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Decentralisation and inclusion in Kenya

From pre-colonial times to the first decade of devolution

Chapter 3

Decentralisation of power in Kenya in historical perspective

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Introduction

Kenya is run by a devolved system of government. This system was reached through historical processes by which the State itself evolved to become what it is today. An understanding of the origin, structure and effectiveness or otherwise of the extant devolved system demands some history. The purpose of this chapter is to restate this history while reflecting on the implication of the various historical happenings on the question of marginalisation, which is at the core of the research in this publication.

The chapter explores the theme of decentralisation of government in Kenya since the colonial days. In so doing, the chapter captures the various phases through which Kenya's governance structure has evolved; The pre-colonial society, the colonial State, and the post-colonial State.

In each of these epochs, the chapter sets out the key historical, normative, policy, structural and administrative developments. The chapter also examines the dominant ideologies that informed the identified developments. It concomitantly reflects on the question of marginalisation as dealt with alongside these key developments, and addresses the historical socio-economic neglect of segments of the Kenyan society over time. The chapter also lays bare the appurtenant struggles.

The chapter argues that the models of decentralised governance and policies adopted in each of the above epochs are a direct result of the mindset of the leadership at the helm and the politics at play at each time. At the centre of this is the clamour for accumulation of resources and a craving for self and community preservation. Thus, the attitudes and politics of government at the various stages of the evolution of the Kenyan State have influenced the legal framework and structure of decentralised governance.[1] This has also had a ripple effect on the question of inclusion along the various fault lines of women, persons with disabilities (PWDs), youth, ethnic and other minorities and marginalised communities.

A common thread that is discernible throughout this chapter is that of resistance (in fact aversion in some instances) to decentralisation and active attempts by the powers of the day to consolidate power at the centre. Kenya's experience has revealed that control of governance apparatus equals the control of resources and everything that comes with it. This appears to have been the key incentive for the obsession of the political elite with centralised power. However, in the course of time, when it became clear that a totalitarian centre could no longer hold, it had to cave in and allow new forms of governance to be forged. And even then, the forces of resistance persisted and still continue to haunt and influence the pace and scope of implementation of devolved governance under the Constitution of Kenya, 2010 (2010 Constitution).

It will be apparent from historical accounts of decentralised governance that the clamour for real decentralised power in the run up to independence in 1963 and in the run up to the birth of the second Republic in 2010 were driven, initially by the fear of domination of segments of the population over other segments, and subsequently by the longing of the people to halt and reverse the pattern of gross historical inequalities that characterised Kenya's political, social and economic environment.

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1 Yash P Ghai, 'Constitutions and constitutionalism: The fate of the 2010 constitution', in, Godwin R Murunga, Duncan Okello and Sjögren Anders (eds), *Kenya: The struggle for a new constitutional order,* Zed Books, 2014, 127.

Whole regions and communities had been excluded from enjoying the benefits of national development. Also defining this era were cases of unequal development, unequal distribution of national resources, and unequal participation in decision-making and management of public affairs especially by women, PWDs, the youth, pastoralists and minority communities.[2] These decentralisation efforts were characteristically always met with intense opposition and challenges, and when the efforts at decentralisation finally succeeded there would emerge equal or more opposing forces to reel back the gains in practice.

Before delving further into the discussions, it is apposite to briefly reflect on some of the key terms used to describe the various models of decentralisation.

Delegation is defined as, '[t]he transfer of responsibility for specifically defined functions to structures that exist outside central government.'[3] Delegation may also be understood to mean the transfer of specific functions from the central government to semi-autonomous agencies in order that they perform certain public functions on behalf of the central government.

Devolution is the practice where the authority to make decisions in some sphere of public policy is delegated by law to local authorities.[4] 'Devolution is by all means, a political device for involving lower-level units of government in policy decision-making on matters that affect those levels while deconcentration is its administrative counterpart.'[5] Distinguishing it with delegation, Jaap de Visser notes that in devolution, sub-national government power is a permanent power and 'original', as opposed to delegation where the same can be withdrawn by the national

2 Constitution of Kenya Review Commission, final report approved for issue at the 95th plenary meeting of the Constitution of Kenya Review Commission held on 11 February 2005, 104.

3 Jaap De Visser, *Developmental local government: A case study of South Africa*, Intersentia, 2005, 14.

4 CKRC, Final Report, 11 February 2005, 228.

5 CKRC, Final Report, 11 February 2005, 229.

government.[6] Others like Jean-Paul Faguet describe devolution as, the transfer of specific functions to regional and local governments 'that are independent of the center within given geographic and functional domains'.[7] In the Kenyan context, Mutakha Kangu infers that devolution might be specifically defined as,

> [a] system of multi-level government under which the Constitution creates two distinct and interdependent levels of government – the national and county – that are required to conduct their mutual relations in a consultative and cooperative manner.[8]

Deconcentration has been defined as 'a pattern of delegated authority that is settled internally within an administration, which can be altered or withdrawn from above'.[9] It has also been described as, 'administrative decentralisation' that involves '[t]he transfer of administrative authority, perhaps coordinated by a representative of the central government in that area, from the centre to the field'.[10] Notably, there are no legal guarantees for this transfer.

Decentralisation refers to geographic transfer of authority, whether by deconcentration of administrative authority to field units of one department or level of government, or by political devolution of authority to local government units or special statutory bodies. Underpinning the concept of decentralisation is the idea of distribution of state powers between the centre and the periphery.[11] Decentralisation

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6 De Visser, *Developmental local government,* 15.

7 Jean-Paul Fauget, 'Decentralization and governance' 53 *World Development*, (2014) 3.

8 John Mutakha Kangu, 'An interpretation of the constitutional framework for devolution in Kenya: A comparative approach', Unpublished LLD Dissertation, University of the Western Cape, 2014, 32.

9 Philip Mawhood, 'Local government in the third world', in Roger Southall and Geoffrey Wood *Local government and the return to multi-partyism in Ken*ya, 95(381) Oxford University Press on behalf of the Royal African Society, October 1996, 501-527 at 508.

10 CKRC, Final Report, 11 February 2005, 228.

11 CKRC, Final Report, 11 February 2005, 227.

can be in unitary or federal systems, and it takes two major forms: deconcentration and devolution.

Majimbo means 'regionalism' or semi-federal states.

Federalism refers to a system of government '[w]here all regions enjoy equal powers and have an identical relationship to the central government'.[12] Federalism implies split sovereignty.[13]

Some cursory remarks on the pre-colonial period

Before the foreign entry of the Europeans in the modern-day Kenya, African communities had an organised way of administering their affairs, 'a simple and relatively informal governmental system, localised and apparently not designed for the modern state'.[14] Some tribal groupings had 'a centralised authority, organised administrative machinery and formal judicial institutions'[15] while others lacked such a centralised, hierarchical administration.[16]

Most communities in the territory of Kenya were communal and leadership vested in a council of elders who made collective decisions.[17] These traditional systems were decentralised, involved popular participation, and arrived at major decisions by consensus. Noticeable too was the absence of a single cohesive local administration system upon which the British could impose theirs.[18] For instance, the

12 Yash Pal Ghai, 'Ethnicity and autonomy: A framework for analysis' in Yash Pal Ghai (ed) *Autonomy and ethnicity*: *Negotiating competing claims in multi-ethnic states*, Cambridge University Press, Cambridge, 2000, 8.

13 Ghai, 'Ethnicity and autonomy', 17.

14 Jackton B Ojwang, *Constitutional development in Kenya: Institutional adoption and social change*, Acts Press, African Centre for Technology Studies, Nairobi, 1990, 21.

15 Jackton B Ojwang, 'Constitutional trends in Africa-The Kenya case' 10(2) *Transnational Law and Contemporary Problems* (2000) 517-538, 519.

16 Ojwang, 'Constitutional trends in Africa-The Kenya case', 519.

17 Republic of Kenya, 'Report of the Commission of Inquiry on Local Authorities in Kenya: A strategy for local government reform in Kenya' 1995, 5-6.

18 Daniel M Muia, Joseph Ngugi and Richard Gikuhi, 'Evolution of local authorities in Kenya' in Tiberius Barasa and Wim Eising (eds) *Reforming local authorities for*

Bukusu community did not constitute one political unit. Their political organisation was based on exogamous clans or clan groupings, which often constituted a large clan or sub clans or families who occupied a distinct territory.[19] The clan was the central social arena where individual roles, groups, status acquisition, corporate action, religious and political authority were carried out. However, the clan-driven structures upon which political authority rested were acephalous given that they were not as formalised, differentiated or centralised.[20] Some communities were nomadic while others were farmers and this affected governance since most pre-colonial communities were concerned primarily with 'the imperatives of securing essential survival needs in a harsh environment'.[21]

Using various means including conquests and agreements, the British Government gained entry into the Kenyan territory causing massive displacement of the native Africans whom they pushed into reserves. The hitherto communal living and decision-making was rudely disrupted by the British administrative system.

Governance in the colonial period, 1897-1963

This section examines the various developments since the British took over the administration of the Kenyan protectorate and colony. The section reveals the various policy and governance models pursued by the foreign administration over the Kenyan natives. From using a company to rule, to the adoption of the various colonial administrative models that are discussed in this chapter, the colonial agenda was well cut out: to retain a neat, hierarchical, separatist administration structure

better service delivery in developing countries lessons from RPRLGSP in Kenya, Institute of Policy Analysis and Research, 2010, 14.

19 Peter Wafula Weseka, 'Politics and nationalism in colonial Kenya: The case of the Babukusu of Bungoma district C 1894-1963', Unpublished Master of Arts, Thesis, Kenyatta University, 2000, 41.

20 Weseka, 'Politics and nationalism in colonial Kenya', 42.

21 Ojwang, 'Constitutional trends in Africa-The Kenya case', 519.

with complete control over the East African Protectorate (EAP), modern day Kenya, transforming it into their image and likeness.

Charles Eliot, who succeeded Arthur Hardinge as the Commissioner of the EAP in December 1900,[22] encouraged an influx of European settlers, mostly from South Africa, whom he saw as a key factor for the economic development of the region.[23] Eliot's administration entrenched the policy of racial exclusion that favoured the white settlers highly in total disregard for the land rights of the African natives.[24] The Commissioner particularly sanctioned the White Highlands Policy, reserving White Highlands only for the white settlers while the Indians were to be allowed to settle in the lowland areas such as near Lake Victoria and along the coastal strip.[25] African natives were to stay away from the activity zone of the railroad.[26] In May 1903, Eliot instructed his Land Officer not to grant rural land in the Highlands to Indians.[27] Thus, through his policies, Eliot set the tone for primacy of European interests over those of the African, Arab and Asian communities.

Eliot envisioned transforming the EAP Highlands into a European's country, along the lines of the South African model.[28] In his words, '[it] is mere hypocrisy not to admit that white interest must be paramount, and that the main object of our policy and legislation should be to found a white colony'.[29] Eliot's ideology of creating a European's country would

22 Fall Makhete, 'Early political discord in Kenya: European settlers' political struggles in the East Africa Protectorate, 1902-1912' Unpublished PhD Dissertation, West Virginia University, 2016, 33.

23 Makhete, 'Early political discord in Kenya', 13.

24 Makhete, 'Early political discord in Kenya', 13.

25 Makhete, 'Early political discord in Kenya', 13.

26 Makhete, 'Early political discord in Kenya', 13.

27 MPK Sorrenson, 'Land policy in Kenya 1895-1945' in Simon Coldham (ed) *Colonial policy and the highlands of Kenya, 1934-1944* 23(1) *Journal of African Law* (1979) 65-83.

28 Sorrenson, 'Land policy in Kenya 1895 - 1945, in Makhete 'Early political discord in Kenya', 11.

29 Sir Charles Eliot, *East Africa Protectorate,* Edward Arnold, London, 1905, 103 in Makhete, 'Early political discord in Kenya', 34.

play out in successive tenures even after his exit from the EAP in 1904, as settlers continually demanded for political concessions.

After the scramble for and partition of Africa by the European nations, the EAP fell into the hands of the British. But Britain did not intend to govern Kenya by itself immediately. Instead, it contracted a chartered company - the British East Africa Association that would later become the Imperial British East Africa Company (IBEAC) - to manage the territory.[30]

Using the company to govern the Protectorate had its benefits besides providing 'strategic cover'. Githu Muigai observes that the IBEAC provided cheap administration and enabled the Colonial Government to, 'outsource legal liability and bypass legal or administrative disability' and further 'enabled European powers and governments to evade political costs at home and abroad associated with direct imperial control'.[31] The system was highly centralised with elements of delegation since the company administered the territory on behalf of the British. In 1895, the British assumed direct control of Kenya and declared it a Protectorate, administered by a Commissioner,[32] who was appointed by the Queen of England.

The highly centralised and hierarchical system of government was 'designed for control as opposed to participatory and democratic governance'.[33] The Colonial Government pursued an economic policy

30 Yash P Ghai and JPWB McAuslan, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present,* Oxford University Press, Nairobi, 1970, 19.

31 Githu Muigai, *Power, Politics and Law: Dynamics of constitutional change in Kenya, 1887-2022,* Kabarak University Press, 2022, 47.

32 John Mutakha Kangu, *Constitutional law of Kenya on devolution*, Strathmore University Press, 2015, 68.

33 Conrad M Bosire, 'Devolution for development, conflict resolution, and limiting central power: An analysis of the Constitution of Kenya 2010' Unpublished LLD Thesis, University of the Western Cape, 2013, 83.

of exclusion on the basis of race, resulting in segregated economic development in favour of the White Highlands.[34]

The Commissioner exercised administrative control over all administrative and political institutions and was answerable to the Colonial Office situated in London. This system of governance disorganised the hitherto autonomous traditional societies into administrative local government systems sanctioned through various Ordinances, enacted in exercise of delegated authority from the Queen. The colonial administration was highly centralised with elements of delegation; firstly, to the Commissioner in the first instance and later to a provincial administration. This system continued until the eve of independence negotiations when an attempt was made to decentralise the governance structure, through a semi-federal system known as majimbo – the regions. In the run up to independence, the clamour for majimbo was a demand meant to secure the interests of the minority ethnic tribes against the larger political tribes, the Kikuyus and Luos.[35] At the time Kenya gained independence, there were three parallel systems of local government: municipalities, white settler areas, and African areas.[36] However, the Government directed more resources into white local authorities than in the African reserves.[37]

Indirect colonial rule

The Colonial Government continued to solidify power through various instruments. Furthermore, the colonial authority established political and administrative structures designed along racial fault-lines. When loud discontent broke across the various races (African,

34 Bosire, 'Devolution for development, conflict resolution, and limiting central power', 83.

35 Ghai and McAuslan, *Public law and political change in Kenya*.

36 Mutakha, *Constitutional law of Kenya on devolution*, 71.

37 Oyugi W Ouma, 'Local government and development in Kenya' *Discussion Paper*, Institute of Development Studies at the University of Sussex Brighton, 1978, 1-35, 16-18.

Arab, Asian and European), there were attempts to restructure the administrative systems so as to give a semblance of representation and local leadership; but as shall be seen subsequently, the attempts appear to have been mere 'optics' since the colonial authority reverberated in the running of these institutions, through the colonial administrative officers hence manipulating them, effectively tightening the grip on centralised rule.

The first legal instrument to establish an administrative system in the Protectorate was the East Africa Order-in-Council of 1897. This enactment empowered the Commissioner to legislate through the Queen's Regulations, and to establish a court for the Protectorate, which was to sit in Mombasa with appeals going to the High Court in Zanzibar. The Commissioner also had powers to regulate the native courts, which exercised exclusive criminal jurisdiction over the Africans, and to establish a constabulary or other force to be employed to maintain law and order, and to deport persons.[38] In exercise of the power delegated by the Queen, the Commissioner developed a system of provincial administration, with the Commissioner having unrestricted powers within the Protectorate. However, they were accountable to the Secretary of State who was based in Britain and who had authority to approve any regulations they made.[39]

Five years later, in 1902, a new Order-in-Council was enacted granting the Commissioner the discretion to divide the country into provinces and districts for purposes of administration.[40] To give effect to these provisions, the Commissioner appointed provincial and district commissioners to manage the provinces and districts respectively.[41] Although the autonomy given to the Commissioner was regarded as administrative devolution, they remained under the control of the Colonial Office in Britain and the provinces and districts established by

38 Ghai and McAuslan, *Public law and political change in Kenya,* 3.

39 Mutakha, *Constitutional law of Kenya on devolution*, 69.

40 Ghai and McAuslan, *Public law and political change in Kenya,* 41.

41 Commission of Inquiry on Local Authorities in Kenya, Report of the Commission of Inquiry on Local Authorities in Kenya: A strategy for local government reform in Kenya (also called the Omamo Report) 1995, 6.

them were just mere administrative outposts under their control. The resultant effect was that the system remained essentially centralised.[42]

In the same year, lower levels of administration were created through the enactment of the 1902 Village Headmen Ordinance. This legal instrument created the position of African village headman. The provincial commissioners had power to appoint chiefs as agents of the Central Government, and any native to be official headmen or collective headmen of any village(s).[43] The village headmen were to maintain law and order, collect taxes, maintain roads and settle minor disputes among the Africans.[44]

In 1903, the Township Ordinance set in motion a series of subsequent amendments and changes in the local government administration. The 1903 Ordinance was specifically to govern the areas of Nairobi and Mombasa, which were exclusively for the white settlers,[45] and which were to be run by committees.[46] In 1912, the Local Authority Ordinance that set up a native authority system was enacted. However, it failed to be implemented because of disagreements between the Colonial Government and the settler community concerning the actual mechanics, functions and compositions of the authority system.[47] The white settlers made various demands including the

> [e]stablishment of legislative and executive councils, the right to vote, no taxation without representation, an important voice in the development of policy directed towards the Colony's African population, and minority rule.[48]

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42 Ghai and McAuslan, *Public law and political change in Kenya,* 41.

43 Omamo Report, 1995, 6.

44 Southall and Wood, *Local government and the return to multi-partyism in Ken*ya, 95.

45 G Njogu, Local government system in Kenya Cap 265, Laws of Kenya: A presentation to the North-South cooperation between Municipal Council of Nyahururu and the Municipalities of Hatulla and Janakal of Finland on the 23 August to 7 September (Unpublished).

46 Omamo Report, 1995, 6.

47 Njogu, 'Local government system in Kenya Cap 265, Laws of Kenya'.

48 Makhete, 'Early political discord in Kenya', 6, 7.

It was clear that the white settlers craved for an exclusive political system disparate from that the Africans and other racial groups and in which they domineered governance. In the meantime, they continued to enjoy domination in political and economic spheres to the exclusion of the other races. This ignited discontent from the Indians as well as the Africans. This agitation would lead to the Indians seeking the intervention of the Colonial Office. Their agitation bore fruits in 1911 partially when the Colonial Government allocated three nominated seats in the Legislative Council (LegCo) to two Indian and one Arab. The seats had been established in 1907. The other persistent demands by the Indians included being allowed to purchase land in the White Highlands, which had been denied to them by the 'Eldgin Pledge' of 1908, and relaxation of immigration rules to allow more Indians to come to Kenya, demands which the white settlers strongly rebuffed. It was not until 1919 that the first local government structures were recognised and formalised following the establishment of the town councils of Nairobi and Mombasa and the recognition of the District Advisory Committees (DACs) for county areas.[49]

In June 1920, the EAP was turned into a colony (with the exception of the ten-mile coastal strip) and renamed Colony and Protectorate of Kenya.[50] Consequently, the Colonial Government began to concern itself with the plight of African peoples. In 1923, the Colonial Secretary issued the Devonshire White Paper[51] in which he indicated that African interests in the Colony had to be paramount. However, it took much longer for the reprieve from this paper to be felt by the Africans.

African pressure against colonial rule started mounting, especially with the return of 'enlightened Africans' who served in World War I. As a response to the rising pressure, the Colonial Government amended the 1912 Native Authority Ordinance to create Local Native Councils (LNCs) in 1924 and encouraged Africans to conduct their political activities

49 Southall and Wood, *Local government and the return to multi-Partyism in Kenya*, 503.

50 Kenya (Annexation), Order-in-Council (1920) in Muigai, *Power, politics and law, 83*.

51 Named after the Colonial Secretary- The Duke of Devonshire.

through these councils.[52] The Native Councils Ordinance of 1924 thus replaced the DACs with LNCs. As Okoth-Ogendo observed, although the LNCs 'were never intended in Kenya to function as political forums in any independent sense', they 'did have a nucleus effect in concentrating African political awareness'.[53] Indeed, the LNCs 'were the first attempt at 'representational' administration in African areas and consequently were closely associated with the emergence of local leadership'.[54] These councils were composed of the district commissioner, the assistant district commissioner, headmen and other Africans appointed at the discretion of the provincial commissioner.[55] The district commissioner acted as chairperson and chief executive authority. The LNCs had power to levy poll rates and began to undertake 'a fairly wide range of services'.[56] Notably, LNCs were established in the districts, which were administrative sub-divisions of the British provinces. All resolutions passed by the LNCs were subject to the approval of the respective provincial commissioner and the Governor of the Colony. Consequently, the LNCs failed to earn respect and recognition among the Africans who viewed them as instruments of indirect colonial rule.

A Commission of Inquiry was appointed in 1926 headed by Richard Feetham (Feetham Commission) to inquire and report on the system of government in the country with emphasis on what was most suitable for the white-settled areas. The Feetham Commission recommended that a policy of separate development for the Africans and the settlers

52 HWO Okoth-Ogendo, 'The politics of constitutional change in Kenya since independence, 1963-69', (Revised version of a paper presented in January 1971 at St Anthony's College, Oxford, United Kingdom and first published in African Affairs 9-34) in *Report of the Constitution of Kenya Review Commission*, (Volume Five Technical Appendices Part I) (2003) 277.

53 Okoth-Ogendo, 'The politics of constitutional change in Kenya since independence 1963-69', 1.

54 Okoth-Ogendo, 'The politics of constitutional change in Kenya since independence 1963-69', 11.

55 CKRC, Final Report, 11 February 2005, 22.

56 Report of the Local Government Commission of Inquiry Hardacre Commission Report, 1966.

be pursued; that district councils comprising elected non-officials with full executive authority be established in Kisumu, Laikipia, Londian, Nairobi, Nakuru, Naivasha, Trans-Nzoia, and Uasin Gishu; and that the townships be excluded from the district councils and be administered by the district commissioners.

The 1929 Local District Council Ordinance gave effect to this separated system of local government.[57] It created local district councils comprising members elected by whites to replace the 1919 DACs in the white-settled areas. Some Asians were allowed to vote or be elected to these councils. The Africans were not allowed to contest elections, even if they were residents of these areas.[58]

In 1930, the Revised Township Ordinance was enacted, creating two grades of townships, A and B. The district commissioner was mandated to run the grade B townships exclusively, and grade A townships with the help of an advisory committee.[59] The 1930 Native Tribunals Ordinance created parallel judicial systems for the African natives and Arabs with jurisdiction over civil and certain criminal matters. A member of the tribunal could be suspended or dismissed if such member 'appeared' to have 'abused his power, or to be unworthy or to be incapable of exercising the same justly, or for other sufficient reason'.[60]

The 1937 Native Authority Ordinance was enacted following pressure from the Africans. It permitted the election of Africans by Africans to the LNCs even though the district commissioner retained the power to remove any elected member perceived to be 'inappropriate'.

The World War II, and the attendant political, economic and social changes in Great Britain and British colonies in Africa formed fodder

57 Omamo Report, 1995, 7.

58 Mutakha, *Constitutional law of Kenya on devolution*, 70.

59 Njogu, Local government system in Kenya Cap 265, Laws of Kenya, 30.

60 See also Native Tribunals (Amendment) Ordinance, 1935. Official Gazette of the Colony and Protectorate of Kenya, Vol. XXXVIL-No 4 Nairobi, 22 January 1935, 58-9.

for advocacy for a federal governance structure in the Colony. Robert Maxon explains why the federal model was appealing thus:

> [F]ederalism's appeal came forth among a portion of the European community and some of the colonial rulers who were concerned about a post-War world that seemed certain to bring far-reaching changes in Britain's most important East African dependency. This included democratisation, the extension of civil liberties, increased economic opportunities for the African majority, and social integration leading to eventual decolonisation. European anxiety as to the impact of such changes on their privileged political, economic and social status produced advocacy for majimbo or a federal system of governance between 1940 and 1960.[61]

In 1946, the system of LNCs was extended by the introduction, mainly in Nyanza and Central provinces, of locational councils as a second tier of local government below the LNCs. The locational chiefs chaired these locational councils.[62]

In 1950, the Local Government (African District Councils) Ordinance was enacted. It created African District Councils (ADCs) as corporate bodies with increased powers including the authority to appoint their own administrative staff and to set up committees to deal with specific matters and functions. The ADCs replaced the LNCs,[63] and were given a number of powers like that to enter into contracts on their own behalf.[64] However, the ADCs relied heavily on Government road grants as their main source of revenue. In 1952 the district councils became county councils, with a slightly wider range of activities, and with a second-tier of local government below them – namely, urban and rural district councils. By the early 1960s all of the county councils had introduced some form of land rating as a second major source of

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61 Robert M Maxon, *Majimbo in Kenya's past: Federalism in the 1940s and 1950s*, Cambria Press, 2017.

62 Hardacre Commission Report, 1966.

63 Omamo Report, 1995, 8.

64 African District Councils (Amendment) Ordinance, 1955, Government Notice No 176, 123 Njogu (n 30).

income, and most of them had started to provide health services in their areas with the assistance of Government grants.[65]

The Local Government (County Councils) Ordinance of 1962 drew a distinction between rural and urban local government. In effect, between 1952 and 1963, the country developed three parallel systems of local government to govern the municipalities, white settler areas, and African areas.[66] However, the Government directed more money into white local authorities than in the African reserves.[67] Therefore, the Government became an exclusive property used for the benefit of the Europeans against Africans. The native Africans genuinely hoped that independence would introduce different approaches to governance that would serve the welfare of all the inhabitants of Kenya.[68]

The advent of independence necessitated a uniform system of local government throughout the country that would streamline the three streams of local government. This was attempted through the Local Government Regulations of 1963.[69] The Regulations were designed to bring all the local authorities directly under the control of the Ministry of Local Government, though provision was made for continued liaison with the provincial administration.[70] Under the new regime, two types of major local authorities were provided for – municipal councils and county councils. Municipal council status was granted to the six already existing municipalities, and the new municipality of Thika was created.[71] The rest of the country was covered by county councils, which replaced the ADCs. The 1963 Local Government Regulations also provided for three types of minor local authorities: Urban councils (which replaced the more developed townships and urban district councils); area councils – which replaced rural district councils and the non-statutory

65 Hardacre Commission Report, 2.
66 Mutakha, *Constitutional law of Kenya on devolution*, 71.
67 Oyugi, 'Local government and development in Kenya'.
68 Mutakha, *Constitutional law of Kenya on devolution*, 71.
69 Hardacre Commission Report (1966), 3.
70 Hardacre Commission Report (1966), 3.
71 Hardacre Commission Report (1966), 2.

divisional councils, and in some districts these authorities were created by amalgamating several old locational councils. In a few instances in the Rift Valley, the former ADCs became area councils under a new and larger county council and local councils.[72] In the meantime, the regional assemblies of the Independence Constitution were being set up, with full powers over local government in their respective regions. As shall be seen in the following pages, these powers reverted to the Ministry of Local Government in the first few years of the Republic.

Governance in independence Kenya

This section analyses the system of governance just before Kenya got independence up to the advent of the clamour for the 2010 Constitution in the 1990. It traces the *raison d'être* for the Independence form of governance, how decentralisation was handled by the post-colonial leaders and the impact this had on the question of exclusion and inclusion that had been a thorn in the flesh for the colonial administration. Through piecemeal constitutional amendments, the Independent Government nibbled on the decentralised model to the core. This was followed by the weakening of local authorities and strengthening of the provincial administration; thus, entrenching autocratic rule firmly. With the erosion and capture of the remaining administrative apparatus, the successive post-independence governments (particularly President Jomo Kenyatta's and President Daniel Moi's) comfortably perpetuated and perfected centralised rule and the colonial policy of segregation and marginalisation of certain regions and ethnic communities.

History records that the ruling Kenya African National Union (KANU) Government had clear intentions not to implement the Independence Constitution, which it perceived as an imposition by the outgoing Colonial Government.[73] With the half-hearted

72 Hardacre Commission Report (1966), 2.

73 Robert Maxon, *Kenya's Independence Constitution: Constitution-making and end of empire,* Fairleigh Dickinson, 2011, 267.

acquiescence of the ruling KANU Government to decentralised power, it was unsurprising that within the first anniversary of independence, successive amendments were calculatedly effected on the Independence Constitution to water down majimboism. Indeed, and as is detailed later on in this section, by the end of the 1960s, every trace of majimbo had been obliterated from the Independence Constitution effectively erecting a unitary governance structure. This was supported by administrative arrangements that fortified the recentralisation efforts.

The process of recentralisation involved not only the abandonment of majimbo espoused by the Independence Constitution but also the weakening of local government; the retention of the colonial economic and investment policy; and the mismanagement of the transfer of land from white settlers to the Africans. It has been argued that the leaders of independent Kenya perpetuated the colonial policy of divide and rule, which favoured certain communities over others in development and employment. The Central Government adopted colonial development policies as well as segregationist models of local government that deepened regional disparities for successive years. As Ben Nyabira and Zemelak Ayele rightly observe, 'political exclusion of many ethnic communities in Kenya is the legacy of colonial rule and a decades long centralised, ethnicised, and personalised presidential system'.[74]

A flashback at the pre-independence negotiations around the structure of the independent government, however, does not support contrary results. The constitutional negotiations preceding Kenya's independence were held in Lancaster, and the outcome of those negotiations produced the Independence Constitution.[75] There were deep-heated contestations in the period stretching from August 1961 to March 1963, on the structure of government that would be adopted

74 Ben Christopher Nyabira and Ayele Zemelak Ayitenew, 'The state of political inclusion of ethnic communities under Kenya's devolved system', 20 *Law, Democracy and Development* (2016) 131 at 132.

75 Wilson Kamau Muna, 'Towards decentralization: A critical analysis of decentralizing governance in Kenya' Unpublished Master of Social Science (Policy and Development Studies) Thesis, University of KwaZulu-Natal, 2012.

between the two major political parties: KANU and the Kenya African Democratic Union (KADU). On the one hand, KANU favored a unitary system of government, while on the other, KADU advocated for a federal system, one that would secure the interests of minority ethnic groups from being overrun by the majority Kikuyu and Luo communities.[76] Controversy also revolved around the Senate, an institution that was seen as significant in securing the autonomy of the regions. As aptly captured by Proctor Jr:

> KADU desired a federal system in which considerable power would be allocated to regional governments. An upper house was considered necessary to safeguard the autonomy of the regions and to assure sufficient representation of minority interests at the center, for it was recognised that a unicameral legislature elected on the basis of 'one-man, one-vote' might very well be completely controlled by KANU which favored a greater centralisation of power.[77]

Eventually, Kenyatta half-heartedly agreed on a compromise for regionalism for the sake of uhuru (independence), a position backed by the colonialists.[78] Thus, the Independence Constitution created a majimbo system of government, consisting of the Central Government and seven regions that were further divided into local authorities. The Independence Constitution[79] provided for the position of Prime Minister as Head of Government. The Queen, represented by the Governor General, would serve as Head of State. Each region had a regional assembly, which elected a regional president from amongst its members. The National Legislature was bicameral comprising the Senate and the House of Representatives, the Senate being the Upper

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76 Robert M Maxon, 'The demise and rise of Majimbo in independent Kenya' in Michael Mwenda Kithinji, Mickie Mwanzia Koster, and Jerome P Rotich (eds) *Kenya after 50: Reconfiguring historical, political, and policy milestones* African histories and modernities, Palgrave Macmillan, 2016, 20.

77 Proctor Jesse Harris,'The role of the Senate in the Kenya political system' *Institute for Development Studies University College*, Nairobi, (1965) 390.

78 Okoth-Ogendo, 'The politics of constitutional change in Kenya since independence 1963-69', 18.

79 Independence Constitution Section 71.

House.[80] The Senate, meant to protect the interests of the regions,[81] comprised 41 senators, each representing the 40 colonial administrative districts and the Nairobi area.[82] The executive power of the regions was vested in the respective finance and establishments committee.[83] The Independence Constitution set out a list of areas which regional assemblies had exclusive competence over, and those in which it had concurrent competence with the National Assembly. In order to entrench the place of regions, the Independence Constitution provided that regional boundaries could be altered by Parliament with the approval of the affected regional assembly. Decentralisation was further provided for through the local government system composed of local councilors.[84]

No sooner had the Senate held its inaugural meeting on 7 June 1963 than suspicion from the opposition broke that some ministers had 'a negative attitude towards [the Senate]'.[85] Rumours also had it 'that the Senate may be washed out'.[86] Suffice to say that three years later, the rumours were given credence as the Senate was swiftly edged out of the Independence Constitution. Moreover, in 1963, Vice President Jaramogi Oginga Odinga, then Minister for Home Affairs, directed all civil servants down to the district assistants to continue as officers of the Central Government.[87] He directed civil servants to maintain close liaison with the Central Government.[88] This effectively turned the public servants of regional governments into an administration answerable to the Central Government, which used them to frustrate the

80 Independence Constitution Section 36.

81 Independence Constitution Section 34(2).

82 Independence Constitution Section 36.

83 Independence Constitution Section 105(1).

84 Patrick LO Lumumba and Luis G Franceschi, *The Constitution of Kenya, 2010: An introductory commentary,* Strathmore University Press, 2014, 512.

85 Kenya Senate, Official Report, 9 July 1963, cited in Harris, 'The role of the Senate in the Kenya political system', 389.

86 Kenya Senate, Official Report, July 9 1963, col. 292 (Sen W Wamalwa) cited in Proctor, 'The role of the Senate in the Kenya political system', 389.

87 Jaramogi Oginga Odinga, *Not yet Uhuru*, Heinemann, London, 1967, 241-242.

88 Odinga, *Not yet Uhuru*, 241-242.

implementation of the federal arrangements.[89] Also, since the salaries of these officers were drawn from the Central Government, they owed their allegiance to the Central Government, rather than the regions. The regional assemblies were also directed to refer their draft legislations to the Central Government for advice before their introduction in the regional assemblies. Additionally, the Central Government also refused to release funds to the regional governments as they had undertaken to do. Coupled by the 'voluntary liquidation' of KADU, the leaders who crossed over to accept Government appointments in the KANU regime did nothing to remedy the grim state of affairs.[90]

In 1964, Parliament enacted the first two constitutional amendments.[91] The first declared Kenya a republic and abolished the offices of the Prime Minister and Governor General, and combined their powers into the newly created office of the President.[92] The amendments also deleted Schedule Two, which provided for some of the functions of the regional governments.[93] The provisions for financial arrangements between the central and regional governments were also repealed, making the latter entirely dependent on grants from the former. The control of the police was centralised to the Central Government and such role by the regional government eliminated. The exclusive legislative function of the regional assemblies was scrapped by redesigning it as a concurrent function, while the executive competence was also abolished.

The 1965 amendment[94] emphasised the inferior status of the regions and regional assemblies by renaming them provinces and provincial councils, which derived their legislative and executive authority from

89 Odinga, *Not yet Uhuru*, 242-248.

90 Southhall and Wood, *Local government and the return to multi-partyism in Ken*ya, 505; Okoth-Ogendo, 'The politics of constitutional change in Kenya since independence, 1963-69', 19.

91 Constitution of Kenya (Amendment) No 28 of 1964 and Constitution of Kenya (Amendment) (No 2) No 38 of 1964.

92 Constitution of Kenya (Amendment) (No 2) No 28 of 1964.

93 Constitution of Kenya (Amendment) (No 2) No 38 of 1964.

94 Constitution of Kenya (Amendment) No 14 of 1965.

Central Government delegation. More specifically, the amendment watered down the legislative powers of the regional assemblies by amending Part 3 of the Independence Constitution and placing the law-making responsibility on provincial councils. The offices of civil secretaries that were offices in the public service set to perform secretarial and executive functions to the finance and establishments committees of the regions were also scrapped. By a 1966 amendment,[95] the Senate was abolished through merger with the House of Representatives to become the National Assembly in which constituencies were created to absorb the former senators.

Through these amendments, the system of regional government was reduced to something nominal. Notably, the powers that the regional assemblies were meant to wield over local government in their respective regions reverted to the Central Government when Kenya became a Republic at the end of 1964.[96] Although in practice the regional assemblies or provincial councils had ceased to perform any functions or have any significance by early 1965, it was not until 1968[97] that they were legislated out of the Independence Constitution.

The abolition of regional structures resulted in the reinstatement of 'the system of provincial administration which had enabled the central authorities to dominate affairs in all parts of the county – thus power was intensely centralised again'.[98] As such, there was once again consolidation of powers in the presidency thus creating a powerful presidential system.

The centralised rule would be further perfected by a deliberate weakening of the local government, through political and administrative mechanism that included interference in staffing as well as starving them financially. As a result, the local authorities' share of overall Government expenditure declined consistently. Local

95 Constitution of Kenya (Amendment) (No 4) Act 1966 (No 40 of 1966).

96 Hardacre Commission Report, 3.

97 Constitution of Kenya (Amendment) Act 1968 (No 16 of 1968).

98 CKRC, Final Report, 11 February 2005, 31.

authority expenditure accounted for a general average of 25% of the overall Government expenditure in the first decade of independence but this figure fell sharply in the subsequent years to a meagre 8-10% between 1975 and 1990.[99] An in-depth exposition of the interference of local authorities by the independence government and the impact this had in consolidating power at the centre is provided in the succeeding subsection.

Reconcentration of power

Though not completely abolished, local authorities were slowly but surely weakened, further reconcentrating power at the centre. The emasculation took various forms ranging from Central Government interference with local government affairs including hiring of staff, to fiscal policy.

Through political and administrative mechanisms, the Central Government secured representation in the local authorities through the District Commissioner who provided liaison between local and Central Government, interpreted Central Government policies to the local authorities and kept the Ministry of Local Government fully informed on what was happening in the councils.[100] The local government finance officers who had been posted to the regions were required to become the eyes of the Ministry in the regions, ensuring that the local authorities complied with the Central Government's financial guidelines.[101]

The local governments suffered inadequate funding since there was no clear financial policy to ensure adequate finances that matched the functions they performed.[102] Their major sources of revenue were school

99 Omamo Report, 1995, 71.

100 Hardacre Commission.

101 Hardacre Commission, 32-47.

102 Lydia Kanini Muendo, 'Challenges facing local government in development in Kenya: The case of Machakos district, 1950-1974' 33 *Historical Research Letter* (2016) 19.

fees, poll rates and Central Government grants, which could not raise adequate revenue commensurate to the high demands for services and development. 1974 was particularly a hard time for local governments. As a competence of regional government, local government was entitled to funding by the former. When regions were denied funding by the Central Government, they became unable to provide this additional funding to the local authorities. When the regions were eventually abolished and local governments put under the control of the Central Government, contrary to expectation, the Central Government did not seem keen on providing funding and when it did, it did not follow any clear policy for funding.[103]

Even though it was clear that the local authorities had different fiscal capacities, there was no provision for any system of financial equalisation.[104] The initial response by the Central Government was the introduction of the Graduated Personal Tax of 1964 as the main source of revenue for local governments following recommendations by the Fiscal Commission's Report of 1963. For the county councils, this new tax did not make a difference since it virtually replaced the poll rates.[105] County councils also faced collection problems due to resistance between the people and the provincial administration.

The Central Government adopted many other measures, which exacerbated the situation of local authorities hastily to the extent that they weakened within a decade of independence tremendously. For instance, in 1964**,** the Central Government entered into an agreement with employers and trade unions (both public and private) to increase their establishment by 10% by 1965 and employ additional people.[106]

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103 Muendo, 'Challenges facing local government in development in Kenya', 19; Patricia Stamp, 'Local government in Kenya: Ideology and political practice, 1895-1974' 29(4) *African Studies Review* (1986).

104 Hardacre Commission, 6, 48.

105 Report of the Fiscal Commission, 1963, 27, 28 and 83; JO England, 'Graduated personal tax in Kenya' *Public Administration and Development*, (1964) 204-5.

106 Jacob Omolo, 'The dynamics and trends of employments in Kenya', *Institute of Economic Affairs – Kenya,* IEA Research Paper Series No.1/2010, 1.

Local authorities were thus forced to employ more staff than they needed, thus imposing more financial restraints on them. In 1966, the Central Government decided to provide free outpatient healthcare services in all medical facilities operated by the Central Government and local governments.[107] The Central Government did not consult the local authorities, yet the decision reduced their revenues from fees and charges.[108] In 1967, the Central Government reduced the Graduated Personal Tax rates from Ksh 48 per person per annum, to Ksh 24 per person per annum, which was altogether abolished in less than a year without proposing an alternative source of revenue.[109] Many rural local authorities, which relied heavily on this source, lost about 60% of their income.[110] Between 1963 and 1969, the Central Government increased the salaries of teachers without consulting local authorities, yet the latter were supposed to pay the new salaries as soon as they were agreed upon by the Central Government and the teachers' unions.

The effect of these decisions was that the local authorities were unable to meet their financial obligations, which led to a public outcry. The response by the Central Government was to enact the Transfer of Functions Act, 1970, which transferred a number of functions such as primary education, roads and health from the local governments to the Central Government. While this relieved local authorities of a heavy financial burden, it took from them some of their most important sources of revenue, for instance, school fees, thereby making it impossible for them to deliver on their remaining functions.[111] Furthermore, although the functions were transferred, personnel were not reduced commensurately, forcing the local authorities to continue paying huge

107 Germano Mwabu, 'Health care reform in Kenya: A review of the process' 32 *Health Policy* (1995) 248.

108 Mwabu, 'Health care reform in Kenya: A review of the process', 248.

109 David Bakibinga, Jalia Kangave and Dan Ngabirano, 'What explains the recent calls for reinstatement of a tax considered unpopular? An analysis of Graduated Tax in Uganda' *International Centre for Tax and Development Working Paper 79* (2018), 7-9.

110 Muia, Ngugi and Gikuhi, 'Evolution of local authorities in Kenya', 18.

111 Muia, Ngugi and Gikuhi, 'Evolution of local authorities in Kenya', 18-19.

salaries to staff they did not require.[112] When the local authorities tried to lay off the workers, the Local County Government Workers' Union intervened and the Central Government directed the local government to retain them.

Legislation increased Central Government control over local government activities. Under the Local Government Act, 1965, the Minister for Local Government acquired absolute control and could do virtually anything in respect of the local government. The local authorities were required to seek the approval of Minister for Local Government for everything they did, and their affairs were closely monitored. This included approval of the standing orders to be followed by all local authorities; approval of all loans made to local authorities; advise on the appointment of certain municipal and county councils' chief officers and approval of their salaries and emoluments; approval of scales of fees and charges levied by local authorities; approval of annual and supplementary estimates of all municipal, county, urban and area councils; power to require local authorities to submit copies of minutes and other records; the power to reduce the Central Government grants payable to municipal and county councils and even power to require the winding up of any local authority. Thus, it was clear that the local governments existed as merely performing the delegated functions of the Central Government.

Decentralised planning and development

Having abolished the regions as well as weakened the local authorities, the Central Government was faced with the problem of how to involve the local communities in development. In 1966, the Central Government attempted to put in place a rudimentary system of district planning by establishing the District Development Committees (DDCs) and District Development Advisory Committees (DDACs), which

112 Southall and Wood, *Local government and the return to multi-partyism in Ken*ya, 516.

were dominated by Central Government administrators, but with representation from the local authorities and Members of Parliament elected from within the district.[113] This initiative only brought local government under more Central Government control, especially in matters of planning. More details on decentralised development will be discussed under the subheading on fiscal decentralisation.

It is instructive that in March 1966, the President appointed a Commission of Inquiry under the leadership of Walter Hardacre (Hardacre Commission) whose terms of reference were to, *inter alia*,

> [i]nquire into and advise on the reforms necessary to make the local government system in Kenya a more effective instrument for the provision of local services and local development within the framework of national policy and national programmes.[114]

The Hardacre Commission was expected to inquire into, amongst other things: the mandatory and permissive functions of local authorities; the extent and nature of Central Government control over local authorities; the general financial situation of local authorities including their taxation potential and how revenue to meet the cost of services provided by them ought to be raised; the extent and nature of Government contributions to local authorities; the means of strengthening the quality and security of local government staff and the means of improving the local authorities to contribute towards the implementation of the National Development Plan. Notably, some of the recommendations from the Hardacre Commission appeared to favour the status quo. For instance, on the thorny issue of Government controls over local authorities, despite establishing that there were more than a hundred Central Government controls mostly contained in the Local Government Regulations of 1963,[115] the Hardacre Commission did not recommend any variations, instead prescribing that, it was 'desirable' for

113 Vide Gazette Notice No 1007 of 22 March 1966.

114 Gazette Notice No 100 of 22 March 1966 in Report of the Local Government Commission of Inquiry, 1966 (Hardacre Commission Report).

115 Hardacre Commission Report (1966), 24.

the Minister for Local Government 'to find ways in which the exercise of those controls [could] be simplified and the implementation speeded up'. In fact, according to the Commission, this could be best achieved as part of the suggested decentralisation scheme whereby senior local government officers [could] be posted to various parts of the country.[116]

On financial health, the Hardacre report revealed that most local authorities, particularly the county councils, were in dire financial constraints due to the huge gaps between their revenue streams and expenditures.[117] In acknowledging that local authorities had limited sources, the Hardacre Commission serendipitously remarked that 'generally speaking there is no prospect of them being increased easily to meet the growing level of expenditure'. According to the Hardacre Commission, the solution was that 'services must be tailored to suit the size of revenues, rather than the size and quality of services setting the pace, and revenues trying to catch up'.[118] The Hardacre Commission, underscored the need for coordination and consultation between the Central Government and the local authorities before new plans or decisions affecting the finances or administration of local authorities were announced.[119] On Central Government support to the local authorities, the Hardacre Commission found the Central Government grants to be insufficient to cover local government expenditure. Further, that the Central Government allocations neither followed a defined criteria nor took into account the unique situation (including revenue sources) of the various local authorities.[120]

116 Hardacre Commission Report (1966), 24.
117 Hardacre Commission Report (1966), 32-47.
118 Hardacre Commission Report (1966), 43.
119 Hardacre Commission Report (1966), 43.
120 Hardacre Commission Report (1966), 48.

The re-entry of colonial economic and investment policies

The Independence Government adopted development and investment policies that increased regional disparities. This is clear in Sessional Paper No 10 of 1965 on *African socialism and its application to Kenya*, which entrenched regional disparities. While it set out a vision for organising and developing the nation's resources for the benefit of all who lived in it, it adopted means that did the opposite. Sessional Paper No 10 identified its objectives as political equality, social justice and equal opportunities, amongst others, yet when dealing with the matter, it stated that:

> Development money should be invested where it will yield the highest income. This approach will clearly favour the development of areas having abundant natural resources, good land and rainfall, transport and power facilities and people receptive to and active in development.

The Independence Government did not only adopt colonial development and investment policies, but also perfected those policies by extending the concept of zoning beyond land to the people. It identified high, medium and low potential people in terms of their receptiveness to and activeness in development, and this played a major role in determining where to invest. An even stranger provision in Sessional Paper No 10 was the provision that the Government would invest taxpayers' money in a high potential area in priority over a low potential area, but after the profits have been made in the high potential area, the low potential areas would be aided by the high potential area by way of loans. Furthermore, the Government adopted and perfected the colonial policy of migrating human resources from low to high potential areas. It even invented a weird idea of developing people without necessarily developing the environment where they lived. It noted that if an area is deficient in resources, development could be achieved by investing in the education and training of the people whether in the area or elsewhere.

Recentralisation in the Moi era, 1978 to 2002

Here we discuss at a deeper length how recentralisation evolved during President Moi's era. After ascending to power in 1978, Moi declared that he would follow in the footsteps of President Kenyatta. Essentially, Moi continued to consolidate centralisation of power through the imperial presidency and weakening of local government.

The main form of centralisation of power began with the constitutional amendment of 1982,[121] which turned Kenya into a one-party state. In the same year, Moi issued a directive that all districts were to become centres for development in the rural areas and required all ministries to ensure the implementation of the directive by 1983.[122] This was drawn from President Kenyatta's DDCs and DDACs.

Thus, in 1983, the Moi Government launched the District Focus for Rural Development Strategy (DFRD), which established a DDC for every district. It was envisioned that the DDC would involve the local people in the identification, design, implementation and management of all developmental projects in the district. The DDC comprised Central Government officials in the district largely. These officials were not necessarily familiar with the local priorities where they were deployed.[123] While it appeared that the system sought to involve the local authorities in local planning, ultimately the authority and autonomy of local government was eroded through closer control by Central Government

121 Constitution of Kenya (Amendment) Act, 1982 (No 7 of 1982). The amendment introduced a new section 2A which stated; "There shall be in Kenya only one political party, the Kenya African National Union".

122 Republic of Kenya (1983, 1984, 1985 and 1987) District Focus for Rural Development, Government Printer Nairobi, 1.

123 P Chitere, and O Ireri, 'District focus for rural development as a decentralized planning strategy: An assessment of its implementation in Kenya' in Thomas N Kibua and Germano Mwabu (eds) *Decentralization and devolution in Kenya: New approaches*, University of Nairobi Press, Nairobi, 2008, 35.

officials.[124] They could not undertake any development project unless it had been approved by the DDC.[125]

In 1984, local government was further weakened when the Public Service Commission took over the recruitment of the top officials of the councils but not their remuneration.[126] Although this measure had the advantage of protecting local government officers from political victimisation, it reduced the administrative autonomy of local authorities. The result was that senior council officers were transformed into central rather than local government employees.[127]

It was during this era that the Ministers for Local Government used their powers under the Local Government Act extensively, upgrading all manner of townships to municipality status, many of which could not deliver the required services without the financial support of the Central Government. This eroded the autonomy of the local authorities further as the services they provided deteriorated to unacceptable levels. As Southall and Wood wrote, by the end of the 1980's, the local authorities, 'to all intents and purposes, had been rendered impotent'.[128]

The Moi Government also established many new districts, most of them illegally through 'roadside declarations' as a 'reward' for or enticement to loyalty as well as a campaign tool. In *Job Nyasimi Momanyi & 2 others v Attorney-General & another,*[129] the High Court declared 210

124 Southhall and Wood, *Local government and the return to multi-partyism in Ken*ya, 507.

125 Southhall and Wood, *Local government and the return to multi-partyism in Ken*ya, 507.

126 Muia, Ngugi and Gikuhi, 'Evolution of local authorities in Kenya', 19, 20; Southhall and Wood, *Local government and the return to multi-partyism in Ken*ya, 507, 519. The appointment of senior officers such as the Clerk, Treasurer, Engineer and Medical Officer of Health was transferred to the Public Service Commission. This resulted in further heightened control of the local authorities by the centre as in 1964, the Ministry of Local Government only had power to advise councils on their appointment and dismissal.

127 Oyugi, 'Local government in Kenya' cited in Southall and Wood, *Local government and the return to multi-partyism in Ken*ya, 507.

128 Southall and Wood, *Local government and the return to multi-partyism in Ken*ya, 509.

129 *Job Nyasimi Momanyi & 2 others v Attorney-General & another,* Constitutional application 68 of 2009 Ruling of the High Court of 4 September 2009, (2009) eKLR.

districts as illegally created and found that the power to create districts, review or vary their boundaries vested in Parliament exclusively.

In a bid to decentralise development efforts (but also have an influence and patronage over the local development initiatives), the Central Government over time initiated various fiscal decentralisation programs that could be seen as shy bids at deconcentrating power from the centre. These programs, dating back to the Independence government would continue to form important development focus for subsequent governments, as we shall see, even post the 2010 Constitution. Earlier forms of decentralisation programs included the District Development Giant Program (1966) and the Rural Works Programmes Grant (1974), which sought to provide discretionary funds outside ministries' budgets for small labour-intensive local projects.[130] These two were later combined to form the Rural Development Fund.[131] The common denominator across the variants of development programs is the central role that the Central/National Government eagerly plays in their implementation. Thus, christened as development packages to spur local development and combat poverty, they become "justified" extensions of national executive control over the local levels and effectively campaign tools for their sponsor.

The persistent disappointment over the performance of the local authorities and service delivery led to the initiation of the Kenya Local Government Reform Programme (KLGRP) under the Ministry of Local Government in 1995 to assist in the transformation of the local authorities. The idea was to transform the local authorities into 'viable autonomous, accountable and responsive local authorities'.

130 Sade Owolabi, 'Shifted responsibilities case studies of Kenya's participatory Local Authority Service Delivery Action Plan (LASDAP)' Unpublished PhD Thesis, Cornell University, 2011,48; Kenya Human Rights Commission and Social and Public Accountability Network (SPAN), 'Harmonization of decentralized development in Kenya: Towards alignment, citizen engagement and accountability ' *KHRC*, December 2010, 17.

131 KHRC and SPAN, 'Harmonization of decentralized development in Kenya: 17.

In 1998, the Moi Government established the Local Authorities Transfer Fund (LATF) through the Local Authorities Transfer Fund Act of 1998. LATF was meant to facilitate the disbursement of funds to local authorities to supplement the financing of the services and facilities they were required to provide under the Local Government Act.[132] An Advisory Committee was established under Section 8 of the LATF Act to advise the Minister for Finance on the running of the Fund. The Advisory Committee comprised appointees of the Minister and those from the Ministry of Local Government. In the first instance, 2% of all tax collected under the Income Tax Act[133] was to be paid into the LATF. In successive years, this percentage could be altered by the Minister for Local Government with the approval of the National Assembly. Monies from LATF were to be expended to local authorities in such manner as the Minister for Finance determined upon the advice of the Advisory Committee.

A policy was developed, the Local Authorities Service Delivery Action Plan (LASDAP), which spelt out the conditions that local authorities were to fulfil before getting allocations under the LATF Act. The LASDAP guidelines detailed how local authorities prepared budget approvals and submission of the plans to the LASDAP secretariat.[134] Notably, '[t[he process involved both administrators and local politicians (councillors), although decisions were made by the full council meetings of the respective local authority'.[135] After compliance, the funds were released in three phases, each with different conditions as provided in the LASDAP.

How did the LASDAP fare? Studies by the World Bank, Ministry of Local Government and scholars agree that there was some progress

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132 See, the repealed Local Government Act, Chapter 265, Laws of Kenya; also, Section 4 of the repealed Local Transfer Fund Act (No 8 of 1998).

133 Chapter 470, Laws of Kenya.

134 Lineth N Oyugi and Thomas Kibua 'Planning and budgeting at the grassroots level: The case of Local Authority Service Delivery Action Plan' in Kibua and Mwabu (eds) *Decentralization and Devolution in Kenya,* 202.

135 Oyugi and Kibua, 'Planning and budgeting at the grassroots level, 136.

through LATF/ LASDAP. The LASDAP improved local participation in development programmes, improved financial management by the LAs and enhanced revenue collection.[136] Nonetheless, the LAs experienced many challenges, key among them being the high centralisation and bureaucracy, which led to delays in project rollouts. There was also lack of coordination between the LAs and the provincial administration and inadequate administrative capacity by LAs that hampered their performance further.[137]

It is from the above background that in 2003, following the coming into power of the National Rainbow Coalition (NARC) Government, the Constituencies Development Fund (CDF) was established through the Constituencies Development Fund Act, 2003 (CDF Act),[138] to iron out the regional imbalances brought about by patronage politics and address poverty levels at the grassroots.[139] This shifted development focus from the district to the constituency level effectively. The CDF Act required that at least 2.5% of the Central Government ordinary revenue collected in every financial year be channeled to the constituencies for purposes of local development dependent on identified local priorities.[140] A percentage of the funds (about 75%) was distributed equally across all the 210 constituencies while the rest (25%) was shared out based on the poverty index.

When a new constitutional order was inaugurated on 27 August 2010, civil society organisations began to question the constitutional foundations of CDF. In the case of *Institute of Social Accountability &*

136 Oyugi and Kibua, 'Planning and budgeting at the grassroots level, 136.

137 Daniel M Muia, 'Devolution: Which way for local authorities?' in Kibua and Mwabu *Decentralization and Devolution in Kenya - New approaches*. University of Nairobi Press, Nairobi, 2008, 154-155.

138 Constituencies Development Fund Act, 2003 (No 10 of 2003) was repealed and replaced with the Constituencies Development Fund Act, 2013 (No 30 of 2013). Following the declaration of the Act as unconstitutional by the High Court, the Act was repealed and replaced with the National Government Constituencies Development Fund Act (No 30 of 2015).

139 Muia, 'Devolution: Which way for local authorities?', 137.

140 CDF Act, Section 4(2).

another v National Assembly & 4 others,[141] the High Court agreed with the civil society position and declared the CDF Act, 2013, unconstitutional, arguing that its design and implementation ran against the grain of the devolved system of governance contemplated under the 2010 Constitution. The High Court ruled that the CDF Act created parallel centres of development not anticipated under the 2010 Constitution and that the arrangement violated the doctrine of separation of powers. However, upon appeal, the Court of Appeal (CoA)[142] saved some of the sections of the CDF Act, 2013 finding that the CDF was an intergovernmental transfer and therefore did not violate the division of powers between the two levels of government. In its decision of 24 November 2017, the CoA set aside the specific sections of the Act that were unconstitutional for violating the principle of separation of powers.[143] In the meantime, Parliament had enacted the National Government Constituencies Development Fund Act (NG-CDF Act).[144] The NG-CDF Act clarified that it would only apply to projects 'in respect of works and services falling within the functions of the National Government under the Constitution'.[145] Nonetheless, the Petitioners proceeded to the Supreme Court in the case of *Institute of Social Accountability & another v National Assembly of Kenya & 3 others,*[146] wherein in a judgement delivered on the eve of the 2022 General Elections, the apex court restored the finding of the High Court that the CDF Act 2013 was unconstitutional. The Supreme Court agreed with the trial court finding that the CDF Act infringed on the division of functions between the national and county governments and violated the vertical separation of powers

141 *Institute of Social Accountability & another v National Assembly & 4 others* Petition 71 of 2013, Judgement of the High Court (2015) eKLR.

142 *National Assembly of Kenya & another v Institute for Social Accountability & 6 others* [2017] Court of Appeal No. 92 of 2015 Judgment of the Court of Appeal (2017) eKLR

143 Specifically, the Court declared sections 24(3)(c), 24(3)(f) and 37(1)(a) of the Constituencies Development Act, 2013 as invalid and unconstitutional.

144 National Government Constituencies Development Fund Act (No 30 of 2015).

145 NG-CDF Act Section 24(a).

146 *Institute of Social Accountability & another v National Assembly of Kenya & 3 others* SC Petition No 1 of 2018 Ruling in the Supreme Court (2021) eKLR.

between legislative bodies and the Executive.[147] The Act also offended the constitutional principles on public finance enshrined under Article 201[148] and those relating to the division of revenue under Article 202(1) of the Constitution.[149] Failure to involve the Senate in the enactment of the CDF (Amendment) Bill, 2013 compounded the unconstitutionality of the Act further.[150]

Other funds established include the Youth Enterprise Development Fund under the Ministry of ICT, Innovation and Youth Affairs. It was gazetted on 8 December 2006, and transformed into a State Corporation on 11 May 2007.[151] The Youth Fund is meant to

147 The Supreme Court at para 130 was categorical that, 'Members of legislative bodies, being Members of the National Assembly, Senators, County Women Representatives, and Members of County Assemblies ought not to be involved in the implementation of any service-based mandates which are a preserve of the Executive branch. This is the only way to respect the constitutional scheme on separation of powers and ensure that the Legislators' oversight mandate is not compromised through conflict of interest'.

148 At para 106 the Supreme Court explained the finding in part as follows, 'This is because a Member of Parliament cannot oversee the implementation or coordination of the projects and at the same time offer oversight over the same projects. To this end, we find that the CDF as structured under the CDF Act 2013 violates the constitutional principles on public finance, particularly the principle of prudent and responsible management of public funds as enshrined in Article 201(d) of the Constitution'.

149 The Supreme Court at para 99 rendered itself thus: 'From the foregoing provisions, we find that Section 4 of the CDF Act 2013 violates the provisions of the Constitution as it seeks to disrupt the revenue sharing formula by directly allocating 2.5% of all the national revenue while the Constitution requires that the revenue raised shall be shared equitably among the national and county governments. It is further our considered opinion that if at all any monies is to be deducted from the national revenue, the money should be granted from the national government revenue as a grant but not directly from the national revenue'.

150 At para 76: 'Consequently, we find that the CDF (Amendment) Bill, 2013 involved matters concerning county governments and therefore the Bill should have been tabled before Senate for consideration, debate, and approval in accordance with Article 96 of the Constitution. Failure to involve the Senate in the enacting of the CDF (Amendment) Act, 2013 renders the CDF Act 2013 unconstitutional'.

151 Youth Enterprise Fund, 'About Us'.

> [P]rovide financial and business development support services to youth-owned enterprises… it creates job opportunities for the young people through entrepreneurship and encouraging them to be job creators not job seekers.[152]

Similarly, the Women Enterprise Fund (WEF) was established in August 2007 to empower women economically, by providing 'accessible and affordable credit to support women start and/or expand business for wealth and employment creation'.[153] WEF is a semi-autonomous Government Agency in the Ministry of Public Service, Youth and Gender Affairs.

The idea of devolved funds as a tool for local development would still continue to be relevant post the 2010 Constitution. In 2014, the Uwezo Fund was established under the Public Finance Management (Uwezo Fund) Regulations, 2014.[154] The Uwezo Fund, which is administered at the constituency level, was a flagship project of President Uhuru Kenyatta's Jubilee Government when it ascended to power in 2013. The Uwezo Fund was meant to spur economic growth by supporting job creation and the realisation of Vision 2030 goals such as poverty reduction across the 290 constituencies. The Uwezo Fund is a revolving fund housed at the Ministry of Public Service, Gender, Senior Citizen Affairs and Special Programmes meant 'to address the socio-economic empowerment of women, youth and persons with disabilities through expansion of access to finance to facilitate initiation and expansion of their enterprises.'[155] According to the Report of the Auditor-General on Uwezo Fund for the year ended 30 June 2019, a total of Kshs 6 299 400 004 had been disbursed to the 290 constituencies as Loan Fund.[156] According to more recent available sources, Uwezo Fund

152 Youth Enterprise Fund.

153 Women Connect, 'Accessing financing in Kenya'.

154 Public Finance Management (Uwezo Fund) Regulations, 2014 Legal Notice No 21 of 21 February 2014.

155 Uwezo Fund, 'Background'.

156 Office of the Auditor-General, 'Report of the Auditor-General on Uwezo Fund for the year ended 30 June, 2019' xii.

has disbursed more than Kshs 6.95 billion and directly supported 1 088 757 beneficiaries since its inception, of which 69% are female and 31% male.[157] The cumulative loan repayment rate stands at 39%.[158] The running of the fund has however been mired by various challenges including low repayment rate and staffing gaps.[159]

In 2016, the National Government Affirmative Action Fund (NGAAF) was established under the Public Finance Management Regulations, 2016,[160] '[t]o facilitate social-economic empowerment of Affirmative Action Groups through financial and social support for inclusive and sustainable development'.[161] These vulnerable groups include women, youth, PWDs, children and the elderly. The NGAAF is hinged on Vision 2030 under the social pillar and is meant to:

> [a]ddress the plight of vulnerable groups through enhanced access to financial facilities for socio-economic empowerment among women, youth, persons with disabilities, needy children and elderly persons in the country. It also provides an avenue for promotion of enterprise and value addition initiatives.[162] According to the Kenya National Bureau of Statistics (KNBS), the total amount of grants disbursed by the NGAAF in three of their programmes (Social Economic Empowerment, Value Addition Initiatives and Bursaries Scholarships) for vulnerable students was Ksh 758.9 million in 2019/20 Financial Year (FY) and was expected to rise by 3.8% to KSh 788.0 million in the 2020/21 FY.[163]

However, some of these funds have been politicised. For instance, women representatives also demanded allocations to them akin to their

157 Uwezo Fund, 'Background'.

158 Uwezo Fund website.

159 Report of the Auditor-General on Uwezo Fund for the year ended 30 June, 2019' xii.

160 Legal Notice Nos 24, 52 of 2016.

161 Republic of Kenya, 'National Government Affirmative Action Fund (NGAAF) draft strategic document ii.

162 National Government Affirmative Action Fund (NGAAF).

163 Republic of Kenya, Kenya National Bureau of Statistics (2020) 'Economic survey 2021' 363.

National Assembly counterparts for them to have developmental record to enable them be felt in the grassroots.[164]

Social Protection initiatives were also adopted to cushion the indigent. The National Safety Net Programme (NSNP) commonly referred to as the Inua Jamii Program remains a 'core social assistance program in Kenya'.[165] Its general object is to uplift the livelihoods of the most vulnerable from chronic poverty and hunger. The programme is coordinated by the Social Assistance Unit under the Ministry of Public Service, Gender, Senior Citizen Affairs and Special Programmes. The five cash transfers under this program are the Older Persons Cash Transfer Programme (OPTC), Cash Transfers to Orphans and Vulnerable Children (CT-OVC), Hunger Safety Net Programme (HSNP), Urban Food Subsidy Cash Transfer (UFS-CT) and Persons with Severe Disability Cash Transfer (PWSD-CT). Under this program, enrolled members receive cash transfers on a bi-monthly basis (currently standing at Ksh 4000 and Ksh 5400 for HSNP).[166] Notably, the Ksh 2,000 monthly allocation falls way below the derived poverty lines.[167] The *Inua Jamii* Programme faces various other challenges including inadequate coverage, delayed disbursements and fraud.[168] Moreover, failure to update records has

164 See for instance Anthony Gitonga, 'Women reps demand kitty to control', *The Standard,* 28 April 2014 and Citizen Reporter, 'Woman Rep aspirants want Ksh. 7 million CDF kitty increased', *Citizen Digital*, 21 April 2022.

165 Republic of Kenya, Ministry of Labour and Social Protection 'Kenya Social Protection Sector Annual Report 2018/19 July 2020', 20.

166 State Department for Social Protection Kenya, 'Social Assistance Unit FAQs'.

167 According to the Kenya Integrated Budget Household Survey 2015/16, the derived poverty lines stand at Ksh 3,252 overall expenditure per month per person in the rural areas and Ksh 5,995 in urban areas.

168 Ministry of Labour and Social Protection (Kenya Social protection sector annual report 2018) 6, 37. According to reports by the Ministry of Labour and Social Protection, a total of 1.3 million households were covered in 2018/19 in the OPTC, CT-OVC, HSNP and PWSD-CT programs. The older person's cash transfer program (OPCT) is the largest scheme with close to 800,000 beneficiaries. Data (2017) indicates that 77% of older persons aged 65 years and above receive an old age pension under Inua Jamii. The data also revealed only 1% coverage exists for PWDs.

been a major gap. According to the Report of the Auditor General for the year 2020/2021, in 68 out of a total of 290 sub counties during the month of November 2021, the payroll for payment of older persons' cash transfer OP-CT, CT-OVC and PWSD-CT contained 7,577 deceased beneficiaries resulting in an unexplained payment of Kshs 254,702,000 for the period starting 2017 to 30 June 2021.[169]

While the multiple fiscal programs by the national government are a positive gesture in affirmative action for the most vulnerable population, they are riddled with many challenges, which make them less effective and impactful in closing the gaps as highlighted.

Despite the many fiscal decentralisation initiatives pre-2010, the changes made to the Independence Constitution remained overbearing leading to the clamor for reforms through constitutional review.[170]

Proposed models of decentralisation during the constitution-making process (1999 to 2010): Multiple drafts, varied interests

This stage was characterised by the clamour for constitutional reforms. At the centre of this struggle was the need for socio-economic and political inclusion. The governance model that Kenya should adopt remained one of the most contentious issues and played a dominant role in the constitutional debates, that is, how far down and wide the powers needed to be dispersed. In what would be a throwback of the pre-independence negotiations, there were those factions that disfavoured devolution and vigorously fought it, leaning towards a centralised presidential system. This section expounds on the various draft constitutions, commencing with the Draft Bill of the Constitution Review Commission, 2002 (CKRC or Ghai Draft) to the Draft Constitution of Kenya, 2004 (Bomas Draft), Proposed New Constitution of Kenya,

169 Report of the Auditor-General for the National Government Ministries, Departments and Agencies for the year 2020/2021, 503-4.

170 Mutakha, 'An interpretation of the constitutional framework for devolution in Kenya: A comparative approach', 84.

2005 (Wako Draft), Harmonised Draft Constitution of Kenya, 2009 (Harmonised Draft), Revised Harmonised Draft Constitution of Kenya (Revised Harmonised Draft) to the now 2010 Constitution.

Kenyans had already, in their minds, accepted that a devolved system of government would be the solution to the many problems they were facing way before the legal framework for incorporating devolution in the legal order was launched.[171] As will be apparent, however, the form and tiers this would take remained controversial throughout the constitutional-making process, particularly in 2003/2004, causing sharp divisions along political/ethnic lines, akin to the divisions witnessed in the negotiations for the *majimbo* Constitution.[172] Similar arguments to those proffered in 1961-63 persisted, as aptly summed up by Maxon thus:[173]

> [M]ajimbo was too expensive for a Kenya facing severe economic problems at the end of Moi's kleptocratic regime. *Majimbo* would also weaken national unity and promote tribalism through a balkanisation of the country. Not all units to which functions could be devolved had sufficient resources and trained manpower. Critics also pointed to the lack of success that had characterised federal governments in Africa (e.g., Nigeria and Sudan)

The Constitution of Kenya Review Commission Draft

The demand for constitutional reform resulted in the formation of the Constitution of Kenya Review Commission (CKRC) under Section 3(2) of the Constitution of Kenya Review Act, 1997 (the Review Act).[174]

The consolidated version of the Review Act (Cap. 3A) empowered the CKRC to spearhead comprehensive review of the Repealed Constitution 'by the people of Kenya'. More specifically, the review was aimed to *inter alia,* 'establish a free and democratic system of

171 CKRC, Final Report, 11 February 2005, 44.

172 See Maxon, 'The demise and rise of Majimbo in Independent Kenya', 19-48.

173 Maxon,'The demise and rise of Majimbo in Independent Kenya', *43.*

174 Constitution of Kenya Review Act (No 13 of 1997).

government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity'; ensure accountability of the Government and its officers to the center of Kenya; promoting the people's participation in governance through democratic, free and fair elections and devolution and exercise of power; respecting ethnic and regional diversity and communal rights' and; 'ensuring provision of basic needs of all Kenyans by establishing an equitable framework for economic growth and equitable access to national resources'.

The Review Act further required the review process to examine existing constitutional commissions, institutions and offices and to make recommendations for improvement and for new bodies to 'facilitate constitutional governance and the respect for human rights and gender equity'.[175]

After travelling all over the country sampling public views, the CKRC came up with a comprehensive Report and a Draft Constitution which were released on the 19 September 2002, and which is popularly known as the Ghai or CKRC Draft.[176] Upon analysis of the public views, the CKRC reported that, 'both the governance and the economic system exclude[d] a large proportion of the people of Kenya' as evidenced by the high levels of poverty that was estimated to be at over 60% of the total population.[177] The report further noted that women, PWDs and minority communities were worst hit. It was on this basis that the CKRC recommended the need for the Constitution to,

> [e]mphasise affirmative action for the historically marginalized and disadvantaged groups and areas including women, people with disability; the youth, pastoralists; older people, and minority communities, in representation, management of public affairs and sharing benefits of development'; and to, 'provide and define criteria for allocating resources

175 Constitution of Kenya Review Act Section 17(d)(iii)).

176 Lumumba and Franceschi, 'The Constitution of Kenya 2010', 44.

177 CKRC, Final Report 11 February, 2005, 107.

to marginalized areas in order to ensure equalization of opportunities and access to development'.[178]

With regard to the principles of devolution, the CKRC Draft recommended the following:

- a model that reflected a cost-benefit analysis of devolution and what devolution was meant to achieve upon adoption;
- enactment of an Act of Parliament to define the levels of devolution and the powers to be exercised by the devolved units;
- a model that reflected the principles of equitable management of resources, participatory governance, cultural diversity and discrete demarcation of functions and powers of the units;
- adoption of a system fashioned in a way that ensures financial autonomy and accountability by the devolved units;
- an ingrained dispute settlement mechanism; and
- the setting up of transitional mechanisms for phasing out the status quo and replacing it with the new order.[179]

The CKRC Draft also recommended a five-tier devolution system involving national, provincial, district, locational and village institutions. The village councils would mobilise residents on local issues as the point of contact between the village and the location/wards, and would be managed and administered by village elders. Locational councils would enable communities to manage their own affairs and exercise some executive functions. They would be run by a council of village elders, two from each village in the location. The location administrator would be elected directly by the people, as prescribed by the district council. The district councils would be the principal level of devolution and would perform both legislative and executive functions. They would be composed of councilors drawn from the number of

178 CKRC, Final Report 2005, 110.

179 Constitution of Kenya Review Commission (CKRC), Final Draft 2005, 223-224.

wards in the then county councils. They would be administered by a district governor who would be the political head of the district after being directly elected by the people. In principle, the district councils would have been the vehicle for the national government to implement policy. The provincial councils would consist of chairpersons of district councils and other stakeholders. They would have had both executive and legislative powers on subjects within their executive responsibilities such as promoting co-operati on between districts, coordinating issues that affect districts, dealing with trans-provincial issues, planning the province's development and managing provincial institutions and resources.[180]

The national government would still have been responsible for collecting major sources of revenue and it was to establish a ministry (of devolution or district governments) to deal and liaise with the provincial and district councils. District councils would also have had the discretion to impose taxes or levies which were to be specified in an Act of Parliament. The national revenue would be shared equitably with the district councils. Provincial secretariats would be funded from the Consolidated Fund, district contributions and revenue raised from provincial utilities. Districts would be funded by Government grants, Government transfer funds and revenue raised from local utilities. The accounts of devolved funds would be audited by the Auditor General.[181]

The CKRC Draft was submitted to the National Constitutional Conference (NCC), which was supposed to debate and adopt it with or without amendments. The NCC was held at the Bomas of Kenya between 2003 and 2004. It adopted the principle of devolution but it directed the CKRC to prepare a special report to improve on the architecture and design of devolution. Consequently, the CKRC presented a special report to the Conference plenary on devolution, which was then committed to the Technical Working Committee of the Conference for improvements

180 CKRC, Final Draft 2005, 239-240.

181 CKRC, Final Draft 2005, 241.

to be made on it.[182] It was then negotiated upon, the result being a much-improved draft, which came to be known as the Bomas Draft.[183]

Bomas Draft

As the Review Act required, the CKRC organised constituency constitutional forums and facilitated numerous other fora at which all persons who were so minded gave their views on the review process; it collected and collated the views of Kenyans and compiled a report together with a summary of its recommendations for discussion and adoption by the NCC. It afforded opportunity for intense public discussion and critique of the said report, and it prepared a draft Bill for debate and adoption by the NCC. The CKRC also convened the NCC as required by Parliament. The NCC which acquired the nickname of 'Bomas' – the same referring to the location of the venue at a place called 'the Bomas of Kenya' in the Langata area of Nairobi – started its work of debating the CKRC's report and draft Bill in April 2003.[184] It is the Draft Constitution of Kenya that originated from this NCC that is popularly known as the Bomas Draft.

The Bomas Draft provided for four levels of government: the national government, regional government, district government and local government.[185] Essentially, it adopted the structures of the provincial administration as a basis of devolved government.[186] Notably, it borrowed heavily from the South African Constitution. It provided for a better-designed Senate, mechanisms for revenue-sharing, intergovernmental

182 Constitution of Kenya Review Commission 'Special working document for the National Constitutional Conference: Report on devolution of powers', (19 August 2003) which was prepared in response to the direction of the conference.

183 Draft Constitution of Kenya (Bomas Draft) (2004).

184 *Timothy M Njoya & 6 others v Attorney General & 3 others,* Judgment of the High Court, (2004) eKLR.

185 *Timothy M Njoya & 6 others v Attorney General & 3 others*.

186 Lumumba and Franceschi, 'The Constitution of Kenya 2010', 513.

relations and dispute resolution mechanisms.[187] Each region was to have a regional government consisting of a regional legislative assembly and a regional executive. The Bomas Draft also provided that the Nairobi Region would be managed as a metropolitan capital city, as prescribed by an Act of Parliament. The executive authority of the Regional Government would be exercised by the regional executive committee, headed by a regional premier. The members of the regional executive committee would be responsible for the exercise of executive powers in relation to functions and powers assigned to the region. Nairobi would be headed by a mayor, assisted by a deputy mayor. The regional legislative assembly would pass laws for the performance of functions in the region.

The district government would consist a district council and a district executive, which would perform their respective legislative and executive functions in the district. The district governor would be the chief executive of the district. The locational government would consist a locational council and locational executive committee to perform the respective legislative and executive functions in the location. The location administrator would be the chief executive of the location.[188]

However, the Bomas Draft was not accepted by some Government officials, who literally walked out of the NCC in protest. It is this group which sought to make amendments to the Review Act[189] so as to give Parliament the power to amend the Bomas Draft and to provide for a mandatory referendum to pass the draft. Curiously, more than three years after the start of the Bomas process and nearly towards its completion, a constitutional petition was instigated by President Mwai Kibaki and other Government officials who favoured the presidential system.[190] In *Timothy Njoya and others v Attorney General and others*

187 Lumumba and Franceschi, 'The Constitution of Kenya 2010', 513.

188 Lumumba and Franceschi, 'The Constitution of Kenya 2010', 513.

189 Constitution of Kenya Review (Amendment) Act of 2004.

190 Yash Pal Ghai 'A short history of constitutions and what politicians do to them' *The Elephant*, 20 March 2020.

where the High Court ruled that a completely new constitution could not be enacted by Parliament but must be adopted by the people in a referendum.[191]

In the words of Ghai, 'Bomas was killed thus. This enabled the Government to take over the whole process, amend the document to take away the parliamentary system – returning to a largely presidential system'.[192] The Bomas Draft has been described as 'the best Constitution Kenya never had'.[193]

The Parliamentary Select Committee, chaired by Simeon Nyachae, travelled to Kilifi where they made changes to the Bomas Draft, hence the birth of what was to be called the Wako Draft deriving its name from Amos Wako the then Attorney General who published the Bill.[194]

Wako Draft

The Wako Draft reduced the model of decentralisation in the Bomas Draft to two levels of government: a national government and a district government.[195] The district was to be the principal unit of devolution. The national government's functions would hence include: foreign affairs; the use of international waters; immigration and citizenship; national defense and security; and the courts. The functions of the district governments would include: formulation of district policies; agriculture in the district; district health services; cultural activities; and transport in the district. Each district would have a district government made up of a district assembly and a district council. The district assembly would be the law-making body of the district government whereas the district

191 *Timothy Njoya and others v Attorney General and others* (2004) AHRLR 157 (KeHC 2004).

192 Ghai, 'A short history of Constitutions and what politicians do to them'.

193 Yash Pal Ghai, 'Why the Bomas Draft is the best constitution we never had' *Daily Nation,* 25 August 2020.

194 Wako Draft 2005.

195 Wako Draft 2005, Chapter 14.

council, headed by district chairperson, would have been the executive body of the district government.[196]

It is important to note that the Wako Draft did not make provisions for Senate. Kangu notes that the changes that were made to the Bomas Draft so as to come up with the Wako Draft went to the heart of devolution that had been adopted at the Bomas Conference.[197] Ghai observes that they 'considerably weakened the devolution chapter'[198] by largely retaining the existing centralised system, which had been strongly criticised and rejected by the people and the NCC participants.[199] The Wako Draft, or what Ghai describes as 'the Government's butchered version of the constitution'[200] was taken to referendum on 21 November 2005, but was rejected by a majority of the Kenyans.[201] This rejection was partly because of the weakened devolution system.[202] But there was not much loss to count anyway; thus, as Ghai quips, 'Nevertheless, no-one in the Government mourned this referendum result: it left them with the old, discredited constitution, complete with its imperial presidency'.[203]

The constitution review process lost its momentum in the succeeding years until when the highly contested 2007 General Election was held and the incumbent President, Kibaki, controversially declared the winner. This resulted in post-election violence from late 2007 to early 2008. To resolve the issue, a Coalition Government was formed, with Kibaki as President and Raila Odinga as Prime Minister.

196 Wako Draft 2005, Chapter 14.

197 Mutakha, 'An interpretation of the constitutional framework for devolution in Kenya, 141.

198 Yash Pal Ghai, 'Devolution: Restructuring the Kenyan State' *Journal of East African Studies, (*2008) 217.

199 Mutakha, 'An interpretation of the constitutional framework for devolution in Kenya: 117.

200 Ghai, 'A short history of Constitutions and what politicians do to them'.

201 Lumumba and Franceschi, 45. In terms of numbers, 43% of the voters supported the 'banana' camp by endorsing the document whilst a majority at 57% of the votes cast preferred the 'orange camp' that rejected the document.

202 Lumumba and Franceschi, 'The Constitution of Kenya 2010', 45.

203 Ghai, 'A short history of constitutions and what politicians do to them'.

One of the agendas of the Coalition Government was to complete the constitutional review process. All the three separate processes the Phillip Waki Commission,[204] the Johann Kriegler Commission[205] and the Kenya National Dialogue and Reconciliation Committee – established to look into the causes of the post-election violence concluded that there was need to conclude the review process and especially come up with an inclusive governance system, which would entail devolution of power. In accordance with the recommendations of the Kenya National Dialogue and Reconciliation Committee, the Constitution of Kenya Review Act, 2008 (Review Act 2008), was enacted.[206]

The Harmonised Draft

The Review Act 2008, established a Committee of Experts (CoE), which came up with the Harmonised Draft Constitution, published on 17 November 2009. The Harmonised Draft was subsequently discussed by the Parliamentary Select Committee and approved by Parliament. However, many contentious issues arose with respect to various aspects of the Harmonised Draft, among them provisions relating to devolution.[207] For instance, the Parliamentary Select Committee made proposals that would have weakened the system and were therefore rejected by the CoE. Such proposals included: that the Senate be referred to as a lower house;[208] that a hierarchical relationship be created between the national and county levels of government by making provision that the national government takes precedence over county governments;[209] that 'checks and balances and the separation of powers' as one of the

204 Commission of Inquiry to investigate the Post-Election Violence (CIPEV) appointed through Legal Notice No 4473 of 2008.

205 Independent Review Commission on the General Elections held in Kenya on 27 December 2007 (Kriegler Commission).

206 Mutakha, 'An interpretation of the constitutional framework for devolution in Kenya: 118.

207 Lumumba and Franceschi, 'The Constitution of Kenya 2010', 47.

208 Committee of Experts on Constitutional Review, Final Report (2010), 115.

209 Committee of Experts on Constitutional Review, Final Report (2010), 125.

objects of devolution be deleted;[210] and that the Commission on Revenue Allocation be omitted from the final constitution.[211]

The Harmonised Draft Constitution adopted three levels of government: national, regional and county. It proposed that the basic level of devolution should be the 79 districts agreed at Bomas and that they be referred to as counties to avoid confusion with the districts existing at the time. The county government was to consist of a directly elected county assembly with legislative authority, and an executive committee elected by the county assembly from amongst the members of the assembly. The Harmonised Draft proposed the region as a level of government to coordinate the functions of the county governments and to plan for services that cut across county boundaries, among other reasons. The regional governments would have had legislative and executive functions at the regional level and a representative role at the national level. Regional assemblies and executives would be elected by county assemblies within the region. Their principal function would be to coordinate the implementation of the programs and projects that extend across two or more counties within the region. The representative role would be performed through Senate, whose members would be elected from the county assemblies. The Harmonised Draft adopted the original eight provinces as the basis of the regional level government.[212]

Revised Harmonised Draft

The CoE disseminated the Harmonised Draft Constitution for public input. It then reviewed it in light of the views received from the public and submitted the Reviewed Harmonised Draft Constitution to the Parliamentary Select Committee on 8 January 2010. One of the changes made touched on the levels of devolved government. They were reduced to two: national and county. Patrick Lumumba and Luis

210 Committee of Experts on Constitutional Review, Final Report (2010), 125.

211 Committee of Experts on Constitutional Review, Final Report (2010), 128.

212 Draft Constitution of Kenya (Harmonised Draft) 2010.

Francheschi note that the structure adopted in the Revised Harmonised Draft is from the Wako Draft, only that district governments were replaced by county governments.[213] For the units of county governments, the districts enacted in 1992 by the District and Provinces Act were adopted as proposed counties.[214] It also provided for the direct election of senators. Furthermore, an additional provision was made requiring the National Government to ensure that county governments are given adequate support and resources.[215] In view of the changes made to the Harmonised Draft by Members of Parliament at Naivasha, the Draft Constitution that Kenyans voted in the referendum of 4 August 2010 was materially different from the Revised Harmonised Draft.[216] This subsequent document was promulgated on 27 August 2010 and is the 2010 Constitution.

Decentralisation under the 2010 Constitution: Another half-hearted attempt?

This section provides a breakdown of the governance brought about by the 2010 Constitution. It also makes a brief assessment of the progress made as well as highlights the challenges in translating the devolution architecture on paper to an operational model meant to realise the objects of devolution under Article 174 of the 2010 Constitution. It will be evident in the ensuing discussion that while attempts were made in the letter of the 2010 Constitution, these were met with reluctance

213 Lumumba and Franceschi, 'The Constitution of Kenya 2010', 513.

214 Some scholars have criticised the framework upon which the county governments as modelled – mostly around the 47 districts of colonialism and post-colonialism. For instances Joshua Kivuva summarises this critique thus: [t]hese colonial-era districts were not delineated on the basis of any of the problems that the devolution system was meant to solve or the aspirations of the people at the grassroots" (See Joshua M Kivuva, 'Restructuring the Kenyan state' Society for International Development, 1 *Constitution Working Paper Series,* (2011) 28).

215 Lumumba and Franceschi, 'The Constitution of Kenya 2010', 513.

216 Luis G Franceschi, 'Where do MPs fall in the devolution chain?' *Daily Nation* 29 November, 2013.

and teething challenges since the first Government under the 2010 Constitution assumed office in 2013. There have been successes, as well as various drawbacks in realising the dream of devolution as evidenced by gaps in the implementation, supremacy wars court battles. It would appear the ghosts of yester-years, of resistance to devolved governance revisited, and continue to haunt the current devolved structure. Little wonder that the 2010 Constitution has witnessed various attempts to undermine it and conspicuous efforts made to delay and derail devolution implementation in more ways than one.

The 2010 promise

On 27 August 2010, the 2010 Constitution was promulgated. Hailed as the 'greatest promise of the new Constitution',[217] devolution became operational in Kenya in 2013, after the first General Election under the 2010 Constitution. This choice of governance model responds to the repressive history of overtly centralised power structures discussed earlier in this Chapter. As the High Court aptly remarked 'at the heart of devolution is a recognition that centralised power creates a climate for coercive state power'.[218]

Ghai writes that the CKRC found that Kenyans felt alienated from the Central Government, 'marginalised' 'neglected' and 'victimised' due to their ethnic and political statuses.[219] In one of his lectures, Ghai vividly paints the picture of a disillusioned people, with a resolute craving for a new model of governance for the country thus:

> Wherever the CKRC went, it noted widespread feeling among the people of alienation from Central Government because of the concentration of power in the National Government, and to a remarkable extent, in the President.

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217 Council of Governors, 'Devolution Law report Volume 1' 2017, v.

218 *Council of Governors & 3 others v Senate & 53 others,* Judgment of the Court of Appeal (2015) eKLR para 107.

219 Yash Pal Ghai, 'Devolution: Restructuring the Kenyan State' 2(2) *Journal of East African Studies*, 2008, 215.

> They felt marginalised and neglected, deprived of their resources; and victimised for their political or ethnic affiliations. They considered that their problems arose from Government policies over which they had no control. Decisions were made at places far away from them. These decisions did not reflect the reality under which they lived, the constraints and privations under which they suffered. … As their poverty deepened, they could see the affluence of others: politicians, senior civil servants, cronies of the regime. They felt that under both presidential regimes, certain ethnic groups had been favoured, and others discriminated against. There was particular resentment against the provincial administration which was seen as an extension of the President's office, and of the arbitrariness and abuse of power by its officials. Local government had lost its authority…[220]

Therefore, devolution in the 2010 Constitution was not enshrined for its own sake but was meant to be a departure from the historical excesses of power and an aperture towards a more inclusive, unifying and development-oriented government structure. In promulgating the 2010 Constitution, Kenyans expressed their aspiration for a government that was based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law; values which were direly missing in the former regimes. Thus, 'the hitherto unilateral whimsical decision-making was to be replaced by accountable exercise of power'.[221] As the Supreme Court observed *In the Matter of the Speaker of the Senate & another*:

> The Kenyan people, by the Constitution of Kenya, 2010 chose to de-concentrate State power, rights, duties, competences – shifting substantial aspects to county government, to be exercised in the county units, for better and more equitable delivery of the goods of the political order. The dominant perception at the time of constitution-making was that such a deconcentration of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfilment, through an enlarged scheme of actual participation

220 Yash Pal Ghai '*Devolution: Restructuring the Kenyan State*' Lecture at the African Research and Resource Forum KICC Nairobi, 23 November 2007.

221 Kenya National Commission on Human Rights, 'Kenya @ 10: A decade after: The state of human rights post the 2010 promulgation of the Constitution: A human rights scorecard', Press Statement, 27 August 2020.

> in governance mechanisms by the people – thus giving more fulfilment to the concept of *democracy.* [222]

The objects of devolution certainly point towards these thematic goals. These objects include fostering national unity by recognising diversity, self-governance and participation of the people in the exercise of State power and decision-making; promoting the interests and rights of minorities and the marginalised; socio-economic development and accessible Government services; equitable sharing of resources; and decentralisation of State organs, their functions and services from the capital.[223] The stated principles of county government further buttress these objects and include the requirement that devolution shall be based on democratic principles and separation of powers; that they have reliable sources of revenue to enable them to govern and deliver services effectively; and that no more than 2/3 of the members of each county government should be of the same gender.[224]

The model of governance under the 2010 Constitution

Devolution has entrenched a system of checks and balances to ensure that power was not abused as in the past. The key organs of governance are also responsible for ensuring that the objects of devolution under Article 174 of the 2010 Constitution were met. The composition and very roles of these organs and institutions tell a tale on their intended significance in reversing exclusion and inequitable development across the country.

Governance of the country is shared between two levels of government- the National Government and the County Governments. The two levels exercise delegated sovereign power of the people.[225] The

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222 *In the Matter of the Speaker of the Senate & another* Supreme Court Advisory Reference 2 of 2013 eKLR para 136.

223 Constitution of Kenya (2010), Article 174.

224 Constitution of Kenya (2010), Article 175.

225 Constitution of Kenya (2010), See Article 1(3)(4).

governments at the national and county levels though interdependent are 'distinct'. They are expected to conduct their mutual relations in a spirit of consultation and cooperation.[226] Indeed, Article 189 requires cooperation, assistance, and consultation between the two levels of Government explicitly.[227]

As discussed earlier, a notable barrier to decentralisation in the pre-2010 epochs was the erosion of local government by clawing power back to the centre. Perhaps in recognition of this fact, the 2010 Constitution delineates National Government and County Governments functions in its Fourth Schedule.[228] For instance, among other functions, counties are mandated to provide county transport, disaster management, and planning and development including land survey and mapping.[229] The National Government functions include foreign affairs, national security and the courts.[230]

The National Executive

The national executive function is vested in a Cabinet.[231] The Cabinet comprises the President, Deputy President (DP), the Attorney-General and a minimum of 14 to a maximum of 22 Cabinet Secretaries (CSs).[232] It is a constitutional imperative that the National Executive reflects the regional and ethnic diversity of the people of Kenya.[233] The CSs are nominated and appointed by the President upon approval by the National Assembly.[234] A clear departure from the previous constitutional arrangement, and what is seen as an attempt to underscore the centrality

226 Constitution of Kenya (2010), Article 6(2).
227 Constitution of Kenya (2010), Article 189.
228 Constitution of Kenya (2010), Fourth Schedule.
229 Constitution of Kenya (2010), Fourth Schedule.
230 Constitution of Kenya (2010), Fourth Schedule.
231 Constitution of Kenya (2010), Article 130.
232 Constitution of Kenya (2010), Article 152(1).
233 Constitution of Kenya (2010), Article 130(2).
234 Constitution of Kenya (2010), Article 152(2).

of separation of powers and checks and balances, the 2010 Constitution is categorical that a CS cannot be a Member of Parliament.[235] The DP is the President's running mate in a General Election[236] and deputises the President in execution of the functions of the Office.[237]

The President

The President is the Head of State and Government and wields the executive authority of the Republic.[238] The President is responsible for directing and coordinating the functions of the ministries and government.[239] The specific functions of the President are clearly delineated under Article 132 of the 2010 Constitution. Not surprising given the history of the Kenyan nation, the President is expressly mandated to: 'promote and enhance the unity of the nation'; 'promote respect for the diversity of the people and communities of Kenya'; and 'ensure the protection of human rights and fundamental freedoms and the rule of law'.[240]

Parliament

Parliament is the collective term for the National Assembly and the Senate, the two legislative chambers at the national level.[241] It is the legislative arm of the National Government. In what is a cautionary bulwark against usurpation of legislative authority and a gag to whimsical 'roadside declarations' of yester-years, the 2010 Constitution is categorical that only Parliament, to the exception of any other person or body has the authority 'to make provision having the force of law in

235 Constitution of Kenya (2010), Article 152(3).
236 Constitution of Kenya (2010), Article 148(1)(2)(3).
237 Constitution of Kenya (2010), Article 147.
238 Constitution of Kenya (2010), Article 131(1).
239 Constitution of Kenya (2010), Article 132(3)(b).
240 Constitution of Kenya (2010), Article 131(2).
241 Constitution of Kenya (2010), Article 93.

Kenya' except under authority conferred under the 2010 Constitution or written law.[242]

The National Assembly comprises a total of 350 members: That is to say, 290 members representing single member constituencies; 47 women representatives one from each county; 12 members representing special interest groups (including the youth, PWDs and workers) and the Speaker who serves as an *ex officio member.* The 12 members representing special interest groups are nominated by political parties according to their proportional representation in the House.[243] The National Assembly represents the people of the constituencies, 'deliberates on and resolves issues of concern to the people', may originate any legislation[244] and 'exercises oversight over national revenue and its expenditure'.[245] The National Assembly is also mandated to oversight State organs and initiate the processes of removal of the President, DP and State Officers and approve declarations and extensions of states of emergency. None of the foregoing roles has elicited fiery controversy and pitted the National Assembly against its sister House -the Senate as much as the legislative and revenue allocation roles; which goes to the very root of devolution.

Senate

Senate is composed of a total of 67 Senators excluding the Speaker. There are 47 members elected from each county; 16 women senators nominated by political parties according to their proportional representation in the Senate; two members representing the youth (one woman and one man); two members representing PWDs (one woman and one man) and the Speaker who is an ex-officio member.[246]

The Senate is tasked with representing counties, and protecting their interests as well as those of county governments.[247] In what appears

242 Constitution of Kenya (2010), Article 94(5).
243 Constitution of Kenya (2010), Article 97.
244 Constitution of Kenya (2010), Article 109(2).
245 Constitution of Kenya (2010), Article 95(4).
246 Constitution of Kenya (2010), Article 98(1).
247 Constitution of Kenya (2010), Article 96(1.

to set the stage for a weakened Senate by design first then further amplified in the actual interpretation of the roles. Senate 'participates in the law-making function of Parliament' by debating and approving Bills concerning counties;[248] determines the allocation of national revenue among counties and exercises oversight over these allocations. [249]

Perhaps no governance institution under the 2010 Constitution has elicited as much controversy as the Senate. Since its (controversial) installation and subsequent removal from the Independence Constitution, to the pre-2010 constitution-making debates, to the 2010 Constitution, the hallmark of devolution, appears to be under siege perpetually from all quarters and in perpetual defence of its space - from the National Assembly, to the national and county executives. To its credit, the Judiciary has rescued the institution of Senate from functional obliteration severally.

County government

There are 47 counties in Kenya.[250] There is a county government for each county, which consists of a county assembly and a county executive.[251] The county assembly is the legislative arm and the county executive acts as the executive arm.[252] Both institutions represent a departure from previous local governance mechanisms in that the county legislative and executive powers are not derived from the National Government but directly from the supreme law of the land, the 2010 Constitution, which secures the autonomy of the subnational governments. So jealously guarded is the devolved government structure under the 2010 Constitution that amendments to it have to be approved in a referendum.[253] Such anchoring was not in vain but

248 Constitution of Kenya (2010), Article 96(2).
249 Constitution of Kenya (2010), Article 96(3).
250 Constitution of Kenya (2010), Article 6(1); First Schedule.
251 Constitution of Kenya (2010), Article 176(1).
252 Constitution of Kenya (2010), Article 176.
253 Constitution of Kenya (2010), Article 255(i)*(h)*.

a necessary safeguard recalling the lifespan of the regional structures of the Independence Constitution and the half-hearted embrace of devolution by a section of the politicians as discussed earlier.

County executive

The executive authority of a county government is vested in a county executive committee (CEC). The CEC comprises the governor (elected one per county) and Deputy Governor, and any members appointed by the Governor with the approval of the County Assembly.[254] Such appointees should not exceed ten in number or more than a third of the members of county assemblies (MCAs).[255]

The governor is required to implement county plans and policies with the cooperation of the county assembly and to generally provide leadership in the county's development and governance.[256] The Council of Governors (CoGs) provides a forum for all the 47 governors to consult and cooperate on matters of common interest.[257]

County assemblies

A county assembly is the legislative arm of every county. It is composed of elected MCAs representing each county ward; six special seat members nominated by political parties to represent marginalised groups and a top up formula to ensure the 2/3 gender rule and representation of members of marginalised groups, including PWDs and the youth, as prescribed by the County Government Act and the Speaker.

254 Constitution of Kenya (2010), Article 179.

255 Constitution of Kenya (2010), Article 179(3).

256 County Governments Act, (2012) Section 30.

257 Intergovernmental Relations Act, (2012) Section 19-23.

The county assembly is charged with making '[a]ny laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule'.[258] It may also approve plans and policies for the management of county resources, county infrastructure and institutions.[259]

Reading the 2010 Constitution with legislation such as the County Government Act, 2012, reveals that county assemblies have other oversight functions such as approving county budget and expenditure and vetting nominees for county offices.[260] County assemblies also have the power to oversight the County Executive by impeaching the Governor, although the Governor will stand removed only if Senate removes them following their impeachment.[261]

Constitutional commissions and independent offices

Though not part of the devolved governance structures, constitutional commissions and independent offices are a significant and unique feature of the 2010 Constitution. They are a critical part of the equation to secure devolution. Thus, during the collection of views by the CKRC, many Kenyans saw constitutional commissions as mechanisms that would rid the country of past ills including 'corruption, discrimination, unfair treatment in access to employment, police brutality and harassment and human rights abuses'.[262]

Chapter 15 of the 2010 Constitution lists ten constitutional commissions[263] although the number comes to 12 given Parliament's

258 Constitution of Kenya (2010), Article 185.

259 Constitution of Kenya (2010), Article 185.

260 County Governments Act (2012), Section 9.

261 Constitution of Kenya (2010) Article 185, County Government Act (2012), Section 33.

262 CKRC, Final Report, 323.

263 Article 248, Constitution of Kenya, 2010. The Repealed Constitution provided for only four constitutional commissions; that is, the Electoral Commission; the Parliamentary Service Commission; the Judicial Service Commission and the Public Service Commission. (CKRC Final Report, 320).

subsequent restructuring of the Kenya National Human Rights and Equality Commission into three independent commissions.[264] All the constitutional commissions have a common overarching mandate, to protect the sovereignty of the people, secure observance of democratic values and principles and promote constitutionalism.[265] Their independence is constitutionally guaranteed.[266] The underlying philosophy behind the creation of constitutional commissions, as elucidated by the Supreme Court, is to exercise oversight over the primary arms of government[267] and to act as the bulwarks for safeguarding the peoples' sovereignty.[268] Among the institutions in involved in the promotion and protection of the rights of the marginalised groups are the National Gender and Equality Commission and the Kenya National Commission on Human Rights.[269]

The faltering promise: Obstacles to a working devolution

Since the first Government under the 2010 Constitution assumed office in 2013, devolution implementation has been checkered with power struggles. Similar to the defunct local authorities, the centre still appears keen to use its power of the public purse to control the affairs of county governments. In the ensuing discussion, it will be evident that

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264 Constitution of Kenya, (2010) Article 59(5)(c). The Kenya National Human Rights and Equality Commission was restructures into three independent constitutional commissions: Kenya National Commission on Human Rights; National Gender and Equality Commission and Commission on Administrative Justice ("the Ombudsman").

265 Constitution of Kenya (2010), Article 249(1).

266 Constitution of Kenya (2010), Article 249(2).

267 Ndung'u SCJ *In the Matter of the Speaker of the Senate & another* Supreme Court Advisory Reference 2 of 2013 eKLR.

268 *In* the *Matter of the National Land Commission* (2015) eKLR; Advisory Opinion Reference No 2 of 2014) para 172.

269 The establishment and mandate of the constitutional Commissions is provided under Article 59 of the Constitution as read with the respective constitutive Acts i.e National Gender and Equality Commission Act, 2011 (No 15 of 2011) and the Kenya National Commission on Human Rights Act 2011 (No 14 of 2011) respectively.

the unrelenting jostle to define and redefine the governance structures did not settle with the promulgation of the 2010 Constitution.

Challenges of transition

The 2010 Constitution prescribes that Parliament will provide for the phased transfer of Article 185 functions from the National Government to the county governments over a period of not more than three years from the date of the first election of county assemblies.[270] To give effect to this provision, Parliament passed the Transition to Devolved Government Act, 2012 (Transition Act). The Transition Authority (TA) was established by the Transition Act to primarily facilitate the analysis and the phased transfer of the functions provided under the Fourth Schedule to the 2010 Constitution to the national and county governments.[271] It was tasked with evaluating whether counties were ready to assume certain functions. However, the Senate had the final say with regard to the transfer process.[272] Section 37(1) of the Transition Act provided that the TA would be dissolved either three years after the first post-constitutional elections or 'upon the full transition to county governments', whichever happened first. The TA formally became defunct in 2016 and its remaining duties were transferred to the Intergovernmental Relations Technical Committee, which was established under Intergovernmental Relations Act.[273]

During its tenure and at the time of its dissolution, the TA was not immune to challenges and controversies. For example, the TA encountered a lack of cooperation from the key offices that would enable it execute its function.[274] In its 2014 report titled, *The progress*

270 Constitution of Kenya 2010 Sixth Schedule, para 15.

271 Transition to Devolved Government Act, 2012; Section 7, Laban Wanambisi, 'President Names Transition Authority' *Capital FM*, 19 June 2012.

272 Transition to Devolved Government Act Section 23, (2012).

273 Ngechu, 'Transition Authority to vacate offices as term expires'.

274 Jeremiah Kiplang'at, 'Transition Authority faults ministers for withholding information', *Nation*, 14 December 2014.

of transition to the devolved system of governance, the TA accused CSs of withholding information that would be crucial in transfer of assets and human resources to county governments.[275] But opposition was also not only from within government but also without the government. For instance, in *Republic v Transitional Authority and another, ex parte Medical Practitioners, Pharmacists and Dentist Union*[276], the High Court dismissed an application by the Kenya Medical Practitioners and Dentist Union (KMPDU) who were opposed to the transfer of the health docket to county governments alleging that the transfer was unlawful for not observing public participation and that it would amount in loss of jobs and/or disadvantageous terms of work.

Incidentally, the TA was also under considerable scrutiny in 2013, over delay in the transfer of funds, functions and poor communication to the Attorney General to gazette the same.[277] Way before its dissolution, the TA faced controversial and political attempts and threats to disband it.[278] Its subsequent dissolution happened amid protests that it was yet to complete its mandate. For instance, it had yet to complete an evaluation and transfer of assets worth Ksh 43 billion.[279]

Usurpation of power: Turf wars

Despite the demarcation of National Government and County Government functions, this has not been crisp and has triggered disquiet and disputes over resources and developmental roles. An important case

275 See also case of Council of County Governors v Attorney General and 4 others, Judgment of the High Court (2015) eKLR.

276 *Republic v Transition Authority and another, ExParte Medical Practitioners, Pharmacists and Dentist Union (KMPDU) and 2 others,* Judgment of the High Court (2013) eKLR.

277 Daily Nation, 'Governors want functions transferred by Aug 10' 27 July 2013.

278 Roselyne Obala, 'CIC, governors want Transition Authority disbanded', *The Standard*, 2014.

279 Wangui Ngechu, 'Transition Authority to vacate offices as term expires', *Citizen*, 4 March, 2016.

in this regard is *The Institute for Social Accountability (TISA) and another v The National Assembly and three others*, where the High Court declared the CDF unconstitutional partially because it infringed upon county functions. The wording of the CDF Act indicated that CDF would be used for community-based projects and infrastructural developments in constituencies.[280] A similar case was that of *Council of Governors & 3 others v Senate & 53 others*[281] in which the High Court declared the County Governments (Amendment) Act 2014 unconstitutional for establishing county development boards (CDBs) in each of the 47 county governments. The composition of the CDBs included Senators MPs, MCAs, as well as members of the Executive operating within the counties. The CBDs were to be chaired by the Senator of the respective county.

The High Court found such arrangements to run against the grain of a devolved government structure. The Court also found the composition and mandate of the CDBs violated the Constitution on three fundamental respects: a) the law compromised the oversight functions of the legislative organs over revenue allocated to the counties; b) it undermined devolution and c) the arrangement ran afoul the principle of separation of powers.[282] Courts have upheld this delineation of functions.[283] In *Nairobi Metropolitan PSV SACCOs Union Ltd and 25 others v County Government of Nairobi and 3 others*, the High Court affirmed the County Government of Nairobi decision to raise parking fees arguing that the County has such revenue-raising powers under the 2010 Constitution.[284]

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280 Constituency Development Fund Act (2013) Section 3.

281 *Council of Governors & 3 others v Senate & 53 others.*

282 See *Council of Governors & 3 others v Senate & 53 others* (2015) eKLR para 102, 103 and 105.

283 See generally Conrad Bosire, 'The emerging approach of Kenyan Courts to interpretation of national and county powers and functions' in Conrad Bosire and Wanjiru Gikonyo (eds), *Animating devolution in Kenya: The role of the judiciary in Kenya: Commentary and analysis on Kenya's emerging jurisprudence under the new Constitution*, 2015, 101-116.

284 (2014) eKLR.

Perhaps the most audacious National Government action yet at undermining devolution was the arbitrary transformation of Nairobi City County to Nairobi Metropolitan Services (NMS).[285] The NMS followed Executive Order No 1 of 2020, which paved way for President Uhuru Kenyatta and the then Nairobi Governor, Gideon Mbuvi Sonko, to agree to transfer some of the County services to the National Government under the administration of the NMS. Despite lack of legal backing, the Employment and Labour Relations Court vindicated the NMS on the grounds that it was created in good faith and would benefit the public.[286]

The 2010 Constitution provides that in the event of removal, the Governor is to be replaced by the Deputy Governor and in the event the Deputy's office is vacant or the Deputy cannot perform the gubernatorial functions, then the Speaker of the County Assembly is to step in until a gubernatorial election is held within 60 days of assumption of office.[287] However, in the curious case of the impeachment of the Nairobi Governor, Sonko, no such replacement procedure was followed.[288] At the time of his impeachment, Sonko had no deputy. The then Speaker, Benson Mutura, assumed office pending a gubernatorial election. However, Sonko sought to bar the gubernatorial election, and the High Court granted his request.[289] Thereafter, Anne Kananu was appointed as Deputy Governor and hurriedly sworn in as the Acting Governor, amid petitions challenging her appointment as Deputy Governor. Despite having no legal backing, the High Court in *Law Society of Kenya v Anne Kananu Mwenda* declined to quash the controversial replacement in a bid

285 Executive Order No 1 of 2020 (revised).

286 *Okiya Omtatah Okoiti v Nairobi Metropolitan Service & 3 others; Mohamed Abdala Badi & 9 others* (Interested Parties) Judgments of the Employment and Labour Relations Court (2020) eKLR.

287 Constitution of Kenya (2010), Article 182.

288 *Law Society of Kenya v Anne Kananu Mwenda & 5 others; IEBC* (Interested Party) Petition E019, E005, E009, E011, E012, EB, E015, & E021 of 2021, E433 of 2020 (Consolidated) Ruling of the High Court of 9 February 2021 (2021) eKLR.

289 Nairobi High Court Petition No E425 of 2020.

to avoid creating 'a constitutional crisis'.[290] The pattern of impeachments further shows that impeachments are as much political as they are legal. The case of Governor Martin Nyaga Wambora of Embu County is most outstanding for being the first governor to be ousted, having been impeached twice, and both times, he was been reinstated by the courts. The case attracted as much political attention as it did legal chats and chants.[291]

Power struggles: The 'big man' syndrome

The well intentioned and sacred principle of checks and balances meant to check power abuses characteristic of the dark era has itself been subject of abuse and a cradle of conflicts within and across the devolution structures, threatening to halt County Governments' operations. Notably, the tension between Senate and County Governments, particularly in instances where Senate is required to 'check' County Governments as per its revenue oversight role, has manifested itself in the courts. In *International Legal Consultancy Group v Senate and another*, the most significant issue before the High Court was whether the Senate acted unconstitutionally by summoning the governors and the county executive members of finance.[292] The High Court observed that Senate was a key organ in implementing devolution as it represented the interests of counties and played a direct part in many matters affecting county governments. In this case, the High Court upheld Senate's power to summon any person to appear before it for the purpose of giving evidence or providing information under Article 125 of the 2010 Constitution.

290 *Law Society of Kenya v Anne Kananu Mwenda & 5 others;* IEBC (Interested Party) (2021) eKLR.

291 See *Martin Nyaga Wambora v County Assembly of Embu & 37 others* Civil Appeal No 194 of 2015, Judgment of the Court of Appeal of 11 December 2015 (2015) eKLR, *Justus Kariuki Mate & another v Martin Nyaga Wambora & another* Judgment of the Supreme Court (2017) eKLR.

292 (2014) eKLR.

The power to summon was however politicised and used as a show of might between the county chiefs and the Senate. The former often failed to honour summonses to appear before the latter under claims that this was a ploy to undermine the stature of the governors. The Senate on the other hand was adamant that county governors had to personally appear before the House to answer to questions on use of county funds. The House would turn away chief finance officers and CECs in charge of finance sent by the governors.[293] The chairperson of the Senate's Committee on Devolution, in what would betray the long-drawn 'war', is reported as having remarked as follows:[294]

> We have told the governors you can go to court, call for a referendum, hide in the forest, you can fly high or even run to your relatives but ultimately you must appear before the Senate to answer questions of accountability.

Impeachment processes was yet another arena that elicited heated battles between the Senate and governors on the one hand, and the governors and County Assemblies on the other. On the latter, many County Assemblies were accused of holding governors ransom and refusing to approve county development plans and budgets until their demands for trips and other allowances were met. One such case was that of Makueni County whereby MCAs failed to approve county budgets for the 2014/2015 financial year paralysing service delivery. The Governor, citing 'irreconcilable differences' and a section of residents petitioned for the suspension of the County Assembly in line with Article 192 of the 2010 Constitution and Section 123 of the County Governments Act, (2012).[295]

As if the vertical turf wars are not enough, the Senate has also had to wrestle for relevance in the bicameral House particularly in matters

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293 Mukaindo, 'Kenya's devolution implementation'.

294 F Kibor 'Governors should appear before Senate, insist Kithure Kindiki and Kipchumba Murkomen', *The Standard,* 25 October 2014, cited in Mukaindo, 'Kenya's devolution implementation,' 40.

295 See Kenya Law, 'Petition for suspension of the Government of Makueni County' *Kenya Law Blog*, 29 April 2015; Francis Gachuri, 'Commission Report shows Makueni County headed for dissolution' *Citizen Digital,* 3 September 2015.

of law making and revenue allocations. In what could appear to be a deliberate move to emasculate the Senate, the National Assembly was severally accused of passing laws without seeking concurrence of the Senate as required by the Constitution and in some cases, 'sitting on' Senate Bills and failing to consider them, sometimes on the pretext that they were money bills, thus effectively 'killing' them.

On 29 October 2020, the High Court in *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others (Interested Parties)*[296] nullified 23 Acts of Parliament enacted by the National Assembly without reference to and input of the Senate as required under Article 110(3) of the 2010 Constitution. Others were laws concerning county governments and which therefore required substantive consideration by the Senate pursuant to Articles 96, and 109 to 113 of the 2010 Constitution. In bypassing the Senate, 'the National Assembly's conduct [was] a threat to the devolution system of governance enshrined in [the] Constitution'.[297] Relying on the *Supreme Court Advisory Reference No 2 of 2013,*[298] the High Court reaffirmed the role of the Senate in the legislative process and declared as unconstitutional the laws that the National Assembly passed without involving the Senate. The decision was partially upheld by the CoA in *Speaker of the National Assembly of the Republic of Kenya & another v Senate of the Republic of Kenya & 12 others.*[299]

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296 *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others* (interested parties) Judgment of the High Court of 29 October 2020, Petition 284 & 353 of 2019 (Consolidated).

297 *Senate of the Republic of Kenya & 4 others v Speaker of the National Assembly & another; Attorney General & 7 others* para 19.

298 *In the Matter of the Speaker of the Senate & another,* Advisory Opinion Reference 2 of 2013, Advisory Opinion of the Supreme Court (2013) eKLR.

299 *Speaker of the National Assembly of the Republic of Kenya & another v Senate of the Republic of Kenya & 12 others,* Civil Appeal E084 of 2021 KECA 282 (KLR) 19 November Judgment of the Court of Appeal, (2021) eKLR. In reversing the High Court decision to nullify the 23 Acts, the appellate court ruled that the concurrence process in Article 110(3) only applied to all Bills concerning counties within the meaning of Articles 109 to 114 of the Constitution. The Appellate Court nonetheless declared the following Acts to be unconstitutional for failing to

The ensuing bitter rivalry and supremacy wars between the two legislative chambers at the national level has seen the National Assembly threaten to disband the Senate.[300] Yet such a move would require an elaborate constitutional process including a referendum as contemplated under Article 255 of the 2010 Constitution.

When it comes to revenue allocations, the Senate has often felt edged out of the cake-sharing table, causing the House to seek the intervention of the highest court in the land. The Supreme Court has variously upheld the centrality of the Senate in the revenue sharing processes. One such matter was that of the *Speaker of the Senate and another v Attorney General and others*.[301] The matter arose out to the lack of involvement of the Senate in passing of the Division of Revenue Bill, 2013. In its majority analysis, the Supreme Court held that the Division of Revenue Bill, and revenue collected at the national level, is essential to the operations of county governments, as contemplated under the 2010 Constitution, and so it was a matter requiring Senate's legislative contribution. The then Chief Justice of Kenya, Willy Mutunga, explained that the relationship between the two parliamentary chambers should be reinforced by the principle that the more checks and balances the better for good governance.

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adhere to Articles 96, 109, 110, 111, 112 and 113 of the Constitution: Equalisation Fund Appropriation Act(No 3 of 2018), the Sacco Societies (Amendment) Act (No 16 of 2018) and amendments made to section 3 and 4 of the Kenya Medical Supplies Authority Act by the Health Laws (Amendment)Act (No of 5 of 2019). The Court of Appeal further upheld the High Court position that 'any Bill or delegated legislation that provides for, or touches on, mandate or powers of Parliamentary Service Commission must be considered by the Senate' and further that Standing Order 121(2) of the National Assembly Standing Orders was unconstitutional for being inconsistent with Articles 109(4) and 110 to 113 of the Constitution.

300 Julius Otieno and Moses Odhiambo, 'MPs threaten to abolish Senate as supremacy row deepens' *The Star*, 4 July 2019.

301 *Speaker of the Senate and another v Attorney General and others*.

Challenges in revenue-generation and sharing

In what appears to be a throwback of the post-independent era wherein Central Government controlled local authorities through the power of the public purse, tensions persist post-2010 Constitution in the manner in which monies from the national kitty reach the devolved units.

The 2010 Constitution specifies that revenue raised nationally shall be divided between and among national and county governments on equitable terms.[302] A number of criteria are provided as to what should be taken into account to determine an equitable division. This includes the national interest, provisions as to public debt, the needs of the National Government, the needs of county governments, among others.[303] Additionally, the 'equitable share of the revenue raised nationally that is allocated to county governments shall be not less than fifteen per cent of all revenue collected by the National Government'.[304]

Delays in disbursement of the equitable share from national to County Governments has been one of the main complaints that has threatened to shut down county operations. In *Council of Governors & 47 others v Attorney General & 6 others* [2019] *e*KLR,[305] the Supreme Court was tasked to superintend over an impasse between the rivaling houses of Parliament over the passing of the 2019 Division of Revenue Bill. Notably, the impasse had taken three months (July 2019 to September 2019), which impacted on the county budget implementation cycles. Similarly, the disbursement to counties for the 2020/221 financial year was hampered following a stalemate at the Senate that lasted three months from July 2020 over the third basis for revenue allocation among county government. The opponents felt that the formula disfavoured marginalised counties and that about 19 counties, mostly

302 Constitution of Kenya (2010), Article 202.
303 Constitution of Kenya (2010), Article 203.
304 Constitution of Kenya (2010), Article 203.
305 Advisory opinion reference no 2 of 2013.

those perceived as historically marginalised stood to lose. A mediation committee had to be set up to foster consensus-building. Consequently, the CoGs reported an impending shutdown of counties since they were yet to receive their equitable share of revenue by 17 September.[306]

The CoGs, on 14 June 2021, again protested non-disbursement of 102.6 billion for the 2020/21 financial year to the 47 counties with only two weeks to the end of the financial year. As a result of this, the CoGs threatened to shut down counties citing lack of funds to run operations.[307] The perennial delays in disbursement of funds to counties has had various repercussions including negative impact on service delivery, accumulated pending bills to suppliers, delays in implementation of development projects and under absorption of budgets thus interfering with the counties' work plans for the ensuing financial year.[308]

The matter of *Council of Governors and 47 others v Attorney General & 3 others*[309] involved an impasse between Senate and National Assembly over the equitable share of revenue between counties and the National Government after the National Assembly and Treasury departed from the Commission of Revenue Allocation's (CRA) recommendations for the Division of Revenue Bill.[310] The important *question before the Supreme Court was:* What happens when the National Assembly and Senate fail to agree on the Division of Revenue Bill thereby triggering an impasse? The Supreme Court adopted a purposive interpretation, as Article 259 of the 2010 Constitution demands, to conclude that Article 222 also

306 Kenya National Commission on Human Rights, 'An alternative report of the state compliance on obligations under Article 132 (C) (I) & (Iii), Constitution of Kenya on realization of Article 10' (2018-2020) citing Council of Governors, Press Statement on the shutdown of County Governments, 17 September 2020.

307 Julius Otieno, 'Governors threaten to shut down counties for lack of funds', *The Star,* 14 June 2021.

308 Speech by H E Hon Martin Wambora, Chairman Council of Governors 'Council of Governors state of devolution address,' 7 July 2022.

309 *Council of Governors & 47 others v Attorney General & 3 others* (*interested parties*); Katiba Institute & 2 others (amicus curiae) (2020) *e*KLR.

310 The CRA is constitutionally tasked with recommending appropriate provisions for the equitable share.

allows withdrawals from the Consolidated Fund for the sake of county government business. The Supreme Court was mindful of the spirit of Article 222 and stated that the money to be withdrawn for county government business shall be 50% of the total equitable share allocated to the counties in the Division of Revenue Act in the preceding year. Where this amount exceeds the total equitable share proposed in the Division of Revenue Bill for the current financial year, the Supreme Court referred to Article 203 of the 2010 Constitution to conclude that the percentage to be withdrawn from the Consolidated Fund should not be less than 15% of all revenue collected by the National Government.

Own-source revenue

The situation is not made any better by the failure of County Governments to raise sufficient funding on their own, a situation that has been described as a significant danger for devolution due to the overreliance on national revenue sources.[311] This is a cause for alarm because, from the history explored earlier, the restriction of revenue sources was a way through which the Central Government controlled local governance. Another audit by the Government has showed that revenue collection was a major challenge with some counties collecting less than what the 'defunct local authorities, municipal and/or country councils used to collect when combined'.[312] While this may in part be due to the limited sources of revenue available to County Governments,[313] there has been a lack of urgency and strategy in revenue mobilisation initiatives.[314] Indeed, a more recent audit by the Controller of Budget

311 Susanne Mueller, 'The devolution paradigm: Theoretical critiques and the case of Kenya', 6 *Conflict, Politics, and Human Rights in Africa* , (2019), 12.

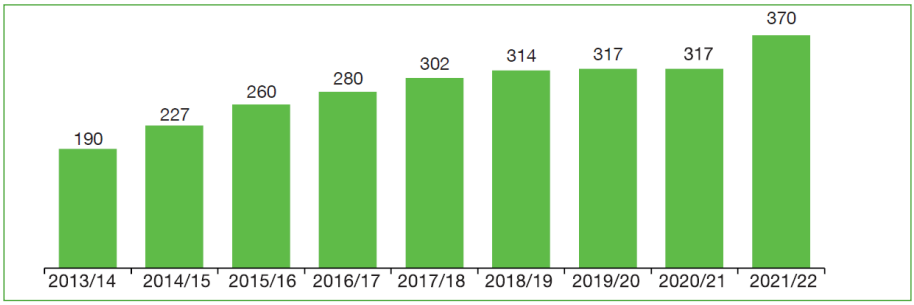
312 Office of the Auditor General, report of the working group on the socio-economic audit of the constitution of *Kenya, 2010*, September 2016, 28.

313 Jeffrey Steeves, 'Devolution in Kenya: Derailed or on track?', 53(4*) Commonwealth and Comparative Politics*, 2015, 461-462.

314 See generally R Wanjiru, 'Local revenue mobilization at the country level: Experiences and challenges' in Conference Proceedings No 2, *Swedish International Centre for Local Development*, Nairobi Safari Club, June 2014, 42-50.

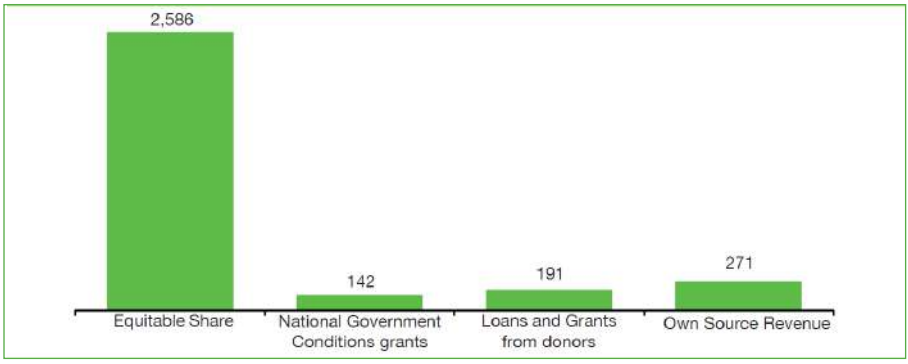
confirms that, "under-performance in own-source revenue collection, low expenditure on development budget, high expenditure on personnel emoluments, and high level of pending bills"[315] remain key challenges affecting implementation in the counties.

Figure 1: Above equitable share allocation to counties for the FYs 2013/14 to 2021/22 (Kshs. Billion).



Source of data: Commission on Revenue Allocation, County Fact Sheets (2022), 7.

Figure 2: Figure showing total county revenues for the FYs 2013/14 to 2021/22 (Kshs. Billion).



Source of data: CRA, County Fact Sheets (2022), 7.

Notably, and as Figure 1 above indicates, the equitable share to county governments appears to have been increasing over the years. Worryingly though, Figure 2 reveals that own generated revenue

315 Office of the Controller of Budget, 'County Governments budget implementation review report for the first half FY 2021/22', February 2022, 429-431.

forms a tiny fraction of county revenue streams, leaving the County Governments at the mercy of National Government disbursements.

Similar to the equitable share, the equalisation fund has also been flouted with delays and piece-meal disbursements, which has shrunk its intended impact. The equalisation fund is set up under Article 204 of the 2010 Constitution. It is meant to provide basic services to marginalised areas such as water, roads, health facilities and electricity to marginalised areas 'to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible'.[316] Thus, the Equalisation Fund aims to address

> [h]istorical marginalisation in the country, accelerate development in the marginalised areas and ensure as far as possible those areas are at par with the rest of the country. It is intended to address the fair distribution of resources in order to bridge the gap of poverty in Kenya.[317]

Despite the express provisions of the law, the Equalisation Fund has not been without hiccups in its application. In the case of *Council of County Governors v Attorney General & 2 others* (above) the High Court in its decision of 5 November 2019 quashed the Guidelines on the Administration of the Equalisation Fund published on 13 March 2015[318] for being in contravention of the 2010 Constitution and the provisions of the Public Finance Management Act. The High Court made an important declaration that,

> [t]he Equalisation Fund, being for the benefit of marginalised counties can only be disbursed by the National Government through the respective and affected county governments, and in accordance with the recommendations made by the CRA as approved by Parliament.[319]

316 Constitution of Kenya (2010), Article 204(2).

317 *Council of County Governors v Attorney General & 2 others*; Commission on Revenue Allocation & 15 others (interested parties) (2019) eKLR para 4.

318 Kenya Gazette Vol CXVII-No 26 as Gazette Notice No 1711.

319 *Council of County Governors v Attorney General & 2 others,* Para 155.

The CRA identified the criteria to be used for classifying counties as marginalised. These include: legislated discrimination; geographical location; culture and lifestyles; external domination; land legislation and administration; minority recognition groups; ineffectual political participation; and inequitable government policies.[320] The CRA initially classified 14 counties under this category for the benefit of the fund: Garissa, Isiolo, Kilifi, Kwale, Lamu, Mandera, Marsabit, Narok, Samburu, Taita Taveta, Tana River, Turkana, Wajir and West Pokot.[321] It later included Baringo and Kitui, making the total number of counties 16.[322] However, there have been few hurdles with respect to the Fund including delays and piecemeal disbursements. Table 1 below shows the first distribution of the Equalisation Fund from Treasury. CRA's First Policy and Criteria for Sharing Revenue Among Marginalised Areas which lapsed in 2016/17 was replaced by the Second Policy whose duration runs up to 2020/21. By the time CRA concluded the Second Policy, Narok, Samburu, Taita Taveta, Turkana and Wajir, still had not commenced projects under the Equalisation Fund due to delayed allocations from Treasury.[323] The Public Service Commission identifies this delay as one of the main performance challenges for these counties, and recommended the Treasury to fast-track the disbursement of the funds.[324]

320 CRA, *First policy and criteria for sharing revenue among marginalised area,* vii.

321 CRA, *First policy and criteria for sharing revenue among marginalised area,* viii.

322 Public Service Commission, 'Evaluation report for the year 2016/2017 on public service compliance with the values and principles in Articles 10 and 232 of the Constitution', 57.

323 CRA, second policy and criteria for sharing revenue among marginalised area, 3, 18 & 25.

324 PSC, 'Evaluation report for the year 2016/2017 on public service compliance with the values and principles in Articles 10 and 232 of the Constitution', 58.

Table 1: Disbursement of Equalisation Fund to marginalised counties[325]

Marginalised county	Year of disbursement (2010/11-2016/17 FY)	Total allocations (Ksh) 2013/14-2015/16FY	Amount disbursed (Ksh)
Marsabit	2016/2017	886,200,000	16,000,000.00
Mandera	2016/2017	967,600,000	27,000,000.00
Garissa	2016/2017	783,500,000	167,816,106.00
Isiolo	2016/2017	746,900,000	66,600,000.00
Lamu	2016/2017	722,200,000	60,000,000.00
West Pokot	2016/2017	866,100,000	103,782,138.00
Tana River	2016/2017	859,000,000	15,000,000.00
Kilifi	2016/2017	763,500,000	5,750,000.00
Kwale	2016/2017	795,300,000	2,0000,000.00
Taita Taveta	2016/2017	751,700,000	
Narok	2016/2017	809,500,000	
Wajir	2016/2017	929,800,000	
Turkana	2016/2017	1,050,200,000	
Samburu	2016/2017	869,700,000	
TOTAL		**11,801,200,000**	**481,948,244**

Thus, the issue of funding for the devolved units, both in quantity and manner/frequency and its management remains major concerns in the 2010 Constitution as was the case after independence, a situation that could hamper realisation of the promise of devolution at the local levels.

Conclusion

Kenya has toyed with variations of decentralised governance in the colonial and post-colonial periods. The entrenchment of regionalism (*majimbo)* in the Independence Constitution promised sharing of power. However, regionalism was killed at its infancy, unmasking the true intentions of the country's founding President Kenyatta and his allies setting the stage for rapid recentralisation in succeeding years. The demise of regionalism ushered in a calculated ploy to consolidate power at the centre incrementally through the provincial administration

325 PSC, 'Evaluation report for the year 2016/2017 on public service compliance with the values and principles in Articles 10 and 232 of the Constitution', 57.

and local authorities resulting in highly centralised governance. The engendering of a one-party state (whether *de jure or de facto)* was an important facilitative piece of puzzle in the scheme of things.

Attempts to mitigate overly-centralised governance and spur local development were made through the various administrative and fiscal decentralisation efforts such as the DFRD and similar piecemeal reforms proved inadequate – too little, too late to bridge the widening rifts and quench the escalating demands for a meaningful revamp of the Kenya's governance structure.

Throughout Kenya's history, decentralisation has witnessed its fair share of controversy with growing intensity in the post-independence era. From the Lancaster Constitutional Conference to the Bomas Constitutional Conference and beyond, this chapter has traced a thread of resistance towards devolution by the powers of the day. The common denominator running through the chapter being the half-hearted acquiesces to devolved governance, to outright politics of resistance to shared power and proactive attempts by the ruling elite to claw back and consolidate power at the centre at the slightest opportunity. It is discernible that the form of decentralisation remained a hot potato throughout the constitution-making process. Taking into account the 'perks' that a centralised governance portended to the political cronies and the 'aligned' ethnic groups, decentralised governance would mean more accountability (read scrutiny), shared power and resources, a 'peril' that certain quarters were unwilling to entertain.

The waves of resistance continue to reverberate post-2010, in overt ways such as non-cooperation by the National Government officials to relinquish power to County Governments during the transition phase, outright calls to disband Senate, delays in disbursement of funds to the County Governments and denying the Senate involvement in relevant legislative and revenue sharing processes, and sometimes not so overt ways such as national development initiatives directed to counties but with strings to the centre and insistence on retaining the provincial administration, all demonstrations of colonial relics. A glimpse at the

history suggests that while the players may change, the tune remains intact. A *déjà vu*.

Whereas notable gains have been witnessed under the 2010 Constitution particularly for the marginalised groups through various affirmative action programs as will be elaborated in the subsequent chapter in more details, more remains to realise the objects of devolution etched in Article 174 of the 2010 Constitution. This is amidst constant threats to devolution – the ghosts of yester-years that constantly revisit, threatening to reel the country back to the dark days of imperial rule. With the foregoing, one would be justified to conclude that successful devolution is one that pervades the written paper on which it is articulated to the mindsets of the leaders, and more significantly, accompanied by what has PLO Lumumba has termed as (the lack of) 'political hygiene'.

Decentralisation and inclusion in Kenya

This book records a year-long study conducted by researchers from Kabarak University Law School and Heinrich Boll Foundation across five counties (Mombasa, Garissa, Narok, Nakuru and Kakamega) that sought to assess the impact of the first decade of devolution on the inclusion of women, youth and persons with disabilities in governance structures in Kenya. Two variables preoccupy this entire study – decentralisation and inclusion. The book hypothesises that there is a positive relationship between decentralisation and the inclusion of the various groups; that the more we decentralise the more we include. That the converse is also true: the more we centralise the more we marginalise.

What emerges clearly from the expositions in the volume are the historical struggles for decentralisation and inclusion by those on the outside, and efforts to congest more powers at the centre and to exclude the others by those on the inside. However, the clamour for decentralisation and inclusion won a major battlefront when the 2010 Constitution, which entrenches devolution as one of the overarching principles, among other transformative provisions, was promulgated.

At the close of a decade after the operationalisation of devolved governments, time is ripe to evaluate the original promise of devolution to democratise and include the marginalised groups. But has devolution delivered on these fronts? This edited volume explores this and other relevant questions after a decade of devolution's career.

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