

State Services, Inclusion and Pluralism

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1.0 Introduction

In the past, state services were dominated by the ethnic groups in charge of the state (especially the security forces/services and the public service generally) a matter of great concern to the excluded communities. Members of minorities have had little prospects of holding senior positions. Exclusion from public service affects a community seriously in other ways too—in terms of access to important information about government policies, and more importantly, being neglected in government plans and programmes.

The Constitution has various provisions about diversity and inclusion in public office and employment. Security services¹ and commissions and independent offices² are particularly required to reflect national diversity. Affirmative action—required by the Constitution³—is intended to ensure that special efforts are made to compensate for past discrimination and disadvantage, including for members of minorities and the marginalised for whom there are to be special opportunities for employment.⁴ Affirmative action is not limited to the public sector.

The study first briefly outlines the conceptual, constitutional and legal requirement for inclusion and pluralism in state services before embarking on the main part of the study which is to determine the extent of inclusion and pluralism of state services at the national and at the county level 6 years since the promulgation of the Constitution. State services for the purposes of this chapter include state corporations, national government public service, Judiciary, security sector, county bureaucracy, and universities.

2.0 Brief conceptual analysis of pluralism and inclusion

There is no one single universal definition of pluralism nor inclusion. Several definitions focusing on, among others, what pluralism seeks to achieve, how it can be achieved, what it is not, its principles and distinction from multiculturalism have been put forward. Ghai has defined pluralism as, ‘a particular kind of policy advocated for adoption in multi-ethnic or multi-cultural states’ as a mode of co-existence.⁵ Fessha agrees with Ghai that pluralism plays a role in the promotion of coexistence in plural societies and goes ahead to state that the principle of recognition of difference, however, need not be realised in every multi-ethnic state. Fessha, argues that the politics of pluralism comes to the fore only when historical, economic and social circumstances deem cultural distinctiveness a politically relevant divide.⁶ Kamali has on his part

¹ Article 238 (2) (d) Constitution of Kenya 2010 (CoK). “(d) recruitment by the national security organs shall reflect the diversity of the Kenyan people in equitable proportions”.

² Article 250 (4).

³ Article 27.

⁴ Article 56 (c).

⁵ Ghai YP & Cottrell JG (eds), ‘Ethnicity, nationhood and pluralism’ in Yash Pal Ghai & Jill Cottrell Ghai (eds) (2013) *‘Ethnicity, nationhood and pluralism: Kenyan perspectives’* (Global Centre for Pluralism and Katiba Institute, Ottawa and Nairobi, (2013), p.1.

⁶ Fessha TJ, “Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia” unpublished PhD thesis, University of the Western Cape, 2008, p 66, ‘Cultural distinctiveness does not always suggest that a multi-ethnic state should organise itself along ethnic lines. The politics of pluralism comes to

defined pluralism as, ‘acknowledging and engaging differences without any attempt to impose hegemony’.⁷ If Kamali’s definition is merged with Ghai’s definition, it will be said that in order to achieve co-existence in diverse societies, diversity should be recognized, be proactively understood, and there be no attempt for one group to dominate over another. Any breach of any of the above conditions is likely to cause group conflicts. Many other definitions support the ones above. The Harvard University Pluralism Project, for example, has proposed the most comprehensive definition, suggesting that pluralism is:

‘not diversity alone, but the *energetic engagement with diversity*’⁸; ‘not just tolerance, but the *active seeking of understanding across lines of difference*’⁹; ‘not relativism, but the *encounter of commitments*’¹⁰; ‘*based on dialogue*’.¹¹

An important element in this is that pluralism is about active continuous engagement across lines of difference. Similarly, Akhters has argued that pluralism is born out of humility and aversion to being judgemental while tolerance is inherently arrogant and regards diversity as something negative. Also, that tolerance privileges one’s own view over those of others and ‘presupposes that the followers of other traditions are misled and deserve compassion’.¹² Norman has gone further and introduced respect for the rights of individuals and groups as other elements of pluralism. He observes that,

The pact that holds plural societies together requires agreement and consensus on certain principles: respect for different ethnic and cultural groups and for the rights of individuals, and commitment to counter prejudice and discrimination with support for the values associated with toleration¹³

Further, Norman argues that ‘the challenge for a plural society ... is to establish common principles without hindering the maintenance of diverse group identities.’¹⁴ This definition points at the need to focus on working together, as opposed to separately, but not to interfere with what makes groups and individuals different.

The Global Centre for Pluralism (GCP) has defined pluralism as “the valuing of the human diversity through mutual respect and recognition through inclusive citizenship”.¹⁵ This definition explains that the elements of mutual respect and recognition comprise active reorientation of the

the fore only when historical, economic and social circumstances deem cultural distinctiveness a politically relevant divide. The service of the principle of recognition is necessitated not based on the acknowledgment that cultural distinctness is a universal human interest that needs recognition in the public sphere, but on historical and other contingencies that warrant the adoption of ‘a politics of difference’. This says the principle of recognition is not a necessary part of an ideal conception or theory of democratic society; it need not be realised in every polity’.

⁷ Kamali MH, ‘Diversity and pluralism: a qur’anic perspective’ (2009) 01 *LAIS Journal* 27.

⁸ Mere diversity without real encounter and relationship will yield increasing tensions in our societies.

⁹ Tolerance is too thin a foundation for a world of religious difference and proximity. It does nothing to remove our ignorance of one another, and leaves in place the stereotype, the half-truth, the fears that underlie old patterns of division and violence. In the world in which we live today, our ignorance of one another will be increasingly costly.

¹⁰ Holding our deepest differences, even our religious differences, not in isolation, but in relationship to one another.

¹¹ Diana LE, ‘Harvard University pluralism project’ (2006) <http://pluralism.org/what-is-pluralism/> (accessed 24 June 2016).

¹² Akhter M. ‘Culture of Respect: a Muslim perspective’ www.ispi-usa.org/docu/Cultureofrespect.ppt (accessed 18 June 2016).

¹³ Norman R. The idea of pluralism in the United States’ p.2 ourpluralhistory.stcc.edu/resources/Curriculum/TheIdeaofPluralism.pdf (accessed 18 July 2016).

¹⁴ Norman R. The idea of pluralism in the United States’ p.2 ourpluralhistory.stcc.edu/resources/Curriculum/TheIdeaofPluralism.pdf (accessed 18 July 2016).

¹⁵ Global Centre for Pluralism (GCP) website, ‘Pluralism’ <http://www.pluralism.ca/en/programs/pluralism-drivers.html> (accessed 10 July 2016).

society with “its political, social, economic and educational systems to recognize and secure the equality of every person as a citizen”.¹⁶ This definition implies that in order to achieve coexistence there is need to have equality of every person hence introducing an interesting link between group and individual rights; that none can be enjoyed without the other.

Besides the above definitions, pluralism has also been differentiated from another concept called multi-culturalism which Ghai has defined as,

systems which provide for the constitutional or legal recognition of cultural communities, often as corporate entities, sometimes with a measure of self-government or autonomy in matters closely connected to their culture or religion.¹⁷

Multi-culturalism has been blamed for advocating permanent separate coexistence of groups, which risks institutionalising differences instead of focusing on the positives- this differentiates it from pluralism. By focusing on differences so much, multi-culturalism has been said to encourage exclusion and tolerance without any active engagement among various diversity both of which are undesirable according to the pluralism theory and are likely to lead to conflicts. It would seem, therefore, that multiculturalism does not seek to build a society that is focused on commonalities while pluralism is, at its core, a positive response to diversity.¹⁸

The challenges of separate coexistence of groups include that, firstly, members of separate groups need to tolerate each other which means that some groups may consider themselves better than other groups, secondly, it would perpetuate or even cause unequal development among groups and individuals leading to hegemony of some groups over others and thirdly, it does not offer an opportunity for active pursuit of understanding and engagement among groups. With the exception of their hegemonistic design,¹⁹ the former South African apartheid system of government and the American ‘separate but equal system’ can be good examples of multi-culturalism. The US Supreme Court in *Brown v Board of Education*²⁰ said that ‘racial segregation of children in public schools violated the Equal Protection Clause of the Fourteenth Amendment’. The decision was in favour of integration as opposed to segregation thus pointing at engagement among groups as a requirement for equality as opposed to simply tolerance without the need for engagement.

The definitions above all point at four main elements of pluralism. They are: pro-active (mutual commitment)/energetic continuous engagement among various diversities; understanding of differences; recognition and mutual respect for differences (diversity) and the rights of groups and individuals; and inclusive citizenship without imposition of hegemony (domination) by groups and/or individuals (not assimilation). Having established the above elements, the next

¹⁶ GCP website ‘Pluralism’ (accessed 10 July 2016).

¹⁷ Ghai YP & Cottrell JG (eds), ‘Ethnicity, nationhood and pluralism’ in Yash Pal Ghai & Jill Cottrell Ghai (eds) (2013) *Ethnicity, nationhood and pluralism: Kenyan perspectives* (Global Centre for Pluralism and Katiba Institute, Ottawa and Nairobi, 2013) 2.

¹⁸ GCP website ‘Pluralism’ (accessed 10 July 2016).

¹⁹ Parris M. ‘Multiculturalism. A dangerous word...just like apartheid’ (2004) <https://www.thetimes.co.uk/article/multiculturalism-a-dangerous-word-just-like-apartheid-57kmd6qkl02> (accessed 13 December 2017).

²⁰ 347 U.S. 483 (1954).

question to ask ourselves is how societies can apply the pluralism concept. Fessha argues that the politics of pluralism comes to the fore only when “historical, economic and social circumstances deem cultural distinctiveness a politically relevant divide”. Fessha’s assertion creates a controversy as to when the pluralism theory should take effect, a question that will not be addressed in this particular study. This paper argues that the existence of diversity in any country (in this case ethnic diversity) creates an adequate situation for the application of the pluralism principles to, as Ghai and others have argued, promote coexistence.

Inclusion and pluralism are closely related. Miller and Katz’s definition of inclusion, for example, to a large extent seems to cover most of the elements identified in the definition of pluralism. They have defined inclusion to include a sense of belonging, feeling respected, valued for who you are, feeling a level of supportive energy and commitment from others. Saloojee has defined inclusion as,

a proactive approach to value all people and groups, create conditions for them to live with dignity including by fulfilling their basic needs, give them an opportunity to participate fully in political, cultural, civic and economic life because they feel valued, and their differences be respected...²¹

Similarly, Silver while recognising that the definition of inclusion is determined by context, has defined it as,

one of a multi-dimensional, relational process of increasing opportunities for social participation, enhancing capabilities to fulfil normatively prescribed social roles, broadening social ties of respect and recognition, and at the collective level, enhancing social bonds, cohesion, integration, or solidarity.

Silver has further said that

social inclusion may refer to a process encouraging social interaction between people with different socially relevant attributes or an impersonal institutional mechanism of opening up access to participation in all spheres of social life²²

Shookner argues that social inclusion can be achieved through social justice; valuing diversity; availing opportunities for choice; entitlements to rights and service; and working together.²³

The above definitions on inclusion can all be located within the pluralism principles derived earlier. Some of them have focused on the elements from which the principles have been derived. Aspects such as ensuring people live in dignity, their basic needs are fulfilled, feel valued, respected, have choices, given capabilities to participate and treated justly are all the factors underlying the various pluralism principles. The only difference that can be noted between the inclusion and pluralism definitions is that in addition to the elements making up inclusion,

²¹ Central Department of Sociology/Anthropology, Tribhuvan University, ‘The Nepal multidimensional social inclusion index: diversity and agenda for inclusive development’ (2014) P. 2, Kathmandu Nepal.

[file:///C:/Users/ADMIN/Downloads/Nepal-Inclusion-Index-Tribuvan%20\(1\).pdf](file:///C:/Users/ADMIN/Downloads/Nepal-Inclusion-Index-Tribuvan%20(1).pdf)

²² Silver H ‘The contexts of social inclusion’ DESA Working Paper No. 144 (2015) 3.

http://www.un.org/esa/desa/papers/2015/wp144_2015.pdf.

²³ As no. 21 above.

pluralism also recognises/stresses on the need for continuous engagement and the non-imposition of hegemony. The pluralism principles, therefore, being broader, will be applied in this study to assess the status of ethnic inclusion.

The International Institute for Social Studies (IISS) has developed Indices of Social Development that brings together 200 indicators to track how different societies are performing along six dimensions of social development among them inclusion of minorities where it measures levels of discrimination against vulnerable groups. Out of the 26 indicators on the level of inclusion of minorities, among the top seven most used include: rating on level of uneven economic development along group lines; level of ethnic tensions; level of economic and political discrimination against minorities; and Educational Disparity of Ethnic Groups.²⁴ This study will qualitatively use these indicators to assess the extent to which the pluralism principles have been adhered to.

In Kenya, a new constitution was enacted in 2010 which, among other objectives, sought to help to address the root causes of the 2007/2008 post-election ethnic violence and the previous suspicion and mistrust among ethnic groups in Kenya. The Kenyan 2010 Constitution seeks to not just define the structure of government, but also how the Kenyan people should relate with each other in the economic, social, political and economic spheres. One such area is in State services and in particular employment opportunities in the public sector which are the focus of this study. The implementation of that constitution has been ongoing since its promulgation in August 2010.

The next section looks into how the Constitution has incorporated the elements of pluralism with a specific focus on State services.

3.0 Locating the pluralism principles in the Constitution

The Constitution, among other objectives, seeks to promote peaceful coexistence by promoting pluralism in various sectors of the Kenyan economy. One of such areas is in State services which it intends that it be inclusive of all the Kenyan diversities. The Kenya National Dialogue and Reconciliation (KNDR) agreement signed on 1 February 2008 recognised the root causes of the 2007/2008 post-election violence as including poverty, inequality and regional imbalances, and unemployment and lack of accountability all of which the Constitution seeks to address and can be traced in the above mentioned pluralism principles.

3.1 Recognition and mutual respect for differences and the rights of groups and individuals

This principle creates both positive and negative obligations on relating with diversity and it can be located right from the preamble of the Constitution which speaks of: “pride in our ethnic, cultural and religious diversity” and Kenyans’ determination to “live in peace and unity as one indivisible sovereign nation.”

²⁴ International Institute for Social Studies (IISS) ‘Indices of social development: inclusion of minorities’ <http://www.indsocdev.org/inclusion-of-minorities.html> (accessed 13 December 2017).

The Constitution also recognises the desire of all Kenyans for “a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.” Ghai argues that the principle seeks to balance the respect for ethnic diversity, promotion of a Kenyan identity and national unity with the protection of the individual rights.²⁵

The recognition of diversity alone is, therefore, not sufficient. There ought to be respect for that diversity including for group and individual rights. The C recognises that ‘every person has inherent dignity and the right to have that dignity respected and protected’.²⁶ The devolved governance provisions of the C are even more explicit. Article 174 lists the objects of devolution including ‘to foster national unity by recognising diversity’.²⁷ Also that devolution seeks ‘to protect and promote the interests and rights of minorities and marginalised communities’.²⁸

Many other provisions in the Constitution and other laws seek to promote the pluralism principle of recognition and mutual respect.

3.2 Pro-active/energetic continuous engagement among various diversity

This principle creates a positive obligation on the engagement of diversity. It recognises that coexistence will only be achieved if persons and groups of people interact continuously. The Constitution has several provisions that seek to promote this principle.

Article 27, for example, says that the State must not discriminate directly or indirectly against any person on any ground, including race, sex, ethnic or social origin, religion, belief, culture, language.²⁹ The article also requires the State to take measures, legislative and others, to give full effect to the said rights. By prohibiting discrimination, the Constitution points at the need for all parties and individuals to be engaged proactively.

Article 56 provides that,

the state must ‘put in place affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life; are provided special opportunities in educational and economic fields; and are provided special opportunities for access to employment’.³⁰

Therefore, no section of the society should be left out. Indeed, the provision above also recognises that employment is a key area requiring the inclusion of minorities and marginalised groups. Further, the Constitution requires Parliament to enact legislation prescribing mechanisms to protect minorities within counties and to ensure that the community and cultural diversity of each county is reflected in its county assembly and county executive committee.³¹ Furthermore, the Constitution has mechanisms to encourage the interaction of people. Article

²⁵ Ghai YP & Cottrell JG (eds), ‘Ethnicity, nationhood and pluralism’ in Yash Pal Ghai & Jill Cottrell Ghai (eds) (2013) *Ethnicity, nationhood and pluralism: Kenyan perspectives* (Global Centre for Pluralism and Katiba Institute, Ottawa and Nairobi, (2013) 90.

²⁶ Article 28.

²⁷ Article 174(b).

²⁸ Article 174(e).

²⁹ Article 27(4).

³⁰ Article 56(a)(b)(c).

³¹ Article 197(2)(a)(b).

39, for example, provides for the freedom of movement and residence. It guarantees every person their right to freedom of movement and to reside anywhere in Kenya. Through the provisions above and many others, the Constitution seeks to ensure that the State, groups and individuals reach out to each other and to ensure that no one is left behind.

3.3 Understanding of differences

This principle underpins the constitutional provision that ‘every person has inherent dignity and the right to have that dignity respected and protected’.³² In order for people to genuinely respect and protect other peoples’ dignity they must first appreciate the need which comes from understanding differences.

Further, to promote the understanding of differences, Article 44 of the CConstitution guarantees every person the right to use the language and to participate in the cultural life, of the person’s choice.³³ This should encourage learning about each other’s diversity which will have an effect of promoting understanding and appreciation. The Constitution also requires that no one should be compelled to perform, observe or undergo any cultural practice or rite,³⁴ meaning the understanding should come from voluntary pursuit of understanding.

3.4 Inclusive citizenship without imposition of hegemony by groups and or individuals

This principle requires that, after recognising the diversity of the population, the next step should be to accommodate the various claims of the many groups of people and individuals. These claims range from political, economic, identity, cultural, and linguistic. The Constitution of Kenya has put a lot of emphasis on the need for an inclusive political system but also equitable sharing of national resources which include employment opportunities.

The Constitution puts particular emphasis on “marginalised communities”, and uses the word marginalised eighteen times. It defines a “marginalised community” as one that because of its small population or its traditional lifestyle has for any other reason, has “been unable to fully participate in the integrated social and economic life of Kenya as a whole”, mentioning particularly hunter or gatherer and pastoral communities.³⁵

Many other provisions point at the aim of promoting inclusion. Article 10 lists inclusiveness, equality, equity, participation of the people, human dignity, social justice, integrity, human rights, non-discrimination and protection of the marginalised as some of the national values and principles of governance.

Words like human dignity, social justice and non-discrimination stress the requirement not to impose hegemony on any group or anyone. Further, Article 43 of the Constitution guarantees every person the social economic rights: discriminating against some would violate these rights. Furthermore, by guaranteeing every person the right to use the language and to participate in the

³² Article 28.

³³ Article 44 (1).

³⁴ Article 44 (3).

³⁵ Article 260.

cultural life of their choice³⁶ the Constitution explicitly rejects the domination of a group or individual(s) over others.

The Constitution sets out specific values and principles of public service. They include: “responsive, prompt, effective, impartial and equitable provision of services”,³⁷ representation of Kenya’s diverse communities, and “adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of” among other diversities, the members of all ethnic groups.³⁸ The values and principles of public service apply to public service in all State organs in both levels of government; and all State corporations and Parliament is required to enact legislation to give full effect to this Article,³⁹ which it has done in the Public Service (Values and Principles) Act, 2015.

Parliament also enacted the County Government Act (CGA) providing that “at least 30% of the vacant posts at entry level be filled by candidates who are not from the dominant ethnic community in the county”. The National Cohesion and Integration Act (NCIA), also, provides that “No public establishment shall have more than one third of its staff from the same ethnic community”⁴⁰ The CGA is the later Act so repeals the NCIA to the extent it is inconsistent with it. A question that may arise is whether a community that has a representation of 90% in the population of the county should be restricted to a representation of 70% in the county public service appointments. More so, when that community is marginalised nationally which partly contributed to the introduction of the devolved system of government. In order for the counties to ‘ensure equitable sharing of national and local resources throughout Kenya’,⁴¹ some communities, especially the hitherto marginalised, would require a representation more close to their population share in order to enhance their access to the national resources. Another reason for the need to have the hitherto most nationally marginalised communities have a representation equivalent to their population in the case where they are the most dominant in the county is because usually such hitherto marginalised communities have not migrated from their ‘home counties’ hence may not benefit a lot from the 30% allowed for other communities in other counties. The author proposes that while the dominant communities, both nationally and at the county level should get a representation of slightly less than their population share (on the basis that they have more political power which comes with many other opportunities for the members of the group) at the area under consideration, the rule should be different for the hitherto marginalised communities. The author observes that a uniform criterion will discriminate against hitherto marginalised communities and those that have very high representation in the counties. The author, therefore, proposes weighted criteria that consider, among other factors, the extent of hitherto marginalisation of a community, the extent the members of a community have migrated from their ‘home county(s)’ to other counties, and the population share of a population. The criteria should be simple to implement in order to avoid the institutionalisation of ethnicity and it should be temporary and be revised from time to time.

³⁶ Article 44 (1).

³⁷ Art 232 (c).

³⁸ Art 232 (1) (I) (ii).

³⁹ Art 232 (2) (a-c).

⁴⁰ Section 7(2) National Cohesion and Integration Act (NCIA) 2012.

⁴¹ Art 174 (g).

The next section attempts to respond to the question of how far Kenya has addressed these issues in the six years since the promulgation of the Constitution by looking at the available data on the extent of ethnic diversity in the public service.

4.0 The status of state services inclusion in Kenya

It is now seven years since the promulgation of the Constitution of Kenya 2010 and over four years since the introduction of the devolved system of government. First though, the study looks at the general ethnic composition of the Kenyan counties.

4.1 Brief analysis of the general ethnic composition in Kenya and in select counties

According to the 2009 national census, Kenya has 42⁴² ethnic communities most of which have several sub-communities.⁴³ Most of these communities reside in specific regions of the country which were followed in the demarcation of the governance boundaries by the colonial government. The provinces and the districts were associated with certain ethnic communities. More than 50 years since independence, however, people from many communities now reside in various parts of the country. No county is entirely inhabited by people from just one ethnic community.

Table 1: The distribution of the Kenyan people in the country with the dominant community for each county

Ethnic group		County/counties in which they are the major ⁴⁴ group
1.	Kikuyu	Kiambu, Muranga, Nyandarua, Nyeri, Kirinyaga, Nakuru, Laikipia (7)
2.	Kalenjin ⁴⁵	Uasin Gishu, Kericho, Bomet, 'Nandi', Baringo, West Pokot, Elgeyo Marakwet (7)
3.	Luo	Siaya, Kisumu, Migori, Homa-Bay (4)
4.	Luhya ⁴⁶	Kakamega, Vihiga, Bungoma, Busia, Trans Nzoia (5)
5.	Kamba	Makueni, Machakos, Kitui (3)
6.	Kisii	Kisii, Nyamira (2)
7.	Meru	Meru, Tharaka-Nithi (2)
8.	Embu	Embu (1)
9.	Maasai	Samburu, Narok, Kajiado (3)
10	Somali ⁴⁷	Garissa, Wajir, Mandera (3)
11	Turkana	Turkana, Isiolo (2)
12	Borana	Marsabit (1)

⁴² 1. Suba 2. Embu 3. Kamba 4. Kikuyu 5. Kisii 6. Kuria 7. Luo 8. Maasai 9. Mbeere 10. Meru 11. Nubi 12. Samburu 13. Taita 14. Taveta 15. Teso 16. Turkana 17. Tharaka 18. Luhya (so stated), 19. Kalenjin (so stated), 20. Mijikenda, 21. Swahili, 22. Kenyan Somali, 23. Ilchamus 24. Njemps 25. Borana 26. Burji 27. Dasanech 28. Gabra 29. Galla 30. Gosha 31. Konso 32. Orma 33. Rendille 34. Sakuye, 35. Waat 36. Galjeel 37. Kenyan Arabs 38. Kenyan Asians 39. Kenyan Europeans 40. Kenyan Americans 41. Isaak, 42. Leysan.

⁴³ Republic of Kenya (2010) 2009 Kenya Population and Housing Census Vol II, Government Printer.

⁴⁴ The community with more than 50% representation.

⁴⁵ Kipsigis, Nandi, Marakwet, Keiyo, Endo, El molo, Dorobo, Cherangany, Bungomek, Arror, Ogiek, Sabout, Samor, Sengwer, Senger, Terik, Tugen, Pokot, Endorois.

⁴⁶ Bakhayo, Banyala, Banyore, Batsotso, Bukusu, Idakho, Isukha, Kabras, Kisa, Marachi, Maragoli, Marama, Samia, Tachoni, Tirik, Tura, Wanga.

⁴⁷ Ajuran, Degodia, Gurreh, Hawiyah, Murile, Ogaden

13	Waswahili ⁴⁸	Mombasa (1)
14	Mijikenda ⁴⁹	Kwale, Kilifi, Tana River, Lamu (4)
15	Taita	Taita Taveta (1)
16	No 'majority' ⁵⁰	Nairobi (1)

Sources: Ministry of State for Planning, *National Development and Vision 2030* (2010).

4.2 State services inclusion at the national level

One of the main reasons for the introduction of the devolved system of government was to 'ensure equitable sharing of national and local resources throughout Kenya'.⁵¹ However, far more resources are still with the national government and its bodies. The Constitution requires that at least 15% of the government revenue must be devolved to the county governments in the form of equitable share. In the 2016/2017 fiscal year, out of Ksh1,400,578 million total preliminary revenue, the national government got Ksh1,120,578 million while all the county governments were allocated Ksh280,300million. The figures show that the national governments still retains more than three quarters of Kenya's annual revenue. In fact, the budget for the national government is always higher than the said share of which the extra amount of money is from other sources. In 2016/2017 for example, the total budget for the national government was Kshs2.479 trillion against the Ksh280.3 billion (excluding county own revenue which is usually relatively very small) that was given to the counties representing just about 11.3% of the total budget.⁵²

This means that despite the devolution of a lot of service delivery to the counties, the national government still controls massive resources. These resources that the national government is controlling also need to be distributed equitably and in accordance with the pluralism principles.

The national and county governments can achieve the pluralism requirements through their resource distribution which affect service delivery and in their employment policy. Some of the main avenues through which this can be achieved is through the National Assembly which allocates the resource use for the national government, the County Assemblies which allocate resources to the county governments, the employment opportunities at the national government level including in the police and in the armed forces, and in the various parastatals including public universities and employment opportunities at the county level. Some studies have been done to ascertain the extent to which the national government has been able to achieve pluralism in public service. The studies have mainly been done by the National Cohesion and Integration Commission (NCIC). There are also some media and official reports on the state of ethnic inclusion in various national government bodies that will be looked at in this section. The focus of the section is on the status of employment of people from various ethnic communities in Kenya at the national government.

⁴⁸ Amu, Bajuni, Chitundi, Jomvu, Munyoyaya, Mvita, Ngare, Pate, Siu, Vumba, Wachangamwe, Wafaza, Wakatwa, Wakilifi, Wakilindini, Wamtwapa, Washaka, watangana, Watikuu.

⁴⁹ Boni, Chonyi, Dahalo, Digo, Duruma, Giriama, Jibana, Kambe, Kauma, Pokomo, Rabai, Ribe, Waata

⁵⁰ Means more than 50% representation.

⁵¹ Article 174(g).

⁵² Budget highlights: the mwananchi guide (2016) available <file:///C:/Users/ADMIN/Downloads/Highlights%20of%20the%202016-2017.pdf> (accessed 15 December 2017).

4.2.1 The state of ethnic inclusion in the parastatals in terms of employment opportunities

There are at least 185 State Corporations in Kenya which employ an equivalent of about half the number of the mainstream civil service which stood at 211,000 in 2011 (NCIC, 2011).⁵³ The parastatals include the Kenya Power and Lighting Company Limited which, by 2015, had highest number of employees being 10,648; the Kenya Ports Authority with 6,543; the Kenya Forest Service with 5,067; the Kenya Wildlife Service with 4,760; the Kenyatta National Hospital with 4541; the Kenya Revenue Authority with 4,442; the Postal Corporation of Kenya with 3,595; Kenya Agricultural and Livestock Research Organization with 3,230; the Moi Teaching and Referral Hospital with 3,118; the KENGEN with 2,411; and the National Youth Service with 2282 employees. Twelve other parastatals each have between 1,000 and 2,000 employees and the rest each have less than 1000 employees.

The 2016 NCIC ethnic and diversity audit of parastatals surveyed 185 state corporations.⁵⁴ The audit looked at the proportion of people from various ethnic communities in various State Corporations and the extent to which such inclusion is in compliance with the existing legal provisions. The report determined that 129 of the corporations complied with the National Cohesion and Integration Act (NCIA) on the basis that not more than 33.3% of staff were from any single ethnic community. The study also observed that the most compliant parastatals were those that had offices in many counties in contrast to those with regional mandates. Another important observation from the study was that “in over 36.8% of the parastatals, the ethnic group of the largest number of employees is like that of the Chief Executive Officer (CEO)”⁵⁵ Further, the report found that the CEOs of all the 185 surveyed parastatals are drawn from just 18 ethnic communities meaning that there is no a single CEO from the rest over twenty five ethnic communities. The report concluded that employment in State Corporations is highly influenced by political inclinations and called for their insulation from political interference.⁵⁶

Different officers in the parastatals are appointed by different authorities and following different procedures and qualifications. The Parastatal Boards are usually composed of a Chairman; the CEO, the Principal Secretaries of the relevant Ministry and the Treasury; a representative from the Office of the Attorney General and a maximum of 11 other members. The Chairperson is appointed by the President, the other members by the relevant Minister and the CEO by the Board.⁵⁷ In the recruitment of the members of staff, the CEOs have a big say on who gets appointed to especially at the senior members of staff level (but also can influence the selection of some of their preferred individuals in the junior positions). The senior members of staff on the other hand have a big say on who gets employed at the mid and junior levels of staff. In addition, the State Corporations Advisory Committee whose 9 out of 12 members are directly

⁵³ National Cohesion and Integration Commission (NCIC), Report on ‘ethnic audit of parastatals in Kenya’ (2016) p. 55.

⁵⁴ National Cohesion and Integration Commission (NCIC), Report on ‘ethnic audit of parastatals in Kenya’ (2016) p. 61.

⁵⁵ National Cohesion and Integration Commission (NCIC), Report on ‘ethnic audit of parastatals in Kenya’ (2016) p. 27.

⁵⁶ National Cohesion and Integration Commission (NCIC), Report on ‘ethnic audit of parastatals in Kenya’ (2016) p. 28.

⁵⁷ Chapter 446 (Revised 2016 [2012]) Section 6(1) State Corporations Act.

appointed by the President can influence the recruitment in the Parastatals as part of their overall advisory role.⁵⁸

Table 2: The representation of ethnic groups in parastatals in terms of the number of members of particular communities among the general and the senior staff and CEOs (2016).

	Ethnic group & population %	Total staff no & (%)	Total senior staff no & (%)	No of CEOs & (%)
1.	Kikuyu (17.7)	20785 (20.6)	981 (25.3)	41 (22.2)
2.	Kalenjin(13.3)	15887 (15.8)	546 (14.1)	30 (16.2)
3.	Luhya (14.2)	15135 (15.0)	499 (12.9)	25 (13.5)
4.	Luo (10.8)	13999 (13.9)	619 (16.0)	30 (16.2)
5.	Kamba(10.4)	9246 (9.2)	398 (10.3)	10 (5.4)
6.	Somali (6.4)	1551 (1.5)	47 (1.2)	8 (4.3)
7.	Kisii (5.9)	6285 (6.2)	244 (6.3)	12 (6.5)
8.	Mijikenda(5.2)	5289 (5.3)	106 (2.7)	3 (1.6)
9.	Maasai (2.2)	1460 (1.5)	56 (1.4)	6 (3.2)
10	Meru (4.4)	3869 (3.8)	109 (2.8)	9 (4.9)
11	Embu (0.9)	1368 (1.4)	68 (1.8)	3 (1.6)
12	Taita (0.7)	2031 (2.0)	66 (1.7)	0
13	Suba (0.4)	158 (0.2)	11 (0.3)	1 (0.5)
14	Swahili (0.3)	527 (0.5)	11 (0.3)	2 (1.1)
15	Turkana(2.6)	452 (0.5)	5 (0.1)	1 (0.5)
16	Borana (0.4)	559 (0.6)	16 (0.4)	0
17	Samburu(0.6)	391 (0.4)	20 (0.5)	0
18	Teso (0.9)	532 (0.5)	17 (0.4)	1 (0.5)
19	Gabbra(0.2)	224 (0.2)	6 (0.2)	0
20	23 Others (2.5)	1041 (1.0)	48 (1.2)	3 (1.6)
	Total	100,789	3873 (100)	185 (100)

Table 2 above shows that in the general staff category, the Kikuyu have the highest representation which is about 20.6% followed by the Kalenjin at 15.8 %, the Luhya at 15% and the Luo at 13.9%. In total, 99.8% of all the staff are from 19 ethnic communities representing 97.5% of the population and a deviation of 2.3% which means that they are over-represented by 2.4% when compared to their population share. The other 24 communities have only a disappointing share of 0.2% of all the staff compared to their 2.5% share of the population which is a deviation of 2.3 representing a -92.2% under-representation. Under the same category, the five biggest communities have a share of 74.5 % of all the staff which is higher than their population share which is 69.7%. It is worth noting that the Somali who have a population share of 6.4% have a share of only 1.5% representing 76.6% under-representation and the Turkana who have a population share of 2.6% have a share of only 0.5% representing -80.8% under-representation. The low representation of, particularly, the Somali and the Turkana shows not just discrimination in terms of recruitment but also in terms of educational opportunities.

⁵⁸ Chapter 446 (Revised 2016 [2012]) Section 26-27 State Corporations Act.

In the senior staff category, the Kikuyu have a share greater than in the general staff, namely 25.3%, followed by the Luo at 16%, the Kalenjin at 14.1%, the Luhya at 12.9% and the Kamba at 10.3%. The Kikuyu, Luo, Kamba and Embu show an increase in representation from the general staff category to the senior while the Kalenjin, Luhya, Meru and Mijikenda (greatest drop) are among those showing a drop. The Somali have an even smaller percentage (1.2%) than their already low general staff representation and the Turkana only 0.1% representing an 80% drop (and only 3.8% of proportionate presence).

Among the Chief Executive Officers (CEOs), the Kikuyu community is leading with 22.2%, followed by the Kalenjin and the Luo at 16.2%, and the Luhya at 13%. In total, 16 communities have at least one CEO in the parastatals, but there are none from the other 26 ethnic groups in Kenya. Other notable trends include a general increase in the representation for most of the big communities at the level of the CEOs compared with the level of the general staff (which was also the general trend at the senior staff level) The following, however, show big changes: the Kamba with a representation of just 5.4% (from 10.3% of senior staff), and the drop in the representation of the Mijikenda to 1.6% from 5.3% in the general staff, while there are increases in the representation of the Somali from 1.5% in the general staff to 4.3%, and of the Maasai from 1.5% to 3.2%.

Other general observations include that the Kamba consistently have low percentages compared to other communities with a similar percentage share in the national population, the Kikuyu have the highest percentage in all cases, the Luo tend to have a higher percentage in the senior positions than in the general staff category and vice versa for the Mijikenda and the 23 smallest ethnic groups have, in all cases, a smaller representation than their population share.

In order to determine whether there are other considerations in deciding who to employ from what ethnic community, this study will compare the staff patterns at the big parastatals with more than 1000 members of staff (likely to be more established and with more resources) and the small ones with far fewer members of staff (less than 25).

Table 2.1: Ethnic representation in the parastatals with more than 1000 staff and those with less than 25 staff by looking at the senior staff (2016).

No	Ethnic group	Parastatals with >1000 staff		Parastatals with <25 staff	
		No. in senior mgt & (%)	No of CEOs & (%)	No. in senior mgt & (%)	No of CEOs & (%)
1.	Kikuyu (17.7)	385 (26.3)	7 (30.4)	30 (29.4)	9 (39.1)
2.	Kalenjin (13.3)	188 (12.8)	8 (34.8)	6 (5.9)	4 (17.4)
3.	Luhya (14.2)	226 (15.4)	1 (4.4)	19 (18.6)	1 (4.3)
4.	Kamba (10.4)	220 (15.0)	1 (4.4)	7 (6.9)	0
5.	Luo (10.8)	133 (9.1)	3 (13.0)	12 (11.8)	2 (8.7)
6.	Mijikenda (5.2)	42 (2.9)	0	-	0
7.	36 Others (28.4)	271 (18.5)	3 (13.0)	19 (25.5)	7 (30.0)
8.	Total	1465 (100)	23 (100)	102 (100)	23 (100)

Table 2.1 focuses on mainly six ethnic communities that have the highest representation in senior management and all the communities that have a representation among the CEOs. The table shows some patterns in the two categories of parastatals that are worth interrogating further. They include the significant drop in the representation of the Kalenjin and the Kamba from the big to small parastatals. Interestingly, the same trend for the two communities is observed in the category of the CEOs which drops from 34.8% to 17.4% for the Kalenjin and from 4.4% for the Kamba to 0%. The representation of the Kalenjin among the CEOs of the big parastatals at 34.8% is very inconsistent with most other data thus the figure raises questions about the motive.

In the big parastatals, the percentage sum of the two most represented communities, the Kalenjin and the Kikuyu, among the CEOs is about 65% which is high compared to their percentage in small parastatals — which is 56.5%. One possible interpretation is that, while the Kikuyu are generally overrepresented at almost every parastatal, the decision on where to employ CEOs from the Kalenjin community might have been made based on which parastatal has more resources and thus more attractive. The two communities' combined population total is 31% meaning they are overrepresented at the CEOs level in big parastatals by more than double.

In the case of 'Others', in all but one, their representation is less than their population share. Indeed, the trend is that the representation in big parastatals for the smallest communities is even smaller than in the smallest parastatals. Not even the small number of staff in the small parastatals can explain this since the number of CEOs is the same but the trend remains the same. One possible explanation is that the recruiting authorities are mostly from the big ethnic communities and they compete more to get positions for people from their ethnic communities or politically allied ones in the more resourced parastatals than in the less resourced ones. In the big parastatals the other three CEO positions are held by people from the Kisii, Embu and Tharaka communities and in the small parastatals the seven remaining are held by people from the Maasai and Kisii communities (each has two) and one each from the Suba, Meru and Somali communities.

Having looked at the extent of ethnic representation in parastatals based on the number of staff that they have, it is important to assess whether the amount of money that a parastatal receives has an influence on who gets employed.

Table 2.2: Ethnic representation in parastatals that receive more than 1 billion shillings and those that receive less than 70 million focusing on the senior staff

No	Ethnic group	Large budget Parastatals (>1B)		Low budget Parastatals (<70M)	
		No. of Senior staff & (%)	No. of CEOs & (%)	No. of Senior staff & (%)	No. of CEO & (%)
1.	Kikuyu (17.7)	303 (31.2)	6 (31.6)	82 (34.2)	6 (31.6)
2.	Kalenjin (13.3)	112 (11.5)	4 (21.1)	24 (10.0)	0
3.	Luhya (14.2)	143 (14.7)	1 (5.3)	40 (16.3)	4 (21.1)
4.	Luo (10.8)	139 (14.3)	3 (15.8)	23 (9.6)	4 (21.1)

5.	Kamba (10.4)	94 (9.7)	1 (5.3)	15 (6.3)	1 (5.3)
6.	Kisii (5.9)	53 (5.5)	0	17 (7.1)	1 (5.3)
11	36 Others (27.7)	128 (13.2)	4 (21.1)	39 (16.3)	3 (15.8)
	Total	972 (100)	19 (100)	240 (100)	19 (100)

Table 2.2 shows that the Kikuyu have the highest representation in both the senior and CEOs levels and in both categories of the parastatals which is a similar trend as in the parastatals that have the highest and least number of staff. The Kalenjin have higher representation in both at the senior and the CEOs category for the parastatals that receive the highest amount of money while they have very low representation in the parastatals that receive the least amount of money. Interestingly, this is a similar trend to that seen for numbers of staff in parastatals. Another trend is the representation of the Kamba which is generally lower compared with their population share and in both cases the percentage of the CEOs is lower than its representation in the general staff. One likely explanation for the above trend is that the Kamba community has relatively little political clout hence the small numbers in the position of the CEOs. The same may be the case with the Kisii, Luhya, and the communities under ‘Others’ who in all categories are underrepresented. Also, many smaller communities do not have even a single CEO while the biggest community has 12 CEOs out of the 38 CEOs which is 31.6%, an almost double their population share. Another important trend is the significant under-representation of the Somali. No CEO is from the Somali community in parastatals with the highest number of staff nor in those receiving the highest funds from the Exchequer. There are just 3 CEOs from the Somali community in the smaller parastatals. In total, only 18 ethnic communities have any out of the 185 CEOs, representing less than half the ethnic communities in Kenya.

In conclusion, the above analysis indicates that there is a clear dominance by some communities. Among the dominant communities are mainly the big seven ethnic communities except the Somali and the Kamba. The Meru are also generally well represented. The smallest ethnic communities are the most under-represented by about 60% in the general and senior staff category and by about 40% in the CEO category.

4.2.2 The state of ethnic inclusion in the independent commissions in terms of employment opportunities

Commissions under the Constitution are autonomous bodies with the responsibilities to protect the sovereignty of the people; ensure observance of democratic values and principles by all State organs, and promote constitutionalism.⁵⁹ They are independent entities, and undertake oversight, and conduct investigations, conciliation, mediation and negotiation. In addition to the twelve constitutional commissions there are a few statutory commissions.⁶⁰ In 2015-2016, the 15

⁵⁹ Chapter 15.

⁶⁰ The Commission on Revenue Allocation; the Independent Electoral and Boundaries Commission; the Judicial Service Commission; the Kenya National Commission on Human Rights ; the National Land Commission; the Commission for the Implementation of the Constitution (now defunct); the National Police Service Commission; the Parliamentary Service Commission; the Public Service Commission; the Salaries and Remuneration Commission;; Ethics and Anti-Corruption Commission; Commission on Administrative Justice, National Gender & Equality Commission and the Teachers Service Commission are constitutional; and the National Cohesion and Integration Commission and Kenya Law Reform Commission are statutory. Other statutory bodies may be called

commissions received a total of Ksh 231, 742,997,406 from national funds, an amount close to what all the counties receive.

As in the parastatals, recruitment of members of staff varies between commissions. In general, however, commissioners are appointed through a selection panel which identifies and recommends names to the National Assembly for vetting before the President appoints those that succeed through the process. The process is shielded from some political interference, including by the qualification requirements, but complete non-interference cannot be achieved because of the requirement of National Assembly approval, which usually means government approval since the government has a majority in the National Assembly. The CEOs are appointed through a competitive process by the respective commissions and the other members of staff are recruited by the human resource departments of the commissions. The commissioners and the CEO can have considerable influence on who gets recruited to the senior, middle and junior members of staff.

Table 3: Ethnic representation in independent commissions (2016)

No	Ethnic group	All staff	No of senior staff & (%)	No of Commissioners & (%)	No of CEOs & (%)
1.	Kikuyu (17.7)	1312(21.8)	111 (19.1)	17 (15.7)	2 (13.3)
2.	Kalenjin(13.3)	812 (13.6)	62 (10.7)	8 (7.4)	0
3.	Kamba (10.4)	675 (11.2)	59 (10.1)	10 (9.3)	0
4.	Luhya (14.2)	669 (11.1)	84 (14.4)	13 (12.0)	4 (26.7)
5.	Luo (10.8)	571 (9.5)	82 (14.1)	12 (11.1)	3 (20.0)
6.	Kisii (5.9)	426 (7.1)	46 (7.9)	6 (5.6)	2 (13.3)
7.	Meru (4.4)	386 (6.4)	29 (5.0)	10 (9.3)	0
8.	Somali (6.4)	236 (3.9)	24 (4.1)	11 (10.2)	1 (6.7)
9.	Samburu (0.6)	139 (3.9)	8 (1.4)	1 (0.9)	0
10	Maasai (2.2)	142 (2.4)	16 (2.8)	3 (2.8)	0
11	Taita (0.7)	126 (2.1)	11 (1.9)	2 (1.9)	0
12	Mijikenda(5.2)	129 (2.1)	8 (1.4)	3 (2.8)	0
13	Borana (0.4)	118 (2.0)	6 (1.4)	3 (2.8)	1 (6.7)
14	Others (7.8)	279 (2.9)	36 (6.2)	9 (8.3)	2 (13.3)
	Total	6029(100)	582 (100)	108 (100)	15

Source: National Cohesion and Integration Commission's 'Ethnic and diversity audit of commissions in Kenya' report, 2016.

A total of 32 ethnic communities have some representation in the independent commissions' general workforce of 6029; 18 communities are among the 108 commissioners; and 8 among the 15 CEOs. Among the general staff, the Kikuyu have the highest number with about 21.8% followed by the Kalenjin with 13.6%, while the Kamba and the Luhya have 11.2% and 11.1% respectively and the rest combined have less than 10%. In comparison with the population of every ethnic community, the Kikuyu have a positive deviation of 4. A number of other

“commissions” but do not have characteristics of these commissions such as some concept of independence – for example the Commission on UNESCO and the Kenya Meat Commission.

communities have a positive deviation of less than two and others have a negative deviation. The deviation of -3 of the Luhya community is worth noting but the biggest deviation is in the smaller ethnic communities which have been classified as “others” in the table. The communities combined have a deviation of -3.21 which is a 40.9% deficit.

In the senior staff category, the Kikuyu are the most dominant with 19.1% followed by the Luo and the Luhya with 14.4% and 14.1% respectively. The Kalenjin have 10.7% and the Kamba have 10.1%. The other communities have less than 10% representation. Only the Luhya, Luo, Kisii, Somali, Maasai and ‘Others’ have increased their representation compared with the general staff proportion. The ‘Others’ particularly increased with the greatest margin.

In terms of the commissioners, the largest group is from the Kikuyu community, namely about 16% followed by the Luo at 14% and the Luhya at 12%. The rest of the communities all have less than 10% representation. The ‘others’ have a representation of 7.44% as opposed to 4.63% of the general staff. The good representation of small groups at the commissioner level may partly be attributed to the publicity (including advertising of applicants and those short-listed and parliamentary confirmation hearings) attached to the appointment of commissioners.

Among the CEOs, the Luhya are leading with 27% followed by the Luo with 20% and the Kikuyu and the Kisii at 13%. The Borana and the Somali have about 7% each. An interesting trend is the percentage for the ‘others’ which is as high as 13% under CEOs up from 7% for the Commissioners and 4% for the general staff. While the high percentages in the senior positions do not necessarily compensate for the representation difference in the general staff because the latter staff are far more numerous, the trend for the specific communities across the various positions is important as it can indicate an attempt to be inclusive in the recruitment which attempt, as already observed, may partly be attributed to the publicity around the appointments to senior positions.

Also notable is the increase and decrease in percentages from the general staff to the commissioners to the CEOs (from largest, to smaller to smallest categories). The Kikuyu, Kalenjin, Kamba, Samburu and the Taita have their percentages generally decreasing— by the biggest margins among the Kikuyu, Kalenjin and Samburu. On the other hand, the percentage of the Luhya, Luo, Meru, Somali, Maasai, Mijikenda, Borana and ‘Others’ has generally increased with the highest margin being with the Somali, Luo, Meru and ‘Others’. Further, the Kikuyu have fewer CEOs than the Luhya and the Luo when considering all the commissions which was certainly not the case with the parastatals where the Kikuyu had a total of 41 compared to 30 from the Luo and 25 from the Luhya. The Kalenjin on the other hand have not a single commission CEO yet they had 30 parastatal CEOs representing 16.2% which was second highest. The increase and decrease is evidently forming a trend for several communities which should be investigated further.

, Eight of the commissions are new, created by the Constitution, and seven are old. In all the old commissions, the Kikuyu form the largest group of staff while in the new commissions, the Kikuyu have the highest number in six of the eight commissions and the Luo the other two. Most old commissions have more staff which could partly explain the slightly higher number of communities in the old commissions. Some commissions, however, stand out for having very

few communities, notably the National Police Service Commission which has 11 communities among its 73 members of staff and the SRC with just 10 ethnic communities among its 65 employees.

At the commissioners' level, in 10 commissions each commissioner comes from a different ethnic community, while other three have just one or two communities having two commissioners. But the SRC's 11 commissioners come from just six ethnic communities, and the JSC 11 commissioners from 7 ethnic communities—both are “new” commissions. The uniqueness in the two commissions derives from the manner of nomination of the commissioners, who are mostly from other bodies—either elected or ex officio. It is important to note that in all but one commission, there is at least one Kikuyu commissioner . In 11 of the 15 commissions, there is at least one Luhya commissioner; eight commissions have at least 1 from each of the Luo, Somali and Kalenjin communities; in 9 of the commissions, at least one Kamba; and a few other communities have representation in five or less commissions. In general, there seems to be significant inclusivity in the commissions particularly in the senior staff category except that there seems to be an attempt to have the big communities represented in every commission.

4.2.3 The ethnic inclusion in government ministries and departments

The members of staff of government ministries and departments are recruited by the Public Service Commission (PSC), one of the independent constitutional commissions. The chairperson, vice-chairperson and other seven members are identified and recommended for appointment by a selection panel constituted by the President but representing specific public and private agencies. Those identified by the selection panel are subject to approval by the National Assembly before appointment by the President.

A study by the NCIC in 2011⁶¹ established that several ministries and departments had violated the legal requirement that none should have more than one third of its employees from one ethnic community. The Kikuyu, Kalenjin, Luhya, Kamba, Luo, Kisii and Meru together comprised 81.7 per cent of the civil service against their combined population share of 76.7 per cent.⁶² Four of these had a higher percentage variance in the civil service than their population share: the Kikuyu (4.7 which is 26.6% more than their population share), the Kalenjin (3.5 which is 26.3% more than their population share) Kisii (0.9 which is 15.3% more than their population share),) and the Meru (1.5 which is equivalent to 34.1% more than their population share).

Out of the 47 government ministries and departments assessed, seven had violated the legal requirement that not more than one-third of the staff should be from one ethnic community. Nine had over 30% of their staff from one ethnic community and in other 22 their largest ethnic community comprised over 25% of the staff. In addition, in eight departments and ministries their largest ethnic community made up between 20 and 25% of their staff. Only the Provincial Administration which used to employ the District Officers, Chiefs, Assistant Chiefs, and support staff had less than 20% of its staff from the most represented ethnic community: namely 16.84%

⁶¹ Cohesion index status of social cohesion, 2011.

⁶² NCIC report, 'building a cohesive Kenyan society- the NCIC experience 2013'.

from the Kikuyu community.⁶³ The seven departments and ministries that had violated the legal requirement are: State House (45.31% from one community), Transport (39.00%), Tourism (34.96), Public Works (34.63), Local Government (34.19), Higher Education (33.70), and Nairobi Metropolitan Development (33.70).

In the police department, the Kalenjin had the highest representation with 20.38% followed by the Kikuyu with 16.18% and the Kamba with 11.2%. The rest of the communities had less than 10% representation. The data shows that the Kalenjin have a 53.2% more representation than their population share while the Kikuyu are slightly underrepresented. The police will be discussed further in the coming sections.

In a 2014 public service evaluation survey of 168 Ministries, Departments and Agencies, it was established that some communities were over-represented and others under-represented in comparison with their population percentage. The communities were found to be over-represented by the following deviation: The Kikuyu 5.55 (31.4% more than their population share), the Kalenjin by 1.57 (11.8% more than their population share); the Kisii by 1.28 (21.7% more than their population share); the Mijikenda by 1.03 (19.8% more than their population share); the Embu by 1.04 (115.6% more than their population share). The other 19 over-represented communities were over-represented to the extent of less than 1 per cent. Another 18 are under-represented with the Turkana, Somali, and the Luhya being by a deviation of -2.18 (83.8% less than their population share); -4.39% (68.6% less than their population share), -1.78% (12.5% less than their population share) respectively. The other six ethnic communities could not be found in the public service.⁶⁴

Another study, in the same year (2014) looked at 88, 885 employees in the civil service. The study found 14 ethnic communities over-represented and the remaining 29 under-represented. The Kikuyu, the Kalenjin, the Kisii and the Meru were overrepresented by a percentage deviation of more than 1 and the Turkana, the Luhya, the Mijikenda, the Somali and other Kenyans were underrepresented by 1.80 per cent, 2.57 per cent, 2.07 per cent, 3.44 per cent, and 1.50 per cent respectively.⁶⁵

The results above indicate a trend largely similar to the parastatals and the Independent Commissions. Similar communities remain over-represented and others under-represented.

Table 4: Ethnic representation in the government ministries and departments

No.	Ethnic groups	Civil service 2011 (... staff)	Civil service 2014 (168 Ministries) (94,286 staff)
1.	Kikuyu	22.3%	22.9%
2.	Kalenjin	16.7%	12.8%
3.	Luhya	11.3%	12.2%
4.	Kamba	9.7%	10.9%

⁶³ Towards national cohesion and unity in Kenya: Ethnic diversity and audit of public service 2014, p. 5.

⁶⁴ Public service commission, Public service evaluation report 2014, p. 68.

⁶⁵ Public service commission, Public service evaluation report 2014, p. 70.

5.	Luo	9.0%	10.6%
6.	Kisii	6.8%	7.1%
7.	Meru	5.9%	4.1%
8.	Mijikenda	3.8%	6.2%
9.	Somali	2.7%	1.9%
10.	Turkana	1.0%	0.4%
11.	32 Others	10.8%	11.0%

Source: NCIC (2011)

4.2.4 The state of ethnic inclusion in public universities and constituent colleges

The Councils of universities are their main governing bodies. The Councils usually have 9 members: the Chairperson, Principal Secretary in the Ministry responsible for education, Principal Secretary in the Ministry of Finance, five other members and the Vice Chancellor. The Chairperson is appointed by the Cabinet Secretary and the five other members are also appointed by the CS but through an open and competitive process.⁶⁶ The Vice Chancellor on the other hand is appointed by the Cabinet Secretary on the recommendation of the Council, after a competitive recruitment process conducted by the Council.⁶⁷ The other members of staff in public universities are recruited by the human resource department but also by the various university departments depending on whether they are academic or non-academic. The Vice Chancellor and the other senior members of staff can influence who gets appointed as a member of staff.

A report that was released by the NCIC in 2012 on the state of ethnic inclusion in the staff recruitment in the Kenyan public universities indicated that universities were doing very badly in ethnic cohesion. The report, for example, indicated that the five biggest ethnic communities in Kenya have up to 93% of all the staff in public universities.⁶⁸ Also, most of the staff in each of the universities come from the same ethnic community as the Vice Chancellor (VC). It was, however, in some instances argued that the ethnic composition of employees sometimes depends on the history and status of their employment. It is, for example, difficult to employ very many subordinate staff from people from communities that live far away from the location of a university. However, even the Vice Chancellors were from the community dominant in the university's locality. The same explanation does not apply to the VC. Considering that some regions have more universities than others, this pattern of employment have the potential to buttress the overrepresentation and underrepresented of various ethnic groups.

Table 5: General Ethnic Composition of employees in Public Universities in Kenya. Listed are communities with over 100 members of staff

N o	Ethnic group	Univ. in counties highest (%)	No of staff (%)	VC/Prin cipal (%)	Council Chair (%)	Council members (%)
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⁶⁶ Section 36(1) Universities Act 2012.

⁶⁷ Section 39(1) (a) Universities Act 2012.

⁶⁸ Odunga D. et al 'Public university chiefs dismiss audit report on staff ethnicity'

<http://www.nation.co.ke/news/Public-university-chiefs-dismiss-audit-report/-/1056/1361562/-/view/printVersion/-/t6i9ss/-/index.html> (21 October 2017).

1.	Kikuyu	8+6=14 (36.8)	7050 (23.6)	4 (12.9)	3 (10.0)	25 (14.3)
2	Kalenjin	5 (13.5)	4586 (15.4)	2 (6.45)	1 (3.3)	24 (13.7)
3.	Kamba	2 (5.2)	2393 (8.0)	4 (12.9)	1 (3.3)	13 (7.4)
4.	Luhya	4 (10.5)	4562 (15.3)	5 (16.1)	4 (13.3)	17 (9.7)
5.	Luo	3 (7.9)	4658 (15.6)	5 (16.1)	4 (13.3)	20 (11.4)
6.	Kisii	1 (2.6)	2470 (8.3)	2 (6.5)	3 (10.0)	6 (3.4)
7.	Meru	1 (2.6)	1348 (4.5)	4 (12.9)	2 (6.7)	11 (6.3)
8.	Somali	1 (2.6)	161 (0.5)	1 (3.2)	3 (10.0)	11 (6.3)
9.	Maasai	1 (2.6)	331 (1.1)	0	1 (3.3)	5 (2.9)
10	Taita	1 (2.6)	370 (1.2)	0	2 (6.7)	7 (4.0)
11	Mijikenda	2 (5.3)	652 (2.3)	1 (3.2)	2 (6.7)	11 (6.3)
12	Turkana	1 (2.6)	-	0	0	1 (0.6)
13	Borana	0	-	0	0	1 (0.6)
14	Embu	1 (2.6)	419 (1.4)	0	0	6 (3.4)
15	Tharaka	1 (2.6)	-	0	0	0
16	Samburu	0	-	0	1 (3.3)	2 (1.1)
17	Teso	0	127 (0.4)	1 (3.2)	0	3 (1.7)
18	Foreigner	0	113 (0.4)	0	0	0
19	Swahili	0	113 (0.4)	1 (3.2)	1 (3.3)	3 (1.7)
20	Others	0	531 (1.78)	0	1 (3.3)	7 (4.0)
	Total	38	29, 835	31	30	175

Table 5 above shows that there are more universities in places dominated by some ethnic communities than others. The data, for example shows that there are up to 14 universities and constituent colleges in areas where the Kikuyu community has the highest population. Six out of the 14 universities are in Nairobi. The NCIC places the population of the Kikuyu community population in Nairobi at 51% but some other studies indicate that there is no single community with more than half the population in Nairobi.⁶⁹ All the studies, however, agree that the Kikuyu are the largest community in Nairobi. Then there are 5 universities in Kalenjin dominated counties, 4 universities in Luhya dominated counties, 3 in Luo dominated counties and 2 each in Kamba and Mijikenda dominated counties. The areas dominated by the Kisii, the Meru, the Somali, the Maasai, the Taita, the Turkana, the Embu and the Tharaka have 1 university each. There are no universities in other counties where other communities may dominate in terms of population. In total, 37% of all universities are in areas dominated by the Kikuyu community and 14% in areas dominated by the Kalenjin community, the Luhya at about 11%, the Luo at about 8% and the Kamba and the Mijikenda at 5% each. Each of the other communities that form a majority in a county that has a university account for about 3% of all the public universities and constituent colleges.

Analysis of the number of staff from the various ethnic communities shows slightly different results. The Kikuyu community has about 24% representation in the universities staff (academic and non-academic) followed by the Luo at about 16%, the Kalenjin and the Luhya at 15% each,

⁶⁹ Ministry of State for Planning, National Development and Vision 2030 (2010).

and the Kisii and the Kamba at 8% each. The remaining communities have less than 5% each. The data shows that most big communities have a higher percentage of staff compared to the percentage of the number of universities in the counties where they form the majority. The exceptions to this rule are the Kikuyu, Somali, Maasai, Taita, Mijikenda and the communities under 'Others'.

The Kikuyu are by far over-represented by a deviation of 6 (33.3% more than their national population share) followed by the Luo who are over-represented by a deviation of 5 (44.4% more than their population share). The Kisii are also over-represented by a deviation of 2 (40.7% more than their national population share), the Kalenjin by a deviation of 2 (15.8% more than their national population share) and the Luhya by a deviation of 1 (7.7% more than their national population share). The rest of the communities are either under-represented or are over-represented by a deviation of less than 1. The most under-represented is the Turkana at 2.5 deviation (96.2% less than their national population share), the Somali with a deviation of 6 (92.2% less than their national population share), the Mijikenda with a deviation of 3 (55.8% less than their national population share), and the Kamba with a deviation of 2 (23.1% less than their national population share). If the basis for the recruitment of most of the university staff is the locality of a university, it is not clear why the representation of the Somali is very low considering there is a University College in an area where the Somali are the largest group- Garissa. There is no university or a university college in Turkana County which is where the Turkana form the largest group.

In terms of the Vice Chancellors and Principals, the Luhya and the Luo have the highest number at 16% each followed by the Kamba, Kikuyu and the Meru at 13% each. The Kisii and the Kalenjin have 6% each and the other communities less than 4% representation each.

Further, out of 31 universities, the Kikuyu have the highest number of the general staff in 12 universities or about 39% of the surveyed universities, followed by the Kalenjin and the Luo at 3 universities— about 10% of the surveyed universities for each of them. Each of the remaining ethnic groups, that form the largest group in at least one university, represents less than 7%. Thirty-one universities were considered to establish the ethnic groups with the largest number of staff which is less than the 38 that were considered under the number of universities in various counties. Due to the different number of universities considered by the two reports, a direct comparison in the findings of the two reports may, therefore, not be made.

In terms of the largest number of staff in senior staff category, the Kikuyu are leading in 14 (or 45%) of the 31 universities followed by the Luo at about 13%. The rest each have less than 10% representation. In general, except the Kikuyu and partly the Luo and the Kalenjin, the percentages of the other communities remain the same as among the general staff.

Among Council Chairs, the Luhya and the Luo have the highest number being 13% each, followed by the Kikuyu, Kisii and Somali at 10% each. In terms of the members of the Council, the Kikuyu and the Kalenjin have about 14% each, followed by 11% and 10% by the Luhya and the Kamba respectively. The remaining communities have less than 10% each.

The general observation is that in categories except the VC/Principals and the Chairs of Councils, among both of which the Luhya and the Luo have the highest number, the Kikuyu

have the highest number. The greatest Kikuyu dominance is in the senior staff category, they being dominant in almost half the 31 universities surveyed. The Kikuyu also have a high representation among the general staff. Another trend is that the Luo scored more strongly in most of the parameters than they have done in other sectors such as in the parastatals. In all but one of the 6 categories the Luo are first or second in their score. In relation to the total population the Luo have a deviation of about 5 which is approximately 46.3% more than their national population share and its representation in senior management is also positive. Another observation is the big negative deviation for the Somali which is about -6 (92.2% less than their national population share) despite the fact that there is one university in an area dominated by the Somali community.

4.2.5 The state of ethnic inclusion in the Judiciary in terms of employment opportunities for Judges

As at 2016, the Judiciary of Kenya had a total of 161 Judges. The Supreme Court 7, the Court of Appeal 22, the High Court 86, the Environment and Land Court 34 and the Employment and Labour Relations Court had 12 Judges. Out of the 42 ethnic communities in Kenya, 19 are represented among the Judges.

The Judges are appointed by the President in accordance with the recommendation of the Judicial Service Commission (JSC). The Chief Justice and the Deputy Chief Justice are, however, first subjected to the approval of the National Assembly.⁷⁰ In undertaking the recruitment, the JSC is required to constitute a selection panel that shortlists persons for nomination by the Commission.⁷¹

Table 6: Ethnic representation at the Judiciary (Judges)

No.	Ethnic community & (pop share)	No. of Judges & (%)	% deviation & (relation to the population share)
1.	Kikuyu (17.7)	42 (26.1)	8.4 (47.5% more than)
2.	Luo (10.8)	25 (15.5)	4.7 (43.5% more than)
3.	Luhya (14.2)	22 (13.7)	-0.5 (3.5% less than)
4.	Kamba (10.4)	19 (11.8)	1.4 (13.5% more than)
5.	Kalenjin (13.3)	15 (9.3)	-4 (30.1% less than)
6.	Kisii (5.9)	12 (7.5)	1.6 (27.1% more than)
7.	Meru (4.4)	5 (3.1)	-1.3 (29.5% less than)
8.	Somali (6.4)	4 (2.5)	-3.9 (60.9% less than)
9.	Embu (0.9)	4 (2.5)	1.6 (177.8% more than)
10	Maasai (2.2)	2 (1.2)	-1 (45.5% less than)
11	Teso (0.9)	2 (1.2)	0.3 (33.3% more than)
12	Mijikenda (5.2)	3 (1.9)	-3.3 (63.5% less than)
13	Taita, Kuria, Suba, Samburu, Asian(2.5)	6 (3.7)	1.2 (48% more than)*

⁷⁰ Article 166 (1) (a) (b).

⁷¹ Section (1) (2) Judicial Service Act 2012 (revised edition 2015).

14	Others (5.2)	1 (0.6)	-4.6 (88.5% less than)
	Total	161 (100)	

A total of 19 ethnic groups have a representation of at least one Judge in the Judiciary. In other words, there is no single judge from 23 ethnic groups. The Kikuyu have the highest number, 26.1%, followed by the Luo at 15.5%, the Luhya at 13.7% and the Kamba at 11.8%. The rest of the ethnic groups have a less than 10% representation each. Further, the Embu, the Kikuyu, and the Luo are over-represented by a large margin while the Mijikenda, Somali, Maasai, and Kalenjin are considerably underrepresented. Combined, the five biggest communities have a total percentage of 76.4% against their combined population percentage of 66.6%. The ‘Others’ category which has 23 ethnic communities have just one Judge which is an underrepresentation of 88.5% based on their national population share.

4.2.6 The state of ethnic inclusion in the Security services in terms of employment opportunities

4.2.6.1 Inclusion in the National Police Service

The National Police Service Commission (NPSC) is mandated to conduct recruitment of persons to the service.⁷² The Commission may, however, delegate to the Inspector General the recruitment, appointment and promotion of officers under the rank of superintendent.⁷³ The NPSC is composed of 9 members appointed by the President,⁷⁴ from among candidates nominated by a selection panel appointed by the President. Its members are from various government agencies,⁷⁵ and it shortlists persons to be forwarded to the President for appointment after approval by the National Assembly.⁷⁶ The Inspector General on the other hand is appointed by the President with the approval of Parliament⁷⁷ and the Deputy Inspectors General are appointed by the President in accordance with the recommendation of the NPSC.⁷⁸ While the recruitment of the various police officers is done across the country by several recruiting officers from the service, the NPSC, the IG and the Deputies can partly influence who gets recruited.

Table 7:

S.	Ethnic group	KPS & %	APS & %	DCI & %	Total
1.	Borana (0.4)	587 (1.3)	946 (2.3)	58 (1.1)	1591 (1.8)
2.	Embu (0.9)	672 (1.5)	696 (1.7)	92 (1.7)	1460 (1.6)
3.	Kalenjin (13.3)	9650 (21.6)	7594 (18.8)	1062 (19.6)	18306 (20.2)

⁷² Article 246 (3) (a).

⁷³ Section 10(2) National Police Service Commission Act, 2012 [revised 2014].

⁷⁴ Article 246 (2).

⁷⁵ (a) Office of the President; (b) the Office of the Prime Minister; (c) the Judicial Service Commission; (d) the Commission for the time being responsible for matters relating to anti-corruption; (e) the Kenya National Commission on Human Rights; (f) the Commission for the time being responsible for matters relating to gender; and (g) the Association of Professional Societies in East Africa

⁷⁶ Section 6 (1-7) National Police Service Act (2012) (revised 2014).

⁷⁷ Article 245 (2) (a).

⁷⁸ Art 245 (3).

4.	Kamba (10.4)	4752 (10.6)	3613 (9.0)	683 (12.6)	9048 (10.0)
5.	Kikuyu (17.7)	6851 (15.3)	8396 (20.8)	906 (16.8)	16153 (17.9)
6.	Kisii (5.9)	2443 (5.5)	2323 (5.8)	286 (5.3)	5052 (5.6)
7.	Kuria (0.7)	465 (1.0)	339 (0.8)	47 (0.9)	851 (0.9)
8.	Luhya (14.2)	4491 (10.1)	3696 (9.2)	568 (10.5)	8755 (9.7)
9.	Luo (10.8)	3319 (7.4)	3282 (8.1)	436 (8.1)	7037 (7.8)
10	Maasai (2.2)	925 (2.1)	740 (1.8)	100 (1.8)	1765 (2.0)
11	Meru (4.4)	2908 (6.5)	2108 (5.2)	348 (6.4)	5364 (5.9)
12	Mijikenda (5.2)	2590 (5.8)	1618 (4.0)	246 (4.5)	4457 (4.9)
13	Samburu (0.6)	424 (0.9)	547 (1.4)	35 (0.7)	1006 (1.1)
14	Somali (6.4)	1097 (2.5)	1384 (3.4)	126 (2.3)	2607 (2.9)
15	Taita (0.7)	9 (0.02)	460 (1.1)	78 (1.4)	547 (0.6)
16	Teso (0.9)	682 (1.5)	453 (1.1)	80 (1.5)	1215 (1.3)
17	Turkana (2.6)	758 (1.7)	639 (1.6)	51 (0.9)	1448 (1.6)
18	Others (2.7)	2082 (4.7)	1496 (3.7)	205 (3.8)	3783 (4.2)
	Total	44705	40330	5407	90442

Source: National Police Service Annual report 2014/2015 p 20

All 42 ethnic groups in Kenya are represented in the National Police Service (NPS). The difference is in the extent of representation in the whole service and in the specific units. The Kalenjin are the most represented with 20.6% followed by the Kikuyu with 17.9% and the Kamba and the Luhya at 10% and 9.6% respectively. Each of the other ethnic groups has less than 8% representation. In the Kenya Police Service (KPS), one of the two constituent services within the NPS, the most represented ethnic group is the Kalenjin with 21.6% followed by the Kikuyu with 15.3%. The other ethnic groups have a 10% or less. In the Administration Police Service, the Kikuyu are the most represented with 20.8% followed by the Kalenjin with 18.8%. All the other ethnic groups have a less than 10% representation. At the Directorate of Criminal Investigations (DCI), the Kalenjin are the most represented with 19.6%, followed by the Kikuyu and the Kamba with 16.8% and 12.6% respectively. The other communities have 10% or less. Across the whole NPS, the Kalenjin have the highest representation (18.9%) followed by the Kikuyu with 17.9%. The five largest ethnic communities together have a representation of 65.6% against their population representation of 66.6%. The Kalenjin, however, are overrepresented by a margin of more than 5 which is 51.9% more than their population share. The Meru are also overrepresented by a relatively a big margin which is by 1.5 deviation representing 34.1% more than their population share. Among the big communities, the Somali are the most underrepresented with a deviation of -3.5 which is 54.7% less than their population share, followed by the Luhya, the Luo and to a small extent the Mijikenda. Interestingly, the small ethnic communities categorised under 'Others' are for the first time overrepresented when compared with their population share being a deviation of 1.5 representing 55.5% more than their population share.

In terms of the various police units, 38 ethnic groups are represented in the KPS, 43 ethnic groups in the APS and 38 in the DCI. Some striking trends across the police units and the ethnic groups include the difference in the representation of the Taita in the KPS which is just 9 officers compared with 460 in the APS. This is despite the fact that in total, the officers of the

KPS are more than those of the APS. The Kikuyu, the Borana and the Samburu too have a high number of the APS compared to the KPS by a large margin.

4.2.6.2 Inclusion in the Military Personnel

The members of the Defence Forces are recruited and appointed by the Defence Council.⁷⁹ The regulations developed from the Kenya Defence Forces Act specifically gives the Service Commanders the powers to appoint the Military Police with the approval of the Defence Council.⁸⁰ The Defence Council consist of the Cabinet Secretary, who is the chairperson; the Chief of the Defence Forces; the three Service Commanders of the Defence Forces and the Principal Secretary.⁸¹ The law also requires that recruitment be done in all the counties and that advertisement be done at least 30 days before the recruitment.⁸² Thus, though there may be political influence based on the representation in the Defence Council, the need to have recruitment take place in all counties helps to promote inclusiveness and reduce the incidence of ethnic bias.

Data on the current state of ethnic inclusion in the Kenyan Military is limited or unavailable. The little available, is largely on the period immediately after independence and a bit on the trend of employment in the Armed Forces in terms of ethnic inclusion by the subsequent governments.

Prior to independence, the Kamba, Kalenjin and the Samburu dominated the Kenyan battalions of the King's African Rifles (KAR). The Kamba and the Kalenjin, for example, had a third of the total members of the military each, together representing approximately 60% of all the military. Immediately after independence, all the officer ranks were predominantly British and Kamba and the military heads were exclusively British and Kamba. Under President Kenyatta's (the first President) government, the employment largely favoured the Kikuyu community which was the ethnicity of the President. The result of favouring the Kikuyu community was the reduction in the number of representation of the Kamba and the Kalenjin mainly. By 1966, for example, the Kikuyu who in 1963 had very small representation had increased their representation to 23% against their population share of about 19% and that of the Kamba had dropped to 28% which was still high compared to their population share of 11%.⁸³ The representation of the Luo in the military by 1966 was 10% against their population share of 14%. One year later, the representation of the Kikuyu was level with that of the Kamba and towards the end of the 1960s they had the highest representation. In contrast, throughout the 1970s no person from the Luo community featured above the rank of major. This pattern continued in the 1970s.

After President Kenyatta, came President Moi in 1978, a Kalenjin, who reduced the representation of the Kikuyu by replacing them with the Kalenjin or by people from apolitical

⁷⁹ Section 28 (1) Kenya Defence Forces Act, 2012.

⁸⁰ Section 28 (5) Kenya Defence Forces Act, 2012.

⁸¹ Article 241 (6).

⁸² Section 28 (5) Kenya Defence Forces Act, 2012.

⁸³ Globalsecurity.org, 'Kenya military personnel'
<https://www.globalsecurity.org/military/world/kenya/personnel.htm>.

ethnic groups such as the Kamba, the Samburu and the Somali.⁸⁴ By 1996, out of the five military heads, three were Kalenjin and the remaining two were Mijikenda and Maasai. In 2002, Moi left power and Kibaki, a Kikuyu, became president. Kibaki was no different. He began another phase of Kikuyunization of the military. He retired several Kalenjin figures and replaced them with mainly Kikuyu. Immediately before President Kibaki's election in 2002, for example, there were no Kikuyu military heads, but by 2005 four out of six of the top military positions were held by Kikuyu.⁸⁵ Despite this notable changes towards the ethnicization of the military, it has been observed that President Kibaki did not ethnicize the military much, unlike President Moi or President Jomo Kenyatta. President Kibaki left office in 2013 and President Kenyatta (a Kikuyu) took over.

Information on the state of ethnic inclusion in the military under President Uhuru Kenyatta is still scarce but as at the time of writing, out of the five senior-most military officers, two are from the Kikuyu community, two from the Taita and Mijikenda ethnic groups (minority groups) and one from the Kalenjin community. While the list is generally more inclusive compared to the previous ones, the general trend in favouring people from the ethnic group of the president and those from small ethnic groups that do not pose serious challenge on the political leadership of the country remain.

4.3 State service inclusion at the county level

The Constitution of Kenya 2010 created 47 counties partly to help address several problems that had been associated with ethnic diversity.⁸⁶

4.3.1 Ethnic representation at the county public services

The County Executive Committee Members (CEC) are appointed by the County Governors with the approval of the county assembly.⁸⁷ The members of the County Public Service Board (CPSB) are on the other hand appointed in different ways. The chairperson and other 3-5 members are nominated and appointed by the Governor with the approval of the county assembly.⁸⁸ There must also be a secretary to the board appointed in a similar manner.⁸⁹ All the board members must be appointed through a competitive process.⁹⁰ The CPSB then recruits the members of staff for the county Executive.

The members of staff in the county assembly are, on the other hand, recruited by the County Assembly Public Service Board (CAPSB) whose members are mainly appointed by the county assembly and indeed partly composed of the members of the County Assembly.

⁸⁴Stubbs T..Ethnopolitics and the Military in Kenya in *Forging military identity in culturally pluralistic societies* P.75 https://books.google.co.ke/books?id=_HOHCgAAQBAJ&pg=PA78&lpq=PA78&dq=the+top+military+heads+under+the+moi+government&source=bl&ots=VP84nVqseX&sig=K_XanNrCazduGELkDSTMjCxsApQ&hl=en&sa=X&redir_esc=y#v=onepage&q=the%20top%20military%20heads%20under%20the%20moi%20government&f=false.

⁸⁵Stubbs T., Ethnopolitics and the Military in Kenya in 'Forging military identity in culturally pluralistic societies' P 78

⁸⁶ Article 174.

⁸⁷ Article (179) (2) (b).

⁸⁸ Section 58 (1) (a) (b) CGA.

⁸⁹ Section 58 (1) (c) CGA.

⁹⁰ Section 58 (2) CGA.

Several studies have been done to establish the extent of ethnic inclusion in the 47 counties in Kenya. The study at the county level is particularly important considering that they were established in 2013 under the 2010 Constitution. It would, therefore, be interesting to assess whether they are more inclusive than institutions established before the 2010 Constitution. The focus will also be on the general inclusion: whether in aggregate devolution has enhanced ethnic inclusion in the public service or not.

One of the studies was by the National Cohesion and Integration Commission (NCIC, 2014). This indicated that the counties in Kenya had employed a total of 116,852 members of staff. This number is slightly lower than the total employees in the national civil service which in 2011 stood at 211,000 (NCIC, 2011). The study further found that only 15 counties had complied with section 65 of the CGA in not exceeding the limit of 70% of the members of staff coming from the dominant ethnic group in the county. The study also sought to assess the validity of the claims that some counties had not met the legal limit on the number of the members of staff coming from one community because of the inherited members of staff from the former local authorities that were much skewed in favour of the dominant communities.

The study found out that up to 32 counties have employed more from the dominant ethnic community than was the case under the former local authorities.⁹¹ In the few counties that have recruited less from the dominant ethnic community than was the case in the local authorities the variance is not as big as in those that have recruited more from the biggest ethnic community.

In terms of the number of ethnic communities in the county services, Kilifi County is leading with a total of 33 ethnic communities with the largest one holding 64.4% of the posts followed by Nakuru County with 31 ethnic communities and the largest ethnic community, the Kikuyu, holding 48.4% of the post. Both counties have, however, since 2013 employed more people from the dominant ethnic communities than was the case under the local authorities. Kirinyaga county has the lowest number, nine, ethnic communities represented in its government with the largest having 93.9%, while Nandi county is second lowest with ten ethnic communities represented among the staff with the largest holding 81.0% of the posts. Both counties are less inclusive than the corresponding old local authorities.

Turning to the number of ethnic communities represented in the County Executive Committees (CEC), 18 counties have all their CECs from only the largest ethnic community; 13 counties from two ethnic communities; 8 counties from three ethnic communities; 5 counties from four ethnic communities, two counties from six communities and one county, Mombasa, has CECs from seven communities.

In the County Public Service Boards, the county equivalent of the national Public Service Commission, 22 counties have all the members coming from one ethnic community; 13 counties from 2 communities, 6 counties from three communities; 2 counties from four; one from five; 2 counties from six and one county from seven communities.

⁹¹ Ethnic and diversity audit of counties page 18.

Among the county assemblies, with a total of 3,711 employees. Wajir County Assembly has the highest number of County Assembly employees at 254 while Tharaka Nithi County has the least at 41 employees. Thirty-four county assemblies have violated the CGA by recruiting more than 70% of their employees from a single community. Kirinyaga and Nandi county assemblies have recruited only from one community.

The study also shows that thirty two counties increased the proportion of members from the dominant ethnic group in their new recruitments as compared to the general staff composition. For instance, while the general composition of staff in West Pokot County was 49.1% Pokot, the new recruitments brought in 89.6% staff from the same community. It can be argued that in some cases, the skewed recruitment is an effort by counties to recruit people who did not benefit from public office in the past. This may, for example, be the case with West Pokot County but not necessarily the case in some other non-compliant counties.

Further, the study found out that some small ethnic communities have been left out completely from the county governments' workforces. These are the Dasanech, the Shangil, the Leysan and Galjeel. Other communities namely: Gosha, Gabra, Burji, Rendille, Suba, Kuria, Teso, Maasai, Mijikenda, Luo, Somali, Luhya, Meru, Kamba, Kenyan Asia, and Turkana are underrepresented since their proportion is below their population proportion.⁹² This, therefore, means that in the overall, based on their population percentage, 16 communities are still underrepresented.

The table below shows the ethnic representation in the county public service by looking at the number of counties where various ethnic communities have a majority, the number in the general staff, the number of CECs, CPSB members and the members of the County Assemblies.

This table uses for the Nairobi figures the study that shows that there is no single community with more than 50% of the Nairobi population.

Table 8: Ethnic Representation in the county public service, looking at the 16 most dominant ethnic communities on the basis that they form a majority in at least one county in the country. The remaining communities (27) are grouped as 'others' (2016).

N o	Ethnic group	No of staff & (%)	Counties highest & (%)	Dev. (staff & pop)	No of CECs & (%)	No in CPSBs & (%)	No in CAs
1.	Kikuyu(17.7)	26807 (22.9)	8 (17.0%)	5.2	69 (15.9)	40 (13.0)	483 (13.0)
2.	Kalenjin+Po kot=(13.3)	16257+819= 17076(14.6)	7 (14.9%)	1.3	59+10= 69 (15.9)	46+7=5 3 (17.3)	471+95=5 66 (15.3)
3.	Kamba(10.4)	9058 (7.8)	3 (6.4%)	-2.7	33 (7.6)	22 (7.2)	301 (8.1)
4.	Luhya(14.2)	15522 (13.3)	5 (10.6%)	-0.9	39 (9.0)	31 (10.1)	397 (10.7)
5.	Luo(10.8)	11913 (10.2)	4 (8.5%)	-0.6	31 (7.1)	23 (7.5)	298 (8.0)
6.	Kisii(5.9)	8000 (6.8)	2 (4.3%)	0.9	20 (4.6)	14 (4.6)	184 (5.0)
7.	Meru(4.4)	4629 (4.0)	1 (2.1%)	-0.4	10 (2.3)	7 (2.3)	142 (3.8)

⁹² Towards national cohesion and unity in Kenya: Ethnic diversity and audit of public service.

8.	Somali(6.4)	3592 (3.1)	3 (6.4%)	-3.3	36 (8.3)	21 (6.8)	326 (8.8)
9.	Maasai(2.2)	2537 (2.2)	2 (4.3%)	-0.0	17 (3.9)	13 (4.2)	127 (3.4)
10	Taita(0.7)	1430 (1.2)	1 (2.1%)	0.5	8 (1.8)	5 (1.6)	60 (1.6)
11	Mijikenda+ Pokomo=5.2	4406+666=5 072 (4.3)	4 (8.5%)	-0.9	16+2=1 8 (4.1)	14+1=1 5 (4.9)	222+33=2 55 (6.9)
12	Turkana (2.6)	891 (0.8)	1 (2.1%)	-1.8	13 (3.0)	7 (2.3)	185 (5.0)
13	Borana (0.4)	953 (0.8)	2 (4.3%)	0.4	6 (1.4)	6 (2.0)	56 (1.5)
14	Embu (0.9)	2817 (2.4)	1 (2.1%)	1.5	5 (1.2)	5 (1.6)	44 (1.2)
15	Tharaka (0.5)	1671 (1.0)	1 (2.1%)	0.5	9 (2.1)	7 (2.3)	15 (0.4)
16	Samburu (0.6)	1008 (0.9)	1 (2.1%)	0.3	9 (2.1)	7 (2.3)	53 (1.4)
17	Others (3.8)	4263 (3.7)	0 (0%)	-0.2	43 (9.9)	32 (10.4)	219 (5.9)
Total		116852 (100)	47		435 (100)	307 (100)	3711 (100)

Table 8 shows that, in aggregate, the Kikuyu have the most staff being at about 23%. This is despite being in majority in 8 counties (9 if Nairobi is added to the list) which represents 17% of all the counties similar to the percentage of the Kikuyu population nationally. It means, therefore, that, comparing the number of staff with its population, the Kikuyu community is still over-represented at the county level. The Kalenjin are second with about 15% which is also more than their national 13.4% of the population. They form the majority in 7 of the 47 counties which represents about 15% of all the counties. Other communities with proportionately more staff than their population are the Kisii, Taita, Borana, Embu, Tharaka, and the Samburu. The remaining communities have a negative deviation. The Somali have a representation of only 3% despite having majority population in 3 counties or 6% of all the counties. The Mijikenda too have a representation of 4% despite being in majority in four counties which represents 8.5% of all the counties. After the Somali, the Kamba are the next most under-represented at about 8% compared to their population representation of slightly more than 10%. It is also important to note that the Kamba have majority in 3 counties which represents about 6% of all the counties.

The Kikuyu and the Kalenjin have the highest presence among the CECs at 69 (16%) followed by ‘Others’, with about 10%, the Luhya at 9% and the Somali at 8%. The rest have less than 8%. For most communities, the percentage in the CEC is lower than among the general staff, but smaller communities are more represented in CEC than among the general staff. One explanation for this is that counties are attempting to be compliant with the legal requirement on ethnic inclusiveness in their staff and in doing that, the inclusiveness is more visible at the CEC level because of the small number of the CECs, as was the case with commissioners. In Mombasa County, for example, seven ethnic communities have at least one member in the CEC meaning that even a small community with only one CEC member has a representation of 10% at this level, which would not be so among the general staff.

On the County Public Service Boards (CPSBs), the Kalenjin have the highest number at 17% followed by the Kikuyu at 13%, the small communities under ‘Others’ at 10.42% and the Luhya at 10.1%. Other communities have less than 10%. The percentage for smaller communities

increases in the CPSBs, again perhaps because of the smaller size of the CPSBs which makes their ethnic make-up more visible.

Among County Assembly staff, the Kalenjin again have the highest representation at 15% followed by the Kikuyu at 13%, the Luhya at 10%, the Somali at 9% and the Kamba and Luo at slightly over 8%. One notable fact is the Somali—with 3% among the general staff—have risen to the fourth most represented among assembly staff. The Kikuyu on the other hand have their representation reduced from about 23% under the general staff to 13% at the County Assembly. The Turkana too have increased by a large margin—from 0.76% to about 5%. ‘Others’ have increased from 3.65% to about 6%.

5.0 The overall trend and adherence to the pluralism principles and the law

The study has so far analysed the ethnic inclusion in employment in the public sector, and has attempted some explanations of the data. What the study has not done includes a direct comparison of the state of ethnic inclusion across the public sectors that have been considered; finding a link, if any, of the results with the appointing authorities; interpreting the results in the context of the pluralism principles and the relevant law; and to establish how ethnic inclusion is being interpreted by the Kenyan courts.

5.1 Overall trends of inclusion in Kenya’s public sector

Table 9: A summary of the representation of the Kenyan ethnic communities in various public entities considered in this study

N	Ethnic groups	Parastatals (%)			Independent commissions (%)				Govt. Min. & Depts %		Universities & constituent colleges (%)				NPS (%)	Judiciary (%)	County governments (%)			
		All staff	Senior staff	CEs	All staff	Senior staff	Commissioners	CEs	2011	2014	All staff	VC/Principal	Council Chair	Council member			All staff	CEs	CPSBs	CAs
1.	Kikuyu(17.7)	20.6	25.3	22.2	21.8	19.1	15.7	13.3	22.3	22.9	23.6	12.9	10.0	14.5	17.9	26.1	22.9	15.9	13.0	13.0
2.	Kalenjin(13.3)	15.8	14.1	16.2	13.6	10.7	7.4	0	16.7	12.8	15.4	6.5	3.3	13.9	20.2	9.3	14.6	15.9	17.3	15.3
3.	Luhya(14.2)	15.0	12.9	13.5	11.1	14.4	12.0	26.7	11.3	12.2	15.3	16.1	13.3	9.8	9.7	13.7	13.3	9.0	10.1	10.7
4.	Luo(10.8)	13.9	16.0	16.2	9.5	14.1	11.1	20.0	9.0	10.6	15.6	16.1	13.3	11.6	7.8	15.5	10.2	7.1	7.5	8.0
5.	Kamba(10.4)	9.2	10.3	5.4	11.2	10.1	9.3	0	9.7	10.9	8.0	12.9	3.3	7.5	10.0	11.8	7.8	7.6	7.2	8.1
6.	Kisii(5.9)	6.2	6.3	6.5	7.1	8.0	5.6	13.3	6.8	7.1	8.3	6.5	10.0	3.5	5.6	7.5	6.8	4.6	4.6	5.0
7.	Meru(4.4)	3.8	2.8	4.9	6.4	5.0	9.3	0	5.9	4.1	4.5	12.9	6.7	6.4	5.9	3.1	4.0	2.3	2.3	3.8
8.	Somali(6.4)	1.5	1.2	4.3	3.9	4.1	10.2	6.7	2.7	1.9	0.5	3.2	10.0	6.4	2.9	2.5	3.1	8.3	6.8	8.8
9.	Samburu(0.6)	0.4	0.5	0	3.9	1.4	0.9	0	-	-	-	0	3.3	1.2	1.1	0.6	0.9	2.1	2.3	1.4
10	Maasai(2.2)	1.5	1.4	3.2	2.4	2.8	2.8	0	-	-	1.1	0	3.3	2.9	2.0	1.2	2.2	3.9	4.2	3.4
11	Taita(0.7)	2.0	1.7	0	2.1	1.9	1.9	0	-	-	1.2	0	6.7	4.1	0.6	0.6	1.2	1.8	1.6	1.6
12	Mijikenda(5.2)	5.3	2.7	1.6	2.1	1.4	2.8	0	3.8	6.2	2.3	3.2	6.7	6.4	4.3	1.9	4.3	4.1	4.9	6.9
13	Borana(0.4)	0.6	0.4	0	2.0	1.37	2.8	6.7	-	-	-	0	0	0.6	1.8	0.0	0.8	1.4	2.0	1.5
14	29Others(7.8)	4.2	4.4	6	2.9	6.19	8.3	13.3	11.8	11.3	4.2	9.7	10.1	11.2	10.3	6.8	7.9	16	16.2	13.9
Appointing authority involved or with potential influence:		President (Pres), Minister and the Board			Select committee, National Assembly (NA), President, Commission & the Human Resource department				PSC, Select committee, NA, President		Council, Vice Chancellor, Cabinet Secretary, Human Resource Department, Other departments				NPSC, IG,NA, Select Panel, Pres.	pres, JSC, NA	Governor, County Assembly, CPSB, County Public Service Board (CAPSB)			

There was no disaggregated data available for the armed forces, thus it has not been included in the table above. It will, however, be considered in the analysis.

This general analysis compares the extent of ethnic inclusion between and among various comparable public entities, rank of staff, and their numbers.

The first comparison is looking at the entity where each community has the highest representation across the board in the category of the general staff and the senior staff. The hypothesis is that if many communities have their highest representation across the entities in a certain entity then it can be argued that that entity is the most inclusive.

By assessing the 13 biggest communities, and the rest classified as 'others', the study finds that at the general staff category, one community has its highest representation in the National Police Service, five in universities and their constituent colleges, six in independent commissions and two in government ministries and departments. No community had its highest representation in the parastatals and in the County governments. The general staff category at the judiciary were not considered in the study. Only the judges were considered and this study has classified them under the senior staff category. Using the hypothesis that the more communities with their highest representation an entity has, the more inclusive it is (meaning that if many have their highest representation in an entity, there is a possibility that the biggest communities have less percentages which get shared by medium communities and thus constituting their highest percentages), these results indicate that the independent commissions are the most inclusive at the general staff category. The universities and their constituent colleges come in second. However, the representation of 'Other' ethnic communities in the general staff category of the independent commissions is only 2.9% compared to, for example, the NPS where they are 10.3%. (Government ministries and departments also have a higher representation for 'others' but the communities under 'others' in this category are 33, not 29 like in the rest of the categories hence not the best comparison). Several other entities also have a higher percentage than 2.9% which contradicts the above thesis. Perhaps the likely explanation is that the independent commissions have tried to be ethnically inclusive but tend to look at the big communities alone. This is possible if, every time there is recruitment, the panel ensures that they employ from several communities but in so doing end up focusing on the big communities only.

Universities and constituent colleges have the second highest number of communities (5) and they also have a relatively high percentage (4.2) of 'Others' which would make them among the most inclusive. However, a keen look at the data also shows that the communities with the highest representation in these institutions are only 5 of the seven biggest communities. That is the opposite of the independent commissions where none of the big seven communities has its highest representation. A possible explanation is that the Independent Commissions are only inclusive of the biggest communities and the medium ones (thus not inclusive of the smallest communities) while the Universities are dominated by the biggest communities, mainly the dominant community where the university is located, and the rest of the communities are evenly spread out.

A look at the presence of 'Others' in government ministries and departments, NPS, county governments and the parastatals, can give a first impression about their inclusiveness. Ministries and departments have the highest representation (11.8%) (Keeping in mind, however, that 'others' in this category represents 33 communities while the 'other' in other categories represent 29 communities) followed by the NPS (11.3%) and the counties at (6.8%). The higher the representation of 'others' the more inclusive an entity. The above order on the most inclusive

entities is retained if a comparison is made with the analysis that looked at the entity where most communities have their highest representation, the same order is retained.

Other possible hypotheses, however, include that the entities that have the least number of communities having their highest representation in those entities, when compared across the board, are the most inclusive which is why all communities have relatively low representation. Also that where there are fewer staff, the representation of communities tend to be more noticeable. Independent commissions, having the least number of staff, are more likely to have a wider range of communities noticeable among those staff.

The next analysis looks at the senior staff category in the same respect- where ethnic groups have their highest representation when compared across the board. While it would have been possible to compute an average of several of the senior positions under a certain entity for example, the CEC and the CPSB, the author decided not to since some percentages can mislead since they are derived from very small numbers compared to others.

The analysis of the senior staff shows that the universities and the independent commissions each have the highest representation being five communities when compared across the board. The counties have three and the Judiciary have one. In the independent commissions, most of the communities that have it as where they are highest represented are the big communities while in the universities it is the smaller communities. This is the reverse of what was the case at the general staff category. The argument that the independent commissions tend to consciously balance the ethnic inclusion during recruitment seems to hold here too. The disadvantage in the balancing too remains which is that the commissions tend to just focus on the big communities which in the end explains why they end up dominating. The smaller the numbers the higher the representation from the biggest communities since they are usually given the first priority and when the pool grows, the medium ones get an opportunity which when compared with their representation in other entities end up being their highest representation. The representation of the 'Others' also generally follows the same trend with most categories of the senior staff in the universities being more than in the Commissions.

As already mentioned, in the senior staff category, three communities (including the 'Others') have their highest representation in the counties while one has in the judiciary. The fact that the 'Others' category has its highest representation in the Counties could be interpreted to mean that devolution has helped get many people in the smallest communities get into senior positions. The representation of the 'Others' in the counties in the general staff category was third after the government ministries and departments and the NPS whose data on senior staff was not available thus not covered by this study.

Even though no ethnic community has its highest representation in the parastatals, the figures show that the big ethnic communities, particularly the Kikuyu, have their second or third highest representation in the senior staff category in the parastatals while the small communities have many of their smallest representation in the parastatals. Considering the parastatals have very many senior staff compared to other entities that it has been compared with, they are the least inclusive in the senior staff category. Other factors that may need to be looked at include the level of education for various ethnic communities and how that has affected the imbalance in the public sector employment and whether that explains why there are very many Judges from the Kikuyu community and very few from the Mijikenda community. Studies have, for example, shown significant disparities in the levels of literacy among the various ethnic communities in Kenya. In 1969, for example, the primary school enrolment was at 64% in Central Province,

61% in Nairobi, 47% in Eastern, 40% in Western, 42% at the Coast, 31% in Nyanza, 29% in the Rift Valley and 4% in North Eastern.⁹³ By 1997, the enrolment at both the primary and secondary schools was still to some extent similar to 1969. Central province was at 100% and 33.7% for primary and secondary school respectively; Rift Valley at 93.4% and 29.6%; Eastern 93.7% and 20.4%; Western at 108.5% and 22.1%; Nyanza 90% and 38.5%; and Coast 87.6% and 14.2%. The data for North Eastern is not available.⁹⁴ In 2005/2006, another study was done on the literacy level and it established that the Kisii have the highest literacy rate at 83.4%, followed by the Kikuyu at 83.0%, Embu, Luo, Kamba, Luhya, Kalenjin, Meru, Mijikenda, Maasai and Somali at 82.4%, 80.8%, 79.4%, 71.9%, 71.6%, 68.2%, 55.0%, 31.8% and 20.9% respectively.⁹⁵ The Mijikenda at 55% literacy would find it difficult to compete with the Kikuyu at 83% literacy level.

Another dimension of looking at the extent of ethnic inclusion is assessing the public entities where the various ethnic communities have the lowest representation when compared across the board at the general staff category and at the senior staff category. The analysis will take the approach similar to the one used above.

In the general staff category, most communities (five) have their lowest representation in the NPS when compared across the board followed by parastatals and independent commissions each with three ethnic communities, universities with two, counties with one and ministries and departments with none. The general hypothesis for this analysis is that the fewer the communities that have their lowest representation in a public entity the more inclusive that entity is (meaning that if many have their lowest representation in an entity, there is a possibility that only a few communities have taken very high percentages). On this basis, in the above list, the national ministries and departments are the most inclusive and the least inclusive the NPS. This seems somewhat inconsistent with the conclusion drawn from looking at the entities where the ethnic communities have their highest representation. The independent commissions were said to be the most inclusive but here they are among the least inclusive. The government ministries and departments now seem more inclusive than in the earlier analysis, while the NPS has remained among the least inclusive.

An antithesis to the above hypothesis is that very few communities have taken most of the positions leaving many others with only a few positions to share. To determine the true picture on the above possibility the study will assess the data using other dimensions.

One such dimension is looking at the representation in the category of 'Others'. The data shows that the NPS—which has just been identified as the least inclusive—has a 10.3% representation of 'others', which is among the highest of all 'other' presence across the board. The government ministries and departments have 11.3% in their latest data which is the highest across the board and which corresponds with their ranking under the above hypothesis. (The 'others' for the ministries and departments is composed of 33 ethnic communities and that of the NPS is 29 hence its higher percentage does not necessarily put it first). The independent commissions were ranked low and they remain so while the counties and the universities are in between with the counties scoring a bit higher all corresponding with the above hypothesis since a high percentage

⁹³ Alwy A. and Schech S. 'Ethnic Inequalities in Education in Kenya' *International Education Journal Vol 5, No 2*, 2004 p. 271.

⁹⁴ Alwy A. and Schech S. 'Ethnic Inequalities in Education in Kenya' *International Education Journal Vol 5, No 2*, 2004 p. 272.

⁹⁵ Towards national cohesion and unity in Kenya: Ethnic diversity and audit of public service 2014, p. 12.

under others indicates more inclusiveness. It, therefore, means that only the NPS have defied the rule which needs to be explained.

Most of the big communities have their lowest representation, when compared across the board, in the NPS accounting for almost all the lowest percentages for communities recorded in the NPS. This data therefore shows that, apart from the Kalenjin, the big communities are least represented at the NPS (partly also because the general trend is that they are overrepresented in other entities) with the implication that there is more representation of the small communities.

The conclusion, therefore, under this category is that the NPS, the government ministries and departments and the counties are the most inclusive while the parastatals and the independent commissions are the least with the universities in between.

At the senior category, the commissions is where most (specifically seven) communities have their lowest representation, followed by the universities with six, the parastatals with five and the counties with three. The Judiciary has none. Based on the hypothesis that the more the communities with their least representation in an entity, (particularly the small communities meaning only a few big communities could be dominant in an entity), the least inclusive an entity is, the independent commissions will be classified as the least inclusive followed by the universities, the counties, the parastatals and the judiciary. If the hypothesis is that the more the communities with their least representation in an entity, the most inclusive an entity is, the independent commissions, the universities, the counties, the parastatals and the Judiciary would be the most inclusive to the least inclusive in that order. In terms of representation at the level of 'Others', the parastatals are the least inclusive, followed by the judiciary, the commissions, the universities and finally the counties thus the counties emerge as the most inclusive.

One explanation for the result from the above hypothesis is the many categories of the senior staff at the independent commissions and at the universities which were counted separately thus increasing the number of times an entity appears. If the commissions and the universities are, for example, left out of the analysis, the parastatals will be the least inclusive which agrees with the triangulation done with the representation of the 'Others' which is least in parastatals. The Judiciary on the other hand while the hypothesis gives it a good position in terms of inclusion, its inclusion at the level of 'Others' only shows that it is among the least inclusive at the senior level of staff.

Another dimension of analysis is by comparing the more closely related entities in order to help explain the behaviour/trend of pluralism principles. The trends will then be compared with the appointing authority. It would be good, for example, to compare counties with the government ministries and department since their staff are in different parts of the country and several of them in Nairobi. The members of staff are also centrally recruited which is within the county headquarters in the case of the counties and by the CPSB (mainly) and members of staff at the ministries and departments of the national government, are also centrally recruited by the Public Service Commission (PSC). The members of the PSC are appointed by the President and they work with significant support from their secretariat. The CPSB is also appointed by the Governor. The comparison of the two shows many similarities but also some differences. A comparison of 10 communities shows a decrease in five of them from the ministries and departments to the counties, an increase in four and no difference in one of them. In fact, the trend shows that bigger communities are experiencing a more of a decrease at the county level than the small ones. The Luo, Kamba, Kisii, Meru and the Mijikenda, for example have smaller representation in the number of staff at the counties than at the ministries and departments. On

the other hand, the 33 smallest ethnic communities have an increase from 11.3% at the ministries and departments level as against 13% in the counties. Other communities that have a higher representation at the counties are the Somali, Luhya and the Kalenjin. The representation of the Kikuyu has remained the same.

Another interesting comparison is between the NPS and the counties. The recruitment of the members of the NPS takes place in all counties and deployed at every part of the country just like the members of staff of the counties are recruited in all counties and deployed to serve in the counties that recruit them. The data show that out of 14 groups that were considered, the proportion of representation at the NPS to the Counties increased in nine groups, decreased in four including 'Others' (which include 29) and there was no change in one of them. This shows that the NPS is far more inclusive than the counties despite the fact that the point of recruitment is similar. An argument can be made that —if one of the objectives of devolved system of government was to ensure greater representation of the various ethnic communities — the best way to achieve that is to recruit as it is done at the NPS. This argument is true in the general staff category. No comparison has been made at the level of senior staff in the counties and at the NPS.

Further, the study assesses which communities seem to be more included than others when comparing across the board. One of the ways of looking at this is by comparing the population with the proportion of representation and checking the number of times the representation is more than the population and vice versa. This approach has its challenges especially when looking at small numbers where a small representation of a small community gives it a high percentage which may give a wrong impression that it is balanced. As such, the analysis will only focus on the general staff category for the parastatals, commissions, universities, NPS and county governments. It will also consider the senior staff of the parastatals and the independent commissions. The government ministries and departments have been left out since they lack some entries for several communities. The ethnic communities will, therefore, be compared with their population in seven instances.

The result shows that only the Kikuyu have a higher percentage of representation than their population share in all the entities considered while only the Somali have a lower representation in all the seven instances. Other ethnic communities that are least represented are the Kamba and the Mijikenda each with just one positive deviation and the 'Others' with just two positive entries. The Maasai and the Luhya follow closely. In addition to the Kikuyu, others that are well represented are the Kalenjin, Taita, Kisii and the Borana each with a positive of six out of seven and the Luo and Samburu each with four positives out of seven. While the figures above have compared the big communities with the smaller ones, it is worth noting that a small representation of the latter —almost any representation— means their representation exceeds their population. This means that it is not entirely fair to compare the representation of the communities with their population in order to assess inclusion. This, therefore, means that the Taita, Borana and the Samburu are not necessarily well included simply because they have a higher percentage than their population proportion. The same may be said of the Luhya that they are not necessarily underrepresented when compared with the smaller communities but that is the case when compared with the big communities.

Finally, the study now assesses whether there is a link between the appointing authority and the inclusion or exclusion of some communities in various entities. The above analysis shows that most big communities are well represented in the universities and parastatals followed by the

independent commissions. They are least represented at the NPS and the county governments. The exceptions to this rule among the biggest seven communities (more than 5% representation) are the Kamba and the Somali.

This study divides the small communities into two: the medium and the smallest, classified as 'Others'. Considering the category of the not very small communities, the independent commissions emerge as the most inclusive followed by the counties and then the parastatals. The universities and colleges are the least inclusive followed by the NPS. In terms of the communities under 'Others', the NPS is the most inclusive followed by the counties, parastatals and universities. The independent commissions are the least inclusive of this group especially in their general staff. This analysis shows that the big communities have most dominance in the universities and parastatals and least dominance in NPS and counties; the medium communities are present most in independent commissions and counties and least in universities and colleges and NPS; while the smallest communities are most represented in the NPS and counties and least in independent commissions and universities. Several questions requiring answers emerge from the above analysis. These include: why are the universities and the parastatals more inclusive of the big communities and least when it comes to the smallest communities? Why are the NPS and the counties the most inclusive for the smallest communities and the least for the big communities? Why are the counties and commissions the most inclusive of the medium communities and the NPS and the universities and constituent colleges the least inclusive? Some of these questions may be answered by looking at how the appointing takes place and the appointing authority for each of the entities.

In terms of where the appointing takes place, the data shows that the more decentralised the recruitment process is the more inclusive entities are which is why the NPS and the counties have emerged as the most inclusive, reaching the smallest communities more than others. The independent commissions, universities and the parastatals each recruit their own staff but that does not seem to help make them very inclusive. Separate recruitment only seems to work where the points of recruitment are distributed across the country and the distribution of the recruitment points across the country is equitable. Counties and the NPS are good examples.

In terms of the appointing authority, the areas to focus on include the likelihood of political bias in the process, the length of the process, the level of education required, the age of an entity among other factors. The NPS seems to have the lowest political interference because of the number of people involved in the recruitment and that is reflected on how inclusive it is. The independent commissions and the ministries and departments are the other entities that seem to be more shielded from political interference compared to the rest. Generally, however, there are political players at some level in all the entities that can introduce or influence political biasness in the process. Further, while there seems to be a relatively long process for most of the positions, some individuals within the system can be key in determining who are employed despite the long process thus defeating the established structures. There is also no strong evidence of whether the introduction of a selection panel that is intended to be neutral leads to more inclusion.

Furthermore, in a system where a few individuals can determine who gets employed, professionalism often is ignored and some unqualified or less qualified people tend to get employed. On the question of the age of an entity, the results show mixed results of exclusion in both new and old entities; no significant difference.

What, however, do the results above mean in terms of implementing the pluralism principles and the law?

The pluralism principles as derived earlier are: Recognition and mutual respect for differences and the rights of groups and individuals; pro-active/energetic continuous engagement among various diversity; understanding of differences; and inclusive citizenship without imposition of hegemony by groups and or individuals (equality). The principles require that the diversity in a society be identified, be respected, be proactively and continuously engaged, their differences be understood and those differences or any other issue not to be used to depict others as better than others. This means that coexistence within a country should not be left to the market forces. Employment opportunities should not just be determined by qualifications, or who applies. When the senior positions in the independent commissions must in all cases have people from some big ethnic communities it raises questions on the extent to which the appointing authority respects the principle of no hegemony or the principle requiring continuous engagement. The inclusion of only the big groups suggests a formalistic way of complying with the law, without an understanding of the whole concept of equality of groups and individuals.

In addition, that only entities with many local recruiting points seem to reach the small ethnic communities, suggests that society has not yet appreciated pluralism and indeed constitutional principles that require the recognition of and engagement with the diversity of a country. It means that it is only through the constitutional design that we are getting closer to attaining ethnic inclusion, not through the appreciation of the need. Can meeting the constitutional requirements for the sake of it help achieve the intended coexistence? The author argues that a constitutional design setting the standards on ethnic inclusion is a step to protect those with 'less power' in the society, because of their smaller numbers etc, and also a starting point to get people to appreciate the need for a continuously more inclusive society and move from compelled compliance to willing coexistence. Partly, this can also be achieved if people appointed turn to be competent. If the individuals and the society don't get to a point of appreciating the need and value for inclusion and begin working towards it, then coexistence remains merely an illusion.

Low levels of education among the smallest communities, for example, should also not be cited as the reason for less inclusion without a further explanation of the steps being taken to address the education problem in those societies. Such would reflect a society that has not appreciated pluralism as a means to enhancing coexistence which also is about respecting the humanity of every individual and society. Similarly, when politics dictate that only those that support those in power get positions in government, that violates the no hegemony principle: the understanding of differences (including political differences- irrespective of their motive) and continuously engaging various diversities. In a plural society, in terms of employment (in this case but also in other sectors of the society), it should be impossible to foretell which ethnic groups and individuals will benefit from certain public opportunities solely on the basis of their ethnicity or political views.

How have the courts applied the existing laws to protect this constitutional principle? In Tana River County, for example, following the 2013 elections, the Governor appointed nine people to the County Executive Committee all from the three biggest communities. Tana River has people from many ethnic communities including the Pokomo, Orma, Wardei, Malakote, Munyoyaya, Akamba, Bajuni and the Kikuyu. After the approval of the list by the County Assembly, a resident of the county went to court claiming that the Committee was not well constituted as it

was not ethnically inclusive.⁹⁶ The court ruled that the governor had failed to observe Article 10 on the national principles and values of inclusiveness, Article 174 on the objects of devolution, which includes recognition, protection and promotion of minorities and marginalized communities, and section 35 of the County Governments Act. Section 35 requires the governor and the county assemblies to ensure that the minorities and marginalised communities are properly included and that affirmative action is taken to ensure that people from such communities qualify for the appointments as entailed in Article 56 of the Constitution.

The implication of the judgment for the concept of inclusion is that the appointment to public offices is not about the proportion of a group in a population. It is about recognising that there is diversity in a given constituency and that that diversity should be continuously engaged, substantially included and not made to feel inferior. The implication of such an arrangement is that smaller groups may tend to be overrepresented which if overstretched can create a feeling of over entitlement over others. The author proposes that the way out of any likely problem from the above arrangement is to ensure that every individual and group has equitable opportunities (including an option for affirmative action where an individual or group is disadvantaged) and that each one of them adheres to the pluralism principles. The end result will be that there will be no one person or group that is to give and another one is to receive. There are only people who recognise diversity and are continuously working to accommodate associated interests using the pluralism principles. It appears, therefore, that the starting point is the recognition of diversity and that everyone is equal on the basis of being human.

There is also another court judgment that agrees with the Tana River case. The case⁹⁷ was filed in the Bungoma High Court by people from the Bongomek, minority community. The petitioners claimed that no person from his community was on the list for Chief Officers of the county and none was in the County Executive Committee. The Court ruled in favour of the petitioner. It said that the Bongomek community were a marginalised community that required representation. The Bongomek community has a population of 3 704 out of a population of over two million in Bungoma County according to the 2009 Population and Housing Census Report thus representing less than 1%.

6.0 Conclusion and Recommendation

Ethnic inclusion in the Kenyan public sector has been a major problem that has in the past contributed to ethnic conflicts. To solve the problem, the Constitution of Kenya sets out various measures intended to help achieve an inclusive plural society. The measures identified as the pluralism principles in this study are: Recognition and mutual respect for differences and the rights of groups and individuals; pro-active/energetic continuous engagement among various diversity; understanding of differences; and inclusive citizenship without imposition of hegemony by groups and or individuals.

The assessment of the parastatals, government ministries and departments, public universities and their constituent colleges, judiciary and the security services at the national level, indicates some level of intention to promote ethnic inclusivity but also some indications of coercion as opposed to voluntary. There are mixed results for the larger and smaller communities in various public entities but some trends emerge. For example, the largest communities (mostly those with more than 5% population share), have largest representation in the universities, parastatals and

⁹⁶ *Republic v Tana River County Assembly & 2 others* [2014] eKLR.

⁹⁷ *John Mining Temoi and Another v Governor of Bungoma County and 3 others* (2014) eKLR.

independent commissions and least represented in the NPS and county governments. The middle-sized communities are represented most in independent commissions and counties and least in universities and the NPS; and the smallest communities (mostly less than 1% population share) are most represented in the NPS and the Counties and least represented in the independent commissions and universities and their Constituent Colleges. The results show that only the entities that have many recruiting points in all parts of the country have realised some level of inclusion for the smallest communities. The rest are still dominated by the largest communities. Indeed, even the entities that have done better in the inclusion of the smallest communities, there is still a lot of room for more inclusion of the small communities.

In terms of ethnic specific inclusion, some ethnic communities are consistently overrepresented while others are consistently underrepresented. Apart from the smallest communities classified in this study as 'Others', there are other communities that are also underrepresented in many instances. The Somali, Mijikenda, Kamba, Turkana and the Maasai generally stand out among the most underrepresented. The Luhya in many cases are also underrepresented. The most overrepresented generally include the Kikuyu (most represented), the Kalenjin, Kisii, Meru, Taita, Borana, the Embu and to some extent the Luo.

The above results show that the recruitment in the public service is still not observing inclusive enough as required by the Constitution. This is why the big communities and particularly those associated with those in power are the most represented. The principle that requires individuals and groups to continuously engage and that against hegemony have not been adequately applied. There are only indications of attempts to satisfy the constitutional and legal requirements but still no serious dedication for inclusion.

In order to help achieve a sense of belonging by all Kenyans, to feel respected for who they are, and feel supportive energy and commitment from others which will then lead to coexistence, there is need for inclusive state services and adherence to pluralism principles.

References

Books, chapters in books, articles, reports, internet sources

1. Akhter M 'Culture of Respect: a Muslim perspective' www.ispi-usa.org/docu/Cultureofrespect.ppt (accessed 18 June 2016)
2. Alwy A and Schech S. 'Ethnic Inequalities in Education in Kenya' *International Education Journal Vol 5, No 2*, 2004
3. Budget highlights: the mwananchi guide (2016)
<file:///C:/Users/ADMIN/Downloads/Highlights%20of%20the%202016-2017.pdf>
(accessed 15 December 2017)
4. Cohesion index status of social cohesion report, 2011
5. Central Department of Sociology/Anthropology Tribhuvan University, 'The Nepal multidimensional social inclusion index: diversity and agenda for inclusive development' (2014), Kathmandu Nepal [file:///C:/Users/ADMIN/Downloads/Nepal-Inclusion-Index-Tribuvan%20\(1\).pdf](file:///C:/Users/ADMIN/Downloads/Nepal-Inclusion-Index-Tribuvan%20(1).pdf) (accessed 13 December 2017)
6. Diana LE 'Harvard University pluralism project' (2006) <http://pluralism.org/what-is-pluralism/> (accessed 24 June 2016)
7. Ethnic and diversity audit of counties (2016)
8. Fessha TJ, "Institutional Recognition and Accommodation of Ethnic Diversity: Federalism in South Africa and Ethiopia" unpublished PhD thesis, University of the Western Cape, 2008
9. GCP website 'Pluralism' (accessed 10 July 2016)
10. Ghai YP & Cottrell JG (eds), 'Ethnicity, nationhood and pluralism' in Yash Pal Ghai & Jill Cottrell Ghai (eds) (2013) *'Ethnicity, nationhood and pluralism: Kenyan perspectives'* (Global Centre for Pluralism and Katiba Institute, Ottawa and Nairobi, (2013)
11. Global Centre for Pluralism (GCP) website, 'Pluralism'
<http://www.pluralism.ca/en/programs/pluralism-drivers.html> (accessed 10 July 2016)
12. Globalsecurity.org, 'Kenya military personnel'
<https://www.globalsecurity.org/military/world/kenya/personnel.htm>.
13. International Institute for Social Studies (IISS) 'Indices of social development: inclusion of minorities' <http://www.indsocdev.org/inclusion-of-minorities.html> (accessed 13 December 2017)
14. Kamali MH 'Diversity and pluralism: a qur'anic perspective' (2009) 01 *LAIS Journal* 27
15. Ministry of State for Planning, National Development and Vision 2030) (2010)
16. National Cohesion and Integration Commission (NCIC), Report on 'ethnic audit of parastatals in Kenya' (2016)
17. NCIC report, 'building a cohesive Kenyan society- the NCIC experience 2013'

18. Norman R 'The idea of pluralism in the United States'
ourpluralhistory.stcc.edu/resources/Curriculum/TheIdeaofPluralism.pdf (accessed 18 July 2016)
19. Odunga D et al 'Public university chiefs dismiss audit report on staff ethnicity'
<http://www.nation.co.ke/news/Public-university-chiefs-dismiss-audit-report/-/1056/1361562/-/view/printVersion/-/t6i9ss/-/index.html> (21 October 2017)
20. Parris M 'Multiculturalism. A dangerous word...just like apartheid' (2004)
<https://www.thetimes.co.uk/article/multiculturalism-a-dangerous-wordjust-like-apartheid-57kmd6qkl02> (accessed 13 December 2017)
21. Public service commission, Public service evaluation report 2014
22. Republic of Kenya (2010) 2009 Kenya Population and Housing Census Vol II, Government Printer
23. Silver H 'The contexts of social inclusion' (2015) DESA Working Paper No. 144
http://www.un.org/esa/desa/papers/2015/wp144_2015.pdf
24. Stubbs T 'Ethnopolitics and the Military in Kenya in 'Forging military identity in culturally pluralistic societies'
https://books.google.co.ke/books?id=HOHCgAAQBAJ&pg=PA78&lpg=PA78&dq=the+top+military+heads+under+the+moi+government&source=bl&ots=VP84nVqseX&sig=K_XanNrCazduGELkDSTMjCxsApQ&hl=en&sa=X&redir_esc=y#v=onepage&q=the%20top%20military%20heads%20under%20the%20moi%20government&f=false
25. Towards national cohesion and unity in Kenya: Ethnic diversity and audit of public service 2014

Laws, regulation and other legal instruments

1. Constitution of Kenya 2010
2. County Government Act (CGA), 2012
3. *John Mining Temoi and Another v Governor of Bungoma County and 3 others* (2014) eKLR
4. Judicial Service Act 2012 (revised edition 2015)
5. Kenya Defence Forces Act, 2012
6. National Cohesion and Integration Act (NCIA) 2012
7. National Police Service Act (2012) (revised 2014)
8. National Police Service Commission Act, 2012 [revised 2014]
9. *Republic v Tana River County Assembly & 2 others [2014] eKLR*
10. State Corporations Act (Revised 2016 [2012])
11. Universities Act 2012