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For heaven's sake, now that you have heard our cries, we, smaller communities, should be given a share of this national cake as a token (*Clapping from Honourable Delegates*) so that we become satisfied and happy and Kenya remains united, Mr. Chairman. I am glad to realize that many Kenyans have now realized that and we are happy nobody is seceding. All that we want is the power to be devolved politically, economically, socially, educationally and administratively to the district and location, Mr. Chairman.

Maalim Abdi Mohamed MP¹

Overview

Kenya grew out of British annexation of territories of a number of communities, and immigrants from India and Britain. As independence drew near, Britain agreed to the demand of minority communities—against strong opposition from larger communities—for federal arrangements under which the regions would have power on matters of special concern to minorities. But soon after independence, regional governments were abolished, leading to a highly centralised system. Authoritarian rule, massive land grabbing, loss of rights, and marginalisation of minorities followed.

For long, the government resisted demands for constitutional reform, but eventually conceded, under pressure from civil society—and from western governments after the cold war. Agreement was reached on principles for reform and a constitution review commission was established, in 2000. This chapter focuses on the work of that commission and the National Constitutional Conference that followed, adopting a draft constitution. It concentrates on issues surrounding devolution of power, on who demanded it and how the issues were resolved. By the time of the Conference in 2003-4, there was a new president. He reneged on promises of reform, and imposed changes, which weakened the draft constitution, including its provisions on devolution. This revised draft was rejected in a referendum in 2005.

Serious violence, driven by ethnic incitement, followed allegedly rigged elections in 2007. International mediation led to a coalition government and the resumption of constitutional reform. In August 2010, a new constitution, based largely on the drafts of the commission and national conference, including on devolution, was adopted in a referendum.

Background

The historian Charles Hornsby writes, “None of the country's borders matched local languages, communities or physical geography; Kenya was an artificial creation, delineated by the British for their purposes, lumping together neighbours, enemies and some communities that had previously no contact whatsoever”.² British colonial occupation went back to the 1880s mainly, with various agreements with other European countries, including the Treaty of Berlin of 1885, fixing those borders. The Coastal strip, about 10 miles wide, came under British control by agreement with the

¹ MP for Wajir East, speaking at the National Constitutional Conference. ‘Plenary Proceedings, Presentation of Draft Bill, Cont. of Chapter 10 – Devolution of Power Held at The Bomas of Kenya on 23rd May 2003’ (available on the Archives website of Katiba) <https://preview.tinyurl.com/NCCDBCh10>

² Charles Hornsby, *Kenya: A History Since Independence* (IB Tauris 2013) 21.

Sultan of Zanzibar. Part of what is now Kenya (roughly corresponding to the current Turkana and West Pokot counties) was transferred from (British) Uganda in 1926, while a large section of Somali territory (formerly “belonging” to the Sultan of Zanzibar) was transferred to Italy in 1924.

The census just before independence (1962) shows the following figures: Kikuyu 1,642,065, Meru and Tharaka 478,369, Embu and Mbere 133,819, Luo 1,148,335, Luhya 1,086,409, Kamba 933,219, Kisii 538,343, Kipsigis 341,771, Nandi 170,085, Maasai 154,079, Taita 83,613, Swahili 8,657; the total being 8,365,942, this left 1,647,178 others. The number of ethnic groups is variously reckoned to be between 40+ and 60+.

The British exercise of power affected the social and economic structures of the African communities, undermining their self-sufficiency. Although the colonial plan was to preserve a measure of traditional systems and to restrict movement of local people out of their traditional lands (except when these were seized for settlers), many forces drove society in new directions. There was greater contact among communities, as well as competition for access to the developing economy and benefits from the state. The basis of traditional egalitarianism was destroyed by the market and administrative practices, leading to differentiation among and within communities. The economy and livelihood of the people depended increasingly on policies and administrative measures of the state. These tendencies accelerated with the approach of independence, destroying trust within communities as well as between communities. Today the force driving ethnicity is electoral politics, building on colonial classification, nourished to considerable extent by patronage dependent on the plunder of the state.

The boundary drawing exercises resulted in several communities having kin in neighbouring countries, such as the Luo (closely related to communities in Uganda, South Sudan and Tanzania), the Maasai (on both sides of the Tanzania/Kenya border) and the Somali.

A commission sent by the British to gauge the wishes of Somalis found overwhelming support for secession—but neither Britain, nor Kenya later, acted on it. There was also uncertainty in the run-up to independence about the Coast. In fact the British had no intention of not including the coastal strip in Kenya and the Sultan did not oppose them. But some on the coast hoped for something else. Especially coastal Arabs and Swahili and some Europeans favoured autonomy for the Coast, or even resisted the idea of the ten-mile strip being confirmed as part of Kenya, wanting reunion with Zanzibar. Among the motivating factors was the beginning of major up-country migration to the coast. On the other hand, the Mijikenda and the main political parties opposed separation and ten-mile strip autonomy.³

At independence the Europeans numbered 55,759 or under one per cent of the population, but they occupied nearly 16% of the arable land. That massive land grab displaced huge numbers of people, especially the Kikuyu, Maasai and Kalenjin, and coastal people. The consequences included that many people were not living in what they considered their ancestral lands—and were resented by the communities whose land they then occupied. The fate of the Europeans and the demand of African communities for the recovery of their ancestral land (specially from Europeans and the Kikuyu) dictated British (and to some extent Kikuyu) policy in the constitution-making process.

Such a legacy tempts rulers towards centralisation, while wisdom dictates distribution of state authority and functions. Kenya’s constitutional history is full of tension between the two.

³ Justin Willis and George Gona, ‘Pwani C Kenya? Memory, Documents and Secessionist Politics in Coastal Kenya’ (2012) 112 (446) *African Affairs* 48; James R Brennan, ‘Lowering the Sultan’s Flag: Sovereignty and Decolonization in Coastal Kenya’ (2008) 50 (4) *Comparative Studies in Society and History* 831. Also see Hornsby (n 2) 62.

Political Mobilisation for devolution

The issue of the establishment of devolution arose in the lead-up to independence in 1963 and again in the 1990s when a new constitution-making process commenced. In 1962-63, apart from some demands for secession by Somalis, Coastal Arabs, and the Maasai, not relevant for our present purpose, the territorial issue was *majimbo* (regionalism). In late 1961, as independence drew near, a consortium of mainly medium sized tribes became worried that the larger tribes would dominate the government, and that minority tribes would be discriminated against. Under the umbrella of a political party (Kenya African Democratic Union—KADU), they demanded the division of powers between the central government and 7 regions (ensuring regional rule for some of their member tribes).

The key actors were the two major African political parties (only racial political parties were allowed) and the British government, plus a small but highly influential group of white settlers (capitalising on their special relationship with the British government). The critical negotiations were conducted in London. The African political parties (KANU (Kenya African National Union) and KADU) became so antagonistic that they refused to be in the same room with each other.⁴ This gave Britain the role of a mediator and vastly increased its negotiating powers, quite apart from its role as the ultimate authority which would decide the terms of independence.

Closely connected to the nature of the state –centralised or decentralised –was the issue of land and rights of property, notably including lands appropriated by the government, European settlers, and some local communities; KADU wanted the regions to control land. At one level the constitutional debate seemed a very intellectual exercise, assisted by constitutional experts from the US, Switzerland, and Britain. But behind this intellectual facade, there was undoubtedly political “mobilisation” engineered by the political parties and interests.

A combination of factors—the initial British distrust of Kenyatta and his party KANU, collaboration between KADU and European settlers, and concern for minority protection—led the British to institute regionalism in the independence constitution. However, regionalism did not last for long, as in general elections after the conference KANU won a majority and Kenyatta, to whom the British had warmed by then, manoeuvred to abolish regionalism. But “majimbo” had entered the Kenyan lexicon.

Ironically, soon after the repeal of regionalism, its leading proponent, Daniel arap Moi became Vice-President in Kenyatta’s highly centralised government. When Kenyatta died in 1978, Moi succeeded to the presidency and his own presidency was just as centralised, violent and corrupt as Kenyatta’s—and geared toward the interests of a few people from his own tribe, regardless of the interests of other communities.

Between them Jomo Kenyatta and Daniel Moi managed to destroy democracy, used excessive violence against people opposed to them, looted the national treasury, and promoted the fortunes of a few from their respective ethnic groups, ethnicising politics (though the great majority of their own communities scarcely enjoyed any benefits). Both of them, and their families, amassed huge fortunes by corruption—and are now among the world’s richest people. Kenyatta managed to destroy all political parties except KANU, and Moi changed the constitution to make Kenya a *de jure* one party state. They were so obsessed about their greed and consolidating their ethnic support, that they cared little about promoting a Kenyan identity among the diverse ethnic, religious and culture communities.

⁴ For a detailed account of negotiations on the independence constitution, see Robert Maxon, *Kenya’s Independence Constitution: Constitution Making and End of Empire* (Fairleigh Dickinson University Press 2011).

Most people kept their heads down and went about their business, while increasing numbers fell into the poverty trap. But there was opposition, torture, detention without trial, victimisation, and occasional murders of dissenters. Moi ruled for 24 years, and removing him became the main concern of the democratic movement, led by civil society, and including some religious groups and some politicians.⁵ The first objective was the repeal of the constitutional provision declaring Kenya a one-party state.

The situation began to change with the end of the cold war, and the victory of western capitalism, meaning that the West now saw little point in buttressing dictators. Multi-partyism in Kenya was restored in 1992. But the opposition proved incapable of putting forward one joint candidate, and Moi was returned to power in 1992 and 1997.

The move for more constitutional change, for a system that would make future MoIs impossible, gathered momentum. A series of national conferences, bringing together a wide cross section of society, including religious groups, trade unions, professional associations, and political parties, were held to define the terms of reform. The agreement reached at these conferences (the last was attended even by Moi) became the terms of reference of the constitution commission that was eventually established to draft the new constitution. But slow progress led civil society (including religious and political groups) to set up a “People’s Commission” to consult the people and draft the constitution. Fearing that he might lose control over reform, Moi set up a state sponsored commission Constitution of Kenya Review Commission (CKRC) in 2000.

When various civil society groups got together in the early 1990s to produce a draft Constitution, one of their demands was that “The executive power was to be shared with Parliament, local government, civil society organisations and the people themselves.”⁶ The draft they produced focused on local government, with considerably more powers than the local authorities ever had.⁷ Mutunga identifies as an important stage in the civil society discussions on a new constitution, the publication in 1996 of a book by Peter Habenga Okondo⁸ that included a detailed analysis of *majimbo*. Although not everyone accepted Okondo’s espousal of ethnic federalism, there was now “an articulation of a *majimbo* constitution by one of the *majimbo* ideologues.”⁹ The word “devolution” was used first, it seems, in a civil society assembly in October 1997: “Executive power must be constitutionally trimmed and controlled and the principle of devolution of power upheld so that equality before the law, accountability, transparency and good government are a reality.”¹⁰ Calls for devolution became a key part of the calls for constitutional reform. Ten days after the 1997 civil society assembly the original Constitution of Kenya Review Act was assented to, without any mention of devolution. But an early amendment said the purpose of review included,

(d) promoting the peoples’ participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power;...

(h) strengthening national integration and unity ...

⁵ An excellent study of the reform movement is Willy Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997* (Mwengo 1999).

⁶ *ibid* 53.

⁷ In Appendix D of Mutunga’s book, *ibid* 348-50.

⁸ PH Okondo, *A Commentary on the Constitution of Kenya* (Phoenix Publishers 1995). Mutunga writes that this book was ‘the genesis of the debate on *majimbo* (regionalism or federalism) in Kenya, and it gave a very concrete framework of operating regionalism in Kenya’ in Mutunga (n 5) 135.

⁹ Mutunga (n 5) in reference to Okondo’s book.

¹⁰ Mutunga (n5) 475.

It also asked the CKRC to “examine the various structures and systems of government including the federal and unitary systems and recommend an appropriate system for Kenya”.

Hornsby says, writing of 1998-99, that “KANU...went on a sales drive for federalism.”¹¹ He goes on to say that the Kikuyu and Luo, and much of civil society, were opposed for fear of a break-up of the country. But it is not at all clear that people equated “devolution” with federalism, rather than simply bringing more decision making closer to the people.

The existing administrative system comprised, in addition to national ministries, two elements: local governments and “Provincial Administration”. Many local governments were very ineffective, and often corrupt. Provincial Administration was the arm of the national government in the local areas, indeed the arm of the ruling party. It had been strengthened in the wake of the end of the *majimbo* experiment, and was widely hated. It was supported by a separate police force, the Administration Police, originally the “Native Police”. Provincial Administration was a hierarchical system, with Provincial and District Commissioners, down to District Officers, Chiefs and sub-chiefs. There were 8 provinces, and had been 41 districts at independence. From 1992 a presidential process of creating new districts – a vote winning strategy – began. By 2002 there were 70 districts and by 2010 there were 265. But only 47, including Nairobi, had been legally created.

Like the districts, the provinces had ethnic connotations: Central (Kikuyu), North-East (Somali), Coast (Swahili, Arab, Mijikenda), Eastern (Somali in the North, Meru, Embu and Kamba in the South), Western (Luhya), Nyanza (Luo and Kisi), Rift Valley (Kalenjin) while Nairobi was very mixed.

The Period of Constitutional Engagement

The central focus of this chapter is on late 2000 to early 2004, part of a twenty-year process that ended only in August 2010 with the promulgation of the new constitution.

We begin with the process, and then turn to the place in it of devolution debates.

Yash Ghai, chairing the official process, made it a condition of accepting the post that he be given a chance to bring together the official and the “People’s” commissions because it seemed unlikely that either on its own would succeed in getting a new constitution, particularly one commanding broad support—a precondition for successful implementation. The merger negotiations took months of shuttle diplomacy, and occasional threats to abandon the process. Ghai concentrated on Kenyans and their organisations, and avoided external involvement. He established a measure of public support and eventually of the religious communities who had promoted the “People’s Commission”. In the end public support became quite critical, for neither side wanted to be seen as a “spoilsport”.

The original CKRC consisted of 15 members (supposedly with knowledge of the law or knowledge and experience in public affairs) nominated by the National Assembly and appointed by the President, plus the Attorney-General and the Secretary. Its final size, with some People’s Commission members, was 29. It was required to conduct and facilitate civic education to, and collect the views of, the people, and on the basis of their views to prepare the draft constitution. It established Constituency Constitutional Forums throughout the country, with small libraries and funds for public meetings to discuss recommendations for submission to the CKRC, all facilitated by a district coordinator, a CKRC employee. A Parliamentary Select Committee liaised with Parliament, especially on administrative and financial matters.

¹¹ KANU was by now Moi’s party – he who had headed the pro-*majimbo* KADU in the early 1960s. Hornsby (n 2) 625.

The CKRC's work began in earnest in May 2001, and its draft constitution and report appeared in September 2002. The authors have described elsewhere its highly participatory process, as well as the efforts at politically, and personally, motivated sabotage.¹² The political motives were related to resistance to any change in system of government and curbing presidential powers rather than devolution. When the CKRC was established without the participation of civil society or opposition people (they were boycotting the "official commission") Moi thought he would be able to dictate to it. But the merger of the two commissions greatly reduced his influence, though several commissioners – from each original body – took orders from him.

The various delays, before and during the process, led to a disproportionate emphasis, especially in the media, on when (or whether) there would be a new constitution, rather than on its contents.

The CKRC draft constitution went to the National Constitutional Conference (NCC) for discussion, amendment and adoption. The NCC was broad based: all members of the National Assembly (223); three representatives from each district (210); one representative of each political party (40); representatives of religious organisations (35), professional bodies (15), women's organisations (24), trade unions (16) and registered non-governmental organisations (24); members of CKRC, but without vote (29)—629 altogether. Thus the political "class" comprised the bulk of the membership (573), even though few bothered to make submissions to the CKRC and their attendance at Bomas was poor. MPs tended to come from the largest ethnic group in their constituency, and while the rules for electing district members insisted on at least one woman there was no ethnic requirement for these or civil society members, though the religious body category ensured that all faiths were represented.

After a suitable period for people and organisations to study the CKR draft constitution, the NCC was scheduled to convene on Monday October 28th 2002, after they had a week's introductory workshop on the draft (in which very few politicians participated) on the draft from experts. It was assumed that the NCC would conclude its work in about 3 months, with the delegates operating behind a "veil of ignorance" and adopting a constitution before forthcoming elections. Then the draft would go for final decision by the National Assembly, so that the elections would be conducted under the new constitution. Ghai tried to persuade Moi that he might (as the constitution allowed) continue in office for some months, rather than dissolving Parliament prematurely. By this time, however, Moi was tired of the process as he had failed to implant his ideas through some commissioners beholden to him.

On the afternoon of Friday 25th, as the introductory workshop wound up, Moi dissolved Parliament, paving the way for elections in December. Work on the constitution was suspended until a new government and parliament were in place, under the old constitution. Moi could not stand again, and was shrewd enough to realise that it would be futile to try. But he nominated as surrogate Uhuru Kenyatta as KANU's candidate. The opposition groups (whose numbers increased even as the CKRC process progressed) formed a coalition, NARC (National Rainbow Alliance). The endorsement by Raila Odinga (himself a potential candidate) of Mwai Kibaki as the candidate of the opposition assured the opposition of victory, in both presidential and national assembly elections. Kibaki, who had long served under Moi before opportunistically switching to the opposition, promised that, if NARC won, it would adopt a new Constitution in 100 days. But soon NARC split into two factions due to Kibaki's refusal to honour a pre-election pact to appoint Odinga as prime minister. This also had an impact on the workings of the National Assembly where Kibaki was in the danger of losing his majority. The political manoeuvrings meant the NCC was not convened until late April 2003, well beyond the 100

¹² Jill Cottrell and Yash Ghai, 'Constitution Making and Democratisation in Kenya (2000-2005)' (2007) 14 (1) *Democratisation* 1.

days. But it is arguable that the sense of national euphoria that accompanied the election,¹³ which brought the end of the Moi era and an optimism for the future, contributed to the ability of the NCC to work, within the walls of the Bomas of Kenya¹⁴ and not on the streets.

Eventually the new government in turn decided that it was not so enthusiastic about the new Constitution that the NCC process was producing. Kibaki's Vice President and Minister of Justice staged a walkout when it appeared that the NCC was likely to vote in favour of a parliamentary system—which Kibaki himself had supported when in opposition, but now preferred an executive presidency. Consequently the closing stages of the NCC were conducted in their absence. This walkout, coupled with intelligence that a major court case was about to be heard directed at derailing the whole process,¹⁵ led to something of a crisis atmosphere in those last days, and considerable pressure to agree on a draft as soon as possible, in contrast to the earlier lackadaisical approach,

There was provision for a referendum if the NCC was deadlocked over a particular issue but this was never resorted to. The final stage involved the submission of the draft as approved by the NCC to the National Assembly, whose only choice was to vote Yes or No on the Bill as a whole; it had no power to amend the Bill. In accordance with section 47 of the then constitution, National Assembly approval required the vote of at least 65% of the members—within one week of submission to the Assembly.

Devolution debates

Homing in on devolution, we look first at the relationship between the political shenanigans and devolution. But we cannot understand this without understanding a little about Kenyan politics generally. Many politicians did not take the Commission process (or even perhaps the whole idea of a new constitution) seriously because they assumed that they would have the last say through Parliament (though politicians did play a more active role in the National Conference in its latter stages). Only two parties can be said to have made real efforts to make presentations to the CKRC. And this indifference to the process continued well into the NCC—until the Kibaki-Odinga coalition began to come apart, and Kibaki decided to keep the old presidency-friendly constitution.

Then we saw politics at its rawest. Kenya politics is about capturing the state, for accumulating personal wealth. The key for politicians is to build support by stimulating ethnic conflicts in order to solidify their base in their own ethnic community, and then look for suitable partners from other communities to ensure a majority vote. Public policy is the least of their concerns or interests. These considerations began to pervade the CKRC as it reached the decision-making stage, and with it the gradual diminishing of the influence of civil society.

Although most political parties had made some sort of submission to the CKRC, when it came to the NCC it was very difficult to hold any sort of party line. If not concerned only with their personal

¹³ Interestingly, Kenyan optimism seems to have been very high in the two months before the election. A Gallup poll held in November – December put Kenyans as the most optimistic in the world, cited in Kimani Njogu, *Youth and Peaceful Elections in Kenya* (Taweza Communications 2013) 112.

¹⁴ The cultural centre where the NCC met – and became known as 'Bomas'.

¹⁵ The case was *Njoya v Attorney-General* Miscellaneous Civil Application No.82 of 2004 (OS) [2004] eKLR (2008) KLR (EP) 658. Available at <<http://kenyalaw.org/caselaw/cases/view/16582>>. Ghai was informed by a senior government official that Kibaki and ministers with ethnic affiliations to him intended to move to court to declare the process unconstitutional on the ground that it did not provide for a referendum. Ghai therefore speeded up the process and managed to complete it before the case was concluded. Among the unfortunate consequences of this haste was that interesting ideas about devolution could not be pursued.

advantage, MPs were largely motivated by ethnic considerations.¹⁶ Of course, to the extent that the devolution issue was an ethnic one, this motivation might have been expected to produce ethnic/party positions on the topic. While MPs' engagement with the process was generally sporadic, a good number participated in devolution discussions.

Kibaki, a Kikuyu, and the key Luo leader, Odinga, differed on the form of government. Kibaki wanted the old type presidential system (although – when in opposition – he had told the CKRC that one of the problems with the old constitution was the “imperial presidency”), and Odinga, the parliamentary. But there were also differences over devolution: Kibaki and his supporters from the Kikuyu and related ethnic groups wanted to keep the centralised system while Odinga wanted devolution with the provinces, and not the districts, as the principal site of power. When Kibaki's group embarked on their strategy of disbanding the NCC, there was fresh enthusiasm among Luo and some other ethnic groups for devolution and a parliamentary system, as more conducive to power-sharing.

The main party submissions to the CKRC came from Kibaki's Democratic Party and later from the National Alliance for Change of which his party was a part.¹⁷ The latter's submission¹⁸ spoke in terms of strong local government rather than using the language of devolution: “The new Constitution should create viable, well financed local authorities for its respective local government, the new constitution should also ensure equitable distribution of national resources, enhance participatory democracy and grass root development through local authorities.”¹⁹

Mindful of the baggage that the word *majimbo* carried, the Commission was anxious to distinguish devolution from it.²⁰ Yet it was hard to articulate the distinction clearly. Debates in the country were already underway, and the predicted divisions were emerging. One speaker characterised both sides as motivated by fear: of ethnic economic marginalisation on the one hand or ethnic cleansing on the other.²¹ Some opposed *majimbo* because they feared would lead to people being evicted from their homes if they lived outside their ancestral home territory, and others feared the loss of their land.²² In both the Coast and the Rift Valley land was a strong source of complaint, specifically that outsiders were taking land, and in the Rift Valley there was something of a history of being driven from their own land, especially by European and later Kikuyu settlers. At the Coast and in the north, the religious factor was also a consideration.

Although opinion on specific aspects was divided, the vast majority wanted the main recipient of devolved powers to be the existing districts (but with possibility of change of boundaries)—the administrative unit they were most familiar with. They wanted local control of many functions which affected their everyday life.

¹⁶ When Ghai asked Uhuru Kenyatta, leader in the NCC of KANU, why it did not have coherent positions, he said that it was impossible to impose party discipline in the face of ethnic factions.

¹⁷ For this short-lived alliance, see Hornsby (n 2) 674-75.

¹⁸ See CKRC, ‘Public Hearing – National Alliance for Change at Charter Hall Nairobi, on 07/03/02’. Available on Katiba Institute Arches site <<https://preview.tinyurl.com/NAKCharterHall>>.

¹⁹ Kiraitu Murungi presenting the submission.

²⁰ Clear from a seminar attended by local and foreign experts, including Professor Ron Watts, Christina Murray and Richard Simeon in December 2001.

²¹ Duncan Okello of the Society for International Development reporting on a meeting SID had held with two political parties.

²² Maalim Mohammed, M.P., CKRC, ‘Verbatim Report of North Eastern Provincial Round Up Held at Nomad Resort Hotel June 09, 2002’ (on file with authors)

CKRC Proposals

The Commission presented its recommendations as being neither federal nor unitary. It placed considerable emphasis on the objectives of devolution, which included the promotion of: democracy, accountability, national unity, self-governance, the interests and rights of minorities and marginalised communities, access to services, and, on a broader front, enhancement of checks and balances.

Districts were to be the principal level of devolution, with directly elected councils and administrators. Powers were distributed between councils and the centre; certain powers were to be concurrent.

Provincial councils were to be indirectly elected from districts, with an executive comprising district administrators. They were to assist and support district governments, promote cooperation and develop provincial infrastructure. The taxing powers of districts were to be determined by an Act of Parliament. In some respects the proposals on details were tentative in that many of these would be spelled out in a Devolution Act, including a mechanism to change boundaries. The CKRC proposal was for a system anchored on the 70 existing districts, which meant that the 1963 structure of eight regions (provinces) as the principal level of devolution was rejected, partly because some provinces were so large that their headquarters were as remote from most people as Nairobi itself, but also because of concerns around identity and potential conflict. As district boundaries were already contested, this was viewed as an interim proposal.

Devolution discussion in the NCC

The NCC strongly and almost unanimously supported devolution, though there were considerable differences over the numbers of devolved units and the basis for them.²³ One speaker did say, “if we really want to devolve powers, we have to be very careful or else, instead of creating devolution, we shall create the devil himself.”²⁴

A number of delegates recommended that provinces cease to exist or be broken up. “That system has made us think in terms of tribes and we know tribalism is the biggest cancer in this country today,” as an MP from Moyale (on the border with Ethiopia) said.²⁵ On the other hand, the former Vice-President of a Region in the majimbo period favoured the provinces; “had we been allowed to continue, Chair, the story today in terms of development, would have been different. But because we allowed for the powers to be concentrated at the centre that was the genesis of corruption and the looting in this country.”²⁶ Districts were the focus of identity for many, “I wanted it to go on record that we from the North don’t want to be part of Rift Valley. With all due respect to Rift Valley, we’ve really suffered. You come to our headquarters in Samburu district, if there is a messenger to be employed at the D.C’s office, the messenger is brought from Nakuru, the messenger is brought from Uasin Gishu. Why and yet we have very poor Samburus who could really work there?”²⁷ A factor in this was hostility to the Provincial Administration.

²³ CKRC, Presentation of the Report of the Task Force on Devolution of Powers - Chapter 10, held at the Bomas of Kenya on 21st August 2003 (National Constitutional Conference). (available at <https://preview.tinyurl.com/NCCDevTaskForce>)

²⁴ Munene J. Othiniel, in debate at National Constitutional Conference, *ibid*

²⁵ Galgalo Gurrach Boru MP NCC Plenary Proceedings, ‘Presentation of Draft Bill, Cont. of Chapter 10 – Devolution of Power Held at the Bomas of Kenya, 22 May 2003’ (available at <https://preview.tinyurl.com/NCCDBChap10220503>)

²⁶ Otieno Ogingo, Plenary Proceedings, Presentation of Draft Bill, Cont. of Chapter 10 – Devolution of Power Held at the Bomas of Kenya, 23 May 2003 (n1)

²⁷ District Delegate Sophia Lepuchirit (n25).

Some doubted the viability of districts as the main focus of devolution,²⁸ and some supported creating units in between existing provinces and districts, comprising a few existing districts merged.²⁹

The CKRC set up a Task Force from its members to review the devolution recommendations. It considered the experience of many countries, drawing on the views of some CKRC members who had visited Germany and South Africa to study their devolution systems, as well as on the literature regarding various forms of decentralization and devolution.³⁰ One member, Mutakha Kangu, played a key role in guiding the committee towards the adoption of the South African model—particularly in terms of intergovernmental relations. But its conclusions still included the CKRC draft provision whereby laws would be made on many details of devolution as agreed in principle.³¹

The Task Force responded to concerns expressed at the NCC by proposing larger regional units as the principal locus of devolution: initially it suggested three options, namely 10, 13 or 18 units (having also considered other possibilities even up to 27). One of the objectives was said to be “cultural homogeneity, harmony and integration, taking into consideration ethnicity and historical factors”.³² They reduced the number of levels of government to four (national, region/zone, county/district and location).

By mid-September 2003 the conference had decided on one option: that of 18 “zones”.³³ Debate in the NCC on devolution focused to a considerable extent (by no means exclusively) on the zones. Specific objections tended to concern smaller communities and where they were to be located, with whom they were to be grouped, and how far the zone headquarters would be from them.³⁴ The main exception to this was the Somali community, which was initially proposed to be split into two zones, but was re-united in the final proposals.

The NCC Technical Committee on devolution, which completed the detailed work, was the most active and numerous committee, and given to passionate support of devolution.³⁵ The tensions are shown by two somewhat contrasting principles agreed at its meeting of September 22nd 2003: “Ethnicity should not be used as criteria for devolution. It should be a way to assist the Marginalised,” but “Historical and cultural background be considered when dealing with devolution of powers”. At

²⁸ eg Crispin Odhiambo Mbai – who became chair of the Devolution Technical Working Committee, and was murdered a few months later (probably not because of his work on this matter) (ibid).

²⁹ eg Charles Edward Ohare, a regional minister in the brief Majimbo days. CKRC National Constitutional Conference ‘Verbatim Report of Plenary Proceedings, Presentation of Draft Bill, Cont. of Chapter 10 – Devolution of Power Held at the Bomas of Kenya on 26th May 2003’ Available at <https://preview.tinyurl.com/NCCDBChap10-260503>.

³⁰ Presented to the NCC on 23 August 2003 – see CKRC, National Constitutional Conference, ‘Verbatim Report of Presentation of Report of The Task Force on Devolution of Powers Held at the Bomas of Kenya on 21st August, 2003’ available at <https://preview.tinyurl.com/PresTFonDevolution>

³¹ For a study of the similarities between devolution in South Africa and Kenya, see Nico Steytler and Yash Ghai (eds), *Kenyan-South African Dialogue on Devolution* (Juta Publishers 2016).

³² The Constitution of Kenya Review Commission, ‘Special Working Document for the National Constitutional Conference: Report on Devolution of Powers’ (Prepared by the Commission and Approved for Issue at a Steering Committee Meeting 19 August 2003)

<<http://katibainstitute.org/Archives/images/CKRC/CK/Special%20Working%20Documents/DEVOLUTION%20OF%20POWERS.pdf>>.

³³ Constitution of Kenya Review Commission, ‘Verbatim Report of Plenary Proceedings, Presentation and Debate on The Draft Provision on Culture, Affirmative Action & Devolution, Held at Bomas of Kenya on 16th September 2003’ (National Constitutional Conference 16 September 2003) Available at <https://preview.tinyurl.com/NCC160903>.

³⁴ Particularly the Mount Elgon and Teso people.

³⁵ Constitution of Kenya Review Commission, ‘The Final Report of Technical Working Group “G” on Devolution of Powers Approved for Issue at the 110th Plenary Meeting of The Constitution of Kenya Review Commission’ (National Constitutional Conference 30 November 2005) <www.constitutionnet.org/vl/item/final-report-technical-working-group-g-devolution-powers>.

one point it proposed an additional, special, unit for the small Teso people “because of its peculiar historical and cultural background”.³⁶ The Committee tried to take into account the requests of delegates from the areas concerned, such as “That Delegates from Samburu ...proposed that Samburu be allowed to join Moyale, Marsabit and Isiolo because they have similar lifestyles and livestock economy is their mainstay”, although at the same meeting³⁷ “Some delegates suggested that delegates have no mandate to take decisions on behalf of their districts.”

The sensitivity of the issues is shown by the fact that the Committee chose, only on this one issue, to decide by secret ballot between options when discussing two zones in the North Rift area. The vote was very close and it took two or three Committee meetings before it was resolved in favour of the solution that was lost on the first vote. The proposers of the motions tended to be prominent Rift Valley politicians. Discussions and revisions of the grouping of districts into zones continued into late February 2004, again a sign of the difficulty of the issues.

At the end of January 2004, the Commission drew up a list of still “contentious issues” including: “Whether there should be three or four levels of devolution; Whether the constituency rather than the district should be a unit of devolution; The constitution of membership of legislative councils/assemblies below the national legislature; Mode of creation of units of devolution immediately below the national government; Distribution of powers between various levels of government”.³⁸

There were differences on three major issues: the system of government (parliamentary or presidential), devolution (the sites of power), and applicability of the *sharia* to Muslims in family matters. A variety of deadlock breaking strategies were employed. A political party initiative to resolve these issues outside the framework of the NCC failed, especially when “a number of government ministers began to project this initiative as a process alternative to the Conference made rejection of its recommendations virtually certain.”³⁹

An intra-NCC consensus building group set up by the Steering Committee produced some recommendations on topics including the executive and devolution. The conference Rapporteur General, Professor Okoth-Ogendo, commented that most of the protagonists on these issues were members of the ruling party,⁴⁰ which was interesting in view of their low profile in the NCC itself. The Steering Committee of the NCC set up a committee to mediate between the two political groups, but failed. European diplomats requested Ghai to be given a chance to mediate—but also failed. The Conference itself set up a third body.⁴¹ None of the third body’s recommendations were accepted by the Conference, and this led to the walk-out by the Kibaki MPs and supporters.

For reasons that are not really clear, the 18 regions were reduced to 14 in late February. This followed on a “retreat” of chairs of technical committees at which a new draft was hammered out.⁴² The consequence was that five of the existing provinces remained intact. Committee members were given a weekend to consult with their fellow delegates about the division of the other provinces. A matter

³⁶ The quotation is from the minutes of the Technical Committee on 22 September 2003 see n35.

³⁷ Minutes for September 23 *ibid*

³⁸ CKRC, ‘The Report of The Rapporteur – General to the National Constitutional Conference on its Deliberations Between January 12 – March 23, 2004 at the Bomas of Kenya’ (National Constitutional Conference 2004) <http://katibainstitute.org/Archives/images/Rapporteur-%20Generals%20NCC%20Report%20on%20Bomas%20III.pdf> Appendix A

³⁹ *Ibid* p. 11.

⁴⁰ *Ibid* p. 12.

⁴¹ *Ibid* p. 13.

⁴² Final Report of Technical Working Group “G” (n 35).

of days before the winding up of the NCC, Ghai produced a document: “A Compromise Proposal for Devolution” making it clear that there was still a good deal of confusion on the topic.⁴³ He suggested that the root of the problem lay with the question of what was the principal unit of devolution: “One group favours the district, the other the region. The compromise the committee struck (which reflects CKRC’s proposal) is to vest significant devolved powers in the district but to find a not unimportant role for the region. ... This produces somewhat confused lines of authority as well as adding greatly to the cost of devolution.” He suggested that one way to cut through this complex system was to reduce the levels of government to two, leaving the lower level with authority to set up a system of local government. The number of units at the higher level would be about 20. At the same time each county would have a real prospect of discharging its responsibilities. This proposal would achieve greater economies of scale than a system based on districts, while at the same time it would enable greater participation of people than would be possible in the provinces. The smaller regions would be less threatening to national unity and more protective of the interests of minorities. However, the NCC adopted, on March 11 2004, 14 regions, and 70 districts (the latter as the main recipient of powers).

The closing stages of the NCC were so rushed and politically charged that, even after the conference adopted a draft, the CKRC found it necessary to check it and made some revisions based on the official records, some of which affected the devolution chapter – but not the core issues.⁴⁴

Process of adoption

The original scheme for adopting the new Constitution was that the Bill adopted by the NCC would go to Parliament, which would apply Section 47 of the existing Constitution whereby the Parliament had either to accept or to reject the document as a whole; it could not introduce an amendment.

It is now clear that in the closing stages of the NCC process, in late February 2004, most of the Commissioners of the CKRC were meeting with the Parliamentary Committee on the Constitution (PSC), without the full knowledge of the chair, but presumably at the initiative of the PSC, to discuss how the Constitution might be amended to give Parliament a fuller role, so as to build consensus in Parliament to ensure that it would be passed.⁴⁵ A PSC member said “I think what has been eluding us is how the elite itself arrives at a consensus so that that consensus joins with the consensus of Wanjiku⁴⁶ to give Kenya a Constitution.”⁴⁷

At the time, the Kibaki group members of the PSC were boycotting the NCC (the PSC Chair called it a strategic decision).⁴⁸ What they were proposing was a deviation from a process deliberately intended to limit the role of Parliament, because all the MPs were members of the NCC. Yet what they were planning was to give themselves (“the elite” Kibwana called them) the power to defeat the will of the

⁴³ Dated 7 March 2004, on file with the authors.

⁴⁴ See the ‘verification’ process <<http://www.katibainstitute.org/Archives/index.php/ckrc-process/verification-procs-docs-verbatim>>; the document on Chapter 14 is relevant to devolution.

⁴⁵ Constitution of Kenya Review Commission, *Verbatim Report of Meeting Between CKRC Commissioners and Members of The Parliamentary Select Committee (PSC) Held at County Hall, Nairobi on February 19 2004* (Nation Constitutional Commission 19 February 2004) <www.constitutionnet.org/vl/item/verbatim-report-meeting-between-ckrc-commissioners-and-members-parliamentary-select-4>.

⁴⁶ Wanjiku is a common Kikuyu name, used to represent the common person, especially since former President Moi asked what could Wanjiku know about a Constitution.

⁴⁷ Kivutha Kibwana.

⁴⁸ Minutes of the meeting of 26 February 2004.

NCC. But they had decided to implicate the CKRC, and persuaded its members (17 of them) to come up with a proposal on how to do it – and to join them in presenting it to the media.⁴⁹

The decision of the court in the *Njoya* case⁵⁰ put a stop to the process that was supposed to lead smoothly from the NCC draft to enactment. It opened the way for the plans discussed between the parliamentarians and a section of the CKRC to amend the Review Act in favour of Parliamentary discretion. (Ghai had tried repeatedly and unsuccessfully to persuade the Attorney-General to amend the Constitution to entrench the process, to prevent precisely this sort of development). This elicited a flurry of public activity, mostly directed at the idea that the initiative was being taken away from the people, though there was wide support for the referendum element in the scheme. There was a petition to Parliament (only the second the Speaker had ever received), presented by William Ruto (who is now Deputy President), seeking deferment of discussion of a revised draft constitution until the constitutionality of the Act to amend the process was established, as well as adoption of a constitutional amendment to guarantee a referendum.⁵¹ A civil society-backed court action sought unsuccessfully to stop the National Assembly from debating revision of the NCC draft.⁵² And the media reported that “Civil societies yesterday threatened to storm Parliament on July 19 unless MPs stop debate on the Draft Constitution.”⁵³

The new process was supposed to be one of consensus – and the parliamentarians, at a retreat, agreed on two levels of government: the national and the “county”, the latter bigger than the districts but smaller than the NCC regions. The roles assigned to the regions, the districts and the locations in the NCC draft should be assigned to the counties. But, confusingly the current districts would remain in place.⁵⁴

In the event the Bill for a new Constitution that was prepared provided for the existing 70 districts to be the sole basis of devolution. The powers of districts were to be similar to those in the NCC draft, but could be changed by ordinary legislation. Although the hated Provincial Administration was to be abolished, there was no provision for a Senate. This would have been a much weaker form of devolution – small, presumably weak, units, with little guaranteed power and no supporting Senate. The draft also provided for a more presidential system of government. Parliament adopted the Bill, aided, at least in part, by an opposition boycott.

This draft, generally known as the Wako Draft after the Attorney General, who was widely believed to have taken over the process, was submitted to a referendum in 2005. It was rejected by 3.5 million to 2.5 million votes. Resentment at the take-over of the draft by Parliament was no doubt one factor, but the geographical spread of the voting indicates that the main factor was a verdict on the Presidency of Mwai Kibaki, in regional/ethnic terms. Only in the Kikuyu Central Province was the majority vote “Yes”.⁵⁵

⁴⁹ The irony was that some of the most ardent supporters of the Kibaki government position had previously followed Moi’s instructions.

⁵⁰ See (n 16).

⁵¹ National Assembly Deb July 20 2005, 2528-29.

⁵² *Onyango v Attorney General* [2005] KHC 677, [2005] Miscellaneous Civil Application. 677 .

⁵³ “Civil Society Opposed to Debate on Bomas Draft” *The Standard* (Nairobi, 20 July 2005).

⁵⁴ The Parliamentary Select Committee on Constitutional Review, Summary of Report of the Retreat, Sopa Lodge, Naivasha (National Assembly 4-7 November 2004) On file with the authors.

⁵⁵ For an account see Bård Anders Andreassen and Arne Tostensen, *Of Oranges and Bananas: The 2005 Kenya Referendum on the Constitution* (Chr. Michelsen Institute, 2006) < <https://www.cmi.no/publications/file/2368-of-oranges-and-bananas.pdf> >

Outcome

Opposition to the Bill had been led by former members of Kibaki's government (Raila Odinga and his LDP) and Uhuru Kenyatta, Moi and Ruto of KANU.⁵⁶ Hornsby says, "The LDP was now effectively in opposition." The campaign changed Kenyan politics, and produced a new party and name: the Orange Democratic Movement (ODM), using as its symbol the orange, the symbol for the No vote in the referendum.

Although the Government liked to say, for example in reports to UN human rights monitoring bodies, that Kenya was working on a new, improved Constitution, little happened for the next two years. But in late 2007, there was considerable violence, death and displacement, on ethnic grounds following ODM accusations that the result of the presidential election was rigged. The ethnic tensions and violence in 2007 had not been exacerbated by the 2000-2005 process, though it did reflect them. Indeed, it was felt that, had something like the Bomas Draft been in place, the disputes and violence of 2007-8 might not have happened.

A resolution of the crisis was found through an internationally brokered "National Accord", which not only brought Odinga into government, in the newly created position of prime minister,⁵⁷ but also included a commitment to produce a new Constitution, in recognition that this major issue was unresolved. A Committee of Experts on the constitution was appointed in 2009, and it included three foreigners out of nine members,⁵⁸ like the other bodies appointed under the National Accord, namely the commissions on the electoral systems, violence, and truth and transitional justice. It took the NCC Draft as its starting point, while consulting other drafts including the CKRC and Wako drafts. On devolution, its first draft envisaged districts as the main unit, with coordinating regions (the eight provinces). The regions were later dropped: comments suggested their roles were limited and unclear.

But the CoE opted, in their second draft, to base the structure on the last "legal" districts, before the presidents started on their district creation sprees. They reduced the districts (which they renamed "counties") from 74 in their first draft to 47. The CoE was prompted in part by a court decision that only the 47 districts as of 1992 were legal.⁵⁹ The CoE introduced more features from South Africa, particularly in the area of conflict resolution and the financial system.

The CoE process was also taken over by parliamentarians who demanded various changes, in a consultation this time prescribed by law. Unlike parliament in 2005, this Parliamentary Select Commission did not abolish the proposed Senate, though they did describe it as "a Lower House with limited legislative role". The CoE disregarded some PSC innovations, but basically accepted the provision for the Senate to: "exercise oversight over funds devolved to the county governments" – the source of much current puzzlement – as it did the removal of the Senate's role in non-county related legislation.

The Constitution was adopted – by a referendum – in August 2010, but the devolution provisions did not come into effect until the 2013 elections. Thus this major departure from previous governance,

⁵⁶ Hornsby (n 2) 739.

⁵⁷ This was done through an amendment to the Constitution. For a description of the whole process, see Office of the AU Panel of Eminent African Personalities, *Back from the Brink: the 2008 mediation process and reforms in Kenya* (African Union Commission 2014).

⁵⁸ These three were Christina Murray, Chaloka Beyani and Frederick Ssempebwa.

⁵⁹ *Job Njyasimi Momanyi v Attorney-General* [2009] HCK 68, (2009) eKLR 1. The 1992 Districts and Provinces Act was the relevant legislation.

has been in operation for only four years.⁶⁰ Only a tentative assessment can be made of the structures, policies and performance of county governments and their relationships with the national government. However, in early 2014 the National Assembly established a Working Group, chaired by the Auditor General, to carry out an assessment of the Constitution, especially of its impact on the economy, public institutions and society. It was widely believed that the MPs anticipated that the report would rubbish much of the constitution, but the Auditor General and his team did not oblige. In this brief evaluation we draw on its report, published in 2016,⁶¹ and other more anecdotal sources.

We have shown how central to debates were the number and size of devolved units. The Working Group observed that many of the counties are made up of people who “share a common history, undertake common economic activities, and speak the same language”. They concluded that

...the county governments as presently constituted are favourable for ethnic and social inclusion. The individual units also comprise population that is not too large and not too small to promote local self-governance, democracy, and delivering quality basic services as envisaged under the Constitution.⁶²

A central objective, and popular expectation, of devolution was improved service delivery.⁶³ The Working Group said that in all the counties, there is evidence of improvement in service delivery, with some counties experiencing services well beyond what they had received since independence.⁶⁴ But a Transparency International survey in 2016 reported that 48% of respondents could identify some service (including infrastructure) that had improved with county government, 21% said nothing had improved.⁶⁵

The objective first mentioned in the constitution is “democratic and accountable exercise of power”.⁶⁶ The Working Group concluded that devolution had indeed “enhanced transparency and social accountability where citizens are more aware and hold leaders responsible on the use of their resources”.⁶⁷ The Transparency International survey reported that 38% of people had had contact with their county assembly member about a problem, as opposed to 19% who had contact with their MP, which does suggest that government has been brought somewhat closer to the people by devolution.⁶⁸

On the more negative side there is corruption. County Assembly members are particularly criticised for selfishness and misappropriation or misuse of public funds, for example, it is said, of sometimes

⁶⁰ There is one major book on the system, but as a legal analysis not an evaluation, John Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (Strathmore University Press 2015) 89. Kangu was the CKRC Commissioner who contributed a great deal to the devolution provisions (see above).

⁶¹ Office of the Auditor-General, ‘Report of the Working Group on Socio-Economic Audit of the Constitution of Kenya, 2010’ (Office of the Auditor-General September 2016) <<https://africacheck.org/wp-content/uploads/2017/01/SocialAudit2010.pdf>>.

⁶² *ibid* para 4-24.

⁶³ Constitution of Kenya art 174(f).

⁶⁴ Office of the Auditor-General (n 56) para 4-10

⁶⁵ Transparency International Kenya, ‘The Kenya County Government Status Report, 2016’ (Transparency International Kenya 2016) p. 30 <https://tikenya.org/wp-content/uploads/2017/09/TI-Kenya_County-Governance-Status-Report_2016.pdf>

⁶⁶ Constitution of Kenya art 174(a).

⁶⁷ Office of the Auditor-General (n 56) para 6-83.

⁶⁸ Transparency International Kenya (n 60) p. 12.

coercing Governors with threats of impeachment. These impressions from the media are supported by the Working Group.⁶⁹

Corruption has been a major cause of conflicts within counties. Corruption suspicions were involved in the first effort to impeach a Governor. He was removed by the Senate. The High Court reinstated him; he was removed again. The Court of Appeal reinstated him, reversing the High Court and holding that there was inadequate public participation, that the factual basis for removal had not been established and that there was an appearance of bias on the part of the Senate Committee.⁷⁰

In one county – Makueni – stalemate resulting from tensions between the county Governor and assembly, as well as from assembly members' siphoning off funds, got so bad that a Commission of Inquiry was appointed by the President.⁷¹ It recommended that the President, and Senate, exercise their power to suspend the county government, but the President declined to act insisting that, despite the "most alarming and deplorable litany of failures" the evidence is not strong enough, and that other methods exist to deal with corruption,⁷² as well as arguably for reasons of political calculation.

Intergovernmental relations have been somewhat problematic. The Auditor-General's Working Group identified lack of a solid assessment of costs of functions as a cause of disputes between levels of government. The insistence of the counties on a "big bang" transfer of functions instead of the phased approach envisaged by the constitution, something that was also demanded by the expectations of citizens, has created its own problems. And counties have not always respected the limits of their powers, and, indeed, those limits are not always clear.⁷³ The Working Group observes that evidence suggests that what is supposed to be "cooperative" devolution is less than fully successful.⁷⁴ There has been some undermining of devolution by increased use of conditional grants.⁷⁵

Mediation of inter-governmental disputes is little used, and the mechanism poorly developed. As the Working Group commented, "In general, inter-governmental relations in Kenya devolution have been adversarial. Yet, cooperative devolved government requires that the society moves away from the adversarial approach to consultation, negotiation and consensus building approach."⁷⁶

Senate has been as much a rival as a supporter of the counties. Senators have been taken aback by what they consider are their limited powers, and jockey for power and publicity with Governors and Members of the National Assembly. In the 2017 elections, several stood, some successfully, for Governor, a phenomenon not unconnected to the financial benefits available to the latter.

⁶⁹ See also Michelle D'Arcy and Agnes Cornell, 'Devolution and Corruption In Kenya: Everyone's Turn To Eat?' (2016) 115 (459) *African Affairs* 246.

⁷⁰ *Martin Nyaga Wambora v County Assembly of Embu* [2015] HCK 194 (2015) eKLR
<<http://kenyalaw.org/caselaw/cases/view/117084/>>.

⁷¹ The report of the Committee, chaired by Mohammed Nyaoga, has not been published, but has been widely reported on.

⁷² Manoah Esipisu, 'Statement by State House Spokesperson in the Matter of the Petition to Suspend Makueni County Government' (*Official Website of the President*, 6 September 2015) <www.president.go.ke/2015/09/06/statement-by-state-house-spokesperson-in-the-matter-of-the-petition-to-suspend-makueni-county-government/>.

⁷³ Transparency International Kenya (n 60) pp. 24-26.

⁷⁴ Office of the Auditor-General (n 56) paras 4-80 to 83.

⁷⁵ *ibid* paras 4-113 to 14.

⁷⁶ *ibid* para 4-83.

From a financial point of view some counties have shown weak capacity to raise their own revenue.⁷⁷ Secondly, there is no doubt it has been expensive. The burden of paying so many legislators is high: Kenyans are over-represented by expensive representatives.⁷⁸

However, surveys show that Kenyans overwhelmingly support devolution, despite criticisms of corruption and often ineffectiveness.⁷⁹ This is borne out by the Working Group's own survey, which showed that devolution is "well embedded in people's lives".⁸⁰

There is another set of issues: those related to ethnicity and to the reasons for having a new constitution. The Working Group commented that county governments, like the national, had not been effective in ensuring that recruitment to public offices reflects regional and ethnic diversity.⁸¹ Another author suggested that, "The new county governments and the political and economic largesse that comes with them are, if not managed equitably, likely to further exacerbate existing conflicts in the poor and conflict-prone counties of northern Kenya."⁸²

Some have suggested that the 2013 elections were peaceful in part because devolution gave people an alternative focus for their interest and loyalties; the election for the presidency was not the only game in town. If so, whether this remains the case for future elections will presumably depend on how successful county government is perceived to be, something that will depend in part on how far the national government allows counties to govern and to do "their own thing".

Lessons

The 2000-4 phase of the process showed that much can be done in constitution making even in the absence of an immediate crisis. Indeed, after the elections of 2002 the heat had gone out of the question of Moi, but interest in the constitution remained high. But one might reasonably take the view that the absence of a crisis made it easier for reactionary forces to strategise to defeat enactment of the constitution. Almost certainly they were at least as happy in 2005 to remain with the existing constitution as they would have been with the Wako draft. And in 2008-10 the sense of crisis, and the international community through Kofi Annan and some other eminent African leaders, played a critical role in pushing the process to conclusion, largely along the lines of the NCC draft. External pressure was lacking in 2002-3, when foreign countries were far more focussed on having elections, and getting rid of Moi, than on a new constitution.

On the face of it the 2000-4 process made a lot of sense: broad consensus among key groups in a series of national conferences; consensus reflected in CKRC's mandate and process; emphasis on consultations with the people; a broad based constituent assembly (nearly one third being civil society and one third being MPs); and back to parliament for a yes-no vote. Consultation with the people worked very positively, especially as the CKRC did very careful analyses of their views and recommendations, which were then widely circulated, and formed a basis of its own proposals.

⁷⁷ *ibid* paras 4-58 to 60..

⁷⁸ *ibid* paras 6-95 to 96.

⁷⁹ Ipsos' 1st Quarter SPEC (Social, Political, Economic and Cultural): Second Media Release: Devolution Support for the Principle, Critical of the Practice"
<www.ipsos.co.ke/spr/downloads/polls/SPEC_Poll_Narrative_Report_22nd_April_2015.pdf>.

⁸⁰ Office of the Auditor-General (n 56) para 4-9.

⁸¹ *ibid* paras 12-18 to 24

⁸² Aden Abdi, 'Clans, conflicts and devolution in Mandera, Kenya' (*Peace Insight*, 14 October 2014)

<www.insightonconflict.org/2014/10/clans-conflicts-devolution-mandera-finding-durable-solution-conflict-degodia-garre/>.

Realistic discussion could only begin once there were concrete proposals, which were made in the draft constitution published by the CKRC in September 2002. But the earlier discussions with the public were an important factor in developing public support for the process, and almost certainly account in no small measure for the strong support, not always backed up by detailed knowledge, now expressed by ordinary Kenyans for the constitution. At that stage, people were able to express their dominant concerns, not often in terms familiar to constitutional lawyers, and it was for the CKRC to reflect those concerns in its ultimate draft.

The 2000-4 process was complex with perhaps too many institutions. There are some difficulties with a process that involves a draft, based on the wishes of the people, followed by an assembly largely of those with limited understanding of the constitutional matters. The design was that the NCC would refine and improve the CKRC draft, but, in the event, this did not happen as much as had been anticipated. However, the NCC process did improve the devolution proposals, as outlined above.

Would it have been better if politicians were given the dominant role at that later stage? Some might think so. But the nature of Kenyan politics must be taken into account. The dominance of personal interest, and the manipulation of ethnicity to achieve that, do not encourage one to have any faith in the national orientation of the politicians. Maybe if they had not been confident that they held the ultimate whip hand (as the post-NCC events showed) they might have taken the NCC more seriously and truly engaged in it. Certainly they could not have been kept out – and even if they were, they would still have manipulated by string pulling. Having them fully in, without the last word being with the National Assembly, would perhaps have been better.

The right balance between politicians, experts, and civil society is hard to achieve. Arguably the Kenyan processes have suffered from a lack of expertise, and a dominance of politics. Neither the CKRC nor, later, the CoE, had a solid core of constitutional experts. But some members of both bodies made major contributions, and political interference was the major obstacle to the production of the highest quality of constitution drafting. A stronger phalanx of legal and other experts might have enabled political interference to be mitigated – but that is not how Kenyan bodies are appointed.

The process was long drawn out. The first part—national conferences—was necessary, to build some kind of consensus after years of authoritarian and tribalist rule, requiring almost a catharsis. The principal approach to the process and substance of the new constitution was agreed. This consensus, confirmed by what many people told the CKRC, facilitated CKRC's role.

Deadlines and timing are always crucial. The irony is that the Kenyan processes have had in theory quite tight timelines. But an early act of the CKRC commissioners was to seek an extension for their work. On the other hand, the CoE had no deadline for submission of its first draft. It submitted it just before Christmas, but a timeline then kicked in giving little time for discussion.

If a process goes on for too long, it is not unlikely that parties might change their minds as they weigh the implications of change for themselves. This happened (as discussed above) with the Kikuyu group. Kibaki, who had from the beginning been a supporter of constitutional reform, became the very person (with two or three close advisers) who killed the draft constitution, made after nearly four years of consultations, meetings and negotiations. Senior officials in the Catholic and Anglican churches followed a line not dissimilar to that of Kibaki and his supporters.

What this underlines is the desirability of decisions being made behind Rawls' veil of ignorance.⁸³ If the initial process could have started moving sooner, this might have been possible. And if the CKRC had not been so successful in dragging its heels, to the financial advantage of the commissioners, again

⁸³ John Rawls, *Theory of Justice* (Harvard University Press 1971).

maybe the election would not have intervened. On the other hand, to have held the election within a matter of months after the new electoral law had come into force would have faced the Election Commission with an intolerable task. The CoE's process, by contrast, finished over two years before the next election.

Deadlock breaking is important and can be useful but in Kenya for various reasons did not work. Even mechanisms involving only politicians did not yield a final settlement. Again the possibility of trumping the process in parliament may have had something to do with this. But it does not explain the inability of opposition politicians to stick to an agreement. This suggests a lack of skill in negotiating, including not having a clear sense of what one's own position is, or perhaps not having made a clear decision in one's own party before embarking on negotiations.

Referendum

The notion of referendum played an important role, in politics as well as in the outcome. A referendum was not a requirement in the making of the old constitution. A different scheme, of extensive consultations with the Somalis in the North East, to find out if they wanted secession was applied (but their overwhelming support for secession was disregarded).

The CKRC Act provided for a referendum for each of the controversial issues at the NCC, *seriatim*. It was not used because it was considered complicated, expensive and time consuming. In turn, the adoption by the NCC of the draft constitution was challenged because it was not put to a referendum; the Court upheld the challenge even though there was no such provision in the CKRC Act. The consequence was that the old, much maligned, constitution was maintained. A referendum was prescribed for the process that resumed in 2008, after post-election violence, and 67% of voters supported the new proposal, though voting unfortunately split largely on ethnic lines (as in the 2005 referendum). The new constitution requires a referendum for amendment of specified articles,⁸⁴ and also a referendum to initiate a separate process for constitutional amendments of the constitution ("popular initiative").⁸⁵ The democratic and participatory nature of the new constitution has increased support for referendums in changing the constitution. But some remain sceptical, especially if the process itself is highly consultative and participatory.

We have to be mindful of the nature of the overall Kenya political system, which is excessively driven by greed, corruption, ethnicity, and violence—in violation of constitutional values. In these respects devolution has replicated the national practice, particularly corruption and violence.

As noted, there is some controversy as to the consequences of devolution, there being greater support for it than criticism. It is almost universally agreed that devolved governments are much better than the national government as far as the administration of counties is concerned. Some of the benefits of devolution are the following: some easing of ethnic tensions as most communities have some autonomy (though national politics continue to be ethnic), freedom to make decisions about matters that are of daily concern, visible signs of "development"—street lights, tarred roads, improved hospitals, involvement of the people in the affairs of the county. An additional possible benefit, though not undisputed, may be some de-ethnicisation of politics, since quite often a county has a huge majority of one community. This tends to lead to intra-group rivalries in that such counties operate a competitive political system. The salience of one ethnic group is also diminished somewhat due to the constitutional requirement of minority representation in both the assembly and the government.

⁸⁴ See Article 255, Constitution of Kenya 2010.

⁸⁵ Article 257.

Critics, on the other hand, tend to argue that the benefits to the people have been meagre in relation to the sums of money transferred to counties, to the wastage of money through the large number of counties, the scale of corruption, and constant conflicts, often violent, among governors and assembly members, and governors and senators.

Inevitably these circumstances have propelled some discussion on the wisdom of some decisions on the design of devolution. Various issues as to the design are still debated. One is whether it was sensible to create so many counties, with their own governments, meaning that a great deal of money goes on institutions, salaries, and resources, leaving little for “development”, or whether the ideas so much debated at Bomas about 10, 12, 18 or 20 larger units should have been pursued. A second issue, is whether it was wise to stick to county boundaries essentially drawn up in 1963 and based on ethnic homogeneity as the criterion, when Kenyans are trying to promote national unity and common identity. A third issue is whether sufficient attention was paid to the structure and role of the Senate, as its members do not have sufficient links with the county governments (as in South Africa), its powers are limited, and it is clearly subordinate to the National Assembly. There is also a sense, that comes out clearly from the Auditor-General’s report, that the transition could have been better handled: inadequate understanding of the costs of functions to be transferred, transfers happening too fast, and too many existing staff foisted on the counties.

How these things happened has, we hope, been indicated earlier. The difficulties of ethnic accommodation, changing ideas in the constitution-making bodies about the most appropriate main site of devolution, the weight of history, the hubris of MPs (behind the demotion of the Senate), and the dearth of people with knowledge and understanding of multi-level government systems are among the explanations.

Consequently people ask if devolution was designed by people who understood its implications, and were aware of the structures suitable for their functions and for inter-governmental relations. Might the lesson be that for issues that are both political and technical, once the political basis for devolution is agreed upon, it might have been better to have had a constitutional requirement for a process first of expert drafting of the necessary legislation and then of gradual implementation as capacities developed, under the supervision of an truly independent and expert body? This, it must be said, was what was envisaged in the very first, 2002, draft constitution.

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