

# Devolution in Kenya's new Constitution



SID

Society for International Development



# Devolution in Kenya's new Constitution

Othieno Nyanjom



SID

Society for International Development

# Devolution in Kenya's new Constitution

Constitution Working Paper No. 4

**Published by:**

Society for International Development (SID)  
Regional Office for East & Southern Africa  
Britak Centre, First Floor  
Ragati/Mara Road  
P.O. Box 2404-00100  
Nairobi, Kenya  
Tel. +254 20 273 7991  
Fax + 254 20 273 7992  
[www.sidint.net](http://www.sidint.net)

© Society for International Development (SID), 2011

ISBN No. 978-9966-029-03-4

**Printed by:**

The Regal Press Kenya Ltd.  
P.O. Box 46166  
Nairobi, Kenya

**Design & Layout:**

Sunburst Communications Ltd.  
P.O. Box 43193-00100  
Nairobi, Kenya  
Email: [info@sun.co.ke](mailto:info@sun.co.ke)



## Abstract

Kenya's 2010 Constitution declares equity to be an underlying principle of governance in the country, which is consistent with its provision for devolution. While the institutionalization of equity is welcomed by the previously marginalized, this is often not the case with the beneficiaries of the old order. In order to efficaciously implement the letter and spirit of Kenya's constitutional devolution, it is important for Kenyans to understand that while nature vastly differentiated their country, successive governments did little to exploit opportunities for providing the scope for nationwide development. This failure inspired many Kenyans' sustained demand for devolution during the two-decade constitutional review saga. Kenya's search for cohesive national development will fail if there is not a nationwide appreciation of the history of our contemporary inequalities, which are at the root of Kenyans' great hope in devolution.

After a decade and a half of post-graduation work in the public service, **Othieno Nyanjom** researched food security for an MSc at the University of Bradford (1995) and equity in the management of public health services for a doctoral degree at the University of Sussex, (2004), both in the UK. He has since consulted and researched extensively on public health, public expenditure, poverty and governance, and has several publications in these topical areas. His experience covers the national and international domain in work for the public and the non-government sectors.

## The SID Constitution Working Paper Series

In 2010, on the cusp of Kenya's new constitutional dispensation, the Society for International Development (SID) embarked on a project called *'Thinking, Talking and Informing Kenya's Democratic Change Framework'*. Broadly stated, the objective of the project was both historical and contemporary: that is, to reflect on Kenyans struggles for a democratic order through a book project, and to examine the significance of a new constitutional order and its legal and policy imperatives, through a Working Paper Series.

Consequently, SID commissioned research on some of the chapters or aspects of the new constitution that require further policy and legislative intervention, culminating in ten Working Papers. These papers, mostly by Kenyan academics, are intended to help shape public discussions on the constitution and to build a stock of scholarly work on this subject.

These papers seek to contextualize some of the key changes brought about by the new constitutional order, if only to underscore the significance of the promulgation of the new constitution on August 27, 2010. The papers also seek to explore some policy, legislative and institutional reforms that may be necessary for Kenya's transition to a democratic order.

The Working Papers explore the extent to which the new constitution deconstructs the Kenyan post-colonial state: how it re-calibrates the balance of power amongst branches of government and reforms government's bureaucracy; redraws the nature of state-individual relations, state-economy relations, and state-society relations; and deconstructs the use of coercive arms of the government. Lastly, the papers examine some of the limitations of the new constitution and the challenges of constitutionalism.

In the first set of papers, **Dr Joshua Kivuva**, **Prof. Ben Sihanya** and **Dr. Obuya Bagaka**, separately examines how the new constitution has re-ordered nature of Kenya's post-colonial state, especially how it has deconstructed the logic of state power and rule, deconstructed the 'Imperial Presidency', and how it may re-constitute the notorious arm of post-independent Kenya's authoritarian rule: the provincial administration.

The next set of papers in this series, by **Dr. Othieno Nyanjom** and **Mr. Njeru Kirira**, separately looks at the administrative and fiscal consequences of Kenya's shift from a unitary-state to a quasi-federal state system. Whereas Dr. Nyanjom examines the anticipated administrative and development planning imperatives of devolving power; Mr. Kirira examines the anticipated revenue and expenditure concerns, which may arise in a state with two-tier levels of government. Both discussions take place within the context of a presidential system of government that the new constitution embraces.

The paper by **Dr. Musambayi Katumanga** examines the logic of security service provision in post-colonial Kenya. Dr. Katumanga argues that Kenya needs to shift the logic of security from regime-centred to citizen-centred security service provision. However, despite several attempts in the recent past, there are still several challenges and limitations which Kenya must redress. The new constitution offers some room for instituting a citizen-centric security reforms.

The paper by **Prof. Paul Syagga** examines the vexed question of public land and historical land injustices. It explores what public land is, its significance and how to redress the contention around its ownership or use. Similarly, the paper examines what constitutes historical land injustices and how to redress these injustices, drawing lessons from the experiences of

other states in Africa that have attempted to redress similar historical land and justice questions.

The papers by **Dr. Adams Oloo**, **Mr. Kipkemai arap Kirui** and **Mr. Kipchumba Murkomen**, separately examines how the new constitution has reconfigured representation and legislative processes. Whereas Dr. Oloo examines the nature of the Kenya's electoral systems, new provisions on representations and its limitations; arap Kirui and Murkomen look at the re-emergence of a bicameral house system and the challenges of legislation and superintending the executive.

If the other nine papers examine the structural changes wrought by the new constitution; the tenth paper, by **Mr. Steve Ouma**, examines the challenges and limitations of liberal constitutional order, especially the tensions between civic citizenship and cultural citizenship from an individual stand point. Perhaps Mr Ouma's paper underscores the possibility of a self-defined identity, the dangers of re-creating ethno-political identities based on old colonial border of the Native Reserves - the current 47 counties and the challenges of redressing social exclusion and the contemporary legacies of Kenya's ethno-centric politics.

The interpretation of the constitution is contested; so will be its implementation. We hope that this Working Paper Series will illuminate and inform

the public and academic discussions on Kenya's new social contract in a manner that secures the aspiration of the Kenyan people.

SID would like to sincerely thank all those who have made the publication of these papers possible, especially those who participated in the research conceptualization meeting and peer-reviewed the papers such as: **Dr. Godwin Murunga**, **Prof. Korwa Adar**, **Ms. Wanjiru Gikonyo**, **Dr. Joshua Kivuva**, **Dr. Richard Bosire**, **Dr. Tom Odhiambo**, **Ms. Miriam Omolo** and **Dr. Mutuma Ruteere**, for their invaluable input.

Lastly, we would like to acknowledge the invaluable support of the SID staff: Hulda Ouma, Irene Omari, Gladys Kirungi, Jackson Kitololo, Aidan Eyakuze, Edgar Masatu, Stefano Prato, and Arthur Muliro; as well as Board members Sam Mwale and Rasna Warah. Similarly, we would like to thank the Swedish International Development Cooperation Agency (Sida) for their financial support. Our gratitude also goes to the Swedish Ambassador to Kenya H. E. Ms. Ann Dismorr; and Ms. Annika Jayawardena and Ms. Josephine Mwangi of Sida for supporting this project.

#### **Working Papers Series Coordinators**

**Jacob Akech**  
**Duncan Okello**

## Contents

List of Figures and Tables .....	viii
Abbreviations/Acronyms.....	ix
<b>1.0 Introduction .....</b>	<b>1</b>
<b>2.0 Devolution: Concept, rationale and experiences.....</b>	<b>2</b>
2.1 The concept – From decentralization to devolution .....	2
2.2 Rationales for devolution.....	3
2.3 The design of devolution .....	3
2.4 Some risks of devolution.....	4
2.5 Some global experiences .....	5
<b>3.0 Devolution in Kenya: A second chance.....</b>	<b>7</b>
3.1 Consequences of deconstructing devolution 1964.....	7
3.2 Kenya's 2010 constitutional devolution .....	9
<b>4.0 Discussing Kenyan Service Delivery .....</b>	<b>12</b>
4.1 The presidencies and unequal development.....	12
4.2 A history of Kenyan decentralization .....	15
4.3 Delivering development since independence .....	16
<b>5.0 Constitutional Devolution: Resolving service delivery bottlenecks.....</b>	<b>18</b>
5.1 Devolution structures .....	19
5.2 Division of roles .....	22
5.3 Securing resources.....	23
5.4 A Bill of Rights.....	25
5.5 National cohesion – The threat of Majimbo.....	26
<b>6.0 Conclusion and the Way Forward .....</b>	<b>27</b>
<b>References .....</b>	<b>30</b>



## List of Figures and Tables

<b>Figure 1:</b>	The status of decentralization in Africa.....	6
<b>Figure 2:</b>	Per capita distribution of Kenya's budgetary resources vs. poverty (1999/00–2003/04) .....	15
<b>Table 1:</b>	Provincial welfare indicators (percentage), 2007 .....	23

## Acronyms

CDF	Constituencies Development Fund
CRA	Commission on Revenue Allocation
DFRD	District Focus for Rural Development
DDC	District Development Committee
GDP	Gross Domestic Product
ICC	International Criminal Court
IGFT	Inter-Government Fiscal Transfer
IMF	International Monetary Fund
IPPG	Inter-Parties Parliamentary Group
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
LA	Local Authority
LATF	Local Authority Transfer Fund
MTEF	Medium Term Expenditure Framework
NARC	National Alliance Rainbow Coalition
NCC	Nairobi City Council
ODM	Orange Democratic Movement
PER	Public Expenditure Review
PNU	Party of National Unity
RMLF	Road Maintenance Levy Fund
SRDP	Special Rural Development Programme
TFDK	Task Force on Devolution in Kenya

## 1.0 Introduction

At independence in 1963 the *Majimbo*<sup>1</sup> Constitution Kenya adopted provided for devolution of government to regional assemblies in the context of a bicameral, Westminster-type parliament with a Senate and National Assembly – the Lower and Upper Houses, respectively. These constitutional provisions were premised on the need to secure the rights of ethnic minorities grouped in the Kenya African Democratic Union (KADU) party, against domination by the ‘big tribes’ grouped in the Kenya African National Union (KANU) party. Barely a year later, however, the 1964 dissolution of the opposition KADU rendered devolution moribund as its very championing party integrated itself into KANU, which had demanded a unitary government during the constitutional talks at Lancaster House in London. Not only had the KANU government hardly undertaken any substantive devolution of administrative functions and attendant budget and personnel resources to subnational agencies by the time of KADU’s dissolution, but KANU soon even usurped functions – such as social service delivery – that the colonial government had allocated to local authorities. In the 1960s and 1970s, the Government of Kenya (GOK) argued about its superior service delivery capacity – reflected in the aspirations of the development blueprint, *Sessional Paper Number 10 of 1965 on African Socialism and Its Application to Planning in Kenya* (GOK, 1965). This led inevitably to various constitutional reforms that created an almighty ‘imperial presidency’.

Into the third independence decade, however, deteriorating government service delivery raised questions about the efficacy of an excessively centralized government, leading to minimal and eclectic decentralizing measures, such as President Daniel arap Moi’s weakly-implemented District Focus for Rural Development (DFRD) planning and budgeting framework. Persisting demands by a

heavily repressed political opposition and a robust civil society for a return to political pluralism as a means of fostering greater government accountability, along with global liberalizing pressure, bore fruit in 1991 when Kenya returned to plural party politics. The demands for extensive constitutional reforms, however, notably incorporating the devolution of government to subnational agencies, were eventually only met in the new millennium. After a two-decade gestation, August 2010 saw Kenya adopt a new constitution with far-reaching provisions for democratization, including the devolution of government to 47 counties.

Beginning 27 August 2010, with the promulgation of the new Constitution, Parliament has up to five years to enact the general legislation and to institute structures necessary for implementation of the whole Constitution. In the instance of devolution, the period is only two years. April 2011 saw a ministerial task force publish a draft report on devolution in Kenya that drew heavily from public hearings across the country, and whose findings have since been taken back to the people for validation. The main purpose of this working paper, therefore, is to add to the stock of ideas that can inform the development of legislation for, and the design of, the administrative and institutional structures with which to undertake devolution. The paper makes an extensive detour into the history of Kenyan political economy to explain how governance has built on the country’s agro-ecological differences to arrive at the vast socio-economic inequalities that fuel demands for devolution. This background is necessitated by the need for – especially better-off – Kenyans to understand the principle of equity, of affirmative action, that underlies the Constitution’s devolution, such as the provisions of Article 204 establishing an ‘Equalisation Fund’.

It is imperative that the discussion clarify the concept of ‘devolution’ through a review of its rationale and

<sup>1</sup> *Jimbo* is the Kiswahili word for ‘region’ (singular); the *ma-* prefix forms the plural.

structures. This is done in Section 2, which also offers insights into other country experiences with decentralization. Section 3 summarizes Kenya's constitutional provisions for devolution, as well as pertinent elements of the rest of the Constitution. Section 4 then recaps Kenya's development history, highlighting how successive presidencies have built on inequalities dictated by nature and colonial policies to arrive at a massively differentiated society. It reviews the inadequacies of Kenya's experiences with decentralization as an agency for narrowing inequalities, thereby leading to the persistent demands for devolution. This history of nearly five decades of independence flows into Section 5's juxtaposition of Kenya's legal and institutional provisions for subnational governance for development before the constitutional review and some global experiences with decentralization to gauge the appropriateness of the devolution proposals in the 2010 Constitution. The final section summarizes the findings and recommends a way forward.

## 2.0 Devolution: Concept, rationale and experiences

Devolution is one among several forms of decentralization, which is a characteristic of all governments globally. One analyst distinguishes *vertical* decentralization, which offers a vote, from *horizontal* decentralization, which also offers voice (Kauzya, 2007). Thus, it is not whether governments decentralize, but rather, how and why they do – considerations that are significant for the choice between alternative modes of decentralization. Indeed, a study of decentralization in 30 African countries concluded that:

It is significant to note that in no country was the claim to *centralization* as a preferred organizational model made or implied, nor was decentralization

considered undesirable, only difficult to effect and sustain (Ndegwa, 2002: 17).

### 2.1 The concept – From decentralization to devolution

As a governance tool, decentralization is based on the *principle of subsidiarity*, which assigns specific functions hitherto conducted by the centre (of an entity) to the lowest feasible subcentres on the periphery.<sup>2</sup> In government, such distribution of responsibilities could involve any one or more (among many) responsibilities, including problem identification, policy making, planning, revenue generation, budget execution, accounting and auditing, and monitoring and evaluation. An underlying logic behind decentralization is that it enlarges subnational participation in decision making over interventions, and consequently enhances their local relevance and citizen participation in implementation. These measures should then expand the scope for efficiency and cost-effectiveness. The various types of decentralization are historical realities of management generated by theory and practice: the clearer the structure of decentralization, the greater the scope for efficiency.

Decentralization has three fundamental dimensions, which may occur independently or jointly: the administrative, the political and the fiscal.<sup>3</sup> *Administrative* decentralization transfers responsibility of functions from a central agency to one or more of its lower levels internally, or to peripheral agencies, such as a state corporation – which may itself also transfer responsibilities to subordinate agencies. *Political* decentralization separates powers and responsibilities horizontally or vertically. In these instances, decentralization is between or among agencies of comparable status, such as the executive, legislature and judiciary, or vertically to agencies that relate hierarchically, such as local authorities. Finally, *fiscal* decentralization

<sup>2</sup> See <http://www1.worldbank.org/publicsector/decentralization/what.htm>. Accessed 15 February 2011.

<sup>3</sup> For a discussion of decentralization practice, see Omolo (2010). Also see Kauzya (2007) and Ndegwa (2002).

involves changing the locus of revenue generation, primarily, but also offers expenditure autonomy. Through this dimension, the central agency assigns some revenue generation responsibilities to subnational agencies, whether the product enters the central kitty or is retained at the collecting agency for local spending.

Beyond the foregoing dimensions, there are also several *types* of decentralization, including deconcentration, delegation and devolution, which are not necessarily mutually exclusive. *Deconcentration* involves assigning responsibilities to regional or peripheral agencies within the same institution, such as the central government assigning policy implementation (oversight) to subnational levels, which might not have originating (policy making) authority. *Delegation* transfers responsibility to substantive and potentially independent institutions, such as state corporations or local authorities. Delegation could also target entities in the non-government sector. Whereas deconcentration and delegation perpetuate the central place of the originating authority, *devolution* – also referred to as democratic decentralization – is an internal arrangement that gives target entities near-autonomous

Thus, a decision to devolve is often based on the failure of central government to deliver, such as in revenue collection or in service delivery.

rights, ideally embedded in a legislative framework specifying relations among the periphery entities, as well as between them and the centre.

Closely related to devolution is the concept of *federation*: While devolution involves the centre ceding authority to the periphery – even if in response to the latter's demands – federation can be the initiative of initially independent entities willing to cede some autonomy for an anticipated greater collective good, as with the five independent countries of the East African Community initiative. Thus, whereas a federation recognizes a centre of authority, the component states are self-contained

entities in as many respects as the instruments of federation provide.

## 2.2 Rationales for devolution

Among the more prominent arguments for devolution – indeed, for decentralization in general – is the issue of efficiency: the expectation that decentralizing functions to the lowest feasible level of decision making and implementation will optimize information flows and reduce transaction costs. Thus, a decision to devolve is often based on the failure of central government to deliver, such as in revenue collection or in service delivery (Commonwealth Secretariat and Commonwealth Local Government Forum, 2001). Devolution has further been seen as an avenue to democratic deepening within an enterprise, with constitutional or legal boundaries diminishing friction with the centre that could otherwise undermine the enterprise.

Besides concern with efficiency in service delivery, devolution can also resolve 'over-centralized mis-governance' or defuse secessionist tendencies, its outcomes leading to greater consensus in decisions (Mwenda, 2010). Indeed, while devolution – and federalism – can respond to heightened ethnic differences, it is important to recognize its limitations as a solution that contains, rather than eliminates, diversity.<sup>4</sup> Further, since the demands for delivering the traditional Bill of Rights in national constitutions often require extraordinary outlays, devolved governments can be superior to national ones in providing the means with which to secure the rights and interests of social minorities and marginalized groups.<sup>5</sup> The measure offers a sustainable means, even if only implicitly so, of providing affirmative action or positive discrimination for such marginalized groups.

## 2.3 The design of devolution

Yet, devolution and decentralization are not panaceas for the inefficiency and weak accountability that

4 <http://www//DevolutioninKenya.doc> Accessed 15 February 2011

5 Ibid.

often induce demands for such measures. The literature warns of the need to get the 'correct' or optimal amount of decentralization or devolution lest the measure becomes a means of decentralizing inefficiencies. Also, where divisive – centrifugal – forces exist against an existing nation-state, devolution could be an important remedial measure that preserves such a state.

Fundamentally, devolution needs to be in the context of a specific framework – preferably constitutional, but at least legislative – that specifies relationships among devolved units as well as with the centre. Second, it is imperative that a clear *expenditure assignation* exist between the centre and the devolved entities, to insure against contested responsibilities, or lacunae in service provision (including through subcontractors), production or delivery. Third, devolution frameworks should ensure *revenue assignation* to secure adequate and timely fiscal capacity for devolved units to deliver services. Because of the weak tax bases of developing countries, multiple taxes are necessary to tap the limited potential that exists here; yet, multiple taxes can further undermine the characteristically weak revenue collecting capacities of such countries.

In effect, devolved domains run the whole spectrum from total dependence on the centre to total independence. Where 'own source revenues' of subnational governments do not suffice to cover assigned roles – constituting a 'fiscal gap' – such shortfalls should be addressed through inter-government fiscal transfers (IGFT).<sup>6</sup> Fiscal transfers may also be used to: simply equalize fiscal resources across subnational governments; cover for fiscal inefficiencies that undermine revenue collection in some subnational units; and subsidize authorities that are over-burdened by unanticipated need, such as new migrants. IGFTs may be in the form of conditional or unconditional grants, but may also

involve consideration of the capacities for sustainable borrowing. The locus of spending of conditional or 'selective' grants is predetermined, but recipients have spending freedom over unconditional or 'general' grants. Grants could be applied uniformly across the domain (such as a country), meaning they are fixed, but they could also be ad hoc or formula based, the last option being the most desirable for its predictability. Finally, the frameworks should ensure the existence of an adequate human resource capacity to manage the devolved responsibilities and should include the scope for capacity building where necessary.

These considerations must be locked into the spatial mapping of devolution, whether the boundaries be natural (geographic) or contrived (based on culture, religion, ethnicity, language, history, race and socio-economic status) – exclusively or jointly so. Moreover, the framework of devolution needs to respond to existing inequalities, whether real or perceived, natural or contrived, through the failure to treat unequals appropriately. Consequently, remedies must espouse elements of affirmative action or positive discrimination in the context of an equity approach that seeks to minimize inequality by uplifting the least privileged without stifling those already more advanced.

The frameworks should ensure the existence of an adequate human resource capacity to manage the devolved responsibilities and should include the scope for capacity building where necessary.

## 2.4 Some risks of devolution

While both decentralization and devolution strive for efficiency, they also have their potential pitfalls. Among the greater risks of devolution is determining the optimal level that resolves perceived problems without providing an alternative threat to cost-effective service delivery.<sup>7</sup> This optimality refers both to which functions and resources to devolve, as

<sup>6</sup> See Decentralisation Thematic Team (no date), 'Issues in Programme Design'. The Online Sourcebook on Decentralization and Local Development. At [http://www.ciesin.org/decentralization/SB\\_entry.html](http://www.ciesin.org/decentralization/SB_entry.html) Accessed 15 February 2011.

<sup>7</sup> For example, devolution can lead to excessive competition for local investment among subnational governments. See Rodriguez-Pose and Gill (2003).

well as to which level/s to devolve to. The concern with optimality touches on the following related concerns:

- **Ignorance and participation capacity:** An underlying logic of decentralization is that it brings development prioritization nearer prospective beneficiaries who are assumed to know their objective – as opposed to subjective – interests. Yet, this is not always so; a majority or popular decision can be misinformed and parochial to the disadvantage of intended beneficiaries.
- **People power – control or participation?:** Linked to the previous concern, the demands of people power could be about controlling government without necessarily having an alternative slate of more efficacious development priorities or interventions, or even commitment to participation as an ideology.
- **Nonexistent or weak subnational institutions:** The heritages of nature and/or 'bad' governance may result in glaring regional inequalities in capacities to manage devolved responsibilities – often forming one basis of the demand for devolution. The dilemma is that decentralizing reform in the face of such initial inequalities could either deepen the inequalities or lead to a suboptimal operation of the chosen devolution framework.
- **Transfer of inefficiencies:** Where the cause of poor service delivery is unclear, devolution is unlikely to be the solution since national level bottlenecks are replicable at subnational levels.<sup>8</sup>
- **Elite capture:** Related to the transfer of inefficiencies is the risk of replicating national elite capture at devolved levels. A consequent question would be whether the shift from the mega corruption of the national elite to the multiplied loci of the petty corruption of subnational elites represents a net saving or cost

for service delivery.

- **Incestuous socio-economic enclaves:** Where devolution creates socio-economic enclaves – such as ethnic or religious ones – such blinkered subnationals could undermine the nation-state, raising the aggregated national cost of service delivery.
- **Inequality deepening:** With varied decentralized capacities to manage the foregoing risks (let alone the devolution enterprise itself), disproportionately so against the least well off, the reform is likely to deepen inequalities despite devolution frameworks incorporating affirmative action.

These and other risks point to the need for an eclectic design and implementation of devolution that considers the objective initial circumstances of the prospective devolved units, rather than employing a single national framework and timetable that are insensitive to variations in circumstances. Thus, while devolution assumes greater involvement of and participation by target communities in needs assessment, policy design, implementation and oversight; such participation may remain merely symbolic. Indeed, it behoves the designers of the devolution framework to build in checks and balances against devolved abuse of power.

## 2.5 Some global experiences

The global arena is full of illustrations of successful and not so successful experiments in decentralization. Among the most notable successful experiences with federalism are the United States of America, with two centuries of experience, and India, with 60 years' experience. The latter has survived despite its curious basis on language, as has the Ethiopian constitution of 1994, which has a provision for secession that only its former province of Eritrea ever exploited. Among the most notable global federation failures is that of the former Union of Soviet Socialist Republics where the 1980s political liberalization (*glasnost* and *perestroika*) opened a Pandora's box of ethnic grievances, resulting in the breakup of the union first into 13 separate countries,

<sup>8</sup> For a literature review on the possibilities of decentralizing corruption, see Fjeldstad (2004).

some of which subsequently divided up further. Yet, one commentator notes almost ruefully of India's durable devolution:

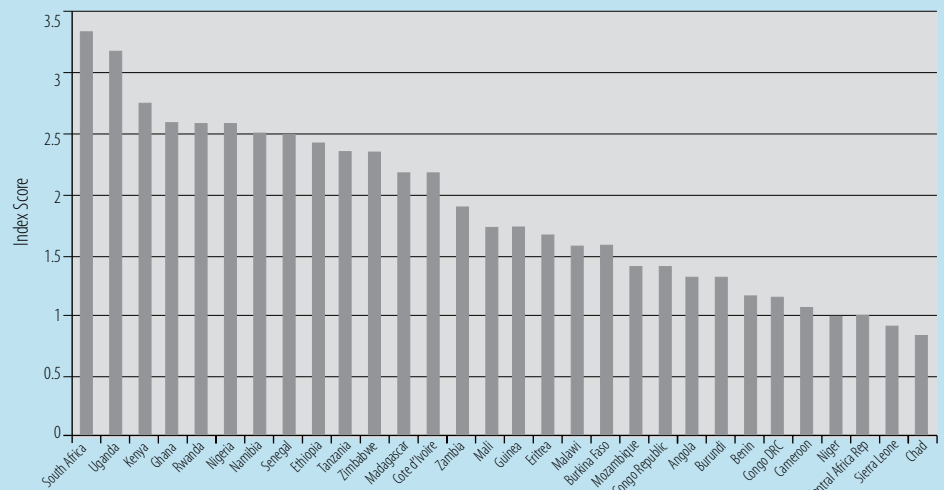
...scholars are of the views that the people's representatives at virtually every level of government easily become a new class of professional politicians and then into parasites on society and begin to live on their ministerships, membership of legislatures, et cetera... For the new breed of professional politicians, national interest is the last priority. Power for its own sake or for personal ends has become the supreme value. Those in government remain so occupied in the struggle for sheer survival that they have not time for serving the people.<sup>9</sup>

Into independence in the 1960s and 1970s, many African countries justified their one-party 'democracies' as an extension of the consensus that had underlain decision making in traditional society. In practice, one-partyism and the centralized state fed off each other, allowing those in power to monopolize the delivery of development. This in turn threatened the equitable delivery of services as those holding the purse strings could use the budget to reward support and punish opposition. Even as competitive party politics took hold on the continent, the desire for absolute control by incumbents undermined effective decentralization. Thus, federation is a rare phenomenon in Africa, among the few instances being Comoros, Eritrea, Ethiopia and Nigeria.

Even so, there is extensive decentralization to varied degrees on the continent (Kauzya 2007; Ndegwa,

2002). Ndegwa's (2002) decade-old 30-country study of decentralization provides insights into the nature of choices of governance on the continent. The study concluded that "decentralization...is progressing but unevenly both in terms of regional spread and...the aspects of decentralization that are installed" (2002: 16). Ndegwa's analysis is based on the perceptions of governance structures by resident World Bank specialists, which were used to score extents of administrative, political and fiscal decentralization in the study countries.<sup>10</sup> Consequently, he warns of "some inevitable subjectivity", national averages that paper over sectoral or regional (urban/rural, resource rich/

**Figure 1: The status of decentralization in Africa**



Source: Ndegwa (2002).

poor) disparities, and the dynamic landscape within which the indicators of the study interact. The overall decentralization status of the 30 countries is reflected in Figure 1, which shows South Africa and Uganda leading with a score of between 3 and 3.5 out of a maximum of 4. Kenya comes third with a score of slightly above 2.5.

<sup>10</sup> The political decentralization index measures the levels of subnational government/local authorities elected in free and fair elections. Administrative decentralization is gauged by the extent to which statutes define roles between authorities, including the right to hire and fire, while fiscal decentralization is reflected in the extent of certainty over fiscal transfers (formula-based vs. ad hoc), and the share of national resources controlled by the subnationals.

<sup>9</sup> See <http://www.srilankaguardian.org/2007/09/devolution-in-sri-lanka-indian-way.html>



Ndegwa (2002) found that political decentralization (democracy) was the most advanced in Africa even if predated by administrative decentralization, which is consistent with the late accession to multi-party politics on the continent. In countries that had high levels of overall decentralization, administrative decentralization closely tracked the higher levels of political decentralization, whereas

the reverse relationship obtained among the low performers. Invariably, fiscal decentralization (devolution) trailed the other two. The study ascribed the weaker decentralization performance of francophone and lusophone countries to their Roman law traditions, arguing that the exceptions – Mozambique and Rwanda – are countries that had made a clean break with their colonial past. Explaining counter-intuitive returns, the study notes

Namibia outperforms constitutionally federal Ethiopia because of the former's stronger political decentralization (democracy).

Among the empirical determinants of decentralization is the political will with which to create an adequate framework for reform out of an undesirable past: apartheid in South Africa, genocide in Rwanda and the origins of the civil war in Uganda (Kauzya, 2007). Reform is also a factor of the nature of the colonial heritage, however, along with the security of the state with respect to ceding authority to the periphery, as well as subnational capacities to manage decentralization, especially the extensive demands of devolution (Ndegwa, 2002). Besides political will, the Ugandan experience underscores piloting for the validation of design and timetable, and sensitization on the management of anticipated and unanticipated obstacles. Kaunzya also reports the counter-intuitive: further reviews to Rwanda's Decentralized Governance Reform Policy *reduced* the number of local authorities from 106 to 30.

Kenya's original dalliance with devolution therefore had no sound grounding in the fundamental values of either its KADU proponents or the KANU government whose onus it became to implement it.

### 3.0 Devolution in Kenya: A second chance...

Kenya transitioned into independence with a constitution arrived at through rounds of Lancaster House talks between Kenyan nationalists and the British Colonial Office. That constitution provided for devolved governance through a bicameral legislature and regional assemblies. While the pre-eminent Kenyan nationalists in KANU had rooted for a unitary state, the perception primarily within the settler class was that the party's base among the numerically larger ethnic groups – notably the Kikuyu and Luo – would enable it to ride roughshod over the numerically smaller ethnic groups, among which the settler class included itself. Consequently, the settler class championed the formation of KADU, an ostensible counterweight to KANU, but in reality the vehicle through which to further the anti-nationalist settler agenda. During the resulting face-off over the structure of the independence government, KANU backed down to allow KADU's demand for a region-based *Majimbo* government. Within a year of independence, however, the victorious KANU party government instigated reviews to the constitution that by 1966 had fashioned a unitary government into a de facto single party system. Kenya's original dalliance with devolution therefore had no sound grounding in the fundamental values of either its KADU proponents or the KANU government whose onus it became to implement it.

#### 3.1 Consequences of deconstructing devolution 1964

In moving away from the *Majimbo* constitution, the independence government undertook various constitutional changes that had the effect of creating an 'imperial presidency' in the sense that they transferred powers away from the peripheral institutions across the country to the centre in general, but specifically to the person rather than the office of the president.<sup>11</sup> While most of the constitutional

<sup>11</sup> Besides being Citizen No. 1 with the attendant statutory prestige, the President became Farmer No. 1, Worker No. 1, Chancellor of all public universities and the patron of a large number of national institutions.

changes were made during founding President Jomo Kenyatta's tenure, i.e., up until 1978, other significant changes took place during the tenure of his successor, Daniel arap Moi, which ended in 2002. Amongst Kenyatta's most notable changes after the 1964 creation of the republic was the re-institution in 1966 of (political) detention without trial. Later, following the coup attempt of 1982, Moi orchestrated the constitutional transformation of Kenya into a de jure one-party dictatorship.

Opposition to the emerging imperial presidency dates back to the mid 1960s, when it resulted in the 1966 resignation of founding Vice President Jaramogi Oginga Odinga over what he perceived to be a failed commitment to the nationalist ideals of the independence struggle (Odinga, 1965). Subsequent intermittent demands for a rationalization of the emerging constitution for national needs underlay the growing, but increasingly covert, 'dissidence' into the 1980s.<sup>12</sup> Substantive nationwide rebellion against the KANU government followed the infamous 1988 general elections, which saw the introduction of the short-lived *Mlolongo* (queue) voting system to facilitate the screening of anti-government supporters who did not line up behind the preferred KANU candidate (Throup and Hornsby, 1998: 319). Then, after Moi acceded to hosting the groundbreaking (even if choreographed) *The Kenya We Want* conference of 1990, sustained domestic and international pressure led to the repeal in 1991 of Section 2(A) of the Constitution which had provided for single-party rule since 1982, thereby returning pluralist party politics. Other reforms limited the presidential tenure to two terms.<sup>13</sup>

Persisting demands for a comprehensive constitutional review were, however, met by only piecemeal reforms such as the 1997 Inter-Parties Parliamentary Group (IPPG) compromise between Moi's conservatives

and the radical reformists.<sup>14</sup> In 2000, Moi relented to establishing the Constitutional Review Commission of Kenya, which took control of a comprehensive review process based at the Bomas of Kenya, the national cultural village. The resulting 'Bomas Draft' constitution was largely ready by the close of Moi's second (under the new rules) and final presidential term in 2002. In campaigning ahead of the general election that year, the opposition National Alliance Rainbow Coalition (NARC) party promised to deliver the Bomas Draft constitution to a national referendum within 100 days of victory. Instead, a much-altered Bomas Draft – dubbed the Wako Draft – generated by the Kibaki wing of a divided NARC government, was defeated during a national referendum in November 2005 – over 900 days later than had been promised.<sup>15</sup>

It would be against the backdrop of the unresolved constitution review process that Kenya held the controversial 2007 general elections in which the disputed presidential results led to intense localized outbreaks of violence killing about 1,100 people while displacing another 650,000 persons from their homes.<sup>16</sup> A peace between the protagonists of the 2007 presidential election, Raila Odinga of the Orange Democratic Movement (ODM) party and President Mwai Kibaki of the Party of National Unity (PNU), was brokered by an international team of Eminent African Persons, resulting in the signing of the National Peace Accord on 28 February 2008. The Accord provided for a constitutional grand coalition government made up of PNU and ODM. The significance of the Accord for the current study is that it mandated a strictly timetabled conclusion

<sup>12</sup> For further salient issues of the period of stifled disgruntlement, especially over the failed land reforms, see Kaggia (1975).

<sup>13</sup> Despite his 13 years in office to 1991, Moi insisted the term limit could not be applied retrospectively, allowing him to contest the 1992 presidential election.

<sup>14</sup> Amidst civil society-led demonstrations that resembled the beginnings of a 'people power revolution', IPPG represented Moi's concession to a slate of minimum but significant reforms ahead of the impending 1997 general elections, such as the right of opposition parties to be represented in the hitherto exclusively Moi-appointed Electoral Commission of Kenya. See Murunga and Nasong'o (1998: 44).

<sup>15</sup> NARC was the first opposition union against KANU tyranny. During 2003, however, an emerging Kibaki kitchen cabinet successfully championed the violation of NARC's election manifesto, resulting in internal rifts that were manifest in the referendum defeat and the subsequent sacking of seven cabinet ministers.

<sup>16</sup> Of the numerous analyses of Kenya's post-2007 election violence, two stand out: Kenya National Commission for Human Rights (2008) and Kanyinga and Okello (2010). The former offers a near contemporaneous documentation of the unfolding violence, while the latter employs a multi-disciplinary analysis of the genesis and conduct of the violence.

of the constitutional review process (amongst other reform imperatives contained in its 'Agenda Four').<sup>17</sup>

So important was the (international) pressure imposed by the Agenda Four timetable that finalization of the proposed constitution, its submission to a national referendum and its eventual promulgation were able to effectively escape the various stumbling blocks that anti-reformist elements had managed to impose on the constitution review process since the early 1990s.<sup>18</sup> Following much brinkmanship over 'contentious issues' in, and multiple litigations against, the document, the new constitution was finally endorsed by 66 per cent of the vote in the 4 August 2010 national referendum.<sup>19</sup>

Successful devolution requires an efficacious design for the context within which it is to be undertaken, especially in a situation such as Kenya's where a core elite has mastered the art of self-reinvention with changing times.

### 3.2 Kenya's 2010 constitutional devolution

Kenya's short-lived devolution experience, provided for in the 1963 Constitution, had lacked a substantive founding in the philosophies of either its sponsor KADU or the victorious KANU, which subsequently had the responsibility of implementing it. Conversely, the 2010 Constitution

including its Chapter 11 on devolution, was the product of an extensively consultative, decade-long process.

While support for the 2010 draft was arguably partisan in certain respects, the fluidity of Kenyan political camps has meant that membership of the 'camps' was not cast in stone.<sup>20</sup> Among the political class, a major cause of shifts in attitudes during the development of the Constitution was perceptions about the impact of its devolution provisions on their political fortunes. For example, political gerrymandering during successive presidencies had seen the number of administrative districts grow from the constitutional 47 to 256 on the eve of the Constitution's promulgation.<sup>21</sup> Thus, one threat posed by devolution in the evolving draft constitution was how to decide on the final slate of subnational entities and their effect on regional power politics. The eventual decision to settle on a mere 47 counties, was heavily disputed by politicians from more populous regions of the country. The Proposed Constitution of Kenya carried the day at the referendum, however, amongst its most significant aspects being the diminution of the powers of the president and central government, and the provisions for substantive devolved government.

Successful devolution requires an efficacious design for the context within which it is to be undertaken, especially in a situation such as Kenya's where a core elite has mastered the art of self-reinvention with changing times. This ability had enabled the elite to embed itself strategically to reap the fruits of a unitary government presiding over a weak political system with similarly weakly performing governance institutions that often belie the existence of relatively substantive governance frameworks. It is thus significant for devolution initiatives that Kenya had addressed integrity in governance since the NARC government's 2003 accession to power on a reformist agenda.<sup>22</sup> Nevertheless, even

17 The other elements of Agenda Four included: re-establishment of the electoral commission; establishment of a boundaries review commission; attention to youth unemployment; attention to national cohesion; establishment of an independent constitutional dispute resolution court; reforms to the police; and the establishment of a national truth, justice and reconciliation commission.

18 Indeed, the last of a number of challenges to the promulgation of the new Constitution was resolved just two days before the (inter)national event!

19 Amongst the contentious issues threatening the passage of the Proposed Constitution were its accommodation of the Islamic Kadhi Courts, abortion on professional advice, and the chapter on land management (the first two of these were long established in Kenya's legal code and thus were not new to the 2010 Constitution). For the winding road to the August 2010 document, see 'Final Report of the Committee of Experts on Constitutional Review' at [http://www.coekenya.go.ke/images/stories/Resources/CoE\\_final\\_report.pdf](http://www.coekenya.go.ke/images/stories/Resources/CoE_final_report.pdf). Accessed 12 May 2011.

20 For example, the politicians who had been the primary opponents of the Wako Draft (2005) formed ODM and became the primary supporters of the Proposed Constitution of 2010.

21 While elements in Kibaki's then Democratic Party obtained a 1997 High Court decision that Moi's new districts were unconstitutional, Kibaki would create similarly unconstitutional districts.

22 Among NARC's pertinent reforms were the enactment and implementation to varied levels of the Anti-Corruption and Economic Crimes Act (2003), the Public Audit Act (2003), Government Financial Management Act (2004), Public Procurement and Disposal Act (2005), Public Officers Ethics Act (2005), and Fiscal Management Act (2009), alongside various institutional reforms.

though the NARC government was able to revive the economy,<sup>23</sup> it performed less notably with respect to improved governance, its reluctance to act against the indiscretions of the previous regime soon manifesting itself in strong, persistent attempts to cover up grand corruption within its ranks.<sup>24</sup>

#### Article 174's objectives of 'devolution' include:

- Promoting democratic and accountable exercise of power;
- Fostering national unity amidst diversity;
- Enabling self-governance of the people towards their interrogation of the State;
- Recognizing the right of communities to self-management and development;
- Protecting and promoting the rights and interests of minorities and marginalized groups;
- Promoting socio-economic development;
- Ensuring equitable sharing of national and local resources;
- Rationalizing further decentralization of State organs; and
- Enhancing checks and balances.

Consequent to the foregoing and other governance shortcomings, the 2010 Constitution underscores the need for transparency in governance. Article 10 lists the national values and principles of governance that should bind all state organs towards sustainable development. Leadership and integrity in governance are also addressed in Chapter 6, and Chapter 4 includes a Bill of Rights identified as

being integral to the Kenyan democratic state. The Bill of Rights secures economic and social rights, including health, housing, food, social security, education, language, culture, family – amongst other interventions (Article 43). It also underscores attention to special groups, e.g., children, the disabled and the youth. These provisions reflect the government's obligations as a stakeholder, but also implicitly touch on individuals' responsibilities and obligations. To these ends, Article 132 requires the president to annually "report...to the nation, on all the measures taken and progress achieved in the realization of the national values...".

Article 174 lists the nine objectives of the governance approach, while Article 175 lists relevant principles, including democracy, separation of powers, reliable revenues and gender sensitivity. Article 176 (read together with the First Schedule) establishes 47 county governments that will each have a county assembly and county executive committee. Article 188 provides for subsequent alteration of county boundaries and the criteria for doing so. County governments are to decentralize functions and service provision while heeding efficiency and practicability.

Part 5 of Chapter 11 addresses the functional relationship between the national and county governments, while the Fourth Schedule elaborates the distribution of service delivery responsibilities. With the exception of omitted functions, which are to remain the preserve of the national government, functions may be duplicated across the levels of government. Article 187 does permit the transfer of functions and requisite resources for their delivery between government levels.

On the composition of the five-year county assembly, Article 177 provides for an *ex officio* Speaker, an elected member for each ward (county constituency), special seat members to ensure that no more than two-thirds of members are from the same gender, and representatives of marginalized groups (i.e., the youth and disabled). In the case

<sup>23</sup> Between 2003 and 2007, economic growth averaged above 4 per cent, up from negative real growth in 2000/01.

<sup>24</sup> For the revelations of NARC's first and only Secretary of Ethics who resigned and fled into self-exile, see Wrong (2009). The NARC government instituted a judicial inquiry into what is arguably Kenya's most notorious scam, the Goldenberg scandal, but promptly dismissed its findings by exonerating a former vice president and finance minister alleged to be at the centre of the scandal. On the scandal, see 'Report of the Judicial Commission of Inquiry into the Goldenberg Affair', at <http://www.tikenya.org/documents/Goldenberg%20Report.pdf>. Accessed 12 April 2011

of these last two categories, the members are to be identified to reflect party strength across the county.

The county assembly will legislate as necessary to facilitate delivery of its mandated functions, review the county executive committee's development-planning proposals and supervise the committee's implementation of priorities (Article 185). The county executive committee will include a directly elected governor, a deputy and members appointed by the governor – with the approval of the county assembly – from among persons not of the county assembly (Article 179). The governor and the entire governor's office will be removable on the grounds of gross misconduct and/or abuse of office and/or lack of mental or physical capacity (Article 181). The county executive committee shall act as advisor to its legislative assembly, implement

county and national legislation, originate legislation, and manage the affairs of the county (Article 183). County governments will establish offices as necessary and fill them, and will be responsible for the good conduct of such officers within the context of a national framework legislated by the National Assembly (Article 235–236).

In the performance of its duties, and in concert with the provisions for the National Assembly, the 2010 Constitution empowers a county assembly to summon persons to give evidence, enforce such attendance under oath, compel production of documentary evidence and even interview witnesses abroad (Article 195). On the other hand, the Constitution also compels county assemblies to conduct their business transparently, including facilitating public and media participation in their proceedings and publishing legal materials in the Kenya Gazette.

While encouraging cooperation between the two levels of government (Article 189), the 2010

Constitution nonetheless recognizes the potential for conflict, especially with regard to respective legislation over which the national government is superior (Article 191). The Constitution requires Parliament to ensure that county governments are adequately resourced for their effective service delivery, but it also mandates Parliament to ensure county compliance with national financial management systems, failing which, the national government may intervene as appropriate (Article 190) and suspend the county government (Article 192).

Alongside the division of roles between the national and county governments, the 2010 Constitution also addresses the financing of the activities of the two levels of government towards an equitable society based on openness, accountability and public participation in public finance management (Article 201 and 202). The taxation burden (Article 209) and resulting revenues are to be shared fairly across the two government levels for the attainment of inclusive equitable development. All government revenues must first be paid into the Consolidated Fund, before they are withdrawn through an Act of Parliament (Article 206).<sup>25</sup> Article 203 provides the criteria for sharing out the annual government revenue ring-fenced for county governments, currently set at a *minimum* of 15 per cent. Article 204 also provides for an initial 20-year Equalization Fund of 0.5 per cent of annual national revenues, to be spent with advice from the Commission on Revenue Allocation (CRA), for redressing primary social and physical infrastructure inequalities in marginalized areas (Articles 215–217).

The county level equivalent of the national Consolidated Fund will be the Revenue Fund into which county revenues (Articles 209(3)–(5), 218, 219, 224) and Treasury subventions (Article 220) will be deposited. Withdrawals will only be possible with the Controller of Budget's approval endorsed by an Act of Parliament (Article 207). County assemblies may approve of borrowing by their counties, but such borrowing will require a guarantee by the

<sup>25</sup> Cf. Article 222 of the Constitution.

The county level equivalent of the national Consolidated Fund will be the Revenue Fund into which county revenues (Articles 209(3)–(5), 218, 219, 224) and Treasury subventions (Article 220) will be deposited.

national government (Article 212). County funds and accounts will be subject to pertinent national systems, such as statutes governing procurement of goods and services as well as the mandatory annual audit of accounts (Articles 225–227).

## 4.0 Discussing Kenyan Service Delivery

The demand for devolution at the eve of Kenya's independence was tainted by an underlying racist desire to restrain the hand of the incoming government from the affairs of the White Highlands owned exclusively by white settlers. Although KADU had championed the demand for devolution at the Lancaster House constitutional talks, by December 1964 its members would cross the floor of Parliament to join the unitarist KANU party, effectively dissolving their own party. This set the stage for the 1965 constitutional changes that included the abolition of *majimbo* and the transfer of the bulk of taxation and service delivery functions from the regional governments to the central government.

Yet, in the context of a nascent statehood, whether a unitary or a devolved government is ideal for the development of nationalism is ultimately an empirical question. Section 2 above emphasized the need to determine the optimal levels of, and responsibility sharing for, devolution based on obtaining circumstances. Thus, having previously rejected devolution, and with a number of political actors from the 1960s still on the scene, Kenyans' sustained demands for devolution since the early 1990s reflect widespread disillusionment with the country's more than four decades of unitarist government.

The following discussion of successive Kenyan presidencies underscores their significant use of the carrot-and-stick approach to regional development, and a manipulation of policy and its implementation that exacerbated regional disparities. Kenyan

technocrats have regularly produced well-regarded, technically sound, five-year national and subnational development plans, accompanied by the attendant operational plans and budgets. At the policy implementation level, however, these plans have not always been put to use as the basis for development interventions, a major finding of the country's inaugural Public Expenditure Review (GOK, 1997). Some analysts have ignored the realities of the disconnect between planning and implementation, as well as the initial divergent agro-ecological heritages, to explain regional inequalities in terms of comparative regional effort.

### 4.1 The presidencies and unequal development

Into the Kenyatta era (1963–1978), the country's broad development environment suffered a double jeopardy. First, the independence development blueprint, *Sessional Paper No. 10 of 1965*, provided a strategy that involved concentrating the small national investment capacity in the areas with the greatest absorptive capacity, with mere surpluses being directed to marginalized areas (GOK, 1965). While the comparatively greater economies of scale available to a unitary state would arguably be more cost-effective in delivering much needed development in the immediate post-colonial period, analysts have suggested that Kenyatta's ambivalence towards *Majimbo* had more to do with his neo-patrimonialist approach, which centred benevolence on himself and KANU (Widner, 1992). The second jeopardy lay in Kenyatta's being from the central Kenya heartland of the Kikuyu, amongst the most expropriated areas during colonial settlement and thus the logical consequent epicentre of the violent *Mau Mau* uprising against British settlement. Ironically, this disproportionate expropriation meant that at independence, the people and region inherited a disproportionately large stock of the 'absorptive capacity' stressed by *Sessional Paper No. 10 of 1965*, as measured by the region's greater integration into the colonial/modern/market economy and the concomitant greater heritage of physical infrastructure.

At independence, therefore, four critical factors in Kenya's subsequent unequal development lay in juxtaposition: Kenyatta's Kikuyu ethnicity; his Kikuyu people's proximity to 'living settlerism' and its beneficial heritage; the African tradition of 'eating chiefs';<sup>26</sup> and *Sessional Paper No. 10 of 1965's* fundamentally inequitable development strategy. Together, these factors gave a development head start to the Kikuyu and their ancestral central Kenya – above all other Kenyans.<sup>27</sup> Areas or districts that were 'ancestrally' Kikuyu, or those to which the Kikuyu migrated before and into independence, would have an advantage, fuelling the need for a more objective, and indeed affirmative, approach to sharing the national cake. *Sessional Paper No. 10 of 1965* appeared to have been purposely designed to justify the ethno-centric (read Kikuyu) 'eating' of the Kenyatta years.<sup>28</sup> This is not to say that no Kikuyu people or areas were marginalized, or indeed that no non-Kikuyus enjoyed favour. On the contrary, there was a class element to the enterprise, but the Kikuyu dominated it.<sup>29</sup>

This is not to say that no Kikuyu people or areas were marginalized, or indeed that no non-Kikuyus enjoyed favour. On the contrary, there was a class element to the enterprise, but the Kikuyu dominated it.

Another significant moment in the Kenyatta years was the release of the Public Service Structure and Remuneration Commission report in 1971 – popularly known as the Ndegwa Report (GOK, 1971) – which sanctioned public officers' participation in private business, potentially undermining integrity over their management of state resources. The report implicitly permitted – or at least facilitated – the award of government

26 In sub-Saharan Africa, tenure at State House of a member of one's ethnic group is invariably an opportunity to 'eat' the national cake, through favoured employment, contracts, public investment and such. For an exposition on Kenyan eating, see Wrong (2009).

27 For regional public spending disparities during the earlier Kenyatta years, see Bigsten (1980).

28 While such a conspiracy theory seems to question the claim that *Sessional Paper No. 10 of 1965* was co-authored by Planning minister Tom Mboya, a non-Kikuyu, the policies are consistent with Mboya's faith in capitalist accumulation.

29 Among the earliest analyses of ethnic inequalities in Kenya is National Christian Council of Kenya (1968), which illustrates the early dominance of Kikuyu names among the listed directors of Kenya's emerging corporate sector.

contracts under serving officers' stewardship to their own companies.

The dynamics of inequalities during the Moi years (1978–2002) were different from those of the Kenyatta years in significant ways, even though the second president fundamentally followed his predecessor's footsteps. While Moi showed no aversion to the underlying philosophy of the Kenyatta dispensation, it could hardly be the basis of the disproportionate opportunities for Moi's hitherto marginalized peoples and homeland. Thus, even as Moi constrained further aggrandizement opportunities for Kenyatta's orphaned elite and their regions, his failure to manage the economy undermined the generation of resources that could have been employed for a 'Marshall Plan' – were that his intention – for those areas in his arid and semi-arid Rift Valley homeland that had been untouched by colonial and Kenyatta era investments.

Moi lacked the intellectual fortitude to appreciate and address regional inequalities. During his years in office, poverty in Kenya reached its highest levels since independence. While his mid-1980s District Focus for Rural Development (DFRD) planning strategy<sup>30</sup> could have focused the spotlight on grassroots development bottlenecks, its full implementation would have taken attention away from a highly narcissistic individual whose exploits typically accounted for more than half the news broadcasts on the monopoly national broadcaster. His parochial ingratiation of the emerging Kalenjin elite<sup>31</sup> did not have the same impact on his people that Kenyatta's parochialism had had, mainly because of the two peoples' disparate socio-economic starting points. Indeed, Moi's mismanagement of the economy undermined sustainable accumulation by his own ethnic elite. Persisting national inequities fuelled demands for far-reaching constitutional

30 See Office of the President (1985). DFRD centred costed planning on an all-sector District Development Committee. The approach failed, however, because the vagaries of individual ministry discretion over budget resources hampered implementation. Its GTZ-sponsored review concluded that it was structurally undemocratic, giving undue weight to central government, notably the Provincial Administration.

31 See for example, Adar and Munyae (2001).

reforms that would reduce the political centre's direct influence on the periphery, demands that also came from his own backyard.<sup>32</sup>

As previously noted, NARC's accession to the presidency in January 2003 was on a platform promising a new constitution within a 100 days, amongst many other pledges. The admittedly tight three-month deadline presumed a mere packaging for publication of the highly consulted Bomas Draft constitution that had provided for a five-tier devolution framework. Instead, NARC revised the Bomas Draft into the Wako Draft, which would be defeated during the November 2005 referendum. Just as Moi's accession had created the 'Kenyatta orphans' – predominantly Kikuyu – so too, Kibaki's accession created a Moi orphanage, predominantly Kalenjin, ushering the Kikuyu elite's second 'turn to eat' into the new millennium (Wrong, 2009). Meanwhile, Kibaki's tenure since 2003 has seen extensive economic revival, based on growth in tourism, construction, roads and telecommunications sectors. But this revival has barely diminished poverty and regional inequalities, both of which have traditionally driven demands for devolution.<sup>33</sup>

Public spending reforms undertaken during the three regimes to improve scrutiny, as well as various seemingly misconceived and mismanaged decentralized funds, seem to have failed to address these regional inequities. Halfway through his tenure in 1971, Kenyatta introduced the Special Rural Development Programme (SRDP), which was launched in only 5 of the 15 arid and semi-arid districts originally targeted (Livingstone, 1976; Ergas, 1982). Weak government support was evident in the poor implementation of an initiative characterized by excessive donor dependence, which in turn undermined grassroots participation. Nonetheless,

valuable lessons were learnt (although not necessarily optimized) about integrating agriculture strategies with rural development strategies (such as in the rural works programmes).

Moi's DFRD was based on the District Development Committee (DDC) of all sector heads and stakeholders, chaired by the District Commissioner. As the DDC faded into near oblivion, the International Monetary Fund (IMF) championed the poverty reduction strategy planning approach that Kenya adopted in 1999, even as it launched its 15-year Poverty Eradication Plan (GOK, 1999). Contemporaneously, Kenya responded to evidence from the 1997 Public Expenditure Review (PER), which indicated persisting weak links among policy, planning and budget execution, by adopting the World Bank's medium-term expenditure framework (MTEF) for budgeting.

Despite these initiatives, successive PERs have continued to reveal fundamental weaknesses in the focus of public spending. The government met only three expenditure management benchmarks out of 15 in 2003, and just four out of 16 in 2004 (GOK, 2004). Critically, the PERs revealed persistent weak spending of the development budget for investments that could open up hitherto marginalized areas (averaging a modest 52.9 per cent for the financial years 1998/99 to 2002/03).

These expenditure reforms were accompanied by the introduction of various decentralized funds, effectively inter-governmental transfers (IGFTs), to shore up service delivery. For example, the Road Maintenance Levy Fund (RMLF) was introduced in 1994 and the Local Authority Transfer Fund (LATF) in 1998 to help local authorities (LAs) meet their service delivery and debt alleviation obligations. LATF required councillors to involve citizens in their respective wards in democratically generating

Critically, the PERs revealed persistent weak spending of the development budget for investments that could open up hitherto marginalized areas.

<sup>32</sup> As was manifest in the campaigns of the 2007 general elections and the ensuing violence, Rift Valley peasants harboured perceptions of their land being expropriated literally with Moi's connivance.

<sup>33</sup> GDP growth rose from 2.9 per cent (2003) to 7 per cent (2007), and per capita income declined to Ksh31,900 in the years to 2003, then rose to Ksh36,000 by 2007 (KIPPRRA, 2009: 3–4). The GDP share of the main employer – agriculture, forestry and fishing – has been erratic, recording 22 per cent, 9 per cent, 30 per cent, 18 per cent and 8.6 per cent between 2003 and 2007.



a Local Authority Service Delivery Action Plan that it would fund. Since 2003, the Constituencies Development Fund (CDF) has channelled a minimum of 2.5 per cent of national revenue to the constituency level. Bigsten (1980) had early flagged the regionally skewed nature of Kenya's public spending. An analysis of public spending in the early years of the millennium showed that little had been done to address Bigsten's concern: The central government's traditional incrementalist budgeting approach had persisted (Kiringai, 2006). Figure 2 illustrates aggregated district spending of central budget and decentralized funds over a period straddling the last Moi years and early Kibaki years. The data reflect little sensitivity to relative levels of poverty, with the lowest poverty districts of central Kenya (lower left quadrant) averaging the same per head public spending as the much higher poverty districts of western Kenya (lower right quadrant).

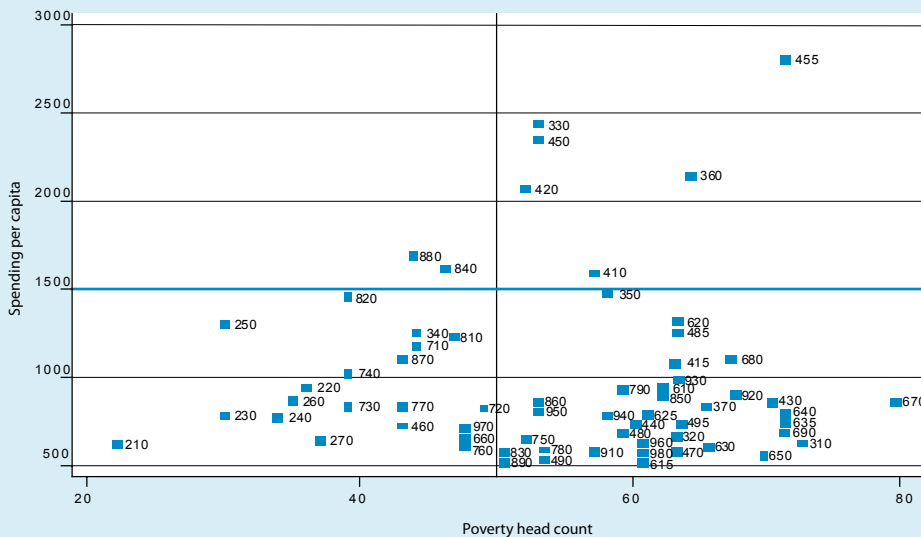
Data from the World Bank's Economic Update of 2010 explain the failure of growth to have a more positive impact on poverty and inequality: The agriculture and fisheries sector accounts for an average of 26 per cent of GDP, placing it eighth overall on average growth (PREM Unit for Africa Region, 2010). Yet, the sector accounts for nearly 60 per cent of national employment. Such outcomes have perpetuated perceptions among poorer Kenyans that their circumstances could be better if they had greater autonomy over the identification and implementation of own development initiatives. In turn, this has led to demands to go beyond the ad hoc decentralized funds towards the more structured decentralization framework offered by devolution. Yet, as previously discussed, this would not be the first time that Kenya attempts devolution, or decentralization in general.

### 4.2 A history of Kenyan decentralization

As noted earlier, Kenyatta's dislike of the *Majimbo* system provided for in the independence constitution meant that his government dithered in financing the operation of regional assemblies and governments, as it lobbied KADU politicians to abandon the devolved approach to national development (Omolo, 2010). The successful lobbying led to the disbandment of elected regional assemblies and their complementary regional governments by the launch of the independence development blueprint, *Sessional Paper No. 10 of 1965*.

The mid 1960s saw the transfer of the delivery of core social services (notably education and health) from local authorities to central government ministries. The core

**Figure 2: Per capita distribution of Kenya's budgetary resources vs. poverty (1999/00–2003/04)**



**Note:** The Y-axis aggregates the per head decentralized public spending (LATF, CDF and RMLF) and central government budgetary allocations, and the X-axis reflects districts' poverty head count rates. While the district is the unit of analysis, the related province can be gauged by the first digit as follows: 2 – Central; 3 – Coast; 4 – Eastern; 5 – North Eastern; 6 – Nyanza; 7 and 8 – Rift Valley; and 9 – Western.

**Source:** Kiringai (2006).

agenda of *Sessional Paper No. 10 of 1965* at the subnational level – eradicating poverty, disease and ignorance – would be coordinated by the ubiquitous Provincial Administration composed of civil servants employed on permanent and pensionable terms. Within LAs with a diminished service delivery role, elected politicians (chairs and mayors) would preside over civil servants (such as town clerks, treasurers, education and health officers, and physical planners) who constituted the respective LA executives.

Besides the SRDP, the late 1970s saw districts provided with a resource basket for financing locally identified development projects under the Rural Development Fund, which was also managed through the DDC by its executive secretary, the District Development Officer. Into the second and third independence decades, decentralization at the levels of both the central government (to the districts) and the LAs proved increasingly ineffective in service delivery. Extensive delays in public audits, coupled with the failure to act on reported indiscretions, encouraged graft within and outside the civil service. Soon LAs, bereft of core revenue-generating capacities and service delivery responsibilities, became shells of inactivity.<sup>34</sup> Persistent poor governance meant that not even the Nairobi City Council (NCC) could achieve financial independence, even after the introduction of a universal service charge in the late 1980s, the commercialization of the car parking fee and domestic water supply regimes, and the extensive Kenya Local Government Reform Programme designed to backstop these initiatives.<sup>35</sup>

For the RMLF, collection through toll stations was soon compromised by excessive corruption. The shift to a fuel consumption-based levy proved more successful in terms of revenue collection, although bad governance undermined the fund's

effectiveness.<sup>36</sup> The planning ministry's 2003 delegation of rural infrastructure investment resources to parliamentary constituency committees through the CDF has also faced extensive hurdles.<sup>37</sup> Other decentralized funds have had mixed results as well, including the Secondary Education Bursary Fund and the Constituency AIDS Control Committee funds. What these examples suggest is that Kenya's experiments with decentralized development funding mechanisms have not led to outcomes that are significantly different from those of direct central government sector funding (see Figure 2). Arguably, the core problem has been the lack of sustainable enabling frameworks reflecting a focused political will to deliver equitable development.

Kenya's experiments with decentralized development funding mechanisms have not led to outcomes that are significantly different from those of direct central government sector funding

### 4.3 Delivering development since independence

Arguably, Kenya's colonial heritage included a more holistic governance framework than was the case with many of the other sub-Saharan African countries with which it gained independence in the 1960s. The reason for this is likely that Kenya, like Rhodesia (later Zimbabwe), was among the few (British) settler colonies for which the white settlers did not envisage a transition into an African-led independence. Thus, notwithstanding the disagreements between the colonial government and the white settlers over the future of the colony, governance institutions were designed to perpetuate colonialism, or at worst, minority rule as occurred in Zimbabwe. Unlike

<sup>34</sup> The Local Government Act, Cap. 265 specifies the various functions of LAs.

<sup>35</sup> By the early 1980s for example, NCC had abandoned its refuse collection responsibility even as the related levy persisted, until an up-market residential association won a court decision against further collections. Into the 1990s, NCC frequently defaulted on salary payments.

<sup>36</sup> RMLF maintains – repairs – roads. Weak prioritization of new roads has persisted, however, causing the 127,000 square kilometres of North Eastern Province to have fewer than 50-odd kilometres of tarmac 50 years into independence.

<sup>37</sup> Despite positive attainments, various reports show extensive misuse of CDF resources. See GOK (2009: 174–5). See also the National Taxpayers Association's CDF audit report for financial year 2007/08, indicating misuse of 24 per cent of all resources: <http://www.nta.or.ke/reports/general/NTA-PHASE-III-CDF-and-LATF-RANKING-2011-AD.pdf>. Accessed 15 May 2011.

other European colonials, however, the British ruled indirectly through an 'educated' domestic African class.<sup>38</sup>

Thus, on the eve of independence, indigenous Kenyans slated to take over the reins of government were well versed in the colonial style, having worked alongside British administrators and settler politicians in a system literally transplanted out of London.<sup>39</sup> On acceding to independence, Kenya needed an intellectual rationalization of its colonial heritage that would bring African interests to the fore. Yet, this was a task that founding President Kenyatta simply did not desire to undertake, preferring to perpetuate colonial fundamentals that had been so effective against African resistance.<sup>40</sup> Moi unfortunately followed in Kenyatta's footsteps, undertaking reforms to increase his powers, rather than to improve the context for more effective development to reduce poverty, disease and ignorance.

Kenyatta substituted the *Majimbo* Constitution whose devolution could arguably have brought development prioritization, implementation and benefits nearer the people, with an omniscient, omnipotent centralist system that brooked no dissent. Kenyatta's years witnessed various significant, related political and public financial (mis)management developments, which are pertinent for Kenyans' toasting of the 2010 Constitution and its provision for devolution. The first was the rise of political intolerance, which precipitated often unprocedural constitutional changes aimed at enabling the President to deal with perceived dissidence. By 1969, the Preservation of Public Security Act of 1950, which allowed detention without trial, would

38 While the British developed a local legislative council in the colony, for the French, parliament was in Paris where African deputies like L.S. Senghor attended sessions.

39 For an example, Nyachae (2010) narrates a seamless, literally preordained, progression from clerical officer to the top of the Kenyan public service, before venturing into politics.

40 See Branch and Cheeseman (2006). Tanzania's Julius Nyerere illustrates a presidency and national leadership that struggled to rationalize the colonial heritage against their country's perceived needs for national development; his choice of Kiswahili as the official and national language arguably generated national cohesion. Nkrumah (1965) succinctly analyses the 'neo-colonialism' evident in the conduct of leaders like Kenyatta.

be used to proscribe oppositionist Oginga Odinga's Kenya People's Union (KPU) party and incarcerate the party's entire leadership. If the constitutionality of such measures belied their inherent impunity, the same exemption could not be made of the 1975 arrests of parliamentarians Martin Shikuku and J.M. Seroney in the sanctified precincts of Parliament, and their subsequent detention without trial.<sup>41</sup> With such acts, Kenyatta had set the standard that Moi would follow zealously.

A further significant event, as pointed out above, was the adoption of the 1971 Ndegwa Report, which opened the way for civil servants to profit from their positions through the direct acquisition of procurement contracts and/or kickbacks.<sup>42</sup> Related to the procurement issues, the third area of significance was the creeping failure of the public audit function. It is understandable that the impunity fostered by the Ndegwa Report would lead public officers to hide their tracks by falsifying returns, or even failing to produce them, for audit purposes. On the financial side, the recurrent failure to act on public audit queries encouraged further indiscretions, undermining service delivery. Into the Moi era, these malpractices had spread to such critical areas as revenue generation, undermining the timely flow of adequate resources to district sector heads and their delivery of services. Contemporaneously, and in the face of a highly muzzled Parliament that could not effectively conduct its oversight function over public finances, *Harambee* fund raising emerged as the basis for the generation of investment resources for the social sector infrastructure.<sup>43</sup> Initially popularized by Kenyatta, *Harambees* became an indispensable complement to public expenditure resources and since these un-audited *Harambee* funds were spent together with budgeted public funds, the aggregate

41 Shikuku's crime was to aver that KANU was dead, while Deputy Speaker Seroney's was to rule in response to a point of order that it was unnecessary for Shikuku to substantiate the obvious.

42 The Ndegwa Report probably merely formalized a context of long-standing indiscretions. For example, Ndegwa (2006) reports Kenyatta's capricious eve of independence allocation to himself of a Settlement Trust Fund plot in the Ol Kalou settlement scheme. For such indiscretions over land, see for example, Hunt (1985).

43 For an early analysis of the significance of *Harambee*, see Mbithi and Rasmusson (1977).

resources in the hands of public officers were subjected to extensive malfeasance. Significant for the later demands for devolution was the fact that the success of *Harambee* fund raising depended on the extensively differentiated local resource potential for development: it was more favourable for areas with better-off populations and political associations with government potentates.<sup>44</sup>

By the early 1980s, widespread impunity over the management of public resources would extensively undermine the government's capacity to both generate revenue and expend it judiciously, thereby increasing reliance on donor budgetary and other support. This opened the door to the World Bank and International Monetary Fund-designed structural adjustment reforms, which included such unpopular measures as social sector cost recovery/sharing characterized by marked differentials in vertical and regional abilities to pay.<sup>45</sup> It is within this context that sectorally ad hoc decentralized funding was developed, such as the LATF and RMLF. The legislative and institutional provisions for these funds, however, suggested that the government had learnt from the failure of DFRD, an earlier attempt at broad decentralization.

Failed budget resource flows induced the need for greater localized fund raising, providing incumbent and aspiring politicians with platforms to market themselves to prospective electors (Nyanjom, 2009). The non-availability or erratic flows of budgetary resources rendered district departmental heads impotent to do their work, aggravating fragile relations with sitting or aspiring politicians who assumed for themselves an oversight function over civil servants. On the other hand, the growing demands for money placed on incumbent and aspiring politicians increasingly transformed them into grassroots 'development officers', and diverted parliamentarians away from their oversight role over public revenue generation and spending, as well as lawmaking. Growing *Harambee* demands have

caused unscrupulous parliamentarians to develop a seemingly insatiable appetite for increased, untaxed remuneration, as well as increased constituency-focused decentralized funds. Regrettably, the systems under which these ad hoc decentralized funds have been administered have contained loopholes allowing their manipulation, leading to suboptimal outcomes.

## 5.0 Constitutional Devolution: Resolving service delivery bottlenecks

An underlying theme of the discussions so far has been that Kenya has fallen short on governance, and that this should therefore be a key area of reform if other focus areas, such as devolution, are to take root. The present Kenyan government is a coalition one precisely because of the bipartisan differences that followed the 2007 presidential elections, which resulted in much violence into 2008. While the National Accord that midwived the Grand Coalition Government brought the violence to a stop, weak commitment to power sharing has caused the coalition to stutter along, rather than thrive – as was manifest in the contentious issues in the run up to the August 2010 referendum on the Proposed Constitution. On balance, however, the reformists have prevailed, giving hope of a comprehensive implementation of the 2010 Constitution. Thus, for example, the manner in which the Judicial Service Commission conducted the April/May 2011 recruitment of the new heads of the Judiciary holds a lot of promise for securing the future of the rule of law, which in turn would secure the effective implementation of the 2010 Constitution.

Any substantive analysis of the Kenyan political economy will point to impunity as a major impediment to equitable access to factors critical

<sup>44</sup> For an education sector case study, see Miguel (2000).

<sup>45</sup> The 1989 introduction of health cost sharing was associated with an abrupt 40 per cent reduction in public facility use rates, causing the immediate suspension of the reform. See Mbugua (1993).

for growth and development, such as education, infrastructure development and maintenance, and domestic and foreign investment. Articles 10, 73 and 75 to 77 of the Constitution referred to the issues that the NARC government brought to the fore through its enactment of various legislation and related measures designed to promote good governance, such as the Public Officer Ethics Act (2003), Anti-Corruption and Economic Crimes Act (2003), and Public Procurement and Disposal Act (2005). Articles 10(2)(a) to (d) of the Constitution emphasize the national values implicit in the implementation of the aforementioned legislation:

patriotism, national unity, rule of law, democracy, participation, human dignity, integrity and sustainable development (among others). Respect for these values is especially important because of the risk noted above of exporting malpractices from national to subnational levels through decentralization and devolution (see Fjeldstad, 2003). Article 73 underscores these values as well, and emphasizes consistency (of State Officers) in the purpose and objects of (the) Constitution – i.e., respect for the people (invoking

Article 1); bring(ing) honour to the nation and dignity; and public confidence in integrity of the office to serve the people, rather than the power to rule them. Article 75 addresses conflicts between personal interests and public office, while Article 77 refers to dedication to duty to the exclusion of other gainful employment and politics.

Beyond these essentials of integrity among public servants, an evaluation of the provisions for devolution should at least consider:

- Whether the devolution structures provided are appropriate;
- Whether the distribution of roles is optimal;
- If the provisions for resourcing are adequate; and

- The potential effect of devolution on national cohesion.

## 5.1 Devolution structures

Going by the characterization above of 'good' devolution (Section 2), the 2010 Constitution has given Kenya a good framework, from the fact that it is now rooted in the supreme law of the land, to its attention to issues of the assignment of revenues and expenditures.

Political expediency, however, seemingly caused Kenya's constitution makers to equivocate on the fate of two decadent institutions in the light of devolution – the Provincial Administration and the LAs. Had the constitution makers overtly declared the abolition of the two institutions, the widespread membership of the two institutions across the country could have undermined a 'Yes' outcome at the August 2010 referendum. Indeed, the tension around the process at some instances meant that Kenyan devolution could not benefit from Uganda's initial experimentation with ten counties before rolling out the reform to the rest of the country (Kauzya, 2007).

The fundamental problem with the Provincial Administration lies in its original design by the colonialists, as an instrument of repression over the citizenry – based on the colonial chief/district officer/district commissioner nexus – and the perpetuation of the same role after independence.<sup>46</sup> This ignominious role reached its peak during Moi's quarter century in power. Kibaki's 2002 victory came atop a firm NARC manifesto commitment to scrap the institution, but this intention promptly changed when Kibaki's inner circle recalled the usefulness of the agency for the purposes of self-perpetuation (against dissenters within NARC as well as the bona fide opposition). Ironically, the growth in the independence era stature of the Provincial Administration was precisely because it coordinated

<sup>46</sup> Decades into independence, members of the Provincial Administration continue to be referred to anecdotally as 'the Crown', an allusion to the British *monarchy* that the institution originally represented. This detracts from the *republican* coat of arms borne by these officers.

The fundamental problem with the Provincial Administration lies in its original design by the colonialists, as an instrument of repression over the citizenry – based on the colonial chief/district officer/district commissioner nexus.

the subnational central government team, which had usurped some of the critical functions the LAs had inherited from the colonial Native Councils, such as delivery of education, health and water.<sup>47</sup>

But the 2010 Constitution intentionally avoided an overt abolition of the Provincial Administration and LAs, preferring to provide for this implicitly by making no mention of the institution in that important Chapter 11 on devolution, or in the very functional Fourth Schedule on the way forward. Instead, the document relegates the hitherto powerful institution to the 'Transitional and Consequential Provisions' of the Sixth Schedule. Article 17 provides that the national government (presumably through an edict) – not Parliament (through a statute) – shall restructure the institution “to accord with and respect the system of devolved government...”. The import of this provision is that whatever role is assigned to the Provincial Administration, it will, as in the previous dispensation, not be a constitutional agency. The Task Force on Devolution in Kenya (TFDK, 2011) recommended a limited role for the Provincial Administration, possibly collecting taxes, supervising law and order, and promoting statehood. Given its history, however, the Provincial Administration could only perform these functions effectively after itself undergoing 'radical surgery' to excise its current ethos. The retraining of public servants already mooted at the Kenya Institute of Administration and related government institutions would need to focus extensively on equipping such officers with the capacity to deliver Articles 1 (Sovereignty of the people) and 10 (National values and principles of governance), and Chapters 4 (Bill of Rights) and 6 (Leadership and Integrity).

LAs are also consigned to the same Sixth Schedule, where Article 18 mandates their perpetuation, subject to subsequent legislation that must be enacted within five years (i.e., by 2015). Various factors in the 2010 Constitution point to the legislated demise of LAs before 2015, however. First,

devolution is a centrepiece of a new dispensation that also transforms Parliament into a bicameral institution with a Senate established by Article 96 specifically to cater for counties. Second, the Fourth Schedule explicitly delineates county functions vis-à-vis those of the national government. It provides that the enabling legislation for this must be in place within three years (by 2013). Significantly, county functions closely map those currently undertaken by LAs. Finally, the basis of elected county leadership will largely be the same wards as those under the LAs.

The provision for legislation by county assemblies and the ring-fenced budget resources (at least 15 per cent of government revenue) will provide room for an improved focus on some local priorities, unlike the past where legislation and budgeting were largely top-down. Under Articles 184 and 200, and the Fifth Schedule, the Constitution also requires that provisions be made within a year for the classification and governance of the capital city, other cities and urban areas. As can be seen from the government's unprecedented investment in the Nairobi-Thika super highway, *Kenya Vision 2030* depends very much on transforming Nairobi into a metropolis, with a whole ministry established exclusively for the purpose in 2008. With legislation and a strategic plan in place, the starting point of the drive to the metropolis was the integration of nine neighbouring LAs under the greater Nairobi Metropolitan Authority. Yet, the co-opted authorities are critical for the economies of their respective counties, i.e., Kajiado and Ngong for Kajiado; Kangundo and Mavoko for Machakos; and Gatundu, Kiambu, Kikuyu, Limuru and Thika for Kiambu. Since the First Schedule recognizes Nairobi City as a distinct county, much tact will be required to resolve the standoff that is likely to arise from the ambitions for the Nairobi Metropolitan Authority. The TFDK's draft report critically overlooks this

Given its history, however, the Provincial Administration could only perform these functions effectively after itself undergoing 'radical surgery' to excise its current ethos.

<sup>47</sup> Widner (1992) has argued convincingly that the motive for this usurpation was political rather than service delivery expediency.

area of potential conflict, as has been evident in the authority's clash with the Nairobi City Council. TFDK does refer to an impending Local Government Bill (2009) and the Transition to County Government Bill (2011), however, that may provide opportunities for resolving issues surrounding the division of responsibilities between urban and rural areas within counties.

In providing for multiple layers of elected county representation (county assembly, county government, county executive committee) – alongside the county roles of senators and National Assembly members envisaged in TFDK's draft report – Chapter 11 enhances the scope for democracy, self-governance and self-management. Furthermore, these multiple sites of representation also potentially provide alternative checks and balances against the kinds of individualistic excesses to which Kenyan politicians have hitherto exposed their electorate. TFDK provides for three rural sub-county governance levels and categorizes the urban counties into large, medium and small municipalities. The TFDK does not, however, consider the relationship between the urban and rural counties categorically. It is hoped the Draft Local Government Bill 2009 will address such issues.

In these respects, and critical to the functioning of the counties, will be the Senate, which was created to represent and protect the interests of the counties and their governments (Article 96). The right to recall a legislator is provided only for parliamentarians and governors, but keeping these critical officers on their toes will afford an effective capacity for oversight over others. Indeed, given the concern that devolution can both import poor governance to the subnational level (Fjeldstad, 2003) and spawn an insulated rural elite, the existence of a multi-party democratic framework is likely to provide stiff competition for anyone desiring to go into politics, or to stay there. Given the roles of the senators and the Senate vis-à-vis counties, TFDK also appreciates the imperative for senators to be accorded specific recognition by the county assembly, such as having

an *ex-officio* capacity to enable their attendance at deliberations to facilitate a vital link to the national level.

Besides elected county leadership, Article 235 provides that legislation will provide 'uniform norms and standards' for establishing and abolishing offices in the county governments (provided for in Article 176), and for recruitment to such offices. Articles 177 to 187 provide the statuses of the two arms of the county governments, i.e., the county assembly and the county executive committee.<sup>48</sup> These institutions will effectively replace the Provincial Administration and LAs, as evidenced in the sharing of responsibilities only between the national and devolved levels. Compared with the old constitutional order through which the legislative and executive functions of a single district belonged to separate hierarchies, the new system integrates both functions under the respective county. Notwithstanding extensive reliance on IGFTs, this should improve the coherence between perceived needs and the strategies for meeting them. The election of governors (rather than the top-down appointment, as was the case with the Provincial Administration) will heighten grassroots ownership; and Article 181's provisions for the removal of a county governor should raise efficiency if used judiciously, and not vindictively to settle scores.

Other critical institutions include the Commission on Resource Allocation (CRA) (under Articles 215-19) and parliamentary oversight of public audited reports. Whether service delivery actually improves will depend on various other factors, such as the functional integrity of planners and implementers (e.g., Articles 10, 73 and 75-77), and the actual flow of human (e.g., Article 235), financial (Chapter 12) and other resources (see Section 5.3 below).

Perhaps the weakest aspect of the Constitution with respect to devolution, however, was the failure to rationalize the number of counties beyond the 47

<sup>48</sup> Section 5.5 of this paper addresses the risks posed by county-based recruitment.

statutory districts, which vary widely in area, natural resource endowments and population size. Yet, the recourse to history rather than determining the counties afresh was understandable given the underlying interests that were at play in attempts to block the review process. Even as the difficult devolution chapter was being debated, Mwai Kibaki, Kenya's president, continued to balkanize the country into untenable sub-ethnic and clannist enclaves dubbed 'districts', the problem with this being that these enclaves would consequently demand distinct recognition within the context of sharing the 'national cake' under devolution. While Moi had created about 30 unconstitutional districts in his 24-year presidential tenure, Kibaki attempted to create over 254 districts in his seven years in power up to 2010 (excluding some ten districts during the week of promulgating the new Constitution). Under such dubious political circumstances, it would have been injudicious for the Committee of Experts on the Constitution to open up debate on the numbers and sizes of counties. Indeed, the Committee set aside the recommendations of professional demographers on reconfiguring county and regional boundaries, as such extensive consideration might have made untenable the deadlines set by the National Accord. Surprisingly, the TFDK report contains no discussion on this matter of the numbers of counties, and instead focuses only on the extent of decentralization below the county level.

## 5.2 Division of roles

Read alongside Chapters 11 and 12, the Fourth Schedule elaborates the roles assigned to the national and devolved levels. At this point, the provisions are simply general statements, and one is only too aware that the 'devil will be in the detail' of the legislation for actualizing the provisions. Besides international issues, Part 1 of the Fourth Schedule focuses extensively on national sectoral policy issues, the uniformity of which across the counties will be critical for delivering ambitious development objectives, such as *Kenya Vision 2030*. Until enabling legislation is developed, there is little room to debate the allocation of roles between the national and county levels, but at that point it will

be possible to evaluate the respective capacities to deliver across the different levels of government. For example, public opinion is quite divided on which of the five levels of the Provincial Administration should be retained, with some feeling that at least the Chiefs should stay, whether appointed or elected.

Regional inequalities are significant in Kenya. The country's widely varied natural resource endowments, such as its diverse agro-ecological zones, also have implications for livelihoods across the counties.<sup>49</sup> Expansive North Eastern Province, for example, lacks bitumen roads, while the much smaller Kiambu county has 400-odd kilometres of road network. Other regional inequalities are summarized in Table 1. How the enabling framework provides for the management of such inequalities will be critical. The development of the enabling frameworks will need careful consideration if effective service delivery is to be realized. For example, Kenya joins many other countries globally that have failed to redirect their meagre budgetary health spending to the more cost-effective grassroots facilities. The new constitutional dispensation anticipates that counties will be able to do this for their county health facilities and pharmacies, which will have implications for how ministry resources are shared between the two levels of government. For example, regions with comparatively low rates of facility births (rather than at home) will need to emphasize village and household-based education, as is provided in the Health ministries' existing Community Strategy (MOH, 2006), which translates into more personnel (although of differing cadres) than would be needed

Mwai Kibaki, Kenya's president, continued to balkanize the country into untenable sub-ethnic and clannist enclaves dubbed 'districts', the problem with this being that these enclaves would consequently demand distinct recognition within the context of sharing the 'national cake' under devolution.

<sup>49</sup> Kenya's agro-ecological zones are: 0 – ever-wet, evergreen rainforests; 1 – evergreen rainforests; 2 – seasonal rainfall (1 to 2 dry months); 3 – seasonal, semi-deciduous forests/savanna; 4 – deciduous unimodal/bimodal rainfall grasslands; 5 – short grass savanna/thorny trees/bushes; 6 – bush land with perennial grass suitable for ranching; 7 – semi-deserts; and 8 – deserts.



by regions performing comparatively better on that indicator.

In light of potential conflicts over shared services, and in order to ensure sustainable legislative and other frameworks coming out of the Fourth Schedule, it is imperative that the appropriate authorities undertake an evaluation of counties' potentials for service delivery (to acceptable levels) across the country. The anticipated legislation and frameworks must provide for the staggered implementation of the devolution provisions. While vertical conflicts should not be difficult to manage, TFDK also provides for an Alternative Disputes Resolution framework that could handle horizontal conflicts across counties.

taxes as specified by Article 209(1), counties will be able to augment their financial resources through entertainment taxes, property rates and any other taxes permitted by Parliament (Article 209(3)). Some county governments will also be eligible to access the Equalization Fund, which amounts to 0.5 per cent of annual national government revenues (Article 204). Finally, county governments will, under Article 212, be allowed to borrow, subject to a guarantee issued by the national government and with the approval of county assemblies.

Among the principles to guide the allocation of financial resources is equity, which as noted above requires that equals be treated equally and unequals appropriately unequally – the only feasible approach to delivering the Bill of Rights (Sec 5.4). The same principle underlies the CDF Act's allocation of its ring-fenced 3.5 per cent of national revenues. Yet, CDF shares 75 per cent of its resources equally across the 210 constituencies, and only 25 per cent is distributed on the basis of poverty incidence, resulting in an outcome that is grossly inequitable, given the wide development disparities across the country (see Figure 2 and Table 1).<sup>50</sup> It is imperative that the spirit of equity in resource allocation be evident, to diffuse tensions across the country. Also, one fundamental objective of the 2010 Constitution is to "ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate (given) the nature of the service" (Article 6(3)). Consequently, it is imperative that civic education sell the idea of affirmative action directed at raising the less endowed to some basic minimum that can enable them to compete with the rest of the Kenyan society. While this is the spirit behind, and the role of, the Equalization Fund (Article 204), the outlay of 0.5 per cent over at least 20 years is unlikely to be enough to redress the inequalities illustrated in Table 1.

With regard to IGFTs from the national to the county governments (Article 203(2)), it is important to base

**Table 1:** Provincial welfare indicators (percentage), 2007

Province	Rural poverty (2005)	Immunization coverage (2007)	Facility deliveries (2006)	Net primary enrolment (2007)	Net secondary enrolment (2007)
Central	30	85	71.8	82.5	33.3
Coast	70	78	31.7	80.8	13.7
Eastern	51	78	37.6	98.3	25.3
North Eastern	75	81	11.7	27.5	4.3
Nyanza	58	66	46.7	98.3	27.0
Rift Valley	50	70	33.6	97.8	22.9
Western	54	66	25.7	99.0	23.9
Nairobi	-	78	77.0	29.0	25.7

**Note:** 'Net enrolment' refers to children of school going age who are in school, as opposed to gross enrolment, which includes all children in school, whether under- or over-age.

**Source:** KIPPRA (2009), various tables and figures.

### 5.3 Securing resources

The third area of concern is revenue assignation, addressing fiscal (and human) resources. For financial resources, the critical provision is Article 203(2), which as noted provides that not less than 15 per cent of national revenues will be shared equitably among the counties on the basis of recommendations by the CRA (Article 216). While such national revenue will be generated through

<sup>50</sup> Allocation of the CDF kitty would likely achieve greater equity if the proportions were the other way round: 75 per cent allocated according to comparative constituency poverty statistics and 25 per cent equally across all 210 constituencies.

these on formulas that capture the development differences among the counties.<sup>51</sup> Kenya has adequate capacity – and CRA should note this – for estimating the resource needs for bridging the gaps between the least well off and acceptable minimum status, as was done with the poverty studies of the 1990s (see, for example, MPND, 2000). Indeed, given anecdotal information of some fiddling with previous census and poverty estimates, it is imperative to undertake a new round of poverty estimates guided by the principles of good governance emphasized by the new constitution. Previous Kenyan welfare studies, however, such as MNP (2000), based their ‘small area’ data collection and analyses on districts and constituencies that were often typically too large to capture welfare differences both *within* and *between* these basic units of analysis. It is imperative to collect and analyse future welfare data at least at the sub-location and ward levels. Aggregation of allocations to these genuinely small areas arrives at a county allocation that more clearly reflects comparative need within individual counties and across the 47.<sup>52</sup>

Unlike the previous constitutional dispensation, it is also timely that the 2010 Constitution provides at Article 219 that the county share of national revenue “shall be transferred without undue delay and without deduction”. Similarly, it is important that the formula does not penalize counties that qualify for the meagre resources available through the Equalization Fund. During the public hearings on devolution, TFDK reports concerns that affirmative action might deter effort among beneficiaries who subsequently await ‘charity’, and among developed counties that might feel penalized for their success. Yet, as discussed at length in Section 3 above, Kenyan development disparities are largely the product of colonial and successive independence governments’ prejudices, building on unequal agro-ecological heritages, factors that civic education

should underscore to refute the myth linking current development status exclusively with effort.<sup>53</sup> The civic education could also draw on the literature on the virtues of the rich subsidizing the medical insurance of the poor to enable the latter to access decent health care, and in so doing ensure that the former are protected from the opportunistic illnesses they might acquire from the latter (see for example, Kalenscher, 2010).

Finally on financing, it is important that Article 212’s provision that county governments may borrow with a government guarantee (with county assemblies’ approval) does not increase inequalities across the counties. The traditionally wide revenue disparities across LAs are likely to be seen in the comparative abilities of counties to generate own revenue,<sup>54</sup> and in addition likely reflect their relative prospects for servicing loans. Thus, the more developed counties – which contribute the most to GDP and have the higher potential for own tax revenues – will likely be best placed to borrow, further enhancing their capital base. Such concerns should also be factored into the development of Article 203(2)’s formula. Additional to this, Kenya is committing itself more deeply into an East African Community in which it is the most developed partner. Since the Community’s provisions will, for example, allow the free movement of people across the international boundaries, it is likely that long-standing perceptions among other East Africans of superior social services in Kenya could attract foreign users, thereby increasing the burdens especially of the counties abutting neighbouring states.

It is imperative to collect and analyse future welfare data at least at the sub-location and ward levels. Aggregation of allocations to these genuinely small areas arrives at a county allocation that more clearly reflects comparative need within individual counties and across the 47.

51 Health economics has made extensive advances on methodologies for attaining vertical equity (treating unequals appropriately unequally) and horizontal equity (treating equals equally) in resource allocation.

52 This approach is likely to show how Ndeiya in nationally least poor Kiambu county is more comparable to small areas in North Eastern Province than it is to the average for Kiambu county.

53 Research has shown, for example, how farming low potential land can be rewarding given a secured access (infrastructure) to markets (Tiffen et al., 1994).

54 For example, a summary generated from the Annual Local Authority Transfer Fund Report of Financial Year 2008/09 shows that four counties generated more than 100 per cent of their expenditure needs compared with ten counties that managed less than 50 per cent of their need.

Besides financial resources, there is need for human skills with which to identify county development bottlenecks, to transform national policy into local strategies and costed plans, and to implement the same. Table 1 shows impressive net primary school enrolment rates for several provinces, but depressingly low rates at the secondary school level, meaning the rate of acquisition of home-based post-secondary education skills with which to manage county development is low. Further, the wide differentials across the provinces will have implications for the personnel available for county employment. County governments should have

at their disposal all the national level personnel that previously served the defunct LAs and the district public service over which the Provincial Administration presided. Even so, the inequitable regional distribution of skills based on people's 'home' districts is such that some of the less developed counties will be constrained in acquiring homegrown skills, meaning they will have to hire 'expatriates'. It might therefore be expedient, for example, for enabling frameworks to provide that the Public Service Commission pre-qualify a national pool of

eligible bureaucrats and technocrats from which counties can then autonomously recruit for their respective administrations. TFDK's recommendation on training of civil servants and future county government managers is therefore timely.

Chauvinism may lead some political leaders to resist affirmative action measures.<sup>55</sup> Thus it is opportune that the 2010 Constitution provide for:

- The transfer of functions between government levels for the more effective performance
- (Article 187);
- Cooperation between government levels;

<sup>55</sup> Some North Eastern Province leaders have campaigned strongly against labelling their province as a 'hardship area', a classification that has attracted a special allowance for government officers serving there.

- Support for county governments; and
- The suspension of a county government "in exceptional circumstances" (Article 192).

#### 5.4 A Bill of Rights

Respect for, and adherence to, the national values of Article 10 and Chapter 6 of the Constitution will be critical to the scope for actualizing the Bill of Rights, which Article 19 declares to be an integral part of a democratic state. The rights are also "inalienable", i.e., they belong innately to individuals rather than being the product of state benevolence. Articles 25–51 of the Constitution list key rights, including the right to life, equality/non-discrimination, human dignity and security. Among the rationales behind devolution was the need to allow a micro-determination of the means through which such rights could be secured, as opposed to expecting – in the face of the existing gross and growing inequalities five decades after independence – that the centre (Nairobi) has the means, and indeed the desire, to ensure such rights for all Kenyans. Devolution provides an alternative framework for attempting to deliver a Bill of Rights that would ensure – literally – that the mere fact of being Kenyan comes with a basic minimum and inalienable level of welfare upon which one can build private initiative. Article 20 applies the Bill of Rights to all individuals, state organs and laws, and imposes a duty upon the court system to develop laws that will secure these rights and fundamental freedoms. Under subsection (3)(b) of Article 20, courts are also to "adopt an interpretation (of the law) that most favours the enforcement of (such) a right or fundamental freedom".

A functional equitable resource allocation framework (Article 203) is critical for securing the 'basic, minimum inalienable welfare level' alluded to under the Bill of Rights. Civic education targeting communities from more developed areas will also be necessary to bolster these efforts. Various sectors already have estimates of the minimum resources required to deliver a minimum package of services. In public health, for example, the World Health Organization has established estimates of the cost

Devolution provides an alternative framework for attempting to deliver a Bill of Rights that would ensure – literally – that the mere fact of being Kenyan comes with a basic minimum and inalienable level of welfare upon which one can build private initiative.

of a minimum package of primary health care, which it sets at US\$34 per person per annum.<sup>56</sup> A less useful estimate is the African Union's Abuja 2000 Declaration committing governments to a minimum public health expenditure rate of 15 per cent of all public spending.<sup>57</sup> These national level averages provide useful starting points from which to review resource allocations to date to explain current welfare attainments. These averages can also facilitate the estimation of the resources needed to meet the objective of the time-bound Equalization Fund (see Section 5.3). It is imperative that a similar approach be employed to ensure that counties can meet the resource requirements set by Article 187(2)(a).

### 5.5 National cohesion – The threat of *Majimbo*

The proposed devolution of government formed one of the most divisive issues in the country in the run up to Kenya's August 2010 constitutional referendum. National cohesion remains a critical element to the successful implementation of the 2010 Constitution. Construed in the manner intended during the 1961 constitutional talks at Lancaster House, devolution – dubbed *Majimbo* – would protect the smaller ethnic groups (then coalesced in KADU), against domination by the larger ethnic groups (then in KANU). The independence framework was supposed to provide for ethnic enclaves of ancestral lands on which non-indigenes would be encroachers. Kenyatta appeased his Kikuyu people over his apparent betrayal of the *Mau Mau* ideal of recovering land lost to white settlers, by resettling Kikuyu peasants in an area stretching 600 square kilometres west of their ancestral homelands of Central Province and into pockets of Coast Province.<sup>58</sup> Thus, the issues of devolution and land rights in the 2010 Constitution

drew sharply antithetical emotions from at least two groups in the country. For the 'indigenous' Rift Valley and coastal Kenyans hosting 'encroachers', devolution to semi-autonomous (counties) would provide an opportunity to reclaim lost land. For 'encroachers' – predominantly Kikuyu – it would be consignment to the wilderness, given their inability to return to their ancestral Central Province where the Kikuyu elite hold comparatively large tracts of land amidst extensive population pressure.

This standoff in opinions over land management has been the basis of ethnic violence in Kenya, heightened through state instigation, ever since Kenya's 1991 return to multi-partyism.<sup>59</sup> Land rights-based violence reached a peak in the aftermath of the disputed 2007 presidential elections.<sup>60</sup> Whereas the 2007 election and violent aftermath clearly pitted the incumbent president's PNU party supporters against his ODM challenger's supporters, the immediate outcome was a coalition government in which the arguably conservative PNU's upper hand resided in its possession of the presidency, while the arguably progressive ODM's numbers controlled Parliament. The latter reality would have been provident for the quick passage and implementation of the 2010 Constitution. However, the push by the International Criminal Court (ICC) to try the alleged masterminds of the post 2007 election violence in the face of persisting government intransigence on the matter, deepened emergent divisions in ODM, whose parliamentary majority has been undermined by rebel politicians from the northern Rift Valley arena of the brunt of the 2007/08 violence. Consequently, parliamentary business on implementing the 2010 Constitution has moved in fits and starts, undermining the spirit of the National Accord that sought to have critical new institutions in place ahead of both the 2012 elections and the five-year timetable of the Fifth Schedule of the 2010 Constitution. Thus, on the 2011 eve of the much-anticipated 2012 elections, various

56 See <http://www.who.int/macrohealth/infocentre/advocacy/en/investinginhealth02052003.pdf> Accessed 18 July 2011.

57 According to *World Health Statistics 2009*, only six countries had attained the 15 per cent public health share of aggregate public spending as at 2008, with another 14 countries' shares *falling* between 2000 and 2006. However, greater gains could also accrue from efficiency reforms, such as redirecting available spending to preventive and promotive care, and away from the current focus on hospital/urban/curative care.

58 The westward settlement of the Kikuyu into Kalenjin ancestral land instigated the 1965 Nandi Declaration asking 'foreigners' to leave. On settlement in Coast Province, see Kanyinga (2000).

59 For an indictment of the Government in the violence of the earlier years (1991 and 1997), see *The Judicial Commission of Inquiry on Tribal Clashes in Kenya*, popularly known as the Akiwumi Report.

60 For details of the post-election violence, see Kenyan National Commission of Human Rights (2008) and Kanyinga and Okello (2010).

outstanding issues could enable malignant elements to try to plunge the country into a repeat of the 2007/08 violence. Besides some internally displaced persons – genuine or impostors – continuing in camps, the frameworks for land reforms have yet to be in place, meaning that the grievances that provoked past violence remain largely unresolved.

In several instances, however, the 2010 Constitution does address some of these fears. Article 40 guarantees any citizen “the right...to acquire and own property... in any part of Kenya... (which) the State or any other person (may not) arbitrarily deprive (one of), or limit...or restrict the enjoyment of...”. Articles 47 and 48 also guarantee individuals access to fair administrative action and to justice, respectively. Although these provisions might appear to appease the more recent arrivals on disputed land than it does the original inhabitants, Part 1 of Chapter 5 on the management of land provides avenues to the more equitable management of land. For example, Article 60 on land policy emphasizes ‘equitable access’ to land for ‘sustainable and productive management’. Furthermore, Article 68 directs that land laws be rationalized (to) prescribe minimum and maximum land holdings. Appropriately implemented, these provisions would bring into use prime land hitherto held idle for speculative purposes. Alongside the socio-economic transformations envisioned under *Kenya Vision 2030*, aimed at opening up livelihood opportunities outside self-provisioning and smallholder agriculture, these proposed land reforms should go a long way towards reducing the scope for land-related tensions.

Other provisions that are relevant to enhanced national cohesion include those aimed at reducing ethnic bias in public appointments, which have hitherto been seen as the avenue through which ethnic groups have eaten (Kauzya, 2001). This is important, as the literature has shown quite conclusively that ethnic conflict is often fuelled by competition over scarce resources, which spawns ‘coalitions of convenience’ (Elscher, 2008; Kimenyi and Ndung’u, 2005). A research report released

in April 2011 by Kenya’s National Cohesion and Integration Commission showed the persisting violation of the National Cohesion and Integration Act (2008), which allows no more than one-third of any public agency’s staff to come from one ethnic community. The 2010 Constitution has done well to establish a framework of checks and balances that will ensure that political leaders do not use public appointments as a means of currying electoral favour. For example, Article 152(2) provides that the president will nominate non-parliamentarians to be Cabinet Secretaries, and that their appointments must be approved by Parliament. Other key public appointments are similarly protected: Attorney General (Article 156(2)); Director of Public Prosecutions (Article 157(2)); Chief Justice and judges (Article 166(1)); Public Service Commissioners (Article 233(2)); National Security Organs (Article 239(6)); Inspector General (Article 245(2)); and Commissions and Independent Offices (Article 250(2)). Within months of the promulgation of the 2010 Constitution, two attempts by the president to make exclusive appointments to key public offices met with appropriate rebuff from Parliament, civil society and the public.<sup>61</sup> Consequently, the April–June 2010 public scrutiny that accompanied the nominations of key judicial officers suggests that public appointments are likely to contribute less to ethnic acrimony.

## 6.0 Conclusion and the Way Forward

This paper has undertaken an extensive review of Kenya’s transition into independence with a view to understanding the dominant issues that are likely to shape the devolution debate henceforth. It noted the manner in which various colonial institutions found

<sup>61</sup> The unilateral 2009 reappointment of the non-performing head of the Kenya Anti-Corruption Commission, who had reportedly tried to block investigations into corruption (Wrong, 2009), was blocked, as was the 2011 attempt to handpick the Chief Justice, Attorney General and Director of Public Prosecutions.

their way into independent Kenya, in total disregard for the fact that colonial institutions were designed to repress – not develop – the natives. Notable among these was the Provincial Administration, the status of which both Kenyatta and Moi greatly elevated to enable them to over-concentrate governance in the presidency while emasculating other institutions that should have overseen equitable development. At the same time, the weakening of parliamentary scrutiny of public finances bred extensive corruption and the arbitrary disbursement of development resources, resulting in a widely unequal society whose social sector services were highly dependent on similarly unequal potential for *Harambee* resources. Occurring alongside the global economic realities that by the 1980s led to need for structural adjustment programmes, service delivery declined in ways that induced demands among Kenyans for greater autonomy over their fates through greater decentralized governance.

After two decades of debating content, Kenyans finally, and emphatically, voted in a new constitution in August 2010. Besides providing for devolution (Chapter 11), the 2010 Constitution acknowledges the risks posed by poor governance (impunity fuelled by low levels of integrity) to equitable and sustainable development. The Constitution consequently devotes substantial attention to the ideals of good governance (such as Articles 10, 73 and 75–77) as the foundation of reforms such as devolution, and without which such reforms would fail.

On devolution (Chapter 11, parts of Chapter 12 and the Fourth Schedule), the Constitution is true to the theory and empirical evidence of good devolution frameworks. First, it is founded on the supreme law of the land. Second, the Constitution is clear on relative roles of the different levels of government, and on the assignment of expenditure and revenue. The emphasis on equity is critical for Kenyans to appreciate the structural changes that must occur in budgets, for example, if the very ambitious but nonetheless timely Bill of Rights is to be fully achieved. Critically, the Constitution does away with the hitherto notorious Provincial Administration

and with LAs, whose perpetuation would amount to an untenable duplication of county government functions. Additionally, out of political expediency the Committee of Experts on the Constitution avoided the rationalization of county numbers, sizes and populations, opting for the country's 47 existing legal districts. The Constitution does, however, provide scope for the future rationalization of the counties.

That Kenyans want the full and expeditious implementation of the 2010 Constitution is reflected in the broad approval of the April–June 2011 process of nominating the Chief Justice, Deputy Chief Justice and Director of Public Prosecutions. Progress on the more contentious issues calls for the expeditious implementation of the Fifth Schedule, however, which provides for enabling legislation. Two factors stand in the way of this agenda: the impending and highly divisive ICC trials over the post 2007 election violence; and the next general election. The partisanship arising over these issues has already imposed bottlenecks to the efficacious attention to the Fifth Schedule.

The following broad steps are proposed for the way forward:

- **Civic education:** Even more importantly than during the campaigns ahead of the August 2010 referendum is the need, now, for civic education so that Kenyans may understand the contents and implications of operating the 2010 Constitution, which is here to stay. The failure to enlighten the citizenry on its contents could lead to disillusionment. Indeed, the work on the Fifth Schedule would benefit greatly from such civic education since the constitution-drafters left some issues for broader public determination, such as the precise fates of the Provincial Administration and LAs. The tight timetable in the Fifth Schedule means that such a civic education programme needs to be undertaken expeditiously.
- **Safeguarding integrity in the process:** With respect to issues of integrity in national

leadership, there is an urgent need to draw on deterrence as a means of raising the stakes against transgressions. Too many Kenyan leaders have acted with impunity and faced no sanctions. The October 2010 change in attitude of parliamentarians of demanding that cabinet ministers step aside to facilitate investigation into alleged impropriety in their dockets is a timely development. The Kenya Anti-Corruption Commission has mentioned re-opening criminal investigation files from the 1990s, which had been shelved through political patronage, and it has taken the unprecedented step of prosecuting a cabinet minister. The public vetting of candidates for the judicial offices opened the eyes of the electorate to the importance of such disclosure – and very likely discouraged potential office seekers with skeletons to hide – and hopefully the practice will trickle down to the county level and below. Such measures will provide a welcome deterrent to future malfeasance over public resources, the resulting savings providing the resources with which to implement the numerous reforms required by the Constitution.

- **Capacity for implementation:** Specifically for devolution, but also in many other areas, there is a great need to assess the capacity and other resource needs for the successful implementation of the devolution agenda. CRA's work will be critical for the successful implementation of devolution as well as the Bill of Rights. Thus, there is an urgent need to update the national household welfare database to enable CRA to undertake small area analysis at the sub-location and ward levels at which resources should be allocated, to replace the current analysis and allocations based on the district and constituency. Further, there is need to develop short courses emphasizing good governance alongside core technical training, which should become mandatory for individuals desiring to hold county offices. These measures are important since county autonomy, which will be interpreted by some as the freedom to

employ 'our own', must be tempered by the imperative to deliver services. Since counties will look down on employment of 'expatriates' (from other counties), it is imperative that in-county capacity be nurtured to the extent possible. Additionally, one critical output of the Fifth Schedule should be a framework that ensures that counties recruit from a pool of individuals able to deliver on nationally acceptable minimum standards of services.

- **Financing:** On funding assignment, it is critical that CRA understand its role, which is to justify what share *above the 15 per cent floor* the Treasury should set aside for the counties. This will require CRA to have adequate resources to undertake multisector financing gap studies. Additionally, it is vital that civic education on the equity implications of devolution be undertaken, i.e., on how and with what objectives national resources will henceforth be shared.
- **Oversight framework:** In the process of developing the frameworks provided for in the Fifth Schedule, it will be necessary to develop an autonomous oversight framework that monitors the scope for synergy between national and county level sectoral interventions, and among the counties themselves.<sup>62</sup> It should not be taken for granted that sector operatives at the national and county levels will work harmoniously.
- **The regional integration process:** Finally, it is important to start thinking, even at this seemingly early stage, about the implications for devolution of Kenya's accession to the revived and enlarged East African Community, whose benefits will include the freedom of movement and employment across the international boundaries. This is especially important for counties on international borders, which the IGFT literature recognizes might need additional subventions.

62 In other words, the benefit accruing from a road built by a single county might require that neighbouring counties or the national ministry also invest in their adjoining roads.

## References

- Adar, K.G. and I.M. Munyae (2001) 'Human Rights Abuse in Kenya under Daniel arap Moi 1978–2001', *African Studies Quarterly: The Online Journal of African Studies*, 5(1): 1.
- Bigsten, A. (1980) *Regional Inequality and Development: A case study of Kenya*, Aldershot: Gower Press.
- Branch, D. and N. Cheeseman (2006) 'The Politics of Control in Kenya: Understanding the bureaucratic-executive state, 1952–78', *Review of African Political Economy* 33(107): 11–31.
- Commonwealth Secretariat and Commonwealth Local Government Forum (2001) *Commonwealth Workshop 2000 on Decentralisation and Devolution*, Edinburgh, 12–14 June.
- Decentralisation Thematic Team (no date) 'Issues in Programme Design'. The Online Sourcebook on Decentralization and Local Development. At [http://www.ciesin.org/decentralization/SB\\_entry.html](http://www.ciesin.org/decentralization/SB_entry.html) Accessed 15 February 2011.
- Elischer, S. (2008) 'Ethnic Coalitions of Convenience and Commitment: Political parties and party systems in Kenya', GIGA Working Paper No. 68 (February), German Institute of Global and Area Studies, Hamburg.
- Ergas, Z.R. (1982) 'Kenya's Special Rural Development Programme: Was it really a failure?', *The Journal of Developing Areas* 17(October): 51–66.
- Fjeldstad, O-H. (2003) 'Decentralisation and Corruption: A literature review', Utstein Anti-Corruption Research Centre (U4), Chr. Michelsen Institute, Bergen (July).
- GOK (1965) *Sessional Paper Number 10 on African Socialism and Its Application to Planning in Kenya*, Nairobi: Government Printer.
- GOK (1971) *Report of the Commission of Inquiry: The Public Service Structure and Remuneration Commission – 1971*, Nairobi: Government Printer.
- GOK (1997) 'Public Expenditure Review 1997', Nairobi, Kenya.
- GOK (2004) 'Public Expenditure Review 2004', Nairobi, Kenya, July.
- GOK (2009) *End Term Review of the Economic Recovery Strategy for Wealth and Employment Creation 2003–07*, Nairobi: Office of the Prime Minister, Ministry of Planning, National Development and Vision 2030.
- Hunt, D. (1985) *The Impending Crisis in Kenya: The Case of Land Reform*, Aldershot: Gower Publishing Company Ltd.
- IEA (2010) *Devolution in Kenya: Prospects, challenges and the future*, IEA Research Paper Series No. 24, Institute of Economic Affairs, Nairobi.
- Judicial Commission of Inquiry (2005) 'Report of the Judicial Commission of Inquiry into the Goldenberg Affair', at <http://www.tikenya.org/documents/Goldenberg%20Report.pdf>
- Kaggia, B. (1975) *Roots of Freedom 1921–1963. The autobiography of Bildad Kaggia*, Nairobi: East African Publishing House.
- Kalenscher, T. (2010) 'My Brother's Keeper? Understanding attitudes towards health care systems from a decision-making perspective'. Available at [http://www.gtzkenyahealth.com/blog/wp-content/uploads/2010/02/My%20Brother%27s%20Keeper\\_Understanding%20attitude%20toward%20solidarity-based%20health%20care%20systems.pdf](http://www.gtzkenyahealth.com/blog/wp-content/uploads/2010/02/My%20Brother%27s%20Keeper_Understanding%20attitude%20toward%20solidarity-based%20health%20care%20systems.pdf) Accessed 12 March 2011.
- Kanyinga, K. (2000) *Redistribution from Above: The politics of land rights and squatting in coastal Kenya*, Nordiska Afrikainstitutet, Research Report No. 115, The Nordic Africa Institute, Uppsala, Sweden.
- Kanyinga, K. and D. Okello (eds.) (2010) *Tensions and Reversals in Democratic Transitions*, Nairobi: Society for International Development/ Institute for Development Studies (SID/IDS).
- Kauzya, J-M. (2001) 'A Holistic Model of Managing Ethnic Diversity in the Public Service in Africa', paper presented to the UN Experts Group Meeting on Managing Diversity in the Civil Service, New York, May.
- Kauzya, J-M. (2007) *Political Decentralisation in Africa: Experiences of Uganda, Rwanda and South Africa*, UN Department of Economic and Social Affairs, New York, December.
- KNCHR (2008) *On the Brink of the Precipice: A human rights account of Kenya's post-2007 election violence – Final Report*, Kenya



- National Commission for Human Rights, Nairobi.
- Kimenyi, M. and N. Ndung'u (2005) 'Sporadic Ethnic Violence: Why has Kenya not experienced full-blown civil war?', in P. Collier and N. Sambanis (eds.) *Understanding Civil War in Africa*, Washington, D.C.: The World Bank.
- KIPPRA (2009) *Kenya Economic Report 2009*, Nairobi: Kenya Institute for Public Policy Research and Analysis.
- Kiringai, J. (2006) 'Public Spending in Kenya: An inequality perspective', in *Society for International Development Readings on Inequality in Kenya*, Nairobi: Society for International Development (SID).
- Livingstone, I. (1976) 'Experiment in Rural Development: Kenya's Special Rural Development Programme', *Agriculture Administration* 3(3): 217–33.
- Mbithi, P.M. and R. Rasmusson (1977) *Self Reliance in Kenya: The case of harambee*, Uppsala: Scandinavian Institute of African Studies.
- Mbugua, J.K. (1993) 'Impact of User Charges on Health Care Utilisation Patterns in Rural Kenya: The case of Kibwezi Division', unpublished PhD thesis, Institute for Development Studies, University of Sussex, UK.
- Miguel, E. (2000) 'Ethnic Diversity and School Funding in Kenya', Center for Labor Economics, University of California at Berkeley.
- MOH (2006) *Taking the Kenya Essential Package for Health to the Community: A Strategy for the Delivery of Level One Services*, Ministry of Health, Nairobi, Kenya.
- MPND (2000) *The Second Poverty Report*, Ministry of Planning and National Development, Nairobi.
- Murunga, G.R. and S.W. Nasong'o (1998) *Kenya: The struggle for democracy (Africa in the New Millennium)*, London and New York: Zed Books.
- Mwenda, A. (2010) 'Introduction' in *IEA Devolution in Kenya: Prospects, challenges and the future*, IEA Research Paper Series No. 24, Institute of Economic Affairs, Nairobi.
- National Christian Council of Kenya (1968) *Who Owns Industry in Kenya*, Nairobi: East African Publishing House.
- Ndegwa, D.N. (2006) *Walking in Kenyatta Struggles*, Nairobi: Kenya Leadership Institute.
- Ndegwa, S.N. (2002) 'Decentralization in Africa: A stock-taking survey', Africa Working Paper Series No. 40, the World Bank, Washington, D.C.
- Nkrumah, K. (1965) *Neo-Colonialism: The last stage of imperialism*, London: Thomas Nelson & Sons.
- Nyachae, S. (2010) *Walking through the Corridors of Service – An autobiography*, Nairobi: Mvule Publishers.
- Nyanjom, O. (2009) 'The Political Economy of Poverty, Tokenism and Free and Fair Elections in Kenya', in O. Okombo (ed.) *Discourses on Kenya's 2007 General Elections: Perspectives and prospects for a democratic society*, Nairobi: Clarion.
- Odinga, O. (1965) *Not Yet Uhuru*, Nairobi: Oxford University Press.
- Office of the President (1985) *District Focus for Rural Development*, Nairobi: OOP.
- Omolo, A. (2010) 'Devolution in Kenya: A critical review of past and present frameworks', in *IEA Devolution in Kenya: Prospects, challenges and the future*, IEA Research Paper Series No. 24, Institute of Economic Affairs, Nairobi.
- PREM Unit for Africa Region (2010) 'Running on One Engine: Kenya's uneven economic performance (with a special focus on the Port of Mombasa)', Kenya Economic Update–June 2010/Edition No. 2.
- Rodriguez-Pose, A. and N. Gill (2003) *The Global Trend towards Devolution and Its Implications*, Monograph, Department of Geography and Environment, London School of Economics, UK.
- TFDK (2011) 'Interim Report of the Task Force on Devolution in Kenya', Task Force on Devolution in Kenya, Nairobi, Kenya.
- Tiffen, M., M. Mortimore and F. Gichuki (1994) *More People, Less Erosion: Environmental recovery in Kenya*, Chichester: John Wiley & Sons.
- Throup, D. and C. Hornby (1998) *Multi-Party Politics in Kenya: The Kenyatta and Moi states and the triumph of the system in the 1992 election*, Oxford: James Currey.
- Widner, J. (1992) *The Rise of the Party-State in Kenya: From 'harambee' to 'nyayo'*, Berkeley: University of California Press.
- Wrong, M. (2009) *It's Our Turn to Eat: The story of a Kenyan whistleblower*, London: Harper Collins.

## SID's Constitution Working Papers Series

No.	Author(s)	Title
1	Dr. Joshua Kivuva	<b>Restructuring the Kenyan state.</b>
2	Prof. Ben Sihanya	<b>The presidency and public authority in Kenya's new constitutional order.</b>
3	Dr. Obuya Bagaka	<b>Restructuring the Provincial Administration: An Insider's View.</b>
4	Dr. Othieno Nyanjom	<b>Devolution in Kenya's new Constitution.</b>
5	Mr. Njeru Kirira	<b>Public Finance under Kenya's new Constitution.</b>
6	Dr. Musambayi Katumanga	<b>Security in Kenya's new constitutional order.</b>
7	Dr. Oloo Adams	<b>Elections, representations and the new Constitution.</b>
8	Mr. Kipkemoi arap Kirui and Mr. Kipchumba Murkomen	<b>The Legislature: Bi-cameralism under the new Constitution.</b>
9	Prof. Paul Syagga	<b>Public land, historical land injustices and the new Constitution.</b>
10	Mr. Steve Akoth Ouma	<b>Challenges of nationhood: Identities, citizenship and belonging under Kenya's new Constitution.</b>

Also available at [www.sidint.org/publications/](http://www.sidint.org/publications/)

## Notes

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

---

Notes

---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



---



Published by:  
**Society for International Development (SID)**  
Regional Office for East & Southern Africa  
Britak Centre, First Floor Ragati/Mara Road  
P.O. Box 2404-00100 Nairobi, Kenya  
Tel. +254 20 273 7991  
Fax + 254 20 273 7992  
[www.sidint.net](http://www.sidint.net)

ISBN No. 978-9966-029-03-4