the post-colonial period. Based on this, it is argued that access to land, to a large extent, determines ones' ability to pursue their socio-economic, political and cultural development in Kenya.

Arguably, access to land was at the heart of the struggle to liberate most African countries from the clutches of colonialism. Land was the fuel that drove the quest for independence from foreign domination in Kenya, Tanzania, Zimbabwe, South Africa and other African Countries. How independent governments handled the land question had a direct impact on the development trajectories of these countries. In that context, Sygga argues that one of the enduring hallmarks of colonialism in Africa is the land question often couched in the phrase "historical land injustices".²²⁰

For instance, in Tanzania, the loss of land by the Wameru people provided a platform for the opposition to rally against "colonial rule throughout the country and heightened political awareness".²²¹ The Meru land case was actually a "central

²¹⁹ Boitt *et al* 2015 *J Agric Inform* 23; Nyaga 2015 *Q J Int' L Agric* 245.

²²⁰ See generally, Syagga *Public land, historical land injustice and the new Constitution*.

²²¹ Sundet *The politics of land in Tanzania* 21.

factor behind the creation of the Tanganyika African Union (TANU)",²²² Tanzania's independent political party.

Robert Mugabe was elected as the first president of Zimbabwe (formerly known as Rhodesia) on the altar of land reform.²²³ In 1980 when Zimbabwe attained its independence, approximately 6,000 White farmers occupied 15.5 million hectares of land while millions of Africans had been crammed in native reserves.²²⁴ The independent government inherited a major land problem from the British colonialists represented by inequitable land holding. The problem was legally bequeathed to the independent government vide the Lancaster House Constitution of 1979.²²⁵ Unfortunately, Mugabe's attempt to tackle this problem in the "third chimurenga"²²⁶ (forceful seizure of White-owned farms) destroyed Zimbabwe's economy.²²⁷

South Africa continues to grapple with the land reform more than a quarter of a century after the White minority rule ended with little success if any. The racially prejudiced land ownership pattern is attributed to colonialism or apartheid²²⁸ and constitutionally entrenched property rights.²²⁹ Cyril Ramaphosa recently indicated the government's commitment to land expropriation without compensation which he argues will be important in addressing historical injustices that occurred during colonialism when Black people were stripped of their right to own property by South Africa's Natives Land Act of 1913.²³⁰ The sceptics, such as the U.S Secretary of State Mike Pompeo, have warned that such a move would be disastrous to the economy.²³¹

The above examples from Tanzania, Zimbabwe and South Africa demonstrate how access to land and economic development are enmeshed in most African countries. Therefore, it is right to assert that in countries whose development was closely tied

²²² Cliffe "Nationalism and the reaction to enforced agricultural change" 19-20.

²²³ Thomas 2003 *Third World Q* 691-712; Gonye and Moyo 2012 *Int'l J Asian Soc Sce* 88-101; Mlambo 2005 *Hist Comp* 1-21; Nmoma 2008 *Journal of African Studies* 377.

²²⁴ Mlambo 2005 *Hist Comp* 7.

²²⁵ Mlambo 2005 *Hist Comp* 2.

²²⁶ Gonye and Moyo 2012 *Int'l J Asian Soc Sce* 88. The authors describe Mugabe's 'Fast Track Land Reform' as the third chimurenga.

²²⁷ See generally, Richardson *The Collapse of Zimbabwe*.

²²⁸ Cohen 2020-02-26 *The Washington Post*.

²²⁹ See generally, Ntsebeza "Land redistribution in South Africa".

²³⁰ Cohen 2020-02-26 *The Washington Post*.

²³¹ Cohen 2020-02-26 *The Washington Post*.

to the land, any meaningful development paradigm must address the issue of access to land.

In Kenya, the colonial government's development paradigm involved restricted access to land for Africans. It is argued that this development paradigm was an obstacle to the development of native Kenyans and was thus incompatible with the principles of the RTD. The Mau Mau freedom fighters and many other landless Kenyans hoped that independence would come with the return of their "stolen" land.

Unfortunately, after independence, the land question was never resolved²³² and instead, the government continued to play the politics of continuity which was deemed "politically expedient", rather than addressing historical injustices around the land.²³³ Kanyinga accurately argues that Kenya attained independence in 1963 without resolving the land question.²³⁴ Consequently, the land question remained a crucial historical point in Kenya's post-colonial period and continues to be an emotive and sensitive issue in Kenya.²³⁵ The reasons for the failure of the independent government to address the land question must be attributed to the economic and political events leading to Kenya's independence in 1963.

During the negotiations for independence, Ian McLeod, the Secretary of State for the Colonies, who was described as "the progressive new broom to sweep away the old empire",²³⁶ presented the White highlanders with "a *fait accompli* at the first set of talks; "majority rule will come in, with an open franchise". They were promised a fair price for their land with no more concessions."²³⁷ The settlers who decided to leave Kenya were allowed to sell their land under a government-sponsored programme known as the "Million Acre Scheme", which was ostensibly supposed to allow Africans to purchase the land.²³⁸

This did not resolve the land question because those who could afford the land were mostly wealthy Africans who collaborated with the colonialists.²³⁹ At independence,

²³² Karanja 2010 *Nordic J Hum Rts* 178.

²³³ Karanja 2010 *Nordic J Hum Rts* 187.

²³⁴ Kanyinga *Re-Distribution from Above* 48.

²³⁵ Sifuna 2009 *LEAD Journal* 42.

²³⁶ Anderson *Histories of the Hanged* 329.

²³⁷ Anderson *Histories of the Hanged* 331.

²³⁸ Anderson *Histories of the Hanged* 331.

²³⁹ Anderson *Histories of the Hanged* 331.

several wealthy and politically connected Kikuyus managed to purchase farms that were owned by the settlers.²⁴⁰ It is argued that the policy of restricted access to land was transferred from colonialists to an emerging African elite. As the saying goes, "the monkeys changed, but the forest remained the same".

The government of Kenya created land settlement schemes to settle squatters in various parts of the country. These schemes did not benefit impecunious squatters, and other landless persons because they could not afford to pay for the land.²⁴¹ With time, the rich and the politically connected minority immensely benefited from government land allocations that were beyond the reach of the majority landless Kenyans.²⁴² Even with these "cosmetic" land distribution programs, access to land continued to be an obstacle to development for a vast majority of Kenyans.

Post-independence governments retained the colonial land laws without any significant alterations. The land policy was also not changed even though the government had identified landlessness as a significant obstacle to the national goal of food security.²⁴³ The landlessness created by the colonial regime continued to be a problem and was never fully resolved after independence. The problem continued to thrive during the post-colonial period, thus negatively affecting the development of the people.

The Mau Mau rebellion, which set the stage for Kenya's independence, was essentially motivated by land restitution claims.²⁴⁴ The fact that the independence government short changed the Mau Mau fighters, is a clear indication that land reform was not adequately addressed by the said government. Jomo Kenyatta, Kenya's founding president, did acknowledge the role of the Mau Mau freedom fighters in the struggle for independence in Kenya but did nothing beyond a mere acknowledgment. According to Anderson;

He did not make any public statement that granted the Mau Mau freedom fighters any rights or any genuine compensation.²⁴⁵ These were not his people, they had no

²⁴⁰ Anderson *Histories of the Hanged* 331.

²⁴¹ Kanyinga *Re-Distribution from Above* 47.

²⁴² Mweseli "Centrality of Land in Kenya" in Wanjala (ed) *Essays on Land Law* 22.

²⁴³ Kanyinga *Re-Distribution from Above* 9.

²⁴⁴ Karanja 2010 *Nordic J Hum Rts* 179.

²⁴⁵ Anderson *Histories of the Hanged* 335.

political legitimacy, and thus, in Kenyatta's Kenya, there would be a deafening silence about the Mau Mau.²⁴⁶

Karanja attributes the land clashes of the 1990s and the post-election violence of 2007-2008 in Kenya to unresolved land issues stemming from colonial times. These land clashes reversed a lot of the developmental gains that Kenyans had made on account of loss of lives and property.²⁴⁷

Apart from the failure of the government to address the land question, the president of Kenya, under the independent constitution, enjoyed unchecked powers in giving grants of freehold and leasehold of un-alienated government land to individuals and corporations.²⁴⁸ As a result, land and the presidency became inextricably intertwined. Land became the "single most important 'political resource', especially in the context of the concentration of the power to determine access and control in the presidency".²⁴⁹ This meant that access to land for development in post-colonial Kenya continued to be the privilege of those with political connections or financial muscle.

Political allies, wealthy business people, relatives and anyone who had access to the presidency had invariably been given land. In this context, Kanyinga notes that:

... in the second half of the 1980s, land became an important resource for establishing and maintaining patronage relations with leaders of groups that were considered to be of strategic significance in terms of political support.²⁵⁰

This consequently accelerated the practice of illegal allocation of public land in Kenya. "Illegal allocation of public land" in the context of this thesis means that public land was used to further the government's political objectives, which had no nexus to the well-being and development of Kenyans.

The practice of illegal allocations of land intensified in the late 1980s and throughout the 1990s. Land was allocated for political rewards and speculation purposes and not for development purposes or for the general public²⁵¹ hence the term "land

²⁴⁶ Anderson *Histories of the Hanged* 336.

²⁴⁷ Karanja 2010 *Nordic J Hum Rev* 179.

²⁴⁸ Section 3 of the Government Lands Act Cap. 280 (repealed).

²⁴⁹ Kanyinga *Re-Distribution from Above* 54.

²⁵⁰ Kanyinga *Re-Distribution from Above* 51.

²⁵¹ Kanyinga *Re-Distribution from Above* 51.

grabbing". There was a lot of reluctance from the government to pursue land reforms recommended by various task forces such as the Njonjo Commission (1999) and the Ndun'gu Commission (2003), charged with investigating the land problem in Kenya.²⁵² The reluctance was perhaps anchored on the reality that control of land served short term personal and political interests of the government of the day.

National resources such as forests were de-gazetted and allocated to private individuals and corporations, including the president himself, without any public interest considerations²⁵³ such as enabling the wider population to pursue their development. Ironically this was the same development policy the colonialists adopted where access to land had been given to a select group leaving the rest of the population unable to develop. The late Professor Wangari Maathai, a Nobel Peace Prize laureate in her memoir "Unbowed", vividly captured this sorry state of affairs in the following words:

In the summer of 1998, I learned of an example of land grabbing so blatant and extensive that I knew this would be a fight we could not afford to lose. The government was taking public land in Karura forest to the north of Nairobi and giving it to its political allies for executive offices and private houses..... I went to Karura to see for myself, I discovered that a road had already been dug and workers were laying down what looked like a drainage system. Even though the work had not yet begun on the houses, several structures to house the construction workers had been erected.²⁵⁴

Professor Mathaai's account paints a poignant picture of the unlimited power that the government had over land allocation. While land allocation by the executive arm of the government was successful in controlling the mischief of land speculation in the colonial era, the same system backfired after independence because it facilitated the massive illegal and irregular allocation of public land by the government.²⁵⁵ The president and the Commissioner of Lands had the opportunity to allocate land in ways that were subversive because the very officials that were

²⁵² Wamari <https://www.nation.co.ke/lifestyle/weekend/1220-151872-x2dcytz/index.html> (Date of use: 10 May 2020).

²⁵³ See generally, Republic of Kenya *Report on the Commission of Inquiry into the Illegal / Irregular Allocation of Public Land* (2004).

²⁵⁴ Maathai *Unbowed* 262. It is worth noting that Wangari Maathai through her Green Belt organisation was able to successfully stop the government from carrying out "land grabbing" in Karura forest and Uhuru Park in Nairobi.

²⁵⁵ Republic of Kenya *Report on the Commission of Inquiry into the Illegal / Irregular Allocation of Public Land* (2004) 6-7.

supposed to be custodians of public land became the facilitators of illegal and irregular allocations of the same land.²⁵⁶

From the above discourse, it emerges that the post-colonial governments in Kenya failed to initiate land reforms and exacerbated the existing disparities in access to the land created by the colonialists. In an economy where the majority of the people depend on agricultural activities to earn a living, access to land, therefore, becomes an enabler of development. The land policies and laws in post-colonial Kenya created obstacles to development by restricting access to land.

The peoples' ability to develop themselves and increase their choices were curtailed due to lack of access to land, thus violating their right to development. In a nutshell, an analysis of the development paradigm that the Kenyan government pursued during the post-colonial era viewed in the context of access to land was not compatible with the principles of the RTD because it created obstacles to development instead of enabling development for the entire Kenyan population.

3.5.3 Equity in Development

This section analyses the development paradigm that emerged during the post-colonial era in Kenya up to August 2010, when the new Constitution had been promulgated. The analysis seeks to establish whether the said development paradigm was equitable and compatible with the RTD principles.

It is argued herein that the colonial phase of development in Kenya was not equitable because the distribution of development resources was biased in favour of the colonialists, and as a result, indigenous Kenyans were left behind in development. The level of inequality in Kenya today strongly indicates that the inequitable development experienced during the colonial era spilt over to the post-colonial period.

According to statistics from Oxfam, 0.1% of Kenya's population hold the bulk of the wealth, thus limiting access to opportunity.²⁵⁷ This reality denies most Kenyans access to healthcare, social security, decent shelter and education, among other

²⁵⁶ Republic of Kenya *Report on the Commission of Inquiry into the Illegal / Irregular Allocation of Public Land* (2004) 7.

²⁵⁷ Ochieng 2019-01-22 *Business Daily*.

services that are key to their development as human beings.²⁵⁸ The concept of inequality is around the unfair distribution of both material and service resources. The distribution of material and service resources may result in either equality or inequality because inequality is a by-product of distribution of resources.²⁵⁹ Therefore, the role of government in the allocation of resources plays a critical role in facilitating equitable development.

Post-colonial Kenya crafted its initial development paradigm around Sessional Paper No 10 of 1965 titled "African Socialism and its Application to Planning in Kenya".²⁶⁰ The policy paper dubbed "African Socialism" was presented by the ministry of economic planning and development as a strategic vision for Kenya. The objective was to create a blueprint for social and economic transformation in which African values and capitalism function side by side.²⁶¹ The policy paper was adopted in 1965 by the first independent government as the economic blueprint for Kenya and thus shaped Kenya's post-colonial development paradigm.

The vision of the policy paper was egalitarian in nature and very impressive. It sought to achieve equity in development by implementing a six-point agenda: "political equality, social justice, human dignity, including freedom of conscience, freedom from want, disease and exploitation, equal opportunities and finally, high and growing per capita incomes equitably distributed".²⁶²

However, in paragraph 133, the policy paper deviated from its "noble cause" by stating:

One of our problems is to decide how much priority we should give in investing in less developed provinces. To make the economy as a whole grow as fast as possible, development money should be invested where it will yield the largest increase in net output. This approach will clearly favour the development of areas having abundant natural resources, good land and rainfall, transport and power facilities, and people receptive to and active in development. A million pounds invested in one area may raise net output by £20,000 while its use in another may yield an increase of £100,000. This is a clear case in which investment in the second area is the wise decision because the

²⁵⁸ Ochieng 2019-01-22 *Business Daily*.

²⁵⁹ Mutakha "Regional inequalities in Kenya" 117.

²⁶⁰ Republic of Kenya "African Socialism and its application to planning in Kenya" (Sessional Paper No 10 of 1965).

²⁶¹ Speich 2009 *Dipl Hist* 440.

²⁶² Republic of Kenya "African Socialism and its application to planning in Kenya" (Sessional Paper No 10 of 1965) 2-3.

country is £80,000 per annum better off by so doing and is therefore in a position to aid the first area by making grants or subsidized loans.²⁶³

The wording of the above paragraph confirms that the independent government adopted a colonial development and investment policy²⁶⁴ that involved putting Kenyan people into "zones" based on how receptive they were to development. It is also quite a concern that the sessional paper recommended giving low yield areas investment money in loans. This development policy ran afoul with principles of equitable development such as distributive justice, which are part and parcel of the RTD. In the context of allocating resources to different regions in a country, equity means distributing development resources based on the needs of a particular region and not the productivity of regions. The "zoning of people" also suggests that human beings were not the centre of development and that the RTD is not an inalienable right.

The government further encouraged rural-urban migration or the movement of people from low potential to high potential areas or regions.²⁶⁵ At one point, the independent government under Kenyatta ordered Asian business people to leave smaller towns and relocate their businesses to bigger cities. The wisdom in this directive was to allow Africans to run businesses in the smaller towns.²⁶⁶ Unfortunately, the directive resulted in capital flight, stagnation in development, loss of skills and opportunities in the small towns.²⁶⁷

To a certain extent, the notion that you can "develop people" and not develop the areas where they reside was also biased.²⁶⁸ Development cannot be selective. It has to be all-inclusive and equitable in nature. Kamga refers to it as a "holistic and human-centred process" for all individuals and peoples.²⁶⁹ Under the UNDRTD, development is viewed as a comprehensive economic, social, cultural and political process aiming at the constant improvement of the well-being of the entire population and of all individuals based on their active, free and meaningful

²⁶³ Republic of Kenya "African Socialism and its application to planning in Kenya" (Sessional Paper No 10 of 1965) 46-47.

²⁶⁴ Mutakha "Regional inequalities in Kenya" 130.

²⁶⁵ Mutakha "Regional inequalities in Kenya" 47 para 134.

²⁶⁶ Mutakha "Regional inequalities in Kenya" 132.

²⁶⁷ Mutakha "Regional inequalities in Kenya" 132.

²⁶⁸ Mutakha "Regional inequalities in Kenya" 132.

²⁶⁹ Kamga *Human rights in Africa* 66.

participation in development and in the fair distribution of the benefits resulting from them.²⁷⁰ It is impossible to improve the well-being of an entire population without improving the areas where the population resides because development is holistic.

Tom Mboya, the chief architect of the 1965 sessional paper, was a firm believer that "forced economic growth would automatically increase the living standards of Kenyans".²⁷¹ Perhaps Mr Mboya did not view development "development" as a comprehensive social, economic, cultural and political process that aims at the constant improvement of the welfare of peoples through their active participation.²⁷² It is submitted that the separation of human rights from the process of development results in a violation of the RTD, and the end product of such a process cannot be referred to as "development".

The sessional paper also advocated for sacrificing the socio-economic rights of the present generation to guarantee future generations' rights. The government argued that it could not provide health services, social security benefits, universal basic education and student loans / bursaries immediately. This is because to provide them "fully and freely now would bankrupt the nation and mortgage economic growth for future generations".²⁷³ Thus the sessional paper advocated that a bigger portion of the development expenditure should be put into activities that would boost agriculture and industrial development in Kenya.²⁷⁴ These measures are thought to "establish a foundation for increased and extended welfare services in the future".²⁷⁵ Such an argument is incompatible with the RTD because the outcome of development ought to be the realisation of all human rights and fundamental freedoms and not to sacrifice certain rights to realise others. It is also incompatible with the principle of progressive realisation of socio-economic rights.²⁷⁶

The Sessional Paper No. 10 of 1965 was not compatible with the principles of the RTD because it failed to provide equity in development. In that regard, Mutakha

²⁷⁰ The Preamble of the UNDRTD para 2.

²⁷¹ Speich 2009 *Diplomatic History* 462.

²⁷² The Preamble of the UNDRTD.

²⁷³ Republic of Kenya "African Socialism and its application to planning in Kenya" (Sessional Paper No 10 of 1965) 29.

²⁷⁴ Speich 2009 *Dipl Hist* 449.

²⁷⁵ Republic of Kenya "African Socialism and its application to planning in Kenya" (Sessional Paper No 10 of 1965) 30, 52.

²⁷⁶ United Nations 1987 *Human Rights Quarterly* 122-135.

refers to it as "a development and investment policy that helped increase the regional disparities in Kenya".²⁷⁷ Dharam Ghai, an economist, studied the sessional paper and noted that it was not equitable and thus warned about the emergence of an African upper class. He recommended government control of salaries to ensure equitable distribution of wealth.²⁷⁸

Okoth-Ogendo, on the other hand, opined that the Sessional Paper No. 10 was "neither a political philosophy nor a plan but rather a simple answer to public clamour for an ideology of government".²⁷⁹ This means that it was not well thought out and did not achieve the egalitarian goals it purported to pursue. David Ndii pejoratively referred to the Sessional Paper No. 10 of 1965 as "development fundamentalism"²⁸⁰ because the government proceeded to adopt, defend and implement the policy despite the fact that it was flawed and did not support equitable development.

Unfortunately, the thinking that informed the sessional paper affected all other planning policies, and it became the norm for the civil service to adopt hard and entrenched positions on economic planning and development.²⁸¹ Sessional paper of 1965 had "a contagion effect" on all other development plans in systemic ways, thus leading to poor service delivery, inefficiencies and losses in State-owned companies.²⁸²

The Sessional Paper No. 10 of 1965 was the foundational blueprint for development in post-colonial Kenya hence the basis of regional development disparities. Therefore, its negative effects could not be undone overnight. As discussed in Chapter 3, efforts to decentralize development through the LATF and CDF, among others, failed to address the deep-seated inequality in the country. Perhaps the Kenyan situation is best exemplified by the parable of the wise and foolish builders in the bible. One of the builders constructed his house on sand and the other on a

²⁷⁷ Mutakha "Regional inequalities in Kenya" 130.

²⁷⁸ Ghai 1965 *East Afr J* 15-18.

²⁷⁹ Cited in Ochola <https://www.internationalbudget.org/wp-content/uploads/ibpkenya-equity-week-2016-sessional-paper-10-critique-shem-ochola-9-19.pdf> (Date of use: 10 May 2020) 2.

²⁸⁰ <https://www.nation.co.ke/oped/opinion/440808-2356036-3914ag/index.html>

²⁸¹ Ochola <https://www.internationalbudget.org/wp-content/uploads/ibpkenya-equity-week-2016-sessional-paper-10-critique-shem-ochola-9-19.pdf> (Date of use: 10 May 2020) 5.

²⁸² Ochola <https://www.internationalbudget.org/wp-content/uploads/ibpkenya-equity-week-2016-sessional-paper-10-critique-shem-ochola-9-19.pdf> (Date of use: 10 May 2020) 4.

rock. The house built on a rock withstood a flood, while the house constructed on sand was washed away because of its weak foundation.²⁸³ Kenya created its development plans on a faulty foundation resulting in neither equitable nor people-centred development.

Another factor that influenced or defined Kenya's development was a powerful chief executive (the president) who had a huge influence on the distribution of development resources around the country. For instance, until 2004, the president was the sole appointing authority of all ministers, ambassadors, military chiefs, heads of government corporations²⁸⁴ and senior judicial officers.²⁸⁵ He was also the chancellor of all public universities and controlled parliament's calendar; he could prorogue or convene the same. Impeaching the president also meant that parliament was dissolved immediately.²⁸⁶ In a nutshell, the president was the most powerful individual in government who could influence how development resources were being distributed.

Regions perceived to be "politically friendly" received the "lion's share" of development resources while other regions received "scraps".²⁸⁷ Persons from the president's ethnic community (Kalenjins during Moi's tenure and Kikuyus during Jomo Kenyatta and Kibaki's tenures) had been appointed to key government institutions and thus were able to influence the allocation of development resources in favour of their regions.²⁸⁸ This resulted in the inequitable distribution of development resources in Kenya, hence the marginalization of certain regions in terms of socio-economic development.²⁸⁹

The above analysis has demonstrated that the development paradigm that Kenya adopted during the post-colonial period led to regional disparities in development; some regions received more development resources than others. This state of affairs was attributed to the government's development policies, such as the

²⁸³ Mathew 7:24-27 and Luke 6:46-49.

²⁸⁴ Opondo 2014 *Afr J Hist & Cult* 60.

²⁸⁵ Oseko *Judicial Independence in Kenya* 137.

²⁸⁶ Opondo 2014 *African Journal of History and Culture* 60.

²⁸⁷ Kimenyi and Ndung'u "Sporadic ethnic violence" in Collier and Sambanis (eds) *Understanding Civil War* 123-156.

²⁸⁸ Adar and Munyae 2001 *Afr Stud Q* 1.

²⁸⁹ Opondo 2014 *Afri J Hist & Cult* 65.

Sessional Paper No. 10 of 1965, which was inherently flawed regarding resource distribution. It failed to espouse equity and pushed for the allocation of development resources to regions that could yield high returns on investment.

Therefore, it is argued that subsequent government development policies were built on the flawed foundations of the Sessional Paper No. 10 of 1965, thus failing to address the issue of equity in the allocation of development resources. In addition, the constitutional architecture that created a powerful executive also negatively influenced the government's development paradigm of basing resource allocation on neopatrimonialism and not equity. It is submitted that this development paradigm was incompatible with the principles of the RTD because it failed to espouse equity.

3.5.4 General Observations

The foregoing discourse has demonstrated that the development paradigm in post-colonial Kenya up to 2010 when the Constitution of Kenya 2010 was promulgated was not people-driven, meaning that it was not participatory. Development was structured along with political patronage, ethnic affiliations and cronyism. The participation of the people in development was minimal because of a centralized system of government that failed to provide structures or forums for meaningful participation by citizens in matters of development.

Land was not used as an enabler of development. Instead, it was a resource for political mobilisation and strategic alliances. Land continued to be a scarce resource and remained in the hands of a minority of Kenyans who had access to both political and economic power. The post-colonial governments in Kenya adopted and perfected the colonial development paradigm that restricted access to land for indigenous Kenyans.

Development was not equitable. Some regions were favoured by the government in the allocation of development resources more than others. Sessional Paper No 10 of 1965 titled "African Socialism and its Application to Planning in Kenya" justified this skewed development policy and thus set the foundation for inequitable development in Kenya. This policy paper is cited as the source of regional development disparities in modern Kenya.

In light of the foregoing, it is argued herein that the post-colonial era in Kenya failed to yield a development paradigm compatible with the RTD. However, this thesis argues that the devolution of power under the Constitution of Kenya 2010 created a normative and institutional structure that birthed a new development paradigm that is compatible with the RTD in Kenya.

3.6 Conclusion

This chapter has been able to answer the question as to whether the RTD is recognized as a valid and justiceable human right within the Kenyan legal system. The RTD is not expressly mentioned in the Constitution of Kenya, but it is argued that group rights and environmental rights in Articles 42, 56 and 69 give rise to the RTD. These rights protect minorities and marginalized groups by bestowing the affirmative action rights. Environmental rights seek to ensure that there is sustainable development and equitable use of natural resources. The interrelated nature of human rights in the bill of rights within the Constitution of Kenya also gives rise to the RTD in Kenya.

It has been submitted that Articles 2(5) and (6) of Kenya's Constitution are a source of the RTD in Kenya. Article 2(5) and (6) recognizes ratified treaties and general rules of international law as part of the law of Kenya. Kenya has ratified major international human rights treaties such as the ICCPR, ICESCR and the ACHPR, meaning that these treaties are part of the law of Kenya. Specifically, the ACHPR provides for the RTD thus applicable to Kenya. It was also argued that the UDHR and UNDRTD are *jus cogens* and thus part of the law of Kenya.

Having identified its normative underpinnings, it is clear that the RTD is a justiciable human right, and its application and enforceability in Kenya are without any doubt.

This chapter has also traced Kenya's development history from colonial times to the post-colonial period in a bid to establish the contours of the development paradigm that has driven Kenya's development policies up to the year 2010 when the country adopted a new constitution that provided for a devolved system of government. This was crucial because some of the development challenges, such as regional disparities, that Kenya is grappling with today, can be traced back to this development paradigm.

This chapter has demonstrated that the colonial and post-colonial phases in Kenya's development journey did not yield a development paradigm that was compliant with the principles of the RTD. These development paradigms were interrogated through the lens of participation, access to land and equity in development as themes that relate to the realisation of the RTD.

An analysis of the colonial period in Kenya demonstrated that the development paradigm implemented by the colonial government was not compatible with the RTD. This is because development was not participatory; colonial laws and policies ensured that native Kenyans will be left out of the development matrix both as participants and beneficiaries. Access to land was restricted in favour of the minority settlers. Native Kenyans were not able to access this vital resource, thus an obstacle to their development. Development was also not equitable because the distribution of resources was skewed in favour of the colonialists.

An analysis of the post-colonial phase shows that Kenya's independence did not herald the birth of a new development paradigm compatible with the RTD. The successive independent governments practised the same inequitable and discriminatory development paradigm created by the colonialists in Kenya. In this context, perhaps the argument that there was a need for a revolution for Kenya to have broken free from colonialism which in the real sense meant "breaking and reducing to ash all aspects of the colonial State" before independence could be achieved,²⁹⁰ is accurate.

The developmental legacy that the British colonialists bequeathed Kenya was inequitable and skewed towards rewarding political loyalists.²⁹¹ Unfortunately, the successive independent governments continued with the same inequitable development system.²⁹² The need to devolve power to the regions in Kenya was, therefore, among other things, an effort to undo the foundations of inequitable distribution of development resources created by the British colonialists. This should have been achieved by placing resources directly in the hands of the people who

²⁹⁰ Gustafson 1995 *Brigham Young U L Rev* 654.

²⁹¹ CKRC Report (2002) 18.

²⁹² Commission on Revenue Allocation <http://devolutionhub.or.ke/file/4ef1130cd1d003e8061520e4d784e647.pdf> (Date of use: 20 February 2018).

ultimately are beneficiaries of development in their respective counties²⁹³ thus, the argument in this thesis that devolution supports the realisation of the RTD.

The quest to establish a development paradigm that would ensure the realisation of the RTD (one that is equitable, participatory and people-centred) led to the enactment of a new Constitution in August 2010. It was also argued that the Constitution of Kenya 2010 introduced a new development paradigm built on the normative and institutional foundations of devolution. This thesis strongly contends that this new development paradigm supports the realisation of the RTD.

The next chapter discusses devolution in Kenya and its relationship to the RTD.

²⁹³ Ghai 2008 *J East Afr Stud* 5.

CHAPTER 4: UNPACKING DEVOLUTION IN KENYA: AN ODYSSEY FROM THE PAST TO THE PRESENT

4.1 Introduction

Chapter 3, shed light on the legal status of the RTD in Kenya and the conceptualization of development in Kenya's colonial period until 2010, when the Constitution of Kenya 2010 was promulgated. Firstly, it was argued that the RTD is justiciable in Kenya. Secondly, that development under the colonial and post-colonial governments in Kenya failed the RTD compatibility test. It was submitted that devolution under the 2010 Constitution set the stage for a new RTD compatible development paradigm in Kenya.

The objective of this chapter is to establish the nexus between the RTD and devolution in Kenya. This is achieved by unpacking the Kenyan system of devolution to provide clarity to issues such as; understanding devolution and its antecedents in Kenya, why Kenyans preferred devolution over a centralized system of government, how devolution is anchored in Kenya's legal system, the socio-economic, political and cultural objectives of devolution in Kenya and finally how the objects of devolution relate to the RTD.

To achieve the said objective, this chapter therefore traces devolution from regionalism or *majimbo*, a decentralized system of government adopted by Kenya after independence in 1963, to the current system of devolution. The history of devolution in Kenya is discussed because this history clarifies why Kenyans overwhelmingly supported a devolved system of government during the 2010 national referendum that culminated in the promulgation of the Constitution of Kenya 2010. In this context, regionalism, or "*majimbo*", are discussed, and the politics that influenced its birth and demise when Kenya was still an "infant State" in 1965. From this history, it is apparent that the reasons that led to the creation of regionalism or "*majimbo*" are the same ones that inspired the current system of devolution in Kenya.

This chapter also sheds light on the normative architecture of devolution as provided in the Constitution of Kenya 2010 and other relevant statutes such as the County

Governments Act and the Urban Areas and Cities Act. Finally, the objects and principles of devolution such as participation, equity, development, service delivery, democracy, and accountability are discussed and mirrored against the elements of the RTD as a build-up towards establishing the link between devolution and the RTD.

4.2 What is Devolution?

For purposes of this thesis, devolution refers to a decentralised system of government where decision-making and implementation powers, functions, responsibilities, and resources are transferred to legally constituted and popularly elected local governments known as county governments. The county governments derive their powers and functions directly from the Constitution and operate independently from the national government. However, the county governments work cooperatively with the national government in discharging some of their functions, such as the provision of health care.

4.3 A Historical Perspective of Devolution in Kenya

This section provides a historical exposition of devolution in Kenya from the advent of the colonial administration to the promulgation of the Constitution of Kenya 2010. It is submitted that the need to devolve State power in Kenya was tied to Kenya's unique socio-economic, political and cultural history. The demand and rationale for devolution is therefore rooted in the origins of the Kenyan State.¹

This historical exposition will demonstrate that the socio-economic and political foundations laid during the formation of the Kenyan State later justified the need for devolution. The historical account of events leading to Kenya's independence also offer some insight into the link between colonialism, the origin of the Kenyan State, and the clamour for devolution.

The formation of the Kenyan State began with the arrival of the British in Kenya. Their arrival marked the advent of territory with defined boundaries that included many tribes which had lived on their land since time immemorial. The British

¹ Ghai "Devolution in Kenya" in Steytler and Ghai (eds) *Kenyan-South African Dialogue on Devolution* 56.

introduced the concept and organization of the State and constitution, translating into common rule over both the inhabitants of the colony and those who visited the colony for trade or other purposes. This administration system formed the foundation of governance in modern Kenya,² thus setting the stage for development policies that were not equitable.

In 'stamping their authority over the colony', the British used force to alienate the resources from certain tribes,³ for instance, the Maasai people were ejected from their ancestral lands to pave the way for British interests.⁴ Gradually, the British set up a civilian administration built upon District Officers and Provincial administration, another foundation of the contemporary Kenyan State. Doing so required consideration of the colony's legal foundations,⁵ thus establishing a socio-economic and political system of government that had less to do with Kenyans than with how the British ruled over them.⁶ The colonial government focused on securing and furthering the interests of the settlers⁷ at the expense of native Kenyans.

Later, as Kenya moved towards independence in the early 1960s, Kenya African National Union (KANU) was the political face of the populous and economically and politically dominant ethnic communities while the smaller communities identified themselves with the Kenya African Democratic Union (KADU). KADU's main agenda was to agitate for an independent Constitution that protected land rights and ensured a share of State power.⁸ These two political parties therefore took diametrically opposed positions on the structure of Kenya's independent government. KADU agitated for a decentralized government with the power given to regional governments, KANU agitated for a strong centralized government.⁹

These conflicting ideologies among the two main political parties that midwived Kenya's independence were informed by negative ethnicity. Negative ethnicity

² Ghai "Devolution in Kenya" in Steytler and Ghai (eds) *Kenyan-South African Dialogue on Devolution* 57.

³ The British used violence on a locally unprecedented scale. See Ellis 1976 *J Afr Hist* 558.

⁴ Kanyinga 2009 *J Cont Afr Stud* 327.

⁵ Kanyinga 2009 *J Cont Afr Stud* 327.

⁶ See generally, Ghai and McAuslan *Public Law and Political Change in Kenya* ch 1 and 2.

⁷ Juma 2002 *Tulsa J Comp Int'l L* 476-477 where he observes that "through conquests, deliberate annexation of territory and lopsided treaties, the British coalesced the ethnic groups and the minority settler populations into a Nation State".

⁸ Oginga *Not yet Uhuru* 146-171.

⁹ Gadjanova 2017 *Afr Aff* 495.

refers to individuals using their tribe to harm or gain undue advantage over other tribes.¹⁰ KANU was viewed as representing the interests of the two big tribes in Kenya while KADU represented the minority communities that were worried about losing ancestral land to the larger communities.¹¹ The British colonialists had created this mistrust between tribes as part of their "divide and rule policy," leading to "the ethnicisation of political alliances, alignments, and mobilizations in post-independent Kenya."¹²

This divide created a narrative that KANU wanted to unite the country through nation-building while KADU sought to divide the country through tribal lines.¹³ KANU eventually acquiesced to the proposed constitution that provided for regional governments for the sake of accelerating the push for independence, but once elected into government, the same KANU quickly amended the Constitution to centralize power and create a unitary system.¹⁴ KANU reverted to its original political ideology of a strong unitary State where development resources would be allocated to all parts of the country by the central government, thus laying a foundation for patrimonialism in Kenya.

Minority groups such as Asians felt too vulnerable to make any major demands and asked for citizenship for those who wanted it, equal rights with other citizens, and the preservation of their British citizenship. The British had treated the Arabs living in the coastal areas as a distinct community from other indigenous groups and thus were seen as supporters of the British, thus creating resentment among Africans.¹⁵ From the foregoing, it has been deduced that the immediate post-independent Kenyan State was divided among ethnic lines which led to inequitable development, socio-economic and political marginalization of certain ethnic communities.

The foregoing state of affairs set the stage for Kenya's independence in 1963 and adopting a form of decentralisation known as regionalism or *Majimbo*. Regionalism

¹⁰ Chagema <https://www.standardmedia.co.ke/article/2001352530/tribalism-is-not-same-as-negative-ethnicity> (Date of use: 15 June 2020).

¹¹ Oyugi "Local government in Kenya" 117.

¹² Karari 2018 *Peace and Conflict Studies* 2.

¹³ Mutakha *Constitutional framework for devolution* 98.

¹⁴ Munene "Constitutional Development in Kenya" 56.

¹⁵ Ghai "Devolution in Kenya" in Steytler and Ghai (eds) *Kenyan-South African Dialogue on Devolution* 63.

was seen as a way of safeguarding the rights of minority ethnic communities in Kenya whose voices could not be heard on the ballot.¹⁶ The intention was that each region would be able to chart its developmental course by demanding equitable distribution of national resources without being stifled by larger ethnic groups that controlled the country's political leadership.¹⁷ Arguably, regionalism was also supposed to engender participatory governance by involving the people in decision making at the regional assemblies. In other words, regionalism brought the government closer to the people.

The following section unpacks *majimbo* or regionalism under Kenya's independence Constitution.

4.3.1 Regionalism (*Majimbo*)

Majimbo is a Swahili term meaning regions.¹⁸ In the context of Kenyan politics regionalism or *majimbo* is perceived as the policy of devolution or decentralisation.¹⁹ *Majimbo* was introduced under the independence Constitution of 1963, which saw the country divided into regions drawn along ethnic lines,²⁰ albeit with minor alterations.²¹ This meant that ethnicity became the foundation of the entire system of *Majimbo*²² since the regions or "*jimbos*" comprised ethnic groupings with diverse interests stemming from their peculiar socio-economic, political and cultural circumstances.

For instance, the regions that supported a centralized system of government comprised Nyanza, Central and Eastern regions. Many Kikuyu and Luo ethnic groups who originally hailed from Central and Nyanza regions respectively had moved out of these regions *en masse* and settled in other regions to set up small

¹⁶ Ogot "The Politics of populism" in Ogot and Ochieng (eds) *Decolonization and Independence in Kenya 1940-93* 70.

¹⁷ Ogot "The Politics of populism" in Ogot and Ochieng (eds) *Decolonization and Independence in Kenya 1940-93* 70.

¹⁸ Anderson and Lochery 2008 *J East Afr Stud* 2.

¹⁹ Anderson 2005 *J Cont Hist* 547-564 cited in Gadjanova 2017 *Afr Aff* 495.

²⁰ Ghai "Devolution in Kenya" in Steytler and Ghai (eds) *Kenyan-South African Dialogue on Devolution* 68-74.

²¹ Smoke *Local Government Finance in Developing Countries* 69.

²² Ghai "Devolution in Kenya" in Steytler and Ghai (eds) *Kenyan-South African Dialogue on Devolution* 71.

businesses and provide skilled labour.²³ They were fearful of being expelled from regions like the Rift Valley if regionalism was implemented and thus supported the KANU's agitation for a centralized government.²⁴ It has been argued that some of the positive aspects of regionalism were lost in KANU's political rhetoric that sought to portray regionalism as something inimical to national unity.

Since *Majimbo* was closely related to ethnicity, it is necessary to highlight the ethnic diversity of Kenya 'to understand the appeal and politics of devolution'.²⁵ Ethnicity plays a significant role in Kenyan politics²⁶ because the ethnic identities shaped by the 'colonial experience entrenched patterns of discrimination and inequality among different ethnic groups'. This gave rise to 'shared group preferences for representation, recognition, or redistribution, often pitting some groups' political and economic interests against others'.²⁷

Statistics show that no ethnic community is close to being the majority in Kenya.²⁸ According to the population census in 2019, the largest single ethnic group is the Kikuyu, whose population is about 8,148,668, followed by the Luhya at 6,823,842, the Kalenjin at 6,358,113 and the Luo at 5,066,966.²⁹ These statistics explain why political alliances are made around the Kikuyu, Luhya, Kalenjin and Luo communities in every election season with the hope of getting the highest number of votes from these populous tribes.

At the same time, Kenya's ethno-politics has led to the notion that one's ethnic community needs to win the presidency to have unfettered access to State resources and services.³⁰ This explains why every ethnic community in Kenya

²³ Branch *Kenya: Between Hope and Despair* 8-9; Kanyinga 2009 *Journal of Contemporary African Studies* 3; Kanyinga 2009 *Journal of Contemporary African Studies* 329.

²⁴ Branch *Kenya: Between Hope and Despair* 8-9; Kanyinga 2009 *Journal of Contemporary African Studies* 329.

²⁵ Ghai "Devolution in Kenya" in Steytler and Ghai (eds) *Kenyan-South African Dialogue on Devolution* 59.

²⁶ Bigsten <https://www.sidint.net/sites/www.sidint.net/files/docs/Inequalities%20Conference%20Report%202006.pdf> (Date of use: 14 April 2020) 92.

²⁷ Gadjanova 2017 *Afr Aff* 485.

²⁸ Gadjanova 2017 *Afr Aff* 484-507.

²⁹ Orinde <https://www.standardmedia.co.ke/article/2001361344/kenya-s-biggest-ethnic-communities-listed> (Date of use: 4 March 2020).

³⁰ African Peer Review Mechanism https://www.eisa.org.za/aprm/pdf/Countries_Kenya_APRM_Report.pdf (Date of use: 27 March 2020) 49.

covets the presidency and why almost all the political parties in Kenya are ethnic-based.³¹

According to Mozaffar, ethnic politics refers to “strategically rational behaviour involving the contingent (as opposed to the reflexive) activation of objective ethnic markers by political elites to form groups, define group interests, and organize collective action to advance political goals”.³² Ethnic politics usually represents and seeks to advance the interests of particular or specific groups in society, united by common experiences, to the exclusion of the rest of the members of society of which they form part of and exist.³³

A practical illustration of ethnic politics in play was the Kenyan land situation at independence. The Kikuyu demanded compensation by the government for the loss they suffered when their land was forcibly taken away by the colonial government, forcing them to live in African reserves or become squatters in other regions of the country like the Rift Valley.³⁴ On the other hand, the Kalenjins (the original inhabitants of the Rift Valley) felt threatened by the large number of landless Kikuyu in the Rift Valley whom the government had embarked on resettling. This situation became the hotbed of ethnic tension and ethnic politics in Kenya.³⁵ It has been argued that this socio-political context caused regionalism to be viewed as a system that would ultimately divide the country along ethnic lines.

The *Majimbo* system could not, therefore, survive because of its perceived links to ethnicity. The real or perceived threat of Kenya being balkanized along ethnic lines was not palatable to the Kenyatta government. Shortly after independence in 1963, Jomo Kenyatta's government systematically resisted further implementation of *majimbo*, culminating in several amendments to the Constitution.³⁶

³¹ Mbondenyei 2011 *J Afr L* 50; Biegon <https://www.khrc.or.ke/publications/183-ethnicity-and-politicization-in-kenya/file.html> (Date of use: 18 June 2020) 44.

³² Mozaffar "The politicization of ethnic cleavages" in *Politicizing socio-cultural structures* cited in Biegon "Politicization of Ethnic Identity in Kenya" in *Ethnicity and Politicization in Kenya*.

³³ Oloo "Party mobilization and membership" in Kanyinga and Okello (eds) *Tensions and reversals in democratic transitions* 31, 33.

³⁴ Kanyinga *Re-Distribution from Above* 47.

³⁵ Kanyinga *Re-Distribution from Above* 47.

³⁶ Ghai "Devolution in Kenya" in Steytler and Ghai (eds) *Kenyan-South African Dialogue on Devolution* 74.

Between 1964 and 1965, Singh records that regionalism in Kenya's independence Constitution was effectively rendered otiose by several constitutional amendments.³⁷ The name "regions" was been abandoned and replaced with provinces headed by provincial commissioners. Regional assemblies were replaced with provincial councils, and the president and vice president, who were the political heads of the former regions, were replaced with the chairman and vice-chairman.³⁸ The regional governments' administrative ability was taken away when the police force and the civil service was transferred to the central government.³⁹

The last nail on the coffin was the senators' acquiescence to the abolishment of the regional system together in lieu of special seats in the national assembly. It was alleged that some senators (elected representatives from the regions) were bribed to accept these constitutional changes.⁴⁰

From the foregoing, it is clear that regionalism in Kenya "died" because of a lack of political goodwill to implement it. The irony here is that despite the rejection of regionalism in the early stages of the formation of the Kenyan republic, the demand for decentralisation decades later saw the country going "full circle" with the issue of regionalism. In 2010 Kenya adopted a constitution that provided for "regionalism" couched in the term "devolution". The following section sheds light on the events leading to the adoption of a devolved system of government and thus the justification for devolution in Kenya.

4.3.2 Events Leading to the Resurrection of Regionalism "Clothed as Devolution" in the 2010 Constitution

This section sheds light on the main reasons why Kenyans pushed for the re-introduction of a devolved system of government through the 2010 constitution. Some justifications include the need to entrench democracy, accountability and equitable and participatory development. There is no historical data to show that regionalism would have augmented democracy, accountability, equity and participatory rights in Kenya because regionalism was never fully operationalized by

³⁷ Singh 1965 *Int'l Comp L* Q 948-949.

³⁸ Constitution of Kenya (Amendment) Act, 1965.

³⁹ Constitution of Kenya (Amendment) Act, 1964.

⁴⁰ Ghai "Devolution in Kenya" in Steytler and Ghai (eds) *Kenyan-South African Dialogue on Devolution* 74.

the independence government under Jomo Kenyatta. However, it is submitted that regionalism created a political system that yielded grassroots representation through the regional assemblies and hence potentially more participatory than a representative system.

The repeal of regionalism in Kenya resulted in the systematic dismantling of democratic principles of government.⁴¹ In 1964 Kenya became a *de facto* one-party state⁴², and all State institutions became effectively subjected to the president's will.⁴³ The leader of the opposition party stated thus:

I have a full mandate to declare today that the official Opposition is dissolved. KADU is joining the government under the leadership of Mzee Jomo Kenyatta and the Opposition today will vote with the government for the new Constitution in the Senate.⁴⁴

Effectively this meant that all political power became concentrated at the centre (the presidency) and that the many tools of repression articulated under colonialism and refined by the ruling class after independence continued to thrive⁴⁵ because of a powerful executive. In this context, Kivuva correctly states that:

The hallmark of Kenya's post-colonial State has without a doubt been the imperial presidency, which has perpetrated the asymmetrical power relations among the three arms of government. It allowed the executive to dominate the two other arms of government.⁴⁶

The country adopted a constitution and a legal system similar to that of her colonizer. Therefore it is accurate to assert that "most of the archaic laws, institutions and attitudes that underwrote colonialism did not just survive independence, they prospered with it".⁴⁷ For instance, the independence Constitution did not expressly guarantee the right to participate in government, yet the quest for independence was largely about the right to participate in government.⁴⁸ The government also maintained inequitable colonial developmental policies such as developing

⁴¹ Ghai "Devolution in Kenya" in Steytler and Ghai (eds) *Kenyan-South African Dialogue on Devolution* 74.

⁴² Singh 1965 *Int'l Comp L Q* 927.

⁴³ Ghai "Devolution in Kenya" in Steytler and Ghai (eds) *Kenyan-South African Dialogue on Devolution* 74.

⁴⁴ *East African Standard* November 11th 1964 cited in Singh 1965 *Int'l Comp L Q* 927.

⁴⁵ Mueller 1984 *J Mod Afr Stud* 399.

⁴⁶ Kivuva *Restructuring the Kenyan State* 5.

⁴⁷ Mbondenyi 2011 *J Afr Hist* 46.

⁴⁸ Mbondenyi 2011 *J Afr Hist* 45.

infrastructure and social services in "productive areas at the expense of the country", resulting in severe regional inequalities.⁴⁹

The local government played a major role in shaping Kenya's development paradigm. The system was conceptualized under the colonial government and was used to implement a policy of separate development for Africans and other races in Kenya.⁵⁰ The 1929 Local District Councils Ordinance created local district councils comprising members elected by White people to administer White settler areas.⁵¹ Africans could not vote or be elected to these councils even if they were residents in the said areas. Asians were permitted to vote or be elected to the councils,⁵² thus setting the foundations for a development paradigm that was exclusionary and non-participatory. This system underwent many changes, and by 1963, the country had developed three separate systems of local government, i.e.; municipalities, White settler areas and African areas.⁵³

The local authorities were poised to play a central role in implementing regionalism after Kenya had attained its independence from British colonial rule. Towards independence, the local government restructured to provide uniform laws for everyone to replace the stratified colonial system.⁵⁴ Consequently, local authorities known as municipal councils for urban areas and county councils for rural areas were created.⁵⁵ This is because regional assemblies are given the powers to constitute local assemblies, assign functions, and allocate financial resources.⁵⁶ County councils and municipalities are given the functions of primary school education and public health, among others.⁵⁷

⁴⁹ Mbondenyei 2011 *J Afr L* 48.

⁵⁰ Commission of Inquiry on Local Authorities in Kenya (1995) "Report of the Commission of Inquiry on Local Authorities in Kenya: A Strategy for Local Government Reform in Kenya" 7. According to this report, the Feetham Commission recommended to the colonial government that a policy of separate development for Africans and settlers be pursued in Kenya.

⁵¹ Mutakha *Constitutional Law of Kenya on Devolution* 70.

⁵² Mutakha *Constitutional Law of Kenya on Devolution* 70.

⁵³ Mutakha *Constitutional Law of Kenya on Devolution* 71.

⁵⁴ Mutakha *Constitutional Law of Kenya on Devolution* 76.

⁵⁵ The 1963 Local Government Regulations.

⁵⁶ Maxon *Kenya's Independence Constitution* 170.

⁵⁷ Commission of Inquiry on Local Authorities in Kenya (1995) "Report of the Commission of Inquiry on Local Authorities in Kenya: A Strategy for Local Government Reform in Kenya" 9.

Unfortunately, the discontinuation of regionalism in 1965 marked the beginning of a developmentally crippled and financially orphaned local government system.⁵⁸ The local authorities were weakened to become mere appendages of the central government.⁵⁹ Key income-generating functions of the local authorities were transferred to the central government to reduce the financial pressure on the local authorities. These included primary education, health and roads.⁶⁰ As much as this relieved the local authorities from a heavy financial burden, most of their sources of revenue are taken away, effectively relegating them to institutions that could not even discharge their remaining functions because of lack of funding.⁶¹

Mutakha identifies three ways in which local government's ability to drive development in Kenya was curtailed. The first was through political and administrative controls. The government ensured that the District Commissioner under the provincial administration exerted significant influence on the functioning of local authorities as the central government's "gatekeeper" or "point person".⁶² He ensured local authorities implemented central government policies.⁶³ This meant that local authorities could not be drivers of equitable and participatory development in Kenya. They became executors of the central government's skewed and inequitable development policies.

The second was the lack of a clear policy for funding the local authorities. The local government relied on the central government for funding through grants which were inconsistent and unreliable.⁶⁴ This meant that the local authorities suffered from a perpetual lack of funding and were unable to perform their development functions.⁶⁵ There was also no legal formula or policy to guarantee equity in allocating resources⁶⁶ resulting in severe disparities in development across different regions in Kenya.

⁵⁸ Mutakha *Constitutional Law of Kenya on Devolution* 76-77.

⁵⁹ Oyugi "Local government in Kenya" 122.

⁶⁰ Transfer of Functions Act of 1970.

⁶¹ Oyugi "Local government in Kenya" 221.

⁶² Mutakha *Constitutional Law of Kenya on Devolution* 77.

⁶³ Mutakha *Constitutional Law of Kenya on Devolution* 77.

⁶⁴ Mutakha *Constitutional Law of Kenya on Devolution* 77.

⁶⁵ Mutakha *Constitutional Law of Kenya on Devolution* 77.

⁶⁶ Mutakha *Constitutional Law of Kenya on Devolution* 78.

Thirdly, the central government passed legislation⁶⁷ to ensure that it maintained "tight" control over local authorities through the influence of the Minister for Local Government, who had the power to constitute and reconstitute local authorities.⁶⁸ The Minister of Local Government also had exclusive authority to appoint key administrative officers in the local authorities such as the clerk, treasurer, engineer and medical officers. These officials' loyalty are therefore directed to the central government and not the local authorities.⁶⁹ This suggests that more often than not, development policies had very little focus on the local communities and had more to do with fulfilling the central government's agenda.

Having abolished regionalism and undermining local authorities, central government realised that it needed to involve local communities in development.⁷⁰ The government established District Development Committees and District Advisory Committees, which were dominated by representatives of the central government such as the provincial administration, with little representation from the local level. Unfortunately, this system increased central government control over planning⁷¹ hence keeping development under the "straight jacket" of central government control.

The development paradigm that emerged under the local government system in Kenya was not participatory and could not guarantee equitable distribution of development resources. In terms of providing an effective decentralisation model that would guarantee the elements of the RTD, such as participation and equity, the local government was deficient. There was still a need for a better model for decentralisation to spur people-driven development and equity in the distribution of resources.

A decade of 'relatively piecemeal decentralisation' in Kenya began in 1999, lasting until the passage of the new Constitution in 2010.⁷² This decade saw the introduction of decentralised funds to address regional inequality in the country. The Local

⁶⁷ Local Government Act Cap 265 of the Laws of Kenya.

⁶⁸ Mutakha *Constitutional Law of Kenya on Devolution* 79.

⁶⁹ Mutakha *Constitutional Law of Kenya on Devolution* 80.

⁷⁰ Mutakha *Constitutional Law of Kenya on Devolution* 80.

⁷¹ Mutakha *Constitutional Law of Kenya on Devolution* 80.

⁷² World Bank <http://documents.worldbank.org/curated/en/385211468088448074/Executive-summary> (Date of use: 3 July 2019) 5.

Authority Transfer Fund (LATF) created through the LATF Act,⁷³ and the Constituency Development Fund (CDF) created through the CDF Act,⁷⁴ are good examples of such funds. These are discussed briefly below.

4.2.3.1 The Local Authority Transfer Fund (LATF)

The government introduced the Local Authority Transfer Fund (LATF) through the enactment of the LATF Act⁷⁵ in a bid to address regional disparities. The Act provided for the setting aside of 5% of the national income tax for local authorities.⁷⁶ The intention was to enable Local Authorities to perform such functions and services as required by the Local Government Act.⁷⁷

The funds were allocated to local authorities as unconditional grants⁷⁸ and disbursed once the local authorities had fulfilled conditions under the Local Authorities Service Delivery Action Plan.⁷⁹ Some of the conditions relevant to this thesis included facilitating community and public participation in project identification and prioritization.⁸⁰

The fund added value to the role of local authorities in development⁸¹ especially increased use of community participation.⁸² However, it failed to have "any serious mechanism for financial equalization which would be useful in addressing the problem of regional inequalities in Kenya".⁸³ The LATF also faced challenges such as over-centralization in decision making since all decisions had to be made by the Ministry of Local Government headquarters leading to bureaucratic delays in the

⁷³ Act 8 of 1998.

⁷⁴ Act 10 of 2003.

⁷⁵ Act 8 of 1998.

⁷⁶ Section 5 of the LATF Act.

⁷⁷ Section 5 of the LATF Act.

⁷⁸ Oyugi "Fiscal Decentralization in Kenya" 172.

⁷⁹ Republic of Kenya Guidelines for Preparation "Implementation and Monitoring of the Local Authorities Service Delivery Action Plan" Office of the Deputy Prime Minister and Ministry of Local Government (2009).

⁸⁰ Republic of Kenya Guidelines for Preparation "Implementation and Monitoring of the Local Authorities Service Delivery Action Plan" Office of the Deputy Prime Minister and Ministry of Local Government (2009) 9-24.

⁸¹ World Bank "Kenya: An assessment of local service delivery and local governments in Kenya" (2002) 33.

⁸² Oyugi "Fiscal Decentralization in Kenya" 171-172.

⁸³ Mutakha "Regional inequalities in Kenya" 136.

execution of projects.⁸⁴ The fund also suffered from inadequate administrative capacity to supervise, monitor and implement projects.⁸⁵

4.2.3.2 The Constituency Development Fund (CDF)

The CDF was a statutory fund established in 2003 under the CDF Act. It provided for the distribution of 2.5% of national revenue to parliamentary constituencies for development and the fight against poverty.⁸⁶ The formula for distribution of funds entailed an equal distribution of 75% of the constituencies and the balance distributed according to the poverty index.⁸⁷ The whole idea was to institutionalize equitable and participatory development in Kenya.

Regulation and management of the fund were vested in a CDF Board.⁸⁸ The board approved funding proposals and performed other administrative functions related to the fund. The Member of Parliament (M.P) for the concerned⁸⁹ constituency was expected to carry out public participation at the grassroots level while preparing the funding proposals, which was forwarded to the District Projects Committee for approval. Once the committee makes its recommendations, the same is forwarded to the CDF Board, which makes the final decision.⁹⁰

The CDF fund was mostly a success compared to the LATF. It “attracted more public participation to local development than any other decentralized programme, and its legislative backing ensured a solid regulatory framework”.⁹¹ Unfortunately, the CDF's normative framework curtailed its ability to stimulate rapid development reforms in Kenya.

Under the CDF Act, development funds are disbursed to parliamentary constituencies. Constituencies were electoral units for electing members of parliament and lacked structures and expertise to create and execute both short

⁸⁴ Republic of Kenya "Study on the Impact of Local Authorities Service Delivery Action Plan" Local Government Reform Programme (KLGRP) (2007) 58-59.

⁸⁵ Republic of Kenya "Study on the Impact of Local Authorities Service Delivery Action Plan" Local Government Reform Programme (KLGRP) (2007) 58-59.

⁸⁶ Wachira "Fiscal Decentralization" in Mwenda (ed) *Devolution in Kenya* 93-94.

⁸⁷ Bosire *Devolution for development* 138.

⁸⁸ Section 17 of the CDF Act.

⁸⁹ Bosire *Devolution for development* 139.

⁹⁰ Bosire *Devolution for development* 139.

⁹¹ Wachira "Fiscal Decentralization" in Mwenda (ed) *Devolution in Kenya* 94.

term and long-term development plans. This resulted in development money being spent on functions already assigned to another arm of government.⁹² For instance, the CDF committee could decide to spend funds on the maintenance of police vehicles or building a police post, yet funds for these projects were already provided for under the ministry of internal security.⁹³

The CDF system also lacked continuity because the CDF committees would be reconstituted after every election, especially if the M.P loses their seat in the constituency. Therefore, it was not possible to develop strategic plans for a constituency that go beyond the term of the M.P since it was not a guarantee that the M.P would be re-elected to office. At the same time, political interests, more often than not, negatively affected the completion of CDF projects, as indicated in a study carried out by Kamau and Muturi.⁹⁴ A newly elected M.P could effortlessly embark on new projects and abandon the ones initiated by their predecessor to "score political points" at the detriment of development.

This normative design could not effectively address the deep-seated development problems in Kenya because the constituency was not a constitutional unit of devolution with clearly defined governance functions, including development functions. Compared with the current system of devolution, counties have functions clearly defined in law, and thus there is no duplication of roles between the national government and county governments, although two levels of government can collaborate in the execution of certain functions. At the same time, county governments have both executive and legislative organs to ensure proper implementation of development policies, thus providing a more elaborate system of checks and balances, accountability, equity and participation. The structure of devolution in Kenya will however be discussed in detail in 3.4 below.

In light of the shortcomings of the CDF, there was a need to create a strong system of decentralisation that could dismantle the deep-seated development injustices in Kenya. For such a system to work, it needed to derive its powers and mandate directly from the constitution hence the agitation for devolution in Kenya.

⁹² Mutakha "Regional inequalities in Kenya" 136.

⁹³ Mutakha "Regional inequalities in Kenya" 136.

⁹⁴ Kamau and Muturi 2015 *Int'l J Econ, Com & Manage* 499-516.

The following section briefly discusses the immediate transition from a centralised system to the adoption of a devolved system of government. It highlights the specific social, economic and political issues that made the Kenyan "devolution train unstoppable".

4.2.3.3 Failed Decentralisation and the Run-up to the 2010 Constitution of Kenya

The problem persisted despite efforts such as the LATF and the CDF to address inequality in resource distribution in Kenya. In 2002 the World Bank noted that the "deterioration of basic services and the rising poverty levels in Kenya inevitably deepen perceptions of ethnic exclusion in Kenya".⁹⁵ The perception that the president's ethnic community or political allies always get the lion's share of government resources was a reality in Kenya.⁹⁶ This is because the patterns of inequality in the country indicated that areas that did not have any "political clout", such as North Eastern Kenya, were marginalized and left behind in development.

For instance, according to a 2006 report by the National Conference on Equity and Growth in Kenya, the doctor-patient ratio in Central Kenya was 1:20,000, while in North Eastern Kenya, during the same period, the ratio was 1:120,000.⁹⁷ These statistics are indicative of the relationship between resource allocation and political power. Both The founding president of the Republic of Kenya and the incumbent in 2006 hailed from Central Kenya, meaning that the region was favoured in resource allocation over other regions in Kenya.

On the other hand North Eastern Kenya did not have a comfortable relationship with the presidency or the government because of the secessionist war known as the *shifita* war that the region immediately experienced after Kenya got her independence from Britain.⁹⁸ This meant that the government was not keen on

⁹⁵ Stewart "Note for discussion: Kenya, horizontal inequalities and the political disturbances of 2008" 8.

⁹⁶ African Peer Review Mechanism "Country Review Report of the Republic of Kenya 2006" https://www.eisa.org.za/aprm/pdf/Countries_Kenya_APRM_Report.pdf (Date of use: 27 March 2020) 49.

⁹⁷ Joint Statement by Hosting Organisations (SID, AAIK and AWC) in *Towards a Policy Agenda for Kenya* (Report of the National Conference on Equity and Growth, 22-23 May 2006 Kenya School of Monetary Studies Nairobi Kenya) 53.

⁹⁸ Branch 2014 *J East Afr Stud* 642-657.

channelling development resources to a region that was insecure and was not a political ally.

Therefore, it was strongly argued that decentralisation and more local autonomy was a solution to inequitable development in Kenya.⁹⁹ Decentralisation became such an important matter of discussion to Kenyans to the extent that politicians used it to attract voters during the presidential elections in 2007.¹⁰⁰ Gadjanova records that Raila Odinga, a Kenyan presidential aspirant in the 2007 elections in Kenya, used promises to implement regionalism (*majimbo*) to entice the Kalenjin community to abandon the incumbent Mwai Kibaki.¹⁰¹

The ethnic violence that broke out after the 2007 presidential elections with tribes such as the Kalenjin fighting the Kikuyu in the Rift Valley was arguably a turning point in the quest for a devolved system of government in Kenya. At the end of February 2008, a settlement was reached between Raila Odinga and Mwai Kibaki through the efforts of the late Kofi Annan, the former Secretary-General of the UN.¹⁰²

The 2007/2008 post-election violence was partly caused by the perception that poor service delivery and under development worked along ethnic lines where the president directed resources to his ethnic community at the expense of national unity and equitable development.¹⁰³ The violence was also attributed to under development, economic competition, historical injustices¹⁰⁴ and rigged elections.¹⁰⁵ This episode of violence demonstrated how development injustice was deeply entrenched in Kenya.

The demand for Constitutional change became unstoppable after the 2007 bungled elections. According to the Constitution of Kenya Review Commission (CKRC), many Kenyans felt left out of governance and development because of their political or ethnic affiliations.¹⁰⁶ This data from the CKRC indicated a need to create a system

⁹⁹ Ghai "Devolution in Kenya" in Steytler and Ghai (eds) *Kenyan-South African Dialogue on Devolution* 75.

¹⁰⁰ Gadjanova 2017 *Afr Aff* 485.

¹⁰¹ Gadjanova 2017 *Afr Aff* 485.

¹⁰² Khaunya, Wawire and Chepng'eno 2015 *Int'l J Econo, Fin & Manage* 30.

¹⁰³ Bosire *Devolution for development* 145.

¹⁰⁴ Bosire *Devolution for development* 145.

¹⁰⁵ Ochami and Ombati <https://www.standardmedia.co.ke/article/2000031666/kivuitu-feared-kibaki-wanted-ally-at-eck-helm> (Date of use: 03 May 2020).

¹⁰⁶ CKRC (2002) 181.

of government where the people would be drivers and direct beneficiaries of development regardless of their political or ethnic affiliations.

Devolution, therefore, appeared to be an attractive solution to ethnic and political polarization that had bedevilled Kenya for a long time. This was a valid argument because studies by the World Bank have indicated that decentralisation has been used as “a political strategy to increase stability in regions marred by ethnic and political polarization”¹⁰⁷ by providing greater participation in governance. Participation promotes national unity by giving groups in different regions in a country a greater ability to be involved in planning and decision making, thus increasing their stake in maintaining political stability.¹⁰⁸ This sense of inclusivity, therefore, tones down negative differentiation among various groups in the polity.

On the 4th of August 2010, Kenyans overwhelmingly voted in favour of a new constitution in a national referendum. The Constitution of Kenya 2010 under Articles 174 and 175 provided a new structure of government where power is devolved from the central government to regions known as counties. According to a survey carried out by Kramon and Posner, a few months after the promulgation of the Constitution of Kenya 2010, the need to entrench devolution in Kenya was a major reason as to why most of the Kenyans in the "YES" camp voted in favour of the new Constitution in the national referendum.¹⁰⁹ This survey confirmed that the idea of decentralizing power in a bid to correct decades of imbalanced development and marginalization had captured the imagination of most Kenyans.

4.4 The Normative Architecture of Devolution under the Constitution of Kenya 2010

Having defined devolution and traced its antecedents in Kenya, this section unpacks the normative framework of devolution as provided for in the Constitution of Kenya. This section discusses the normative architecture of devolution in Kenya and relates this architecture to the objectives of devolution under the Constitution of Kenya 2010. The section aims at shedding light on the normative design features that

¹⁰⁷ Rondinelli, Nellis and Cheema <http://documents.worldbank.org/curated/en/868391468740679709/pdf/multi0page.pdf> (Date of use: 05 February 2020) 11.

¹⁰⁸ Rondinelli, Nellis and Cheema <http://documents.worldbank.org/curated/en/868391468740679709/pdf/multi0page.pdf> (Date of use: 05 February 2020) 11.

¹⁰⁹ Kramon and Posner 2011 *J Democ* 96.

enable devolution to be a driver of development in Kenya. Normative design features that guarantee and secure democracy and accountability, participation of the people, equity and inclusiveness and effective decentralisation will be discussed.

Devolution in Kenya is anchored on particular constitutional and legislative structures designed to ensure that it achieved its intended purpose. The history of decentralisation in Kenya unequivocally demonstrates that some of the reasons for adopting a devolved system of government included the need to realise equitable and participatory development. Article 174(c) and (g) of the Constitution of Kenya confirms this fact by providing that the objects of devolution include enhancing participation of the people and ensuring equitable sharing of national and local resources throughout Kenya.

Analysis of the said normative architecture and design features of devolution in Kenya make it possible to conceptualize human rights-based development within the context of devolution and argue that devolution supports the realisation of the RTD. This section will also demonstrate that devolution is fundamentally different from the previous decentralisation initiatives by the government of Kenya hence a better development model in the context of realising the RTD.

4.4.1 The Structure of Devolution in Kenya

The structure of devolution under the Constitution of Kenya 2010 entails 47 developed units known as counties.¹¹⁰ County political power is divided into legislative¹¹¹ and executive powers,¹¹² with the former vested in the county assembly and the latter in the county executive. The general county government structure is a presidential system led by an elected county governor who appoints a cabinet that is approved by the county assembly.¹¹³

According to Lumumba and Mbondenji, a well-organized programme of devolution must contain four elements or types of devolution, namely, administrative

¹¹⁰ First Schedule of the Constitution of Kenya read with article 6(1).

¹¹¹ Article 185 of the Constitution of Kenya.

¹¹² Article 183 of the Constitution of Kenya.

¹¹³ Bosire "Political Structures and Politics of Counties in Kenya" 138.

devolution, political devolution, fiscal devolution and economic devolution.¹¹⁴ They validly argue that all these elements must be combined to make devolution work.¹¹⁵ Political devolution without administrative devolution is not effective because proper administrative structures have to be put in place to realise the developmental objectives of devolution. Devolution of administrative and political decision making without appropriate financial authority is ineffective. This is what "killed" the *majimbo* system. Economic devolution usually improves service delivery because the private sector easily employs innovation in providing public goods and services compared to government entities. A private-public partnership can therefore lead to efficiency.

The proceeding section discusses these elements briefly and will finally demonstrate why all these elements should be combined to make devolution effective. This section will also demonstrate how these elements are secured in the normative architecture of devolution in Kenya.

4.4.1.1 Administrative Devolution

Administrative devolution refers to the transfer of responsibility for planning, financing and managing of selected public functions from the national government to the lower tier government units.¹¹⁶ The lower tier units then enjoy autonomy in carrying out these functions.

The Constitution of Kenya 2010 provides for administrative devolution. Some of the devolved functions are health services, pre-primary education, cultural activities, street lighting, firefighting, trade and development, county roads, traffic and parking.¹¹⁷ Therefore, county governments create plans, formulate budgets and develop supervision and/or monitoring systems to ensure service delivery. The county governments also enjoy autonomy in providing the said services because the functions have been allocated to county governments by the Constitution of Kenya 2010.¹¹⁸

¹¹⁴ Mbondenyi and Lumumba "Conceptual and Historical Overview" 16.

¹¹⁵ Mbondenyi and Lumumba "Conceptual and Historical Overview" 16.

¹¹⁶ Cheema and Rondinelli (eds) *Decentralisation and Development* 19.

¹¹⁷ Schedule 4 of the Constitution of Kenya 2010.

¹¹⁸ Schedule 4 of the Constitution of Kenya 2010.

Administrative autonomy has positive effects on development. It enhances self-reliance by sealing gaps of possible interference by the national or central government.¹¹⁹ Administrative devolution curtails problems such as over-centralization in decision-making leading to bureaucratic delays in the execution of projects, a challenge faced by the LATF.¹²⁰ The overall effect is that efficiency in service delivery within the devolved units is greatly enhanced.

Localised or decentralised decision-making enhances citizens' participation, thus positioning the citizens as the objects and direct beneficiaries of development programmes. Administrative autonomy also allows meaningful participation to happen because the citizens' views, opinions and other concerns often incorporated in decision-making more than in a centralised decision-making system, that is often far removed from the grassroots. It is submitted that administrative autonomy, therefore, supports the realisation of the RTD because of enhanced citizen participation.

4.4.1.2 Political Devolution

On the other hand; political devolution consists creating autonomous sub-national levels of government.¹²¹ The success of political devolution is hinged on the existence of normative structures that create these sub-national governments through multiparty, participatory, grassroots-based systems. Legitimately elected local governments must exercise the power that is devolved.¹²²

The Constitution of Kenya 2010 provides for political devolution. The citizens directly elect the governor, his deputy¹²³ and Members of the County Assembly (MCA).¹²⁴ The governor is the head of the executive arm of government in the county, while the MCAs represent the different wards within the county in matters legislative and

¹¹⁹ Cameron "Vertical decentralisation and urban service delivery in South Africa: Does politics matter?".

¹²⁰ Republic of Kenya "Study on the Impact of Local Authorities Service Delivery Action Plan" Local Government Reform Programme (KLGPR) (2007) 58-59.

¹²¹ Cheema and Rondinelli (eds) *Decentralisation and Development* 19.

¹²² Mbondenyi and Lumumba "Conceptual and Historical Overview" 14.

¹²³ Article 180 of the Constitution of Kenya 2010.

¹²⁴ Article 177 of the Constitution of Kenya 2010.

development. The duly elected governor constitutes his cabinet known as the county executive committee (CEC) with the approval of the county assembly.¹²⁵

Further, the law also empowers the people to impeach the governor¹²⁶ or any cabinet member through the county assembly.¹²⁷ The citizens themselves can exercise their sovereignty through the right to recall their MCA¹²⁸ and petition the county assembly to consider any matter within its authority, including the impeachment of the governor or member of the CEC.¹²⁹ It is therefore submitted that political devolution is evident in the legal framework for devolution in Kenya.

Political devolution enhances democratic and accountable governance through a system that makes leaders directly answerable to the people or their representatives at the grassroots signifying that leaders act in the best interests of the people, and the people retain systems that allow them to demand accountability and proper representation from the leaders. This leads to the realisation of participatory rights making it possible for the citizens to maintain a "principal-agent relationship" where the government is the agent and the citizens the principal.

It is argued that political devolution activates the citizens' right to active, free and meaningful participation in development. This implies voicing of and taking into account the people's opinion in the political process with reference to their right to development.¹³⁰ It is also argued that political devolution enables the right to have a voice in and share control over the economic environment but within the limitation imposed by budgetary constraints and State legislative procedures.¹³¹

4.4.1.3 Fiscal Devolution

Fiscal devolution refers to "the definition and alignment of the monetary functions among the different levels of government".¹³² According to Lumumba and Mbondenyi, fiscal devolution exists when the responsibilities of the different levels

¹²⁵ Section 30 and 35 of the County Governments Act 17 of 2012.

¹²⁶ Article 181 of the Constitution of Kenya 2010 and section 33 of the County Governments Act 17 of 2012.

¹²⁷ Section 40 of the County Governments Act 17 of 2012.

¹²⁸ Section 27 of the County Governments Act 17 of 2012.

¹²⁹ Section 15 of the County Governments Act 17 of 2012.

¹³⁰ *Waris Tax and Development* 155.

¹³¹ Barsh 1991 *HRQ* 329.

¹³² Smoke *Fiscal Decentralization in Developing Countries* 9.

of government regarding the collection of taxes and expenditures are spelt out in law.¹³³ Failure to properly structure fiscal devolution may result in a "derailment of an otherwise plausible devolution programme".¹³⁴ In this sense, fiscal devolution is, therefore, an indispensable component of any effective devolved system of government.

It is arguable that the Constitution of Kenya 2010 reasonably secures fiscal devolution by guaranteeing the availability of revenue funds for county governments in two ways. Firstly, the constitution guarantees county governments reliable sources of revenue to enable them perform their constitutional functions effectively.¹³⁵ For this reason, the Constitution provides that the county's "share of revenue raised by the national government must be transferred to the county without undue delay and deduction".¹³⁶ Secondly is the establishment of a revenue fund in which all money raised or received can be paid on behalf of a county government. Expenditure or withdrawals from the revenue fund can only be effectuated upon passing the relevant appropriation Act by the county legislature,¹³⁷ thus ensuring financial accountability and prudence.

The Commission on Revenue Allocation (CRA) is an independent commission under the Constitution of Kenya 2010¹³⁸ that plays an essential role in guaranteeing fiscal devolution. The CRA is subject only to the Constitution and is autonomous from control and/or persons and authorities' direction.¹³⁹ The commission makes recommendations concerning "equitable sharing of revenue raised by the national government between the national government and county governments and among the county governments".¹⁴⁰ The commission's recommendations are then sent to the Senate and National Assembly for debate and approval before the funds is disbursed. Therefore, it is submitted that the Constitution of Kenya provides a legal framework that supports fiscal devolution.

¹³³ Mbondenye and Lumumba "Conceptual and Historical Overview" 15.

¹³⁴ Mbondenye and Lumumba "Conceptual and Historical Overview" 15.

¹³⁵ Article 175(b) of the Constitution of Kenya 2010.

¹³⁶ Article 219 of the Constitution of Kenya 2010.

¹³⁷ Article 207 (1) – (4) of the Constitution of Kenya 2010.

¹³⁸ Article 248 of the Constitution of Kenya 2010.

¹³⁹ Article 249 of the Constitution of Kenya 2010.

¹⁴⁰ Article 216(1) of the Constitution of Kenya 2010.

Kenya's constitutional architecture and design on fiscal devolution has certain inherent weaknesses that have manifested in inordinate delays when it comes to division of revenue between the national and county governments and allocation of revenue between the different counties. The constitution defers division of revenue and revenue allocation matters to the political arm of government leading to "over politicization of fiscal devolution".

Whenever the Senate and the National Assembly disagree on the Division of Revenue Bill, the matter is referred to a mediation committee comprising members of the National Assembly and Senate.¹⁴¹ If the mediation committee fails to resolve the impasse, the bill fails.¹⁴² The same provisions apply when there is a lack of consensus in the Senate over the County Revenue Allocation Bill.

The Kenyan experience shows that politics has been the root cause of conflicts around fiscal devolution.¹⁴³ Arguably; these constitutional provisions force legislators to make political compromises on fiscal matters, thus watering down the technical input of the CRA in the process. At the same time, the Supreme Court of Kenya has stated that the division and allocation of revenue is a political process, and political compromises have to be struck whenever conflict arises.¹⁴⁴ However, this will be discussed in detail in Chapter 5 of this thesis.

Fiscal devolution, therefore, guarantees the availability of resources to the devolved units to pursue their development programmes. Fiscal devolution also gives the devolved units reasonable control over funds allocated to them, thus freeing them from the shackles of centralized bureaucracy. Finally, fiscal decentralisation leads to equitable distribution or sharing of development resources in the country since the Constitution requires that revenue be shared equitably between the national and the county governments. Equity is an element of the RTD. Fiscal decentralisation actualises equitable distribution of funds for development across the different

¹⁴¹ Article 217(6)(b) of the Constitution of Kenya 2010.

¹⁴² Article 113 of the Constitution of Kenya 2010.

¹⁴³ Wainaina <https://www.pd.co.ke/news/national/mt-kenya-calls-for-one-man-one-vote-one-shilling-system-26557/> (Date of use: 6 February 2021); Ngugi and Rasto <https://www.kenyanews.go.ke/governor-demands-equity-in-distribution-of-funds/> (Date of use: 6 February 2021).

¹⁴⁴ *Council of Governors & 47 Others v Attorney General & 3 Others (Interested Parties); Katiba Institute & 2 Others (Amicus Curiae)* [2020] eKLR; *International Legal Consultancy Group v The Senate and Another Constitutional Petition Number 8 of 2014* [2014] eKLR para 70.

counties in Kenya, thus the argument that devolution augments the realisation of the RTD in Kenya.

4.4.1.4 Economic Devolution

Economic devolution, on the other hand, "consists of privatization and de-regulation".¹⁴⁵ According to Lumumba and Mbondenyi, this form of devolution shifts responsibility for providing goods and delivering services from the central government to the private sector.¹⁴⁶ The functions that had previously been State's primary responsibility are now carried out by private corporations, community groups, cooperatives and non-governmental groups (NGOs).¹⁴⁷

County governments can enter into partnerships with public or private organisations under the provisions of the Public-Private Partnerships Act¹⁴⁸ or any other law for the time being in force, for any work, service or function for which it is responsible within its area of jurisdiction.¹⁴⁹ The county government has to ensure efficiency, effectiveness, inclusivity and public participation when exercising these powers.¹⁵⁰

The Public-Private Partnership Act is an Act of Parliament "to provide for the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development projects of the government through concession or other contractual arrangements". The Act also provides for "the establishment of institutions to regulate, monitor and supervise the implementation of project agreements on infrastructure or development projects. Under the Act, a contracting authority refers a state department, agency, state corporation, or county government that intends to have a function undertaken by a private party".¹⁵¹

Therefore, it is submitted that the ability of county governments to legally enter into arrangements with other private entities for the provision and delivery of public goods and services is evidence of economic devolution in Kenya. Economic

¹⁴⁵ Smoke *Fiscal Decentralisation in Developing Countries* 9.

¹⁴⁶ Mbondenyi and Lumumba "Conceptual and Historical Overview" 15.

¹⁴⁷ Smoke *Fiscal Decentralisation in Developing Countries* 9.

¹⁴⁸ Act 15 of 2013.

¹⁴⁹ Section 9(3) of the County Governments Act 17 of 2012.

¹⁵⁰ Section 9(6) of the County Governments Act 17 of 2012.

¹⁵¹ Section 2(1)(b) of Public Private Partnerships Act 15 of 2013

devolution leads to efficiency because the private sector is usually more creative than government entities in providing public goods and services. Public-private partnerships (PPPs) lead to improved welfare of citizens because of better and efficient access to public goods and services.¹⁵²

For instance, PPPs were touted as the solution to Kenya's affordable housing plan under the government's "big 4" development plan.¹⁵³ Consequently, the government has entered into PPPs to construct at least 500,000 modern affordable housing units by 2022.¹⁵⁴ It is working with county governments to realise this ambitious plan, and recently the government intimated that 1,370 housing units currently being constructed in Nairobi county through PPP with a Chinese developer would be ready for occupation by February 2021.¹⁵⁵ The realisation of the right to housing and shelter leads to realisation other rights like clean water, sanitation, health rights, among others. In the process, other rights such as the right to life and dignity are also realised. This indivisibility and interconnectivity of rights is the essence of the RTD.

This argument was brought out in the case of *Satrose Ayuma & 11 others v The Registered Trustees of Kenya Railways Staff Retirement Benefits Fund Scheme and 3 others*¹⁵⁶ wherein the court referred to the CESCR general comments No. 4¹⁵⁷ and 7¹⁵⁸ in expounding on the interpretation of the right to adequate housing.¹⁵⁹ The court stated that under general comment No.4, "the right to adequate housing should not be interpreted narrowly as a right to basic shelter or a roof over one's

¹⁵² Mbondenye and Lumumba "Conceptual and Historical Overview" 16.

¹⁵³ *Business Daily* <https://www.businessdailyafrica.com/analysis/ideas/Affordable-housing-will-be-attained-from-smart-PPP-bargains/4259414-4372278-t8oj15z/index.html> (Date of use: 1 July 2020).

¹⁵⁴ Boma Yangu "The 500,000 Affordable Housing Programme" <https://bomayangu.go.ke/> both (Date of use: 01 July 2020).

¹⁵⁵ <https://www.nation.co.ke/kenya/life-and-style/dn2/all-you-need-to-know-about-the-affordable-housing-programme-190844> (Date of use: 01 July 2020).

¹⁵⁶ [2011] eKLR.

¹⁵⁷ UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 4: The Right to Adequate Housing (Art 11 (1) of the Covenant)*, 13 December 1991, E/1992/23 <https://www.refworld.org/docid/47a7079a1.html> (Date of use: 03 July 2020).

¹⁵⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 7: The right to adequate housing (Art 11.1): forced evictions*, 20 May 1997, E/1998/22 <https://www.refworld.org/docid/47a70799d.html> (Date of use: 03/07/2020 (Date of use: 3 July 2020).

¹⁵⁹ Paragraph 69.

head but instead as the right to live somewhere in security, peace and dignity".¹⁶⁰ Thus, the court reiterated that human rights are interrelated and indivisible and that the right to housing is connected to the human person's inherent dignity.

Therefore, it is submitted that economic devolution makes it easier for the government to realise several socio-economic rights that have a positive impact on other human rights. Devolution enables the county governments to initiate efficient development programmes, for instance, PPPs in housing, that impact the socio-economic aspects of the citizens' lives. Therefore, economic devolution facilitates the realisation of the RTD through the implementation of development programmes that lead to the holistic realisation of all other human rights and fundamental freedoms.

4.4.2 Objects of Devolution

This section discusses the objects of devolution in Kenya. It sheds light on the social, economic, political and cultural issues devolution was intended to address in Kenya. In other words, the section discusses the goal or purpose of devolution in Kenya. Unpacking the objects of devolution is crucial because this thesis later links the objects of devolution to the realisation of the RTD. This section discusses the constitutional goals of devolution and relates these goals to elements of the RTD, thus demonstrating the relationship between the RTD and devolution in Kenya.

The word "object" is defined as "something sought to be attained or accomplished; an end, goal or purpose".¹⁶¹ In the context of legislation, "objects of statute" means "the aim or purpose of legislation; the end or design that the statute is meant to accomplish".¹⁶² The Constitution of Kenya 2010 uses the word "object" to provide for the goal or purpose of devolution.

Article 174 of the Constitution of Kenya 2010 expressly spells out the objects of devolution without any ambiguity.¹⁶³ The objects of devolution form part of the

¹⁶⁰ Paragraph 70.

¹⁶¹ Garner (ed) *Black's Law Dictionary* 1177.

¹⁶² Garner (ed) *Black's Law Dictionary* 1177.

¹⁶³ Under article 174 of the Constitution of Kenya the objects of devolution comprise the following:-

- a) To promote democratic and accountable exercise of power;
- b) To foster national unity by recognizing diversity;

Constitution's purposes, values, and principles, which, according to article 259(1)(a), must be promoted whenever the Constitution is interpreted.¹⁶⁴ The objects justify the adoption of devolution by identifying the problems that devolution was designed to address, thus guiding policy and legislative action towards fixing these problems.¹⁶⁵

The objects point at the "goals that must be achieved in the functional areas assigned to each level of government"¹⁶⁶ and set parameters within which the authority and power of the two levels of government are exercised.¹⁶⁷ These also include setting position standards that must be complied with or achieved¹⁶⁸ by policymakers, legislators, and other participants within government to realise the goals of devolution. The role of county governments must always be interpreted within the context of these constitutional goals.

Such parameters limit power and authority, they transform the objects and powers into legal obligations and create enforceable obligations when read with the bill of rights.¹⁶⁹ For instance, article 56 (e) of the Constitution of Kenya read with article 174 (f) create an obligation on county governments to protect the socio-economic rights¹⁷⁰ of the minorities, specifically, access to water, health services, and infrastructure. This means that an interpretation of some of the objects rise to human

-
- c) To give powers of self-governance to the people and enhance participation of the people in exercise of the powers of the State and in making decisions affecting them;
 - d) To recognize the right of communities to manage their own affairs and to further their development;
 - e) To protect and promote the interests and rights of minorities and marginalized communities to manage their own affairs and to further their development;
 - f) To protect and promote the interests and rights of minorities and marginalized communities;
 - g) To promote social economic development and provision of proximate, easily accessible services throughout Kenya;
 - h) To ensure equitable sharing of national and local resources throughout Kenya;
 - i) To facilitate the decentralization of state organs, their functions and services from the capital of Kenya and;
 - j) To enhance checks and balances and separation of powers;

¹⁶⁴ Mutakha *Constitutional framework for devolution* 136.

¹⁶⁵ Mutakha *Constitutional framework for devolution* 136.

¹⁶⁶ Steytler and Fesha 2007 *SALJ* 332-333.

¹⁶⁷ Steytler and De Visser *Local Government Law* ch 8.

¹⁶⁸ *United Democratic Movement v President of the Republic of South Africa* 2002 1 BCLR 1179 (CC) para 19.

¹⁶⁹ Mutakha *Constitutional framework for devolution* 137.

¹⁷⁰ Article 34 of the Constitution of Kenya 2010: socio-economic rights are justiciable.

rights obligations such as the realisation of the RTD, with the county governments being the duty bearers.

According to Professor Yash Ghai, who participated in the Constitution-making process in Kenya, the significance of the devolution in Kenya was at least threefold; It involved the re-organization of the entire State, moving it towards hybrid-federalism. Secondly, it sought to introduce standards and practices of equitable distribution and delivery of services throughout the country. Thirdly, it established rules and principles, including democracy and participation, by which devolved powers (as also national powers) are exercised.¹⁷¹

In the *Speaker of the Senate and the Senate of the Republic of Kenya v The Honourable Attorney General and the Speaker of the National Assembly*,¹⁷² the court identified objects of devolution to include better and equitable delivery of goods, better access to social goods, and promotion of democracy through enhanced participation in governance. In this regard, the court stated:

The Kenyan people by the Constitution of Kenya 2010 chose to de-concentrate State power, rights, duties, competences – shifting substantial aspects to county government, to be exercised in the county units, for better and more equitable delivery of the goods of the political order. The dominant perception at the time of constitution-making was that such a de-concentration of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope of political self-fulfillment, through an enlarged scheme of actual participation in governance mechanisms by the people - thus giving more fulfillment to the concept of democracy.

The objects of devolution can be summarised into the following four broad categories; those that promote and advance democracy and accountability; development and service delivery; equity and inclusiveness; and those that limit centralisation, "though some of the objects overlap with others."¹⁷³ These four broad objects incorporate the three broad objectives of devolution, as asserted by Ghai. Some of these objectives are similar to the elements of the RTD, such as participation, recognition of development as a right, equity, and inclusiveness. Therefore, it is arguable that the objects of devolution create a link between the RTD

¹⁷¹ Ghai "Devolution in Kenya" in Steytler and Ghai (eds) *Kenyan-South African Dialogue on Devolution* 78-79.

¹⁷² Supreme Court Advisory Opinion Reference No 2 of 2013.

¹⁷³ Mutakha *Constitutional framework for devolution* 139.

and devolution in Kenya. As discussed in the next section; the four broad categories also justify the adoption of devolution in Kenya.

4.4.2.1 Democracy and Accountability

Devolution seeks to promote and advance democracy and accountability.¹⁷⁴ Prud'Homme confirms this by arguing that a desire for real democracy can influence a country towards decentralisation,¹⁷⁵ meaning that democracy is best practiced where there are high levels of decentralisation. Therefore, it is important to understand what the terms "democracy" and "accountability" mean before discussing how devolution contributes to their advancement.

4.4.2.1.1 What is Democracy?

The common understanding of the term democracy is a "government by and for the people."¹⁷⁶ a definition attributed to Abraham Lincoln, one of the founding fathers of American democracy.¹⁷⁷ Democracy classically defined as the "institutional arrangements for arriving at political decisions in which individuals acquire the power to decide through a competitive struggle for the people's vote".¹⁷⁸ There are many forms of "democracy" based on a country's "socio-economic conditions and its entrenched State structures and policy practices,"¹⁷⁹ meaning that postulating a precise definition of democracy may be an arduous task.

In this context, Weinstein states that the words "of," "by" and "for" used in Abraham Lincoln's Gettysburg speech with reference to democracy "are oracular, delphic, shining with light and hope, yet tantalizingly vague, with meaning sometimes obscured, much like the chameleon phrases "due process," "cruel and unusual punishment," and "the rule of law" that continue to "inspire, intrigue and puzzle us."¹⁸⁰ Weinstein's argument is that the concept of democracy continues to evolve and change depending on the socio-economic, political, and cultural circumstances

¹⁷⁴ Article 174(a) and (b) of the Constitution of Kenya.

¹⁷⁵ Prud'Homme "On the dangers of decentralization" 6.

¹⁷⁶ Lijphart *Thinking about Democracy* 112.

¹⁷⁷ Abraham Lincoln, address delivered at The Dedication of the Cemetery at Gettysburg (Nov 19, 1863), reprinted in Balser *et al* (eds) *Abraham Lincoln* 734 cited in Weinstein 2008 *Card L Rev* 13-14.

¹⁷⁸ Schumpeter *Capitalism, Socialism and Democracy* 269.

¹⁷⁹ Schmitter and Karl 1991 *J Democ* 114.

¹⁸⁰ Weinstein 2008 *Card L Rev* 13.

of a country. This means that the concept of democracy in devolution must be analysed from Kenya's unique circumstances.

Acknowledging the vagueness of the classical definition of democracy as "government by and for the people," Lijphart argues that this definition raises fundamental questions like who has to do the governing? Whose interests should a government be responsive to when the people are in disagreement and express divergent preferences?¹⁸¹ In terms of governing, majoritarian democracy demands that political power concentrated in the hands of the majority, and thus the government would need to be responsive to the needs of the majority. Consensus democracy, on the other hand, tries to accommodate as many people as possible. It "tries to share, disperse, restrain and limit power in various ways"¹⁸² so that both the minority and majority voices are heard. This could be done by qualifying the majority's decision by using laws such as constitutional provisions.¹⁸³

Devolution incorporates elements of both consensus and majoritarian democracy. An example of consensus democracy within the context of devolution is when minorities who cannot be heard through the ballot resort to judicial avenues such as public interest litigation.¹⁸⁴ An example of majoritarian democracy in the context of devolution includes the election of the governor and the MCAs since they are elected on the basis of a popular vote. These examples will be discussed in detail below.

In unpacking the term democracy, the golden thread that runs through the different notions of term is a reference to a community of individuals, "a people" who are, in some sense, collectively self-governing.¹⁸⁵ Some of the hallmarks of democracy include; regular free and fair elections in which representatives of the people are elected, majority rule where the governing body makes decisions by combining the

¹⁸¹ Lijphart *Thinking about Democracy* 112.

¹⁸² Lijphart *Thinking about Democracy* 112.

¹⁸³ Schmitter and Karl 1991 *J Democ* 114.

¹⁸⁴ *Governor Bungoma County v John Mining Temoi & 19 Others* [2019] eKLR; *National Association for the Advancement of Coloured People v Button* 371 US 415 (1963).

¹⁸⁵ Arrhenius "Democracy for the 21st Century: Research Challenges" 166.

majority votes, and cooperation, where people must voluntarily make collective decisions binding on the community as a whole.¹⁸⁶

Democracies depend on leaders who sit in positions of authority and can give legitimate commands to the governed.¹⁸⁷ The elements that distinguish democratic rulers from non-democratic ones are the norms that state “how the rulers came to power and the practices that hold them accountable for their actions”.¹⁸⁸ It is submitted that in a democracy, the law, usually the constitution, creates a system that determines how rulers come into power, thus legitimizing their leadership role. The law also determines how these rulers are held accountable by those who put them in office.

Schmitter and Karl also argue that in a democracy, the popularly elected officials must exercise their constitutional powers without being subjected to the veto power of unelected officials such as civil servants, military officials, and State managers, among others. They also argue that “the polity must be self-governing and must act independently of any constraints from some other overarching political system”.¹⁸⁹

The above-highlighted features of democracy will be discussed in detail in section 3.3.2.1.3 below to demonstrate how they relate to Kenya’s devolved system of government.

4.4.2.1.2 What is Accountability?

Accountability is a "contested" term and an "ever-expanding concept" because different meanings have been given to the term by various scholars depending on the context of their research.¹⁹⁰ Generally, the idea of accountability suggests that "one person or institution is obliged to give an account of his, her or its activities to another."¹⁹¹ The definition adopted by this research will be relevant to devolution because this research seeks to demystify the role of devolution in fostering accountability.

¹⁸⁶ Arrhenius "Democracy for the 21st Century: Research Challenges" 166.

¹⁸⁷ Schmitter and Karl 1991 *J Democ* 115.

¹⁸⁸ Schmitter and Karl 1991 *J Democ* 115.

¹⁸⁹ Schmitter and Karl 1991 *J Demo* 117.

¹⁹⁰ Brandsma and Schillemans 2013 *J Pub Admin Res & Theory* 955.

¹⁹¹ Jenkins "The role of political institutions in promoting accountability" 136.

Accountability is defined as “any mechanism that makes powerful institutions responsible for their particular subjects”.¹⁹² Accountability is also defined as the “ability of the governed to exercise control over officeholders to whom power is delegated.”¹⁹³ Together with delegation (in the context of this thesis, the apt term would be “decentralisation”) and representation, “accountability is one of the cornerstones of democracy”.¹⁹⁴ Delegation involves “empowering another party with the discretion to exercise certain powers, representation is about the interests at stake”, and the role of accountability to ensure that the exercise of discretion is not arbitrary.¹⁹⁵

In a democracy, the idea of accountability often conceptualized in the form of a “principal-agent relationship.”¹⁹⁶ The principal (voters) delegate authority to the agents (politicians and civil servants) “who are expected to act on the principal’s” behalf.¹⁹⁷ Therefore, Keohane views accountability as “relationships in which principals have the ability to demand answers from agents to questions about their proposed or past behaviour, to discern that behaviour, and to impose sanctions on agents if they regard their behaviour as unsatisfactory.”¹⁹⁸

Accountability can take the form of legal accountability, professional accountability, bureaucratic accountability, or political accountability.¹⁹⁹ A golden thread that conceptually connects all these forms of accountability is that they “relate to multiple dyadic relationships” between public agents and different “audiences” or “accountability forums.”²⁰⁰ For purposes of this thesis, “public agents” refer to county governments, and “audiences” or “accountability forums” refer to the citizens.

Having unpacked the meaning of democracy and accountability above, the preceding section will discuss the nexus between devolution, democracy and

¹⁹² Mulgan *Holding power to account* 8.

¹⁹³ Jenkins “The role of political institutions in promoting accountability” 137.

¹⁹⁴ Brandsma and Schillemans 2013 *J Pub Admin Res & Theory* 953.

¹⁹⁵ Brandsma and Schillemans 2013 *J Pub Admin Res & Theory* 953.

¹⁹⁶ Jenkins “The role of political institutions in promoting accountability” 137.

¹⁹⁷ Jenkins “The role of political institutions in promoting accountability” 137.

¹⁹⁸ Keohane *Global Governance and Democratic Accountability* 3.

¹⁹⁹ Romzek and Dubnick 1987 *Public Admin Rev* 228.

²⁰⁰ Brandsma and Schillemans 2013 *J Pub Admin Res & Theory* 955.

accountability to demonstrate how devolution contributes to the growth and development of democracy and accountability in Kenya.

4.4.2.1.3 How Does Devolution Foster Democracy and Accountability?

Going by the above definitions of democracy and accountability, one notable feature in democracy is a system that makes the leaders accountable to the people.²⁰¹ One cannot speak about the existence of democracy if there are no accountability systems. It is submitted that accountability is an element of democracy, and thus democracy cannot exist without accountability.

Schmitter and Karl connect democracy and accountability by describing democracy as "a system of governance in which rulers are held accountable for their actions in the public realm by citizens acting indirectly through competition and cooperation of their elected representatives."²⁰² Therefore, the rulers are not free to do as they please but must always act in the best interests of the citizens because of the accountability structures that underlie the system of governance.

The regime or system of governance is a combination of patterns that determine the how leaders get into public office, the qualities of the persons who can get access to public office; the strategies that the persons may use to gain access, and the rules that apply when publicly binding decisions are made.²⁰³ For such an ensemble to work appropriately, it must be institutionalized in the form of a written body of laws undergirded by a written constitution.²⁰⁴ This model is the most preferred, owing to written constitutions, effectively "limit the government" by generating "a set of inviolable principles" to which government action must conform, and this is "vital to the stability of democracy."²⁰⁵

Using the foregoing hypothesis, this thesis proceeds to discuss the idea of democracy within the context of devolution and explain briefly to illustrate that devolution creates a system of governance that makes democracy thrive.

²⁰¹ Schmitter and Karl 1991 *J Democ* 114 & 115.

²⁰² Schmitter and Karl 1991 *J Democ* 114.

²⁰³ Schmitter and Karl 1991 *J Democ* 114.

²⁰⁴ Schmitter and Karl 1991 *J Democ* 114.

²⁰⁵ Ginsburg, Elkins and Melton <https://escholarship.org/content/qt6jw9d0mf/qt6jw9d0mf.pdf> (Date of use: 09 July 2020) 4.

According to Robert Dahl, certain procedural minimal conditions must be present for a viable democracy to exist. The first one is that the control of government decisions about the polity is constitutionally vested in elected officials.²⁰⁶ In the context of devolution in Kenya, the governor is the county's chief executive officer (CEO).²⁰⁷ In exercise of executive power, the governor creates policies that sometimes have to be approved by the county assembly.²⁰⁸ The county assemblies also play an oversight role over the county executive in keeping with the doctrine of separation of powers.²⁰⁹

The control of government decisions on the polity is therefore vested squarely in the hands of elected officials,²¹⁰ which is a hallmark of democracy. Additionally, the fact that the people in a general election directly elect the governor and the MCAs also reinforces majoritarian democracy. The oversight role that the county assembly plays over the executive in policy creation, budgeting, and appointments of certain county officials such as the county executive committee (CEC), has been realised through accountability.²¹¹ It is arguable that apart from entrenching accountability, the oversight role by the county assembly also entrenches consensus democracy by ensuring that constitutional principles such as equity, inclusiveness, participation of the people, and protection of the marginalized is observed by the county executive in the exercise of its power.²¹²

Dahl also argues that for democracy to exist, the people must choose officials through regular free and fair elections. Under the devolved system of government, the governor is elected directly by the people and occupies office for a maximum of two terms, each term comprising a cycle of five years.²¹³ The people also elect the MCAs who serve for five years.²¹⁴ The elections for governors, their deputies, and

²⁰⁶ Dahl *Dilemmas of Pluralist Democracy* 11.

²⁰⁷ Nyanjom *Devolution in Kenya's new Constitution* 11.

²⁰⁸ Section 30(f) of the County Governments Act 17 of 2012.

²⁰⁹ Article 185(3) of the Constitution of Kenya 2010.

²¹⁰ Article 180 of the Constitution of Kenya 2010 provides for the election of a governor and his deputy while Article 177 provides for the election of the MCAs.

²¹¹ Nyanjom *Devolution in Kenya's new Constitution* 11.

²¹² Under Article 10 of the Constitution of Kenya these principles are binding on state organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions.

²¹³ Article 180(7) of the Constitution of Kenya 2010.

²¹⁴ Article 177(1)(a) and (4) of the Constitution of Kenya 2010.

the MCAs happen on the same day as a general election of members of parliament, senators, the president, and deputy president, being the second Tuesday in August in every fifth year.²¹⁵ This system of regular free and fair elections oils the wheels of democracy to turn in the right direction.

According to Dahl, another precondition for democracy is universal suffrage for all adults: the right to vote.²¹⁶ In Kenya; an adult is defined as one who has attained the age of 18 years.²¹⁷ Any adult citizen who is a registered voter in a particular county can participate in an election as a voter.²¹⁸ The governor, his deputy, the MCAs, and senators are all elected by the people through grassroots elections. The right to vote is a Constitutional right guaranteed under Article 38(2) and (3) of the Constitution of Kenya 2010. According to the Elections Act,²¹⁹ any person whose name and biometric data have entered in a register of voters in a particular polling station and who produces an identification document shall be eligible to vote in that polling station.²²⁰

Therefore, devolution entrenches democracy by creating a system through which the citizens can exercise their right to universal suffrage. The county's political and executive structures are constituted by the citizens through regular elections, thus making it possible for the people to self-govern through popularly elected representatives, an element of democracy.

The right to run for elective office (for adults) is a condition precedent for democracy²²¹ so that the "collective governing" element of democracy is achieved. To be eligible to compete in an election for the position of MCA,²²² senator²²³ or county governor under the devolved system of government in Kenya,²²⁴ they have to be registered as a voter in the relevant county. Additionally, one has to meet the

²¹⁵ Articles 101(1), 136(2)(a), 177(1) and 180(1) of the Constitution of Kenya 2010.

²¹⁶ Dahl *Dilemmas of Pluralist Democracy* 11.

²¹⁷ Article 260 of the Constitution of Kenya 2010 and section 2 of the Elections Act 24 of 2011.

²¹⁸ Article 38(3) of the Constitution of Kenya.

²¹⁹ Act 11 of 2011, an Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes.

²²⁰ Section 10 of the Elections Act 24 of 2011.

²²¹ Dahl *Dilemmas of Pluralist Democracy* 11.

²²² Article 193 of the Constitution of Kenya 2010.

²²³ Section 24 of the Elections Act 24 of 2011.

²²⁴ Article 180(2) of the Constitution of Kenya 2010.

educational, moral, and ethical requirements and be nominated by a political party or be an independent candidate. In essence, this means that any citizen can run for an elective position as long as they satisfy the basic criteria set by the law. Therefore, the right to run for elective office is realizable within the framework of devolution, thus entrenching democracy.

As stated earlier, a written constitution is arguably one of the most preferred ways of institutionalizing democracy because it creates a system that allows collective governing and accountability from the people's representatives.²²⁵ Some theories that seek to explain the origin of constitutions argue that constitutions are made out of societal consensus. For instance, according to the social contract theory, the common power that man produced by creating a government is known as "State power,"²²⁶ while "constituent power" is referred to as the power to form a government.²²⁷ Therefore, constitutions or laws are meant to limit State power created by men in their quest for self-preservation and survival. A constitution defines, distributes and constrains the use of State power to ensure it is used to serve the objective that necessitated its creation.²²⁸

Based on the understanding that a constitution is a product of societal consensus, it is arguable that the decision to include an educational, moral, and ethical threshold for those who desire to run for different offices in Kenya is not undemocratic. It is merely a representation of how society has agreed to be governed.

It is also important to note that for democracy to thrive, the government must guarantee freedom of expression.²²⁹ The protection of freedom of expression is anchored in the Bill of Rights in Chapter four of the Constitution of Kenya 2010. Every person has the right to freedom of expression, which includes the freedom to seek, receive and impart information or ideas, freedom of artistic creativity,

²²⁵ Ginsburg, Elkins and Melton <https://escholarship.org/content/qt6jw9d0mf/qt6jw9d0mf.pdf> (Date of use: 09 July 2020).

²²⁶ Mutakha "Regional inequalities in Kenya" 123.

²²⁷ *Reverend Dr. Timothy M. Njoya and 6 Others v Honourable Attorney General and Another* [2004] eKLR.

²²⁸ Mutakha "Regional inequalities in Kenya" 123.

²²⁹ Dahl *Dilemmas of Pluralist Democracy* 11.

academic freedom, and scientific research.²³⁰ How does freedom of expression foster democracy under the devolved system of government in Kenya?

Freedom of expression enables public participation to happen. Devolution was adopted to provide for the modalities and spaces for realising public participation in Kenya.²³¹ Devolution in Kenya seeks “to give citizens increased powers of self-governance and enhance their participation in the exercise of the powers of the State and in making decisions affecting them”.²³² Citizens' participation in county affairs is crucial and forms the bedrock of county business. Public participation as a national value and principle of governance²³³ does not occur abstract but within a concrete legal and institutionalized context.²³⁴ This means that participation has to be meaningful because its essence is to inform the public of what is to be expected, allow the citizens to express concerns, fears and even make demands. Citizen participation, therefore, gives legitimacy to any democratic State.²³⁵

Freedom of expression enables participation in various ways. For instance, it empowers the citizens to freely express themselves in public participation fora at the county²³⁶ and allows them to get information. Freedom of expression also secures the citizens' right to petition and challenge the county government in any matter,²³⁷ while the county government has a legal obligation to respond to these petitions.²³⁸ The county government can also conduct local referenda on issues such as county laws and petitions,²³⁹ which allows citizens to engage with the county government because the Constitution guarantees their freedom of expression.

²³⁰ Article 33(1) of the Constitution of Kenya 2010.

²³¹ Ochieng "Devolution of Government" 175.

²³² Article 174(c) of the Constitution of Kenya 2010.

²³³ Article 10 of the Constitution of Kenya 2010.

²³⁴ *Institute of Social Accountability & Another v National Assembly & 4 Others* [2015] eKLR Lenaola J, Majanja J and Mumbi Ngugi J, a three-judge bench noted that public participation is anchored under article 10(2) of The Constitution of Kenya which establishes the founding values of the state which include, among others, transparency, accountability and participation of the people.

²³⁵ *Republic v Independent Electoral and Boundaries Commission (IEBC) Ex parte National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR 168. The court also stated that when a decision is made without consulting the public the result can never be an informed decision. The court cited with approval the dictum in the South African case of *Poverty Alleviation Network & Others v President of the Republic of South Africa & 19 Others* (CCT86/08) [2010] at para 33.

²³⁶ County Government Act 17 of 2012 Section 91.

²³⁷ County Government Act 17 of 2012 Section 88.

²³⁸ County Government Act 17 of 2012 Section 89.

²³⁹ County Government Act 17 of 2012 Section 90.

Participation provides an avenue through which the citizens can participate in governing by having a say in decision making. It also acts as an accountability mechanism where the people can legitimately question the decisions of their leaders and demand feedback.

The right to information and /or alternative sources of information is another minimal procedural condition that must exist for democracy to thrive.²⁴⁰ Access to information is a right that is provided for and protected under the Constitution of Kenya 2010. Every citizen of Kenya has the right to access information held by the State.²⁴¹ The State is also obligated to publish and publicise any important information affecting the nation.²⁴²

However, the right to access information is not absolute. By law, “it can be limited only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.²⁴³ An example of such a law is the Official Secrets Act passed to limit citizens’ access to information that the government believes would compromise its internal security.²⁴⁴

Additionally, a citizen may request access to any information in the custody of the county government or State organ as of right in accordance with Article 35 of the Constitution of Kenya 2010.²⁴⁵ The county governments are also required under the law to designate an office to ensure access to information.²⁴⁶

Under section 87 of the County Governments Act,²⁴⁷ citizens' participation is based on “reasonable access to formulating and implementing law and regulations, including approval of development proposals, projects and budgets”. Citizens cannot exercise their participatory rights unless they have access to information and can express themselves freely. In light of the foregoing, it was argued that the normative and institutional structures under devolution in Kenya contribute to democratic and accountable governance and development. That is because these

²⁴⁰ Dahl *Dilemmas of Pluralist Democracy* 11.

²⁴¹ Article 35(1)(a) of the Constitution of Kenya 2010.

²⁴² Article 35(3) of the Constitution of Kenya 2010.

²⁴³ Article 24 of the Constitution of Kenya 2010.

²⁴⁴ Cap 187 the Laws of Kenya. See the preamble of the Act.

²⁴⁵ Section 96(1) of the County Governments Act 17 of 2012.

²⁴⁶ Section 96(2)-(3) of the County Governments Act 17 of 2012.

²⁴⁷ Act 17 of 2012.

structures make it possible for the citizens to exercise their right to access information and freedom of expression.

The right to form relatively independent associations or organizations is another condition precedent for a viable democracy.²⁴⁸ The Constitution of Kenya guarantees freedom of association²⁴⁹ and political rights,²⁵⁰ which includes forming, or participating in the formation of a political party or participating in the activities of, or recruiting members for a political party or campaigning for a political party or cause.²⁵¹

Therefore, in exercising these rights, Kenyans can form political parties and participate in politics, including electing leaders of their choice in the counties without any interference. The elected leaders within the devolved government system are governors, their deputies and members of the county assembly (MCAs). These leaders, who have been elected in a free and fair manner, are accountable to the people because they exercise their sovereign power through them,²⁵² thus promoting democracy.

In essence, devolution indeed creates a governance system that enhances democracy and accountability in Kenya. It provides for both majoritarian and consensus democracy and brings governance back to grassroots enabling the people to exercise self-governance through their elected representatives and hold them accountable. Devolution enhances citizen participation in development and governance by providing normative and institutional structures that define and govern the "principal-agent" relationship between the people and leaders.

4.4.2.2 Development and Service Delivery

Promoting "development and service delivery" is one of the broad functions of devolution in Kenya.²⁵³ This is discerned from the reading of the text of the

²⁴⁸ Dahl *Dilemmas of Pluralist Democracy* 11.

²⁴⁹ Article 36 of the Constitution of Kenya 2010.

²⁵⁰ Article 38 of the Constitution of Kenya 2010.

²⁵¹ Article 38 of the Constitution of Kenya 2010.

²⁵² Article 1(2) of the Constitution of Kenya 2010 provides that the people of Kenya can exercise their sovereign power either directly or through their democratically elected representatives. Additionally, article 1(4)(a) and (b) provides that sovereign power of the people is exercised at both national and county levels of government.

²⁵³ Mutakha *Constitutional framework for devolution* 139.

Constitution of Kenya 2010. This section identifies the specific provisions of the Constitution that task county governments with the legal obligation to promote development and service delivery. The section then discusses how devolution contributes to development and service delivery.

In a bid to ensure that devolution promotes development and service delivery, the Constitution of Kenya empowers communities to manage their affairs to further their development.²⁵⁴ Communities have been empowered through administrative, fiscal and political devolution. These forms of devolution give the counties autonomy in planning and action without much interference from the national government. The counties manage their developmental affairs and tailor them to suit their unique needs. It is worth noting that counties are required under law to develop a five-year county integrated development plan (CIDP), a 10-year county sectoral plan, a 10-year county spatial plan and a cities and urban areas plan.²⁵⁵ All these are clear indicators that devolution is supposed to be an enabler of development and service delivery.

The text of the Constitution also recognizes the promotion of social and economic development and the provision of proximate, easily accessible services throughout Kenya as one of the objects of devolution.²⁵⁶ A devolved system of government is a basis of rapid development²⁵⁷ because county governments are more aware of local needs and are open to feedback from beneficiaries of the services, thus enhancing the quality of service delivery.²⁵⁸ According to Gathii and Otieno, county governments have made more strides in development because of their ability to pay attention to local concerns much more than the pre-devolution national government.²⁵⁹

Related to development and service delivery, Okoth-Ogendo argues that devolution was meant to ensure equal distribution of national resources and the reduction of poverty.²⁶⁰ Devolution achieves this through equitable distribution of national

²⁵⁴ Article 147(d) of the Constitution of Kenya 2010.

²⁵⁵ Section 105 of the County Governments Act 2012.

²⁵⁶ Article 174(f) of the Constitution of Kenya 2010.

²⁵⁷ Mbondenyi and Lumumba "Conceptual and Historical Overview" 27.

²⁵⁸ Mbondenyi and Lumumba "Conceptual and Historical Overview" 28.

²⁵⁹ Gathii and Otieno 2018 *Fed L Rev* 610.

²⁶⁰ Okoth-Ogendo 1972 *Afr Aff* 9.

resources where priority has been given to areas that have suffered socio-economic and political historical marginalization to address the problem of regional disparities in revenue allocation.²⁶¹ This is a general reduction of poverty levels and enhanced access to services such as healthcare in the counties. In this context, Professor Anyang' Nyong'o rightly posits that devolution gives "ordinary Kenyans more opportunity to experience development".²⁶²

Eminent African leaders such as Thabo Mbeki, the former president of the Republic of South Africa, have acknowledged that decentralisation (devolution is a form of decentralisation) leads to an efficient government and promotes social and economic development. He stated:

There is a renewed interest in local government sweeping across the African continent. This is informed by a common recognition that the system of local democracy enriches the overall project of national liberation and democratisation, and that decentralisation of government power to the appropriate local level actually strengthens government through rendering it more effective. There is also a common commitment to the notion of developmental local government, with a focus on the strategic role of local government in promoting social and economic development at a local level.²⁶³

Thabo Mbeki reiterates that local governments are in a better position to champion socio-economic development and provision of public goods and services because of their proximity to the people. Local governments can appreciate the specific needs of the people and respond faster than the national government. Going by Mbeki's views, devolution has the potential of unlocking rapid grassroots development and service delivery in Kenya.

Statistics strongly indicate that decentralisation tends to increase with economic levels,²⁶⁴ perhaps because of high levels of citizen participation attributed to a more informed citizenry and of proper institutional and legal structures that guarantee meaningful participation. Rondinelli, Nellis and Cheema refer to a study that

²⁶¹ Article 203(1)(g) of the Constitution of Kenya 2010.

²⁶² Nyong'o *Presidential or Parliamentary Democracy in Kenya?* 161.

²⁶³ Mbeki <http://www.dirco.gov.za/docs/speeches/1999/mbek0730.htm> (Date of use: 02 February 2020).

²⁶⁴ Fisman and Gatti <https://openknowledge.worldbank.org/handle/10986/19852> (Date of use: 06 February 2020).

suggests that industrialized countries with well-established governments and high GDP tend to have higher degrees of decentralisation than poorer countries.²⁶⁵

It is submitted that in developed countries (in this context, "developed" refers to industrialized countries with well-established governments and high GDP), citizens normally demand high levels of efficiency in delivering public goods and services from the government. Decentralisation would be a natural response to this demand because it increases efficiency in planning and service delivery²⁶⁶ and leads to greater participation in development planning and management.²⁶⁷ Decentralisation also increases the officials' knowledge of local conditions²⁶⁸ and leads to more significant equity in the allocation of government resources.²⁶⁹

In the same vein, Cloete argues that there is a significant correlation between high levels of development and strong, autonomous local governments. Low levels of development usually correlate with weak, largely powerless and inefficient local government systems.²⁷⁰ Weak local governments are usually unable to respond to local developmental needs because of a lack of normative and institutional structures that guarantee administrative, political, fiscal and economic devolution.

Shah observes that the institutional structures in developing countries require a greater degree of decentralisation than what has been needed in a developed country.²⁷¹ De Visser builds on Shah's argument by asserting that "developing States can overcome a great deal of their institutional backlog by opting for decentralisation".²⁷² This is because a well-organized model of decentralisation normally frees institutions from the bureaucratic shackles that dominate highly centralized systems of governance by giving the sub-national units fiscal and

²⁶⁵ Rondinelli, Nellis and Cheema <http://documents.worldbank.org/curated/en/868391468740679709/pdf/multi0page.pdf> (Date of use: 05 February 2020) 12; Prud'Homme "On the dangers of decentralization" 26 cited in De Visser *Developmental Local Government* 20.

²⁶⁶ Rondinelli, Nellis and Cheema <http://documents.worldbank.org/curated/en/868391468740679709/pdf/multi0page.pdf> (Date of use: 05 February 2020) 10.

²⁶⁷ Rondinelli, Nellis and Cheema <http://documents.worldbank.org/curated/en/868391468740679709/pdf/multi0page.pdf> (Date of use: 05 February 2020) 10.

²⁶⁸ Rondinelli, Nellis and Cheema <http://documents.worldbank.org/curated/en/868391468740679709/pdf/multi0page.pdf> (Date of use: 05 February 2020) 11.

²⁶⁹ Rondinelli, Nellis and Cheema <http://documents.worldbank.org/curated/en/868391468740679709/pdf/multi0page.pdf> (Date of use: 05 February 2020) 10.

²⁷⁰ Cloete "Capacity building" 282.

²⁷¹ Shah <http://documents.worldbank.org/curated/en/392211468742509872/Balance-accountability-and-responsiveness-lessons-about-decentralization> (Date of use: 7 February 2020).

²⁷² De Visser *Developmental Local Government* 21.

administrative autonomy thus leading to rapid development. Shah's and De Visser's observations mirror the findings by Rondinelli et al and Cloete which indicate that decentralisation fosters development much more than a centralized system of government.

Current literature has not changed the findings of the study by Rondinelli et al and others. A World Bank brief on decentralisation in 2013 stated that community-driven development (CDD) and decentralisation nexus could empower communities to drive local development²⁷³ leading to accelerated development and better service delivery.

Faguet and Pöschl also argue that "decentralisation is good for development" because subnational governments are empowered when significant resources and authority were devolved.²⁷⁴ Two or more levels of government are jointly tasked with the responsibility of provision of local, regional, and national public services. "It transforms a simple, linear system of bureaucratic fiat (think command and control), run from the capital, into a much more complex system of coordination, cost-sharing, and overlapping responsibilities amongst multiple tiers of autonomous government with independent mandates".²⁷⁵ This system supports rapid development and efficient service delivery because both national and local development is tailored to suit the needs of the people.

In light of the foregoing, it is submitted that devolution is a catalyst for increased development and better service delivery. Devolution empowers communities to make key decisions in the development and provision of services. The reviewed literature in this section supports this argument.

4.4.2.3 Equity and Inclusiveness

This section discusses how devolution fosters equity and inclusivity in Kenya. It was argued that one of the broad functions of devolution is to promote equity and inclusivity in Kenya.²⁷⁶ The proceeding discourse will shed light on the meaning of

²⁷³ World Bank <https://www.worldbank.org/en/topic/communitydrivendevelopment/brief/Decentralization> (Date of use: 5 February 2020).

²⁷⁴ Faguet and Pöschl *Is Decentralization Good for Development?* 13.

²⁷⁵ Faguet and Pöschl *Is Decentralization Good for Development* 13.

²⁷⁶ Mutakha *Constitutional framework for devolution* 139.

the terms "equity" and "inclusivity," after which their relationship with devolution will be discussed.

Equity in the context of development addresses collective well-being; “development should enable everyone to benefit equally from a redistribution effect extending to the most vulnerable group in society, including future generations”.²⁷⁷ Equity introduces an element of "need" in sharing resources by prioritising resource distribution to those sections of society in dire need. This means that the sharing of resources should be based on needs and not mathematical calculations since the latter can result in unfair distribution of resources because of the disparities arising from historical marginalization.²⁷⁸ Equity, therefore, seeks to ensure the collective well-being of the society by prioritizing the most vulnerable groups in the distribution of national resources to enable them to rise above their developmental challenges.

The outcomes of equity are access to services across different groups of the population based on income, gender, regions (interregional equity) and other categories.²⁷⁹ This means equity has been achieved when different groups within the population are given the same opportunities to access public goods and services all over the country. The term "collective well-being" was used when defining equity²⁸⁰ to mean that even under-developed areas that do not generate much revenue for the government in the form of taxes must be beneficiaries of distributive justice under devolution. An analysis of whether this works in practice will be undertaken in Chapter 5 of this research.

Inclusiveness in the context of devolution is defined as “giving active support to those groups who feel alienated from the political process”.²⁸¹ Dudouet and Lundström define "inclusivity" as "the degree of access to the various areas of political settlements for all sectors of society beyond the most powerful elites, either by participating – directly or indirectly – in decision-making (process inclusivity), or

²⁷⁷ De Visser *Developmental Local Government* 12.

²⁷⁸ Bosire *Devolution for development* 219.

²⁷⁹ Litvack, Ahmad and Bird *Rethinking Decentralization* 8.

²⁸⁰ De Visser *Developmental Local Government* 12.

²⁸¹ Davies "Ron Davies raises profile of ethnic and minority groups in the Assembly" cited in Chaney and Fevre 2001 *Contemp Wales* 29.

by having their concerns addressed by the state (outcome inclusivity)".²⁸² This entails engagement with minority groups traditionally excluded from the development process, usually by enlarging participatory arenas through deliberate legislative action.

Strands of inclusiveness include "fostering equity, equality and participation".²⁸³ Pursuing equity in the distribution of resources does away with discrimination where certain groups are favoured over the others in development. This leads to the realisation of participatory rights for all. Ultimately, all groups in society are given an equal or fair opportunity to pursue their development through an all-inclusive process.

Inclusiveness also seeks to reverse the adverse effects of historical marginalization by giving a voice to those previously restrained. "Having a voice" refers to the actualisation of both "process inclusivity" and "outcome inclusivity," as postulated by Dudouet and Lundström.²⁸⁴ Inclusivity also seeks to ensure that groups that were previously denied access or had limited access to development resources can equitably access resources and further their development.

Some scholars have argued that decentralisation does not necessarily result in equity and inclusiveness because some regions may be disadvantaged in revenue generation.²⁸⁵ This is especially common in developing countries where the model of decentralisation does not allow for national redistribution of resources because taxes are collected and spent locally.²⁸⁶ Arguably, the Kenyan model of decentralisation is designed to achieve equity and inclusiveness.

How is equity inclusiveness achieved in the Constitution of Kenya 2010? Firstly, it is a Constitutional requirement that Kenya's public finance system promotes an equitable society by ensuring that "revenue raised nationally is shared equitably

²⁸² Dudouet and Lundström http://www.berghoffoundation.org/fileadmin/redaktion/Publications/Papers/IPS_Synthesis_Report_web.pdf (Date of use: 16 July 2020) 8.

²⁸³ Davies "Ron Davies raises profile of ethnic and minority groups in the Assembly" cited in Chaney and Fevre 2001 *Contemp Wales* 29.

²⁸⁴ Dudouet and Lundström http://www.berghoffoundation.org/fileadmin/redaktion/Publications/Papers/IPS_Synthesis_Report_web.pdf (Date of use: 16 July 2020) 8.

²⁸⁵ Davies "Ron Davies raises profile of ethnic and minority groups in the Assembly" cited in Chaney and Fevre 2001 *Contemp Wales* 27.

²⁸⁶ Prud'Homme "On the dangers of decentralisation" 26 cited in De Visser *Developmental Local Government* 27.

among the national and county governments”.²⁸⁷ Secondly, the expenditure by the government must promote the equitable development of the country, including by making special provisions for marginalized groups and areas.²⁸⁸ Thirdly, the benefits of development ought to be shared equitably between present and future generations.²⁸⁹ These broad principles that determine the equitable allocation of development resources in Kenya are designed to ensure that everyone is a participant and a beneficiary of development.

Several factors are taken into account when it comes to allocating revenue between the national government and the county government.²⁹⁰ National interest²⁹¹ and the need to make provision for public debt and other national obligations²⁹² must be taken into account. According to the Constitution, other relevant factors include; “the needs of the national government, determined by objective criteria; the need to ensure that county governments can perform the functions allocated to them; the fiscal capacity and efficiency of county governments; developmental and other needs of counties; economic disparities within and among counties and the need to remedy them; the need for affirmative action in respect of disadvantaged areas and groups; the need for economic optimisation of each county and to provide incentives for each county to optimise its capacity to raise revenue; the desirability of stable and predictable allocations of revenue; and the need for flexibility in responding to emergencies and other temporary needs, based on similar objective criteria”.²⁹³

The Commission on Revenue Allocation (CRA), an independent commission under the Constitution of Kenya,²⁹⁴ plays a significant role in ensuring that there is equitable sharing of revenue between the national government and the county governments²⁹⁵ by basing its recommendations on several factors including

²⁸⁷ Article 201(b)(ii) and article 202(1) of the Constitution of Kenya 2010.

²⁸⁸ Article 201(b)(iii) of the Constitution of Kenya 2010.

²⁸⁹ Article 201(c) of the Constitution of Kenya 2010.

²⁹⁰ Article 203(1) of the Constitution of Kenya 2010.

²⁹¹ Article 203(1)(a) of the Constitution of Kenya 2010

²⁹² Article 203(1)(b) of the Constitution of Kenya 2010.

²⁹³ Articles 203(1)(c)-(k) of the Constitution of Kenya 2010.

²⁹⁴ See chapter 15 of the Constitution of Kenya 2010. Commissioners to Independent Commissions enjoy security of tenure; they can only be removed from office under specific grounds and through a process provided in the constitution. Their salaries are charge on consolidated fund meaning that pressure cannot be put on them by reducing their salaries or benefits. They also have power to investigate complaints made by a member of the public, including summoning witnesses, just like a court.

²⁹⁵ Article 216 of the Constitution of Kenya 2010.

economic disparities among counties and how to remedy them.²⁹⁶ Every five years, the CRA develops a revenue allocation formula which the Senate approves.²⁹⁷ The formula combines different factors such as population, equal share among the 47 counties, poverty, land area, fiscal effort, and development.²⁹⁸ The formula is not binding since it is a recommendation to the Senate; however, the Senate has to consider the proposals in its decision.²⁹⁹ Arguably; this system has been written into the Constitution of Kenya to ensure that the specific objects of devolution, that is, equity and inclusiveness, are realised.

In practice, equitable sharing of revenue has had many challenges. There has been an enduring debate regarding the basis of the proportion of revenue owed to the counties should be calculated.³⁰⁰ For instance, in 2020, the Senate experienced an impasse in enacting the County Allocation of Revenue Act for the year 2020/21. This is because the new division of revenue formula proposed by the CRA resulted in more revenue allocation to densely populated counties while the sparsely populated counties that are traditionally marginalized ended up receiving reduced funding.³⁰¹

Some Senators rightly argued that the formula will not achieve equity because the sparsely populated counties have suffered many years of socio-economic and political marginalization.³⁰² Some governors also called for "one person, one vote, one shilling" in the allocation of revenue, meaning that revenue allocation must be based on county population and revenue generation.³⁰³ It is submitted that if such a formula is adopted, equity as an object of devolution will not be achieved as it would mean that certain regions that are sparsely populated and cannot generate much revenue will be disadvantaged. These issues will however be addressed in Chapter

²⁹⁶ Article 203(1)(g) of the Constitution of Kenya 2010.

²⁹⁷ Article 217 of the Constitution of Kenya 2010.

²⁹⁸ <https://www.crakenya.org/information/revenue-allocation-formula/> (Date of use: 14 July 2020).

²⁹⁹ *Council of Governors & 47 Others v Attorney General & 3 Others (Interested Parties); Katiba Institute & 2 Others (Amicus Curiae)* [2020] eKLR para 56-57.

³⁰⁰ Cheeseman, Lynch and Willis 2016 *J Mod Afr Stud* 14.

³⁰¹ Oruko <http://www.kenya24news.com/kenya/tyranny-of-numbers-hits-county-cash-debate/143542-news> (Date of use: 4 July 2020) 2.

³⁰² Oruko <http://www.kenya24news.com/kenya/tyranny-of-numbers-hits-county-cash-debate/143542-news> (Date of use: 4 July 2020) 2.

³⁰³ Ng'ang'a <https://www.standardmedia.co.ke/article/2001362366/mt-kenya-roots-for-one-man-one-vote-one-shilling> (Date of use: 20 July 2020).

5 of this thesis under threats to devolution and the challenges surrounding equitable sharing of revenue.

4.4.2.4 Limitation of Centralization

This section discusses how devolution limits the centralization of State power in Kenya. A historical analysis of devolution in Kenya and various studies over time indicated that centralization is inimical to development.³⁰⁴ In section 3.2.3 above, it was argued that centralisation affected Kenya's growth negatively. It was demonstrated that some of the decentralisation efforts adopted by the government were weak and could not address some of the deep-seated socio-economic and political problems associated with highly centralized governments, thus the push for a stronger system of decentralisation as devolution.

Devolution in Kenya seeks to “limit centralization by transferring decision-making and implementation powers, functions, responsibilities, and resources to legally constituted and popularly elected local governments”.³⁰⁵ Devolution gives control back to the people at the grassroots by decentralizing power from the national government to the county governments.³⁰⁶ By doing so, the people are able to play a more significant role in development³⁰⁷ and ultimately become direct beneficiaries of development.³⁰⁸

The need to limit centralization was informed by Kenya's post-colonial experience characterised by skewed and unbalanced development, resulting in the marginalization of certain ethnic groups. For instance, the Luo, the Coast, Northern Kenya, and other parts of the country complained of economic neglect in the last 50 years of independence caused by politics of ethnicity.³⁰⁹ The powerful central

³⁰⁴ Rondinelli, Nellis and Cheema <http://documents.worldbank.org/curated/en/868391468740679709/pdf/multi0page.pdf> (Date of use: 05 February 2020) 12; Prud'Homme "On the dangers of decentralisation" 26 cited in De Visser *Developmental Local Government* 20; Cloete "Capacity building" 282; De Visser *Developmental Local Government* 21; World Bank <https://www.worldbank.org/en/topic/communitydrivendevelopment/brief/Decentralization> (Date of use: 5 Februarie 2020).

³⁰⁵ *Hand Book on Devolution* 5.

³⁰⁶ Article 174(i) of the Constitution of Kenya 2010.

³⁰⁷ Article 174(d) of the Constitution of Kenya 2010.

³⁰⁸ Article 174(h) of the Constitution of Kenya 2010.

³⁰⁹ Opondo 2014 *Afr J Hist & Cult* 60.

government used the allocation of resources for political expediency rather than equity.

This situation mirrored the state of many countries in post-colonial Africa whose centralized governance systems had failed to attain sustained economic growth and provision of public goods and services such as clean water and health care, among others.³¹⁰ Therefore, the need to decentralise State power was critical to Kenya's quest for an appropriate development paradigm.

Devolution in Kenya is therefore seen as a model that will help restore equity in development³¹¹ by limiting centralisation and allowing the people to have more control over their resources and development agenda.³¹² In this context, Mutunga CJ in 2013, in the case of *Speaker of the Senate & Another v Attorney- General & 4 Others*,³¹³ argued that devolution was a bold attempt to address the negative effects of highly centralized governments.³¹⁴

Devolution, therefore, creates a normative framework that enables decentralisation of State power to regional governments known as counties in Kenya. The wisdom behind this decentralisation model is that it secures equitable distribution of resources to all the regions in Kenya. At the same time, counties are in a better placed to drive development at the grassroots due to their proximity to the people and would understand the needs of the local communities better than the national government, which is usually disconnected from the needs of the local communities.

However, it is important to note that devolution has not been able to effectively champion development by limiting centralization because of other problems associated with devolution, such as poor governance³¹⁵ and "devolved corruption"³¹⁶ in the counties. These issues will however be examined in detail under Chapter 5 of this thesis.

³¹⁰ Ebel and Yilmaz <https://openknowledge.worldbank.org/handle/10986/14821> (Date of use: 06 February 2020).

³¹¹ Constitution of Kenya Review Commission Report (2005) 235.

³¹² Article 174(c), (d) and (f) of the Constitution of Kenya.

³¹³ In the Matter of the *Speaker of the Senate & Another* [2013] eKLR.

³¹⁴ *Speaker of the Senate & Another* [2013] eKLR.

³¹⁵ See generally, Khaunya, Wawire and Chepng'eno 2015 *Int'l J Econ, Fin Manage* 27-37.

³¹⁶ See generally, D'Arcy and Cornell 2016 *Afr Aff* 246-273.

4.5 Conclusion

An analysis of the history of devolution and its place in the overall structure of the State reveals that the Kenyan State had been founded on "a partisan, sectarian, and exclusionary logic,"³¹⁷ which resulted in a country riddled with developmental inequalities. The "inequalities within groups and between regions are manifested in the class structure of society, ethno-regional differences, rural-urban divides, and gender biases".³¹⁸ "It is this logic that the Constitution of Kenya, 2010 sought to deconstruct"³¹⁹ by introducing a devolved system of government.

This chapter has demonstrated that devolution was introduced to correct the historical injustices associated with the inequitable allocation of resources and marginalization of certain ethnic communities. While observing the objects of devolution, such as promotion of development, service delivery, equity and inclusiveness, it was submitted that devolution aims to create a new development paradigm that is equitable, people-centred and people-driven. This resonates with the conceptualisation of development under the UNDRTD, which describes development as a process that involves the active and meaningful participation of the people both as "process owners" and direct "beneficiaries" of the "fruits of development."

The Constitution also creates systems through which county governments can be held accountable by the people and operate relatively independently from the national government. Constitutional principles such as participation of the people ensure that county governments do not engage in "a frolic of their own" in development matters. County governments must involve the people in matters of development. Arguably, this leads to the realisation of the RTD seeing that participation is a pillar of the RTD.

Devolution also ensures that every Kenyan can develop through equitable distribution of development resources all over the country. Equitable distribution of development resources means that groups in dire need or groups that have been victims of historical marginalisation have been prioritised in resource allocation.

³¹⁷ Mutunga CJ in the matter of the *Speaker of the Senate & Another* [2013] eKLR para 165.

³¹⁸ Mutunga CJ in the matter of the *Speaker of the Senate & Another* [2013] eKLR para 165.

³¹⁹ Mutunga CJ in the matter of the *Speaker of the Senate & Another* [2013] eKLR para 165.

Equitable distribution of resources implies that every person has a reasonable opportunity to access resources to increase their capabilities. This has a positive effect on the realisation of the RTD in Kenya because equity is a pillar of the RTD.

It was submitted that the normative architecture of devolution under the Constitution of Kenya 2010 seeks to limit centralisation by creating four types of devolution effectively: administrative devolution, political devolution, fiscal devolution and economic devolution. It was argued that this model makes relatively strong and independent sub-national governments called counties that directly derive their mandate from the grassroots. The normative architecture of devolution under the Constitution of Kenya 2010 ensures that county governments operate without undue interference from the national government.

It was argued that the drafters of the Constitution of Kenya 2010 consciously avoided creating a weak form of decentralisation such as the *majimbo* system found in Kenya's independence constitution. The government under late president Jomo Kenyatta, was able to dismantle the *majimbo* system of government because of weak constitutional provisions that did not effectively protect the regional governments, such as a mere 90% majority vote in the senate to pass a constitutional amendment affecting regional governments.³²⁰ This could be easily obtained because of the political influence the executive had over the legislature. It is alleged that some of the senators were even bribed to allow these constitutional changes.³²¹

Under the Constitution of Kenya 2010, any constitutional amendment touching on devolution must be subjected to a referendum which is arduous. This is because such an exercise is in nature "an election" and thus requires engagement with the Independent Electoral and Boundaries Commission (IEBC), civic education, public participation, campaigns and resources, among other things. Further, at least 25% of the registered voters in at least 24 out of the 47 counties must vote in the referendum.³²² If the amendment is by popular initiative, it must receive the support

³²⁰ For a more detailed discussion see Singh 1965 *Int'l Comp L Q* 878-949.

³²¹ Ghai "Devolution in Kenya" in Steytler and Ghai (eds) *Kenyan-South African Dialogue on Devolution* 74.

³²² Article 255(1)(ii) of the Constitution of Kenya 2010.

of at least 24 county assemblies before being subjected to a referendum.³²³ It is argued that these constitutional processes protect the Constitution from mutilation by politicians who may want to amend it to meet their selfish ends. In this context, therefore, devolution in Kenya enjoys reasonable constitutional protection.

This "strong" system of decentralisation packaged under the term "devolution" augments the realisation of the RTD in Kenya. Under the UNDRTD, participation of the people has to be "active, free and meaningful".³²⁴ Any form of participation that is cosmetic or simply carried out to fulfil legal requirements cannot pass the threshold set in the UNDRTD. Active, free and meaningful participation means that the peoples' voices have to be heard during the development process and that the end product of the development process must, to a great extent, reflect the people's expectations. Additionally, the people must be direct beneficiaries of the process of development. The normative and institutional structures under devolution make it possible for citizens to actively, freely and meaningfully participate in development matters within their county, thus realising the RTD.

It is worth noting that despite the deliberate constitutional provisions that seek to "protect" devolution, the recent Building Bridges Initiative (BBI) has demonstrated that politicians can still work together to amend the Constitution. The BBI arose out of a compromise "hand-shake" between Uhuru Kenyatta, the current president of Kenya and leader of Jubilee, the ruling political party and Raila Odinga, the leader of the Orange Democratic Movement (ODM), the political party that came second in the presidential election of 2017.³²⁵ Uhuru and Raila agreed to work together to unite the country that the 2017 elections had polarized.³²⁶

Amending the Constitution to create a governance structure that is "all-inclusive" to abolish the current "winner takes it all" system was seen as the long-term solution to divisive politics in Kenya. The BBI Task Force was formed to collect the views of Kenyans and prepare a report that will form the basis of a Constitutional amendment process. This has weakened the official opposition party in the legislature and almost all the politicians were "speaking in one voice regarding the proposed

³²³ Article 257 of the Constitution of Kenya 2010.

³²⁴ See the para 2 of the preamble and Article 2(3) of the UNDRTD.

³²⁵ Mwangi 2020-03-09 *The People Daily*.

³²⁶ See generally, Nyong'o *Presidential or Parliamentary Democracy in Kenya?*

constitutional amendments".³²⁷ The situation bore an uncanny resemblance to the 1964 saga when the opposition party KADU decided to merge with the ruling party KANU marking the end of regionalism in Kenya.³²⁸

Arguably, this state of affairs poses a threat to some institutions that enjoy constitutional protection, such as devolution. This is because politicians have much influence over the masses and thus can push for a favourable outcome in a constitutional amendment referendum, regardless of the merits of the proposed amendments, if they decide to work together.

The next chapter will establish the link between the RTD and devolution and subsequently discuss how the Constitution of Kenya secures the realisation of the RTD through the devolved system of government.

³²⁷ Wanga and Owino 2018-05-19 *The Daily Nation*; Ayaga and Nyamori 2019-07-15 *The Standard*.

³²⁸ *East African Standard* November 11th 1964 cited in Singh 1965 *Int'l Comp L Q* 927.

CHAPTER 5: AN ANALYSIS OF THE IMPACT OF DEVOLUTION ON THE RIGHT TO DEVELOPMENT IN KENYA

5.1 Introduction

This chapter discusses the link between devolution and the RTD in Kenya by demonstrating how devolution has practically impacted the pillars or elements of the RTD, such as participation, equity, the realisation of all human rights and the right to self-determination. The chapter is a practical "compatibility checker" for devolution and the RTD in Kenya and aims at justifying the argument that devolution supports the realisation of the RTD in Kenya. By using certain case studies and data from research, the normative and institutional design of devolution under the Constitution of Kenya 2010 is analysed to demonstrate its impact on the realisation of the RTD in Kenya.

Two crucial issues that are germane to this thesis emerge in this chapter; firstly, the RTD and devolution share certain elements: participation, equity, the right to self-determination and the realisation of all human rights. Secondly, that by dint of this commonality, devolution in Kenya and the RTD are mutually supportive. These two issues crystalize the argument that devolution under the Constitution of Kenya 2010 heralded the birth of a new development paradigm that supports the realisation of the RTD in Kenya. This is significant because, in Chapter 3 of this thesis, it is argued that under the repealed Constitution of Kenya, the government failed to yield a development paradigm that was compliant or compatible with the RTD.

This chapter delineates the contours of "a good development paradigm" by arguing that such a paradigm must be informed by a clear understanding of the purpose of government in society and the role of the State in realising the RTD for its people. This is because the social contract theory posits that governments were formed to guarantee, protect and regulate the enjoyment of their citizens' natural rights. Therefore, governments must ensure that they create development paradigms that will result in the realisation of all human rights and fundamental freedoms of their citizens.

Human rights scholars like Shue and Eide have stated that the obligation of duty bearers entails the commitment to respect, protect and fulfil the realisation of human rights.¹ This duty is also known as the tripartite typology.² Going by the Maastricht guidelines on the interpretation of social, economic and cultural rights, in the context of the RTD, the obligation to respect means that a State needs to refrain from acts that would amount to a violation of the RTD. The obligation to protect means that the State must ensure that third parties do not infringe on the citizens' enjoyment of the RTD. The obligation to fulfill means that the State has to actively engage in creating an appropriate national and international development infrastructure for the realisation of the RTD.³ This requirement has also been spelt out in the UNDRTD, making the government or the State a duty bearer when it realises the RTD domestically and internationally.

This chapter discusses the specific steps Kenya has taken to fulfil its duty to respect, protect and fulfill its human rights obligations in its capacity as a duty bearer of the RTD. The discourse is undertaken within the context of normative and institutional structures of devolution in Kenya in keeping with the research problem. Therefore, the chapter analyses the devolution experience of different counties in Kenya while linking that experience with the realisation of the RTD. The linkage is created by analysing the impact of devolution on the pillars of the RTD. These pillars are; participation, equity, the realisation of all human rights and the right to self-determination.

The thesis demonstrates that devolution has opened up multiple platforms for citizen participation in governance. These platforms ensure that citizen participation is active, free and meaningful. This is because participation is anchored in the Constitution of Kenya 2010 and other relevant laws that operationalize devolution, such as the County Governments Act. The "active, free and meaningful" aspect of participation comes alive by virtue of the provisions of the law, which make it mandatory for the government to involve the citizens in activities that relate to development, such as budgeting and the creation of county development plans

¹ Eide "Economic, Social and Cultural Rights as Human Rights" in Eide, Krause and Rosas (eds) *Economic, Social and Cultural Rights* 23.

² Sepúlveda *The Nature of the Obligations under the International Covenant* 157.

³ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22-26 January 1997 para 6.

among others.⁴ Citizens are also able to effectively demand accountability from the government because of the legal framework for participation. This, in turn, has placed the human person's right at the center of the development matrix leading to the realisation of the RTD in Kenya.

Equity is also a pillar of the RTD. The UNDRTD obligates the State to ensure equality of opportunity for all in their access to socio-economic rights, access to development resources and the fair distribution the benefits of development such as income, in its efforts to realise the RTD. This chapter discusses how devolution has secured equitable distribution of development resources throughout Kenya.

The Constitution of Kenya provides for equitable distribution of revenue between the national government and the county governments and also between the county governments themselves. Equitable distribution of revenue means that certain counties may receive higher allocations than others due to several considerations. The CRA has created a revenue allocation formula that considers factors such as population, poverty index, landmass and others in the process of allocation of revenue. Therefore, this chapter demonstrates that equitable distribution of development resources under devolution in Kenya has made it possible for counties that had suffered historical marginalization to make real strides in development. This finding, therefore, means that devolution in Kenya truly augments the realisation of the RTD.

This chapter also discusses devolution and how it contributed to the realisation of all human rights and fundamental freedoms in general and the right to self-determination. This is because the right to self-determination is part and parcel of the RTD. Additionally, the RTD is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and benefit from a process of development in which all human rights and fundamental freedoms can be fully realised.

⁴ In the matter of the *Mui Coal Basin Local Community* [2015] eKLR (a matter regarding participation of the people as a constitutional value in article 10 of the Constitution of Kenya) it was held that courts will strike down any laws or public acts or projects that do not comply with article 10 of the Constitution of Kenya 2010.

Examples are drawn from various counties in Kenya to demonstrate the practical impact of devolution on the elements of the RTD in Kenya. The counties of Makeni, Nairobi, Mombasa, Lamu, West Pokot and Garissa are among the counties used as case studies. The research methodology informing the selection of these counties as case studies is explained within the chapter.

This chapter also discusses threats to devolution. Threats to devolution refer to the factors that make county governments unable to deliver their RTD related constitutional objectives. The constitutional objectives of devolution related to the RTD include; enhancing democracy and accountability,⁵ citizen participation,⁶ rights of peoples to manage their resources and chart their course of development,⁷ equitable development⁸ and access to socio-economic goods and services.⁹

The chapter identifies corruption, negative ethnicity, the poor synergy between the national government and the county government, the politics of fiscal devolution and inadequate public participation as threats to devolution in Kenya. This chapter proceeds to illustrate how these threats curtail the ability of devolution to act as a catalyst for the realisation of the RTD in Kenya.

The chapter finally argues that there is evidence to show that devolution in Kenya has had a positive impact on the elements of the RTD, such as equity, participation and the realisation of all human rights. Consequently, Kenya can leverage the linkage between devolution and the RTD to pursue the realisation of the RTD.

5.2 Justification for "RTD Compliant" Development Paradigm in Kenya

This section discusses the role of the State in the realisation of the RTD, thus justifying the need for a development paradigm that is compliant with the RTD in Kenya. This is done in two ways. Firstly, by highlighting the role of the State as a duty bearer in the realisation of the RTD as provided for under the UNDRTD and other international treaty and policy documents. In this context, it was argued that Kenya has to fulfil its obligation to realise the RTD at both international and national

⁵ Constitution of Kenya 2010 Article 175(a) and (i).

⁶ Constitution of Kenya Article 175(c).

⁷ Constitution of Kenya Article 175(d) and (e).

⁸ Constitution of Kenya Article 175(g).

⁹ Constitution of Kenya Article 175(f).

levels. Secondly, by discussing the Hobbesian, Lockean and Rousseauan theories on government and how they relate to the role of government in the realisation of the RTD.

The need and justification for a new development paradigm that is compatible with the RTD in Kenya is gleaned from the fact that development policies hitherto pursued by the government of Kenya were not beneficial to a majority of the people of Kenya. This is demonstrated in Chapter 4 of this thesis, whose verdict was that Kenya's development policies and or models from the colonial to the post-colonial phases did not meet the threshold of a RTD compliant development paradigm. Therefore, this section argues that devolution under the Constitution of Kenya 2010 sought to create a new development paradigm by re-setting the relationship between the government and people.

Willy Mutunga, chief justice of Kenya emeritus, aptly summed up Kenya's failed development paradigm as follows:

The centralized political and economic model that we have experimented with for 50 years has not elevated Kenya from its status at independence, as a third-world country, into a first or second-world power – an achievement realised by many other countries during the same period. Instead, we have witnessed significantly high poverty levels, asymmetrical development patterns, and highly ethnicised politics – basically a failed political culture, and a failed development paradigm.¹⁰

An analysis of the history of development in Kenya in Chapter 3 of this thesis demonstrated a need to adopt a new development paradigm that espouses values such as equity and participation of the people. It is submitted herein that such a development paradigm must be anchored on a sound understanding of the purpose of government in society and the role of the State in realising the RTD.

5.2.1 The Role of the State in Realising the RTD

The State is the duty bearer when it comes to the exercise of the RTD.¹¹ The State drives the strategy for the realisation of the right at both national and international

¹⁰ In the matter of the *Speaker of the Senate & Another* [2013] eKLR para 175.

¹¹ Articles 4, 5, 6, 7, 8, 9 and 10 of the UNDRTD in which the State has both national and international obligations to realise the RTD.

levels.¹² As a duty bearer, the State is required to create domestic and international conditions conducive for the realisation of the RTD.¹³

The central role of the State in the realisation of the RTD was reiterated in several international instruments¹⁴ such as:

- a) Human Rights Council's 2019 resolution reiterated that States had a primary responsibility to create national and international conditions favourable to the realisation of the RTD.¹⁵
- b) The *Vienna Declaration*, which provides that "States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realisation of the right to development and the elimination of obstacles to development".¹⁶
- c) The Global Consultation from 1990, which reiterated the national and international obligations on States to realise the RTD, and,
- d) ACHPR, which provides that "States shall have the duty, individually and collectively, to ensure the exercise of the right to development".¹⁷

While the role of the State as a duty bearer in the realisation of the RTD is not in contention, it is not clear what specific actions States are required to take both individually and collectively to realise the RTD.¹⁸ The vagueness is attributed to failure of the international community to condemn the RTD to the realm of soft law.¹⁹ It is argued herein that Kenya can eliminate obstacles that prevent people from

¹² Salomon *Global Responsibility for Human Rights* 115.

¹³ *Right to Development: Note by the Secretary-General – Report of the Independent Expert on the Right to Development*, 17 August 2000, UN Doc A/55/306 para 26(e).

¹⁴ Lindroos *The Right to Development* 34.

¹⁵ Human Rights Council resolution 42/23, *The Right to Development*, A/RES/42/23 (27th September 2019) the preamble.

¹⁶ Paragraph 10.

¹⁷ Article 22 of the ACHPR.

¹⁸ Marks "Obligations to Implement the Right to Development" 86, 89.

¹⁹ Marks "Obligations to Implement the Right to Development" 86, 89.

pursuing their development²⁰ by creating appropriate national development policies. It is therefore submitted that devolution in Kenya is one such development policy.

5.2.2 Purpose of Government in Society and the Realisation of the RTD

The social contract theory is used to illustrate the purpose of government in society, thus explaining why the State plays a key role in realising the RTD. Philosophers of old such as Thomas Hobbes,²¹ John Locke²² and Jean Jacques Rousseau,²³ were of the common view that the State exists to protect the welfare of the people. The common thread that ran through their theories on government was that human beings have an innate, natural or instinctive desire or will to survive and preserve themselves, thus forming a "social contract" between society and the government.

These philosophers generally argued that governments were set up to ensure the survival and preservation of mankind because man's existence in a state of nature was no longer tenable. Abundant natural resources declined with the increase in populations; the weak could not survive in such a system where man's natural rights were at loggerheads.²⁴ Men had to surrender their natural rights and move out of a life of solitude into a life of society crafted around a political organization called government²⁵ or State.

It is submitted that the State's role in the realisation of the RTD in Kenya as provided in the UNDRTD therefore concurs or aligns with the Hobbesian, Lockean and Rousseauan theories on government. The social contract theory has attained judicial endorsement in several Kenyan court decisions. In *John Harrison Kinyanjui v Attorney General & Another*,²⁶ the High Court observed:

Whereas we appreciate that the people are represented in parliament, it is our view that the present Constitution is partly crafted based on the Lockean social contract

²⁰ Articles 2(3), 5, 6(3), 7 and 8 of the UNDRTD. All these are articles emphasise on the role of the State in eliminating obstacles to the realisation of the RTD.

²¹ Hobbes (ed) and MacPherson *Leviathan*.

²² Locke and MacPherson *Second Treatise of Government*.

²³ Rousseau www.bartleby.com/168/ (Date of use: 5 April 2020).

²⁴ Mutakha "Regional inequalities in Kenya" 122-123.

²⁵ Mutakha "Regional inequalities in Kenya" 122-123.

²⁶ *Constitutional Petition No 74 of 2011* [2016] eKLR and *Priscilla Nyokabi Kanyua v Attorney General & Another* Constitutional Petition 1 of 2010 [2010] eKLR.

theory. This is so when it is appreciated that article 1(1) of the Constitution, the very first article, provides that "all sovereign power belongs to the people of Kenya.

In *Christopher Ndarathi Murungaru v Standard Limited & 2 others*,²⁷ Odunga J stated in a relevant passage that:

Democratic societies uphold and protect fundamental human rights and freedoms, essentially on principles that they are in line with Rousseau's version of the social contract theory. In brief the theory is to the effect that the pre-social humans agreed to surrender their respective individual freedom of action, in order to secure mutual protection, and that consequently, the *raison d'etre* of the State is to facilitate and enhance the individual's self-fulfillment and advancement, recognizing the individual's rights and freedoms as inherent in humanity. Protection of the fundamental human rights therefore is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy.

In *Dennis Mogambi Mong'are v Attorney General & 3 others*,²⁸ Otieno-Odek J stated:

In addition to the Kelsenian concept of grundnorm, the natural law and utilitarian theories if applied to the vetting process would find the process legitimate and constitutional. John Locke and Jean Jacques Rousseau observed that law is a social contract ... the 2010 Constitution being the supreme law is the "social contract" between the three arms of government and the citizens and it embodies the wishes and aspirations of the people of Kenya.

The common argument that runs through all the above court decisions is that the State was created by men to guarantee and protect their rights. In the context of this thesis, this means that the government's legal obligation under the UNDRTD to formulate development policies that enable the Kenyan people to pursue their social, political, economic and cultural development finds validity under the social contract theory.

Therefore, contrary to the best interests of its people, State power may not be used. Therefore, in matters of development, a State has a legal duty to formulate a development paradigm that will ensure all its people are both participants and beneficiaries of the development process, which is the essence of the RTD. The government's objective is to ensure that the welfare of the people is improved

²⁷ *Civil Suit No 513 of 2011* [2012] eKLR.

²⁸ *Civil Appeal No 123 of 2012* [2014] eKLR para 121.

through prudent management of development of resources and the equitable distribution and redistribution of the same.²⁹

Anchoring development issues in the constitution guarantees that the peoples' claims against the government are legitimate and justiciable simply because the Constitution is the "social contract" between the State and the people.³⁰ It defines, distributes and constrains State power to ensure that it is being used to serve the objective that necessitated its creation.³¹ For instance, under the Constitution of Kenya 2010, the government is charged with certain development deliverables, such as the provision of socio-economic rights.³² This constitutional anchoring gives rise to legitimate constitutional claims in the event of non-delivery of these rights by the government.

It is therefore submitted that the RTD can be linked to man's innate quest for self-preservation and thus the creation of the State. The obligation of the State to realise the RTD originates from the social contract to protect, preserve and guarantee man's natural rights. The State has a duty to ensure that whatever development paradigm it adopts results in the realisation of its primary mandate, which is; service to the welfare of the people through proper management and development of resources and their equitable distribution and redistribution.

To achieve this mandate, governments are "interventionist in nature". They intervene on behalf of their members, particularly the weaker ones, to protect their rights.³³ Governments are also utilitarian and egalitarian, and part of this utility is to ensure equitable distribution of resources.³⁴ Governments are also based on reason, deliberation, consultation and negotiation, and a system that lacks these components usually fails.³⁵ It is submitted that a legitimate government must therefore pursue a development paradigm that allows the people to meaningfully and actively participate in the process of development that results in the realisation of all their human rights. Governments are required to "level the playing field"

²⁹ Mutakha "Regional inequalities in Kenya" 123.

³⁰ Mbondenyi and Lumumba "Conceptual and Historical Overview" 51.

³¹ Mutakha "Regional inequalities in Kenya" 123.

³² Article 43 of the Constitution of Kenya 2010.

³³ Mutakha "Regional inequalities in Kenya" 123.

³⁴ Mutakha "Regional inequalities in Kenya" 124.

³⁵ Mutakha "Regional inequalities in Kenya" 124.

through equitable distribution of development resources so that every citizen can actively, freely and meaningfully participate in development.

It is submitted that the need for a new development paradigm that is compatible with the principles of the RTD in Kenya arose from the fact that colonial and post-colonial phases in Kenya's history yielded "developmental injustices," and thus, the State failed to perform its functions under the "social contract" that is; to safeguard the welfare of the Kenyan people. This state of affairs negatively impacted the realisation of the RTD in Kenya.

The quest to establish a development paradigm that would ensure the realisation of the RTD led to the enactment of a new constitution in August 2010. It was argued that the Constitution of Kenya 2010 introduced a new development paradigm built around devolution, and this thesis posits that this new development paradigm supports the realisation of the RTD.

The following section illustrates how the Constitution of Kenya 2010 practically secures the realisation of the RTD through the devolved system of government. This illustration establishes and strengthens the link between the RTD and devolution in Kenya.

5.3 The Post 2010 Phase: The Impact of Devolution on the RTD in Kenya

This thesis argues that the Constitution of Kenya 2010 heralded the birth of a new development paradigm compatible with the RTD. In Chapter 4, it is discussed that this development paradigm is discernible from the normative and institutional structure of devolution under the Constitution of Kenya 2010, which supports the realisation of the RTD. An analysis of the normative and institutional structures of devolution under the Constitution of Kenya 2010 indicates that RTD and devolution in Kenya share some common elements that engender a mutually supportive relationship.

This link between the RTD and devolution emerges by identifying and analysing the elements of the RTD *vis-à-vis* to the constitutional objectives of devolution in Kenya. The elements of the RTD that inform this analysis are; participation, equity, the right to self-determination and the RTD as a process in which all human rights and

fundamental freedoms were realised. These elements are discussed in the context of the following constitutional objectives of devolution; democracy and accountability, participation, protection of the rights of minorities, socio-economic development, equity and decentralisation.³⁶

The practical impact of devolution on elements of the RTD such as participation, equity, the right to self-determination and the realisation of all human rights in Kenya are discussed. The objective of this section in this thesis is to provide practical evidence to support the argument that devolution in Kenya supports the realisation of the RTD.

5.3.1 Participation

This section illustrates how participation has practically impacted the realisation of the RTD in Kenya. This section seeks to answer a question that is germane to this thesis; "to what extent does participation under devolution in Kenya lead to the realisation of the RTD"? The question is answered by providing practical examples of how participation structures under devolution in Kenya have positively impacted the realisation of the RTD among the citizens of Kenya.

The concept of participation is common to both the RTD and the devolution. This was discussed in Chapters 2 and 4 of this thesis, where it was argued that under the UNDRTD, States are required to encourage widespread participation in all spheres as an important factor in the development and the full realisation of all human rights.³⁷ Devolution in this regard complements the realisation of the RTD by giving powers of self-governance to the people of Kenya by enhancing their participation in the exercise of the powers of the State and in making decisions affecting them.³⁸ This synergy between the UNDRTD and devolution in Kenya is "people-centred development" which is the essence of the RTD.

³⁶ Article 174 of the Constitution of Kenya 2010.

³⁷ Article 8(2) of the UNDRTD. Further article 2(3) of the UNDRTD requires that participation must be "meaningful" perhaps to ensure that indeed the State actually involves the people in development as against some form of cosmetic or routine participation.

³⁸ Article 174(c) of the Constitution of Kenya 2010.

Notably, the UNDRTD does not specify how popular participation should be inculcated in development.³⁹ This means that States have the discretion to conceptualise development models that espouse popular participation. It is submitted that States can create development paradigms that are compatible with the RTD by securing constitutional protection for the RTD elements, such as popular participation. This is evident in Kenya, where participation is both an object of devolution⁴⁰ and a constitutional value that must inform both governance development praxis.⁴¹

It is submitted that devolution in Kenya creates the necessary normative framework for securing the peoples' participation in development.⁴² Participation and accountability yield participatory development. It is argued that the test for participatory development is whether people who were previously treated as mere pawns can now actively play a critical role in development thereby becoming subjects of their social destiny.⁴³

Devolution of power enhances participatory governance by opening up multiple centres of decision making⁴⁴ which can greatly enhance the pursuit of development.⁴⁵ This has been experienced in Germany, where decentralisation of State power through the federal model has resulted in high levels of citizen engagement, especially at local and municipal levels of government.⁴⁶ Participation at the federal level is only focused on consultation and information whilst most innovative methods are found at the local level. The local authorities work in close conjunction with private companies to organize citizen participation processes in

³⁹ Article 8(2) of the UNDRTD merely provides that "States should encourage popular participation in all spheres as an important factor in development and in the full realisation of all human rights".

⁴⁰ Article 174(c) of the Constitution of Kenya 2010.

⁴¹ Article 10(1) and 10(2)(b) of the Constitution of Kenya 2010.

⁴² For instance, section 125(2) of the Public Finance Management Act 2012 makes public participation mandatory during the formulation of the county budget. Article 175(c) of the Constitution of Kenya 2010 provides that one of the objects of devolution is to enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them. The County Governments Act 17 of 2012 devotes part VIII (section 87-92) to "citizen participation" in county affairs.

⁴³ Freire *Pedagogy of the Oppressed* cited in Waris *Tax and Development* 154.

⁴⁴ World Bank *World Development Report 1999/2000* 107.

⁴⁵ Bosire *Devolution for development* 209.

⁴⁶ European Urban Knowledge Network <https://www.eukn.eu/policy-labs/policy-lab-for-cy-public-participation-in-the-development-process/participatory-planning/participatory-planning-in-germany/> (Date of use: 3 October 2020).

urban planning, infrastructure development and partly, investment decisions⁴⁷ resulting in "people centred development".

A historical overview of Kenya's development paradigm in Chapter 3 of this thesis demonstrated that since colonial times, Kenyans played a peripheral role in the development matrix, which amounted to a violation of the RTD. Mutunga C.J observed that development in Kenya was highly centralized, leading to the "emergence of state-made rather than market-created economic elites".⁴⁸ The public-policy choices made and pursued by the government were skewed in favour of ethnic groups as opposed to merit in the allocation of development resources.⁴⁹ It is argued that devolution radically changed this development paradigm to one that makes the human person the central focus of development⁵⁰ through participation.

Participation facilitates "people-centred development" through local democratic institutions within the devolved units in Kenya.⁵¹ Inculcating effective participation in development through the devolution framework has made county governments pay critical attention to local concerns while formulating development programmes. The central government in the pre-devolution era was not able to effectively do.⁵² Devolution has reduced the inefficiency and red tape associated with central bureaucracy, thereby advancing effective development⁵³ by yielding relevant local solutions to local problems by promoting the realisation of the RTD.

"People-centred development" leads to the realisation of the RTD because the UNDRTD succinctly states that the human person is the central subject of development and should be an active participant and beneficiary of the same.⁵⁴ The inclusion of minorities and marginalized groups in governance by devolution in Kenya⁵⁵ ensures that no one is left out of the development matrix. Devolution

⁴⁷ European Urban Knowledge Network <https://www.eukn.eu/policy-labs/policy-lab-for-cy-public-participation-in-the-development-process/participatory-planning/participatory-planning-in-germany/> (Date of use: 3 October 2020).

⁴⁸ In the matter of the *Speaker of the Senate & Another* [2013] eKLR para 167.

⁴⁹ In the matter of the *Speaker of the Senate & Another* [2013] eKLR para 167.

⁵⁰ See generally, Mutunga CJ's concurring opinion in in the matter of the *Speaker of the Senate & Another* [2013].

⁵¹ World Bank *World Development Report 1999/2000* 107.

⁵² Gathii and Otieno 2018 *Federal Law Review* 610.

⁵³ World Bank *World Development Report 1999/2000* 114.

⁵⁴ Article 2(1).

⁵⁵ Ghai 2008 *J East Afr Stud* 211-226.

secures the right of communities, marginalized groups and minorities to manage their affairs and further their development.⁵⁶

The heart of citizen participation is in the ability to influence outcomes of development processes, thus placing the citizens at the centre of development. According to Hope, "devolution stresses accountability by bringing participation and decision making closer to the people".⁵⁷ Hope further argues that "the proximity of citizens to devolved governments in Kenya has increased transparency in the use of local resources and strengthened accountability mechanisms, resulting in a decrease in corrupt practices".⁵⁸

However, Hope's assertion is more theoretical than practical because in practice counties have become conduits for "devolved corruption".⁵⁹ The accountability mechanisms under devolution appear to be more "reactionary" than "preventive," hence the need for reforms if the fight against corruption is to be won. However, it is worth noting that because of increased citizen participation, governors who have been accused of corruption or perceived to be corrupt were successfully impeached in Kiambu and Nairobi counties.⁶⁰ Therefore, it is arguable that the citizens' participation in governance has been greatly increased by devolution in Kenya hence a gainer for the RTD since the people can play an active and meaningful role in governance and development.

Several counties in Kenya "have made remarkable strides to facilitate public participation including enacting laws and setting up dedicated units to spearhead it".⁶¹ For instance, Kiambu county, the second-most populous county in Kenya,⁶² enacted a public participation law in 2017.⁶³ The law established the Office of Citizen Petitions and provided guidelines for forming and operating citizens' participation

⁵⁶ Article 174(e) and (f) of the Constitution of Kenya 2010.

⁵⁷ Hope "Devolved Government and Local Governance in Kenya" 13.

⁵⁸ Hope "Devolved Government and Local Governance in Kenya" 13.

⁵⁹ Ngigi and Busolo 2019 *Pub Pol'y & Admin Res* 18.

⁶⁰ Wanambisi <https://www.capitalfm.co.ke/news/2020/01/waititu-impeached-by-the-senate/>; Ogila <https://www.standardmedia.co.ke/politics/article/2001397657/its-over-for-sonko> (Date of use: 15 January 2021).

⁶¹ Kemunche "8 Years on" in Tödting (ed) *The devolved governance system in Kenya* 12.

⁶² According to the 2019 national census, Kiambu County had a population of 2.4 million people. Kenya National Bureau of Statistics <http://www.knbs.or.ke/?wpdmpro=2019-kenya-population-and-housing-census-volume-i-population-by-county-and-sub-county> (Date of use: 15 May 2021).

⁶³ Kiambu County Citizen Petition and Participation Act of 2017.

forums.⁶⁴ Some of the benefits of increased citizen participation in Kiambu county include; reduced litigation, reduced civil protests or demonstrations, and efficient and improved service delivery.⁶⁵ Increased citizen participation ensures that the "development programming is more focused thus solving county-specific problems through tapping local opportunities".⁶⁶

Makueni county was highly ranked among the counties that have successfully implemented devolution in Kenya⁶⁷ to the extent that it formed part of a World Bank study on the impact of devolution in Kenya.⁶⁸ In a bid to enhance participation, Makueni county has established a public participation office to ensure effective participation by the public.⁶⁹ Further, by 2018, Makueni County had coached 990 community based trainers on public participation from diverse backgrounds such as Non-Governmental Organizations (NGOs), the education sector and the religious fraternity.⁷⁰ Consequently, Makueni county has successfully embraced the community-driven development (CDD) model and tapped into its potential for fruit farming by providing market linkages, infrastructure as well as capacity development for local farmers.⁷¹ Participation has generated local solutions to local development issues in Makueni.

The CDD model emphasises the role of the community in planning, decision making, managing and implementing community-level activities through public participation.⁷² Participation by beneficiaries leads "to better identification of

⁶⁴ Maarifa Centre staff <https://maarifa.cog.go.ke/resource/how-kiambu-county-handles-citizen-grievances-to-ensure-responsive-service-delivery> (Date of use: 15 April 2021).

⁶⁵ Maarifa Centre staff <https://maarifa.cog.go.ke/resource/how-kiambu-county-handles-citizen-grievances-to-ensure-responsive-service-delivery> (Date of use: 15 April 2021).

⁶⁶ Maarifa Centre staff <https://maarifa.cog.go.ke/resource/how-kiambu-county-handles-citizen-grievances-to-ensure-responsive-service-delivery> (Date of use: 15 April 2021).

⁶⁷ Ohashi <https://www.standardmedia.co.ke/commentary/article/2001361704/key-lessons-from-the-makueni-success-story> (Date of use: 15 May 2021)

⁶⁸ World Bank <https://makueni.go.ke/news/makueni-among-the-core-counties-to-inform-a-study-by-world-bank-on-the-impact-of-devolution/>

⁶⁹ Mbithi, Ndambuki and Juma 2018 *J Asian & Afr Stud* 57.

⁷⁰ Mbithi, Ndambuki and Juma 2018 *J Asian & Afr Stud* 57.

⁷¹ Mbithi, Ndambuki and Juma 2018 *J Asian & Afr Stud* 57.

⁷² Section 2 of the County Governments Act 1 of 2016 defines the words "the public" when used in relation to public participation in the Act to mean—

- a) the residents of a particular county;
- b) the rate payers of a particular city or municipality;
- c) any resident civic organisation or non-governmental, private sector or labour organization with an interest in the governance of a particular county, city or municipality;

communities' needs, more appropriately designed interventions, more inclusion of the poor and more efficient use of resources".⁷³ This is in line with the UNDRTD, which encourages popular participation in all spheres as an important factor in developing and fully realising human rights.⁷⁴ Therefore, it was submitted that this has resulted in the realisation of the RTD because the people of Makueni are indeed the direct beneficiaries of development initiatives.

The overarching impact of participation under the framework of devolution is the empowerment of the people to take charge of their development. The type of "development" envisioned under devolution is arguably "sustainable development". This is because section 102(f) of the County Governments Act⁷⁵ makes it mandatory for planning and development facilitation principles to engender effective resource mobilization for "sustainable development". This legal provision resonates with the call by human rights experts to realise the RTD through "sustainable development,"⁷⁶ hence a confirmation that devolution enables the realisation of the RTD in Kenya.

5.3.2 Equity

Chapter 4 of this thesis comprehensively discusses the role of devolution in the realisation of distributive justice or equity in Kenya. This section discusses the outcomes of equity under the devolved system of government in Kenya. The section practically illustrates how these outcomes have impacted the realisation of the RTD. Equity is both an objective of devolution and a pillar of the RTD. Equity is, therefore, an effective yardstick in assessing the impact of devolution on the realisation of the RTD in Kenya.

The Constitution of Kenya 2010 places a high premium on equity. Equity is a national value and principle of governance.⁷⁷ It is binding on State organs, State

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- d) non-resident persons who because of their temporary presence in a particular county, city or municipality make use of services or facilities provided by the county, city or municipality;

⁷³ El-Kogali *et al* *The Impact of a Community Development and Poverty Reduction Program 2*.

⁷⁴ Article 8(2).

⁷⁵ Act 17 of 2012.

⁷⁶ UN experts "Urgent need to speed up world action to realise Right to Development" <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22474&LangID=E> (Date of use: 31 December 2017).

⁷⁷ Article 10(2)(b) of the Constitution of Kenya 2010.

officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy decisions.⁷⁸ It was the intention of Kenyans during the constitution-making process to ensure that the principle of equity was applied across the board without any exceptions. This was informed by the historical developmental injustices spanning the colonial and post-colonial periods, which resulted in high levels of inequality in Kenya, as discussed in Chapter 3 of this thesis.

The realisation of equity in development involves the actualisation of distributive justice. Under the UNDRTD, the beneficiaries of development must be the entire population and not just a select few. The benefits of development have to be distributed evenly among the citizens.⁷⁹ Equitable sharing of resources means that priority is given to those groups that are in dire need of resources to ensure that all groups within the community have fair access to resources. The results of equity are access to services across diverse groups of the population on the basis of income, gender, regions (interregional equity) and other categories.⁸⁰

The UNDRTD calls on governments at the national level to undertake all measures available to ensure equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and distribution of income.⁸¹ On the other hand, devolution seeks to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya.⁸² It is submitted that this object of devolution supports the realisation of the RTD because it creates equality of opportunity for development for every citizen.

The Constitution requires that Kenya's public finance system promotes an equitable society by ensuring that revenue raised nationally is shared equitably among the national and county governments.⁸³ Additionally, the government's expenditure must promote the equitable development of the country, inclusive of making special provisions for marginalized groups and areas.⁸⁴ Even the benefits of development

⁷⁸ Article 10(1) of the Constitution of Kenya 2010.

⁷⁹ Article 2(3) of the UNDRTD.

⁸⁰ Litvack, Ahmad and Bird *Rethinking Decentralization* 8.

⁸¹ Article 8 of the UNDRTD document.

⁸² Article 147(f) of the Constitution of Kenya 2010.

⁸³ Article 201(b) (ii) and article 202(1) of the Constitution of Kenya 2010.

⁸⁴ Article 201(b) (iii).

ought to be shared equitably between present and future generations.⁸⁵ The Commission on Revenue Allocation (CRA) and the Senate ensure that regional disparities in development must be addressed by creating and adopting an equitable revenue sharing formula for the county governments.⁸⁶

These equitable principles in the sharing of revenue have resulted in an increase of access to services by different groups of the population based on income, gender, regions and other categories, thus increased support for devolution in Kenya. According to a poll by Ipsos Synovate, the support for devolution in Kenya increased from 69% in November 2014 to 84% in March 2018.⁸⁷ The respondents cited reasons for supporting devolution to be more accessible officials or offices: 30%; increased public participation: 20%; improved health services: 19%; improved roads: 11%; increased local employment opportunities: 10%.⁸⁸

According to a resolution adopted by the Human Rights Council on 27th September 2019 on the RTD, inequality was singled out as a major obstacle to the realisation of the RTD within and across countries.⁸⁹ It is submitted that a development model such as the one based on devolution in Kenya, whose objective is to reduce all forms of inequalities through equitable distribution of resources, invariably augments the realisation of the RTD.

The effect of devolution on equity is evident in some of the poorest counties in Kenya. Most of these counties had suffered marginalisation by the colonial and post-colonial governments.⁹⁰ According to the 2014 CRA report, Lamu county was listed as one of the most marginalised counties in Kenya.⁹¹ As a result of devolution, the first caesarean section operation was done in 2017 in Lamu since Kenya became

⁸⁵ Article 201(c).

⁸⁶ Article 203(1)(g) of the Constitution of Kenya 2010.

⁸⁷ Ipsos https://www.ipsos.com/sites/default/files/ct/news/documents/201908/ipsoske_spec_1st_release_presentation_pa_v1.pdf (Date of use: 15 January 2021).

⁸⁸ UNDP http://www.ke.undp.org/content/kenya/en/home/library/democratic_governance/ma king-devolution-work.html (Date of use: 16 January 2020) 1.

⁸⁹ Human Rights Council resolution 42/23 *The Right to Development* A/RES/42/23 (27th September 2019).

⁹⁰ Gathii and Otieno 2018 *Fed L Rev* 612.

⁹¹ CRA <https://www.crakenya.org/wp-content/uploads/2013/10/SURVEY-REPORT-ON-MARGINALISED-AREAS-COUNTIES-IN-KENYA.pdf> (Date of use: 18 May 2021) 24. Other marginalised counties include Turkana, Marsabit, Mandera, Wajir, Isiolo, Samburu, Tana River, West Pokot and Garissa.

independent more than fifty years ago.⁹² In Mandera county, another marginalised county,⁹³ the first tarmac road was built by the county government.⁹⁴ In West Pokot county, another marginalised county,⁹⁵ the county government has initiated a raft of development projects such as the construction of more than 200 kilometers of new roads, schools and water projects to improve living standards in the community.⁹⁶ Devolution has also led to a steady increase in access to quality health care leading number of children delivered in hospitals in marginalised counties such as Garissa and West Pokot.⁹⁷

Additionally, devolution has increased the number of people who can access education by expanding early childhood development centres (ECDs) and county technical institutions all over Kenya.⁹⁸ The running of ECD education and county technical institutions are devolved functions under the Constitution of Kenya 2010. In discharging these constitutional functions, county governments have invested in infrastructure and human resource development by constructing ECD centres and county technical institutions. Human resources are trained and hired, thus expanding access to these institutions of learning.⁹⁹

Access to basic education is the foundation for equality of opportunity for citizens. It also enables the development of human beings, increasing their chances of accessing socio-economic goods and services in society. An educated individual has more opportunities to generate an income than a person who has limited or no education at all. Amartya Sen argues that “economic development has to be concerned with what people can do or cannot do”, and thus development expands

⁹² Apollo <https://nation.africa/kenya/news/how-devolution-has-changed-kenya-35796> (Date of use: 2 September 2020).

⁹³ CRA <https://www.crakenya.org/wp-content/uploads/2013/10/SURVEY-REPORT-ON-MARGINALISED-AREASCOUNTIES-IN-KENYA.pdf> (Date of use: 18 May 2021) 24.

⁹⁴ Gathii and Otieno 2018 *Federal Law Review* 612.

⁹⁵ CRA <https://www.crakenya.org/wp-content/uploads/2013/10/SURVEY-REPORT-ON-MARGINALISED-AREASCOUNTIES-IN-KENYA.pdf> (Date of use: 18 May 2021) 24.

⁹⁶ County Government of West Pokot <http://www.westpokot.go.ke/index.php/inspection-of-development-projects-in-sekerr-ward> (Date of use: ??).

⁹⁷ Apollo <https://nation.africa/kenya/news/how-devolution-has-changed-kenya-35796> (Date of use: 2 September 2020).

⁹⁸ Elachi <https://www.capitalfm.co.ke/eblog/devolution-has-made-kenya-a-better-country> (Date of use: 2 September 2020).

⁹⁹ Elachi <https://www.capitalfm.co.ke/eblog/devolution-has-made-kenya-a-better-country> (Date of use: 2 September 2020).

the capabilities of people.¹⁰⁰ "Capability" refers to the ability to do different things for themselves, for instance; be well-nourished, to have a job, among others. Access to education increases peoples' capabilities.

Equity in the allocation of revenue to the counties has enabled several countries to prioritize development by ensuring that the county assemblies make reasonable budgetary allocations. For instance, in Makueni county, the proposed development per allocation in the financial year 2019/2020 was; community economic empowerment at 28.7%, water resource management at 13.6%, socio-economic development at 20.7%, enablers at 25.3% and land urban planning and development at 11.7%.¹⁰¹ Activities that had a direct impact on development, community economic empowerment and socio-economic development had a combined 49.4% budgetary allocation which is a clear indication of the importance attached to development by the county government.

To promote trade, Makueni County has built milk and fruit-processing factories, the first in any county.¹⁰² At the 2017 devolution conference, Makueni County was one of the counties acknowledged for their commitment to providing clean water by building dams. The county has also allocated over Kshs. one billion towards the provision of water and was cited as one of the counties partnering with development partners to champion innovation.¹⁰³

Devolution led to an improvement in the socio-economic conditions of the residents of Mombasa County. More than 25,000 students in the county have benefitted from scholarships and bursaries across the six sub-counties. There has also been a major improvement to the county's referral hospital facility and the establishment a health insurance scheme for high-risk populations such as the elderly.¹⁰⁴ In the last

¹⁰⁰ Sen 1983 *Econ J* 754-755. Also see Sen *Development as Freedom* 366 where development is likened to the removal of obstacles that leave people with little choice and little opportunity of exercising their reasoned agency.

¹⁰¹ Government of Makueni County <https://makueni.go.ke/cidp/wp-content/uploads/2018/10/2018-Makueni-County-Budget-Review-and-Outlook-Paper.pdf> (Date of use: 7 September 2020) 32-33.

¹⁰² Apollo <https://nation.africa/kenya/news/how-devolution-has-changed-kenya-35796> (Date of use: 2 September 2020).

¹⁰³ Council of Governors "Clarion call: The Devolution Transformation" (2017) 22.

¹⁰⁴ Murathe <https://nation.africa/kenya/brand-book/how-devolution-has-changed-lives-in-mombasa-county-51030> (Date of use: 10 June 2020).

five years, the county government of Mombasa has constructed more than 100km of roads in the county.¹⁰⁵

Devolution has also made it possible for different regions all over Kenya to create and implement development plans. For instance, for the first time in 20 years, Mombasa County (in collaboration with the Japanese government) has implemented its development master plan.¹⁰⁶ This master plan highlights areas of opportunities and areas of improvement in infrastructure and development. Infrastructure development in the county has consequently was fashioned to take into account the plan.¹⁰⁷ These development plans focus on, each region's unique development priority areas, hence more effective than centralized planning.

The impact of these development projects on equity is that most areas that had been left behind in development or could not get adequate resources for development now have a constitutional and legal right to equitable allocation of development resources. Devolution has therefore brought services closer to the people in keeping with its objective to promote social and economic development and provision of proximate, easily accessible service throughout Kenya,¹⁰⁸ including equitable distribution of development resources.

Equitable distribution of development resources through devolution has made it possible for the inhabitants of rural Kenya to access government services without having to travel to the bigger towns or even to the capital city Nairobi.¹⁰⁹ Therefore, this state of affairs means two things; firstly, regional disparities in development are gradually fading away as essential services such as health services that were hitherto concentrated in urban areas have been devolved to the counties. The second point is that equity has augmented the realisation of human rights in Kenya. There is generally better access to basic rights such as; health care, water and sanitation, and education, much more easily than during the pre-devolution era.

¹⁰⁵ Murathe <https://nation.africa/kenya/brand-book/how-devolution-has-changed-lives-in-mombasa-county-51030> (Date of use: 10 June 2020).

¹⁰⁶ Mombasa County <http://www.mombasa.go.ke/lands-planning/> (Date of use: 10 June 2020).

¹⁰⁷ Mombasa County <http://www.mombasa.go.ke/lands-planning/> (Date of use: 10 June 2020).

¹⁰⁸ Ongwae <https://www.standardmedia.co.ke/article/2000212142/devolution-is-kenya-s-best-gift-since-1963> (Date of use: 10 June 2020).

¹⁰⁹ UNDP http://www.ke.undp.org/content/kenya/en/home/library/democratic_governance/ma-king-devolution-work.html (Date of use: 6 April 2017).

Using the unanimity of rights argument, one can correctly conclude that devolution has indeed led to the realisation of the RTD in Kenya.

5.3.3 A Process in which all Human Rights are Realised

In this section, the role of devolution in the realisation of human rights and fundamental freedoms in Kenya is discussed. This is crucial for this thesis because the UNDRTD provides for the indivisibility of human rights by urging the need to prioritize the implementation, promotion and protection of civil, political, economic, social and cultural rights.¹¹⁰ States are also required to eliminate obstacles to development resulting from a failure to observe civil and political rights as well as economic, social and cultural rights.¹¹¹ In their legal obligation to realise the RTD, At the national level, States need to ensure, *inter alia*, equal opportunity for all to “access to basic resources, education, health services, food, housing, employment and the fair distribution of income”.¹¹²

It is argued herein that the normative and institutional structure of devolution in Kenya that devolution can facilitate the realisation of all the generations of human rights by providing greater access to basic rights, ultimately resulting in the realisation of the RTD. Under the 2010 Constitution, Kenya's health sector has been devolved to promote "accessibility to health services throughout the country", address "the problem of low-quality health services", promote "efficiency in health service delivery," and address "the disparities in the quality of health service delivery in the urban centres and rural areas".¹¹³

Devolution has therefore facilitated better access to health care in Kenya, improving access to the right to health. Hitherto marginalized areas like Mandera and Isiolo have benefitted from infrastructure development like the construction of health centres and hospitals, including recruitment and training of relevant human resources because of devolution.¹¹⁴ This has been made possible through the

¹¹⁰ Article 6(2) of the UNDRTD.

¹¹¹ Article 6(3) of the UNDRTD.

¹¹² Article 8 of the UNDRTD.

¹¹³ Wanzala and Oloo 2019 *Saudi J Med* 501.

¹¹⁴ Wanzala and Oloo 2019 *Saudi J Med* 501.

participatory development and equitable distribution of development resources as discussed in the preceding sections, thus improving access to quality health care.¹¹⁵

Some indicators that point out the impact of devolution on access to healthcare in the select counties are availability, affordability and accessibility.¹¹⁶ Makueni county has made significant strides towards the provision of universal healthcare through its program dubbed MakueniCare. This is the county's intervention in the provision of health care coverage across all public health facilities.¹¹⁷ For an annual subscription of Kshs 500 per household, Makueni residents can access free primary health care provided by the national government and get to enjoy free treatment at 13 level 4 hospitals within the county courtesy of the county government. The county also supplies these facilities with drugs, equipment and medical staff.¹¹⁸

Makueni county has also been celebrated for improvements in the health sector that saw them conduct the first telemedicine operation.¹¹⁹ In less than five years, Makueni county has more than doubled the number of health facilities built by the previous regimes, with 13 level 4 hospitals, 113 dispensaries and health centres.¹²⁰ Such innovative solutions to access to health care could not be rolled out under the repealed Constitution of Kenya due to the inefficiencies and weaknesses of a highly centralized system of governance. Devolution allows:

... users to shape service provision, to increase responsiveness and faster implementation by avoiding central bureaucracy, to improve quality, transparency and accountability through community oversight and involvement in decision-making, and to reduce existing inequities through distribution to traditionally marginalized groups.¹²¹

West Pokot county, a hitherto marginalized area in Kenya, has been celebrated for employing innovative measures, thus significantly increasing the number of child

¹¹⁵ Wanzala and Oloo 2019 *Saudi J Med* 501.

¹¹⁶ Wanzala and Oloo 2019 *Saudi J Med* 500.

¹¹⁷ Gathara <https://www.theelephant.info/features/2018/01/11/devolved-healthcare-makuenis-trailblazing-experiment-in-providing-universal-health-coverage/> (Date of use: 10 June 2020).

¹¹⁸ Gathara <https://www.theelephant.info/features/2018/01/11/devolved-healthcare-makuenis-trailblazing-experiment-in-providing-universal-health-coverage/> (Date of use: 10 June 2020).

¹¹⁹ Apollo <https://nation.africa/kenya/news/how-devolution-has-changed-kenya-35796> (Date of use: 2 September 2020).

¹²⁰ Gathara <https://www.theelephant.info/features/2018/01/11/devolved-healthcare-makuenis-trailblazing-experiment-in-providing-universal-health-coverage/> (Date of use: 10 June 2020).

¹²¹ McCollum *et al* 2018 *Health Pol'y & Plan* 730.

deliveries in hospitals and reducing maternal mortality rates.¹²² Mother's waiting home is one such innovation in operation in West Pokot.¹²³ The county government provides expectant mothers with a home outside their home but close to the health facility to easily access the health facility when they are about to give birth.¹²⁴ The Pokot people are nomadic pastoralists who live in far-flung areas, which poses a challenge to women who desire to give birth in a hospital. Due to this intervention by the county government of West Pokot, the number of maternal deaths has drastically reduced.¹²⁵

From the foregoing, it is evident that county governments in Kenya have created an enabling environment for realising the right to health by expanding access. On this basis, it is argued that devolution contributes to the realisation of all human rights since human rights are interdependent and interrelated – the realisation of one right leads to the realisation of other groups of rights.

In terms realising human rights, the county governments are also responsible for public works and services including water and sanitation services, agriculture, county health services, county planning and development, including housing. Counties have the responsibility to initiate, expand and implement social health insurance programs consistent with the Constitution of Kenya 2010¹²⁶ and the Kenya Vision 2030.¹²⁷ It is submitted that the county governments facilitate the realisation of socio-economic rights when they provide services such as water and sanitation, among others.¹²⁸

Access to clean and safe water in adequate quantities and sanitation is a human right under the Constitution of Kenya.¹²⁹ Water and sanitation services were devolved to counties under the 2010 Constitution.¹³⁰ As a result, counties became

¹²² Apollo <https://nation.africa/kenya/news/how-devolution-has-changed-kenya-35796> (Date of use: 2 September 2020).

¹²³ Ministry of Health www.health.go.ke (Date of use: 19 June 2020).

¹²⁴ Ministry of Health www.health.go.ke (Date of use: 19 June 2020).

¹²⁵ Ministry of Health www.health.go.ke (Date of use: 19 June 2020).

¹²⁶ Article 174(f) of the Constitution of Kenya 2010.

¹²⁷ Kenya Vision 2030 <https://vision2030.go.ke/county-governments-at-the-centre-of-achieving-universal-health-care/> (Date of use: 3 May 2020).

¹²⁸ A position supported by Thabo Mbeki. See Mbeki <http://www.dirco.gov.za/docs/speeches/1999/mbek0730.htm> (Date of use: 02 February 2020).

¹²⁹ Article 43(1)(b) and (d) of the Constitution of Kenya 2010.

¹³⁰ Schedule 4 of the Constitution of Kenya 2010.

the owners of water service providers regulated by the Water Service Regulatory Board (WASREB).¹³¹ WASREB creates the impetus for water service providers to improve their performance through its public reporting mechanism.¹³² The reports assess the performance of the sector through monitoring key indicators such as water coverage, sanitation coverage, unaccounted water, water quality, hours of supply and others that form part of the binding Minimum Service Levels.¹³³ Arguably, this structure pushes county governments to continuously work toward improved provision and access to water and sanitation hence a real gainer for socio-economic rights, specifically the right to clean water and sanitation.

In the context of civil and political rights, it is arguable that devolution in Kenya has led to a more accountable government and a more empowered citizenry. As discussed in Chapter 4 of this thesis, devolution enhances democracy and accountability.¹³⁴ This is made possible by the normative design of devolution in Kenya, which requires the county leadership to derive its mandate directly from the people, thus institutionalising key processes that are part and parcel of a functioning democracy.¹³⁵ These include; the right to free and fair elections,¹³⁶ a representative and responsive government, separation of power between arms of government,¹³⁷ citizen participation in governance,¹³⁸ among others. A functioning democracy relies on exercising civil and political rights to hold leaders accountable to the electorate.¹³⁹ From this perspective, it is arguable that devolution in Kenya allows for the exercise of civil and political rights, leading to the realisation of all the other groups of human rights and thus the RTD.

¹³¹ Water Service Regulatory Board <http://wasreb.go.ke/water-service-providers/> (Date of use: 3 May 2020).

¹³² Water Service Regulatory Board <http://wasreb.go.ke/water-service-providers/> (Date of use: 3 May 2020).

¹³³ Water Service Regulatory Board <http://wasreb.go.ke/water-service-providers/> (Date of use: 3 May 2020).

¹³⁴ Schmitter and Karl 1991 *J Democ* 114 & 115.

¹³⁵ Article 175(a) of the Constitution of Kenya 2010.

¹³⁶ Article 180 of the Constitution of Kenya 2010 provides for the election of a governor and his deputy while Article 177 provides for the election of the MCAs.

¹³⁷ Article 176(1) of the Constitution of Kenya 2010 provides for the county executive headed by the governor and the legislative arm of government at the county level which known as the county assembly.

¹³⁸ Ochieng "Devolution of Government" 175.

¹³⁹ Freedom of expression is cited as a vital element of democracy. See Dahl *Dilemmas of Pluralist Democracy* 11.

The UNDRTD espouses the principle of indivisibility and the interrelatedness of human rights.¹⁴⁰ In this context, the RTD is a process of realising civil and political as well as social, economic and cultural rights and solidarity or group rights.¹⁴¹ Baxi argues that "the vital factor in the composite nature of the RTD is the organic linkage between human rights and not the individual recognition of each human right".¹⁴² Therefore, it is submitted that devolution complements "the composite nature of the RTD" by creating a development paradigm that facilitates the realisation of all human rights in Kenya.

5.3.4 The Right to Self-Determination and Devolution

The right to self-determination is part and parcel of the RTD. Article 1(2) of the UNDRTD provides that the RTD implies the full realisation of people's right to self-determination. In Chapter 2 of 2.2.5 of this thesis, was established that the right to self-determination is a central pillar of the RTD. In this section, it is argued that devolution in Kenya leads to the realisation of the right to self-determination and consequently the realisation of the RTD. The section examines this argument by giving practical illustrations of how devolution in Kenya has resulted in the realisation of the right to self-determination.

In this section, the right to self-determination is not viewed through the lens of secession¹⁴³ or the quest for independence from foreign domination. The right to self-determination is regarded as a right that entitles citizens or communities to have control over their development resources and determine their social, economic, political and cultural development.¹⁴⁴

The RTD is inseparable from the right to self-determination.¹⁴⁵ The essence of the right to self-determination empowers people to determine their own economic, social

¹⁴⁰ Preamble of the UNDRTD. Also stated in the *Vienna Declaration*.

¹⁴¹ Preamble of the UNDRTD. Also stated in the *Vienna Declaration*.

¹⁴² Baxi 1983 *Indian JIL* 235.

¹⁴³ For instance, South Sudan's separation from Sudan. See UN News Service <https://www.refworld.org/docid/4d590f021e.html> (Date of use: 1 October 2020).

¹⁴⁴ See *African Commission on Human and Peoples Rights v The Republic of Kenya* Application No 006/2012 judgment delivered on 26 May 2017 and *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Republic of Kenya* Communication 276/2003.

¹⁴⁵ Donnelly 1985 *Calif West Int'l L J* 473.

and cultural development.¹⁴⁶ The right transforms people from being "pawns" in the development matrix to active participants and direct beneficiaries. Going by this exposition, it is arguable that in the context of a devolved system of government in Kenya, enhanced participation in governance and development creates an arena for the people to exercise their right to self-determination¹⁴⁷ hence realisation of the RTD.

The *Ogiek* case¹⁴⁸ discussed in Chapter 2 of this thesis is particularly illustrative that the right to self-determination under the ACHPR¹⁴⁹ is realizable within the context of specific communities, minority ethnic or indigenous groups as long as these groups do not challenge the territorial integrity of their State.¹⁵⁰ Further, the economic independence, development and self-determination of Africa's peoples are guaranteed under article 21 of the ACHPR. The article provides for the right of people to freely dispose of their wealth and natural resources. This interconnectivity of rights results in the realisation of the RTD¹⁵¹ under the ACHPR.¹⁵²

Similarly, the connection between the right of a community to control the use of their resources and the right to self-determination was established in the *Endorois* case.¹⁵³ In this case, the right to self-determination is viewed as including the ability to dispose of natural resources as a community wishes. It was held that the inability to use salt licks, water and the soil of lake Bogoria was a violation of the Endorois peoples' right to self-determination.¹⁵⁴ In light of the holding in the *Ogiek* and *Endorois* cases, it is not in dispute that the right to self-determination can be realised within the territorial boundaries of Kenya by a specific community.

¹⁴⁶ This is the definition of self-determination according to the preamble of the UNDRTD, Article 1 of the International Covenant on Economic, Social and Cultural Rights UNGA res 2200A (XXI) 2 UN GAOR Supp (No 16) at 49 UN Doc A/6316 (1996) and the International Covenant of Civil and Political Rights UNGA res 2200A (XXI), 2 UN GAOR Supp (No 16) at 52 UN Doc A/6316 (1996).

¹⁴⁷ Juma "Devolution of Power as Constitutionalism" 36-59.

¹⁴⁸ *African Commission on Human and Peoples Rights versus The Republic of Kenya Application No 006/2012* judgment delivered on 26 May 2017.

¹⁴⁹ Article 20(1).

¹⁵⁰ Paragraph 199 of the *Ogiek* decision.

¹⁵¹ Article 22.

¹⁵² Paragraph 199 of the *Ogiek* decision.

¹⁵³ Communication 276/2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council versus Republic of Kenya*.

¹⁵⁴ Paragraph 129 of the *Endorois* decision.

What is the role of county governments in securing the right to self-determination for people in Kenya? The argument here is that county governments in Kenya play a key role in securing the peoples' right to self-determination. Such peoples include ethnic minorities¹⁵⁵ and distinct communities such as pastoralists, among others. Devolution guarantees the right to self-determination by giving powers of self-governance to peoples,¹⁵⁶ recognizing their right to manage their affairs and further their development,¹⁵⁷ and promoting the interests and rights of minorities and marginalized communities in Kenya.¹⁵⁸ All this happens within the normative and institutional structures of devolution that espouse values such as democracy, accountability and citizen participation, as discussed in Chapter 4 of this thesis.

In Chapter 3 of this thesis, while conceptualising development in Kenya, it was argued that land is a crucial development resource in Kenya, and therefore, access to the same has an impact on the RTD. Devolution in Kenya plays a critical role in securing this development resource for communities to manage their affairs and further their development. In this regard, county governments hold in trust all unregistered community land¹⁵⁹ on behalf of the beneficiary communities.¹⁶⁰ County governments empower communities to have a say over the use and disposal of their natural resources culminating in the realisation of their right to self-determination.

In exploiting natural resources such as minerals, oil and gas, county governments are positioned as an essential link in the transfer of benefits to the local communities by acting as trustees.¹⁶¹ Section 28 of the Draft Natural Resources (Benefit-Sharing) Bill 2014, though not yet enacted into law, demonstrates the role of devolution in sharing benefits accruing out of natural resources in Kenya. The bill establishes a County Benefit-Sharing Committee. The Committee comprises the County Executive Committee Member in charge of Finance, the Chairperson of the County

¹⁵⁵ See generally, *Wekesa County Governments and Rights of Marginalised Ethnic Minorities*.

¹⁵⁶ Article 174(c) of the Constitution of Kenya 2010.

¹⁵⁷ Article 174(d) of the Constitution of Kenya 2010.

¹⁵⁸ Article 174(e) of the Constitution of Kenya 2010.

¹⁵⁹ Community Land Tenure is one of the ways in which land can be legally owned in Kenya. See article 63 of the Constitution of Kenya 2010 and the Community Land Act 27 of 2016.

¹⁶⁰ Article 63(3) of the Constitution of Kenya 2010 and the Community Land Act 27 of 2016.

¹⁶¹ Twayigize *The Role of the Kenyan Constitution and Indigenous Communities* 189.

Assembly Committee responsible for natural resources and five persons elected by the local community representing the diversity of the local community.

The Committee's mandate is to negotiate with an affected organization or organizations, monitor the implementation of projects undertaken by the county under the Benefit-Sharing Agreement and determine the amount of money allocated to each local community from the benefit-sharing agreement. The Committee also convenes public forums to facilitate discussions on proposed County Benefit-Sharing Agreements, community projects to be supported from county earnings and advising the County governments on projects to be supported using revenue from benefit-sharing agreements.

Under Section 31 of the Bill, a Local Community Benefit-Sharing Forum comprising five people directly elected by the community in a public gathering of the local community is established. The function of this forum is to negotiate with the County Benefit-Sharing Committee, a local community benefit-sharing agreement; identify local community projects to be funded by the money allocated to the community by the County Benefit-Sharing Committee, and to supervise the execution of projects undertaken at the local community using revenue from the local community benefit-sharing agreement.

The strategic role of the devolution in the exploitation and management of natural resources for the benefit of the local communities has been seen in Turkana county, the only region in Kenya currently producing crude oil. The county government of Turkana has put in place various frameworks for the management of oil resources.¹⁶² The county government of Turkana has been given the responsibility of managing the 20%¹⁶³ and 5% shares¹⁶⁴ of royalties derived from oil drilling by Tullow Oil¹⁶⁵ to benefit the county and local people, respectively.¹⁶⁶ The Turkana County government is also "the custodian of communal land in the county and is

¹⁶² Twayigize *The Role of the Kenyan Constitution and Indigenous Communities* 189.

¹⁶³ In accordance with the provisions of section 58(2) of the Petroleum Act 2 of 2019.

¹⁶⁴ In accordance with the provisions of section 58(3) of the Petroleum Act 2 of 2019.

¹⁶⁵ PSCU <https://www.standardmedia.co.ke/counties/article/2001280995/uhuru-how-revenue-from-turkana-oil-will-be-shared> (Date of use: 28 May 2021).

¹⁶⁶ Twayigize *The Role of The Kenyan Constitution and Indigenous Communities* 189-190.

charged with the responsibility of utilizing and controlling this resource on behalf of the community".¹⁶⁷

The local communities residing within counties in Kenya elect their county chief executive (the governor and his deputy) and their representatives to the county assembly every five years.¹⁶⁸ This normative constitutional design enables the local communities to determine their socio-economic, political and cultural development because it makes the county government's political and administrative structures accountable to the people. Arguably, the exercise of sovereign power by the people to constitute and re-constitute county governments illustrates how the right to self-determination functions within the structure of devolution in Kenya.

From the foregoing discourse, it was submitted that devolution in Kenya enhances the right to self-determination by giving powers of self-governance to the people. The people can self-govern through their participation in the exercise of the powers of the State and in making decisions affecting them. The express recognition of the rights of communities to manage their affairs and to further their development under devolution enhances the realisation of their right to self-determination. Therefore, it is arguable that the devolution creates a structure within which communities can exercise their right to self-determination hence the realisation of the RTD.

5.4 Threats to the Realisation of the RTD through Devolution in Kenya

This section discusses threats to the realisation of the RTD through devolution in Kenya. Threats refer to circumstances that make devolution in Kenya dysfunctional. Threats also refer to factors that make it impossible or difficult for devolution to achieve the constitutional objectives related to the realisation of the RTD in Kenya. Examples of such constitutional objectives include; enabling communities to manage their affairs and further their development, promotion of democracy and accountability, development and service delivery, equity and inclusiveness, among others. These threats will also demonstrate the shortcomings of devolution as a RTD compliant development paradigm in Kenya.

¹⁶⁷ Twayigize *The Role of The Kenyan Constitution and Indigenous Communities* 190.
¹⁶⁸ Articles 180 and 193 of the Constitution of Kenya 2010.

The threats to the realisation of the RTD through devolution in Kenya discussed herein are corruption; the inability of counties to absorb certain devolved functions; divisive politics; inadequate funding or division of revenue; poor synergy between the county and the national governments; poor leadership, and inadequate public participation.

5.4.1 Corruption

The quality of leadership in a county, without doubt, has either a positive or negative effect on development. Good leaders invariably steer their counties into prosperity.¹⁶⁹ County governments in Kenya have been victims of poor leadership, with governors failing to measure up to the leadership and integrity provisions set out in Chapter 6 of the Constitution of Kenya 2010.¹⁷⁰ This section argues that corruption has negatively affected the quality of leadership in the county governments, thus hindering their ability to discharge constitutional functions related to the realisation of the RTD.

What is corruption? Corruption is “the abuse of entrusted power for private gain”.¹⁷¹ Corruption can also be defined as “bribery or any other behaviour in relation to persons entrusted with responsibilities in the private and public sectors, which violates their duties as public officials or private employees aimed at obtaining undue advantage of any kind for themselves or others”.¹⁷²

The Anti-Corruption and Economic Crimes Act¹⁷³ of Kenya defines corruption as; bribery, fraud, embezzlement or misappropriation of public funds, abuse of office, breach of trust, or an offence involving dishonesty in connection with any tax, rate or impost levied under any Act, or any written law relating to the elections of persons to public office.¹⁷⁴ This definition focuses on "acts that happen within the context of

¹⁶⁹ Musambayi 2018 *JGER* 1-12.

¹⁷⁰ Mungai 2019-06-09 *The Standard* (Kenya).

¹⁷¹ Transparency International <https://www.transparency.org/en/what-is-corruption#> (Date of use: 16 June 2020).

¹⁷² SADC https://www.sadc.int/files/7913/5292/8361/Protocol_Against_Corruption2001.pdf (Date of use: 16 June 2020) Article 1.

¹⁷³ Act 3 of 2003.

¹⁷⁴ Section 2.

public office" more than in the private sphere. In reality, however, corruption happens in both public and private spheres.

Studies have shown that corruption has plagued several counties in Kenya since 2013.¹⁷⁵ Examples of recent corruption cases in county governments include a case against the former governor of Nairobi city county, Mike Mbuvi Sonko, where he had been accused of misappropriating Kshs 357 million belonging to the county government of Nairobi,¹⁷⁶ which resulted in his impeachment.¹⁷⁷ His predecessor, Evans Kidero, is still facing a court case on conspiracy to defraud the county government of Nairobi of millions of shillings.¹⁷⁸

The governor of Kiambu country, Ferdinand Waititu, was impeached on the grounds of corruption,¹⁷⁹ and Moses Lenolkulal, the governor of Samburu County, is facing criminal charges for embezzling Kshs 87 million from the coffers of the county government of Samburu.¹⁸⁰ Unfortunately, none of these corruption cases were successfully concluded by the Kenyan anti-corruption courts, so the affected governors remain suspects until proven guilty.

Corruption has adverse effects on society. It has been equated to a "cancer"¹⁸¹ that ails the Kenyan society. In that context court stated the following in the case of *Christopher Murungaru*:¹⁸²

Corruption is equally cancer which robs the society in general but more particularly the poor when resources of a country whether public or privately controlled are siphoned into local or foreign accounts for the benefit of a few individuals or groups thereof... As stated above, the massive and debilitating cancerous nature of corruption in Kenya has impoverished and continues to impoverish the great majority of the Kenyan masses, and leads to robbing Kenyans of resources to build, repair and maintain a run-down

¹⁷⁵ Ngigi and Busolo 2019 *Pub Pol'y & Admin Res* 18.

¹⁷⁶ Cece <https://nation.africa/kenya/counties/nairobi/court-dismisses-sonko-bid-to-stop-sh357m-corruption-case-254140?view=htmlamp> (Date of use: 19 August 2020).

¹⁷⁷ Ogila <https://www.standardmedia.co.ke/politics/article/2001397657/its-over-for-sonko> (Date of use: 15 January 2021).

¹⁷⁸ Ogemba <https://www.standardmedia.co.ke/nairobi/article/2001374950/judge-rules-for-dpp-in-sh237m-kidero-graft-case> (Date of use: 20 March 2020).

¹⁷⁹ Standard Digital Team <https://www.standardmedia.co.ke/article/2001358452/governor-ferdinand-waititu-impeached> (Date of use: 20 March 2020).

¹⁸⁰ Wangui <https://allafrica.com/stories/202002130040.html> (Date of use: 19 August 2020).

¹⁸¹ *Samwel Njuguna Githinji v Republic* [1992] eKLR. The court noted that "the cancer of corruption has spread too far and widely in this country and everybody, including the courts, should assist in curbing it".

¹⁸² *Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & Another* [2006] eKLR 28, 48.

infrastructure inadequate health services, and mediocre and inadequate educational facilities. It has led to spiral inflation and unemployment.

Similarly, in the case of *Moses Kasaine Lenolkul v Republic*,¹⁸³ the court also emphasized the devastating effects of corruption on society by stating that:

In this case, the applicant is charged with various corruption-related offences committed within and in his capacity as governor of Samburu county. These are serious offences, particularly given the devastation that corruption wreaks on our society and the well-being of citizens.

The UN Committee for Development Policy and the Transparency International's 2016 Corruption Index reveal the undeniable link between corruption and a State's development. All the countries ranked highly in the corruption index were featured in the list of Least Developed Countries (LDCs). For instance, Somalia, which ranked as one of the most corrupt countries in the world, prominently featured on the list of LDCs,¹⁸⁴ an indication that indeed underdevelopment is a direct by-product of corruption. Underdevelopment indicates a failure to realise the RTD, thus the nexus between corruption and the RTD.

It is submitted that corruption is a real threat to the realisation of the RTD in Kenya. Corruption short circuits the ability of county governments to work at their optimum in achieving their constitutional objectives. Inclusivity, universality, accountability, openness, transparency and equity are some of the human rights principles that guide the realisation of the RTD.¹⁸⁵ Corruption interferes with these human rights principles by perpetuating wastage, loss and misuse of public resources, inequitable allocation of public resources, marginalisation of certain groups from governance, failure or poor delivery of socio-economic goods and services, among other ills.

A violation of human rights happens when the conduct or omission of a State organ falls short of its human rights duties.¹⁸⁶ "To determine whether a particular corrupt practice violates a human right, therefore, it is first necessary to establish the scope

¹⁸³ [2019] eKLR.

¹⁸⁴ *Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & Another* [2006] eKLR 73.

¹⁸⁵ Munyai and Agbor "The Impact of Corruption" 72.

¹⁸⁶ *Corruption and Human Rights: Making the Connection* (2009 International Council on Human Rights Policy Versoix Switzerland) 24 https://papers.ssrn.com/sol3/papers.cfm?Abstract_id=1551222 (Date of use: 12 June 2020).

and content of the human rights obligation in question".¹⁸⁷ According to the UNDRTD socio-economic rights are particularly important in the realisation of the RTD.¹⁸⁸ The Committee on Economic Social and Cultural Rights has also noted that nearly all substantive articles 1-15 of the ICESCR touch upon the substance of the RTD most notably article 11 on the right to an adequate living standard.¹⁸⁹

In Kenya, county governments bear human rights obligations because they play a significant role in providing socio-economic goods and services such as housing, water, health and sanitation, among others.¹⁹⁰ Any act (such as corruption) that interferes with county governments' ability to discharge these functions amounts to a violation of human rights. This is because corruption causes counties to fail to deploy the maximum extent of their available resources to fulfill the RTD. Corruption takes away resources available for the implementation of the RTD.¹⁹¹

Misallocation of development resources like public funds can result in a violation of human rights. This argument was supported by the CESCR, which held that insufficient expenditure or misallocation of public funds resulting in the non-enjoyment of specific human rights like the right to work amounts to a violation of the obligation to fulfill the right to work.¹⁹² Going by the CESCR general comment, it is arguable that misallocation of public funds through corruption hinders the realisation of the RTD.

Corruption also creates a platform for forming a political or ethnic hegemony in the counties defeating the constitutional objective of inclusiveness and diversity. "When corruption becomes endemic, it benefits the well-connected and wealthy leading to the weakening of the accountability structures which are cardinal for protecting

¹⁸⁷ *Corruption and Human Rights: Making the Connection* (2009 International Council on Human Rights Policy Versoix Switzerland) 24 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551222 (Date of use: 12 June 2020).

¹⁸⁸ Article 8(1).

¹⁸⁹ UN Committee on Economic Social and Cultural Rights Submission Follow-up to HRC Resolution 15/25 *"The Right to Development"*.

¹⁹⁰ See Schedule 4 of the Constitution of Kenya 2010; Wanzala and Oloo 2019 *Saudi Journal of Medicine*; WASREB <http://wasreb.go.ke/water-service-providers/> (Date of use: 3 May 2020); Kenya Vision 2030 <https://vision2030.go.ke/county-governments-at-the-centre-of-achieving-universal-health-care/> (Date of use: 3 May 2020).

¹⁹¹ Moyo 2017 *SAJHR* 212.

¹⁹² UN Committee on Economic Social and Cultural Rights *General Comment No 18 The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights* (2006).

human rights."¹⁹³ Corruption is also "a barrier to socio-economic and political development as it leads to the diversion and siphoning of public funds at the expense of the implementation of development programs".¹⁹⁴

Misallocation of resources has also been seen in hiring of personnel in counties where governors have been blamed for using their influence to give their relatives and cronies jobs. Hassan Ali, the former Wajir Senator, pointed out that the wage bill in the 47 counties in Kenya exceeds the allowed minimum because of failure to adhere to the basic rules of hiring staff.¹⁹⁵ Consequently, the bloated workforce threatens the viability of counties.¹⁹⁶ Instead of handing out jobs to friends and relatives, he opines that governors must downsize and consider allocating money to development budgets that would fuel growth and thus employment.¹⁹⁷

Moyo argues that corruption is an obstacle to the realisation of the RTD and a violation of human rights.¹⁹⁸ It is a violation of human rights because it interferes with the process of "expanding the real freedoms that people enjoy"¹⁹⁹ by relegating the human person from being the centre of development²⁰⁰ to a pawn or stooge in the development process. Creating public policy based on an adequate development process must include economic, social and political institutions that can enhance peoples' capabilities.²⁰¹ Corruption affects the functions of these economic, social and political institutions by short-circuiting their ability to provide services that would lead to the realisation of the RTD.

Fulfilling the RTD through devolution in Kenya would entail adopting effective anti-corruption measures to reduce and eliminate the scourge of corruption.²⁰² This is in tandem with article 10 of the UNDRTD, which calls for the formulation, adoption and implementation of policy, legislative and other measures at national and international levels realisation to realise the RTD. Corruption has adverse effects on

¹⁹³ Moyo 2017 SAJHR 194.

¹⁹⁴ Munyai and Agbor "The Impact of Corruption" 72.

¹⁹⁵ Ali *The Star* 2019-04-01 (Kenya).

¹⁹⁶ Ali *The Star* 2019-04-01 (Kenya).

¹⁹⁷ Ali *The Star* 2019-04-01 (Kenya).

¹⁹⁸ Moyo 2017 SAJHR 194.

¹⁹⁹ Sen *Development as Freedom* 1.

²⁰⁰ Iqbal 2007 *Pol Pers* 1, 8.

²⁰¹ Munyai and Agbor "The Impact of Corruption" 73.

²⁰² Moyo 2017 SAJHR 206.

development, and for the RTD to be realised, corruption in all its forms must be fought.²⁰³

5.4.2 Inability to Fully Absorb Health Services as a Devolved Function

The second threat to the realisation of the RTD through devolution in Kenya is the inability of county governments to fully absorb the provision of health services as a devolved function.²⁰⁴ It is submitted that this problem is a threat to the realisation of the RTD because it affects the ability of county governments to deliver services that are crucial to the realisation of socio-economic rights and, by extension, the RTD.

Under the Constitution of Kenya 2010, functions hitherto vested in the central government were transferred to the county governments to enhance efficiency by bringing services closer to the people.²⁰⁵ One of the key devolved functions was the provision of health services. This service was transferred to county governments save for national hospitals or referral hospitals.²⁰⁶ Devolving health services in Kenya resulted in a steady increase in the level realisation of the right to the highest attainable standard of health as provided for under article 43(1)(a) of the Constitution of Kenya 2010.²⁰⁷

The negative effect of devolving health care has been that county governments have been plagued by perennial health workers' strikes, that is: doctors, pharmacists, nurses, laboratory workers, among others.²⁰⁸ Some of the reasons given by health care workers to justify their recourse to industrial action include; delayed payment of salaries, wages and allowances, low wages, salaries and allowances, poor working conditions, unfair promotion guidelines and failure by county governments to honour collective bargaining agreements with the respective workers' unions among other grievances.²⁰⁹

²⁰³ Moyo 2017 *SAJHR* 206.

²⁰⁴ Kimathi 2017 *Afr Dev* 65-66.

²⁰⁵ Kimathi 2017 *Afr Dev* 55.

²⁰⁶ The Fourth Schedule of the 2010 Constitution of Kenya.

²⁰⁷ Gimoi *The impact of devolution on healthcare systems* 60.

²⁰⁸ Masika <https://theconversation.com/why-kenyan-health-workers-are-on-strike-and-what-can-be-done-about-it-70221> (Date of use: 20 July 2021).

²⁰⁹ Masika <https://theconversation.com/why-kenyan-health-workers-are-on-strike-and-what-can-be-done-about-it-70221> (Date of use: 20 July 2021).

Experts have argued that county governments in Kenya have been unable to effectively absorb and manage health services as a devolved function,²¹⁰ perhaps because each county government implements its human resources policies separately. This lack of harmonized approach to the human resources component in the health sector has made some health workers feel disgruntled. Experts have therefore argued that the solution to the never-ending industrial action by health workers is to create a constitutional commission similar to the public service commission (PSC) or teachers' service commission (TSC) to manage the human resources component of the health services.²¹¹ This will however be discussed in detail in Chapter 7 of this thesis.

Arguably, these disruptions in the health sector have denied millions of Kenyans access to the right to health as guaranteed under the Constitution of Kenya.²¹² The disruptions have negatively impacted the realisation of the RTD because socio-economic rights touch on the substance of the RTD.²¹³ Further, all human rights are interrelated and interconnected, meaning that a violation of the right to health violates other human rights. Therefore, it becomes difficult to realise the RTD if county governments cannot guarantee the right to health in Kenya.

5.4.3 Negative Ethnicity

A conceptualisation of Kenya's development paradigm in Chapter 3 above demonstrated that ethnicity largely contributed to inequitable development in Kenya. It was perfected by post-independence governments that structured development policies based on a flawed development ideology, political patronage, ethnic affiliations and cronyism. The practice began with the British colonialists who employed the divide and rule tactic to cement their control over Kenya.

Even with the advent of devolution under the 2010 constitution, ethnicity remains a challenge in Kenya. A report by the National Cohesion and Integration Commission in 2016 revealed that divisive practices such as tribalism, nepotism and corruption

²¹⁰ Mwai <https://www.researchgate.net/publication/321050763> (Date of use: 20 July 2021).

²¹¹ Masika <https://theconversation.com/why-kenyan-health-workers-are-on-strike-and-what-can-be-done-about-it-70221> (Date of use: 20 July 2021).

²¹² Irimu *et al* 2018 *British Medl J Glob Health* 1-5.

²¹³ UN Committee on Economic Social and Cultural Rights Submission Follow-up to HRC Resolution 15/25 "*The Right to Development*".

continue to pervade public recruitment in national institutions in Kenya.²¹⁴ Ethnicity has been described as “the consciousness of belonging to an ethnic group,”²¹⁵ and “it becomes negative when the ‘we versus them’ dichotomy is implied”.²¹⁶

Ethnicity is negatively manifested within the context of devolution, where tribal or ethnic identities are commonly used as benchmarks in awarding tenders and State contracts in Kenya.²¹⁷ The implication is that if one does not belong to the "favoured" ethnic identity, they will be side-lined in the allocation of development resources by the county governments in Kenya. This practice flies in the face of equity in the distribution of development resources. Equity is a pillar of the RTD; thus, the argument that ethnicity is a threat to the realisation of the RTD through devolution in Kenya.

It has been observed that “nepotism is rife in ethnic homogenous counties, while in heterogeneous counties ethnicity has taken over in Kenya”.²¹⁸ According to Wanjiku Kihika, the founder of the Tribeless Alliance, an initiative launched by young Kenyans who are tired of tribal or ethnic politics, politicians are not keen to tackle tribalism because it plays to their advantage.²¹⁹ They use it to gain followers, sell their political agenda and command loyalty.

For instance, politicians have used ethnicity to convolute and confuse the recent discourse on the county revenue allocation formula in Kenya to galvanise political support from their communities. In 2019, populous counties that share a common ethnic identity in the Mount Kenya region began the push to adopt a "one man, one shilling, one vote" revenue distribution formula. This meant that revenue is allocated to counties based on their population size. On the other hand, the less populous regions responded by demanding a "one shilling, one-kilometre" formula, which essentially required that counties are allocated revenue based on their landmass.²²⁰

²¹⁴ Waweru <https://www.capitalfm.co.ke/news/author/mwaweru/> (Date of use: 20 July 2021).

²¹⁵ Lesasuiyan *Analysis of the impact of negative ethnicity on national politics in Kenya* x.

²¹⁶ Lesasuiyan *Analysis of the impact of negative ethnicity on national politics in Kenya* x.

²¹⁷ Kisaka and Nyadera 2019 *J Soc Pol'y Con* 159-180.

²¹⁸ Kisaka and Nyadera 2019 *J Soc Pol'y Conf* 159-180.

²¹⁹ Nyambura <https://www.dw.com/en/in-kenya-politics-split-on-ethnic-divide/a-37442394> (Date of use: 6 February 2021).

²²⁰ Wainaina <https://www.pd.co.ke/news/national/mt-kenya-calls-for-one-man-one-vote-one-shilling-system-26557/> (Date of use: 6 February 2021).

Proponents of the "one man, one-shilling formula" argued that money should be distributed according to the population as they are the ones who contribute the highest amount of tax. The proponents of this formula were politicians from populous ethnic communities, such as the Kikuyu, who were historically favoured in the allocation of development resources. The opponents of the formula rightly argued that it would only further marginalize arid and semi-arid counties,²²¹ thus defeating the essence of equity which requires that development resources must not only reach the highest number of people possible but must also have a multiplier effect as well as a lasting impact on their socio-economic conditions.²²²

The use of ethnicity to galvanise political support in Kenya can fan the flames of negative ethnicity that reverse the gains made by devolution in securing elements of the RTD such as equity. There is a need for the political class to encourage cohesion and avoid negative ethnicity in matters of devolution.

5.4.4 The Politics of Fiscal Devolution

Kenya's fiscal devolution design was discussed in Chapter 4 of this thesis, where it was argued that fiscal devolution in Kenya catalyses the realisation of the RTD in three ways. Firstly, fiscal devolution guarantees the availability of resources to the counties to pursue their development programmes. Secondly, fiscal devolution gives the devolved units reasonable control over funds allocated to them, thus freeing them from the shackles of centralized bureaucracy. Thirdly, fiscal decentralisation enables equitable distribution or sharing of development resources all over Kenya.

It was also argued that despite express constitutional provisions on fiscal devolution, the politics of fiscal devolution has led to delayed and insufficient funding to county governments in Kenya. This section discusses how the politics of fiscal decentralisation has negatively impacted the ability of county governments to discharge their RTD related functions. In this thesis, the politics of fiscal devolution refers to the political discourses that define, shape and determine equitable

²²¹ Ngugi and Rasto <https://www.kenyanews.go.ke/governor-demands-equity-in-distribution-of-funds/> (Date of use: 6 February 2021).

²²² Omete https://www.businessdailyafrica.com/bd/life_style/health-fitness/revenue-allocation-debate-should-focus-on-quality-of-life-2298806 (Date of use: 6 February 2021).

allocation of revenue vertically (between the national government and the county government) and horizontally (between county governments) in Kenya.

The politics of fiscal devolution in Kenya has manifested itself in three ways; delayed division of revenue between the national government and the county governments, delayed allocation of revenue between the 47 counties in Kenya and delays by the national treasury to release budgeted funds to the counties. These problems are discussed below.

5.4.4.1 Division of Revenue between the National and County Governments

Kenya's constitutional architecture and design on fiscal devolution requires that revenue collected nationally must be shared between the national, and county governments. This is done through the enactment of the Division of Revenue Act.²²³ Every five years, the CRA comes up with a recommendation that guides the Senate and National Assembly in debating the Division of Revenue Bill.²²⁴ The Constitution of Kenya places the minimum share of revenue allocated to county governments at 15% of revenue collected annually.²²⁵

In 2019, the Senate and the National Assembly disagreed on the sharing of revenue between the national government and the county governments. The Senate insisted that the recommendation of the CRA was binding to parliament, and thus the Division of Revenue Bill of 2019 had to be passed in terms of the CRA's recommendation. On the other hand, the National Assembly was of the opinion that it can disregard the CRA's recommendation during the passage of the Division of Revenue Bill. This led to a protracted stalemate that delayed the allocation of funds to the county governments.²²⁶ While this impasse persisted, the National Assembly enacted the Appropriation Act, which unlocked funding for the national government.²²⁷

²²³ Article 218(1) of the Constitution of Kenya 2010.

²²⁴ Article 217 of the Constitution of Kenya 2010.

²²⁵ Article 203(2) of the Constitution of Kenya 2010.

²²⁶ Ayega <https://www.capitalfm.co.ke/news/2019/08/revenue-division-mediation-starts-on-negative-footing-as-camps-take-hardline-stances/> (Date of use: 26 February 2021).

²²⁷ Article 221 of the Constitution of Kenya 2010.

The genesis of the stalemate in the passing of the Division of Revenue Act was a superiority contest or a power play between the Senate and the National Assembly. It manifested in the misconceived notion that the National Assembly has the final say in a Division of Revenue Bill.²²⁸ However, by law, any bill that makes provisions on the sharing of revenue between two levels of government requires the input of the CRA before the National Assembly and Senate can consider it.²²⁹ If the Senate and the National Assembly disagree on the bill, a mediation committee comprising members of both houses of parliament is formed to seek consensus on the contentious issues.²³⁰

While the power play between the houses of parliament persisted, frustrated county governments decided to approach the Supreme Court for an advisory opinion on the matter.²³¹ From the onset of the matter, the Supreme Court declined to interfere with the function of the legislature in fiscal allocation, citing the doctrine of separation of powers and the political question doctrine. The recommended mediation under article 217(6)(b) of the Constitution as a solution to the disagreement on the allocation of revenue. Finally, the mediation committee comprising the Senate and the National Assembly reached a consensus on the matter where it was agreed that the countys' equitable share of the revenue for the financial year 2019/2020 would be Kshs 316.5 billion.²³²

On the question as to whether the recommendation of the CRA was binding on parliament, the court held that the recommendation of the CRA regarding the Division of Revenue Bill "was not binding on both the Senate and the National Assembly, but such recommendations are to be given serious consideration by both

²²⁸ Gachane <https://www.nation.co.ke/news/No-more-money-for-counties-Uhuru-says/1056-5210254-nejegaz/index.html> (Date of use: 28 February 2021).

²²⁹ Article 205(1) of the Constitution of Kenya 2010.

²³⁰ Article 217(6)(b) of the Constitution of Kenya 2010.

²³¹ *Council of Governors & 47 Others v Attorney General & 3 Others (Interested Parties); Katiba Institute & 2 Others (Amicus Curiae)* [2020] eKLR delivered on 15th of May 2020 with a majority. 4 Judges concurred and 1 dissented.

²³² Report of the Mediation Committee on Division of Revenue Bill (No 2) 2019 Pursuant to Article 113 of the Constitution of Kenya 2010, September 2019 at 8. Available at <http://www.parliament.go.ke/the-national-assembly/committee/12/mediation-committee-na> (Date of use: 26 February 2021).

houses of legislature while debating the Division of Revenue Bill”.²³³ Failure to consider the recommendations of the CRA will be unconstitutional.²³⁴

The court also held that in the event there is an impasse between the Senate and the National Assembly on the passing of the Division of Revenue Bill, 50% of the allocation to the counties in the Division of Revenue Act of the preceding financial year can be withdrawn from the Consolidated Fund. This is in line with article 222(2)(b) of the Constitution, which provides for situations where the national government may not access funding because the relevant legislation has not been passed. The Supreme Court noted that “this formula safeguards the functionality of the county governments while affording parliament the opportunity to resolve the impasse through a second mediation”, thus preserving the doctrine of separation of powers.²³⁵

The court also warned that failure by parliament to pass crucial legislation such as the Division of Revenue Act could lead to the dissolution of parliament for failure to uphold the Constitution under article 258 of the Constitution of Kenya.²³⁶ In other words, the court emphasised the legislature's accountability to the Constitution of Kenya and the need for each arm of government to operate within the strict confines of the Constitution.²³⁷

The advisory opinion was critical to devolution in Kenya because it demonstrated that the politics of superiority between the Senate and the National Assembly in fiscal matters was subversive to devolution in particular and the Constitution of Kenya generally. The Senate and the National Assembly have no choice but to reach political compromises in fiscal devolution matters to avoid protracted disputes that disrupt the funding of counties in Kenya.

²³³ Paragraph 54.

²³⁴ *Council of Governors & 47 Others v Attorney General & 3 Others (Interested Parties); Katiba Institute & 2 Others (Amicus Curiae)* [2020] eKLR para 56-57.

²³⁵ Paragraph 83.

²³⁶ Paragraphs 88 and 91.

²³⁷ This refers to governments upholding or practising constitutionalism. See Currie and De Waal *The Bill of Rights Hand Book* 8 where constitutionalism is defined as the idea that government should derive its powers from a written constitution and that its powers should be limited to those set out in the constitution.

5.4.4.2 Division of Revenue Between the County Governments

The Constitution of Kenya 2010 provides that the CRA shall come up with a formula to guide the Senate every five years when enacting the County Allocation of Revenue Act.²³⁸ This is the law that determines the equitable distribution of revenue between the different counties in Kenya. In 2020, this process became contentious, acrimonious and divisive because of politics surrounding the third-generation revenue sharing formula proposed by the CRA.²³⁹

Senators opposing the government's position on revenue allocation to the different counties were arrested on trumped-up charges ostensibly to intimidate them into revising their stand on the matter.²⁴⁰ This fallout again prompted the formation of a mediation committee comprising senators who supported the government's position and those who opposed it.²⁴¹

The main issue of contention was that the new revenue sharing formula was going to reduce the revenue that was to be allocated to certain counties while favouring other counties with increased allocations. This is a political issue because the senators ordinarily lookout for the interests of the electorate in their respective counties, and thus they would not want to pass laws that would disadvantage the electorate in any way.

To clarify the contentious issues in the CRA revenue sharing formula of 2020, below is a table showing the three revenue allocation formulas created by the CRA since 2013.

²³⁸ Article 217 read together with Article 218(b) of the Constitution of Kenya 2010.

²³⁹ Mungao <https://www.standardmedia.co.ke/amp/nairobi/article/2001383440/uhuru-this-way-ruto-that-way> (Date of use: 23 February 2021).

²⁴⁰ Mungao <https://www.standardmedia.co.ke/amp/nairobi/article/2001383440/uhuru-this-way-ruto-that-way> (Date of use: 23 February 2021).

²⁴¹ Otieno <https://www.standardmedia.co.ke/politics/article/2001381394/senate-picks-nine-member-team-to-unlock-revenue-stalemate#> (Date of use: 26 February 2021).

Table 1: First, second and third revenue sharing formula²⁴²

	First Revenue Sharing Formula	Second Revenue Sharing Formula	Third Revenue Sharing Formula
Parameter	Weight (%)	Weight (%)	Weight (%)
Population	45	45	18
Basic Equal Share	25	26	20
Poverty	20	18	14
Land Area	8	8	8
Fiscal Responsibility	2	2	-
Development Index	-	1	-
Health	-	-	17
Agriculture			10
Urban services			5
Roads			4
Fiscal Effort			2
Fiscal Prudence			2
Total	100	100	100

The first and second-generation formulas had the parameters of population, basic equal share, poverty, land area, fiscal effort and the second formula had an additional parameter of development factor at 1%. The third-generation revenue sharing formula aimed to redistribute resources based on functions assigned to counties and key services. To realise this objective, the formula incorporated the following parameters; enhanced service delivery in the health sector (17%), agriculture (10%), urban services (5%), basic share (20%), other county services (18%). The second objective of the third-generation formula is to promote balanced development as indicated by land area (8%), roads (4%), poverty (14%). The Senate included two parameters: fiscal effort at 2% and fiscal prudence at 2% to incentivize counties to raise revenue and pursue fiscal prudence.²⁴³

Senators rejected the third-generation formula because 22 counties risked losing about Kshs. 20 billion collectively, while ten counties with the highest number of

²⁴² Commission on Revenue Allocation (CRA) <https://cra.go.ke> (Date of use: 23 February 2021).

²⁴³ Ovugi <https://kepsa.or.ke/unpacking-the-third-revenue-sharing-formula-for-business> (Date of use: 23 February 2021).

people stood to lose Kshs. 4.4 billion collectively.²⁴⁴ The senators argued that reducing the population parameter from 45% to 18% meant that the most populous county would receive reduced funding. The wisdom of the CRA in rooting for this formula was that counties need resources to enable them to deliver on particular assigned functions such as agriculture, health, urban services, among others. Poverty levels in the counties must also be taken into account to realise the objective of equity in the distribution of resources. Counties that have suffered many years of marginalisation invariably experience high poverty levels and low population. Distributing resources based on population in such circumstances would institutionalize inequality rather than cure the problem.

According to the Supreme court's advisory opinion, the CRA's recommendation on revenue sharing is not binding. Thus the Senate can make changes to the formula as long as it can justify its decision in light of the provisions of article 217 of the Constitution of Kenya 2010.²⁴⁵ Further, the Supreme Court stated that the Senate is only required to justify a "significant deviation" from the CRA's recommendation by way of a memorandum and what constitutes a "significant deviation" ought to be determined on a case by case basis.²⁴⁶

Despite the above misgivings, the Supreme Court in *Council of Governors & 47 others v Attorney General & 3 others*²⁴⁷ clearly stated that allocation and division of revenue are budgetary matters that ought to be decided on by legislature through political processes. Thus, the resolution of legislative deadlock must happen "either through the formal constitutional processes or through the practical workings of the political system".²⁴⁸ Comparatively, in Australia, legislative conflicts between the Senate and House of Representatives with regard to fiscal or budgetary matters are resolved either within parliament through negotiations and political compromises or outside legislature by way of an election once both houses are dissolved.²⁴⁹

²⁴⁴ Mungai <https://www.standardmedia.co.ke/amp/nairobi/article/2001383440/uhuru-this-way-ruto-that-way> (Date of use: 23 February 2021).

²⁴⁵ Paragraph 54-60.

²⁴⁶ Paragraph 62.

²⁴⁷ *Council of Governors & 47 Others v Attorney General & 3 Others (Interested Parties); Katiba Institute & 2 Others (Amicus Curiae)* [2020] eKLR.

²⁴⁸ *Council of Governors & 47 Others v Attorney General & 3 Others (Interested Parties); Katiba Institute & 2 Others (Amicus Curiae)* [2020] eKLR para 208.

²⁴⁹ Article 57 of the Commonwealth of Australia Constitution Act.

It is, however, important to note that determining a suitable county revenue allocation formula is a technical process that requires the expertise of professionals, and that is why the CRA was created in the Constitution of Kenya 2010. In Kenya, politicians have the last word determining how best revenue should be distributed among the counties. This diminishes the role of the CRA in revenue allocation because CRA's recommendation can be countermanded by legislators who, more often than not, lack technical expertise in fiscal matters.

It is argued that subjecting the final decision in fiscal matters to political actors is a serious weakness in Kenya's constitutional architecture and design on fiscal devolution. Chapter 3 of this thesis demonstrated that post-independence Kenya failed to achieve participatory and equitable development because politicians led by the president had the final say in key processes such as the distribution of development resources.

Perhaps the Constitution of Kenya ought to have provided a minimum threshold for what constitutes a significant deviation from the CRA's recommendation. This proposition will however be interrogated in detail in Chapter 7 of this thesis.

5.4.4.3 Delayed Release of Funds to the Counties by the National Treasury

The success of devolution in Kenya depends on the ability of county governments to discharge their constitutional functions such as the provision of health services, basic education, water and sanitation, among others. As argued herein, devolution facilitates the realisation of all the generations of human rights by providing greater access to basic rights, ultimately resulting in the realisation of the RTD. Therefore, county governments require prompt and adequate funding to discharge their constitutional functions, which, by extension, augment the realisation of the RTD.

Since the inception of devolved units in 2013, county governments have grappled with the problem of inadequate and delayed funding.²⁵⁰ The national treasury has failed to release budgeted funds to the counties on time hence a threat to devolution.²⁵¹ The Constitution of Kenya provides that a county's share of revenue

²⁵⁰ Mugendi 2020-01-03 *iAfrikan Business*; Onyango 2019-06-18 *The Sunday Standard*.

²⁵¹ *Council of Governors & 47 Others v Attorney General & 3 Others (Interested Parties); Katiba Institute & 2 Others (Amicus Curiae)* [2020] eKLR para 26.

raised by the national government shall be transferred to the county without undue delay and without deduction except when the transfer has been stopped under the Constitution's provisions.²⁵²

In the *Council of Governors & 47 others, v Attorney General & 3 others*²⁵³ delayed funding to county governments was put forth to the Supreme Court of Kenya as an issue for determination. The county governments jointly argued that the national treasury should release budgeted funds to the counties within 14 days after the Division of Revenue Act and the Appropriation Act have been assented to by the president.²⁵⁴ According to the county governments, the term "undue delay" did not give any specific timelines, thus resulting in unwarranted delays in releasing funds by the national treasury. They urged the court to interpret article 219 of the Constitution of Kenya to provide specific timelines within which the national government should release the equitable share of revenue to the county governments.

The Supreme Court noted that delays in releasing these funds could, in fact, sabotage devolution. However, the court held that it was ill suited to determine with precision when the monies due to the counties should actually be transferred,²⁵⁵ the logic being that this is an exclusive function of the executive arm of government. The court further held that the national government should always convene a forum to explain delays in the disbursement of funds because any unexplained delays do violate the constitution.²⁵⁶ In a sense, the court noted that fiscal matters were not capable of judicial resolution and thus deferred to the appropriate organ(s) of government; the legislature and the executive.

The court also shed light on the question as to whether the Appropriation Bill can be passed before the Division of Revenue Act has been enacted. The court stated that the enactment of the Appropriation Act before the Division of Revenue Act had the effect of unlocking funds from the Consolidated Fund to the national government while the county governments did not have any funds to operate. This was

²⁵² Article 219 of the Constitution of Kenya 2010.

²⁵³ *Council of Governors & 47 Others v Attorney General & 3 Others (Interested Parties); Katiba Institute & 2 Others (Amicus Curiae)* [2020] eKLR.

²⁵⁴ Paragraph 27.

²⁵⁵ Paragraph 95.

²⁵⁶ Paragraph 95.

unconstitutional since the national government can only appropriate funds that are allocated to it under the Division of Revenue Act. Similarly, the Senate cannot pass the County Allocation of Revenue Act before the Division of Revenue Act has passed.²⁵⁷

While respecting the wisdom of the Supreme Court of Kenya in choosing to defer fiscal matters to the executive and legislative arms of government, it was argued herein that the Constitution of Kenya should have provided specific timelines within which budgeted funds should be released to the county governments. This proposal is further explored in Chapter 7 of this thesis.

The provisions of article 219 of the Constitution of Kenya are wanting because they give the national government leeway to frustrate or sabotage devolution by delaying the release of budgeted funds to the county governments. Lack of adequate funding due to delays in disbursement of funds by the national treasury cripples devolved governments, making them unable to perform their constitutional functions. Therefore, a devolved system that does not work is a threat to the realisation of the RTD in Kenya.

5.4.4.4 Concluding remarks

The constitutional architecture and design on fiscal decentralisation in Kenya bears the hallmarks of a cooperative relationship between the national and county governments. According to Woolman *et al.*, a cooperative system of government is designed to facilitate political compromises to conflicts between two levels of government to avoid an adversarial relationship.²⁵⁸ In the same vein, in the case of *International Legal Consultancy Group versus The Senate and Another*, the court held that "pertinent political questions between the two levels of government should be resolved in a manner that does not result in acrimony and hostility".²⁵⁹

The Constitution of Kenya 2010 and the Inter-governmental Relations Act of 2012 institutionalize the cooperative relationship between levels of government in Kenya.²⁶⁰ Both the national and the county governments are required to perform

²⁵⁷ Paragraphs 100-101.

²⁵⁸ Woolman and Roux "Co-operative Government and Intergovernmental Relations" Ch 14-8.

²⁵⁹ *Constitutional Petition Number 8 of 2014* [2014] eKLR para 70.

²⁶⁰ Article 189 of the Constitution of Kenya 2010.

their functions and exercise their powers in a manner that respects the functional and institutional integrity of government at both levels while respecting the constitutional status and institutions of government at all levels of government.²⁶¹

The national and county governments are required to assist, support and consult each other in the implementation of legislation within their spheres of authority to achieve constitutional objectives of each level of government.²⁶² To harness synergies in this cooperative relationship, all levels of government are required to liaise with each other in the exchange of information, coordination of policies, and their administration.²⁶³ To that end, the national and county governments may set up joint committees or authorities.²⁶⁴ The two levels of government are required to make every reasonable effort to settle disputes arising out of the cooperative relationship.²⁶⁵

Since the national government controls the disbursement of budgeted funds to the county governments through the national treasury, the national government expects to release the funds timeously to curb the possibility of financially crippling county governments. This is important because both national and county governments play specific and significant roles under the Constitution of Kenya in realising the fundamental rights and freedoms of the people of Kenya, including the RTD.

The spirit of the Constitution of Kenya also requires other organs of government, specifically the legislature and the executive, to forge a cooperative relationship to achieve broad constitutional objectives such as the ones that flow out of devolution. For instance, where the two houses of parliament disagree on the passing of joint bills, the Constitution provides for the formation of mediation committees to unlock such an impasse. Mediation will, more often than not, require political compromises. This raises the concern that fiscal devolution in Kenya is a highly technical matter, and thus, politicians should not have the final say in its determination.

The Supreme Court in the *Council of Governors & 47 others v Attorney General & Others* offered some clarity to some of the contentious issues surrounding fiscal

²⁶¹ Article 189(1)(a).

²⁶² Article 189(1)(b).

²⁶³ Article 189(1)(c).

²⁶⁴ Article 189(2).

²⁶⁵ Article 189(3).

devolution in Kenya and even proposed enactment of specific laws to address some of the lacunas in the Constitution. Most importantly, the decision restated the importance of fiscal devolution under the Constitution of Kenya 2010 by holding that counties cannot be denied funding under any circumstances because this will be contrary to the national values and principles of governance in article 10 of the Constitution of Kenya 2010. The decision was also clear that the political organs of government best resolve fiscal matters.

When legislators make political compromises on fiscal devolution, are they acting contrary to the values and principles of the Constitution of Kenya 2010? Not at all, as long as the political compromises are not inconsistent with constitutional values and principles. Devolution is a value and principle of governance, and thus it follows that the Constitution should always be interpreted to give life to these values and principles because they constitute the essence or ethos of the Constitution. These values and principles breathe life into the letter of the Constitution.²⁶⁶ Musila aptly describes constitutional values and principles as "the soul of the Constitution, the guiding light providing a kind of roadmap and justification of the entire constitution".²⁶⁷

Musila's description of constitutional values and principles means that all organs of government are bound by constitutional values and principles when carrying out their constitutional functions. Therefore, it is expected that no organ of government will act in a manner that sabotages devolution. In practice, however, it appears as though the national government and the county governments have had a strained relationship rather than a cooperative one when it comes to devolution matters. It is submitted that expecting the organs of government to give life to the spirit of the Constitution in matters concerning fiscal decentralisation is perhaps untenable because of the politics of fiscal devolution that have affected the ability of county governments to meet their constitutional objectives, thus a threat to the realisation of the RTD through devolution in Kenya.

²⁶⁶ As per Ringera J in *Crispus Karanja Njogu v Attorney General Criminal Application No 39 of 2000*.

²⁶⁷ Musila "The State of Constitutionalism in Kenya in 2012" 4.

The main issue arising from this discourse is that the constitutional architecture and design on fiscal decentralisation in Kenya should be redesigned to prevent excessive political interference in fiscal decentralisation matters and give more deference to expert constitutional bodies such as the CRA. However, these proposed reforms will be explored in detail in Chapter 7 of this thesis. This is crucial because the realisation of the RTD through devolution in Kenya depends on the ability of counties to deliver on their objectives under article 174 of the Constitution of Kenya. These objectives cannot become a reality unless county governments are well funded.

5.4.5 Poor Synergy between County Governments and the National Government

It is argued in this section that poor synergy between the county and national governments is a threat to the realisation of the RTD through devolution in Kenya. Poor synergy has manifested in duplication of roles, a challenge noted by the Council of Governors (COG) one year after devolution in Kenya.²⁶⁸

The *Council of Governors & 3 others v Senate & 53 others*²⁶⁹ is an excellent example of a suit in which the duplication of roles between the national government and the county governments was in issue. In the matter, the petitioners challenged the constitutionality of the County Development Boards (CDBs). On 24th July 2014, the National Assembly of Kenya had, pursuant to consultation with the Senate, amended the County Governments Act (CGA) by introducing a new section 91A which created the County CDBs in each of the 47 counties in Kenya. “The CDBs were to comprise, *inter alia*, members of the National Assembly representing constituencies within respective counties, members of county assemblies, as well as members of the executive, operating within respective counties, and were to be chaired by the Senator from the county”.²⁷⁰

In essence, the amendment to the CGA placed the coordination and harmonisation role of county development plans and projects within the ambit of the CDBs. It was argued that these provisions violated the Constitution by involving members of the

²⁶⁸ Ngigi and Busolo 2019 *Pub Pol'y & Admin Res* 17.

²⁶⁹ Petition No 381 of 2014 [2015] eKLR.

²⁷⁰ Paragraph 4.

national government in county affairs and members of the legislature in county executive matters, thus undermining devolution and violating the principle of separation of powers.²⁷¹

The court held that these amendments to the CGA were “unconstitutional and amounted to an attempt to extend the powers of the national legislature, the National Assembly and Senate, into the county executive by assigning to the CDBs a role in the planning and budgetary processes of counties”. This “not only undermined devolution but was a direct threat to the principle of separation of powers which is one of the cornerstones of Kenya's new, democratic dispensation”.²⁷²

Similarly, in the *Institute of Social Accountability & another v National Assembly & 4 others*,²⁷³ the court declared the Constituency Development Fund Act (CDF Act of 2003) as unconstitutional on the grounds that the Act established CDF as a mechanism that runs parallel to the constitutionally recognised governance structures.²⁷⁴ Specifically, section 22 of the CDF Act, which allowed the fund to undertake local development projects, was inconsistent the division of functions between the national and county governments and compromised the county government autonomy.²⁷⁵ The court also held that CDF Act 2003 is inconsistent the principle of separation of powers by incorporating Members of Parliament in the planning, approving and implementing of the CDF projects. In that sense, the CDF Act was inconsistent with the doctrine of separation of powers between the executive and legislative functions. It also “undermined some fundamental national values and principles of governance, including devolution of power, accountability and good governance”.²⁷⁶

The recent Managed Medical Equipment Services (MES) scandal is another example of poor synergy between Kenya’s national and county governments. In 2015, the national government procured and leased medical equipment on behalf of counties at a cost of Kshs 63B in an attempt to improve the quality of health care

²⁷¹ Paragraph 13.
²⁷² Paragraph 120.
²⁷³ [2015] eKLR.
²⁷⁴ Paragraph 139.
²⁷⁵ Paragraph 139.
²⁷⁶ Paragraph 139.

all over Kenya.²⁷⁷ The county governments were not involved in negotiating the deal even though the provision of health services is a devolved function under the Constitution of Kenya.²⁷⁸

The program backfired, leaving many patients, suffering from serious diseases like cancer, without proper care. Lack of skilled personnel is blamed for the failure to operate the equipment or problems in replenishing supplies needed to make the equipment function.²⁷⁹ It later was found that MES was a conduit used to siphon money from the national treasury.²⁸⁰ Counties argued that they were not involved in the process while the Senate declared it a criminal enterprise to enrich a few individuals.²⁸¹

This lack of synergy between the national government and the county government depicted through turf wars, duplication of roles, and general lack of coordination between the two levels of government has affected the ability of county governments to deliver their mandate under the Constitution of Kenya 2010 effectively. It has resulted in wasted funds, time, poor allocation of resources and under-utilisation of resources. As argued above, the inability of county governments to discharge their constitutional functions is, therefore, a threat to the realisation of the RTD through devolution.

5.4.6 Inadequate Public Participation

In the preceding chapters of this thesis, participation is identified as a key pillar of the RTD. Devolution in Kenya harnesses the power of participation in the realisation of the RTD by creating forums and structures through which the citizens can play a meaningful role in the development matrix. Apart from equipping citizens to demand accountability from the government, participation equips the citizens to forge local tailor-made solutions to local problems, thus a "bottom-up approach" to development. In this context, the World Bank lauded the public participation model

²⁷⁷ Miriri <https://www.reuters.com/article/kenya-health-idINL8N2G622A> (Date of use: 27 March 2021).

²⁷⁸ Schedule 4 of the Constitution of Kenya 2010.

²⁷⁹ Schedule 4 of the Constitution of Kenya 2010.

²⁸⁰ Daily Nation Editorials 2020-09-09 *Daily Nation* Kenya.

²⁸¹ Daily Nation Editorials 2020-09-09 *Daily Nation* Kenya.

in Makueni county because it allows citizens to identify their development priorities at the grassroots level and become involved in their prioritization.²⁸²

The benefits of participation under devolution in Kenya and the resultant effect on the RTD was discussed in section 5.3.1 above. Participation inculcates transparency, accountability, enhanced service delivery, equity and inclusiveness in development and governance.²⁸³ Mbithi sums it up by arguing that meaningful public participation translates into developmental benefits such as the “capacity to redress developmental imbalances that have hindered the country's social and economic development”.²⁸⁴

Despite the potential developmental benefits that participation presents within the context of devolution, studies have indicated that in practice, citizens' involvement in public participation is not sufficient, especially among the "urbanites" in Kenya.²⁸⁵ This low attendance rate implies that participation is not comprehensive and broad-based since a significant population group is usually left out of the process.

For instance, in Makueni County, the conventional "town hall meeting" or "*barazas*", which is the dominant method of participation, has an attendance rate of about 55% of constituents.²⁸⁶ The findings also indicated that 48% of the respondents felt they had less influence on the choice of development programs for implementation in their wards.²⁸⁷ Limited support from the political class and low civic education levels have been identified as the challenges hindering public participation in Makueni county.²⁸⁸

According to the Siaya County Assembly and civil society groups, public participation apathy was cited as one of the biggest threats to devolution.²⁸⁹ It was observed that county governments had failed to impact the lives of the people because they spent funds on projects that were not a priority to the beneficiaries.²⁹⁰

²⁸² Mbithi, Ndambuki and Juma 2018 *J Asian & Afr Stud* 52-69.

²⁸³ Mbithi, Ndambuki and Juma 2018 *J Asian & Afr Stud* 52-69.

²⁸⁴ Mbithi, Ndambuki and Juma 2018 *J Asian & Afr Stud* 52-69.

²⁸⁵ Khakula and Muendo 2019 *Afr J Comp Const L* 103-127.

²⁸⁶ Mutuku *The Impact of Public Participation*.

²⁸⁷ Mutuku *The Impact of Public Participation*.

²⁸⁸ Mbithi, Ndambuki and Juma 2018 *Journal of J Asian & Afr Stud* 52-69.

²⁸⁹ Odhiambo 2019-10-11 *The Standard* (Kenya).

²⁹⁰ Odhiambo 2019-10-11 *The Standard* (Kenya).

This indicates that public participation is not effective because development is not "people driven" and is "disconnected from the real needs" of the people.

Research findings by Dr Njoroge revealed that attendance to public forums was low due to lack of proper mass communication, lack of awareness, poor infrastructure and communication barriers as county information may be packaged in languages or formats not suitable for the local population in counties.²⁹¹ On the other hand, Members of the County Assembly, blame lack of sufficient funds as a constraint to effective public participation.²⁹²

Insufficient public participation is a threat to the realisation of the RTD through devolution in Kenya because it minimizes the citizens' involvement in the development matrix. Citizen involvement in the development matrix is an indispensable element in the realisation of the RTD. Some of the recommendations that are mooted herein to make public participation effective include; civic education, public communication, proper access to information, zero tolerance to corruption, the use of information technology and prudent utilization of available resources.²⁹³ These recommendations will however be discussed in detail in Chapter 7 of this thesis.

5.5 Conclusion

This chapter is dubbed "the compatibility checker" between the RTD and devolution in Kenya. The chapter's objective was to practically demonstrate that devolution in Kenya supports the realisation of the RTD. This was done by analysing the impact of devolution on the RTD. The chapter crystallises the main argument in this thesis; that Kenya's model of devolution supports the realisation of the RTD in Kenya.

The UNDRTD does not specify how popular participation ought to be inculcated in development. It, however, provides that participation ought to be meaningful and active. This chapter has shown that devolution provides the structures through

²⁹¹ Muchiri <https://www.usiu.ac.ke/935/research-reveals-challenges-public-participation-county-level/> (Date of use: 12 February 2021).

²⁹² Muchiri <https://www.usiu.ac.ke/935/research-reveals-challenges-public-participation-county-level/> (Date of use: 12 February 2021).

²⁹³ Githinji <https://www.afrocave.com/make-public-participation-in-kenyan-counties-effective/> (Date of use: 12 February 2021); Khakula and Muendo 2019 *Afr J Comp Const L* 103-127.

which the people's active, free and meaningful participation can be inculcated into development praxis in Kenya. These include constitutional and legislative provisions that require citizen participation in county affairs.²⁹⁴

The benefits of increased participation have led to the inclusion of marginalized and minority groups in governance, increased government accountability, and bottom-up development against top-down development. Consequently, counties such as Makueni county have developed local solutions to local problems and tapped into the local potential to drive development which has improved the lives of its people. The lesson learnt is that participation through devolution in Kenya has placed the people in the centre of the development matrix, where they are both participants and beneficiaries of development. This has had a positive impact on the realisation of the RTD in Kenya.

The impact of devolution on equity was demonstrated in this chapter. Devolution has created a legal framework that actualises the equitable distribution of development resources in Kenya. The Constitution's fiscal devolution design incorporates the CRA as specialist institution that guides the legislature in determining equitable distribution of development resources horizontally and vertically. The outcomes of equity in Kenya are also highlighted. These included; increased access to socio-economic goods and services such as health services, clean water and sanitation, early childhood education, and improved road infrastructure across counties that had been hitherto marginalised.

Therefore, devolution has played a central role in the gradual reduction of inequality in Kenya since every county receives resources that enable it to pursue its development. This has contributed to the realisation of the RTD in Kenya because the UN Human Rights Council has singled out inequality as a major obstacle to the realisation of the RTD within and across countries.²⁹⁵

²⁹⁴ For instance, article 175(c) of the Constitution of Kenya 2010 provides that one of the objects of devolution is to enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them, section 125(2) of the Public Finance Management Act 2012 makes public participation mandatory during the formulation of the county budget and the County Governments Act 17 of 2012 devotes part VIII (sections 87-92) to "citizen participation" in county affairs.

²⁹⁵ Human Rights Council resolution 42/23 *The Right to Development* A/RES/42/23 (27th September 2019).

This chapter has also demonstrated that devolution in Kenya has furthered or enhanced the process of realisation of all human rights, especially socio-economic rights through improved access to socio-economic goods and services. County governments are legally mandated to provide services that touch on socio-economic rights such as; health services, early childhood education, water and sanitation, and housing. The realisation of these rights leads to the realisation of the RTD in line with the UNDRTD's espousal of the principle of the indivisibility and interrelated nature of human rights.²⁹⁶ Devolution complements the RTD by creating a development paradigm that augments the realisation all human rights in Kenya.

The relationship between the right to self-determination and devolution in Kenya is also analysed in this chapter. It was argued that devolution in Kenya leads to the realisation of the right to self-determination and consequently the realisation of the RTD. The *Ogiek* and *Endorois* cases show that the right to self-determination is exercised by minority groups residing within counties in Kenya. Therefore, devolution plays a key role in securing the right to self-determination by giving powers of self-governance to peoples,²⁹⁷ recognizing their right to manage their affairs and further their development,²⁹⁸ and promoting the interests and rights of minorities and marginalized communities in Kenya.²⁹⁹ All this happens within the normative and institutional structures of devolution that espouse values such as recognition and promotion of rights of minorities and marginalised peoples, democracy, accountability and citizen participation.

Threats to devolution have also been discussed in this chapter. Threats refer to factors that make county governments unable to discharge those constitutional functions linked to the realisation of the RTD. Threats to devolution include; corruption, inability by county governments to absorb the function of health services, negative ethnicity, politics of devolution, the poor synergy between the county governments and the national government and inadequate public participation. Legislative reforms, adoption of effective anti-corruption measures, healthy political dialogues, and increased citizen participation, have been suggested as some of the

²⁹⁶ Preamble of the UNDRTD. Also stated in the *Vienna Declaration*.

²⁹⁷ Article 174(c) of the Constitution of Kenya 2010.

²⁹⁸ Article 174(d) of the Constitution of Kenya 2010.

²⁹⁹ Article 174(e) of the Constitution of Kenya 2010.

measures that ought to be embraced to curb these threats to devolution in Kenya. These reforms will however be discussed in detail in Chapter 7 of this thesis.

The key lesson learnt in this chapter is that devolution in Kenya and the RTD are mutually supportive. This means that if devolution were to be implemented as provided under the Constitution of Kenya and other relevant laws; there would be a corresponding increase in the realisation of the RTD in Kenya. Article 10 of the UNDRTD urges countries to employ legislative, policy, and other measures to realise the RTD. It is arguable that devolution in Kenya "answers the call" in article 10 of the UNDRTD. It is submitted that devolution is a crucial gainer for Kenya in terms of human rights practice. This is because, through devolution, the realisation of the RTD can be pursued without necessarily getting into the controversies about the exact substance and implications of the RTD. These are the controversies that have hampered the concrete implementation of the UNDRTD internationally.³⁰⁰

The next chapter is a comparative study of the decentralisation experience in South Africa, Germany and Ethiopia to demonstrate the effect decentralisation has had on the elements of the RTD such as equity, participation and the realisation of all human rights.

³⁰⁰ Arts and Tamo 2016 *Neth Int'l L Rev* 222.

CHAPTER 6: DECENTRALISATION AND ITS IMPACT ON THE ELEMENTS OF THE RTD: LESSONS FROM SOUTH AFRICA, ETHIOPIA AND GERMANY

6.1 Introduction

This chapter analyses the decentralisation experience of South Africa, Ethiopia and Germany by looking at the history, the structure and the impact of decentralisation on elements of the RTD such as equity, participation of the people, the right to self-determination and the realisation of all human rights. The thesis highlights some of the key lessons learnt from the said countries in relation to the realisation of the RTD.

Many countries worldwide have adopted varied forms of decentralisation to spur development, curb ethnic and political polarization, entrench democracy, accountability and citizen participation.¹ South Africa, Ethiopia and Germany all have different historical backgrounds however, the common thread among them is the choice of decentralisation as a tool for development.²

South Africa is used as a case study because of its history of institutionalized inequality perpetuated by apartheid. The post-apartheid era saw the country grapple with serious economic disparities among the Blacks and Whites, with the Blacks being extremely disadvantaged and left behind. Therefore, decentralisation in the post-apartheid era was employed to soothe this tension by transforming public institutions and improving service delivery.

South Africa is, therefore, an appropriate case study to analyse the impact of decentralisation on elements of the RTD such as; (i) equity, (ii) active, free and meaningful participation in development, and (iii) the realisation of all human rights and fundamental freedoms. This enquiry supports the hypothesis in this thesis that "devolution in Kenya augments the realisation of the RTD".

¹ Litvack, Ahmad and Bird *Rethinking Decentralization* 1.

² For South Africa see generally, De Visser *Developmental Local Government* 49-73.

South Africa's history of racial segregation and developmental injustice largely dictated the country's choice of decentralisation for development.³ White minority rule formed the foundation of South Africa's development paradigm for many decades until 1996, when the country enacted a new constitution with democratic principles such as majority rule and equality for all races.⁴ Therefore, this constitution was tasked with the complete deconstruction of the segregationist apartheid development paradigm through the creation of a local government structure that would spur equitable development at the grassroots.⁵ In the White Paper on Local Government, the mandate of local government was set out as:

... local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives.⁶

This explains Mureinik's words while referring to the South African Constitution, that it is "a historic bridge between a past" of developmental injustice and a future of "development opportunities" for all South Africans.⁷ In this context, the South African Constitution has been referred to as a "transformative constitution"⁸ in the sense that it sought to address historical wrongs such as development injustice.

This chapter examines the three tiered structure of devolution or decentralisation in South Africa: national, provincial, and local levels of government. The chapter assesses the impact this structure; specifically, the local government has had on elements of the RTD such as equity, participation and the realisation of all human rights. This analysis shows that the devolving State power to the local sphere of government in South Africa entrenches participation of the people in development,

³ See generally, De Visser *Developmental Local Government* 49-73.

⁴ De Visser *Developmental Local Government* 49.

⁵ De Visser *Developmental Local Government* 67.

⁶ White Paper on Local Government 1998 7.

⁷ Mureinik 1994 *SAJHR* 31.

⁸ The term has been used by various legal scholars and courts. See Klare 1998 *SAJHR* 146; Albertyn and Goldblatt 1998 *SAJHR* 248; Liebenberg 2006 *Stell LR* 5; Moseneke 2002 *SAJHR* 309; Botha 2003 *TSAR* 20; Pieterse 2005 *SAPL* 155; Van der Walt 2006 *Fundamina* 1; Langa 2006 *Stell LR* 351; *S v Makwanyane* 1995 (3) SA 391 (CC) para 262; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) 490 (CC) paras 73-74; *Minister of Finance v Van Heerden* 2004 (6) 121 (CC) para 142; *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W) paras 51-52; *Rates Action Group v City of Cape Town* 2004 (5) SA 545 (C) para 100.

equity in the distribution of development resources, and the realisation of socio-economic rights, which are all key factors in the realisation of the RTD.

Ethiopia has a history of ethnic divisions resulting in political instability and civil war. The decision to decentralize political power by creating a federation was seen as a solution to political instability and a foundation for economic growth and development. Ethiopia is also the only African country that has explicitly recognized the right of communities and peoples to self-determination through express constitutional articulation.⁹ This makes Ethiopia a worthwhile case study in linking decentralisation to the RTD because the right to self-determination is an inextricable component of the RTD.

Decentralisation in Ethiopia was also seen as a means of bringing decision making closer to the people to enable them to pursue their political, economic, social and cultural development through participation at the lowest levels of State power. Ethiopia's history of ethnic divisions makes it an appropriate case study to determine if decentralisation of State power to the lowest level of government, known as districts or *Woredas*, has an impact on the following elements of the RTD; (i) active,

⁹ This is the author's finding. Article 49 of the FDRE Constitution provides for the "Rights of Nations, Nationalities, and Peoples:

1. Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.
2. Every Nation, Nationality and People in Ethiopia has the right to speak, to write and to develop its own language; to express, to develop and to promote its culture; and to preserve its history.
3. Every Nation, Nationality and People in Ethiopia has the right to a full measure of self-government which includes the right to establish institutions of government in the territory that it inhabits and to equitable representation in state and Federal governments.
4. The right to self-determination, including secession, of every Nation, Nationality and People shall come into effect:
 - (a) When a demand for secession has been approved by a two-thirds majority of the members of the Legislative Council of the Nation, Nationality or People concerned;
 - (b) When the Federal Government has organized a referendum which must take place within three years from the time it received the concerned council's decision for secession;
 - (c) When the demand for secession is supported by majority vote in the referendum;
 - (d) When the Federal Government will have transferred its powers to the council of the Nation, Nationality or People who has voted to secede; and
 - (e) When the division of assets is effected in a manner prescribed by law."
5. A "Nation, Nationality or People" for the purpose of this Constitution, is a group of people who have or share large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.

free and meaningful participation in development, (ii) the right to self-determination (a right exercised by distinct communities within a country and the legal parameters set by the African Commission and the African Human Rights Court in the *Endorois* and *Ogiek* cases discussed in Chapters 2 and 5 of this thesis). This enquiry supports the hypothesis in this thesis that "devolution in Kenya augments the realisation of the RTD".

Therefore, Ethiopia's decentralisation experience is discussed through the lens of participatory rights and the right to self-determination as elements of the RTD. The discourse seeks to determine whether decentralisation of State power to the *Woredas* in Ethiopia has created better platforms for citizen participation in development and whether decentralisation has made it possible for ethnic communities to realise their right to self-determination by being the architects of their development.

Germany successfully used federalism to bridge the gap between East and West Germany after the collapse of the iron curtain and the Berlin Wall on the 9th of November 1989.¹⁰ Germany's decentralisation experience provides lessons on how fiscal decentralisation can be used to address equity in a country that had to grapple with unifying a "poor ex-communist East Germany" and a "rich capitalist West Germany".

Drawing from Germany's experience with fiscal decentralisation, this chapter demonstrates the effect of decentralisation on equity as an element of the RTD. Devolution in Kenya espouses equity in the distribution of development resources, and it is on this basis, this thesis argues that devolution in Kenya augments the realisation of the RTD. Therefore, a case study of Germany's fiscal decentralisation experience offers practical lessons that Kenya can learn as it implements devolution to achieve equity in development and, by extension, the realisation of the RTD.

The chapter's main objective is to analyse the decentralisation experience of South Africa, Ethiopia and Germany through the lenses of elements of the RTD such as equity, participation, the right to self-determination and the realisation of all human rights. This chapter makes it possible to appreciate that decentralisation does not

¹⁰ See generally, Bastuck 1991 *International Lawyer* 251-266.

automatically yield a development paradigm compatible with the RTD. The normative and institutional design of decentralisation is a key factor in determining whether the realisation of the RTD will be attained.

This chapter ultimately demonstrates that decentralisation is generally good for the realisation of the RTD and therefore validates the hypothesis in this thesis that devolution in Kenya augments the realisation of the RTD. The chapter, however, further clarifies the argument that "decentralisation is generally good for the realisation of the RTD" by demonstrating that an ideal decentralisation system that augments the realisation of the RTD must be able to guarantee real participatory rights, distributive justice and result in the realisation of all human rights.

6.2 Decentralisation in South Africa and the RTD

This section discusses decentralisation in South Africa to analyse the impact of decentralisation on elements of the RTD, namely, equity, participation and the realisation of all human rights in South Africa. This is done by firstly looking at the history of decentralisation in South Africa. A historical approach to decentralisation in South Africa clarifies the goals that decentralisation was designed to achieve for South Africa through the Constitution of the Republic of South Africa, 1996. Identifying these goals creates a basis for an enquiry as to whether decentralisation in South Africa has indeed achieved its objectives and to what extent this has impacted the realisation of the RTD.

After discussing the history of decentralisation in South Africa, the section discusses the general structure of decentralisation, following this an analysis of the impact of decentralisation on the RTD is undertaken. The analysis is limited to local government level the lowest level of devolution in South Africa, whereby local communities are incorporated in the development matrix.

The effect of decentralisation on the realisation of socio-economic rights, equity and participation in South Africa is discussed against the backdrop of South Africa's history of apartheid, which cut off the majority Black population from exercising their participatory rights and accessing socio-economic goods and services. The apartheid system also institutionalized and legitimized inequity in the distribution of development resources.

6.2.1 History of Decentralisation

The English and Dutch colonized South Africa in the seventeenth century.¹¹ The European presence in South Africa grew to exploit the country's abundance of natural resources.¹² This eventually led to the 1913 Land Act, which pushed the Black population to live on reserves.¹³ The two colonial powers (the English and Dutch) struggled for power until the 1940's when the Afrikaner National Party amassed a strong majority and invented apartheid to stamp their control.¹⁴ By 1948, apartheid laws had been enacted, thereby institutionalizing racial segregation.¹⁵

The advent of democracy in South Africa in 1994 after decades of apartheid rule offered the country the opportunity to redesign its governance system¹⁶ resulting in greater decentralisation of powers and functions to local government. This move was influenced by the widespread view that decentralisation was needed for the total transformation of all public institutions and services provided by the State.¹⁷

South Africa adopted a new constitution as a transformative document that intended to provide a blueprint for an equitable future by overcoming a past where most Black South Africans were excluded from the development matrix.¹⁸ In this context, Stewart argues that "South Africa's 1996 Constitution is different from liberal classic Constitutions or Bill of Rights in other parts of the world because it is an engagement with the future that it will partly shape".¹⁹ In other words, the constitution seeks to address the injustices of the past.²⁰ One of the greatest hurdles in the post-apartheid era was that the only people who could enjoy the benefits brought about by

¹¹ Anon <http://www-cs-students.stanford.edu/~cale/cs201/apartheid.hist.html> (Date of use 12 June 2021).

¹² Nittle <http://www.thoughtco.com/brief-history-of-south-african-apartheid-2834606> (Date of use 12 June 2021).

¹³ Nittle <http://www.thoughtco.com/brief-history-of-south-african-apartheid-2834606> (Date of use 12 June 2021).

¹⁴ Anon <http://www-cs-students.stanford.edu/~cale/cs201/apartheid.hist.html> (Date of use 12 June 2021).

¹⁵ Anon <http://www-cs-students.stanford.edu/~cale/cs201/apartheid.hist.html> (Date of use 12 June 2021).

¹⁶ Feinstein 2015 *GPG* 1.

¹⁷ Nzimakwe and Pillay 2014 *AJPA* 16.

¹⁸ Ahmed and Bulmer *Social and Economic Rights* 13.

¹⁹ Stewart 2011-IV *Dirritto Pubblico Comparato ed Europeo* 1515 in Fuo 2015 *AHRLJ* 170.

²⁰ Stewart 2011-IV *Dirritto Pubblico Comparato ed Europeo* 1515 in Fuo 2015 *AHRLJ* 170.

democracy were those who had already acquired productive assets such as land.²¹ The new Constitution of South Africa was therefore tasked with changing this paradigm to one that was equitable.

During the transition to democracy, South Africa's history of apartheid made the "anti-democracy pro-status quo camp" and the "pro-democracy pro-change camps" strange bedfellows in this sense that both camps supported decentralisation from a different standpoint. The apartheid system had in the past used the local government to implement its segregationist development policies.²² In this context, De Visser notes that:

Throughout the rest of (urban) South Africa, local government was even more subservient, racist, exploitative and illegitimate in nature.²³

On one hand, decentralisation to strong and autonomous subnational governments was viewed by the anti-democracy or conservative camp as an attractive way to maintain the status quo and by putting "a brake on an almighty central government".²⁴ On the other hand, those who sought radical transformation envisioned an autonomous local government guided by specific constitutional principles as a viable tool to dismantle the segregationist development policies perpetuated by the old colonial forces that effectively disenfranchised Black South Africans from being part of the development matrix.²⁵

Therefore, the current constitutional design for local government was, a product of negotiations throughout the constitution-making process. The highlights being; the Local Government Negotiating Forum (LGNF) which resulted in the enactment of the Local Government Transition Act (LGTA) number 209 of 1993.²⁶ The LGTA provided for the disbanding of the race-based municipalities and the establishment of transitional councils, which lasted until 2000.²⁷ The LGTA was recognized under the Interim Constitution of 1993, and this was significant because it marked the

²¹ Ravens <https://m.bizcommunity.com/Article/196/357/156977.html> (Date of use: 12 June 2021).

²² De Visser *Developmental Local Government* 58-60.

²³ De Visser *Developmental Local Government* 58.

²⁴ De Visser *Developmental Local Government* 60.

²⁵ De Visser *Developmental Local Government* 57-73.

²⁶ De Visser *Developmental Local Government* 61.

²⁷ De Visser *Developmental Local Government* 61.

beginning of constitutional recognition of local government in South Africa.²⁸ The final “icing on the cake” was the 1996 Constitution of South Africa, in which Local Government was recognized as a sphere of government with full constitutional protection²⁹ and with a developmental mandate.³⁰

Under the 1996 constitution, local government was designed to be the focal point or epicentre for developmental transformation in South Africa.³¹ To make this possible, local government is constitutionally obligated to ensure democracy and accountability to the people,³² provision of services,³³ promotion of social and economic development,³⁴ environmental protection³⁵ and community participation in matters governance.³⁶ Municipalities do not have to power to pursue their development agenda. They are required to prioritize the needs of the community and participate in national and provincial programs.³⁷ An ANC politician one Mr. Malebo, succinctly put it as follows:

Owing to the battles in respect to high rentals, homelessness and municipalities' lack of capacity to render services, infrastructure, water and housing we became convinced that local government objectives must be not only service oriented but also developmental.³⁸

Having established that the local government is the first building block for development in South Africa's decentralized system of government, the proceeding section will discuss the structure of decentralisation in South Africa with a particular focus on the local government sphere. Understanding the normative design of local government will make it possible to analyse the impact of decentralisation on the elements of the RTD later in this section.

²⁸ De Visser *Developmental Local Government* 63.

²⁹ Section 40(1) of the Constitution of South Africa, 1996.

³⁰ Sections 152 and 153 of the Constitution of South Africa, 1996.

³¹ De Visser *Developmental Local Government* 70.

³² Section 152(1)(a) of the Constitution of South Africa, 1996.

³³ Section 152(1)(b) of the Constitution of South Africa, 1996.

³⁴ Section 152(1)(c) of the Constitution of South Africa, 1996.

³⁵ Section 152(1)(d) of the Constitution of South Africa, 1996.

³⁶ Section 152(1)(e) of the Constitution of South Africa, 1996.

³⁷ Section 153(b) of the Constitution of South Africa, 1996.

³⁸ Debates on the Constitutional Assembly 1996 270 (Mr. SM Malebo MP ANC) cited in De Visser *Developmental Local Government* 67.

6.2.2 Structure of Decentralisation

The South African Constitution provides for three spheres of government, namely National, Provincial and Local, which are distinctive, independent and interrelated, espousing the principle of cooperative government.³⁹ From a developmental perspective, the principle of cooperative government ensures that "national and provincial policy informs local policies and that local needs inform national and provincial policy,"⁴⁰ meaning that local government can escalate the developmental needs of particular communities to both provincial and national levels of government.⁴¹

Municipalities under the local government have a constitutionally protected right to raise their revenue through activities such as property rates and levies on services such as water and electricity.⁴² 90% of their income is derived from their revenue.⁴³ Municipalities are also entitled to an equitable share of revenue raised nationally,⁴⁴ which is determined annually through a legislated formula.⁴⁵ This is a constitutional right that cannot be conditional.⁴⁶

The Fiscal and Financial Commission (FFC), an independent body established by the Constitution, makes recommendations to Parliament and provincial legislatures about financial issues affecting all three tiers of government in South Africa⁴⁷ and, based on its recommendation, equitable revenue-sharing formula is adopted. This is very similar to the Kenyan system discussed in Chapter 5, where the CRA proposes a revenue-sharing formula that is adopted by the legislature with variations if need be.

Municipalities also get intergovernmental transfers which are generally set off against line department budgets. Normally these would be conditional grants; for

³⁹ Section 40(1) of the Constitution of the Republic of South Africa, 1996.

⁴⁰ De Visser JW Steytler NC and Mettler J 2000 "Co-operate Government in the Systems Bill Challenged" 2000 *Local Government Law Bulletin* 14.

⁴¹ Bhabha "Role of the national council of provinces in local government" 18.

⁴² Section 229(1) of the Constitution of South Africa, 1996.

⁴³ De Visser *Developmental Local Government* 84.

⁴⁴ Section 227(1) of the Constitution of South Africa, 1996.

⁴⁵ Section 214 of the Constitution of South Africa, 1996.

⁴⁶ De Visser *Developmental Local Government* 84.

⁴⁷ Grote *et al* 2000 *SAJEMS* 63.

instance, the national treasury can stop the transfer of funds to a municipality if there is a serious or persistent material breach of treasury norms and standards.⁴⁸

Municipalities are divided into three categories; A, B, and C.⁴⁹ Category A comprise single tiered "metropolitan municipalities" comprising huge cities and urban areas such as Johannesburg, Cape Town, and Durban.⁵⁰ The rationale for this is that metropolitan urban governance needs an institutional structure that is different from municipal governance in smaller cities and urban areas because of the difference in the nature of needed services in the different municipalities.⁵¹

Category B and C municipalities share their authority, i.e., a number of category B municipalities make up a category C district municipality. In this arrangement, legislation has to ensure that all the municipalities in a district can provide municipality services equitably and sustainably while providing for a clear demarcation of functions and powers.⁵² To ensure that all citizens of South Africa can benefit from the developmental mandate of municipalities, the Constitution requires that municipalities be established all over the country,⁵³ thus the terminology "wall to wall" local government.⁵⁴

Legislative and executive authority is vested in the Municipal Council⁵⁵ consisting of elected councillors.⁵⁶ There is no separation of powers at local level. Both powers are vested in the Council and members of the executive remain councillors.⁵⁷ Executive power can be exercised through an executive committee or executive mayor elected by the councilors. Other smaller municipalities exercise executive powers through a plenary system where the whole council acts as a council executive.⁵⁸

⁴⁸ Grote *et al* 2000 SAJEMS 63.

⁴⁹ Section 155(1).

⁵⁰ De Visser *Developmental Local Government* 74.

⁵¹ De Visser *Developmental Local Government* 74.

⁵² De Visser *Developmental Local Government* 74.

⁵³ Section 151(1) of the Constitution of South Africa 1996.

⁵⁴ De Visser *Developmental Local Government* 75.

⁵⁵ Section 151(3) of the Constitution of South Africa, 1996.

⁵⁶ Section 157(1) of the Constitution of South Africa, 1996.

⁵⁷ De Visser *Developmental Local Government* 77.

⁵⁸ De Visser *Developmental Local Government* 77.

The local government has extensive legislative and executive powers and functions under the Constitution and it is the sphere that is closest to the community.⁵⁹ This is because the local government does not serve the interests of particular minority constituents, but it is part of a broad national development agenda.⁶⁰ The Constitution imposes a duty on municipalities to participate in provincial and national development programs.⁶¹

The local government sphere in South Africa is constitutionally obliged to provide a democratic and accountable government and public services to communities sustainably. The local government is also charged with “the responsibility to promote social and economic development, promote a safe and healthy environment and encourage the involvement of communities and community organisations in local government matters”.⁶²

At the same time, while performing their developmental role, “municipalities are required to structure and manage their administration and budgeting and planning processes to prioritise the basic needs of the community and promote the social and economic development of the community”.⁶³ This explains why about two-thirds of municipal functions relate to providing crucial socio-economic services, including water, sanitation, roads, storm water drainage and electricity.⁶⁴

These constitutional obligations lay bare the strategic role of local government in development matters. The activities countenanced within the functions of local government in South Africa aim to improve the well-being of individuals and communities through relevant development programmes hence the linkage between decentralisation and the RTD.

6.3 Decentralisation in Ethiopia and the RTD

This section discusses the impact of decentralisation on elements of the RTD, such as participation and the right to self-determination in Ethiopia. This is done by

⁵⁹ Fuo 2015 *AHRLJ* 171.

⁶⁰ De Visser *Developmental Local Government* 71.

⁶¹ Section 153(b) of the Constitution of South Africa, 1996.

⁶² Section 152 of the Constitution of South Africa, 1996.

⁶³ Section 153(a) of the Constitution of South Africa, 1996.

⁶⁴ Amusa and Mabugu "The Contribution of Fiscal Decentralisation to Regional Inequality" 7.

looking at the history and normative structure of decentralisation in Ethiopia. Understanding the normative design of decentralisation in Ethiopia is important because through this normative design the elements of the RTD, such as participation and the right to self-determination, are impacted.

The discourse in this section will focus on the districts or *woredas* as the lowest level of government to which State power is devolved and thus the centre of socio-economic development according to the Federal government's Sustainable Development and Poverty Reduction Program (SDPRP).⁶⁵

Apart from the constitutional provisions that provide for regional governments, the Constitution of the Federal Republic of Ethiopia expressly provides for the RTD.⁶⁶ This section will shed light on whether this normative design has had any significant impact on the realisation of the RTD and suggest how this constitutional provision can be operationalized within the framework of decentralisation.

The need for decentralisation is often unique to each country, and so an analysis of the history of decentralisation in Ethiopia in this section will; i) provide understanding as to why Ethiopia opted for its current decentralisation model and how this is linked to the RTD and; (ii) answer the question as to whether decentralisation to the *woredas* has impacted the realisation of the RTD. For instance, has the use of ethno-federalism to foster national unity in Ethiopia resulted in empowering regional States to determine their political, socio-economic and cultural development? This is a crucial research question in this section because the ability of regional States to pursue their development translates to the realisation of the right to self-determination, which is part and parcel of the RTD.

⁶⁵ FDRE and MOFED <https://reliefweb.int/sites/reliefweb.int/files/resources/A594EE1853FAC46085256C4E0059E429-imf-eth-31jul.pdf> (Date of use: 6 August 2021).

⁶⁶ Article 43. "The Right to Development:
1. The Peoples of Ethiopia as a whole, and each Nation, Nationality and People in Ethiopia in particular have the right to improved living standards and to sustainable development.
2. Nationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community.
3. All international agreements and relations concluded, established or conducted by the State shall protect and ensure Ethiopia's right to sustainable development.
4. The basic aim of development activities shall be to enhance the capacity of citizens for development and to meet their basic needs."

6.3.1 History of Decentralisation

Decentralisation through the creation of the Ethiopian Federal State in 1994⁶⁷ aimed to empower the lowest constitutionally recognized local government units, known as the *Woredas* (districts).⁶⁸ The Ethiopian constitution creates a framework for citizen participation in governance and development by providing that power ought to be devolved to the lowest units of government to enable the people to participate directly in the administration of such units.⁶⁹

Decentralisation in Ethiopia was intended to bring decision making nearer to the villages of the agrarian communities from the central towns because more than 85% of Ethiopia's population is agrarian⁷⁰ and 78% rural.⁷¹ This means that locally designed solutions or grassroots development would be more effective because of "a greater sense of ownership and priority including better accountability"⁷² than the "top-down" approach common in highly centralized States.

In advocating for grassroots development, Livtac argues that the "bottom-up" approach to the provision of public services in municipalities has been more effective than the supply-driven "top-down" approach in Colombia. Devolving public services to municipalities in Colombia has resulted in more responsive local governments and enhanced citizen participation in the choice and execution of services and projects.⁷³ It is therefore arguable that this is the effect decentralisation in Ethiopia sought to achieve.

Decentralisation in Ethiopia occurred in two waves; the first wave saw devolution of power from the centre to the regional States in 1994.⁷⁴ The second wave was in the early 2000s; it further devolved power from the regional government to the district level.⁷⁵ The first wave involved the enactment of a new constitution that granted semi-autonomy to nine regions drawn along ethnic lines through the

⁶⁷ Cohen 1995 *Northeast African Studies* 163.

⁶⁸ Maru "Devolution of power in Ethiopia" 31.

⁶⁹ Article 50(4) of the Constitution of the Federal Republic of Ethiopia.

⁷⁰ Maru "Devolution of power in Ethiopia" 31.

⁷¹ World Bank <https://data.worldbank.org/indicator/SP.RUR.TOTL.ZS?locations=ET> (Date of use: 6 September 2021).

⁷² Maru "Devolution of power in Ethiopia" 31.

⁷³ Litvack, Ahmad and Bird *Rethinking Decentralization* 28.

⁷⁴ Agegnehu and Dibu 2017 *JASD* 3-6.

⁷⁵ Agegnehu and Dibu 2017 *JASD* 3-6.

creation of a federation.⁷⁶ The second wave involved public sector reforms ,such as the Sustainable Development and Poverty Reduction Program (SDPRP)⁷⁷ and the Public Sector Capacity Building Program (PSCBP) in 2002.⁷⁸ These reforms sought to devolve power to the lowest constitutionally recognized local government units known as *woredas* (districts) to improve service delivery to communities by their local governments that are directly accountable to the communities or people.⁷⁹

6.3.2 Structure of Decentralisation

Since 1991, Ethiopia has been implementing an ethno-linguist federal constitution that establishes nine ethnically based regional states.⁸⁰ An ethno-linguist federal constitution refers to “a constitution that establishes and legitimizes the territorial autonomous self-government of ethno-cultural community”.⁸¹ An ethno-cultural community is a group that is defined by shared characteristics unique to and recognized by that group, such as language, national identity, cultural tradition, and ancestry .⁸²

Ethno-linguist federalism was adopted in Ethiopia to; (1) curb divisive inter-ethnic conflict that ravaged the Ethiopian society for many years; (2) promote equitable material conditions in all areas of the country, and (3) improve the efficiency and effectiveness of the public sector performance at the lowest level of government.⁸³ To some extent, this has worked because since 1995; the country has experienced notable economic growth and poverty reduction, including the roll-out of several mega projects aimed at accelerating economic transformation particularly, after 2001.⁸⁴

⁷⁶ Cohen 1995 *Northeast African Studies* 163-164.

⁷⁷ FDRE and MOFED <https://reliefweb.int/sites/reliefweb.int/files/resources/A594EE1853FAC46085256C4E0059E429-imf-eth-31jul.pdf> (Date of use: 6 August 2021) 40.

⁷⁸ Maru "Devolution of power in Ethiopia" 31.

⁷⁹ Maru "Devolution of power in Ethiopia" 31.

⁸⁰ Selassie 2003 *YJIL* 64.

⁸¹ Maru "Devolution of power in Ethiopia" 9.

⁸² Government of Canada <https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-023-applicants-assisting-ethnocultural-communities.html> (Date of use: 12 July 2021).

⁸³ Cohen 1995 *Northeast African Studies* 159.

⁸⁴ Ndiaye <https://media.africaportal.org/documents/Ethiopia-Conflict-Insights-Vol-1-3042020.pdf> (Date of use: 12 July 2021) 2.

The country is divided into nine regional governments and one city administration under the umbrella of the Federal government.⁸⁵ According to the Federal Constitution of Ethiopia, regional States are expected to devolve power to the lowest administrative units⁸⁶ known as districts or *Woredas* with the objective of improving service delivery to communities by their local governments, which are directly accountable to the communities or people.⁸⁷

Woredas are governed by a council whose members are directly elected to represent each ward (*Kebele*) within the *Woreda*.⁸⁸ There are about 670 rural districts and 100 urban ones.⁸⁹ Arguably; the council is directly accountable to the people because its members are elected ward representatives. Executive power is usually vested in an executive council chaired by a chief administrator or mayor.⁹⁰ The *Woredas* also have sectional offices that deal with processes around providing social services and economic development. They thus adopt their budgets and hire and fire their personnel.⁹¹

In terms of fiscal autonomy, local authorities are not guaranteed funding under the Constitution of Ethiopia⁹² like in South Africa⁹³ or Kenya.⁹⁴ Their ability to respond to local communities' development needs are, therefore, stifled save for the taxes levied within the State, which may not be adequate to support significant development projects. *Woredas* can raise their revenue from local taxes and levies, accounting for about 30% of their total annual budget.⁹⁵ They rely on grants from the regional government to discharge their developmental responsibilities⁹⁶ however they have the discretion to determine how the funds are spent.⁹⁷ Unfortunately, 90%

⁸⁵ Agegnehu and Dibu 2017 *JASD* 3-6.

⁸⁶ Article 50(4).

⁸⁷ Article 50(4).

⁸⁸ Ayele 2011 *Law, Democracy and Development* 11.

⁸⁹ Anon https://en.wikipedia.org/wiki/Districts_of_Ethiopia (Date of use: 12 July 2021)

⁹⁰ Ayele 2011 *Law, Democracy and Development* 11.

⁹¹ Ayele 2011 *Law, Democracy and Development* 12.

⁹² Ayele 2011 *Law, Democracy and Development* 10.

⁹³ Section 214 of the Constitution of South Africa, 1996.

⁹⁴ Article 202 of the Constitution of Kenya, 2010.

⁹⁵ Yilmaz and Venugopal *Local government accountability and discretion in Ethiopia* 17-18.

⁹⁶ Ayele 2011 *Law, Democracy and Development* 14.

⁹⁷ Garcia and Rajkumar *Achieving better service delivery* 58.

of budgeted funds is spent on salaries and very little is left for development,⁹⁸ a problem that continues to ail county governments in Kenya.⁹⁹

The Constitution of Ethiopia does not employ "equity" in the sharing of revenue between the two levels of government. Article 95 of the Constitution merely provides that the "Federal government and the States shall share revenue taking the Federal arrangement into account". Fiscal matters are the preserve of the House of the Peoples' Representatives.¹⁰⁰ This potentially means that revenue allocation can be abused by politicians especially considering that currently, the ruling party, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), controls all levels of government.¹⁰¹ Lessons from Kenya show that allocation of development resources can be used to reward political loyalty resulting in the marginalisation of sections of the country that are perceived as "politically unfriendly".¹⁰²

6.3.3 Locating the RTD within Ethiopian Federalism

Ethno-linguistic federalism in Ethiopia creates and legitimizes the territorial autonomous self-government of ethno-cultural communities as a mechanism for accommodating ethno-cultural diversity, and a tool for conflict management.¹⁰³ A highly centralized state in which individual and group rights were violated has been identified as the root cause of political instability in pre-1991 Ethiopia.¹⁰⁴ Creating multiple legal platforms for different ethnic groups in Ethiopia to participate in governance through an ethno-linguistic federal system was thus seen as a solution to political instability.¹⁰⁵ This mode of governance was found to be appealing because it enables ethnic groups a right under the constitution to organise themselves as self-governing units within their regions.¹⁰⁶

⁹⁸ Ayele 2011 *Law, Democracy and Development* 14.

⁹⁹ Anon <https://www.standardmedia.co.ke/counties/article/2001417368/burden-of-increasing-recurrent-expenditure-in-county-budgets> (Date of use: 11 September 2021).

¹⁰⁰ Article 55(10)(11).

¹⁰¹ Ayele 2011 *Law, Democracy and Development* 13.

¹⁰² Kanyinga *Re-Distribution from Above* 51.

¹⁰³ Maru "Devolution of power in Ethiopia" 10.

¹⁰⁴ Ndiaye <https://media.africaportal.org/documents/Ethiopia-Conflict-Insights-Vol-1-3042020.pdf> (Date of use: 12 July 2021) 4.

¹⁰⁵ Cohen 1995 *Northeast African Studies* 159.

¹⁰⁶ Selassie 2003 *YJIL* 106.

The Constitution of Ethiopia also empowers nations, nationalities, and peoples to pursue their right to self-determination and secession.¹⁰⁷ Nations, nationalities and peoples refer to “a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identity, a common psychological - makeup, and who inhabit an identifiable, predominantly contiguous territory”.¹⁰⁸ This supports the realisation of the RTD because the RTD implies the full realisation of the right to self-determination.¹⁰⁹

Under the 1995 Constitution of the Federal Democratic Republic of Ethiopia, the RTD is a fundamental human right that includes the “right to improved living standards, the right to sustainable development, the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community”.¹¹⁰ While the constitution is silent on "how the RTD should be realised" in Ethiopia,¹¹¹ it is arguable that decentralisation provides the crucial legal framework to inculcate elements of the RTD such as participation, sustainable development and improved living standards into governance. This is because decentralisation reduces inter-ethnic conflict by enhancing peoples' participation in governance, promotes equitable development and improves provision and access to public goods and services.¹¹²

It has been noted that a significant challenge may arise in Ethiopia in the sphere of enforcement of the RTD because of the absence of comprehensive legislation dealing with development issues.¹¹³ The Ethiopian courts have a poor history of applying constitutional provisions in the absence of specific legislation detailing the operationalization of a particular constitutional provision.¹¹⁴ An example of legislation detailing development matters in South Africa is the Spatial Planning and Land Use Management Act 16 of 2,¹¹⁵ which replaced the repealed Development

¹⁰⁷ Article 43 of the Constitution of the Federal Democratic Republic of Ethiopia, 1995.

¹⁰⁸ Article 43(5) of the Constitution of the Federal Democratic Republic of Ethiopia, 1995.

¹⁰⁹ Article 2(1) of the UNDRTD; Kamga *Human rights in Africa* 119.

¹¹⁰ Article 43 of the Constitution of the Federal Democratic Republic of Ethiopia, 1995.

¹¹¹ Woldemichael *PROLAW SJRLD* 3.

¹¹² Cohen 1995 *Northeast African Studies* 159.

¹¹³ Woldemichael *PROLAW SJRLD* 15.

¹¹⁴ Woldemichael *PROLAW SJRLD* 15.

¹¹⁵ Spatial Planning and Land Use Management Act 16 of 2013.

Facilitation Act (1995) of South Africa.¹¹⁶ The legislation provides a legal framework for spatial development planning and land use management in South Africa.

While these views may be valid, it was argued that it is still possible to enforce the RTD in Ethiopia. This is because apart from recognizing the RTD in its constitution, Ethiopia has ratified the ACHPR, meaning that the government has a legal obligation to ensure the realisation of the RTD domestically. Going by the jurisprudence of the African Commission and the African Human Rights Court in the *Endorois* and *Ogiek Cases*, every State party to the ACHPR must ensure the realisation of the RTD for its people.¹¹⁷ Arguably, decentralisation in Ethiopia can be instrumental in "shaping development policies that are compatible with the RTD" without necessarily getting into the often "controversial language of rights" described by Brownlie and Schrijver as "an identity problem"¹¹⁸ and "a case of putting the cart before the horse"¹¹⁹ respectively.

In fact, in the case of *Tsedale Demissie v Kifle Demissie*, the Federal Supreme Court Cassation Division delivered a crucial decision regarding the application of human rights in both treaty law and the constitution by all courts in Ethiopia.¹²⁰ The court overturned the decision of the lower courts by relying on the provisions of the U.N Convention on the Rights of the Child and section 36(2) of the Constitution of Ethiopia that deal with the best interest of the child to determine a custody dispute in favour of the father of the minor in question. This set a precedent that courts should interpret constitutional provisions in tandem with provisions of international human rights treaties.¹²¹

The finding, in this case, implies that provisions of international human rights treaties and declarations such as the UNDRTD and the ACHPR are capable of judicial recognition and enforcement in the national courts of Ethiopia. For the RTD, this means that judicial enforcement of the right in Ethiopia is not in doubt. It also means

¹¹⁶ Development Facilitation Act 67 of 1995.

¹¹⁷ See Communication 276/2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council versus Republic of Kenya and African Commission on Human and Peoples Rights versus The Republic of Kenya* Application No 006/2012 judgment delivered on 26 May 2017.

¹¹⁸ Brownlie *The Human Right to Development*.

¹¹⁹ Schrijver 2020 *Neth Q Hum Rts* 89.

¹²⁰ *Tsedale Demissie v Kifle Demissie* (2006) cited in Birhane 2018 *Beijing L Rev* 340.

¹²¹ Birhane 2018 *Beijing L Rev* 341.

that the functions of decentralized units such as *Woredas* must be legislated and interpreted to give rise to the RTD. In any case, the rationale behind devolving State power to the lowest level of government was to increase human capabilities through development.¹²²

6.3.4 Lessons learnt

David Bevan observes that “Ethiopia's present government has, for the most part, been quite impressive in macroeconomic policy, fiscal reform and public expenditure management”.¹²³ In 2000, the country had been ranked as the third poorest country in the world.¹²⁴ However, this position changed in 2016 with the IMF stating that Ethiopia was the third-fastest growing country in the world.¹²⁵ The country has experienced notable economic growth and poverty reduction, including the roll-out of several mega projects to accelerate economic transformation.¹²⁶

In 2001, the Federal government adopted a poverty reduction and development policy with decentralisation as a key driver.¹²⁷ To make this possible, *Woredas* were given certain political, administrative and financial powers to implement the policy.¹²⁸ However, the local government is not properly institutionalized to operate, function and exist as a distinct and autonomous level of government.¹²⁹ They implement centrally planned and adopted policies¹³⁰ and lack their own tailored economic growth strategy, contextualized to their specific needs.¹³¹ This affects the ability of *Woredas* to champion an aggressive people-centred localized development, which is the essence of the RTD. On the other hand, China decentralised development by

¹²² Ayele 2011 *Law, Democracy and Development* 21.

¹²³ Bevan 2001 *University of Oxford and Harvard University* in Maru "Devolution of power in Ethiopia" 30.

¹²⁴ Kopf <https://qz.com/africa/1109739/ethiopia-is-one-of-the-fastest-growing-economies-in-the-world> (Date of use: 3 October 2020).

¹²⁵ Kopf <https://qz.com/africa/1109739/ethiopia-is-one-of-the-fastest-growing-economies-in-the-world> (Date of use: 3 October 2020).

¹²⁶ Ndiaye <https://media.africaportal.org/documents/Ethiopia-Conflict-Insights-Vol-1-3042020.pdf> (Date of use: 12 July 2021) 2.

¹²⁷ FDRE and MOFED <https://reliefweb.int/sites/reliefweb.int/files/resources/A594EE1853FAC46085256C4E0059E429-imf-eth-31jul.pdf> (Date of use: 6 August 2021) 40.

¹²⁸ FDRE and MOFED <https://reliefweb.int/sites/reliefweb.int/files/resources/A594EE1853FAC46085256C4E0059E429-imf-eth-31jul.pdf> (Date of use: 6 August 2021) 40.

¹²⁹ Ayele 2011 *Law, Democracy and Development* 10.

¹³⁰ Ayele 2011 *Law, Democracy and Development* 10.

¹³¹ Maru "Devolution of power in Ethiopia" 35.

granting regions economic autonomy and freedom to develop their economic growth strategy.¹³² As a result, China is currently a global economic powerhouse.¹³³

The lack of proper institutionalization of the local government in Ethiopia is attributed to the fact that the Constitution of Ethiopia does not expressly provide for *Woredas*. In terms of decentralisation, the two levels of government recognised by the Constitution are the Federal government and the regional States.¹³⁴ However, Ayele argues that the provisions of Article 50(4), which require regional States to establish and adequately empower local government, give constitutional legitimacy and justification to the *Woredas*.¹³⁵

There is also a lack of a clear legal framework to define the roles of the *Woredas* and the State governments. Regional laws, therefore, treat *Woredas* as subordinate structures of regional States rather than autonomous governments. The executive heads of the *Woredas* are accountable to both the council and the regional government,¹³⁶ which makes them conflicted where the council and regional government are not in concurrence. This also makes it possible to replace decisions made by locally elected representatives of the people with decisions made by the regional government, thus emasculating active and meaningful participation of the people in the development matrix.

Decentralisation in Ethiopia is meant to embed democracy at the grassroots level and enhance development.¹³⁷ Decentralisation has failed to "create autonomous local governments responsive to local preferences and accountable to local people".¹³⁸ For the realisation of the RTD, this portends that the human person is at the periphery of development due to local government institutions that are not autonomous hence unable to secure active and meaningful citizen participation in the conceptualisation and execution of development programmes.

¹³² See generally, Canfei 2006 *Post-Communist Econ* 34-49.

¹³³ Razo <https://unctad.org/topic/trade-analysis/chart-10-may-2021> (Date of use: 6 September 2021).

¹³⁴ Article 50(1) of the Constitution of Ethiopia.

¹³⁵ Ayele 2011 *Law, Democracy and Development* 10.

¹³⁶ Ayele 2011 *Law, Democracy and Development* 12.

¹³⁷ Ayele 2011 *Law, Democracy and Development* 21.

¹³⁸ Ayele 2011 *Law, Democracy and Development* 21.

Decentralisation in Ethiopia was more of a response to political reform rather than economic reform.¹³⁹ The same is also echoed by Livtack *et al.*, who stated that “devolution in Ethiopia is meant to keep the country united by granting significant autonomy to regional governments”.¹⁴⁰ The normative and institutional design of decentralisation in Ethiopia does not adequately support the realisation of the RTD due to lack of strong legal structures to guarantee fiscal, administrative and political devolution, which are key in yielding elements of the RTD such as equity, citizen participation and the realisation of all human rights and fundamental freedoms including the right to self-determination.

6.4 Decentralisation in Germany and the RTD

This section discusses decentralisation in Germany. As stated in the introduction to this chapter, Germany successfully used federalism to bridge the gap between East and West Germany after the collapse of the iron curtain and the Berlin Wall on the 9th of November 1989.¹⁴¹ Germany's decentralisation experience sheds some light on how fiscal decentralisation can be used to address equity or distributive justice in a country that had to grapple with unifying a "poor ex-communist East Germany" and a "rich capitalist West".

One of many things that Germany had to do to make the unification work was ensure equitable distribution of development resources between the German States through fiscal equalization.¹⁴² Germany's experience with fiscal equalization offers some important lessons on how a sound fiscal decentralisation system can be used to realise distributive justice, a key element of the RTD. This is significant because it is argued in this thesis that devolution in Kenya makes it possible to integrate equity in development, which augments the realisation of the RTD.

¹³⁹ Maru "Devolution of power in Ethiopia" 36.

¹⁴⁰ Litvack, Ahmad and Bird *Rethinking Decentralization* 1.

¹⁴¹ See generally, Bastuck 1991 *International Lawyer* 251-266.

¹⁴² Bird and Tarasov 2004 *Environ & Plan C: Gov & Pol'y* 93.

6.4.1 The History and Structure of German Federalism

The Federal Republic of Germany has a population of about 84,000,000 people.¹⁴³ It consists of a Federal (*Bund*) government, 16 *Lander* governments and numerous municipal governments.¹⁴⁴ The 16 States (States/regions) include the five new States brought into the Federation after the collapse of the iron curtain and the reunification of Germany in 1990.¹⁴⁵ This was just a continuation of Germany's history of uniting small sovereign States with pronounced competencies through a political and administrative decentralisation system.¹⁴⁶

Germany has a long tradition of federalism. In the 17th century, there were about 300 "small self-confident, independent German States," which was very different from highly centralized States such as France and Great Britain. The second German empire, which existed between 1871- 1918, consisted of 26 States giving way to the Weimer Republic and later a centralized German state under the Nazis.¹⁴⁷

The second world war experience left the different regions of Germany poor and impoverished to the extent that "balanced regional development and uniform living conditions became attractive features for policymaking and institutional building".¹⁴⁸ These principles also found themselves in the post- second world war German Constitution.¹⁴⁹

The German States exert their sovereignty conjointly at the national level through the *Bundestat* (Upper House). This house consists of representatives of State governments, not elected representatives and decisions are made based on a majority vote that is binding to all, thus a uniform policy across all German States.¹⁵⁰ In terms of development, this house sets the foundation for implementing the legal

¹⁴³ Worldometer <https://www.worldometers.info/world-population/germany-population/> (Date of use: 20July 2021).

¹⁴⁴ Watts R and Hobson P "Fiscal Federalism in Germany" 2000 2.

¹⁴⁵ Bird 2004 *Environ & Plan C: Gov & Pol'y* 95.

¹⁴⁶ www.reformgestaltung.de/en/ (Date of use: 3 October 2020).

¹⁴⁷ Werner 2018 *Presupuesto y Gasto Público* 158.

¹⁴⁸ Werner 2018 *Presupuesto y Gasto Público* 158.

¹⁴⁹ Article 106(3) of the German Constitution.

¹⁵⁰ Werner 2018 *Presupuesto y Gasto Público* 159.

obligation on the *Länder* to ensure uniform living standards throughout the territory of the Federation.¹⁵¹

German Constitution (Basic Law, *Grundgesetz*) governs decentralisation in Germany.¹⁵² It divides “the Federal government's legislative responsibilities into exclusive powers, concurrent powers and framework powers”.¹⁵³ All regions have fully developed autonomous legislative, executive and judicial bodies as well as their constitutions.¹⁵⁴ These constitutions reflect the character of each *Land* government while conforming to the principles of Article 28 of the Basic Law, which provides for the autonomy of the *Länder* and municipalities therein.¹⁵⁵

Länder governments must adhere to principles of a republican democratic and social State governed by the rule of law within the meaning of the German Constitution. At the same time, the representatives of the people in municipalities and counties must be elected through free and fair elections.¹⁵⁶ It can be argued that this provision inculcates citizen participation through their duly elected representatives into the operations of the lower levels of government which is a necessary element of the RTD.

The Constitution protects the sovereignty of the *Länder* by providing that the exercise of state powers and the discharge of state functions is a matter for the *Länder* except as otherwise provided or permitted by the Constitution.¹⁵⁷ At the same time, in foreign relations, the *Land* has to be consulted before a treaty that affects the *Land* can be concluded by the federal government.¹⁵⁸

Municipalities have a constitutional right to self-govern. In this sense, they regulate all their local affairs within the law and exercise fiscal autonomy in raising taxes and

¹⁵¹ Grundgesetz (German Constitution) Article 72:2, para 3 and Article 106:3, para 2 in Hepp and Von Hagen 2010 *Publius* 5.

¹⁵² European Union <https://portal.cor.europa.eu/divisionpowers/pages/Germany-Fiscal-Powers.aspx> (Date of Use 3rd October 2020).

¹⁵³ West *et al* 2010 *Environ & Plan C: Gov & Pol'y* 5.

¹⁵⁴ Assembly of European Regions <https://aer.eu/regionalisation-germany-advantages-federal-state/> (Date of use: 3 October 2020).

¹⁵⁵ Assembly of European Regions <https://aer.eu/regionalisation-germany-advantages-federal-state/> (Date of use: 3 October 2020).

¹⁵⁶ Article 28(1) of the Constitution of Germany.

¹⁵⁷ Article 30 of the Constitution of Germany.

¹⁵⁸ Article 28(2) of the Constitution of Germany.

spending the tax revenues.¹⁵⁹ The municipalities play an active role in generating revenue through local taxes and the provision of socio-economic goods and services, including development within the Land.¹⁶⁰ This constitutional feature has the hallmarks of the right to self-determination, which is an element of the RTD.

6.4.2 How Fiscal Decentralisation Works

The country's federal fiscal system attempts to harmonise "two conflicting principles present in the German Constitution".¹⁶¹ The State governments, on one hand, are autonomous and independent of each other and the federal government in the budgetary policies. They are also required to individually carry out their tasks effectively.¹⁶² On the other hand, the Constitution requires States to ensure uniform living standards throughout the territory of the Federation.¹⁶³ The contradiction is that the German States are not entirely autonomous in matters of development. Constitution grants autonomy to the German States to pursue their development while at the same time these "autonomous" States are required to ensure uniform living conditions all through the country, usually through fiscal equalization, as will be explained later below.

The individual German States do not have their own autonomous tax authority.¹⁶⁴ Therefore, the Federal government is responsible for taxes and their distribution,¹⁶⁵ thus making it possible to employ fiscal equalization measures "from the top" when distributing revenues to the *Länder*. The Federal government does not have its own administration to execute its policies in the *Länder*; it, therefore, relies on the States to collect all taxes.¹⁶⁶ This enables the Federal government to employ distributive justice in fiscal allocation.

¹⁵⁹ Article 28(2) of the Constitution of Germany.

¹⁶⁰ Article 28(2) of the Constitution of Germany.

¹⁶¹ Hepp and Von Hagen 2010 *Publius* 5.

¹⁶² Grundgesetz (German Constitution) Article 29, 30 and 109 at 1 in Hepp and Von Hagen 2010 *Publius* 5.

¹⁶³ Grundgesetz (German Constitution) Article 72:2 para 3 and Article 106:3 para 2 in Hepp and Von Hagen 2010 *Publius* 5.

¹⁶⁴ Assembly of European Regions <https://aer.eu/regionalisation-germany-advantages-federal-state/> (Date of use: 3 October 2020).

¹⁶⁵ Assembly of European Regions <https://aer.eu/regionalisation-germany-advantages-federal-state/> (Date of use: 3 October 2020).

¹⁶⁶ Watts and Hobson <https://www.queensu.ca/iigr/sites/webpublish.queensu.ca/iigrwww/files/WorkingPapers/watts/WattsFiscalFederalismGermany2000.pdf> (Date of use: 20 May 2021) 6.

States do not exercise any form of taxation, but municipalities are afforded some form of discretion in setting tax rates for municipal taxes.¹⁶⁷ Tax revenue is typically shared and apportioned among layers of government according to own assigned revenues and revenue sharing.¹⁶⁸ For example, revenues from property taxes are available to municipalities in full (own revenue). VAT which is raised nationally, is shared among the federal States based on an equalisation formula.¹⁶⁹

Fiscal equalisation among the federal States finds its anchor in Article 107 of the Basic Law which allows supplementary allocations to financially weak *Länder* to enable them to fulfil their legal obligations. The fiscal equalisation formula consists of several elements, including the distribution of corporation and personal tax, distribution of VAT, fiscal equalisation among the *Länder* and the allocation of additional funds by the central or Federal government.¹⁷⁰ These elements are discussed below.

Generally, fiscal authorities in the respective *Länder* are entitled to receive in full the tax revenues from the State-owned taxes and a share of both income tax and VAT according to the principle of collection of taxes in the place where they are generated.¹⁷¹ This means that when apportioning corporation tax and personal income tax, the location of the business and the taxpayer's residence, respectively, are taken into account.¹⁷²

As for VAT, at least 75% of the generated VAT to which the *Länder* is entitled has to be distributed among the *Länder* according to population. The remaining 25% is distributed as an additional percentage to the financially weak States which finds its origins in need to bridge the gap between East and West Germany post the reunification.¹⁷³ The VAT redistribution has enabled the financially weaker German States to take steps towards attaining the average level of the financial strength of the Federal States.¹⁷⁴

¹⁶⁷ Werner 2018 *Presupuesto y Gasto Público* 159.

¹⁶⁸ Werner 2018 *Presupuesto y Gasto Público* 159.

¹⁶⁹ Werner 2018 *Presupuesto y Gasto Público* 159.

¹⁷⁰ Werner 2018 *Presupuesto y Gasto Público* 166.

¹⁷¹ Werner 2018 *Presupuesto y Gasto Público* 166.

¹⁷² Werner 2018 *Presupuesto y Gasto Público* 166.

¹⁷³ Werner 2018 *Presupuesto y Gasto Público* 167.

¹⁷⁴ Werner 2018 *Presupuesto y Gasto Público* 168.

Apart from the VAT payments, the German system also employs a fiscal equalisation system that involves direct horizontal transfer payments between the *Länder*. These direct transfers each based on every single State's financial strength, calculated by multiplying the population by the nation-wide per capita figure of the State and municipal tax revenues. If the financial requirement is higher than its financial strength, the particular *Land* will receive equalization funds from the financially stronger States.¹⁷⁵

The German fiscal decentralisation system also employs vertical grants to the *Länder* comprising deficit-coverage funds¹⁷⁶ and special requirement funds.¹⁷⁷ The deficit coverage funds enable the weaker *Länder* to reach nearly 99.5% of the average financial strength of the federal State. As part of the equalisation formula, the States also earn points for positive developments regarding their tax revenues.

The Federation can grant the *Länder* financial assistance for particularly important investments by the *Länder* and municipalities (associations of municipalities), which are necessary to; "avert a disturbance of the overall economic equilibrium, equalise differing economic capacities within the federal territory, or promote economic growth".¹⁷⁸ Additionally, the Federation may grant the *Länder* financial assistance for development that is important to the country as a whole, and for special limited-term expenditures on the part of the *Länder* and municipalities (associations of municipalities) towards the improvement of the efficiency of municipal education infrastructure and also social housing.¹⁷⁹

The net effect of this system of fiscal decentralisation and equalisation is that the German States can pursue their own socio-economic, political and cultural development yet at the same time support the financially weaker States to stay within certain minimum developmental thresholds in fulfilling their legal obligation to ensure a uniform standard of living throughout the federation.

¹⁷⁵ Werner 2018 *Presupuesto y Gasto Público* 168.

¹⁷⁶ Werner 2018 *Presupuesto y Gasto Público* 168.

¹⁷⁷ Werner 2018 *Presupuesto y Gasto Público* 168.

¹⁷⁸ Article 104b.

¹⁷⁹ Articles 104c and 104d.

6.4.3 Impact of Fiscal Decentralisation of the RTD and Lessons Learnt

Fiscal equalization, as a principle, is anchored in the German constitution, while the particular mechanisms used to achieve it are regulated by Federal legislation negotiated between the Federal and State governments.¹⁸⁰ The implication here is that the States are not just mere appendages of the Federal government. They have a "real voice" in fiscal matters, thus a solid foundation for citizen participation in development and the realisation of the RTD.

The tax redistribution model is anchored on the constitutional objective of the "equivalence of living conditions".¹⁸¹ The financial equalization scheme redistributes tax income until the financially weaker *Länder* reach 95% of the financial resources of the contributing States.¹⁸² The weaker States also receive supplementary grants from the Federal government.¹⁸³ This is very similar to the county revenue allocation formula¹⁸⁴ and the equalization fund¹⁸⁵ under the Constitution of Kenya 2010, whose objective is to ensure that development resources are shared equitably among the counties by prioritizing allocations to counties left behind in development.

Vertical and horizontal fiscal equalization in Germany makes it possible to realise distributive justice or equity in allocating development resources. Equity in this sense relates to the distributional outcomes of the development process, social justice and fair distribution of the benefits of development.¹⁸⁶ In the context of the RTD, development has to entail distributive justice. Governments must remove inequalities among people and provide an opportunity for all their access to basic resources. It is submitted that fiscal equalization in Germany plays this role, thus leading to the realisation of the RTD.

Although the former East Germany States continue to lag in productivity, unemployment and per-capita GDP, this gap has been narrowed considerably since

¹⁸⁰ Hepp and Von Hagen 2010 *Publius* 3.

¹⁸¹ Fuhr, Fleischer and Kuhlmann 2018 *GIZ GmbH* 12.

¹⁸² Fuhr, Fleischer and Kuhlmann 2018 *GIZ GmbH* 12.

¹⁸³ Fuhr, Fleischer and Kuhlmann 2018 *GIZ GmbH* 12.

¹⁸⁴ Article 217 of the Constitution of Kenya, 2010.

¹⁸⁵ Article 204 of the Constitution of Kenya, 2010.

¹⁸⁶ Report of the High-Level Task Force on the Implementation of the Right to Development on its sixth session, 8 March 2010 A/HRC/15/WG.2/TF/2/Add.2 para18.

the unification.¹⁸⁷ Arguably, fiscal equalization has played a major role in bridging the developmental gap between the former East Germany States and West Germany.

Fiscal equalization has also been used to operationalize the constitutional requirement for uniform standards of living all through the Federation. Uniform standards of living must be understood to mean constitutional protection against "inequalities stemming from different fiscal capabilities and not from geographical or other objective differences that cannot or should not be offset".¹⁸⁸ Equivalence of living conditions is an essential protection against arbitrary differentiation in development and thus justifies redistribution of resources, where necessary¹⁸⁹ so that every person can be a participant and beneficiary of development.

This position is synonymous with the conceptualisation of development under the UNDRTD. Development is viewed as a comprehensive economic, social, cultural and political process that aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.¹⁹⁰ Therefore, it is submitted that fiscal equalization in Germany has the effect of removing obstacles to development so that every person can expand their capabilities.

6.4.4 Lessons Learnt

Despite having numerous successes such as uniting the country while maintaining regional uniqueness, fiscal equalization in Germany is not completely perfect. Fiscal equalization has been and continues to be a contentious issue with States such as Baden-Württemberg, Bavaria and Hesse filing successful lawsuits in the Constitutional Court in Karlsruhe challenging the equalization formula.¹⁹¹ While the details of these contentious issues are outside the scope of this thesis, it is important

¹⁸⁷ Gramlich <https://www.pewresearch.org/fact-tank/2019/11/06/east-germany-has-narrowed-economic-gap-with-west-germany-since-fall-of-communism-but-still-lags/> accessed on 31 August 2021).

¹⁸⁸ Thöne and Bullerjahn *Reform and Future of Federal Fiscal Relations in Germany* 22.

¹⁸⁹ Thöne and Bullerjahn *Reform and Future of Federal Fiscal Relations in Germany* 22.

¹⁹⁰ Paragraph 2 of the UNDRTD.

¹⁹¹ Werner 2018 *Presupuesto y Gasto Público* 167.

to note that fiscal equalization in Germany continues to undergo reforms to match the German people's socio-economic, political and even cultural needs.¹⁹²

In an article documenting the triumph of German democracy at the 70th anniversary of its constitution, David Frum likens Germany "to a patient who has recovered from a terrible disease and ever after monitors himself for a recurrence of the symptoms".¹⁹³ In the context of the RTD, Frum's sentiments can be argued to mean that policies and laws such as the fiscal equalization laws have to be continuously refined and adjusted to ensure that they support a development paradigm that is participatory, equitable and leads to the realisation of all human rights and fundamental freedoms.

Looking at the Kenyan experience with the allocation of revenue between the national government and the county governments discussed in Chapter 5 of this thesis, disputes between levels of government in fiscal matters is unavoidable because the process is largely a political one. Even with expert commissions such as the CRA in Kenya, politicians still have the final say in the process. Jean Werner addressing the same problem in Germany, proposes delegating Germany's fiscal equalization process to an Independent Council of Economic Experts who will make "economic decisions" rather than "economic-political decisions" in fiscal equalization matters.¹⁹⁴ However, he rightly argues that such "political outsourcing always leads to lack of democratic control" because the experts are not direct representatives of the electorate.¹⁹⁵

In light of the foregoing, it is submitted that Germany's fiscal equalization scheme has made it possible for the country to pursue a development policy that aims at the constant improvement of the well-being of the entire population and of all individuals and equitable distribution of development outcomes. This is especially true in light of the developmental progress achieved since Germany's reunification in 1989.

However, the downside is that fiscal equalization has resulted in an "equalisation overdose" where the donor States and the recipient States lack incentives to attract

¹⁹² West *et al* 2010 *Environ & Plan C: Gov & Pol'y* 5.

¹⁹³ Frum <https://www.theatlantic.com/ideas/archive/2019/05/its-70th-anniversary-germany-democracy-alive/588955/> (Date of use: 30 July 2021).

¹⁹⁴ Werner 2018 *Presupuesto y Gasto Público* 175.

¹⁹⁵ Werner 2018 *Presupuesto y Gasto Público* 175.

additional tax revenues. This is blamed on an equalisation system that punishes every additional tax administration effort through high siphoning-off rates.¹⁹⁶ The equalization system was criticized as providing an incentive for weaker States to maintain their weak status because they still get vertical and horizontal allocations from the Federal government and the *Länder*, respectively.¹⁹⁷

From a RTD perspective, this implies that the capabilities of the citizens in the weaker States are not being necessarily increased through fiscal equalization. There is a need for further investigation to establish the missing link between the RTD and fiscal decentralisation in Germany to realign it with the RTD. Despite this concern, fiscal equalization remains the most viable method of realising the RTD in Germany and other countries that have embraced fiscal equalisation. It has been argued that abolishing fiscal equalization will increase the national GDP and a decrease in welfare in Germany.¹⁹⁸ Abolishing fiscal equalization will be a move in the wrong direction because development is not about an increase in GDP and revenues.¹⁹⁹ Development is about improving the lives of people by increasing their opportunities and capabilities.²⁰⁰

6.5 General Conclusions

This chapter has analysed the decentralisation experience in South Africa, Ethiopia and Germany while demonstrating the effect of decentralisation on the realisation of the RTD. The decentralisation journey of each country was unique. Ethiopia introduced federalism to pursue national unity and create an enabling environment for democracy and development. In Germany, decentralisation was seen as a means of uniting small sovereign States with pronounced competencies, whereas in South Africa, decentralisation was necessitated by the need for the total transformation of all public institutions and social services provided by the State.

¹⁹⁶ Werner 2018 *Presupuesto y Gasto Público* 175.

¹⁹⁷ Fuhr, Fleischer and Kuhlmann 2018 *GIZ GmbH* 12; Bird and Tarasov 2004 *Environ & Plan C: Gov & Pol'y* 96.

¹⁹⁸ Henkel, Seidel and Südekum <https://voxeu.org/article/germany-without-fiscal-transfers> (Date of use: 10 September 2021).

¹⁹⁹ World Bank *World Development Report* 4.

²⁰⁰ Paragraph 2 of the preamble of the UNDRTD.

This chapter focused on specific elements of the RTD within the decentralized government structures of South Africa, Ethiopia and Germany. The discourse in this chapter sought to answer the following three questions:

1. What is the impact of decentralisation on participation, equity and the realisation of all human rights in South Africa and what does this mean for the realisation of the RTD?
2. What is the impact of decentralisation on participation, equity and the right to self-determination in Ethiopia, and what does this mean for the realisation of the RTD?
3. What is the impact of decentralisation on equity or distributive justice in Germany, and what does this mean for the realisation of the RTD?

The findings in this chapter are summarized as follows:

6.5.1 South Africa

The South African experience with devolution shows that decentralisation directly impacts the RTD in terms of inculcating distributive justice and citizen participation in development praxis. It has been noted that the normative and institutional structures under the Local government in South Africa have the potential to yield people-centred development and consequently the realisation of the RTD.

Because of decentralisation in South Africa, there seems to be a reduction in poverty levels attributed to allocating of social grants and extension of social services. However, patterns of poverty continue to persist, and the proceeds of a growing economy are not trickling down to the poor. The lack of a "trickle-down effect" has been linked to the apartheid spatial patterns that persist, denying most Black South Africans access to and ownership of the economy. This has manifested in high unemployment rates, low wages, fewer skills and inability to own assets, among a host of other social problems.

The implication here is that decentralisation in South Africa has not had a significant impact on eliminating obstacles to development. Most South Africans have been cut off from meaningful participation in development and fair distribution of benefits

resulting thereof. The promise of development for the majority of South Africans through decentralisation remains far from being realised. By extension, the level of realisation of the RTD in South Africa remains minimal and more needs to be done to make the RTD a reality.

It is proposed that political leaders address these problems to transform the normative provisions in the Constitution and other laws into real benefits for a majority of South Africans. The government must employ strategic structural changes in the economy. These include, land re-distribution and distributive justice policies, to enable the majority of South Africans to have access to and ownership of the economy.

There is also a need to enhance citizen participation in development by eliminating influence by the elite and the political class. Demanding higher levels of public accountability while ensuring that the voices of the less privileged is heard in fundamental grassroots development processes like the integrated development planning process in municipalities will also enhance the realisation of the RTD. Additionally, human rights institutions in South Africa also need to localize awareness of the RTD as a human rights issue.

Finally, for the RTD to be actualized in South Africa, there is a need to develop human capabilities alongside economic growth. This involves framing the development agenda consistent with human rights standards, guaranteeing equitable sharing of development gains and putting in place concrete re-distributive measures to ensure a balanced society.

6.5.2 Ethiopia

Decentralisation in Ethiopia was more of a response to political reform by granting significant autonomy to regional governments rather than economic reform. For this reason, the normative and institutional design of decentralisation in Ethiopia does not adequately support the realisation of the RTD due to lack of strong legal structures to guarantee fiscal, administrative and political devolution, which are key in yielding elements of the RTD such as equity, citizen participation and the realisation of all human rights and fundamental freedoms including the right to self-determination.

The most significant weakness in Ethiopia's decentralized system of government is that the *Woredas* are not properly institutionalized to operate, function and exist as distinct and autonomous levels of government. They are susceptible to interference and control from politicians and the Federal government. Lack of Constitutional recognition as a distinct level of government and lack of a clear legal framework to define the roles of the *Woredas* and the State governments affects the *Woredas'* ability to champion people-centred localized development, which is the essence of the RTD.

Decentralisation in Ethiopia has failed to create autonomous local governments which are responsive to local preferences and accountable to local people. For the realisation of the RTD, this portends that the human person is at the periphery of development due to local government institutions that are not autonomous hence unable to secure active and meaningful citizen participation in the conceptualisation and execution of development programmes.

Ethiopia has experienced impressive economic growth since 1995, despite the above misgivings since the country adopted a federal constitution. In 2016, Ethiopia was ranked third among the fastest-growing countries in the world. The country has experienced notable economic growth and poverty reduction, including the roll-out of several mega projects to accelerate economic transformation. Arguably, this impressive economic growth can in part attribute to decentralisation.

In a nutshell, the local government in Ethiopia has to be given more political, fiscal and administrative autonomy for it to become a catalyst for the realisation of the RTD. Affording the RTD constitutional recognition is not enough. There is a need to include human rights practice in development programming at the *Woreda* level so that development policies could be interpreted and executed to give rise to the RTD.

6.5.3 Germany

Fiscal decentralisation and equalization in Germany has made it possible for the country to pursue a development policy that ensures uniform living conditions throughout the country. This means that fiscal equalisation ensures equity in development throughout the German States, with the stronger States supporting the weaker ones.

Arguably, fiscal decentralisation and equalisation has made it possible to implement a development paradigm that aims at the constant improvement of the well-being of the entire population and of all individuals and equitable distribution of development outcomes. This is especially true in light of the developmental progress achieved since Germany's reunification in 1989.

Fiscal decentralisation and equalisation has generally improved the welfare of the people of Germany. Since the essence of the RTD is about improving the welfare of the people by making them active participants and beneficiaries of development, it was argued that fiscal decentralisation and equalization in Germany supports the realisation of the RTD.

The equalization system was also criticized for creating an "equalization overdose" where the States are not motivated to raise more tax revenues. It was criticized as providing an incentive for weaker States to maintain their weak status because the stronger States will always bail them out.

Despite the highlighted misgivings, Germany's fiscal system appears to offer more benefits than liabilities considering that the system has registered a positive impact on the welfare of the German people. There is a need to continuously monitor and adjust the fiscal system to address the emerging socio-economic, political and cultural needs of the German people.

6.5.3 Closing Remarks

What lessons can Kenya learn from South Africa's, Ethiopia's and Germany's decentralisation experience?

1. Devolution of State power does not automatically support the realisation of the RTD. The devolved system must be designed to clearly define the developmental role of the sub-national governments and incorporated in government development policy.
2. Political, administrative and fiscal autonomy is crucial in creating a devolved system of government that supports the elements of the RTD, such as equity and participation.

3. Fiscal equalization is a critical element in implementing distributive justice in a devolved system of government.

These lessons are expounded further in the next chapter under recommendations.

CHAPTER 7: CONCLUDING ANALYSIS AND RECOMMENDATIONS

7.1 An Overview of the Thesis

The RTD is “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised”. The RTD also “implies the full realisation of peoples’ right to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources”.¹

Therefore, devolution in the Kenyan context involves “the dispersion of power and responsibilities from the central government to largely locally managed units in the form of county governments”.² These “lower-level units of government are known as counties, to which power, authority and responsibility have been transferred (devolved) are more or less autonomous from each other”.³ They have geographically defined boundaries within which they exercise their authority and perform public functions⁴ mandated by the Constitution.

This thesis argued that the system of devolution in Kenya supports the realisation of the RTD. This hypothesis was anchored on the argument that devolution in Kenya and the RTD share certain common elements such as; participation of the people, equity and the realisation of the right to self-determination by specific groups of peoples such as ethnic minorities residing within a country. Another common element between devolution and the RTD is that both lead to the realisation of all human rights, that is, civil and political rights, socio-economic and cultural rights and

¹ Articles 1 and 2 of the United Nations Declaration on the Right to Development (UNDRTD) UN Doc A/RES/41/128 adopted on 4th December 1986 for its text see http://www.ohchr.org/Documents/Issues/Development/DeclarationRightDevelopment_en.pdf (Date of use: 22 March 2017).

² Kaburu 2013 *Afr Naz Univ L J* 76-77.

³ Ribot *African Decentralisation; United Nations Research Institute for Social Development, Democracy; Governance and Human Rights Programmer Paper Number 8* pg 7.

⁴ Mbondenyi and Lumumba "Conceptual and Historical" in Lumumba, Mbondenyi and Kabau (eds) *Devolution in Kenya* 13-14.

even solidarity or group rights. The thesis argued that because of this commonality, devolution in Kenya could be used to augment the RTD's realisation.

In Chapter 1, the complexity around the realisation of the RTD was discussed. This thesis established that despite the RTD not being "a novel right," it has remained trapped in the realm of soft law and the subject of international discourse for over 40 years.⁵ The international community has not been able to transform the UNDRTD into a legally binding human rights treaty. The latest attempt to push for the adoption of the binding international treaty on the RTD was in 2020 when the UN Working Group on the RTD released the first draft of the international human rights treaty on the RTD⁶ "prepared by Dr Mihir Kanade of the UN University for Peace, who heads a Drafting Group established by the United Nations Office of the High Commissioner for Human Rights."⁷

The lack of an international legally binding human rights treaty on the RTD is blamed on the politics or controversies of the RTD discussed in Chapter 2 of this thesis. The controversy is characterised by the global North and global South schism in which the two groups continue to read from different scripts when it comes to defining the duties of States under the international dimension of the RTD.⁸ This highly convoluted discourse on the international dimension of the RTD has made the realisation of the RTD at the international level a mirage. Therefore, it is argued in this thesis that exploring the realisation of the RTD through the adoption of appropriate national development policies such as devolution in Kenya may be a practical 'starting point' for the realisation of the RTD rather than waiting for international consensus on the matter.

Interestingly, while the controversies of the RTD continue to persist on the international plane, it is observed that at the regional level, the African continent seems to have achieved consensus on the RTD. The Banjul Charter, the primary normative human rights instrument in the African continent, recognises the RTD as

⁵ See Office of the High Commissioner for Human Rights, Realising the Right to Development (United Nations 2013) https://www.ohchr.org/Documents/Publications/RightDevelopmentInteractive_EN.pdf (Date of use: 2 July 2021); Marks 2004 *Harv Hum Rev J* 137.

⁶ See UN Doc A/HRC/WG.2/21/2/Add.1, 20 January 2020, which contains the Draft Convention on the Right to Development, with commentaries.

⁷ Schrijver 2020 *Neth QHR* 89.

⁸ Schrijver 2020 *Neth QHR* 85-86.

a legally binding human right. The African Commission and the African Human Rights Court have confirmed this position in cases such as the *Endorois* and *Ogiek* cases involving the rights of minority indigenous peoples in Kenya.

For Kenya, this position presents viable opportunities to fast track the realisation of the RTD in several ways. Firstly, Kenya has ratified the Banjul Charter, and therefore the charter is binding on Kenya. This means that the RTD is a justiciable right in Kenya. Secondly, Article 2(6) of the Constitution of Kenya 2010 makes general rules of international law part of the law of Kenya. Therefore, it is arguable that the UNDRTD can be viewed as *jus cogens* and thus has the effect of a binding treaty.⁹ It is also noted that even though the Constitution of Kenya does not expressly mention the RTD, the reference to certain group rights such as the rights of marginalized groups and minorities in Article 56 of the Constitution strongly suggests that the RTD is an implied right under the Constitution of Kenya. These arguments are expounded in Chapter 2 of this thesis, concluding that the RTD is therefore binding in Kenya.

Chapter 3 of this thesis gave a historical exposition of Kenya's development journey from the colonial period to the post-colonial period to establish whether the development policies hitherto pursued by Kenya were compatible with the RTD. The UNDRTD definition of development informed this enquiry. Development under the UNDRTD is viewed as “a comprehensive economic, social, cultural and political process aiming at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom”.¹⁰

It is noted in Chapter 3 that colonialism played a pivotal role in shaping Kenya's development paradigm(s). The RTD and colonialism have shared history. Historically the RTD amalgamated voices of resistance against the elaborate schemes of economic domination and systematic exploitation (neo-colonialism),

⁹ Manchak 2010 *Boston College Third World Law Journal* 48. The author argues that the RTD is consistently invoked by States as a rule of international law. The right is so fundamental, so inviolable, and so broadly accepted, it may even be properly considered a *jus cogens* norm. See also Bunn 2000 *Am U Int'l L Rev* 1425.

¹⁰ The Preamble of the UNDRTD para 2.

which reappeared in the wake of the dissolution of colonial forms of power in the 1970s.¹¹ As stated in Chapter 2, the emergence of the NIEO¹² was driven by the need to eliminate world injustice so that third world countries enjoy the direct benefits of development.¹³

Chapter 3 of this thesis demonstrated that the development policies pursued by Kenya during the colonial and post-colonial periods were not compatible with the RTD, and thus there was a need to re-align Kenya's development paradigm with the RTD. An analysis of the colonial period in Kenya demonstrated that the development paradigm that the colonial government implemented was not compatible with the RTD. This is because development was not participatory; colonial laws and policies ensured that native Kenyans were left out of the development matrix as both participants and beneficiaries. Access to land was restricted in favour of the minority settlers. Native Kenyans were not able to access this vital resource, thus an obstacle to their development. Development was also not equitable because the distribution of resources was skewed in favour of the colonialists.

The post-colonial phase of Kenya's developmental journey did not herald the birth of a new development paradigm compatible with the RTD. The successive independence governments pursued the same inequitable and discriminatory development paradigm established by the colonialists in Kenya. Sessional Paper No. 10 of 1965 titled "African Socialism and its Application to Planning in Kenya" created a foundation for a skewed development policy after Kenya gained independence from the British colonialists. This policy paper is blamed for development disparities in the different regions of Kenya.

Kenya's socio-economic and political history occasioned an urgent need to re-model and re-design the concept of development. This was important because of the deep systemic problems that needed addressing. The issues included; regional inequality, lack of citizen participation in development, inequitable distribution of

¹¹ Akinsanya and Davies 1984 *Int'l Comp L* Q 208. See also Balakrishnan Rajagopal "Global governance: old and new challenges" 172 cited in Miyawa 2016 *Transnat Hum Rts Rev* 42.

¹² *Declaration for the establishment of the New International Economic Order* UNGA RES/S-6/3201 of 12th December 1974.

¹³ Kamga *Human rights in Africa* 147.

development resources, historical marginalisation of communities, and other problems.

Devolution of power under the Constitution of Kenya 2010 created a normative and institutional structure which, this thesis argues, birthed a new development paradigm that is compatible with the RTD. This thesis argues that a devolved system of government introduced the elements of the RTD into the concept of development in Kenya. These include; equity in the distribution of development resources, human rights-based development and effective citizen participation in development, the realisation of the right to self-determination and all fundamental human rights and freedoms.

Chapter 4 of this thesis unpacked the concept of devolution in Kenya. Devolution is defined as a decentralised system of government where decision making and implementation powers, functions, responsibilities and resources are transferred to legally constituted and popularly elected governments known as county governments. Kenya's devolved system of government was born out of several attempts by Kenyans to decentralise development, starting with the *majimbo* system when Kenya gained independence from colonial rule to recent initiatives like the CDF and LATF.

The objects of devolution under the Constitution of Kenya 2010 entail four broad categories; those promoting and advancing democracy and accountability; development and service delivery; equity and inclusiveness; and those limiting centralization, "though some of the objects overlap with others".¹⁴ Some of these objectives mirror the elements of the RTD, such as participation, recognition of development as a right, equity and inclusiveness hence the link between devolution in Kenya and the RTD.

In linking the objects of devolution and the RTD, it was argued that democracy and accountability go hand in hand with citizen participation in governance and development. Equality and inclusiveness foster distributive justice, while limitation on centralization means that decision making on crucial matters such as governance and development is done at the grassroots level, thus making the people active

¹⁴ Mutakha *Constitutional framework for devolution* 139.

participants and beneficiaries of development. The argument put forth here is that the realisation of the objects of devolution results in the realisation of the RTD because of this linkage.

It is also submitted that devolution's design features under the Constitution of Kenya 2010 guarantee political, administrative and fiscal devolution. These features enable the citizens to drive their own development through effective and meaningful participation in governance. The thesis also argued that political, administrative and fiscal devolution makes it possible for citizens living in the different counties in Kenya to exercise their human right to self-determination, which culminates in the realisation of the RTD since the right to self-determination is an indispensable element of the RTD.

Chapter 5 of this thesis was a practical "compatibility checker" between devolution in Kenya and the RTD. The chapter teased out the link between devolution in Kenya and the RTD by demonstrating how devolution has practically impacted RTD elements. It is argued that the Kenyan State owes its people an obligation under the social contract theory and the UNDRTD to create development policies that will result in the realisation of the RTD. Devolution under the Constitution of Kenya 2010 creates a solid normative and institutional platform or foundation for realising the RTD. Chapter 5 of this thesis essentially answers that call in Article 10 of the UNDRTD that urges States to take legislative, policy and other measures to realise the RTD within their national jurisdictions.

The thesis noted that since its inception in 2013, devolution has significantly improved the levels of citizen participation in development leading to people centred development. Citizen participation in Makueni and Kiambu counties has resulted in tailor-made solutions to local problems, hence having a more significant impact on the residents of these counties. It is argued herein that when the people participate in the process of development, they can craft solutions that have the effect of directly and significantly removing the obstacles to their development and increasing their capabilities.

Fiscal equalization under devolution in Kenya has led to the realisation of the RTD because it has made development accessible to everyone, which is the essence of

distributive justice. Devolution has also made it possible to distribute development resources to the various counties in Kenya based on an equitable formula that takes into account key development indicators such as the poverty index, population, essential services, and fiscal prudence. As a result of this, there has been a gradual improvement in access to essential services such as health care, especially in counties left behind in development. Lamu County and West Pokot County are examples of counties listed in this thesis that have benefited from distributive justice under devolution in Kenya.

The thesis also indicated that devolution has also augmented the realisation of all human rights in Kenya, an element of the RTD. Devolution makes it possible for citizens to directly elect their leaders in the county and demand accountability from them at that level, thus realising their civil and political rights. The successful impeachment of Kiambu County and Nairobi County governors in the year 2020 and Wajir County in 2021 on allegations of corruption and abuse of office is a demonstration of the ability of citizens to demand accountability from their elected leaders at the county level.

Regarding socio-economic rights, the County governments are in charge of providing several services related to socio-economic rights. These include basic education, health care, water and sanitation, housing, among others. The affordable housing programme in Nairobi County shows how devolution has positively impacted socio-economic rights. The same applies to improved access to health care in counties such as Lamu and West Pokot courtesy of devolution.

The thesis also noted that devolution has also secured the right to self-determination for different communities in Kenya. In Turkana County, the county government is the custodian of the County's and host communities' share of benefits from oil extraction by the government and Tullow Oil. The Turkana people are now able to freely pursue their economic, social, cultural and political development. The realisation of the right to self-determination is the essence of the RTD.

While the benefits of devolution on RTD in Kenya are undeniable, several factors pose a threat to the functioning of devolution. These are summarized in this thesis to include; corruption, negative ethnicity, the politics of fiscal devolution, the poor

synergy between county governments and the national government, the inability of counties to fully absorb health services as a devolved function and inadequate public participation. These factors affect the ability of county governments to discharge their constitutional functions related to the realisation of the RTD. A raft of reforms is proposed in this chapter to address these threats.

Chapter 6 of this thesis was a comparative study of the decentralisation experience of Ethiopia, Germany and South Africa. It is noted that all three countries embraced decentralisation because of their unique socio-economic, political and cultural history. In terms of whether their decentralized systems of government support the realisation of the RTD, the following findings was made:

1. Decentralisation in South Africa has not had a significant impact on elimination of obstacles to development. Most South Africans are still cut off from meaningful participation in development and fair distribution of benefits resulting therefrom. The promise of development for the majority of South Africans through decentralisation remains far from being realised. Realising the RTD in South Africa remains minimal. Radical political and policy reforms must be initiated to remedy the situation.
2. Decentralisation in Ethiopia was more of a response to political reform by granting significant autonomy to regional governments rather than economic reform. For this reason, the normative and institutional design of decentralisation in Ethiopia does not adequately support the realisation of the RTD. This is attributed to lack of strong legal structures to guarantee fiscal, administrative and political devolution, which are key in yielding elements of the RTD such as equity, citizen participation and the realisation of all human rights and fundamental freedoms including the right to self-determination.
3. Fiscal decentralisation and equalization in Germany have made it possible for Germany to pursue a development policy that ensures uniform living conditions throughout the country. Fiscal equalisation therefore ensures equity in development throughout the German States, with the stronger States supporting the weaker ones. It was argued that Germany's fiscal system supports the realisation of the RTD.

The findings in Chapter 6 of this thesis indicate that a well-designed decentralisation system invariably supports the realisation of the RTD especially if decentralisation is anchored in the constitution of a country. A well-designed decentralisation system must empower citizens to exercise political, administrative and fiscal powers at the lowest levels of government. The system must also enable distributive justice. When this happens, elements of the RTD such as citizen participation, equity, the exercise of the right to self-determination and the realisation of all human rights and fundamental freedoms are activated.

The comparative study in chapter 6 of this thesis demonstrates that decentralisation (whether it's federalism or devolution) is good for the realisation of the RTD only if its design guarantees political, administrative and fiscal decentralisation. This finding is important because it validates the main argument in this thesis that devolution in Kenya augments the realisation of the RTD. The lessons learnt in the chapter also inform some of the recommendations in this chapter.

7.2 Devolution as Development Paradigm for the Realisation of the RTD in Kenya

This thesis argues that the Constitution of Kenya 2010 heralded the birth of a new development paradigm compatible with the RTD. This development paradigm is discernible from the normative and institutional structure of devolution under the Constitution of Kenya 2010, which supports the realisation of the RTD.

Devolution under the Constitution of Kenya 2010 and RTD share some common elements that engender a mutually supportive relationship. These are; participation, equity (distributive justice), the right to self-determination and a process of development through which all human rights and fundamental freedoms are realised.

An analysis of the development paradigm(s) pursued by the government since the birth of the Kenyan State demonstrated that none of them was compatible with the RTD. History indicates that development in Kenya is not properly conceptualised because there were no proper legal structures to anchor citizen participation and equity in development. This meant that the actual beneficiaries of development, the people of Kenya as a whole were left out of the development matrix.

It was submitted that while devolution in Kenya sought to address some of the development injustices in Kenya's history, it also provided the requisite normative and institutional framework to pursue an RTD compatible development paradigm that was anchored in the Constitution of Kenya 2010. Devolution gives life to the elements of the RTD such as citizen participation, equity, the realisation of all human rights and fundamental freedoms, the realisation of the right to self-determination, among others.

Using a model such as devolution, Kenya can avoid the controversies that have riddled the RTD internationally and create traction on realising the RTD nationally. Strong local and national development leads to stronger economies hence the BRICS countries' emergence in the last two decades.¹⁵ The emergence of the BRICS countries has been instrumental in driving the debate away from the traditional North-South schism in which the North was fixated on the possible international legal obligations to give development aid to the South to a healthier debate on the international dimension of the RTD.¹⁶

7.3 Recommendation 1: Making Devolution in Kenya Work

When devolution works, the RTD becomes a reality to the people of Kenya because of the linkage between devolution and the RTD, as argued in this thesis. It is, therefore, crucial to ensure that devolution delivers on its constitutional mandate in Kenya. Threats to devolution in Kenya were discussed in Chapter 5 of this thesis. These threats must be addressed to make the RTD a reality for the people of Kenya. The following recommendations seek to address the threats to devolution in Kenya.

7.3.1 The Politics of Fiscal Devolution and the role of the CRA

The main issue arising from the discourse on the politics of fiscal devolution in Chapter 5 of this thesis strongly suggests that the constitutional architecture and design on fiscal decentralisation in Kenya should be reformed in two ways. Firstly,

¹⁵ Marks and Malhotra <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/134/2017/07/Marks-Malhotra-The-Future-of-the-Right-to-Development-2017.pdf> (Date of use: 16 January 2018) 8.

¹⁶ Marks and Malhotra <https://cdn1.sph.harvard.edu/wp-content/uploads/sites/134/2017/07/Marks-Malhotra-The-Future-of-the-Right-to-Development-2017.pdf> (Date of use: 16 January 2018) 8.

the constitution should allow only minimal political interference in fiscal decentralisation matters. Secondly, the Constitution should allow more deference to expert Constitutional bodies such as the CRA in matters concerning fiscal devolution.

The inclusion of the CRA in fiscal decentralisation was intended to ensure that experts in fiscal matters guide the process. The legislature, however, has the final say in the case, which then questions the relevance of the CRA. In other words, experts' recommendations in fiscal matters tend to be sacrificed on the altar of political expediency by the legislature.

To avoid over politicisation of the process of fiscal decentralisation in Kenya, the Constitution of Kenya should provide a minimum threshold when it comes to what constitutes "a significant deviation from the CRA's recommendation". This would mean that legislature, by law, would not be able to change the recommendations of the CRA beyond the minimum constitutional threshold. This would preserve the professional input of the CRA as an independent constitutional body while respecting the sanctity of the doctrine of separation of powers and the political question doctrine.

The same concern was also noted in Germany's fiscal system, where politics and economics more often than not behave like "water and oil".¹⁷ While it is wise to reduce political influence or interference in fiscal equalisation matters, it is important to ensure a system of accountability to the electorate through the legislature. This informs the recommendation herein for a "minimum constitutional threshold" rather than a "blank cheque" where the legislature can significantly deviate from the CRA's recommendation by providing "a mere explanation" for the deviation.

In South Africa, the Financial and Fiscal Commission (FFC) plays a supervisory role in fiscal devolution matters.¹⁸ The CRA can benchmark from the FFC by demanding an annexure of CRA proposals to Bills generated indicating the extent to which the CRA proposals being factored in legislation.¹⁹ This would address the politicization of fiscal devolution by making the legislature accountable for the decisions made in

¹⁷ Werner 2018 *Presupuesto y Gasto Público* 20.

¹⁸ Kaburu 2013 *Afr Naz Univ L J* 76.

¹⁹ Kaburu 2013 *Afr Naz Univ L J* 98.

fiscal matters. In Kenya, there is no legal framework to track and check the extent to which the CRA proposals have been factored into the Allocation and Division of Revenue Bills.

7.3.2 Delayed funding to Counties

Lack of adequate funding due to delays in disbursement of funds by the national treasury makes devolved governments unable to perform their constitutional functions. Therefore, a devolved system that does not work is a threat to the realisation of the RTD in Kenya.

The provisions of Article 219 of the Constitution of Kenya gives the national government leeway to frustrate or sabotage devolution by delaying the release of budgeted funds to the county governments. This is crucial because the realisation of the RTD through devolution in Kenya depends on the ability of counties to deliver on their objectives under Article 174 of the Constitution of Kenya. These objectives cannot become a reality unless county governments are well funded.

While respecting the Supreme Court's wisdom of giving deference to the executive and legislative arms of government in fiscal matters related to devolution,²⁰ it is argued herein that the Constitution of Kenya should have provided specific timelines within which budgeted funds ought to be released to the county governments.

Lack of constitutional timelines for disbursement of funds to counties allows the national executive to play politics with such a critical process. For instance, the national executive can easily use timely disbursement of funds to win the county executives' political support. At the same time, delayed disbursement of funds to counties can be used to "punish" counties that do not support the national executive's political agenda. This ultimately hinders the ability of devolution to augment the realisation of the RTD in Kenya.

Germany's experience with fiscal decentralisation demonstrates the importance of having an efficient fiscal system if equitable development must be achieved. Germany has successfully transformed constitutional provisions that guarantee a

²⁰ *Council of Governors & 47 Others v Attorney General & 3 Others (Interested Parties); Katiba Institute & 2 Others (Amicus Curiae)* [2020] eKLR para 83.

"uniform standard of living" throughout Germany into a reality. The successful integration of the former East German States into reunified Germany is evidence of this success. It was argued that without a proper fiscal equalisation system,²¹ this would not have been possible. Despite the criticisms levelled against Germany's fiscal system, it is clear that the gains far outweigh the losses.²²

Therefore, a well-designed fiscal system guarantees the availability of resources on an equitable basis, thus enabling communities to pursue their development. Kenya's fiscal system needs to be reformed so that county governments can receive their equitable share of revenue without any delays to implement development programmes that will result in the realisation of the RTD.

7.3.3 Enhanced Public Participation for Accountability and the Fight against Corruption

Corruption is an obstacle to the realisation of the RTD and a violation of human rights.²³ In Chapter 5 of this thesis, it is noted that corruption "short circuits" the ability of county governments to fulfill their RTD-related constitutional objectives. While inclusivity, universality, accountability, openness, transparency and equity guide the realisation of the RTD,²⁴ corruption interferes with these human rights principles. "Devolved corruption" is a real problem in Kenya owing to the fact that several county governors have been implicated in mega corruption scandals.²⁵ A recent report by the Auditor General has also sounded the alarm on county governments' misuse of Covid-19 funds.²⁶

There is a need to effectively operationalize - anti-corruption measures such as enforcing the leadership and integrity provisions in the Constitution of Kenya 2010,²⁷

²¹ Fuhr, Fleischer and Kuhlmann 2018 *GIZ GmbH* 12; Bird and Tarasov 2004 *Environ & Plan C: Gov & Pol'y* 96.

²² Henkel, Seidel and Südekum <https://voxeu.org/article/germany-without-fiscal-transfers> (Date of use: 10 September 2021).

²³ Moyo 2017 *SAJHR* 194.

²⁴ Munyai and Agbor "The Impact of Corruption" 72.

²⁵ Wangui <https://www.standardmedia.co.ke/politics/article/2001397657/its-over-for-sonko> (Date of use: 15 January 2021); Ogemba <https://www.standardmedia.co.ke/nairobi/article/2001374950/judge-rules-for-dpp-in-sh237m-kidero-graft-case> (Date of use: 20 March 2020); Wangui <https://www.nation.co.ke/kenya/news/samburu-governor-moses-kasaine-paid-his-firm-sh87m-249878> (Date of use: 19 August 2020).

²⁶ Oruko <https://allafrica.com/stories/202102260228.html> (Date of use: 07 July 2021).

²⁷ Transparency International Kenya <https://africog.org/wp-content/uploads/2015/10/Implementation-of-Chapter-Six-of-the-Constitution-of-Kenya-2010.pdf> (Date of use: 30 July 2021) 46.

lifestyle audits for public servants, protection of whistleblowers,²⁸ and enforcement of the right to access information.²⁹ The strengthening institutions like the Ethics and Anti-Corruption Commission³⁰ and Judiciary can also help reduce the levels of corruption in county governments in Kenya.

There is also a need to increase the citizens' involvement in governance at the county level. This will enable Kenya's citizens to demand accountability from the county leadership, thus minimizing the window for leaders to get involved in corrupt practices. The normative structures for participation are already in place, starting with the Constitution of Kenya 2010.³¹ Some of the interventions that can make public participation effective include; civic education, public communication, proper access to information, zero tolerance to corruption, information technology and prudent utilization of available resources.³²

South Africa's experience with devolution demonstrates that citizen participation by the less privileged in the local government sphere is minimal. Citizen participation is mostly influenced by the elite and political class.³³ It is argued that this could be one of the reasons why devolution in South Africa has not managed to break the patterns of poverty that had their foundations in apartheid. If the elite and the political class influence the process of development, the benefits of development will invariably be in their favour and not have less impact on the less privileged who are the majority. With the South African experience in mind, the need to enhance public participation in Kenya for accountability and the fight against corruption cannot be overstated.

²⁸ Oredi <https://www.businessdailyafrica.com/bd/opinion-analysis/letters/letters-protection-of-whistleblowers-key-in-war-on-graft-2237018> (Date of use: 30 July 2021).

²⁹ UNCAC Civil Society Coalition <https://www.article19.org/wp-content/uploads/2017/12/UNCAC-Information-Leaflet-ENG.pdf> (Date of use: 30 July 2021).

³⁰ See generally, Njagi 2017 *Int'l J L & Pol'y* 52-63.

³¹ Article 10(2)(a) of the Constitution of Kenya 2010 makes participation a national value and principal of governance; Sections 94, 95, 102(i), 115 of the County Government Act 17 of 2012; Section 207 of the Public Finance Management Act of 2012 and Section 48; Schedule 2 part 2 of the Urban Areas and Cities Act 13 of 2011 among other laws.

³² Githinji <https://www.afrocave.com/make-public-participation-in-kenyan-counties-effective/> (Date of use: 12 February 2021); Khakula and Muendo 2019 *Afr J Comp Const'l L* 103-127.

³³ Claasen "South Africa: Country Survey on Legal Arrangements or Decentralized Governance" 18.

7.3.4 Inability to Fully Absorb Health Services as a Devolved Function

For the RTD to be a reality in Kenya, there is a need for county governments to absorb health services entirely as a devolved function. The right to health is a key enabler of the RTD for two reasons. Firstly, it is a justiciable socio-economic human right under Article 43 of the Constitution of Kenya 2010. Judging by the unanimity of rights theory, that the enjoyment of one right is necessary for the enjoyment of others,³⁴ the enjoyment of the right to health, therefore, leads to the realisation of the RTD. This is because it enables a process of development in which all human rights are realised. Secondly, the right to health invariably improves the physical and mental well-being of a human person, thus increasing their capabilities. Going by Sen's arguments, the RTD involves increasing the capabilities of a human person.³⁵

The health sector in Kenya suffers from acute underfunding.³⁶ This has resulted in understaffing or staff shortages, discrepancies in remuneration across different counties, delayed salaries, lack of medical supplies and equipment and poor infrastructure in county health facilities.³⁷ Currently, the government's spending on health is at 9.2% of the total annual budget,³⁸ which is way below the recommended 15% mandated by the Abuja Declaration.³⁹

One of the recommended ways of addressing the poor delivery of health services is to incentivize health workers to motivate them.⁴⁰ Studies have shown that providing monetary and non-monetary incentives to employees in the health sector increases their job motivation.⁴¹ Incentives include; training opportunities, better remuneration, improved terms of service, and improving the – health-worker-patient ratio.⁴² This strategy will require adequate financing hence the need to increase the government's budgetary allocations towards the provision of health services.

³⁴ Minkler and Sweeney 2011 *HRQ* 354.

³⁵ Sen *The Idea of Justice* 253-290.

³⁶ Masaba *et al* 2020 *Public Health* 139.

³⁷ Masaba *et al* 2020 *Public Health* 139.

³⁸ Mutua and Wamalwa *Leasing of medical equipment project* 9.

³⁹ *Abuja Declaration and Frameworks for Action on Roll Back Malaria* at para 25 <https://au.int/sites/default/files/pages/32894-file-2001-abuja-declaration.pdf> (Date of use: 4 August 2021).

⁴⁰ Masaba *et al* 2020 *Public Health* 139.

⁴¹ Onyango and Wanyoike 2014 *Eur J Mat Sci* 11-15.

⁴² Njuguna, Mwangi and Kamau 2014 *Journal of Health Care for the Poor and Underserved* 204-214.

Experts have argued that county governments in Kenya have been unable to effectively absorb and manage health services as a devolved function⁴³ because each county government implements its human resources policies separately. This lack of harmonized approach to the human resources component in the health sector has led to disparities in terms of service for health workers in Kenya hence the perennial cases of industrial action. Experts have therefore argued that the solution to the never-ending industrial action by health workers is to create a constitutional commission similar to the public service commission (PSC) or teachers' service commission (TSC) to manage the human resources component of the health services.⁴⁴

7.3.5 Poor Synergy between County Governments the National Government

The poor synergy between the National government and the County governments in Kenya can be attributed to poor coordination or communication between the two levels of government. The Constitution of Kenya makes provision for relations between the two levels of government. Article 189 provides a legal framework for consultation, collaboration and dispute resolution between Kenya's national government and county governments.

The Intergovernmental Relations Act⁴⁵ is the substantive law that operationalizes Article 189 of the Constitution of Kenya 2010. The Act establishes a comprehensive framework for consultation and cooperation between the national and county governments and establishes a mechanism for resolution of intergovernmental disputes under Articles 6 and 189 of the Constitution of Kenya.

The Act also provides a system for consultative consideration of any matter that affects relations between the two levels of government and county governments.⁴⁶ The Act creates a National County Government Co-ordinating Summit, which is the apex body for intergovernmental relations. Its membership comprises the governors of all 47 counties in Kenya chaired by the president or deputy president and the

⁴³ Mwai *et al* "Devolution of healthcare in Kenya assessing county health system readiness in Kenya: A review of selected health inputs" (Technical Report 2014) 7.

⁴⁴ Masika *The Conversation* 14 December 2016.

⁴⁵ Act 2 of 2012.

⁴⁶ Section 3(e).

chairperson of the Council of Governors.⁴⁷ There is need to fully operationalize the Act to streamline the synergy between the two levels of government in Kenya.

According to the Intergovernmental Relations Act, the functions of the summit include; “it acts as a forum for consultation and co-operation between the national and county governments; promotion of national values and principles of governance; promotion of national cohesion and unity; consideration and promotion of matters of national interest; consideration of reports from other intergovernmental forums and other bodies on matters affecting national interest; evaluating the performance of national or county governments and recommending appropriate action; receiving progress reports and providing advice as appropriate; monitoring the implementation of national and county development plans and recommending appropriate action; considering issues relating to intergovernmental relations referred to the Summit by a member of the public and recommending measures to be undertaken by the respective county government; coordinating and harmonizing the development of county and national governments policies; facilitating and coordinating the transfer of functions, power or competencies from and to either level of government; and performing any other function that may be conferred on it by legislation or that it may consider necessary or appropriate”.⁴⁸

These provisions of the Act have not been fully utilized, leading to dysfunctional programmes such as the MES that cost county governments a loss of Kshs 65B. The revenue allocation dissension between the two levels of government that culminated in *Council of Governors & 47 Others v Attorney General & 3 Others*⁴⁹ could have been avoided if there was more consultation and coordination between the two levels of government under the provisions of the Intergovernmental Relations Act.

The relationship between the national and county governments in Kenya can be improved significantly by using the existing legal framework under the Constitution and the Intergovernmental Relations Act. The legal framework allows both levels of government to harmonize and synchronize their policies leading to reduced conflict

⁴⁷ Section 7.

⁴⁸ Section 8 of the Intergovernmental Relations Act 2 of 2012.

⁴⁹ *Council of Governors & 47 Others v Attorney General & 3 Others (Interested Parties); Katiba Institute & 2 Others (Amicus Curiae* [2020] eKLR.

and better service delivery. This will allow county governments to concentrate on discharging their constitutional functions, including their RTD related functions.

7.4 Recommendation 2: Devolving Human Rights Practice in Kenya

This thesis has established that the normative and institutional structures under devolution can cause development policies to be aligned with the RTD due to the linkage between the objects of devolution in Kenya and the elements of the RTD. The achievement of the RTD through devolution cannot be by inference, fluke or sheer luck. There must be a deliberate and conscious effort to realise the RTD within the county governments.

The African development narrative depicts a disconnect between human rights practice and development policies.⁵⁰ Despite having impressive binding provisions on the RTD in the ACHPR,⁵¹ Africa's lack of human security due to poverty and under-development persists.⁵² The ACHPR does not provide any comprehensive blueprint on how the RTD should be realised by member States. Article 22(2) merely provides that States shall have the duty, individually or collectively, to ensure the exercise of the RTD but does not provide the practical steps States ought to take to ensure the exercise of the RTD.⁵³

The South African experience with devolution demonstrated that despite having elaborate normative and institutional structures to operationalize decentralized development, more has to be done beyond legislation for people's welfare actually to improve. While there is no doubt that the RTD is an implied right under the Constitution of South Africa⁵⁴ and thus justiciable,⁵⁵ the justiciability of the RTD has failed to bring any meaningful socio-economic transformation to the majority of Black

See generally, Burgis *The Looting Machine*. The author argues that Africa has 30% of the world's minerals, 14% of the world's population yet 43% of the world's poor live in Africa. He attributes this to development that amounts to looting the continent's resources instead of benefiting its people.

⁵¹ Article 22(1) "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development."

⁵² Resolution on Economic, Social and Cultural Rights in Africa - ACHPR/Res.73(XXXVI)04 (Pretoria Declaration on Economic, Social and Cultural Rights in Africa 2004).

⁵³ Okafor "A regional perspective" 377; Mbondenyei *International Human Rights* 212.

⁵⁴ Gutto "The right to development" 109, 109-118; see also the First Periodic Report of South Africa to the African Commission 38th Ordinary Session (2005) para 325.

⁵⁵ Ngang 2019 *SAJHR* 46-47.

South Africans.⁵⁶ More than 25 years later, South Africa has not yet achieved equity in development and grapple with poverty and unemployment.⁵⁷

Similarly, despite express Constitutional recognition in Ethiopia,⁵⁸ the RTD faces enforcement challenges such as a lack of enabling legislation.⁵⁹ This means that a lot more has to be done to convert the Constitutional provisions on the RTD to real benefits for the people of Ethiopia.

This thesis recommends pursuing a human rights-based approach to development within the devolved government structure because of the strategic role of the county governments in Kenya in championing people centred grassroots development. A deliberate effort has to be undertaken to mainstream the RTD in county development policies in Kenya. This will make it possible to translate the promise of a "RTD compatible development paradigm" contained in the devolution framework as argued in this thesis, into tangible and practical gains for Kenyans.

This proposal is justified because most County Integrated Development Plans (CIDPs) do not incorporate human rights in their execution strategies yet the importance of incorporating human rights in development has been underscored by development authorities such as the Bretton Woods Institutions.⁶⁰ The Nairobi County CIDP 2018-2022 merely makes a cursory remark about human rights in the context of forced evictions. The plan recommends the provision of low-income housing for victims of forced evictions and the enactment forced eviction laws.⁶¹ What is more worrying is that the proposals have been put under the ministry of lands and urban settlement, which is ill-equipped to deal with human rights matters.

The Vihiga county CIPD 2018-2022 does not mention human rights apart from the need to harmonize the development plan with the SDGs,⁶² while the Wajir County

⁵⁶ Ngang 2019 *SAJHR* 46-47.

⁵⁷ Ngang 2019 *SAJHR* 39; Gumede *Mail & Guardian* 2–8 June 2017 1.

⁵⁸ Constitution of the Federal Democratic Republic of Ethiopia, 1995 Art 43.

⁵⁹ Woldemichael *PROLAW SJRLD* 15-16.

⁶⁰ World Bank *World Development Report* 4.

⁶¹ County Government of Vihiga <https://devolutionhub.or.ke//resource/nairobi-county-integrated-development-plan-2018-2022> (Date of use: 19 September 2021) 300.

⁶² County Government of Vihiga <https://vihiga.go.ke/documents/2018-2022%20CIDP%20Popular%20Version%20FINAL.pdf> (Date of use: 19 September 2021) at 5.

CIDP 2018- 2022 does not refer to human rights at all.⁶³ The Mombasa CIDP 2018-2022 only makes reference to human rights regarding the rights of children and health rights. It proposes the construction of rescue centres for children and hospitals to realise the right to health.⁶⁴

Makueni County CIDP 2018-2022 indirectly references human rights by aligning the development plan with the SDGs.⁶⁵ The CIDP also focuses on the socio-economic development of the people by increasing access to health care, enhancing education and social welfare.⁶⁶ Arguably, this deliberate effort by Makueni County to integrate human rights in development planning has the effect of increasing the capabilities of the human person, thus culminating in the realisation of the RTD.

The realisation of the RTD by County governments in Kenya should be understood as a legal obligation owed to the people. It is not a favour, an act of charity or benevolence but a protected entitlement under the law. Chapter 4 of this thesis argued that the objects of devolution and functions of devolved governments in Article 174 and schedule 4 of the Constitution, respectively, give rise to an obligation to realise the RTD. This is because the functions of County governments refer to all developmental aspects of the socio-economic welfare of the human person, including the realisation of all human rights and fundamental freedoms. It is for this reason that county governments are, in fact, duty bearers of the RTD.

A Rights-based approach to development at the county level expands human freedoms and capabilities, creating more opportunities and options for the people of Kenya. Therefore, the need to incorporate human rights in county CIDPs cannot be overstated.

This thesis also recommends devolving human rights institutions by law to mainstream human rights in county operations. Currently, there are no human rights institutions established by law within the governance structures of county

⁶³ County Government of Wajir <https://de-volutionhub.or.ke//resource/wajir-county-integrated-development-plan-2018-2022> (Date of use: 19 September 2021).

⁶⁴ County Government of Mombasa <https://devolutionhub.or.ke/resource/mombasa-county-integrated-development-plan> (Date of use: 19 September 2021) at 21, 83, 89.

⁶⁵ Government of Makueni County <https://makueni.go.ke/2018/documents/cidp-2018-2022/> (Date of use: 10 September 2021) at 7.

⁶⁶ Government of Makueni County <https://makueni.go.ke/2018/documents/cidp-2018-2022/> (Date of use: 10 September 2021) at 22.

governments. Examples of such include independent human rights commissions which can be referred to as “County Human Rights Institutions (CHRIs). It is crucial to include human rights institutions within the county government structure because these institutions will provide much-needed guidance to the county governments in fulfilling their human rights obligations.

7.5 Recommendation 3: Giving Constitutional Recognition to the RTD in Kenya

The RTD as a human right has not been expressly recognized in the Constitution of Kenya 2010. It is an implied right, as argued in Chapter 2 of this thesis. Lack of express recognition of the RTD in the Constitution of Kenya 2010 does not diminish its status nor put its justiciability into question for two reasons. Firstly, the Bill of Rights in Kenya’s Constitution recognises other rights or conferred by law as long as they are not inconsistent with the Constitution.⁶⁷ In that respect, there is no doubt that the RTD is an inalienable right in international law to the extent that it can be considered as customary international law.⁶⁸ Secondly, the RTD was expressly recognized under the ACHPR, which being ratified by Kenya⁶⁹ and thus part of the law of Kenya.⁷⁰

This thesis proposes giving constitutional recognition to the RTD so that the "identity of the right" can be transformed from being a matter of "international law" to a "domestic issue". The current domestic status of the right does not give it the prominence it deserves because the RTD concerning Kenya has only been litigated at the international level in the *Endorois* and *Ogiek* cases discussed in Chapter 2 of this thesis.

In addition to Ethiopia, a few countries in Africa have given the RTD constitutional recognition. In Uganda, the RTD⁷¹ “guides all organs and agencies of the State, all citizens, organisations and other bodies and persons in applying or interpreting the

⁶⁷ Article 19(3)(b) of the Constitution of Kenya 2010.

⁶⁸ Okafor 1995 *AJICL* 872.

⁶⁹ Adopted June 27, 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), entered into force Oct 21, 1986. Kenya ratified the treaty on 23/01/1992. <http://www.achpr.org/instruments/achpr/ratification/> (Date of use: 17 July 2017).

⁷⁰ Article 2(6) of the Constitution of Kenya 2010.

⁷¹ Constitution of the Republic of Uganda, National Objectives and Directive Principle of State Policy. Part IX titled The Right to Development provides: "In order to facilitate rapid and equitable development, the State shall encourage private initiative and self-reliance."

Constitution or any other law and in taking and implementing any policy decisions for the establishment and promotion of a just, free and democratic society".⁷² However, the RTD cannot be enforced in the courts of Uganda because it is part of the National Objectives and Directive Principles of State Policy, which are not capable of judicial enforcement.⁷³ The president instead reports to parliament every year on progress made to achieve these objectives and principles.⁷⁴

Malawi has also given constitutional recognition to the RTD.⁷⁵ According to the Constitution of Malawi, individuals and persons have a right to development and therefore to the enjoyment of economic, social, cultural and political development with special consideration given to women, children and persons with disabilities in applying the right. The State is therefore required to take all necessary measures for the realisation of the RTD. Such measures include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure. The State is also obligated to take measures to introduce reforms to eradicate social injustices and inequalities, respect the right to development and justify its policies in accordance with the responsibility to respect the RTD.

It is submitted that the RTD in the Constitution of Malawi is better articulated than in the Constitutions of Uganda and Ethiopia and thus can transform the RTD from the realm of theory to practice within the domestic plane. This is because of the express requirement that the government has to design development policies that are compliant with the RTD. The fact that the Constitution also clearly identifies the elements of the RTD, such as equality of opportunity, among others. The said potential notwithstanding, Kapindu notes that judicial enforcement of the RTD in Malawi has been disappointing and more needs to be done to make the citizens and the judiciary more aware of the right.⁷⁶

⁷² Constitution of the Republic of Uganda, National Objectives and Directive Principles of State Policy, Objective I(i).

⁷³ Gebeye 2017 *Afr J Comp Const* L 18.

⁷⁴ Constitution of the Republic of Uganda, National Objectives and Directive Principles of State Policy, Objective I(i).

⁷⁵ Article 31 of the Constitution of the Republic of Malawi.

⁷⁶ Kapindu 2013 *AHRJ* 125-151.

Drawing from the Malawian, Ethiopian and Ugandan experience, this thesis proposes an express constitutional recognition of the RTD in the Kenyan Constitution as a justiciable right with the national and county governments as duty bearers of the right. With such constitutional recognition, the inclusion of the RTD by the county governments in development policies in Kenya will no longer be an afterthought but a conscious and deliberate act, thus enhancing its realisation.

7.6 Recommendation 4: Raising Awareness About the RTD in Kenya

There is a lack of awareness of the RTD in Kenya. The jurisprudence from Kenyan courts informs this position. There is no single case involving the realisation of the RTD that has been heard and determined by the Constitutional Court in Kenya.⁷⁷ This lack of awareness affects the ability of the government to include the RTD in its development policies.

It is recommended that the government works in partnership with other stakeholders such as the civil society to raise awareness of the RTD both at the national and county levels of government. This can be achieved through strategic training and workshops for the county government policy-makers, the judiciary and other stakeholders in the justice system, national civic education at the grassroots and publication of information about the RTD.

Raising awareness about the RTD will give the right the prominence it deserves and thus contribute towards its realisation, particularly within the framework of devolution in Kenya.

7.7 Area(s) of Further Research

This thesis focused on realising the RTD nationally by creating appropriate development policies such as devolution in Kenya. Apart from pursuing the realisation of the RTD domestically, countries have an obligation under the UNDRTD to take steps, individually and collectively, to formulate international development policies to facilitate the full realisation of the RTD.⁷⁸ The realisation of

⁷⁷ This was ascertained by the researcher by looking at the database of reported cases on official law reporting institution in Kenya; National Council for Law Reporting www.kenyalaw.org/caselaw/ (Date of use: 20 September 2021).

⁷⁸ Article 4 of the UNDRTD.

the international dimension of the RTD in Kenya is not addressed herein because it was beyond the scope the thesis. There is a need to carry out further research on relationship between devolution and the realisation of the international dimension of RTD in Kenya.

A further research question from this thesis is how the RTD could be realised in Kenya through regional cooperation. For instance, regional integration under the East African Community (EAC), which Kenya is part of, could augment the realisation of the RTD. Borrowing from the experience of the European Union, regional integration has successfully been used to integrate human rights in development policies,⁷⁹ thus leading to the realisation of the RTD. Generally, a regional approach to the promotion and enforcement of human rights seems to have gained traction⁸⁰ and, therefore, the potential of a regional institution like EAC to realise the RTD needs to be explored through further research.

There is also a need to carry out further research on the long-term impact of devolution on the RTD in Kenya as devolution has only been operational from 2013, that is; for the last eight years. Eight years may not be sufficient to generate enough national data to concretize the arguments in this thesis, thus the need to test the hypothesis again using data generated over a long time.

⁷⁹ Beke *et al* <https://repository.gchumanrights.org/handle/20.500.11825/72#> (Date of use: 27 July 2021); D'Hollander, Marx and Wouters https://ghum.kuleuven.be/ggs/publications/wor king_papers/2014/134dhollandermarxwouters (Date of use: 27 July 2021].

⁸⁰ Sarkin 2008 *Inter-Am & Eur Hum Rts J* 199-217.

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