

# **Devolution for development, conflict resolution, and limiting central power: An analysis of the Constitution of Kenya 2010**

By

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## DECLARATION

I CONRAD M. BOSIRE do hereby declare that '**Devolution for development, conflict resolution, and limiting central power through constitutional design: An analysis of the Constitution of Kenya 2010**' is my original work and has not been submitted for any degree or examination in any other university or institution of higher learning. While I have relied on numerous sources and materials to develop the main argument presented in the thesis, all the materials and sources used have been duly and properly acknowledged.

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## ABSTRACT

State practice and literature suggest that devolution of power can address the main challenges of underdevelopment, internal conflict and abuse of centralised power in developing states. However, this thesis advances the argument that the design features of devolved government for these purposes are not always compatible. Accordingly, while there are complementary and neutral design features in the three designs, trade-offs have to be made between the unique design features in order to ensure the effective pursuit of the three purposes through a single system of devolved government. Kenya, the case study for this inquiry, confirms the international trend as its major challenges over the last 50 years have been underdevelopment, internal conflict and abuse of central power. As such, development, ethnic harmony, and the limiting of central power featured prominently throughout the entire constitutional review process as purposes to be pursued by means of devolution of power. To this end, the devolution of state power is one of the central elements of the current constitutional dispensation in Kenya. There are trade-offs made in Kenya's devolution design in order to accommodate the three purposes of devolution. However, the overall result has been that the emphasis falls on development at the expense of conflict resolution and limiting central power. Nevertheless, regardless of the trade-offs and nature of the final design, the design's effectiveness or lack thereof may depend very much on factors external to the design. Lack of political will to make devolution work can negate the effectiveness of even the most perfect design; by same token, political will could make an apparently bad design effective. In practice, therefore, effectiveness depends on an array of other context-specific factors.

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## DEDICATION

To my parents Barnabas Bosire, and Beatrice Mogotu

My pillars and shining light



## LIST OF ABBREVIATIONS

MDG	Millennium Development Goals
WDR	World Development Report
UNDP	United Nations Development Programme
OECD	Economic Cooperation and Development
UNCDF	United Nations Capital Development Fund
DGD	Decentralised Governance for Development
LDC	Less Developed Countries
USAID	United States Agency for International Development
FPTP	First-Past-the-Post system of elections
PR	Proportional Representation system of elections
IBEAC	Imperial British East African Company
LNC	Local Native Council
PC	Provincial Commissioner
DC	District Commissioner
KAU	Kenya African Union
KANU	Kenya African National Union
KADU	Kenya African Democratic Union
ADC	African District Council
LGLA	Local Governments Loans Authority
PA	Provincial Administration
SRDP	Special Rural Development Programme
LASC	Local Government Service Charge
GPT	Graduated Personal Tax
LA	Local Authority
PLGO	Provincial Local Government Officer
ILO	International Labour Organisation
IC	Independence Constitution
DFRD	District Focus for Rural Development
DDC	District Development Committee
DEC	District Executive Committee
DPU	District Planning Units

DDO	District Development Officer
PMEC	Provincial Monitoring and Evaluation Committee
LATF	Local Authority Transfer Fund Act
LASDAP	Local Authorities Service Delivery Action Plan
KLGRP	Kenya Local Government Reform programme
CDF	Constituency Development Fund
FPE	Free Primary Education Fund
CEBF	Constituency Education Bursary Fund
REPLF	Rural Electrification Programme Levy Fund
RMLF	Roads Maintenance Levy Fund
CKRC	Constitution of Kenya Review Commission
NCOP	National Council of Provinces
NARC	National Rainbow Coalition
NAK	National Alliance of Kenya
NCC	National Constitutional Conference ( <i>Bomas</i> )
ODM	Orange Democratic Movement
PNU	Party of National Unity
HDC	Harmonised Draft Constitution
RHDC	Revised Harmonised Draft Constitution
CoE	Committee of Experts on Constitutional Review
PSC	Parliamentary Select Committee
CRA	Commission on Revenue Allocation
IEBC	Independent Electoral and Boundaries Commission
CIC	Commission on Implementation of the Constitution (CIC)
KNHREC	Kenya National Human Rights and Equality Commission
TFDG	Taskforce on Devolved Government
CEC	County Executive Committee
CA	County Assembly
CGA	County Government Act
PRMA	Public Finance Management Act
CPSB	County Public Service Board
UACA	Urban Areas and Cities Act
TDGA	Transition to Devolved Government Act (TDGA)
TA	Transitional Authority

CIC	Commission on Implementation of the Constitution
NLC	National Land Commission
CILOR	Compensation in Lieu of Rates
DRB	Division of Revenue Bill
CARB	County Allocation of Revenue Bill
CoB	Controller of Budget
CGPFMTA	County Government Public Finance Management Transition Act



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# CHAPTER ONE

## INTRODUCTION

### 1. The problem

It is generally agreed that developing states face multiple challenges, including underdevelopment, conflict, poor governance and other all-too-familiar 'third-world' problems. It is estimated that more than 1.2 billion people live in countries plagued by war and other disasters, with almost one-third of them in the developing world.<sup>1</sup> Siegle and O'Mahony observe that "poor countries have been more prone to intrastate conflict in the post-Cold War period"<sup>2</sup> than more developed countries. The developmental consequences of this situation are clear: countries affected by internal conflict are among those with the highest levels of socio-economic problems, and are the farthest from achieving the Millennium Development Goals (MDGs).<sup>3</sup> The World Bank notes that "[n]o low-income fragile or other conflict-affected country has yet achieved a single MDG".<sup>4</sup>

These 'third-world' challenges are historical, systemic and structural, displaying an identifiable pattern across almost all developing states. Underdevelopment and disparities are linked to poor governance policies that are frequently traceable to the colonial era. Colonial governance structures are often described as centralised, hierarchical and meant for control rather than democratic governance; indeed, the centralised state has been termed "the last, and perhaps, the most serious, vestige of Western Colonialism".<sup>5</sup> At independence, most post-colonial leaders rejected the semi-federal structures which their departing colonial masters attempted to bequeath to them, dismissing these as colonial projects. Instead, centralised systems of government were promoted as necessary for the purposes of unity and development.

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<sup>1</sup> World Bank *World Development Report: Conflict, Security and Development* (2011) 2; Overseas Development Institute 'Fragile states: Beyond the quick wins' ODI Policy paper (2010) 1, cited in United Nations Development Programme (UNDP) 'Local Governance, peace building and state building in post-conflict settings: A UNDP discussion paper' (2010) 5.

<sup>2</sup> Siegle J & O'Mahony P ('Assessing the merits of decentralization as a conflict mitigation strategy' (2006) 4) state that "specifically, countries with per capita incomes below \$2000 have been eight times as likely to engage in intrastate conflict in the post-Cold War period as countries with per capita incomes above \$ 4000".

<sup>3</sup> UNDP (2010) 5.

<sup>4</sup> World Bank (2011) 5.

<sup>5</sup> Olowu D & Wunsch J *The Failure of the Centralized State: Institutions and Self-Governance in Africa* (1990) 18.

A few decades later, however, it became evident that centralised systems of government were neither a panacea for development nor unity. Post-independence leaders found colonial control structures a convenient tool for entrenching themselves in power and cracking down on political opposition; under this strategy, other arms of government and critical public institutions were subordinated to the ruler,<sup>6</sup> resulting in the 'big-man syndrome'.<sup>7</sup> Personal rule created ruling elites and patronage networks, with these networks typically drawn from the ruler's own community and maintained by "cannibalising" state resources.<sup>8</sup>

Predictably, then, the centralisation of power and plunder of state resources led to inefficiency, a decline in the provision of basic services, and the growth of both regional and interpersonal economic disparities. A lack of essential services contributed to the increase in poverty levels and the emergence of other developmental concerns. The centralisation of power and political patronage created perceptions of political and economic marginalisation among communities at the periphery of power, perceptions that were deepened by policies of exclusion in which state resources were diverted to the 'home regions' of the rulers to the detriment of other areas.

The consequence of this exclusion is that it engendered a belief that control of the presidency is the ultimate way to access state resources and opportunities. This belief in turn has made presidential elections a 'do or die' affair in which each subnational group seeks to control the presidency. Many states have witnessed deadly internal conflict as the main subnational groups contending for the presidency engage in zero-sum competition for control of national political power.

In what came to be known as the "the second wave of democratisation",<sup>9</sup> developing states in the 1970s resorted to decentralising powers and resources to new or existing subnational levels in a bid to address the challenges associated with the centralised state.<sup>10</sup> In fact, the trend later became global, with developed states joining in the decentralisation fray.<sup>11</sup> While the

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<sup>6</sup> Olowu & Wunsch (1990) 59.

<sup>7</sup> Olowu & Wunsch (1990) 55.

<sup>8</sup> Olowu & Wunsch (1990) 65; Bratton M & De Walle NV 'Neopatrimonial regimes and political transition in Africa' (1994) 46 *World Politics* 301.

<sup>9</sup> Fessha Y & Kirkby C 'A critical survey of subnational autonomy in African states' (2008) 38 *Publius: The Journal of Federalism* 248-249.

<sup>10</sup> Marks G & Hooghe L 'Contrasting visions of multi-level governance' in Bache I & Flinders M (eds) *Multi-level Governance* (2004) 15.

<sup>11</sup> Marks & Hooghe (2004) 2.

decentralisation trend is most common in developing states,<sup>12</sup> a 2004 survey of developed states reveals that, since 1980, no European country has become more centralised and that half of the countries in the European Union (EU) have devolved authority to regional level governments.<sup>13</sup> Developed countries with a strong tradition of centralisation, such as France, the United Kingdom and Spain, also transferred significant power to their respective subnational levels in the same period.<sup>14</sup> A World Bank report indicates that at least 95 percent of the states in the world have some form of elected subnational government.<sup>15</sup>

During the Cold War, most of the autocratic regimes established in the developing world after independence were shielded, and often even actively supported, by Western powers that wished in part to stem communist infiltration. However, the period after the fall of the Berlin Wall saw an unprecedented rise in internal conflict as aggrieved sub-state groups sought to challenge years of dominance by Western-backed dictatorial regimes. This in turn led to conflict as sub-state groups engaged in violent struggles to challenge political and economic exclusion by the politically dominant groups.

In the post-Cold War period the devolution of power to subnational levels came increasingly to be seen as a means of enhancing political and economic inclusion and thus as a process with the potential to ameliorate internal conflict.<sup>16</sup> However, the principle of devolving power to the subnational level as a means of keeping the peace is an old idea, one associated with federal systems such as Switzerland (1847), and Canada (1867). The possibility that devolution could enhance sharing of power and resources, and thereby address internal conflict, makes it an attractive concept in the face of mounting internal turmoil and contestation.

Whereas the centralised state is viewed as a tool of domination over smaller groups by the group politically dominant at the national level, the devolution of power to the subnational level is seen as a way of sharing powers and resources and hence as providing the basis for consolidating peace. Sharing power with subnational groups is meaningful only if it enables the aggrieved subnational groups to exercise political power and control resources through their subnational governments. Perceptions of domination can also be addressed if, through their

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<sup>12</sup> Marks & Hooghe (2004) 15.

<sup>13</sup> Marks & Hooghe (2004) 2.

<sup>14</sup> World Bank *World Development Report 1997: The state in a Changing World* (1997) 121.

<sup>15</sup> World Bank *World Development Report 1999/2000: Entering the 21<sup>st</sup> Century* (1999) 108.

<sup>16</sup> See generally Crawford G & Hartmann C (eds) *Decentralisation in Africa: A Pathway Out of Poverty and Conflict?* (2008).

representative structures, subnational groups can influence important central decision-making processes such as the exercise of political power at the national level and the use of national resources.

The end-result is that devolution of powers is increasingly expected to address numerous purposes, including development, political stability and limiting central power. Indeed, all developing countries transfer powers to the subnational level in the hope of enhancing access to services and development; conflict-ridden states, in particular, transfer power with the aim of consolidating political stability by enhancing a more equitable sharing of power and resources.<sup>17</sup>

One clear factor is that these multiple challenges also confront a state concurrently. This is evidenced by the fact that the most conflict-ridden states are also the most underdeveloped. Centralising power to the exclusion of other groups lays the basis for underdevelopment in that it leads to bureaucratic inefficiencies which in turn deepen the perceptions of marginalisation that drive conflict. The only way that devolution can address these multiple and concurrent challenges is if it can ensure efficient service delivery and development, bring about effective economic and political accommodation for all groups, and meaningfully limit central power.

## **2. Research question: How to design devolution to address underdevelopment, internal conflict and abuse of central power**

The multiplicity and concurrency of these challenges calls for an effective response. This thesis seeks to examine whether a state can, through the constitutional design of its devolved system of government, effectively respond to issues of underdevelopment, internal conflict, and limitations on central power. However, states have long been confronted by these three challenges and, in an attempt to address them, they have, consciously or unconsciously, designed systems which respond to these three challenges with varying degrees of effectiveness.

Arguably, a system which effectively pursues the three purposes is one which accommodates the three purposes in its design and implementation. This could be achieved through making trade-offs between conflicting or potentially conflicting design features. In turn, an inquiry into how trade-offs in the design of devolution can be made to accommodate the three purposes should be preceded by understanding the distinct design features of devolution for each purpose. Through an examination of state practice, scholarship on devolution and other literature from institutions involved in devolved governance, one can determine the typical

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<sup>17</sup> Crawford & Hartmann (2008, 21) argue that a possible exception could be Mauritius.

devolution design-features for development, political stability, and limiting central power. Identifying the typical design features of each purpose is an important step towards understanding how a single system can balance the three issues in its design and implementation. The next important step is to understand the nature and relationship between the respective devolution designs, with a view to determining their compatibility. Three main questions inevitably underlie such an inquiry:

- How have states designed, or proposed to design, devolution in order to address underdevelopment, internal conflict and centralisation of power?
- Are there distinctive design features for each of these three purposes?
- If so, are the design features for the three purposes harmonious? If not, can the conflicting aspects (if any) be “traded off” to create a single design that can effectively address underdevelopment and internal conflict as well as limit central power?

### **3. Significance of the study**

Generally, the evidence of development through devolution is weak and unconvincing; the results are even more uncertain in the case of linkages between devolution, managing internal conflict, and limiting central power. Indeed, the very assumptions on which the concepts of devolution and decentralisation are erected are increasingly being questioned. Nevertheless, states continue to devolve power to suit varying purposes and objectives. This unsurprising trend may be explained by the persistence of the challenges identified above and the apparent lack of a visible alternative to devolution of power or decentralisation at this point in time.

In the above circumstances, it would seem that the right question to ask is not whether devolution of power or decentralisation effectively achieves the intended purpose, but rather how devolution can be designed in order to pursue effectively the three main and persistent challenges. This inquiry is undertaken with reference to Kenya, which is in the process of devolving powers to devolved units with an explicit objective of pursuing development, resolving conflict, and limiting central power. As such, this study seeks to facilitate deeper understanding of Kenya’s devolved system of government; in addition, it has potential relevance to other developing states that struggle with underdevelopment, internal conflict, and abuse of central power and which may wish to address these challenges by devolving power.

#### **4. Devolution design in Kenya: the study scope**

This thesis uses the Kenyan devolution design to answer the three research questions identified above. Kenya is a typical developing country, and the three purposes that are the subject of inquiry in this thesis are relevant to it in that it has experienced years of abuse of central power, a problem traceable to the colonial centralised state inherited by successive post-colonial regimes. Centralisation of power was a major contributor to underdevelopment and poverty as a result of a centralised and inefficient bureaucracy. Real or perceived grievances stemming from political and economic exclusion along ethnic lines form the basis of ongoing ethnic and political conflict, with the country having suffered its worst conflict after the disputed 2007 presidential elections.

Kenya adopted a new Constitution in 2010 in what was a clear attempt to address the root causes of its conflict. Through the Constitution, Kenya hopes to address development, facilitate ethnic accommodation, and limit central power. Indeed, the objectives of devolved government in the Constitution are clear that the devolved system of government must pursue development, ethnic accommodation and the limitation of central power. While the three issues are relevant to developing states in general, Kenya is an important reference point for this study because its recently adopted devolution design engages with them explicitly and deliberately.

The Kenyan devolution design is assessed in three main stages. Through an analysis of the country's history of devolved governance, the first stage ascertains the relevance of underdevelopment, internal conflict, and central power abuse to Kenya; as is typical of post-colonial developing African states, the three issues present themselves as both historical and systemic challenges. Second, the analysis turns to the constitutional review process to ascertain whether the three issues informed the deliberations as well as the final devolution design features adopted in the 2010 Constitution. Next, the current Kenyan devolution design is evaluated against the typical institutional design features for pursuit of each of the three purposes. The last stage is an assessment of whether, and in what way, the Kenyan system of devolution accommodates the three purposes in its design in order to facilitate effective pursuit of them.

#### **5. Argument**

State practice and literature suggest that devolution of power can address the main challenges of underdevelopment, internal conflict and abuse of centralised power. However, this thesis advances the argument that the design features of devolved government for these purposes are

not always compatible. Accordingly, while there are complementary and neutral design features in the three designs, trade-offs have to be made between the unique design features in order to ensure the effective pursuit of the three purposes through a single system of devolved government.

Kenya, the case study for this inquiry, confirms the international trend as its major challenges over the last 50 years have been underdevelopment, internal conflict and abuse of central power. As such, development, ethnic accommodation, and the limiting of central power featured prominently throughout the entire constitutional review process as purposes to be pursued by means of devolution of power. To this end, the devolution of state power is one of the central elements of the current constitutional dispensation in Kenya. There are trade-offs made in Kenya's devolution design in order to accommodate the three purposes of devolution. However, the overall result has been that the emphasis falls on development at the expense of conflict resolution and limiting central power.

In the light of the Kenyan case study, the argument in the thesis is developed in the manner described below.

Given that the three purposes are pursued through a common process, namely, the constitutional devolution of power, there is a general and common framework within which variations in design emerge. Indeed, inherent in the process of devolution is the creation of autonomous subnational units that can exercise and control powers independently from the centre. However, what may vary with each purpose are aspects of autonomy, such as the nature, level, and extent of autonomy. Other design aspects that may vary with the purpose of devolution include: the institutional and structural design, fiscal design, and the nature and design of central-local relations.

Effective development through devolution, for instance, requires small but economically viable units for effective participation and accountability. Conflict resolution may require large or small units, depending on the context. Effectively limiting central power, on the other hand, requires large homogenous units with powers and resources. As a result, there is a potential for conflict between these different structural design features and trade-offs may be needed in order to accommodate the three purposes in a single design. Other design aspects that may vary with the purpose relate to the nature and extent of powers exercised by the devolved units, the nature and level of fiscal powers, the design of institutions, and even the nature of relations between the centre and the devolved units.

The distinctive design features of each of the three purposes of devolution reveal a potential for conflict if implemented in a single system. Accordingly, if the three purposes are to be pursued through a single system of devolved government, trade-offs have to be made between the conflicting features in order to accommodate the three purposes. The most significant of the design aspects and compromise thereof is the structure of the devolved units and specifically the size and number of such units. This is because the structure will determine the effectiveness in terms of exercise of powers, and may even determine the nature and effectiveness of relations with the centre. Arguably, the traditional devolution structure composed of the national, regional and local levels is a potential compromise between the three purposes of devolving power. This is because it has regional and local levels, and thus combines structures considered important for the three purposes.

A country may either adopt the “national-regional-local” structure of devolution or choose a different structure. For instance, a country can eliminate the regional level and retain local units only. A country may also establish a new “hybrid level” which is neither regional nor local but a “compromise level” between them. Elimination of a regional level means that typical regional functions are either devolved to the local level or centralised at the national level. On the other hand, where a “hybrid level” is created, regional and local functions are merged in the new “compromise level”. Elimination of a level and the creation of a “hybrid level” can both cause complications, due to the fact that typical regional and local functions may not sit comfortably in another level. Accordingly, unless special circumstances so compel, a state may want to retain or adopt the traditional structure of national, regional and local levels, and make trade-offs within this basic structure.

Nevertheless, regardless of the trade-offs and nature of the final design, the design’s effectiveness or lack thereof may depend very much on factors external to the design. For instance, the lack of political will to make devolution work can negate the effectiveness of even the most perfect design; by same token, political will could make an apparently bad design effective. This means that even after potentially conflicting design features are accommodated in a single system through compromises, effectiveness is not always guaranteed. In practice, effectiveness depends on an array of other context-specific factors.

## **6. Literature survey**

There is a large body of literature worldwide on the institutional design and implementation of devolution for the three purposes. The literature on decentralisation or devolution of power for

development is well developed, mainly by the World Bank, which is the undisputed leader in shaping the development discourse generally. The typical design features are highlighted in the *World Development Report (WDR)*<sup>18</sup> of 1999/2000.<sup>19</sup> Other WDRs, such as those of 2000,<sup>20</sup> 2004<sup>21</sup> and 2011<sup>22</sup> have enhanced those initial design features in order to ensure accountability, local responsiveness and allocative efficiency. Additional relevant literature includes World Bank-commissioned studies such as *Rethinking Decentralization in Developing Countries*,<sup>23</sup> which formed the basis of the 1999/2000 WDR. Other scholars have also supplemented the basic design proposed by the Bank; these include De Visser<sup>24</sup> and Prud'homme,<sup>25</sup> who critique the main assumptions of the World Bank Model. Further literature beyond World Bank material includes UNDP<sup>26</sup> reports and other institutional reports on devolved governance.

Separate, but equally voluminous, is the literature on devolving power for purposes of conflict resolution, a practice rooted in federalism. Accordingly, the works of leading federal theorists such as Watts<sup>27</sup> and Elazar<sup>28</sup> provide a basis for understanding the design features. However, given the ever-blurring unitary-federal dichotomy, there is, in addition, an emerging literature on devolution of power and conflict resolution which is general and not confined to federalism. The main texts include Siegle and O'Mahony<sup>29</sup> as well as the 2010 UNDP study<sup>30</sup> on decentralisation and conflict management.

Literature on devolution design for the explicit purpose of limiting central power is generally underdeveloped. Much of it is also tied to federalism since most federal features are inherently

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<sup>18</sup> Yusuf S *et al* *Development Economics Through the Decades: A Critical Look at 30 Years of the World Development Report* (2009) 2.

<sup>19</sup>World Bank (1999) 107-124.

<sup>20</sup> World Bank *World Development Report 2000/2001: Attacking Poverty* (2000).

<sup>21</sup> World Bank *World Development Report 2004: Making Services Work for Poor People* (2004).

<sup>22</sup> World Bank *World Development Report 2011: Conflict, Security and Development* (2011).

<sup>23</sup> Litvack J, Ahmad J & Bird R *Rethinking Decentralisation in Developing Countries* (1998).

<sup>24</sup> De Visser J *Developmental Local Government: A Case Study of South Africa* (2005).

<sup>25</sup> Prud'homme R 'The Dangers of Decentralization' (1995) 10 *The World Bank Observer* 201-220.

<sup>26</sup> UNDP 'Decentralised governance for development: A combined practice note on decentralization, Local governance and urban/ rural development' (2004).

<sup>27</sup> Watts RL *Comparing Federal Systems* (2008).

<sup>28</sup> Elazar JD *Exploring Federalism* (1987).

<sup>29</sup> Siegle & O'Mahony (2006).

<sup>30</sup> UNDP (2010).

'centre-constraining'.<sup>31</sup> Accordingly, the works of federal theorists such as Saunders,<sup>32</sup> Watts<sup>33</sup> and Baldi<sup>34</sup> were relied on to identify the central devolution design features for limiting central power. However, there is an emerging literature which is not tied to classical federalism, and it includes works by Murray and Simeon,<sup>35</sup> Jeffery<sup>36</sup> and others.

Almost entirely absent is literature addressing the way in which the three purposes are mutually reinforcing or incompatible in devolution design; similarly, there is almost no literature which explicitly examines tensions or conflicts in the respective designs. The literature has developed separately on the three purposes, despite the fact that usually they are intended to be implemented through a single system. This thesis therefore fills an identifiable gap in the literature.

Literature on the Kenyan system of devolution is scarce, given the fairly recent adoption of the structure. While there is abundant literature on decentralisation in the previous dispensation,<sup>37</sup> as well as the constitutional review process,<sup>38</sup> not much is available on devolution in the 2010 Constitution. Ghai and Cottrell<sup>39</sup> analyse the entire Constitution, but while the chapter they devote to the subject of devolution provides important insights, it does not go into adequate detail owing to its general focus. The World Bank report *Devolution without disruption: A*

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<sup>31</sup> Baldi B 'Beyond the federal-unitary dichotomy' working paper, Institute of Governmental Studies, University of California, Berkeley (1999).

<sup>32</sup> Saunders C 'Legislative, executive and judicial institutions: A synthesis' in Le Roy K *et al* (eds) *Legislative, Executive and Judicial Governance in Federal Countries* (2006) 344-384.

<sup>33</sup> Watts (2008).

<sup>34</sup> Baldi (1999).

<sup>35</sup> Murray C & Simeon R 'Promises unmet: multi-level government in South Africa' in Saxena R (ed) *Varieties of Federal Governance: Major Contemporary Models* (2011) 232-260.

<sup>36</sup> Jeffery C 'The Union's place: Scottish-English relations after devolution' in Saxena (2011) 433-446.

<sup>37</sup> Ghai YP & McAuslan JPWB *Public law and Political Change in Kenya* (1970); Oyugi WO 'Local government in Kenya: a case of institutional decline' in Mawhood P (ed) *Local Government in The Third World: The Experience of Tropical Africa* (1993) 109-143; Oyugi WO *Local Government and Development in Kenya* (1978); Smoke P *Local Government Finance in Developing Countries: The Case of Kenya* (1994); Kibua TN & Mwabu G (eds) *Decentralization and Devolution in Kenya: New Approaches* (2008).

<sup>38</sup> Constitution of Kenya Review Commission (CKRC) 'The final report of the Constitution of Kenya Review Commission' (2005); Committee of Experts on Constitutional Review (CoE) 'Final report of the Committee of Experts on Constitutional Review' (2010a); Oyugi WO 'The search for an appropriate decentralisation design in Kenya: historical and comparative perspectives' in Kithure K & Ambani A (eds) *The Anatomy of Bomas: Selected Analyses of the 2004 Draft Constitution of Kenya* (2005) 57-106.

<sup>39</sup> Ghai YP & Cottrell JG *Kenya's Constitution: An Instrument for Change* (2011).

*pathway to a successful new Kenya*,<sup>40</sup> released in late 2012, is arguably the most detailed analysis yet of the Kenyan devolved system. However, in keeping with the World Bank's traditional approach, it focuses mainly on the practical aspects of effective implementation of fiscal issues and does not undertake an analysis of the design. This thesis will thus contribute to an understanding of Kenya's devolved system in general and how it accommodates the three purposes in particular.

## **7. Methodology**

This study relies on available literature to identify the typical devolution design features for the three purposes. For development, the World Bank's *World Development Report* (WDR), an annual publication of the Bank,<sup>41</sup> was the primary reference. The thesis relies specifically on the WDR of 1999/2000, which discusses the central design features of decentralisation for development<sup>42</sup> and subsequent WDRs. Independent studies were also used as a secondary reference for the "World Bank Model". The thesis is also informed by the works of individual scholars who have either elaborated upon the World Bank Model or critiqued the assumptions on which it rests. Other materials relied upon include literature generated by institutions that have a focus on decentralisation/devolution and development. For conflict resolution, there is no universal and coherent design as is the case with development. Accordingly, the thesis draws on literature by federal theorists and other literature on decentralisation/devolution and conflict resolution generally. Likewise, it examines federal theorists and other "non-federal" literature relevant to the question of limiting central power through devolution.

For the Kenyan case study, the thesis relies on the Constitution of Kenya, 2010 to elicit the devolution design. In addition, it draws on national laws, policy papers, government reports and other papers which interpreted or expanded on the constitutional design. The thesis also relies on the scholarly work and institutional reports which has analysed the devolved system of government. For the historical analysis and the Kenyan constitutional review process, the thesis draws on government reports as well as scholarly work analysing the history of decentralisation and the constitutional review process.

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<sup>40</sup> World Bank *Devolution without Disruption: Pathways to a Successful New Kenya* (2012).

<sup>41</sup> Yusuf *et al* (2009) 2.

<sup>42</sup>World Bank (1999) 107-124.

## **8. Delineations and limitations of the study**

This thesis is focused on the primary constitutional design of devolution in Kenya, a focus which limits or delineates the research in three main ways. First, while a raft of legislation has been passed to implement the constitutional design, such laws are referred to in this thesis only insofar as they enhance or limit the basic constitutional design. Second, the research focuses on analysing of the constitutional design of devolution rather than exploring the practical aspects and efficacy of its implementation. Third, at the time of writing, the devolved system of government had not started full operations. Accordingly, the analysis and assessment of the constitutional design is not informed by the actual experience of county governments.

While the thesis makes reference to conflict resolution generally, the discussion of Kenya concentrates on ethnic conflict only. Ethnicity is undoubtedly one of the main drivers of conflict in Kenya, even though it would be an oversimplification to attribute the Kenyan conflict in its entirety to ethnicity alone. Accordingly, while other factors such as religious identity, class, gender, race, and other forms of identity in Kenyan society may have relevance to the conflict, this thesis is limited to conflict in Kenya which is of an ethnic nature.

## **9. Definition of key terms**

The concept of devolution is core to this thesis and the term “devolution” therefore features extensively in the entire thesis. Accordingly, its meaning and application is dealt with comprehensively in the next chapter. However, for purposes of introduction, the term may be defined as the transfer of powers from the centre to existing or new units, with an assured degree of permanence through constitutional entrenchment or framework legislation. The devolved units exercise the powers (normally political, administrative, and financial) with a reasonable degree of autonomy from the centre.

While “devolution” and “decentralisation” both generally refer to the same process of transferring powers from the centre to the subnational level, the nature and degree of autonomy and powers differs. In devolved systems, autonomy and permanence may be secured through constitutional entrenchment. In decentralised systems, however, subnational powers are usually secured through ordinary legislation, executive decree, or other “non-permanent” avenues which make it easier for the centre to recentralise the powers if it so wishes.

## 10. Chapter outline

This thesis is presented in nine chapters including the current introductory chapter. The first part of Chapter 2 examines design features considered essential for development, conflict resolution, and limiting central power, respectively. The second part analyses the relationship between the respective designs, and assesses their compatibility in a single devolved system.

Chapter 3 analyses the relevance of the three purposes to Kenya by evaluating Kenya's history of devolved governance. The chapter traces the path that Kenya has followed from the early days of formal rule in Kenya with regard to devolved governance. The discussion in the chapter as a whole focuses on issues of underdevelopment, ethnic conflict and abuse of central power, issues that are shown to be historical, structural and systemic.

Chapter 4 evaluates the constitutional reform process which led to adoption of the devolved system of government in the current Constitution. The chapter aims at understanding the choices and compromises that were made in arriving at the current devolution design.

Chapters 5, 6, and 7 evaluate the structure and powers of the counties. Chapter 5 focuses on the structure of counties, a focus which includes the boundaries and number as well as the design of the institutions of county governments. Chapter 6 focuses on powers and functions of county governments. Chapter 7 evaluates the fiscal design of county governments. In each of these chapters, the focus is on the three purposes and the compatibility in design.

Chapter 8 evaluates the design of national institutions relevant to devolved governance in Kenya. The chapter basically focuses on the structure and powers of the Senate which represents county governments at the centre. The structure and powers of the Senate are analysed and assessed in terms of the three purposes.

Chapter 9 provides a concluding analysis that synthesises the respective chapter findings and sets them up as building blocks for the final argument. Accordingly, the chapter provides a closing analysis of the Kenyan system and presents overall conclusions about the topic of this research.

## CHAPTER TWO

### THE PURPOSES AND DESIGN OF DEVOLVED GOVERNMENT

#### 1. Introduction

This chapter examines the literature and state practice with regard to the design of devolution for development, conflict resolution and limiting central power.<sup>1</sup> The concurrency of the challenges of underdevelopment, conflict, central power abuse compels states to integrate these three purposes into their devolved systems of governance. Thus, any inquiry into the effectiveness of a devolved system should go beyond institutional design for a particular purpose and instead examine how the entire devolved system of government balances the three purposes in its design.

Accordingly, the objective of this chapter is twofold. First, the typical design features of each of the three purposes are discussed; second, the chapter examines how states accommodate the three purposes in a single design. In particular, after identifying the suggested design features for each purpose, the chapter examines the compromises that can be made in order to accommodate the three purposes in a single system.

The chapter starts with development, which is often the pre-eminent purpose. This is followed by a discussion of the central features of devolution design for conflict resolution. Thereafter, the chapter examines the design features considered necessary to enable devolved units to limit central power. The last part of the chapter examines the compatibility of the three purposes in a single design. Specifically, the last part examines how trade-offs are made between the potentially conflicting design features of the three purposes in order to ensure effective pursuit of the three purposes.

#### 1.1 The problem of definitions

Terms such as “devolution”, “federalism”, “decentralisation”, “deconcentration”, and “delegation” are used throughout this thesis. However, they do not have clear and watertight definitions. The fact that their usage varies across states and time makes it even more difficult to arrive at precise or universal definitions. For different reasons, states eschew terms such as “federalism”

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<sup>1</sup> Dickovic TJ & Riedl RB ‘Comparative assessment of decentralization in Africa: Final report and summary of findings’ Report prepared for the United States Agency for International Development (USAID) (2010) 3-5.

even when their systems of government are federal in everything but name. For instance, South Africa has all the essential features of a federal system and is generally regarded as such by scholars. However, the term “federalism” does not feature in the Constitution and is generally avoided by the government, which regards itself as unitary.<sup>2</sup> South Africa’s “federo-phobia” is traceable both to the widely discredited apartheid policy of creating independent “Bantustans” and to the tensions between groups that wanted federal and unitary government arrangements during negotiations for a democratic South Africa.<sup>3</sup>

### 1.1.1 Federalism

The term “federalism” has no precise meaning, as demonstrated by the scholarly debate on its meaning and usage. It may be used descriptively or normatively. As a descriptive term, “federalism” refers to “a certain category of political institutions”;<sup>4</sup> in its normative use, it refers to the idea or concept (as opposed to a structure) that encompasses “advocacy of multi-tiered government combining elements of shared-rule and regional rule”.<sup>5</sup> This thesis uses the term “federalism” descriptively to refer to “a constitutionally established system with at least two orders of government each of which has some genuine autonomy from each other. The governments at each level are primarily accountable to their respective electorates”.<sup>6</sup> The term “federalism”, or “federation”, as Watts prefers, thus “represents a particular species in which neither the federal nor the constituent units of government are constitutionally subordinate to the other”.<sup>7</sup> This means that all orders of government in a federal system draw their autonomy and powers from the constitution.

More importantly, Watts offers a “federal checklist” of six essential elements that constitute a federal system. First, there must be at least two orders of government, one for the entire federation, another for the constituent units, and all directly accountable to their respective citizenry at the federal and constituent unit levels. Second, autonomy is guaranteed through constitutional allocation of powers, functions and resources. Third, there must be formal

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<sup>2</sup> Steytler N ‘Republic of South Africa’ in Kincaid J & Tarr GA (eds) *Constitutional Origins, Structure and Change in Federal Countries* (2005) 316-319; Murray C ‘Republic of South Africa’ in Le Roy K *et al* (2006) 261.

<sup>3</sup> Steytler N & Mettler J ‘Federal arrangements as a peacemaking device during South Africa’s transition to democracy’ (2001) 31 *Publius: The Journal of Federalism* 93-96.

<sup>4</sup> Watts RL *Comparing Federal Systems* (2008) 8.

<sup>5</sup> Watts (2008) 8.

<sup>6</sup> Anderson G *Fiscal Federalism: A Comparative Introduction* (2010) 1.

<sup>7</sup> Watts (2008) 8.

structures for representation at the centre, normally through a second legislative chamber. Fourth, constitutional amendment, especially on issues affecting powers and functions of any of the orders, must involve a significant proportion of the units. Fifth, there must be a system for resolving disputes either by the judiciary or through the second legislative chamber. Finally, there must be institutions, principles and mechanisms to enhance collaboration between the federal government and the units, especially in respect of shared functions.<sup>8</sup>

Inconsistent state practice in the use of terms such as “federalism” blurs their conceptual clarity especially in concrete and practical situations. For instance, Kenya’s devolved structure is constitutionally based;<sup>9</sup> there is a senate (second chamber) composed of directly elected representatives of counties who represent county interests,<sup>10</sup> and the counties have some degree of political and functional autonomy. The Constitution generally delineates areas of exclusive and concurrent competence for each level, with principles of inter-governmental relations.<sup>11</sup> A constitutional amendment that affects the structure and powers of counties is subject to a national referendum,<sup>12</sup> and courts are empowered to adjudicate intergovernmental disputes.<sup>13</sup> All these features are an essential part of a federal form of government, yet Kenya does not consider itself federal.<sup>14</sup>

### 1.1.2 Decentralisation

The term “decentralisation” is even less precise. Rondinelli *et al* posit that decentralisation “can vary, from simply adjusting workloads within central government organizations, to the divesting of all government responsibilities”.<sup>15</sup> They go on to state that decentralisation can be categorised into four types: deconcentration, delegation, devolution and privatisation.<sup>16</sup> Such a wide definition makes it almost impossible to have even a general understanding of the term. For instance, Rondinelli *et al* consider deconcentration as a form of decentralisation, yet, in their

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<sup>8</sup> Watts (2008) 8.

<sup>9</sup> Chapter 11, Constitution of Kenya, 2010.

<sup>10</sup> Article 96(1).

<sup>11</sup> Article 189.

<sup>12</sup> Article 255 (2).

<sup>13</sup> Article 191 (5).

<sup>14</sup> The constitution avoids use of the term federalism. Furthermore, as Chapter 5 will reveal, Kenya opted out of regional federal-type units and this may be a further indication that it did not want to take the federal route.

<sup>15</sup> Rondinelli DA et al *Decentralization in Developing Countries: A Review of Recent Experience* (1984) 9-10.

<sup>16</sup> Rondinelli *et al* (1984) 10.

own words, it is the mere “shifting of the workload from centrally located officials to staff or offices outside of the national capital”.<sup>17</sup>

The question which then arises is whether the mere establishment of field offices of a central government can be considered as decentralisation. Such a query in turn invites clarification as to whether “decentralisation” is merely a descriptive term which refers to certain institutional arrangements or is indeed a normative concept against which different systems can be tested. Elazar argues that decentralisation implies hierarchy and is thus a pyramid with “gradations of power flowing from the top”.<sup>18</sup> De Visser adds that “if there was no centre, there would be no decentralisation but rather two or more completely separate entities”.<sup>19</sup> Both De Visser and Elazar thus present decentralisation as a normative concept which involves the flow of power from the centre to a lower government or to another agency outside of the absolute control of central government. Using this standard, deconcentration means only the presence of the “centre” in the field as opposed to a flow of power from the centre. It is in this context that Oyugi cautions that the transfer of power, for instance to government parastatals, can hardly be described as decentralisation, especially where such parastatals are under direct central government management.<sup>20</sup>

Delegation is considered a form of decentralisation and generally refers to “the transfer of responsibility for specifically defined functions to structures that exist outside central government ... delegation takes place if a power that originally resides with the central government is being transferred to a subnational government”.<sup>21</sup> However, delegation has also been defined as the transfer of specific functions to semi-autonomous agencies in order that they perform certain public functions on behalf of the central government.<sup>22</sup>

Is decentralisation, then, the same as “non-centralisation”? Elazar argues that they are different concepts: while a government which decentralises can recentralise if it so wishes, a non-centralised system “cannot legitimately be centralized without breaking the structure and spirit of the constitution”.<sup>23</sup> He adds that centralisation and decentralisation “are extremes in the same

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<sup>17</sup> Rondinelli *et al* (1984) 10.

<sup>18</sup> Elazar DJ ‘Federalism vs decentralization: The drift from authenticity’ in Kincaid J (ed) *Federalism* (2011) 83.

<sup>19</sup> De Visser J *Developmental Local Government: A Case Study of South Africa* (2005) 14.

<sup>20</sup> Oyugi WO *Decentralised Development Planning and Management in Kenya: An Assessment* (1990) 2-3.

<sup>21</sup> De Visser (2005) 14.

<sup>22</sup> De Visser (2005) 14.

<sup>23</sup> Elazar (2011) 83.

continuum”, but non-centralisation “represents another continuum altogether”.<sup>24</sup> In his discussion, he refers to the American federal structure as an example of a non-centralised system and criticises scholars who have, in his view, referred erroneously to the American system as an instance of “decentralisation”.<sup>25</sup> While it is relatively easy to measure the flow of power from the centre to the periphery in decentralised systems, Elazar states that such measurement is not easy in non-centralised systems.<sup>26</sup> The states in the American federation are not creatures of the federal government. Instead, both the states and the federal government emanate from the people, as opposed to one from the other. This feature, Elazar argues, makes the American system different from a decentralised system.<sup>27</sup>

Is non-centralisation, therefore, another term for federalism? Elazar describes “contractual non-centralisation” which is characterised by “structured dispersion of power among many centers whose legitimate authority is constitutionally guaranteed” as the principle feature of federal democracy.<sup>28</sup> Thus, federal systems easily fall within non-centralised systems of government. The question which inevitably follows is whether all non-centralised systems are federal. This issue is dealt with below under the definition of “devolution”.

### 1.1.3 Devolution

Rondinelli *et al* classify devolution as falling under the wide definition of decentralisation.<sup>29</sup> De Visser, on the other hand, defines “devolution” as “the location of decision-making power with autonomous subnational governments.”<sup>30</sup> De Visser explains that in devolution, subnational government power is a permanent power and “original”, as opposed to delegation where the same can be withdrawn by the national government. However, he adds that powers devolved need not be entrenched in the constitution because framework legislation can suffice.<sup>31</sup> Some

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<sup>24</sup> Elazar (2011) 83.

<sup>25</sup> Elazar (2011) 82.

<sup>26</sup> Elazar (2011) 83.

<sup>27</sup> Elazar (2011) 82.

<sup>28</sup> Elazar (2011) 82.

<sup>29</sup> Rondinelli *et al* (1984) 10.

<sup>30</sup> De Visser (2005) 15.

<sup>31</sup> De Visser (2005) 15.

scholars equate devolution with “transfer of political power”<sup>32</sup> while others describe devolution as “a more extensive form of decentralization”.<sup>33</sup> Oloo equates “political decentralisation” with devolution.<sup>34</sup>

While a precise and universally-agreed definition is neither possible nor useful, it appears that shared political powers with significant autonomy arrangements between the centre and local units are indeed the defining feature of devolution. Whether or not such a system is federal is a different question. From Watts’ “federal checklist”, federalism or a federation is a “species” with very specific elements that can be tested against a system. For instance, a system where powers are devolved but not provided for in a written constitution does not meet the requirements of a federal system and is therefore not federal.

### **1.1.3.1 Devolution as a process**

The phrase “devolution of powers” can find institutional expression in both federal and non-federal systems. As a process, devolution refers to the creation of federations, especially where a federal system is being created out of an existing polity. It may also refer to the process of establishing decentralised systems of government, particularly where the subnational units enjoy some permanence of power and autonomy from the central government.

### **1.1.3.2 Devolution as a structure: a weak form of federalism?**

States and even scholars have been blamed for the “terminological mess”<sup>35</sup> that has accompanied the use of “devolution” and related terms. In Kenya, the term “devolution” is a political catchphrase.<sup>36</sup> It was used consistently in the entire constitutional reform process and is the term used in the 2010 Constitution. There is no policy articulation on the use of the term, and its origin in Kenya’s political discussions is not clear. However, as the next chapter will

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<sup>32</sup> Nibbering JW & Swart R ‘Giving local government a more central place in development: An examination of donor support for decentralisation’ (2010) 258 (Atelier de capitalisation Efficacité de la décentralisation comme outil de développement local Ségou MALI, juin 2010).

<sup>33</sup> Litvack *et al Rethinking Decentralisation in Developing Countries* (1998) 4-6.

<sup>34</sup> Oloo A ‘Devolution and Democratic Governance: Options for Kenya’ in Kibua TN & Mwambu G (eds) 2008 *Decentralization and Devolution in Kenya: New Approaches* 109.

<sup>35</sup> Suksi M *Sub-State Governance through Autonomy: A Comparative Study of Powers, Procedures and Institutions* (2011) 82.

<sup>36</sup> Juma, D ‘Devolution of power as constitutionalism: The constitutional debate and beyond’ in The Kenyan section of the International Commission of Jurists (ICJ- Kenya) (2008) *Ethnicity, Human Rights and Constitutionalism in Africa* (2008) 37.

show, the term “federalism” is widely associated with the semi-federal structure in the Independence Constitution. Also known as *Majimbo*,<sup>37</sup> the regional system of government at independence was widely portrayed as promoting ethnic balkanisation. Thus any “federal talk” in the review process was frowned upon. This may well be the reason why the politically neutral term “devolution” was adopted. Indeed, Kenya meets all the formal elements in Watts’ checklist but prefers the term “devolution” to describe its multi-level government structure.

Kenya is not the only country finding itself in a terminological muddle. The United Kingdom (UK) uses the same term to define its process of gradual transfer of functions to Scotland, Northern Ireland and Wales.<sup>38</sup> However, unlike Kenya, the process in the UK is a gradual one with no clear end in terms of both process and structure.<sup>39</sup> Furthermore, the absence of a formal, written constitution in the UK, through which such a process may be entrenched, further complicates the nomenclature. Many other states have adopted systems which look federal in character but do not meet all the elements of a federal system. These include countries like Italy and Spain. The situation has led to the rise of terms such as “quasi-federal”, “partially federal”, “regionalisation”, “hybrid structure” and “weak-federalism”, among others.

A notable feature is that most of these states are strongly decentralised, to the extent that they may even be classifiable as non-centralised. Gamper points out that “strongly decentralized states, such as Spain and, more recently, Italy and the United Kingdom, nearly approach the – very vague and controversial – standard of what is called a federal system”.<sup>40</sup> In some cases, autonomy is constitutionally guaranteed but constitutional overrides place the central government at a higher position. It is submitted that such systems can be referred to simply as “devolved”.

## 2. Decentralisation for development

As the central concern for most or all developing states, development is the basis and main objective of devolving power. Rising inequalities, uneven development and the promise of more

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<sup>37</sup> Ghai & McAuslan (*Public law and Political Change in Kenya* (1970, 178) explain that “*Majimbo* is a Swahili word which means an ‘administrative unit’ or ‘region’, and is generally used to refer to those provisions of the Constitution which established the [independence] regional structure”.

<sup>38</sup> Jeffery C ‘The Union’s place: Scottish-English relations after devolution’ in Saxena R (ed) *Varieties of Federal Governance: Major Contemporary Models* (2011) 433-435.

<sup>39</sup> Jeffery (2010) 433-435.

<sup>40</sup> Gamper A ‘Austrian federalism and the protection of minorities’ in Tarr GA *et al* (eds) *Federalism, Subnational Constitutions and minority rights* (2004) 69, cited in Suksi (2011) 82.

equitable development through decentralisation inform the enthusiasm for decentralisation. This section discusses decentralisation design features considered essential for effective decentralised development, but, before doing so, the meaning and concept of development, and its link to decentralisation, is discussed. While the term “devolution” represents a broader scheme of distribution of power in multi-level governance, most of the developments in the pursuit of subnational development have taken place in the context of decentralisation as defined by Elazar. Thus, the discussion in this section will use the term “decentralisation”, while the term “devolution” will be used only in the appropriate context.

## 2.1 Development: an evolved concept and meaning

There is no universally accepted definition of the term “development”, partly because, throughout history, varying factors have been used to define and refine the concept. The Industrial Revolution in Europe between the second half of the 18<sup>th</sup> century and the early part of the 20<sup>th</sup> century,<sup>41</sup> when the state played a dominant role in rapid industrialisation, marks the formal beginnings of the concept of “development”.<sup>42</sup> The failure of banks during the Great Depression strengthened the resolve of states to lead development.<sup>43</sup> However, the state-led development model which was introduced in post-colonial states from the early 1940s<sup>44</sup> failed as a result of a weak industrial base.

Despite growth in some developing states, rising poverty levels made institutions such as the World Bank start to focus in the mid-1970s on poverty alleviation in the development discourse.<sup>45</sup> However, this approach imputed a paternalistic role to the state in which its peoples were seen as passive recipients of development.<sup>46</sup> Further changes introduced in the 1980s through structural adjustment programmes – which were characterised by cuts in public expenditure and the “thinning” of government – did not yield any significant change.<sup>47</sup>

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<sup>41</sup> Yusuf S *et al* *Development Economics through the Decades: A Critical Look at 30 years of the World Development Report* (2009) 3.

<sup>42</sup> Yusuf *et al* (2009) 4.

<sup>43</sup> Yusuf *et al* (2009) 6.

<sup>44</sup> Yusuf *et al* (2009) 6.

<sup>45</sup> Yusuf *et al* (2009) 21.

<sup>46</sup> Yusuf *et al* (2009) 22.

<sup>47</sup> Yusuf, *et al* (2009) 24.

Thus, from around 1995, the World Bank sought to influence the discourse on development. With civil society as a partner in the process,<sup>48</sup> it encouraged states to work directly with citizens for sustainable development.<sup>49</sup> It is during this period that financial and administrative decentralisation, urbanisation and localisation were seen as some of the major global forces shaping the concept of development.<sup>50</sup> The World Bank's World Development Reports (WDRs) of the years 2004, 2006 and 2007 emphasised "pro-poor, services-led, redistributive and participatory development".<sup>51</sup> The concept of sustainable "human development", promoted by the United Nations Development Programme's (UNDP) human development index (HDI),<sup>52</sup> sought to place people at the centre of the development process: people were increasingly seen as involved in a participatory and transformative process which not only focuses on material growth but also the sustainable well-being of all human beings.<sup>53</sup>

The concept of "development" was thus expanded to include factors such as participatory and sustainable development. In this expanded sense, people are placed at the centre of the process, not only as beneficiaries but as active partakers who make real choices which in turn influence development.<sup>54</sup> De Visser identifies three main features of the redefined concept of "development": material element, choice and equity. "Material element" refers to the tangibles brought about by the process of development.<sup>55</sup> "Choice" refers to the opportunity that people have to make decisions in order to satisfy their needs, and it recognises that inherent human dignity entitles one to make decisions on matters that concern one's personal and collective development.<sup>56</sup> The third element, "equity", addresses collective well-being; that is, development should enable everyone to benefit equally from a redistribution effect extending to the most vulnerable groups in the society, including future generations.<sup>57</sup>

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<sup>48</sup> Yusuf, *et al* (2009) 35.

<sup>49</sup> Yusuf, *et al* (2009) 34.

<sup>50</sup> Yusuf, *et al* (2009) 35.

<sup>51</sup> Yusuf, *et al* (2009) 36.

<sup>52</sup> UNDP 'Decentralised Governance for Development: A Combined Practice Note on decentralization, Local Governance and Urban/ Rural development' (April 2004) 5 explains that "the concept of human development is development that is pro-poor, pro-women, pro-environment and taking into consideration the long term".

<sup>53</sup> De Visser (2005) 10.

<sup>54</sup> De Visser (2005) 10.

<sup>55</sup> De Visser (2005) 10.

<sup>56</sup> De Visser (2005) 10.

<sup>57</sup> De Visser J (2005) 12.

## 2.2 Decentralisation: an institutional expression of the idea of development

The White Paper on Local Government in South Africa defines a developmental local government as “a local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives”.<sup>58</sup> This definition represents the refined concept of development and indicates the role that decentralisation can potentially play in the realisation of development.

Decentralisation is said to offer an institutional and practical avenue through which the vital components of development can be achieved. First, it is argued that decentralisation enhances the “quality of representation” which enables people to participate more effectively in development;<sup>59</sup> in essence, decentralisation is said to strengthen democracy by enhancing the government’s institutional ability to determine and respond to people’s choices.<sup>60</sup> Through decentralised institutions, it is argued, minorities and vulnerable members who may otherwise have a weak or non-existent voice at the national level are more effectively represented, thereby enhancing participation in development.<sup>61</sup>

Second, decentralisation is said to improve institutional efficiency. It is argued that decentralisation relieves the centre of the burden of planning, hence reducing the central bureaucracy that often leads to inefficiency. Decentralised units are seen as better able to respond to local needs than the centre.<sup>62</sup> Furthermore, it has been argued that competition between the decentralised units enhances overall efficiency and contributes to overall development.<sup>63</sup> If well designed, decentralisation can address inequalities and ensure equitable development.<sup>64</sup> Decentralisation can thus be viewed as the institutional expression of the willingness of a state to work towards effective realisation of the refined concept of development. This is because decentralisation offers an avenue through which the concept of development can be institutionally pursued.

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<sup>58</sup> Department of Provincial and Local Government (DPLG) ‘The white paper on local government’ (1998) 22.

<sup>59</sup> World Bank (1999) 111; De Visser (2005) 19.

<sup>60</sup> De Visser (2005) 20.

<sup>61</sup> UNDP *Marginalised minorities in development planning: A UNDP resource guide and toolkit* (2010) 52.

<sup>62</sup> World Bank (1999) 107.

<sup>63</sup> Litvack *et al Rethinking Decentralization in Developing Countries* (1998) 6-7.

<sup>64</sup> World Bank (1999) 110-111.

However, decentralisation has its critics, who attack the assumptions above on which decentralised development is based. Indeed, even proponents of decentralisation acknowledge that successful decentralisation depends very much on its design.<sup>65</sup> The potential pitfalls of decentralisation are dealt with later.

### **2.3 Designing decentralisation for development: the World Bank Model**

The idea of development through decentralisation is promoted by institutions such as the World Bank,<sup>66</sup> the UNDP<sup>67</sup> and regional organisations, such as, the European Union (EU)<sup>68</sup> and the Organisation for Economic Cooperation and Development (OECD).<sup>69</sup> While these organisations promote decentralisation, both developing and developed states are increasingly decentralising power.<sup>70</sup> Indeed, Rondinelli, Nellis and Cheema argue that “ultimately ... decentralisation is an ideological principle, associated with objectives of self-reliance, democratic decision-making and popular participation in government, and accountability of public officials to citizens”.<sup>71</sup> Thus, even the without benefits of development and growth, decentralisation is in itself a desirable political objective which is pursued by most states.

Not surprisingly, the World Bank has taken a keen interest in decentralisation and development,<sup>72</sup> and is arguably the leader in the thinking and shaping of the design of decentralisation for development.<sup>73</sup> This section analyses the design features proposed by the World Bank to achieve decentralised development. The World Bank’s keen interest is driven by the potential role that decentralisation can play with regard to matters such as fiscal and financial development, service delivery, poverty alleviation, institutional capacity-building, and infrastructure investment, all of which are major concerns for the World Bank in its work with its

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<sup>65</sup> World Bank (1999) 107.

<sup>66</sup> Through the Bank’s studies and reports, mainly through the *World Development Reports* series, issued by the Bank; see especially the development reports of 1997, 199/2000, 2004, 2006 and 2007. See also Yusuf *et al* (2009) for a discussion on the impact of the WDRs.

<sup>67</sup> UNDP (2004) 8-17.

<sup>68</sup> See generally European Union (EU) ‘Towards an EU approach to democratic local governance, decentralisation and territorial development’ Background paper: Project No. 2007/ 147439 – Version 1.

<sup>69</sup> See generally OECD ‘Lessons Learned on Donor Support to Decentralisation and Local Governance’ (DAC Evaluation series) (2004).

<sup>70</sup> Oloo (2008) 105-106.

<sup>71</sup> Rondinelli *et al* (1983) 8.

<sup>72</sup> Litvack *et al* (1998) 1.

<sup>73</sup> See generally Litvack *et al* (1998).

client governments.<sup>74</sup> How decentralisation influences or affects these factors is therefore of core interest to the Bank.

On the basis of its extensive experience with governments, the World Bank proposes what can be termed a coherent design meant to facilitate development in the context of multi-level governance.<sup>75</sup> First, the design deals with fiscal relations between levels of government.<sup>76</sup> Known as “the fiscal federalist model”, it basically entails allocation of separate fiscal and financial responsibilities between different spheres of government but is geared towards a common fiscal policy.<sup>77</sup> Second, the World Bank proposes a political and institutional design with the objective of enabling different levels of government to facilitate local and overall development.<sup>78</sup> The pursuit of a common objective within the differentiated institutions and functions is a key feature of the model. While political and institutional design is an essential part of the model, this came much later: the Bank initially concentrated on the analysis of economic factors, while political and institutional relations were at the periphery of its concerns with regard to development.<sup>79</sup>

The period 1986-2001 saw the Bank support decentralisation programmes in 74 developing countries, mainly through direct funding and technical and strategic research support.<sup>80</sup> The Bank’s interventions also included support for sectoral decentralisation strategies<sup>81</sup> as well as loans both to national and subnational governments to support decentralisation.<sup>82</sup> However, due to the multifaceted nature of decentralisation, many other institutions have also been involved in various aspects of decentralisation.<sup>83</sup>

The World Bank influences decentralisation and development policy mainly through<sup>84</sup> the *World Development Report*, an annual publication of the Bank.<sup>85</sup> From their first publication in 1978,

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<sup>74</sup> Litvack *et al* (1998) 2.

<sup>75</sup> World Bank (1999) 107-124; World Bank (1997) 111-130; World Bank (2000) 106-115.

<sup>76</sup> World Bank (1999) 114.

<sup>77</sup> World Bank (1999) 114.

<sup>78</sup> World Bank (1999) 111-114.

<sup>79</sup> See Easterly W ‘The indomitable in pursuit of the inexplicable: The World Development Reports’ failure to comprehend economic growth despite determined attempts’ in Yusuf *et al* (2009) 121-130.

<sup>80</sup> Litvack *et al* (1998) 1.

<sup>81</sup> Litvack *et al* (1998) 1.

<sup>82</sup> Litvack *et al* (1998) 1.

<sup>83</sup> Litvack *et al* (1998) 1.

<sup>84</sup> See generally Litvack *et al* (1998); Yusuf *et al* (2009).

<sup>85</sup> Yusuf *et al* (2009) 1-47.

the reports have had, and continue to have, a significant impact on the way governments, institutions, scholars and practitioners approach development.<sup>86</sup> Specifically, the WDR of 1999/2000 laid down the basic principles of decentralisation for development, and these have been elaborated in subsequent WDRs such as those for 2004, 2006 and 2007.<sup>87</sup> While the WDR is the primary source relied on for the model, this thesis also makes reference to other “secondary sources” of the model, such as the independent Bank-commissioned studies that influence the WDRs.<sup>88</sup>

However, the Bank seems to be cautious in the way it presents the decentralised development model. For instance, while it promotes decentralisation, it categorically states that decentralisation “in itself is neither good nor bad” for development.<sup>89</sup> Decentralisation is, in most cases, presented as a solution to underdevelopment, but the World Bank sees it not as a solution but an alternative to other approaches to development. As such, it cautions that effective decentralisation only happens where the local context is factored into its design and implementation.<sup>90</sup> Thus, even as the Bank sets forth the essential features of decentralisation for development, it exonerates itself from “bad implementation” that fails to take into account the specific context of application.

### **2.3.1 Fiscal design in multi-level governance: the ‘fiscal federalist’ model**

While the Bank urges caution in decentralisation design,<sup>91</sup> the most important aspect of the design seems to be the allocation functions and responsibilities. State experience with decentralisation reveals that poorly allocated functions may lead to a fiscal crisis, even the collapse of a country’s financial system.<sup>92</sup> As such, functions should be allocated optimally. Following this principle, the Bank lists functions that should ideally be performed by the centre and those that should be decentralised.

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<sup>86</sup> Yusuf *et al* (2009) 1-47.

<sup>87</sup> Yusuf *et al* (2009) 36.

<sup>88</sup> For instance, Litvack *et al* (1998) 1; Yusuf *et al* (2009) 36, and other independent World Bank-commissioned studies, individual scholars, development institutions and sources that expand aspects of the traditional World Bank model for decentralised development.

<sup>89</sup> World Bank (1999) 107.

<sup>90</sup> World Bank (1999) 107.

<sup>91</sup> World Bank (1999) 107.

<sup>92</sup> World Bank (1999)114.

The 1999/2000 WDR outlines the general features and principles of the model,<sup>93</sup> which relate to four main areas: expenditure responsibilities, assignment of revenue-raising functions, intergovernmental transfers, and subnational borrowing.<sup>94</sup> Effective design and implementation of these four elements should, according to the Bank, result in redistribution of income and resources, equitable distribution, efficient service delivery, and promote macroeconomic stability.<sup>95</sup>

### **2.3.1.1 Assignment of functions: principles and rationale**

The guiding principle in the allocation of functions, is that a function which is national in nature and cuts across decentralised units is best performed by the centre.<sup>96</sup> This is because of the economies of scale attached to such an approach. By applying this standard, many services currently performed by decentralised units can also be performed by the centre due to economies of scale. However, despite the economic advantage of the centre providing services on a large scale, a balance has to be struck between providing public goods and services uniformly and economically, on the one hand, and ignoring or responding to local preferences, on the other.<sup>97</sup> It is for this reason that the Bank proposes that functions whose utility is national and subject to low variability should be at the centre, while functions with variable local preferences should be decentralised.<sup>98</sup>

Typical national functions identified by the Bank are “national defense, external relations, monetary policy, or the preservation of a unified national market”.<sup>99</sup> The “costs of economic stabilization and redistribution” should also remain with the centre.<sup>100</sup> The World Bank identifies functions such as “basic health and education, street lighting and cleaning, water, sewerage and power, public markets and refuse collection, major transport networks and land development for business and residential purposes” as ones commonly performed by local governments.<sup>101</sup> The kind of functions performed by local governments can, according to the Bank, substantially

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<sup>93</sup> World Bank (1999) 107-187.

<sup>94</sup> World Bank (1999) 115-121.

<sup>95</sup> World Bank (1999) 107.

<sup>96</sup> World Bank (1999) 115.

<sup>97</sup> World Bank (1999) 115.

<sup>98</sup> World Bank (1999) 115.

<sup>99</sup> World Bank (1999) 115.

<sup>100</sup> World Bank (1999) 115.

<sup>101</sup> World Bank *World Development Report 1988* (1988) 157.

contribute to raising living standards and growth.<sup>102</sup> Local services have the potential to improve people's lives, and if decentralised, the potential of such services to enhance people's lives forms a basis for the people to hold their local governments to account, thereby promoting democratic accountability – another key feature of the World Bank Model.<sup>103</sup>

Citing the poor example of South Africa, the World Bank advises that clarity in allocation of roles is important. Vaguely defined joint functions may lead to neglect of essential services as there is no clear actor, and, in most cases, local governments ignore such functions in the hope that national government will take care of them.<sup>104</sup> The Bank adds that “without clarity and an appropriate regulatory framework, there can be no accountability”.<sup>105</sup> An effective design is thus one in which functions are well defined within a regulatory framework that enhances clarity and cohesiveness.<sup>106</sup>

### **2.3.1.2 Assignment of taxes and other revenue raising powers and functions**

Such “local context” considerations are also reflected in the World Bank's proposals regarding the assignment of fiscal functions in multi-level governance. Thus, while the ideal situation is for each level of government to raise its own revenue,<sup>107</sup> the broader context cannot allow such an approach. For instance, a local government's revenue is only as good as that government's tax base.<sup>108</sup> Disparities within decentralised units, especially in developing states where the revenue base is “thin”, necessitate a differentiated approach taking these disparities into account.<sup>109</sup> Indeed, the World Bank model deliberately makes decentralised units dependent on the centre so as to enable the latter to address equity concerns.<sup>110</sup>

Second, an argument equivalent to “local versus national functions” is made with regard to taxes. The World Bank proposes that services whose “tax burden” is local, such as local infrastructure or property taxes, should be allocated to decentralised units.<sup>111</sup> Indirect taxes such as Value Added Tax (VAT), whose incidence or burden may be outside the local jurisdiction,

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<sup>102</sup> World Bank (1999) 115.

<sup>103</sup> World Bank (1999) 117.

<sup>104</sup> World Bank (1999) 115.

<sup>105</sup> World Bank (1999) 115.

<sup>106</sup> World Bank (1999) 123.

<sup>107</sup> World Bank (1999) 117.

<sup>108</sup> World Bank (1999) 117.

<sup>109</sup> World Bank (1999) 117.

<sup>110</sup> World Bank (1999) 117; Litvack *et al* (1998) 12.

<sup>111</sup> World Bank (1999) 117.

should be allocated to national government.<sup>112</sup> Litvack *et al* simplify the “tax burden” concept by stating that tax on movable and immovable factors is appropriate for national and local taxation, respectively.<sup>113</sup> Furthermore, “redistributive” taxes (such as those on wealth and personal income), taxes vulnerable to economic fluctuation or taxes imposed to achieve national objectives should also be national taxes.<sup>114</sup>

However, the Bank cautions that this rule is not absolute. At all times, the central government should be in control of major taxes. Such control is a tool for fiscal management, and it also minimises an unnecessary increase in public debt as a result of national borrowing to finance functions.<sup>115</sup> Apart from considerations of fiscal prudence, the World Bank observes that taxes raised locally form the basis for local communities to hold their respective local governments to account. It is for this reason that the Bank further advises that local taxes should be spent on local issues in order to strengthen local accountability.<sup>116</sup> In South Africa, property ratepayers use the payment of such rates to demand services from their municipalities.<sup>117</sup>

### **2.3.1.3 Intergovernmental transfers**

Decentralised units are mostly designed in such a way that not all of their revenue needs are met locally.<sup>118</sup> This makes intergovernmental transfers a key factor in the effectiveness of subnational governments.<sup>119</sup> Considering the fundamental role of transfers, the Bank proposes three factors relevant to the design of transfers: the amount to be transferred, the criteria for sharing funds, and the type or nature of conditions imposed on the use of intergovernmental transfers.<sup>120</sup>

Bearing in mind the central role of local taxes with respect to accountability, the Bank advises that the size of the transfer should not be so large as to eliminate the need for local taxes.<sup>121</sup> It is in this context that the Bank advises that local taxes should, as far as possible, fund exclusively

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<sup>112</sup> World Bank (1999) 117.

<sup>113</sup> Litvack *et al* (1998) 11.

<sup>114</sup> Litvack *et al* (1998) 11.

<sup>115</sup> World Bank (1997) 124; World Bank (1999) 111.

<sup>116</sup> World Bank (1999) 117.

<sup>117</sup> See generally, Community Law Centre (CLC) ‘The withholding of rates and taxes in five local municipalities’ 15 November 2010.

<sup>118</sup> World Bank (1999) 117; Litvack *et al* (1998) 12.

<sup>119</sup> World Bank (1999) 117.

<sup>120</sup> World Bank (1999) 117-118.

<sup>121</sup> World Bank (1999) 117.

local functions.<sup>122</sup> In practice, however, this rarely happens, and the Bank recommends that where transfers are made to replace local taxes, the amount should be equivalent to the “lost taxes” and, in the interests of local accountability, should not have centrally-imposed conditions attached to it.<sup>123</sup>

Second, transfers are the main avenue for addressing equity concerns, and the design of central transfers should reflect this.<sup>124</sup> Inequalities are, generally, as much a reality as they are a perception. Thus, efforts to address equity concerns and redistribution should deal with both the perception and the reality: the Bank states that “transfers should be determined as openly, transparently and objectively as possible”.<sup>125</sup> In this regard, Litvack *et al* argue that transparency and objectivity can be enhanced by an independent body such as a Grants Commission dedicated to determining grants.<sup>126</sup> Objectivity and transparency in transfers are enhanced by pre-determined and agreed-upon rules that minimise “uncertainty and bargaining”.<sup>127</sup>

Apart from equity and redistribution concerns, national governments also use transfers to regulate local expenditure through “earmarking transfers or disbursing them as matching grants”.<sup>128</sup> However, in all cases, transfers form the backbone of local government finances and the basis for the performance of functions. The World Bank thus cautions that transfers should be stable and predictable to allow stability in local planning and budgeting processes.<sup>129</sup>

#### **2.3.1.4 Subnational borrowing**

Ideally, decentralised units should freely seek loans from financial institutions. However, the impact on a country’s fiscal and macro-economic policy of such a laissez-faire approach to local government calls for regulation.<sup>130</sup> The World Bank experience with states shows that local governments may borrow in the hope that central government will pay in case of default.<sup>131</sup> In other cases, the Bank observes that reckless local borrowing and spending increases public

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<sup>122</sup> World Bank (1999) 117.

<sup>123</sup> World Bank (1999) 118.

<sup>124</sup> World Bank (1999) 117.

<sup>125</sup> World Bank (1999) 118.

<sup>126</sup> Litvack *et al* (1998) 12.

<sup>127</sup> World Bank (1999) 118.

<sup>128</sup> World Bank (1999) 117.

<sup>129</sup> World Bank (1999) 118; Litvack *et al* (1998) 13.

<sup>130</sup> World Bank (1999) 118.

<sup>131</sup> World Bank (1999) 118.

debt, as illustrated by the experience of Mexican and Argentine provinces.<sup>132</sup> States have reacted differently: some have chosen to control borrowing, while some are indifferent.<sup>133</sup> For its part, the Bank proposes control but with a further caveat: administrative authorisation, borrowing limits and direct controls not only stand to aggravate a highly politicised process in which decentralised units are pitted against the centre, but, in addition, do not sit well with the idea of decentralisation.<sup>134</sup> Accordingly, the Bank advises that, first, there must be “a credible “no bailout” pledge by the central government”,<sup>135</sup> and that, second, central government should curb expenditure by local governments with what are called “hard budget constraints” in order to avoid the identified consequences of uncontrolled spending.<sup>136</sup>

### **2.3.2 Political and institutional design for decentralised development**

The design features regarding fiscal and financial functions discussed above can be described as simple, objective, and straightforward. In practice, however, fiscal and financial functions are carried out in politically charged environments pitting national and local political and institutional actors against each other. In some cases, the effect of this political and institutional interaction negates the very basis and rationale for the fiscal federalist model. It is in cognisance of this fact that the World Bank later developed proposals on how political and institutional relations can enhance realisation of the objectives behind the model.

Accordingly, the first concern of the Bank is a “coherent” set of rules to guide political and institutional relations.<sup>137</sup> Citing the experience of China, the Bank remarks that “informal, negotiation-based decentralization is difficult to manage”.<sup>138</sup> The Bank ties the need for rules to a broader culture of constitutionalism.<sup>139</sup> Due to the unpredictable way in which institutional and political relations unfold, it is sometimes in order to let rules develop naturally. However, the Bank sees the position of local governments vis-a-vis the centre as a potentially weak one, often to the disadvantage of the former. In this regard, the Bank concludes that explicit rules can enable “subnational governments to coordinate a defense against an overassertive central

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<sup>132</sup> World Bank (1999) 124.

<sup>133</sup> World Bank (1999) 120.

<sup>134</sup> World Bank (1999) 120.

<sup>135</sup> World Bank (1999) 120.

<sup>136</sup> World Bank (1999) 124.

<sup>137</sup> World Bank (1999) 112.

<sup>138</sup> World Bank (1999) 112.

<sup>139</sup> World Bank (1999) 112.

government”.<sup>140</sup> The rules should be “explicit, stable and self-reinforcing” in nature and character.<sup>141</sup>

Of course, the goals of the design of political and institutional relations are to improve institutional efficiency,<sup>142</sup> accountability, local responsiveness,<sup>143</sup> and competitiveness,<sup>144</sup> all of which resonate with the objectives of the fiscal federalist model. Indeed, and as observed earlier, institutional relations are meant to augment the objects of fiscal design. The design proposals put forth by the Bank can be summarised into three broad areas: division of political powers, the design of the institutions and functions, and electoral rules and other institutional and political arrangements that enhance citizen interaction with democratic representatives.<sup>145</sup>

### **2.3.2.1 Levels, number and size, and structure of decentralised units**

A number of factors influence the size and number of decentralised units as well as the number of levels in a decentralised system. These include ethnicity, religion or other identity factors (which the Bank refers to as the “political make-up”), and even factors such as geographical features.<sup>146</sup> However, while the “political make-up” varies, the World Bank identifies cost as an overriding factor<sup>147</sup> even in developed countries.<sup>148</sup> Decentralised units which are too large may lose important features such as responsiveness and overall efficiency.<sup>149</sup> On the other hand, tiny units, especially in developing states, may exhaust the limited resources through administrative costs.<sup>150</sup> Despite this, the Bank notes a trend to increase local governments even in very poor countries, a trend the Bank attributes to “block grants” which provide incentives for creating more units.<sup>151</sup>

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<sup>140</sup> World Bank (1999) 112.

<sup>141</sup> World Bank (1999) 112.

<sup>142</sup> World Bank (1999) 108.

<sup>143</sup> World Bank (1999) 108.

<sup>144</sup> World Bank (1999) 109.

<sup>145</sup> World Bank (1999) 112.

<sup>146</sup> World Bank (1999) 115.

<sup>147</sup> World Bank (1999) 115.

<sup>148</sup> World Bank (1999) 115.

<sup>149</sup> The World Bank (1999, 115) cites as an example the local government of Midnapur in India, which, with a population of 8.3 million in 1999, is considered too large.

<sup>150</sup> The World Bank (1999, 115) also cites the local governments of Armenia, Czech Republic, Latvia and the Slovak Republic, which serve less than 4000 people and draw a huge part of their resources for administrative costs, as too small.

<sup>151</sup> World Bank (1999) 115.

While the Bank does not state the ideal number of levels in a decentralised system, its extensive literature emphasises the importance of decentralisation to “the local level”. The Bank justifies the existence of the local level as necessary for effective participation, responsiveness, poverty alleviation and local development.<sup>152</sup> Thus, the local level, as opposed to higher levels in decentralisation, is a more appropriate avenue to realise the benefits of decentralised development as espoused by the Bank. Indeed, a critical part of the Bank’s literature is dedicated to making the local level (as opposed to the regional level) effective for development. While the Bank makes brisk reference to the role of the “meso-level” of government (states, provinces or regions), this has almost always been in relation to the efficiency and effectiveness of the local level.

### **2.3.2.2 Powers and functions of decentralised units**

The kind of powers and functions decentralised to devolved units should, if properly exercised, lead ideally to the achievement of the objectives discussed above and serve the broader purpose of decentralisation. According to the Bank, the clear delineation of decentralised powers and functions is again key; the lack thereof can lead to inefficiency due to the absence of a clear actor.<sup>153</sup> Moreover, the powers and functions should be relevant to the developmental needs of the local community.<sup>154</sup> In complementing this essential feature, De Visser aptly states that “if local governments would be empowered only in areas that have little or no impact in development such as for example, dog licences or animal burial places, the developmental potential for local governments is negated”.<sup>155</sup> Furthermore, even where local developmental functions are generally agreed upon, the powers should still be sensitive to the local context, for instance, its rural/urban nature.<sup>156</sup>

While the same kinds of services, for instance, are needed in urban areas and rural areas, the manner or conditions of delivery may differ. For instance, refuse removal, piped-water supply and urban-type housing projects may not be appropriate for far-flung rural-based communities. Indeed, Prud’homme terms as “absurd” a system that treats “decentralization to cities just like decentralization to villages”.<sup>157</sup> Litvack *et al* also observe that large metropolitan areas can have

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<sup>152</sup> World Bank (2000/ 2001) 106-110.

<sup>153</sup> World Bank (1999) 115.

<sup>154</sup> World Bank (1999) 112-113.

<sup>155</sup> De Visser (2005) 40.

<sup>156</sup> World Bank (1997) 122.

<sup>157</sup> Prud’homme (1995) 214.

the advantage of economies of scale if they manage large regional services such as transport and rail infrastructure.<sup>158</sup>

These observations may point to some form of asymmetry with regard to powers and functions. However, the defining goal of the asymmetry is not to depict some devolved units as less important or less autonomous. Instead, this is an exercise which takes into account differences in reality while building a coherent decentralised system.<sup>159</sup>

Lastly, while clearly defined powers and functions are important, equally important is the final authority to make decisions in the exercise of those powers.<sup>160</sup> De Visser describes this as the “final decision-making power”, one which entails having “the final say” and “the absence of undue interference”.<sup>161</sup> The final authority is normally exercised through laws, resolutions and regulations meant to ensure performance of functions.<sup>162</sup> The powers should be vested in the respective organs and include executive decision-making with regard to the functions so allocated.<sup>163</sup>

During transition to decentralised governance, appropriate powers, staff and resources should be concurrently deployed to local units in order to build an effective decentralised system.<sup>164</sup> However, the Bank advises that, during transition, the full decentralisation of functions may be delayed until the centre has the necessary and effective controls and the units have developed sufficient capacity.<sup>165</sup> This is because an incompetent administration may pose a challenge to “even a well-meaning political team”.<sup>166</sup> The central government should offer technical support to enable local units to develop the necessary capacity.<sup>167</sup>

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<sup>158</sup> Litvack *et al* (1998) 23-25.

<sup>159</sup> Litvack *et al* (1998) 23.

<sup>160</sup> World Bank (1997) 120-121.

<sup>161</sup> De Visser (2005) 40.

<sup>162</sup> World Bank (1999) 115.

<sup>163</sup> World Bank (1999) 115.

<sup>164</sup> World Bank (1999) 122.

<sup>165</sup> World Bank (1997) 128.

<sup>166</sup> World Bank (1999) 122.

<sup>167</sup> World Bank (1999) 122.

### **2.3.2.3 Fiscal autonomy**

The World Bank states that, apart from having a power to decide on what priorities to address, “local authorities need to have enough fiscal control to plan their activities”.<sup>168</sup> In essence, this power completes or actualises the “final say” highlighted above. Granted, fiscal autonomy and the final decision-making power form an effective tool to match local needs and preferences with available resources, and enhance allocative efficiency.<sup>169</sup> As a critical part of the local government finance depends on central government transfers, local financial autonomy is secured mainly through guaranteed transfers but also through powers to raise revenue locally or other means.<sup>170</sup> However, fiscal autonomy is equally subject to limits, such as regulations considered necessary to enhance and maintain fiscal discipline.<sup>171</sup>

### **2.3.2.4 Political accountability**

While final decision-making powers and fiscal autonomy enable local governments to act, political accountability completes the chain by allowing local communities to determine how the powers and resources are used.<sup>172</sup> As a yardstick for measuring accountability, the Bank uses the ability of poor and vulnerable sections of the local community to hold the local administrative and political representatives accountable.<sup>173</sup> Furthermore, the Bank calls for more than one channel of political accountability to achieve effective accountability.<sup>174</sup> The main channels of accountability include local elections<sup>175</sup> as well as other public participation avenues.<sup>176</sup>

Ideally, the Bank argues, periodic elections give people an opportunity to choose between different options as to how they want the local political and development agenda pursued.<sup>177</sup> In this regard, the World Bank states that “the principle of one person, one vote is fundamental to the representative purpose of elections”.<sup>178</sup> However, elections can easily become a ritual with

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<sup>168</sup> World Bank (2000) 107.

<sup>169</sup> World Bank (1999) 121. See also World Bank ‘World Bank decentralisation website’ at [www1.worldbank.org/publicsector/decentralization/what.htm](http://www1.worldbank.org/publicsector/decentralization/what.htm), cited in De Visser (2005) 42.

<sup>170</sup> World Bank (1999) 117.

<sup>171</sup> World Bank (1999) 120.

<sup>172</sup> World Bank (1997) 120.

<sup>173</sup> World Bank (2000/ 2001) 106.

<sup>174</sup> World Bank (1997) 111-120.

<sup>175</sup> World Bank (1997) 122.

<sup>176</sup> World Bank (1997) 111-130.

<sup>177</sup> World Bank (1997) 122.

<sup>178</sup> World Bank (1997) 112.

little to no connection to the accountability argument presented by the Bank. The Bank thus proposes a number of steps for ensuring that elections remain as far as possible an exercise in accountability. The Bank advises against large electoral units which diminish the significance of the voting exercise, the rationale being that a unit should be small enough to make voters feel they are making a difference by casting a vote.<sup>179</sup> Furthermore, local political leadership should be elected rather than appointed (the Bank specifically discourages appointment of mayors).<sup>180</sup>

The Bank endorses electoral systems that ensure as much societal representativeness as possible, as opposed to “winner-take-all” systems. In particular, it endorses the proportional representation system as one with the potential to “attract higher voter turn-outs and enhance political accountability.”<sup>181</sup> This is, of course, accompanied by the broader caveat that elections should be properly managed, because flawed elections negate the relevance of the process as a tool for political accountability.<sup>182</sup>

However, even factors such as levels of public awareness and access to information through voter education can influence the degree of political accountability; in some instances they may make all the difference.<sup>183</sup> It is for this reason that the Bank calls for an active civil society to complement electoral accountability mechanisms. It cautions, though, that the local administration must be ready to engage and “tap into” civil society.<sup>184</sup> The Bank specifically identifies civil society organisations as an effective avenue for channelling the “voice” of the weak and marginalised and enhancing their participation in the development process.<sup>185</sup>

### **2.3.3 Supervision**

While the World Bank promotes local political and fiscal autonomy, it refers to a paradox in which effective decentralisation occurs in practice only if “a certain level of centralization” has been achieved in terms of fiscal control and effective central policies.<sup>186</sup> The Bank also

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<sup>179</sup> World Bank (1999) 121.

<sup>180</sup> World Bank (1999) 121.

<sup>181</sup> World Bank (1999) 121.

<sup>182</sup> World Bank (2000) 113-115.

<sup>183</sup> World Bank (1999) 121.

<sup>184</sup> World Bank (1999) 121-122.

<sup>185</sup> World Bank (1997) 116.

<sup>186</sup> World Bank (1997) 128.

underlines the importance of the role that national ministries play by supporting local units and ensuring that national standards are implemented.<sup>187</sup>

Two significant implications emerge from this observation as well as the rest of the discussion above. First, central government has a direct interest to ensure that the local implementation of its functions, for instance redistribution, is carried out effectively; the same extends to all other functions of the central government.<sup>188</sup> Second, there is no guarantee that, in exercising its local powers, the local government will do so for the benefit of the local community; according to the Bank, decentralisation of power “may simply mean that power is transferred from national to local elites”.<sup>189</sup> Mechanisms for the central government to supervise or intervene in a local unit should thus be in place to ensure overall effectiveness.<sup>190</sup>

### 2.3.4 Cooperation

The World Bank advises that, despite the fact that national and political leaders have their respective spheres of power, effective decentralisation happens only if political leaders at all levels realise that “it is in their best interest to cooperate”.<sup>191</sup> Indeed, factors such as joint functions, national policy, common national decentralisation objectives and broader governmental objectives call for unity of action at all levels. The Bank observes that common interests can create an incentive to cooperate.<sup>192</sup> In this regard, it proposes joint national and local government elections in order to foster pursuit of the same political agenda.<sup>193</sup> However, the Bank negates this proposal by cautioning that the distinctiveness of the local political agenda may be “drowned” by the national political campaigns.<sup>194</sup> Indeed, many an author has cautioned against joint local and national elections for the same reason.<sup>195</sup>

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<sup>187</sup> World Bank, World Bank decentralisation website at [www1.worldbank.org/publicsector/decentralization/what.htm](http://www1.worldbank.org/publicsector/decentralization/what.htm), cited in De Visser (2005) 43.

<sup>188</sup> World Bank (2000) 107.

<sup>189</sup> The World Bank (1999, 109) states that “In India, for instance, local participation depends on social caste, and the poor have little influence.”

<sup>190</sup> While the World Bank (1999, 120-121) does not mention interventions expressly, it makes a strong case for regulation of local governments in order to forestall a local fiscal crisis or even to ensure that national standards are enforced. The Bank states that “regulation is also essential to ensure the validity of the local electoral process and to address conflicts between the units of subnational government”.

<sup>191</sup> World Bank (1999) 114.

<sup>192</sup> World Bank (1999) 112-113.

<sup>193</sup> World Bank (1999) 114.

<sup>194</sup> World Bank (1999) 114; Powell D ‘Why a single election for all three spheres would be a bad move’ (2011) 13 *Local Government Bulletin* 19-20.

De Visser observes that cooperation “is not presented as an element that requires inclusion in an institutional design” or even a legal framework for decentralisation.<sup>196</sup> He argues that intergovernmental dialogue can indeed be a substantive institutional design feature in decentralisation.<sup>197</sup> This, he argues, can be achieved through a normative framework for cooperation, institutionalisation of both vertical and horizontal relations, and other mechanisms of intergovernmental relations.<sup>198</sup>

In this regard, De Visser proposes that there should be a normative and agreed framework to facilitate intergovernmental cooperation. Vertical integration should ensure that local governments participate in development as an equal partner with other spheres of government. While local government units are “equals” among themselves, horizontal integration facilitates cooperation which will ensure that development activities cutting across local government boundaries are jointly implemented. Lastly, mechanisms of intergovernmental relations will provide rules within which cooperation can be nurtured between national and subnational units.<sup>199</sup>

### **2.3.5 Competing models for decentralised development?**

The World Bank is easily “the towering oak in the forest”<sup>200</sup> in the development discourse. However, there are other institutions also involved in decentralisation and development. The United Nations – through agencies such as the UNDP and the United Nations Capital Development Fund (UNCDF) – as well as regional organisations like the EU<sup>201</sup> and OECD,<sup>202</sup> are but a few of the main organisations that also promote decentralised development. For instance, the UNDP<sup>203</sup> is present in 166 countries where it carries out different engagements related to decentralisation and development.<sup>204</sup> The UNDP started a programme called

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<sup>195</sup> Southall R & Wood G ‘Local Government and the Return to Multi-partyism in Kenya’ (1996) 95 *African Affairs* 510-511; Powell (2011) 19-20.

<sup>196</sup> De Visser (2005) 46 (references omitted).

<sup>197</sup> De Visser (2005) 46.

<sup>198</sup> De Visser (2005) 211-212.

<sup>199</sup> De Visser (2005) 211-212.

<sup>200</sup> Yusuf S ‘A star is born’ in Yusuf *et al* (2009) 2.

<sup>201</sup> EU (2007).

<sup>202</sup> OECD (2004).

<sup>203</sup> The UNDP was established as a special programme under the United Nations General Assembly and is the UN’s leading agency on issues of development.

<sup>204</sup> <http://www.undp.org/about/> (accessed 20 February 2013).

Decentralised Governance for Development (DGD) that focuses on four issues it collectively terms its “signature approach”: human development,<sup>205</sup> human rights,<sup>206</sup> a holistic approach,<sup>207</sup> and “a participatory dialogue and consulting approach”.<sup>208</sup> A 2004 UNDP report states that DGD was increased six times and supported programmes in 100 countries, several strategic regional programmes in all regions, and five global programmes.<sup>209</sup> The UNCDF has an approach similar to the UNDP but one focused on Less Developed Countries (LDCs).<sup>210</sup>

However, the basic model for decentralisation and development advocated by the UNDP and UNCDF is similar to the structural and design features promoted by the World Bank.<sup>211</sup> For instance, a 2005 UNDP report on decentralisation and poverty alleviation provides the same features as those of the fiscal federalist model discussed earlier above.<sup>212</sup> The value added by the UNDP is emphasis on concepts such as human development and human rights, which are core to the UNDP’s work.<sup>213</sup> Like the UNDP, the UNCDF supports different aspects of decentralised governance, such as participatory budgetary planning and ensuring proper integration of subnational governments into the fiscal system.<sup>214</sup> All the other institutions follow the basic concepts and model of decentralisation proposed by the World Bank, but emphasise specific aspects of the model that are core to their respective institutional foci.

### **2.3.6 Decentralised development and its critics**

While the World Bank holds that effective decentralisation depends on its design and implementation, this argument is weakened by the fact that, across states and time, there already exist varied decentralised systems designed to fit the local context.<sup>215</sup> The evidence of development traceable to decentralisation is weak. The World Bank’s answer to this is that

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<sup>205</sup> UNDP (2004) 5: The UNP explains that “the concept of human development is development that is pro-poor, pro-women, pro-environment and taking into consideration the long term”.

<sup>206</sup> The UNDP (2004, 5) defines pro-human rights development as one that is based on the principle of equality, participation and accountability.

<sup>207</sup> The UNDP (2004, 5) defines a holistic approach to development as one that is multi-thematic, multi-actor, multi-level, multi-functional, and yet offering flexibility in points of entry and modalities.

<sup>208</sup> UNDP (2004) 5.

<sup>209</sup> UNDP (2004) 2.

<sup>210</sup> UNDP ‘Fiscal decentralisation and poverty reduction’ (2005) 1.

<sup>211</sup> See generally UNDP (2004); UNDP (2005).

<sup>212</sup> UNDP (2005) 3.

<sup>213</sup> UNDP (2004) 5

<sup>214</sup> UNDP (2004) 5.

<sup>215</sup> World Bank (1999) 109.

sometimes decentralisation brings with it changes that are hard to measure in economically quantifiable terms.<sup>216</sup> Even where there is improved efficiency, it is difficult to attribute it to decentralisation, because improved efficiency may arise as a result of a variety of factors, not all of which are necessarily connected to decentralisation.<sup>217</sup> Other sceptics assert that decentralisation is not useful and may lead to harmful effects,<sup>218</sup> singling out developing countries whose relatively fragile economies and weak central governments are ill-prepared to manage the vicissitudes of decentralisation. The link between decentralisation and economic growth is also contested terrain with no clear answers.<sup>219</sup>

Critics attack the fundamental assumptions upon which the concept of decentralisation is founded. Prud'homme, one of the foremost critics, argues that, contrary to popular thought, decentralisation can exacerbate disparities between regions, or at the least, make redistribution, a function best performed by the central government, even harder.<sup>220</sup> Prud'homme argues that central government, through its national budget and macro-allocation, has a better chance of addressing disparities than local institutions.<sup>221</sup> He argues that addressing disparities through decentralisation is based on the assumption that inequalities can be reduced by the movement of capital, goods and labour, an assumption which the experience of industrialised countries has proved faulty. He asserts, furthermore, that even raising the income levels of a region will have no effect if basic economic opportunities are lacking.<sup>222</sup>

In addition, Prud'homme attacks the allocative-efficiency argument which assumes that the local voter is rational and will vote according to local developmental needs. In reality, people vote on the basis of group loyalties such as tribal, religious and party-political affiliations as well as other interests unrelated to the allocative-efficiency argument.<sup>223</sup> Even though the Bank proposes measures such as voter education and access to information, these have little effect especially in rural areas, which comprise a large part of the electorate in developing states.<sup>224</sup> Prud'homme maintains that this logic is irrelevant in the context of developing states, where needs are basic,

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<sup>216</sup> World Bank (1999) 109.

<sup>217</sup> USAID report (2010) 5.

<sup>218</sup> Prud'homme R 'The Dangers of Decentralization' (1995) 10 *The World Bank Observer* 208.

<sup>219</sup> De Visser (2005) 21.

<sup>220</sup> Prud'homme (1995) 202.

<sup>221</sup> Prud'homme (1995) 202.

<sup>222</sup> Prud'homme (1995) 202..

<sup>223</sup> Prud'homme (1995) 208.

<sup>224</sup> World Bank (2000) 113.

common and known; even if such reasoning holds water, resource and capacity constraints on their own will ultimately negate the argument.<sup>225</sup> Furthermore, the assumption that if services do not work, people will vote with their feet by moving to a more responsive local authority,<sup>226</sup> ignores the reality that it is highly impractical for the rural poor to uproot and move to other areas for service-delivery reasons.

Even the World Bank's confidence in decentralisation and state transformation has declined over time. While it was upbeat about the role of decentralisation in state restructuring and transformation in its earlier WDRs, such as those of 1997 and 1999/ 2000,<sup>227</sup> the Bank has gradually adopted a more cautious approach or even neglected decentralisation arguments in relevant discussions. For instance, the 2011 WDR focuses on state institutions and transformation for security, development and welfare of citizens,<sup>228</sup> but decentralisation is given peripheral treatment throughout the discussion.<sup>229</sup>

Despite the apparent decline of interest in decentralisation by the World Bank, there is still no alternative thereto that has so far been proposed. This alone makes decentralisation, despite its risks, a desirable if not the only option for developing states. Furthermore, recent trends indicate a growing interest in decentralising power and resources to the local level as a means of managing internal conflict. Thus, the design and implementation of decentralisation as a means of achieving peace should also be investigated.

However, and more importantly for this discussion, decentralisation is happening and is a reality with which states have to live. What is more, centralisation, the extreme in the continuum, has been long associated with underdevelopment, inefficiency and institutional failure in developing states; it is, most certainly, not the way to go. Thus, the appropriate and practically beneficial inquiry here is not whether decentralisation works but how best to design it in order to avoid its potential pitfalls and reap its potential benefits.

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<sup>225</sup> Prud'homme (1995) 208; Kaiser K 'Decentralization reforms' in Coudouel A & Paternostro S (eds) *Analyzing the Distributional Impact of Reforms: A Practitioner's Guide to Pension, Health, Labor Markets, Public Sector Downsizing, Taxation, Decentralization and Macroeconomic Modeling* (2006) 331.

<sup>226</sup> World Bank (1999) 108.

<sup>227</sup> World Bank (1997) 110-130; World Bank (1999) 107-124.

<sup>228</sup> World Bank (2011) 99-116, 119-139, 145-174.

<sup>229</sup> See especially World Bank (2011) 164-167.

A 2010 study by the United States Agency for International Development (USAID) which assessed decentralisation in 10 African countries<sup>230</sup> came to the conclusion that there was evidence of “slight improvements in service delivery”.<sup>231</sup> The study also observed that “there have been no major declines in public services after decentralization,” which dispels the notion that local incapacity is not worse than central incapacity.<sup>232</sup> The research concluded that “there has been little damage as result of decentralization”.<sup>233</sup> The findings from this study thus assuage some of the main fears about decentralisation highlighted above.<sup>234</sup>

### **2.3.7 Summary of the key design features of the ‘World Bank Model’**

The proposals by the Bank on decentralised development are, as described above, coherent and simple. First, with regard to finances, a country’s major taxes should remain with the central government, while taxes whose incidence is local should be decentralised in order to enhance efficiency. Local taxes are important as they form the basis for local accountability, and central transfers should take cognisance of this. Central transfers should be determined by an independent institution, using pre-determined, agreed rules and an objective formula aimed at equitable sharing. Furthermore, centrally enforced fiscal discipline, especially with regard to local borrowing, is essential. However, this does not include central administrative approvals, authorisation, or central government guarantees of loans for local governments.

Second, with regard to their size and number, decentralised units should not be so numerous as to become a burden in terms of administrative costs, nor should they be so large as to stifle participation and responsiveness. Additionally, fewer levels of decentralised government are preferred, as multiple levels make the division of functions complex and confusing, resulting in overall inefficiency.

Third, the powers of devolved units should be relevant to the local developmental needs and appropriate to the local context. The powers should clearly define the power and the actor, especially with regard to joint powers that have more than one actor. Local units should have the final authority in the exercise of these powers without any undue limitations or interference. However, the local community should, through periodic elections or other accountability channels, hold local units accountable for their decisions.

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<sup>230</sup> Botswana, Burkina Faso, Ethiopia, Ghana, Mali, Mozambique, Nigeria, South Africa, Tanzania, and Uganda.

<sup>231</sup> Dickovic & Riedl (2010) 5.

<sup>232</sup> Dickovic & Riedl (2010) 7.

<sup>233</sup> Dickovic & Riedl (2010) 7.

<sup>234</sup> Dickovic & Riedl (2010) 63.

Lastly, central government should supervise or, where necessary, intervene in local matters to ensure that national policies, standards and regulations are implemented. Furthermore, intergovernmental cooperation between the national and local governments is important, and this can be achieved by conducting joint national and local elections.

### 3. Devolution of powers for conflict resolution

Despite the waning confidence in decentralisation as a tool for development, devolving power for the purpose of addressing internal conflict is gaining currency. The post-Cold War period has seen an unprecedented rise in internal state conflict, especially in Africa, and this has led to the growing interest in the local level as an avenue for building state peace and political stability.<sup>235</sup> A 2010 UNDP report states:

Strengthening local governance structures has emerged as a key instrument for both national and international partners in managing the implementation and the long term consolidation of peace and stability. Local governments are now increasingly considered to have a key role in responding to the socio-economic needs of affected populations in both the immediate post-conflict humanitarian/early recovery phase and in the long term, as part of the consolidation of peace and state-building.<sup>236</sup>

The World Bank also sees the value of decentralisation in maintaining political stability “in the face of pressures for localisation”.<sup>237</sup> The Bank states that “when a country finds itself deeply divided, especially along geographic and ethnic lines, decentralisation provides an institutional mechanism for bringing opposition groups into a formal, rule-bound bargaining process”.<sup>238</sup> Litvack *et al* add that in some situations, “the very preservation of a national political system has required the decentralization of power”.<sup>239</sup>

However, the concept of devolution of powers as a means of holding a state together is an old one. Indeed, as it will later emerge in the discussions below, some of the oldest modern federations like Switzerland (1848) and Canada (1867) were formed along general “conflict resolution” lines. In Africa, devolution of power was also attempted from the early days of colonial rule and even at the end of colonialism, with varying degrees of success. The next

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<sup>235</sup> UNDP ‘Local governance, peace building and state building in post-conflict societies’ A UNDP discussion paper (2010) 4.

<sup>236</sup> UNDP (2010) 4.

<sup>237</sup> World Bank (1999) 107-108.

<sup>238</sup> World Bank (1999) 107-108.

<sup>239</sup> Litvack *et al* (1998) 4.

section will focus on the assumptions and institutional design features that underlie this renewed enthusiasm in devolving powers to secure peace.

### 3.1 The meaning of conflict

Fisher defines “conflict” as “an incompatibility of goals or values between two or more parties in a relationship, combined with attempts to control each other and antagonistic feelings toward each other”.<sup>240</sup> The incompatibilities may be real or perceived by conflicting parties; in addition, emotional hostility and “opposing actions” by the parties are defining features of conflict.<sup>241</sup> Due to differences in ideals, aspirations and other aspects of life, conflict is an inevitable part of human interaction. Indeed, Fisher notes that “the absence of conflict usually signals the absence of meaningful interaction”; conflict becomes constructive or destructive depending on how it is managed.<sup>242</sup>

Conflict can take place within an individual or between individuals; it can assume an inter-group, multi-group or international dimension.<sup>243</sup> Group conflict occurs as a result of “incompatibility in ways of life – preferences, principles and practices that people believe in”.<sup>244</sup> These include identity factors such as race, ideology, religion, culture and ethnicity, among others. Two other points need mentioning as well. First, a conflict may take the form of a sub-state group imposing its identity on other unwilling groups, thereby creating a conflict of values. Second, group identity may be used as the basis of denying or accessing resources, leading to identity-based grievances over resources. Daniel Katz developed a third category of conflict known as power conflict.<sup>245</sup> In this type of conflict, “each party wishes to maintain or maximise the amount of influence that it exerts in the relationship and the social setting,”<sup>246</sup> and may in the process use resources to exert such influence.

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<sup>240</sup> Fisher R *International Peace and Conflict Resolution* (2000) 1.

<sup>241</sup> Fisher (2000) 1.

<sup>242</sup> Fisher (2000) 1; Regassa T ‘Learning to live with conflicts: Federalism as a tool of conflict management in Ethiopia: An overview’ paper presented at a training workshop organized by the Council of Nationalities (CON) of the Southern Nations Nationalities, and Peoples’ Regional State (SNNPRS) in July 2009, Hawassa, Ethiopia.

<sup>243</sup> Fisher (2000) 3.

<sup>244</sup> Fisher (2000) 3.

<sup>245</sup> Fisher (2000) 2.

<sup>246</sup> Katz D ‘Nationalism and strategies of international conflict resolution’ in Kelman HC (ed) *International Behaviour: A Social Psychological Analysis* (1965) 357.

In most developing states, internal state conflict is mainly identity-based, involves resources and is essentially a power struggle between the conflicting groups. This has led to the use of terms such as “intractable conflict”<sup>247</sup> and “deep-rooted conflict”, which Houlihan describes as “conflict that occurs in “divided societies” where identity-based factors overlap with the grievances about economic, social and/or cultural injustice”.<sup>248</sup> This thesis focuses on the extreme dimensions where conflict has become destructive, as opposed to normal human or group interaction. Accordingly, the phrase “conflict resolution” refers to the management of human interaction in a manner that prevents violent and disruptive conflict between identifiable sub-state groups.

### 3.2 Designing devolution for conflict resolution: an evasive and incoherent model

Unlike the near universal model of decentralisation for development, there is no such equivalent for conflict resolution. The UNDP admits that “there is no conceptual framework to evaluate this dimension of local governance interventions in post-conflict situations”.<sup>249</sup> Different reasons have been advanced to explain this. Litvack *et al* argue that due to the nature of its clients (governments), the World Bank may have shied away from directly addressing internal political issues to ensure stability.<sup>250</sup> In the state of Bihar in India, for instance, a development strategy prepared under the aegis of the Bank avoided caste discrimination issues largely responsible for poverty and violent conflict in the state.<sup>251</sup> The Bank chose neutral language, such as “fighting poverty” and “the rural poor”, and ignored the politicised identities responsible for the problems in Bihar. The study engaged in a “dry” economic analysis focused on diversification of the economy and “improved service delivery” targeting “the rural poor”.<sup>252</sup>

While governments readily acknowledge development as a goal of decentralisation, only a few readily admit the existence of internal conflict. Such denial forecloses opportunities to deliberate

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<sup>247</sup> Bercovitch J ‘Characteristics of intractable conflicts’ in Burgess G & Burgess H (eds) *Beyond Intractability*, Conflict Research Consortium, University of Colorado, Boulder. Posted: October 2003 <[http://www.beyondintractability.org/essay/Characteristics\\_IC/](http://www.beyondintractability.org/essay/Characteristics_IC/)>

<sup>248</sup> Houlihan SD ‘Federalism and violent conflict prevention, management and resolution mechanism’ unpublished paper (2010) presented at the 5<sup>th</sup> International Conference on Federalism, Addis Ababa, 13-16 December 2010.

<sup>249</sup> UNDP (2010) 7.

<sup>250</sup> Litvack *et al* (1998) 5. The World Bank (2011, 2) itself argues that the global system is built with clear roles for national and international actors for development “in promoting the capability and prosperity of the nation state (but stepping out during active conflict)”.

<sup>251</sup> World Bank ‘Bihar: Towards a Development Strategy: A World Bank Report’ (2005) 11-14.

<sup>252</sup> See generally Mukherjee R ‘Coalition Building in a Divided Society: Bihar state India, 2005-2009’ (2009) (Princeton University: Innovations for Successful Societies) 85-88.

and design a coherent and appropriate decentralisation structure to address internal conflict.<sup>253</sup> The attitude of governments towards internal conflict has relegated the subject of decentralisation design for conflict resolution to international organisations and other non-state actors only,<sup>254</sup> thereby missing a critical stakeholder in the process of defining appropriate structures and institutions of devolution to address internal conflict.

However, it is also important to note that conflicts vary in terms of their nature, duration, stage, and underlying causes. This makes it difficult to draw comparative lessons for purposes of a coherent or universal framework.<sup>255</sup> Nevertheless, internal conflict remains a reality for many developing countries. Countries such as the Democratic Republic of Congo (DRC),<sup>256</sup> Ethiopia,<sup>257</sup> Sudan and Uganda<sup>258</sup> have at some point attempted to devolve power as a means of addressing internal conflict. There are also proposals to manage internal conflict in Somalia through the devolution of powers.<sup>259</sup>

### **3.2.1 The 'federal solution': an evolving and dynamic concept**

Devolution of powers as a means of resolving conflict is firmly rooted in classical federalism.<sup>260</sup> The fact that some of the older federations, such as the USA (1787), Switzerland (1848), and Canada (1867),<sup>261</sup> have remained stable despite the diversity of their populations is a demonstration of the inherent ability of federalism to hold a state together.

However, attempts to duplicate the same structures in other states have ended disastrously, in some cases leading to the break-up of states. In Africa, classical examples of federal failures include the Mali federation,<sup>262</sup> which was formed in 1958 and dissolved shortly after in 1960,<sup>263</sup>

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<sup>253</sup> Crawford G & Hartmann C 'Introduction: Decentralisation as a pathway out of poverty and conflict' in Crawford G & Hartmann C (eds) *Decentralisation in Africa: A Pathway out of Poverty and Conflict?* (2008) 21.

<sup>254</sup> Crawford & Hartmann (2008) 21.

<sup>255</sup> UNDP (2010) 7.

<sup>256</sup> See generally Djamba DW *Bread and Peace for the Democratic Republic of Congo: Is decentralisation the answer?* (Unpublished PhD thesis, University of Pretoria, 2010).

<sup>257</sup> Fessha YT *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* (2010) 151-187.

<sup>258</sup> World Bank (2000) 108.

<sup>259</sup> Ford R & Adam H 'Removing barricades in Somalia: Options for peace and rehabilitation' (1998) (United Institute for Peace (USIP)) 20-22.

<sup>260</sup> Watts (2008) 1.

<sup>261</sup> Watts (2008) 3.

<sup>262</sup> Formed at the end of French colonialism in West Africa, the Mali Federation was originally composed of Senegal, Dahomey, Upper Volta, and Soudan (later renamed Mali).

and the secession of Southern Sudan from the former Sudan.<sup>264</sup> Departing colonial regimes also attempted to bequeath federal and semi-federal structures to their former colonies such as Uganda and Kenya, all of which were later dismantled and abandoned.<sup>265</sup> The collapse of the Soviet Union and the violent disintegration of the former Yugoslavia also show the weakness inherent in federal arrangements as a peacemaking device.<sup>266</sup> Watts observes that between 1960 and the late 1980s “it became increasingly clear that federal systems were not the panacea that many had imagined them to be”.<sup>267</sup>

Despite the failures noted above, Watts acknowledges the resurgence of interest in federal political solutions from the early 1990s, citing Belgium, South Africa, Spain, Argentina and Brazil as more recently established federal systems.<sup>268</sup> Federalism as a conflict-resolution tool has also been applied in Bosnia and Herzegovina, Sudan, Iraq<sup>269</sup> and the Democratic Republic of Congo, and is being considered in Nepal, Sri Lanka, the Philippines<sup>270</sup> and even Somalia.<sup>271</sup>

### **3.2.2 Designing subnational units for conflict resolution**

#### **3.2.2.1 The danger of regions or large units**

A number of studies and experiences of states point to the inherent danger of regions or large units. Siegle and O'Mahony observe that “systems where federalism was formalized or provincial governments granted some degree of autonomy were consistently linked to higher probabilities and magnitude of conflict”.<sup>272</sup> They add that the “the greatest threat of ethnic conflict comes from societies where there is a dominant group comprising between 45-90 per cent of the population”.<sup>273</sup> This is because other minority groups are in constant fear of

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<sup>263</sup> Kurtz DM ‘Political integration in Africa: the Mali Federation’ (1970) 8 *The Journal of Modern African Studies* 405-406.

<sup>264</sup> Lloyd AM ‘The Southern Sudan: A compelling case for secession’ (1999) 32 *Columbia Journal of Transnational Law* 419-454.

<sup>265</sup> Neuberger B ‘Federalism in Africa: Experience and prospects’ in Elazar JD (ed) *Federalism and Political Integration* (1995) 174.

<sup>266</sup> Critchley WH ‘The failure of federalism in Yugoslavia’ (1993) 48 *International Journal* 434-447.

<sup>267</sup> Watts (2008) 4.

<sup>268</sup> Watts (2008) 4.

<sup>269</sup> Brancati D ‘Can federalism stabilize Iraq?’ (2004) 27 *The Washington Quarterly* 7-21.

<sup>270</sup> Watts (2008) 4.

<sup>271</sup> Ford & Adam (1998) 20-22.

<sup>272</sup> Siegle J & O'Mahony P ‘Assessing the merits of decentralization as a conflict mitigation strategy’ (2006) 51.

<sup>273</sup> Siegle & O'Mahony (2006) 6.

economic, political and social exclusion by the dominant group. Roeder calls this dominant ethnic group the “core-nationality” in the ethno-federal set-up.<sup>274</sup> He proposes the splitting of the core ethnic group in order to minimise consolidation of a regional political identity that can endanger the nation-state.<sup>275</sup>

In Africa, Barkan observes, Nigeria and Uganda have used this approach, which he calls “fractionalisation” of the bigger ethnic groups.<sup>276</sup> He argues that initially many African independence leaders ignored ethnic identities and perpetuated the failed myth of “national unity”.<sup>277</sup> Nigeria began with three big regional units carved out along three ethnic and religious fault-lines. In the words of one of the military rulers, the three regions “were so large and powerful as to consider themselves self-sufficient and almost entirely independent. The Federal Government which ought to give lead to the whole country was relegated to the background.”<sup>278</sup> The regions were subsequently divided into the current 36 states in order to curb centrifugal forces.<sup>279</sup> Barkan asserts that where two to four ethnic groups account for one-third to two-thirds of the population, there is a prospect of conflict, and this can only be managed if the large groups are “fractionalised”. However, fractionalisation has to be accompanied by additional measures that will ensure equitable access to resources and development.<sup>280</sup> He concludes that Nigeria is a relative success in this approach. While it is still a “polarised and fractious society”, it is not a “deeply divided situation”.<sup>281</sup>

The risk of conflict posed by large regions is further enhanced or reduced by the nature of their composition. Tierney observes that the heterogeneous nature of Northern Ireland has slowed down the consolidation of Northern Irish nationalism. However, Scotland’s<sup>282</sup> relatively homogeneous composition has ensured consolidation of political pressure, making the UK

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<sup>274</sup> Roeder PG ‘Ethnofederalism and the mismanagement of conflicting nationalisms’ in Erk J & Anderson LM *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?* (2010) 26.

<sup>275</sup> Roeder (2010) 26.

<sup>276</sup> Barkan JD ‘Ethnic fractionalization and the propensity for conflict in Uganda, Kenya and Tanzania’ in Herbst *et al* (eds) *On the Fault Line: Managing the Tensions and Divisions within Societies* (2012) 150.

<sup>277</sup> Barkan (2012) 150.

<sup>278</sup> General Yakubu Gowon’s broadcast on 26 May 1968, quoted in Elaigwu JI ‘The Federal Republic of Nigeria’ in Majeed A *et al* (eds) *Distribution of Powers and Responsibilities in Federal Countries* (2006) 211.

<sup>279</sup> Roeder (2010) 28.

<sup>280</sup> Barkan (2012) 154-155.

<sup>281</sup> Lewis P ‘Boundaries and bargains: Managing Nigeria’s fractious society’ in Herbst *et al* (2012) 19-20.

<sup>282</sup> Tierney S ‘Federalism in a unitary state: A paradox too far?’ in Erk J & Anderson (2010) 47.

devolve substantial powers to Edinburgh.<sup>283</sup> Similarly, the homogeneity of the French-speaking province of Quebec in Canada has led to its recognition as a separate nation within the state of Canada.<sup>284</sup>

However, while large regions may pose a danger to the unity of the state, in some cases it is a matter of necessity rather than choice. The very recognition of the Quebecois as a separate nation within Canada “blunted the force of secession”,<sup>285</sup> as confirmed by Quebec nationalists who demanded: “Recognise our right to national self-determination so that we won’t use it”.<sup>286</sup> Thus, depending on the local context, some states have no choice but to have such large regions for the sake of political stability. It is the same case with Spain’s regionalisation process, which was initiated as a response to agitation for autonomy by Catalonia and the Basque Country.<sup>287</sup> Indeed, it may not be possible to split such units through democratic means. In Nigeria only military rulers were gradually able to fragment regions by largely undemocratic means.<sup>288</sup>

In Africa, the break-up of the Mali Federation in 1960, which consisted of the present-day Mali and Senegal,<sup>289</sup> and the break-up of Sudan generally illustrate the danger of two large regions within a state.<sup>290</sup> The rising secessionist demand in English-speaking South Western Cameroon is a further illustration of the same peril.<sup>291</sup> Siegle and O’Mahony warn that, for the sake of national unity, Uganda should not accede to the asymmetrical federal demands of the Baganda through the “Buganda Kingdom”. They argue that “the central government should be cautious in

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<sup>283</sup> Meadwell H ‘The political dynamics of secession and institutional accommodation’ in Erk & Anderson (2010) 33.

<sup>284</sup> Cameron D ‘The Paradox of Federalism: Some Practical Reflections’ in Erk & Anderson (2010) 116.

<sup>285</sup> Cameron (2010) 124-125; Watts RL ‘The evolution of the distribution of powers in the Canadian Federation’ in Government of Catalonia (Ministry of Home Affairs, Institutional Relations and Participation) *Decentralizing and Re-centralizing Trends in the Distribution of Powers within Federal Countries* (2010) 183-185.

<sup>286</sup> Cameron (2010) 124-125.

<sup>287</sup> Watts (2008) 41-42; Sorens J ‘The partisan Logic of decentralization in Europe’ in Erk J & Anderson (2010) 68-70.

<sup>288</sup> Roeder (2010) 28.

<sup>289</sup> Kurtz (1970) 405-406.

<sup>290</sup> Neuberger (1995) 178.

<sup>291</sup> See *Kevin Mgwanga Munme et al v Cameroon* (African Commission on Human and People’s Rights Communication 266/ 2003). The decision dealt with the issue of secession of Southern Cameroon from Northern Cameroon.

responding to pressures for creating autonomous regions or federalism”,<sup>292</sup> as the Buganda Kingdom may end up creating a competing political identity with a secessionist agenda.<sup>293</sup>

### **3.2.2.2 The third/ local level as a ‘brake’ on regional conflict**

After examining the risk to national unity of creating large or regional units, Siegle and O’Mahony conclude that rather than encouraging provincial autonomy, there is “relatively greater importance of decentralization initiatives that enhance legitimacy, spending discretion, and capacity of local authority – expenditures, employment, and elected leaders”.<sup>294</sup> They recommend the use of the local level as a brake on the secessionist agenda associated with regions. The UNDP and Siegle and O’Mahony conclude that effective local government can assist in addressing poor or deficient local capacity and services where the same is a reliable indicator of internal conflict, as is the case in the Philippines and Uganda.<sup>295</sup> As institutions focused on local service delivery, local governments are in the best position to address development-related issues that underlie conflict.

However, the experience in Indonesia seems to reveal another equally, if not more, significant role of the local level. Suharto’s rule in Indonesia eliminated the autonomy that regions enjoyed since the days of Dutch colonial rule.<sup>296</sup> However, after the demise of his rule in 1998, demands for regional autonomy threatened to disintegrate the country. The country had three options: to extend autonomy to the regional level, eliminate the provincial governments altogether, or retain provinces but with limited autonomy.<sup>297</sup> The new president favoured the elimination of provinces in order to do away with secession claims. The reform team, however, advised against such a move on the grounds that the abolition of regions might generate centrifugal forces the country could not contain. The final structure was “the compromise option” consisting of regions with limited autonomy and a strong system of local districts. Bennet explains the significance of the final structure:

By effectively skipping over the provincial level of governance, the drafters were able to limit the strength of those provinces that might seek separatism in the future. They assumed that any form

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<sup>292</sup> Siegle & O’Mahony (2006) 49.

<sup>293</sup> Siegle & O’Mahony (2006) 49.

<sup>294</sup> Siegle & O’Mahony (2006) 51.

<sup>295</sup> UNDP ‘International cooperation at crossroads: Aid, trade and security in an unequal world’ (Human Development Report) (2005) 174; Siegle & O’Mahony (2006) 52.

<sup>296</sup> Bennet (2010) 4.

<sup>297</sup> Bennet (2010) 4.

of collective action on the part of potential separatists would be far more difficult to coordinate if power was diffused among approximately 300 mayors and regents at the district level rather than 28 provincial governors.<sup>298</sup>

Similarly, at end of apartheid-rule South Africa was faced with demands for a strong federal system of government.<sup>299</sup> The demands were led by Zulu nationalists and right-wing Afrikaners who wanted a self-governing territory in Kwazulu-Natal province and an *Afrikaner Volkstaat*, respectively.<sup>300</sup> Their demands were based on the fear of a strong centralised government under the ANC, which was consolidating its political power in a democratic South Africa.<sup>301</sup> However, underdevelopment, poverty and lack of basic services – all traceable to the apartheid era – also necessitated a strong system of local government to enhance access to services and development. The final system that was adopted is commonly referred to as an “hour-glass structure”. Composed of relatively “weak” provinces created as a response to demands for autonomy, it is a structure in which powers and resources are devolved to local governments, the site of intensive service delivery.<sup>302</sup>

It is clear that Indonesian and South African local governments are not mere service-delivery agents but, indeed, offer a systemic equilibrium to the vertical power balance. The local level thus plays a critical role in maintaining the broader political integrity in Indonesia and South Africa. While the developmental role of local government is critical in addressing the underlying causes of conflict, their place in the entire political system can assist in preventing the break-up of a state.

Furthermore, the Former Yugoslavia Republic of Macedonia (FYROM) averted regional secessionist conflict pitting the dominant ethnic Macedonians against the minority ethnic Albanians, by devolving power to local units and eliminating regions totally.<sup>303</sup> The General Framework Agreement of August 2001 (the Ohrid Agreement), which saved the country from

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<sup>298</sup> Bennet (2010) 4.

<sup>299</sup> Steytler & Mettler (2001) 95-96.

<sup>300</sup> Steytler & Mettler (2001) 96.

<sup>301</sup> Steytler & Mettler (2001) 94.

<sup>302</sup> See generally De Visser (2005).

<sup>303</sup> Reka A ‘The Ohrid Agreement: The travails of inter-ethnic relations in Macedonia’ (2008) 9 *Human Rights Review* (2008) 59; Daskalovski Z ‘Language and identity: the Ohrid Framework Agreement and the liberal notions of citizenship and nationality in Macedonia’ (2002) 3 *Journal on Ethnopolitics and Minority Issues in Europe* 14, cited in Reka (2008) 56.

civil war, explicitly excluded federal arrangements.<sup>304</sup> Thus, regionalisation or creation of mono-ethnic regions was not an option.<sup>305</sup> Instead, 80 municipalities were created across the country without an intervening regional level.<sup>306</sup> Factors such as the independence of Kosovo and the possibility of Albanian regions in Macedonia breaking away to join the Albanian-dominated Kosovo informed Macedonia's "federo-phobia".<sup>307</sup> The 80 units that were created denied ethnic Albanians a "mother region" from which to foment secession and join the greater Albanian state of Kosovo.

South Africa, Macedonia and Indonesia illustrate the importance of the local level in addressing the inherent risks associated with large units. A state can opt for the local level only, as was the case with Macedonia, or maintain the region but push to the local level, resources and powers that could facilitate regional conflict and secessionism.

### **3.2.2.3 Boundaries of units: exclusive enclaves or mixed units?**

A state may opt to have mixed units or homogenous units. In the former, the state chooses not to have units whose boundaries coincide with identity factors such as language, ethnic, religious or other identity. In the latter, the state creates homogenous units where the majority of the people in a unit have a common identity. Both approaches have their origins in the practice of federal states. Watts observes that in federal states where there is a dominant language and ethnic, religious or other divisions are not as dominant – for instance, the USA, Austria, Australia and Brazil – the trend has been to establish mixed units; regional differences mainly turn around historical and economic as opposed to identity-based issues.<sup>308</sup> In other federal states where identity differences such as ethnicity, religion and language are sharp – for example, Switzerland, India,<sup>309</sup> Canada, Belgium, Spain,<sup>310</sup> and Ethiopia<sup>311</sup> – the trend has been to establish exclusive units.

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<sup>304</sup> Basic Principle 1.2 of the Ohrid Agreement 2001; Ragaru N 'The Former Yugoslav Republic of Macedonia: between Ohrid and Brussels' in Batt J (ed) *Is there an Albanian Question?* (2008) 43.

<sup>305</sup> Ragaru (2008) 43.

<sup>306</sup> Lyon A 'Decentralisation and the management of ethnic Conflict: A case study of the Republic of Macedonia' (2011) 77 (Unpublished PhD thesis, University of Bradford, 2012).

<sup>307</sup> Ragaru (2008) 54.

<sup>308</sup> Watts (2008) 76.

<sup>309</sup> Bakke KM 'State, 'Society and separatism in Punjab' in Erk J & Anderson (2010)100-103.

<sup>310</sup> Aja E 'Spain: Nation, nationalities, and regions' in Loughlin J (ed) *Subnational Democracy in the European Union* (2001) 234-238.

<sup>311</sup> Fessha (2010) 200-210.

Both approaches are argued to have value in terms of dealing with conflict through devolution of power. The mixed-units approach, or “territorial or administrative federalism”, as it is termed by some scholars,<sup>312</sup> is lauded for “weakening the potentially divisive ethno-nationalism by designing the constituent units to prevent ethnic, linguistic or religious minorities from becoming majorities within constituent units”.<sup>313</sup> Watts adds that the mixed-units approach seeks to deal with the sharp divisions that lead to secessionism and nationalism among groups.<sup>314</sup> Mixed units attempt to establish each unit as “a demographic microcosm of the state as a whole”.<sup>315</sup>

The exclusive-units<sup>316</sup> approach is also said to have distinctive benefits. Fessha argues that an exclusive territorial unit may be created to protect an ethnic group from cultural, linguistic, economic and political domination.<sup>317</sup> This approach is seen as “reducing interethnic tension by giving each group a sense of security in protecting its distinctiveness”.<sup>318</sup>

Whether any of the two approaches (exclusive and mixed units) can actually resolve conflict, is a contested matter. Ironically, experience shows that both of the strategies can be used to dominate or isolate certain groups. Kymlicka writes that in the USA “it was decided that no territory would be accepted as a state unless national minorities were outnumbered within that state”.<sup>319</sup> For instance, in Florida boundaries were drawn in such a way that Indian tribes and Hispanic groups were outnumbered,<sup>320</sup> in Hawaii, statehood was delayed until Anglo-Saxons “swamped” the indigenous inhabitants.<sup>321</sup> On the other hand, while exclusive regional and local units are seen as the way out of conflict in Ethiopia, Watts sees this approach as dangerous. He argues that “the territorial segmentation of a society has been sharpest where the territorial

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<sup>312</sup> Fessha (2010) 41-42.

<sup>313</sup> Watts (2008) 76.

<sup>314</sup> Watts (2008) 77.

<sup>315</sup> Anderson L & Stansfield G ‘The implications of elections for federalism in Iraq: Towards a five-region model’ (2005) 35 *Publius: The Journal of Federalism* 359-383.

<sup>316</sup> Factors such as urbanisation, mixed settlement and migration make it impossible to have purely exclusive regional and local units; thus, in almost all cases one can only end up with a majority group within a unit but not a completely exclusive unit.

<sup>317</sup> Fessha (2010) 43.

<sup>318</sup> Watts (2008) 77.

<sup>319</sup> Kymlicka W ‘Federalism and secession: at home and abroad’ (2000) 13 *Canadian Journal of Law and Jurisprudence* 210.

<sup>320</sup> Kymlicka (2000) 210.

<sup>321</sup> Kymlicka (2000) 210.

distribution of the different factors causing conflict – religious, linguistic, ethnic, economic, historical and ideological – have tended to coincide, mutually reinforcing each other”.<sup>322</sup>

Both exclusive and mixed constituent units can be used to achieve significantly different results in different contexts. It thus seems that the most important factor here is the legitimacy, or lack thereof, of the pursuit of an exclusive or mixed territorial unit. It is for this reason that Watts warns against the plain importation of models, because “even where similar institutions are adopted, different circumstances may make them operate differently”.<sup>323</sup> Leonardy argues that while ethnic and other identity factors should play a role in the demarcation of boundaries, they should certainly not play the dominating role.<sup>324</sup>

Whichever option is chosen, every state has to contend with the issue of boundary demarcation, typically a highly fraught exercise that mobilises competing political interests. In most federal systems, adjustment of boundaries is constitutionally protected. Watts identifies two principles in respect of boundary demarcation: first, there must be transparency and objective criteria, and, second, there must be participation by the affected population through referenda or other means of making the views of the affected persons heard.<sup>325</sup> In an ethno-federal arrangement, where ethnicity is amplified, ethnic identity will be a major factor in determining boundaries.<sup>326</sup> In other cases, factors such as economic viability and non-identity issues will determine boundary demarcation. In Uganda, boundary demarcation is based on effective administration, capacity considerations in service delivery and other factors not related to identity.<sup>327</sup> Boundary demarcation may be entrusted to an independent body dedicated to that issue only, for instance, the Municipal Demarcation Board in South Africa. In other cases, such as that in Uganda, the process of creating new local government districts is entrusted to the unicameral national legislature.<sup>328</sup>

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<sup>322</sup> Watts (1999) 4.

<sup>323</sup> Watts (2008) 2.

<sup>324</sup> Leonardy U ‘Demarcation of regions: International perspectives’ in de Villiers B & Sindane J (eds) *Regionalism: Problems and Prospects* (1993) 4.

<sup>325</sup> Watts (2008) 78.

<sup>326</sup> Articles 46 and 47 of the Constitution of the Federal Democratic Republic of Ethiopia, 1995, article 46 (2) states that “states shall be delimited on the basis of the settlement patterns, language, identity and consent of the peoples governed”.

<sup>327</sup> Singiza DK & De Visser J ‘Chewing more than one can swallow: the creation of new districts in Uganda’ (2011) 15 *Law Democracy and Development* 8.

<sup>328</sup> Article 179 of the Constitution of Uganda (1995).

### 3.2.3 Powers and functions of devolved units

Actual or perceived political and socio-economic exclusion of a sub-state group by a centre that is dominated or seen to be dominated by another sub-state group forms a basis for “narratives to social injustice”.<sup>329</sup> It thus appears that a possible solution is devolving powers and functions that can facilitate political inclusion.<sup>330</sup> Devolving power may also divert political attention the subnational level, thereby eliminating or minimising conflict in a bid to capture central power.<sup>331</sup> Where grievances are related to resources and development, effective local service delivery and development may, in the long run, address development-related grievances.<sup>332</sup>

#### 3.2.3.1 Political powers and functions

Political and economic exclusion, often tied to identity, is the most common element defining conflict in developing states. Accordingly, the powers devolved to subnational units should facilitate effective political inclusion. In the Philippines, “the poorest 10 provinces ... in almost every aspect of human development, are also the most conflict-ridden”.<sup>333</sup> (Incidentally, these are also the regions with religious minorities.<sup>334</sup> In Uganda, ethnic-identity issues are often tied to grievances about poor services and underdevelopment.<sup>335</sup> Siegle and O’Mahony conclude that, at least in the case of Uganda, decentralisation for conflict resolution has much to do with local delivery and access to basic services.<sup>336</sup>

Devolving powers and functions that facilitate access to local services and development may thus have the ability to address conflict. This is because identity-conflict is tied to underdevelopment and lack of services. It is in such a context that empowering decentralised institutions to provide access to basic services such as education, health, and local infrastructure may enhance political inclusion. In some cases, grievances revolve around identity issues such as language. In these cases, conflict may be averted if powers over language use are devolved to the local level. In Macedonia, conflict eased when the 2001

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<sup>329</sup> World Bank (2011) 83.

<sup>330</sup> Ghai YP ‘Devolution: Restructuring the Kenyan state’ (2008) 2 *Journal of Eastern African Studies* 211, 215-216.

<sup>331</sup> Ghai (2008) 215-216.

<sup>332</sup> UNDP (2010) 5.

<sup>333</sup> Siegle & O’Mahony (2006) 37.

<sup>334</sup> Siegle & O’Mahony (2006) 37.

<sup>335</sup> Schelnberger AK ‘Decentralisation as a means of conflict management: A case study of Kibaale district, Uganda’ Institute of Development Research and Development Policy, IIE Working Papers, Ruhr University Bochum (2005) 50.

<sup>336</sup> Siegle & O’Mahony (2006) 52.

Peace Agreement<sup>337</sup> recognised the use of Albanian and other minority languages in municipalities where Albanians and other minorities are present.<sup>338</sup> Accordingly, the powers devolved should be relevant to addressing the narratives that support conflict, narratives which commonly relate to resources but which, in addition, may include identity issues.

### **3.2.3.2 Finances: enhancing equity for peace**

The link between fiscal design and conflict resolution is rarely explored, mainly because the latter “is well outside the normal field of expertise of economists”.<sup>339</sup> Nevertheless, fiscal design plays an important role since most conflicts arise from real or perceived economic exclusion. Indeed, few, if any, countries are economically homogeneous; such heterogeneity provides the basis for conflict, especially where inequalities coincide – whether in perception or actuality – with differences in identity. In these cases, inequalities “can become a powerful mobilising agent that can lead to a range of political disturbances”.<sup>340</sup> In this regard, Prud’homme suggests that economic disparities should be seen not as “merely statistical artefacts” but sociological factors influencing perceptions of collective inclusion and exclusion.<sup>341</sup>

Fiscal asymmetry has the potential to address inequalities that form the basis of conflict.<sup>342</sup> While such asymmetry in fiscal design is more defined and formal in federal systems, it also exists, albeit subtly, in unitary systems.<sup>343</sup> Bird *et al* single out conditional grants for funding projects with a “regional significance” as important for addressing perceptions.<sup>344</sup> Projects of “regional significance” may, in this context, be regarded as those which address perceptions or realities of economic exclusion. Tranchant adds that fiscal decentralisation can promote stability only if resources are devolved to sub-state groups that are national minorities.<sup>345</sup> However, he

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<sup>337</sup> Reka (2008) 62.

<sup>338</sup> Reka (2008) 62.

<sup>339</sup> Bird RM & Ebel RD ‘Fiscal federalism and national unity’ in Ahmad E & Brosio G (eds) *Handbook of Federalism* (2006) 2.

<sup>340</sup> Stewart F ‘Horizontal inequalities as a cause of conflict’ (2011) 2, Background paper of World Development Report (2011) 3.

<sup>341</sup> Prud’homme (1995) 203.

<sup>342</sup> Bird & Ebel (2006) 2.

<sup>343</sup> Bird & Ebel (2006) 8-9.

<sup>344</sup> Bird & Ebel (2006) 8; Brodjonegoro B & Ford JF ‘Intergovernmental fiscal relations and state building: The case of Indonesia’ in Bird & Ebel (2007) 330.

<sup>345</sup> Tranchant J ‘Does fiscal decentralization dampen all ethnic conflicts? The heterogeneous impact of fiscal decentralization on local minorities and local minorities’ (2010) 3.

cautions that the interests of local minorities must also be catered for in order to avert local minority conflict.<sup>346</sup>

It thus appears that in order to address conflict, fiscal design should facilitate economic inclusion by addressing economically-based grievances. The nature and level of economic grievances may vary from one context to another. Ultimately, though, there must be some asymmetry in the fiscal design which responds to the prevailing economic inequalities that form the basis for conflict. This may come about in the form of conditional funding, as proposed by Bird and Ebel,<sup>347</sup> or through other special measures responding to the disparities as well as the perceptions surrounding them. Siegle and O'Mahony maintain that fiscal design should emphasise local spending of revenue raised centrally rather than locally, on the grounds that the latter is frequently associated with conflict<sup>348</sup> whereas the former has a lower propensity for ethnic conflict.<sup>349</sup>

The centre plays an important role and should be factored in the fiscal design for peace. In Bosnia and Herzegovina, the Dayton Agreement of October 1995, which created two Majority-Croats and Majority-Bosniac regions, denied the centre major revenues and taxes.<sup>350</sup> As a result, the centre could not address regional inequalities, some of which were the cause of conflict.<sup>351</sup> Indeed, as argued earlier, with the correct political will, macro-allocations from the centre are better able to address disparities than when done by subnational governments.<sup>352</sup> It is thus clear that the main design features of the "fiscal federalist" model discussed earlier bear considerable relevance to conflict resolution, insofar as the model aims at equitable distribution of resources and balanced development.

### **3.2.3.3 'Economic self-determination': control of 'home' resources**

Natural resource-rich developing countries are ten times more likely to experience conflict<sup>353</sup> than other developing countries, mainly because of the disparate sharing of benefits from the

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<sup>346</sup> Tranchant (2010) 5.

<sup>347</sup> Bird & Ebel (2006) 8.

<sup>348</sup> Siegle & O'Mahony (2006) 50.

<sup>349</sup> Siegle & O'Mahony (2006) 50.

<sup>350</sup> Fox W & Wallich C 'Bosnia-Herzegovina: the Dayton challenge' in Bird RM & Vaillancourt F (eds) *Fiscal Decentralization in Developing Countries* (1998) 271.

<sup>351</sup> Fox & Wallich (1998) 271.

<sup>352</sup> Fox & Wallich (1998) 274.

<sup>353</sup> World Bank (2011) 78; Siegle & O'Mahony (2006) 5.

natural resources.<sup>354</sup> While devolving control of such resources to the local level may address common grievances, resource-rich developing states rely heavily on such resources and are thus less likely to devolve control.<sup>355</sup> For instance, while the federal government of Nigeria has rejected demands to devolve control over oil revenues to oil-producing states,<sup>356</sup> Canada has managed, due to its developed economy, to devolve natural resources to its provinces, making Alberta the richest in GDP per capita largely thanks to its natural resource endowment.<sup>357</sup>

Nevertheless, even within developing states special measures have been put in place to address demands for local “economic self-determination”. In Nigeria, 13 percent of federal revenue is reserved for the oil-producing states where the revenue is earned.<sup>358</sup> In the Democratic Republic of Congo, 40 percent of national revenue allocated to provinces is to be “retained at source”.<sup>359</sup> In Indonesia, legislation passed in 1999<sup>360</sup> facilitates the sharing of revenue from natural resources (mainly gas and oil), through intergovernmental transfers, with 62 districts in 5 provinces where the resources are located.<sup>361</sup>

### **3.2.4 Designing the national level: inclusiveness through shared-rule**

Central institutions provide the glue that holds a state together.<sup>362</sup> However, this can only happen if the central institutions reflect diversity and effectively enhance political inclusion.<sup>363</sup> Effective inclusion of previously excluded sub-state groups in “federal decision-making” can address conflict. Indeed, the lack of formal central structures of representation of devolved units in the UK has weakened the representation of regional interests in the UK.<sup>364</sup> In federal systems, shared-rule is, almost universally, effected through a second chamber in the national

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<sup>354</sup> Bird & Ebel (2006) 10.

<sup>355</sup> World Bank (1999) 117-118.

<sup>356</sup> Watts (2008) 97- 99.

<sup>357</sup> Watts (2008) 97-99.

<sup>358</sup> Section 162(2) of the 1999 Constitution of Nigeria provides for a “derivation fund” for oil-producing communities in which 13% of federal revenue from the area is ploughed back for economic development. See also Lewis (2012) 26.

<sup>359</sup> Article 175 of the Constitution of the Democratic Republic of Congo (2005).

<sup>360</sup> Law No. 22/ 1999 on Fiscal Relations between Central and Local Governments.

<sup>361</sup> World Bank *Spending for Development: Making the most of Indonesia’s New Opportunities* (2008) 122; Brodjonegoro B & Asanuma S ‘Regional autonomy and fiscal decentralization in democratic Indonesia (2000) 41 *Hitosubashi Journal of Economics* 117-118.

<sup>362</sup> Watts (2008) 134.

<sup>363</sup> Siegle & O’Mahony (2006) 53.

<sup>364</sup> Tierney (2010) 57-58.

legislature.<sup>365</sup> With the legislature being an institution of horizontal power-sharing, the second chamber may enhance the inclusion of sub-state groups represented therein.<sup>366</sup> Depending on its structure, powers, and functions, the second chamber has a potential to enhance political inclusion at the centre.

#### 3.2.4.1 The structure and powers of the second chamber

Being a forum for central decision-making, the structures and powers of the second chamber should enhance the representation and participation of sub-state groups in determining important matters of state. The mode of representation, however, varies. In some federations, notably the USA,<sup>367</sup> Switzerland, and Australia, members of the second chamber are directly elected by voters from their respective units.<sup>368</sup> In Austria and India, members are elected by their respective regional legislatures. In South Africa, a portion of the members are elected by their respective regional assemblies while others are representatives of the provincial executives.<sup>369</sup> In Germany, members of the executives of *Lander* governments are the representatives in the Federal Council (*Bundesrat*).<sup>370</sup> In Canada, members of the Senate are appointed by the ruling party.<sup>371</sup>

All systems have their benefits and risks in terms of “federal decision-making”. For instance, while Watts argues that party interests tend to prevail over regional interests in directly elected second chambers,<sup>372</sup> the same trend is observable even in second chambers indirectly elected by the regional legislatures. Furthermore, while central appointment of members to the second chamber, as is the case in Canada, has the least credibility in terms of representing regional interests,<sup>373</sup> with political will it may be an avenue to enhance central representation of

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<sup>365</sup> Watts (2008) 146.

<sup>366</sup> Watts (2008) 136.

<sup>367</sup> Riker WH ‘The Senate and American federalism’ (1955) 2 *The American Political Science Review* 452-469.

<sup>368</sup> Watts (2008) 149-151.

<sup>369</sup> Watts (2008) 151; De Vos P ‘The role of the National Council of Provinces in the governance of South Africa’ in Luther J, Passaglia P & Tarchi R (eds) *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism* (2006) 618-619.

<sup>370</sup> Konrad Adenauer Stiftung (KAS) ‘The example of federalism in the Federal Republic of Germany: A reader’ (1994) 67.

<sup>371</sup> Christensen K & Studlar DT ‘Is Canada a Westminster or consensus democracy? A brief analysis’ (2006) 39 *Political Science and Politics* 839.

<sup>372</sup> Watts (2008) 151.

<sup>373</sup> Watts (2008) 151; Christensen & Studlar (2006) 839.

minorities.<sup>374</sup> Furthermore, equal representation of devolved units, however large or small, ensures the protection of interests of minority groups at the national level, thereby minimising minority conflict.<sup>375</sup>

Being part of the national legislature, the second chamber's legislative power becomes the most important tool for promoting the interests of devolved units.<sup>376</sup> Watts observes that the main role of the federal chamber is "reviewing federal legislation with a view to bringing to bear upon it regional and minority interests and concerns".<sup>377</sup> In this regard, some federal chambers have a special veto or power with regard to laws concerning the constituent units.<sup>378</sup> While the roles played by second chambers vary with federal systems, the federal chambers are mainly equipped with powers relevant to the protection of the interests of constituent units.<sup>379</sup>

### **3.2.5 Designing inclusive national and local rule: 'complex power-sharing'**

Beyond self-rule and shared-rule arrangements, there are other vital structures and processes which have the potential to enhance inclusiveness in both local and national decision-making.<sup>380</sup> These include the design of the electoral system, composition of the administration, and even the local and national executive and legislative structures. Wolff argues that self-rule and shared-rule arrangements should be complemented by these processes in what he terms "complex power-sharing".<sup>381</sup> While the executive and legislature are institutions of horizontal rather than vertical power-sharing, federal governance is influenced by their respective structures and powers.<sup>382</sup>

#### **3.2.5.1 An inclusive electoral system**

The electoral system is described as "the most powerful lever of constitutional engineering for accommodation and harmony in severely divided societies".<sup>383</sup> The electoral system can be designed to enhance cross-communal cooperation, bargaining and interdependence between

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<sup>374</sup> Watts (2008) 152.

<sup>375</sup> Watts (2008) 154.

<sup>376</sup> Watts (2008) 153.

<sup>377</sup> Watts (2008) 153.

<sup>378</sup> Watts (2008) 153-154. Section 76 (5) (b) (i) and (ii) of the Constitution of the Republic of South Africa, 1996.

<sup>379</sup> Watts (2008) 153-154.

<sup>380</sup> Wolff S 'Post-conflict state building: The debate on institutional choice' (2011) 7.

<sup>381</sup> Wolff (2009) 3.

<sup>382</sup> Watts (2008 ) 136.

<sup>383</sup> Reilly B *Democracy in Divided Societies: Electoral Engineering in Divided Societies* (2004) 20.

groups in a divided society.<sup>384</sup> Electoral systems vary and are mainly classified according to the variation between the votes cast and the outcome in terms of numbers of the elected representatives. There are three main categories of electoral systems, each with several variants: plurality-majority systems, semi-proportional systems and proportional representation systems.<sup>385</sup>

Under plurality-majority systems, the First-Past-the-Post (FPTP) system is the simplest form thereof. The FPTP system uses single-member districts and is “candidate-centred”. Voters choose candidates, and the one with the most votes, though not necessarily the majority wins.<sup>386</sup> Oloo observes that the FPTP system is preferred largely because of its simplicity and the geographical connectedness of winning candidates.<sup>387</sup> Voters also get to choose between individuals and not parties,<sup>388</sup> and can thus assess the individual merits and performance of candidates.<sup>389</sup> The most common majoritarian system is the run-off or “two-round” system. In this system, the first round is carried out according to normal FPTP principles. If a candidate receives an absolute majority, he or she is elected. If, however, there is no majority winner, another election is held between the two candidates with the highest number of votes; the one receiving the most votes, regardless of margin, wins.<sup>390</sup>

There are two main types of Proportional Representation (PR) electoral systems relevant to this discussion.<sup>391</sup> The first and most common PR system is the Party List PR system, where parties present lists of candidates in the order of priority for election. Votes are cast for parties rather than candidates, and each party is allocated elective seats from their lists in accordance with the proportion of votes won.<sup>392</sup> The second variant is the Mixed Member PR system (MMP), which combines FPTP and PR features. Some seats are elected through the FPTP system, whereas others are allocated to parties.<sup>393</sup>

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<sup>384</sup> Reilly (2004) 2.

<sup>385</sup> Reilly (2004) 14.

<sup>386</sup> Oloo A ‘Elections, representations and the new Constitution’ Society for International Development (SID) Constitution Working Paper No. 7 (2011) 2.

<sup>387</sup> Oloo (2011) 2.

<sup>388</sup> Reilly (2004) 15.

<sup>389</sup> Reilly (2004) 15.

<sup>390</sup> Reilly (2004) 15-16.

<sup>391</sup> The third variant is the Single Transferrable Vote system (STV). See Reilly (2004) 15-16 for its description.

<sup>392</sup> Reilly (2004) 18.

<sup>393</sup> Reilly (2004) 18.

Compared with plurality-majority electoral systems, the PR system “faithfully translates votes cast into seats won” and thus avoids “wasted votes”, a common occurrence in plurality-majority systems where a candidate may win with a minority vote as a result of split votes between candidates.<sup>394</sup> Because of this, the Party List PR system is seen more able to produce a more representative structure than the FPTP system<sup>395</sup> and is indeed recommended for effective representation of both minorities and majorities in a divided society.<sup>396</sup>

It has also been argued that the PR system encourages politicians to make appeals beyond their own groups.<sup>397</sup> In Nigeria, for instance, the President must win at least one-quarter of the votes cast in at least two-thirds of the 36 states.<sup>398</sup> The instant run-off system also encourages “moderate politicians who are willing to compromise with politicians from the other side” to cooperate and therefore foster integration.<sup>399</sup> Because the PR system can prevent a clear majority from emerging, it may thus ensure the formation of coalition governments and facilitate inclusive decision-making.<sup>400</sup> In practice, however, the choice of electoral systems is due to “accidental factors” such as colonialism and the effects of “influential neighbours”. Furthermore, once a particular design has been chosen, states tend to maintain these systems and emphasise their benefits rather than seek to change them.<sup>401</sup>

### 3.2.5.2 Inclusive executive and administration

The executive and administrative structures can be used to enhance inclusiveness by ensuring that the structures reflect the local and national diversity. This can be achieved through a coalition government, minority vetoes and proportional public sector employment.<sup>402</sup> The UNDP argues that decentralisation should, if it is to address conflict, enhance inclusiveness as

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<sup>394</sup> Oloo (2011) 3.

<sup>395</sup> Oloo (2011) 2.

<sup>396</sup> Oloo (2011) 2; Siegle & O’Mahony (2006) 6.

<sup>397</sup> Oloo (2011) 3.

<sup>398</sup> Section 133 (b) of the Constitution of the Federal Republic of Nigeria 1999.

<sup>399</sup> O’Flynn I ‘Democratic values and power sharing’ in O’Flynn I & Russell D (eds) *Power Sharing: New Challenges for Divided Societies* (2005) 24.

<sup>400</sup> Wolff S ‘Electoral-Systems design and power-sharing regimes’ in O’Flynn & Russell (2005) 62.

<sup>401</sup> Reilly (2004) 14.

<sup>402</sup> Wolff (2005) 60.

opposed to reinforcing “social patterns of exclusion and inequity”.<sup>403</sup> The UNDP adds that since local governments perform most of the local services, they become a “point of contestation” on issues of political or economic exclusion<sup>404</sup> and should thus be the starting point in structuring inclusion.<sup>405</sup> In this regard, the “son of the soil” practice in Uganda, which “allows districts to give hiring preferences to individuals who are indigenous native to that district”, has been criticised for encouraging exclusion.<sup>406</sup>

The World Bank, too, encourages the formation of “inclusive-enough coalitions”<sup>407</sup> that ensure representation of diversity at the local and national levels.<sup>408</sup> Inclusive institutions have the potential to “mediate contests between different classes or ethnic, religious or regional groups peacefully”.<sup>409</sup> In the South African Province of KwaZulu-Natal, local governments adopted in 1995 an executive committee system which drew members from rival parties (the African National Congress and the Inkatha Freedom Party).<sup>410</sup> This created mutual dependency in local decision-making and thus facilitated accommodation.<sup>411</sup> In Ghana, a deliberate policy of inclusiveness has been Ghana’s decentralisation success: the government passed a law<sup>412</sup> to enhance ethnic harmony and introduced affirmative action programmes in marginalised areas.<sup>413</sup> Ethnic diversity is reflected in the composition of public institutions, including the military. Inclusiveness is provided for at both the national and local levels.

In addition, special measures can be used to enhance representation of minorities. In Ghana, 70 percent of members of District Assemblies are elected while 30 percent are appointed by the

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<sup>403</sup> UNDP ‘Local Governance, peace building and state building in post-conflict settings’ A UNDP discussion paper (2010) 4.

<sup>404</sup> UNPD (2010) 7.

<sup>405</sup> UNPD (2010) 7.

<sup>406</sup> Siegle & O’Mahony (2006) 34.

<sup>407</sup> World Bank (2011) 12-13.

<sup>408</sup> World Bank (2011) 12-13.

<sup>409</sup> World Bank (2011) 89.

<sup>410</sup> Nebandla I ‘Freedom from Strife: An Assessment of Efforts to Build Peace in KwaZulu-Natal’ The Centre for the Study of Violence and Reconciliation (CSV) (2005) 15-2.

<sup>411</sup> Nebandla (2005) 27.

<sup>412</sup> Siegle & O’Mahony (2006, 33) note that the 1957 Ghanaian ‘Avoidance of Discrimination Act’ outlawed the formation of parties along ethnic, religious or regional lines in a bid to consolidate national political unity. They also add that “the Directive Principles of State Policy contained in the 1992 Constitution seek to manage political competition and inequality in the public sector by stressing national integration”.

<sup>413</sup> Siegle & O’Mahony (2006) 34.

president, thereby affording the president an opportunity to appoint minority representatives who may not make it through the ballot.<sup>414</sup> However, a similar provision in Zimbabwe has been used to swamp local councils in opposition areas with cronies of the ruling party.<sup>415</sup> It thus appears that while local and national structures can be built to reflect and enhance diversity, their effectiveness depends on whether leaders have the vision and maturity to make appropriate use of the laid-down structures.<sup>416</sup>

### **3.2.6 Devolution as a tool for conflict resolution: the scepticism**

A basic assumption is that devolution of power will lead to equitable development and thus address the perceptions that drive conflict.<sup>417</sup> However, the UNDP notes that “development itself is change and de-stabilises.”<sup>418</sup> Development raises expectations but also highlights disparities, and this may trigger further conflict.<sup>419</sup> Where conflict is seen as deep and interwoven with identity issues and resources, such factors are “transformed into proximate causes of violence when they are mobilised politically”.<sup>420</sup> In the absence of public institutions sufficiently resilient to manage the pressure and challenge political opportunism, a resurgence of conflict is likely, even after development has taken off.

#### **3.2.6.1 The paradox of devolution and conflict resolution**

Acceptance of self-rule and shared-rule arrangements may be an indication of the willingness of the dominant group to compromise and accommodate.<sup>421</sup> However, smaller parties may treat devolution of powers not as a solution to a conflict but a ground for more radicalised demands such as secession and fragmentation of a state.<sup>422</sup> In such cases, devolution may indeed create the impetus for further conflict. Nonetheless, a 2010 study on 10 African countries by the USAID

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<sup>414</sup> Bagaka O 'Restructuring the Provincial Administration: An insider view' SID Constitution Working Paper No. 3 (2011) 9.

<sup>415</sup> Madzivanyika L 'The impact of weaknesses in the Urban Councils Act on efficient and effective service delivery in urban local councils in Zimbabwe' (2011) 42-43 (Unpublished LLM research paper, University of the Western Cape 2010).

<sup>416</sup> Morrow D 'Breaking antagonism? Political leadership in divided societies' in O'Flynn & Russell (2005) 51.

<sup>417</sup> UNDP (2010) 5-6.

<sup>418</sup> Wood B 'The development dimensions of conflict prevention and peace-building' An independent study prepared for the Emergency Response Division, UNDP (2001) 18.

<sup>419</sup> Wood (2001) 18

<sup>420</sup> Wood (2001) 20.

<sup>421</sup> Siegle & O'Mahony (2006) 10.

<sup>422</sup> Siegle & O'Mahony (2006) 1.

indicates that devolution of power “has helped consolidate stability in some cases and does not appear to have compromised stability in any cases.”<sup>423</sup> This is an important finding that supports devolution of power as a tool for political stability, especially in Africa where the post-colonial period has witnessed a number of civil conflicts.<sup>424</sup>

### **3.2.6.2 The fragility of developing states**

Siegle and O’Mahony note “the relative ease with which small bands of rebels can destabilize weak states”.<sup>425</sup> Conflict may restart where a state lacks capacity to address the issues that underlie the conflict.<sup>426</sup> Building the capacity and resilience of state institutions takes a long time and needs patience; there are no “easy-fix” solutions,<sup>427</sup> and it may take between 15-30 years before institutions have developed sufficient capacity and resilience.<sup>428</sup> Devolution of powers involves creating new institutions at the local level and pumping in resources and capacity to make the local units effective; however, most developing states are challenged in terms of resources and capacity. This reality militates against the argument that devolution of power and resources constitutes an effective strategy for resolving conflict.<sup>429</sup>

### **3.2.7 Summary of the devolution design features for conflict resolution**

For various reasons, there is no universal devolution design for conflict resolution. Even so, institutional features can still be extracted from the literature and state practice discussed in the preceding sections. First, large or regional units are generally not appropriate as they can form the basis for political mobilisation and potential destabilisation. However, the context may actually require the creation or retention of large units for purposes of addressing conflict. Local units also have a potential to ameliorate the risks associated with large regions; in addition, they may serve to address other root causes of conflict by facilitating service delivery and development. With regard to boundary demarcation, the units can either be mixed or exclusive, and the choice of one over the other is informed by consideration of the local context and the legitimacy of a particular approach.

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<sup>423</sup> Dickovic & Riedl (2010) (2010) 2.

<sup>424</sup> Dickovic & Riedl (2010) 3.

<sup>425</sup> Siegle & O’Mahony (2006) 4.

<sup>426</sup> Siegle & O’Mahony (2006) 4.

<sup>427</sup> World Bank (2011) 99-100.

<sup>428</sup> World Bank (2011) 10.

<sup>429</sup> Siegle & O’Mahony (2006) 54.

Second, the powers and functions should be relevant to the conflict; the powers should enhance identity where this is a source of contestation, and should also facilitate political inclusion. Further inclusivity can be achieved by an electoral design that promotes diversity, preferably through proportional representation. Inclusion can also be enhanced through executive and administration structures which reflect local and national diversity. Likewise, special measures can be adopted to ensure the representation of minorities in local and central decision-making.

Fiscal and financial powers should enhance economic inclusion. Devolved units should exercise control over finances which they can use to address their priorities. Where conflict revolves around demands for “economic self-determination” over local resources, this can be addressed through measures which ensure local benefit. Furthermore, with regard to financing devolved units, emphasis should be placed on local spending of central revenue as opposed to raising revenue locally, especially in poor and conflict-prone areas.

Central representation of devolved units enhances inclusiveness in central decision-making, which is important for addressing real or perceived exclusion. In federal systems, this is achieved through a second chamber of the national legislature composed of representatives of devolved units. Devolved units may be represented equally or proportionally (taking into account the size, population, and other factors) in the second chamber. However, equal representation enhances the voice of the smaller units or minorities. Representatives can be directly elected voters, indirectly elected from the regional legislatures; they can be representatives of the unit governments or centrally appointed. Each mode of representation has its benefits and risks. The second chamber reviews national legislation to ensure that unit interests are protected, and may also perform other functions necessary to enhance “federal governance”.

#### **4. Limiting central power through devolution**

The centralised state traces its origins to colonial rule which was centralised, hierarchical and meant for control. The colonial structures were appropriated by the independence leaders who found them convenient control-mechanisms for crushing political opposition and entrenching political power.<sup>430</sup> The semi-federal structures left by departing colonial masters were dismissed as extensions of colonialism<sup>431</sup> and replaced with centralised systems for purposes of enhancing unity and development.<sup>432</sup> However, none of these goals was achieved, and instead the

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<sup>430</sup> Olowu & Wunsch (1990) 26.

<sup>431</sup> Neuberger (1995) 174-176.

<sup>432</sup> Oloo (2008) 105, 115.

centralised state has been the main cause of underdevelopment, alienation of the people from government, and conflict.<sup>433</sup>

Under the centralised state, political plurality was rejected and replaced by a policy of “fixed homogeneity” through a one-party system or, in the worst cases, no party at all.<sup>434</sup> Repressive laws were put in place to quell political opposition.<sup>435</sup> The leaders engaged in what has been described as “deinstitutionalisation and personalisation of political rule”,<sup>436</sup> which entailed stripping security of tenure for serving heads of public institutions in order to enhance personal control.<sup>437</sup> Exercise of public power, including judicial, executive and legislative power, tended to collapse into a single person, the ruler.<sup>438</sup> Personal rule created a ruling elite and networks based on “patron-clientship”; state resources were in turn used to maintain these patronage networks<sup>439</sup> and “buy” political support from the opposition.<sup>440</sup>

Decentralised institutions were controlled through “close bureaucratic supervision” due to the suspicion that they could be breeding grounds for political dissent.<sup>441</sup> Vital aspects such as finances, appointments of key staff, and other operations, were controlled by the central ministry.<sup>442</sup> In some cases, the mandate to provide basic services was transferred to central government departments, leaving local governments irrelevant and without revenue.<sup>443</sup> In the 1970s, many states began decentralising power to address the ills of the centralised state.<sup>444</sup>

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<sup>433</sup> Ghai YP ‘Constitutions and political order in East Africa’ (1972) 21 *International and Comparative Law Quarterly* 406-410

<sup>434</sup> Olowu & Wunsch (1990) 47; Neuberger (1995)187; Mueller SD ‘Government and opposition in Kenya 1966-9’ (1984) 22 *The Journal of Modern African Studies*, 399-427.

<sup>435</sup> Mueller (1984) 399-427; Crawford Y ‘The Colonial state and its political legacy’ in Rothchild D & Chazan N (eds) *The Precarious Balance: the State and Society in Africa* (1988) 57.

<sup>436</sup> Olowu & Wunsch (1990) 61.

<sup>437</sup> Esman (1991) 26.

<sup>438</sup> Olowu & Wunsch (1990) 59.

<sup>439</sup> Olowu & Wunsch (1990) 65.

<sup>440</sup> Bratton M & De Walle NV ‘Neopatrimonial regimes and political transition in Africa’ (1994) 46 *World Politics* 301.

<sup>441</sup> Olowu & Wunsch (1990) 91.

<sup>442</sup> Esman JM *Management Dimensions of Development: Perspectives and Strategies* (1991) 26; Malcolm W ‘District planning and local government in Kenya’ (1990) 10 *Public Administration and Development* 437-452.

<sup>443</sup> Esman (1991) 26.

<sup>444</sup> Fessha Y & Kirkby C ‘A critical survey of subnational autonomy in African states’ (2008) 38 *Publius: The Journal of Federalism* 248-249.

While the success of decentralisation varies, enhancing accountability in the exercise of central power remains a constant objective for many post-colonial states.<sup>445</sup>

#### **4.1 Devolution design features to limit central power**

Devolution of power has the potential to limit central power in two ways. First, the concept of devolution in itself limits central power as it means that the central government does not have absolute control over all agenda.<sup>446</sup> In other words, devolution of power limits central power by “denying” it absolute control of powers. The nature and extent of the limitation may vary, however, depending on such factors as whether a country is unitary or federal in structure. In federal systems, neither the units nor the federal government have absolute control of power,<sup>447</sup> and their respective powers can be varied only by mutual consent.<sup>448</sup> In unitary systems, the government can recentralise powers.<sup>449</sup> Thus, the “limiting ability” afforded by devolution may be comparatively weaker in unitary or decentralised systems than in federal systems; nevertheless, even decentralised systems can provide the basis for “reduc[ing] the concentration of power at the centre and thus hinder[ing] its arbitrary exercise”.<sup>450</sup>

Second, in federal systems or devolved systems generally, the direct or indirect participation of devolved units in central decision-making can enable devolved units to influence decisions at the centre and thus enhance overall accountability at the centre. The sections below discuss the local and national design features that have a potential to limit central power. Limiting central power implies that the process of devolution curbs central power by denying the centre control over some of the state power or by influencing the exercise of power at the centre.

#### **4.2 The structure of the constituent units**

##### **4.2.1 Size and number**

The size and number of constituent units should facilitate the effective limiting of central power. Roeder argues that “ethnofederal provinces, when large and powerful enough, can protect individual liberties by acting as ‘bulwarks’ that check the central state by creating a ‘separation

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<sup>445</sup> Olowu & Wunsch (1990) 65.

<sup>446</sup> Baldi (1999) 12.

<sup>447</sup> Elazar D *Exploring Federalism* (1987) 13.

<sup>448</sup> Baldi (1999) 6.

<sup>449</sup> Baldi (1999) 4.

<sup>450</sup> Hatchard J *et al Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (2004) 187; Siegle & O'Mahony (2006) 9.

of loyalty' that checks any 'unhealthy veneration' of the common-state."<sup>451</sup> Leonardy also recommends fewer and larger units; arguing that the current 16 units of the German federation are on the higher extreme, he writes:

It would seem to be obvious that there is a vital danger of federalism having too many constituent parts and inviting by this fact not only the temptation, but also the power to divide and rule on the level of the federation. American observers of their own constitutional scene would probably admit that their system is at least under permanent strain of such trends, owing to the fact that it comprises no fewer than 50 states.<sup>452</sup>

In South Africa, there were calls for strong regional governments as a brake on a strong central government, among other measures that were intended to tame the ANC's political might.<sup>453</sup> Emphasising the importance of provinces in South Africa, Simeon and Murray argue that the nine provinces are better able to check a politically dominant centre than would 283 municipalities.<sup>454</sup> Similarly, the 2005 Constitution of Iraq gives smaller units an option to come together and form a region for purposes of enjoying "significantly greater powers independently of the centre".<sup>455</sup> Regarding Nigeria, Elaigwu argues that the fragmentation of the constituent units from the original three to the current 36 has had the effect of weakening the resource base of states and making the units reliant on the central government.<sup>456</sup> From the above, it is clear that large units possess an inherent ability to limit central power. Smaller or tiny units, on the other hand, are perceived as too fragmented to facilitate the consolidation of political authority necessary to limit central power.<sup>457</sup>

#### **4.2.2 The composition of the constituent units**

The composition of constituent units can also enhance or limit their ability to claim powers and autonomy from the national government. Generally, federations with highly diverse units tend to have more resources and powers devolved to them, while in relatively homogeneous federations, powers and resources tend to be more centralised.<sup>458</sup> In Switzerland, the diversity

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<sup>451</sup> Roeder (2010) 18.

<sup>452</sup> Leonardy U 'Demarcation of regions: International perspectives' in de Villiers B & Sindane J (eds) *Regionalism: Problems and Prospects* (1993) 4.

<sup>453</sup> Steytler & Mettler (2001) 94.

<sup>454</sup> Murray & Simeon (2011) 250.

<sup>455</sup> Wolff (2009) 4.

<sup>456</sup> Elaigwu (2006) 211.

<sup>457</sup> Murray & Simeon (2011) 249-250.

<sup>458</sup> Watts (2008) 84-85.

between cantons has helped to nurture a political culture that is “consensual rather than majoritarian”.<sup>459</sup> In India, too, state boundaries have gradually been defined along linguistic lines, thus highlighting the diversity of the federation. This has had the effect of transforming India from a highly centralised federation into one “negotiatory” in character.<sup>460</sup> It can thus be concluded that, generally, homogenous units tend, for various reasons, to be more assertive than mixed units.

### **4.2.3 The powers of devolved units: the ‘political significance’ of units**

The ability to limit central power implies that constituent units have substantial powers which can enhance their autonomy and overall political significance. The World Bank observes that the ability of a subnational unit to influence central government depends on “the division of national political power between national and subnational governments” and “the structure, functions and resources assigned to subnational governments”.<sup>461</sup> The powers of constituent units should be substantial and clearly defined to protect the space of devolved units.<sup>462</sup> Administrative autonomy enhances self-reliance by sealing gaps of central intrusion through administrative centralisation.<sup>463</sup> In South Africa, for instance, a single public service under national legislation has encouraged the centre to prescribe even matters such as terms and conditions of provincial administrations.<sup>464</sup>

The involvement of constituent units in constitutional amendment also increases, since the Constitution is the source of power for both orders of government and actually divides the vertical powers and defines their respective structures.<sup>465</sup> Constituent units in the main federations, including Australia, Canada, and the USA, all play a role in constitutional amendments.<sup>466</sup> Most regional units in major federations such as Canada,<sup>467</sup> Austria<sup>468</sup> and

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<sup>459</sup> Saunders C ‘Legislative, executive and judicial institutions: A synthesis’ in Saunders, Le Roy *et al* (eds) (2006) 347.

<sup>460</sup> Dhavan & Saxena (2006) 168.

<sup>461</sup> World Bank (1999) 112.

<sup>462</sup> World Bank (2000) 112.

<sup>463</sup> Murray (2006) 260; Cameron R ‘Vertical decentralisation and urban service delivery in South Africa: Does politics matter?’ paper presented at a conference themed “Urban Governance and Service Delivery” 5 June 2012, University of Cape Town; Saunders (2006) 364.

<sup>464</sup> Saunders (2006) 363.

<sup>465</sup> Saunders (2006) 351.

<sup>466</sup> Saunders (2006) 351.

<sup>467</sup> Huglin TO ‘Canada’ in Le Roy *et al* (2006) 123.

Germany<sup>469</sup> have exclusive control of the local government level. This enhances the power of the regional units as the centre cannot undercut regional powers by circumventing regional units and dealing directly with the local level.

### 4.3 Enhancing 'federal decision-making' through national design

Effective limitation of central power means that devolved units can, through institutions of central representation, influence central decision-making and thus participate in the exercise of central power. Baldi argues that territorial representation at the centre is an important "centre-constraining" feature in federalism.<sup>470</sup> Participation in national legislation and constitutional amendment also further limits central power as the units participate in central decisions that affect them.<sup>471</sup> As in the case of conflict resolution, the central representation of devolved units is effected through a second chamber of the national legislature.<sup>472</sup> Accordingly, the features of shared-rule discussed in relation to conflict resolution are all relevant for the purposes of limiting central power.

There is no universally agreed mode of central representation of devolved units that can facilitate effective 'federal decision-making' in the second chamber.<sup>473</sup> While some authors endorse the German style of "governmental representation",<sup>474</sup> other systems prefer direct and indirect elections.<sup>475</sup> However, as discussed earlier above, the effectiveness varies and the local context plays an important role in determining the effectiveness of any form of structure adopted. Nevertheless, there is a general trend towards directly elected representatives.<sup>476</sup> The powers of the second chamber should also enable it to protect the interests of units, such powers including special vetoes on matters (for instance, legislation) that are important to the interests of the devolved units.<sup>477</sup>

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<sup>468</sup> Gamper A 'Republic of Austria' in Le Roy *et al* (2006) 89-90.

<sup>469</sup> Oeter S 'Federal Republic of Germany' in Le Roy *et al* (2006) 154-157.

<sup>470</sup> Baldi (1999) 7.

<sup>471</sup> Baldi (1999) 7.

<sup>472</sup> Watts (2008) 147.

<sup>473</sup> Watts (2008) 150-152. .

<sup>474</sup> Baldi (1999) 9.

<sup>475</sup> Saunders (2006) 358-359.

<sup>476</sup> Saunders (2006) 358-359.

<sup>477</sup> Watts (2008) 154; Section 76, Constitution of the Republic of South Africa, 1996.

### 4.3.1 'Design versus effectiveness' in the limiting of central power

While federal features offer effective limits on the exercise of central power, the experience of even some of the more established federal systems shows that such features can be blurred by a politically over-assertive national executive. For instance, Watts observes that this was the case in the Russian Federation during Putin's rule<sup>478</sup> and in the USA during George W. Bush's rule, where the executive enhanced its control over federal matters.<sup>479</sup> Party dominance in South Africa<sup>480</sup> and Ethiopia<sup>481</sup> also blurs the lines of federal governance. Saunders makes similar observations about Argentina and Nigeria, where "concentration of power in the presidency" has dominated the legislature and the constituent units.<sup>482</sup> Saunders<sup>483</sup> and Majeed observe that federal systems formed out of an existing polity are more prone to centralisation tendencies than those formed from units that were previously sovereign.<sup>484</sup>

### 4.3.2 Summary of the devolution design features to limit central power

The central design features of devolution for constraining central power can be identified from the preceding discussions. Constituent units should be large, few and homogenous in composition. The constituent units should have powers that can enhance their "political significance". These include participation in constitutional amendment and control of the lower levels and other powers that can enhance overall autonomy.

Central representation of units enhances the ability of devolved units to influence central decision-making, something which is achieved through a federal chamber. Equal representation of all devolved units is emphasised for an effective limitation of central power. Representatives can be either be directly or indirectly elected, or be governmental representatives of devolved units. The powers of the second chamber should be relevant to the interests of constituent units, for example, by means of special powers to review national laws concerning devolved units.

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<sup>478</sup> Watts (2008) 141.

<sup>479</sup> Watts (2008)141.

<sup>480</sup> Steytler (2004) 159-169.

<sup>481</sup> Dickovic & Riedl (2010) 37; see also Zemelak A 'Local government in Ethiopia: Still an apparatus of control?' (2011) 15 *Law Democracy and Development* 1.

<sup>482</sup> Saunders (2006) 353.

<sup>483</sup> Saunders (2006) 347.

<sup>484</sup> Majeed A 'Republic of India' in Kincaid J & Tarr GA (eds) *Constitutional Origins, Structure and Change in Federal Countries* (2005) 187.

## **5. Compatibility of purposes of devolution: making “trade-offs”**

The preceding sections have highlighted devolution design features considered necessary for the pursuit of development, conflict resolution and limiting central power. A careful review of the respective design reveals common, neutral and potentially conflicting design features. Design features that are common across the three purposes, or which have a neutral effect on other designs, need no balancing. However, trade-offs or compromises have to be made between conflicting or potentially conflicting design features. Due to the fact that underdevelopment, internal conflict, and central power abuse are persistent and concurrent challenges, states have, over time, consciously or unconsciously, made compromises and created balances in their devolved structures. Indeed, the varying designs across states are evidence of attempts to balance the purposes of devolution through design. However, before analysing state practice, it is necessary to understand the neutral, complementary and conflicting aspects of the three categories of principles and design.

This section examines the relationship between the central design features for the three purposes. The analysis starts with the compatibility of the structures, which relates to size, the number of levels, number of units, and institutional structures. In the second place, it attends to the political, financial and administrative powers and functions of the decentralised units. Third, national design and central institutions are examined, and, lastly, the analysis turns to the design of centre-unit relations for each of the three purposes.

In practice, one purpose seems to dominate, with modifications being made to accommodate design features of the other less prominent purposes; the more dominant purpose is, in turn, influenced by factors specific to a local context. In developing countries, the developmental purpose is likely to be the most prominent reason for devolving power. This is especially true of devolution systems adopted in the early 1990s and thereafter, a period which can be described as the “devolution renaissance”.

### **5.1 Compatibility in structures and institutions of devolution**

#### **5.1.1 Size, levels, and number of units**

Development requires economically viable small units for effective participatory development.<sup>485</sup> Indeed, the World Bank seldom focuses on the regional level. Conflict resolution may require large or small units depending on the context. Limiting central power emphasises larger and

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<sup>485</sup> World Bank (1999) 115.

fewer units in order to facilitate consolidation of regional power that can be used to limit central power. The traditional structure which encompasses the national, regional, and local levels is a potential compromise between the three purposes.

In Indonesia, for instance, the 36 autonomous regions and 434 districts are a balance between the three purposes.<sup>486</sup> As Bennet observes, the framers of Indonesia's decentralised system had to "walk a thin line between enhancing the capacity of subnational governments to offer services suited to local needs, on the one hand, and empowering and enabling those leaders who might seek independence on the other".<sup>487</sup> Accordingly, district governments concentrate on service provision while the regions manage secessionist demands. Even then, the regions coordinate important activities between districts which contribute to efficient provision of local services.<sup>488</sup> There is thus a structural and functional balance between the regional and local units in order to complement the pursuit of the three purposes.

In South Africa, Murray and Simeon have cautioned against the ruling party's proposal to abolish the provincial level. Arguing that abolishing provinces will "weaken rather than strengthen democracy in South Africa",<sup>489</sup> they note that while local governments can absorb the "democratic deficit" occasioned by scrapping provinces, the 283 local units are "unlikely to develop any real challenge to central dominance"<sup>490</sup> and will be subordinated to the dominant centre. Thus, while the 283 local governments are appropriate for local service delivery, they are too "fragmented" to limit central government – a role better served by the nine provinces. These provinces may be politically and fiscally weak, but they can certainly play a better role in checking the centre than the 283 municipalities. Indeed, while party dominance has undermined the role of provinces in checking national government, the main opposition party controls one of the provinces, and this has granted the party an impetus to check the national government.<sup>491</sup>

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<sup>486</sup> World Bank *Spending for Development: Making the most of Indonesia's New Opportunities* (2008) 113; Decentralisation Law No. 22/ 1999; Diprose R 'Decentralization, horizontal inequalities and conflict management in Indonesia' (2009) 8 (1) *Ethnopolitics* 110.

<sup>487</sup> Bennet (2010) 3.

<sup>488</sup> World Bank (2008) 120; Brodjonegoro & Asanuma (2000) 117-118.

<sup>489</sup> Murray & Simeon (2011) 248.

<sup>490</sup> Murray & Simeon (2011) 249.

<sup>491</sup> Cornelissa S & Horstmeier S 'The social and political construction of identities in new South Africa: An analysis of the Western Cape Province (2004) 40 (1) *The Journal of Modern African Studies* 68-69.

In the case of Macedonia, the elimination of the regional level means that the more than 80 units are too numerous to limit central power.<sup>492</sup> Thus, while the local governments engage in service delivery and have recognised minority languages, the exclusion of federal arrangements meant that bicameralism or territorial representation could not be pursued. However, the Constitution provides for double majority votes for groups considered minorities at both the national and local levels (locally known as the Badinter principle).<sup>493</sup> Thus, in Macedonia's case, other avenues (outside of the decentralised structure) are used to limit central power.

There is also a potential conflict in the design with regard to the number of levels. It is argued that the higher the number, the greater the powers devolved from the centre, and the stronger the prospects for checking the exercise of central power.<sup>494</sup> However, in the case of development, it is argued, multiple levels complicate the division of powers and lead to inefficiency.<sup>495</sup> Thus, in this design aspect there is a potential conflict between serving a developmental purpose and limiting central power. In practice, though, the existence of many levels does not necessarily result in a "weakened" centre and, in fact, it may have the opposite effect.

### **5.1.2 Institutional structures**

There is no doubt that institutional autonomy is an element common to the three purposes. Indeed, autonomy is implied in the very concept of devolution of power as its aim is to transfer power to the subnational units. Accordingly, institutional structures aimed at facilitating the autonomy of the devolved units are common to the three purposes. However, there are slight variations in the approach to the design of these structures, variations that are due to the differences between the purposes. For instance, for development, wide participation is sought in order to ensure effective participation and accountability, whereas, in the case of conflict resolution, it is done so for the purpose of enhancing inclusiveness, given that a lack of inclusivity can foment conflict. Accordingly, in order to achieve wide participation, the PR system is recommended for the pursuit of both purposes,<sup>496</sup> if for slightly different reasons in each instance.

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<sup>492</sup> Lyon (2011) 13.

<sup>493</sup> Ragaru (2008, 46) observes that the 'Badinter principle' was introduced after the Albanian political elite complained that majority parties had formed a coalition to oppose minority initiatives.

<sup>494</sup> Siegle & O'Mahony (2006) 5.

<sup>495</sup> World Bank (1999) 115.

<sup>496</sup> World Bank (1997) 112; Oloo (2011) 3.

Development emphasises clear lines of local accountability. In regard to elections, the World Bank calls for direct election of mayors in order to enhance the visibility of elections as a tool for accountability.<sup>497</sup> A directly elected head with an effective majority is seen as being able to make decisions for which he or she can then be held to account by the local community.<sup>498</sup> Conflict resolution, on the other hand, calls for a PR system that prevents an effective majority and instead encourages the formation of local coalitions in the interests of collective decision-making and hence unity and cohesion.<sup>499</sup> However, the World Bank regards coalitions as “inherently less stable” – because they are more susceptible to group and sectarian interests – than a majoritarian government;<sup>500</sup> by contrast, a directly elected mayor is seen as better able to stand up to centralisation and thereby limit central power.<sup>501</sup>

Accordingly, there are common as well as potentially conflicting features in the design of institutional structures. The developmental purpose leans towards majority electoral systems for purposes of clear lines of accountability. Limiting central power leans, too, towards majority electoral systems for the purposes having a powerful subnational leader who can stand up to the central government. Conflict resolution, on the other hand, calls for a PR system which avoids an effective majority and paves the way for a coalition that can enhance collective decision-making across the different groups.

In regard to administrative structures, overall administrative autonomy facilitates pursuit of the three purposes. However, there may be slight variations between the three purposes. While development emphasises competence for overall efficiency in service delivery, conflict resolution emphasises diversity in administrative structures in order to promote inclusiveness. There may be potential conflict, particularly in cases where not all groups have the requisite skills for service delivery. This is especially so among minorities who have low literacy levels and formal skills; in such instances, administrative structures may end up being filled by persons from the dominant group to the exclusion of other groups.

## **5.2 Compatibility in the design of powers and functions**

Functional autonomy is also common to the three purposes. For development, the relevant powers seek to enable devolved units to provide local services and address local preferences.

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<sup>497</sup> World Bank (1999) 121.

<sup>498</sup> World Bank (1999) 121.

<sup>499</sup> Siegle & O'Mahony (2006) 6; Wolff (2005) 62.

<sup>500</sup> World Bank (1999) 114.

<sup>501</sup> World Bank (1999) 121.

In regard to conflict, the relevant powers seek to enable devolved units to address the root causes of conflict. Vertical division of power also enhances the autonomy of counties, augments their political significance in the entire system, and thereby supports their ability to limit central power. Overall functional autonomy thus plays an important role across the three purposes.

However, the level or nature of powers required may vary between the three purposes. Development requires powers relevant to the provision of local services and local development, such provision including local infrastructure development, education, health, refuse removal and other typical local government functions. However, conflict resolution may require more powers, especially where the conflict is about the control of national power. In order to address the conflict, the amount or level of powers devolved to the subnational level must be significant enough to enable political inclusion of the aggrieved groups. Limiting central power also implies that the devolved units have powers that can operate as an effective limit to central powers. Processes such as constitutional amendments define and determine the structures and powers at the national and subnational level.

### **5.3 Compatibility in the design of fiscal powers and finances**

Fiscal autonomy and control over finances enhances the overall autonomy of devolved units and is therefore essential for the three purposes. For development, fiscal autonomy is necessary for devolved units to address local preferences. This means that there should be enough resources and accompanying discretion to enable devolved units to address democratically agreed local preferences. In regard to conflict resolution, fiscal autonomy and the amount of finances devolved to, or controlled by, devolved units should enable effective economic inclusion. In regard to limiting central power, fiscal autonomy reifies the overall autonomy of devolved units from the centre.

However, the nature, extent and amount of resources controlled by devolved units may vary among the three purposes. For development, devolved units need resources to facilitate the performance of service delivery and local development. In cases of conflict over local resources, effective “self-economic determination”, such as that in the Nigerian derivation principle,<sup>502</sup> can assist in conflict resolution. In other cases of economic exclusion, devolved units should control resources that will address perceptions of economic exclusion. In regard to limiting central

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<sup>502</sup> Section 162(2) of the 1999 Constitution of Nigeria contains a ‘derivation provision’ which requires 13 percent of the federal oil revenue to be ploughed back to oil-producing states.

power, the amount of resources and fiscal power exercised by the devolved units should be sufficient to constitute an effective economic counterweight to the centre.

Undeniably, the fiscal federalist model, which aims at enhancing equitable sharing of resources, is relevant to conflict resolution inasmuch as it addresses perceptions of economic exclusion. However, effective economic inclusion may require more than the resources necessary for local service delivery. Where sub-state groups are in conflict over control of national resources, resources for local service delivery will be grossly insufficient to facilitate effective economic inclusion. Furthermore, resources that are adequate only for financing local services and local development are insufficient to limit the economic might of the centre. Devolved units that are allocated resources which are adequate to facilitate economic inclusion and limiting of central power can obviously manage local service delivery; accordingly, there is no conflict in design, only variance in the amount of powers and resources that are required.

#### **5.4 Compatibility in central government design features**

The national level plays an important role for the three purposes. Effective devolved development requires supervision of devolved units and cooperation with the national government. In regard to conflict resolution, appropriate national design facilitates inclusive national decision-making processes which are critical for inclusion. National design also enhances the ability of devolved units to influence central-decision making, thus facilitating the limiting of central power. However, the respective designs may differ between the three purposes.

For instance, the central territorial representation of decentralised units in terms of territorial shared-rule arrangements is not essential for development. Indeed, the World Bank proposes that, due to the limited powers of most second chambers, the lower chamber is generally more appropriate for representation of local government interests at the national level.<sup>503</sup> In federal systems, the local level is generally not directly represented in “federal decision-making”. Even in South Africa, where the local level is provided for in the “federal chamber”, representation is by organised local government, and the representatives have no right to vote on decisions taken in the NCOP.<sup>504</sup> Indeed, the bulk of local government functions are coordinated with the sectoral ministries, which are part of the executive, while “federal decision-making” is normally “hooked”

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<sup>503</sup> World Bank (1999) 113.

<sup>504</sup> Section 67 of the Constitution of the Republic of South Africa.

in the legislature. Nevertheless, the federal chamber may exercise powers that can protect and safeguard the autonomy of local government units to pursue development.

Central representation of devolved units is essential for conflict resolution and limiting central power. It is only through “federal decision-making” that devolved units can be included in central decision-making to enhance the inclusive and collective decision-making so crucial for addressing conflict. The representation and participation of devolved units in central decision-making also offers an opportunity for influencing central decision-making and hence potentially limiting central power. The powers exercised by the federal chamber should be relevant to the political and economic inclusion of devolved units and other matters that are relevant and of mutual concern to the centre and the constituent units.

### 5.5 Compatibility in the design of centre-unit relations

Interaction between the centre and devolved units is important for the three purposes. However, the emphasis in the structures and process of interactions creates a potential conflict. While supervision of devolved units is important for effective devolved development, the same is not encouraged for the other two purposes. Supervision of devolved units can easily be interpreted as – or actually be – an avenue for domination by the nationally dominant group in control of national government. In regard to limiting central power, supervision may facilitate central intrusion in local units and thereby weaken their autonomy. Cooperation, which emphasises equality of levels, is, however, complementary to the three purposes. It enhances the autonomy and equality of levels, which can form a basis for effective political inclusion, and also enhances the political significance of devolved units, which is important for purposes of limiting central power. Table 1 provides a summary of the discussions on the design features of development, conflict resolution, and limitation of central power. The last column indicates the potential trade-off for the conflicting design aspects in each of the design features listed in first column.

**Table 1: Summary of the design features and trade-offs**

Design element	Development	Conflict resolution	Limiting central power	The trade-off
<b>size and number of units</b>	<ul style="list-style-type: none"> <li>Development requires small (but economically viable) units for effective participation and responsiveness</li> </ul>	<ul style="list-style-type: none"> <li>Traditionally focuses on classical federal features that emphasise few and large</li> </ul>	<ul style="list-style-type: none"> <li>Effected by larger and fewer units that can stand up to the centre</li> </ul>	<ul style="list-style-type: none"> <li>The “hour-glass” structure: large but “weak” regions and strong local governments</li> </ul>

<b>Design element</b>	<b>Development</b>	<b>Conflict resolution</b>	<b>Limiting central power</b>	<b>The trade-off</b>
	<ul style="list-style-type: none"> <li>• Development cautions against too many units, which will lead to high administrative costs</li> </ul>	<p>regions</p> <ul style="list-style-type: none"> <li>• The local level plays an important role, too</li> </ul>		<p>(South Africa and Indonesia)</p> <ul style="list-style-type: none"> <li>• Eliminating the regional level to remain with the central and local level (Macedonia)</li> <li>• “Hybrid level”: creating a new level between the regional and local levels (Kenya)</li> </ul>
<b>Number of levels</b>	<ul style="list-style-type: none"> <li>• Avoids multiple levels because they often lead to lack of clarity on functions, resulting in ineffectiveness</li> <li>• Emphasises local level for enhanced service delivery</li> </ul>	<ul style="list-style-type: none"> <li>• Regional level addresses autonomy concerns (in some cases)</li> <li>• Local level for service delivery to address development-related conflict</li> </ul>	<ul style="list-style-type: none"> <li>• A strong regional level only and local government as a competence of the region</li> </ul>	<ul style="list-style-type: none"> <li>• A hybrid level that performs both regional and local functions (Kenya)</li> <li>• The “hour-glass structure” (South Africa, Indonesia)</li> </ul>
<b>Boundary demarcation criteria</b>	<ul style="list-style-type: none"> <li>• Wall-to-wall boundary demarcation focusing on rural/urban divide</li> <li>• Focuses on economic functionality</li> </ul>	<ul style="list-style-type: none"> <li>• Can either be mixed or exclusive ethnic units</li> <li>• Asymmetry creating “special units”</li> </ul>	<ul style="list-style-type: none"> <li>• Exclusive / homogenous units generally tend to be more assertive against the centre than mixed ones</li> </ul>	<ul style="list-style-type: none"> <li>• Economic viability and identity factors mixed, e.g. the special local governments/regions</li> </ul>
<b>Financial powers and resources</b>	<ul style="list-style-type: none"> <li>• Emphasises financial powers for local responsiveness</li> <li>• Emphasises local tax powers in order to enhance political accountability</li> </ul>	<ul style="list-style-type: none"> <li>• Emphasises control of local resources for “economic self-determination”</li> <li>• Emphasises spending powers as opposed to revenue-raising power</li> </ul>	<ul style="list-style-type: none"> <li>• Emphasises financial power for self-reliance and reduced dependency on the centre</li> </ul>	<ul style="list-style-type: none"> <li>• Complementary “fiscal federalist” structure that straddles the three purposes</li> </ul>

Design element	Development	Conflict resolution	Limiting central power	The trade-off
<b>Distribution of powers and functions</b>	<ul style="list-style-type: none"> <li>Emphasises asymmetry for purposes of addressing regional economic disparities and efficiency, e.g. urban and rural local government</li> </ul>	<ul style="list-style-type: none"> <li>Emphasises equality of powers and functions for inclusiveness</li> <li>Emphasises asymmetry in some cases (Spain – Catalonia and Basque country/ Canada - Quebec/UK – Scotland)</li> </ul>	<ul style="list-style-type: none"> <li>Equality of all units essential in order to enhance individual and collective ability to limit central power</li> </ul>	Asymmetry of powers and functions
<b>Central structures for unit representation</b>	<ul style="list-style-type: none"> <li>Not essential</li> </ul>	<ul style="list-style-type: none"> <li>Bicameralism</li> <li>Inclusive national executive</li> <li>Inclusive national institutions</li> </ul>	<ul style="list-style-type: none"> <li>Upper chamber with legislative and review power to influence central decisions</li> <li>Governmental representation of units in central structures</li> </ul>	Complementary design features
<b>Unit representation in central decision-making (shared rule)</b>	<ul style="list-style-type: none"> <li>Not emphasised because focus is on local praxis</li> </ul>	<ul style="list-style-type: none"> <li>Essential for purposes of inclusion</li> </ul>	<ul style="list-style-type: none"> <li>Essential for purposes of influencing central decision-making</li> </ul>	<ul style="list-style-type: none"> <li>Complementary design feature for conflict resolution and limiting central power but neutral for development</li> </ul>

## 6. Conclusion

This chapter examined how different states integrate development, conflict resolution and the limitation of central power in the design and implementation of devolved government. An analysis of the relationship between the design features and principles of the three purposes reveals aspects that are common and complementary, aspects that are neutral, and aspects that are potentially or actually in conflict. Thus, states have had to adopt varying structures in an

attempt to balance the conflicting design features. In most cases, the most prominent purpose determines the main structure, which is modified to provide or serve other purposes. For instance, in conflict situations, conflict-resolution design features will lay the basis for devolved government while the other purposes will be accommodated as “off-shoots” to the primary design of conflict resolution.

Kenya adopted a new Constitution in 2010 with a devolved system of government composed of the national level and 47 county governments as the next and only constitutionally entrenched level of government. The 47 county governments can be classified as neither regional nor local but as a “hybrid level” between the regional and local levels. The next chapter seeks to establish the relevance of the three purposes to the Kenyan design by analysing the country’s history of devolved governance.



## CHAPTER THREE

### CENTRALISATION, UNDERDEVELOPMENT AND ETHNIC CONFLICT IN KENYA: A COLONIAL LEGACY

#### 1. Introduction

Kenya's first contact with formal governance and administrative structures occurred in the colonial era when the area forming the territory of present-day Kenya was consolidated and brought under British administration. The rules, institutions and structures that were put in place have changed through the colonial, independence and post-independence phases. A commonly held view is that most of the challenges facing Kenya in terms of governance, development, political stability and peace are traceable to colonial policies that were condoned and even encouraged in the post-independence period. This chapter analyses the various phases Kenya has undergone from its early days of formal administration until the adoption of the current Constitution in 2010. At each stage, the chapter evaluates the different laws, policies and practices that have shaped Kenya's devolved governance.

The colonial administration is described as centralist, hierarchical and designed for control as opposed to participatory and democratic governance. The economic policy pursued by the colonial establishment was one of exclusion on the basis of race. This resulted in segregated economic development in favour of areas set aside for European settlement. Thus, at independence, Kenya inherited a segregated economic structure and administrative and government structures meant for centralised control. While the African nationalist movement campaigned and agitated for independence on a reform platform, this chapter demonstrates that colonial governance and economic structures were left intact, with far-reaching consequences for development, ethnic harmony and accountability in the exercise of central powers.

Areas that were most heavily influence by colonial development, advanced, while others untouched by colonial development lagged behind. These economic disparities have led to real or perceived economic marginalisation along ethnic lines. Later ethnic conflicts in the post-colonial era are traceable to perceptions about economic disparities created during the colonial period. Colonial government policy, which pursued an ethnic "divide-and-rule" strategy, was also left unaddressed after independence. As a result, underdevelopment and poverty, and ethnic

and political conflict – along with other factors that continue to pose challenges to post-colonial Kenya – have their origins firmly rooted in the colonial era. This chapter seeks to trace these issues from the pre-colonial, colonial, independence and post-independence phases. Within these four epochs, the issues that defined and shaped Kenya’s decentralised governance policies will be discussed.

## **2. The pre-colonial and colonial phase**

### **2.1 Consolidating the Kenyan territory: the early days**

Before the advent of British rule, the area comprising the territory of present-day Kenya was occupied by various ethnic communities in exclusive territories or homelands with “cultural and economic significance” to them.<sup>1</sup> On the basis of a somewhat arbitrary system of classification that leaves certain groups claiming different ethnic identities for themselves, Kenya is said to have 42 different ethnic groups.<sup>2</sup> The largest of the main groups include the Kikuyu (17.2%), who largely occupy the central region of Kenya, the Luhya (13.8%) in the western part of the country, the Kalenjin (12.9%) in the Rift Valley region, and the Luo (10.4%), who are also located in the western part. Other ethnic communities include the Kamba (Eastern region), Somali (North Eastern region), Kisii (Western region), Mijikenda (coastal part), Meru (Lower Eastern region), Turkana (North Western part), Maasai (Rift Valley region) and the Teso (Western part).<sup>3</sup>

Although no political framework existed to bring together these communities, there is evidence of barter trade between them<sup>4</sup> as well as other economic activities.<sup>5</sup> Leadership was simple and community-based: “local councils of elders were responsible for the administration of settled areas and ensuring that the communal rights of the society were protected”.<sup>6</sup> Ojwang adds that most communities had “a simple and relatively informal governmental system, localized and apparently not designed for a modern state”.<sup>7</sup> Arrangements for future British control over the

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<sup>1</sup> Juma L ‘Ethnic politics and the constitutional review process in Kenya’ (2001-2002) 9 *Tulsa Journal of Comparative and International Law* 474.

<sup>2</sup> Juma (2001-2002) 474.

<sup>3</sup> Republic of Kenya ‘2009 Population and housing census results’ Ministry of State for Planning, National Development and Vision 2030 (31 August 2010).

<sup>4</sup> Ndege PN ‘Colonialism and its legacies in Kenya’ (Lecture delivered during Fulbright – Hay Group Project abroad programme: 5 July to 6 August 2009 at the Moi University, Main Campus).

<sup>5</sup> Rogers P ‘The British and the Kikuyu 1890-1905’ (1979) 20 (2) *The Journal of African History* 255.

<sup>6</sup> Bubba N & Lamba D ‘Urban management in Kenya’ (1991) 3 *Environment and Urbanization* 37; Oyugi (1983) 110.

<sup>7</sup> Ojwang JB *Constitutional Development in Kenya: Institutional Adoption and Social Change* (1990) 21.

region were secured as early as 1886 through agreements with other colonial powers, but “without any reference to the desires or views of the people most likely to be affected”.<sup>8</sup>

The British East Africa Association (which later changed into the Imperial British East African Company (IBEAC)) was given a royal charter to administer the territory.<sup>9</sup> The Charter gave the Company powers to appoint commissioners to administer districts, promulgate laws, and establish and operate courts of justice.<sup>10</sup> As the British Association/Company expanded the territory to the hinterland, the chiefs of ethnic communities signed agreements the significance of which they and their people seldom understood.<sup>11</sup> In June 1895, the British government declared protectorate status over the region and took over administration from IBEAC.<sup>12</sup> The entry of the British government saw fairly rapid steps towards consolidating the territory of present-day Kenya.<sup>13</sup>

Ogot writes that the British employed violence on a locally unprecedented scale,<sup>14</sup> “and with unprecedented singleness of mind, to usher Kenya into the twentieth century”.<sup>15</sup> Juma adds that “the process of acquiring territory through conquests benefited a great deal from the British tactics of playing one African group against another and rewarding their supporters with loot, mainly cattle, taken from conquered groups”.<sup>16</sup> For instance, the Maasai benefited from cattle confiscated from neighbouring tribes after joining the British in “punitive expeditions” against neighbouring tribes.<sup>17</sup>

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<sup>8</sup> Ghai YP & McAuslan JPWB *Public law and Political Change in Kenya* (1970) 5.

<sup>9</sup> Ghai & McAuslan (1970) 5.

<sup>10</sup> Ghai & McAuslan (1970) 8.

<sup>11</sup> Ghai & McAuslan (1970) 5-6.

<sup>12</sup> Ghai & McAuslan (1970) 12.

<sup>13</sup> Ghai & McAuslan (1970)14.

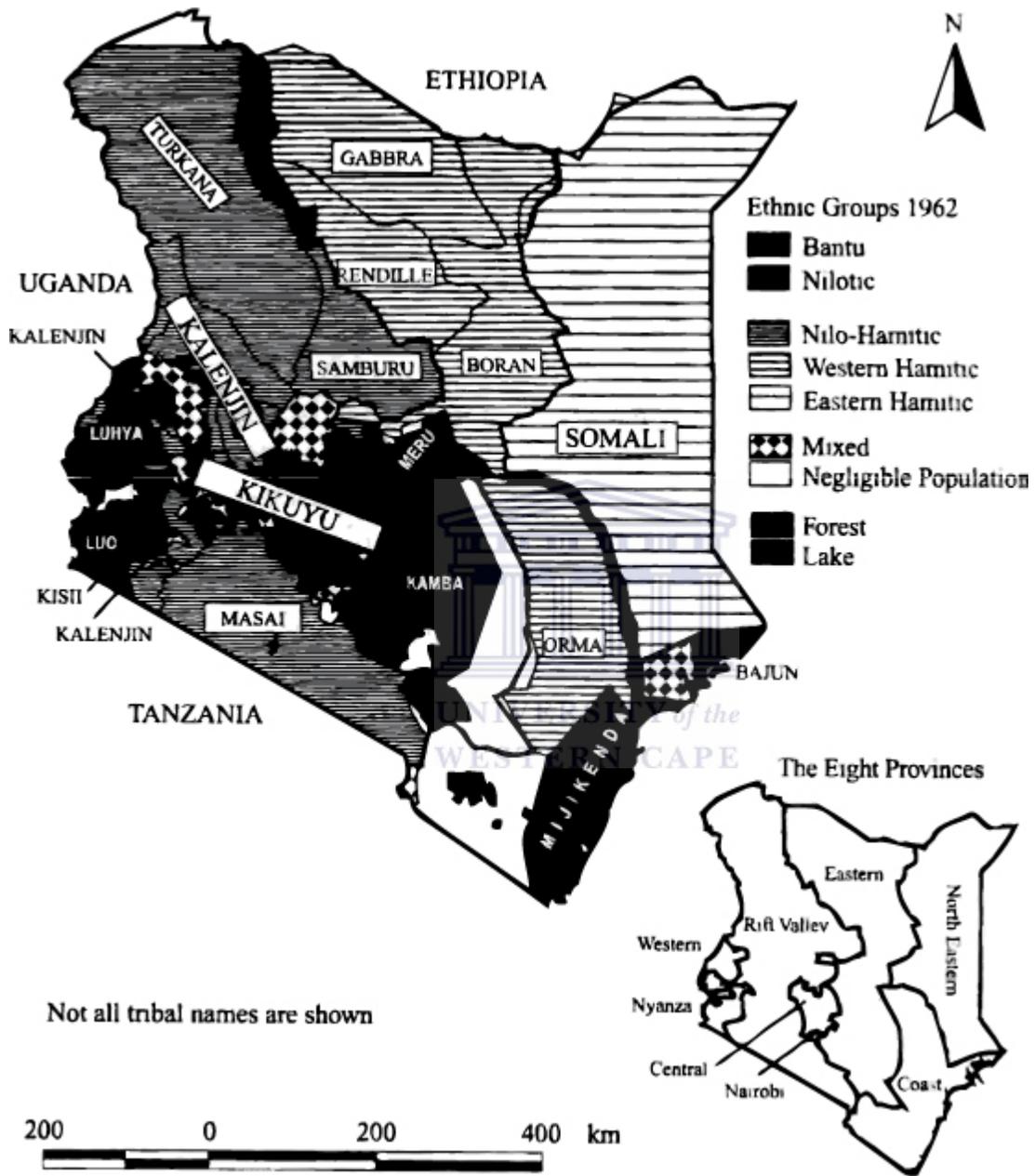
<sup>14</sup> Ellis D ‘The Nandi Protest of 1923 in the context of African resistance to colonial rule in Kenya’ (1976) 17 (4) *The Journal of African History* 558.

<sup>15</sup> Atieno-Odhiambo ES ‘The formative years 1945-55’ in Ogot BA & Ochieng WR (eds) *Decolonization and Independence in Kenya (1940-93)* (1995) xiv.

<sup>16</sup> Juma (2001-2002) 477.

<sup>17</sup> Mungeam GH ‘Masai and Kikuyu responses to the establishment of British Administration in the East Africa Protectorate’ (1970) 11 (1) *The Journal of African History* 131-132, 136.

Map 1: Ethnic distribution in Kenya



Source: From Roddy Fox, "Bleak Future for Multi-Party Elections in Kenya", *Journal of Modern African Studies*, 1996 Vol. 34 No. 4 at page 598.

## 2.2 Colonial rule: sowing the seeds of centralisation, underdevelopment and conflict

### 2.2.1 Colonial administration policy

The initial period of colonial rule was used to establish administrative structures and take control inland. Completion of the railway from the coast to Lake Victoria in 1902 played a major role in opening up the territory.<sup>18</sup> In the same year (1902), a new “Order in Council” was passed that empowered the Commissioner (the representative of the Crown in a protectorate) “to divide the country into provinces and districts for the purpose of administration”.<sup>19</sup> The Commissioner could also exercise executive, judicial and legislative powers. In addition, regulations were passed which gave Provincial Commissioners power to appoint headmen, later referred to as chiefs.<sup>20</sup> Oyugi explains that the headmen/chiefs “became the major link between the colonial authorities and the people”.<sup>21</sup> Colonial administrators also carried out judicial and executive functions on behalf of the Commissioner. Prior to the formal appointment of individuals as headmen/chiefs, leadership in most communities in the territory of Kenya was communal and vested in a council of elders who made collective decisions.<sup>22</sup> Thus, colonial administrative structures replaced a system based on collective decision-making with one in which individuals who were appointed to head communities were accountable to colonial authorities.<sup>23</sup>

A number of policies were put in place to entrench colonial policy. Fertile areas of the colony were set aside for supposedly permanent European settlement.<sup>24</sup> While alienation of land started from the Central region well before 1900,<sup>25</sup> the same applied to other regions of the colony, most notably the Rift Valley and Eastern regions.<sup>26</sup> Africans were displaced and

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<sup>18</sup> Ghai & McAuslan (1970) 41.

<sup>19</sup> Ghai & McAuslan (1970) 41.

<sup>20</sup> Regulations No. 22 of 1902 (Village Headmen) cited in Ghai & McAuslan (1970) 40; Akivaga *et al Local Authorities in Kenya* (1981) 24-25; Oyugi (1983) 110.

<sup>21</sup> Oyugi (1983) 110.

<sup>22</sup> Republic of Kenya ‘Report of the Commission of Inquiry on Local Authorities in Kenya: A strategy for local government reform in Kenya’ (1995) 5-6.

<sup>23</sup> Odinga O *Not yet Uhuru* (1976) 15.

<sup>24</sup> Kanyinga K ‘The legacy of the White Highlands: Land rights, ethnicity and the post-2007 elections violence in Kenya’ (2009) 3 *Journal of Contemporary African Studies* 327.

<sup>25</sup> Overton J ‘The origins of the Kikuyu land problem: Land alienation and land use in Kiambu, Kenya, 1895-1920’ (1988) 31 (2) *African Studies Review* 109-110. He states that “the earliest land alienation in the Kenya Highlands began in Kiambu”.

<sup>26</sup> Overton (1988) 109-110.

exclusive ethnic reserves created around the European-settled areas.<sup>27</sup> The colonial government imposed taxes on Africans, which in turn forced them to come out of their reserves and work in white areas.<sup>28</sup> Other measures of economic control included prohibition from growing cash crops in African areas.<sup>29</sup>

African pressure against colonial rule started building, especially with the return of “enlightened Africans” who served in World War I.<sup>30</sup> As a response to the rising pressure, the colonial government amended the 1912 Native Authority Ordinance to create Local Native Councils in (LNCs) in 1924 and encouraged Africans to conduct their political activities through these councils.<sup>31</sup> As the then Chief Native Commissioner stated, “[I]t was hoped that the [Local Native] councils would provide an avenue of expression for the educated natives, a safety-valve to check disloyal organizations.”<sup>32</sup>

LNCs were not created to give an independent voice to the Africans. Members were appointed by the Provincial Commissioners (PCs) and under the control of the District Commissioner (DC).<sup>33</sup> A new Ordinance was passed in 1937 which retained the LNCs structure but, for the first time, introduced elected representatives to the LNCs.<sup>34</sup> However, the DC, exercising the powers of the PC, could still get rid of “errant” members or bar individuals from seeking elective office to the LNCs.<sup>35</sup> Administrative units were generally drawn along ethnic boundaries that created exclusive ethnic units in the African areas. As Ghai and McAuslan note, “while there was no

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<sup>27</sup> Leys C ‘Politics in Kenya: The development of peasant society’ (1971) 1 (3) *British Journal of Political Science* 307.

<sup>28</sup> Kanyinga (2009) 327-328.

<sup>29</sup> Maloba WO ‘Decolonization: A theoretical perspective’ in Ogot BA & Ochieng WR (eds) *Decolonization and Independence in Kenya (1940-93)* (1995) 9; Overton (1988) 120-121; Wasserman G ‘European settlers and Kenya colony: Thoughts on a conflicted affair’ (1974) 17 (2) *African Studies Review* 430.

<sup>30</sup> Odinga O *Not yet Uhuru* (1976) 26-29.

<sup>31</sup> Okoth-Ogendo HWO ‘The Politics of Constitutional Change in Kenya since Independence, 1963-69’ (Revised version of a paper presented in January 1971 at St. Anthony’s College, Oxford, United Kingdom and first published in *African Affairs* 9-34) in Report of the Constitution of Kenya Review Commission, (Volume Five Technical Appendices Part I ) (2003) 277.

<sup>32</sup> Oyugi WO ‘Local government in Kenya: A case of institutional decline’ in Mawhood P (ed) *Local Government in the Third World: The Experience of Tropical Africa* (1983) 112.

<sup>33</sup> Oyugi WO *Local Government and Development in Kenya* (1978) 7.

<sup>34</sup> Oyugi (1983) 111.

<sup>35</sup> Oyugi (1978)15-18; Oyugi (1983) 111.

thoroughgoing system of indirect rule, the tribe was generally the unit of administration, and inter-tribal contacts were minimal”.<sup>36</sup>

Not unexpectedly, the LNCs did not quell rising pressure and political agitation among the Africans. As a result, many political parties were formed in the late 1930s and early 1940s outside the LNCs. Most of the parties were ethnic-based, with these including the Kikuyu Central Association, the Kavirondo Tax Payers Association and others. The ethnic-based African representative structures and the colonial policy of pure and exclusive ethnic reserves played a major part in the formation of ethnic-based political movements. Indeed, as Karuti observes, “[T]hese native reserves laid a firm framework for solidifying ethnicisation of Kenyan society. The administration placed solid socio-political boundaries between the various units of the native reserves, and thus prevented inter-ethnic political relationships.”<sup>37</sup>

The first political party with colony-wide impact was the Kenya African Union (KAU).<sup>38</sup> Formed in 1944, it lasted until 1953 when it was banned for allegedly being a cover for Mau Mau activities, a movement that mainly drew its membership from the Kikuyu in the central region and parts of Eastern region and which had launched an armed struggle against colonial rule.<sup>39</sup> Mau Mau activity led to declaration of a state of emergency in 1952, and all political activity was banned in the colony. The ban was lifted in 1958, and though political activity was again allowed, it was restricted to the “district” level only. The colonial government’s experience with KAU’s activities played a big role in the decision to ban all national political movements and restrict political activity to the district.<sup>40</sup>

While the rest of the country was allowed to carry out political activities at the end of the emergency rule, Central Kenya, the hotbed for Mau Mau activity, was excluded.<sup>41</sup> Ogot comments that the exclusion of the Central Province from politics denied “an articulate section of the Kenyan population” from participating in politics at a crucial time when African leaders were politically organising for independence; this may have slowed down the consolidation of

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<sup>36</sup> Ghai & McAuslan (1970) 182.

<sup>37</sup> Kanyinga (2009) 328.

<sup>38</sup> Lonsdale J ‘KAU’s cultures: Imaginations of community and constructions of leadership in Kenya after the Second World War’ (2000) 13 *Journal of African Cultural Studies* 110-111.

<sup>39</sup> Lonsdale J ‘The moral economy of Mau Mau: The problem’ in Berman B & Lonsdale J (eds) *Unhappy Valley: Conflict in Kenya and Africa* (1992) 265-203.

<sup>40</sup> Ogot BA ‘The decisive years 1956-63’ in Ogot & Ochieng’ (1995a) 52.

<sup>41</sup> Ogot (1995a) 53.

African national political leadership.<sup>42</sup> It has been observed that while communities such as the Kikuyu may have gained from colonial rule, they also suffered the heaviest under the colonial rule through loss of land, forced labour and other negative effects of colonial rule. This may have informed the community's agitation for independence.<sup>43</sup>

Indeed, when colony-wide political activity was allowed, the major political parties at the time manifested a fragmented political front. Okoth-Ogendo observes that by 1957 there were "at least seven major 'district' parties in existence, each of which was tribal and led by a tribal personality".<sup>44</sup> Many of the African independence leaders served in the LNCs before rising to national politics, and some scholars argue that the ethnic-based political structures of the LNCs may have influenced the ethno-political style of leadership at independence.<sup>45</sup> Thus, as the different political leaders geared towards negotiations for independence, they emerged from a system based on ethnic mobilisation. Tom Mboya, one of the African nationalists, recalls the effect of ethnic-based district parties:

It was clear that from the outset that these district organizations would be a threat to national unity, because we could see district loyalties (since district and tribal boundaries were often the same). District chairmen became kings in their own right in their own areas, and this has been the major part of our problem of disunity both between KANU and KADU, and sometimes inside KANU itself. We have never been able to escape completely from the district consciousness which developed during that period.<sup>46</sup>

The restriction of political parties to the district level denied the African leaders an opportunity for creating a unified national political movement. African leaders arrived at negotiations for independence while ethnically fragmented, this by virtue of policies that helped to sustain the colonial project.

### **2.2.2 Colonial local government**

For a variety of reasons, colonial local government in Kenya did not start out as an independent and distinct tier of government. This, as Oyugi argues, is traceable to the absence of a cohesive

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<sup>42</sup> Ogot (1995a) 53.

<sup>43</sup> Lonsdale (2000) 112.

<sup>44</sup> Okoth-Ogendo (2003) 276.

<sup>45</sup> Okoth-Ogendo (2003) 277.

<sup>46</sup> Mboya T *Freedom and After* (1963) 75; Odinga (1976) 146.

policy by the British government regarding local government in its colonies.<sup>47</sup> The development of local government institutions varied from one colony to another and was largely influenced by local circumstances.<sup>48</sup> In some areas, such as Uganda and Northern Nigeria, the British government used indirect rule, while in Kenya the councils of elders were bypassed as the colonial administration set up its own structures.<sup>49</sup>

Moreover, colonial local government in Kenya followed the wider colonial policy of separate development in which a colony was divided into European-settled areas and African reserves.<sup>50</sup> It is within this setting and colonial administrative structure that local government in Kenya was born and developed.<sup>51</sup> The first urban areas, Mombasa and Nairobi, grew as a result of the railway construction which opened the interior of the country up to Lake Victoria in the Western part.<sup>52</sup> Town councils were informally established in Mombasa and Nairobi by early 1900. The Townships Ordinance was passed in 1903, placing larger urban areas (by then Mombasa and Nairobi only) under the Provincial Commissioner.<sup>53</sup> As the colonial government structures became more elaborate, Nairobi and Mombasa were in 1919 formally declared as town councils; in the same year, local committees in other European settled areas were transformed into District Advisory Committees.<sup>54</sup> In 1928 the Local Government (Municipalities Ordinance) was passed, promoting Nairobi, Mombasa and a number of other towns into Municipal Boards. However, despite these developments, it was not until the 1950s that councils had African representation, given that membership was reserved for Europeans mainly and a minority Asian representation.<sup>55</sup>

European settlement had occurred in the fertile areas of the colony, and by 1905 European districts had been delimited and district associations formed. In the early days of colonial rule,

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<sup>47</sup> Oyugi (1978) 6-7.

<sup>48</sup> Oyugi (1978) 6-7.

<sup>49</sup> Oyugi (1978) 6-7.

<sup>50</sup> Oyugi (1983) 108.

<sup>51</sup> Oyugi (1983) 108.

<sup>52</sup> Oyugi (1983) 109.

<sup>53</sup> Stamp P 'Local government in Kenya: Ideology and political parties, 1895-1974' (1986) 29 (4) *African Studies Review* 23; Smoke P *Local Government Finance in Developing Countries: The Case of Kenya* (1994) 62.

<sup>54</sup> Oyugi (1983) 109.

<sup>55</sup> Oyugi (1983) 109.

local interests were facilitated mainly through informal associations among the settlers.<sup>56</sup> Oyugi traces the formal beginnings of local government to 1915, when the Registration of Persons Ordinance was passed.<sup>57</sup> Parallel advisory committees known as District Committees were formed for European areas. These committees were only advisory and were consulted by the colonial government on local matters. After 1920, the committees in the European areas “were charged ... with the maintenance of access roads in the settled areas”.<sup>58</sup>

In African areas, the LNCs were the first formal local government institutions to provide local services.<sup>59</sup> Before the LNCs were created in 1924, tribal chiefs and headmen appointed under the 1902 Ordinance were the only contact between colonial authorities and the communities. The colonial administration also created native tribunals which solved disputes using customary law.<sup>60</sup> The amendment of the 1912 Native Authority Ordinance ushered in the LNCs which, by 1926, were fully established throughout the country, with the exception of the nomadic areas in the northern part of Kenya.<sup>61</sup>

#### **2.2.2.1 European District Councils 1928-1963**

In 1926 a commission appointed by the Governor to look into the extension and establishment of local government in the settled areas and upcoming urban areas recommended a racially segregated system of local government for European and urban areas.<sup>62</sup> It was on the basis of this report that the district committees in European areas were made district councils in 1928 under the District Council Ordinance passed in the same year.<sup>63</sup> The Local District Councils replaced the 1919 District Advisory Committees. Persons elected were all Europeans, except in the Nyanza District Council where an Asian was elected by a community of Asians.<sup>64</sup>

The local government system in settled areas remained the same until 1952 when a two-tier system based on the English model was adopted for settled areas. County councils were

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<sup>56</sup> Smoke (1994, 65) notes that in 1903 white settlers formed the Farmers and Planters Association, which had 23 members and dealt with agricultural issues; the association was renamed the Colonists Association, and sought to protect white farming interests as well as encourage settlement in Kenya.

<sup>57</sup> Oyugi (1983) 114.

<sup>58</sup> Oyugi (1983) 114.

<sup>59</sup> Oyugi (1978) 7.

<sup>60</sup> Courts Regulation of 1897 and the Courts Ordinance of 1907.

<sup>61</sup> Oyugi (1978) 7.

<sup>62</sup> Oyugi (1983) 114-115.

<sup>63</sup> Oyugi (1983) 114-115.

<sup>64</sup> Oyugi (1978) 9.

created out of the former district councils. Within these counties, townships urban areas and rural (European) districts were to be established. At the upper tier would be the county council, with the lower tier being urban or rural councils depending on the area (rural/urban). The councils were to exercise separate functions independently.<sup>65</sup> This structure remained until independence in 1963 when the local government system was unified.

### **2.2.2.2 The Local Native Councils 1924 – 1950**

The 1912 Native Authority Ordinance that was amended in 1924 provided for the basic structure of the LNCs and their functions. The LNCs were headed by the DC, and the membership of the councils included the Assistant DC, headmen who were normally chiefs, and a few other persons appointed at the discretion of the PC. While people could elect persons to the LNCs, the DC had a final say on who became an LNC member.<sup>66</sup>

Another amendment in 1937 introduced elections to the LNCs, thus making them composed of elected and nominated members. However, the PC and DC retained their powers to determine who remained in the LNC structures. While the 1937 ordinance brought some clarity to the functions of the LNCs, features such as the basic structures of the LNCs and control by the Provincial Administration and the colonial Governor were left intact.<sup>67</sup>

The original idea behind LNCs was to give the DC a forum for community consultation in order to make his own decisions.<sup>68</sup> However, the LNCs were later granted developmental functions which they were expected to perform. Developmental functions were first allocated under the 1937 Amendment Ordinance (Local Native Ordinance 1937); these included public health; education; land use; establishment and regulation of markets; provision, regulation and maintenance of food and water supplies; and matters such as agriculture and livestock.<sup>69</sup> Despite the varying local conditions and capacities, all LNCs were allocated uniform functions which they were expected to perform.<sup>70</sup> However, these functions were merely permissive in that they could be performed only when the LNCs could afford, or had capacity, to carry out such functions and with the authority of the DC.<sup>71</sup> Another challenge was the lack of clear

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<sup>65</sup> Oyugi (1978) 10.

<sup>66</sup> Oyugi (1978) 7.

<sup>67</sup> Oyugi (1978) 8.

<sup>68</sup> Oyugi (1978) 11.

<sup>69</sup> Oyugi (1978) 11.

<sup>70</sup> Oyugi (1978) 10.

<sup>71</sup> Oyugi (1978) 11.

separation of functions between the central government and the LNCs, since both performed essentially the same functions.<sup>72</sup> The central government performed most of the functions, in the process paying more attention to European areas, which received the bulk of resources for development.<sup>73</sup>

Oyugi argues that the colonial attitude towards the development of African areas played a key role in determining the actual functions performed by LNCs. He states that “African areas were meant to develop as appendages of the white settler economy”.<sup>74</sup> LNCs did not develop capacity to ensure effective local development in African areas. While there were full councils in LNCs which voted on budgets and expenditure, the bulk of expenditure for African areas was incurred by central government officials.<sup>75</sup> Many expenditure proposals were disallowed by the DCs, as the colonial government imposed a policy of conserving surpluses. Colonial records show that balances of many LNCs more than doubled between 1929 and 1945.<sup>76</sup>

This can be contrasted with the European councils, which not only enjoyed a relatively higher autonomy but received, even as late as 1957, 75 percent of national revenue from central government grants.<sup>77</sup> Oyugi observes that “only one council (Nairobi District Council) by 1946 had introduced a land rate of 10 percent per acre. The rest refused to do so until 1952.”<sup>78</sup> The councils used their autonomy to refuse to raise local revenue, and, with their network of informal relationships with the central government, displayed “spoilt child” behaviour in the conduct of their affairs.<sup>79</sup> The central government carried out most of the development functions and built infrastructure in the European settled areas, which led to the councils being “regarded as little more than the agents for expenditure of government funds”.<sup>80</sup>

Despite the challenges faced by LNCs, Oyugi observes that most of the social services infrastructure established in African areas between the years 1925 and 1950 was set up by LNCs.<sup>81</sup> In areas such as Nyanza, the LNCs established health facilities and also financed many

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<sup>72</sup> Oyugi (1978) 12.

<sup>73</sup> Oyugi (1978) 13.

<sup>74</sup> Oyugi (1978) 12.

<sup>75</sup> Oyugi (1978) 13.

<sup>76</sup> Oyugi (1978) 13.

<sup>77</sup> Oyugi (1983) 116.

<sup>78</sup> Oyugi (1978) 13.

<sup>79</sup> Oyugi (1983) 115-116.

<sup>80</sup> Report of the Commissioner for Local Government 1958-50 published in 1951, quoted in Oyugi (1983) 116.

<sup>81</sup> Oyugi (1978) 14.

mission schools. In drier areas, dams were built and wells dug.<sup>82</sup> With regard to funding, Oyugi observes that in the years 1925-1945 local authorities received no direct financial support from Central government. This policy was uniform regardless of the financial situation or local context of any LNC. The LNCs mainly derived their revenue from poll rates and other fees and charges.<sup>83</sup> As a result, services such as education and health were more developed in stronger LNCs, while areas served by weaker LNCs deteriorated. Some of these historical disparities are still visible.<sup>84</sup>

### **2.2.2.3 African District Councils 1950-1963**

Attempts to strengthen the LNCs led to the passing of the 1950 African District Councils Ordinance. Apart from the change of name from LNCs to African District Councils (ADCs), the Ordinance also introduced significant structural changes. The 1950 Ordinance established the ADCs as corporate bodies with separate legal existence, which gave them powers to enter into contracts for the performance of functions. Locational Councils formed in some areas as lower decentralised levels from 1946 were recognised in the Ordinance. ADCs were legally authorised to hire their own staff and set up committees for specific functions. ADCs were also allowed under the 1950 Ordinance to form joint committees with neighbouring councils and work in areas of common interest. In addition, the ADCs could elect an African deputy chairman, but the DC remained an *ex officio* member and chair of the council.<sup>85</sup>

The 1950 Ordinance made a clearer separation of central and local government functions. The functions of ADCs included building and maintaining health centres and dispensaries, markets, cattle dips, maintaining small roads and primary education. As with the LNCs, the main source of revenue for ADCs was the poll rate, a local tax charged on personal income.<sup>86</sup> However, in 1950 “the government agreed to contribute 2 Kenyan shillings for every local rate collected (i.e. for every head [that] paid the rate)”.<sup>87</sup> The ADCs were able to perform the mandatory services using the local and central revenue, although the DC could still disallow any expenditure. A

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<sup>82</sup> Oyugi (1978) 14.

<sup>83</sup> Sharp AM & Jetha NM ‘Central government grants to local authorities: A case study of Kenya’ (1970) 13 *African Studies Review* 43; Oyugi (1978) 13.

<sup>84</sup> Oyugi (1978) 14.

<sup>85</sup> Oyugi (1983) 111.

<sup>86</sup> Oyugi (1978) 15.

<sup>87</sup> Oyugi (1978) 15.

growing demand for services of the ADCs necessitated more funding from the central government.<sup>88</sup>

Demand for more funds led to the establishment of the Local Government Loans Authority in 1953 to lend money to local authorities for performance of services.<sup>89</sup> Oyugi writes that the fund generally benefited ADCs with capacity to repay loans and urban-oriented projects, thus excluding many ADCs that were mainly rural-based.<sup>90</sup> Indeed, the development plan of 1957-1960 stated the role of the LGLA as thus:

In view of the general capital shortage the authorities should adhere to the general priorities which are now being followed by the government and only make loans for the undertaking of essential economic projects such as water supplies, sewers, drains and roads in urban areas.<sup>91</sup>

As a result of the above policy, large municipalities and European councils benefited more than the ADCs, which served mainly rural areas and a handful townships.<sup>92</sup> Without additional assistance from central government, it became clear that ADCs could do little in terms of local development. By 1958, some ADCs were spending more than 70 percent of council revenue on recurrent expenditure on education, much of it going to teachers' salaries and equipment.<sup>93</sup> Many ADCs struggled to provide even very basic services such as health and education. Most annual reports of the ADCs at the time cited lack of resources as a challenge to effectiveness.<sup>94</sup>

While the transformation of local authorities from LNCs to ADCs led to a clearer separation of functions and increased local autonomy, resource constraints prevented ADCs from functioning effectively. Oyugi concludes that "because the majority of the Councils lacked a sound revenue base in the absence of central government assistance, they could not play a meaningful role in development".<sup>95</sup> This remained the situation of ADCs until Kenya became independent in 1963.

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<sup>88</sup> Oyugi (1978) 16.

<sup>89</sup> Oyugi (1978) 16.

<sup>90</sup> Oyugi (1978) 16.

<sup>91</sup> Colony and Protectorate of Kenya Development Plan 1957-1960 (Sessional paper No. 77 of 1956/ 57) 61.

<sup>92</sup> Oyugi (1978, 16) states that development loans issued to ADCs in the years 1957-1962 amounted to 5.9% only. European rural county districts, on the other hand, received 20.2% while municipalities received 73.1% of the total LGLA development loans.

<sup>93</sup> Oyugi (1978) 17.

<sup>94</sup> See Oyugi (1978, 18-19) for a cross-section of the reports.

<sup>95</sup> Oyugi (1978) 20.

### 2.3 The failed colonial reforms and the inevitable march to independence

The colonial policy of exclusion of Africans from political, economic and development matters led to wide resentment of the colonial system by Africans. The LNCs that were created to “blunt” the rising political pressure from Africans proved inadequate to contain the rising pressure. Economic restrictions placed on Africans, such as the ban on growing cash crops, and the socio-economic problems created by displacements, racial segregation and poor services in African areas, contributed to the anti-colonial feelings among Africans. Loss of land to European settlement created a major sense of loss among Africans, whose population was steadily rising.<sup>96</sup> Colonial policy had ensured that even access to basic services such as housing and health, pensions and education were highly unequal and segregated on a racial basis.<sup>97</sup> It is in this economic and socio-political context that African political parties started being formed. The resentment with colonial rule also led to increasing support for activities of the Mau Mau.<sup>98</sup>

In a bid to stem growing support for anti-colonial activity, the colonial government made a series of attempts to address certain of the challenges facing Africans. The policy of creating communal areas of settlement such as native reserves was halted in 1957.<sup>99</sup> The colonial government also repealed all laws that prohibited the growing of cash crops in African areas.<sup>100</sup> The colonial ministry of agriculture commenced a land consolidation exercise in African areas that sought to improve agricultural productivity and ensure economic development of African farmers.<sup>101</sup> Constitutions adopted in 1954 and 1958 created more African representation within the colonial executive and legislative structures. The objective of these reforms, Ogot argues, was to “broaden the basis of collaboration at the national level to include Africans within the political and economic structures of the colonial society”.<sup>102</sup> Ultimately, “these colonial reforms were to create a base upon which a collaborative African leadership could emerge and to undermine the support of *Mau Mau* freedom fighters”.<sup>103</sup>

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<sup>96</sup> Overton (1988) 109.

<sup>97</sup> Rothchild D 'Ethnic inequalities in Kenya (1969) 7 (4) *The Journal of Modern African Studies* 690-695.

<sup>98</sup> Bates RH 'The Agrarian Origins of Mau Mau: A Structural Account' (1987) 61 (1) *Agricultural History* 8-11.

<sup>99</sup> Ogot (1995a) 60.

<sup>100</sup> Wasserman (1974) 430.

<sup>101</sup> Atieno-Odhiambo (1995) 43.

<sup>102</sup> Ogot (1995a) 48.

<sup>103</sup> Ogot (1995a) 48.

The first African was appointed to the Legislative Council in 1944.<sup>104</sup> However, it was not until 1954 that the Lyttleton Constitution,<sup>105</sup> introduced at the height of Mau Mau activity and during a state of emergency, formally introduced the principle of multi-racial government.<sup>106</sup> Initially, the Constitution provided for minority African representation, but this was subsequently increased to equal, and then majority, African representation.<sup>107</sup> Despite these reforms, African nationalists pressed for further reforms, leading to the first constitutional conference and independence talks in London in 1960. While the problems faced by Africans contributed to ending colonial rule, others have argued that scarcity of land, a paucity of settlers, an unfavourable climate pattern and a growing African population were among the real reasons why the British beat a retreat from their colonial project in Kenya.<sup>108</sup>

### 3. Ethnic and political tensions at independence

By as late as 1958, political activity was still restricted to the district level. Regional disparities in social and economic development were evident as a result of the colonial development policy. The presence of a large number of landless peasants from the Kikuyu ethnic community in the Rift Valley, arising from forced displacement<sup>109</sup> and crackdown on Mau Mau activities in their home region, was a source of tension. Anderson observes that the Kikuyu and Luo ethnic communities had “taken earlier and lasting advantage of the opportunities of colonialism.”<sup>110</sup> These opportunities provided by “colonial settlement and investment” relative to other areas untouched by the colonial economy.<sup>111</sup> Official anti-Mau Mau propaganda had also served to demonise the Kikuyu and further fuel fear and hatred by other communities.<sup>112</sup> Other regions

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<sup>104</sup> Eliud Mathu was appointed to represent African interests.

<sup>105</sup> Constitutions written for colonies were commonly named after the secretaries of state for colonies who negotiated the constitutions. The 1954 Constitution was named after Oliver Lyttleton who served as Secretary of State for Colonies from 1951 to 1954.

<sup>106</sup> Munene AW ‘The Bill of Rights and constitutional order: A Kenyan perspective’ (2002) 2 *Africa Human Rights Law Journal* 135, 138.

<sup>107</sup> Anderson DM ‘Yours in the struggle for *Majimbo*’; Nationalism and the party politics of decolonization in Kenya’ (2005) 40 *Journal of Contemporary History* 549.

<sup>108</sup> Wasserman (1974) 428.

<sup>109</sup> Overton (1988, 112) states that the Kikuyu started migrating to the Rift Valley from around 1912, when increasing colonial control and land pressure in the central region made Rift Valley attractive.

<sup>110</sup> Anderson (2005) 552.

<sup>111</sup> Rothchild (1969) 690; Branch D *Kenya: Between Hope and Despair, 1963-2011*(2011)8-9.

<sup>112</sup> Anderson (2005) 552.

were less developed, and their leaders “were much smaller and more vulnerable at the national level”.<sup>113</sup>

Ethnic polarisation was manifest as the larger, and economically and politically dominant, ethnic groups came together under the Kenya African National Union (KANU) while smaller communities coalesced under the Kenya African Democratic Union (KADU).<sup>114</sup> As Africans prepared for independence, the opposing views of the two political parties came to represent ethnic tensions in wider society, tensions which originated in part in the colonial government’s “divide-and-rule” strategy. Yet, while the main political tension lay between, on the one hand, the larger and more dominant tribes and, on the other, the smaller and vulnerable ones, there were other sources of tension, too.

The Somalis in the North Eastern part of the country wanted to secede and join Somalia, which had just gained independence in 1960. The region boycotted the 1963 independence elections to demonstrate the seriousness of its bid to secede.<sup>115</sup> Indeed, a participant in the independence talks argued that holding on to the region would provoke a war involving Somalia and Ethiopia.<sup>116</sup> It would later take military intervention to quell secessionist activity in the NFD.

Similarly, Arabs in the coastal region wished to have no part in an independent Kenyan republic, basing their claim to secession on an agreement formed between the Sultan of Zanzibar and the British government. Through their political party,<sup>117</sup> representatives argued that if the Sultan were to relinquish his claims over the region, the latter should be a self-governing territory and that any arrangements involving it falling under the control of an independent Kenya should be concluded only through consultation with the coastal peoples.<sup>118</sup> However, African groups in the region opposed this stance out of fear of Arab dominance,<sup>119</sup> by the same token, the coastal Arabs were driven by “fears of economic domination by the ‘up-country peoples’, who had already formed the bulk of the labour force in the colonial period.”<sup>120</sup>

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<sup>113</sup> Ogot (1995a) 67.

<sup>114</sup> Ogot (1995a) 61.

<sup>115</sup> Ochieng’ WR ‘Structural and political changes’ in Ogot & Ochieng’ (1995) 92.

<sup>116</sup> Blundell (1964) 304-305.

<sup>117</sup> Mwambao United Front, see Ogot (1995a, 67).

<sup>118</sup> Ogot (1995a) 67.

<sup>119</sup> Ogot (1995a) 67.

<sup>120</sup> Anderson (2005, 551) states that “the dominant position of the Luo in the labour market, particularly for skilled work of all kinds, was popularly perceived by the 1950s as the barrier to advancement of others, especially the

### **3.1 The land question: ‘the elephant in the room’**

Of all the issues underlying the political tension at independence, the most explosive was the land issue. Indeed, it has been noted that “land and land shortage lie at the centre of Kenyan political history throughout the colonial period and beyond”.<sup>121</sup> Land alienation created “a keen sense of loss” among Africans that not even the colonial reforms could assuage.<sup>122</sup> At independence, the land issue was a source of tension as different leaders sought to assure the interests of their respective ethnic communities. Kalenjin leaders in the Rift Valley feared that a Luo-Kikuyu-dominated government would settle the Kikuyu in the Rift Valley and disregard the Kalenjin’s ethno-territorial claims to the region. Thus, Kalenjin leaders called for resolution of the land question.<sup>123</sup> The leaders from the Rift Valley called for the restoration of their original land rights; in essence, they argued for ethnically exclusive pre-colonial spheres<sup>124</sup> and even made a declaration to evict “foreigners” from their home district.<sup>125</sup>

### **3.2 The centralisation versus regionalism debate**

The political debate about the structure of government pitted the two main parties, KANU and KADU, against each other, which reflected the group and ethnic tensions described above. KADU, which drew the majority of its members from the Rift Valley, coastal region and the Western parts, argued for strong regional governments. During the second talks at the Lancaster House constitutional conference, KADU explained its reason for supporting regional governments:

Because of regional and group differences and imbalances, there was a genuine danger of discrimination and conflict between the different regions and groups. ‘Domination by a political party, or personality, group or tribe must be prevented in order to protect the political rights of and fundamental freedoms of the individual and to insure the independence of the judiciary’. To achieve these aims, it was necessary to decentralize state power. They therefore proposed the creation of six regional authorities with legislative and administrative powers. They also proposed the establishment

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Abaluhya, Kalenjin and the coastal peoples who were by then seeking to move into the labour market in increasing numbers”.

<sup>121</sup> Overton (1988) 109.

<sup>122</sup> Overton (1988) 109; Ellis (1976) 555.

<sup>123</sup> Kanyinga (2009) 329.

<sup>124</sup> Anderson (2005) 552; Kanyinga (2009) 328-329.

<sup>125</sup> Mitei, ‘Nandi Hills Declaration’ 27 July 1969 KNA KA/11/9 cited in Branch (2011) 87.

of a bicameral system, with the federal parliament consisting of a lower house elected on a national basis and an upper house elected by the regional assemblies voting as electoral colleges, both houses having substantially equal powers.<sup>126</sup>

Probed further on their submissions, the KADU leader explained: “[T]here should be decentralization of power. Such decentralization must be to authorities which can implement and execute their responsibilities without depending on Central government aid, either financially or in any other way.”<sup>127</sup> The regional system of government advocated by KADU became known as *Majimbo*,<sup>128</sup> a name later associated with the regional governments created by the independence constitution.

While fear of dominance by majority ethnic groups was the driving force for the demand for regionalism, other reasons have been advanced to explain KADU's position. Sanger and Nottingham trace regionalism to 1954 when the Federal Independence Party, a settler party, was formed to champion Kenyan independence with an exclusive white region<sup>129</sup> and an older aspiration to establish a white island the size of Wales.<sup>130</sup> Another explanation is that KADU had hoped, with the support of European and Asian communities, to form the independence government.<sup>131</sup> It has also been argued that fears of expropriation of property by the KANU government led European and Asian communities to support KADU's regionalist agenda.<sup>132</sup> Maxon however dismisses these claims saying that while there were marginal links between KADU and the settler political parties during the discussions on *majimbo*, KADU's agenda was mainly driven by minority fears of political domination by the larger ethnic groups, as opposed to settler interests.<sup>133</sup>

Contrary to KADU's position, KANU supported a strong centralist state with a system of strong individual rights protection.<sup>134</sup> This was so because regionalism would jeopardise the Kikuyu

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<sup>126</sup> Ogot (1995a) 70.

<sup>127</sup> KADU chairman Ronald Ngala, quoted in Ogot (1995a, 70).

<sup>128</sup> Ghai & McAuslan (1970, 178) explain that “*Majimbo* is a Swahili word which means an ‘administrative unit’ or ‘region’, and is generally used to refer to those provisions of the Constitution which established the regional structure”. See also Ogot (1995a) 74.

<sup>129</sup> Sanger C & Nottingham J’ The Kenya general election of 1963’ (1964) 1 *The Journal of Modern African Studies* 9.

<sup>130</sup> Sanger & Nottingham (1964) 9.

<sup>131</sup> Sanger & Nottingham (1964) 9.

<sup>132</sup> Kanyinga (2009) 329.

<sup>133</sup> Maxon RM *Kenya's Independence: Constitution-Making and End of the Empire* (2011) 36-37.

<sup>134</sup> Ogot (1995a) 71; Kanyinga (2009) 329.

who had moved to and settled in other regions of the country; it would also affect the Luo, who dominated the skilled labour market in various sectors across of the country.<sup>135</sup>

Although not all of its proposals were adopted, the KADU side won, seeing as the Independence Constitution adopted regional governments with extensive powers and functions.<sup>136</sup> The independence elections held in 1963 were largely interpreted as a policy contest between KADU regionalists versus KANU unitarists. Okoth-Ogendo observes that KANU “treated the May election of 1963 as a referendum on regionalism” and KADU’s defeat as a defeat of regionalism.<sup>137</sup> During the campaigns, KANU leaders did not hide their views, saying openly that KANU had no intention of implementing the regional system and had only agreed to the structure in order to attain independence.<sup>138</sup> KANU’s victory in the 1963 elections was, as Anderson writes, “a victory for nation over region and for nation over tribe”.<sup>139</sup>

However, while KANU recorded a landslide win in the May 1963 elections,<sup>140</sup> KADU won in regions that supported the calls for regionalism, notably the Rift Valley and the Coastal regions. The elections were held under the Constitution agreed to in 1962 Lancaster Conference. It provided for a bicameral national legislature and regional legislatures, and in the House of Representatives, KANU won 72 seats and KADU, 32.<sup>141</sup> The Senate was divided equally: 20 for KANU and 21 for KADU. The six regions were also equally divided, with KADU controlling the Western, Rift Valley and Coast regions while KANU won majorities in Nyanza, Rift Valley and Eastern Regions.<sup>142</sup> The defeat of KADU in the 1963 elections symbolically marked the end of regionalism in Kenya’s political and constitutional future.<sup>143</sup>

### 3.3 The ‘Majimbo’ system

Kenya attained independence with a Constitution that provided for a regional system of government (*majimbo*).<sup>144</sup> With the regional government system, Ghai and McAuslan note, “the unitary character of Kenya’s government, which had persisted throughout its colonial history,

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<sup>135</sup> Branch (2011) 10; Kanyinga (2009) 329.

<sup>136</sup> Ogot (1995a) 74.

<sup>137</sup> Okoth-Ogendo (2003) 284.

<sup>138</sup> Ogot (1995a) 74.

<sup>139</sup> Anderson (2005) 547.

<sup>140</sup> Anderson (2005, 561) argues that KANU was far more organised and well-funded than KADU.

<sup>141</sup> Anderson (2005) 561.

<sup>142</sup> Anderson (2005) 561.

<sup>143</sup> Anderson (2005) 561.

<sup>144</sup> Ghai & McAuslan (1970) 178.

was discarded towards its end”.<sup>145</sup> The Independence Constitution divided the country into seven regions, including Nairobi.<sup>146</sup> The regional boundaries were similar to the provincial boundaries of the colonial PA (that is, drawn along ethnic lines), albeit with minor alterations.<sup>147</sup> Regional boundaries could be altered only with the consent of the affected regional government and upon a resolution of both chambers of the national legislature.<sup>148</sup>

The regional governments were composed of elected members empowered to elect a regional president and vice-president.<sup>149</sup> The regional executive powers rested in the Finance and Establishments Committee, which was empowered to create administrative structures to deal with an array of functions and responsibilities, including taxing powers.<sup>150</sup> Committees elected by the regional assemblies could assist the Finance and Establishments Committee to carry out various executive functions.<sup>151</sup> Regional assemblies had wide and exclusive legislative functions and some shared legislative competences.<sup>152</sup> Former PCs in the colonial administration were renamed Civil Secretaries and were to operate as chief executive officers at the regional level. They were to be in charge of the regional public service and were not under the control of the national public service.<sup>153</sup>

### **3.3.1 Allocation of powers and functions between the centre and regions**

Ghai and McAuslan argue that distrust between KADU and KANU led to a detailed scheme of division of power between the centre and the regions.<sup>154</sup> However, this also made the division of powers “complex, elaborate and confusing”.<sup>155</sup> The powers and functions were listed in the schedules and divided into three main parts: matters of exclusive legislative competence of

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<sup>145</sup> Ghai & McAuslan (1970) 178.

<sup>146</sup> Part II of Schedule 11 to the Independence Constitution, the regions were Western, Nyanza, Coast, Rift Valley, Central, Eastern, North-Eastern, and Nairobi area.

<sup>147</sup> Smoke (1995) 69.

<sup>148</sup> Section 239-243 of the Independence Constitution of Kenya (IC), 1963.

<sup>149</sup> Sections 93, 98 and 99 IC.

<sup>150</sup> Sections 129-126 IC.

<sup>151</sup> Section 113 (2) IC.

<sup>152</sup> Section 102 and Parts I and II of the first Schedule to the IC.

<sup>153</sup> Section 116 and 193 IC.

<sup>154</sup> Ghai & McAuslan (1970) 197.

<sup>155</sup> Ghai & McAuslan (1970) 197.

regions,<sup>156</sup> matters of concurrent competence for the regions and the national parliament<sup>157</sup> and matters to which executive authority of regions extended but which were not within the legislative competence of the regional assemblies.<sup>158</sup> Validly passed national legislation could prevail over regional legislation and residual legislative power was vested in the national parliament.<sup>159</sup>

Ghai and McAuslan argue that some of the matters listed as concurrent between the two levels overlapped with the exclusive regional powers and this had a potential to negate the allocation of separate functions.<sup>160</sup> Indeed, functions in key areas such as education, agriculture and planning were divided between the regions and the centre.<sup>161</sup> Furthermore, the scheduled functions were not specially entrenched in the Constitution<sup>162</sup> and could thus be easily amended. Indeed, the scheduled functions were the first to be “assaulted” by the KANU government, leaving the regions as empty shells with no substantive functions.<sup>163</sup>

Local government was within the competence of regions, with a basic structure provided for in the Constitution.<sup>164</sup> Regional assemblies had extensive powers over local government, which included powers to constitute Local Authorities (LAs), divide LAs and create new local electoral

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<sup>156</sup> Items 1-28 in Part 1 of Schedule 1 to the IC. The items included: agriculture (training institutions below diploma level and livestock branding), archives (other than national government archives), primary and secondary education (with the exception of some schools), community development (excluding Kabete Training School), fire prevention and fire-fighting, funeral services, hotels and eating houses, licensing of traders, housing, health institutions (except the major hospitals), refuse and effluent disposal, suppression of nuisance, sewers and drains, etc.

<sup>157</sup> Items 1-20 in Part II of Schedule 1 to the IC. These included: agriculture (manufacture and distribution of agricultural input, processing of hides and skins, inspection and storage of agricultural produce, marketing of agricultural produce and land use and development), antiquities and museums, civil aerodromes, registration and management of co-operative societies and associations, fishery services, medical research and training, training of teachers, etc.

<sup>158</sup> Item 1-11 in Part III of Schedule 1 to the IC. These included: adulteration of food, youth services and preventing cruelty to children and young persons (excluding employment and treatment of offenders), extra-mural penal employment, liquor licensing, private street works, probation services, registration of births, deaths and marriages, rent control, scrap metals, and town- and country-planning.

<sup>159</sup> Ghai & McAuslan (1970) 197.

<sup>160</sup> Ghai & McAuslan (1970) 198.

<sup>161</sup> Parts I and II of Schedule 1 to the IC.

<sup>162</sup> Specially entrenched constitutional provisions could only be amended if an amendment Bill secured three-quarters of votes in the National Assembly on the second and third readings and 90 percent of votes in the Senate.

<sup>163</sup> Ghai & McAuslan (1970) 208.

<sup>164</sup> Chapter XIII IC.

areas.<sup>165</sup> The regions had powers to dissolve LAs or remove councillors for maladministration.<sup>166</sup> The regional assemblies also had powers to legislate on revenue functions and transfers to local governments within their respective regions.<sup>167</sup>

While Ghai and McAuslan argue that the regional executive powers were fluidly designed, dispersed, and could not lead to strong regional governments,<sup>168</sup> Maxon differs with this view and says that they “fail to prove the alleged unworkability of the *majimbo* Constitution”.<sup>169</sup> He adds that Ghai and McAuslan’s criticism of the regional system creates a perception that the drafters<sup>170</sup> of the *majimbo* Constitution were “incompetent or sloppy in their work” and he says that such a view is “hardly credible”.<sup>171</sup> Maxon does not counter Ghai and McAuslan’s assessment of the regional system with a detailed analysis of the *majimbo* system to show its particular strengths. However, the fact that the regional system was dismantled shortly after being adopted means that its practical effectiveness will remain a mystery. Furthermore, the lack of political will by the KANU government to implement the system also meant that regardless of the solidness of the framework, the regional system could still have become ineffective as a result of frustration by a hostile central government.

### 3.3.2 Central-regional relations: supervision and intervention in regions

A number of controls, subject to the necessary safeguards, were put in place through which the central government could intervene in regional governments. Parliament could decide, with a 65 percent vote in both the Senate and the National Assembly that the executive authority of a region was being used to impede or prejudice the exercise of executive authority of the government of Kenya, or was being used in contravention of an applicable national law.<sup>172</sup> Parliament could take up the legislative powers of that region and make laws for it on any matter.<sup>173</sup>

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<sup>165</sup> Section 223-226 IC.

<sup>166</sup> Section 230 IC.

<sup>167</sup> Section 143 IC.

<sup>168</sup> Ghai & McAuslan (1970) 200.

<sup>169</sup> Maxon (2011) 203.

<sup>170</sup> Maxon (2011, 203) refers to the drafters simply as Steel and Webb.

<sup>171</sup> Maxon (2011) 203.

<sup>172</sup> Section 106 (2) IC laid down the manner in which executive authority of regions was to be exercised.

<sup>173</sup> Section 69 IC.

The national government could issue directions to a regional assembly as it deemed necessary in order to ensure that regions did not contravene applicable national laws or impede exercise of executive authority of the central government. The central government could bypass the Regional Assemblies and directly address regional administrators or regional departments if “reasonably satisfied that such a course was necessary to avert a serious threat to the public welfare caused by an outbreak of a disease or other calamity”.<sup>174</sup> Furthermore, during emergencies, the central government could assume all regional functions.

### 3.3.3 Powers of the Senate in the Independence Constitution

A second chamber was created for the national legislature. KADU had initially demanded a senate with five members from each region nominated by the regional assemblies as well as equal legislative powers for both the senate and the national assembly, with a joint committee to mediate differences. KADU had also demanded that the cabinet be elected by both houses through a joint sitting, and the Senate was to play a crucial role in all constitutional amendments. Most of these proposals were rejected.<sup>175</sup>

The Constitution provided for direct election of senators from 40 districts and Nairobi area, 41 in total.<sup>176</sup> The 40 Senate constituencies were based on the colonial administrative districts, with slight boundary alterations which ensured that no district crossed a regional boundary in accordance with recommendations of a 1962 regional boundaries commission report.<sup>177</sup> Ghai and McAuslan argue that the revision of the district boundaries made the “Senate constituencies more tribally homogeneous” and essentially provided for (though not perfectly) the representation of tribes in the Senate.<sup>178</sup> The Senate constituencies are further noted to have given an electoral advantage to KADU by “giving greater representation to less populated rural and pastoral areas where regionalism was supported”. KANU’s areas of support, mainly the Kikuyu and Luo, “were in smaller, densely populated areas around Mt. Kenya and Lake Victoria”.<sup>179</sup> Proctor adds that this composition in essence enabled stronger representation of minority ethnic communities in the Senate.<sup>180</sup>

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<sup>174</sup> Ghai & McAuslan (1970) 200.

<sup>175</sup> Ghai & McAuslan (1970) 204

<sup>176</sup> Section 35 IC.

<sup>177</sup> Section 240 (1) (d) IC.

<sup>178</sup> Ghai & McAuslan (1970) 204; Proctor JH ‘The role of the Senate in the Kenyan political system’ Institute for Development Studies, University College, Nairobi, (1965) 393 (Reprint series: No. 11 Reprinted for private circulation from *Parliamentary Affairs* Vol. XVIII, No. 4, Autumn 1965).

<sup>179</sup> Smoke (1995) 69.

The Senate had limited powers compared to the House of Representatives (lower house). A money Bill could not originate in the Senate.<sup>181</sup> Furthermore, if a money Bill was not passed by the Senate without amendment, the Governor General (the representative of the Queen, who was head of State in Kenya under the Independence Constitution) could still assent it into law after one month.<sup>182</sup> The Senate could only delay the passing of such a Bill for two months, pending determination by the courts as to whether the Bill qualifies as a financial Bill or not. In the case of Bills other than financial legislation, the Senate could delay their passing for up to one year.<sup>183</sup>

The Senate had considerable power with regard to declaration of emergency. Such a declaration could hold only after garnering 65 percent support in both chambers. Ghai and McAuslan identify this as an important function, given that the declaration of emergency had an effect of suspending regional governments.<sup>184</sup> Indeed, the Senate used its power to delay approval of the use of emergency power to quell secessionist conflict in the NFD Somali region,<sup>185</sup> much to the chagrin of the Kenyatta government.<sup>186</sup> Furthermore, a constitutional amendment could go through only if the Senate approved it with a 65 percent vote.<sup>187</sup> The constitution also provided for specially entrenched powers for the Senate with regard to amendments on Senate elections, powers of Senate, regional government structure and financial powers of regions and alteration of regional boundaries.<sup>188</sup> Others included fundamental rights, citizenship, the judiciary and transactions on tribal lands.<sup>189</sup>

The brief period of the Senate's existence was characterised by suspicion and mistrust about its role.<sup>190</sup> No ministers were appointed from the Senate, and at the national level this weakened its political and institutional significance relative to the House of Representatives.<sup>191</sup> Furthermore, all senior politicians opted to vie for seats in the House of Representatives, leaving "low-calibre"

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<sup>180</sup> Proctor (1965) 394.

<sup>181</sup> Section 59 IC.

<sup>182</sup> Section 59 IC.

<sup>183</sup> Section 61 IC.

<sup>184</sup> Ghai & McAuslan (1970) 205.

<sup>185</sup> Proctor (1965) 409-410.

<sup>186</sup> Okoth-Ogendo (2003) 276.

<sup>187</sup> Section 71 IC.

<sup>188</sup> Ghai & Mc Auslan (1970) 208.

<sup>189</sup> Ghai & Mc Auslan (1970) 208.

<sup>190</sup> Proctor (1965) 389.

<sup>191</sup> Proctor (1965) 407.

candidates for the Senate.<sup>192</sup> While KADU maintained that the Senate should protect regional interests, KANU Senators argued that “it was altogether improper for Senators to act as regional representatives”.<sup>193</sup> Furthermore, party loyalty and party interests prevailed over other issues and was indeed the main basis of Senate decisions.<sup>194</sup> The non-entrenchment of the functions of the regions made it difficult for the Senate to safeguard regional autonomy<sup>195</sup> as “the substance of the regional system itself was severely reduced”.<sup>196</sup> Proctor concludes that the ability of the Senate to curb executive power was generally limited and that the Senate played an insignificant role in this respect.<sup>197</sup>

### **3.4 ‘Caught in the cross-fire’: local government at independence**

Inevitably the local government system found itself at the centre of the tussle between KANU and KADU. This manifested itself in the competition between regions and the central government for the control of LAs. However, the conflict over local authorities was preceded by unanimous calls to do away with the racially segregated system of local government from the colonial period. Thus, immediately after the second Lancaster conference constitutional talks, the transitional government (composed of both KANU and KADU) formed a commission in 1962 to study the local government system and recommend changes. The commission’s recommendations resulted in the Local Government Regulations of 1963, which later formed the basis of the Local Government Act enacted in 1977.<sup>198</sup>

The colonial segregated system of local government was unified and reorganised to create two major types of local government; county councils and municipal councils. The former European District councils were dissolved and county councils created, which coincided with administrative district boundaries.<sup>199</sup> In the African areas, the ADCs were similarly dissolved and replaced with county councils, which likewise coincided with administrative district boundaries.<sup>200</sup> Municipal councils were also created for urban areas: 39 county councils and

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<sup>192</sup> Proctor (1965) 397.

<sup>193</sup> Proctor (1965) 404.

<sup>194</sup> Proctor (1965) 402.

<sup>195</sup> Ghai & Mc Auslan (1970) 208.

<sup>196</sup> Proctor (1965) 396.

<sup>197</sup> Proctor (1965) 414.

<sup>198</sup> Oyugi (1983) 121.

<sup>199</sup> Republic of Kenya (1995) 14.

<sup>200</sup> Oyugi (1983) 121.

seven municipal councils were formed at independence.<sup>201</sup> In addition, the 1963 Regulations provided for the creation of urban councils to operate in small towns under county councils and local councils to operate in rural areas. Local councils were a collection of administrative locations, the unit below administrative districts. The county councils essentially continued the same functions that were carried out by the African District Councils during the colonial era.<sup>202</sup> These included primary education, health services, road construction and maintenance, maintenance of market places and slaughter houses. Among the other functions were water supply and sanitation services, mainly in urban centres within county council areas.<sup>203</sup>

In terms of the regulation of local authorities, the Independence Constitution devolved substantial powers over local authorities to the regions. The regions were empowered to establish local authorities and demarcate local government boundaries.<sup>204</sup> Regional authorities could determine the revenue sources for local governments.<sup>205</sup> The regional governments could also allocate functions to local governments. Additionally, the regional governments could dissolve local governments.<sup>206</sup> However, most of these powers and functions never got to be exercised due to political differences between KADU and KANU about the role of regions in local governance.

After the KANU and KADU coalition government was dissolved in 1963 and KANU took over control of central government, “the central government behaved as if regions did not exist”.<sup>207</sup> Thus, instead of letting regions take over their regulatory role over local governments, the central government opted to use the PA to undermine the authority of regions over local governments. The District Commissioners (DCs), who were supposed to be agents of regional governments under the independence constitution, were deployed as central government nominees in the county councils.<sup>208</sup> While the stated role of the DCs was to act as points of liaison between the Ministry of Local Government and the LAs, the DCs were actually meant to

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<sup>201</sup> Republic of Kenya (1995) 15.

<sup>202</sup> Oyugi (1978) 22-23.

<sup>203</sup> Oyugi (1978) 22.

<sup>204</sup> Section 224 IC.

<sup>205</sup> Section 142 IC.

<sup>206</sup> Section 235 IC.

<sup>207</sup> Oyugi (1983) 121.

<sup>208</sup> Oyugi (1983) 122-123.

keep the local authorities in check on behalf of the central government. The KANU government feared that KADU could use local authorities to advance the regional-government agenda.<sup>209</sup>

The central government refused to abolish the national ministry of local government and transfer the regulatory functions to regions, as recommended by the preparatory commission which had completed the unification of the segregated local government system.<sup>210</sup> The Ministry instead issued circulars and legal notices that required local governments to be accountable to the Ministry instead of their respective regional governments. The legal notices directed councils to submit budgetary estimates to the ministry, instead of regions, for approval. Regions were only to be served copies and had no role in approval of expenditure. The local government ministry officials posted to local authorities monitored the expenditure of local authorities and ensured strict adherence to central government financial guidelines.<sup>211</sup>

Furthermore, local councils were run during the transitional period as “winding-up commissions” headed by the DCs. This, Oyugi argues, denied local governments “political spokesmen who could have joined the regional political leaders in urging the centre to surrender to them what was ‘lawfully’ theirs according to the then-existing constitution”.<sup>212</sup> However, even under the colonial era, local governments never really achieved any political significance beyond delivery of basic services. A report observes that “even where a strong system of local government was established, its functions were mostly administrative and regulatory”.<sup>213</sup> It is thus not a surprise that local government remained politically invisible in the period of political contestation between the regions and the centre.

Local authorities were a subject of political contestation between the regions (through KADU) and the centre (through KANU), with the latter winning the contest. The local government system found itself once again under strong control by central government powers as it had in the colonial order. Writing in 1993, Oyugi concluded that “the structures and patterns of relationships emerging after the struggles of 1962-4 have, by and large, remained in operation.”<sup>214</sup>

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<sup>209</sup> Smoke (1994) 71; Oyugi (1983) 122.

<sup>210</sup> Oyugi (1983) 122.

<sup>211</sup> Oyugi (1983) 122.

<sup>212</sup> Oyugi (1983) 123.

<sup>213</sup> Republic of Kenya (1995) 8.

<sup>214</sup> Oyugi (1983) 123.

#### 4. (Re) centralisation and personalisation of power after independence

The KANU victory at the independence elections in June 1963 dealt a major blow to KADU and the regional system. True to its word, KANU frustrated all efforts to establish viable regional governments. This was first done by denying them resources and secretariats.<sup>215</sup> Branch writes that “by July 1964, the bank accounts of the regional assemblies were empty”.<sup>216</sup> Totally weakened by defections to KANU, which was consolidating its power, KADU was formally dissolved in November 1964, thereby making Kenya a *de facto* one party state.<sup>217</sup> The British government, through its new Kenyan Governor, Malcolm MacDonald, made it clear that the regional system of government would be implemented as agreed in the Lancaster talks but that the entire process was now in the hands of the KANU government.<sup>218</sup>

With KADU out of the way and there being no strong or visible opposition to centralisation, the KANU government commenced a process of dismantling the regional system of government. After frustrating the “young” regions, quick and carefully crafted constitutional amendments were made which gradually weakened and, in 1968, finally abolished the regional governments.<sup>219</sup> However, the constitutional amendments not only recentralised powers but also had the effect of consolidating powers in the President. Under the powerful presidency, the PA, with which the central government had maintained a close relationship throughout the transitional period, was expanded in the post-independence period at the expense of local authorities.

##### 4.1 Dismantling of ‘*majimbo*’ and the entrenchment of personal rule

President Jomo Kenyatta, in a speech to the House of Representatives in August 1964, announced proposed constitutional amendments that affected regions. He stated that regions should not have exclusive powers in respect of matters requiring national planning, such as health, education and agriculture. Regional public services, police and other regional departments were to be transferred back to the centre. A Bill was drafted to effect the proposed changes.<sup>220</sup> Substantive powers of the regions not constitutionally entrenched were deleted

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<sup>215</sup> Ochieng’ (1995) 92-97; Odinga (1976) 233-234.

<sup>216</sup> Branch (2011) 15.

<sup>217</sup> Anderson (2005) 563.

<sup>218</sup> Anderson (2005) 562.

<sup>219</sup> Muigai G ‘The Structure and values of the Independence Constitution’ Report of the Constitution of Kenya Review Commission (2003) 308.

<sup>220</sup> Oyugi (1983) 123.

through the amendment; regional police and public service were abolished. The amendment also removed provisions that guaranteed financial and fiscal independence of regional units.<sup>221</sup>

An amendment Act of 1965 changed the names of the regions and assemblies to Provinces and Councils, a move seen as emphasising their inferior status.<sup>222</sup> The amendment also removed the constitutional protection of regional boundaries.<sup>223</sup> Another amendment abolished the bicameral national legislature, establishing a unicameral house.<sup>224</sup> Parliamentary constituency boundaries were revised, which created constituencies for senators who became members of the unicameral house.<sup>225</sup> The last amendment that abolished the regional system was made in 1968.<sup>226</sup> The amendment, Muigai notes, “abolished the Provincial Councils and deleted from the Constitution all references to the provincial and district boundaries and alteration thereof, thereby removing the last vestiges of regionalism”.<sup>227</sup> The dismantling of regions in essence removed centres for political competition that could challenge the president’s power and rule.

The Independence Constitution had created a dominion state with a prime minister as head of government and the Queen, represented by the Governor General, as head of state.<sup>228</sup> However, these two positions were merged by the 1964 amendments and vested in the President.<sup>229</sup> As a result, the President became the head of state and head of government, and a full member of the National Assembly. The President had no legal obligation to consult any person or institution in the exercise of both sovereign powers and duties as head of government.<sup>230</sup> For instance, while it was intended that the Queen could dissolve Parliament at the advice of the prime minister, the new amendment provided that the president could dissolve parliament at any time.<sup>231</sup>

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<sup>221</sup> Act 38 of 1964.

<sup>222</sup> Ghai & McAuslan (1970) 213.

<sup>223</sup> Act 38 of 1964.

<sup>224</sup> Act 40 of 1966.

<sup>225</sup> Ghai & McAuslan (1970) 214.

<sup>226</sup> Act 16 of 1968.

<sup>227</sup> Muigai (2003) 270.

<sup>228</sup> Section 72 IC.

<sup>229</sup> Singh C ‘The Republican Constitution of Kenya: Historical background and analysis’ (1965) 14 *The International and Comparative Law Quarterly* 929-930.

<sup>230</sup> Singh (1965) 929-930.

<sup>231</sup> Singh (1965) 14.

The dismantling of regions and consolidation of powers in the President created a powerful presidential system. Indeed, Ogot argues, there were two transfers of power in this period: the first from the British government to the African nationalists in 1963, and the second from the nationalists, via Parliament, to Kenyatta.<sup>232</sup> He writes that “right from 1964 Kenya’s nationalists in parliament, for whatever reasons, would concede considerable political power to the president in a quick succession of constitutional amendments” with no serious discussion or challenge.<sup>233</sup> Constitutional provisions that barred the Senate from introducing money Bills were retained in the Constitution but applied against the unicameral legislature.<sup>234</sup> Money Bills or amendments thereto could be introduced only at the recommendation of the president.<sup>235</sup>

One may wonder how it was that the ethnic-based grievances about land and the secessionist demands threatening the foundations of the Kenyan state during independence negotiations came to fizzle out; indeed, these grievances were not (re)awakened by the dismantling of regions and centralisation of political powers. Sanger and Nottingham observe that “there were still several thousands of *Mau Mau* fighters from the Kikuyu, Embu, and Meru communities in the forests, who had sworn to remain there until all chances of a KADU victory had vanished and the claims of the true fighters for freedom had been recognised”.<sup>236</sup> A number of reasons have been advanced to explain this situation.

The land issue was one of the most sensitive factors that the independence government had to deal with immediately upon assuming office. Indeed, the land question infiltrated the debate on regionalism versus centralisation. Decolonisation had triggered debates on *majimboism* and a return to pre-colonial settlement patterns.<sup>237</sup> While the ethnic tensions in the Rift Valley were due to the presence of a large number of landless Kikuyus among landless Kalenjin communities, the government had to reassure settler farmers, in whose hands the economy lay,<sup>238</sup> that there would be no invasions. Of all the affected ethnic groups, the Kikuyu were the

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<sup>232</sup> Ogot (1995b) 212.

<sup>233</sup> Ogot (1995b) 212.

<sup>234</sup> Murray & Wehner (2011) 1.

<sup>235</sup> Murray & Wehner (2011) 1.

<sup>236</sup> Sanger & Nottingham (1964) 566.

<sup>237</sup> Branch (2011) 15.

<sup>238</sup> Ochieng’ & Atieno-Odhiambo (1995, xv) notes that: “With very few exceptions the Europeans occupied the top of the colonial economic, political and social pyramid. Their salary scale was the highest in the colonial state. Although there were only 61 000 Europeans in 1960 – compared with 169 000 Asians and 7.8 million Africans – about 40 per cent of the total wage-bill of that year accrued to them. The Europeans also monopolized the best professions and dominated the industrial, banking, mining and commercial life of the country. In addition, they manned the top posts in

most militant, with groups such as Mau Mau and Kenya Land Freedom Army threatening to regroup and forcefully take over white-owned farms.<sup>239</sup> Keen to forestall an economic crisis, the Kenyatta government prioritised resettlement of Kikuyus to gain the confidence of settlers.<sup>240</sup>

In order to appease the Kikuyu and deal with the anxiety of the white farmers, the government decided to carve off a part of the Rift Valley Province (Kinangop area) and move it to the Central region, the home of the Kikuyu.<sup>241</sup> However, regardless of the government's intentions, this action did not go down well with the Kalenjin community, who interpreted it as government preference of Kikuyu interests over theirs.<sup>242</sup> Kanyinga notes that "the new administration under President Kenyatta, a Kikuyu, pushed aside demands for the 'sanctity of tribal lands' or territorial spheres that KADU vehemently argued for".<sup>243</sup> Indeed, Kalenjin communities, specifically the Nandi, suffered the greatest loss of their communal territories through gradual and systematic alienation to create areas for European settlement.<sup>244</sup>

With the dissolution of KADU in 1964, its key members, representing the ethnic communities in the Rift Valley, were incorporated into the KANU government and given cabinet posts.<sup>245</sup> This included Daniel Moi, the influential Kalenjin leader who would later succeed Jomo Kenyatta as president in 1978. KANU rule saw more of the people, mainly from the Central Province, resettled in the Rift Valley. Anderson and Lochery comment that "many Kalenjin came to believe that Kikuyu immigration to the Rift Valley was the price Moi paid for being made vice-president under Kenyatta".<sup>246</sup> Competing claims among the Kalenjin sub-tribes also prevented the Kalenjin land claims from solidifying any further.<sup>247</sup>

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the civil service and owned most of the large-scale farming production and the best and richest land in the Kenya Highlands. These covered approximately 7.5 of the arable land and 20 per cent of Kenya's highly productive areas. By 1960, 4000 Europeans accounted for 83 per cent of the total agricultural exports of the country. European domination of the economy and society was effected through legislation and was buttressed by the armed forces, particularly in the period of militant African nationalism, between 1950 and 1963."

<sup>239</sup> Kanyinga (2009) 332.

<sup>240</sup> Kanyinga (2009) 331.

<sup>241</sup> Kanyinga (2009) 332.

<sup>242</sup> Kanyinga (2009) 331.

<sup>243</sup> Kanyinga (2009) 330.

<sup>244</sup> Ellis (1976) 563-564.

<sup>245</sup> Kanyinga (2009) 329.

<sup>246</sup> Lochery E & Anderson D 'Violence and exodus in Kenya's Rift Valley, 2008: Predictable and preventable? (2008) 2 (2) *Journal of Eastern African Studies* 337.

<sup>247</sup> Kanyinga (2009) 336.

More importantly, KANU had, in its pursuit of “Africanisation policy” in the white highlands and overall economic stability of the largely agricultural independence economy, allocated huge tracts of land to the upcoming African elite, one which cut across ethnic groups.<sup>248</sup> Top KADU leaders were beneficiaries of these allocations, and were thus unable to articulate the position of their ethnic communities in the Rift Valley as they did before independence. A few of the former KADU leaders who dared to speak for the land interests of their communities in the Rift Valley were arrested and charged with incitement.<sup>249</sup>

While the Kalenjin leaders softened their stance on ancestral claims for land in the Rift Valley, the land issue did not vanish but reappeared during elections in subsequent years. Specifically, and as will be seen in the next chapter, the introduction of multi-party politics in the country in 1992 coincided with the rise of politically-instigated ethnic land-clashes in the Rift Valley.<sup>250</sup> The issue of land kept resurfacing during political activities and events such as the constitutional review process, elections, national referenda and other political processes. The worst violence in the region was experienced in the 2007 presidential elections: while the presidential election results were the immediate trigger for it, the central issue in the 2007/2008 violence was land.<sup>251</sup>

With regard to the issue of coastal secession, Jomo Kenyatta signed an agreement on behalf of the Kenya government with the Sultan of Zanzibar and the British government that the coastal region would be under the new Kenya Republic. However, the government was to guarantee the continuity of practices such as Islamic courts on issues of personal law.<sup>252</sup> Furthermore, the region was faced with “party factionalism” and, as opposition by African groups to the secession agenda weakened, the self-determination claim died out.<sup>253</sup> In the case of the NFD Somali region, Parliament approved the use of emergency rules and regulations allowing security

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<sup>248</sup> Kanyinga (2009) 332.

<sup>249</sup> Kanyinga (2009) 336; Branch (2011) 128. Such was the fate of Jean-Marie Seroney, a former KADU leader, who, unlike Moi, came from the Nandi community, which lost heavily to colonial rule and post-independence governments.

<sup>250</sup> Kanyinga (2009) 325-326

<sup>251</sup> The causes of the unprecedented violence that engulfed the country in that year are discussed in more detail in Chapter 4.

<sup>252</sup> Kenya Coastal Strip ‘Agreement between the Government of United Kingdom, His Highness the Sultan of Zanzibar, the Government of Kenya and the Government of Zanzibar’ (presented to Parliament by the Secretary of State for Colonies by command of Her Majesty, October 1963). See also Brennan JR ‘Lowering the Sultan’s flag: Sovereignty and decolonization of coastal Kenya’ (2008) 50 *Comparative Studies in Society and History* 831-861.

<sup>253</sup> Ogot (1995a) 66-67.

forces to enter the region and violently suppress the secessionist movement.<sup>254</sup> However, it has also been claimed that Kenya remained peaceful because it maintained high military discipline inherited from the colonial days. Indeed, events such as military takeovers – rampant elsewhere in the region – were unheard of in Kenya.<sup>255</sup>

It has also been noted that, apart from these issues, the *Majimbo* Constitution was “embarrassingly complicated”<sup>256</sup> and proved difficult to implement even for those who were promoting it. This made it easy for the newly independent government to dismantle the regional system of government without much resistance.<sup>257</sup> However, Maxon has criticised those who attribute the dismantling of the *majimbo* to its purported complexity.<sup>258</sup> He argues that they ignore the KANU government’s main concern which was that “the constitution gave more power to the regional assemblies than the party controlling the central government would countenance”.<sup>259</sup> However, what is clear is that the real autonomy of the regions or effectiveness of the framework was never tested and there was no political will by the independence government to facilitate it.

#### **4.1.1 The strengthening of the Provincial Administration and the weakening of local authorities**

After the dismantling of regions and consolidation of powers, the KANU government still had the task of delivering on its campaign promises. These included addressing socio-economic problems and economic disparities created by the colonial regime: proper education, health-care systems and equitable development in order to combat “ignorance, poverty and disease”. The state had to organise its state machinery for service delivery and development. The Provincial Administration (PA) was the preferred institution in terms of development planning and implementation. Local authorities were subordinated to the bureaucracy of the PA, denied resources, stripped of essential functions, and rendered irrelevant.<sup>260</sup>

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<sup>254</sup> Castagno AA ‘The Somali-Kenya controversy: Implications for the future’ (1964) 2 *Journal of Modern African Studies* 165-188.

<sup>255</sup> Tamarkin M ‘The roots of political stability in Kenya’ (1978)77 *African Affairs* 300, 306-307.

<sup>256</sup> Anderson (2005) 561;

<sup>257</sup> Okoth-Ogendo (2003) 277; Ghai & McAuslan (1970)199-200.

<sup>258</sup> Maxon (2011) 202-203.

<sup>259</sup> Maxon (2012) 203.

<sup>260</sup> Gertzel C ‘The Provincial Administration in Kenya’ (1966) 4 *Commonwealth & Comparative Politics* 201-202.

Gertzel writes that “the Central Government was able throughout 1964 to maintain sufficient overall control to prevent any real disintegration of the administrative machine”.<sup>261</sup> Indeed, the Ministry of Home Affairs, in whose docket the PA was as at independence, had earlier written a circular to Provincial Commissioners (PCs), the regional administrators (renamed as Civil Secretaries in the regional governments), to maintain more direct communication with the Ministry in the interest of better coordination.<sup>262</sup> Another circular directed that lower administrators would be under the administration of the Ministry and only seconded to regions.<sup>263</sup> These directives went against the Independence Constitution, which provided that regional administrators were to be heads of the regional public service and under their respective regional governments.<sup>264</sup> However, the Kenyatta government had shown clear preference for the PA over the regional governments and sought to entrench the PA system in the state’s organisational machinery for development.

In yet another clear demonstration of the government’s intention with regard to the PA, the coordination of the PA was transferred to the Office of the President. This step was welcomed by the administrators as it gave them personal access to the President.<sup>265</sup> It was also a welcome relief to the PA officials as the regional governments, under which they were to serve, were struggling after being denied resources and capacity by the centre.<sup>266</sup> Furthermore, the administrators had dealt directly with the centre during the colonial era and were relieved that the arrangement had been restored.<sup>267</sup>

The transfer of the PA to the Office of the President also made the administrators representatives of the President in their areas.<sup>268</sup> However, this role was not well received by politicians, who believed that elected representatives, and not administrators, were the appropriate link between the people and the president, himself a politician.<sup>269</sup> The role of the PA would expand even further to include matters such as coordinating development, security and essentially all government functions at the regional and local levels. The PA had clearly become

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<sup>261</sup> Gertzel (1966) 201-202.

<sup>262</sup> Gertzel (1966) 203.

<sup>263</sup> Gertzel (1966) 203.

<sup>264</sup> Section 116 and 193 IC; Gertzel (1966) 208.

<sup>265</sup> Gertzel (1966) 203-204

<sup>266</sup> Gertzel (1966) 202.

<sup>267</sup> Gertzel (1966) 208.

<sup>268</sup> Gertzel (1966) 201-202.

<sup>269</sup> Gertzel (1966) 201-202, 210.

the link between the executive and the people.<sup>270</sup> Motions were introduced in both houses of parliament at different times to curb the growing political role of the PA, a role that was undermining politicians.<sup>271</sup>

However, while the President sidestepped politicians in favour of the PA, it later became apparent to the administrators that they would not enjoy the same discretion to exercise powers as their colonial counterparts once had. Instead, they got their instructions from the President.<sup>272</sup> Gertzel observes that “it was possible during 1965 to detect a sense of frustration among many administrators who felt that they ought indeed to be consulted more often before policies that they would be required to implement were decided upon”.<sup>273</sup> This shift in the power balance between the top leadership of the PA vis-a-vis the national executive in the colonial and post-independence periods was an indication of creeping personal rule. Kenyatta’s preference of the PA over the party was unique arrangement since the political party was used in other states to entrench personal rule.<sup>274</sup> Gertzel attributes this to organisational problems within KANU, the strong relationship between the PA and the national executive in the short period of existence of regional governments, and the general lack of a constitutional basis for a one-party state.<sup>275</sup>

#### **4.1.2 Provincial Administration as a planning and development agency**

Before delving into the developmental functions of the PA, it is important to understand the origins and functions of the PA. Established in the early days of colonial rule, the PA was the main institution was used for control and administration of the colony.<sup>276</sup> From its early days the PA reflected a centralised and hierarchical structure. In the early days of colonial rule, when there were no elaborate state structures, the duties and functions of the British government at the local level were lumped together and placed on the shoulders of administrators. Thus, colonial administrative officers administered tax collection, acted as magistrates, supervised local authorities and presided over security matters of the colonial government.<sup>277</sup> Gertzel

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<sup>270</sup> Gertzel (1966) 210.

<sup>271</sup> Gertzel (1966) 160-161.

<sup>272</sup> Gertzel (1966) 209-210 notes that the PCs could sometimes operate as a pressure group against the Governor on some of the policy issues by the national government.

<sup>273</sup> Gertzel (1966) 210.

<sup>274</sup> Gertzel (1966) 201.

<sup>275</sup> Gertzel (1966) 202.

<sup>276</sup> Chitere PO ‘The Provincial Administration in Kenya: Its characteristics and options for the future’ (2005) 21 (IPAR discussion paper Series: Discussion paper No. 074/ 2005).

<sup>277</sup> Chitere (2005) 21.

describes the colonial PA as “a powerful, sophisticated, and centralised machine through which the Governor administered by direct rule.”<sup>278</sup> The PA was significantly expanded during the emergency period (1952-57) when the colonial government used the PA to rout the Mau Mau rebellion. While some adjustments were made to the structure, role and functions of the PA in the post-independence period, the structure has basically remained the same.

The structure of the PA is fairly simple. It was composed of Provinces, Districts, Divisions, Locations and Sub-locations. A uniform structure is maintained throughout the country, although with varying conditions.<sup>279</sup> The PA was used for organising government activities, especially in the rural areas, and core ministries such as Agriculture were organised in accordance with the PA structures.<sup>280</sup> The PA was under the Office of the President, specifically under the Permanent Secretary, Provincial Administration and National Security.<sup>281</sup> The President appointed the Provincial Commissioners (PCs), District Commissioners (DCs) and other senior PA staff. The DCs in turn supervised government work, including that of ministries at the district level. Below the district level, the District Officers, chiefs and sub-chiefs represent the PA and supervised government work at that level.<sup>282</sup> There was an informal arrangement under which village headmen were either appointed or elected to assist the sub-chief and chief in organising and coordinating government work at the village level.<sup>283</sup>

The developmental role that the PA took up after independence can be understood only in the context of the economic and development policies and plans that the independence government pursued. Despite early reforms in the early stages of independence, such as deracialisation of the white highlands and halting the policies of segregation of the economy, inequalities and socio-economic challenges persisted. In order to address this challenge, the Ministry of Economic Planning and Development came up with a policy dubbed “African Socialism and its Application to planning in Kenya”.<sup>284</sup>

In the policy, the government laid out its development agenda and the way in which it intended to address the challenges at independence. Noting huge inequalities and the need to ensure that more Africans participated in the economy, the policy committed the government to an

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<sup>278</sup> Gertzel (1966) 201.

<sup>279</sup> Chitere (2005) 20.

<sup>280</sup> Chitere (2005) 20.

<sup>281</sup> Chitere (2005) 21.

<sup>282</sup> Chitere (2005) 21.

<sup>283</sup> Chitere (2005) 21.

<sup>284</sup> Republic of Kenya ‘African Socialism and its application to planning in Kenya’ (Sessional Paper No. 10 of 1965).

“Africanisation” policy that would ensure more Africans participated in economic development and government service.<sup>285</sup> Although the policy did not expressly provide so, all subsequent development plans were aligned with the PA system.<sup>286</sup> The PA was thus institutionalised as the agent for national and local development.<sup>287</sup>

The Planning Ministry issued institutional plans in March 1966 to implement the development agenda and proposed to have “Provincial Planning Officers” based at the Provincial Headquarters.<sup>288</sup> The plans also included Provincial Development Committees with Provincial Commissioners as chairmen of these committees and Provincial Heads of departments of relevant ministries as members.<sup>289</sup> These committees were mandated with coordinating the development agenda in the province and ensure that the national development plans were achieved. The Ministry also proposed the same structure for all districts, with the DC as chairman of the District Development Committee and responsible for supervising development functions at the district level.<sup>290</sup> While administrators were recognised as “leaders in development”, the Ministry retained overall coordination and authority on development.<sup>291</sup>

In addition, the Ministry proposed the formation of advisory committees, also headed by PCs and DCs but composed of area elected representatives such as MPs and members of local authorities.<sup>292</sup> Gertzel argues that advisory committees were an attempt to end the earlier differences that had emerged between politicians and administrators.<sup>293</sup> The Special Rural Development Programme (SRDP), run from 1971 to 1975, was among the first PA-based decentralised development strategies and a precursor to later development programmes (discussed below).<sup>294</sup>

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<sup>285</sup> Republic of Kenya (1965) (preface).

<sup>286</sup> Gertzel (1966) 211.

<sup>287</sup> Gertzel (1966) 211.

<sup>288</sup> Gertzel (1966) 211.

<sup>289</sup> Gertzel (1966) 211.

<sup>290</sup> Gertzel (1966) 211.

<sup>291</sup> Gertzel (1966) 211.

<sup>292</sup> Gertzel (1966) 212.

<sup>293</sup> Gertzel (1966) 213.

<sup>294</sup> Wallis M ‘District planning and local government in Kenya’ (1990) 10 *Public Administration and Development* 440-441.

## **5. Local government in post-independence Kenya: Subordination, neglect and decline in local service delivery**

Before assessing the PA-based development strategy, it is important to examine the fate of local government after independence. Long suspected as avenues through which local political dissent could emerge, (local authorities) LAs were subjected to central controls through a number of means. The PA system was used to subordinate and undermine LAs. Gradual abolition of their main sources of revenue left them without resources to carry out functions. With local authorities unable to meet the growing demand for local services and development, the government responded by transferring the essential services to national government. Furthermore, the multiple channels of development planning through the PA, sector-led development through line ministries and the local authorities resulted in uncoordinated development that impacted negatively on the effectiveness of local authorities.

### **5.1 The structure, organisation and functions of local authorities**

The basic structure of post-independence local government was provided for under the Local Government Act (LGA).<sup>295</sup> Enacted in 1977, the LGA borrowed Local Government Regulations that were adopted in 1963 and which unified the racially segregated system of local government. The LGA created four types of LAs: county, municipal, town and urban councils. County councils basically had the same geographical divisions as administrative districts, and thus covered majority of the country's rural areas. Municipal councils were established in larger urban areas. Town councils were established for smaller urban areas, while urban councils (also referred to as County Divisions in the LGA) were established under county councils "in emerging urban centres being prepared for transition to town and ultimately municipal councils".<sup>296</sup> However, urban councils were not independent and relied on county councils for their operation. County councils covered all areas of administrative districts, except areas separately designed as town or municipal councils.<sup>297</sup>

In essence, the former African District Councils (ADCs) of the colonial era were the ones established as county councils.<sup>298</sup> The colonial system of differentiating urban and rural LAs was

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<sup>295</sup> Cap 265 laws of Kenya.

<sup>296</sup> Republic of Kenya (1995) 14.

<sup>297</sup> Republic of Kenya (1995) 14.

<sup>298</sup> World Bank (2002) 17.

also maintained through municipalities, town councils and urban councils.<sup>299</sup> The LGA established LAs as corporate entities with separate legal existence.<sup>300</sup> However, while the Act created the different types of LAs, there was no clear and substantial distinction between municipal, county, town and urban councils.<sup>301</sup> The LGA also empowered LAs to issue by-laws which could enable them perform their functions.<sup>302</sup>

The LGA used phrases such as “may” and “shall have power to”, and most of the functions required the consent or approval of the Minister of Local Government or the sector-specific minister before performance.<sup>303</sup> A directive from the ministry could make any of the permissive functions mandatory to a particular LA.<sup>304</sup> Accordingly, except for the mandatory duty and power to make arrangements for the burial or cremation of destitute persons within their areas,<sup>305</sup> the rest of essential local services such as provision of health,<sup>306</sup> education<sup>307</sup> road maintenance, markets, slaughterhouses, water and sanitation, street lighting were all permissive as opposed to mandatory.<sup>308</sup>

While the LGA provided for a distinction between urban-based local authorities with regard to service provision, the World Bank observes that the distinction was basically a “carry-over” from the colonial system.<sup>309</sup> In practice, most LAs tended to carry out the same functions, for example, garbage collection, maintenance of markets, maintenance of local roads, etc.<sup>310</sup> However, larger municipalities were responsible for primary education and health services while county councils and newer municipalities never exercised such functions.<sup>311</sup>

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<sup>299</sup> World Bank (2002) 17.

<sup>300</sup> Section 12(3) of the LGA.

<sup>301</sup> Republic of Kenya (1995) 18.

<sup>302</sup> Section 210 LGA; World Bank ‘Kenya: An assessment of local service delivery and local governments in Kenya’ (2002) 17.

<sup>303</sup> World Bank (2002) 17.

<sup>304</sup> Republic of Kenya (1995) 43.

<sup>305</sup> Sections 167 and 161 LGA.

<sup>306</sup> Section 145 para(i) LGA.

<sup>307</sup> Section 152 LGA.

<sup>308</sup> Smoke (1994) 95.

<sup>309</sup> World Bank (2002) 19.

<sup>310</sup> World Bank (2002) 19.

<sup>311</sup> World Bank (2002) 19.

Local authorities were established as local councils, with councillors elected, at the same time as presidential and parliamentary elections, for a term of five years.<sup>312</sup> One third of the councillors were nominated to allow representation and participation of professionals and stakeholders in council matters. Previously the Minister for Local Government had the sole discretion to nominate councillors. This power was used to “swamp” opposition councils with nominees of the ruling party.<sup>313</sup> However, after introduction of multi-party elections, nomination was based on party strength in the councils.<sup>314</sup> Nominated seats were allocated according to the proportion of seats won by a party in a respective council. The DC was also an *ex officio* member of the council and meant to provide a coordinating link between the LAs and district level activities of the PA.<sup>315</sup>

Chairpersons (for county and town councils) and mayors (municipalities) were elected for a term of two years by councillors from among the council members, and they could be re-elected.<sup>316</sup> The Act also provided for formation of joint committees with other LAs for purposes of local service delivery.<sup>317</sup>

## 5.2 The financial situation of local authorities after independence

Local authorities inherited the financial woes that faced ADCs on the eve of independence. Functions remained the same, and most of the revenue was spent on the main services that included education, roads and health.<sup>318</sup> The primary source of revenue for local authorities immediately after independence was school fees, poll rates and central government grants. However, as Oyugi observes, the revenue realised from the three major sources at the time was not enough even to cover recurrent costs.<sup>319</sup> Revenue collection by the LAs was also poor, and poll rates were opposed by politicians. School enrolment was unpredictable, with LAs in poorer areas receiving little or no revenue from school fees. Government grants took longer to arrive and when they did, it was not the expected amount.<sup>320</sup>

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<sup>312</sup> Section 27 LGA.

<sup>313</sup> Southall R & Wood G ‘Local government and the return to multi-partyism in Kenya’ (1996) 95 *African Affairs* 512.

<sup>314</sup> World Bank (2002) 17.

<sup>315</sup> World Bank (2002) 43.

<sup>316</sup> Section 13 LGA; Republic of Kenya (1995) 32-33.

<sup>317</sup> Section 93 LGA.

<sup>318</sup> Oyugi (1978) 25.

<sup>319</sup> Oyugi (1978) 25.

<sup>320</sup> Oyugi (1978) 25.

Poor management of the little revenue collected also proved to be a challenge to the councils.<sup>321</sup> There were no proper measures to monitor revenue collection; many of the councils were overstaffed, with many of the staff being overpaid; and there were breaches of financial guidelines with respect to tenders and other corrupt practices.<sup>322</sup> While municipal councils could raise considerable local revenue to support some of their services, county councils (mainly based in rural areas) were the worst hit.<sup>323</sup>

In order to address the financial situation of LAs, the government in 1964 introduced the Graduated Personal Tax (GPT), a surcharge on specified personal incomes, which was recommended by the Fiscal Commission in 1963.<sup>324</sup> However, the GPT did not yield much, and collection of the same in rural areas, where most county councils operated, proved a challenge. The DCs were empowered in 1965 to collect GPT and often their effectiveness hinged on the enthusiasm of a particular DC.<sup>325</sup> The government had also introduced in 1964 general grants that replaced the colonial era specific grants and which were calculated on the basis of ability to pay.<sup>326</sup>

Despite the measures taken to strengthen the financial position of councils, growing demand for services and the expansion of the education sector placed a strain on the LAs. The period between 1965 and 1969 saw a rise in deficits of LAs, but despite this negative trend government grants were uncertain and in a steady decline.<sup>327</sup> By 1969, most LAs spent 66 percent of their budgets on recurrent expenditure, with the bulk going to teachers' salaries.<sup>328</sup> Initially LAs turned to banks for overdrafts, but the latter later refused to offer them such facilities owing to the uncertainty of central government grants.<sup>329</sup>

In March 1966 the government appointed a commission of inquiry "to look into and advise on the reforms necessary to make the local government system in Kenya a more efficient

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<sup>321</sup> Republic of Kenya 'Report of the Commission of Inquiry: Public Service and Remuneration Commission 1970-71' (1971) 223.

<sup>322</sup> Oyugi (1978) 26.

<sup>323</sup> Sharp & Jetha (1970) 44; Smoke P 'Rural local government finance in Kenya: The case of Murang'a County Council' (1992) 12 *Public Administration and Development* 89-91.

<sup>324</sup> Oyugi (1978) 26.

<sup>325</sup> Oyugi (1978) 26.

<sup>326</sup> Oyugi (1978) 26.

<sup>327</sup> Oyugi (1978) 25-27.

<sup>328</sup> Oyugi (1978) 28.

<sup>329</sup> Oyugi (1978) 28.

instrument for the provision of the local services and development”.<sup>330</sup> The report released in 1967 confirmed that LAs needed assistance in the delivery of services. The government adopted the recommendations as Sessional Paper No. 12 of 1967 (on Local Government Commission). However, instead of implementing the recommendations, the government passed the Local Government Transfer of Functions Act of 1969, which transferred major services such as primary education, roads and public health to the central government with effect from 1 January 1970.<sup>331</sup> While the central government interpreted this as a relief to the LAs, the services transferred accounted for 80 percent of the total revenue of LAs.<sup>332</sup> No new sources of revenue were given to replace the revenue lost after the transfer of the functions;<sup>333</sup> other revenue sources which remained were “weak and undependable”.<sup>334</sup>

The resources available to LAs were used to cover ever-increasing recurrent expenditure such as salaries. Most LAs accumulated debt and some went for years without paying staff salaries. In 1973 the government abolished GPT and then further withdrew general and specific grants to LAs in 1974.<sup>335</sup> For a long time, the Local Government Loans Fund, sectoral ministry budget financing and the District Development Fund remained the only source of development funding for LAs. Central government grants were only granted in “special circumstances” where “salvage operations” were done “to rescue councils which could otherwise collapse entirely”.<sup>336</sup>

While LA expenditure accounted for about 25 percent of central government recurrent expenditure in the past, this figure fell to an average of 8-10 percent between 1975 and 1990 as a result of the deprivation of revenue through the centralisation of functions. This, a report notes, showed the insignificant fiscal role that the LAs played during the period.<sup>337</sup> Indeed, local government share of the GDP fell from 3.26 percent in 1969/70 to 1.22 percent in 1999/2000.<sup>338</sup>

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<sup>330</sup> Republic of Kenya (1995) 10.

<sup>331</sup> Republic of Kenya (1995) 10.

<sup>332</sup> Oyugi (1978) 32.

<sup>333</sup> These included plot rentals, occupational licenses, market fees, bicycle licenses, water rates, and poll rates.

<sup>334</sup> Oyugi (1978) 32.

<sup>335</sup> Republic of Kenya (1995) 12.

<sup>336</sup> Wallis (1996) 441.

<sup>337</sup> Republic of Kenya (1995) 71.

<sup>338</sup> Rocaboy Y et al ‘Public finances of local government in Kenya’ in Dafflon B & Madies T (eds) (2012) *The Political Economy of Decentralization Sub-Saharan Africa: A New Implementation Model in Burkina Faso, Ghana, Kenya, and Senegal* 165.

This is even after the government introduced the Local Government Service Charge (LASC) in 1989 to “boost the revenue base of local authorities so as to enhance service delivery”.<sup>339</sup>

### **5.3 Central-local government relations: central control and inefficiency**

Most of the post-independence challenges of LAs are traceable to central government policy. A number of reasons have been advanced to explain this. First, the central government wanted to hold on to and control LAs for political reasons. Second, the colonial-era challenge of the lack of clear distinction of functions persisted in the post-independence era. Furthermore, a number of decisions made at the centre, often without consultation with LAs, had adverse effects on the financial capacity of LAs. Indeed, Oyugi observes that “historically, the institution of local government has been treated by the centre as though it were just another government department”.<sup>340</sup>

In 1964 the central government entered into an agreement with trade unions that it would increase the workforce in public institutions by 10 percent. This agreement resulted in LAs hiring more staff without a needs-assessment and stretching the LAs even further. In 1966, the central government abolished charges for out-patient services in public health institutions without consulting LAs, further denying LAs revenue for services that they offered.<sup>341</sup>

The LGA bestowed upon the Minister immense power and control over LAs. The minister could establish new LAs, define and alter boundaries, amalgamate LAs or promote an LA from one kind to another.<sup>342</sup> The powers to alter boundaries have often been used arbitrarily for political reasons and to the detriment of the affected LAs. A 1995 report states:

There has been a tendency for the Minister and by the local authorities to include large expanse of rural land under municipal, town and urban councils mainly for political reasons, but also to provide a revenue base for these councils from surrounding rural areas under county councils. This has only helped to frustrate the county councils whose areas have been transferred, such areas also happen to be the centres of economic activities from where the county councils derive their revenue.<sup>343</sup>

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<sup>339</sup> Republic of Kenya (1995) 87.

<sup>340</sup> Oyugi (1983) 126.

<sup>341</sup> Oyugi (1978) 30.

<sup>342</sup> Section 9 LGA.

<sup>343</sup> Republic of Kenya (1995) 16.

The Minister could issue guidelines on performance of LA obligations,<sup>344</sup> issue directives to LAs,<sup>345</sup> remove council members,<sup>346</sup> appoint special commissions to run affairs of local authorities that he wound up; he could also require LAs to furnish him with council minutes and deliberations.<sup>347</sup> The minister had power to approve expenditure and new sources of revenues for LAs.<sup>348</sup> A 1995 report stated that the lack of a limited period within which a minister should approve or reject LA budgets “normally brings to a standstill most local authorities [most important business]”.<sup>349</sup> Furthermore, section 249 of the LGA gave the minister powers to reduce or cancel a central government grant to any LA.<sup>350</sup> The LGA also empowered the minister in charge of local government to control the hiring of senior staff in LAs,<sup>351</sup> a power vested in the Public Service Commission and the Ministry in 1984.<sup>352</sup> As a result, senior staff in LAs felt more accountable to the ministry than to the local councils.<sup>353</sup>

The Ministry of Local Government was organised into different departments for the purpose of effective supervision of LAs. Communication with LAs took place mainly through ministry circulars which, in practice, carried the force of law within LAs.<sup>354</sup> Sometimes the directives and circulars could overlook or contravene the LGA under which the directives were purportedly made.<sup>355</sup> A report identified 216 areas of intervention in the activities and life of LAs; these ranged from approval of expenditures and general regulation to simple matters such as granting a mayor permission to host a dignitary at a luncheon or approving a bicycle loan to a council messenger.<sup>356</sup> Such interventions not only made LAs inefficient but also diverted the ministry from broader policy issues that it could have addressed appropriately.<sup>357</sup>

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<sup>344</sup> Section 246 LGA.

<sup>345</sup> Section 248 LGA.

<sup>346</sup> Section 252 LGA.

<sup>347</sup> Section 224 LGA.

<sup>348</sup> Section 2 Local Government (Performance Contracting) Regulations 2007.

<sup>349</sup> Republic of Kenya (1995) 31.

<sup>350</sup> Republic of Kenya (1995) 49.

<sup>351</sup> Part IV of the LGA.

<sup>352</sup> Wallis (1990) 442.

<sup>353</sup> Southall & Wood (1996) 514-515.

<sup>354</sup> Oyugi (1983) 127.

<sup>355</sup> Republic of Kenya (1996) 41-42.

<sup>356</sup> Republic of Kenya (1995) 387.

<sup>357</sup> Republic of Kenya (1995) 387.

In each province there was a representative of the Ministry called the Provincial Local Government Officer (PLGO). Closely supervising the LAs in the respective provinces,<sup>358</sup> the PLGO was the secretary to a provincial committee that approved LA budgets in the province.<sup>359</sup> The modifications of the budgets of the LAs by the provincial committee were final. The PLGO also approved loan facilities, proposals for local revenue and other local investments. However, while the PLGO could grant prior authorisation on the proposals, the formal and final authority was given by the minister.<sup>360</sup>

Moreover, the central government had the power to dissolve any local authority suspected of mismanagement.<sup>361</sup> As such, 12 LAs were dissolved between 1970 and 1982,<sup>362</sup> but it was a power used mainly to stem political opposition at the local level and pursue ministerial vendettas.<sup>363</sup> the central government had an extensive array of means at its disposal for exerting control over LAs and did not hesitate to use it. Furthermore, holding joint civic, parliamentary and presidential elections meant that local issues were subordinated to national political campaigns;<sup>364</sup> as a result, aspiring councillors were perceived as “fighting for the scraps left over by bigger politicians”.<sup>365</sup> Southall and Wood conclude that authority was centralised to such an extent that local government in actuality was “neither local nor government”.<sup>366</sup>

#### **5.4 ‘Neither local nor government’: decay and near collapse of local authorities**

The central government did not pay any serious attention to LAs after stripping them of essential functions and revenue sources in 1970. It was not until 1989 that it again attempted to introduce another revenue source for LAs. The Local Authority Service Charge (LASC), a tax rate on employees and businesses, was to be deducted at source and remitted to LAs by employers.<sup>367</sup> However, despite high expectations that the LASC would improve the revenue base of the LAs, it did not yield much (it only came to an average of 10-30 percent of LA revenues).<sup>368</sup>

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<sup>358</sup> Rocaboy *et al* (2012) 167-168.

<sup>359</sup> Rocaboy *et al* (2012) 167-168.

<sup>360</sup> Rocaboy *et al* (2012) 168.

<sup>361</sup> Section 253 LGA.

<sup>362</sup> Southall & Wood (1996) 508.

<sup>363</sup> Southall & Wood (1996) 508.

<sup>364</sup> Southall & Wood (1996) 510.

<sup>365</sup> Southall & Wood (1996) 510.

<sup>366</sup> Southall & Wood (1996) 503.

<sup>367</sup> Republic of Kenya (1995) 87.

<sup>368</sup> Republic of Kenya (1995) 87.

Furthermore, administering the tax was cumbersome for LAs that lacked facilities such as printing stamps, fraud prevention, record-keeping and so on. The Minister also imposed restrictions on how the resultant funds were to be spent.<sup>369</sup>

Despite the numerous problems faced by LAs right from independence, successive local government ministers established more and more LAs without any objective criteria.<sup>370</sup> Some LAs were promoted from Urban and Town Councils to Municipal Councils without regard to issues such as population, size, revenue base, and capacity for service delivery or peoples' views.<sup>371</sup> In 1963, there were 39 county councils and seven municipalities, but by 1995 the number had risen to 50 and 35, respectively.<sup>372</sup> By 2010, there were 175 local authorities, (one city council, 45 municipal councils, 67 county councils and 62 town councils), most of which were established mainly for illegitimate reasons.<sup>373</sup>

While the ministry of local government was charged with supervision of LAs, there was serious incapacity at the ministry. A 1995 report stated that only 170 of the 485 vacant posts at the ministry were filled.<sup>374</sup> This deficit weakened the capacity of the ministry to regulate and supervise LAs efficiently. The LAs themselves were no different; most of them lacked adequate managerial staff. The World Bank reports that in the 2000/01 budget estimates, around 10 percent of management positions in LAs were vacant; more than one-third of top-level staff positions of Nairobi City Council and Mombasa Municipal Council were vacant.<sup>375</sup> Furthermore, while there was a staff deficit at the top level, LAs were overstaffed at the operational level. This led to lack of commitment and accountability by the lower staff.<sup>376</sup> LAs had also accumulated debts, and many properties of various LAs were attached for debt recovery.<sup>377</sup> A World Bank report in 1992 pointed out that most LAs in Kenya were actually insolvent, as expenditure had outstripped income.<sup>378</sup>

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<sup>369</sup> Republic of Kenya (1995) 87-88.

<sup>370</sup> Oyugi (1983) 127.

<sup>371</sup> Republic of Kenya (1995) 14-29.

<sup>372</sup> Republic of Kenya (1995) 15.

<sup>373</sup> Institute of Economic Affairs (IEA) 'Understanding the local government system in Kenya: A citizens handbook (2009) 12; Southall & Wood (1996) 507.

<sup>374</sup> Republic of Kenya (1995) 47.

<sup>375</sup> World Bank (2002) 46.

<sup>376</sup> World Bank (2002) x, 44-46.

<sup>377</sup> Republic Of Kenya (1995) 10.

<sup>378</sup> Republic of Kenya (1995) 71.

The transfer of functions in 1969 to central government ministries did not in any way enhance the effectiveness of the services. A report states that “ministries that took over the functions did not have the capacity to undertake all that was required of them”.<sup>379</sup> Township roads and rural access roads were neglected. The gap left by the transfer of services prompted the government to develop a strategy to fill it, but by the early 1970s it was clear that this PA-led development strategy was facing challenges. The government sought to further streamline the PA system by using different strategies.

## **6. Post-independence decentralisation reforms**

### **6.1 ‘Lipstick on a pig’: Streamlining the Provincial Administration development strategy**

Reports from the International Labour Organisation (ILO) in 1972 and the World Bank in 1975 were the first to give an early indication that the post-independence development policies were not working due to growing disparities.<sup>380</sup> Clearly, the PA-led development strategy was not bearing fruits. The first official assessment of the role of the PA in development was made in a report released in May 1971 (Ndegwa report),<sup>381</sup> which observed that links between the PA and technical ministries were weak.<sup>382</sup> While the PA was given responsibility to drive the local development agenda, it had no power to carry out the same. On the other hand, line ministries had powers but no responsibilities.<sup>383</sup> The provincial and district teams that had been formed to make plans and supervise implementation proved to be ineffective. The PCs and DCs had many other tasks and were thus unable to fulfil what is required of them under the government’s development plans.

Importantly, the report noted that the fundamental failure of the PA system is mainly “because the system of field administration was never designed around the concept of planned development and project management”.<sup>384</sup> The PA was grossly inadequate to the task of exercising the functions bestowed on it, functions that were bestowed without provision having

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<sup>379</sup> Republic of Kenya (1995) 10.

<sup>380</sup> Ochieng (1995) 90.

<sup>381</sup> Republic of Kenya (1971) 112.

<sup>382</sup> Republic of Kenya (1971) 22.

<sup>383</sup> Republic of Kenya (1971) 22.

<sup>384</sup> Republic of Kenya (1971) 22.

been being made for adequate capacity. For instance, the PA lost staff to line ministries and yet was supposed to coordinate field functions.<sup>385</sup> The report continued:

Members of the Administration often refer to themselves, with justice, as jacks of all trade and maids of all work. This may have been adequate in the days of colonial administration, at least in the early days when the emphasis was still heavily on political control and maintenance of order, but it is not compatible with the needs of professionalized development administration today. There must be some division of labour at the key levels of the Administration.<sup>386</sup>

In order to overcome the challenge above, the report recommended that the PCs and DCs be provided with technical staff to assist with the developmental nature of tasks given to the PA. Thus, a key recommendation was the growing of the technical capacity of the PA and especially the district level, where most of the developmental activities should take place. These recommendations were taken into account when, under Moi in 1983, a programme known as District Focus for Rural Development (DFRD) was adopted. However, the plans to improve the PA system which was fundamentally unsuitable as an agency for national development is comparable to 'lipstick on a pig'.

#### **6.1.1 The District Focus for Rural Development strategy (DFRD)**

The District Focus for Rural Development (DFRD), which was announced during a presidential speech in 1982, basically adopted the key recommendation in the Ndegwa Report with regard to districts.<sup>387</sup> Under the DFRD, districts were to be the basic operational units equipped with planning, design and management capacities in order to enhance rural development.<sup>388</sup> Under the DFRD strategy, the existing District Development Committee (DDC) retained their supervisory role of district development, but the District Executive Committee (DEC) and District Planning Units (DPU) were added at the district level.<sup>389</sup> The PCs and DCs, however, retained their say over the development matters at provincial and district levels.

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<sup>385</sup> Republic of Kenya (1971) 112.

<sup>386</sup> Republic of Kenya (1971) 113.

<sup>387</sup> Chitere P & Ireri O 'District Focus for Rural Development as a decentralized planning strategy: An assessment of its implementation in Kenya' in Kibua TN & Mwabu G (eds) *Decentralization and Devolution in Kenya: New Approaches* (2008) 9.

<sup>388</sup> World Bank (2002) v-vi.

<sup>389</sup> Chitere & Ireri (2008) 21.

The DEC was to “plan district-specific projects for approval by the DDC, coordinate and monitor implementation of the projects, and prepare the draft district plan and its annual annexes for approval by the DDC”.<sup>390</sup> The DPU, on the other hand, had the District Development Officer (DDO), an office recommended by the Ndegwa report, as chairperson and the Assistant DDO as secretary. Other members were the district statistical officer, district population officer, district physical planning officer, district quantity surveyor, district valuer and district architect. The DPU was to “serve as a secretariat to the DEC and was aimed at strengthening planning and implementation work in the district”.<sup>391</sup> Similar arrangements were repeated at the levels below the district (namely, the division, location and sub-location levels).<sup>392</sup> LAs were also required to submit their plans to the DDC for scrutiny and alignment to “district priorities”, as well as attend district planning meetings.<sup>393</sup>

In terms of monitoring and evaluation of the DFRD projects, the strategy provided for formation of Provincial Monitoring and Evaluation Committees (PMECs) composed of a wide range of members.<sup>394</sup> The PMEC was charged with facilitating inter-district co-ordination of rural development; it was also to monitor the work of DDCs and ensure sectoral integration in development.<sup>395</sup>

At the national level, the strategy was coordinated by the Development Coordination and Cabinet Office section of the Office of the President (OP). The Rural Planning Department of the Ministry of National Planning and Development worked closely with the OP. At the district level, the DCs, through the DDCs, had enhanced control over development activities, and DCs started controlling funds allocated by national ministries to the districts.<sup>396</sup>

### **6.1.2 Assessment of the Provincial Administration development strategy**

While the DFRD was meant to devolve planning, implementation and management of local development, the structure described above shows that community representation was starkly

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<sup>390</sup> Chitere & Ileri (2008) 21.

<sup>391</sup> Chitere & Ileri (2008) 21.

<sup>392</sup> Chitere & Ileri (2008) 22.

<sup>393</sup> Oyugi WO *Decentralized Development Planning and Management in Kenya: An Assessment* (1990) 43-44.

<sup>394</sup> The Provincial Commissioner, Provincial Planning Officer, Provincial Heads of all Ministries/departments in the province, all district development officers in the province and all members of parliament in the province. See Republic of Kenya 'District Focus for Rural Development' (1995) 10-11.

<sup>395</sup> Republic of Kenya (1995) 10-11.

<sup>396</sup> Chitere & Ileri (2008) 21.

missing at the district level. More government officers were deployed to the district level supposedly to facilitate community participation, but this served only to “crowd out” communities from the development process.<sup>397</sup> Committees formed at lower levels (divisional, locational and village levels) initially participated and presented their development plans, but their priorities were not taken seriously at higher levels of implementation.<sup>398</sup> At the same time, national and local plans were produced, which was in itself evidence of the lack of local input in national planning.<sup>399</sup> Less than half of the projects implemented by the DDC emanated from lower committees.<sup>400</sup> As a result, local committees stopped taking project formulation committees seriously.<sup>401</sup> Furthermore, only locally influential individuals – such as chiefs and traders, rather than ordinary members of the community – attended meetings at the divisional, location and village levels.<sup>402</sup>

While reforms were carried out to promote community participation, about 75 percent of the persons in the full implementation of the DFRD were civil servants. Chitere and Ileri argue that this fact effectively eliminated the space for local communities to participate in development.<sup>403</sup> Civil servants normally came from other regions and were thus not familiar with the local areas where they were deployed to work.<sup>404</sup> Divisional planning was to be done by the District Officer and the Community Development Assistant facilitated by the DDO without an explicit requirement of community participation and input.<sup>405</sup>

Another challenge stemmed from the source of funds for development. Most projects under the DFRD were donor-funded, while the bulk of government money went into the salary bill and other operational expenditure.<sup>406</sup> Planning for donor funds took place at ministry headquarters with donors and thus undermined the purported objectives of the DFRD of local planning processes.<sup>407</sup> Furthermore, projects and requested funds came from sector budgeting and funding based on ministry budgets. Local plans and budgets, on the other hand, were not

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<sup>397</sup> Republic of Kenya (1971) 20, 114; Chitere & Ileri (2008) 26.

<sup>398</sup> Chitere & Ileri (2008) 24-25.

<sup>399</sup> Chitere & Ileri (2008) 24-25.

<sup>400</sup> Chitere & Ileri (2008) 24-25.

<sup>401</sup> Chitere & Ileri (2008) 24.

<sup>402</sup> Chitere & Ileri (2008) 35.

<sup>403</sup> Wallis (1990) 438.

<sup>404</sup> Chitere & Ileri (2008) 35.

<sup>405</sup> Chitere & Ileri (2008) 26.

<sup>406</sup> Chitere & Ileri (2008) 28.

<sup>407</sup> Chitere & Ileri (2008) 28.

considered and in any case did not have a detailed budget analysis.<sup>408</sup> Thus, even with effective community participation, there were systemic factors that negated any possible community input. Furthermore, cases of corruption were rampant at the district level and featured the DC, who was in charge of the tendering process together with the District Supplies Officer and contractors.<sup>409</sup>

In terms of monitoring and evaluation, the DDCs<sup>410</sup> and PMECs involved large numbers of people that rendered the whole exercise ineffective. Composed of persons such as politicians and civil servants, they did not have the appropriate mix for a team to carry out the technical work of evaluating local development.<sup>411</sup> Furthermore, the PCs and DCs who spearheaded the projects for development were presidential appointees; thus, there was no accountability to the communities concerned where development projects were taking place, because the administrators were accountable instead to the president.<sup>412</sup> The technical officers in the field were answerable to the DCs on the manner they carried out their work.<sup>413</sup> In their assessment of the DFRD, Tostensen and Scott conclude:

It is difficult to see how in principle a political system, based on ... patronage and rapidly shifting factional alliances can provide ... an ... adequate foundation for a decentralized system of authority which pre-supposes rational decision making, grounded on universalistic principles of administrative management.<sup>414</sup>

The early 1990s saw a change in the development approach by states in which there was a shift from central government development planning to processes such as cuts in public spending, removal of government subsidies, privatisation and movement away from social programmes. The approach emphasised a reduced role of the state in development, and embraced market-led strategies for development. No training for the DFRD was held between 1988 and 1995, but

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<sup>408</sup> Chitere & Ileri (2008) 24-25.

<sup>409</sup> Chitere & Ileri (2008) 31.

<sup>410</sup> Chitere and Ileri (2008, 24) note that some DDCs such as that of Kakamega District had over 100 members.

<sup>411</sup> Chitere & Ileri (2008) 24.

<sup>412</sup> Chitere & Ileri (2008) 23.

<sup>413</sup> Chitere & Ileri (2008) 23.

<sup>414</sup> Tostensen A and Scott JG *Kenya Country Study* Bergen – Norway: The Chr. Michelsen Institute (1987), quoted in Chitere & Ileri (2008) 35.

289 government officials were trained between 1996 and 1997. The strategy was gradually abandoned as the state shifted to other emerging approaches to development.<sup>415</sup>

## **6.2 Local government reforms: The Kenya Local Government Reform Programme**

The growing demand for local services that the LAs were unable to provide led to discussions on improvements of the LA system. Studies done by the Ministry of Local Government with the assistance of World Bank identified the need to strengthen the LAs to meet the demand for local services, which has been in steady decline over the years.<sup>416</sup> The reforms led to formation of the Kenya Local Government Reform programme (KLGRP) under the Ministry of Local Government in 1995 to assist the ministry in the transformation of the LAs.

Formed in 1995, the KLGRP was to assist in transforming LAs into “viable autonomous, accountable and responsive local authorities” and support the ministry in facilitating “good governance and improved service delivery for enhanced social economic development”.<sup>417</sup> The reforms saw the enactment of the Local Authority Transfer Fund Act (LATF Act),<sup>418</sup> the main role of which was to provide for the setting aside of 5 percent of the national income tax for Local Authorities.<sup>419</sup> The LATF replaced the LASC, and its primary role was to facilitate the LAs to perform such functions and services as required of them by the Local Government Act.<sup>420</sup> The Act established an advisory committee that would support the Ministry of Local Government to perform the functions listed under the Act.<sup>421</sup> While disbursements under the LATF were unconditional grants,<sup>422</sup> the Local Authorities Service Delivery Action Plan (LASDAP), a policy that was developed, spelt out the conditions that LAs were to fulfil before getting allocations

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<sup>415</sup> Chitere & Ireri (2008) 37.

<sup>416</sup> The World Bank (2002, 9) observes that the idea of local government reforms was further fuelled by reports and studies done by the Ministry of Local Government which called for comprehensive reforms.

<sup>417</sup> See <http://www.rprlgsp.go.ke/KLGRP.php> (accessed 2 August 2011).

<sup>418</sup> Act No 8 of 1998.

<sup>419</sup> Section 5 of the LATF Act.

<sup>420</sup> Section 5 of the LATF Act.

<sup>421</sup> Section 8 of the LATF Act.

<sup>422</sup> Oyugi L 'Fiscal decentralization in Kenya: The case of Local Authority Transfer Funds' in Kibua & Mwabu (2008) 172.

under the LATF Act.<sup>423</sup> LASDAP had the following objectives: ensuring that LAs facilitate community and public participation in project identification and prioritisation;<sup>424</sup> ensuring transparency in the use of funds; ensuring that funds were appropriately allocated between recurrent and development expenditure; and increasing efficiency in revenue collection as well as service delivery.<sup>425</sup>

The LASDAP guidelines provided a detailed outline of how LAs prepared budget plans and consultation up to approval and submission of the plans to the LASDAP secretariat.<sup>426</sup> The process involved both administrators and local politicians (councillors), although decisions were made by the full council meetings of the respective local authority.<sup>427</sup> After compliance, the funds were released in three phases, each with different conditions as provided in the LASDAP. The government released funds as was provided for under the LATF Act, which started with 2 percent and later increased it to 5 percent of ordinary government revenue. The government disbursed substantial amounts of money to LAs through the LATF Act and the LASDAP, which became the main revenue source for most of the LAs in Kenya.<sup>428</sup>

Studies by the World Bank, Ministry of Local Government and individual scholars all acknowledge that there was some progress under the KLGRP programme, especially through LATF/ LASDAP.<sup>429</sup> The World Bank hailed it as representing “a new direction in mobilizing citizen input in the local level planning process”.<sup>430</sup> Some of the key benefits included: increased community participation in local development;<sup>431</sup> improvement in financial management systems of local authorities; and improvement in revenue collection.<sup>432</sup> However, the results varied from

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<sup>423</sup> See generally ‘Republic of Kenya ‘Guidelines for preparation, implementation and monitoring of the Local Authorities Service Delivery Action Plan’ Office of the Deputy Prime Minister and Ministry of Local Government (2009).

<sup>424</sup> Republic of Kenya (2009) 9-24.

<sup>425</sup> Republic of Kenya (2009) 40-54.

<sup>426</sup> Cifuentes M ‘Better services for all: The impact of LASDAP in an informal settlement in Nairobi’ in Kibua & Mwabu (2008) 239.

<sup>427</sup> Oyugi LN & Kibua T ‘Planning and budgeting at the grassroots level: The case of Local Authority Service Delivery Action Plan’ in Kibua & Mwabu (2008) 202.

<sup>428</sup> Oyugi (2008) 172.

<sup>429</sup> Oyugi (2008) 169-233; Republic of Kenya ‘Study on the impact of Local Authorities Service Delivery Action Plan’ Local Government Reform Programme (KLGRP) (2007).

<sup>430</sup> World Bank (2002) 33.

<sup>431</sup> Oyugi (2008) 171-172.

<sup>432</sup> Muia DM ‘Devolution: which way for local authorities?’ in Kibua & Mwabu (2008) 154-155.

one local authority to another. While there was some improvement in the performance of local authorities, this was only marginal as LAs still faced massive challenges in the performance of their duties and responsibilities.<sup>433</sup>

One challenge of the LATF/ LASDAP process, as identified by Muia, was “the over-centralized manner in which decision making about local authorities was made as ultimately everything had to be cleared with Ministry of Local Government headquarters. This introduced bureaucratic delays in rolling out plans.”<sup>434</sup> Other challenges included inadequate administrative capacity of LAs for performance as well as capacity for supervision and monitoring of local performance at the national level.<sup>435</sup> Lack of coordination between councils and the Provincial Administration was also cited as a challenge.<sup>436</sup> A study on the impact of the LATF/ LASDAP commissioned by the Ministry of Local Government in 2007 confirmed many of the challenges identified above.<sup>437</sup> Thus, even as the LATF/LASDAP process became the backbone of the operation of the LAs, there was only marginal progress with regard to effectiveness of LAs in Kenya. The bulk of the challenges facing LAs remained largely unchanged.

The systemic challenges faced by the LAs persisted despite the reforms; the LGA was silent on public participation as the same was not considered critical in 1977 when the Act was passed. While the LGA provided that LAs could publish budget estimates, the Act never made it mandatory.<sup>438</sup> The Ministry of Local Government and the Local Authorities lacked institutional capacity for supervision and regulation and service delivery, respectively.<sup>439</sup> Before the LATF/LASDAP reforms, some LAs had not submitted Abstract Accounts (financial statements) for more than 20 years.<sup>440</sup> Financial guidelines provided in the LGA were never followed. Producing realistic budgets and proper record keeping remained a challenge for LAs.<sup>441</sup>

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<sup>433</sup> Odhiambo M, Mitullah WV & Akivaga KS *Management of Resources by Local Authorities: The case of Local Authority Transfer Fund in Kenya* (2005) 134-148.

<sup>434</sup> Muia (2008) 155.

<sup>435</sup> Oyugi (2008) 185-186.

<sup>436</sup> Muia (2008) 155; Oyugi (2008) 185-186.

<sup>437</sup> Republic of Kenya (2007) 58-59.

<sup>438</sup> World Bank (2002) 53.

<sup>439</sup> World Bank (2002) xi.

<sup>440</sup> World Bank (2002) 50.

<sup>441</sup> World Bank (2002) x.

### 6.3 Other decentralisation reforms

Apart from the KLGRP, other decentralised programmes were initiated to devolve resources for local development. Numerous devolved funds were established. These included the Constituency Development Fund (CDF), The Free Primary Education Fund (FPE), the Constituency Education Bursary Fund (CEBF), the Rural Electrification Programme Levy Fund (REPLF) and the Roads Maintenance Levy Fund (RMLF). While some of the funds are statute-based, some are established by executive decree without any legislative backing.

#### 6.3.1 The Constituency Development Fund (CDF)

This was a statutory fund established in 2003 by the Constituency Development Fund Act.<sup>442</sup> It provided for 2.5 percent of national revenue to be set aside for the fund.<sup>443</sup> The funds were then distributed to parliamentary constituencies according to a formula that considered the constituency poverty index.<sup>444</sup> The funds were sent to the constituencies “for purposes of development, and fighting poverty at the constituency level”.<sup>445</sup> Regulation and management of the fund was vested in a CDF board created under the Act.<sup>446</sup> The functions of the CDF Board included approving constituency funding proposals and other administrative duties of the fund. Funding proposals were submitted by Members of Parliament (MPs) to the board and scrutinised for consistency with the Act.<sup>447</sup> However, the final decision on the funds to constituencies and decisions on any unspent monies in the hands of the CDF Board were made by the Constituencies Development Fund Committee (CDF Committee) composed of MPs only.<sup>448</sup>

At the local level, the CDF Act provided for a District Projects Committee which coordinated implementation of development projects in the constituency.<sup>449</sup> The Projects Committee was composed of the DC, DDO, District Accountant, MPs representing constituencies in the district and representatives from the LAs in the district. Actual implementation was done by the projects

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<sup>442</sup> Act 11 of 2003.

<sup>443</sup> Section 4 (1) (a) CDF Act.

<sup>444</sup> 75 percent divided equally among constituencies and the rest according to the poverty index.

<sup>445</sup> Wachira K ‘Fiscal decentralization: fostering or retarding national development?’ in Institute of Economic Affairs (IEA) ‘Devolution in Kenya: Prospects, Challenges and the Future’ IEA Research Paper Series No. 24 (2010) 93-94.

<sup>446</sup> Section 6 CDF Act.

<sup>447</sup> Section 12 CDF Act.

<sup>448</sup> Section 17 CDF Act.

<sup>449</sup> Sections 39 and 40 CDF Act.

committee, assisted by the respective government department under which an approved project belonged. General government regulations applied to the project. A CDF Board officer in the constituency was the accounting officer and maintained records of all disbursements from the CDF Account.<sup>450</sup> The MP was in charge of participatory planning and ensured that communities were consulted to the lowest level. The MP was charged with preparation of proposals which the MP then submitted to a District Projects Committee meeting convened for that purpose. The Projects Committee scrutinised the proposals and made recommendations to the CDF Board, which made the final decision. The Projects Committee was required, at the beginning of each financial year, to make a list of projects approved for funding.

There is consensus that the CDF attracted more public participation to local development than any other decentralised programme and that its legislative backing has ensured a solid regulatory framework.<sup>451</sup> The fund assisted other government agencies in the provision of basic services such as health, education and water, especially in poor areas.<sup>452</sup> One challenge, however, is that the fund, which is basically placed in the hands of the legislator, leads legislators to engage in the business of local service delivery, a task that conventionally belongs to the local authorities.<sup>453</sup> Indeed, it has been observed that the CDF had the effect of weakening local authorities because the CDF Act created “a new local bureaucracy that then entered into competition with the LAs”.<sup>454</sup>

Specific challenges included poor coordination of local development projects<sup>455</sup> and lack of long-term planning, as plans recognised under the Act were basically fashioned along a serving politician’s five-year term.<sup>456</sup> This led to wastage due to the abandonment of projects in cases where an incumbent MP lost elections.<sup>457</sup> While the District Project Committees was to ensure that development projects were in line with sectoral plans, numerous CDF projects such as health institutions, roads and schools ended up with no public staff to run the facilities.<sup>458</sup> The

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<sup>450</sup> Section 33 CDF Act.

<sup>451</sup> Wachira (2010) 94.

<sup>452</sup> Wachira (2010) 94.

<sup>453</sup> See, for instance, section 12 which requires an MP to come up with proposed projects for funding by the CDF.

<sup>454</sup> Rocaboy (2012) 165.

<sup>455</sup> Wachira (2010) 94.

<sup>456</sup> Wachira (2010) 94.

<sup>457</sup> Wachira (2010) 94.

<sup>458</sup> Wachira (2010) 94.

CDF also inevitably became a tool for political and resource patronage by MPs, with numerous reported cases of wastage, theft and misuse of funds.<sup>459</sup>

### 6.3.2 Other decentralised funds

Apart from the CDF, other funds have been decentralised to the local level for various functions. The Free Primary Education Fund was established in 2003 under the Ministry of Education as one measure towards the Millennium Development Goals (MDGs).<sup>460</sup> The fund was calculated on the basis of the cost per pupil, and funds decentralised to primary schools through the Ministry's decentralised offices. However, unlike the CDF, the fund was not anchored on a legal framework and allocations could be varied by the executive.<sup>461</sup> The Constituency Education Bursary Fund (CEBF) was established via a presidential decree in the 1993/4 fiscal year.<sup>462</sup> The fund was managed by a constituency-based committee and disburses funds and reports to the Ministry of Education. Like the FPE fund, it is not established by legislation, and the amount of the fund depends of ministry allocations which vary from year to year.

Another decentralised fund is the Rural Electrification Programme Levy Fund (REPLF), which was established under the Energy Act of 2006<sup>463</sup> and meant to finance electrification projects in poor and marginalised areas.<sup>464</sup> While the institutional framework for management of the fund made use of local processes established under the DFRD, CDF and LATF, there was no participation of the public in identifying target areas. Wachira notes that crucial decisions on the use of the fund are made by public agencies involved and "beneficiary communities usually come in at the implementation stage when the major decisions have already taken place".<sup>465</sup>

The RMLF was created by legislation and funds maintenance of public roads, including local authority unclassified roads.<sup>466</sup> It is reported that a large portion of the fund, obtained from a levy on petroleum products, goes to maintenance of larger roads, and 16 percent is divided equally

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<sup>459</sup> Ratemo J 'Warrant of arrest: Gesami sought for misuse of CDF' *The Daily Nation* 10 July 2011; Chepkemei P 'Voters sue MP over shs 100 million kitty' *The Daily Nation* 11 August 2011; Angira Z 'Minister quizzed over CDF fraud' *The Daily Nation* 4 August 2011.

<sup>460</sup> Wachira (2010) 95.

<sup>461</sup> The fund was established by a presidential directive in 2003.

<sup>462</sup> Wachira (2010) 95.

<sup>463</sup> The fund is established under section 79 of the Energy Act No 12 of 2006.

<sup>464</sup> Wachira (2010) 96.

<sup>465</sup> Wachira (2010) 97.

<sup>466</sup> Wachira (2010) 97

among constituencies for maintenance of rural roads; there is participation of constituency- and district-based structures in identifying roads that benefit from this fund.<sup>467</sup>

## **7. Assessment of decentralised service delivery in post-independence era**

It is clear from the discussion above that systemic challenges have slowed down and, in several instances, totally derailed delivery of public services at the local level. While some of the reforms that were undertaken were undoubtedly necessary for purposes of addressing questions of efficiency, the critical question of comprehensive political and institutional reforms was not addressed. As a result, the longstanding systemic challenges remained.

### **7.1 The ‘fruits of centralisation’: control, inefficiency, and poor delivery of services**

A key theme in the various decentralisation programmes in post-independence Kenya is the centralised control of local development and service delivery. Both the DFRD strategy and the LA system of service delivery had strong elements of central government control. While centralised control of LAs managed to prevent them from posing a political threat to the centre, this was achieved at a great cost to efficiency in local service provision.

At the local level, LAs were controlled by administrators from the PA. For instance, in 1986 the government called for amendment of the Local Government Act in order to legally place LAs under the control of District Development Committees.<sup>468</sup> The irony is that while the LAs at least had a legal mandate for service delivery, the DFRD strategy had no legislative basis.<sup>469</sup> At the local level, LAs were required to attend planning meetings at the district and lower levels of the PA, adding a further strain on an already-stretched LA workforce.<sup>470</sup> The World Bank noted in a 2002 report that DDCs, dominated by central government bureaucrats, could hold up proposed LA projects for years even where the latter had capacity to undertake the projects. Line ministries in sectors such as health, water and education also placed additional restrictions on the respective sector functions performed by LAs.<sup>471</sup> A 1995 government report noted that councillors were worried about “the domineering role of the provincial administration at the local level”.<sup>472</sup> The PA could at times deny councillors permits to hold local meetings, deny the LAs

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<sup>467</sup> Wachira (2010) 97.

<sup>468</sup> Republic of Kenya ‘Sessional Paper No. 1 of 1986 on economic management and renewed growth’ (1986) 53.

<sup>469</sup> Chitere & Ileri (2008) 23.

<sup>470</sup> Oyugi (1990) 43-44.

<sup>471</sup> World Bank (2002) 19.

<sup>472</sup> Republic of Kenya (1995) 57.

access to development funds from the district treasury, or simply refuse to recognise them as elected leaders during important local decision-making.<sup>473</sup>

Lack of a clear separation of functions between the centre and local institutions of service delivery provided another challenge. It will be recalled this was also a challenge in the colonial era, one which was carried over to the post-independence period. A World Bank report written in 2002 observes that “functional allocations across institutions do not appear to be based on any clear governing principles and seem to be guided by the historical context and independent developments in each sector”.<sup>474</sup>

The lack of clear separation of powers in law, policy or practice was further complicated by a dual system of service delivery through the PA and line ministries, on the one hand, and local governments, on the other. This is yet another element inherited from the colonial system, where the PA and local government systems existed side-by-side at the local level and all dealt with local development. In the post-independence setting, sectoral ministries and the private sector/NGOs also joined the system.<sup>475</sup> In addition, in 2003 the CDF Act introduced the parliamentary constituency as another avenue for pursuing local development. The multiplicity of such systems led to a weakening of the individual channels and produced inefficiencies, with few resources being available for actual service delivery.<sup>476</sup>

Coordination of the multiple channels of service delivery, especially at the local level, proved a major challenge in which practical service delivery emerged a casualty. For instance, an independent study commissioned by the Ministry of Local Government on the impact of LASDAP singles out an instance where a road in the Nandi area of the Rift Valley region was targeted by both LATF funds and the Roads funds; both teams met in the field, but could not agree on who should proceed.<sup>477</sup> There are also numerous cases where development projects were double-listed as funded by the CDF and LATF funds.<sup>478</sup>

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<sup>473</sup> Republic of Kenya (1995) 57.

<sup>474</sup> World Bank (2002) 20; Smoke (1993) 907.

<sup>475</sup> World Bank (2002) viii, 41.

<sup>476</sup> World Bank (2002) viii, 41.

<sup>477</sup> Republic of Kenya (2007) 16.

<sup>478</sup> Republic of Kenya (2007) 61

## 7.2 Failed decentralisation reforms: 'new wine in old skins'

A 2002 World Bank report evaluating the local service delivery process observed that it was possible, even within the parallel systems of service delivery, to differentiate national and local functions. In essence, what the World Bank suggested is that while a cohesive institutional framework for decentralised service delivery was the ideal option, the division of functions into national and local ones within the multiple avenues could have assisted in streamlining local service delivery.<sup>479</sup> The World Bank argued that even within the multiple avenues of service delivery, regional and national agencies could perform major functions such as regional and national trunk roads and policy-making while LAs maintained smaller roads and carried out local services and local planning.<sup>480</sup>

However, the World Bank's proposal focused only on efficiency in allocation of functions while avoiding the broader systemic institutional and political issues that hampered service delivery. Ideally, reforms should have begun with the admission that political problems lay at the centre of the failure of the DFRD and LAs. Thus, the first priority for reforms in decentralised service delivery was inevitably a comprehensive legal and constitutional reform that would overhaul the then existing political structure.

Litvack *et al* argue note that the World Bank in practice avoids politically sensitive reform issues when dealing with its clients (governments)<sup>481</sup> and that this may be the case in the Bank's engagement with Kenya's decentralisation reform process. In its analysis of the role of the KLGRP (which it initiated), the World Bank identified three phases of the programme: the "conceptualizing phase", "take-off phase" and "consolidation phase".<sup>482</sup> In the conceptualisation phase, the Ministry of Local Government, with the Bank's assistance, carried out studies and identified the problem for reform. The take-off phase included gains such as the LATF/LASDAP process, improved financial management systems in the LAs, and reduced debt repayment plans of the LAs<sup>483</sup> along with technical assistance to the government and the LAs.<sup>484</sup> The third

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<sup>479</sup> World Bank (2002) viii.

<sup>480</sup> World Bank (2002) 41.

<sup>481</sup> Litvack *et al Rethinking Decentralisation in Developing Countries* (1998) 4.

<sup>482</sup> World Bank (2002) 8-9.

<sup>483</sup> World Bank (2002) 9.

<sup>484</sup> World Bank (2002) 9.

phase was to consolidate the two previous phases through a new local government law and broader constitutional reforms.<sup>485</sup>

However, the Bank's proposal approached the reform process from the wrong end. Broader political and legal reforms would have offered a basis upon which institutional efficiency could be pursued. Thus, the correct order would have been to start from the consolidation phase with broader legal reforms, which the World Bank placed as the last phase. Instead of addressing systemic issues through broad reform, among the main issues that the World Bank picked up as important for strengthening LAs included building capacity for monitoring and evaluation, improving budgeting and financial management, and improving responsiveness, in addition to other efficiency arrangements.<sup>486</sup> However, the uncertainty of the constitutional reform process, as well as the controversy surrounding it, may have informed the World Bank's cautious and pragmatic approach to the then decentralisation reform process.

## 8. Conclusion

In 2002 the World Bank observed that deterioration of local services had its heaviest impact on the poor in Kenya. Given the socio-political history of the country, the deterioration of basic services and the rising poverty levels inevitably deepen perceptions of ethnic exclusion.<sup>487</sup> This is worsened by a deliberate policy of (re)directing state resources to other regions. Indeed, it has been noted by numerous analysts that the real intention of the Moi government in starting the DFRD programme was to economically marginalise the Kikuyu and thereby weaken the relatively strong economic and political base they had built since the Kenyatta era.<sup>488</sup> Indeed, statistics reveal that while increased funds under the DFRD strategy were channelled to Moi's home region of the Rift Valley, allocations to other regions declined over time.<sup>489</sup> Nevertheless, even during Kenyatta's rule, state resources were disproportionately channelled to the Central region to enhance services and buy political support.<sup>490</sup> Government appointments and top civil

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<sup>485</sup> World Bank (2002) 9.

<sup>486</sup> World Bank (2002) 69-71.

<sup>487</sup> Stewart F 'Note for discussion: Kenya, horizontal inequalities and the political disturbances of 2008' Centre for Research on Inequality, Human Security and Ethnicity (CRISE) Department of International Development, University of Oxford (March 2008) (2008) 8.

<sup>488</sup> Chege M and Barkan JD 'District focus and the politics of reallocation in Kenya' (1989) 27 *Journal of Modern African Studies* 436-437; Southall & Wood (1996) 509; Tordoff W 'Decentralisation: Comparative experience in Commonwealth Africa' (1994) 32 (4) *Journal of Modern African Studies* 568-570.

<sup>489</sup> Chege & Barkan (1989) 436-437.

<sup>490</sup> Branch (2011) 99.

service positions were also given to individuals from the successive presidents' respective ethnic communities.<sup>491</sup>

This trend created a perception that an ethnic community could access better services and development only if one of their own controlled the presidency. This in turn made the presidency a highly sought-after position and pitted ethnic communities against one another. The conflict witnessed in 2007/2008 in Kenya arose partly as a result of the perception that poor service delivery and underdevelopment worked along ethnic lines. Centralisation of state power gave the president absolute power to redirect state resources to his community at the expense of national unity and equitable development.

The purposes served by a devolved system are dictated by the issues that confront a state. In the case of Kenya, the state struggles with centralisation, underdevelopment and ethnic conflict. This chapter has examined how the governance systems inherited from the colonial era were retained and even expanded in post-colonial Kenya. Socio-economic disparities created by colonial rule were also left intact. The centralisation of power and regional disparities created a perception of economic and political marginalisation along ethnic lines, leading to deadly ethnic conflict. While the clamour for change began soon after independence when Kenyans realised that things were no different from the colonial era, the formal quest for a new constitutional dispensation began in 1982 after Kenya became a *de jure* one-party state. Sustained pressure for comprehensive constitutional reforms led to the adoption of a new constitution in August 2010 after the constitutional review process. The next chapter evaluates the deliberations in that process with respect to devolution.

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<sup>491</sup> Branch (2011) 99.

## CHAPTER FOUR

# THE ROCKY ROAD TO DEVOLUTION: THE CONSTITUTIONAL REVIEW PROCESS

### 1. Introduction

This chapter evaluates the deliberations on devolution that took place during the constitutional review process. The centralisation and personalisation of powers reached a climax with a 1982 constitutional amendment that made Kenya a one-party state under KANU. Paradoxically, it marked the beginning of sustained pressure for constitutional and political reforms. Led by human rights groups, political dissidents, churches and the public in general, the struggle resulted in the introduction of multi-party politics in 1992 and the subsequent constitutional review processes that led in 2010 to the adoption of the current Constitution.

While the search for a new constitution in Kenya went on for more than two decades, there were many intervening events and issues that defined the process until the adoption of the new constitution. The constitutional process can be divided into two broad phases. The first is the period from the enactment of the Constitution of Kenya Review Act (CKRC Act) in 1998 until November 2005, when the proposed draft constitution was rejected in a national referendum. The second phase began in 2008 when constitutional reforms were identified as one of the long-term solutions to the electoral violence witnessed in 2007/2008 and terminated in August 2010 with the promulgation of the current constitution; in short, a law enacted in early 2008 led to this second phase of the constitutional review process.

Seen in its entirety, the process confronted issues that have always stood in the path to Kenya's unity and nationhood. The ever-controversial issue of land infiltrated the constitutional review debate on devolution, and the calls for a *majimbo* system, one entailing strong regional systems of government, followed a pattern similar to that of the debates at independence. While public views and proposals on devolution were not always coherent and detailed, there was discernible, unambiguous public support for devolution of power. Accordingly, one constant challenge for the constitutional drafters was to translate these views on devolution into a coherent and detailed devolution design that reflected the people's aspirations.

The three issues of centralisation of power, underdevelopment and ethnic conflict emerged and indeed dominated the deliberations on devolution during the review process. As such, this analysis focuses on the weight that was placed on each of the three purposes in arriving at the final design. While the three purposes featured in the discussions, this chapter arrives at the conclusion that most of the major decisions with regard to devolution design were informed by the developmental purpose. Accordingly, while ethnic harmony and limiting of central power were clear objectives of devolution, development emerged in the entire review as the primary purpose of devolution. The chapter examines the first phase, which ends with the 2005 referendum, and then proceeds to the second phase, which ended with adoption of the current constitution in 2010. In these two phases, the context of review process and other factors that shaped the debate on devolution are examined.

### **1.1 The context of constitutional and political reforms in Kenya**

The clamour for political reform started in earnest after the 1982 constitutional amendment that made Kenya a *de jure* one-party state under KANU.<sup>1</sup> Prior to 1982, the Moi regime had continued with the political centralisation and crackdown on political dissent that characterised Kenyatta's rule. Moi took over in 1978, with repression and intolerance of alternative political views intensifying after an unsuccessful military coup in August 1982.<sup>2</sup> A report by the Constitution of Kenya Review Commission describes the effect of the 1982 amendment:

As a result of this amendment, anyone aspiring to political participation or a political office had to become a member of KANU. All political opposition was banned (and leading politicians and others opposed to the government were detained without trial). In this way, crucial pillars of a democratic system – the right to form political parties or similar associations, to lobby for alternatives in law and policy, to mobilise public opinion, to scrutinise and criticise the acts of the administration, and seek change in government through a vote of no confidence or in a General election – were destroyed. The subordination of holders of constitutional office to the pleasure of the Executive was achieved by removing safeguards necessary for maintaining fair administration, neutrality of public institutions, accountability of government, and the protection of rights in general.<sup>3</sup>

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<sup>1</sup> Ogot BA 'The Politics of populism' in Ogot BA & Ochieng WR (eds) *Decolonization and Independence in Kenya: 1940-93* (1995b) 211.

<sup>2</sup> Ogot (1995b) 210-211.

<sup>3</sup> Constitution of Kenya Review Commission (CKRC) 'The final report of the Constitution of Kenya Review Commission' (2005) 30.

Furthermore, between 1986 and 1988 the government pursued other tactics for entrenching personal rule and weakening institutions. These methods included the removal of security of tenure for judges,<sup>4</sup> the Attorney-General,<sup>5</sup> the Auditor-General<sup>6</sup> and members of the Public Service Commission,<sup>7</sup> a measure that severely weakened these critical public offices. Holders or members of these offices served purely at the pleasure of the President.<sup>8</sup> The amendments, which in most cases were rushed through parliament with “special motions” to shorten the periods required for parliamentary debate,<sup>9</sup> attracted wide public outcry.<sup>10</sup> The CKRC observes that during this era, “the constitution was not treated as an important document which established either a contract or formed the fundamental character of government. Constitutionalism was not valued”.<sup>11</sup> Under the one-party regime, the president controlled the national treasury and other critical institutions of government, while “parliament’s role was further reduced to one of ritual approval” with practically no oversight on the executive.<sup>12</sup>

Some sections of the media critical of the government’s manoeuvres raised concerns about the rapid amendments that made drastic changes to the constitution. One newspaper pointed out that while constitutions need to be revised to respond to changes, there was no time to discuss changes; this meant the constitution loses value as a contract between the governed and government.<sup>13</sup> The newspaper added that the trend could lead to loss of public confidence in the institution of parliament.<sup>14</sup> Indeed, as the CKRC observes, Kenyans gradually lost confidence in the Constitution and public institutions, and slowly started demanding for accountability and rule of law.<sup>15</sup>

Events in Africa and the world at large formed the wider context for the pressure for reform. The collapse of communism and the end of the Cold War saw the replacement of despotic regimes

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<sup>4</sup> CKRC (2005) 30-31; Ogot (1995b) 212.

<sup>5</sup> CKRC (2005) 30-31; Ogot (1995b) 211-212.

<sup>6</sup> CKRC (2005) 30-31.

<sup>7</sup> CKRC (2005) 30-31; Ogot (1995b) 211.

<sup>8</sup> Ogot (1995b) 211.

<sup>9</sup> Ogot (1995b) 212.

<sup>10</sup> Ogot (1995b) 212.

<sup>11</sup> CKRC (2005) 31.

<sup>12</sup> Kirira N ‘Public finance under Kenya’s new constitution’ Society for International Development (SID) Constitution Working Paper Series No. 5 (2011) 2.

<sup>13</sup> *Weekly Review* Nairobi (5 August 1988) 5-6, cited in Ogot (1992) 212.

<sup>14</sup> *Weekly Review* Nairobi (5 August 1988) 5-6, cited in Ogot (1992) 212-213.

<sup>15</sup> CKRC (2005) 31.

which had thrived in this period, in addition to which there were widespread calls in many African states for internal political reform<sup>16</sup> as growing civil society movements began challenging regimes across the continent.<sup>17</sup> In Kenya, the CKRC observes, talks about reforms similar to those then taking place in the Soviet Union (Perestroika) were commonplace.<sup>18</sup>

Public concerns about constitutional change were raised at a KANU Review Committee formed in 1990 to hear public opinion on party matters.<sup>19</sup> The Committee “was stunned at how the KANU government enjoyed very little support”.<sup>20</sup> Instead of addressing party issues, the public expressed dissatisfaction with the recent constitutional changes that had weakened the separation of powers and independence of critical public institutions. However, the KANU Review Committee did not attend to these concerns as it considered them outside its mandate.<sup>21</sup> More pressure from churches, civil society organisations and opposition politicians in the early 1990s for constitutional review<sup>22</sup> led to the repeal of the then section 2A of the Constitution which had established a one-party state. The repeal paved way for the first multi-party elections in Kenya since independence.<sup>23</sup>

But not only was the opposition divided along ethnic lines,<sup>24</sup> it was hampered by the old constitutional system, one inimical to political pluralism; this ensured that no substantial change in governance was realised through multiparty politics.<sup>25</sup> On the contrary, the (re)introduction of multi-partyism coincided with the start of politically-instigated ethnic violence, especially at election times, with the violence reaching its peak in 2007/2008.<sup>26</sup> While, thanks to an ethnically

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<sup>16</sup> CKRC (2005) 36; Ogot (1995b) 240.

<sup>17</sup> CKRC (2005) 36; Ogot (1995b) 240.

<sup>18</sup> CKRC (2005) 31.

<sup>19</sup> CKRC (2005) 37-38.

<sup>20</sup> Juma L 'Ethnic politics and the constitutional review process in Kenya' (2001-2002) 9 *Tulsa Journal of Comparative and International Law* 493.

<sup>21</sup> CKRC (2005) 38.

<sup>22</sup> CKRC (2005) 38.

<sup>23</sup> Ogot (1995b) 239-260.

<sup>24</sup> Juma (2001-2002, 493-494) observes that after the introduction of multipartyism, “the ethnic groups unfavored by the Moi regime hurriedly and disjointedly formed political parties”. The Luo, Luhya, and a small minority of Kikuyu politicians formed the Forum for Restoration of Democracy (FORD), which was later split into two, with Luhyas and Luos in FORD-Kenya while Kikuyus formed FORD-Asili. The Kalenjin, who are the majority in the Rift Valley, parts of Eastern, North Eastern and Coastal regions, remained in the ruling party KANU.

<sup>25</sup> Ogot (1995b) 239-260.

<sup>26</sup> Republic of Kenya 'Report of the Commission of Inquiry into Post-Elections Violence' (CIPEV) (2008) 28.

divided opposition, KANU won the first multi-party elections in 1992 with a minority 36 percent, opposition parties won substantial seats with the local authorities in opposition areas.<sup>27</sup> However, as Southall and Wood argue, opposition parties never saw this as an opportunity to start advocating for political change from the local level.<sup>28</sup> Instead, political parties turned their attention to national politics at the expense of creating viable local democratic polities on the basis of the local authorities won by opposition parties.<sup>29</sup> Nevertheless, given the central government's hold over the LAs, it is also clear that there was no chance the LAs could have become an avenue for vibrant opposition politics.

Consequently, as Mutunga argues: "Constitution-making became the sole vehicle through which democratization, promotion and protection of human rights and social justice were robustly agitated."<sup>30</sup>

## 1.2 The devolution 'niche' in the review process

A cardinal theme in the entire constitutional review process is the role that devolution was to play in the new constitutional dispensation. Years of political centralisation and intolerance made Kenyans yearn to take control of their affairs. Thus, in the constitutional review process, devolution of powers was expected to "tame the interfering tendency on the part of the Central Government on the activities of sub-national government units".<sup>31</sup> This, according to Oyugi, "would be the first concern of the decentralisation/devolution project in Kenya".<sup>32</sup> Juma adds that the main aim of the review exercise was to restructure centralised state structures by "redefining the extent of executive power and widening the parameters for the exercise of individual rights and freedoms".<sup>33</sup> Indeed, Kenyans would accept any system of government other than a centralised state structure.<sup>34</sup>

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<sup>27</sup> Southall R & Wood G 'Local government and the return to multi-partyism in Kenya' (1996) 95 *African Affairs* 512-514.

<sup>28</sup> Southall & Wood (1996) 511.

<sup>29</sup> Southall & Wood (1996) 512-514.

<sup>30</sup> Mutunga W, quoted in Bannon AL 'Designing a constitution-drafting process: Lessons from Kenya' *Yale Law Journal* 116 (2006-2007) 1825, 1824.

<sup>31</sup> Oyugi WO 'The Search for an appropriate decentralisation design in Kenya: Historical and comparative perspectives' in Kithure K & Ambani A (eds) *The Anatomy of Bomas: Selected Analyses of the 2004 Draft Constitution of Kenya* (2005) 76.

<sup>32</sup> Oyugi (2005) 76.

<sup>33</sup> Juma (2001-2002) 501.

<sup>34</sup> Oyugi (2005) 76.

Hence, a key assumption underlying the quest for devolution of power was that the final framework of devolved government should bring government closer to the people. This would enable people to influence government decisions impacting on them and thus participate effectively in governance.<sup>35</sup> Indeed, while Kenyans could participate in regular elections, there was no substantial participation, seeing as elections had turned into a periodic ritual and people's sovereignty and rights had been circumvented.<sup>36</sup> The majority of the people, excluding the ruling class and political elite, and including the marginalised and vulnerable, had been locked out of the political process.<sup>37</sup>

Moreover, after the 2007/2008 election violence, the quest for devolved government increasingly focused on the need to cultivate inter-ethnic harmony; this would entail addressing the issues of underdevelopment, inequality and socio-economic contestation that continue to define ethno-political conflict in Kenya. As the CKRC report notes, "The political establishment has since independence sought to pronounce ethnic identity as a constant threat to national unity while using the same to cause conflict, tension and even civil wars (ethnic clashes)."<sup>38</sup> Ethnic and political tensions are defined by real or perceived feelings that access to national resources and development are based on ethnicity, with ethnic communities at the "periphery" feeling excluded on these grounds.<sup>39</sup> Devolution was increasingly seen as a means of enhancing equitable access to resources and development.

The call for devolution of powers through constitutional reforms was also informed by global and regional trends wherein decentralisation was adopted as a means of state transformation. The end of the Cold War heralded a process of internal democratic processes in Eastern Europe, where centralised communist rule was gradually being abandoned.<sup>40</sup> In Africa, there was continued enhancement of the "third wave of democratisation" that started in the 1970s.<sup>41</sup> Oyugi observes that around this time, "in a survey of 75 developing countries with populations greater than 5 million, all but twelve claimed to have embarked on some form of transfer of political

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<sup>35</sup> Oyugi (2005) 97.

<sup>36</sup> CKRC (2005) 58.

<sup>37</sup> CKRC (2005) 58.

<sup>38</sup> CKRC (2005) 55-56.

<sup>39</sup> YP Ghai, 'Devolution: Restructuring the Kenyan state' (2008) 2 *Journal of Eastern African Studies* 217.

<sup>40</sup> Oyugi (2005) 57-58.

<sup>41</sup> Oyugi (2005) 57-58.

power to local units of government".<sup>42</sup> Indeed, during the entire review process, no single view or person opposed the principle of devolving power.

### **1.3 Resistance, stalemate and negotiations during the review process**

The process leading to the formation of the CKRC was not without controversy. The process became highly politicised, pitting together the KANU government, opposition politicians, civil society organisations and church groups. After the 1992 elections, opposition groups wanted reforms before the elections in 1997, calls to which church and civil society groups added their support. As a result, a caucus of political parties named the Inter-parliamentary Parties Group (IPPG) was formed. IPPG talks initially led to some minimal reforms,<sup>43</sup> but more importantly an agreement was reached to have a constitutional review law enacted. The law was passed by parliament in November 1997 as the country went into elections.<sup>44</sup>

In early 1998, after the elections, the government commenced the review process again, but church groups opposed the process, saying that the CKRC Act which had been passed in December 1997 vested control of the process within government. In support of their claim, the groups cited section 5 of the law, which gave the president power to appoint a chairman of the Review Commission. The government agreed to renegotiate the law, and several meetings were held in 1998 that involved the government, opposition parties, church groups and civil society organisations. Consensus was reached at a meeting held in October 1998 in which it was agreed that the Review Commission would be composed of 25 commissioners nominated by political parties, religious groups and civil society.<sup>45</sup> A Bill reflecting the consensus was presented in parliament on 2 December 1998 and passed on that same day.

While all other organisations nominated the number of persons required to the proposed commission, KANU sought to nominate two extra persons to the Review Commission, a move

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<sup>42</sup> World Bank 'World Participation Sourcebook' Environment Department papers participation series (1995, iv) cited in Oyugi (2005, 62).

<sup>43</sup> Licensing of political meetings by state security agencies was abolished, powers of local administrators were reduced, and there was an undertaking by the ruling party to repeal the Public Order Act, a law that had been used to crack down on the activities of opposition politicians.

<sup>44</sup> Constitution of Kenya Review Act Cap 3A laws of Kenya; Juma (2001-2002) 508.

<sup>45</sup> Juma (2001-2002, 511) notes that the number was spread as follows: 13 from political parties, including two women, civil society organisations to nominate four persons, women's organisations to nominate five persons, and one person each from the National Council of Churches of Kenya (NCCK), the Muslim Consultative Council (MCK) and the Kenya Episcopal Conference (KEC).

which was vehemently opposed by political parties and led to an impasse. KANU announced its intention to take the matter back to parliament, a move that was opposed by the opposition and all other groups involved in the negotiations.<sup>46</sup> Demonstrations were organised by opposition politicians, civil society and church groups in protest at the KANU proposal, with most of them ending up in violent confrontation with the police.<sup>47</sup>

In February 1999 calls were made by opposition politicians, church groups and civil society organisations to start a parallel review process as a result of KANU's obstinacy.<sup>48</sup> The parallel process commenced in December 1999 and was dubbed the Ufungamano Initiative.<sup>49</sup> Desperate to recapture the process, KANU restarted negotiations which led to an agreement to merge the parliamentary process and the Ufungamano Initiative.

Meanwhile, Parliament appointed a select committee to collect views on the contentious issues and provide a way forward on the review process. The committee was established on 15 December 1999<sup>50</sup> and finished its work in March 2000. The Committee recommended that Parliament should have power to appoint members of the commission that would collect and collate views as well as write a draft constitution. The chairman of the commission was to be appointed by the President from a list presented by parliament. The report was tabled in Parliament in April 2000 and adopted. A Bill was prepared which incorporated the committee recommendations. The final Act empowered parliament to set up the Constitution of Kenya Review Commission comprised of 23 members. The government advertised positions, interviewed applicants and shortlisted 23 nominees. The president was to choose 15 commissioners and a secretary from the list. On 10 November 2010, the final list of commissioners was released, and Yash Pal Ghai, an internationally recognised constitutional law professor, was appointed by the president to lead the Commission.<sup>51</sup>

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<sup>46</sup> Juma (2001-2002) 513-514.

<sup>47</sup> Juma (2001-2002) 515.

<sup>48</sup> Juma (2001-2002) 517.

<sup>49</sup> Named after 'Ufungamano House' in Nairobi where the groups met to plan the parallel constitutional review process.

<sup>50</sup> The Committee was composed of 21 MPs; Raila Odinga, then an opposition politician, was nominated by parliament to chair the committee.

<sup>51</sup> Juma (2001-2002, 525) argues that "the establishment of a commission and appointment of Prof. Yash Pal Ghai as its head heralded the beginning of a serious approach toward constitutional reform. Undisputedly, Prof. Ghai's appointment revamped the credibility of the whole process and allayed fears that the KANU-NDP alliance may simply install their surrogates at the helm of such an important review body."

Upon being formed, the CKRC Commissioners insisted on unification with the Ufungamano Initiative, which had already started collecting public views. After negotiations between the newly-formed CKRC, the Ufungamano Initiative and the Parliamentary Select Committee on Constitutional Review, it was agreed in December 2000 that the two processes should be merged. This necessitated an amendment of the CKRC Act to accommodate the 12 Commissioners from the Ufungamano Initiative. The new CKRC composed of the 15 original commissioners, 10 new commissioners from the Ufungamano Initiative, and two nominees from the Parliamentary Select Committee, making a total of 27 Commissioners.<sup>52</sup>

## **2. The first phase of constitutional review (April 2001 – November 2005)**

The first phase of the constitutional review process formally commenced in April 2001 after the final CKRC team was constituted. The review process was to be guided by the CKRC Act which reflected the consensus. With the legal framework in place to guide the process and the team, the process of collecting public views commenced.

### **2.1 The legal obligations of the CKRC regarding devolution: the CKRC Act 1998**

While the main mandate of the CKRC was to collect and collate the views from Kenyans into a draft Constitution,<sup>53</sup> the CKRC Act<sup>54</sup> spelt out specific obligations with regard to devolution. The Act specifically required the CKRC to ensure that the people were able to “examine the various structures and systems of government including the federal and unitary systems and recommend an appropriate system for Kenya”.<sup>55</sup> The CKRC was also required to ensure that Kenyans adequately “examine and review the place of local government in the constitutional organisation of the Republic of Kenya and the degree of devolution of powers to local authorities”.<sup>56</sup>

In carrying out these specific functions, the CKRC was to ensure that the constitutional review process as well as the new constitutional dispensation will “guarantee peace, national unity and integrity”.<sup>57</sup> Furthermore, the objective of the review exercise was “to respect ethnic and regional diversity and community rights”, including “the right of communities to organise and participate

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<sup>52</sup> CKRC (2005) 8.

<sup>53</sup> Section 17 (b) CKRC Act 1998.

<sup>54</sup> Cap 16A laws of Kenya (CKRC Act 1998).

<sup>55</sup> Section 17 (d) (ii) CKRC Act 1998.

<sup>56</sup> Section 17 (d) (vi) CKRC Act 1998.

<sup>57</sup> Section 3 (a) and (h) of the CKRC Act 2008.

in cultural activities and express their identities”.<sup>58</sup> In addition, the Act expressly recognised that “promoting the people’s participation in the governance of the country”<sup>59</sup> includes “the devolution and exercise of power”.<sup>60</sup> The CKRC was also to facilitate public discussion on appropriate governmental and institutional structures to enable “constitutional governance and the respect of human rights and gender equity” as well as economic, social, religious, political and cultural development.<sup>61</sup>

The CKRC Act contained extensive requirements for public participation in order realise the above objectives. The Act provided that the CKRC must establish constituency constitutional forums in all the then 210 parliamentary constituencies in order to facilitate public participation and consultation.<sup>62</sup> The Act further required the CKRC to convene a National Constitutional Conference to discuss and debate any amendments, and adopt the report and draft constitution Bill that were to come out of the CKRC process.<sup>63</sup> This would be followed by discussions in parliament, which was to approve the draft Bill adopted by the National Constitutional Conference. The Act also provided for a referendum vote on the draft constitution adopted by Parliament.<sup>64</sup> Most of these provisions were incorporated through amendments to the original Act that was enacted in 1998. The amendments underpinned the participatory nature of the review process under the CKRC.<sup>65</sup>

## **2.2 Public views presented to the CKRC on devolution**

Various views were presented to the CKRC through forums organised by the CKRC. However, with regard to devolution, there was little detail from the public on what institutional structures were to be adopted. Thus, while there was overwhelming public support for the principle of devolution,<sup>66</sup> the principles, design features and other detailed issues concerning devolution did not emerge clearly. Consequently, the challenge facing the CKRC was, as stated earlier, to come up with a detailed and coherent devolution system that reflected the will of the people.

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<sup>58</sup> CKRC (2005) 41-42.

<sup>59</sup> Section 2A (d); CKRC (2005) 45.

<sup>60</sup> Section 2A (d); CKRC (2005) 45.

<sup>61</sup> Section 17 (d) (iii); CKRC (2005) 45.

<sup>62</sup> Section 20 of the CKRC Act 1998.

<sup>63</sup> Section 27 (1); CKRC (2005) 349.

<sup>64</sup> Section 36 provided that the Act shall lapse after the dissolution of the CKRC.

<sup>65</sup> CKRC (2005) 39.

<sup>66</sup> Ghai (2008) 216.

### **2.2.1 Organisation of the state structure: a federal or a unitary system?**

The CKRC had a specific legal obligation to facilitate public discussion and consultation on the suitability of a federal or unitary state structure in Kenya. While some sections of the country proposed a federal-like structure of government with a strong regional system of government akin to the independence regional governments, the majority of Kenyans called for a devolved system of government within a unitary state framework. The CKRC summarised public views on the structure of the state as thus:

Although there was a general agreement among Kenyans that devolution is necessary, there was less agreement on its form and levels. While many people in provinces such as Coast and parts of the North Eastern and Rift Valley, proposed a federal form of devolution (*majimbo*), many people in Central, Nairobi, Eastern, Western and parts of Nyanza Provinces proposed devolution within a unitary system. In either case, few submissions of the Commission provided details.<sup>67</sup>

The support and opposition to a regional system of government was divided, with substantial support on both sides.<sup>68</sup> However, in all cases, people supported a strong system of local government to offer services at the local level.<sup>69</sup> People unequivocally called for “strengthened local government to support the state in local administrative, management and development activities”.<sup>70</sup> Indeed, the CKRC concluded that there was no way that people would be content with a deconcentrated system of government or mere administrative decentralisation.<sup>71</sup>

### **2.2.2 Levels, structures and functions of devolved government**

There was no public consensus on the levels or tiers of the devolved government structure. Some people supported the regional level of government while others called regions to be scrapped.<sup>72</sup> Those in support of regions or provinces pointed that out that this level was important for purposes of coordination and supervision of local government and other lower levels. However, the local level, as opposed to the regional level, was preferred as the principal

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<sup>67</sup> CKRC (2005) 237.

<sup>68</sup> CKRC (2005) 237.

<sup>69</sup> CKRC (2005) 232.

<sup>70</sup> CKRC (2005) 234.

<sup>71</sup> CKRC (2005) 237.

<sup>72</sup> CKRC (2005) 234.

unit of devolution.<sup>73</sup> No direct views were received on technical and specific issues such as the division of powers and competences, intergovernmental relations, shared powers, and so on. Nonetheless, it is clear from the views briefly presented above that while regional and local levels received support, there was a clear support for a local level of government in the devolved government structure.

### **2.2.3 The role of the local level in the devolved structure**

As the CKRC collected views around the country, it noted a feeling of widespread alienation from government due to concentration of powers at the centre.<sup>74</sup> There were wide perceptions of “marginalisation and victimization due to political affiliation” and “unjust deprivation of resources”.<sup>75</sup> The public was emphatic that central government functions should be decentralised,<sup>76</sup> feeling that “there should be an end to the colonial and post-colonial history of excluding communities at the grassroots from participating in local governance”.<sup>77</sup> As a result, there were strong direct and indirect calls for the strengthening of the local level in the devolved government structure to ensure that communities at level were in charge of government and public processes. There were also views that, whatever the system or levels of devolution and democratic representation chosen, it should result in greater control of resources, especially land, by local communities.<sup>78</sup>

With regard to the then existing local government structures, there were strong calls for all offices of councillors to be elective and for the nomination of councillors to LAs by the minister for local government to cease.<sup>79</sup> Furthermore, the public felt that mayors and chairs of LAs should be directly elected by the people as opposed to being nominated or elected at the council level.<sup>80</sup> Moreover, people believed that local elections should not be based on party labels but focus on individuals.<sup>81</sup> People specifically recommended that representatives of the Provincial Administration at the local level such as DCs, District Officers (DOs), chiefs and

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<sup>73</sup> CKRC (2005) 234.

<sup>74</sup> CKRC (2005) 234.

<sup>75</sup> CKRC (2005) 234.

<sup>76</sup> CKRC (2005) 235.

<sup>77</sup> CKRC (2005) 235.

<sup>78</sup> CKRC (2005) 234.

<sup>79</sup> CKRC (2005) 235.

<sup>80</sup> CKRC (2005) 235.

<sup>81</sup> CKRC (2005) 235.

assistant chiefs should be elected in order to enhance accountability.<sup>82</sup> Furthermore, calls were made for local budgeting and participatory development processes at the local level.<sup>83</sup> There were also strong views calling for local communities to control/regulate land.<sup>84</sup> People told the CKRC as well that there should be mechanisms for local community involvement in land and other community resource management.<sup>85</sup> The people called, too, for formal recognition of traditional leadership structures in the devolved system of government.<sup>86</sup>

#### **2.2.4 The Provincial Administration**

According to the CKRC, there was a very specific message from the public regarding the PA: the PA needed either to be scrapped altogether or made accountable to the public. Specific complaints about the system included the fact that apart from the chiefs and sub-chiefs, the administrators of the PA were appointed from outside and would thus not necessarily have knowledge of local issues and concerns.<sup>87</sup> Complaints were also presented of nepotism, tribalism and political patronage through the appointment of PA officials.

The PA structures for local development, such as the District Development Committees (DDCs), were said to be unrepresentative of the local community as “most members are civil servants who do not come from the area and often stay there for only a short while”.<sup>88</sup> The PA seems to have infiltrated every single area of public life at the local level with a view of controlling local processes in a manner less than accountable to the people. For instance, people told the CKRC that the PA’s “close association with the ruling party was felt to be an obstacle to fair voting – because it keeps order at polling stations and essentially conducts elections and the Electoral Commission heavily relies on it”.<sup>89</sup>

The CKRC was also told that the PA refused to co-operate with the local authorities, ignoring their views and denying them licences as well as central government funds.<sup>90</sup> Furthermore, the CKRC was told that the PA’s “overall structure of decision-making bodies at the local level was

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<sup>82</sup> CKRC (2005) 235.

<sup>83</sup> CKRC (2005) 235.

<sup>84</sup> CKRC (2005) 235.

<sup>85</sup> CKRC (2005) 235.

<sup>86</sup> CKRC (2005) 235.

<sup>87</sup> CKRC (2005) 236.

<sup>88</sup> CKRC (2005) 236.

<sup>89</sup> CKRC (2005) 236.

<sup>90</sup> CKRC (2005) 236.

under-funded, bureaucratic, and excessively centralised”,<sup>91</sup> thus making it inefficient in respect of the purposes it purportedly served.

Accordingly, the public proposed “a gradual process of abolition of the PA and transfer [of] its functions to a new local government system”.<sup>92</sup> At the very least, the CKRC recommended, “if the provincial system is retained, it must be more accountable to the people or be replaced with a strengthened elected local authority administration answerable to the people”.<sup>93</sup> The public specifically called for replacement of the PA with strengthened local authority administrations, or with elected bodies, to enhance local accountability.<sup>94</sup> The CKRC was thus clear on the public’s position with regard to the PA: the system had to be scrapped or reined in by being made accountable to the public.

### **2.2.5 Assessment of the public views to the CKRC**

First, it is clear that people were deeply dissatisfied with the centralisation policy of government traceable to the colonial period. This is evidenced by the overwhelming support for the devolution of powers and resources to the local level to facilitate participation in governance. The radical public proposals against the PA are evidence of deep-seated grievances with the post-independence government policies and structures of centralisation.

Second, while the idea of devolution was supported universally with no single view opposing it, there was less agreement on the form that the structure should take. Of particular interest here is the fact that views on the role of regions differed significantly. The CKRC observed that areas such as the Rift Valley and Coast supported stronger regional governments while other areas opted for the local level. It is important to note that these same areas supported calls for *majimbo* at independence. Calls for the devolution of powers of control and regulation of land were also widely supported during hearings in the Rift Valley.<sup>95</sup>

In one of the CKRC hearings held at in Nandi Hills town for Tinderet Constituency, local politicians and elders strongly supported a federal system as strong regions would ensure socio-economic development.<sup>96</sup> The elders and leaders expressly clarified that federalism did

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<sup>91</sup> CKRC (2005) 236.

<sup>92</sup> CKRC (2005) 236.

<sup>93</sup> CKRC (2005) 236.

<sup>94</sup> CKRC (2005) 235-237.

<sup>95</sup> CKRC ‘Verbatim report of constituency public hearings, Tinderet Constituency, held at Nandi Hills Town Hall on 16 July 2002’ (2002a) 6-20.

<sup>96</sup> CKRC (2002a) 6-20.

not mean the eviction of some communities from one region to another.<sup>97</sup> The land question remained emotive throughout the meeting, with most speakers saying that the Nandi sub-tribe of the Kalenjin community lost heavily under colonial rule as well as post-independence government and should be compensated.<sup>98</sup> In addition, speakers called for devolution of the management of land use and land resources to regions and local councils when the new constitution was passed.<sup>99</sup>

The centrality of the land question to the review process and indeed to the broader question of transformation of the Kenyan state emerged clearly from public views. In one CKRC hearing, a member of the public stated:

We know the constitution made a mistake; let us correct the mistakes. The first Kenyatta government should have returned the land to others first. Replacement has been from white settlers to black settlers, so that system should not be there. Let the government again politely in a good way redistribute the land again to the owner for the sake of justice and for survival. I have heard some people say no, we do not have to talk about that, it is tribalism no, we are tribes that is a fact. There is nothing we can do about it so it is there and we decide we are talking about it, we put it aside it will never die and people continue living miserably. We do not want to reach a state of hopelessness, we do not want to reach a state of ready to die and die with many innocent people, we want things to work comfortably and smoothly. I am saying this, because I know I am a Sabaot, I know it. Bwana Commissioners, the question of how we govern ourselves will come later on, let us solve the land issue first. Then we shall go to others. How we govern ourselves later on, this is a question of willing seller, willing buyer is not a very good thing for the minority who have low economic power. I wish we go into the federal system and we have different tribes, we become one in diverse communities in Kenya, and let live each other, we do not want hatred; for sure Sabaots in Kitale or Bungoma look at us in a very funny way because they know it is their land but they would like to extinguish us if possible so that they can take everything, in court we will refuse, and God has refused. Israels are back in Jerusalem, so nothing will stop that kind of thing ...<sup>100</sup>

It is clear from the above statement that addressing the land question remains emotive and will form a critical part of a solution to ethnic conflict and development in some parts of the country. Loss of land was tied to ethnic identity; it was not an individual loss but group or tribal loss.

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<sup>97</sup> CKRC (2002a) 6-20.

<sup>98</sup> CKRC (2002a) 6-20.

<sup>99</sup> CKRC (2002a) 6-20.

<sup>100</sup> CKRC 'Verbatim report of constituency public hearings, Saboti Constituency, held at Kitale Town Museum Hall on 1 July 2002' (2002b) 27.

Inevitably, land issues entered the debate on devolution in the form of a call for stronger regions and devolution of control over land to regional units. Not unexpectedly, the CKRC made a specific recommendation for investigation and resolution of historical claims in the Rift Valley, Coast and parts of North Eastern.<sup>101</sup> One author argues that unresolved land issues in areas such as the Rift Valley have always infiltrated national issues such as elections, referenda and the review exercise,<sup>102</sup> a claim demonstrated in the CKRC exercise.<sup>103</sup>

Rather than propose that the management of land be devolved to regions, the CKRC recommended only that the matter be investigated separately and appropriate measures taken. This recommendation, it is submitted, stems from recognition that while conflict resolution can be managed through devolution, there is a need for mechanisms complementary to it. In this case, land reform and historical grievances over land can be addressed, as recommended by the CKRC, only through appropriate land laws and land administrative policies. In most cases, land administration and policy has been a national function, and while devolved governments play a role in respect of regional and local land planning and development, it is almost always a peripheral role. Thus, other measures outside the devolved government framework need to be instituted.

### **2.2.6 The proposed devolution structure in the CKRC Draft Bill (the 'Ghai Draft')**

In late 2001 the CKRC developed a draft constitution, popularly known as the "Ghai Draft" after the first Chairman of the CKRC, Prof. Yash Pal Ghai.<sup>104</sup> The CKRC draft was to form the basis for discussions at the National Constitutional Conference convened and managed by the CKRC.

The CKRC draft provided for five levels of government: national, provincial, district, locational and village government.<sup>105</sup> The draft proposed creating eight provincial governments and 70 district governments (including Nairobi).<sup>106</sup> Communities at the village level were to decide the leadership structure of the village government, that is, whether it was to be a council of elders or

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<sup>101</sup> CKRC (2005) 271.

<sup>102</sup> Kanyinga K 'The legacy of the White Highlands: Land rights, ethnicity and the post-2007 elections violence in Kenya' (2009) 3 *Journal of Contemporary African Studies* 327-328.

<sup>103</sup> See for instance, CKRC (2002b) 27.

<sup>104</sup> CKRC 'Report of the Constitution of Kenya Review Commission (volume two): The Draft Bill to amend the Constitution' (2001).

<sup>105</sup> Article 215.

<sup>106</sup> Second schedule to the CKRC 'Ghai Draft'.

local elected persons.<sup>107</sup> Representatives from the village government would constitute locational governments. The district government was to be the principal unit of devolution,<sup>108</sup> and administrators were to be elected by registered voters in the district. The executive power of provinces would be exercised by the Provincial Executive Council composed of all district administrators in a province.<sup>109</sup> Legislative powers were to be exercised by a provincial council composed of persons nominated into the council by the district councils of a province.

With regard to functions, the CKRC draft was vague on the role of provinces, which included: building the capacity of districts; enhancing cooperation between district councils; and formulating plans for exploitation of provincial resources (which were not specified).<sup>110</sup> As the principal unit of devolution, the district government had its functions listed in a schedule. These included local service delivery, development planning and typically local services.<sup>111</sup> The seventh schedule shared functions between the national government and district governments only. Further sharing of functions between the other levels of government was to be done through enabling legislation.<sup>112</sup> The draft provided that cities and municipalities had the status of a district, and smaller urban areas, that of a location.<sup>113</sup> Relations between the different governments were to be defined further in enabling legislation.

At the national level, the CKRC draft proposed an upper house, named the National Council and composed of elected members from the 70 districts to represent the devolved units.<sup>114</sup> While the Draft Bill also contained provisions for vertical and horizontal intergovernmental relations,<sup>115</sup> as well as for the division of revenue between national government and devolved governments,<sup>116</sup> most of the issues were left to an Act of parliament including matters concerning taxes.<sup>117</sup> The

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<sup>107</sup> Article 216.

<sup>108</sup> Articles 220 (1).

<sup>109</sup> Article 219.

<sup>110</sup> Article 221.

<sup>111</sup> Part 2 of the Seventh Schedule to the 'CKRC Draft'.

<sup>112</sup> Article 230 (2).

<sup>113</sup> Article 222.

<sup>114</sup> Article 105 (b) and 106.

<sup>115</sup> Articles 227-229.

<sup>116</sup> Article 226.

<sup>117</sup> For instance, Article 230 (1) of the CKRC draft states: "To give effect to the principles and objectives of devolution and other provisions of this Chapter, detailed provisions for the structure, powers and functions of the Devolved authorities and their relationship with the National Government shall be contained in an Act of Parliament."

CKRC thus chose a unitary structure with powers devolved to 70 sub-regional units. The draft also expressly abolished the Provincial Administration.<sup>118</sup>

### 2.3 Deliberations on devolution at the National Constitutional Conference

In accordance with its mandate, the CKRC convened the National Constitutional Conference (NCC) to discuss the draft discussed above. The NCC (popularly known as *Bomas*, named after the venue of the Conference, “Bomas of Kenya”) was held from 28 October 2002<sup>119</sup> to 12 January 2004 when the “Bomas Draft” was adopted.<sup>120</sup> However, the conference did not run consecutively as it was interrupted by a number of activities, among them the national elections in December 2002. As a result, the conference was held in three sessions entitled *Bomas I*, *Bomas II* and *Bomas III*, all of which took place after the 2002 elections.<sup>121</sup>

While the devolution structure proposed in the CKRC Draft proved inadequate in the *Bomas I* discussions, the structure was gradually improved upon as deliberations progressed. It was clear from *Bomas I* that technical details of devolution could not be ironed out and agreed at the plenary.<sup>122</sup> A proposal was thus made that the plenary build a general consensus on issues and leave the technical details to a smaller taskforce or working committee composed of CKRC Commissioners and a section of the NCC delegates.<sup>123</sup>

#### 2.3.1 *Bomas I* deliberations

At the start of the *Bomas I* discussions, the Chairman stated that the CKRC was not comfortable with the chapter on devolution in the CKRC draft.<sup>124</sup> He asked delegates to discuss a separate document which had been circulated to them, saying it was an improved version. However, this proposal was rejected by the plenary,<sup>125</sup> and discussions were held on the original CKRC

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<sup>118</sup> Article 223.

<sup>119</sup> This was the date gazetted for the conference to begin formally; pre-conference activities had begun from 21 October 2002. See CKRC (2005) 349.

<sup>120</sup> CKRC (2005) 349.

<sup>121</sup> CKRC (2005) 349.

<sup>122</sup> CKRC/National Constitutional Conference (NCC) ‘Verbatim report of plenary proceedings: Presentation of the Draft Bill - Chapter Ten, Devolution of Powers - held at the Bomas of Kenya on 22, 23 and 26 March 2003’ (2003a) 278.

<sup>123</sup> CKRC/NCC (2003a) 278.

<sup>124</sup> CKRC/NCC (2003a) 7.

<sup>125</sup> CKRC/NCC (2003a) 23-28.

draft.<sup>126</sup> In his presentation, the Chairman stated that the CKRC, based on the simple views received from Kenyans, took the liberty to choose the kind of design needed. The CKRC chose neither a federal nor unitary system, due to the former's complex nature and disconnection from the centre, and the latter's tendency to (re)centralise, a fact all too familiar from Kenya's history.<sup>127</sup> The CKRC also chose the district over the province as the preferred level of devolution, because provinces, especially the larger ones,<sup>128</sup> were far removed from the villager at the rural local level.<sup>129</sup>

The proposal to devolve to the local level was supported by representatives of marginalised and minority groups as a means of bringing about effective participation in government.<sup>130</sup> Other delegates even called for the scrapping of the regional level and retention of only the national and local levels.<sup>131</sup> However, among some delegates there was confusion between the proposed devolved structure and the PA system, which the CKRC draft had actually expressly proposed to abolish.<sup>132</sup> Many gaps were also pointed out in the CKRC draft chapter on devolution, with some participants maintaining that no clear design of the structure emerged from the draft.<sup>133</sup> However, it also emerged that delegates needed documents and materials to guide them on technical areas of devolution.<sup>134</sup> This prompted the chairman to suggest a general discussion and leave the technical details to a committee.

### **2.3.2 Preparations for *Bomas II*: further research and consultation on devolution**

The discussions on devolution were led by the NCC technical committee comprised of 60 members drawn from the NCC delegates, and included two members of the CKRC who served as rapporteurs.<sup>135</sup> The technical committee organised consultative forums, study tours and other research activities to do with devolution. A smaller group proved sufficient to address gaps that had emerged during the conference and which clearly needed more time and research.

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<sup>126</sup> CKRC/NCC (2003a) 8.

<sup>127</sup> CKRC/NCC (2003a) 285.

<sup>128</sup> CKRC/NCC (2003a) 82-83, 101, 115-117, 126 and 155-256.

<sup>129</sup> CKRC/NCC (2003a) 285.

<sup>130</sup> CKRC/NCC (2003a) 126-127.

<sup>131</sup> CKRC/NCC (2003a) 62, 63 and 66-67.

<sup>132</sup> CKRC/NCC (2003a) 181-182.

<sup>133</sup> CKRC/NCC (2003a) 37.

<sup>134</sup> CKRC/NCC (2003a) 37.

<sup>135</sup> CKRC (2003a) 184.

Increasing numbers of issues were raised at consultative forums about the proposed devolved government structure.

A special working document prepared by the CKRC was distributed to delegates after the *Bomas I*. The document included the issues that came up during *Bomas I* and was used at the NCC and other forums organised by the CKRC to discuss devolution.<sup>136</sup> The special working document recognised the strong support for devolution by delegates during *Bomas I*, but noted concerns about the economic viability of the devolved structure. Specifically, delegates had called for a reduction of district governments, 77 in total.<sup>137</sup> The special working document also suggested that, among the principles of devolution in the Act, one of them should provide that “in appropriate cases, the higher levels of government exercise restraint in favour of the lower levels of devolved government”.<sup>138</sup>

The special working document also reminded the NCC of the role that devolution should play in term of: resolving conflict and accommodating ethnic and other diversity;<sup>139</sup> acting as a check and balance on the exercise of national power;<sup>140</sup> enhancing participatory democracy; and improving efficiency and effectiveness in developmental functions.<sup>141</sup> In arriving at these views, the document acknowledged the recorded public views to the CKRC on devolution.<sup>142</sup> Furthermore, the document noted that the majority of the delegates in *Bomas I* supported the local level as opposed to the regional level as the principal level of devolving power.<sup>143</sup>

The document suggested some changes to the CKRC Draft discussed in *Bomas I*. It called for the allocation of functions to be more clearly defined.<sup>144</sup> It also emphasised that revised functions should enable devolved levels to the check on exercise of powers,<sup>145</sup> ensure efficiency and equity in management of resources, and promote political accommodation, including

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<sup>136</sup> CKRC (2003b) ‘Special working document for the National Constitutional Conference: Report on devolution of powers’ (August 2003)

<sup>137</sup> CKRC (2003b) 6.

<sup>138</sup> CKRC (2003b) 9.

<sup>139</sup> CKRC (2003b) 36.

<sup>140</sup> CKRC (2003b) 36.

<sup>141</sup> CKRC (2003b) 36.

<sup>142</sup> CKRC (2003b) 29.

<sup>143</sup> CKRC (2003b) 38.

<sup>144</sup> CKRC (2003b) 36.

<sup>145</sup> CKRC (2003b) 36.

minorities and marginalised groups.<sup>146</sup> The document suggested that devolution should be incorporated into general but vital constitutional provisions such as the preamble, sovereignty and supremacy of the constitution, the republic, national goals, values and principles as well as bill of rights.<sup>147</sup> At the national level, the special document called for enhanced legislative functions and powers for the upper chamber of the national legislature.<sup>148</sup>

Based on the special working document and the revised Chapter that was rejected by the plenary during *Bomas I*,<sup>149</sup> the levels of government were reduced from the initial five to four by excluding the village level. The four levels were national, zonal, local government and locational levels; the zonal level had 18 units.<sup>150</sup>

In a workshop organised by the technical committee,<sup>151</sup> the issue of drawing of boundaries and accommodation of diversity emerged.<sup>152</sup> It was reported that there was uneasiness in zoning certain districts such as Mt Elgon and Trans-Nzoia,<sup>153</sup> and that “there was fear of possible ethnic hostilities in the wake of zoning”.<sup>154</sup> The two districts were generally considered as ethnically distinct from other districts in the former province and were thus “special minorities”. Drawing on the German experience, an expert invited to the workshop noted that the zones seemed to be drawn along ethnic lines, which might heighten ethnic tension between the different zonal governments.<sup>155</sup> He also noted that, for purposes of viability, there was a need to reduce the number of zones to 9 or 10 from the 18 zones provided for in the revised chapter.<sup>156</sup> However, redrawing boundaries on natural or non-ethnic had to be undertaken with caution as it held the potential for opening “old wounds” and renewing boundary conflict.<sup>157</sup>

The parallel systems of service delivery through “local authorities, the PA and the emerging constituency forum”, also surfaced during the workshop. It was pointed out that these parallel

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<sup>146</sup> CKRC (2003b) 36.

<sup>147</sup> CKRC (2003b) 46.

<sup>148</sup> CKRC (2003b) 47.

<sup>149</sup> CKRC (2003a) 12; Regulation 49 (4) of the Conference Regulations, see CKRC (2005) 4.

<sup>150</sup> CKRC ‘Report of the workshop on devolution of power and good governance’ (2003c) 12.

<sup>151</sup> CKRC (2003c).

<sup>152</sup> CKRC (2003c) 14.

<sup>153</sup> CKRC (2003c) 14.

<sup>154</sup> CKRC (2003c) 14.

<sup>155</sup> CKRC (2003c) 18.

<sup>156</sup> CKRC (2003c) 18.

<sup>157</sup> CKRC (2003c) 20.

systems should be fused through the reform process in order to enhance efficiency in service delivery.<sup>158</sup>

### 2.3.3 *Bomas II deliberations*

A lot of discussions and consultation had taken place during the break between *Bomas I* and *II*, and by the time plenary discussions on devolution resumed, the technical committee on devolution had a firmer grip of the issues. The rapporteur of the technical committee presented three options of how zones, being the larger devolution units, could be demarcated in the new constitution.<sup>159</sup> The first option had 10 zones as devolution units, the second had 13, and the last, 19.<sup>160</sup> A close examination of the clustering of the three options reveals that option one had mixed and bigger ethnic enclaves,<sup>161</sup> option two also had bigger but both mixed and ethnically exclusive zones,<sup>162</sup> while option three had smaller and ethnically exclusive units.<sup>163</sup>

The majority of the delegates who responded to the three options supported the third option.<sup>164</sup> Oyugi comments that the “third option is the recommended one and indeed the one which received greater support on the floor of the conference”.<sup>165</sup> The third option had 19 units and smaller and exclusive ethnic enclaves, unlike the first two options which had some mixed units.

There were other calls for the constituency level, then composed of 210 units, to form part of the local devolved structures.<sup>166</sup> Many delegates who spoke also called for specification of a definite proportion of national revenue that should be devolved to regional and local units.<sup>167</sup> After *Bomas II*, the technical committee prepared a report which was presented in *Bomas III* and incorporated the discussions in *Bomas II*. The final report noted that many delegates still wanted the districts as the principal point of devolution and that delegates had proposed that the then

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<sup>158</sup> CKRC (2003c) 17.

<sup>159</sup> CKRC/NCC (2003a) 36-37.

<sup>160</sup> Oyugi (2005) 81.

<sup>161</sup> CKRC/NCC (2003a) 36-37.

<sup>162</sup> CKRC/NCC (2003a) 37-38.

<sup>163</sup> CKRC/NCC (2003a) 38-39.

<sup>164</sup> CKRC/NCC (2003a) 50-51.

<sup>165</sup> Oyugi (2005) 81.

<sup>166</sup> CKRC/NCC ‘Verbatim report of plenary proceedings: Report of the Taskforce on Devolution of Power (chapter 10) and Motion by Hon. Delegate No 121 on affirmative action held at Bomas of Kenya on 22 August 2003 (2003d) 35-36, 60.

<sup>167</sup> CKRC/NCC (2003d) 50-51.

existing administrative districts under the PA should form that level.<sup>168</sup> However, the report noted that the NCC wanted the administrative district boundaries only as an interim measure until a permanent independent boundary review mechanism was established to review the boundaries using objective criteria.<sup>169</sup>

#### **2.3.4 Bomas III deliberations**

The final NCC plenary on devolution was held in November 2005, and the technical committee presented its report incorporating the discussions from the last plenary and the committee deliberations. The rapporteur stated that public views, and deliberations by the plenary and the committee, revealed three main objectives of devolution: enhancing local people's participation in governance within the Kenya state; efficient and accessible service delivery; and the equitable distribution of access to resources.<sup>170</sup>

The technical committee agreed on four levels of government: national, regional, district and location governments.<sup>171</sup> District governments were to be the principal devolution units and vested with local government powers and functions.<sup>172</sup> Constituencies were rejected as points of devolution on two points. First, the constituencies were demarcated on the basis of national electoral representation which followed different criteria. Second, it was thought that MPs should concentrate on legislative business, and using the parliamentary constituencies could have formed a basis for their direct involvement in matters of local development. It was also pointed out that using the constituency as a unit for local development would infringe on the principle of separation of powers and functions.<sup>173</sup>

While the revised CKRC chapter had provided for 19 units, the devolution committee later unanimously agreed to reduce the regions to 14. The regions were reduced from the 19 proposed in the third option, which received a nod during *Bomas II*, to 14 regions, largely due to considerations of cost and economic viability.<sup>174</sup> The committee called for the formation of an independent commission to determine vertical and horizontal division of revenue. The technical committee also recognised the need for harmonisation of its findings with those of the finance

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<sup>168</sup> CKRC/NCC 'The final report of technical Working Group "G" on devolution of powers' (2005) 7.

<sup>169</sup> CKRC/NCC (2005) 7.

<sup>170</sup> CKRC/NCC (2005) 8.

<sup>171</sup> CKRC/NCC (2005) 8.

<sup>172</sup> CKRC/NCC (2005) 8.

<sup>173</sup> CKRC/NCC (2005) 8.

<sup>174</sup> CKRC/NCC (2005) 10.

committee which dealt with allocation of fiscal and financial functions.<sup>175</sup> While the committee agreed to have four levels of government, it was recommended that only the district level have revenue-raising powers.<sup>176</sup>

The report of the technical committee was well received during *Bomas III*; however, controversy about other parts of the constitutional review process – and specifically the structure of the national executive – nearly derailed the conference.<sup>177</sup> There was a mass walk-out from the conference by ministers and MPs allied to the then ruling arm of the coalition government.<sup>178</sup> This was followed by a public announcement by the then Vice-president that the national executive had formally withdrawn from the NCC, citing political interference that had compromised the process.<sup>179</sup> The chairman and the rest of the delegates resolved to go ahead with the conference without the participation of the national executive. However, the latter's withdrawal is said to have obviated consideration of further models of devolved governance.<sup>180</sup>

### **2.3.5 Proposed devolution structure in the 'Bomas Draft'**

The "Bomas Draft" was adopted on 15 March 2004.<sup>181</sup> The devolution chapter incorporated the input and consensus of the NCC on devolution. The main features of devolved government under the "Bomas Draft" were that it provided for four levels – national, regional, district, and location government<sup>182</sup> – and thus excluded the village government level in the CKRC draft.

The district was retained as the principal unit of devolution.<sup>183</sup> The district governor (changed from district administrator in the CKRC draft) and district councillors were to be directly elected by voters. Executive authority of the district governments would be exercised by a district council whose members were appointed by the district governor with approval of the district council.<sup>184</sup> The Regional Assembly was to be composed of persons nominated from district councils. Executive powers at the regional level were to be exercised by a regional executive

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<sup>175</sup> CKRC/NCC (2005) 13.

<sup>176</sup> CKRC/NCC (2005) 13.

<sup>177</sup> Ghai YP 'Devolution: Restructuring the Kenyan state' (2008) 2 (2) *Journal of Eastern African Studies* 216.

<sup>178</sup> Ghai (2008) 216.

<sup>179</sup> Ghai (2008) 216.

<sup>180</sup> Ghai (2008) 216.

<sup>181</sup> NCC/ CKRC 'The Draft Constitution of Kenya 2004'.

<sup>182</sup> Articles 211, 217 and 223.

<sup>183</sup> Article 207.

<sup>184</sup> Article 220.

committee headed by a regional chief executive. The latter and the deputy were to be elected by regional assemblies. The chief executive was then to appoint a regional executive committee with the approval of the regional assembly.<sup>185</sup> Location government, the last level, was to be composed of elected representatives in the locational council and an elected location administrator.<sup>186</sup> Nairobi was made a “special region”, with the mayor as the chief executive and deputy mayor as the deputy chief executive.<sup>187</sup> The draft created 14 regions, including Nairobi, and 68 district governments, including four boroughs crafted out of the Nairobi region.<sup>188</sup>

The Fourth Schedule distributed functions between the four levels of government.<sup>189</sup> However, while functions were distributed to the four levels, the principal and substantial functions were allocated to the national and district levels. Taxation powers and functions were only divided between the districts and the national government in a separate schedule.<sup>190</sup> Regional government functions included inter-district coordination, regional planning and formulation of regional policy and standards, monitoring and evaluation, delivery of “regional services” (not defined in the schedules) and capacity assistance to districts. Location governments were primarily supposed to facilitate community participation and coordination at community level.

The Bomas Draft’s provisions on intergovernmental relations were an improvement upon those in the CKRC Draft. Provisions that required cooperation between the different levels of government in performance of functions were introduced for the first time,<sup>191</sup> and a requirement for amicable settlement of intergovernmental disputes was also introduced.<sup>192</sup> Elaborate provisions dealing with conflict of laws between the different levels of government were introduced, and criteria were stipulated as to when national law would prevail over sub-national legislation and vice-versa.<sup>193</sup>

At the national level, the Bomas Draft established a senate as the second chamber of the national legislature, with legislative powers and representatives elected by the district councils

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<sup>185</sup> Article 212, 214, 218 and 219.

<sup>186</sup> Articles 223-225.

<sup>187</sup> Article 213.

<sup>188</sup> First schedule.

<sup>189</sup> In accordance with Article 209(1).

<sup>190</sup> Fifth schedule, in accordance with Article 238 ‘Bomas Draft’.

<sup>191</sup> Article 208.

<sup>192</sup> Article 208 (3).

<sup>193</sup> Article 210.

through college votes.<sup>194</sup> The role of the senate as a representative of devolved units was recognised in the chapter on devolution, which stated:

The principal role of the senate is to provide for an institution through which the devolved levels of government share and participate in the formulation and enactment of national legislation and to protect the interests of the Regional, District and Locational governments<sup>195</sup>

Furthermore, the Bomas Draft provided for special voting procedures; senators were to cast bloc votes as regions on matters affecting regions and districts (regional votes) and individual votes on other matters not affecting regions and districts.<sup>196</sup>

### **2.3.6 Assessment of the *Bomas* deliberations and the ‘*Bomas Draft*’**

A review of the devolved government structure provided in the Bomas Draft reveals several improvements on the initial CKRC draft. Indeed, the CKRC had itself unsuccessfully attempted to introduce an improved version during *Bomas I* discussions. The improvements can be attributed to the more detailed and technical work done by the NCC technical committee on devolution. The break between *Bomas I* and II provided ample time for the committee members to carry out more research, organise consultative forums with experts, and conduct study visits in order to assess comparative experiences on devolution that would be useful to Kenya.

Clear themes for devolution started emerging as the technical committee carried on its deliberations. First, it was clear that people’s views collected by the CKRC and NCC plenary deliberations were in support of a stronger local level. This was captured through the devolution of power to districts as opposed to the regions or provinces. The technical committee realised the importance of ensuring effective representation of devolved units at the centre in order to guard against (re)centralisation. Thus, the role of the second chamber, as a representative of interests of regions and districts, was greatly enhanced in the Bomas Draft. Furthermore, location governments were given the primary function of ensuring “local self-determination” at the community level, which implies a strong participatory element in governance at the local level.

Second, accommodation of diversity and protection of minorities also started emerging strongly. During the NCC deliberations, representatives of minorities and marginalised groups supported devolution to the local level. The issue of accommodation of ethnic diversity through

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<sup>194</sup> Article 122.

<sup>195</sup> Article 207 (3).

<sup>196</sup> Article 141.

demarcation of local units was also discussed during consultative forums. Option three on devolved units (19 ethnically exclusive regional units), which was widely supported, seemed to grant most of the areas considered as minorities their own regional enclaves. At the national level, the Bomas Draft provided for representation of minorities and marginalised groups in the senate.<sup>197</sup>

Third, the economic viability and development potential of devolved units was also a major factor in the deliberations, influencing some of the major decisions taken in the course of the entire NCC process. For instance, the shift from 19 regions, supported during *Bomas II*, to 12 regions in the Bomas Draft was explained as thus:

Firstly, fewer regions were more economically viable. Secondly, since regions would be mainly coordinative units, there was merit in having fewer regions. The general public mood also favoured fewer regions. Finally, the committee took the view that the fewer regions there were, the lesser the cost of running the proposed devolution structure would be.<sup>198</sup>

It cannot be argued conclusively that public views were exclusively in favour of a definite number of levels or devolved units. Therefore, the CKRC and the NCC had to make certain decisions, and it is the factors which influenced such decisions that show what purpose was pursued by a particular design. For instance, the 19 regions presented to *Bomas II* placed districts with ethnic minorities such as Teso, Mt. Elgon and Kuria in smaller regions where they could have substantial representation within the region. However, the decision to reduce the regions to 14 “diluted” the arrangements and made the minority districts smaller within larger regions. It can be concluded that while the accommodation of diversity issues as taken into consideration, economic viability and development arguments were overriding.

Oyugi argues that while there was clear support by delegates for the 19 regions during *Bomas II*, no sound reasons for the choices were advanced in the debates.<sup>199</sup> Oyugi also criticises the technical committee for deciding on three devolved levels based on the experience of developed countries whose context is different from that of Kenya.<sup>200</sup> This was in reference to a statement in which the Committee noted “that comparative studies indicate that most developed countries have three levels of government. Taking into account the need to bring government

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<sup>197</sup> Article 122 (2).

<sup>198</sup> CKRC/NCC (2005) 10.

<sup>199</sup> Oyugi (2005) 81.

<sup>200</sup> Oyugi (2005) 79.

closer to the people we propose a reduction of the number of levels of government from five to four.”<sup>201</sup>

Oyugi also raises concerns about the removal of the village government, arguing that it was vital for fulfilment of the objective of giving power for self-governance to the people at all levels and enhancing participatory governance.<sup>202</sup> Indeed, the Chairman of the CKRC/NCC had opposed the deletion of village governments from the CKRC draft, but was prevailed upon by the committee.<sup>203</sup> While the main reason advanced for deleting the village government was its cost, especially in setting administrative structures, Oyugi argues that village government did not necessarily need to have the same institutional and administrative structures as the other levels.<sup>204</sup> A 1995 government report had also recommended formation of village forums in order to enhance participation in governance and development at the local level.<sup>205</sup>

Lastly, while the chapter on devolution improved significantly in the Bomas Draft, it is important to trace the basis of these improvements and new provisions. The Bomas Draft borrowed heavily from the South African system of devolution. The key features introduced from the South African system include the specialised voting procedures of South Africa’s National Council of Provinces (NCOP). Provincial delegates to the NCOP cast provincial votes through their respective heads of delegations on matters concerning provinces, and cast individual votes on all other matters not concerning provinces.<sup>206</sup>

Furthermore, Article 210 of the Bomas Draft was a replica of section 146 of the South African constitution, which provides for how conflict between provincial and national laws should be addressed. Thus the same criteria were applied to conflict between national and regional/district laws in the case of Kenya. Moreover, the Bomas Draft also borrowed the concept of “cooperative government” from the South African constitution, which has a whole chapter dedicated to the subject.<sup>207</sup> Although Kenya did not borrow the entire chapter, Article 208 contains provisions that call for fostering cooperation between the different levels of government, encourage amicable settlement of disputes and expressly discourage judicial adjudication – provisions akin to the South African ones.

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<sup>201</sup> Oyugi (2005) 79.

<sup>202</sup> Oyugi (2005) 80

<sup>203</sup> Ghai (2008) 216.

<sup>204</sup> Oyugi (2005) 80.

<sup>205</sup> Republic of Kenya (1995) 56.

<sup>206</sup> Section 65 Constitution of the Republic of South Africa 1996.

<sup>207</sup> Chapter 3 Constitution of the Republic of South Africa 1996.

It is important to note that South Africa was among the few countries in Africa, including Uganda and Ethiopia that had recently adopted new constitutions with elaborate provisions on decentralisation. Thus, South Africa was bound to have a major influence on Kenya and indeed other African countries pursuing decentralisation through constitutional reforms. The breaks between sessions during the NCC deliberations enabled CKRC commissioners and members of the technical committee to carry out more research, with South Africa being one of the countries whose devolved system was studied. Three CKRC commissioners visited South Africa and held discussions with key departments and institutions dealing with provincial and local government matters. Furthermore, some of the commissioners had studied constitutional law in South Africa, and were thus influenced by the provisions of the South African constitution on devolution.

Kokott recognises the heavy influence that comparative scholars can have in transplanting, and borrowing from, systems. Commenting on the influence of the German system on South Africa, Kokott argues thus on the influence of scholars:

In those times, the reception and transplantation of constitutional models and ideas depended much more upon individual scholars having a particular interest in a specific foreign constitutional order or upon scholars who had spent some time abroad studying a foreign system whose concepts they brought home. ... Thus, the fact that many South African constitutionalists have been visiting scholars in Germany considerably contributed to the German system's influence upon the new South African constitutional order.<sup>208</sup>

The devolution chapter in the current Kenyan constitution (discussed extensively in the next chapter) borrowed many provisions from the South African system. Kokott's observation about the German system's influence in South Africa also holds true of South Africa's in Kenya.

#### **2.4 After *Bomas*: mutilation of the '*Bomas Draft*' and the 2005 referendum**

The CKRC Act 1998 required the CKRC to hand over the "Bomas Draft" to Parliament for debate and approval.<sup>209</sup> The National Assembly was thereafter required to debate the Draft and, with the assistance of the Parliamentary Select Committee on Constitutional Reform,<sup>210</sup> propose

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<sup>208</sup> Kokott J 'From Reception and Transplantation to Convergence of Constitutional Models in the Age of Globalization – with Special Reference to the German Basic Law' in Starck C (ed) *Constitutionalism, Universalism and Democracy – a comparative analysis: The German Contributions to the Fifth World Congress of the International Association of Constitutional Law* (1999) 74.

<sup>209</sup> Section 27 CKRC Act 2008.

<sup>210</sup> Recognised under section 10 of the CKRC Act, 1998.

changes to the draft and make recommendations to the Attorney General.<sup>211</sup> The Attorney General was in turn supposed to receive the proposals, make the suggested changes and publish it as the proposed new constitution which was to be subjected to a national referendum.<sup>212</sup>

However, Parliament became a site for political wrangles that extended from the NCC period when the government withdrew from the NCC deliberations. Politicians developed “consensus documents” in purported bids to strike a deal on the controversial matter of the structure of the national executive, a matter which had led the executive to withdraw from the NCC process.<sup>213</sup> One group of politicians wanted a parliamentary system with a powerful prime minister, while the other wanted a presidential system of government with parliamentary checks and balances.

In the same period, civil society activists who had actively supported the review process moved to court to block the referendum by challenging its legality. The petitioners did so by invoking section 47 of the former constitution, which allowed “alteration” only through amendment rather than comprehensive review.<sup>214</sup> However, the court rejected this argument, ruling that “alteration of the constitution” should, unlike ordinary legislation, be construed widely in order to allow comprehensive reforms.<sup>215</sup> The court ordered that the referendum vote should proceed as per the CKRC Act.

Meanwhile, parliament presented the constitutional draft to the Attorney General for drafting, along with other statements on parliamentary consensus regarding the contentious issues. However, when the “Proposed New Constitution 2005” was finally published by the Attorney General, drastic changes had been made to the “Bomas Draft”, especially the provisions on devolved government. The release of the Proposed New Constitution 2005”, named the “Wako Draft” (after the then Attorney General Amos Wako), sparked an immediate outcry by a number of politicians, civil society groups and even CKRC commissioners.

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<sup>211</sup> Section 27 CKRC Act 2008.

<sup>212</sup> Section 27 CKRC Act 2008.

<sup>213</sup> CHR Michelsen Institute (CMI) ‘Kenya Constitutional Documents: A Comparative Analysis’ (2006) 4.

<sup>214</sup> See the ruling of Justice Aaron Ringera (as he then was) in the case, *Njoya and 6 others v Attorney General and 3 others* (2008) KLR (EP).

<sup>215</sup> *Njoya and 6 others v Attorney General and 3 others* (2008) KLR (EP)

#### **2.4.1 Devolution structure in the Proposed New Constitution 2005 (the ‘Wako Draft’)**

The “Wako Draft” introduced far-reaching changes to the provisions on devolved government in the “Bomas Draft”. First, the draft removed the three levels of government provided for in “Bomas Draft” and created districts as the next and only level of devolved government after the national level.<sup>216</sup> The national government and district government functions listed in the schedules remained more or less the same. With regard to conflict of national and district legislation, the “Wako Draft” removed the “Bomas provision”, which provided instances where sub-national laws prevail, and introduced a new provision which expressly provided that in case of conflict, national legislation was to prevail over all district legislation.<sup>217</sup> Furthermore, the provisions in the Bomas Draft promoting amicable settlement of disputes were deleted. The Wako Draft simply provided that dispute resolution mechanisms will be provided for through enabling legislation.<sup>218</sup>

At the national level, the “Wako Draft” established a unicameral parliament and deleted the provisions on the Senate (second chamber) in the Bomas Draft.<sup>219</sup> To cater for interests of the districts at the national level, the “Wako Draft” established a “loose” structure named “National Forum for District Governments and Other Fora”.<sup>220</sup> The functions listed for the structure were: coordinating of inter-district matters;<sup>221</sup> advising government on affairs of district governments;<sup>222</sup> and nominating district government representatives to the Commission on Revenue Allocation.<sup>223</sup> Enabling legislation was to provide for composition and membership of the National Forum as well as procedures of conducting business.<sup>224</sup>

#### **2.4.2 Assessment of the devolution structure in the ‘Wako Draft’**

There is no doubt that the Attorney General went beyond his mandate in the CKRC Act by making material alterations to the Bomas Draft. The Attorney General was required only to “redraft” the “Bomas Draft” into a Constitution Bill for the referendum vote. The Attorney General destroyed what the public, the CKRC and NCC delegates had painstakingly built. The national

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<sup>216</sup> Article 207.

<sup>217</sup> Article 202.

<sup>218</sup> Article 200 (3).

<sup>219</sup> Articles 114-116.

<sup>220</sup> Article 206.

<sup>221</sup> Article 206 (2) (a).

<sup>222</sup> Article 206 (2) (b).

<sup>223</sup> Established under Article 204.

<sup>224</sup> Article 206 (4).

executive, which had withdrawn from the process during the *Bomas* III discussions, found the Attorney General's office a convenient point to push its agenda. For instance, powers of the Prime Minister as provided for in the *Bomas* Draft were substantially weakened in the *Wako* Draft.<sup>225</sup>

There were no stated reasons from the Office of the Attorney General for the radical changes to the devolved government structure in the *Bomas* Draft, making it difficult to understand the intention underlying them. Deeper analysis is hence required of the context within which the devolved structure – developed through participation and consensus – was literally torn apart. Ideally, what the devolved government attempted to do was to dismantle a system of centralised and personal rule that had alienated the same people it was meant to serve.<sup>226</sup> The immediate former constitution, for instance, gave the president unfettered powers over parliament, and a powerful senate may have been perceived as a threat to an incumbent who was then preparing for another term in office. Centralisation allowed the elite, mainly drawn from the president's community, to benefit unfairly from state resources, as witnessed in all the three regimes since independence. Devolution was thus a direct threat to entrenched interests. Indeed, Kanyinga argues that the *Wako* Draft was defeated at the referendum "because the Kikuyu political elite, who were in central positions in government, were not keen to share political power with other tribes".<sup>227</sup>

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<sup>225</sup> For instance, Article 172 of the *Bomas* Draft had provided that:

- (1) There shall be a Prime Minister of the Republic who shall be head of government;
- (2) The Prime Minister shall co-ordinate the work of the ministries and the preparation of legislation and is responsible to parliament;
- (3) The Prime Minister shall preside at meetings of the cabinet;

However, Article 163 of the *Wako* Draft provided thus on the Prime Minister:

- (1) There shall be a Prime Minister of the Republic, who shall be appointed by president in accordance with provisions of this part
- (2) The Prime Minister shall be accountable to the president and shall, under the general direction of the president:
  - (a) Be the leader of Government business in parliament
  - (b) Perform or cause to be performed such other duties as the president may direct; and
  - (c) Perform such other as are conferred by this constitution and any other functions as the president may assign.

<sup>226</sup> Ghai, YP (2005). 'The *Wako* Draft lost course on devolution'. *Sunday Nation*, 6 November 2005.

<sup>227</sup> Kanyinga (2009) 339.

The Office of the Attorney General has been used in several other ways, all too familiar even to ordinary Kenyans, to subvert the people's will, entrench personal rule, plunder national resources, and further political impunity.<sup>228</sup> The *Bomas* Draft landed in an office whose holder played a key role in furthering political impunity, and it is very unlikely that the devolution design – which sought to deconstruct the centralised state – could leave the Attorney General's office unscathed. Phrases such as “the national government” were replaced with “the Government” in the *Wako* Draft in a bid to emphasise the pre-eminence of the central government over the districts. This shows the extent to which the idea of devolution based on autonomy and equality of national and sub-national spheres of government was detested by persons entrenched in the centralised system of government.

The *Wako* Draft was defeated by a 58 percent vote in the national referendum held in November 2005. It has been noted that Kenyans rejected the *Wako* Draft specifically because the devolution structure that was negotiated and agreed upon was interfered with by forces resisting change.<sup>229</sup>

## **2.5 Ethnic conflict and politicisation of the constitutional review: the 2005 referendum and 2007 elections**

### **2.5.1 Build-up to the 2007 violence: referendum and election campaigns**

While Kenya experienced politically-instigated ethnic clashes in the 1992 and 1997 elections in parts of the Rift Valley and the Coastal region, no such violence was witnessed in the 2002 elections or during the 2005 referendum.<sup>230</sup> However, the 2007 elections saw violence that almost degenerated into civil war.<sup>231</sup> The build-up to the 2007 violence can be traced to the collapse of the National Rainbow Coalition (NARC), a coalition of parties that brought Mwai Kibaki to power in 2002.<sup>232</sup> Moi had completed his final term and proposed a KANU presidential

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<sup>228</sup> Indeed, in his statement after conducting a visit to Kenya in February 2009, Phillip Alston, the former UN Special Rapporteur stated: ‘Mr Wako is the embodiment in Kenya of the phenomenon of impunity’ (UN Special Rapporteur on extra-judicial, arbitrary or summary executions Mission to Kenya available at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/52DF4BE7194A7598C125756800539D79?opendocument>) (accessed 1 March 2012).

<sup>229</sup> Ghai (2008) 212.

<sup>230</sup> Lochery E & Anderson D ‘Violence and exodus in Kenya’s Rift Valley, 2008: Predictable and preventable?’ (2008) 2 (2) *Journal of Eastern African Studies* 329; Kanyinga (2009) 326.

<sup>231</sup> Lochery & Anderson (2008) 328.

<sup>232</sup> Chege M ‘Kenya: Back from the brink?’ (2008) 19 (4) *Journal of Democracy* 129-130.

candidate to stand for elections in 2002. His action led to a stream of defections from KANU to the opposition. The two main opposition groupings, the National Alliance of Kenya (NAK) led by Mwai Kibaki and the Rainbow Alliance led by Raila Odinga, united to field a single candidate against Uhuru Kenyatta, Moi's preferred candidate of KANU.

However, after NARC emerged victorious and formed the government in 2003, Kibaki reneged on a pre-election Memorandum of Understanding (MoU) on sharing of cabinet positions and key government positions.<sup>233</sup> The political differences percolated into the constitutional review which started soon after the elections in 2003. While the NAK allied to Kibaki proposed a strong presidential system, Rainbow Alliance members proposed a parliamentary system with a ceremonial president and a Prime Minister who is head of government. These differences heightened with the publication of the Wako Draft, which was to be put to a vote in the referendum.

The NAK wing of the coalition campaigned for a "Yes" vote while most of the Rainbow Alliance members campaigned for a "No" vote. There were clear ethnic undertones in the campaigns, with the Proposed Constitution being interpreted as determination by the ruling Kikuyu elite to preserve their entrenched interests in the centralised system of government. The results of the referendum reflected the political divisions among the political leaders. The "No" vote won in regions such as Nyanza, Western Province and Coastal regions where the Rainbow Alliance had a huge support base. The "Yes" vote won in Central Province and Eastern Provinces, considered strong NAK zones. The Nairobi region voted "No" with the vote being almost equally split.<sup>234</sup>

Following the referendum victory, the "No" side transformed itself into a political party, the Orange Democratic Movement (ODM).<sup>235</sup> The President dissolved the Cabinet and reconstituted a fresh one without the Ministers who were in the "No" campaign. This set the stage for further political divisions as the country prepared for the 2007 presidential elections. The ODM party was split into two parties: ODM and ODM-Kenya. However, Raila Odinga of ODM and Kibaki, who had joined the Party of National Unity (PNU), emerged as the major contenders for the presidential seat. Political campaigns were emotive, and the old but ever-present issues of land

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<sup>233</sup> Chege (2008) 129-130.

<sup>234</sup> Institute for Education in Democracy (IED) 'Constitutional Referendum 2005: results' available at <http://www.scribd.com/doc/2224431/Referendum-results-2005> (accessed 2 March 2012).

<sup>235</sup> The party was named 'Orange' after the 'No' vote symbol; the 'Yes' vote was represented by a banana.

and “*majimbo*” emerged during the referendum campaign. Karuti explains how the debate over regions was reflected in the party policies of ODM and PNU:

From a policy point of view, the main opposition, the Orange Democratic Movement, supported the *majimbo* system and argued that devolution would be pursued as a policy to enable people to make decisions on matters around their regions. The governmental Party of National Unity, however, argued against *Majimbo*, describing it as a bad policy for the country because it would undermine national cohesion. The party argued that *majimbo* would lead to eviction of people from certain regions on the basis of historical claims to territories.<sup>236</sup>

Lochery and Anderson add that “the key element in the campaign for the Rift Valley vote was Odinga’s support for constitutional change and *majimboism*”.<sup>237</sup> The PNU side saw devolution as a “constitutional cover for ethnic cleansing”.<sup>238</sup> ODM did not at any point advocate for expulsion of communities; however, ODM leaders remained “persistently vague” on what devolution would entail.<sup>239</sup>

Incidentally, the *majimbo* debate became commonly understood in areas like the Rift Valley as implying that communities that settled outside their “home regions” would be evicted and pre-colonial ethnic spheres restored.<sup>240</sup> Even at independence, there were reports of “foreigners” being evicted in April 1964 from places such as Timau in the Central/Eastern region, South Baringo in the Rift Valley, and Bungoma and Kitale in the Western region in the brief period of existence of the *majimbo* constitution.<sup>241</sup> The final report of the CoE recalls that the 2005 referendum campaigns were marked by “distortion and incitement based on ethnicity and tribal affiliation”.<sup>242</sup> Ethnic appeals led to ethnic polarisation as voting day approached.

## 2.5.2 On the brink of civil war: violence after the 2007/2008 elections

While the announcement of the presidential election results on 30 December 2007 was the immediate trigger of the widespread violence, the delay in releasing the results had already caused unrest in areas such as Kisumu, the home-town of the opposition candidate, Raila

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<sup>236</sup> Kanyinga (2009) 339-340.

<sup>237</sup> Anderson & Lochery (2008) 329.

<sup>238</sup> Anderson & Lochery (2008) 329.

<sup>239</sup> Anderson & Lochery (2008) 330.

<sup>240</sup> Kanyinga (2009) 339.

<sup>241</sup> Branch D *Kenya: Between Hope and Despair, 1963-2011*(2011) 15.

<sup>242</sup> CoE (2010b) 21.

Odinga. The announcement of Kibaki as the winner saw violence in Nairobi, the Rift Valley, Coast region, Nyanza, and Western provinces – the regions where ODM drew its largest support.<sup>243</sup>

Kanyinga identifies four patterns in the violence. First, there were riots and looting as people protested at the results, claiming that the elections were rigged and a “denial of justice”. Second, this was followed by police descending on protesters and sometimes using excessive force as they tried to quell the riots and restore calm. Third, there were coordinated attacks in which politicians, businessmen and other influential persons used the youth to attack other communities in the Rift Valley. Members of the Kikuyu and Kisii communities were attacked, and their businesses looted and properties burnt down. The last pattern of violence took the form of revenge attacks in which the Kikuyu arranged attacks and evictions of the Kalenjin, Luo and Luhyas from areas in the Rift Valley where the Kikuyu are a majority. These areas include Naivasha, Nakuru and parts of Nairobi. It was during this phase that politicians allied to both the ODM and PNU were alleged to have organised and funded illegal ethnic militias to carry out attacks on other communities.<sup>244</sup> In total, more than 1 300 persons were killed and 500 000 forcefully displaced.<sup>245</sup>

### **2.5.3 Forging ahead: constitutional reforms as a long-term solution**

The violence attracted the attention of the international community, which intervened with a view to restoring order. The African Union appointed a panel led by former UN Secretary General, Kofi Annan; to assist in mediation between the ODM and PNU.<sup>246</sup> The violence halted after the two parties signed a peace deal on 28 February 2008 brokered by the “Annan Panel.”<sup>247</sup> Issues for immediate attention included cessation of violence and addressing the plight of internally displaced persons. The constitutional review process, which had stalled after the “Wako Draft” was rejected in the November 2005 referendum,<sup>248</sup> was identified as one of the long-term issues to address the root causes of the conflict and political instability.<sup>249</sup> Other long-term

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<sup>243</sup> Kanyinga (2009) 340.

<sup>244</sup> The International Criminal Court (ICC) has confirmed charges for international crimes committed during the violence against three persons.

<sup>245</sup> Republic of Kenya (2008) 24.

<sup>246</sup> Abuya EO ‘Consequences of a flawed presidential election’ (2009) 27 *Legal Studies* 138.

<sup>247</sup> Abuya (2009) 138.

<sup>248</sup> Kindiki K ‘The emerging jurisprudence on Kenya’s constitutional review law’ (2007) 1 *Kenya Law Review* 155.

<sup>249</sup> Kenya National Dialogue and Reconciliation (KNDR) ‘Longer term issues and solutions-constitutional review’ (4 March 2008).

issues included the formation of a commission of inquiry into the causes of the violence, a truth and reconciliation commission, and addressing other issues such as land reforms, poverty and unemployment.<sup>250</sup>

The Commission of Inquiry into Post-Election Violence (CIPEV) released its report in late 2008, concluding that the announcement of presidential elections results was only a trigger, whereas some of the underlying causes of the violence were traceable to colonialism and the independence government. The CIPEV identified personal rule and the weakening of public institutions since independence as one of the root causes.<sup>251</sup> Land was also identified as another root cause – more specifically, the inequalities in land ownership perceived along ethno-geographic lines.<sup>252</sup> In addition, the CIPEV observed that economic disparities and unequal access to state resources and development, also perceived along ethnic lines, were another cause of the violence.<sup>253</sup> Moreover, the use of economically deprived and unemployed youth by political leaders for political violence – a longstanding and unsanctioned practice that had created a culture of impunity – was identified as a further root cause.<sup>254</sup>

#### **2.5.4 Devolution as a 'long-term solution'**

Indeed, while the immediate trigger of the violence was the disputed elections results, the root causes of the violence, as identified by the CIPEV, show how fragile the Kenyan state was as result of the failure of successive post-independence governments to address several core issues. Until 2007 Kenya had managed to exist in relative political stability, unlike most of its neighbours and despite the issues challenging its nationhood. However, the 2007/2008 violence revealed a fragile nation easily capable of sliding into civil war.<sup>255</sup> Thus, an inescapable long-term measure for addressing the root causes of conflict in Kenya is fundamentally to restructure the state. However, this raises the question: What does restructuring entail, and what is the nature of the role that devolution can play?

The centralised system has been repeatedly cited as one of the main sources of the problems facing post-independence Kenya. With regard to development, centralisation has led to inefficiency in local service delivery, rising poverty and skewed allocation of resources to elites

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<sup>250</sup> KNDR 'Annotated agenda and time-table' (2008).

<sup>251</sup> Republic of Kenya (2008) 28.

<sup>252</sup> Republic of Kenya (2008) 30.

<sup>253</sup> Republic of Kenya (2008) 30.

<sup>254</sup> Republic of Kenya (2008) 24, 33.

<sup>255</sup> Tamarkin (1978) 300.

from the incumbent president's ethnic community. This inevitably undermines socio-political stability, especially where communities outside government perceive themselves as outsiders. Corruption, resource patronage and entrenched interests have also thrived as a result of the centralised system.

Thus, as Kenyans restarted the constitutional review process after the violence, devolution was increasingly seen as a means through which Kenya could restructure the state and move past the challenges brought about by centralisation. It is thus necessary that for devolution to assist in defining the future path of the Kenyan state, it must be designed and implemented in a way that responds to the key issues identified by CIPEV. Devolution must promote development and facilitate equitable access to resources and development if it is to play a relevant role in transforming Kenya. Devolution must also ensure that political powers are devolved from the centre to the devolved units. This would in turn ensure that devolved units limit the exercise of power by the national level and thus enhance political inclusion and overall accountability.

However, it has been argued that devolution was supported by the Kalenjin because it has the potential to "protect the demands of self-proclaimed indigenous groups for land over those consistently described as outsiders".<sup>256</sup> Indeed, as far back as 1996 when Moi was still in power, Southall and Wood noted that the KANU government's hold on power had become "increasingly tenuous".<sup>257</sup> They opined that "Kalenjin politicians' fears for the post-Moi future could lead them in the direction of support for a genuine devolution of power".<sup>258</sup> Indeed, this could be the very basis upon which Rift Valley supported the ODM and its calls for a strong regional system of government. The ODM rose to the occasion by promising that 60 percent of resources would be controlled by sub-national governments as opposed to the centre.<sup>259</sup>

### **3. Enter the Committee of Experts (CoE): the second phase of constitutional review process (2008 - 2010)**

The CKRC Act 2008, enacted in early 2008 to facilitate the review process, established the Committee of Experts (CoE) which managed the second phase of the review process.<sup>260</sup> Other organs created by the CKRC Act 2008 were the Parliamentary Select Committee (PSC), the

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<sup>256</sup> Branch (2011) 267.

<sup>257</sup> Southall & Wood (1996) 526.

<sup>258</sup> Southall & Wood (1996) 526.

<sup>259</sup> Branch (2011) 267.

<sup>260</sup> Section 8 CKRC Act 2008.

National Assembly and the Referendum.<sup>261</sup> The CKRC Act 2008 was to “facilitate the completion of the review of the constitution of Kenya” meaning that the process was not to start from a “clean slate”. Indeed, sections 29 and 30 of the CKRC Act 2008 obligated the CoE to take into consideration the views of the people of Kenya as presented to the CKRC as well as the CKRC Draft, the draft adopted by the delegates and the 2005 referendum draft.<sup>262</sup> The CKRC Act 2008 retained all objectives from the 1998 CKRC Act.<sup>263</sup> However, an objective of “committing Kenyans to peaceful resolution of national issues through dialogue and consensus”<sup>264</sup> was added in the light of the events in 2007/2008.

The Act set out extremely tight deadlines which, as will emerge below, affected the quality of discussions and the final structure of devolved government. However, the enactment of a new law also provided an opportunity to address some of the legal challenges that the constitutional review under the CKRC had faced in that section 47 of the former constitution was amended to provide expressly for comprehensive constitutional reforms.<sup>265</sup> Other changes included the tight deadlines,<sup>266</sup> a high threshold for Parliament to make changes to the final draft from the CoE,<sup>267</sup> and a generally well-coordinated process that borrowed vital lessons from the challenges in the first phase.

### 3.1 The social and political context of the post-2008 constitutional review process

The second phase of the constitutional review process commenced as part of a long-term solution to the violence that rocked the country after the 2007 presidential elections. Furthermore, this was after a failed referendum in 2005. Thus, as stated by the CoE, the reform

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<sup>261</sup> Section 5 CKRC Act 2008.

<sup>262</sup> CoE ‘The report of the Committee of Experts on Constitutional Review issued on the submission of the Revised Harmonized Draft Constitution to the Parliamentary Select Committee on Constitutional Review on 8 January 2010 (2010a) 8-9.

<sup>263</sup> Section 4 CKRC Act 2008 is almost a replica of section 3 CKRC Act 1998.

<sup>264</sup> Section 4 (k).

<sup>265</sup> Constitution of Kenya (Amendment) Bill 2008. During the first phase of the review, it was argued that section 47 of the immediate former constitution provided only for amendment of the constitution and did not contemplate a total overhaul of the constitution; as such, opponents to the review process argued that the entire review exercise was unconstitutional. However, the constitutional court in the case *Njoya and 6 others v Attorney General and 3 others* (2008) KLR (EP) ruled that the process should go on despite the provision. The 2008 constitutional amendment cleared the controversies surrounding the legality of the review process under the former constitution.

<sup>266</sup> For instance, section 28 required the CoE to complete the review work within 12 months of the commencement of the Act, and this meant extremely tight deadlines if all the review steps were to be completed.

<sup>267</sup> Section 5A of the CKRC Act 2008.

context was characterised by “deepened suspicion, cynicism and apathy”.<sup>268</sup> There were real fears that the review process would merely polarise the country politically without serving any useful purpose. Furthermore, the public was conscious of the mutilation of the Bomas Draft in 2005, and there was no assurance that the political elite would not repeat the same shenanigans.<sup>269</sup> With the 2012 elections approaching, the concern was that if the constitutional review process dragged on, it would become muddled with the elections and disrupted. It was thus important that the review exercise be completed before the end of 2010.<sup>270</sup>

### 3.2 The limited mandate of the Committee of Experts

The CoE was obligated to build on previous work done by the CKRC and the *Bomas* discussions, but it had neither the time nor mandate to conduct extensive public hearings akin to the CKRC hearings. It was required to review past documents and other sources, carry out thematic consultations, and identify in a report the contentious and non-contentious issues.<sup>271</sup> This was to be followed by a harmonised draft constitution, to which the public had 30 days only to make input.<sup>272</sup> After receiving public comments, the CoE had just 21 days to revise the draft based on public input and publish a Revised Harmonised Draft (RHDC). The RHDC was to be submitted to the Parliamentary Select Committee on constitutional review (PSC) for consensus-building on the contentious issues.<sup>273</sup>

The CoE was then required to consider changes suggested by the PSC and revise the RHDC accordingly.<sup>274</sup> Thereafter, the CoE was required, within 21 days, to prepare a Proposed Constitution and return the document to the PSC. The PSC was in turn required to table a draft report, based on the RHDC, in Parliament within seven days of receipt.<sup>275</sup> Parliament had 30 days to debate the draft constitution, approve it, and pass it on to the Attorney General (AG) for publication. The AG had 30 days to publish the approved draft as the proposed new constitution,<sup>276</sup> after which a national referendum was to be held within 60 days of publication.<sup>277</sup> All these deadlines were met.

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<sup>268</sup> CoE ‘Final report of the Committee of Experts on Constitutional Review’ (2010b) 25.

<sup>269</sup> CoE (2010b) 25.

<sup>270</sup> CoE (2010b) 28.

<sup>271</sup> Section 30 (1) (a) and (b); CoE (2010b) 13.

<sup>272</sup> Section 30 (2).

<sup>273</sup> Section 32 (c).

<sup>274</sup> Section 33 (3).

<sup>275</sup> Section 33 (8).

<sup>276</sup> Section 34 (1).

In coming up with the contentious issues, sections 23 (a) and (b), 29 and 30 of the CKRC Act 2008 required the CoE to review the people's views to CKRC, study the earlier drafts and identify areas where the drafts were not in agreement. Contentious issues were to be identified on the basis of discrepancies between the different drafts. Thus, while issues such as land and Islamic courts were hotly debated, provisions were consistent in all the past drafts and did not therefore qualify as "contentious" under the CKRC Act 2008.<sup>278</sup> The CoE identified three issues as contentious: the system of government (the nature of executive and legislature), devolution, and the transitional clauses or bringing the constitution to effect.<sup>279</sup> However, with regard to devolution and the national executive, the CoE noted that "accountability of the executive and legislature and the need for devolution were never in contention. The differences were over the form of government and the levels of devolution."<sup>280</sup>

In order to manage the fairly wide consultation process, the CoE held thematic consultations and appointed different members of the CoE to be in charge of different themes; accordingly, a member of the CoE was appointed in charge of devolution.<sup>281</sup> Consultative meetings were held, including one dedicated to devolution.<sup>282</sup> Devolution matters were also discussed at several other consultative meetings held with sectors of society on the general process.<sup>283</sup> The CoE developed 10 working principles to guide it in the review process; these included: to decentralise power; constrain executive power; embrace the separation of power, with checks and balances; deepen democracy; and ensure accountability and equity in distribution of resources as well as ethnic, regional and gender balance.<sup>284</sup>

### **3.3 CoE deliberations on the structure of devolved government**

The CoE identified three important objectives of the review process that were to guide the deliberations and decisions regarding devolution of powers: promotion of participation in governance through democratic elections and the devolution and exercise of power;<sup>285</sup> provision

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<sup>277</sup> Section 34 (3).

<sup>278</sup> CoE (2010b) 29, 61.

<sup>279</sup> CoE (2010b) 41.

<sup>280</sup> CoE (2010b) 62.

<sup>281</sup> Prof. Frederick Ssepembwa, a Ugandan, was in charge of thematic consultations on devolution.

<sup>282</sup> Held on 25 June 2009 at the Intercontinental Hotel 2009, it was attended by 45 participants. See CoE (2010b) 155.

<sup>283</sup> CoE (2010b) 155.

<sup>284</sup> CoE (2010b) 37.

<sup>285</sup> Section 4 (d).

of basic needs and equitable distribution access to national resources;<sup>286</sup> respect and recognition of diversity, community and cultural rights and identities;<sup>287</sup> and ensuring that the national interest prevails over regional or sectoral interests. Based on these objectives and the working principles mentioned above, the CoE identified three issues that were contentious with regard to devolution: first, whether there should be two or more levels of government; second, what the powers of each level should be; and third, allocation of national powers of supervision and ensuring national equity.<sup>288</sup>

The CoE produced three constitutional drafts with varying designs that reflected the discussions which took place at each stage. The first was the Harmonised Draft Constitution (HDC), followed by the Revised Harmonised Draft Constitution (RHDC) and the Proposed Constitution, which was sent to the National Assembly and later the Attorney General for redrafting and publication as a Constitution Bill for a referendum vote.

### **3.3.1 Devolution in the Harmonised Draft Constitution (HDC)**

After a review of past drafts, discussions and views submitted on levels of government, the CoE concluded that the views were divided mainly between having two or three levels of government. The CoE found that a “substantial minority” supporting the two levels of government wanted large geographical units of devolved units comparable to the eight regions at independence.<sup>289</sup> The majority of those supporting two levels wanted a smaller unit “based on districts, counties or local council and constituencies”.<sup>290</sup> However, in all cases, the CoE observed, the driving objective in the search for an appropriate structure was to have “a unit that would be viable demographically and have adequate resources for effective governance without endangering service delivery”.<sup>291</sup>

The CoE further observed that majority of those who supported 3 levels of government (national, regional, and local) wanted the local level to be the principal point of devolution.<sup>292</sup> The middle or regional level of government was explained as a supplement to “building ... national unity and ... provid[ing] a basis for representation of local interests at the national

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<sup>286</sup> Section 4 (f).

<sup>287</sup> Section 4 (e).

<sup>288</sup> CoE (2010b) 67.

<sup>289</sup> CoE (2010b) 68.

<sup>290</sup> CoE (2010b) 68.

<sup>291</sup> CoE (2010b) 68.

<sup>292</sup> CoE (2010b) 68.

level”.<sup>293</sup> Thus, the CoE settled for three levels after considering the following: “functions that a system of devolved government is intended to serve”, “the history of local government”, and “the cost of administration”.<sup>294</sup> The HDC adopted three levels of government: national, regional and county,<sup>295</sup> with county level as proposed as the principal point of devolving power.<sup>296</sup>

There were various proposals regarding the number, size and boundaries of county governments. These included adopting the PA-based districts, which were over 250, or clustering them; adopting the 210 parliamentary constituencies or clustering them; converting the 14 regions in the *Bomas* Draft into the principal unit or using the 79 *Bomas* districts as the principal units.<sup>297</sup> The districts were ruled out because 250 units would be too costly; furthermore, there was a High Court ruling which declared all districts created after 1992 unconstitutional.<sup>298</sup> The CoE noted that while the districts were created mainly as a response to demands by people and hence created a sense of belonging, “proper considerations in establishing devolved government” were not taken into accounting when the districts were being increased.<sup>299</sup> The 210 parliamentary constituencies were ruled out, too, because they were just too many and using them as devolved units would confuse their role as units of national representation. The 14 regions in the *Bomas* Draft were also dismissed as principal units on account of their large size and population (in some of the regions), which were “likely to compromise service delivery”.<sup>300</sup>

The CoE settled for the 74 districts that were proposed in the *Bomas* Draft as the principal units of devolution in the HDC, and it did so for two reasons. First, the 74 districts were the result of a careful deliberation “which balanced the communities’ sense of belonging with the needs of service delivery”.<sup>301</sup> Additionally, the cost of running 74 units was much lower than the other units (PA administrative districts and the parliamentary constituencies). The *Bomas* districts were named “counties” in the HDC in order to avoid confusion with the PA administrative districts. The CoE also noted that while the 74 districts were negotiated and a result of a

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<sup>293</sup> CoE (2010b) 68.

<sup>294</sup> CoE (2010b) 68.

<sup>295</sup> Article 215 and 221.

<sup>296</sup> Article 228.

<sup>297</sup> CoE (2010) 68.

<sup>298</sup> CoE (2010b) 70.

<sup>299</sup> CoE (2010b) 70.

<sup>300</sup> CoE (2010b) 70.

<sup>301</sup> CoE (2010b) 70.

compromise, time had elapsed since *Bomas* and some factors had changed, which might necessitate boundary revision. The HDC thus provided for an *ad hoc* commission for boundary review when the need arises. Furthermore, while “*Bomas* districts” were 74 and formed the basis of HDC’s counties, the HDC had 74 counties, a discrepancy that was not explained by the CoE.<sup>302</sup>

The CoE gave three reasons for adopting regions in the HDC. First, the regions would be large, with substantial populations, and hence would be able to accommodate ethnic and cultural diversity and contribute to nation-building.<sup>303</sup> Second, a regional level would coordinate cross-county functions of county governments.<sup>304</sup> Third, for purposes of equitable allocation of resources, regions would offer a vital link and representation of devolved units at the national level.<sup>305</sup> However, the CoE rejected the 14 regions in the *Bomas* Draft. While the regions were carefully deliberated by NCC delegates,<sup>306</sup> the CoE “was looking at larger and fewer units better placed to provide checks and balances on the exercise of power at the national level”.<sup>307</sup> The HDC thus adopted the eight original provinces as the basis of the regional governments.<sup>308</sup>

As principal units of devolution, the county governments were established with both legislative and executive institutions.<sup>309</sup> County representatives and the county executive were to be directly elected.<sup>310</sup> The HDC also allocated local revenue raising functions and service delivery functions to the 74 county governments.<sup>311</sup> Regions were also created with legislative and executive functions at the regional level. However, unlike counties, regional assemblies and the executive were to be elected by county assemblies within a region. The principal function of the regional government was to coordinate cross-county projects and functions, which included

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<sup>302</sup> First Schedule to the HDC.

<sup>303</sup> CoE (2010b) 70.

<sup>304</sup> Article 215 (2) HDC.

<sup>305</sup> CoE (2010b) 70.

<sup>306</sup> CoE ‘Verbatim Report of Proceedings of the Committee of Experts on Constitutional Review Consultative Forum with political parties held 3 September 2009, at Leisure Lodge Resort, Mombasa’ (2009) 67. Indeed, a former commissioner with the CKRC cautioned that the regional boundaries for the 14 units in the NCC draft were delicately negotiated and that it would be “unreasonable to disturb the consensus”.

<sup>307</sup> CoE (2010b) 70.

<sup>308</sup> First Schedule to the HDC.

<sup>309</sup> Articles 222 and 223 HDC.

<sup>310</sup> Article 224.

<sup>311</sup> Fourth Schedule to the HDC.

formulation of policies for harmonious implementation and monitoring actual implementation.<sup>312</sup> Representation at the centre was to be through the senate, whose members were to be elected from county assemblies.<sup>313</sup>

With regard to national relations with devolved units, the HDC provided that the relationship between levels would be cooperative. The HDC provided national government powers to suspend county governments or regional governments in extreme cases only (emergency and war).<sup>314</sup> Cost considerations were the main reason why the CoE did not provide for decentralisation structures below the 74 counties in the HDC. The CoE, borrowing from the Wako Draft, thus left this to the discretion of the county governments to further decentralise if it was efficient to do so.<sup>315</sup>

### **3.3.2 The Revised Harmonised Draft Constitution (RHDC)**

The CoE received comments and input after publication and dissemination of the HDC. The chapter on devolution received the second highest number of comments after the structure of the national executive. The CoE observes that support of the idea of devolution was wide and consistent.<sup>316</sup> However, it received varied submissions regarding various aspects of the devolved government structure in the RHDC. The main issues on which submissions were received included: number of levels, boundaries of devolved units and the necessity, or not, of the regional level of government.

With regard to the levels of government, the CoE noted a shift in support for three levels to two, “which was discernible from the suggestions and comments”.<sup>317</sup> Two main reasons were advanced in support of a two-level system: first, the three levels of devolved government would be costly, and second, the 74 counties were small and would “lack resources to govern effectively”.<sup>318</sup> Furthermore, the CoE report added, the 74 counties were too small to provide checks on the exercise of power at the national level. The boundaries of the 74 counties in the HDC were described as random and without any rationale in terms of “population, geographical

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<sup>312</sup> Article 215 HDC.

<sup>313</sup> Article 125 HDC.

<sup>314</sup> Article 235 HDC.

<sup>315</sup> CoE (2010b) 72.

<sup>316</sup> CoE (2010b) 90.

<sup>317</sup> CoE (2010b) 90.

<sup>318</sup> CoE (2010b) 90.

features and command of resources”.<sup>319</sup> Regions, as provided for in the HDC, received negative views mainly because they had no clear role and “may become irrelevant”.<sup>320</sup> The regions had no clear source of funds to perform their coordination and provide assistance to counties. Regions were composed of delegates (appointees) from the county governments and would thus not effectively supervise performance of functions by counties. Lastly, while regions were allocated regional planning and regional policy formulation functions and delivery of regional services, there was vagueness as to what these functions entailed.<sup>321</sup>

Accordingly, the RHDC made a number of changes to address the concerns raised above. First, the levels were reduced to two (national and county government)<sup>322</sup> “in accordance with the majority’s preferences”.<sup>323</sup> This change was made in response to concerns about the cost and roles of the regions as provided for in the HDC. Second, the 74 county units were abandoned and boundaries of administrative districts as at 1992, provided for in the District and Provinces Act, were adopted as county boundaries.<sup>324</sup> The CoE explains that the 1992 districts were adopted for two main reasons: first, due to the removal of regions, there was a need for relatively large units which could provide checks and balances at the national level, a function that was to be performed by the regions; second, there was a need for units that had the capacity to provide services closer to the people. Thus the 1992 districts, which were the basis of the 47 counties adopted, were seen as appropriate to serve this purpose after the removal of regions.<sup>325</sup>

The HDC was also criticised for its weak provisions relating to supervision and regulation, and the CoE was urged to add necessary measures to allow intervention by the national government.<sup>326</sup> The HDC had only provided for suspension, a measure which would only be invoked in extreme cases rather than in the course of normal regulation and supervision.<sup>327</sup> However, the CoE argued that overt provisions on regulation and supervision of counties may create an opportunity for central intrusion into affairs of counties. Thus, the role of the national

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<sup>319</sup> CoE (2010b) 91.

<sup>320</sup> CoE (2010b) 91.

<sup>321</sup> CoE (2010b) 91.

<sup>322</sup> Article 209 RHDC.

<sup>323</sup> CoE (2010b) 91.

<sup>324</sup> CoE (2010b) 91.

<sup>325</sup> CoE (2010b) 92.

<sup>326</sup> CoE (2010b) 92.

<sup>327</sup> Article 224 RHDC.

government in the counties was couched in the RHDC as one of “ensuring capacity and resources” to counties in order to enhance their effectiveness.<sup>328</sup> The RHDC also provided that intervention would be used only in a manner that respects the integrity of the system of devolution and provision of essential services.<sup>329</sup>

Removal of the regions necessitated changes to the structure of the Senate at the national level whose membership was based on the regions. The majority of the views presented perceived the indirect election of senators, as provided in the HDC, as a weakness.<sup>330</sup> The CoE was told that persons of “the right calibre” would not emerge from indirect election, and that “senators without popular support would carry less weight than members of the proposed National Assembly”.<sup>331</sup> Accordingly, the RHDC provided for direct election of senators.<sup>332</sup> In order to create a link between the directly elected senators and the counties, senators could sit in the county assemblies, but without a right vote; in addition, they had to furnish annual reports to their respective county governments.<sup>333</sup>

The transitional arrangements in the HDC provided for dissolution of the PA.<sup>334</sup> However, some views were expressed that the PA was “accessible to the people” at the local level and should be retained. The CoE took the view that locally elected representatives would be even closer and more accountable to the people. Besides, “the system of Provincial Administration in its current form was incompatible with, and may impede, the implementation of the system of devolution”.<sup>335</sup> The RHDC thus retained the provision of “phasing out” the PA within five years of implementation of the constitution.<sup>336</sup>

### **3.3.3 Parliament’s views and proposals on devolution**

The 27-member PSC of the National Assembly and the National Assembly itself were both created as review organs in the Act.<sup>337</sup> The PSC was supposed to examine the RHDC and build

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<sup>328</sup> Article 221 (b) RHDC.

<sup>329</sup> CoE (2010b) 93; Article 210 (4) RHDC.

<sup>330</sup> CoE (2010b) 92.

<sup>331</sup> CoE (2010b) 92.

<sup>332</sup> Article 120 (1) (a) RHDC.

<sup>333</sup> CoE (2010b) 92.

<sup>334</sup> Section 7, Seventh Schedule to the HDC.

<sup>335</sup> CoE (2010b) 93.

<sup>336</sup> CoE (2010b) 93; section 16 of the Sixth Schedule to the RHDC.

<sup>337</sup> Section 5 CKRC Act 2008.

a political consensus around contentious issues and hand the RHDC back to the CoE for redrafting in order to reflect the political consensus.<sup>338</sup> The CoE was then supposed to hand over the RHDC with the changes by the PSC to the National Assembly, which could in turn make amendments but only after attaining a high threshold of 65 percent of members to support an amendment. While some suggested changes by the PSC were incorporated into the draft constitution, proposed amendments by the National Assembly did not sail through due to the high threshold required for proposed amendments.

### **3.3.3.1 Proposals by the Parliamentary select committee (PSC)**

The CoE declined to accept some of the suggested changes by the PSC “for reasons of coherence and in order to adhere to the guiding principles of the process of constitutional review”.<sup>339</sup> The PSC suggested the deletion of the objective of devolved government that provided that devolution will enhance checks and balances. However, the CoE observed that devolution did in fact offer other checks and balances, and thus rejected the proposal.<sup>340</sup> The PSC also suggested the inclusion of a provision stating that “national government takes precedence over county governments”. However, the CoE was of the view that in order to ensure that both levels of government respected their mutual and functional integrity, neither of the governments was to be subordinate to the other. This proposal was rejected too. Furthermore, the CoE emphasised “assistance” and “building of capacity” of counties to ensure effective performance of functions as opposed to regulation by national government regulation, as was suggested by the PSC.<sup>341</sup>

With regard to powers of the Senate, the PSC suggested that the name be changed to a “lower house” with primarily powers to represent counties at the national level.<sup>342</sup> The PSC removed the legislative functions of the Senate and instead enhanced the Senate’s power with regard to county finances. The PSC specifically proposed that decisions of the Senate on matters such as county finances could be overturned only by a 65 percent vote of the National Assembly vote.<sup>343</sup> The PSC also removed the role of the Senate in impeaching the president, and made impeachment a sole prerogative of the National Assembly.

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<sup>338</sup>CoE (2010b) 153.

<sup>339</sup>CoE (2010b) 103.

<sup>340</sup> CoE (2010b) 125.

<sup>341</sup> CoE (2010b) 125.

<sup>342</sup> CoE (2010b) 114.

<sup>343</sup> CoE (2010b) 114.

The CoE considered that the 65 percent vote required to bypass a Senate veto, on any matter, may impede the National Assembly and general government business. The CoE also considered that a legislative role of the Senate would enhance the system of checks and balances at the national level. Furthermore, enhancing people's participation through devolution of power implied a strong Senate with legislative power,<sup>344</sup> a public view that was presented to the CKRC.<sup>345</sup> The CoE thus reinstated the legislative role of the Senate on county matters and also provided for only a simple majority vote in the National Assembly in order to overturn a decision of the Senate.<sup>346</sup> The CoE also reinstated the role of the Senate with regard to impeachment of the president. The CoE argued that this will ensure that the president is not held hostage by "transient majorities" in the National Assembly.<sup>347</sup> The CoE termed the change of name of the Senate from an "upper house" to a "lower house" a constitutional absurdity unheard of in comparative constitutional theory and practice, and reverted to the "upper house" name.<sup>348</sup>

The PSC proposed establishment of an equalisation fund that would cater for marginalised areas. The CoE lauded this as an important sign of commitment to equitable distribution of national resources.<sup>349</sup> The fund (0.5 percent of national revenue) was to be set aside for the provision of basic services in marginalised areas to bring them to the level of other areas. The Commission on Revenue Allocation (CRA) was given the mandate to identify areas to benefit.<sup>350</sup> The CoE added a provision that the fund would operate for 20 years, after which it would be reviewed.<sup>351</sup>

The PSC suggested that the CRA should be removed and its functions transferred to the Senate.<sup>352</sup> The CRA's was proposed as an independent body which will advise on vertical division of revenue between the centre and devolved units as well as horizontally among the

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<sup>344</sup> CoE (2010b) 114.

<sup>345</sup> CKRC (2005) 186.

<sup>346</sup> CoE (2010b) 114.

<sup>347</sup> CoE (2010b) 114.

<sup>348</sup> CoE (2010b) 8.

<sup>349</sup> CoE (2010b) 127.

<sup>350</sup> CoE (2010b) 127.

<sup>351</sup> CoE (2010b) 128.

<sup>352</sup> Parliament of Kenya (National Assembly) 'Report of the Parliamentary Select Committee on the Review of the Constitution of the Reviewed Harmonized Draft Constitution' (2010) 11.

counties.<sup>353</sup> The CoE reinstated the CRA mainly because of the complexity of the issue involving division of revenue. While Parliament could have the final decision on the division of revenue, analysis of figures and criteria for division of revenue required technical expertise such as the one that the CRA could provide. As the CoE explained:

It is appropriate that the Parliament should make the final decisions on these matters but its political decisions need to be informed by independent skilled and professional analyses of the problems. The CRA does not supplant parliament. Its technical advice will strengthen debate in parliament and enable parliament to make informed decisions. In addition, because CRA is an independent body, its advice is more likely to be trusted.<sup>354</sup>

The CoE also recognised the relatively weak link between the senator and the county governments, links which can be further complicated by the fact that the senator and county governor may be from different parties. Thus, there is no guarantee that the senator would represent county government interests in matters of revenue-sharing at the national level. The CoE argued that the role of the CRA had the potential to address this gap.<sup>355</sup>

### **3.3.3.2 Devolution debate in Parliament: Botched attempt to re-introduce regions**

The CoE submitted the Proposed Constitution to the National Assembly on 28 February 2012 after responding to the PSC's suggested changes discussed above. At least 150 amendments to the Proposed Constitution were raised in Parliament. However, the high threshold of 65 percent or 164 members required to pass an amendment could not be reached for any of the proposed amendments.<sup>356</sup> A member allied to the ODM party sought to move a motion in parliament to amend the Proposed Constitution in order to reintroduce regional level. The MP, who was also a minister,<sup>357</sup> argued for the regional level as follows:

We have done so well in so far as separation of powers is concerned. The three arms of government are well established but when it comes to the issue of devolution of power and resources, and the participation of people, the draft constitution does not meet the principles that are set out in the Act and in the values. The counties, as they exist and as I understand, are to enhance people's participation. At the local level, the people should be able to participate in the

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<sup>353</sup> CoE (2010b) 128.

<sup>354</sup> CoE (2010b) 131.

<sup>355</sup> CoE (2010b) 131.

<sup>356</sup> CoE (2010b) 137.

<sup>357</sup> Mr. James Orendo, a legislator from the Nyanza region, then serving as Minister for Lands.

manner in which they will be governed. That is why we need the third-tier. The second-tier, which has the provinces, is to ensure that power at the centre can be checked and counterbalanced. If we have a second-tier that is not strong enough, then we may have created yet another imperial presidency.<sup>358</sup>

MPs who opposed the motion on regions branded it an attempt to reintroduce *majimbo*, which is “dangerous to this country”.<sup>359</sup> MPs who spoke made reference to the 2008 violence and its connection to the “*majimbo*” talk, indicating that removal of the regions was important for purposes of national cohesion.<sup>360</sup> In the media, it was reported that regions were rejected on grounds that they would lead to ethnic violence.<sup>361</sup>

### 3.3.4 Assessment of CoE deliberations and constitutional drafts

The CoE identified three contentious issues around devolution: whether there should two or three levels, what the powers of each level should be, and how equitable distribution of resources should be structured in the devolved government structure. Indeed, a review of the devolution structures in the past drafts reveals that the structures were as varied as the number of drafts. Thus, the CoE had to decide on one structure or the other. However, there is a need to review the final structure that was adopted by the CoE in the light of the discussions and proposed structures in the past drafts.

With regard to levels, the CoE abandoned the regional level, provided for in all past drafts except the Wako Draft 2005 that was defeated at the 2005 national referendum. The reasons given for this decision were largely based on cost considerations, efficiency and capacity.<sup>362</sup> While the CoE observed that the regions were to play an important role in “building national unity”,<sup>363</sup> this concept was never canvassed by the CoE beyond mere mention. After removal of the regional level, it became necessary that the county units be kept large enough in order to

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<sup>358</sup> Parliament of Kenya (National Assembly) ‘Official Report’ (Wednesday 31 March 2010) 15.

<sup>359</sup> Parliament of Kenya (National Assembly) ‘Official Report’ (Statement by Hon. Robinson Njeru Githae National Assembly) (Wednesday 31 March 2010) 15.

<sup>360</sup> National Assembly ‘Official Report’ (Wednesday 31 March 2010) 14-19.

<sup>361</sup> Rugene N & Wafula C ‘Suspicion leads to rejection of provincial governments’ *Daily Nation* 31 March 2010; Rugene N ‘It’s a Push and Pull over regions’ *Daily Nation* 27 March and 2010; Nyassy D, Kibirige A & Kitimo A ‘Fear denied as majimbo, say coast MPs’ *Daily Nation* 3 April 2010.

<sup>362</sup> CoE (2010b) 91.

<sup>363</sup> CoE (2010b) 68.

check the centre.<sup>364</sup> This explains why the 74 counties in the HDC were reduced to 47 in the Proposed Constitution after the regional level was removed.

The CoE did not consider the effect that removal of regions and reducing of the number of counties would have on the accommodation of ethnic diversity. Indeed, soon after the publication of the Proposed Constitution, MPs from the “minority districts” immediately rejected the draft and called for creation of more counties for “marginal groups”.<sup>365</sup> The referendum campaigns saw the MPs for Kuria and Mt. Elgon constituencies charged for incitement to violence.<sup>366</sup> In the August 2010 referendum, Kuria Constituency returned a “No” victory of 58 percent, while Mt. Elgon Constituency returned a “No” victory representing 68 percent of the total vote.<sup>367</sup> The *Bomas* Draft, and indeed all other previous drafts, had provided individual units for Kuria and Mt. Elgon. However, the CoE Draft used the 1992 administrative districts which denied these two areas their own units.

While it is clear that the CoE never considered the “accommodation of diversity” element in deciding local units, there is a need to examine the reasons for this. First, the CoE had limited time to engage in the question of creating devolved units versus accommodating diversity. Indeed, the CoE admits that after the PSC consensus settled on a presidential system of government, this should have been followed up with a more nuanced devolved system than was provided for in the Proposed Constitution. The CoE stated:

Ideally, the political consensus on the presidential system should have been followed by a fundamental revision of the structure of devolution (size and number of units, powers and functions, and revenue capacity) towards a more effective system of checks by the devolved governments, over the national governments. The CoE could not undertake such revision without encouraging other aspects of the consensus of the PSC.<sup>368</sup>

Thus, the devolved structure remained unchanged despite the adoption of a pure presidential system. Moreover, the demarcation of boundaries tends to be a highly political exercise with various competing interests. With limited time and a relatively restricted mandate, the CoE chose to go with the 1992 administrative boundaries instead of negotiating new local

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<sup>364</sup> CoE (2010b) 92.

<sup>365</sup> Nation reporter ‘Draft: MPs seek more counties for marginal groups’ *Daily Nation* 1 March 2010;

<sup>366</sup> Nation reporter ‘We have failed in the healing process’ *Daily Nation* 11 May 2010;

<sup>367</sup> <http://thedailynation.blogspot.com/2010/08/kenyan-referendum-results-constituency.html> (accessed 5 March 2012).

<sup>368</sup> CoE (2010b) 125.

boundaries, which was bound to have been a long-running and explosive affair. The provision for an independent boundary review mechanism in accordance with objective criteria in all the CoE drafts may well be evidence that it was in effect a postponement of the politics of boundary demarcation.

Furthermore, the decision to base county government boundaries on the 1992 administrative boundaries did not take into account the nature and history of the PA boundaries. As discussed in the previous chapter, PA district boundaries were defined along ethnic lines. The 1962 Boundaries Commission report did not substantially revise this policy, and as a result post-independence administrative district boundaries largely followed the colonial policy of ethnically exclusive units.<sup>369</sup> In view of the colonial legacy of PA boundaries, the CoE should have examined the suitability of using the administrative boundaries in terms of nation-building and national unity before basing counties on them. Instead, it regarded the 1992 administrative district boundaries as large enough to provide checks and balances at the centre and ensure service delivery at the same time.

Clearly, suitability of the units for accommodation of diversity was not considered by the CoE. This is confirmed by the Taskforce on Devolved Government appointed to advise the government on implementation of devolution. It conducted county consultation exercises in the “minority areas”, and wrote thus in its final report:

[A] number of communities were opposed to the number of Counties, their boundaries and the composition. In Bungoma County, the Sabaot were opposed to the CoK 2010 because they had been grouped together with a large population of the Luhya community. In Elgeyo-Marakwet County, the Marakwet were opposed to them being grouped with the Keiyo because of past marginalisation. In Baringo County, many minority groups such as the Pokot, Njemps, Endorois and Arror feared the other dominant Tugen communities. In Migori County, the Kuria were opposed to being grouped together with the Luo majority. In Garissa County, the Abdalla clan of Ijara did not want to be grouped together with the dominant Abudwak and Aulihan clans.<sup>370</sup>

It is thus clear that arguments of economic viability, efficiency and service delivery and ability to check on the national government took primacy over ethnic accommodation. There were no attempts to balance the development and economic arguments against the need to build national unity. As a result, virtually all small minority groups found themselves within larger

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<sup>369</sup> Ghai & McAuslan (1970) 204.

<sup>370</sup> Republic of Kenya ‘Final report of the Taskforce on Devolved Government’ (2011) 203.

ethnic groups. The regional level could have been used to address “centre-constraining” concerns while the local level could have concentrated on accommodation and local service delivery. But this option was not given much consideration in the deliberations. However, the CoE’s decision is understandable, given its limited mandate and available time as well as the complexities that could have emerged if it attempted to accommodate ethnic concerns through boundary demarcation.

It is also important to note that even during the *Bomas* discussions, major decisions regarding the size, number of levels and their functions were mainly made on the basis of economic, cost and development concerns. For instance, the 19 regions originally proposed and supported in the *Bomas* discussions had an advantage of smaller regional governments through which minority communities could have a better say. However, the regions were reduced to 14 by the technical committee on the basis of cost considerations, thus “diluting” the influence of the minority communities in the proposed larger and fewer regions.

The changes that were proposed by the PSC and the National Assembly must also be put in perspective. The attempt by MPs to weaken the role of the Senate and enhance the position of the national government vis-a-vis counties represents a broader tussle to keep the centralised system intact. It is true that in a devolved system, with a strong second chamber representing devolved units at the national level and exercising legislative power, has the potential to enhance accountability and hence “compete” with the National Assembly. In other words, the MPs (some of whom were ministers) acted out of self-preservation by attempting to retain the National Assembly’s legislative powers in the new dispensation.

Furthermore, the ODM party policy supported the regional level of government in order to enhance “participation in governance”. It is thus no surprise that the ODM side proposed the reintroduction of regions into the draft. It is also no surprise that all MPs who supported this amendment were ODM members and from the Rift Valley, while those opposed to regions were mainly drawn from the central and eastern regions of the country.<sup>371</sup> The patterns of support and opposition to regions represented the old fissures that have been present since independence. However, supporters of the amendment were unable to marshal the high threshold of 65 percent vote needed to amend the Proposed Constitution.<sup>372</sup>

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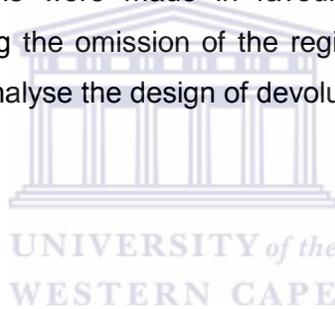
<sup>371</sup> Parliament of Kenya (National Assembly) ‘Official Report’ (Wednesday 31 March 2010) 14-19.

<sup>372</sup> In accordance with section 5A of the CKRC Act 2008.

#### **4. Conclusion**

This chapter has analysed the constitutional review that led to the adoption of the current Kenyan Constitution in August 2010; more specifically, it has evaluated the various issues that informed the devolution deliberations and the context in which those deliberations took place. Issues of underdevelopment and sharing of resources, centralisation of power, and ethnic conflict were at the core of the discussions and deliberations on devolution. However, as the preceding examination has revealed, the three issues were not given equal weight.

Major decisions regarding issues such as number of levels, size of units and powers and functions were made on the basis of development arguments relating to capacity and economic viability. While the potential of the devolved system of government to enhance unity and nation-building was recognised in the process, these issues were not given adequate attention or addressed in detail. Furthermore, the potential of counties to limit central power was also recognised but many concessions were made in favour of the development purpose of devolution, the most notable being the omission of the regional level from the final draft. The rest of the chapters in this study analyse the design of devolution in Kenya's new constitution.



## CHAPTER FIVE

# THE STRUCTURE AND INSTITUTIONAL FRAMEWORK OF COUNTY GOVERNMENTS

### 1. Introduction

Chapter 3 demonstrated how centralisation of power, underdevelopment and ethnic conflict continue to be the major obstacles to Kenya's effective statehood and nationhood. Chapter 4 showed that in the constitutional review process, devolution of power was considered as a means to address these issues. What is thus important for this discussion is how the constitutional design of devolved government responds to them. While this thesis is focused on devolution, Chapters 3 and 4 reveal, too, that addressing centralisation, underdevelopment and ethnic conflict are not just devolution objectives but relate to broader political and systemic challenges facing Kenya. The Constitution adopted in 2010 seeks to address these three issues in a number of ways, and devolving power to counties is but one of them.

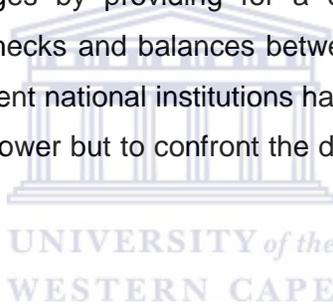
While Chapters 6 and 7 will examine the powers and finances of county governments, this chapter evaluates the structures and institutional frameworks of county governments. Accordingly, after examining the objectives and principles of devolved government, it analyses the structures and institutions of county governments in terms of development, conflict resolution and limiting central power. More specifically, the chapter assesses how the size, number and institutional framework of county governments accommodate the three purposes through design. Importantly, this chapter assesses how the potentially conflicting design features of the three purposes are accommodated in county structures.

In Chapter 4, it was emphasised that major decisions about the design of devolution in Kenya were made on the basis of development. As such, the argument presented in this chapter is that county government structures and institutional frameworks are primarily designed for the pursuit of development. Indeed, while it was possible to incorporate design features for the pursuit of other purposes without compromising development, these options were, for reasons that are unclear, not considered. As such, while ethnic conflict and limiting central power are recognised as objectives of devolution, the two purposes are ambivalently pursued in the design of the structure and institutional framework of county governments.

Development, ethnic conflict and limiting central power are broader political issues that, in addition, have been addressed through other constitutional mechanisms outside the devolution framework. Thus, before delving into the system of devolved government, the next section briefly examines the broader constitutional mechanisms put in place to pursue development, ethnic harmony and limited central power.

## **2. Constitutional mechanisms to address centralisation, underdevelopment and ethnic conflict**

The 2010 Constitution can broadly be termed a framework to structure public power and enhance accountability in the exercise of that power. Inevitably, therefore, the presidency was the main target in the attempt to dismantle the centralised state structure. The personalisation of presidential powers and subordination of critical public institutions have been regarded as the main source of underdevelopment and ethnic conflict in post-colonial Kenya. The Constitution seeks to address these challenges by providing for a clearer separation of powers and introducing strong and effective checks and balances between the three arms of government. Furthermore, strong and independent national institutions have also been created, not only as a further limit to national executive power but to confront the developmental and other issues that underlie ethnic conflict in Kenya.



### **2.1 Limited presidential powers**

While the 2010 Constitution retained the presidential system in which the president is both head of state and head of government,<sup>1</sup> presidential powers have been significantly curtailed.

First, there is a clear separation of powers between the executive and the legislature. Unlike the previous regime where the president could prorogue or dissolve parliament at any time,<sup>2</sup> parliament now runs its programme and legislative affairs independently of the executive. Furthermore, ministers are no longer part of the legislature, and this further reduces the president's control of parliament.<sup>3</sup> The absence of ministers from parliament will, according to Ghai and Cottrell, oblige the president to negotiate with supporters of government policy in parliament, unlike the situation in the past when ministers controlled the parliamentary agenda.<sup>4</sup>

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<sup>1</sup> Article 131 (1).

<sup>2</sup> Section 59 of the Constitution of Kenya (Act 5 of 1969) (repealed).

<sup>3</sup> Ghai YP & Cottrell JG *Kenya's Constitution: An Instrument for Change* (2011) 23.

<sup>4</sup> Ghai & Cottrell (2011) 23.

Second, there is a clearer separation of power between the executive and the judiciary, with the aim of creating an independent and impartial judiciary. While in the past the president used to appoint the chief justice, the appointment of the chief justice is now an independent process which involves the Judicial Service Commission (JSC), an independent national institution, and the National Assembly which vets and approves nominees for the position of chief justice before formal appointment by the president.<sup>5</sup> Furthermore, appointment of judges is now vested in the Judicial Service Commission.<sup>6</sup> These measures bolster the independence of the judiciary from the national executive.

Apart from the separation of powers and functions, the presidency itself is subject to several limitations. The president can serve for two terms only, of five years each.<sup>7</sup> The president can also be removed from office by an impeachment process involving the National Assembly and the Senate.<sup>8</sup> Furthermore, while the president had unfettered powers over all key public appointments in which holders of constitutional and public offices served at his pleasure,<sup>9</sup> such appointments are now subject to parliamentary approval. The National Assembly approves the appointment of cabinet secretaries,<sup>10</sup> the secretary to the cabinet,<sup>11</sup> principal secretaries,<sup>12</sup> the Attorney-General and the Director of Public Prosecutions.<sup>13</sup> The appointment of members of independent public institutions and offices is subject, too, to approval by the National Assembly.<sup>14</sup>

In addition, the Constitution establishes national commissions and offices which perform various important functions independently from the control of the national executive.<sup>15</sup> These institutions perform functions which were initially vested in the president. For instance, the JSC, as noted above, now appoints judges and participates in the selection of the chief justice. While the

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<sup>5</sup> Article 166.

<sup>6</sup> Article 172.

<sup>7</sup> Article 142 (2).

<sup>8</sup> Article 145.

<sup>9</sup> Section 24 of the Constitution of Kenya (Act 5 of 1969) (repealed).

<sup>10</sup> Article 152 (2).

<sup>11</sup> Article 154 (2).

<sup>12</sup> Article 155 (3) (b).

<sup>13</sup> Article 157 (2).

<sup>14</sup> Article 250 (2).

<sup>15</sup> Article 248.

president had power to appoint electoral commissioners,<sup>16</sup> members of the Independent Electoral and Boundaries Commission (IEBC) are approved by the National Assembly, and this enhances the independence of the Commission from the national executive.<sup>17</sup>

Other independent commissions include the Commission on Revenue Allocation (CRA) which advises on the distribution of national resources, the Salaries and Remuneration Commission which advises on public salaries, the National Land Commission,<sup>18</sup> and the Commission on Implementation of the Constitution (CIC).<sup>19</sup> The independent offices are those of the Attorney-General, and the Controller of Budget.<sup>20</sup> More importantly, while most of these institutions or their functions were previously under the national executive, they now operate as independent institutions outside the control of the national executive. The main objective of these independent offices and institutions is to “protect the sovereignty of the people”, “secure the observance by all State organs of democratic values and principles”, and promote constitutionalism.<sup>21</sup> The CIC, for instance, at one point identified impunity of the national executive<sup>22</sup> as a challenge to the effective implementation of devolution.<sup>23</sup>

The executive is further constrained by a strong Bill of Rights which protects both individual and collective rights from interference by all state organs<sup>24</sup> and even private parties.<sup>25</sup> The Bill of Rights incorporates civil and political rights as well as economic, social and cultural rights. As such, the national executive and indeed all relevant state organs are obligated to ensure that the enjoyment of these rights by every person is honoured. Any person whose rights or freedoms have been infringed on can approach a court,<sup>26</sup> which can issue an appropriate order

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<sup>16</sup> Republic of Kenya ‘Report of the Independent Review Commission (IREC) on the general elections held in Kenya on the 27 December 2007’ (2008) 50.

<sup>17</sup> Article 248 (2) (c).

<sup>18</sup> Article 248 (2).

<sup>19</sup> Section 5, Sixth Schedule to the Constitution of Kenya 2010.

<sup>20</sup> Article 248 (3).

<sup>21</sup> Article 249 (1).

<sup>22</sup> Commission for the Implementation of the Constitution (CIC) ‘Third quarterly report: July-September 2011’ (2012) 44. The office of the Attorney General had tabled two Bills on devolution without consulting CIC and CRA as required by the transitional provisions in the Constitution.

<sup>23</sup> CIC (2012) 51.

<sup>24</sup> Ghai & Cottrell (2011) 40-63.

<sup>25</sup> Article 20 (1); Ghai & Cottrell (2011) 35.

<sup>26</sup> Article 22 (1).

or relief or remedy to stop the infringement.<sup>27</sup> A court may thus protect a person from the arbitrary use of public power that infringes on fundamental rights and freedoms protected under the Constitution.<sup>28</sup> Apart from judicial protection, the Kenya National Human Rights and Equality Commission (KNHREC) is constitutionally mandated to monitor the state's compliance with the Bill of Rights and other human rights obligations and may take measures necessary to ensure that the state lives up to its obligations.<sup>29</sup>

In the past, the National Treasury exercised unfettered control over all government budgeting and expenditure.<sup>30</sup> The cabinet, which was usually composed of presidential appointees, controlled the budget process within parliament.<sup>31</sup> The president's control of parliament and the National Treasury in turn enabled him to use state resources to sustain patronage networks and divert resources to their home regions.<sup>32</sup> However, budgeting powers are now shared with the National Assembly, which has power to amend the budget.<sup>33</sup> The effect of these changes is that the budget process is now subject "to a wider set of actors, particularly giving citizens and MPs a greater role, and fundamentally reduc[ing] the traditional, undemocratic and nearly unlimited powers of the executive".<sup>34</sup> Furthermore, the Senate, which is part of the legislature, has special powers to determine both the criteria for, and division of, revenue among counties.<sup>35</sup> Budget overview is delinked from the National Treasury and placed in the CoB, an independent office.<sup>36</sup> These changes, as the World Bank notes, "reflect a distrust of the centralised Executive and its opaque control over resources".<sup>37</sup>

## 2.2 Enhancing inter-ethnic harmony

A number of measures are put in place in the Constitution to address ethnic conflict and enhance unity and harmony. Political parties, which sponsor presidential candidates and other

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<sup>27</sup> Article 23 and Articles 47-51.

<sup>28</sup> Article 47-51.

<sup>29</sup> Article 59.

<sup>30</sup> Kirira N 'Public Finance under Kenyas' new constitution' (Society for International Development: (SID) Constitution Working Paper Series No. 5 (2011) 5.

<sup>31</sup> World Bank *Devolution without Disruption: Pathways to a Successful New Kenya* (2012) 125.

<sup>32</sup> Murray C & Wehner J 'How new laws balance budgetary powers' *The Nairobi Law Monthly* (January 2012) 8.

<sup>33</sup> Murray & Wehner (2012) 38.

<sup>34</sup> Murray & Wehner (2012)38.

<sup>35</sup> Kirira (2011) 7.

<sup>36</sup> Article 228.

<sup>37</sup> World Bank (2012) 125.

national and local candidates, are required to have a “national character”. Accordingly, the Constitution expressly prohibits the formation of political parties on the basis of ethnicity, region or religion.<sup>38</sup> Political parties are required to uphold and promote national unity,<sup>39</sup> as well as to respect the right of everyone, including minorities and marginalised groups, to participate in the political process.<sup>40</sup> This provision is born of past experience with negative ethnic political mobilisation that formed the basis for ethnic conflict.

Chapters 3 and 4 demonstrated how successive presidents relied on ethnic support and how this culture laid the basis for deadly ethno-political conflict in Kenya. In order to address this, some authors call for electoral rules that encourage politicians to seek votes beyond their own groups, a measure that can form a basis for integration in ethnically divided societies.<sup>41</sup> The Constitution implements this measure by providing that the president has to receive more than half of the total votes cast in the election<sup>42</sup> and at least 25 percent of the votes cast in more than half of the 47 counties.<sup>43</sup> Where the condition is not met, the top two candidates proceed to a run-off in which the candidate with the highest number of votes becomes president regardless of the margin or number of votes.<sup>44</sup> In most cases, presidential candidates are forced to appeal for votes beyond their own ethnic communities, and this may form a basis for fostering ethnic integration.

Once in office, the president has direct obligations to foster ethnic harmony and national unity. The president is required to respect, uphold and safeguard the Constitution and safeguard the sovereignty of the nation.<sup>45</sup> The president is also required to promote and enhance unity and promote respect for the diversity of the people and communities of Kenya.<sup>46</sup> Indeed, the president is required to be a “symbol of national unity”.<sup>47</sup> Accordingly, the Cabinet and the entire national executive should reflect the regional and ethnic diversity of the people of Kenya.<sup>48</sup> Key appointments are vetted by the National Assembly, or sometimes jointly with the Senate, which

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<sup>38</sup> Article 91.

<sup>39</sup> Article 91 (1) (c).

<sup>40</sup> Article 91 (1) (e).

<sup>41</sup> Reilly B *Democracy in Divided Societies: Electoral Engineering in Divided Societies* (2004) 2.

<sup>42</sup> Article 138 (4) (b).

<sup>43</sup> Article 138 (4) (b).

<sup>44</sup> Article 138 (5).

<sup>45</sup> Article 131 (2) (a) and (b).

<sup>46</sup> Article 131 (2) (c) and (d).

<sup>47</sup> Ghai & Cottrell (2011) 41.

<sup>48</sup> Article 130 (2).

may facilitate scrutiny to ensure that diversity is respected in the appointments.<sup>49</sup> In the past, appointments to key government positions often benefited individuals from the president's community,<sup>50</sup> and this fomented conflict by engendering perceptions of exclusion by ethnic communities at the "periphery" of power.

Such perceptions of ethnically-based economic marginalisation have underlain conflict in the past.<sup>51</sup> The CRA seeks to address them by ensuring transparency and objectivity in the sharing of revenue raised nationally.<sup>52</sup> For instance, the World Bank observes that in Nigeria, periodic reports on how national funds were distributed "helped to diffuse public mistrust of central government, focusing public scrutiny and pressure on the use of funds".<sup>53</sup> Furthermore, control of public finances and the budgeting process has become more participatory at the national<sup>54</sup> and county level. These measures have opened up the space for a more open and accountable process in public finances and thus have the potential to address perceptions of exclusion from state resources.

In addition, the Bill of Rights prohibits discrimination on the basis of ethnicity.<sup>55</sup> The right to language and culture are also protected, and persons can individually or collectively enjoy their language or culture.<sup>56</sup> The Bill of Rights thus enhances the individual and collective rights of minorities and marginalised groups. Provisions on equality and non-discrimination will serve to protect individuals or groups of people from unfair treatment and work towards ensuring equality across the ethnic divide. The Bill of Rights requires the state to put in place affirmative action programmes targeted at minorities and marginalised groups.<sup>57</sup> These measures may facilitate the inclusion of minorities and marginalised groups in governance by enabling them to maintain their distinct cultural and socio-economic identities.<sup>58</sup>

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<sup>49</sup> Article 152 (2) and Article 245 (2) (a).

<sup>50</sup> Branch D *Kenya: Between Hope and Despair, 1963-2011*(2011) 99; Ghai YP 'Devolution: Restructuring the Kenyan state' (2008)2 *Journal of Eastern African Studies* 211, 215-216.

<sup>51</sup> Republic of Kenya 'Report of the Commission of Inquiry into Post-Elections Violence' (CIPEV) (2008) 28.

<sup>52</sup> Ghai & Cottrell (2011)123-124.

<sup>53</sup> World Bank 'Navigating the storm, delivering the promise: With a special focus on Kenya's momentous devolution' Kenya economic update (2011) 47-48.

<sup>54</sup> Kirira (2011) 5.

<sup>55</sup> National Integration and Cohesion Commission (NCIC) 'Road to cohesion' (2012).

<sup>56</sup> Article 44.

<sup>57</sup> Article 56.

<sup>58</sup> Article 56 (e).

### 2.3 Mechanisms to address underdevelopment

Chapters 3 and 4 detailed how centralisation of powers and personal rule contributed to underdevelopment through bureaucratic inefficiency, the plunder of resources and ethnically-skewed allocation of state resources. However, the constitutional framework now forms a basis for a more accountable and transparent process that can facilitate the pursuit of equitable national development.<sup>59</sup> This is especially important because the national government is constitutionally entitled to a maximum of 85 percent of revenue collected nationally, thus placing it in a vastly superior position to counties (which are entitled to a minimum of 15 percent) to address development issues. Additionally, the Constitution allocates the major taxes to the national government,<sup>60</sup> leaving counties with a relatively small tax base.<sup>61</sup> Indeed, Prud'homme argues<sup>62</sup> that with political will, the central government is better able to address inequalities and implement redistribution through macroeconomic allocation at the national level. The Constitution provides that national resources shall be used to promote equitable development which takes into account the special needs for marginalised groups or areas; this requirement may form a basis for the pursuit of equitable development at the national level.<sup>63</sup>

The Constitution establishes the Equalisation Fund, which is under central government control and into which 0.5 percent of all the revenue collected nationally must be deposited.<sup>64</sup> The Fund can be used directly by the central government or, through counties as a conditional grant, to enhance access to basic services including water, roads, health facilities and electricity in marginalised areas.<sup>65</sup> The services targeted by the Fund are county functions; it is therefore most likely to be applied as a conditional grant for the target counties.<sup>66</sup> Its purpose is to bring the quality of specified services in the marginalised areas up to the standard enjoyed by the rest of country,<sup>67</sup> and is supposed to lapse after 20 years unless parliament extends the life of the fund for a further fixed period.<sup>68</sup> While the Fund has been criticised for being too small,<sup>69</sup> it can

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<sup>59</sup> Kirira (2011) 5.

<sup>60</sup> Article 209 (1) of the Constitution provides that only the national government can impose income tax, value-added tax, customs duties and other duties on import and export goods, and excise tax.

<sup>61</sup> Article 209 (3).

<sup>62</sup> Prud'homme R 'The dangers of decentralization' (1995) 10 *The World Bank Observer* 202.

<sup>63</sup> Article 201 (b) (iii).

<sup>64</sup> Article 204 (1).

<sup>65</sup> Article 204 (2).

<sup>66</sup> Article 204 (3) (b).

<sup>67</sup> Article 204 (2).

<sup>68</sup> Article 204 (6) and (7).

supplement the efforts of county governments to enhance basic services to previously neglected areas and thus contribute to overall equitable development.<sup>70</sup> Furthermore, the CRA should be consulted before any appropriations from the Fund are made, a requirement that enhances transparency and objectivity.<sup>71</sup>

Indeed, all public funds should be utilised in accordance with the principles of public finance listed in the Constitution.<sup>72</sup> The principles emphasise equity, transparency, and prudent use of funds for purposes of development, among other requirements. Offices and institutions such as the National Treasury, the ministry in charge of finance and planning, the Auditor-General and the Controller of Budget are all meant to ensure that national funds are used in a manner that promotes identified national priorities for development. The Bill of Rights, too, provides that every person is entitled to basic needs, which include food, water, health care, housing, education and social security.<sup>73</sup> These basic entitlements lay a further basis for enhancing access to basic services and development across the country by all organs of state.

#### **2.4 Devolution: a means to achieve a wider constitutional purpose**

The preceding discussion shows that devolution is but one of the constitutional mechanisms put in place to address underdevelopment, ethnic conflict and the need to limit central power. However, the promises of devolution make the devolution of power not just an optional alternative but a necessity in the pursuit of the three purposes. Devolution of power enhances participatory governance by opening up multiple centres of decision-making,<sup>74</sup> which can greatly enhance the pursuit of development, ethnic accommodation and limiting central power.

Devolution of power can facilitate “people-centred development” through local democratic institutions.<sup>75</sup> Devolution also reduces the inefficiency associated with central bureaucracy, thereby advancing effective development.<sup>76</sup> Devolution of power also has the potential to facilitate the inclusion of subnational groups who are minorities and therefore have weak or no

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<sup>69</sup> The World Bank (2012, 120) describes the Equalisation Fund as “materially unimportant” due to its small size.

<sup>70</sup> Nyanjom O ‘Constitutional devolution in Kenya: Setting the agenda’ Kenya Civil Society Strengthening Programme (KCSSP) (2011) 36-37.

<sup>71</sup> Article 204 (4).

<sup>72</sup> Article 201.

<sup>73</sup> Article 43 (1).

<sup>74</sup> World Bank *World Development Report 1999/2000: Entering the 21<sup>st</sup> Century* (1999) 107.

<sup>75</sup> World Bank (1999) 107.

<sup>76</sup> World Bank (1999) 114.

representation in national structures.<sup>77</sup> The process can promote the accommodation of subnational groups who are in competition for control of the centre and thus address conflict about power or resources.<sup>78</sup> Furthermore, the very concept of devolution implies that there are limits on central power, given that power is transferred to local units and state power is thus vertically divided.<sup>79</sup> These potential benefits of devolution make it indispensable to the pursuit of the three issues.

### **3. Devolution as a core constitutional principle**

Devolution is woven into the national values and principles of the Constitution, thus making it a core constitutional principle. Sovereignty, which is declared as emanating from the people, is vested in both the national and county governments.<sup>80</sup> In essence, the Constitution splits state sovereignty and power into national and county power. As such, counties are not mere subnational entities but polities that, on the basis of the concept of shared sovereignty, are meant to enjoy the same constitutional and political legitimacy as the national government.

County boundaries are constitutionally recognised as the internal territorial divisions of the Kenyan Republic<sup>81</sup> in Article 6 of the Constitution in which the republican status and sovereignty of the Kenyan state is declared. In a different part of the same Article, it is declared that national and county governments are distinct but inter-dependent and should thus conduct their affairs on the basis of consultation and cooperation.<sup>82</sup> In the past, local authorities operated as appendages of the centre.<sup>83</sup> By contrast, the treatment of counties in the Constitution invokes a different continuum altogether, one in which counties are of essence to the definition of the republic.

The Constitution also lists “national values and principles of governance” which bind all state organs, state officers, public officers, and all persons when applying or interpreting the

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<sup>77</sup> Ghai (2008) 216.

<sup>78</sup> Ghai (2008) 216.

<sup>79</sup> Ghai (2008) 216.

<sup>80</sup> Article 1 ((3).

<sup>81</sup> Article 6 (1).

<sup>82</sup> Article 6 (2).

<sup>83</sup> Oyugi WO ‘Local government in Kenya: a case of institutional decline’ in Mawhood P (ed) *Local Government in The Third World: The Experience of Tropical Africa* (1993) 126.

Constitution, enacting or applying or interpreting a law, or making or interpreting policy.<sup>84</sup> There are four categories of national values and principles of governance. The first category entails patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of people.<sup>85</sup> The second category encompasses human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.<sup>86</sup> The third category involves good governance, integrity, transparency and accountability.<sup>87</sup> The last category deals with sustainable development.<sup>88</sup> The fact that “devolution of power” is contained in the first category, even ahead of other important values such as human rights, shows the importance attached to devolution as a constitutional value and principle in Kenya’s constitutional and legal order.

County governments can participate in constitutional amendment through the popular initiative.<sup>89</sup> While county powers are not equivalent to those of the national legislature in regard to constitutional amendment, the counties’ participation in amendments enhances their significance in the constitutional order. Furthermore, while other constitutional provisions can be amended by a two-thirds majority of the National Assembly and the Senate, after following the procedures for amendment, the provisions dealing with the objects, principles and structure of devolved government are subject to a national referendum vote.<sup>90</sup> Other provisions subject to a national referendum vote include amendments touching on the national values and principles of governance, sovereignty and the territory of Kenya.<sup>91</sup> The requirement for a referendum entrenches devolution and makes the people, from whom all constitutional power emanates, the guardians of devolution.

The constitutional provisions discussed above are indicative of the centrality of the concept of devolution in the restructuring and transformation of the Kenyan state. For instance, while a country like South Africa is generally considered a hybrid federal system, the preamble and founding provisions of its constitution do not elevate the devolution of power to provinces and

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<sup>84</sup> Article 10 (1).

<sup>85</sup> Article 10 (2) (a).

<sup>86</sup> Article 10 (b).

<sup>87</sup> Article 10 (2) (a).

<sup>88</sup> Article 210 (d).

<sup>89</sup> Article 257 (5) and (6).

<sup>90</sup> Article 255 (1).

<sup>91</sup> Article 255 (1).

local governments as a core constitutional principle, as is the case in the Kenyan Constitution.<sup>92</sup> Ultimately, however, the substantive power and resources controlled by counties will determine their actual significance within the Kenyan state and political system. While the formal constitutional significance of devolution is clear, the actual powers exercised by counties and the nature and amount of resources controlled by them are even more important to understanding the substantive role that devolved government will play in Kenya.

#### **4. The objectives and principles of devolved government**

##### **4.1 The objectives of devolved government**

The objectives and principles of devolved government are provided for at the beginning of Chapter 11 of the Constitution, which deals exclusively with devolved government. Article 174 lists nine objects of devolved government:

- (a) to promote democratic and accountable exercise of power;
- (b) to foster national unity by recognising diversity;
- (c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- (d) to recognise the right of communities to manage their own affairs and to further their development;
- (e) to protect and promote interests and rights of minorities and marginalised communities;
- (f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- (g) to ensure equitable sharing of national and local resources throughout Kenya;
- (h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and,
- (i) to enhance checks and balances and the separation of powers.

While subsequent provisions in the chapter on devolution describe the details of the devolved system, the objects provide guidance and a basis for understanding the intention and purpose of devolution. The objectives, thus, provide an important starting point for interrogating the purposes which the devolved system of government, as expressed in the Constitution, serves in Kenya.

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<sup>92</sup> Section 1-6 of the Constitution of the Republic of South Africa, 1996. Provinces and municipalities are mentioned in the founding provisions only in connection with use of languages but not in the context of formal recognition of the fundamental division of state power between the centre and other spheres.

#### 4.1.1 Democratic and accountable exercise of power

The first purpose of the devolved system of government is “to promote democratic and accountable exercise of power”.<sup>93</sup> As institutions which will exercise power on behalf of people, counties will be accountable to the public through elections and other channels of enhancing democratic accountability. The democratic and accountable exercise of power, however, is a broader constitutional objective and purpose which all government, devolved or not, will have to respect. Indeed, the Constitution provides that all sovereign power belongs to the people and is to be exercised directly by the people or through their directly elected representatives.<sup>94</sup> Thus, any person or institution which exercises power is, as a constitutional imperative, accountable to the people.

However, devolution of powers for decision-making opens up multiple centres for decision-making, thus facilitating as wide a degree of participation as possible.<sup>95</sup> In this way, devolution enhances democratic and accountable exercise of power. Democratic and accountable exercise of power implies that decisions reflect the will of the people.<sup>96</sup> Indeed, as stated earlier in this thesis, devolution is the institutional expression of a willingness to enhance the accountable and democratic exercise of power, and is a way through which the idea of democracy can be institutionally pursued. Through devolution, the people, to whom power belongs, can pursue their choices by influencing or determining the manner in which public power is exercised and decisions made locally.<sup>97</sup>

The object does not, however, expressly identify the purpose served by democratic accountability. Discussions in Chapter 2 indicate that democratic accountability is in all cases tied to a specific purpose. For instance, as mentioned above, it can enhance participation in development and is indeed core to the concept of development.<sup>98</sup> Democratic accountability furthermore implies representation of all groups in decision-making processes, and this may form a basis for inclusion in divided societies. Furthermore, democratic accountability implies a limited government that is subject to democratic controls.

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<sup>93</sup> Article 174 (a).

<sup>94</sup> Article 1 (1) and (2).

<sup>95</sup> World Bank (1999) 111; De Visser J *Developmental Local Government: A Case Study of South Africa* (2005) 19.

<sup>96</sup> World Bank (1999) 111; De Visser (2005) 19.

<sup>97</sup> World Bank (1999) 111; De Visser (2005) 19.

<sup>98</sup> World Bank (2000/2001) 106.

#### 4.1.2 Fostering national unity by recognising diversity

The second object of devolved government is “to foster national unity by recognising diversity”. This object recognises two things: first, Kenyan society is diverse, and second, accommodation of that diversity is important for achieving national unity. The Constitution recognises various forms of diversity and seeks to protect them. This can be seen through the Bill of Rights outlawing discrimination on the basis of ethnicity or social origin, race, sex, religion, conscience, belief, culture, dress, language and other grounds.<sup>99</sup> Accordingly, there is no doubt that Kenya has various diversities which this object is meant to promote and protect.<sup>100</sup>

While the objective does not state which diversity should be accommodated in order to consolidate peace, Kenya’s past experience leaves no doubt that the objective makes reference to ethnic diversity. In the Kenyan experience, real or perceived exclusion along ethnic lines led to political and ethnic conflict.<sup>101</sup> Indeed, many provisions in the Constitution specifically require that the “regional and ethnic” diversity of the people of Kenya to be respected. These include the composition of the national executive,<sup>102</sup> political party nomination lists for the national and county legislatures,<sup>103</sup> and the public service.<sup>104</sup> Ethnic diversity should also be respected in the composition of the Kenyan Defence Forces,<sup>105</sup> the National Police Service<sup>106</sup> and independent commissions.<sup>107</sup> The Constitution further requires a specific law to promote ethnic and regional diversity, among other forms of diversity.<sup>108</sup>

Devolution of power seeks to enhance ethnic accommodation in order to achieve ethnic harmony and peace by facilitating the sharing of power between the centre and subnational groups. Through devolved government, ethnic communities that are not in control of the presidency but have their own counties participate in the economic, political and governance process of the state; this addresses all or part of the perceptions of exclusion that underlie

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<sup>99</sup> Article 27 (4).

<sup>100</sup> See for instance Article 131 (2) (b).

<sup>101</sup> Anderson DM ‘Yours in the struggle for *Majimbo*’; Nationalism and the party politics of decolonization in Kenya’ (2005) 40 *Journal of Contemporary History* 549.

<sup>102</sup> Article 130 (2).

<sup>103</sup> Article 90 (2) (c).

<sup>104</sup> Article 232 (1) (i) para (ii).

<sup>105</sup> Article 241 (4).

<sup>106</sup> Article 246 (4).

<sup>107</sup> Article 250 (4).

<sup>108</sup> Article 100.

ethnic conflict in Kenya. The object recognises that sustainable national unity requires political and economic inclusion of all ethnic communities, and that devolution of powers can be an institutional avenue to pursue the same.

#### **4.1.3 Self-governance and people's participation in decision-making**

The third object of devolved government is “to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them”.<sup>109</sup> In essence, this object calls for democratic and accountable exercise of power, just as the first object does. The only difference, perhaps, is the use of the phrase “give powers of self-governance” and the emphasis on “decisions affecting them” in the third objective. This may imply democratic exercise of power in the context of a devolved system of government. Particularly, the phrase “decisions affecting them” implies localised decision-making that enables communities to address local preferences varying from one community to another.

It is only through devolution of power that the broad principle of “self-governance” can be institutionally realised. While development is not expressly mentioned in the object, the language used in this object is typical devolved-development talk. Devolved governance is exalted as a means of planning and of using resources to address local preferences in the name of allocative efficiency.<sup>110</sup> This approach is supported by the principle of subsidiarity, which requires all functions to be performed at the lowest possible level unless effective performance requires such functions to be retained at the national level.<sup>111</sup> Thus, while the first object on democratic and accountable exercise of power is general, the third object espouses the same but is particular to a decentralised-governance setting. However, both the first and third objects broadly emphasise the same broad principle of democratic and accountable exercise of power.

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<sup>109</sup> Article 174 (c).

<sup>110</sup> World Bank (1999) 121. See also World Bank ‘World Bank decentralisation website’ at [www1.worldbank.org/publicsector/decentralization/what.htm](http://www1.worldbank.org/publicsector/decentralization/what.htm), cited in De Visser (2005) 42.

<sup>111</sup> De Visser J ‘Institutional subsidiarity in the South African Constitution’ (2010) 21 *Stellenbosch Law Review* 209-211.

#### **4.1.4 The right of communities to manage their own affairs and development**

The fourth objective of devolved government is “to recognise the right of communities to manage their own affairs and further their own development”.<sup>112</sup> Like the third and first objectives, this one seeks to promote democratic and accountable exercise of power. This is because effective democratic decision-making implies that communities are able to influence the exercise of power in order to address their needs. To this extent, the fourth objective serves essentially a similar purpose to that of the first and third objects of devolved government. The phrase “their own affairs” equally implies the principle of subsidiarity, which calls for local decision-making for effectiveness and efficiency.<sup>113</sup>

The fourth object has, however, expressly identified development as a purpose to be pursued through democratic decision-making. Thus, while communities will participate in decision-making, this object adds that such participation is with the express purpose of enhancing their development. In so doing, the object ties the broader meaning of development, which emphasises participation, with decentralisation. Decentralisation is said to enhance institutional and allocative efficiency, hence leading to local development.<sup>114</sup> Preferences, priorities, and needs in terms of development differ between regions and even localities. Devolution offers an avenue for localised decision-making that can address developmental issues relevant to the local context.<sup>115</sup> Mechanisms of accountability, on the other hand, enable local communities to ensure that devolved units use powers and resources allocated to them in a manner that addresses democratically determined local needs and priorities.<sup>116</sup>

#### **4.1.5 Safeguarding rights of minorities and marginalised communities**

The fifth object of devolved government seeks “to protect and promote the interests and rights of minorities and marginalised communities”.<sup>117</sup> International<sup>118</sup> and Kenyan<sup>119</sup> experience reveals that minorities and marginalised communities have been excluded from mainstream

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<sup>112</sup> Article 174 (d).

<sup>113</sup> World Bank *World Development Report 2000/2001: Attacking Poverty* (2000) 107.

<sup>114</sup> World Bank (1999) 107.

<sup>115</sup> World Bank (1999) 110-111.

<sup>116</sup> World Bank (1999) 110-111.

<sup>117</sup> Article 174 (e).

<sup>118</sup> UNDP ‘Marginalised minorities in development planning’ (2010) 31-69.

<sup>119</sup> Mukundi GW ‘The rights of indigenous peoples: Kenya’ International Labour Organisation (ILO) and the African Commission on Human and Peoples Rights (ACHPR) (2009) 33-34.

social, political, and economic realms of the society. Thus, if the devolved system of government were to be inclusive, marginalised and minority groups would, of necessity, be a starting point in terms of enhancing inclusion. The object makes reference to two groups: minorities and marginalised communities. Unlike the term “minorities”, which is not defined in the Constitution, the phrase “marginalised communities” is given a fairly comprehensive definition. The Constitution specifies four categories of people who fit the description “marginalised community”.

First, a marginalised community may mean a community, which, because of its relatively small population, has been unable to fully participate in the integrated social and economic life of Kenya as a whole.<sup>120</sup> Second, a marginalised community may mean a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole.<sup>121</sup> Third, a marginalised community may mean an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter and gatherer economy.<sup>122</sup> Lastly, a marginalised community may also mean pastoral persons and communities, whether nomadic or settled, that, because of their relative geographic isolation, have experienced only marginal participation in the integrated social and economic life of Kenya as a whole.<sup>123</sup>

The Constitution, however, makes a distinction between a marginalised *community* and a marginalised *group*. The latter is defined as “a group of people” who have faced disadvantages and discrimination due to previous and current laws and practices.<sup>124</sup> This object thus targets “communities” as opposed to identifiable groups who are not a “community”; the latter may be persons with disabilities, women, children, the youth, or other groups who do not fall within the definition of a “community”.

While this object seeks to accommodate diversity, as is the case in the second objective, it is clear that the two objectives target different groups for accommodation and protection, respectively. Lack of accommodation of ethnic diversity may cause conflict. However, lack of protection of marginalised communities leads only to further marginalisation, as opposed to conflict. There is no real or major threat of conflict if the rights of marginalised groups are not

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<sup>120</sup> Article 260.

<sup>121</sup> Article 260.

<sup>122</sup> Article 260.

<sup>123</sup> Article 260.

<sup>124</sup> Article 260.

respected or safeguarded. On the other hand, lack of accommodation of ethnic diversity may threaten the political stability of a state. As such, the second object targets the groups that contest for the political power of the state, while this object targets groups that need protection. In the Kenyan context, the major ethnic communities who are contenders for the presidency fit within the second objective. However, the smaller ethnic communities who are not a risk to political stability fit within this objective.

The term “minorities” or “minority” is not defined in the Constitution and, even internationally, does not have a universal definition, “partly because of the diverse contexts in which minorities exist globally”.<sup>125</sup> While minorities in the Kenyan context may refer to different groups, this object focuses narrowly on ethnic minorities. In Kenya, no single ethnic community accounts for more than half of the country’s population. As such, all ethnic communities can technically be referred to as minorities.<sup>126</sup> However, such an approach ignores the dynamics of ethnicity, especially with regard to access to and control of political and state power. Five of the largest ethnic communities in Kenya account for over 50 percent of Kenya’s population (which stands at around 41,609,728), while the rest, approximately 41 ethnic communities, account for almost a third of the total population.<sup>127</sup> It can thus be concluded that minorities, in the Kenyan context, exclude the largest five ethnic communities but include the 41 who account for 30 percent of the total population.

However, even within the smaller ethnic communities, there are those who are far more numerically inferior; of the 41 smaller ethnic groups, 18 have a population of less than 100 000.<sup>128</sup> It is less than likely that these communities can secure a county or, in some cases, even a county ward. It thus seems that the term “minorities” as used in this object refers to the smaller ethnic communities, while “marginalised communities” includes the smallest ethnic communities that may not constitute a county or even a county constituency, among other communities.

Safeguarding the rights of minorities and marginalised communities may entail enhancing their participation in social, political and economic affairs in order to improve their livelihood.

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<sup>125</sup> Wekesa SM ‘County governments and rights of marginalised ethnic minorities in Kenya: Evaluating the potential challenges and benefits of devolution’ (Unpublished LLM thesis, University of Pretoria, 2012) (2012)1

<sup>126</sup> Wekesa (2012) 2.

<sup>127</sup> Republic of Kenya ‘2009 Population and housing census results’ Ministry of State for Planning, National Development and Vision 2030 (31 August 2010).

<sup>128</sup> Wekesa (2012) 2.

Development and access to resources is the central tool for ensuring inclusion of marginalised groups or minorities, especially in the context of a developing country like Kenya. As such, democratic decision-making and the other developmental objects devolution still remain relevant to the protection and promotion of the interests and rights of minorities and marginalised communities.

#### **4.1.6 Socio-economic development service delivery throughout Kenya**

The sixth object of devolved government is “to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya”.<sup>129</sup> This object re-emphasises what the other objectives discussed above have addressed. For instance, the need to protect the interests of minorities and marginalised communities is based on the realisation that marginalised areas have low socio-economic development and poor service delivery that need to be addressed. Effective safeguarding of the rights of minorities and marginalised groups will thus have to include socio-economic development and enhanced access to services throughout Kenya. Furthermore, the objects which seek to promote democratic accountability for purposes of development have the ultimate aim of enhanced socio-economic development and access to services throughout the country.

#### **4.1.7 Equitable sharing of national and local resources throughout Kenya**

The seventh object of devolved government is “to ensure equitable sharing of national and local resources throughout Kenya”.<sup>130</sup> This object recognises the devolved system of government as an avenue for sharing of state resources both at the national and local level. The object contains two important elements: sharing of resources, and equity in the process of sharing of those resources. While the object recognises that state resources need to be shared across the country for development, there is further recognition of the need to share the resources equitably. Equity introduces the element of “need”, meaning that sharing of resources should be based on needs.

Areas across the country are not equally endowed in terms of resources and thus have varying needs. Some of the disparities in terms of resources and needs are a result of past deliberate policies of exclusion from development and public resources. In these circumstances, distribution of resources according to mathematical equality will result in unfair distribution of

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<sup>129</sup> Article 174 (f).

<sup>130</sup> Article 174 (g).

resources as it will ignore the disparities in the country, some of which were created or deepened through deliberate exclusion. As such, equity aims at “equalisation” and redistribution of resources in order to achieve equitable development. However, this object re-emphasises the main issues that previous objects dealing with development have addressed. Equitable sharing of resources is central to decentralised development<sup>131</sup> and is also an important element in addressing ethnic conflict over state resources.

#### **4.1.8 Decentralisation of State organs, services and functions from the capital**

The eighth object of devolved government is “to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya”.<sup>132</sup> The Constitution defines a “state organ” as a “commission, office, agency or other body established under this Constitution”.<sup>133</sup> Thus, the object can only, in this context, mean counties as they fit into the definition of a state organ. Indeed, most of the services offered by counties, along with their human resources, are concentrated in Nairobi and a few other urban areas, all to the detriment of the majority of the population based in rural areas.<sup>134</sup> However, this object is only an emphasis of the foregoing objects that provide for equitable development and access to services.

The phrase “state organs” may be interpreted to mean deconcentration of central government departments and agencies which are mostly based in Nairobi and have little or no presence outside of it. Indeed, the Constitution expressly provides that “a national state organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service”.<sup>135</sup> However, in the context of devolved government, to which the object applies, the phrase can only mean decentralisation of services to devolved units. Thus, while deconcentration is a desirable objective, especially in order to enhance access to central government services, deconcentration falls outside of the normative meaning and application of the term “devolution”.

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<sup>131</sup> World Bank (1999) 117; Litvack *et al Rethinking Decentralisation in Developing Countries* (1998) 12.

<sup>132</sup> Article 174 (h).

<sup>133</sup> Article 260 (q).

<sup>134</sup> Republic of Kenya ‘Rapid result Initiative: Staff audit in the civil service and the Teachers Service Commission’ (2011) 42.

<sup>135</sup> Article 6 (3).

#### **4.1.9 Enhance checks and balances and the separation of powers**

The last objective of devolved government is “to enhance checks and balances and the separation of powers”.<sup>136</sup> There are two possible ways of looking at this object: first, it may refer to the role that the devolved system of government can play in enhancing accountability at the national level; second, the object may refer to accountability within the county structures. Devolution of powers has the effect of diffusing power from the centre to the devolved units. As such, the subnational level exercises control and powers over which the centre no longer has control.<sup>137</sup> Accordingly, this vertical split of power has the effect of limiting or preventing absolute or total control of all powers by the centre.

The only other way that county governments can enhance horizontal “separation of powers” at the national level is indirectly through the Senate, which represents county interests. Structurally, though, the Senate is part of the national legislature and is indeed provided for under a different chapter of the Constitution where its “separation of powers” functions are listed. However, the object may also be in reference to county structures, in which case it will require checks and balances between organs of government and the separation of power at the county level.

#### **4.2 Assessment of the objects of devolved government**

Six of the nine objects of devolved government (first, third, fourth, sixth, seventh, and eighth) focus directly on development. These six objects deal with democratic accountability, effective participation, responsiveness and allocative efficiency, equitable sharing of resources, and enhancing access to services. All these aspects are important if devolution is to lead to development. For instance, it is mainly through accountable exercise of power that people will be assured that devolved units respond to local needs and enable communities to manage their own affairs and development.<sup>138</sup> Furthermore, a properly designed devolved system can be used to pursue redistributive policies as well as enhance equitable sharing of resources, all of which are central to devolution for development.<sup>139</sup> Thus, any effective system of devolution aimed at development will incorporate all of the six objects of devolved government.<sup>140</sup>

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<sup>136</sup> Article 174 (i).

<sup>137</sup> Baldi B ‘Beyond the federal-unitary dichotomy’ Working Paper, Institute of Governmental Studies, University of California, Berkeley (1999) 11.

<sup>138</sup> World Bank (2000/2001) 106.

<sup>139</sup> World Bank (1999) 117.

<sup>140</sup> World Bank (1999) 111-118.

Two objects of devolved government (second and the fifth) are specific to conflict resolution as a purpose of devolving power. The two objects provide that devolved government will foster national unity by recognising diversity,<sup>141</sup> and that the devolved system will safeguard the rights of minorities and marginalised groups.<sup>142</sup> Kenya's experience shows that political and economic exclusion along ethnic lines has been the main cause of past internal conflicts.<sup>143</sup> Indeed, even generally, exclusion of identifiable groups from effective political and economic participation of a state is the cause of internal conflicts in many conflict-ridden states.<sup>144</sup>

In the Kenyan context, the devolved system of government can only promote national unity if all groups have a sense that they are able to participate effectively in the broader economic and political framework of the state. To this effect, the developmental objectives of equity and redistribution of resources and development remain central to resolving ethnic conflict in Kenya. Effective representation and participation in political structures, on the other hand, will enable all groups, especially minorities and marginalised groups, to also take charge of their own affairs and thus minimise their disaffection.<sup>145</sup> Where all groups, including minorities and marginalised groups are effectively included, the potential for conflict is minimised or eliminated.<sup>146</sup>

Only the ninth object is directly relevant to limiting of central power as a purpose of devolved government. As discussed above, the county governments will share power with the central government, thus limiting the latter's absolute control over all government power. Furthermore, and as indicated earlier, the Senate, which essentially represents counties at the national level, will also facilitate "county rule" at the national level.

While only an analysis of the specific structures, powers and resources will reveal the most prominent of the three purposes, it is clear that much weight was placed on development in the formulation of the objectives of devolution. Indeed, as demonstrated in the discussions in Chapter 4, critical decisions on the structure of devolved government during the constitutional

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<sup>141</sup> Article 174 (b).

<sup>142</sup> Article 174 (e).

<sup>143</sup> Ogot BA 'The decisive years 1956-63' in Ogot BA & Ochieng' WR (eds) *Decolonization and Independence in Kenya: 1940-93* (1995a) 52.

<sup>144</sup> Barkan JD 'Ethnic fractionalization and the propensity for conflict in Uganda, Kenya and Tanzania' in Herbst J, McNamee T & Mills G (eds) *On the Fault Line: Managing the Tensions and Divisions within Societies* (2012) 150.

<sup>145</sup> UNDP 'Local Governance, peace building and state building in post-conflict settings' A UNDP discussion paper (2010) 4.

<sup>146</sup> Murray C & Simeon R 'Promises unmet: multi-level government in South Africa' in Saxena (2011) 248-250.

review were made on the basis of development.<sup>147</sup> This may thus explain the pre-eminence of the developmental purpose of devolution in the objects of devolution.

The nine objects are, however, not exclusive but instead mutually reinforce each other. For instance, effective service delivery and equitable development has the potential to address development-related issues of conflict. Furthermore, centralisation of power is a source of internal conflict, especially where state power is in the exclusive control of a dominant group. Thus, an effective limit to central power has the potential not only to manage or eliminate internal conflict but to facilitate the devolution of necessary controls and thereby improve local efficiency and development. It is hence likely that the achievement of one object will assist achievement of the others.

Nevertheless, while the objectives can be said to be mutually reinforcing, the discussions in Chapter 2 demonstrated that there are potentially conflicting design features for each of the three purposes. Objectives are, however, general and aspirational in nature, whereas the design of a system takes into account concrete details, some of which may be in conflict with each other. In such circumstances, the ideal situation is to identify these conflicting aspects and make trade-offs to ensure that the three purposes can be accommodated in one design.

#### **4.3 Other purposes pursued by devolved government?**

A further review of the nine objects reveals that democracy emerges as a purpose which may be treated as distinct from the three other purposes discussed above. Indeed, accountable exercise of power, self-governance, minority participation in political processes, and separation of powers are all aimed at enhancing the quality of representative democracy. Devolution of power opens up multiple centres for decision-making, thus enhancing democracy and accountability. However, a deeper analysis of the objects reveals that while democracy may be couched as a distinct purpose of devolution, it is primarily an instrumentality through which all the three purposes will be pursued and realised. Put differently, the democratic process facilitates participatory development, inclusiveness and provides ways to limit and control central power.

Thus, while democracy is an important process listed as an objective of devolved government, it serves other substantive purposes without which the concept of democracy would be “hollow” and unhelpful. For instance, democratic participation in decision-making is only useful insofar as it leads to identification of developmental needs to be addressed. This may well be the reason

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<sup>147</sup> CoE ‘Final report of the Committee of Experts on Constitutional Review’ (2010b) 91-92.

why most of the objectives emphasise development as key to democratic and accountable exercise of power. Furthermore, even inclusion in the context of conflict resolution is meaningful only if it addresses the substantive needs of excluded groups, which mainly revolve around resources. Accordingly, participation, accountability and decision-making must be linked to resources or other causes of conflict.

#### **4.4 Principles of devolved government**

The Constitution draws a distinction between objects of devolved government listed in Article 174 and the three principles of devolved government in Article 175. The first provides that “county governments shall be based on democratic principles and the separation of powers”.<sup>148</sup> The second promises that “county governments shall have reliable sources of revenue to enable them to govern and deliver services effectively”.<sup>149</sup> The third principle states that “no more than two-thirds of the members of representative bodies in each county government shall be of the same gender”.<sup>150</sup>

While the objects of devolved government lay down the purposes of devolution, the principles of devolved government seem to deal with the question of the functioning of the counties as opposed to setting out the broad purpose. For instance, while the objectives require effective participation in development, the third principle (the one-third gender rule) lays down a definitive operational rule. All representative structures of county government will thus be required to obey the one-third gender rule. However, the third principle is less precise in its application. It merely restates the need for adequate resources for county governments without a definite process of achieving the same. The general nature of the principle and lack of specific details makes it unhelpful beyond a general recognition of the need for resources. The third principle, on the other hand, merely restates the ninth object which provides for separation of powers.

### **5. County government units and boundaries**

The adoption of 47 counties in the 2010 Constitution as the only constitutionally entrenched level of subnational government impacts differently on the three purposes of devolving power. According to the World Bank, the developmental potential can be realised where units are small

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<sup>148</sup> Article 175 (a).

<sup>149</sup> Article 175 (b).

<sup>150</sup> Article 175 (c).

enough to facilitate participation but large enough to ensure viability.<sup>151</sup> Effectively limiting central power requires fewer and larger, and preferably homogenous, regional units.<sup>152</sup> Conflict resolution, on the other hand, may demand smaller or larger units or both, depending on the circumstances.<sup>153</sup>

The 47 counties adopted in the 2010 Constitution are based on the 46 administrative districts that existed as at 1992, along with Nairobi County which was considered a ‘special province’ in the Provincial Administration (PA) structure.<sup>154</sup> Chapter 4 analysed the factors that led to the adoption of the 47 counties, with the three purposes featuring prominently in the relevant deliberations. The background discussions and the reasons for adoption of those counties are documented.<sup>155</sup> However, the impact and effectiveness of the counties may not necessarily be the same as was intended. This section evaluates the composition, size and number of county government units and the impact of these factors on the three purposes of devolution.

### **5. 1 County boundary demarcation: ethnic accommodation?**

Ethnic conflict is, as argued in Chapters 3 and 4, caused mainly by perceptions of political and economic exclusion along the major ethnic lines. The devolved system of government aims at addressing ethnic conflict by recognising ethnic diversity and safeguarding the rights of marginalised communities. While boundary demarcation can be used to enhance accommodation of diversity and promote integration in divided societies, there is no agreement, in theory or in practice, on a universal approach for doing so.

Proponents of ethnic exclusive units argue that the best approach is one that safeguards against dominance.<sup>156</sup> Others argue that mixed units lay a basis for ethnic integration for the greater nation-building.<sup>157</sup> Thus, in literature and practice there is no agreement on whether ethnically exclusive units or mixed units are the most appropriate in terms of accommodating

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<sup>151</sup> World Bank (1999) 115.

<sup>152</sup> Leonardy U ‘Demarcation of regions: International perspectives’ in de Villiers B & Sindane J *Regionalism: Problems and Prospects* (1993) 4; Watts RL ‘Comparative conclusions’ in Majeed *et al* (2006) 324.

<sup>153</sup> Dhavan R & Saxena R ‘Republic of India’ in Le Roy K *et al* (eds) *Legislative, Executive and Judicial Governance in Federal Countries* (2006) 168.

<sup>154</sup> Section 3 Districts and Provinces Act 1992, cap 5 laws of Kenya.

<sup>155</sup> CoE (2010b) 90.

<sup>156</sup> Fessha (2010) 43.

<sup>157</sup> Anderson L & Stansfield G ‘The implications of elections for federalism in Iraq: Towards a five-region model’ (2005) 35 *Publius: The Journal of Federalism* 359-383.

diversity and promoting inter-ethnic harmony. The legitimacy or lack of it in the pursuit of a particular approach in boundary demarcation may end up determining whether a selected approach will address conflict.<sup>158</sup>

In Kenya, the legitimacy or not of the current boundaries must start with the stated reasons for adopting the current 47 county boundaries.<sup>159</sup> The 47 counties are a product of a colonial policy that entailed an ethnically-based “divide-and-rule” strategy. However, the boundaries were not retained with the explicit purpose of continuing this policy. The 47 county boundaries were adopted because they are large enough to provide additional checks and balances and are at the same time economically viable.<sup>160</sup> Thus, the current county boundaries that are ethnically defined are more of a historical accident that happens to coincide with other apparently legitimate purposes than a reflection of a deliberate policy to organise devolution on the basis of ethnicity.

The CoE had a limited time and mandate to prepare a draft based on wide political consensus. Kivuva observes that the Parliamentary Select Committee on Constitutional Review (PSC) and the National Assembly failed to agree on a mechanism to determine the number, size and composition of county government units.<sup>161</sup> Boundary issues are highly political, and the CoE had a narrow mandate and limited time. Furthermore, it is observed that there were forces bent on using the boundary issue to scuttle the entire review process.<sup>162</sup> This led the CoE to settle on the 1992 districts, which were a somewhat politically neutral fall-back.<sup>163</sup> However, while the adoption of the largely ethnic-based county system is a matter of accident rather than design, the system is still ethnically-based and thus subject to the possible perils and/or benefits of such composition.

### **5.1.1 The ethnic composition and structure of counties**

The structure of county governments in terms of the ethnic composition can be analysed in five main ways. First, the county boundary structure fragments the larger ethnic communities into

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<sup>158</sup> Watts RL *Comparing Federal Systems* (2008) 2.

<sup>159</sup> One factor that stands out in the entire constitutional review process in Kenya is that bodies in charge of the review process not only came up with draft constitutions, but also issued reports which captured the debates, issues and compromises that were made in the process of producing the constitutional drafts.

<sup>160</sup> CoE (2010b) 92.

<sup>161</sup> Kivuva JM ‘Restructuring the Kenyan state’ SID Working Paper 1 (2011) 19.

<sup>162</sup> Nyanjom O ‘Devolution in Kenya’s new constitution’ SID Constitution Working Paper No. 4 (2011) 22.

<sup>163</sup> Kivuva (2011) 19; CoE (2010b) 91.

several counties. Accordingly, each of the larger ethnic communities in Kenya has several counties that are carved out of the former “home provinces”.<sup>164</sup> Due to their numerical superiority (relative to other ethnic communities) and the ethnic-based style of Kenyan politics these five largest ethnic communities (Kikuyu, Luhya, Kalenjin, Luo, Kamba) have emerged as the more politically dominant communities. This is evidenced by the fact that in the run-up to general elections in Kenya, political coalitions and counter-coalitions are largely formed between these five communities while the smaller communities play a peripheral role in the coalition formation.<sup>165</sup> Accordingly, the term “politically dominant” in reference to ethnic communities generally refers to the largest five.

Second, a number of the smaller ethnic minorities that never had their “home province” in the former regime now have a “home county” or two under the 2010 Constitution. Third, there are ethnic minorities who, because of their small size, were not given their own counties and who can be termed “in-county” minorities. Fourth, in counties historical migration has also created “migrant” majorities that are not considered “indigenous” to the area. Lastly, there are counties that are fully or partially urbanised (for instance, Nairobi) and which form ethnic “melting pots”.

Table 2 summarises information pertaining to the ethnic composition of the 47 counties. It is divided into four parts. The first lists the counties that resulted from the split of the larger ethnic communities. The second lists counties with “migrant” ethnic communities. The third part lists the ethnic communities that are small nationally but large enough to have a “home county”. The last part has information on Nairobi County, the only fully mixed and urbanised county with no single ethnic majority. Due to the unavailability of ethnically disaggregated data by county, the table refers only to the apparent majority ethnic group in each of the counties. Although other diversities such as religion may be prominent in some counties, the analysis focuses on ethnic diversity alone.

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<sup>164</sup> Central Province (Kikuyu), Nyanza Province (Luo), Western Province (Luhya) and the Rift Valley Province (Kalenjin).

<sup>165</sup> Barkan (2012) 154-155.

**Table 2: Counties' ethnic composition**

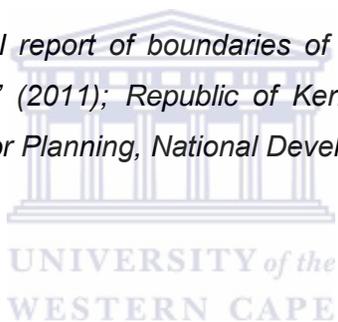
<b>Large ethnic groups</b>			
<b>Category/Ethnic composition</b>	<b>County</b>	<b>Total population</b>	<b>Land area (sq km)</b>
Kikuyu	Nyandarua	596 268	3 245
	Nyeri	693 558	3 337
	Kirinyaga	528 054	1 479
	Kiambu	1 623 282	2 543
	Murang'a	942 582	2 559
Percentage of total population: 38 605 929		<b>11.36 percent</b>	
Kalenjin	Uasin Gishu	894 179	3 345
	Nandi	752 965	2 884
	Baringo	551 561	11 015
	Kericho	758 339	2 479
	Bomet	724 186	2 471
Percentage of total population: 38 605 929		<b>9.54 percent</b>	
Luo	Siaya	842 304	2 530
	Kisumu	968 909	2 086
	Homa Bay	958 991	2 586
	Migori	563 033	1 969
Percentage of total population: 38 605 929		<b>8.63 percent</b>	
Luhya	Kakamega	1 660 651	3 051

	Vihiga	554 622	531
	Bungoma	1 630 934	3 593
	Busia	488 705	1 134
Percentage of total population: 38 605 929		<b>11.2 percent</b>	
Akamba	Machakos	1 098 584	6 208
	Kitui	1 012 709	30 496
	Makueni	884 527	8 009
<b>Subtotal</b>	<b>21</b>	<b>18 728 943</b>	<b>195 100</b>
Percentage of total population: 38 605 929		<b>48.5 percent</b>	
<b>“Migrant” ethnic majorities</b>			
<b>Category/Ethnic composition</b>	<b>County</b>	<b>Total population</b>	<b>Land area (sq km )</b>
Kikuyu	Nakuru	1 603 325	7 495
Kikuyu	Laikipia	399 227	9 462
Luhya	Trans-Nzoia	818 758	2 496
<b>Subtotal</b>	<b>3</b>	<b>2 821 310</b>	<b>19 453</b>
Percentage of total population: 38 605 929		<b>7.3 percent</b>	
<b>Smaller ethnic groups</b>			
<b>Category/Ethnic composition</b>	<b>County</b>	<b>Total population</b>	<b>Land area (sq km)</b>

Kisii	Kisii	1 511 422	2 542
	Nyamira	598 252	899
Meru	Meru	1 356 301	6 936
	Tharaka-Nithi	365 330	2 639
Embu	Embu	516 212	2 818
Maasai	Samburu	223 947	21 022
	Narok	850 920	17 933
	Kajiado	687 312	21 901
Somali	Garissa	623 060	44 175
	Wajir	661 941	56 686
	Mandera	1 025 756	25 991
Turkana	Turkana	855 399	68 680
	Isiolo	143 294	25 336
Borana	Marsabit	291 166	70 961
Waswahili, Duruma, Giriama, Rabai, Boni, Digo	Mombasa	939 370	219
Mijikenda	Kwale	649 931	8 270
	Kilifi	1 109 735	12 610
	Tana River	240 075	38 437
	Lamu	101 539	6 273
Taita	Taita/Taveta	284 657	17 084
Pokot	West Pokot	512 690	9 169
Marakwet	Elgeyo/Marakwet	368 998	3 030
<b>Subtotal</b>	<b>22</b>	<b>13 917 307</b>	<b>463 611</b>

<b>Percentage of total population: 38 605 929</b>		<b>36.0 percent</b>	
<b>Mixed ethnic settlement</b>			
<b>Category/Ethnic composition</b>	<b>County</b>	<b>Total population</b>	<b>Land area (sq km)</b>
Mixed	Nairobi	3 138 369	695
Percentage of total population: 38 605 929		<b>8.1 percent</b>	
<b>Total</b>	<b>47</b>	<b>38 605 929</b>	<b>678 859</b>

*Sources: Independent IEBC 'Final report of boundaries of constituencies and wards' (2012); CRA 'Kenya: County fact sheets' (2011); Republic of Kenya '2009 population and housing census results' (Ministry of State for Planning, National Development and Vision 2030) (2010)*



Map 2: County boundaries



Source: Softkenya-all about Kenya <http://softkenya.com/county/kenya-counties-map/>

### **5.1.1.1 “Fragmentation” of the large ethnic communities**

The five largest ethnic communities in Kenya account for over 50 percent of the total Kenyan population and each controlled a “home region” in the former system of provincial administration. However, as can be seen from Table 2 and Map 2, these communities have been split into several counties – the Kikuyu community, into five, the Luhya, into four, the Luo, into four, the Kalenjin, into six, and the Kamba community, into three, the 22 counties account for over 60 percent of the country’s population.

Apart from the former “home regions”, some of the large ethnic communities are “migrant” majorities in other counties outside of the “home regions”. This can be traced to historical factors such as displacement from the central region leading to immigration to other regions like the Rift Valley. The movements into other regions have, in some cases, fundamentally altered the ethnic composition. Nakuru County, in the former Rift Valley, was originally inhabited by the Maasai, but historical migration of the Kikuyu and the Kalenjin into the area has turned them into a tiny minority.<sup>166</sup> Other counties with substantial “migrant” majorities include Trans-Nzoia (with a Luhya Majority) and Laikipia (with a Kikuyu majority). In some cases, the “migrant” communities have a concentrated rural settlement, mainly as a result of ethnically exclusive land allocation schemes after independence,<sup>167</sup> in others, there are predominantly mixed and urban-type settlements due to ever-increasing rural-urban migration.

### **5.1.1.2 A “home county” for the bigger minorities**

The 47 county boundaries also had the effect of giving the smaller ethnic minorities a “home county”. Most of these ethnic communities were minorities within the former provinces but now have their own territorial units. These approximately 12 ethnic communities<sup>168</sup> each control one or two counties and have a total of 20 counties. The total population of these counties accounts for approximately one-third of the country’s population.

### **5.1.1.3 The emergence of “county minorities”**

Not all ethnic communities have a “home county” in the current structure. A number of the minority ethnic communities share counties with larger ethnic communities. As indicated in

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<sup>166</sup> Kanyinga K ‘The Legacy of the White Highlands: Land rights, ethnicity and the post-2007 elections violence in Kenya’ (2009) 3 *Journal of Contemporary African Studies* 332.

<sup>167</sup> Kanyinga (2009) 332.

<sup>168</sup> Kisii, Meru, Miji Kenda, Somalia, Embu, Maasai, Taita, Pokot, Turkana, Samburu, and the Pokomo.

Chapter 4, the removal of the regional level necessitated the reduction of the number of county governments from 74 to the current 47. While these minority ethnic communities had earlier been allocated their own units, removal of the regional level meant that they will be combined with the larger communities. As noted earlier, approximately 18 communities have a population of 100 000 or less, and these form part of the county minorities.<sup>169</sup>

Within these smaller minorities, there are some that are much larger than the 100 000 referred to above and which thus form a substantial minority within their respective counties. Among the larger “in-county minorities” are: the Kuria in Migori County, Sabaot in Bungoma County, Teso in Busia County and Marakwet in Elgeyo-Marakwet.<sup>170</sup> Most of them remain consistently opposed to the current county boundaries and even voted against the Constitution in the 2010 constitutional referendum.<sup>171</sup> In addition, there are much smaller minorities, such as those numbering 100 000 or less, who may be too small to have a significant “group impact” even in county level politics.

#### **5.1.1.5 Urbanised counties: the ethnic “melting pots”**

Four counties are either fully urbanised or have majority urban-based populations: Nairobi, Machakos, Kiambu and Mombasa. A predominant characteristic of urbanisation is that it creates non-concentrated mixed ethnic settlement due to rural–urban migration across ethnic boundaries. As a result, most urban areas have mixed ethnic settlement as opposed to the ethnically exclusive settlements in most rural areas of the country. However, except for Nairobi, which is “fully mixed”, all other urban areas of the country have a predominant local ethnic group in their urban population structure. While Machakos and Kiambu counties are urbanised, the Akamba and Kikuyu, respectively, are the dominant communities in the two counties. Even in Mombasa, which is fully urbanised with many “migrant” communities from the hinterland, the “indigenous” ethnic communities, who include the Swahili, Duruma, Giriama, Rabai, Boni and the Digo, are the dominant ethnic communities. Kenyans of Asian and European origin are also located mostly in urban areas.

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<sup>169</sup> Wekesa (2012) 2.

<sup>170</sup> Republic of Kenya ‘Final report of the Taskforce on Devolved Government’ (2011) 203.

<sup>171</sup> <http://thedailynation.blogspot.com/2010/08/kenyan-referendum-results-constituency.html> (accessed 5 March 2012).

### 5.1.2 The role of county boundaries in the management of ethnic conflict

The current county boundaries will have an inevitable impact on ethnic harmony in the country. First, the splitting of the larger ethnic communities into several counties may impact on ethnic mobilisation. Second, the granting of “home counties” to smaller groups that hitherto had no home regions has the potential to impact on ethnic accommodation. Third, the current boundaries have given rise to “in-county” minorities and this may form a basis for ethnic minority conflict. Lastly, urbanisation is increasingly creating a “melting pot” of different ethnic communities across the country due to rural-urban migration; this is also likely to affect ethnic harmony.

#### 5.1.2.1 Fractionalisation of larger groups: a “brake” on negative ethnic mobilisation?

Opinion on the effect of “ethno-fragmentation” on inter-ethnic relations is divided, with some scholars supporting it and others criticising it. Barkan and Mutua argue that the splitting of the larger ethnic blocs acts as a “brake” on ethnic mobilisation in Kenyan politics.<sup>172</sup> They observe that due to the fractionalisation, “[d]evolution is also likely to break up the concentrations of power wielded by Kenya’s largest ethnic groups particularly the Kikuyu, the Kalenjin, the Kamba, the Luo, and the Luhya – who together comprise 70 percent of the country’s population”.<sup>173</sup> This is because the counties will on average serve populations smaller than these groups.<sup>174</sup>

Barkan compares this fractionalisation to the gradual division of the Nigerian regions from the original three to the current 36 states.<sup>175</sup> He observes that since it is not possible to alter the ethnic composition or make-up of a country, leaders have to manage the ethnic fault lines which vary from one country to another and sometimes run deep.<sup>176</sup> Roeder supports this strategy, observing that the fractionalisation of larger ethnic groups in Nigeria has empowered smaller ethnic groups and at the same time politically “weakened” the larger ones.<sup>177</sup> Initially, Barkan

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<sup>172</sup> Barkan JD & Mutua M ‘Turning the corner in Kenya: A new constitution for Nairobi’ *Foreign Affairs* (Published by the Council on Foreign Relations) (2010).

<sup>173</sup> Barkan & Mutua (2010).

<sup>174</sup> Barkan (2011) 10.

<sup>175</sup> Barkan JD ‘Ethnic fractionalization and the propensity for conflict in Uganda, Kenya and Tanzania’ in Herbst J, McNamee T & Mills G (eds) *On the Fault Line: Managing the Tensions and Divisions within Societies* (2012) 150.

<sup>176</sup> Barkan (2012) 150.

<sup>177</sup> Roeder PG ‘Ethnofederalism and the mismanagement of conflicting nationalisms’ Erk J & Anderson LM (eds) *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?* (2010) 25.

argues, independence leaders used the “myth of national unity”, repression and resource patronage to manage the “fissiparous tendencies” of their societies. However, the strategy is now shifting as countries such as Kenya, Nigeria and Uganda<sup>178</sup> have adopted the “fractionalisation approach” “by establishing some form of “compensatory regime” that simultaneously considers the level of ethnic fractionalisation and the geographic pattern of uneven development.”<sup>179</sup> The resulting state structures, he adds, are semi-federal structures that respond to various ethnic and development issues, structures which were rejected by independence leaders but whose “time has come” in many countries.<sup>180</sup>

The four largest ethnic groups in Kenya account for almost two-thirds of the population. This composition, Barkan argues, “raises the prospect for conflict because, depending on its size, the largest group needs only form an effective coalition with two or four partners to control the state”.<sup>181</sup> The danger in such an arrangement is that other large groups will rush to form “counter-coalitions” and in the process deeply divide the country in a deadly “zero-sum” game of ethno-political competition.<sup>182</sup> At independence, the KANU/KADU political conflict was a contest between the large and politically dominant communities versus the smaller communities. However, the conflict now pits the larger communities against each other while the smaller communities have taken whichever side they deem expedient.

Given that fragmentation works against the political objective of the large communities, it is bound to be opposed by them. Indeed, in Nigeria only military regimes could carry out the largely “undemocratic” fragmentation of units to the current 36 states.<sup>183</sup> In Kenya, for instance, it has been argued that Kalenjin politicians opposed the Constitution because devolution had the potential “break up their power base in the present Rift Valley Province”,<sup>184</sup> leading to a “No” victory in the 2010 referendum.<sup>185</sup>

As early as 1996 when Moi was still in power, Southall and Wood correctly predicted that “fears for the post-Moi future” may lead the Kalenjin to support genuine devolution of power, if only as a measure to counter central government domination in the hands of the other major ethnic

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<sup>178</sup> Barkan (2012) 150.

<sup>179</sup> Barkan (2012) 150.

<sup>180</sup> Barkan (2012) 150.

<sup>181</sup> Barkan (2012) 154-155.

<sup>182</sup> Barkan (2012) 154-155.

<sup>183</sup> Roeder (2010) 28.

<sup>184</sup> Barkan & Mutua (2010) 3.

<sup>185</sup> Barkan & Mutua (2010) 3.

communities.<sup>186</sup> Moi's rule has been described as a coalition of smaller ethnic groups formed to counter the larger Luo and Kikuyu communities.<sup>187</sup> Given that the larger ethnic communities are wont to oppose fragmentation, one may be surprised that the other large communities never joined the Rift Valley in opposing the counties. The political leaders from the other major communities enjoyed "incumbency" through a coalition agreement which shared powers between the president (Kikuyu) and the Prime Minister (Luo). Both campaigned for the "Yes" vote in the 2010 Constitution. It can be argued that the advantages of "incumbency" made the two communities turn a blind eye on the effects of fractionalisation. Another reason that political leaders from other larger communities supported the fractionalisation is because large regions were also associated with the ethnically divisive talk of *majimbo* which was commonly interpreted as a return to the pre-colonial exclusive ethnic spheres.

Given that the larger ethnic communities are not under one polity, fragmentation denies the communities a ready structure for ethnic political mobilisation. While it is still possible for the larger communities to ethnically mobilise across the current county boundaries during presidential elections, the county boundaries do not complement this destabilising effort. Thus, regardless of the reasons for the support of the devolved structure, the current county boundaries have the potential to address ethnic conflict in Kenya.

#### **5.1.2.2 "Diluting the centre": diffusing power to smaller ethnic groups**

There are two main ways in which the current boundaries may facilitate the accommodation of the smaller ethnic groups. First, the "establishment of the counties will provide each ethnic group, particularly those that are not part of the governing coalition of the national government, with a measure of control over its own affairs".<sup>188</sup> Indeed, where powers and resources are devolved to groups that are not in control of the centre, such devolution may form part of economic and political inclusion and thus address possible conflict.<sup>189</sup> Second, in the face of domination by the larger ethnic communities, fractionalisation has the effect of politically "weakening" the larger ethnic communities, thereby "equalising" them with the smaller ethnic

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<sup>186</sup> Southall R & Wood G 'Local government and the return to multi-partyism in Kenya' (1996) 95 *African Affairs* 526.

<sup>187</sup> Southall & Wood (1996) 526.

<sup>188</sup> Barkan JD 'Kenya: Assessing risks to stability' A report of the Centre for Strategic and International Studies (CSIS), Africa Programme (2011) 10.

<sup>189</sup> World Bank *World Development Report 2011: Conflict, Security and Development* (2011) 83.

communities. Roeder observes the same effect in Nigeria after the gradual fragmentation of the larger communities.<sup>190</sup>

In the Kenyan context in particular, “home counties” are an important step towards management of ethnic harmony. Past centralisation of political powers and resources ensured that only the president’s ethnic community had access to state resources and development; the smaller ethnic communities had no chance, due to their small size, of capturing the presidency. As such, it would not have been possible, under a centralised system, to access and control state resources and powers at the centre. Devolution of powers hence enables the smaller ethnic communities to share in the powers and resources of the state while the larger ethnic communities struggle for the presidency.

From the earlier discussion and table above, the smaller communities (which exclude the largest five, the Kikuyu, Kalenjin, Luo, Luhya and Kamba) will control approximately 22 of the 47 counties. This can be contrasted with the 108 parliamentary constituencies out of 290 parliamentary constituencies.<sup>191</sup> With powers and resources being shared through counties, the current boundary structure has the potential to ensure that ethnic communities with a “home county” effectively participate in sharing of state powers and resources. However, overall effectiveness also depends on how county powers and finances, as well as the structure and powers of the Senate, are designed. (These other matters are examined in later chapters.)

Not all agree that the current county structure will foster ethnic harmony. Akoth, for instance, argues that the Constitution awards “sovereignty to ethnic groups” through ethnically defined boundaries of county governments.<sup>192</sup> He criticises this approach as one that “highlights differences at the expense of the pursuit of perpetual peace”,<sup>193</sup> and concludes that the 47 counties are no different from the colonial administration design of Maasai country, Akamba country and other colonial-era ethnic homelands.<sup>194</sup> Indeed, experience generally shows that conflict or potential conflict has been greatest where identity issues coincide with territorial

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<sup>190</sup> Roeder (2010) 25.

<sup>191</sup> See Chapter 8 Table 2.

<sup>192</sup> Akoth SO ‘Challenges of Nationhood: Identities, Citizenship and Belonging under Kenya’s New Constitution’ (Society for International Development (SID) Constitution Working Paper No. 10) (2011) 15.

<sup>193</sup> Akoth (2011) 15.

<sup>194</sup> Akoth (2011) 15.

boundaries.<sup>195</sup> It has been added that such an approach “freezes” group differences and slows down any processes towards integration and peace.<sup>196</sup>

The divided opinion on Kenyan county boundaries does not come as a surprise, given the general lack of consensus, in both theory and practice, on the ideal approach to boundary demarcation for unity. The divergent views are valid: the county boundaries highlight historical and economic ethnic disparities which can further deepen perceptions that drive ethnic conflict. While communities can seek cross-ethnic integration, the ethnically exclusive nature of boundaries may actually fail to provide a structural basis to facilitate such integration. However, it is also true that many ethnic communities have been economically and politically marginalised and that this structure holds real potential to ameliorate past exclusion. Furthermore, the “equalisation” of the smaller and larger communities through fractionalisation has enhanced general inclusiveness, the lack of which contributed to past ethnic conflict. Thus, while there is some risk of further ethnic conflict, the current boundary structure also has potential benefits.

### **5.1.2.3 The question of county ethnic minorities**

While 74 counties had initially been proposed, removal of the regional level necessitated the reduction of counties to the current 47 counties.<sup>197</sup> However, this meant that a number of small ethnic communities would have to share counties with the larger communities. The communities denied counties include the Kuria in Migori County, the Sabaot in Bungoma County, the Teso in Busia County and other “in-county minorities” in counties such as Elgeyo-Marakwet, Baringo, and Garissa.<sup>198</sup> Most of these “in-county minorities” are opposed to the current county boundaries<sup>199</sup> and voted against the Constitution in the 2010 referendum.<sup>200</sup> Due to their weak voice, their calls for the creation of their own counties were largely ignored in the review process.<sup>201</sup>

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<sup>195</sup> Watts RL ‘Federal co-existence in the Near East: General introduction’ in Fleiner T (ed) *Federalism: A Tool for Conflict Management in Multicultural Societies in the Near East* (1999) 4.

<sup>196</sup> Fessha YT *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* (2010) 40.

<sup>197</sup> CoE (2010b) 70.

<sup>198</sup> Republic of Kenya ‘Final report of the Taskforce on Devolved Government’ (2011) 203.

<sup>199</sup> Nation reporter ‘We have failed in the healing process’ *Daily Nation* 11 May 2010.

<sup>200</sup> <http://thedailynation.blogspot.com/2010/08/kenyan-referendum-results-constituency.html> (accessed 5 March 2012).

<sup>201</sup> Nation reporter ‘Draft: MPs seek more counties for marginal groups’ *Daily Nation* 1 March 2010.

However, calls by “in-county minorities” for the creation of their own counties are likely to continue. The current county boundaries are largely ethnically defined and this may have a spiral effect as “in-county” minorities” end up demanding nothing less than “our own county”. Referred to as “ethnic entrepreneurship”, this trend is led by elites in smaller minority groups who see creation of autonomous units as a way of accessing state resources and opportunities.<sup>202</sup> Adjustment of boundaries and creation of more counties is subject to a rigid constitutional procedure which includes a national referendum where the larger ethnic communities would participate.<sup>203</sup>

The TFDG suggests that decentralisation of power to levels below the county government may encourage “in-county” minorities to participate in governance and thus make decisions affecting their livelihood.<sup>204</sup> However, effective accommodation of county minorities can only be achieved through real sharing of powers and resources with the minorities. Counties have discretion on what to decentralise to the sub-county level and how to do it.<sup>205</sup> Accommodation of “in-county minorities” will thus depend on whether counties will be willing to devolve powers and resources. The sub-county structures (rural and urban) are discussed in more detail in the next chapter, which deals with powers and functions.

#### **5.1.2.4 Urbanisation: a game changer to ethnic conflict?**

There are a few counties that are either fully urbanised or have a majority urban-based population. Even those counties with a few urban areas are experiencing an increased mixed ethnic settlement as a result of rural-urban migration. Indeed, it is estimated that more than half of Kenya’s population will be urbanised by the year by the year 2030.<sup>206</sup> Barkan argues that urbanisation adds a further dimension to inter-ethnic relations in the country. He observes that there is “a growing vibrant middle class of entrepreneurs, technocrats, and business leaders”<sup>207</sup> who are “predominantly young, urban and educated”<sup>208</sup> and have little time for the old-style of

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<sup>202</sup> Ayele ZA ‘Decentralisation, development and accommodation of minorities: The case of Ethiopia’ Unpublished PhD thesis, University of the Western Cape (2012) 217-218.

<sup>203</sup> Article 255 (1) (i) requires an amendment of the provisions on the “structure of devolved government” to be subjected to a national referendum and this can be interpreted to include the addition of another county as the current 57 counties are listed in the First Schedule to the Constitution.

<sup>204</sup> Republic of Kenya (2011) 58.

<sup>205</sup> Article 176 (2).

<sup>206</sup> Republic of Kenya (2011) 39.

<sup>207</sup> Barkan (2011) 2.

<sup>208</sup> Barkan ( 2011) 2.

ethnic politics. He argues that this raises hopes “that the ethnic fault lines of division in the country may one day lose their potency”.<sup>209</sup>

However, while the ethnic “melting pot” may introduce a different dimension to the politics of ethnicity in Kenya, this is yet to happen. Currently, most of the country’s population is based in rural areas that are defined largely along ethnic boundaries. As such, the social change produced by urbanisation has yet to make a significant impact on Kenya’s ethnically-based style of politics.

## **5.2 Forty-seven counties: too many/too small to limit central power?**

Ghai and Cottrell state that “the truth is that there are too many counties, which most likely will weaken the county as against the centre” and that this could be cured only if the counties “are able to present a united stand”.<sup>210</sup> They add that the situation could have been different if the centre was confronted by a smaller number of counties of around five to eight.<sup>211</sup> Indeed, it has been argued that even for more stable federations like Germany and the USA, the 16 *Landers* and 50 states respectively are too many as they have the potential to “dilute” their power vis-a-vis that of their respective federal governments.<sup>212</sup> Indeed, fragmentation has been used as a strategy for central control, as demonstrated in Uganda.<sup>213</sup> Even Nigeria’s gradual fragmentation had a “recentralisation effect”.<sup>214</sup> It is clear that in terms of constraining the centre, counties start from a structurally weak position with the 47 units.

However, as Ghai and Cottrell state, the position of counties vis-a-vis the centre can be enhanced if counties present a united stand.<sup>215</sup> This implies a strong horizontal cooperation between the counties in order to counter their fragmented structure. The TFDG observes that “close kinship linkages” may facilitate such cooperation,<sup>216</sup> but other factors such as the powers and resources controlled by the counties will also determine the ability of counties to constrain

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<sup>209</sup> Barkan (2011) 2.

<sup>210</sup> Ghai & Cottrell (2011) 134.

<sup>211</sup> Ghai & Cottrell (2011) 134.

<sup>212</sup> Leonardy U ‘Demarcation of regions: International perspectives’ in de Villiers B & Sindane J (eds) *Regionalism: Problems and Prospects* (1993) 4.

<sup>213</sup> Singiza DK & De Visser J ‘Chewing more than one can swallow: the creation of new districts in Uganda’ (2011) 15 *Law Democracy and Development* 8.

<sup>214</sup> Roeder (2010) 28.

<sup>215</sup> Ghai & Cottrell (2011) 135.

<sup>216</sup> Republic of Kenya (2011) 30.

or limit central power. Furthermore, the rigid constitutional amendment procedure, which includes a referendum, protects the counties from being further fragmented through adjustment of boundaries to create new counties.<sup>217</sup>

### 5.3 Forty-seven counties and development: an unclear developmental role

The 47 counties complicate the developmental role in two main ways. First, while the counties are not regions, they are not truly local units either; the World Bank maintains that the 47 counties are “not a substitute for local governments”.<sup>218</sup> Indeed, the Bank calls for small units in order to enhance participation in development.<sup>219</sup> However, the 47 county governments replaced 175 local authorities<sup>220</sup> and over 250 deconcentrated administrative districts<sup>221</sup> which were involved in service delivery in the previous order. Thus, even by Kenyan standards, reducing the local authorities to less than half the original number may affect local participation in development. Indeed, during the constitutional review process, many people called for devolution of power to the local level,<sup>222</sup> and the creation of 47 counties seems instead to have concentrated powers in the 47 “non-local” points only. The counties have constitutional powers to decentralise services to levels below, which has the potential to facilitate effective local participation. (Decentralisation to levels below counties is discussed in the next chapter as a county power.)

Second, due to their small size relative to regions, counties cannot effectively take up developmental functions such as regional infrastructure, which straddle several counties, unless they jointly perform such functions.<sup>223</sup> For instance, the World Bank states that counties are “not big enough to become strong regional blocks”,<sup>224</sup> and that while counties may desire to attract industrial development, they are “too small to generate economies of scale, which companies need to be successful”.<sup>225</sup> It is thus clear that while counties may be eager to pursue broader development, their size places limits on the nature of the developmental role they could play.

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<sup>217</sup> Article 188 (b).

<sup>218</sup> World Bank (2012)162.

<sup>219</sup> World Bank (1999) 115.

<sup>220</sup> Institute of Economic Affairs (IEA) ‘Understanding the local government system in Kenya: A citizen’s handbook’ (2009) 12.

<sup>221</sup> Districts and Provinces in Kenya (2009).

<sup>222</sup> Ghai & Cottrell (2011) 129.

<sup>223</sup> Litvack et al *Rethinking Decentralisation in Developing Countries* (1998) 20.

<sup>224</sup> World Bank (2012) iv.

<sup>225</sup> World Bank (2012) 2.

County effectiveness will, however, also depend on the interpretative approach taken in defining their constitutional powers.<sup>226</sup>

#### **5.4 Assessment of the boundaries, size and number of counties**

The size, boundaries and number of counties have an inevitable impact on the three purposes of devolving power. From the discussions in Chapter 2, the ideal size, number and composition of devolved units vary with the purpose. Accordingly, the impact of the size and composition of the 47 counties will vary with the purpose.

##### **5.4.1 The impact on development**

Decentralised development requires small but economically viable units for effective participation.<sup>227</sup> In Kenya, this was a concern as the 47 counties were reduced from the 74 that were initially proposed on the grounds, among others, of economic viability.<sup>228</sup> The 47 counties cannot, however, be termed as local units and are not, as the World Bank observes, substitutes for local governments.<sup>229</sup> There is the potential risk that the 47 counties, due to their relatively large size, may hinder effective local participation and local service delivery. In South Africa, 46 district municipalities, which were largely established as an “upper tier” level above the country’s 283 municipalities at the local level, failed to facilitate effective local service provision as intended partly because of their size.<sup>230</sup> The Constitution envisages decentralisation to levels below the county including a separate framework for urban governance, and this has the potential to fill the gap by facilitating local participation.<sup>231</sup>

##### **5.4.2 The impact on ethnic accommodation**

The main ethnic conflict in Kenya is between major communities who are “presidential contenders”. However, the smaller ethnic communities also feel excluded from power and development because of perceptions that power and resources are skewed in favour of the

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<sup>226</sup> World Bank (2011b) 28.

<sup>227</sup> World Bank (1999) 115.

<sup>228</sup> CoE (2010b) 70.

<sup>229</sup> World Bank (2012) 162.

<sup>230</sup> Steytler N ‘Demarcating district municipalities’ in Steytler N (ed) *The First Decade of the Municipal Demarcation Board: Some Reflections on Demarcating Local Government in South Africa* (2010) 83-85.

<sup>231</sup> Decentralisation to levels below counties is dealt with in the next chapter as a county power.

president's community. Devolution of powers and resources has the potential of diffusing power from the centre by sharing it with other subnational groups not in control of the presidency.<sup>232</sup>

First, the largest ethnic communities have been split into several counties. This "fractionalisation" has denied the larger ethnic groups a "home region" that could facilitate negative ethnic political mobilisation. However, it is also true that the fragmented nature of the counties has contributed to the "unattractiveness" of the units to the large groups. Indeed, fractionalisation as a strategy has, in practice, largely been achieved without the enthusiastic support of the group that is fragmented.<sup>233</sup> As explained in Chapter 4, this is part of the reason why the current devolved system of government was opposed in the Rift Valley. Arguably, a "home region" could have been a better fall-back position for the big losers than the fragmented units. Perhaps due to a lack of a "home region", the larger ethnic communities may be even more determined to capture the presidency, thus intensifying ethnic conflict.

For the smaller ethnic communities that are large enough to get a "home county" and do not have an "ethnic political stake" in the presidency, the county boundary structure offers a basis for their political and economic inclusion. While their overall effectiveness will depend on the resources and powers exercised by counties, the county boundaries provide the basis for economic and political inclusion. However, there is also a risk, as argued by some authors, that ethnically exclusive boundaries may "freeze" identities and hinder ethnic integration. Indeed, the current boundaries highlight the kinds of historical disparities that have the potential to be construed as ethnically biased and thus to deepen the perceptions that drive ethnic conflict.

For the "in-county" minorities, there may be continued disaffection with the current county structures that deny them "home" units. While some counties may choose to share powers and resources with county minorities through decentralisation, and thereby facilitating the latter's inclusion, there is no constitutional guarantee for such an arrangement beyond the mere recognition of the need to safeguard the rights of "in-county minorities". County minorities may not be a threat nationally but can threaten stability in their respective counties. Accordingly, the risk exists that the current county boundaries could form the basis for minority ethnic conflict.

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<sup>232</sup> Ghai (2008) 211, 215-216.

<sup>233</sup> Elaigwu JI 'The Federal Republic of Nigeria' in Majeed *et al* (eds) *Distribution of Powers and Responsibilities in Federal Countries* (2006) 211.

### 5.4.3 Impact on the ability to limit central power

Important ingredients for constraining central power are regional units that are large, few in number, endowed with resources and powers and preferably homogenous in composition.<sup>234</sup> Although the counties were reduced from the proposed total of 74 to the current 47 in order to enhance their ability to check the national government,<sup>235</sup> they are still too fragmented for the task.<sup>236</sup> While the regions that were provided in the initial constitutional drafts had no clear powers and resources,<sup>237</sup> their retention in the final structure could have created an impetus for the gradual devolution of regional-scope functions to the regions. Indeed, the relatively weak South African provinces are said to provide an important basis for limiting central power.<sup>238</sup> The absence of a regional level in Kenya, however, may lead to recentralisation of power due to the lack of a level capable of effectively handling matters with regional scope.

### 5.4.4 Is there a balance of purposes in the structure of county boundaries?

The 47 counties were, as argued in Chapter 4, a clear attempt at balancing the developmental and central power-limiting purposes of devolution. While the 74 units proposed initially were adequate to facilitate local participation, they had to be reduced to the current 47 counties in order to fill in the gap left by removal of regions. However, this is a case of design versus effectiveness. The 74 counties that were proposed initially would definitely have been completely weakened in terms of constraining the centre, but the current 47 counties are still ineffective for the purpose. Furthermore, the 47 counties have created uncertainty with regard to effective local government. Thus, while there are clear trade-offs between the two purposes, the compromise structure is unsuitable for the pursuit of the two purposes which informed the compromise.

The impact of the current county boundaries on ethnic accommodation was not explicitly considered during the review process. This is despite the fact that regions were highlighted as important for purposes of accommodation.<sup>239</sup> There are “default” risks and advantages of the county boundaries to ethnic accommodation, as discussed earlier. However, this is not as a result of a conscious or explicit trade-offs with the other two purposes. It is thus clear that ethnic

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<sup>234</sup> Leonardy (1993) 4.

<sup>235</sup> CoE (2010b) 70.

<sup>236</sup> Ghai & Cottrell (2011) 134.

<sup>237</sup> CoE (2010b) 91.

<sup>238</sup> Murray & Simeon (2011) 250.

<sup>239</sup> CoE (2010b) 68.

accommodation was not seriously considered in the design, despite the possible benefits and risks presented in the structure. On the other hand, development and limiting of central power were considered and trade-offs duly made. The resultant structure is essentially ineffective in its design unless complemented by other measures that can address the potential pitfalls in the design.

## **6. The institutional design of county governments**

Institutions of devolved government are the main avenues through which decisions will be made and the objectives of devolved government institutionally pursued. Institutional structures are thus important in the pursuit of the three purposes of devolution. In regard to development, the local institutional design should generally facilitate local accountability, as this will form a basis for the realisation of local preferences.<sup>240</sup> For conflict resolution, the institutions should facilitate inclusiveness both in terms of the structure and the actual decision-making process.<sup>241</sup> Institutional design should also promote local autonomy, which is important for limiting central power.<sup>242</sup>

The county government structure generally replicates national government structures. It provides for a “presidential system” headed by an elected county governor who appoints his or her “cabinet” (the County Executive Committee (CEC)) subject to approval by the County Assembly (CA),<sup>243</sup> the legislative arm of the county government. Similarly, there are a number of institutional checks and balances put in place to limit the powers of the governor and enhance accountability in the county government generally.

### **6.1 The County Assembly**

The CA is composed of representatives from single-member county wards<sup>244</sup> elected for a term of five years.<sup>245</sup> The TFDG proposed a total of 1450 country wards,<sup>246</sup> which is the number

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<sup>240</sup> World Bank (1999) 112-118. See Abraham KS ‘Kenya at 50: unrealized rights of minorities and indigenous peoples’ (Report: Minority Rights Group International, and Ogiek Peoples Development Programme) (2012) 22-24.

<sup>241</sup> UNDP ‘Local Governance, peace building and state building in post-conflict settings’ A UNDP discussion paper (2010) 4.

<sup>242</sup> Saunders C ‘Legislative, executive and judicial institutions: A synthesis’ Le Roy *et al* (eds) (2006) 351.

<sup>243</sup> Article 175 (a).

<sup>244</sup> Article 177 (1) (a).

<sup>245</sup> Article 177 (4).

<sup>246</sup> Republic of Kenya (2011) 80.

adopted in the CGA.<sup>247</sup> Each county has at least 15 wards.<sup>248</sup> Special interests are also represented in the CA. First, there are “gender seats” to ensure that no more than two-thirds of the membership of the CA is of the same gender.<sup>249</sup> Second, the Constitution provides that “marginalised groups” (including persons with disabilities and the youth)<sup>250</sup> are to be represented in the CA. This provision seems implicitly to exclude “marginalised communities”. However, the CGA which implements the constitutional provisions places the number at six<sup>251</sup> and makes reference to both “marginalised groups” and “marginalised communities” as defined in the Constitution.<sup>252</sup> Indeed, the Constitution uses the term “including” and therefore does not exclude other categories. Gender and special seats are filled through pre-determined political party lists on the basis of their performance in the FPTP county ward seats.<sup>253</sup> Parties are thus allocated gender and special seats in the proportion of FPTP seats won in all the county wards.<sup>254</sup>

The implication of this system is that a political party which wins most or all of the FPTP seats may end up being allocated most or all of the gender and special seats in the CA. While the Constitution describes this system as “proportional representation by use of party lists,”<sup>255</sup> the system differs from known PR systems, where seats are usually allocated in the proportion of party votes.<sup>256</sup> On the contrary, in the system provided in the Constitution, allocation of special seats is based on seats won through FPTP.<sup>257</sup> Oloo observes that this “strange” system does not enhance proportional representation because if the FPTP produces a disproportionate result, most or all special seats will still be allocated to the dominant party, thus causing a further disproportion.<sup>258</sup>

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<sup>247</sup> Section 26 (1).

<sup>248</sup> Section 26 (3) (a) CGA, subsequent reviews, to be carried out between 8 and 15 years, are to ensure that all counties have at least 25 wards.

<sup>249</sup> Article 177 (1) (b).

<sup>250</sup> Article 177 (1) (c).

<sup>251</sup> Section 7 (1).

<sup>252</sup> Section 7 (1) and section 35 (2)(b) of the CGA.

<sup>253</sup> Article 177 (2).

<sup>254</sup> Article 177 (3).

<sup>255</sup> Article 90 (1).

<sup>256</sup> Oloo (2011) 8.

<sup>257</sup> Article 90 (1).

<sup>258</sup> Oloo (2011) 8.

In a bid perhaps to have a “neutral voice” in the CA, the CA is required to elect a speaker from outside the CA and who becomes an *ex officio* member.<sup>259</sup> While the Constitution is silent on the procedure for removal of a CA speaker, the CGA provides that the speaker can be removed by a resolution supported by 75 percent of the CA.<sup>260</sup> The CGA provides that English and Kiswahili shall be the only languages used to transact official business of the CA, thus excluding local languages from CA proceedings.<sup>261</sup>

The CA is constitutionally empowered to enact county laws necessary or incidental to the exercise of county powers and performance of allocated functions.<sup>262</sup> The CA is also constitutionally mandated, within the framework of separation of powers, to exercise oversight over the CEC and the county executive generally.<sup>263</sup> Accordingly, the CA has powers to approve the budget and expenditure of the county governments.<sup>264</sup> The CA also reviews and approves management and development plans prepared by the CEC,<sup>265</sup> as well as plans for the management and exploitation of the county’s resources.<sup>266</sup> In addition, the CA is constitutionally empowered to approve borrowing by a county government.<sup>267</sup>

The CGA extends the CA’s oversight role to appointments by the county governor. While the county governor is empowered to appoint CEC members, the CA is empowered to vet and approve the appointments.<sup>268</sup> The CGA provides that the CA shall not approve nominations to the CEC which do not respect the one-third gender rule<sup>269</sup> or which do not enhance the representation of minorities, marginalised groups, and marginalised communities.<sup>270</sup> The CA can also reject nominations for the CEC which do not reflect the community and cultural diversity of a county.<sup>271</sup>

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<sup>259</sup> Article 177 (1).

<sup>260</sup> Article 178 (3); section 11 CGA.

<sup>261</sup> Section 18 (1) and (2) CGA.

<sup>262</sup> Article 185 (2).

<sup>263</sup> Article 185 (3).

<sup>264</sup> Article 207; section 8 (1) (c) CGA.

<sup>265</sup> Article 185 (4) (a).

<sup>266</sup> Article 185 (4) (b).

<sup>267</sup> Article 212 (a).

<sup>268</sup> Section 30 (2) (d) CGA.

<sup>269</sup> Section 35 (2) (a) CGA.

<sup>270</sup> Section 35 (2) (b) CGA.

<sup>271</sup> Section 35 (2) (c) CGA.

Implementation of the “one-third gender rule” is straightforward. There is, however, no clear and objective way for the CA to arrive at a decision that the CEC represents the cultural and community diversity. The CGA provides that the CEC nominees should “to the fullest extent possible” reflect the community and cultural diversity of the county<sup>272</sup> but this provision is vague and imprecise. This is even more complicated in multi-ethnic or urbanised counties which may have more diversity than can be accommodated in the CEC.

Other appointments which require approval of the CA are the County Public Service Board (CPSB),<sup>273</sup> county chief officers,<sup>274</sup> the clerk to the CA,<sup>275</sup> the county secretary,<sup>276</sup> and any other appointments as may be provided by other legislation.<sup>277</sup>

## 6.2 The County Executive

The county executive is composed of the county governor, deputy county governor and members of the County Executive Committee (CEC).<sup>278</sup> The county governor is directly elected by county voters. However, unlike the president, who needs a specified majority of votes and proportion of votes from the counties, the county governor only needs to garner the most votes, regardless of the proportion or margin, in order to be elected county governor.<sup>279</sup> Thus, a governor need not obtain 50 percent of the vote where there are more than two candidates. The governor can only be re-elected once, as with the president.<sup>280</sup> An aspirant for the county governor’s seat selects a running mate who becomes a deputy county governor of the winning candidate.<sup>281</sup>

Apart from the gender rule and requirements for community cultural diversity, a CEC member must be a holder of a university degree and have at least five years’ relevant experience,<sup>282</sup> and

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<sup>272</sup> Section 35 (1) (a) CGA.

<sup>273</sup> Section 58 (1) (b) CGA.

<sup>274</sup> Section 45 (1) (b) CGA.

<sup>275</sup> Section 13 CGA.

<sup>276</sup> Section 44 (2) (b) CGA.

<sup>277</sup> Section 8 (1) (a) CGA.

<sup>278</sup> Article 179 (2).

<sup>279</sup> Ghai & Cottrell (2011) 127.

<sup>280</sup> Article 180 (7) (a).

<sup>281</sup> Article 180 (7) (b).

<sup>282</sup> Section 35 (3) CGA.

this, unlike the “fluid” rule on diversity, is a hard rule that must be fulfilled.<sup>283</sup> The Constitution caps the CEC membership at ten or less.<sup>284</sup> While the Constitution vests executive authority collectively in the CEC,<sup>285</sup> it specifies that CEC members are accountable to the county governor.<sup>286</sup> The Constitution specifies that the county governor and his or her deputy are the chief executive and deputy, respectively,<sup>287</sup> thereby establishing the governor as “the real head of government” at the county level.<sup>288</sup>

The Constitution is vague on the functions of the governor, but the CGA expands the functions to include coordination of all executive functions in the county.<sup>289</sup> The county governor assents to county legislation<sup>290</sup> and may veto legislation. However, the governor’s veto can be overturned by a two-thirds vote of the CA.<sup>291</sup> The president may also assign “state functions” to the governor, though what amounts to “state functions” is unclear in the Constitution or CGA.<sup>292</sup>

The Constitution lays down the grounds for removal of a county governor from office<sup>293</sup> but leaves the procedure to be determined by national legislation.<sup>294</sup> The CGA<sup>295</sup> provides that the CA can institute proceedings for the removal of the governor.<sup>296</sup> However, the actual impeachment power of the county governor is reserved for the Senate which makes the final decision, by a vote of a simple majority, on whether a governor should be removed from office.<sup>297</sup>

As the Constitution is also silent on the manner of dismissal of CEC and the procedure, it is provided for by the CGA. A member of the CEC can be removed from office for incompetence,

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<sup>283</sup> Mukundi GW ‘The Rights of Indigenous Peoples: Kenya’ International Labour Organisation (ILO) and the African Commission on Human and Peoples Rights (ACHPR) (2009) 33-34.

<sup>284</sup> Article 179 (3) (b).

<sup>285</sup> Article 179 (1).

<sup>286</sup> Article 179 (6).

<sup>287</sup> Article 179 (4).

<sup>288</sup> Ghai & Cottrell (2011) 128.

<sup>289</sup> Section 30 (2) CGA.

<sup>290</sup> Section 30 (1) CGA.

<sup>291</sup> Section 24 CGA.

<sup>292</sup> Section 30 (2) (b) CGA.

<sup>293</sup> Article 180 (1) (b), (c) and (d).

<sup>294</sup> Article 181 (2).

<sup>295</sup> Section 33 CGA.

<sup>296</sup> Article 181 (1).

<sup>297</sup> Section 33 (2) to (10) CGA.

abuse of office, gross misconduct, or failure to attend three consecutive CEC meetings without any reasonable excuse or written authority of the governor.<sup>298</sup> A member of the CEC may also be removed from office for gross violation of the Constitution, or on grounds of mental or physical incapacity which renders the member unable to discharge the functions of a CEC member.<sup>299</sup> The CA can institute proceedings for the removal of a CEC member and vote to have a member of the CEC removed from office.<sup>300</sup> The governor is required to promptly dismiss a member of the CEC against whom CA proceedings, on the grounds listed above, have been completed.<sup>301</sup> Regardless of the procedure involving the CA in removal of a CEC member, the governor can dismiss a CEC member if the governor “considers that it is appropriate or necessary to do so”.<sup>302</sup>

While the Constitution provides for autonomy of the county executive to hire staff,<sup>303</sup> the powers to do so are delinked from the county governor and vested in another county body, the County Public Service Board (CPSB).<sup>304</sup> The CGA establishes a CPSB<sup>305</sup> for each county which is charged with power to establish and abolish offices in the county.<sup>306</sup> The Constitution, however, provides that the nationally-based Public Service Commission shall “hear and determine appeals in respect of county governments’ public service”.<sup>307</sup> While the governor has power to appoint the CPSB members, the CA vets and approves the nominees to the CPSB whose membership is restricted to three to five members.<sup>308</sup> In order to enhance the independence of the CPSB, the members serve for a non-renewable term of six years.

The Constitution is general and vague on the nature and extent of national Commission’s jurisdiction with regard to appeals. The CGA provides that appeals to the national Public Service Commission can cover recruitment, selection, appointment, and qualification attached to any office.<sup>309</sup> Appeals can also be made in respect of remuneration and terms and conditions of

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<sup>298</sup> Section 40 (1) CGA.

<sup>299</sup> Section 40 (1) CGA.

<sup>300</sup> Section 40 (2) CGA.

<sup>301</sup> Section 31 (b) CGA.

<sup>302</sup> Section 31 CGA.

<sup>303</sup> Article 235 (1); Article 234 (3) (b).

<sup>304</sup> Section 56 (1) CGA.

<sup>305</sup> Section 56 (1) CGA .

<sup>306</sup> Section 58 CGA.

<sup>307</sup> Article 234 (2) (i).

<sup>308</sup> Section 58 CGA.

<sup>309</sup> Section 77 (2) (a) CGA.

service, national values and principles of governance, retirement or other removal from service, pensions and gratuity, and other matters the national Commission considers as falling within its constitutional competence.<sup>310</sup> The CGA thus extends the jurisdiction of the nationally-based Public Service Commission to virtually all matters concerning county public service and thus leaves almost nothing to the CPSB's exclusive jurisdiction.

### **6.3 Assessment of county institutional design**

The county institutional design discussed above has an inevitable impact on the three purposes. The county institutional structures are expected to facilitate local responsiveness and accountability, which are critical in addressing local preferences. Additionally, the institutional design should promote inclusiveness by reflecting the county's diversity and enhancing inclusive decision-making. Lastly, the institutional design should facilitate the autonomy of county government and thus the ability to limit central power. The design discussed above has the potential to advance the realisation of the three purposes. However, aspects of the design may also hinder the realisation of those purposes.

#### **6.3.1 County institutional design and development**

##### **6.3.1.1 Design aspects which promote effective development**

The county governor is directly elected by voters, a factor which the World Bank argues is necessary for enhancing accountability at the subnational level.<sup>311</sup> Direct elections give voters a chance to vote for a person of their choice, and it is assumed that voters make a rational choice and vote for a person who will respond to local preferences.<sup>312</sup> Direct elections are also extended to county ward representatives, meaning that voters can use the electoral process to hold their representatives accountable.

The county governor is the head of the executive, and members of the CEC are accountable to him or her. The county governor is thus able effectively to make decisions and can be held accountable by the electorate accordingly. Direct elections and the decision-making powers can direct the county governor to address local preferences and thereby promote effective devolved development.

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<sup>310</sup> Section 77 (2) CGA.

<sup>311</sup> World Bank *World Development Report 1997: The State in a Changing World* (1997) 112.

<sup>312</sup> World Bank (1997) 112.

### **6.3.1.2 Design aspects which may hinder effective development**

While the county governor has powers to make executive decisions, he needs an effective majority in order to ensure that his or her decisions are approved or supported in the CA. However, there is no requirement that a county governor must win with a specified proportion of county wards or margin of votes. It is possible for a county governor to be elected by a minority vote, courtesy of a split vote, in cases where there are more than two candidates. In such a situation, the minority governor may lack support in the CA and county business may end up being frustrated or even derailed. If important processes such as approval of budget, expenditure, and appointments, are frustrated or derailed, the development process may be affected.

Effective participatory development requires that all sectors of society are represented in democratic structures.<sup>313</sup> Indeed, the World Bank argues that effective participation can be measured only from the ability of the marginalised to hold political and administrative leadership to account.<sup>314</sup> However, the FPTP system for electing representatives of county wards favours local majorities.<sup>315</sup> Minorities and marginalised communities are further excluded by an unfavourable system of nominating special representatives. As such, the institutional design does not facilitate effective participation.

### **6.3.2 Institutional design of county governments and ethnic accommodation**

#### **6.3.2.1 Design aspects which enhance ethnic accommodation**

The county institutional design enhances ethnic accommodation in a number of ways. First, the fractionalisation of the larger ethnic groups has created several “intra-community” electoral processes. This has the potential to divert attention from broader group political mobilisation to the county elections that happen intra-communally, and may have the overall effect of putting a brake on community-wide political mobilisation. Indeed, the main ethnic conflict is between the large communities. The county electoral system may diffuse community-wide political mobilisation by making each county, a fragment of the larger group, concentrate on its individual political processes.

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<sup>313</sup> World Bank *World Development Report 2000/2001: Attacking Poverty* (2000) 106.

<sup>314</sup> World Bank (2000) 106.

<sup>315</sup> IEBC ‘The revised preliminary report of the proposed boundaries of constituencies and wards: Volume 1 (9 February 2012)’ (2012) 27.

For the smaller ethnic communities with “home counties”, the county institutional design will enable communities to choose their own representatives. The FPTP system allows them to elect the county governor and their ward representative directly. The institutional design thus facilitates effective inclusion in governance for communities with “home counties”.

### **6.3.2.2 Design aspects which hinder ethnic accommodation**

The FPTP system for electing the county governor and ward representative has the potential to exclude “in-county minorities.” Furthermore, while the need for special representation of minorities is recognised, the system used to choose the representatives negates the intention. It is unlikely that county minorities will secure the governor seat or even, in some cases, county ward seats. The IEBC, too, did not consider county minorities in the demarcation of county ward boundaries.<sup>316</sup> The dominant party, which incidentally belongs to the county majority, has the prerogative of choosing minority representatives and may end up choosing party loyalists as opposed to genuine representatives of “in-county minorities”.<sup>317</sup> The county institutional design excludes county minorities, despite recognising the need for their representation; this may form the basis for ethnic minority conflict.

In regard to election of a governor, lack of proportion or margin requirements may hinder ethnic accommodation. A candidate from the majority ethnic community may end up relying on his or her own ethnic community to win. In contrast to the national level, the president is not only required to win more than half the votes but should also win votes in more than half of the 47 counties.<sup>318</sup> A similar requirement for governor elections could have forced candidates to cross-appeal for votes, which could have given impetus to ethnic integration.<sup>319</sup> The current structure could end up merely replicating the all-too-familiar pattern of national politics where candidates appeal for political support from their own communities to the exclusion of other communities.<sup>320</sup> A governor elected into office on the basis of majority ethnic support is likely to serve ethnic interests and thus exclude other communities. The provisions requiring that community and

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<sup>316</sup> IEBC (2012) 27.

<sup>317</sup> Oloo A ‘Elections, representations and the new Constitution’ Society for International Development (SID) Constitution Working Paper No. 7 (2011) 2.

<sup>318</sup> Reilly (2004) 20.

<sup>319</sup> Reilly (2004) 20.

<sup>320</sup> Mbathi M & Ngau P ‘The geography of voting in Kenya: An analysis of the 2007 presidential, parliamentary and civic voting patterns’ in Kanyinga K & Okello D (eds) *Tensions and Reversals in Democratic Transitions: The Kenya 2007 General Elections* (2010) 139-174.

cultural diversity be respected are not clear and are hence not an adequate safeguard for ethnic accommodation in county structures. A partisan CA, mainly as a result of the FPTP system and mode of choosing nominees, may further exclude minorities not represented in the CA by approving and supporting executive policies conceivably aimed at the exclusion of “in-county minorities”.

The academic qualifications and extensive professional experience required for appointment to the CEC may lock out marginalised communities, who normally have low formal literacy levels.<sup>321</sup> In essence, this requirement prioritises the developmental purpose of devolution over representation of diversity. County minorities are already disadvantaged by the FPTP system, and the requirement for academic qualifications may cause further exclusion. It thus can be concluded that the county institutional design excludes county minorities and that this could form the basis for county minority conflict. While county minorities are not a major political threat, they can be disruptive at the county level where they have a stronger presence; the constitutional design may, in this regard, form a basis for such conflict.

### **6.3.3. County institutional design and limiting central power**

#### **6.3.3.1 Design aspects which enhance the ability to limit central power**

The county institutional design generally enhances the autonomy of county governments from the central government. While county power is divided into executive and legislative power, both are exercised by elected representatives at the county level. Nomination of special representatives in the former local authorities was done by the central government in the past; however, the process is now done by political parties using pre-determined party lists. This enhances institutional autonomy, as central nominees have been used in the past to undermine local councils in opposition areas. Furthermore, a directly elected governor is believed to have a sounder basis for asserting county autonomy and challenging an intrusive central government than one who is appointed.<sup>322</sup>

#### **6.3.3.1 Design aspects which hinder the centre-constraining ability of counties**

There are a number of design gaps which are left to national legislation, a situation which may create an opportunity for central government to undermine county autonomy through national laws. While impeachment proceedings against the governor are commenced in the CA, the

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<sup>321</sup> Mukundi (2009) 30-33.

<sup>322</sup> World Bank (1999) 121.

CGA bestows the actual impeachment powers on the governor in the Senate. The Senate is established to protect the interests of counties, but in a situation where the president has control of the Senate; such a power may be prone to abuse. For instance, the president may use the Senate to remove “errant” governors whenever an opportunity presents itself in the Senate.

The Constitution generally states that the national Public Service Commission has powers to hear and determine appeals from decisions of the CPSB. However, the CGA lists grounds of appeal to include decisions on recruitment, retirement, and remuneration. It appears that the national Public Service Commission can overturn all matters that the CPSB. The national Public Service Commission may end up end intruding into areas of county government autonomy such as power to hire staff and terminate services at the county level. It can thus be concluded that while the county institutional design generally grants autonomy to county governments, there are design gaps that could allow county autonomy to be undermined by national legislation.

#### **6.3.4 Is there a balance of purposes in the design of county government structures?**

The FPTP system is potentially a major impediment to ethnic accommodation despite the many benefits it presents to Kenya.<sup>323</sup> The PR system, which is recommended for both development<sup>324</sup> and conflict resolution,<sup>325</sup> may have been the ideal compromise between the two purposes. While the CoE purports to have adopted a PR system for choosing special representatives, the system only serves to further exclude minorities. The current electoral system thus serves development but hinders ethnic accommodation. The FPTP system used for electing the governor likewise favours development and the limiting of central power, but it does not facilitate ethnic accommodation. Indeed, ethnic accommodation requires collective exercise of powers in order to enhance inclusiveness. However, the structures entitle a powerful individual to make decisions, something which is potentially ethnically divisive. Although ethnic accommodation was considered during the deliberations, it was not given serious attention, especially with regard to viable trade-offs with the other two purposes.

Competence is important for effectiveness, but the high qualification required for CEC members may exclude county minorities. While community and cultural diversity is provided for as an element in the composition of the CEC, it is a secondary requirement which comes after a hard rule on qualifications. As such, development is elevated at the expense of ethnic

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<sup>323</sup> Oloo (2011) 8.

<sup>324</sup> World Bank (1999) 121.

<sup>325</sup> Oloo (2011) 3.

accommodation. It can thus be concluded that the county institutional design only succeeds at balancing development and the limitation of central power at the price of neglecting ethnic accommodation.

Some aspects of the design impede realisation of all the three purposes. Simultaneous county and national elections are likely to see county development issues sidelined in national political campaigns.<sup>326</sup> Worse still, joint elections are most likely to focus on ethno-political competition for the control of the presidency and hence negate the very benefits that can be derived from fragmentation of the communities that are presidential contenders. What is more, presidential candidates may end up having their lackeys elected as county governors, thus forming a basis for undermining county autonomy.

## **7. Conclusion**

This chapter has evaluated the size, number and boundaries of counties as well as the institutional design of county governments. In regard to county boundaries, there was an explicit attempt to balance development and the limiting of central power. However, the resulting “hybrid level” is ineffective for the pursuit of both of them. In terms of conflict resolution, the fractionalisation of larger ethnic communities and “equalisation” with smaller ethnic communities may prevent ethnic mobilisation, but it also makes the county level an unviable consolation prize to losers in the presidential contest. Similarly, both the county boundaries and institutional design serve to exclude county minorities, hence creating the potential for county ethnic conflict.

The limitations brought by the county boundary and institutional design may, however, be partly remedied by other measures. Sub-county structures may actually ensure effective participatory development and accommodation of ethnic minorities. Furthermore, while the counties are structurally weak in limiting central power, mainly as a result of their fragmented nature, the design of the centre may address this weakness by providing institutional arrangements that can enhance the limiting and even counterbalancing of central power at the centre. Accordingly, there are several other factors that may enhance the pursuit of the three purposes regardless of these structural limitations. The next chapter discusses county powers and functions.

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<sup>326</sup> World Bank (1999) 114; Powell D ‘Why a single election for all three spheres would be a bad move’ (2011) 13 *Local Government Bulletin* 19-20 for a discussion on the importance of separate local and national elections.

## CHAPTER SIX

### THE POWERS AND FUNCTIONS OF COUNTY GOVERNMENTS

#### 1. Introduction

In order to realise development, devolved units should, within necessary national controls, have a final say over clearly defined and relevant functions.<sup>1</sup> Clearly defined functions can facilitate accountability as local communities will know what is expected of their local authorities and hold them to account accordingly.<sup>2</sup> Moreover, in terms of resolving internal conflict, the powers of devolved units should be relevant to<sup>3</sup> the “narratives that support conflict” in a particular context.<sup>4</sup> These may include powers, resources and/or identity issues such as language and culture.<sup>5</sup> Furthermore, the powers devolved to constituent units should be politically significant and thus directly or indirectly impose constraints on central power.<sup>6</sup>

The Constitution stipulates that sovereign power, which emanates from the people, is vested in parliament and the legislative assemblies of county governments, as well as in the national and county executive structures.<sup>7</sup> This provision reflects a fundamental change in approach to powers of subnational governments in Kenya. While the former local authorities derived their powers from national legislation and administrative fiat, the powers of county governments are a product of the constitutional division of state power and shared sovereignty. This chapter examines the powers and functions of county governments.

County government powers are, for purposes of enhancing accountability, divided into legislative and executive powers.<sup>8</sup> The Constitution empowers counties to make any laws in

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<sup>1</sup> World Bank *World Development Report 1999/2000: Entering the 21<sup>st</sup> Century* (1999) 114-122.

<sup>2</sup> World Bank *Devolution Without Disruption: Pathways to a Successful New Kenya* (2012) 23.

<sup>3</sup> United Nations Development Programme (UNDP) ‘Local governance, peace building and state building in post-conflict settings: A UNDP discussion paper’ (2010) 7.

<sup>4</sup> World Bank *World Development Report: Conflict, Security and Development* (2011a) 83.

<sup>5</sup> Reka A ‘The Ohrid Agreement: The travails of inter-ethnic relations in Macedonia’ (2008) 9 *Human Rights Review* 62; World Bank (2011) 83; Ghai YP ‘Devolution: Restructuring the Kenyan state’ (2008) 2 *Journal of Eastern African Studies* 211, 215-216.

<sup>6</sup> Roeder PG ‘Ethnofederalism and the mismanagement of conflicting nationalisms’ in Erk J & Anderson LM *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?* (2010) 18.

<sup>7</sup> Article 1 (3) (a) and (b).

<sup>8</sup> Article 175 (a).

exercise of their powers; they can also pass laws on matters which, though not within their jurisdiction, are incidental to the effective exercise of county powers.<sup>9</sup> Counties can be assigned more powers by national legislation. Furthermore, governments at either level can transfer their respective functions to the other level, subject to the receiving government's consent and other conditions stipulated in the Constitution. The counties thus have what can be termed original powers, along with the possibility of acquiring more powers through assignment or transfer.

It was argued in Chapter 5 that the number and size of counties pose a challenge to the pursuit of the three purposes. This chapter, too, argues that tension between the “regional” and “local” role of counties is evident in the distribution of powers and functions, a tension which in turn complicates the pursuit of development. Additionally, counties are denied powers necessary to address some of the root causes of ethnic conflict. The nature of powers and functions devolved to counties makes them typical local government units engaged in local service delivery. While these powers are important for local service delivery development, they diminish the “political significance” of counties in the national political scene and inhibit counties from effectively limiting central power. Accordingly, while county powers are suited for local development, the powers are too weak to limit central power and cannot facilitate ethnic accommodation of the larger communities, who are likely to remain fixated on the “all-powerful” centre.

## **2. Original county powers**

The Fourth Schedule is the main source of county powers and functions.<sup>10</sup> The Constitution also provides that counties may make any laws necessary in order to facilitate the effective exercise of Fourth Schedule powers. In other clauses, the Constitution empowers counties to participate in constitutional amendments through the popular initiative. The Constitution also grants counties some powers over community land which counties hold in trust for the local communities. Moreover, counties have powers over local government. The constitutional entrenchment of these specific powers implies that counties can draw directly upon the Constitution as the source of their powers. De Visser refers to this kind of power as “original” or “primary” power.<sup>11</sup>

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<sup>9</sup> Article 185 (2) and Article 186 (1).

<sup>10</sup> Article 186 (1).

<sup>11</sup> De Visser J *Developmental Local Government: A Case Study of South Africa* (2005) 121.

## 2.1 Fourth Schedule functions

The Constitution distributes national and county government powers through two separate lists in the Fourth Schedule, which contains national (Part 1) and county functions (Part 2), respectively. There is no explicit list of what is concurrent or exclusive to the two levels of government as is the case, for instance, in the South African<sup>12</sup> and Nigerian<sup>13</sup> constitutions. As such, concurrent powers and functions are implied by the two lists in the Fourth Schedule.

### 2.1.1 Functional areas of county governments

Functional areas listed in the second part of the Fourth Schedule as county functions include, inter alia, agriculture, health, transport and communication, infrastructure and development, planning and trade. In agriculture, counties have powers over crop and animal husbandry, livestock yards, county abattoirs, plant and animal disease control, and fisheries.<sup>14</sup> In the health sector, functional areas that fall under the county domain include “county health services” which are disaggregated as: county health facilities and pharmacies; ambulance services; promotion of primary health care; and licensing and control of undertakings selling food to the public. Other county health services include veterinary services, cemeteries, funeral parlours and crematoria, refuse removal, refuse dumps and solid waste disposal.<sup>15</sup> County functional areas also include control of air and noise pollution and other public nuisances, and outdoor advertising.<sup>16</sup>

The Fourth Schedule allocates “county transport” to counties, which includes county roads, street lighting, traffic and parking, public road transport, and ferries and harbours. Regulation of international and national shipping is, however, reserved for the national government.<sup>17</sup> In trade development and regulation, counties have powers over markets, trade licences, fair trading practices, local tourism, and cooperative societies.<sup>18</sup> With regard to planning and development, counties have powers over “county planning and development”, which includes statistics, land survey and mapping, boundaries and fencing, housing, and electricity and gas reticulation and

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<sup>12</sup> The Fourth and Fifth Schedules to the Constitution of South Africa (1996) contain separate lists of concurrent and exclusive functional areas.

<sup>13</sup> Elaigwu JI ‘The Federal Republic of Nigeria’ in Majeed A *et al* (eds) *Distribution of Powers and Responsibilities in Federal Countries: A Global Dialogue on Federalism* (2006) 213-215.

<sup>14</sup> Item 1 Part 2, Fourth Schedule.

<sup>15</sup> Item 2 Part 2, Fourth Schedule.

<sup>16</sup> Item 3 Part 2, Fourth Schedule.

<sup>17</sup> Item 5 Part 2, Fourth Schedule.

<sup>18</sup> Item 7 Part 2, Fourth Schedule.

energy regulation.<sup>19</sup> In addition, counties have powers over “county public works and services” which include storm water management systems in built-up areas, and water and sanitation services.<sup>20</sup>

In the education sector, counties have a mandate over pre-primary education, village polytechnics, homecraft centres and childcare facilities.<sup>21</sup> Counties also have powers over “cultural activities, public entertainment and public amenities”. These include betting, casinos and other forms of gambling, racing, liquor licensing, cinemas, video shows and hiring, libraries, museums, sports and cultural activities and facilities, and county parks, beaches and recreation facilities.<sup>22</sup> Counties have powers, too, to ensure the coordination and participation of communities and locations in governance at the local level. Specifically, they have powers to assist communities and locations to develop the administrative capacity for the effective exercise of the functions and powers as well as for participation in local governance.<sup>23</sup>

Other areas listed as county functions in the Fourth Schedule are “animal control and welfare” which include licensing of dogs, and facilities for the accommodation, care and burial of animals.<sup>24</sup> Counties have powers over fire fighting services and disaster management,<sup>25</sup> as well as powers over the control of drugs and pornography.<sup>26</sup>

The county functions highlighted above have been described as “very high-level aggregated functions”; it has been observed, too, that “additional decisions are required at a more detailed intra-sectoral level”.<sup>27</sup> A government report has also noted that many of the national and local functions were understated while others were totally omitted.<sup>28</sup> The county functions can be described as broad functional areas that require further clarity on the specific powers allocated to each level of government.

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<sup>19</sup> Item 8 Part 2, Fourth Schedule.

<sup>20</sup> Item 11 Part 2, Fourth Schedule.

<sup>21</sup> Item 9 Part 2, Fourth Schedule.

<sup>22</sup> Item 4 Part 2, Fourth Schedule.

<sup>23</sup> Item 14 Part 2, Fourth Schedule.

<sup>24</sup> Item 6 Part 2, Fourth Schedule.

<sup>25</sup> Item 12 Part 2, Fourth Schedule.

<sup>26</sup> Item 26 Part 2, Fourth Schedule.

<sup>27</sup> World Bank ‘Navigating the storm, delivering the promise: With a special focus on Kenya’s momentous devolution’ (Kenya economic update) (2011b) 28.

<sup>28</sup> Republic of Kenya ‘Report on devolved functions, structures and staffing for county governments’ Ministry of State for Public Service (2012) 2.

The World Bank identifies “basic health and education, street lighting and cleaning, water, sewerage and power, public markets and refuse collection, major transport networks and land development for business and residential purposes” as typical local government functions.<sup>29</sup> Most of these functions appear in the list of county functions, and it can be preliminarily concluded that counties will be generally in a position of providing basic local services.

A further reading of the functions in the first and second parts of the Fourth Schedule shows that county powers are limited in essential areas. For instance, counties have been denied powers over primary and secondary education which is, in conventional and comparative practice, a function left to lower levels of government.<sup>30</sup> Counties are limited<sup>31</sup> to pre-primary education, village polytechnics, homecraft centres and childcare facilities only.<sup>32</sup> Counties have also been denied powers over language policy and the promotion of official and local languages.<sup>33</sup> This means that counties cannot determine the use of local languages or provide an essential service such as education. The overall effectiveness of county powers and functions will, however, depend on the nature, extent and scope of powers exercised by counties. This will, in turn, depend on how the county powers are interpreted.

### **2.1.2 The scheme of distribution of the Fourth Schedule powers and functions**

While the full extent and nature of county powers is subject to further clarification and interpretation, there is still a discernible trend or pattern in the allocation of functions between the national and counties. First, the Fourth Schedule generally allocates policy-making to the national government while responsibility of implementation is left mainly to county governments. Second, functions and powers that are national in nature or scope are generally allocated to national government, while powers and functions which require local implementation are generally allocated to county governments.

#### **2.1.2.1 “Policy-making” versus “implementation”**

The national government is vested with policy-making powers over health,<sup>34</sup> agriculture, transport, energy, economic policy and planning, and tourism policy and development. In each

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<sup>29</sup> World Bank *World Development Report 1988* (1988) 157.

<sup>30</sup> World Bank (2012) 33.

<sup>31</sup> Ghai & Cottrell (2011) 121-122.

<sup>32</sup> Item 9, Part 2 Fourth Schedule.

<sup>33</sup> Item 5, Part 1 Fourth Schedule.

<sup>34</sup> Items 23 and 28, Part 1 Fourth Schedule.

of these areas, county governments are generally allocated an implementation role. Counties are, for instance, allocated powers over county health services, trade development and regulation, local tourism, electricity and gas reticulation and energy regulation, among other functions.

However, the division between national and county functions (policy-making versus implementation) is by no means neat. In education, for instance, the national government is in charge of policy as well as primary and secondary education, an implementation role usually left to the subnational level.<sup>35</sup> Furthermore, concurrent powers imply that both levels of government possess equal powers over concurrent matters, a situation which further negates clarity in the division of power.

### **2.1.2.2 “National” functions versus “county” functions**

Many of the functions allocated respectively to the national and county governments amount to shared functional areas. However, there is also a discernible attempt in the Fourth Schedule to create some distinctness between what is allocated to the national and the county government. Some of the functions that seem to have “national scope” are allocated to the national government. These include powers over use of international waters and water resources<sup>36</sup> and national economic planning,<sup>37</sup> and national statistics and data on population.<sup>38</sup> In the health sector the national government has powers over “national referral health facilities”;<sup>39</sup> it also has powers over ancient and historical monuments of “national importance”.<sup>40</sup>

Counties, on the other hand, have functions with a “county” qualification. These include “county health services”, “county roads”, “county transport”, “county planning and development”, and “county public works”. While other functions do not have the “county” prefix, the very nature of the function requires “local” performance, for example, ensuring and coordinating community participation, local markets and local livestock sale yards. However, neither the “county” qualification nor the apparent national-local dichotomy of the functions makes the division of powers clear. The exact nature and scope of county powers may only become clear after the list of county powers has been interpreted and unbundled into specific powers.

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<sup>35</sup> World Bank (2012) 33.

<sup>36</sup> Item 2, Part 1 Fourth Schedule.

<sup>37</sup> Item 9, Part 1 Fourth Schedule.

<sup>38</sup> Item 11, Part 1 Fourth Schedule.

<sup>39</sup> Item 23, Part 1 Fourth Schedule.

<sup>40</sup> Item 25, Part 1 Fourth Schedule.

### 2.1.3 The uncertainty and complexity of the Fourth Schedule powers

As indicated earlier, the Fourth Schedule functions need further clarity due to their highly aggregated nature and the lack of an explicit list of concurrent powers and functions. Furthermore, while there is a discernible trend of “policy versus implementation” and a “national-local dichotomy” in the division of functions, it is a general delineation with no clear and specific boundaries. Indeed, some functions which are of a local nature, such as primary education and policy on use of local languages, are allocated to the national government. Accordingly, the Fourth Schedule alone does not provide assistance in understanding the specific powers of counties and those of the national government.

The lack of an explicit list of concurrent powers means that concurrent powers are to be determined from the two lists.<sup>41</sup> Yet this distinction is important, given the varying constitutional treatment of the different kinds of county powers. The national government has no jurisdiction over a function that is exclusively allocated to the county level. For instance, if a county passes a law on a matter of concurrent jurisdiction that is clearly overridden by national legislation, such a law is only rendered inoperative (not invalid) to the extent the inconsistency.<sup>42</sup> However, if a law is passed by any level of government on a matter that is exclusively vested in another level of government, such a law is simply unconstitutional and invalid by dint of the lack of jurisdiction to pass the law.

Exclusive powers thus have the potential to bolster the autonomy of county governments as the national government is excluded from exercising any of these powers. On the other hand, while both levels have the same powers over matters of concurrent competence, the powers are limited by overrides. De Visser defines “concurrent powers” as a scheme of division of powers where “both spheres have the same legislative competency and the overriding provisions determine which law prevails in a case of conflict”.<sup>43</sup> Therefore, a distinction between what is concurrent and exclusive in the Fourth Schedule is important as it forms a basis for understanding the nature, scope, and extent of county powers. There is, however, no neat boundary between concurrent and exclusive powers, and what belongs to either category will be determined through interpretation.

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<sup>41</sup> Ghai YP & Cottrell JG *Kenya's Constitution: An Instrument for Change* (2011) 120.

<sup>42</sup> Article 191 (6).

<sup>43</sup> De Visser (2005) 126.

Given that the two lists in the Fourth Schedule do not, for the reasons advanced above, offer clarity on the specific powers of the national and county functions, one may have to rely on other relevant constitutional provisions to understand the nature and extent of the respective powers and functions listed in the Schedule.

#### **2.1.4 Interpreting the Fourth Schedule**

There are four important constitutional provisions that may aid understanding of the nature and scope of the Fourth Schedule powers. The first states that “except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule”.<sup>44</sup> While it states an obvious point, this provision affirms that the intention was actually to divide powers and functions between the two spheres of government. Accordingly, any approach or interpretation adopted should give effect to that intention. For instance, this provision implies that the Fourth Schedule cannot be interpreted or construed in a manner that leaves counties with no substantive power. Therefore, while it is a general provision, it serves as a basic restatement that counties are to exercise some power even though the scope or extent of it is not clear at this point.

The second provision is on concurrency, stating that “a function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government”.<sup>45</sup> However, as argued earlier, the lack of an express list of concurrent powers complicates the application of this provision as concurrent powers can only be inferred on the basis that they appear on both lists in the Fourth Schedule. The powers intended to be concurrent are not apparent from the two lists in the Fourth Schedule, which means that it is only through interpretation that concurrent powers can be identified. However, the list of concurrent powers is likely to vary depending on the interpretation of, or approach taken to, the issue of concurrency of powers.

The third provision can be termed the “residual powers clause”. It states that “a function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government”.<sup>46</sup> The implication is that all powers not reflected in the Fourth Schedule are essentially national government powers. However, given the preceding discussions, this provision is by no means absolute. For instance, the fact that the functions are

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<sup>44</sup> Article 186 (1).

<sup>45</sup> Article 186 (2).

<sup>46</sup> Article 186 (3).

described as “highly aggregated” implies that there are specific functions falling within the county category that are not listed in Part 2 of the Fourth Schedule. Indeed, the county list uses the term “including” when giving specific elements of a general county function, thus implying that the list is not exhaustive.<sup>47</sup> Therefore, while there are many functions that are not expressly listed in the Fourth Schedule, not all of them fall within the category of unassigned functions that revert to the national government.

The last provision states that “for greater certainty, Parliament may legislate for the Republic on any matter”.<sup>48</sup> The extent of this provision is not clear at all. Like the other constitutional provisions discussed above, it is subject to further interpretation and can, depending on the interpretative approach taken, have varying meaning(s) and implication(s) in regard to the nature and scope of county powers. One approach may interpret the provision as vesting parliament with powers over all matters. Since there is no list of exclusive county powers, all the powers will essentially be concurrent and both levels can legislate, subject to the applicable legislative overrides. In the second approach, this provision can be interpreted restrictively to mean that parliament is only limited to providing greater clarity to county powers as opposed to a power to substantially alter the nature or scope of county powers.

It thus appears that the kind of interpretation given to powers in the Fourth Schedule will determine the nature and scope of county powers. The vagueness of the constitutional provisions discussed above means that powers listed in the county section can either be exclusive or concurrent. As explained above, the classification of powers as either exclusive or concurrent has implications in that the different kinds of power are treated differently under the Constitution. This uncertainty opens the county powers in the Fourth Schedule to two possible interpretations.

#### **2.1.4.1 The “pro-centre approach”: amplifying the concurrency of county powers**

Under the “pro-centre approach”, the county powers listed in Part 2 of the Fourth Schedule may be interpreted as concurrent powers and functions. The Constitution recognises concurrency of powers and functions,<sup>49</sup> but there is no express list of exclusive or concurrent powers in the Fourth Schedule, thus leaving the determination of concurrent powers to interpretation of the two lists. This approach is backed by the fact that only a few, if any, functional areas are not

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<sup>47</sup> Items 1-8, Part 2 of the Fourth Schedule.

<sup>48</sup> Article 186 (4).

<sup>49</sup> Article 186 (2).

shared with the national government. Indeed, the preceding parts have shown that the national government has policy-making powers over virtually all county powers. As such, most or all of the county powers in Part 2 of the Fourth Schedule will be concurrent national and county powers.

To this end, Article 186(4) of the Constitution can be interpreted to mean that the national government can pass laws on any matter that appears in the county list. Concurrency of powers, however, also means that counties have same powers and can pass laws on the same issues. Both the national and county laws are, in the case of a conflict, subject to the overrides clause in the Constitution. Accordingly, the nature and level of county autonomy in this approach will depend on how the overrides clause is applied to county powers. On the one hand, an overly “generous” interpretation of the overrides clause (one in favour of the national government) may end up shrinking the powers of counties; on the other, a restrictive interpretation (one in favour of counties) may end up expanding the scope of county powers in matters of concurrent jurisdiction.

The Constitution provides that national law prevails if it applies uniformly across the country and if the national law provides for a matter that cannot be effectively regulated by individual county law. National law also prevails if the matter requires “national uniformity” and the national law provides the required uniformity by establishing national standards or national policies. The national legislation can also prevail over county law if the national law is necessary for: maintenance of national security and economic unity; protection of the common market in respect of the mobility of goods, services, capital and labour; promotion of cross-county economic activities; promotion of equal opportunity or equal access to government services; and protection of the environment.<sup>50</sup>

The Constitution does not list instances where county legislation prevails; it simply provides that county law prevails if none of the conditions for national overrides apply.<sup>51</sup> In determining conflict between county and national legislation, courts are required to prefer an interpretation that avoids conflict to one which leads to it.<sup>52</sup> Ghai and Cottrell argue that with regard to overrides, national law may trump county legislation in many instances as it is “subject to very limited safeguards”<sup>53</sup> over county laws. Accordingly, if an overly “generous” approach (in favour

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<sup>50</sup> Article 191 (3).

<sup>51</sup> Article 191 (4).

<sup>52</sup> Article 191 (5).

<sup>53</sup> Ghai & Cottrell (2011) 134-135.

of the centre is taken) is taken, the national government may end up legislating on most or all of the functional areas that appear as county functions in the Fourth Schedule. A less “generous” interpretation of the legislative overrides may, on the other hand, safeguard the scope of county powers.

Exclusive county powers limit the national government role to national policy-making and regulations only, and this are arguably less restrictive than the generously-worded overrides. However, under this “pro-centre approach”, very few powers, if any, listed in Part 2 of the Fourth Schedule will amount to exclusive county powers. Indeed, for any power to amount to an exclusive power, it must be unambiguously clear that it only appears in Part 2 of the Fourth Schedule and that it does not need any conceivable clarification, something that is almost impossible. Both levels have functions in all major sectors such as health, education, planning and development, agriculture, trade development. It is therefore highly unlikely that one can identify a single exclusive power under this approach.

Under the “pro-centre approach”, the “residual power clause” which vests residual powers in the national government may end up being of little or no use.<sup>54</sup> Furthermore, the constitutional provision which provides for the “national-county dichotomy” in powers and functions will also be of diminished significance as few or no powers will be purely county powers. Article 186 (4), on the other hand, will be of significance as national legislation will, subject to the override clause, determine the extent and scope of county powers.

#### **2.1.4.2 The “pro-county approach”: amplifying the exclusivity of county powers**

In terms of the “pro-county” approach, most of the functions listed in Part 2 of the Fourth Schedule are interpreted as providing counties with exclusive powers over which the national government cannot exercise legislative power. Under this approach, the role of the national government is limited to making policies and regulations on the exercise of county powers as opposed to exercising legislative power.

In the “pro-county” approach, the generally discernible patterns of “policy versus implementation” and “national versus local functions” are seen as being of significance as they support the assertion that there is an intention to delineate county powers which the national government can only supervise or regulate. Accordingly, aspects such as the “county” qualification are seen as important for understanding the nature and scope of the county powers. However, as argued earlier, the nature of the list of county powers in the Fourth

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<sup>54</sup> Article 186 (3).

Schedule is such that the powers must be further interpreted and clarified in order to arrive at specific county powers.

In the “pro-county approach”, Article 186 (1) – which recognises that powers are divided into national and county in the Fourth Schedule, respectively – becomes key to emphasising the distinctiveness of county powers from national powers. This provision implies that there is an intention to delineate county powers over which the national government has no jurisdiction. Accordingly, the “pro-centre” approach, which leaves no specific powers for counties, can be argued as contrary to the spirit and intent of this provision.

The provision which recognises concurrency of powers will, under this approach, be narrowly interpreted in order to restrict the role of national government. For instance, it may be argued that while the national and county governments have shared functional areas, the Fourth Schedule delineates specific and distinct powers for each level even though the operational sectors are shared. Accordingly, concurrency will be recognised only in cases where the Fourth Schedule confers exactly the same specific power as opposed to a generally shared functional area. The “county” qualification and other assisting factors become important for defining exclusive county powers.

Under this approach, the “residual power clause” will be important in determining county powers. As indicated earlier, the Fourth Schedule powers need to be disaggregated and unbundled. Indeed, not all the functions that are not expressly listed in the Fourth Schedule amount to unassigned, and therefore national, functions. Accordingly, the starting point under this approach is first to define and determine county powers and then declare the rest as unassigned and therefore national government functions.

The provision which empowers the national government to legislate on any matter for greater certainty<sup>55</sup> will similarly be restrictively interpreted. Under this approach, Article 186 (4) can be interpreted to mean that the national government is restricted to providing clarity on what has already been allocated to counties by the Fourth Schedule. This means that the county functions in Part 2 of the Fourth Schedule confer certain definable powers to counties which only need greater clarity or certainty through national legislation. This is different from the “pro-centre” approach, which sees the provision as providing the national government powers to legislate on the county functions, subject to overrides only. Accordingly, the national government is restricted to a secondary role of providing further clarity as opposed to defining

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<sup>55</sup> Article 186 (4).

primary powers, which, under this approach, are deemed as already determined in the Fourth Schedule.

A number of constitutional provisions can also be relied on to endorse this approach. First, Article 186 (1), which provides that powers are divided into national and county, can only be meaningful if counties have substantive powers that they control to the exclusion of the national government. Second, Article 186 (2), which deals with concurrency, also implicitly recognises that there are some powers that will be exclusively county powers. Lastly, Article 186 (3) envisages powers as belonging either to counties or the national level, with the unassigned powers reverting to the national level. Article 186 (4) should thus be interpreted in a manner that gives effect to articles 186 (1) to (3), and this can only be achieved through the “pro-county approach”.

The phrase “[f]or greater certainty” can be interpreted to imply that the Constitution has already determined the fundamental division of power and that this is only a residual or secondary role of refining the division of powers within the general constitutional scheme of distribution of functions. The phrase “for the Republic” may also be interpreted as implying a power to address general issues for “the Republic”. Put differently, the provision should not be interpreted as giving the national government power to legislate for counties. Rather, it should be limited to enacting framework legislation while the exercise of specific powers should be left to counties. Accordingly, the phrase “on any matter” is qualified in two ways (as opposed to being absolute). The phrase means, first, that the section only provides greater clarity on an already-defined power, and second, the clarity must relate to a general matter of a “Republic nature” which applies to all counties. Secondly, the fact that the provision is contained in a section of the Constitution which deals with interpretation of national and county powers means that it is limited to powers as opposed to other aspects of devolution.

#### **2.1.4.3 Picking an approach that is congruent to the constitutional objectives**

The vagueness in the design of county powers and functions and the division of powers between the national government and counties paves the way for two opposing interpretations. While the two approaches lead to vastly different results in terms of the nature and extent of county powers, both approaches have a constitutional backing. However, the possibility of two constitutionally tenable but opposing approaches to interpretation of county powers points to the weakness in the design of powers and functions in the Constitution. The current design of county powers leaves the possibility for weakening county powers by declaring them concurrent

and therefore subjecting them to “generously”-worded national overrides. On the other hand, a “pro-county approach” can result in significantly expanded county powers that the national government can only supervise and regulate within the relevant constitutionally set limits.

Is there an interpretation, among the two approaches, that can indeed be considered congruent with the broader constitutional purpose and objective of devolving power? Such an inquiry must, of necessity, commence with understanding the processes or implications inherent in the very nature of the concept of devolution. Furthermore, one must also understand the broad constitutional objectives and the specific role that counties are meant to play in the pursuit of those objectives. Specifically, one must understand how the constitutional objectives impact on the powers to be exercised by county governments.

Devolution was defined at the beginning of this thesis as a process which entails the transfer of power to the subnational level. Therefore, an interpretation that favours the control of power by a subnational unit is essentially a “devolution approach” that gives effect to the meaning and application of the concept of devolution. It was noted in Chapter 5 that devolution is part of a broader constitutional framework meant to pursue development, resolve conflict and limit central power. Accordingly, the very nature of the concept of devolution favours the “pro-county approach”, which can facilitate the transfer of real power to counties.

The founding provisions of the Constitution may also offer guidance on the approach to be taken in regard to interpretation of powers. The Constitution shares sovereignty, which emanates from the people, between the national government and counties.<sup>56</sup> Devolution is also woven into the definition of the Republican status of the Kenyan state.<sup>57</sup> Both levels are defined as distinct but interrelated in the founding provisions.<sup>58</sup> The spirit and intent of these provisions is reflected in the constitutional objectives of devolved government.<sup>59</sup> Counties are expected to facilitate communities to pursue their own development,<sup>60</sup> enhance peace by facilitating political and economic inclusion,<sup>61</sup> and limit central power.<sup>62</sup> However, counties can only reflect this constitutional standard and expectation if they control powers that enable them to pursue this purpose and therefore match up with the constitutional significance given to devolution.

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<sup>56</sup> Article 1 (4).

<sup>57</sup> Article 6.

<sup>58</sup> Article 6 (2).

<sup>59</sup> Article 174.

<sup>60</sup> Article 174 (a), (c), (d), (f), (g), and (h).

<sup>61</sup> Article 174 (b) and (e).

<sup>62</sup> Article 174 (i).

Apart from the founding provisions, the constitutional provisions specific to powers and functions in Article 186 imply that counties should control substantial power to the exclusion of the national government. The provisions which recognise, the Fourth Schedule,<sup>63</sup> concurrency,<sup>64</sup> and residual power,<sup>65</sup> all imply that counties exercise some power exclusively as well as concurrently. It is in this regard that Article 186 (4) should be interpreted restrictively, in order to give effect to the spirit and intent of the other interpretational provisions and the broader spirit and intent of the Constitution.

The “pro-centre approach” can also be justified as being in line with the broader constitutional objective. For instance, concurrent powers, which are amplified under the “pro-centre” approach, ideally confer the same powers to both levels, thus making the counties “as powerful as the national government”. However, this position is only ideal and is negated by two main points. First, a careful look at Fourth Schedule functions reveals that there are many national government functions which clearly do not fall within county functions. These include functions such as foreign affairs national defence, police services, courts, monetary policy, central banking, among other functions that are typically vested in the national government exclusively.<sup>66</sup> The impact is that concurrency is unlikely to “disturb” national government power as it would county powers. Accordingly, the argument that concurrency may “equalise” the two levels would be more of a myth than reality. Second, the generously-worded override clauses work in favour of the national government and thus have the potential to “strangle” counties.

### **2.1.5 Applying the “pro-county approach” to the Fourth Schedule powers**

Even after choosing the “pro-county approach”, which is argued above to be in alignment with broader constitutional purpose and objectives, the county powers in the Fourth Schedule need further interpretation. Accordingly, within a broader choice of the “pro-county” approach, further interpretation is still necessary. The functions listed in the Fourth Schedule need further disaggregation, the “county” qualification is also not clear in scope, and many of the listed county powers are not exhaustive. Furthermore, while concurrency is substantially curtailed through the pro-county approach, it still needs to be determined within the broad “pro-county approach”.

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<sup>63</sup> Article 186 (1).

<sup>64</sup> Article 186 (2).

<sup>65</sup> Article 186 (3).

<sup>66</sup> World Bank (1999) 107.

As with the “pro-county” and “pro-centre” approaches discussed above, there are two possible ways of interpreting county powers in the Fourth Schedule. The first can be a restrictive approach to county powers, within the broad “pro-county approach”, whereas the second involves further generous interpretation of county powers. The upshot of this situation is that some powers and functions may still fall into either category of county or national powers. As such, the scope and extent of county powers will depend on the second approach taken to county powers. Indeed, the World Bank notes that usually many functions are recentralised and then decentralised as functions are continuously refined.<sup>67</sup>

### **2.1.5.1 A restrictive interpretation to county powers: the South African approach**

A restrictive interpretation may limit the exclusive powers of counties to “intra-county” matters or matters that have a “county scope” only. This approach was used by the South African Constitutional Court, which concluded that “where provinces are accorded exclusive powers these should be interpreted as applying primarily to matters which may appropriately be regulated intra-provincially”.<sup>68</sup> Using this approach, Steytler and Fessha argue that in order to identify a “municipal health service”, one should ask “whether a specific health facility serves (and intends to serve) a community broader than a particular municipal area”.<sup>69</sup> They further argue that “a municipal competence must be interpreted to deal with intra-municipal activities and concerns only and excludes activities with an extra-municipal dimension”.<sup>70</sup> With regard to roads, Steytler and Fessha argue that “if the purpose of a road is to link two or more municipalities, there is an extra-municipal dimension to the road and it must be regarded as provincial”.<sup>71</sup>

A South African approach to county powers may mean that functions which straddle counties will revert to the national government. If applied to Kenya, this provision will, for instance, mean that provincial hospitals which offer services beyond the boundaries of the host counties will fall under national government. Indeed, the status of provincial hospitals is unclear as they can fall in either category.<sup>72</sup> While the World Bank categorises the provincial hospitals as unassigned

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<sup>67</sup> World Bank (2012) 118.

<sup>68</sup> *Ex parte president of the Republic of South Africa: In re Constitutionality of the Liquor Bill 2000* (1) SA 232 (CC) at para 53.

<sup>69</sup> Steytler N & Fessha Y ‘Defining provincial and local government powers and functions’ (2007) 124 *South African Law Journal* 322.

<sup>70</sup> Steytler & Fessha (2007) 333.

<sup>71</sup> Steytler & Fessha (2007) 334.

<sup>72</sup> World Bank (2012) 35.

functions, it also recognises that the hospitals may still fall under counties and that this depends on the approach taken with regard to interpretation.<sup>73</sup> The same uncertainty applies to other “regional-scope” functions such as cross-county bulk water supply infrastructure,<sup>74</sup> regional roads and other functions, or activities with a cross-county scope.<sup>75</sup>

### **2.1.5.2 A further “generous interpretation” to county powers**

Under the generous approach, county powers will not necessarily be restricted to “intra-county” activities only. As a result, provincial hospitals, regional water supply infrastructure, and regional roads, among other “regional scope” functions, may be vested in county governments. This may be informed by the reasoning that “cross-county” functions are not necessarily national functions and can actually be allocated to a county. It is therefore apparent that some of the powers may actually fall in either category of powers in the Fourth Schedule and that this will depend mainly on the interpretative approach taken in determining the nature and scope of county powers. Like the “pro-county” and the “pro-centre” approaches discussed above, one may still ask which interpretation would be preferable in the Kenyan context.

### **2.1.5.3 A “restrictive” versus “generous” interpretation: what are the merits?**

The possibility of there being further differing approaches to interpretation, even after the “pro-county approach” has been settled on, points to a further weakness in the design of powers and functions. The county powers, even after they are secured through a “pro-county approach”, may be expanded or contracted, although not to the extent of the “pro-centre approach” discussed earlier above. The “generous interpretation” may also be justified on the same grounds as that of the “pro-county approach” because it expands county powers. However, a number of other factors may favour one interpretation over the other.

For instance, unlike South Africa, Kenya has no regional or provincial level of government. As such, its “competitor” for powers and functions is the national government. Thus, while inter-municipal functions can still remain “decentralised functions” which belong to the province in the South African context, in Kenya “inter-county” functions could end up being centralised due to the fact that the national government is the only other level above the county. Indeed, while counties can form joint committees and authorities, “regional-scope functions” cannot be constitutionally allocated to a group of counties. There is no constitutionally recognised entity

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<sup>73</sup> World Bank (2012) 53.

<sup>74</sup> World Bank (2012) 62.

<sup>75</sup> World Bank (2012) 62.

with an inter-county scope except the national government. Accordingly, a power can only be, constitutionally, a national or county power.

However, mainly as a result of their small size and “fragmented” nature, counties may also not effectively take up some of the cross-county functions. A county that, for instance, hosts a “regional-scope” facility such as a provincial hospital may be less inclined to use its funds to provide services which extend beyond its borders. It is in this context that the World Bank warns that if provincial hospitals are left wholly to counties, the facilities and services are likely to decline.<sup>76</sup> In this regard, the World Bank advises that if the hospitals are allocated to counties, the national government may give “conditional grants” to counties which host provincial hospitals in order to maintain the vital “regional scope” of health services.<sup>77</sup> The World Bank also calls for “creative approaches” which include effective horizontal cooperation in order to enhance the effective management of these “regional-scope” services.<sup>78</sup>

This complication with regard to powers and functions emerges from Kenya’s unique devolution structure which does not have a regional tier. A regional level would, perhaps, have provided a basis for implementation, or even coordination only, of “regional-scope” functions. While provinces in South Africa have no clear powers and are generally politically weak, they perform important coordination functions that would otherwise fall to the national government and lead to central bureaucracy and eventual local inefficiency.<sup>79</sup> Kenya, on the other hand, needs “creative solutions” such as effective horizontal cooperation in order to address its structural shortcomings.

#### **2.1.5.4 Concurrency of powers under the “pro-county approach”**

Unlike the “pro-centre approach” which declares all powers as concurrent, the “pro-county approach” uses factors such as the “county” qualification and the “national-local dichotomy” to minimise concurrent powers. Accordingly, concurrent powers are those which, from the reading of national and county government lists, confer the exact nature and scope to both levels. Even within the same sector, powers can be interpreted as exclusive components such as policy-making, national functions, and local functions. In the health sector, for instance, the exclusive national government functions are policy-making and national health facilities, while county

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<sup>76</sup> World Bank (2012) 113.

<sup>77</sup> World Bank (2012) 113.

<sup>78</sup> World Bank (2012) 113.

<sup>79</sup> Murray C & Simeon R ‘Promises unmet: multi-level government in South Africa’ in Saxena R (ed) *Varieties of Federal Governance: Major Contemporary Models* (2011) 250.

exclusive powers are “county health services”. Using this restrictive approach, it is difficult to identify what is conferred concurrently to the national and county government.

The World Bank identifies “disaster management” as a concurrent function.<sup>80</sup> In the national government function, the power appears as “disaster management” while in the county section it is listed as “fire fighting services and disaster management”. This may be reasonably interpreted as a concurrent power as it has no “county” qualification to it, although such a determination is by no means absolute. Energy regulation also seems to be a concurrent national and county government function. The national item reads “energy policy, including electricity and gas reticulation and energy regulation”, while the county item reads “electricity and gas reticulation and energy regulation”. Accordingly, both vest “energy regulation” in the respective governments. A national government report has proposed that counties will only have powers to license and regulate plants below 3 Mega Watts.<sup>81</sup> Such a move may be subject to the overrides clause and may or may not pass the test. What is clear, though, is that concurrency is subject to a far stricter test under the “pro-county” approach and few powers will fall under the category of concurrent powers.

#### **2.1.5.5 National government role in limiting/defining county power**

While counties have both exclusive and concurrent powers, the role of the national government may impact on the full scope of county powers. First, the national government has exclusive power to make policies and this may impact on the manner in which counties perform their functions. Furthermore, the extent of policy-making powers is not clear. For instance, while policy formulation is clear, the extent to which national government can carry out “policy coordination” is not exactly clear.<sup>82</sup> As a result, “policy coordination” or other “national regulation” mechanisms may end up having far-reaching consequences in the exercise of county powers.

Second, the overrides clause may end up limiting county powers in matters of concurrent national and county jurisdiction.<sup>83</sup> The grounds under which national law prevails have been described as too limiting to counties.<sup>84</sup> Accordingly, many of the laws passed by the national government on matters of concurrent jurisdiction may end up prevailing over county laws.

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<sup>80</sup> World Bank (2012) 130.

<sup>81</sup> Republic of Kenya (2012) 51.

<sup>82</sup> World Bank (2012) 116.

<sup>83</sup> Article 191 (1).

<sup>84</sup> Ghai & Cottrell (2011) 134-135.

However, the “pro-county approach” limits the scope of concurrency, meaning that very few functions, if any, will be subject to the generously-worded overrides if the “pro-county approach” is adopted.

## **2.2 Incidental power of counties**

County governments can exercise their powers beyond the expressly listed functions. However, this is envisaged only in situations where such powers are necessary or incidental to the exercise of listed county functions.<sup>85</sup> Again, the extent of incidental power is not clear even in the comparative experience of federal or devolved systems.<sup>86</sup> De Visser argues that incidental power “is not intended to increase number of functional areas”.<sup>87</sup> While an incidental power has the potential to create overlaps with national government powers, the intention is not to make an incidental power a concurrent power as the county will be exercising power in an area that is, strictly speaking, outside its competence. An incidental power should, by its very nature and name, just be incidental to the performance of a different and substantive county function. While the Constitution seems to limit the incidental power to Fourth Schedule functions,<sup>88</sup> it would seem consistent to allow counties to exercise incidental power over all other powers.

## **2.3 Other constitutional powers of county governments**

While the Fourth Schedule is the main source of county powers and functions, there are also other constitutional provisions which vest original powers in county governments, namely: powers over community land, participation in constitutional amendment through the popular initiative, and powers over local government.

### **2.2.1 The role of counties in constitutional amendment by popular initiative**

Counties can play a role in a constitutional amendment by popular initiative.<sup>89</sup> A popular initiative for constitutional amendment is commenced through a draft amendment Bill or in the form of a general suggestion which is signed by at least one million registered voters and submitted to the Independent Electoral and Boundaries Commission (IEBC).<sup>90</sup> The IEBC, after

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<sup>85</sup> Article 185 (2).

<sup>86</sup> *Bronstein V ‘Legislative competence’ in Woolman S et al (ed) Constitutional Law of South Africa (2011) 15-1 to 15-28.*

<sup>87</sup> De Visser (2005) 122.

<sup>88</sup> Article 185 (2).

<sup>89</sup> Articles 256 and 257.

<sup>90</sup> Article 257 (1), (2) and (3).

verifying compliance with relevant provisions, is required to submit the draft Bill to each CA for consideration within three months of receiving the draft Bill or suggestion for amendment of the Constitution.<sup>91</sup>

County Assemblies (CAs) have three months to deliberate and vote on the draft Bill. If passed, each CA Speaker is required to pass on the draft Bill and a certificate indicating that the CA has approved it, to the speakers of the National Assembly and Senate.<sup>92</sup> If the draft Bill is approved by half of the counties, it is introduced in parliament without delay and the constitutional amendment goes through if supported by a simple majority of both chambers of parliament.<sup>93</sup> If both chambers pass the Bill, it shall be submitted to the president for assent and if rejected, the amendment shall be subjected to a referendum.<sup>94</sup>

While the counties are empowered to participate in amending the Constitution by popular initiative, their involvement is triggered only after the public has initiated the process. As such, while parliament can commence a constitutional amendment process, the counties have no powers to initiate an amendment. The counties have to wait for the public process of collection of signatures and their verification by the IEBC before the CAs can be properly seized of the process. Furthermore, constitutional amendment by popular initiative appears to be a lengthy and complicated process that cannot be used regularly. Constitutional amendment by parliamentary initiative, discussed in Chapter 8, seems the most practical and convenient route for any future constitutional amendments.

### **2.3.2 County powers over community land**

Counties are empowered to hold unregistered community land in trust for local communities.<sup>95</sup> This provision has its roots in the former Constitution where community land, then referred to as “trust land”, was held in trust for local communities by county councils established for rural areas under the former Constitution<sup>96</sup> and the now-repealed Local Government Act.<sup>97</sup> Trust lands were originally native reserves held by British Native Boards but transferred to the county councils

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<sup>91</sup> Article 257 (5).

<sup>92</sup> Article 257 (6).

<sup>93</sup> Article 257 (8) and (9).

<sup>94</sup> Article 257 (10) and (11).

<sup>95</sup> Article 63 (3).

<sup>96</sup> Section 115 of the Constitution of Kenya (Act 5 of 1969) (repealed).

<sup>97</sup> Cap 265 Laws of Kenya.

under the former constitutional dispensation, after independence.<sup>98</sup> Community land can only be disposed off in accordance with national legislation<sup>99</sup> which protects the respective individual and collective rights.<sup>100</sup> Community land includes lands held by specific communities such as forests, grazing areas or shrines, ancestral lands and lands traditionally occupied by hunter-gatherer communities.<sup>101</sup>

However, it is apparent that county governments will play only a peripheral role with regard to land issues. While the Constitution recognises other categories of land, such as public and private land, counties are only required to hold “trust land” or “community land” on behalf of communities. Even then, most of the powers over land administration, including community land, are vested in the National Land Commission, an independent nationally-based institution.<sup>102</sup> Powers vested in the National Land Commission include change of category of land, revision, consolidation and rationalising existing land laws, prescription of minimum and maximum holding acreages with respect to private land, protecting and conserving public land and other general matters related to land administration.<sup>103</sup>

Indeed, even under the former Constitution, the county councils were completely unable to protect the interests of communities. The president, for instance, had constitutional powers to solely set aside trust lands for a different purpose other than the benefit of a community.<sup>104</sup> These unfettered presidential powers were used to alienate public and trust lands which were given to politically connected families and individuals.<sup>105</sup> As a result, the mandate of county councils to play custodian to community lands was negated by the arbitrary use of presidential powers over land.<sup>106</sup> Indeed, a substantial part of land that was formerly “trust land” or “community “ is now private land subject to central administration rather than counties; in the case of the remaining “trust land” or “community land”, the counties play only a “caretaker” role on behalf of the local communities.

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<sup>98</sup> Republic of Kenya ‘Report of the Commission of Inquiry on Local Authorities in Kenya: A strategy for local government reform in Kenya’ (1995) 39.

<sup>99</sup> Parliament enacted the Land Act No. 6 of 2012.

<sup>100</sup> Article 63 (4).

<sup>101</sup> Article 63 (d).

<sup>102</sup> Article 67.

<sup>103</sup> Article 68.

<sup>104</sup> Ghai & Cottrell (2011) 77.

<sup>105</sup> World Bank (2012) 77-78.

<sup>106</sup> Ghai & Cottrell (2011) 76-79.

### 2.3.3 Local government as a county power

As the World Bank observes, the 47 counties are “not a substitute for local governments”.<sup>107</sup> The 47 counties were, as highlighted in Chapter 4, reduced from an initial proposed number of 74 counties in order to cover the void left by the removal of the regions.<sup>108</sup> This compromise makes the 47 counties too large to be local governments. Furthermore, the current constitutional framework for devolved government is essentially a symmetrical devolution of power to the 47 counties without differentiating the rural and urban divide within the particular counties. Prud’homme terms such an arrangement, one which regards devolution to cities as being the same as devolution to villages, a “decentralisation absurdity”.<sup>109</sup>

The Constitution recognises the complications created by the current structure. First, it envisages the decentralisation of services from the county to lower levels: “every county government shall decentralise its functions and the provision of its services to the extent that is sufficient and practicable to do so”.<sup>110</sup> Second, the Constitution recognises the need for a differentiated approach to rural and urban governance. Accordingly, “[n]ational legislation shall provide for the governance and management of urban areas and cities”.<sup>111</sup>

Measures to provide for further decentralisation are in tandem with public views. During the constitutional review process, there were overwhelming public views that services should be decentralised to the local level in order to enhance access to basic services.<sup>112</sup> Specifically, the majority of the members of the public who gave their views rejected regions as the principal units of devolved government as they are too far from the people at the local level.<sup>113</sup> As such, concentrating power in the 47 counties will negate the purpose that devolved government is meant to serve for the public, namely, enhancing access to basic services to the local level.

The differentiation of rural and urban governance also has a strong basis in Kenya’s past experience. A 1995 Kenyan government report observes that where urban and rural areas were combined under the same local authorities, agricultural taxes were redirected to the provision of

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<sup>107</sup> World Bank (2012)162.

<sup>108</sup> CoE (2010b) 92.

<sup>109</sup> Prud’homme R ‘The dangers of decentralization’ (1995) 10 *The World Bank Observer* 214.

<sup>110</sup> Article 176 (2).

<sup>111</sup> Article 184 (1).

<sup>112</sup> CKRC (2005) 235.

<sup>113</sup> CKRC (2005) 234.

urban services, thus “draining” rural areas<sup>114</sup> and leading to neglect of rural services.<sup>115</sup> The World Bank notes that, with the exception of a few fully urbanised counties, most of the counties have predominant rural areas in which the majority of the population live.<sup>116</sup> However, contrary to the situation in the past, urban areas are, according to the World Bank, the “losers” in the current structure because the composition of counties may create a “strong rural bias”.<sup>117</sup> The Bank warns that this could result in county resources being drained into rural areas to the detriment of urban areas.<sup>118</sup> Regardless of the effect of combining rural and urban areas, the differentiation of rural and urban governance is important due to the varying nature of needs and preferences.

However, there is no substantive constitutional framework for decentralisation of powers to levels below counties beyond the formal constitutional recognition of the need to do so. The constitutional provisions on decentralisation to the sub-county level are general, vague and unclear. This is mainly as a result of merging regional and local functioning to the county level; local government powers are listed as county functions in the Fourth Schedule. In most systems of multilevel government (usually composed of the national, regional and local level), power over the local level is normally treated as a power of either the national or regional level or is a joint competency of the upper levels.<sup>119</sup> In Kenya, the difficulty arises from the fact that local government powers are primary constitutional powers of counties and can thus not be institutionally delinked from counties.

### **2.3.3.1 Urban local government: management of cities, municipalities and towns**

The Constitution merely provides that national legislation should provide for urban governance which should entail: criteria for classifying urban areas into cities and other categories; principles of governance and management of urban areas; and provisions for public participation in urban governance.<sup>120</sup> The Constitution also provides that the legislation should provide for the governance of the different categories of urban local government.<sup>121</sup> The TFDG

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<sup>114</sup> Republic of Kenya (1995) 17.

<sup>115</sup> Republic of Kenya (1995) 17.

<sup>116</sup> Nairobi, Mombasa, Kiambu, Kisumu and Machakos Counties.

<sup>117</sup> World Bank (2011b) 39.

<sup>118</sup> World Bank (2011b) 41.

<sup>119</sup> Steytler N ‘Comparative conclusions’ in Steytler N (ed) *Local Government and Metropolitan Regions in Federal Systems* (2009) 427-428.

<sup>120</sup> Article 184 (1).

<sup>121</sup> Article 184 (2).

points out that the Constitution did not adequately provide for urban local government and thus failed to recognise the dynamic of urbanisation.<sup>122</sup> For instance, while the Constitution requires public participation in urban governance, it fails to clarify if and whether urban areas should have elected leadership. The Urban Areas and Cities Act (UACA),<sup>123</sup> enacted to govern urban areas, does not provide for elected urban leadership. Public accountability is instead provided through indirect public and stakeholder participation, and it is not clear whether such a measure satisfies the Constitution or not.<sup>124</sup>

As required in the Constitution, the UACA classifies urban areas into municipal, city and town status. Municipal councils and cities have a separate corporate existence, but towns are not administratively delinked from the county.<sup>125</sup> While the president formally confers a city status, the decision is made by the CEC and the CA with the concurrence of the Senate.<sup>126</sup> However, only the county government can confer a municipal or town status.<sup>127</sup> City counties will be managed under the law relating to county governments.<sup>128</sup>

One question that arises is the nature and extent of the national government's role in urban governance. The powers of the national government over urban management appear weak. Urban local government powers and functions are essentially county powers. Furthermore, all the major sources of funds for local urban government are vested in the counties.<sup>129</sup> The World Bank argues that the constitutional provisions on urban areas could be interpreted to mean that the Constitution intended to give national government powers to establish urban local government and that this should extend to powers to give urban local government functional responsibilities.<sup>130</sup> The World Bank argues that the provision could also mean that national legislation is required to set a framework for urban governance while counties have a choice to set up urban local government and resource them.<sup>131</sup> The UACA, the World Bank argues, has provisions that reflect a compromise between these two competing interpretations.

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<sup>122</sup> Republic of Kenya (2011) 36.

<sup>123</sup> Act 13 of 2011.

<sup>124</sup> World Bank (2012) 98.

<sup>125</sup> Section 12 (2).

<sup>126</sup> Section 8, Mombasa and Kisumu Counties are deemed as cities under the Act.

<sup>127</sup> Section 9, 10 (1).

<sup>128</sup> Section 12 (3).

<sup>129</sup> World Bank (2012) 159.

<sup>130</sup> World Bank (2012) 159.

<sup>131</sup> World Bank (2012) 159.

However, the fact that urban local government powers and functions as well as sources of finance are listed as county powers makes it hard for national legislation to vary these powers without the consent of the counties. In essence, the institution of urban local government is functionally fused with the county government. In turn, the counties have constitutional protection over their powers and functional areas. Thus, while the UACA provides for classification of urban areas and different management, it recognises the primary constitutional autonomy of counties over urban local government by giving counties the actual powers of deciding the status or category of an urban area.<sup>132</sup> The World Bank also observes that there is no clear process for delegation of the functions to urban areas.<sup>133</sup>

The Act is explicit that cities and urban areas are agents of counties<sup>134</sup> and that institutional accountability lies with their respective county governments.<sup>135</sup> The appointed leadership of cities and urban areas<sup>136</sup> is accountable to the county governor, who has power to remove any member of a municipal or city board from office.<sup>137</sup> The UACA also mandates county governments to define and demarcate the operational sectors<sup>138</sup> of urban areas as well as delegate functions to urban areas.<sup>139</sup> County governments will determine and approve revenue-raising functions for urban areas.<sup>140</sup> Furthermore, the budget estimates of all urban areas are debated and approved by the CA and funds disbursed from the county government.<sup>141</sup> While the cabinet secretary can make regulations under the Act, the Senate has to approve the regulations before the same can take effect.<sup>142</sup>

It is clear that the national government has an almost insignificant role to play in terms of urban local government. County governments are constitutionally and legally empowered to control the vital processes of urban local government. Urban local government, it is submitted, is a county power as opposed to a concurrent or exclusively national power. The World Bank

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<sup>132</sup> Section 8, Mombasa and Kisumu counties are deemed as cities under UACA.

<sup>133</sup> World Bank (2012) 164.

<sup>134</sup> Section 11 (b).

<sup>135</sup> Section 11 (b) to (f).

<sup>136</sup> Section 13. Stakeholders include professional bodies, the private sector, association of informal sector groups, and resident associations.

<sup>137</sup> Section 18 (1) (b) UACA.

<sup>138</sup> Section 20 (a) and (b) UACA.

<sup>139</sup> Section 20 (e) UACA.

<sup>140</sup> Section 20 (m) and (n) UACA.

<sup>141</sup> Section 43 (2) UACA.

<sup>142</sup> Section 53 (2) UACA.

observes that the devolved system of government in essence places urban management under counties.<sup>143</sup> The Bank concludes that the “effectiveness of urban management will thus depend to a large extent on county government decisions, concerning delegation of powers and revenues to urban roads, and how they hold them accountable”.<sup>144</sup>

### **2.3.3.2 Rural local government**

County governments have an absolute discretion regarding how to, and what to, decentralise in respect of rural areas. Ghai and Cottrell argue that even “having local offices of the county government is enough to satisfy the Constitution”.<sup>145</sup> However, the local nature of functions such as coordination community and location participation implies the presence of sub-county structures for effectiveness.<sup>146</sup> Indeed, the concept of local participation will be negated if powers are “centralised” to “county capitals” only. The principle of subsidiarity also means that local planning and participation should be decentralised to the local level in order to realise meaningful participation; by implication, this calls for measures beyond mere field offices. Apart from the elusive concept of subsidiarity, there is no other compelling provision in the Constitution that specifically obligates counties to decentralise planning and services to the local level in rural areas.<sup>147</sup>

### **3. Additional county powers**

While the Fourth Schedule lists the primary source of county powers, the Constitution provides that counties can receive added powers and functions beyond those listed in Part II of the Fourth Schedule. First, the national government can, through national legislation, assign powers and functions to counties. Second, the national government can, with the agreement of a county government, transfer national functions to a county government. While both assignment and transfer of functions all end up adding more powers and functions to counties, the nature and scope of county power may vary according to the process followed.

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<sup>143</sup> World Bank (2012) 157.

<sup>144</sup> World Bank (2012) 162.

<sup>145</sup> Ghai & Cottrell (2011) 129.

<sup>146</sup> Ghai & Cottrell (2011) 129.

<sup>147</sup> Steytler & Fessha (2007) 335.

### 3.1 Assigned powers

The national government can, through national legislation, assign powers and functions to county governments.<sup>148</sup> The Constitution states that “a function or power not assigned by this Constitution or *national legislation* to a county is a function or power of the national government”.<sup>149</sup> There is no further constitutional provision regarding assignment of functions to counties. As such, assignment of functions is only mentioned in a constitutional provision which deals with residual functions. Powers assigned by national legislation appear to be more of a permanent power than temporary delegation. De Visser describes assigned powers as a form of devolution due to the permanency attached to an assigned function.<sup>150</sup> From the wording of Article 186 (2), the national government can assign powers to counties without the latter’s consent. The national government may, for instance, assign counties powers and functions which are not assigned to either level through the Constitution.

While the Constitution requires that the transfer of functions be accompanied by funds, there is no equivalent provision for assignment of powers. However, it can be assumed that in vetting national legislation, the Senate (whose role is discussed in Chapter 8) can prevent functions from being piled upon counties via national legislation without corresponding funds being made available. In this regard, the CRA is also required to make recommendations to the Senate or the NA on any legislation that touches on county financial matters.<sup>151</sup> Each House is required to consider the recommendations by the CRA before voting on the Bill.<sup>152</sup> Furthermore, one of the principles of devolved government provides that counties should have adequate resources to perform their functions.<sup>153</sup> These measures may operate as general safeguards to unfunded mandates to county governments.

There is no constitutional provision that empowers the national executive to assign powers administratively or by executive action only. The Constitution provides that a county executive committee shall perform functions conferred on it by the Constitution or national legislation.<sup>154</sup> A county executive is also under duty to implement national legislation within the county to the

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<sup>148</sup> Article 186 (3).

<sup>149</sup> Article 186 (3) (emphasis added).

<sup>150</sup> De Visser (2005) 139.

<sup>151</sup> Article 205 (1).

<sup>152</sup> Article 205 (2).

<sup>153</sup> Article 175(b).

<sup>154</sup> Article 183 (1) (d).

extent that the national legislation requires.<sup>155</sup> It is thus clear that executive functions can be assigned to county governments only by national legislation. The CGA, for instance, provides that the President can assign the county governor “state functions” on the basis of mutual consultations.<sup>156</sup> However, while what amounts to “state functions” is not clear, they certainly do not include any of the national executive powers in the Fourth Schedule or in other parts of the Constitution.

### **3.2 Transferred powers**

Powers and functions can be transferred between the two levels of government subject to mutual consent and if the power so transferred would be performed more effectively by the receiving government. The transfer should also be permitted by the legislation under which the power is created.<sup>157</sup> While county governments would have to agree individually to a transfer of functions, it appears that a collective agreement by county executives through intergovernmental structures can also lead to a general transfer of functions to all counties.<sup>158</sup>

The Constitution provides that where a power is transferred from one level to another, “constitutional responsibility for the performance of the function or exercise of the power” remains with the level to which the power is assigned in the Fourth Schedule.<sup>159</sup> The meaning of “constitutional responsibility” over transferred functions is not clear. For instance, it is not clear whether the donating level can unilaterally resume transferred functions without reference to the receiving level. The agreement for transfer of powers may, however, provide for a procedure through which transferred powers can revert to the donating level.

What is clear, though, is that transferred functions are merely delegated functions and there is limited discretion in the exercise of donated powers. While legislative assignment of functions can create a certain degree of permanence, transferred functions are merely delegated functions which can revert to the donating level. However, the level of discretion may also depend on the provisions of the authorising legislation or the terms of the transfer agreement.

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<sup>155</sup> Article 183 (1) (b).

<sup>156</sup> Section 30 (1) (b).

<sup>157</sup> Article 187 (1) (a) and (b).

<sup>158</sup> De Visser (2005) 140-141.

<sup>159</sup> Article 187 (2) (a).

The Constitution provides that one of the grounds for the transfer of powers and functions is if a power or function can be exercised more effectively by the receiving level of government.<sup>160</sup> This provision incorporates the principle of subsidiarity, which requires that “a government function should be performed as close to the citizenry as possible”.<sup>161</sup> Indeed, the scheme of distribution of power in the Fourth Schedule generally adheres to the principle of subsidiarity. For instance, the national government has the bulk of the policy-making powers while counties mainly implement. Furthermore, functions that are national in nature are generally at the national level, while counties are generally allocated matters which require local implementation. However, while the Constitution recognises the principle of subsidiarity, its effect and application is not clear; Steytler and Fessha describe the principle as “notoriously vague and imprecise”.<sup>162</sup> For instance, while primary education is a function that is conventionally allocated to the subnational level of government,<sup>163</sup> the Constitution has allocated primary education to the national government. The principle of subsidiarity calls for primary education to be either assigned or transferred to counties.<sup>164</sup>

#### **4. Limits to county government powers**

There are instances where exercise of county powers and functions can, in terms of the Constitution, be stopped by the national government. First, the Constitution recognises that counties can be delayed from assuming their allocated functions until they develop the requisite capacity. Second, even where a county has assumed all the powers, the national government can still intervene in county governments and take over functions of counties.<sup>165</sup> Third, and as a last resort, the Constitution provides a procedure through which exercise of county powers can be suspended.<sup>166</sup>

National intervention in counties should, however, be distinguished from other national powers over county government matters such as policy-making and national regulation, and the setting of national standards. While national intervention or suspension of counties has the effect of

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<sup>160</sup> Article 187 (1) (a).

<sup>161</sup> De Visser (2005) 142; De Visser J 'Institutional subsidiarity in the South African Constitution' (2010) 21 *Stellenbosch Law Review* 209-211.

<sup>162</sup> Steytler & Fessha (2007) 335.

<sup>163</sup> World Bank (2012) 25.

<sup>164</sup> World Bank (2012) 25.

<sup>165</sup> Article 200 (e).

<sup>166</sup> Article 192.

limiting county powers, the other powers of national government, such as policy-making, serve to define the parameters and scope of county powers as opposed to limiting the powers of counties. As such, national regulation or policy-making and setting of national standards only delineate county powers as opposed to halting the exercise of county powers. Intervention and suspension, on the other hand, is a constitutionally sanctioned intrusion into functional areas of counties for purposes recognised and provided for in the Constitution.

#### **4.1.1 Transition to counties: gradual transfer of powers to counties**

The Constitution provides that county powers will be devolved gradually over a period of three years.<sup>167</sup> This measure will ensure that transition to county governments does not lead to disruption of services.<sup>168</sup> Indeed, the World Bank advises that devolution of power can be delayed until the subnational level develops adequate capacity to handle functions.<sup>169</sup> Parliament enacted the Transition to Devolved Government Act (TDGA) to implement the constitutional provisions above and the Act establishes the Transitional Authority (TA) to manage the process.<sup>170</sup> The TDGA permits asymmetrical devolution of powers to counties that are ready to assume their constitutional powers.<sup>171</sup> The TA is mandated to assess the readiness of the county to receive the functions<sup>172</sup> and has to propose “clear and practical” measures to develop the capacity of a county deemed not ready.<sup>173</sup> However, the Senate is the final authority with regard to a decision on the transfer of powers to a county.<sup>174</sup> The transition process is monitored by the Commission on Implementation of the Constitution (CIC) to ensure objectivity and integrity of the process.<sup>175</sup>

#### **4.1.2 National intervention in county governments**

There are two main grounds for a national intervention in a county government: first, where a county is unable to perform its functions;<sup>176</sup> second, where a county fails to operate a financial

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<sup>167</sup> Section 15(1) Sixth Schedule.

<sup>168</sup> World Bank (2011b) 18.

<sup>169</sup> World Bank (2012) 122.

<sup>170</sup> Act 1 of 2012.

<sup>171</sup> Section 15 (12) (c) Sixth Schedule.

<sup>172</sup> Section 23 (3) and (4).

<sup>173</sup> Section 23 (6).

<sup>174</sup> Section 23 (7) and (8) CGA.

<sup>175</sup> Section 15 (2) (d) Sixth Schedule.

<sup>176</sup> Article 190 (3) (a).

management system that complies with the requirements prescribed by national legislation.<sup>177</sup> The power of the national government to intervene on financial matters is discussed in the next chapter, which focuses on the financial and fiscal powers of counties. The Constitution requires national legislation to provide for intervention where a county fails to perform its functions. The law should authorise the national government to take appropriate steps to ensure that a county resumes its functions. The law should also, where necessary, enable the national government to assume performance of county functions.<sup>178</sup>

The Constitution generally adopts a fairly restrictive approach as it clearly provides that interventions should only be made when necessary and should be limited to necessary measures during the intervention.<sup>179</sup> An intervention should only take place after giving adequate notice to the concerned county. Deliberate effort should be made to ensure that a county resumes responsibility of its functions.<sup>180</sup> The Constitution also provides that national legislation should allow for a procedure under which the Senate may, at any time, end an intervention in a county government.<sup>181</sup>

#### **4.1.3 Suspension of county governments**

The Constitution provides that powers of county governments can be limited through suspension. However, suspension is an extreme measure: a county can be suspended only in an emergency arising out of internal conflict or war, or in any other exceptional circumstances.<sup>182</sup> What amounts to “exceptional circumstances” is determined by an independent commission of inquiry investigating the allegations against a county government. The President can suspend a county only after the commission recommends it and the Senate authorises it.<sup>183</sup> The Senate may, however, and at any time, terminate the suspension of a county.<sup>184</sup> During the period of suspension, the Constitution provides that arrangements are to be provided for the performance of the powers and functions of a suspended county.<sup>185</sup> The

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<sup>177</sup> Article 190 (3) (b).

<sup>178</sup> Article 190 (4).

<sup>179</sup> Article 190 (5) (b).

<sup>180</sup> Article 190 (5) (c).

<sup>181</sup> Article 190 (5) (d).

<sup>182</sup> Article 192 (1).

<sup>183</sup> Article 192 (2).

<sup>184</sup> Article 190 (4).

<sup>185</sup> Article 192 (3).

maximum period of a suspension of a county is 90 days,<sup>186</sup> after which elections for the affected county shall be held.<sup>187</sup>

The CGA defines the “exceptional circumstances” in the Constitution as “actions that are deemed to be against the common needs and interests of the citizens in the county”.<sup>188</sup> The CGA also clarifies that both the legislative and executive are affected and members of both organs will retain only half of their benefits.<sup>189</sup>

## **5. Assessment of county powers and functions**

The various factors, discussed in the preceding sections, which affect the nature and scope of county powers also have an inevitable effect on the three purposes of devolution. The main issue in the assessment of county powers, therefore, is whether the current design of the powers and functions of county governments can help or hinder the pursuit of development, ethnic harmony and the limiting of central power.

### **5.1.1 County powers and development**

With regard to development, counties are expected to enhance access to basic services, address regional disparities through redistribution, and realise equitable development. Counties are also expected to enhance equity in the distribution of available national resources in order to promote equitable development. As earlier discussed, these objectives are rooted in past experience where centralised policies led to inefficiency and poor service delivery, growing economic disparities and skewed distribution of national resources. During the constitutional review process, there were specific calls to devolve power and resources to the local level in order to enhance access to basic services. There were calls for affirmative action to enhance access to services in areas and communities that were previously neglected and excluded from development.<sup>190</sup>

A review of the design of the powers and functions of county governments reveals that there are aspects of the design that will advance the realisation of the developmental purpose of devolution. However, there are also a number of factors that may hinder the realisation of the developmental objective.

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<sup>186</sup> Article 190 (5).

<sup>187</sup> Article 190 (6).

<sup>188</sup> Section 123 (1) CGA.

<sup>189</sup> Section 124 (1) and (2) CGA.

<sup>190</sup> CKRC/NCC (2003) 62, 63 and 66-67.

### 5.1.1.1 Design aspects that enhance development

A key value in devolution is that units should have a final decision-making power to be able to match available local resources to preferences.<sup>191</sup> The Constitution entrenches county powers by dividing powers between the national government and the counties. The elaborate list of the functional areas of county governments in the Fourth Schedule gives county powers a solid constitutional backing. The “original” or “primary” powers in the Constitution provide counties with the basis for addressing local preferences, while the national level will be mainly in charge of policy, national regulation and setting standards.

The county functional areas touch on most or all the sectors concerned with basic services and local development. These include health, housing, water and sanitation, county infrastructure and development, community participation, agriculture, trade and development regulation, gas and electricity reticulation. All these sectors are critical to local service delivery and development.<sup>192</sup> While the specific powers that counties exercise in each sector will vary – and in some cases, such as education, they are very limited – the functional areas are generally relevant to local service delivery and local development. Effective exercise of powers in the listed functional areas has the potential to enhance access to basic services and development as envisaged in the objectives of devolved government.

The symmetric devolution of powers to the 47 counties enables all counties to exercise the same powers and functions. This has the potential of enhancing access to services and development to areas that were previously neglected. Past policies resulted in inequitable access to basic services such as basic health care<sup>193</sup> and skewed distribution of national resources. Accordingly, counties can use their powers to expand and enhance access to basic services and development to previously neglected areas. The asymmetry of powers envisaged in the transition period is only meant to ensure that counties are ready to take up powers and functions and that there is no disruption of service delivery.

County powers are subject to national policies and standards and the supervision of the national government. This will ensure that all counties exercise their powers in accordance with the set overall objectives. Furthermore, important issues such as redistribution and equitable sharing of national resources are assured through effective monitoring of devolved units.<sup>194</sup>

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<sup>191</sup> World Bank (1999) 115.

<sup>192</sup> World Bank (1988) 157.

<sup>193</sup> World Bank (2011b) 25.

<sup>194</sup> World Bank (1999) 107.

### 5.1.1.2 Design aspects that pose a risk to development

A number of potential pitfalls in the design of county powers and functions may impede the realisation of development. The vaguely defined county powers may affect the developmental purpose of county government. First, many of the vaguely defined functions could end up being centralised in the national government, thus limiting the capacity of counties to provide local services and development. Second, vaguely defined functions may lead to neglect of essential functions by both levels of government in the hope that the other level will shoulder the responsibility.<sup>195</sup> Vaguely defined powers also lead to weak accountability as there is no clear actor whom the public can hold to account.<sup>196</sup>

The poor design of powers and functions is partly traceable to the “hybrid” structure that combines “regional powers” and “local powers” in one level, thus adding to the complexity. For instance, while the Constitution envisages a local government structure, at least for the urban areas, local government functions are fused with county government functions. Indeed, there is a symmetric devolution of powers to the 47 county governments, with very weak distinction between urban and rural areas.

The “hybrid” structure has complicated the design of county powers for development in a number of ways. The symmetric devolution of powers to the 47 counties without a clear distinction between rural and urban settings may affect development. The World Bank warns that urban services and overall economic growth may be affected.<sup>197</sup> However, past experience also shows that rural development could be neglected.<sup>198</sup> An appropriate design is one which considered the respective needs of rural and urban areas and designed powers appropriate for each of the areas. The current design lumps rural and urban local government powers in county governments, and this may affect the developmental role that county governments can play.

Without effective decentralisation of powers and functions to levels below the current 47 counties, participatory development may be affected. The 47 counties are too large and are not, as observed by the World Bank, a substitute for local governments.<sup>199</sup> If powers and functions are “centralised” to the 47 counties without any effective further decentralisation, it is possible that participatory development will be affected. The Fourth Schedule allocates counties the

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<sup>195</sup> World Bank (1999) 115.

<sup>196</sup> World Bank (1999) 115.

<sup>197</sup> World Bank (2012) 181.

<sup>198</sup> Republic of Kenya (1995) 17.

<sup>199</sup> World Bank (2012) 177.

responsibility to ensure effective local and community participation in planning and development. However, this is only possible if planning and development functions are effectively decentralised from counties to the lower levels in order to facilitate effective participatory development.

Counties have also been denied some powers relevant to important local services and development. As such, the design of powers has limited the role of counties in the provision of important local services relevant to basic services and development. For instance, counties have powers over pre-primary education and childcare facilities only. Comparative decentralisation practice shows that powers over primary and secondary education are normally devolved to lower levels of government while national governments normally limit their roles to national policies.<sup>200</sup> The World Bank proposed that this function should be devolved to the county level.<sup>201</sup> After independence, local governments were in charge of primary and secondary education, but the services were taken over by the national government in 1969.<sup>202</sup> A few local authorities continued to manage primary and secondary schools after the take-over. However, all schools may end up being transferred to the national government if this function is not transferred to counties.

While supervision and national regulation is an important part of devolved development, there is no clear boundary between county government operations and the extent of the national government's regulatory and policy-making role. The World Bank, for instance, notes that while it is easy to delimit the scope of policy formulation, it is not easy to draw the line with regard to coordination of implementation of the policy.<sup>203</sup> There is a risk that the central government may use its policy implementation powers to intrude into the functional areas of counties and in the process hurt county efficiency and effectiveness. Where such intrusion affects the discretion of counties to address local needs and development, the developmental purpose of devolved government will have been affected or even negated.

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<sup>200</sup> World Bank (2012) 17, 33.

<sup>201</sup> World Bank (2012) 17, 33.

<sup>202</sup> Republic of Kenya (1995) 10.

<sup>203</sup> World Bank (2012) 131-132.

### 5.1.2 County powers and ethnic conflict

Devolved units can only assist in resolving internal conflict if they have powers to address the “narratives which support conflict”.<sup>204</sup> The factors may either be identity conflict, resources and political powers, or a mixture of these factors.<sup>205</sup> The main political and ethnic conflict in Kenya is between the major ethnic groups in Kenya who are embroiled in destructive competition for control of the presidency.<sup>206</sup> This competition is driven largely by a perception that the president will divert state resources and powers to his ethnic community to the exclusion of other ethnic groups.

Perceptions of exclusion are informed by past experience in which incumbent presidents diverted state resources, development and other benefits to their home regions.<sup>207</sup> Regional and interpersonal disparities, often perceived along ethnic lines, have further deepened these perceptions.<sup>208</sup> There is a widespread feeling among the major ethnic communities that the only way to address their political and economic exclusion is to capture the presidency.<sup>209</sup> In turn, this has led to conflict between the major ethnic groups who are “presidential contenders”. Land and land-based resources top the root causes of ethnic conflict in Kenya; unresolved historical land injustices and perceptions of exclusion from land ownership along ethnic lines have been the major drivers of ethnic conflict.<sup>210</sup>

As such, the only way that counties can also address ethnic conflict in Kenya is if they are allocated powers to address the root causes of conflict. This can happen only if county powers provide an alternative to control of the presidency. In such a situation, communities not in control of the presidency will ideally be content with exercising county powers. Such a division of power has the potential to diffuse political attention from the centre to the counties.<sup>211</sup> If the

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<sup>204</sup> World Bank (2011a) 83.

<sup>205</sup> World Bank (1999) 115.

<sup>206</sup> Barkan JD ‘Ethnic fractionalization and the propensity for conflict in Uganda, Kenya and Tanzania’ in Herbst J, McNamee T & Mills G (eds) *On the Fault Line: managing the tensions and divisions within societies* (2012) 154-155.

<sup>207</sup> Chege M and Barkan JD ‘District focus and the politics of reallocation in Kenya’ (1989) 27 *Journal of Modern African Studies* 436-437; Southall & Wood (1996) 509; Tordoff W ‘Decentralisation: Comparative experience in Commonwealth Africa’ (1994) 32 (4) *The Journal of Modern African Studies* 568-570.

<sup>208</sup> YP Ghai ‘Devolution: Restructuring the Kenyan State’ (2008) 2 *Journal of Eastern African Studies* 211, 215-216.

<sup>209</sup> Ghai (2008) 215-216.

<sup>210</sup> Republic of Kenya (2008) 30.

<sup>211</sup> Ghai (2008) 215-216.

major ethnic communities find the county level a viable political alternative, the presidency will no longer be the “life-and-death” prize it currently is.

While the main political conflict is between ethnic communities that are “presidential contenders”, there are the smaller ethnic communities who, though not a major threat nationally, can be disruptive. As such, counties should enable these communities as well to engage in power-sharing and development. Moreover, among the smaller ethnic communities are ones still even smaller; referred to in the Constitution as “marginalised communities” and “minorities”, they have distinct lifestyles and cultures which, too, should be maintained for purposes of local peace and harmony. In most cases, the lifestyles revolve around land and land-based resources.<sup>212</sup> Counties should also be given powers to address the existing regional and economic disparities that are perceived along ethnic lines and which fuel conflict. As such, county powers should enable counties to enhance access to essential services and development in order for these perceptions of exclusion to be addressed.

The main question, then, is whether the county powers discussed above can engage with the issues that define ethnic conflict in Kenya. A review of the powers of counties reveals that while counties may be in a position to address some of these issues, most county powers are too limited to be able to do this effectively.

#### **5.1.2.1 County powers and ethnic political accommodation**

For the purposes of considering ethnic political accommodation, ethnic groups in Kenya may be divided into three major categories: the “big five” who are presidential contenders; the smaller ethnic communities who are too small to capture the presidency but able to secure a county or two; and “in-county” minorities who are too small to have a county of their own. The way in which county powers have been designed has a different impact in each of these categories of ethnic communities.

For the larger ethnic groups, county powers can address ethnic conflict only if they provide a viable “consolation prize” in lieu of control of the presidency. Given the nature of most of the powers exercised by county governments, the counties amount to vehicles for local service delivery as opposed to being institutions that wield significant political and state power.<sup>213</sup> In addition, the possibility exists that county powers could be constricted even further by the

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<sup>212</sup> Sing’oei KA ‘Kenya at 50: Unrealised Rights of Minorities and Indigenous Communities’ (Report: Minority Rights Group International (MRI), and Ogiek Peoples Development Programme (PDP)) (2012) 11.

<sup>213</sup> Ghai & Cottrell (2012).

adoption of a restrictive interpretation of county powers and functions. There are limited grounds on which county laws and powers can override the national government in matters of concurrent jurisdiction, and the national government retains a regulatory, supervisory role in respect of most or all powers exercised by the counties.

Each of the major ethnic communities holds the possibility of clinching the presidency and might not see the weak county powers as an alternative to the control of the presidency. The bulk of political powers and resources are retained at the centre, with the Constitution retaining a pure presidential system, albeit with clipped presidential powers. The limited county powers diminish the “political significance” of counties, meaning that the presidency may thus remain a highly attractive prize to these communities. Barkan warns that this situation could make the large ethnic groups rush to form “counter-coalitions” and in the process deeply divide the country in a deadly “zero-sum” game of ethno-political competition.<sup>214</sup> Indeed, the run-up to the March 2013 general elections saw gradual ethnic and political polarisation as coalitions and counter-coalitions formed around the big five ethnic communities.<sup>215</sup>

While the Constitution formally recognises the people’s sovereignty as the basis for exercise of county powers, the actual content of county powers does not represent any fundamental sharing of state and political power. This division of sovereignty and powers between the national and county government is more symbolic than real, and the bulk of political and economic power has remained in the hands of the national government. Despite the fact that county powers are constitutionally recognised and entrenched, the powers are diminished by a number of factors discussed in the preceding sections. The larger ethnic communities are thus likely to remain fixated on capturing the presidency.

For smaller ethnic communities with a home county or two, the current design of county powers may actually address their ethnic grievances and bring about their political inclusion. Being too small in number to capture the presidency, most of these communities are content with political and economic inclusion at the county level. The constitutional recognition and entrenchment of county powers and functions is of significance to these smaller ethnic communities. In the past regime, powers and functions of local authorities were subject to administrative authorisation and other forms of control.<sup>216</sup> The local authorities were overshadowed by central government departments and were largely irrelevant to local communities.<sup>217</sup>

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<sup>214</sup> Barkan (2012) 154-155.

<sup>215</sup> Mathiu M ‘Alliances no breath of fresh air; they stink of old wines in new skins’ *Daily Nation* 13 December 2012.

<sup>216</sup> Southall & Wood (1996) 503.

Counties now have powers over crucial sectors and will play a relevant role in local development. Ethnic communities, through “home counties”, will shape their own development at the local level as opposed to complying with a centrally determined agenda, as was the case in the past. The smaller ethnic communities will thus have a chance, through county democratic processes, to participate in the political governance of the country. This has potential to address their grievances relating to political exclusion. Therefore, while the larger ethnic communities will find county powers inadequate to quench their “political thirst”, the smaller ethnic communities with no stakes in the presidency may well be content with the current county powers.

However, the fact that the larger ethnic communities will remain in competition for control of the presidency means that threats to ethnic harmony and national political stability still exist. Whereas ethnic conflict in the independence era was between the larger, more dominant ethnic groups and the smaller ethnic communities, the nature of the conflict has changed. The large and politically dominant groups are divided and in open political competition; smaller ethnic communities have gradually been drawn into the conflict between the major ethnic groups, and could still play a role in ethnic conflict by taking sides in the “presidential contest” between the larger communities.

For the tiny ethnic groups who are minorities at the county level, the manner of decentralisation of powers to levels below counties will determine whether they will be included or not. “in-county minorities” can only be accommodated through decentralisation of powers and resources from the county level to the sub-county level in order to facilitate their political and economic inclusion. However, the preceding discussions have shown that the framework for decentralisation of power to levels below the county is weak and unclear. Counties have almost complete latitude on what to, and how to, decentralise from the county level. Even mere deconcentration without any real decentralisation of powers and resources can still satisfy the Constitution. However, county minorities will only be effectively included if powers and resources are devolved to the sub-county level where the minorities are dominant. If powers and resources are concentrated at the county level where they are in the hands of the dominant ethnic group, county minorities may protest against such exclusion, leading to conflict.

While “in-county minorities” may protest at exclusion, they – much like the slightly bigger ethnic minorities with a “home county” or two – are not a threat to national political stability. However, where county minorities form a substantial part of a county population, they are capable of being

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<sup>217</sup> World Bank (2002) 46.

disruptive at the county level. This is true of groups such as the Kuria in Migori County, the Marakwet in Elgeyo County, the Saboot in Bungoma County and the Teso in Busia County. Singo'ei, for instance, warns that "while Luos are dominant in Migori and can secure most positions at the county level, the stability of the country depends also on the extent of inclusion of the Kuria minority".<sup>218</sup> Concentrating powers and resources at the county level may lead to resentment and minority conflict in reaction to real or perceived domination by the local ethnic majority in counties where there is a substantial presence of "in-county minorities". It has been observed that minimal attention was given to the "within-county" dynamics of devolution – dynamics relating, for instance, to intra-county equity – and this has the potential to ignite county minority conflict.<sup>219</sup>

Thus, it can be concluded that while county powers have been constitutionally entrenched and safeguarded, the possibility remains that ethnic and political conflict will continue because the larger ethnic communities, the main threat to political stability, are likely to be dissatisfied with county powers and may still focus on clinching the presidency. While the smaller communities with a home county may be content with county powers, past experience shows that they are usually drawn into competition for presidency by taking sides with the larger ethnic communities, thereby aggravating the conflict. The lack of a clear framework for decentralisation of powers to county ethnic minorities may also lead to perceptions of exclusion from county powers. As such, there is a likelihood of county minority conflict in counties that host substantial numbers of county ethnic minorities.

#### **5.1.2.2 County powers and equity**

The Constitution provides for symmetric devolution of powers to all the 47 counties. As such, counties with areas that were previously neglected now have powers to enhance access to services and ensure effective local development. County functional areas include health, roads and infrastructure, planning and development, water and sanitation, gas and electricity reticulation and energy regulation, and agriculture. These are much-needed services in neglected areas, and counties will have the functional competence to provide them. The World Bank, for instance, notes high disparities in nutrition levels between children in Wajir and

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<sup>218</sup> Sing'oei (2012) 23.

<sup>219</sup> World Bank (2012) 17.

Mombasa counties,<sup>220</sup> and this is evidence of the high disparities in access to essential services such as basic health care.

More importantly, the regional and economic disparities in terms of development and access to services have often been perceived along ethnic lines, thus forming a basis for ethnic conflict. Most of these disparities have their roots in colonial policies which were perpetuated by post-colonial government development policies.<sup>221</sup> County powers are generally relevant to the expansion of these services and development to previously neglected areas.

However, addressing development-related disparities takes time and may require “long-term patience” before any real change can be apparent.<sup>222</sup> Indeed, the World Bank has noted that counties where access to services is needed most are the ones with the lowest capacity to deliver, capacity which needs to be built over time.<sup>223</sup> This means that, regardless of the powers and resources allocated to counties with little or no services and development, it will take a long time before they are “pulled up” to the same level as other counties that perform relatively well. Inequalities are thus likely to persist despite the fact that counties have relevant powers to address them. Aggrieved perceptions based on inequalities might continue to stay in force – and continue to fuel ethnic conflict.

The ability of counties to address regional and economic disparities will also depend on other factors, such as the amount of resources that are available to counties for purpose of providing essential local services and development. Furthermore, the division of resources has to consider the disparities within counties, which implies that there must be equity in the distribution of resources between the county governments. (County finances and the equitable share of resources are discussed in the next chapter.)

### **5.1.2.3 County powers and the land question**

Because the land issue is at the heart of ethnic conflict in Kenya,<sup>224</sup> counties need extensive powers over land matters if they are effectively to engage with land-related ethnic grievances. These include powers to address land-related historical injustices, for instance by restoring land in clear cases of unfair dispossession. However, county powers are limited to holding

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<sup>220</sup> World Bank (2011b) 25.

<sup>221</sup> Chege & Barkan (1989) 436-437.

<sup>222</sup> World Bank (2011a) 10.

<sup>223</sup> World Bank (2011b) 19.

<sup>224</sup> Kanyinga (2009) 330.

community lands in trust for the local communities. Substantial power over land issues lies with the nationally-based NLC.

Indeed, the complexities of the land question mean that the county is not the appropriate forum to address some of the root causes. For instance, while counties may host persons displaced from other counties, restoring possession may require the national government, which has better capacity to address a matter of such a scope. Indeed, as mentioned in Chapters 3 and 4, the land question permeates every national political issue, including devolution.<sup>225</sup> This question demands a comprehensive response that clearly goes beyond the current scope of county powers and which may require utilisation of the more effective national mechanisms.

#### **5.1.2.4 County powers and ethnic and cultural identity**

Where the identity of a subnational group is threatened by a dominant culture or identity, there is bound to be conflict. Devolution can address such a conflict only if the devolved units have powers to protect, promote and preserve the identity of the respective subnational group(s).<sup>226</sup> Accordingly, devolved units should have powers over matters that enhance the threatened identity; these may include matters such as use of language, ethnic identity, or even the “unique” socio-economic activities or a lifestyle which defines a specific identity that is otherwise discordant with the mainstream or dominant culture or language.

Kenya has 43 major ethnic communities with diverse cultures and languages. The fact that most of the 47 counties are ethnic-based implies that each ethnic group can potentially use its home county or counties to promote and protect its ethnic and cultural identity. Indeed, counties have powers over “cultural activities and facilities”.<sup>227</sup> The main ethnic conflict in Kenya is, however, a struggle between the major ethnic communities for political and economic power. Ethnic identity is thus appropriated as a means for accessing state powers and preserving political power and wealth. Ethnic identity *per se* is not the political objective or goal of political leaders in the major ethnic communities. Instead, the ethnic tag is used almost purely as a tool for leveraging access to state, political, and economic power.

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<sup>225</sup> Constitution of Kenya Review Commission (CKRC) ‘The final report of the Constitution of Kenya Review Commission’ (2005) 271.

<sup>226</sup> Reka A ‘The Ohrid Agreement: The travails of inter-ethnic relations in Macedonia’ (2008) 9 *Human Rights Review* 62.

<sup>227</sup> Item 4(h), Part 2 of the Fourth Schedule.

The power to promote the use of local languages is, for instance, retained at the national government and counties are restricted to two national languages (Kiswahili and English) in the conduct of official county business. One would expect the counties, which are mainly ethnically-based, to claim powers to promote their respective local languages and identity. However, there is little doubt that most counties are content to use the two official languages. The Kenyan situation is different from other states where accommodation of local identity and languages is important for securing peace. In Macedonia, for instance, denying the local governments powers to use their local languages may foment conflict. In Kenya, though, English and Kiswahili are considered ethnically neutral and therefore acceptable, while the use of local languages is generally deemed to be divisive. Promotion of cultural and ethnic identity *per se*, especially for the larger ethnic groups, is not a political priority.

Most ethnic groups in Kenya share a common social and economic lifestyle. While different ethnicities identify themselves on the basis of language, their lifestyle and economic activities are basically integrated. However, there are other ethnic communities with a cultural identity and lifestyle distinct from the mainstream Kenyan social and economic lifestyle,<sup>228</sup> for instance, the Maasai, who are found mainly in three counties, Narok, Kajiado and Samburu.<sup>229</sup> Other ethnic communities with a distinct cultural and socio-economic identity include the Sengwer, Ogiek and Endorois, who are found in the former Rift Valley Province.<sup>230</sup> However, official government statistics have always sought to place these smaller but culturally distinct groups under larger ethnic identities, such as the Kalenjin, against their choice.<sup>231</sup>

A number of factors make the socio-economic lifestyle of these communities distinct from mainstream Kenyan society. Their lifestyles are mainly connected or tied to land-based resources. The communities rely on traditional and communal land tenure systems, pastoralism, or simple “hunter-gatherer” economies. While the rest of Kenyan society is being gradually integrated into mainstream socio-economic life, these communities seek to preserve their distinctiveness; as such, their identity has existed alongside a dominant and mainstream socio-economic lifestyle.<sup>232</sup>

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<sup>228</sup> Sing'oei (2012) 11-15.

<sup>229</sup> Sing'oei (2012) 11-15.

<sup>230</sup> Sing'oei (2012) 6.

<sup>231</sup> Sing'oei (2012) 6.

<sup>232</sup> Sing'oei (2012) 11-15.

The definition of “marginalised communities” in the Constitution targets these communities. Marginalised communities are typically small in number, not fully integrated to the social and economic life of Kenya, and have sought to preserve their distinct lifestyle. One of the objects of devolution is to protect and promote the interests and rights of minorities and marginalised communities.<sup>233</sup> Concerns raised by these groups include the dispossession of ancestral land and resource rights, and developments which distort their livelihoods, such as commercial developments, the gazettement of forest areas as public and government land, and other mainstream economic activities injurious to their distinct socio-economic lifestyle.<sup>234</sup> Other challenges include charges of trespass when they try to access grazing grounds as well as intimidation for squatting on “public land”,<sup>235</sup> land which in most cases belonged to them communally in the past. In Lamu County, for instance, the proposed Lamu Port mega project is said to have the potential to destroy the “distinct culture and creed” of the local people in Lamu such as the Bajuni, Sanye and Boni.<sup>236</sup> While these communities do not pose a national political threat, they could be potentially disruptive at the county level where their presence can be felt. Counties should have powers that can address the needs and concerns of these communities.

However, counties will only have a limited role to play in the protection of the rights and interests of these communities. First, land and land-based resources appear a primary concern for most or all of these communities. Counties have only the limited role of being custodians of existing community land. For existing land that is registered as community land, counties have powers to ensure that such land is used in accordance with the interests of the local communities. Counties have no powers to restore land rights, administer land or determine the use of land. Some of the lands which initially belonged to these communities are now listed as “public land”, “private land”, and other categories of land over which the counties do not have an explicit mandate. The nationally-based NLC has the bulk of the powers that are important for protecting the culture and identity of these groups.

Powers over education can enable counties to promote awareness of the social and economic lifestyle of these communities and also to provide education in a way that suits these lifestyles. However, county powers in matters of education are limited to pre-primary schools, childcare facilities and village polytechnics. As such, counties do not have powers, for instance, to set up

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<sup>233</sup> Article 174 (e).

<sup>234</sup> Sing’oei (2012) 11.

<sup>235</sup> Sing’oei (2012) 11.

<sup>236</sup> Sing’oei (2012) 15.

mobile primary schools for school-going children from pastoralist communities. This is a function of the national government. Furthermore, only the national government determines the syllabus and the content thereof. As such, it falls upon the national government to include awareness of these communities in the curriculum.

In addition, counties have no powers over the promotion of local languages. As such, it is only the national government that will regulate the use of local languages. The CGA already restricts county business to Kiswahili and English, and this may limit marginalised communities who have little or no knowledge of the two official languages.<sup>237</sup>

Since counties have powers to deliver basic services in the main sectors such as health, infrastructure, agriculture, planning and development at the county level, water and sanitation, and other service delivery sectors, they may extend these services to the marginalised communities. Most of these services are lacking in areas where marginalised communities live; accordingly, counties may extend them to these communities. For instance, counties may decide to dig boreholes for pastoralist communities, establish a system of mobile health services, and ensure that the socio-economic lifestyle of these communities is considered in all county planning and development projects. However, most of these services will also be subject to national government regulation and policies. It is also possible that the extent of county powers in these functional areas may expand or contract, depending on whether the county powers are interpreted generously or restrictively.

### **5.1.3 County powers and the limiting of central power**

One of the objectives of devolved government is to limit central power.<sup>238</sup> This can only be achieved if the extent of power under the control of counties amounts to a substantial and effective vertical power division between the centre and the counties. Ideally, this would transform counties into effective counterweights to central power. However, an assessment of the powers of county governments reveals that while there are aspects of the design that may enhance the ability of counties to limit central power, many of the design aspects also weaken that ability.

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<sup>237</sup> Mukundi GW 'The Rights of Indigenous Peoples: Kenya' International Labour Organisation (ILO) and the African Commission on Human and Peoples Rights (ACHPR) (2009) 33-34.

<sup>238</sup> Article 174 (i).

### 5.1.3.1 Design aspects that enhance counterbalancing of central power

The express constitutional recognition of people's sovereignty as the basis for the exercise of county powers enhances the political significance of counties. Counties are not agents of the national government but exercise shared sovereignty with the national government. County powers are thus a product of the fundamental division of the political powers of the state. While the former local authorities drew their authority from administrative directions, counties draw their powers from the Constitution. The role of the counties in constitutional amendment through the popular initiative also enhances the "political significance" of counties in that it is recognised that counties are integral to the entire constitutional system.

The powers of counties are constitutionally entrenched: Part II of the Fourth Schedule to the Constitution lists the functional areas of county governments and other clauses which grant counties primary or original powers. County powers can thus be varied only through a constitutional amendment. While counties can have added powers and functions through assignment or transfer, the counties have to consent to a transfer of functions. In regard to assignment of powers, the Senate (which is discussed in Chapter 8) has power to vet national legislation that seeks to assign powers to county, and this may act as a safeguard on county interests with regard to assignment of powers.<sup>239</sup> Accordingly, counties are protected from becoming agents of the national governments by procedures of transfer and assignment of powers which safeguard county interests.

While the bulk of county government functions were performed by the former local authorities,<sup>240</sup> some of the powers granted to county governments will be devolved to counties for the first time. These include functions such as gas and electricity reticulation and energy regulation, and constitutional amendment, which were never performed by the former local authorities. As such, there is a slight expansion of the functional areas of the former local authorities. Furthermore, depending on the interpretation given to county powers, counties may end up with expanded powers far beyond those of the former local authorities. For instance, provincial hospitals may end up with county governments, thus expanding the scope of county powers in the health sector. A similar approach to other mainstream sectors may end up significantly expanding county powers.

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<sup>239</sup> Article 96 (2).

<sup>240</sup> Ghai & Cottrell (2012) 121-122.

### 5.1.3.2 Design aspects that limit counterbalancing of central power

Beyond the symbolic treatment of the status of counties in the constitutional structure, the actual content of county powers appears weak. Counties will essentially have powers similar to those of the former local authorities, with only a marginal expansion in a few areas. Furthermore, a number of weaknesses in the design of county powers may lead to further contraction of powers and (re)centralisation. The nature of the bulk of powers exercised by local governments makes them much more like local governments engaged in local service delivery than politically powerful regional units that can counteract central power. The supervisory and regulatory role of the national government over county matters is more like “typical national government regulation” of local governments as opposed to “federal governance” between the federal level and the constituent units. Concurrent powers and functions are also subject to generously-worded national overrides.

The county powers are typical local government powers that are subject to many central government policies and regulations. In essence, only a few functional areas were added to the powers exercised by the former local authorities. It is in this context that Ghai and Cottrell comment that the limited county powers “are somewhat at odds with the rather elaborate institutional arrangements, including the Senate at the national level for the protection of county interests”.<sup>241</sup> The involvement of county powers in constitutional amendment via popular mandate enhances their significance. However, the process is complex and lengthy; it is less than likely that any constitutional amendments will take this route. Furthermore, counties play only a “gate-keeping role” in that they do not initiate any amendments. The participation of counties in constitutional amendments is incumbent on other processes that are external to the counties: public petitions for constitutional amendment and verification by the IEBC, before the counties vote on the proposed amendment.

The extent and scope of county powers is not clear as the functional areas are vaguely defined. A number of functions may become either national or county functions, depending on the approach taken to the interpretation of county functions. Therefore, there is a possibility that county powers may be contracted or expanded depending on the interpretation. A restrictive interpretation may end up limiting the scope of county powers and centralising powers to the national government. For instance, many of the functions listed in Part II of the Fourth Schedule could end up spilling across county governments. If county powers are limited to intra-county

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<sup>241</sup> Ghai & Cottrell (2011) 26.

activities, the scope of county powers will be narrow. If all cross-county activities are left to the national government, there will be little left for counties. Furthermore, a “pro-centre” interpretation may make all county powers to be subject to the “generously” worded national overrides. As such, there is a danger that powers that could belong to counties will be centralised.

The uncertainty with regard to certain powers and functions of counties can be traced to the “hybrid” nature of the county level. There are powers and functions which could easily have fitted as “regional functions” if there were a regional level of government. However, under the current structure, powers and functions considered beyond counties may automatically revert to the national government. The 47 counties are too fragmented, a situation which might limit the exercise of some powers and functions and see these reverting to the national government.

#### **5.1.4 Is there a balance of purposes in the design of county powers?**

Design features that are common or neutral to the three purposes need no balancing. However, there must be trade-offs between the conflicting features for a balanced pursuit of the three purposes of devolution. With regard to the design of powers and functions, many design aspects are common. Indeed, devolved units need autonomy and powers in order to make and implement decisions on development, enhance political inclusion and limit central power. Accordingly, there is no major conflict in the design of powers and functions for the three purposes. However, the level of autonomy or amount of power differs with the three purposes and the current design suits the developmental purpose more than the other two purposes.

The county powers are too limited to pacify the “thirst” of the larger ethnic communities. Accordingly, county powers cannot counterbalance or effectively limit central power. However, the same powers are relevant and sufficient for the pursuit of local development. As such, ethnic accommodation and the limiting of central power were not carefully considered in the design of county powers. Furthermore, many of the powers and functions relevant to the root causes of ethnic conflict in Kenya, such as land, were retained at the national level, thus limiting further the ability of counties to address ethnic conflict.

While decentralisation of powers to sub-county structures offers a chance to accommodate “in-county minorities” and facilitate local participation, it is likely that decentralisation to the sub-county level will serve the developmental purpose more than the ethnic accommodation. Indeed, the urban local government system is created with the goal of effective service delivery. Ghai and Cottrell also note that the emphasis is on “decentralisation of services” as opposed to

political inclusion of county minorities.<sup>242</sup> It can thus be concluded that while autonomy and powers are important for the three purposes, the current design emphasises the developmental purpose to the exclusion of the other two purposes.

## **6. Cooperative government**

While devolution of power implies separate government at national and local level, the interconnectedness and interaction of the national and devolved units is inevitable.<sup>243</sup> Information-sharing is important if national priorities are to be informed by local needs and if there is to be a local understanding of national policies and objectives.<sup>244</sup> Thus, it is only through cooperation that there can be a coordinated and harmonious agenda. Cooperation, unlike other elements such as regulation and supervision, is based on the equality of the levels of government.<sup>245</sup>

In turn, the emphasis on equality between national and subnational units of government may have relevance not only to the overall development agenda but also ethnic accommodation and the ability to limit central power. Arguably, equality of levels can enhance the significance of counties: the national government may, for instance, be constrained in the exercise of its powers by an “injunction” of first consulting counties before exercising any power that could impact on county operations. It is in this context that De Visser remarks:

National government must genuinely relinquish power to local government and not use their supervisory powers to thwart decentralisation and, at the same time, local governments must not use their powers at will or at the expense of the national development agenda.<sup>246</sup>

Importantly, De Visser warns that a distinction must be made between coordination and cooperation. In the former, he observes, there is a person at the centre charged with “ensuring” a smooth flow of things, and this reinforces the “vertical relationship” which is inimical to equality of levels of government.<sup>247</sup> Subnational governments, the “junior partners” in the relationship, are the most likely “losers” if coordination (the need to work together) is emphasised at the expense of cooperation (on the basis of equals).<sup>248</sup> Steytler refers to these two aspects as

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<sup>242</sup> Ghai & Cottrell (2011) 129.

<sup>243</sup> De Visser (2005) 210.

<sup>244</sup> De Visser (2005) 212.

<sup>245</sup> De Visser (2005) 210.

<sup>246</sup> De Visser (2005) 210.

<sup>247</sup> De Visser (2005) 210.

<sup>248</sup> De Visser (2005) 211.

“coercive” and “cooperative” models of intergovernmental relations, respectively;<sup>249</sup> cooperative government is the appropriate one, as it emphasises interaction between equals. Steytler and De Visser<sup>250</sup> argue that the words “distinctive” and “interdependent”, also used in the Kenyan Constitution, represent autonomy and the need to pursue a common agenda, respectively.<sup>251</sup>

The Constitution provides principles and a general framework for cooperation between counties and the national government. The national and county levels are established as distinct and interdependent. Accordingly, both governments shall conduct their “mutual relations” on the basis of consultation and cooperation.<sup>252</sup> Governments at both levels are required to perform their functions and exercise their respective powers in a manner that respects the functional and institutional integrity of the other level.<sup>253</sup> Both levels are also required to liaise for the purpose of exchanging information, coordination of policy and administration, and enhancing capacity.<sup>254</sup> The Constitution also recognises that both levels can form (vertical and horizontal) joint committees or authorities for purposes of effective performance of functions and exercise of powers.<sup>255</sup>

### **6.1 Cooperative government and development**

The common objectives of devolved government, the majority of which are geared towards development, imply a common understanding in the pursuit of development. Mutual understanding is, in turn, based on consultation and the sharing of information. In practice, this will entail consultation between, and within, levels of government as well as participation in the formulation of national development policies and priorities.<sup>256</sup> The discussions in the preceding parts reveal that many structural and functional aspects of national and county powers will require vertical and horizontal cooperation for effective devolved development.

First, while the Constitution generally delineates respective functional areas for both levels of government, most of the functional areas are basically shared. Clarification of the nature and

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<sup>249</sup> Steytler N ‘Co-operative and coercive models of intergovernmental relations: A South African case study’ in Courchene *et al* (eds) *The Federal Idea: Essays in Honour of Ronald L. Watts* (2011) 417-423.

<sup>250</sup> Steytler N & De Visser J *Local Government Law of South Africa* (2011) 16-3.

<sup>251</sup> De Visser (2005) 211.

<sup>252</sup> Article 6 (2).

<sup>253</sup> Article 189 (1) (a).

<sup>254</sup> Article 189 (c).

<sup>255</sup> Article 189 (2).

<sup>256</sup> De Visser (2005) 210.

extent of specific powers and responsibilities is a continuous process of refinement.<sup>257</sup> A number of functions may either end up as county or national government functions or shift between the two levels. This process requires cooperation and consultation in order to create a mutual understanding of the boundaries with regard to powers and functions. An inherent benefit of cooperation is that joint clarification of the respective powers and functions can end in clearly defined and commonly agreed powers. Clearly defined powers will in turn ensure efficiency in performance of functions and accountability, as the public will know which government to hold accountable for non-performance.<sup>258</sup> This will lay a strong basis for effective devolved development.

Second, the structural limitations (size, number, institutional structures) on the developmental role of counties were discussed in the previous chapter and the preceding parts of this chapter. However, the limitations related to size and number of counties may be partly addressed if counties can ensure effective horizontal and vertical cooperation in the performance of functions. The 47 counties are too fragmented to effectively take up functions that are cross-county in nature. The World Bank observes that while counties can cooperate in performance of functions, “the sheer number of counties will challenge effective decision-making”.<sup>259</sup> The World Bank proposes stronger and more effective structures of horizontal cooperation that are capable of making decisions.<sup>260</sup> Accordingly, effective horizontal cooperation may cure the structural deficiency caused by the fragmented nature of counties.<sup>261</sup>

## **6.2 Cooperative government and ethnic accommodation**

An important aspect of both vertical and horizontal cooperation is that it will bring counties into interaction through joint performance of functions and other matters that require cooperation between the different counties. The majority of the 47 counties are ethnic-based, and effective cooperation means that different ethnic groups will, through cooperative government structures and forums, interact on issues of development and other activities. Such a process has the potential to form the basis for ethnic integration and minimising ethnic conflict. A central element in cooperation is the emphasis on equality of orders, and this has the potential to pacify ethnic groups that are not in control of the presidency (and therefore the national government). At the

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<sup>257</sup> World Bank (2012) 118.

<sup>258</sup> World Bank (2012) 115.

<sup>259</sup> World Bank (2012) 113.

<sup>260</sup> World Bank (2012) 113.

<sup>261</sup> World Bank (2012) 114.

very least, the “political significance” of counties vis-a-vis the national government is enhanced by the emphasis on equality.

However, despite the potential benefits of cooperation highlighted above, the process of cooperation may itself lay a basis for further ethnic conflict and polarisation. For instance, while horizontal cooperation may facilitate effective exercise of power, it may, in the same breath, facilitate the re-grouping of the major ethnic communities who were split several counties. Horizontal cooperation may lead to the formation of the old regional ethnic blocs and thus lay a basis for negative ethnic mobilisation. Indeed, while “close kinship linkages” can facilitate horizontal cooperation, as suggested by the TFDG, it could facilitate the re-building of the former ethnic homelands.

An unmitigated assumption that lower levels of government have, through cooperation, a truly equal place with national government is, as De Visser states, “somewhat of a sophistry”.<sup>262</sup> It is unlikely that the concept of equality and cooperation will pacify ethnic communities who lose the presidency. Joint performance of functions may also lay a basis for further ethnic-based political wrangles over resources and management of joint development projects. Thus, while there is a possibility that cooperation may foster ethnic integration, there is no guarantee that it will be achieved. “Cooperation” may actually deepen ethnic animosity and conflict.

### **6.3 Cooperative government and limiting of central power**

Vertical cooperation limits both levels of government from unilateral exercise of autonomy. In this regard, it has the potential to limit the powers of the central government. The national government is obliged, under the principle of cooperation, to consult with county governments before exercising its powers on matters of mutual concern. It is clear that while equality of orders is emphasised in cooperation, a clear beneficiary of the principle is the county government, which is most likely to emerge as a “junior partner” in intergovernmental relations.<sup>263</sup> Some of the restrictions which emanate from the principles of cooperative government against the national government have the potential to enhance the position of counties vis-a-vis the centre.

While the counties are too fragmented to effectively counterbalance central power, it has been argued that they could counter this structural limitation by presenting a united stand in their

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<sup>262</sup> De Visser (2005) 211.

<sup>263</sup> De Visser (2005) 211.

relations with the national government.<sup>264</sup> This implies strong horizontal cooperation in dealings with the central government. A united stand by the counties may make counties more powerful together when bargaining with the national government. Conflicts and fragmented voices from counties will, on the other hand, add to the structural limitations and weaken counties if they deal with the national government individually.

The small size and number of counties limits their effective exercise of powers and functions, especially functions that have a cross-county dimension. While such functions may fall on the national government due to the fact that they straddle county boundaries, horizontal cooperation has the potential to enable counties to effectively perform such functions. In essence, effective horizontal cooperation may enable counties to claim and perform functions which they could otherwise not perform effectively as individual devolved units. Through cooperation, counties can claim more powers from the centre and exercise them more effectively. This will, in the long run, limit central government power and at the same time make counties more powerful.

## **7. Conclusion**

The preceding discussions reveal that the impact of the design of county powers will vary with the three purposes. While the vaguely defined powers of counties and the limited role of counties in crucial sectors may pose a challenge to the developmental role of counties, the bulk of the powers are more suited to the pursuit of development. Accordingly, if other enabling factors such as finances are present, the current design of county powers will generally enable counties to pursue development to the exclusion of ethnic accommodation and limiting central power.

County powers are too limited to ensure effective political accommodation of the ethnic groups that are perennial contenders for the presidency. While the powers may facilitate the ethnic accommodation of smaller groups that are not in competition for the presidency, the major threat to political stability in Kenya is between the larger ethnic groups who are likely to remain fixated on the presidency. The weak framework for decentralisation of power to the sub-county level may also lead to county minority conflict if dominant groups in counties exclude them politically and economically at the county level. Furthermore, most of the powers relevant to addressing issues that underlie ethnic conflict in Kenya have been allocated to the national government.

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<sup>264</sup> Ghai & Cottrell (2011) 134.

While the Constitution provides that the distribution of powers between the national and county governments is rooted in shared sovereignty, the bulk of powers have been retained at the national level. County powers are too limited to enable the county governments to limit central power. The division of powers is slanted in favour of the centre which retains critical powers and functions. Furthermore, the size and number of counties is itself a structural limitation in the bid to counterbalance central power. Cooperative government may assist counties to address structural limitations, but there is no guarantee that this will be achieved. As a result, counties will be limited in their ability to limit central power.

However, even with a design of powers that generally favours development, there are other factors that will determine the overall effectiveness of counties; these include the institutional design dealt with in the last chapter, and the availability of funds to finance operations. The next chapter examines the fiscal design of county governments and its impact on the three purposes.



## CHAPTER SEVEN

### FISCAL AND FINANCIAL POWERS OF COUNTY GOVERNMENTS

#### 1. Introduction

Fiscal autonomy enables devolved units to match local preferences with available resources and thereby improve local service delivery and development.<sup>1</sup> In situations of internal conflict, fiscal autonomy and control over local resources may facilitate the economic inclusion of subnational groups, the lack of which is a common ground for conflict.<sup>2</sup> Effective fiscal and financial powers also provide an important basis for limiting central power;<sup>3</sup> weak or absent fiscal powers, on the other hand, expose devolved units to the risk of political subordination and control by the centre.<sup>4</sup>

This chapter examines the fiscal and financial powers of county governments through the prism of development, ethnic accommodation and limiting central power. First, the nature and extent of county powers to raise revenue locally, and the extent to which such powers facilitate effective local self-rule, are examined. Second, the chapter evaluates the design of intergovernmental transfers to county governments and the extent to which the design facilitates or limits self-rule. However, before delving into the details of the design, the chapter starts by examining, among other constitutional principles, the principles of public finance that underlie the fiscal powers of counties.

The argument presented in this chapter is that counties are denied crucial sources of local revenue and will thus be dependent on central transfers to perform their functions. While there is a constitutional minimum county share from revenue raised nationally, official<sup>5</sup> and

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<sup>1</sup> World Bank *World Development Report 1999/2000: Entering the 21<sup>st</sup> Century* (1999) 117.

<sup>2</sup> Lewis P 'Boundaries and bargains: Managing Nigeria's fractious Society' in Herbst *et al* (eds) *On the Fault Line: Managing the Tensions and Divisions within Societies* (2012) 19-20; World Bank 'Spending for development: Making the most of Indonesia's new opportunities' (2008) 122; Brodjonegoro B & Ford JF 'Intergovernmental fiscal relations and state building: The case of Indonesia' (2000) 41 *Hitosubashi Journal of Economics* 113.

<sup>3</sup> World Bank (1999)117.

<sup>4</sup> Saunders C 'Legislative, executive and judicial institutions: A synthesis' in Le Roy K *et al* (eds) *Legislative, Executive and Judicial Governance in Federal Countries* (2006) 347.

<sup>5</sup> CRA 'Recommendations on sharing revenue by the national government between the national government and county governments and among county governments' 2012.

independent estimates<sup>6</sup> indicate that it may not be enough to cover the revenue needs of county governments. Accordingly, county governments are highly likely to require additional funds beyond their minimum equitable share. While the Constitution provides that additional funds may be provided conditionally and unconditionally, the manner in which additional funding will be provided is likely to have an impact on the three purposes of devolution.

### **1.1 Principles of public finance and devolution**

The Constitution lists five main principles that are meant to “guide all aspects of public finance in the Republic”.<sup>7</sup> The first principle provides for openness and accountability, including participation in financial matters.<sup>8</sup> All public institutions, including counties, are required to carry out financial matters in a transparent manner. This means that financial records and other information regarding public finances should be easily accessible to the public for scrutiny. Accountability also implies that there should be means through which the leadership of all public institutions can be held to account. Public participation, on the other hand, means that public institutions should facilitate public engagement in all matters concerning public finances, which include planning, budgeting and monitoring of budget implementation.

The second principle provides that the entire public finance system shall promote equity in three main ways.<sup>9</sup> First, the burden of taxation shall be shared fairly.<sup>10</sup> Second, revenue raised nationally shall be shared equitably among national and county governments.<sup>11</sup> Third, public expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups or areas.<sup>12</sup> This principle recognises the element of fairness in the conduct of all matters of public finance. Taxation should be designed in a way that recognises disparities; doing so enhances fairness because the varying capacities will be taken into account in the payment of taxes. The division of revenue between and within levels of government should also take into account in respect of the disparities and needs. In order to remedy past injustices, the principle also calls for “affirmative action” in matters of public finance with respect to areas or groups that were previously and deliberately marginalised.

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<sup>6</sup> World Bank *Devolution without Disruption: Pathways to a Successful New Kenya* (2012) 55.

<sup>7</sup> Article 201.

<sup>8</sup> Article 201 (a).

<sup>9</sup> Article 201 (b).

<sup>10</sup> Article 201 (b) (i).

<sup>11</sup> Article 201 (b) (ii).

<sup>12</sup> Article 201 (b) (iii).

The third principle provides for “inter-generational equity” in the conduct of public finances, and requires that all the benefits arising from public borrowing and the use of resources be shared equitably between present and future generations.<sup>13</sup> While fairness has mainly focused on current disparities, fairness between generations is also increasingly becoming a concern.<sup>14</sup> The Constitution thus requires that in all matters concerning public finance, the interests of coming generations must be taken into consideration. The effect of this principle is that resources have to be divided fairly between the current generation and future generations. Accordingly, policies of public finance should not lead to depletion of resources or future “debt bondage” as a result of excessive public borrowing; it also means that there should be fair sharing of the costs of current investments, which will have benefits for future generations.

The fourth and fifth principles provide that public money shall be used in a prudent and responsible way, and that financial management shall be responsible with clear fiscal reporting, respectively.<sup>15</sup> These two principles require that finances should be used for intended purposes and laid down procedures be followed to ensure that the intended purposes are met.

While the principles above apply to all public institutions, including counties and other institutions of devolved governance, there are also objectives and principles that pertain specifically to devolution. It is thus important to understand the relationship between the principles and objectives of public finance and those of devolved government. The objectives and principles of devolved government, as discussed in Chapter 5, reveal that there is little, if any, dissonance between the principles of public finance and the objectives and principles of devolved government. Indeed, the objectives of devolved government strongly emphasise accountability,<sup>16</sup> participation,<sup>17</sup> equity,<sup>18</sup> and affirmative action to marginalised communities and areas;<sup>19</sup> they are thus aligned with the broad objectives and principles that bind all other public institutions.

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<sup>13</sup> Article 201 (c).

<sup>14</sup> De Visser J *Developmental Local Government: A Case Study of South Africa* (2005) 13.

<sup>15</sup> Article 201 (d) and (e).

<sup>16</sup> Article 174 (a).

<sup>17</sup> Article 174 (c).

<sup>18</sup> Article 174 (e).

<sup>19</sup> Article 174 (f).

## 1.2 The Constitution's approach to county financing: the "funding model"

In regard to county financing, a county is expected first to raise its own revenue to the best of its revenue potential. Determination of the county share from revenue collected nationally is to be informed by, among other factors, "the need for economic optimisation of each county and to provide incentives for each county to optimise its capacity to raise revenue".<sup>20</sup> Accordingly, the Commission on Revenue Allocation (CRA) which recommends the county equitable share is required, before making proposals on the county share, to take into account the need for resource optimisation by counties.<sup>21</sup> The CRA is also expected to encourage fiscal responsibility<sup>22</sup> in county governments, a matter which includes efficiency and the optimisation of revenue collection. In addition, the Constitution provides that the CRA should, when appropriate, define and enhance the revenue sources of counties.<sup>23</sup>

The implications of the provisions above is that county governments should first optimise their own revenues and that central transfers should come into play only to fill the deficit between the local revenue and the overall revenue needs. There is a constitutionally guaranteed minimum county share of 15 percent<sup>24</sup> which can be increased depending on county needs. There is also a provision for further funding through conditional or unconditional grants,<sup>25</sup> including an equalisation fund which is a conditional grant for enhancing access to basic services in marginalised areas.<sup>26</sup> The main object of central government transfers, including the equitable share and additional funds, is to ensure broader equity. The revenue potential of counties varies, and this should be factored in the design of central transfers.

Following the approach to county financing described above, the first step is to ascertain the revenue potential of counties before the equitable share is determined. However, the extent to which this funding model will work in the initial stage is questionable since there is no basis for assessing the revenue capacity of counties individually or collectively.<sup>27</sup> Not unexpectedly, the initial CRA formula did not take into account the revenue potential of counties in the design of

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<sup>20</sup> Article 203 (i).

<sup>21</sup> Article 216 (3) (a).

<sup>22</sup> Article 216 (3) (c).

<sup>23</sup> Article 216 (3) (b).

<sup>24</sup> Article 203 (2).

<sup>25</sup> Article 202 (2).

<sup>26</sup> Article 204 (1).

<sup>27</sup> World Bank (2012) 92-93.

the initial central government transfers.<sup>28</sup> However, future formulas for transfers may consider the revenue potential of counties when it becomes possible to assess their actual performance and capacities.

## **2. Own county government revenue**

The ability of counties to raise their own revenue in order to fund their functions represents the highest form of autonomy. Indeed, devolved units should, ideally, be in a position to raise their own revenue in order to support all their functions.<sup>29</sup> Own local revenue strengthens the autonomy of subnational units.<sup>30</sup> It is also argued that paying local taxes creates an impetus for local communities to demand better services, which can in turn improve efficiency and accountability.<sup>31</sup>

The constitutional power to levy property taxes is a fundamental shift from the previous regime where the Constitution did not mention any taxing power of local authorities. Indeed, the former local authorities had to get administrative authorisation from the minister in charge of local government before implementing any revenue-raising measures.<sup>32</sup> De Visser notes that the constitutional entrenchment of a local government's revenue-raising power prevents the upper levels of government from taking the fiscal powers of a subnational government.<sup>33</sup>

Despite the stated significance of own local revenue to effective devolved development, county governments in Kenya have been denied access to major tax bases. Only two kinds of taxes are constitutionally protected sources of county revenue: property taxes and entertainment tax.<sup>34</sup> The national government, on the other hand, controls the major taxes, which include income tax, value-added tax, customs duties and other duties on import and export goods, and excise tax.<sup>35</sup> However, the county tax base can be expanded if additional taxes are provided

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<sup>28</sup> World Bank (2012) 92-93.

<sup>29</sup> World Bank (1999) 117; Litvack *et al Rethinking Decentralisation in Developing Countries* (1998) 12.

<sup>30</sup> World Bank (1999) 117.

<sup>31</sup> World Bank (1999) 117.

<sup>32</sup> World Bank (2012) 62.

<sup>33</sup> De Visser (2005) 162.

<sup>34</sup> Article 209 (3) (a) and (b).

<sup>35</sup> Article 209 (1).

through national legislation.<sup>36</sup> Apart from taxes, the Constitution provides that both national and county governments may impose fees and service charges.<sup>37</sup>

Even with the small tax base left to counties, there is the potential that own county revenue could only play a substantial role in financing county revenue. A World Bank report estimates that the local authorities in the former constitutional dispensation raised an average of 59 percent of their expenditure from their own sources, while 41 percent was met by central government transfers.<sup>38</sup> Although factors such as the level of funding to counties and the revenue capacity of the counties may fundamentally change these statistics, the figures are an indication that local revenue may still play a substantial role in county financing, at least in counties where property rates, entertainment taxes and service charges would be a meaningful source of revenue.

## **2.1 Property rates**

While the Constitution empowers counties to levy property rates, it lays down conditions to which counties must adhere in exercising the power. The Constitution also provides that all taxes and licensing fees are to be charged in accordance with enabling legislation.

### **2.1.1 Authority to levy and administer property rates**

Counties have constitutionally protected powers to levy property rates<sup>39</sup> which must be exercised in accordance with legislation.<sup>40</sup> The Constitution does not, however, specify whether property rates are subject to national or county legislation as it generally states that taxes and license fees are subject to legislation. The term “legislation” is defined in the Constitution to include both national and county legislation.<sup>41</sup> Accordingly, the enabling legislation required in respect of property rates may be interpreted as national or county legislation. The World Bank interprets the provision as referring to enabling national legislation.<sup>42</sup>

The Constitution further states that “the taxation and other revenue-raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities

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<sup>36</sup> Article 209 (2).

<sup>37</sup> Article 209 (4).

<sup>38</sup> World Bank (2012) 65.

<sup>39</sup> Article 209 (3) (b).

<sup>40</sup> Article 210 (1).

<sup>41</sup> Article 260.

<sup>42</sup> World Bank (2012) 68.

across county boundaries or the national mobility of goods, services, capital or labour”.<sup>43</sup> Presumably, therefore, the enabling legislation is meant to give effect to these conditions. These conditions, nevertheless, are general and seem to give discretion and broad flexibility to counties on how to administer and charge property rates.

County government powers over property rates in the current Constitution go beyond the narrow and constricted powers that local authorities had in the former dispensation. With this being a constitutional power allocated to counties, the counties must be in a position to settle the key questions regarding the administration and levying of property rates. As such, requirements that, for instance, counties can levy property rates only with ministerial approval would be unconstitutional. The only limitations that will apply to the exercise of county powers are those recognised in the Constitution; county governments should not exercise their power to levy property rates in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital and labour.<sup>44</sup> It is not entirely clear what constitutes prejudice of economic policy or a breach of these conditions; what is clear, though, is that a restrictive approach that unreasonably and unjustifiably limits the power of counties to effectively charge and administer property taxes may be unconstitutional.

National legislation may provide for framework legislation that sets broad parameters within which counties must operate in administering county taxes. For instance, it may specify whether property taxes can be based on the value of land only or the improved value (buildings, etc.). However, the enabling national legislation must allow counties to vary property rates within the generously-worded conditions in the Constitution. The County Government Public Finance Management Transition Act, enacted in early 2013, provides that revenue-raising measures used by the former authorities shall continue under the new dispensation, at least for the first fiscal year.<sup>45</sup> Accordingly, the Rating Act,<sup>46</sup> under which the former authorities charged property rates, may continue operation under the county governments.<sup>47</sup> However, provisions of the Act will have to be construed with necessary alterations to reflect the expanded county powers, as provided in the transitional provisions of the current Constitution.<sup>48</sup>

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<sup>43</sup> Article 209 (5).

<sup>44</sup> Article 209 (5).

<sup>45</sup> Section 22.

<sup>46</sup> Cap 267 laws of Kenya.

<sup>47</sup> World Bank (2012) 68.

<sup>48</sup> Section 7, Sixth Schedule to the Constitution.

### 2.1.2 Significance of property rates

In the former constitutional regime, property rates were the most important source of own local revenue for the former local authorities, accounting for an average of 12 percent of the total local government revenue.<sup>49</sup> It is therefore potentially the case that property rates will be an important source of local revenue for county governments. However, property rates were not “uniformly important” for all local authorities. The World Bank notes that while rates accounted for 25 percent of the local revenue of the former municipalities, they were a paltry 6-7 percent for town and city councils.<sup>50</sup>

The varying importance of property rates is a result of a combination of factors. The valuation rolls that were used to charge property rates captured “the larger more valuable urban tax base for properties”, which favoured municipalities whose gazetted areas were predominantly urban.<sup>51</sup> The Rating Act gave local authorities the power and flexibility to assess and levy rates, but these powers were, for various reasons, rarely exercised.<sup>52</sup> For instance, property rates could be applied to both land and improvements on land<sup>53</sup> but were mainly applied to land only, thus leaving out tax on developed properties. Agricultural land (less than 12 acres), public land, and most private lands were also excluded from rating rolls.<sup>54</sup> Government ministries paid Compensation in Lieu of Rates (CILOR) to local authorities in respect of government properties, which too contributed to lower rates.<sup>55</sup> Indeed, it has been noted that, with property rates at just 12.1 percent of the total local government finance, Kenya is under-collecting property rates, which stand on average at 40 percent in other developing countries.<sup>56</sup>

It is thus clear that central control, poor administration and lack of institutional capacity may have led to the diminished significance of property rates. The TFDG recommended that CILOR should be scrapped and government pay normal rates. The TFDG also recommended that the assessment for rates should include improved and unimproved value sites.<sup>57</sup> However, beyond capacity issues, it is still likely that property rates will be of little relevance to rural areas. This is

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<sup>49</sup> World Bank (2012) 62.

<sup>50</sup> World Bank (2012) 63.

<sup>51</sup> World Bank (2012) 63.

<sup>52</sup> World Bank (2012) 63.

<sup>53</sup> World Bank (2012) 63.

<sup>54</sup> World Bank (2012) 63.

<sup>55</sup> Republic of Kenya ‘Final report of the Taskforce on Devolved Government’ (2011) 254.

<sup>56</sup> World Bank (2012) 70.

<sup>57</sup> Republic of Kenya (2011) 254.

because factors such as poverty, communal ownership of land in some rural areas, and poor or absent services in rural areas may make property rates difficult to administer and collect. On the other hand, urban areas have improved site value, registered ownership, and urban services, which form a basis for the assessment and collection of property rates. The varying significance of property rates across counties is thus likely to continue.

## **2.2 Entertainment tax**

The power to levy entertainment taxes is exclusively granted to counties.<sup>58</sup> Entertainment tax under the previous regime was applied on admission to entertainment.<sup>59</sup> It is thus likely that the tax will apply to charges levied on admission to entertainment and social places. These may include stadia and other sports facilities, theatres, casinos and entertainment spots, and other places of entertainment that may fit in this category. Counties have constitutional powers to levy entertainment tax subject to enabling legislation (national or county).<sup>60</sup> The Entertainments Tax Act, which was passed before the current Constitution,<sup>61</sup> may be used as enabling legislation, in which case its provisions must also be construed as amended in order to reflect the expanded county powers.<sup>62</sup>

It is clear, however, that most entertainment places upon which the tax can be levied are sited in urban areas. Accordingly, as with property rates, this tax may end up being important for counties with predominantly urban areas where entertainment places are located. While counties with no urban-type entertainment places may have similar power, it would be of little or no relevance to them.

## **2.3 Additional county taxes: assigned taxing powers**

While counties are expressly empowered to charge only two kinds of taxes, the Constitution provides that they can be assigned more taxing powers through national legislation.<sup>63</sup> However, the additional taxes, unlike those on property and entertainment, will not have express constitutional protection. All taxing powers, except property and entertainment taxes, are essentially national government taxing powers. Therefore, any taxing power assigned to

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<sup>58</sup> Article 209 (3) (b).

<sup>59</sup> Section 3.

<sup>60</sup> Article 210 (1).

<sup>61</sup> Cap 479 Laws of Kenya.

<sup>62</sup> Section 7(1), Sixth Schedule to the Constitution.

<sup>63</sup> Article 209 (2).

counties implies a greater role of the national government in ensuring effective administration and collection of those taxes.<sup>64</sup> In all cases, county governments will need authority through national legislation to administer any taxing powers assigned by national government. Government regulation and supervision of tax collection and administration of assigned taxes may also be greater than in the case of entertainment and property taxes.

Given that the major tax bases enable the national government to perform important functions such as macroeconomic control, redistribution and other important national objectives and policies,<sup>65</sup> it is unlikely that any of the major taxes will be assigned to counties. However, taxes which are local in nature and whose transfer may not pose a threat to fiscal policy should be devolved. The World Bank advises, for instance, that hotel accommodation tax, levied under the Hotel Accommodation Act,<sup>66</sup> should be assigned to counties.

## **2.4 County service charges and “regulation revenue” of county governments**

The Constitution provides that “the national and county governments may impose charges for services”.<sup>67</sup> Part II of the Fourth Schedule lists the main functional areas of counties from which counties can raise revenue. There are two main ways in which counties can raise fees. First, counties can raise fees by charging the public for individual services of which they (the public) are consumers. These include, inter alia, water and sanitation, electricity and energy reticulation, and health services. The second source is what can be termed “regulation revenue”. Some of the powers of county governments listed in the Fourth Schedule may enable county governments to raise revenue from official charges such as licence fees. These include trade licensing, energy regulation, development planning and other regulatory powers.

### **2.4.1 Charges for county services**

Counties will be in charge of providing a wide range of services to the public at the county level. The bulk of these services are mainly basic services essential to livelihood at the local level. As a result, county services will have ready consumers in the public. Services to be provided by county governments in the health sector include: county health facilities and pharmacies; ambulance services; veterinary services; cemeteries, funeral parlours and crematoria; and

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<sup>64</sup> Article 187 (2) (b).

<sup>65</sup> World Bank (1999) 107.

<sup>66</sup> Cap 478 laws of Kenya.

<sup>67</sup> Article 209 (4).

refuse removal, refuse dumps and solid waste disposal.<sup>68</sup> With regard to cultural activities, public entertainment and public amenities, county services include: cinemas, video shows and hiring; libraries, museums, sports and cultural activities and facilities; and county parks, beaches and recreation facilities.<sup>69</sup> Under county transport, counties will be in charge of county roads, street lighting, traffic and parking, public road transport, and ferries and harbours.<sup>70</sup>

In the agricultural sector, counties will be in charge of crop and animal husbandry, livestock sale yards, county abattoirs, plant and animal disease control, and fisheries.<sup>71</sup> Counties will also be in charge of providing facilities for the accommodation, care and burial of animals.<sup>72</sup> With regard to “county planning and development”, counties will be in charge of providing housing as well as electricity and gas reticulation.<sup>73</sup> Under trade development, counties will run markets and “local tourism”. In the education sector, the county services are limited to pre-primary education, village polytechnics, homecraft centres and childcare facilities.<sup>74</sup> Counties are also in charge of providing water and sanitation services.<sup>75</sup>

Many of the functions allocated to counties were actually performed by the former local authorities and other decentralised institutions in the previous dispensation. However, the nature and extent of authority that the local authorities and other decentralised institutions had over those services may differ from the powers of counties over the functions. For instance, unlike county governments, none of the former decentralised institutions had a direct constitutional authority to levy charges for services delivered. It is thus clear that while counties will inherit functions performed by institutions in the former dispensation, the nature and extent of authority will differ. It is not possible to discuss exhaustively all the revenue-raising functions of county governments.

#### **2.4.1.1 Authority to levy charges for county services**

Unlike taxes and licensing fees, the power of counties to charge for services offered is not subject to enabling legislation. Article 210 (1) only restricts “tax and licensing fees” to enabling

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<sup>68</sup> Item 2, Part 2 Fourth Schedule.

<sup>69</sup> Item 4, Part 2 Fourth Schedule.

<sup>70</sup> Item 5, Part 2 Fourth Schedule.

<sup>71</sup> Item 1, Part 2 Fourth Schedule.

<sup>72</sup> Item 6, Part 2 Fourth Schedule.

<sup>73</sup> Item 8, Part 2 Fourth Schedule.

<sup>74</sup> Item 9, Part 2 Fourth Schedule.

<sup>75</sup> Item 11 (b), Part 2 Fourth Schedule.

national legislation. Charges for county services are not mentioned in the article or any other provision as requiring enabling legislation before counties can levy service charges. It is thus possible for county governments to directly invoke their constitutional power as a basis for levying charges for services offered to the public. The constitutional autonomy of county governments to set and implement tariffs is recognised in the CGA.<sup>76</sup> The Public Finance Management Act (PFMA) also provides that county governments can declare any public agency or authority or body delivering services allocated to counties as “county government entities”.<sup>77</sup> This provision is in recognition of the constitutional autonomy and power of county governments to provide services and raise revenue from the services offered.

It can thus be concluded that the county powers and autonomy to raise revenue for services rendered is greater than the county powers relating to raising revenues through taxes or “regulation revenue”. This is because taxes and “regulation revenue” need enabling legislation, whereas counties do not need enabling legislation to charge revenue for services. Even then, the significance of the revenue raised from services will vary with the service and the county involved.

#### **2.4.1.2 County health services**

Under county health services, counties will be in charge of county health facilities and pharmacies. An important source of revenue here may be the user fees that will be levied in county hospitals and other health facilities within the counties. Past experience shows that hospital user charges have the potential to be a significant contributor to county revenue.<sup>78</sup> However, experience also shows that the cost of provision of health services may outstrip the income received from user fees, especially in poor areas where user fees may be adjusted to be less proportionate to the services offered.<sup>79</sup> An important factor is that health services are uniformly important for rural and urban areas and may therefore be the potential source of revenue for all counties.

The other services listed under “county health services” include ambulance services, veterinary services, cemeteries, funeral parlours and crematoria, refuse removal, refuse dumps and solid waste disposal. The significance or amount of revenue to be realised from these services is not

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<sup>76</sup> Section 120 CGA.

<sup>77</sup> Section 5 PFMA.

<sup>78</sup> World Bank (2012) 73.

<sup>79</sup> World Bank (2012) 21.

clear. However, it is clear that, with the exception of veterinary services, the other services are of an urban nature and may therefore be insignificant to counties with predominantly rural areas.

#### **2.4.1.3 Water and sanitation services**

Counties have constitutional power to provide water and sanitation services and raise revenue from them.<sup>80</sup> Powers over water and sanitation include the power to set and implement tariffs, and even take over public entities involved in the provision of water and sanitation services in the counties.<sup>81</sup> Accordingly, while water sector reforms, which commenced in 2002,<sup>82</sup> “ring-fenced” revenue from water and sanitation services for improvement of the services, thereby enhancing efficiency,<sup>83</sup> such arrangements can be preserved only with the consent of county governments. Admittedly, while the water sector reforms improved efficiency, the “ring-fencing” denied the local authorities a crucial revenue source.<sup>84</sup> Counties may want to take over the control of revenue from water and sanitation services, and while the national government may desire that water and sanitation revenue should be “ring-fenced”, it has to be done with the concurrence of county governments.

#### **2.4.1.4 Game reserves**

Counties have powers to implement specific national government policies on natural resources and environmental conservation.<sup>85</sup> Under trade development, county governments also have powers over “local tourism”.<sup>86</sup> These two functions may extend to the power of counties to take charge of game reserves, a tourist attraction which in the past has been a significant source of revenue for those local authorities that host such reserves. While aggregate income from entry fees into game reserves amounted to just 3.9 percent of the total local government revenue in the past,<sup>87</sup> it accounted for over 30 percent of the own revenue for local authorities that host

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<sup>80</sup> Item 11 (b), Part 2 Fourth Schedule.

<sup>81</sup> Section 5 PFMA.

<sup>82</sup> Cap 372 Laws of Kenya.

<sup>83</sup> World Bank (2012) 72.

<sup>84</sup> World Bank (2012) 72.

<sup>85</sup> Item 10, Part 2 Fourth Schedule.

<sup>86</sup> Item 7 (d), Part 2 Fourth Schedule.

<sup>87</sup> Republic of Kenya ‘Local Authorities Transfer Fund (LATF): Annual report and review of local authority financial performance FY 2008-2009’ (2009) 4.

game reserves.<sup>88</sup> For the three counties hosting game reserves – Isiolo, Samburu and Narok – entry fees have the potential to be a key source of own revenue.

The Constitution uses the phrase “government game reserve”, one which is not normally used in Kenyan law.<sup>89</sup> Game reserves are usually either on government or private land and are so declared by the Wildlife (Conservation and Management) Act; however, the declaration of a game reserve does not affect ownership of the land as the land can still remain private or public.<sup>90</sup> Ghai and Cottrell note that “if ‘government game reserve’ means a reserve on national government land, presumably any other reserve will remain as it is”, and this means that the game reserves that were under the former county councils may still remain under the host counties.<sup>91</sup>

#### **2.4.1.5 Gas and electricity reticulation**

Under the functional area of county planning and development, county governments have powers over “electricity and gas reticulation”.<sup>92</sup> The national government, on the other hand, has power over “energy policy including electricity and gas reticulation and energy regulation”.<sup>93</sup> This means that the actual supply of gas and electricity is a county function while the national government is left with policy-making. It is submitted that the view given by the World Bank, that county power “appears to be limited to planning, while the national government may look after actual service delivery”,<sup>94</sup> is incorrect. The World Bank did not take cognisance of the term “development” which appears in the function and instead chose to emphasise the “planning” component only. It is submitted that the Fourth Schedule grants counties both “planning” and implementation (development) powers with regard to matters of electricity and gas reticulation. It is thus possible for county governments to constitutionally claim powers to reticulate electricity and gas.

In South Africa, electricity reticulation accounts for an average of 30 percent of the total revenue of the largest 21 municipalities and the six metropolitan municipalities.<sup>95</sup> However, Kenyan

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<sup>88</sup> Republic of Kenya (2009) 8; World Bank (2012) 64.

<sup>89</sup> Ghai & Cottrell (2011) 126.

<sup>90</sup> Section 18 Cap. laws of Kenya

<sup>91</sup> Ghai & Cottrell (2011) 126.

<sup>92</sup> Item 8 (e) Part II Fourth Schedule.

<sup>93</sup> Item 31 Part I Fourth Schedule.

<sup>94</sup> World Bank (2012) 130.

<sup>95</sup> Steytler N & De Visser J *Local Government Law of South Africa* (2011) 17-3.

counties will have to build capacity for gas and electricity reticulation from scratch. A government report states that counties will generally be in charge of implementation of the electrical energy policy.<sup>96</sup> The report states that counties will be responsible for data and statistics collection crucial for energy project design such as river flow data. Counties will also implement rural electrification projects and the construction of small hydropower and geothermal plants of less than 3MW (mega watts).<sup>97</sup> With regard to electricity reticulation, the report states the counties will have power over “planning, development, operation and maintenance of mini-grids and dispersed (isolated) systems”.<sup>98</sup> The county will also be “responsible for generation of energy support data, and for mobilizing resources for energy projects”.<sup>99</sup>

The meaning and extent of the proposals in the government report referred to above are not yet clear. What is clear, though, is that, while counties have power for actual reticulation of gas and electricity, the non-existent capacity of counties, along with other complications in the energy sector, may delay the transfer of this power to county governments.

#### **2.4.1.6 Other county services**

As mentioned earlier, it is not possible to discuss all the services to be offered by the counties and their revenue potential or significance. However, the nature and extent of county powers with respect to all the services listed in the Fourth Schedule remain the same. Counties can set tariffs and levy charges within the constitutional limits discussed earlier above. Other important contributors to local government revenue in the past were market fees, vehicle parking, house rent and plot rents.<sup>100</sup>

#### **2.4.2 County “regulation revenue”**

There are powers in the Fourth Schedule that are allocated to counties which, if exercised, have the potential to generate revenue for county governments. The bulk of these powers deal with the regulation and licensing of various activities falling within the functional area of county governments. Counties are charged with control of air pollution, noise pollution, other public

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<sup>96</sup> Republic of Kenya ‘Report on devolved functions, structures and staffing for county governments’ Ministry of State for Public Service (2012) 50-51.

<sup>97</sup> Republic of Kenya (2012) 51.

<sup>98</sup> Republic of Kenya (2012) 51.

<sup>99</sup> Republic of Kenya (2012) 51.

<sup>100</sup> World Bank (2012) 70.

nuisances and outdoor advertising.<sup>101</sup> Counties are also charged with licensing and control of undertakings that sell food to the public.<sup>102</sup>

Under public amenities, counties are charged with liquor licensing and regulating betting, casinos and other forms of gambling.<sup>103</sup> With regard to animal control, counties have powers over licensing of dogs.<sup>104</sup> In trade regulation, counties have power to issue trade licences, ensure fair trade practices and regulate cooperative societies.<sup>105</sup> Under county planning, counties have powers over land survey and mapping, and energy regulation.<sup>106</sup> Counties also have powers over control of drugs and pornography.<sup>107</sup> All these powers have the potential to enable counties to raise revenue through their regulatory role. This can be through licence fees, fines or other official fees payable to the counties.

#### **2.4.2.1 Authority to impose licence fees or raise other “regulation revenue”**

The Constitution provides that no licensing fee may be imposed, waived or varied except as provided for by legislation,<sup>108</sup> but does not specify whether it is national or county legislation. Therefore, the provision can be interpreted as requiring either national or county legislation.<sup>109</sup> However, the role of the national legislation is limited to defining constitutionally defined limits for the exercise of the power. The legislation may provide for different categories of businesses and corresponding licence fees. The Act may also prescribe upper limits of county licence fees and impose other conditions which reasonably fall within the prescribed constitutional limits in Article 209 (5) of the Constitution. Under the County Government Public Finance Management Transition Act (CGPFMTA), counties can use the repealed Local Government Act to impose licence fees that were provided under the Act in the transition period.<sup>110</sup>

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<sup>101</sup> Item 3, Part 2 Fourth Schedule.

<sup>102</sup> Item 2 (d), Part 2 Fourth Schedule.

<sup>103</sup> Item 4 (a) and (c), Part 2 Fourth Schedule.

<sup>104</sup> Item 6 (a), Part 2 Fourth Schedule.

<sup>105</sup> Item 7, Part 2 Fourth Schedule.

<sup>106</sup> Item 8, Part 2 Fourth Schedule.

<sup>107</sup> Item 13, Part 2 Fourth Schedule.

<sup>108</sup> Article 210 (1).

<sup>109</sup> Article 260.

<sup>110</sup> Section 22 CGPFMTA.

#### **2.4.2.2 Potential significance of county “regulation revenue”**

In the 2009/10 fiscal year, “trade regulation” was the second highest source of local revenue for the former local authorities at an average of 9.8 percent of the total revenue.<sup>111</sup> Unlike property rates, which are confined to urban areas, revenue from “trade regulation” is an important source of revenue for both urban and rural areas. For instance, the Single Business Permit (SBP) that was levied by the former local authorities contributed to 20 percent of the own revenue in county councils and 19 percent in town councils.<sup>112</sup> It is thus a potentially significant source of local revenue for all counties.

Under the county planning function, counties have powers over land survey and mapping.<sup>113</sup> Counties can raise revenue through fees for approval of plans, registration of plans, change of user, fines and other activities which can become revenue-raising measures. In the 2008/2009 and 2009/2010 fiscal years, plans approvals and administrative charges were among the “other” category which contributed to 18-20 percent of the total local revenue for the former local authorities.<sup>114</sup> It is thus possible that land survey and mapping will also be a significant source of “regulation revenue” for the county governments, among other “regulatory functions”.

#### **2.5 County borrowing**

It is recognised in the Constitution that county governments can raise local revenue through borrowing.<sup>115</sup> However, a number of conditions must be met before county governments can access loan facilities. The Constitution provides that a county government can only borrow money if the national government guarantees the loan.<sup>116</sup> Second, a county government may only borrow money if the CA approves the loan.<sup>117</sup> The Constitution further provides that national legislation shall prescribe conditions under which the national government may guarantee a loan to a county. The PFMA which spells out further conditions restricts county borrowing to capital financing, thus excluding all recurrent expenditure from this source of revenue.<sup>118</sup> These conditions may make county borrowing an undesirable source of county

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<sup>111</sup> World Bank (2012) 62.

<sup>112</sup> Republic of Kenya (2009) 8.

<sup>113</sup> Item 8 (b) Part II Fourth Schedule.

<sup>114</sup> World Bank (2012) 62.

<sup>115</sup> Article 212.

<sup>116</sup> Article 212 (a).

<sup>117</sup> Article 212 (b).

<sup>118</sup> Section 58 (2).

revenue. A county loan is part of “the public debt” as defined in the Constitution,<sup>119</sup> and the central government may be keen to control the level of the public debt.<sup>120</sup> Factors such as ability to repay may also lock out many counties from loans.<sup>121</sup>

## **2.6 “Ownership” of local natural resources: additional county revenue?**

The Constitution provides that parliament should enact “legislation ensuring that investments in property benefit local communities and their economies”.<sup>122</sup> This may be interpreted as facilitating “economic self-determination” from natural resources for “host communities”. The constitutional framework is unclear, however, as it does not specify the subcategories of natural resources or investments within this category or their benefits. In Nigeria, the derivation clause in the Constitution provides that 13 percent of oil revenue accruing to the federal government will be redirected to the oil-producing state from which the revenue originated.<sup>123</sup>

Kenya is not as endowed with natural resources as Nigeria or other natural resource-rich countries, which may explain the undeveloped framework for “economic self-determination”. There have been recent oil discoveries in Kenya, and a detailed framework for local benefits, as envisaged in the Constitution, may be necessary. A draft Geology, Minerals and Mining Bill drafted in 2012 proposes sharing of royalties in the proportion of 75:15:10 percent to the national government, county government and the community, respectively.<sup>124</sup> This may be a starting-point to ensure that natural resources benefit local communities.<sup>125</sup>

## **2.7 The overall significance of county government own revenue**

While counties were denied crucial sources of revenue, own county revenue may still play an important role in county finances. Past experience with the former local authorities shows that some of the sources of revenue listed in the Part II of the Fourth Schedule can generate substantial revenue. The World Bank estimates that own county government revenue may account for 17 percent of the total county government revenue if central transfers are

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<sup>119</sup> Article 214.

<sup>120</sup> World Bank (2012) 168.

<sup>121</sup> Republic of Kenya (2009) 15.

<sup>122</sup> Article 66 (2).

<sup>123</sup> Section 162(2) of the 1999 Constitution of Nigeria provides for a “derivation fund” for oil-producing communities in which 13 percent of federal revenue from the area is ploughed back for economic development. See also Lewis (2012) 26.

<sup>124</sup> Third Schedule to the Geology, Minerals and Mining Bill 2012.

<sup>125</sup> World Bank (2012) 76.

maintained at the minimum 15 percent.<sup>126</sup> However, the World Bank estimates are based on the performance of the former local authorities. County powers to raise revenue have been expanded and new areas to raise revenue, such as gas and electricity reticulation, energy regulation and entertainment taxes, have been added.

However, the bulk of the revenue-raising powers are predominantly urban-based. These include powers such as property and entertainment taxing powers, water and sanitation services, and other typical urban services. In the past, local authorities in 28 out of the 47 counties used to receive over 50 percent of their funding from central government transfers.<sup>127</sup> Only the former Nairobi City Council and local authorities in the three counties (Samburu, Isiolo and Narok) that host game reserves were able to finance over 70 percent of their expenditure from locally-generated revenue.<sup>128</sup> It is thus likely that with the exception of business licenses – which appear to be an important source of revenue for both urban and rural areas – most of the revenue sources may only end up benefiting counties with predominantly urban counties. This has the potential to diminish the overall significance of local revenue, given that the majority of county governments are predominantly rural.

### **3. Intergovernmental transfers to county governments**

Almost as a universal rule, subnational governments are designed to be revenue-deficient and hence dependent to varying degrees on central government transfers for their operations.<sup>129</sup> In turn, central government allocations to devolved units are used to pursue important national objectives such as redistribution, equitable sharing of national resources, and addressing regional disparities.<sup>130</sup> Indeed, as Prud'homme argues, redistribution is better addressed through central macro-allocations than through individual devolved units.<sup>131</sup> Kenya is no exception to the universal model of fiscal design. Counties are denied major tax bases, which have been reserved for the national government, and thus are not in a position to fund all their functions from their own local sources of revenue.

Accordingly, the Constitution provides for a system of intergovernmental transfers to county governments to enable them to perform their functions. In this regard, the most important of the

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<sup>126</sup> World Bank (2012) 73.

<sup>127</sup> World Bank (2012) 74.

<sup>128</sup> World Bank (2012) 74.

<sup>129</sup> World Bank (1999) 117; Litvack *et al* (1998) 12.

<sup>130</sup> World Bank (2000) 107.

<sup>131</sup> Prud'homme R 'The dangers of decentralization' (1995) 10 *The World Bank Observer* 202.

intergovernmental transfers is the counties' equitable share of revenue raised nationally. However, the Constitution also recognises that further transfers, beyond the equitable share, can be made to county governments, either conditionally or unconditionally.<sup>132</sup> The transfers also include the Equalisation Fund, which the national government can allocate to counties and which is intended to enhance access to specified basic services in marginalised areas.<sup>133</sup>

### **3.1 The equitable share**

The Constitution lays down the factors and objectives to be considered in the vertical division of revenue between the national and county governments and horizontally among the county governments. Being the most likely largest source of revenue for county governments, the criteria are put in place to ensure that the objectives of devolved governments and other broader constitutional objectives are factored into its design.

#### **3.1.1 Criteria for determination of the equitable share**

The Constitution lists 11 factors that need to be considered in determining the equitable vertical and horizontal division of revenue.<sup>134</sup> The first factor requires that “national interests” be considered in the division of revenue.<sup>135</sup> The phrase “national interest” usually connotes the intents of the national government, acting on behalf of the country as a whole, in accordance with the overall constitutional objectives.

Second, the equitable share must consider “any provision that must be made in respect of the public debt and other national obligations”<sup>136</sup> that make it relevant to the vertical division of revenue. “Public debt” seems to refer to “national debt”, as it is lumped together with “other national obligations.” Therefore, before any division is made, public or national debt, as well as other national government obligations, have to be considered.

Third, “the needs of national government, determined by objective criteria” have to be considered before the vertical division of revenue.<sup>137</sup> Generally, government expenditure-needs are virtually limitless and can be used to justify the retention of all revenue generated nationally. It is for this reason that the Constitution provides for objectivity in the vertical division of

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<sup>132</sup> Article 202 (1).

<sup>133</sup> Article 204.

<sup>134</sup> Article 202.

<sup>135</sup> Article 203 (1) (a).

<sup>136</sup> Article 203 (b).

<sup>137</sup> Article 203 (1) (c).

revenue. The CRA enhances objectivity by recommending the equitable share based on the needs of both governments and the resources available.

Fourth, as a counterweight, the equitable share should also consider “the need to ensure that county governments are able to perform the functions allocated to them”.<sup>138</sup> Counties are allocated functions to perform, and this should be considered in determining the vertical share. The CRA is thus required to objectively balance the revenue needs of both levels of government and the available revenue.

Fifth, the equitable share must also consider the “the fiscal capacity and efficiency of county governments”.<sup>139</sup> Thus, while the Constitution provides that the revenue needs of counties should be considered, the capacity of counties is relevant. This may refer to the capacity to make efficient use of revenue allocated to them; it may also refer to the capacity for revenue collection which will determine the equitable share that a county or counties will receive. This criterion is related to the ninth criterion, which provides that vertical division of revenue should also consider “the need for economic optimisation of each county and provide incentives for each county to optimise capacity to raise revenue”.<sup>140</sup> These two elements mean that counties’ revenue potential as well as their capacity to spend moneys allocated to them are both relevant in determining the vertical equitable share.

Sixth, the “developmental and other needs of counties” should be considered in determining the equitable share.<sup>141</sup> It was shown in Chapter 5 that the bulk of the objectives of devolution are aimed at pursuing development.<sup>142</sup> Accordingly, this function should be considered separately among other factors. The seventh and eight factors are relevant to development. The seventh factor provides that “economic disparities within and among counties and the need to remedy them” must be considered.<sup>143</sup> Accordingly, the equitable share must address the varying needs in order to ensure fair distribution of resources. The eighth factor provides that the equitable share must consider “the need for affirmative action in respect of disadvantaged areas or

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<sup>138</sup> Article 203 (1) (d).

<sup>139</sup> Article 203 (1) (d).

<sup>140</sup> Article (203) (1) (i).

<sup>141</sup> Article 203 (1) (f).

<sup>142</sup> Article 174.

<sup>143</sup> Article 203 (1) (g).

groups”.<sup>144</sup> This factor calls for special needs arising from past unfair or discriminatory policies to be recognised and addressed.

Tenth, the equitable share should consider “the desirability of stable and predictable allocations of revenue”.<sup>145</sup> Indeed, stable and predictable allocations allow efficient planning at the local level.<sup>146</sup> The eleventh and last factor is closely related and requires the equitable share to consider “the need for flexibility in responding to emergencies and other temporary needs, based on similar objective criteria”.<sup>147</sup> Flexibility in the allocations also allows counties to respond effectively and efficiently to changing circumstances, thus enhancing effectiveness.

The factors discussed above are closely related to the objectives and principles of devolved government,<sup>148</sup> as well as the principles of public finance discussed earlier.<sup>149</sup> The three focus on common issues which revolve around issues of equity in distribution of resources, affirmative action for marginalised sections of the society, and equitable development, among other objectives. The county equitable share is highly likely to be the most important source of revenue for most counties. The factors to be considered in determining the share tie it to the broader objectives of devolved government.

### **3.1.2 Determining the equitable share**

There are two main and important stages in the determination of the equitable share. The first is the vertical division of revenue between the national government and the county governments. The second stage is the horizontal division of revenue among county governments. Both stages are provided for in the Constitution. The CRA plays an important role in both stages by making recommendations on the vertical and horizontal division of revenue based on objective criteria recognised and provided for in the Constitution. Accordingly, the independence and effectiveness of the CRA are vital for the smooth functioning of the process.

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<sup>144</sup> Article 203 (1) (h).

<sup>145</sup> Article 203 (1) (j).

<sup>146</sup> World Bank (1999) 118; Litvack *et al* (1998) 13.

<sup>147</sup> Article 203 (1) (k).

<sup>148</sup> Article 174.

<sup>149</sup> Article 201.

### 3.1.2.1 The Commission on Revenue Allocation: structure and role

The CRA is established as an independent Commission to advise the government on the vertical and horizontal division of revenue.<sup>150</sup> It consists of the chairperson nominated by the President and approved by the National Assembly,<sup>151</sup> two persons nominated by the political parties represented in the National Assembly according to party strength,<sup>152</sup> and five other members nominated by the political parties represented in the Senate, also according to party strength.<sup>153</sup> The large share of Senate nominations is to ensure that county interests are safeguarded in revenue allocation. While involvement of parliamentary political parties is seen as likely to “introduce politics into revenue allocations”,<sup>154</sup> CRA members are required to be experienced professionals<sup>155</sup> who serve in their personal capacity and for a fixed term of six years.<sup>156</sup> Furthermore, politicians are expressly excluded from nomination to the CRA.<sup>157</sup> The principal secretary in the ministry responsible for finance is also a member of the CRA.<sup>158</sup>

Although the CRA’s role in regard to division of revenue is advisory in nature, the Constitution puts in place measures to ensure that its recommendations are taken seriously. Accordingly, the Bills which seek to divide revenue vertically and horizontally, when presented in parliament, should be accompanied by a summary of the deviations from the figures proposed by the CRA, along with an explanation for each deviation.<sup>159</sup> This measure has the potential to ensure that the CRA proposals are given serious considerations as any unjustified deviations can be challenged in parliament; it also has the potential to contribute to the overall objectivity and transparency of the process.

### 3.1.2.2 Vertical division of revenue

At least every two months before the end of the financial year, a Division of Revenue Bill (DRB), which divides revenue collected nationally among the national and county levels in accordance

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<sup>150</sup> Article 248 (2) (f).

<sup>151</sup> Article 215 (2) (a).

<sup>152</sup> Article 215 (2) (b).

<sup>153</sup> Article 215 (2) (c).

<sup>154</sup> Kirira N ‘Public finance under Kenya’s new Constitution’ (Society for International Development (SID) Constitution working paper No.5) (2011) 14.

<sup>155</sup> Article 215 (3) and (4).

<sup>156</sup> Article 250 (6) (a).

<sup>157</sup> Article 215 (3) and (4).

<sup>158</sup> Article 215 (2) (d).

<sup>159</sup> Article 218 (2) (c) and Article

with the Constitution, is to be introduced in Parliament.<sup>160</sup> The CRA makes recommendations concerning the basis of the vertical division of revenue,<sup>161</sup> with the county share not being less than 15 percent of the revenue collected nationally.<sup>162</sup> In proposing the vertical division, the CRA is required to give effect to the criteria provided for in determining the equitable share.<sup>163</sup> The CRA should also, where appropriate, define and enhance the revenue sources of both levels of government,<sup>164</sup> as well as encourage fiscal responsibility.<sup>165</sup> The DRB should be accompanied by a summary of significant deviations from CRA recommendations and an explanation for each of such deviation.<sup>166</sup> The DRB should also be accompanied by a memorandum explaining how revenue allocation is proposed in the Bill,<sup>167</sup> and an evaluation of the DRB Bill in relation to the criteria provided for determining the equitable share.<sup>168</sup>

The Constitution does not expressly state whether the DRB is a Bill affecting county governments. However, a Bill concerning county government is defined as including “a Bill referred to in Chapter Twelve affecting the finances of county governments”.<sup>169</sup> The DRB can, therefore, easily fall into the category of a Bill concerning county government. The Senate will thus have occasion to consider and debate the DRB and vote on it as an ordinary Bill affecting counties. If the Bill is rejected by either House, it may be referred to mediation by a committee drawn from both Houses until consensus is reached.<sup>170</sup> However, a delay in passing the DRB runs the risk of derailing the budget process at both the national and county levels.<sup>171</sup>

Furthermore, the DRB is not defined as a money Bill in the Constitution.<sup>172</sup> This means that it can be introduced in either House as Money Bills cannot be introduced in the Senate. Second, Money Bills can only be amended on recommendation of the relevant Committee of the National Assembly, and after taking into account the views of the Cabinet Secretary in charge of

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<sup>160</sup> Article 218 (1) (a).

<sup>161</sup> Article 216 (1) (b).

<sup>162</sup> Article 203 (2).

<sup>163</sup> Article 216 (3) (a).

<sup>164</sup> Article 216 (3) (b).

<sup>165</sup> Article 216 (3) (c).

<sup>166</sup> Article 218 (2) (c).

<sup>167</sup> Article 216 (2) (a).

<sup>168</sup> Article 216 (2) (b).

<sup>169</sup> Article 110 (1) (c).

<sup>170</sup> Article 112.

<sup>171</sup> World Bank (2012)143.

<sup>172</sup> Article 114 (1).

Finance.<sup>173</sup> This restrictive procedure does not apply to the DRB, and such flexibility can allow appropriate adjustments to the DRB in parliament.<sup>174</sup>

In accordance with the Constitution, at least 15 percent of the revenue collected nationally should be allocated to counties in the DRB.<sup>175</sup> However, what amounts to “revenue raised nationally” is not clear. The TFDG had proposed that donor funds, domestic borrowing, appropriations in aid, and other government transfers should be included in the determination of the equitable share.<sup>176</sup> The CRA Act, however, only makes reference to tax and non-tax revenue that is collected nationally, thus excluding other items that were proposed by the TFDG.<sup>177</sup> While the base for calculating the 15 percent is not clear, the CRA can, and did, make an initial recommend which went beyond the 15 percent minimum,<sup>178</sup> thus making the base largely unimportant.<sup>179</sup>

In its initial allocation, the national treasury proposed to allocate Kshs. 160 billion to county governments.<sup>180</sup> However, the 2012/13 estimates reduced this figure to Kshs. 149 billion. The CRA, on the other hand, recommended that counties should be allocated Kshs. 203 billion, which represents 33 percent of the last audited national revenues.<sup>181</sup> This proposal is indicative that the amount of the equitable share will be determined, not by the minimum guarantee, but by the needs of both levels of government. Estimates show that counties will need far more than the 15 percent minimum in order to operate effectively.<sup>182</sup> Even unitary states such as Tanzania and Uganda allocate 17.6 percent and 25.6 percent, respectively, to subnational governments,<sup>183</sup> while South African provinces and local governments take approximately half of the revenue collected nationally.<sup>184</sup> It is likely that that the equitable share will be increased

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<sup>173</sup> As per Article 114 (2).

<sup>174</sup> World Bank (2012)143.

<sup>175</sup> Article 203 (2)

<sup>176</sup> This was proposed in the Intergovernmental Fiscal Relations Bill, 2011 prepared by the TFDG.

<sup>177</sup> World Bank (2012) 57.

<sup>178</sup> CRA ‘Recommendations on sharing revenue by the national government between the national government and county governments and among county governments’ 2012.

<sup>179</sup> World Bank (2012) 57.

<sup>180</sup> *Daily Nation* ‘Big counties will get more devolution cash’ 23 February 2012.

<sup>181</sup> CRA (2012).

<sup>182</sup> World Bank (2012) 87.

<sup>183</sup> World Bank (2012) 74.

<sup>184</sup> Wehner J ‘Fiscal federalism in South Africa’ *Publius: The Journal of Federalism* (2000) 30 (3) 65-66.

beyond the minimum as proposed by the CRA or, alternatively, the deficit may be met by additional transfers to county governments as envisaged in the Constitution.<sup>185</sup>

### 3.1.2.3 Horizontal division of revenue

There are two main stages in determining the horizontal division. First, the Senate and the National Assembly are required to pass a resolution that provides the basis for division of revenue. Second, every year a Bill (the County Allocation of Revenue Bill, or CARB) which proposes the horizontal division of the total county share is tabled in parliament for debate and adoption. The resolution which forms the basis for horizontal division is prepared and adopted by the Senate<sup>186</sup> with the advice and input of the CRA.<sup>187</sup> While the resolution is also to be considered by the National Assembly after being passed by the Senate, the latter has a special veto power. The National Assembly can only reject the resolution via a two-thirds vote.<sup>188</sup> Furthermore, the resolution is deemed to be passed without amendments upon the lapse of 60 days after its introduction in the National Assembly.<sup>189</sup>

The special Senate veto power and the automatic “enactment” of the resolution, after the lapse of 60 days, give the Senate effective control over determining the basis for the horizontal division of revenue. These measures form a basis for the Senate to protect county interests in horizontal revenue division. In the event that the National Assembly garners enough votes to reject the resolution, the Senate can either adopt a new resolution which will repeat the procedure, or the Senate may request for mediation through a joint committee of both Houses.<sup>190</sup> A resolution by the Senate on the basis of division of revenue applies until the next resolution is adopted.<sup>191</sup> However, the Senate may, at any time, and by a resolution of two-thirds, amend the resolution, in which case the same procedure for the NA approval will follow.<sup>192</sup>

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<sup>185</sup> Article 202 (2).

<sup>186</sup> Article 217 (1).

<sup>187</sup> Article 217 (b).

<sup>188</sup> Article 217 (5) (b) paras (i) and (ii).

<sup>189</sup> Article 217 (5) (a).

<sup>190</sup> Article 217 (6).

<sup>191</sup> Article 217 (7).

<sup>192</sup> Article 217 (8).

In determining the basis for horizontal division, the Senate is required to consider the constitutional criteria for determining the equitable share.<sup>193</sup> The Senate is also required to consult county governors, the cabinet secretary responsible for finance and any organisation of county governments,<sup>194</sup> as well as carry out public consultation.<sup>195</sup> While the first and second reviews of the criteria will be done after three years,<sup>196</sup> subsequent reviews of the criteria will be done after every five years.<sup>197</sup> The resolution forms a stable and predictable basis for the horizontal division of revenue.

The CARB is prepared on the basis of the resolution discussed above, and tabled in parliament at least two months before the end of each financial year.<sup>198</sup> The CARB must also be accompanied by a summary of any significant deviation from CRA proposals, explanations for each deviation,<sup>199</sup> and an evaluation of compliance with the constitutional criteria for determining the equitable share.<sup>200</sup>

### **3.1.3 County discretion in regard to use of the equitable share**

The county equitable share is, by definition, not part of national government revenue but a constitutionally protected entitlement of county governments.<sup>201</sup> Accordingly, the Constitution requires the national government to release the equitable share without undue delay and without deduction, except as allowed in the Constitution.<sup>202</sup> Steytler and De Visser argue that even where various components or factors are considered in determining the equitable share, the equitable share remains an unconditional allocation that is not tied to the factors considered.<sup>203</sup> In the Kenyan context, it has also been argued that the constitutional autonomy of county governments, the objectives of devolved government, and the limited powers of intervention in county governments, all support the argument that the equitable share is

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<sup>193</sup> Article 203 (1).

<sup>194</sup> Article 217 (c).

<sup>195</sup> Article 217 (2) (d).

<sup>196</sup> Section 16, Sixth Schedule.

<sup>197</sup> Article 217 (1).

<sup>198</sup> Article 218 (1) (b).

<sup>199</sup> Article 218 (2) (c).

<sup>200</sup> Article 218 (2) (b).

<sup>201</sup> Article 202.

<sup>202</sup> Article 219.

<sup>203</sup> Steytler & De Visser (2011) 12-10.

unconditional.<sup>204</sup> While dividing the equitable share into sector-based block grants, as happens in South Africa, may be desirable, the World Bank warns that such a measure may be unconstitutional in the Kenyan context.<sup>205</sup>

The discretion to use the county equitable share enables counties to plan and budget and thereby be in a position to match needs and preferences with available resources.<sup>206</sup> However, after identifying the priorities and needs to which moneys will be applied, counties are expected to comply with their pre-determined budget. In this regard, the office of the Controller of Budget (CoB) is established to monitor implementation of the budget.<sup>207</sup> The CoB is nominated by the president and appointed to the position after approval of the National Assembly,<sup>208</sup> and he or she holds office for a non-renewable term of eight years, providing quarterly reports to the both the Senate and National Assembly.<sup>209</sup>

The extent of the COB's authority in ensuring compliance with the budget is not clearly stated in the Constitution.<sup>210</sup> However, since the COB is to authorise every withdrawal from the County Revenue Fund,<sup>211</sup> the highest measure that can be taken is to reject any withdrawal that is not in compliance with the budget.<sup>212</sup> Counties are expected to prepare cash flow statements which they shall provide to the National Treasury and the CoB,<sup>213</sup> and these could form the basis of monitoring budget implementation.<sup>214</sup> This arrangement is by no means an infringement on the autonomy of counties. Counties have complete discretion in preparing their budgets, and the CoB's mandate is limited only to ensuring compliance with the pre-determined budget.<sup>215</sup> In the former dispensation, subnational expenditure was monitored solely by the National Treasury, but mistrust of the national executive led to this role being vested in an independent office.<sup>216</sup>

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<sup>204</sup> Legal opinion by Christina Murray to the World Bank, cited in World Bank (2012) 53.

<sup>205</sup> World Bank (2012) 59.

<sup>206</sup> Article 220 (1); section 117 (5) PFMA.

<sup>207</sup> Article 228 (1)

<sup>208</sup> Article 228 (1).

<sup>209</sup> Article 228 (6).

<sup>210</sup> World Bank (2012) 155-156.

<sup>211</sup> Article 207 (3).

<sup>212</sup> Article 228 (5).

<sup>213</sup> Section 120.

<sup>214</sup> Section 127 PFMA.

<sup>215</sup> Article 228 (4).

<sup>216</sup> World Bank (2012) 132.

## 3.2 Additional intergovernmental transfers

Given the anticipated deficit in county finances, the national government may have to provide additional funding through conditional or unconditional transfers.<sup>217</sup> Among the conditional transfers is the Equalisation Fund, which is an “affirmative action fund”.<sup>218</sup>

### 3.2.1 The Equalisation Fund

The Equalisation Fund is a “national government fund” set aside from revenue collected nationally (0.5 percent of national revenue) and used to enhance access to basic services including water, roads, health facilities and electricity in marginalised areas.<sup>219</sup> Being a national government fund, the Constitution provides that the fund can either be given to counties with identified marginalised areas as a conditional grant<sup>220</sup> or the national government may directly implement the projects targeted by the fund in identified areas.<sup>221</sup> However, the fund targets issues which can be more appropriately addressed by counties, and the principle of subsidiarity requires counties to implement the fund.<sup>222</sup> The fund is temporary (20 years, unless extended by parliament for a further fixed period),<sup>223</sup> and has also been criticised for being too small to make a difference.<sup>224</sup>

### 3.2.2 Other additional transfers

Additional funding may be provided through conditional or unconditional funding. The manner in which additional funding is provided to counties will have implications in terms of discretion and, possibly, autonomy. Increasing the county equitable share is the most appropriate way of assuring complete discretion in the use of the additional funds. Conditional grants, however, have the potential of facilitating national government control over counties. Indeed, the World Bank argues the equitable share should be maintained at the guaranteed minimum and the rest given through conditional funding in order to “leverage” the implementation of national priorities at the local level.<sup>225</sup>

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<sup>217</sup> Article 202 (2).

<sup>218</sup> Article 204 (1).

<sup>219</sup> Article 204 (2) and Article 187 (1) (a).

<sup>220</sup> Article 204 (3) (b).

<sup>221</sup> Article 204 (3) (a).

<sup>222</sup> Article 204 (2).

<sup>223</sup> Article 204 (6) and (7).

<sup>224</sup> World Bank (2012) 120.

<sup>225</sup> World Bank (2012) 94.

#### 4. National government supervision of county financial management

Supervision was highlighted as an important element for local efficiency.<sup>226</sup> This implies that the centre must have a means of controlling expenditure, especially to curb irregularities and breaches that may run counter to the objectives of devolved government. However, this must be balanced with the need to preserve local autonomy. Accordingly, the Constitution provides for circumstances under which the national government can temporarily stop part of the funds due to a county government.<sup>227</sup> The national government may also under some circumstances intervene in a county government.<sup>228</sup>

The cabinet secretary in charge of finance can stop funds due to a county government for serious material breach or persistent material breaches of financial guidelines.<sup>229</sup> However, only 50 percent of the funds due to a county government can be stopped,<sup>230</sup> and for 60 days only.<sup>231</sup> Furthermore, the stoppage lapses if it is not ratified by both Houses of parliament.<sup>232</sup> Any renewal of the stoppage after 60 days can only be done via resolutions adopted in both Houses<sup>233</sup> and after the CoB has presented a report to parliament on the breach. The affected county should also, before a renewal, be given an opportunity to defend itself before the relevant parliamentary committee.<sup>234</sup> In addition, the national government can intervene in a county government if the county does not operate a financial management system that complies with the requirements prescribed by national legislation.<sup>235</sup> The national government takes charge of the financial affairs of a county until the breach is corrected or if the Senate terminates the intervention.<sup>236</sup>

It is thus clear that national government powers over county finances are limited. The stoppage of funds is partial, temporary and subject to fairly strict conditions. The intervention is equally

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<sup>226</sup> World Bank (1997) 128.

<sup>227</sup> Article 225 (3).

<sup>228</sup> Article 190 (3) (b).

<sup>229</sup> Article 225 (3).

<sup>230</sup> Article 225 (4).

<sup>231</sup> Article 225 (5) (a).

<sup>232</sup> Article 225 (5) (b).

<sup>233</sup> Article 225 (6).

<sup>234</sup> Article 225 (7) (a) and (b).

<sup>235</sup> Article 190 (3) (b).

<sup>236</sup> Article 190 (5) (d).

subject to strict conditions and can be terminated at any time. The powers of the national government over county finances are hence limited.

## **5. Assessment of the fiscal and financial powers of county governments**

Finances are a critical part of devolution in the pursuit of the objectives of devolved government. Indeed, financial autonomy reifies the political autonomy of devolved units. This, in turn, facilitates the devolved units to pursue the three purposes: fiscal autonomy can enable devolved units to address local preferences<sup>237</sup> and economic inclusion,<sup>238</sup> as well as enhance the autonomy so critical to limiting central power. However, there are also aspects of the fiscal design that may hinder the pursuit of the three purposes.

### **5.1 County finances and development**

With regard to development, the most important aspect is that counties have adequate resources and discretion to match local preferences.<sup>239</sup> Counties have local revenue-raising powers and are also entitled to a share of revenue raised nationally; arguably, this forms a basis for the counties to address local preferences. However, the nature and level of funds available to counties, and the discretion in the use of the funds, will impact on the ability of counties to effectively pursue development. Undeniably, there are aspects that will enhance the pursuit of development and those that may hinder it.

#### **5.1.1 Design aspects of county finances that enhance development**

Counties have constitutional powers to charge property and entertainment taxes,<sup>240</sup> as well as charge fees for services offered.<sup>241</sup> Importantly, the counties have complete discretion in regard to planning and use of these funds. Accordingly, counties are in a position to address local preferences. Revenue generated locally can be used to provide local services at the county level. More importantly, it is noted that locally generated revenue can enhance accountability as it creates an impetus for local taxpayers to hold their local leadership accountable.<sup>242</sup> The local nature of the tax burden of property rates and entertainment tax lays a stronger basis for local

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<sup>237</sup> World Bank (1999)117.

<sup>238</sup> Bird RM & Ebel RD 'Fiscal federalism and national unity' in Ahmad E & Brosio G (eds) *Handbook of Federalism* (2006) 8.

<sup>239</sup> World Bank (1999) 117.

<sup>240</sup> Article 209 (3).

<sup>241</sup> Article 209 (4).

<sup>242</sup> World Bank (1999) 117.

accountability. For instance, ratepayers are more inclined to demand better services from their respective county governments, thus enhancing accountability.<sup>243</sup>

The design of the county equitable share also has the potential to facilitate the effective pursuit of development. Counties are entitled to a specified minimum share of revenue collected nationally which is fully discretionary.<sup>244</sup> The CRA enhances transparent and objectivity in the division of revenue. The fact that any fundamental deviations from CRA proposals have to be explained also enhances objectivity in the sharing of revenue.<sup>245</sup> The guaranteed minimum of county equitable share enhances predictability.<sup>246</sup> In regard to discretion, the county equitable share is unconditional, and this enables counties to plan and budget for local preferences.<sup>247</sup> The Senate resolution which sets the basis for revenue division can also enhance stability, objectivity and predictability in allocations.<sup>248</sup>

There are a number of design measures which are meant to facilitate equitable development. The determination of the equitable share is to be guided by the existing economic disparities and the need to address them.<sup>249</sup> The county equitable share should also be guided by the developmental needs of counties, including the special needs of areas that were previously marginalised.<sup>250</sup> In this regard, the equalisation may supplement the efforts to enhance access to basic services in counties with marginalised areas.

### **5.1.2 Design aspects of county finances that may hinder development**

While counties have symmetric powers to raise revenue locally, such powers are only as significant as the tax base.<sup>251</sup> Local revenue-raising powers are only relevant to urban areas (property rates, entertainment tax, urban services, etc.) where there is a viable tax base.<sup>252</sup> The majority of the counties that have predominantly rural populations and local revenue powers

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<sup>243</sup> See generally, Community Law Centre (CLC) 'The withholding of rates and taxes in five local municipalities' 15 November 2010.

<sup>244</sup> Article 203 (2).

<sup>245</sup> Article 218 (2) (c).

<sup>246</sup> Article 202 (2) and Article 203 (2).

<sup>247</sup> World Bank (2012) 58-59.

<sup>248</sup> Article 217.

<sup>249</sup> Article 203 (1) (g).

<sup>250</sup> Article 203 (1) (h).

<sup>251</sup> World Bank (1999) 117.

<sup>252</sup> World Bank (2012) 74.

may be of limited significance. Thus, while local revenue may play a role in enhancing accountability, weak local tax bases make this avenue for accountability weak and unreliable.

While counties will be heavily reliant on central government transfers to fund local services, the minimum share of counties, which is unconditional, is hardly enough to finance functions.<sup>253</sup> Counties will thus need additional funding either through an increased county share or through conditional or unconditional grants. Too many conditional grants have the potential to shrink local discretion as counties may be reduced into implementation agents of the national government through additional conditional grants and funding. Another danger is that too much conditional funding may reduce local accountability because county governments may feel more accountable to the central government than to the local communities.

## 5.2 County finances and ethnic accommodation

In situations of internal conflicts, which often revolve around economic and political exclusion, financial and fiscal powers can enhance economic inclusion and thus address perceptions of exclusion. Local control of resources and ability to make decisions over the use of resources and finances through devolved governance has the potential to prevent conflict.<sup>254</sup> In Chapters 3 and 4, it was highlighted that real or perceived economic exclusion along ethnic lines laid a basis for ethnic conflict. Indeed, evidence has shown that successive presidents actually diverted public resources to their home regions, thereby deepening feelings of exclusion by other communities.<sup>255</sup> During the constitutional review process, the idea of devolved government received universal support mainly because of its potential to enhance equitable distribution of national resources and development.<sup>256</sup>

The constitutional design of devolved government incorporates strong provisions for equity and affirmative action in the financing of counties. There is therefore potential for the fiscal design to address some of the underlying issues of ethnic conflict. However, there are also aspects of the design that may hinder effective ethnic accommodation.

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<sup>253</sup> CRA (2012).

<sup>254</sup> Bird & Ebel (2006) 8-10.

<sup>255</sup> Chege M and Barkan JD 'District focus and the politics of reallocation in Kenya' (1989) 27 *Journal of Modern African Studies* 436-437; Southall R & Wood G 'Local government and the return to multi-partyism in Kenya' (1996) 95 *African Affairs* 509; Tordoff W 'Decentralisation: Comparative experience in Commonwealth Africa' (1994) 32 (4) *The Journal of Modern African Studies* 568-570.

<sup>256</sup> CKRC (2005) 234.

### 5.2.1 Aspects of the design that may enhance ethnic accommodation

Perceptions that the central government, dominated by the ruling ethnic group, controlled national resources to the exclusion of other communities, fomented ethnic conflict. However, the constitutionally guaranteed and unconditional share of national resources, determined through a transparent and objective process, has the potential to address this perception. The role of the CRA, which is established as an independent body, and the role of parliament in the national budget process all serve to make the entire public finance process credible. This may form a basis for trust in the sharing of national resources for development.

Most of the 47 counties are ethnically exclusive. Accordingly, any fiscal powers exercised by the counties will in essence be granting ethnic communities control over public resources by democratically elected county leadership. Counties will have resources and discretion as to how they use the funds. It can thus be concluded that fiscal autonomy will enhance ethnic accommodation as the different ethnic communities, through their respective county representatives, will determine and pursue their development agenda.

Apart from facilitating political and economic inclusion, county government financial powers have the potential to improve basic service delivery, the lack of which also fuelled ethnic conflict in the past.<sup>257</sup> Counties have powers to budget their resources in order to enhance basic services. The World Bank notes that a total of 41 counties will see their funds double from past allocations, with some counties receiving more than 1000 percent of previous decentralised funding.<sup>258</sup> Other measures such as the role of the CoB are put in place to ensure that funds set aside for provision of services actually perform the intended purpose. It can thus be concluded that there is the potential to address development-based ethnic grievances.

In appropriate circumstances, “economic self-determination” can address conflict around natural resources.<sup>259</sup> Kenya is not a resource-rich state, but the recent the discovery of oil in the Turkana region may lead to demands for local benefits from the oil revenue.<sup>260</sup> While the Constitution does not have well-developed provisions on “economic self-determination”, it generally recognises the principle<sup>261</sup> and this can be “fleshed out” in enabling legislation. Indeed, the draft Geology, Minerals and Mining Bill 2012 provides that 15 percent and 10 percent of

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<sup>257</sup> Republic of Kenya (2008) 30.

<sup>258</sup> World Bank (2012) 91-92.

<sup>259</sup> World Bank ‘Spending for development: Making the most of Indonesia’s new opportunities’ (2008) 122.

<sup>260</sup> World Bank (2012) 85.

<sup>261</sup> Article 66 (2).

royalties should be allocated to the county government and communities, respectively,<sup>262</sup> and other laws may adopt the same approach.<sup>263</sup>

### 5.2.2 Aspects of the design which hinder ethnic accommodation

Chapters 3 and 4 highlighted that the main ethnic conflict in Kenya is between the larger ethnic communities that are “presidential contenders”.<sup>264</sup> While perceived or actual exclusion was felt by the smaller ethnic communities, this had a greater impact on the larger communities as it formed a basis for deadly conflict, with each large community seeking to capture the presidency at all costs.<sup>265</sup> The alternative that devolution could offer is to make devolved units a viable “consolation prize” for the losers.<sup>266</sup> This means the design of county finances should make counties financially powerful in order to pacify the losers in the presidential contest.

Instead, counties generally have a weak local revenue base as all the major taxes are allocated to the national government. At 15 percent of revenue collected nationally, the minimum equitable share of county governments is far too low even compared to unitary states such as Tanzania (25.6 percent) and Uganda (17.6 percent).<sup>267</sup> First, it is less likely that such limited resources will translate into a viable political alternative for the larger ethnic communities. The government may remain with a whopping 85 percent of revenue collected nationally, which would serve as a permanent motivation for larger ethnic communities to capture the presidency.

Second, a substantial part of county revenue needs may be met by conditional funding from the national government. While this is recommended as a viable way to ensure that counties implement national objectives,<sup>268</sup> it may form a basis for conflict. With most counties being ethnically exclusive, central government conditions can be easily perceived as a means of ethnic domination by the ethnic group “in control of” the presidency. Indeed, it has been argued that conditional funding has potential to limit local discretion and provide a basis for political

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<sup>262</sup> Third Schedule to the Bill.

<sup>263</sup> World Bank (2012) 76.

<sup>264</sup> YP Ghai ‘Devolution: Restructuring the Kenyan state’ (2008)2 *Journal of Eastern African Studies* 211, 215-216.

<sup>265</sup> Branch D *Kenya: Between Hope and Despair, 1963-2011*(2011) 1999.

<sup>266</sup> Ghai (2008) 215-216.

<sup>267</sup> World Bank (2012) 74.

<sup>268</sup> World Bank (2012) 104.

subordination of devolved units.<sup>269</sup> This may form a basis for ethnically-based, central-county wrangles, wrangles that may in turn fuel ethnic conflict.

### **5.3 County finances and limiting central power**

Decentralised governance in Kenya has historically been characterised by political subordination and control.<sup>270</sup> One of the ways in which this was conveniently achieved was by a tight fiscal control of local governments.<sup>271</sup> The ministry in charge of local government controlled practically every aspect of local government finance. Central bureaucracy and inefficiency, in turn, led to decline of local service delivery and the institutional decay of local governments.<sup>272</sup> The only way that counties can limit central power is if they have fiscal powers and control over finances that amount to a sizeable proportion of the entire state spending.<sup>273</sup> The Kenyan fiscal design has aspects which can enhance the ability of counties to limit central power. However, there are also other aspects of the design that can hinder effective counterbalancing of central power.

#### **5.3.1 Aspects that enhance the ability to limit central power**

The constitutionally protected fiscal autonomy of county governments enhances their autonomy. Counties have constitutional power to levy property and entertainment taxes as well as charge for services rendered. More significantly, counties have extensive powers with regard to revenue-raising functions which extend to powers to set tariffs and take over public entities that perform functions belonging to counties.<sup>274</sup> These powers secure the position of counties in the overall system and enhance their political significance.

The constitutionally guaranteed, and unconditional, county equitable share also enhances the overall autonomy of counties from the central government, thus facilitating the ability of counties to limit central power. More importantly, the Senate, which represents the interests of counties at the national level, plays an important role in determining the equitable share and hence protects county interests. Senate powers include debating and voting on the DRB (as an

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<sup>269</sup> World Bank (1999) 121, see also World Bank 'World Bank decentralisation website' at [www1.worldbank.org/publicsector/decentralization/what.htm](http://www1.worldbank.org/publicsector/decentralization/what.htm), cited in De Visser (2005) 42.

<sup>270</sup> Southall & Wood (1996) 503.

<sup>271</sup> Republic of Kenya (1995) 387.

<sup>272</sup> Southall & Wood (1996) 503.

<sup>273</sup> Saunders (2006) 347.

<sup>274</sup> Section 5 PFMA.

ordinary Bill that affects county governments) which divides revenue vertically.<sup>275</sup> The Senate also has special power to pass the resolution that provides the basis for the horizontal division of revenue among counties,<sup>276</sup> as well as special powers with regard to the CARB, which actually divides revenue among counties.<sup>277</sup> The Senate's role in facilitating the counterbalancing of central power is discussed in more detail in the next chapter.

The counties have complete discretion on how to use the resources at their disposal with minimal central government control, and this enhances their autonomy and, therefore, their ability to counterbalance central power. The government's control over county finances is limited to material and persistent breaches, and even then only part of the funds can be temporarily stopped. National government intervention is limited to necessary measures only,<sup>278</sup> and the Senate can terminate a central government intervention in a county at any time.<sup>279</sup> Furthermore, the role of the CoB is limited to monitoring budget implementation, which counties have a complete discretion to prepare.

It can thus be concluded that the constitutional entrenchment of county fiscal powers, the role of the Senate, and the limited powers of the central government in county finance matters all enhance the ability of counties to limit central power in fiscal matters. However, within the same fiscal design, there are aspects which undermine the ability of county governments to effectively limit central power.

### **5.3.2 Aspects that hinder the ability to counterbalance central power**

The combined local and national revenue will still be insufficient to fund county government functions. Thus, while counties have constitutional autonomy over their finances, the size of revenue that counties control is too limited to ensure the effective limiting of central power. The revenue gap may end up being filled by conditional funding, which may in turn undermine the constitutional autonomy of counties. Indeed, the level of funding to county governments and the extent of fiscal autonomy only goes as far as developmental autonomy.

While supervision and regulation of county governments is seen as an important element for overall effectiveness, they present a danger of intrusion in county affairs. These include the

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<sup>275</sup> Article 112 (1).

<sup>276</sup> Article 217.

<sup>277</sup> Article 218 (1) (b).

<sup>278</sup> Article 190 (5) (b).

<sup>279</sup> Article 190 (5) (d).

requirement for central government authorisation for county loans, which runs contrary to the concept of devolution. Other elements which may form a basis for intrusion include the power of stoppage of funds due to a county, and powers of intervention. However, there are also adequate controls in the exercise of these functions that can prevent control of counties.

#### **5.4 Is there a balance of purposes in the design of county finances?**

Fiscal autonomy is an important and common design feature for the three purposes of devolving power, one that, moreover, is inherent to the very concept of devolution. Indeed, fiscal autonomy facilitates developmental autonomy, economic inclusion and political autonomy from the centre. However, the level of fiscal autonomy and amount of resources controlled may determine how each purpose is pursued and realised. While the Kenyan Constitution allows some level of fiscal autonomy, the nature and extent of the fiscal autonomy will impact differently on the three purposes.

With regard to development and ethnic accommodation, the level of fiscal autonomy granted to county governments may assist counties to enhance services. This may address development-related ethnic grievances and, to this extent, it is a common design feature. However, while counties have the same level of autonomy to pursue development, the nature and extent of the fiscal powers of county governments do not address the main ethnic conflict in Kenya. The limited resources controlled by counties may make them unattractive to the larger ethnic groups, who will still seek to control the presidency. To this extent, development was given more consideration than ethnic conflict resolution.

The level of fiscal autonomy granted to county governments facilitates only developmental autonomy rather than providing a viable “consolation prize” to the larger ethnic communities. The counties will need more than the guaranteed 15 percent, which means that they are grossly under-funded and might not transform into powerful units that could effectively limit central power. The current design, it can be argued, thus suits the developmental purpose more than the one of limiting central power.

Therefore, while the Constitution grants the counties some level of fiscal autonomy, the nature and level of autonomy is suited for development as opposed to ethnic accommodation or limiting central power. It can thus be concluded that the fiscal design of county governments favours the developmental purpose of devolution more than ethnic accommodation and the limiting of central power.

## 6. Conclusion

The principles of public finance and the general fiscal design are relevant to the general objectives of devolved government which, in turn, revolve around the pursuit of the three purposes. However, this chapter has also concluded that many aspects of the fiscal design may hinder achievement of the three purposes. Counties generally have limited fiscal powers, thus creating opportunities for central government intrusion, especially through conditional funding. While it is undeniable that counties have constitutionally protected fiscal powers, the level of resources they control weakens their ability to bring about effective economic inclusion and limit central power.



## CHAPTER EIGHT

# SHARED RULE: THE STRUCTURE, POWERS AND FUNCTIONS OF THE SENATE

### 1. Introduction

Although self-rule is important and the basis of devolution, shared rule serves an equally important purpose as it completes the link by ensuring that the structure and powers of the centre enhance devolved governance. In terms of resolving conflict and limiting central power, shared rule promotes inclusiveness, and “federal decision-making”<sup>1</sup> provides a basis for influencing central decision-making.<sup>2</sup> While typical shared-rule structures are not essential for devolved development, elements such as cooperation and supervision involve the centre. The centre also has a “negative duty” to refrain from infringing on the developmental autonomy of devolved units which is important for addressing local preferences.<sup>3</sup>

In the Kenyan context, the Senate is constitutionally mandated to represent and protect the interests of counties and their governments.<sup>4</sup> Accordingly, any analysis of the central design of shared rule must revolve around the structure, powers and functions of the Senate. The Senate is part of the national legislature,<sup>5</sup> which is in line with comparative federal practice where the formal representation of constituent units at the centre is “piggy-backed” on national institutions of “horizontal power-sharing” and, particularly, the legislature.<sup>6</sup> With it being part of the national legislature, the Senate’s effectiveness in representing and protecting county interests will inevitably be measured in terms of its legislative role, but apart from the latter role, the Senate has several other functions that are relevant to the representation and protection of the interests of county government.

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<sup>1</sup> Watts RL *Comparing Federal Systems* (2008) 153.

<sup>2</sup> Baldi B ‘Beyond the federal-unitary dichotomy’ Working paper, Institute of Governmental Studies, University of California, Berkeley (1999) 9.

<sup>3</sup> World Bank *World Development Report 1997: The State in a Changing World* (1997)128; De Visser J *Developmental Local Government: A Case Study of South Africa* (2005) 211-212.

<sup>4</sup> Article 96 (1).

<sup>5</sup> Article 93 (1).

<sup>6</sup> Watts (2008) 134.

This chapter analyses the structure, powers and functions of the Senate. Chapters 5, 6 and 7 concluded that the structures, powers and finances of county governments are more appropriately configured to pursue development than the other two purposes of limiting central power and resolving ethnic conflict. In contrast, this chapter finds that the Senate's structure and powers have the potential to counterbalance central power and enable effective incorporation of county interests into national decision-making; in addition, they also stand to facilitate ethnic accommodation and the pursuit of development.

## **2. The Senate structure and composition**

The Senate consists of 47 Senators elected directly from the 47 counties using the FPTP electoral system,<sup>7</sup> along with 16 female members who are to be nominated by political parties in proportion to their performance in the FPTP elections of Senate seats.<sup>8</sup> Additionally, there are four other members of the Senate: two men and two women, who represent the youth and persons with disabilities (PWDs), respectively.<sup>9</sup>

While the Constitution generally provides for special representation of minorities and marginalised groups in the CAs and the National Assembly,<sup>10</sup> there is no such provision with respect to the Senate. The report of the CoE mentions that marginalised groups, whose representatives participated actively in the review process,<sup>11</sup> were to be included in the composition of Senate,<sup>12</sup> but this recommendation was not implemented in the current Constitution. Civil society organisations and “marginalised groups” had a strong presence in the entire constitutional review process, a situation which may have led to the inclusion of PWDs and the youth in the Senate.<sup>13</sup>

The majority of the counties are mainly ethnically exclusive and, given the ethnic factor in Kenyan elections, senators are likely to be from the county ethnic majorities. Consequently, many of the smaller ethnic communities have “home counties” and are thus likely to be

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<sup>7</sup> Article 98 (1) (a).

<sup>8</sup> Article 98 (1) (b).

<sup>9</sup> Article 198 (1) (d) and (e).

<sup>10</sup> Articles 97 (1) (c) and Article 177 (1) (c).

<sup>11</sup> Sing'oei KA 'Kenya at 50: unrealised rights of minorities and indigenous communities' (Report: Minority Rights Group International, and Ogiek Peoples Development Programme) (2012) 16.

<sup>12</sup> CoE 'Final report of the Committee of Experts on Constitutional Review' (2010b) 66.

<sup>13</sup> Bannon AL 'Designing a constitution-drafting process: lessons from Kenya' (2007) 116 *Yale Law Journal* 1842.

represented in the Senate. The larger ethnic communities were also split into several counties and are also likely to be represented by several senators from the fragmented units.

Table 3 shows the likely ethnic composition of the Senate as compared to the National Assembly. The table is divided into three sections: the large ethnic communities (Kikuyu, Kalenjin, Luhya, Luo and Akamba) and the smaller ethnic communities with a “home county” or two. Nairobi County, due to its cosmopolitan nature, is not classified under any of the large or small ethnic groups. In each section, the table shows the subtotals and totals of different issues: number of counties/Senate elective seats, National Assembly constituencies per county, population per county, and the land area per county. In the first section, the table gives both the individual and collective totals of the large ethnic groups; however, the second section, which covers the smaller ethnic groups, gives only the collective figures of the smaller ethnic communities.

**Table 3: Possible ethnic composition in the Senate and the National Assembly**

<b>Large ethnic communities</b>			
<b>Category/Ethnic composition</b>	<b>County</b>	<b>National Assembly Reps.</b>	<b>Total population</b>
Kikuyu	Nyandarua	5	596 268
	Nyeri	6	693 558
	Kirinyaga	4	528 054
	Kiambu	12	1 623 282
	Murang'a	7	942 582
	Nakuru (migrant majority)	10	1 603 325
	Laikipia (migrant majority)	3	399 227
Subtotal	7	47	6 386 296

Percentage (Grand total)	14.9 %	16.2 %	16.5 %
Kalenjin	Uasin Gishu	6	894 179
	Nandi	6	752 965
	Baringo	6	551 561
	Kericho	6	758 339
	Bomet	5	724 186
Subtotal	5	29	3 681 230
Percentage (Grand total)	10.6 %	10 %	9.5 %
Luo	Siaya	6	842 304
	Kisumu	7	968 909
	Homa Bay	8	958 991
	Migori	8	563 033
Subtotal	4	29	3 333 237
Percentage	8.5 %	10 %	8.6 %
Luhya	Kakamega	12	1 660 651
	Vihiga	5	554 622
	Bungoma	9	1 630 934
	Busia	7	488 705
	Trans-Nzoia (migrant majority)	5	818 758
Subtotal	5	38	5 153 670
Percentage	10.6 %	13.1 %	13.3 %
Akamba	Machakos	8	1 098 584

	Kitui	8	1 012 709
	Makueni	6	884 527
Subtotal	3	22	2 995 820
Percentage	6.4 %	7.6 %	7.8 %
<b>Total (large ethnic groups)</b>	<b>24</b>	<b>165</b>	<b>18 728 943</b>
<b>Percentage (Grand total)</b>	<b>51 %</b>	<b>56.9 %</b>	<b>48.5 %</b>

**Smaller ethnic groups with “home counties”**

<b>Category/Ethnic composition</b>	<b>County</b>	<b>National assembly Reps.</b>	<b>Total population</b>
Kisii	Kisii	9	1 511 422
	Nyamira	4	598 252
Meru	Meru	9	1 356 301
	Tharaka-Nithi	3	365 330
Embu, Meru	Embu	4	516 212
Maasai	Samburu	3	223 947
	Narok	6	850 920
	Kajiado	5	687 312
Somali	Garissa	6	623 060
	Wajir	6	661 941
	Mandera	6	1 025 756
Turkana	Turkana	6	855 399

	Isiolo	2	143 294
Borana	Marsabit	4	291 166
Waswahili, Duruma, Giriama, Rabai, Boni, Digo	Mombasa	6	939 370
Mijikenda	Kwale	4	649 931
	Kilifi	7	1 109 735
	Tana River	3	240 075
	Lamu	2	101 539
Taita	Taita/Taveta	4	284 657
Pokot	West Pokot	4	512 690
Marakwet	Elgeyo/Marakwet	4	368 998
<b>Total (small ethnic groups)</b>	<b>22</b>	<b>107</b>	<b>13 917 307</b>
<b>Percentage</b>	<b>46.8 %</b>	<b>36.9 %</b>	<b>36 %</b>
<b>Nairobi (cosmopolitan county)</b>			
<b>Category/Ethnic composition</b>	<b>County</b>	<b>National assembly Reps.</b>	<b>Total population</b>
Mixed	Nairobi	16	3 138 369
Percentage	2.1 %	5.5 %	8 %
<b>Grand total</b>	<b>47</b>	<b>290</b>	<b>38 605 929</b>

*Sources: Independent IEBC 'Final report of boundaries of constituencies and wards' (2012); Republic of Kenya '2009 population and housing census results' (Ministry of State for Planning, National Development and Vision 2030) (2010)*

The composition of the Senate shown above has the potential to impact on decision-making and the overall functioning of the Senate. From the figures in Table 3, it is clear that smaller ethnic communities have stronger representation in the Senate than in the National Assembly. As a result, Senate decision-making may be influenced by the stronger presence of the smaller ethnic communities. However, the potential of the smaller ethnic groups to influence Senate decisions depends, first, on whether the smaller ethnic communities will elect their own to the Senate and, second, whether the smaller groups will vote as a bloc in the Senate. Assuming that this happens, the Senate structure outlined above has three main implications. First, it “equalises” the larger and smaller ethnic communities; second, it locks out “in-county minorities”; and, third, the structures makes the Senate a politically powerful “federal chamber” but with weak institutional links to county governments.

## **2.1 'Equalisation' of the large and small ethnic groups**

Equality of counties has enhanced the representation of the smaller ethnic communities in the Senate. In the previous constitutional dispensation, these communities had a weaker voice as their representatives were outnumbered by those of the larger ethnic communities. Indeed, the same pattern can be seen in the National Assembly, where, according to Table 3, smaller ethnic communities have a representation of 38 percent while, for the large ethnic groups, it is almost 60 percent.

However, the Senate may alter this by “equalising” the larger and smaller ethnic communities. The smaller ethnic communities compose almost 47 percent of the Senate whereas the larger ethnic communities have 51 percent representation. For instance, Lamu County, with a population of 101 539 people, has one representative in the Senate, just like Nairobi County which has a total population of 3 138 369. In the National Assembly, however, Nairobi County has a total of 16 seats, compared to Lamu’s two seats. A number of other small counties have equal representation in the Senate, which they would otherwise not have in a system of proportional representation. Indeed, it was noted that the split of the constituent units of the

Nigerian federations had the effect of “equalising” the smaller ethnic communities with the larger ethnic communities.<sup>14</sup>

## 2.2 Exclusion of county minorities from the Senate

While the Senate structure “equalises” the larger and smaller ethnic communities with “home counties”, the current structure could potentially exclude “in-county minorities”. A number of “in-county minorities”, as argued in Chapter 5, share counties with the larger ethnic communities. The main county ethnic minorities include, among others, the Kuria in Migori County, the Teso in Busia County, the Sabaot in Bungoma County, and the Marakwet in Elgeyo-Marakwet.<sup>15</sup> These communities may end up with no representation in the Senate due to two main factors in the structure and composition of the Senate.

First, senators are elected through the FPTP electoral system.<sup>16</sup> While members of “inter-county minorities” county ethnic minorities can vie for the Senate seat, their communities are outnumbered by the respective county ethnic majorities and senators are likely to be elected from their respective county ethnic majorities. Second, while special representation of county minorities would at least have enhanced their representation, the Constitution does not provide for special representation of “in-county minorities” or “marginalised communities” despite the fact that the CoE felt the need for their inclusion in the Senate structures.<sup>17</sup>

One may argue that the additional non-elective seats of the Senate (16 women, two youth representatives and two persons with disabilities) can be used to enhance representation of “in-county minorities”. But while this could be achieved if all or part of the women, youth and PWD representatives could be drawn from “in-county minorities” or marginalised communities, the nominated seats are filled by political parties based on their on their performance in the FPTP elections for the Senate. This means that the major parties, which often belong to the large ethnic groups, are likely to nominate their own supporters for the seats. As a result, unless deliberate efforts are made to pick representatives of minorities and marginalised groups, the

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<sup>14</sup> Roeder PG ‘Ethnofederalism and the mismanagement of conflicting nationalisms’ in Erk J & Anderson LM (eds) *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?* (2010) 25.

<sup>15</sup> Republic of Kenya ‘Final report of the Taskforce on Devolved Government’ (2011) 203.

<sup>16</sup> Article 98 (1) (a).

<sup>17</sup> CoE (2010b) 66.

special seats are likely to go to party loyalists instead of representatives of “in-county minorities.”<sup>18</sup>

It can thus be concluded that the Senate structure may lead to the exclusion of county minorities from the Senate altogether. However, parties could take deliberate action to address this structural limitation. A dominant party, which is likely to get the nominated seats, may decide to fill its party lists for nominated seats with representatives of the minorities and marginalised groups. Furthermore, political parties may enter into agreements that facilitate the election of a member from a county minority into the Senate. In Migori County, for instance, political leaders from the Luo community agreed to support a Kuria candidate for the Senate. In turn, both sides agreed to support a candidate for the county governor’s seat from the Luo community.<sup>19</sup> This may see a candidate from the minority Kuria ethnic community elected to the Senate. In the absence of such arrangements, the general design of the Senate structure is not friendly towards the representation county ethnic minorities.

#### **2.4 A politically strong Senate with ‘weak links’ to county governments**

Kenyan senators are directly elected by voters from their respective counties,<sup>20</sup> and this differs from some federal systems where representatives are indirectly elected or chosen. In the USA, senators are directly elected, as is the case in Kenya as well, while in India members of the *Rajya Sabha* are elected by the respective state assemblies.<sup>21</sup> Other variants include the German *Bundesrat*, whose members are part of the executive of the respective *Lander* governments;<sup>22</sup> in the South African NCOP the members are a mixture of indirectly elected representatives and members of the provincial executive.<sup>23</sup>

Each of these systems has its own benefits and risks. However, their effectiveness is largely determined by factors that are particular to each context. For instance, while the German system of governmental representatives is regarded as the most effective for counterbalancing

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<sup>18</sup> Oloo A ‘Elections, representations and the new Constitution’ (Society for International Development (SID) Constitution Working Paper No. 7) (2011) 7.

<sup>19</sup> Oluoch N ‘Unease over move to “award” senate to Kuria’ *The Standard* 3 December 2012.

<sup>20</sup> Article 98 (1) (a).

<sup>21</sup> Dhavan R & Saxena ‘Republic of India’ in Le Roy K *et al* (eds) *Legislative, Executive and Judicial Governance in Federal Countries* (2006) 175; Saunders (2006) 360.

<sup>22</sup> Konrad Adenauer Stiftung (KAS) ‘The example of federalism in the Federal Republic of Germany: A reader’ (1994) 67.

<sup>23</sup> Watts (2008) 151.

central power,<sup>24</sup> party politics have weakened the South African NCOP, a system closely fashioned after the German *Bundesrat*.<sup>25</sup> In India, too, state legislatures nominate members of the *Rajya Sabha*; however, regional party interests, and not legitimate state government interests, determine the selection of representatives.<sup>26</sup> On the other hand, Watts argues that directly elected members tend to vote along party lines, and his preference is for indirectly elected representatives to represent regional interests.<sup>27</sup> However, the independence of the American Senate demonstrates that, in the right context, directly elected representatives can resist party interests and vote on the basis of genuine state interests.<sup>28</sup>

It can be concluded that there is no universally preferred method of structuring the central representation of devolved units. Indeed, even the Canadian system of centrally appointed members – which is criticised as having the least credibility – is said to have the potential to enhance the representation of minorities who cannot make it through a popular vote.<sup>29</sup> There is thus no universally accepted model, nor is there any assurance that a particular design will bear the same fruit if it is transplanted elsewhere as effectiveness depends on factors which are sometimes not related to the design.

The framers of the Constitution had provided initially for indirect election from respective constituent units.<sup>30</sup> However, in its responses, the public perceived indirect election of Senate members as a “weakness”.<sup>31</sup> The CoE received views that “persons of the right calibre were unlikely to emerge” through indirect elections<sup>32</sup> and that indirectly elected senators “would carry lesser weight than members of the National Assembly”.<sup>33</sup> The CoE addressed these concerns by reverting to direct elections in order to have a “strong” Senate.<sup>34</sup>

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<sup>24</sup> Baldi (1999) 9.

<sup>25</sup> Malherbe E ‘The South African National Council of Provinces: A trojan horse or white elephant?’ (1998) 77 *Journal of South African Law*.

<sup>26</sup> Dhavan R & Saxena R ‘Republic of India’ in Le Roy *et al* (2006) 176.

<sup>27</sup> Watts (2008) 151.

<sup>28</sup> Riker WH ‘The Senate and American federalism’ (1955) 2 *The American Political Science Review* 452-469.

<sup>29</sup> Watts (2008) 154.

<sup>30</sup> CoE (2010b) 92.

<sup>31</sup> CoE (2010b)92.

<sup>32</sup> CoE (2010b)92.

<sup>33</sup> CoE (2010b)92.

<sup>34</sup> CoE (2010b)114-115.

The context in which an indirectly elected Senate was perceived a political weakness needs some examination. A directly elected Senate has an explicit democratic and popular mandate, unlike an indirectly chosen one.<sup>35</sup> This gives the Senate a people's voice and democratic legitimacy equal to that of the National Assembly, as opposed to a derived "secondary mandate" that may make the Senate politically inferior to the National Assembly. Indeed, the Senate has attracted the interest of senior politicians who are interested in the Senate seats, and there is no doubt that direct election is a major motivation for politicians who are senatorial candidates.<sup>36</sup> This may well be the reason why the CoE and the Kenyan public saw a directly elected Senate as the most viable way of strengthening the voice of the Senate.

However, governmental representation, as demonstrated by the German *Bundesrat*, is also important for effective representation of devolved units at the centre.<sup>37</sup> Indeed, representation of counties is not equivalent to representation of county governments. While the term "county" is general and may include territory or be used to refer collectively to people from a certain county, the phrase "county government" is specific in that it refers to the institution of government in charge of a county, an institution composed of the county executive and legislature. The contrast between these two concepts ("county" and "county government") is best illustrated by a situation where the senator and county governor are from different political parties. The CoE had suggested that senators should attend CA sessions as non-voting members and also submit annual reports to their respective counties in a bid to create the "institutional linkage".<sup>38</sup> Earlier drafts such as the *Bomas* Draft had incorporated the CoE suggestion,<sup>39</sup> but no such provision was retained in the Constitution.

In South Africa and Germany, the delegations from the provincial and *Lander* governments ensure "governmental representation" of constituent units at the centre. Since they are members of their respective governments, it can be argued that in "federal decision-making" there is a basis for a stronger and more effective representation of the interests of subnational governments. However, as demonstrated by the South African and Indian experiences, party politics can still negate the benefits of the apparently appropriate structure for representing subnational governments the centre.

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<sup>35</sup> CoE (2010b) 66, 92.

<sup>36</sup> Ghai YP & Cottrell JG *Kenya's Constitution: An Instrument for Change* (2011) 101.

<sup>37</sup> KAS (1994) 67.

<sup>38</sup> CoE (2010b) 92.

<sup>39</sup> Clause 141 (4) *Bomas* Draft.

In the Kenyan context, the struggle may have been between, on the one hand, a politically strong Senate of equal democratic legitimacy with the National Assembly and, on the other, a “politically weak” Senate with strong “institutional links” with the counties. Indeed, the direct election of senators may well be the basis of the political strength and democratic legitimacy of the Senate. During the constitutional review process, for instance, the parliamentary Select Committee, drawn from the then unicameral national legislature, attempted to “water down” the powers of the Senate.<sup>40</sup> The action by the PSC is indicative of the potential political rivalry between the two Houses. The popular mandate of the Senators is likely to enable the Senate to assert itself against the National Assembly and at the national level generally.

While centralisation of political power is one of the major challenges that Kenya sought to address through the Constitution, a politically weak Senate might not achieve this objective as county interests cannot be guaranteed by a politically weak Senate. The popular mandate of the Senate gives it the necessary political leverage to enhance accountability in the exercise of power at the national level. Furthermore, while there is a possibility that directly elected senators may serve party interests, there is no certainty that indirectly elected Senators will serve party interests, as demonstrated by the experience with India’s federal chamber. While direct elections may mean a weak institutional link to county governments, it is still possible to build a working relationship between Senators and the county governments, and this is envisaged in the Constitution. For instance, the Constitution provides that the Senate should consult county governors, among other relevant persons, when coming up with a basis for horizontal division of revenue.<sup>41</sup> Furthermore, the general framework for intergovernmental cooperation can provide a basis for stronger and effective institutional links between the Senate, senators and the county governments.

### **3. The Senate voting procedure**

The Senate powers are mainly limited to matters affecting county governments. However, the Senate is also mandated to deal with matters that do not concern counties. The Constitution stipulates different procedures of voting for matters that concern counties and for those that do not. Accordingly, before a vote is taken on any matter in the Senate, the speaker is required to

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<sup>40</sup> CoE (2010b) 114. See also Parliament of Kenya (National Assembly) ‘Report of the Parliamentary Select Committee on the Review of the Constitution on the Revised Harmonized Draft Constitution’ (2010) 11.

<sup>41</sup> Article 217 (2) (c).

rule whether the matter affects counties or not in order to ascertain which voting procedure applies.<sup>42</sup>

### 3.1 Matters affecting county governments

In matters affecting counties, the Constitution provides that members of the Senate who are registered voters from one county should cast votes as a “delegation”.<sup>43</sup> This means that in all matters affecting counties, the 20 nominated members of the Senate do not have an independent vote. The elected county representative casts the vote<sup>44</sup> after consulting the rest.<sup>45</sup> The matter is carried if it is supported by a majority of the “delegation” votes.<sup>46</sup> The intention behind this system of “county votes” may have been to enhance representation of county interests, and is most likely borrowed from South Africa or Germany, where members of the federal chamber are true delegates of the constituent units and cast “delegation” votes.<sup>47</sup>

The Kenyan Senate, however, has no delegates from county governments but representatives instead who are directly elected or nominated independently of the county governments. Indeed, Senate members from the same county may actually be from different political parties with opposing political views<sup>48</sup> and might not reach consensus. In any case, the elected representative can ignore the input of fellow “delegates” and vote differently. The county vote is essentially an individual vote of the elected county representative in the Senate.

The “county vote” procedure may offer protection, however, to the smaller ethnic communities. The 20 extra nominated members are most likely to be from the major parties, which also incidentally belong to the larger ethnic communities. Accordingly, if the non-elected members were to have independent votes, this could mean 20 extra votes for the larger ethnic communities if the nominated members choose to vote with their parties. To this extent, the casting of “county votes” prevents the dilution of the ethnic minority vote in the Senate, as 20 extra votes can tilt the scales in any voting process.

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<sup>42</sup> Article 123 (2).

<sup>43</sup> Article 123 (1).

<sup>44</sup> Article 123 (1).

<sup>45</sup> Article 123 (4) (b).

<sup>46</sup> Article 123 (4) (c).

<sup>47</sup> Watts (2008) 151; De Vos P ‘The role of the National Council of Provinces in the governance of South Africa’ in Luther J, Passaglia P & Tarchi R (eds) *A World of Second Chambers: Handbook for Constitutional Studies on Bicameralism* (2006) 618-619. See also KAS (1994) 67.

<sup>48</sup> Ghai & Cottrell (2011) 101.

### **3.2 Matters not affecting county governments**

In matters not affecting counties, all the Senate members, including the 20 nominees, have a vote each.<sup>49</sup> The Senate is expressly excluded from legislation not affecting county governments,<sup>50</sup> and the 20 extra members get to vote only on other matters (other than laws) that do not affect counties. The constitutional provisions are not clear, however, on what amounts to “a matter not affecting counties” and this will mainly depend on the speaker’s interpretation.

The Senate, being part of the national legislature, is vested horizontal checks and balances with the other arms of government. These roles include the power to impeach the president or the deputy president.<sup>51</sup> The 20 nominated members may therefore be allowed to vote on impeachment as this is not a matter affecting counties. However, another speaker may rule that impeachment affects counties since some of the president’s powers have an impact on county operations. What amounts to a matter affecting counties or one that does not (and which will thus include nominee votes) depends on the interpretation that is adopted.

The decision on whether a matter affects counties or not has a substantial impact on the voting and decision-making as it will either reduce or increase Senate votes by 20. This is a fairly substantial proportion, and can tilt the decision in any tightly contested matter between the elected representatives. For instance, if the power to impeach is ruled as not affecting counties, the 20 extra votes may sway the decision if the Senate is equally divided on the impeachment of the president. The same applies to other matters that may be ruled as not affecting counties. Furthermore, if Senate procedural questions are ruled as matters not affecting counties, the major parties may end up determining procedural matters in their favour as they are likely to have 20 extra votes. Since procedural questions determine how the Senate arrives at decisions, the procedures adopted may end up working in favour of the major parties if the 20 extra members are allowed to cast votes in determining procedural questions.

### **4. Powers and functions of Senate**

The Constitution lists three main functions of the Senate through which it can represent and protect county interests at the national level.<sup>52</sup> First, it participates in the law-making function of

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<sup>49</sup> Article 123 (3).

<sup>50</sup> Article 96 (2).

<sup>51</sup> Article 96 (4).

<sup>52</sup> Article 96 (1).

parliament by considering, debating and approving Bills concerning counties.<sup>53</sup> Second, it determines the allocation of national revenue among counties, and also exercises oversight over national revenue allocated to county governments.<sup>54</sup> Lastly, it has oversight powers over the national executive, including the power to impeach the president or deputy president.<sup>55</sup>

#### 4.1 Legislative power

While the Senate has legislative power, it is limited to legislation affecting counties<sup>56</sup> and thus has no role in legislation not affecting counties. While this provision can be seen as a limit to the legislative power of the Senate, it has the potential to ensure that the Senate focuses on protecting and representing counties only, as opposed to attending to general issues that could “dilute” its key mandate.<sup>57</sup> For instance, the South African NCOP’s general legislative mandate has been described as “no more than a delaying power” with no real benefit to the provinces.<sup>58</sup>

A Bill affecting county governments may originate in either House.<sup>59</sup> Such a Bill is defined as one which contains provisions that affect the county government functions listed under the Fourth Schedule.<sup>60</sup> Additionally, any Bill relating to the election of members of a CA or CEC, or a Bill affecting county finances, is considered a Bill affecting county governments.<sup>61</sup> In practice, however, many laws affect counties, and much will depend on how willing or able the Senate is to scrutinise legislation.<sup>62</sup> Indeed, experience from multilevel systems such as South Africa, India and Canada shows that few Bills can be tagged as not affecting the subnational units.<sup>63</sup>

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<sup>53</sup> Article 96 (2).

<sup>54</sup> Article 96 (3).

<sup>55</sup> Article 96 (4).

<sup>56</sup> Articles 109 (3) and 112.

<sup>57</sup> Murray C & Nijzink L *Building Representative Democracy: South Africa’s Legislatures and the Constitution* (1999) 43-44.

<sup>58</sup> *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC) Certification judgment II) para 64.*

<sup>59</sup> Article 109 (4).

<sup>60</sup> Article 110 (1) (a).

<sup>61</sup> Article 110 (1).

<sup>62</sup> Ghai & Cottrell (2011) 24.

<sup>63</sup> Murray C & Simeon R “Tagging” Bills in parliament: section 75 or section 76? (2006) 123 *South African Law Journal* 234.

It is the duty of the speakers of both Houses jointly to resolve a question whether a law affects county governments or not.<sup>64</sup> There are no further procedures provided on how such a decision should be reached. It is thus possible that a pro-centre speaker of the Senate may end up narrowing the Senate's legislative mandate, whereas a pro-county speaker could greatly expand the legislative power of the House. In South Africa, the NCOP and the National Assembly collectively, through a "joint tagging committee", make decisions on the tagging of Bills, the procedure for which is set out in the Joint Rules of Parliament.<sup>65</sup> If the Tagging Committee cannot agree, the matter is referred to the floors of both Houses and, as a last resort, to the Constitutional Court.<sup>66</sup>

However, unlike the NCOP in South Africa which has powers over all legislation whether it affects provinces or not, the Senate in Kenya is expressly excluded from laws that do not concern counties. This means, therefore, that it is only through effective tagging of Bills that the Senate's power can be triggered to protect county interests. Incorrect tagging means that the Senate will not have any opportunity to debate the Bill. For instance, South Africa's NCOP can still consider a wrongly tagged Bill as legislation not affecting provinces because of its general legislative mandate. Even then, South Africa's Constitutional Court in the case of *Tongoane and others v Minister for Agriculture and Land Affairs and others*<sup>67</sup> ruled that where a Bill is wrongly tagged, and the wrong legislative procedure followed, the resulting legislation is invalid. In Kenya, a similar approach is crucial with regard to wrongly tagged Bills, given that the Senate is completely excluded from considering a Bill tagged as not affecting counties.

The constitutional provisions further separate Senate legislative power into an ordinary and special legislative power. Accordingly, even after a Bill is tagged as affecting counties, both speakers must also jointly decide whether it is a special Bill affecting counties or an ordinary Bill affecting county governments.<sup>68</sup> The Senate has an ordinary veto over ordinary Bills affecting counties and a special veto over special Bills affecting counties.

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<sup>64</sup> Article 110 (3).

<sup>65</sup> Joint rules of Parliament (January 2003), rules 151-158 cited in Murray & Simeon (2006) 243.

<sup>66</sup> Murray & Simeon (2006) 243.

<sup>67</sup> 2010 ZACC 10 para109 (Tongoane case).

<sup>68</sup> Article 110 (3).

#### 4.1.1 Ordinary legislative veto power

A special Bill affecting counties is defined in the Constitution as a Bill that relates to the election of members of a CA or a CEC<sup>69</sup> or is the County Allocation of Revenue Bill (CARB).<sup>70</sup> Therefore, all other Bills affecting counties that do not fall within the category of special Bills affecting counties are subject to the ordinary legislative veto power of the Senate. All ordinary Bills affecting county governments can be passed by the Senate or the National Assembly by a simple majority vote. The speaker of the House that passes the Bill submits the same to the other House for debate and approval.<sup>71</sup> The other House may pass it, reject it or pass it with amendment.<sup>72</sup> If passed with an amendment, the Bill is referred back to the originating House for reconsideration with the amendment.<sup>73</sup> If passed as amended, the respective House passes it on to the president for assent.<sup>74</sup>

If an ordinary Bill affecting counties is rejected as amended by either House, a mediation committee,<sup>75</sup> composed of equal number of members from both Houses, is set up to develop a “consensus Bill” acceptable to both Houses.<sup>76</sup> If the consensus Bill is passed by both chambers,<sup>77</sup> the speaker of National Assembly passes the Bill to the president for assent.<sup>78</sup> If the consensus Bill fails in either House, the Bill is defeated.<sup>79</sup> In essence, with regard to ordinary Bills affecting counties, both Houses have equal legislative power.

Money Bills, defined as Bills which seek to affect taxes or other public finances other than as contemplated in the finance section of the Constitution, cannot originate in the Senate.<sup>80</sup> Instead, Money Bills should originate only in the National Assembly, and only after views of the cabinet secretary in charge of finance have been taken into account.<sup>81</sup> Therefore, the Senate can only wait to debate and pass a money Bill affecting county governments after the Bill has

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<sup>69</sup> Article 110 (2) (a) (i).

<sup>70</sup> Article 110 (2) (a) (ii).

<sup>71</sup> Article 110 (4).

<sup>72</sup> Article 112 (1).

<sup>73</sup> Article 112 (1) (b).

<sup>74</sup> Article 112 (2) (a).

<sup>75</sup> Article 112 (1).

<sup>76</sup> Article 113 (1).

<sup>77</sup> Article 113 (2).

<sup>78</sup> Article 113 (3).

<sup>79</sup> Article 113 (4).

<sup>80</sup> Article 114 (2).

<sup>81</sup> Article 114 (2).

been introduced in the National Assembly. The CARB and the DRB are excluded from the definition of a money Bill and they can thus be introduced in either House.<sup>82</sup>

The president can veto laws enacted by Parliament, and in that case both Houses may amend the law to incorporate the president's concerns or pass it without amendment.<sup>83</sup> Where both Houses amend the law incorporating the president's views, the appropriate speaker will resubmit the same for presidential assent.<sup>84</sup> However, the two Houses can also reject the president's reservations and pass the law with a two-thirds majority vote.<sup>85</sup>

Through its legislative power, the Senate, which represents counties, safeguards the interests of counties in national legislation. With regard to ordinary Bills affecting counties, the Senate has powers equal to those of the National Assembly and can thus ensure that county interests are considered in the promulgation of laws affecting counties. The interests of counties are therefore potentially safeguarded by the Senate's ordinary veto over ordinary legislation affecting counties.

#### **4.1.2 Special legislative veto power**

The Senate has a special veto power with regard to a Bill concerning the election of members of a CA or a CEC<sup>86</sup> and the County Allocation of Revenue Bill (CARB).<sup>87</sup> If the Senate passes any of these Bills, the National Assembly can only amend or veto the Bill via a resolution supported by at least two-thirds of the members of the NA.<sup>88</sup> If the National Assembly does not garner the required two-thirds, the speaker of the National Assembly is required to hand over the Bill to the president within seven days for assent.<sup>89</sup>

While the Senate has a general power to represent and protect the interests of counties, the special legislative power is indicative of the core interests of counties that the Senate has to protect. The CARB, which is discussed in more detail in Chapter 7, shares out resources among county government.<sup>90</sup> The equitable share is a crucial aspect of the operations of the county

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<sup>82</sup> Article 114 (3).

<sup>83</sup> Article 115 (2).

<sup>84</sup> Article 115 (3).

<sup>85</sup> Article 115 (4) (b).

<sup>86</sup> Article 110 (2) (a) (i).

<sup>87</sup> Article 110 (2) (a) (ii).

<sup>88</sup> Article 111 (2).

<sup>89</sup> Article 111 (3).

<sup>90</sup> Article 218 (1) (b).

governments, as counties are likely to be heavily reliant on revenue collected nationally.<sup>91</sup> The special Senate veto has the potential to facilitate a more equitable and transparent process of sharing resources among counties.

Legislative and executive structures of counties, on the other hand, are the basis of the exercise of all county powers. It is through executive and legislative structures that county governments are able to exercise their autonomy and powers. Local authorities in the past dispensation were, as shown in Chapter 3, subordinated and made appendages of the central government. With its special veto, however, the Senate can protect the structures, and therefore the autonomy, of county governments. The requirements for a two-thirds majority vote in the National Assembly may be difficult to reach, and this protects counties from any intrusive national laws that may undermine county structures or resources, both of which are critical to the autonomy of counties.

#### **4.1.3 Constitutional amendment**

Constitutional amendment can be done either through a parliamentary or popular initiative, and the Senate participates in both. A constitutional amendment may be introduced in either House<sup>92</sup> in the form of an amendment Bill. The amendment will pass if approved by at least two-thirds of the votes in both Houses on the second and third readings.<sup>93</sup> The Senate thus plays a role equal to that of the National Assembly with regard to constitutional amendments. The Senate is not given special powers over amendment of constitutional provisions relevant to devolved government. Instead, amendments of provisions touching on the objects, principles and structure of devolved government are to be put to a national referendum after the parliamentary process described above.<sup>94</sup> The amendment has to be supported by a simple majority of the voters and at least 20 percent of the voters in half of the 47 counties.<sup>95</sup> The amendment of national values and principles of governance,<sup>96</sup> which include “sharing and devolution of power”, is also subject to a referendum.<sup>97</sup>

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<sup>91</sup> World Bank *Devolution without Disruption: Pathways to a Successful New Kenya* (2012) 68.

<sup>92</sup> Article 256 (1) (a).

<sup>93</sup> Article 256 (1).

<sup>94</sup> Article 255 (1) (i).

<sup>95</sup> Article 255 (1) and (2).

<sup>96</sup> Article 10 (2) (a) to (d).

<sup>97</sup> Article 10 (2) (a).

More significantly, the Constitution clearly states that the powers exercised by the national and county governments emanate from the people and are exercised on their behalf by the respective governments.<sup>98</sup> Accordingly, county powers do not flow from the centre but from the people to the national and county governments, respectively. It is thus fitting that the people are the custodians of the provisions establishing and empowering county governments.

#### **4.2 Setting the basis for horizontal division of revenue**

The Constitution empowers the Senate to determine the basis of allocating the county equitable share among counties.<sup>99</sup> The Senate must, once every five years, pass a resolution which determines the basis for horizontal division of revenue. In setting the basis for horizontal revenue sharing, the Senate is to be guided by the criteria for determining the equitable share provided for in the Constitution.<sup>100</sup> The Senate is also required to request and consider recommendations from the CRA.<sup>101</sup> Furthermore, the Senate should consult the county governors, the Cabinet Secretary responsible for finance and any organisation of county governments.<sup>102</sup> Lastly, the Senate is required to invite the public, including professional bodies, to make submissions on the matter.<sup>103</sup>

After passing the resolution that sets the basis for horizontal division of revenue, the resolution is referred to the National Assembly within 10 days and the National Assembly is required to vote to accept it fully or with amendments, or reject it, within 60 days.<sup>104</sup> If the National Assembly does not vote within 60 days, the resolution is to be considered adopted without amendment.<sup>105</sup> The National Assembly can either amend or reject the resolution by a two-thirds vote.<sup>106</sup> If amended or rejected by the National Assembly, the Senate can either adopt a new resolution, in which case the same procedure will apply, or request mediation through a joint committee.<sup>107</sup> A resolution by the Senate on the basis of division of revenue applies until the

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<sup>98</sup> Article 1.

<sup>99</sup> Article 217 (1).

<sup>100</sup> Article 203 (1).

<sup>101</sup> Article 217 (2) (b).

<sup>102</sup> Article 217 (2) (c).

<sup>103</sup> Article 217 (2) (d).

<sup>104</sup> Article 217 (3) and (4).

<sup>105</sup> Article 217 (5) (a).

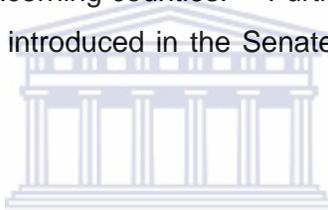
<sup>106</sup> Article 217 (5) (b) paras (i) and (ii).

<sup>107</sup> Article 217 (6).

next resolution is adopted.<sup>108</sup> However, the Senate may, at any time, and by a resolution of two-thirds, amend the resolution, in which case the same procedure for the National Assembly approval will follow.<sup>109</sup>

The special power of the Senate over the CARB and the resolution setting the basis for the horizontal division of revenue gives the Senate an upper hand over the horizontal distribution of revenue. The CARB is not a money Bill and can be introduced in the Senate. A combination of these factors gives the Senate unassailable control over the horizontal division of revenue.

Despite the extensive county powers over the horizontal division of the county equitable share, the Senate has no equivalent special power over the vertical division of revenue. The Senate does not have express powers to debate and pass the DRB which deals with the vertical division of revenue.<sup>110</sup> This may be seen as a weakness because the size of the overall share will determine the significance of the share that individual counties receive. The DRB easily fits in the category of ordinary Bills concerning counties.<sup>111</sup> Furthermore, the DRB is exempted from a money Bill and can thus still be introduced in the Senate and discussed as an ordinary Bill affecting counties.<sup>112</sup>



### **4.3 Review power**

The Senate has the power to review national executive decisions affecting counties as well as some decisions which do not affect counties. The review power of the Senate emanates from its dual role of representing counties and of being a national organ of horizontal power-sharing. While some of the review powers are co-shared with the National Assembly, the Senate has exclusive review power over national executive decisions that directly concern county governments. The Senate can set aside national executive decisions and is thus capable of safeguarding county interests.

#### **4.3.1 Review power over matters concerning counties**

The Senate has exclusive powers to review national government interventions in county governments. The Constitution provides that national legislation should provide for a process by which the Senate may bring an intervention by a national government in a county government to

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<sup>108</sup> Article 217 (7).

<sup>109</sup> Article 217 (8).

<sup>110</sup> Article 218 (1) (a) as read with Article 111 (1).

<sup>111</sup> Article 110 (1) (c).

<sup>112</sup> Article 114 (3).

an end,<sup>113</sup> the procedure for which is set out by the CGA.<sup>114</sup> The constitutional power of the Senate to terminate an intervention in a county government at any time<sup>115</sup> is also recognised in the CGA.

While the Constitution provides for circumstances under which a county government can be suspended by the national executive,<sup>116</sup> the Senate may, at any time, terminate the suspension of a county government.<sup>117</sup> The procedure of suspension of a county government is provided for in CGA,<sup>118</sup> which also recognises the power of the Senate to terminate a suspension.<sup>119</sup> Given that a suspension has the effect of suspending county structures and may lead to fresh elections,<sup>120</sup> the Senate power to review suspension is important to safeguard county interests and ensure objectivity in the process.

The transitional provisions of the Constitution provide that the transfer for powers of counties can be delayed and undertaken gradually as counties build their capacity over a period of three years from the start of operations.<sup>121</sup> The Transition to Devolved Government Act (TDGA),<sup>122</sup> which was passed to guide the transition to devolved government, grants the Senate exclusive powers to review decisions on the transfer of powers to county governments.<sup>123</sup> While the Transitional Authority (TA), established in the TDGA, has powers to receive applications by counties for the transfer of powers and may reject such an application,<sup>124</sup> a county can appeal to the Senate, which has a final say on the transfer of powers.<sup>125</sup>

Supervision and national regulation are key pillars of decentralised governance.<sup>126</sup> It is only through supervision and regulation that county governments can adhere to national standards

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<sup>113</sup> Article 190 (5) (d).

<sup>114</sup> Article 190 (1) (3).

<sup>115</sup> Article 190 (1) (3).

<sup>116</sup> Article 192 (1).

<sup>117</sup> Article 192 (4).

<sup>118</sup> Sections 123 and 124 of the CGA.

<sup>119</sup> Section 124 (5) (a) CGA.

<sup>120</sup> Article 192 (6).

<sup>121</sup> Sixth schedule, section 15 (1).

<sup>122</sup> Act 1 of 2012.

<sup>123</sup> Section 23 (7) and (8) TDGA.

<sup>124</sup> Act 1 of 2012.

<sup>125</sup> Section 23 (7) and (8) CGA.

<sup>126</sup> World Bank (1997) 128.

and implement important national policies at the county level.<sup>127</sup> The gradual transfer of powers, on the other hand, is necessitated by the need to ensure uninterrupted delivery of services in the transition period.<sup>128</sup> However, these measures are a form of limitation on county government autonomy. Therefore, there is an inherent risk that they could be used as a means of undermining county autonomy and devolution in general. Indeed, national regulatory powers have been used in the past to control and bring local authorities into submission.<sup>129</sup> The exclusive review power of the Senate protects counties from any possible central government attempts to undermine county government powers and autonomy.

#### 4.3.2 General review power

General review powers of the Senate relate to it being a component of the national legislature. The general review powers thus enable the Senate, along with the National Assembly, to participate in horizontal checks and balances of the national executive and the judiciary. The National Assembly and the Senate share powers to impeach the president and the deputy president. The Constitution provides that impeachment proceedings should commence from the National Assembly.<sup>130</sup> If supported by two-thirds of the National Assembly, the motion moves to the Senate.<sup>131</sup> The Senate votes on impeachment charges after an investigating committee drawn from the Senate makes recommendations for impeachment.<sup>132</sup> A two-thirds vote for impeachment of the president will see the president vacate office.<sup>133</sup> The same procedure applies to impeachment of the deputy president.<sup>134</sup>

Thus, while impeachment proceedings against the president commence in the National Assembly, the Senate makes the final and actual determination whether the president or the deputy president is fit to hold office. The Senate can thus be said to have the power of “a quasi-judicial institution”<sup>135</sup> that can try the president.<sup>136</sup> The main limitation, however, is that the power

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<sup>127</sup> World Bank (1997) 128.

<sup>128</sup> World Bank (2012) 200-201.

<sup>129</sup> Muia DM ‘Devolution: which way for local authorities?’ in Kibua TN & Mwabu G (eds) *Decentralization and Devolution in Kenya: New Approaches* (2008) 155.

<sup>130</sup> Article 145 (1).

<sup>131</sup> Article 145 (2).

<sup>132</sup> Article 145 (5).

<sup>133</sup> Article 145 (7).

<sup>134</sup> Article 150 (2).

<sup>135</sup> Kirui K & Murkomen K ‘The Legislature: Bi-cameralism under the new Constitution’ (SID Constitution Working Paper No 8) (2011) 16-17.

of the Senate can be activated only after an impeachment is passed by the National Assembly and referred to the Senate.

The Constitution specifies that some executive appointments are subject to “Parliament’s approval”, including appointment of the Inspector General of Police which requires approval of parliament generally.<sup>137</sup> However, the Senate is excluded from a number of important appointments: cabinet secretaries, principal secretaries,<sup>138</sup> the Controller of Budget, auditor general, and appointment of members of independent commissions. The provisions of the Constitution require “approval of the National Assembly”, thus excluding the Senate. Furthermore, only the National Assembly can commence a motion to remove a cabinet secretary from office.<sup>139</sup> While the wording excludes the Senate from seemingly relevant and important appointments, Ghai and Cottrell attribute this omission to an oversight by the drafters as opposed to a deliberate intention to exclude the Senate.<sup>140</sup>

Both the Senate and the National Assembly approve deployment of national forces in and outside of Kenya.<sup>141</sup> The Senate also approves jointly with the National Assembly the extension of the term of parliament when the country is at war.<sup>142</sup>

#### **4.4 Power to nominate members of the CRA**

The Constitution provides that the political parties represented in the Senate shall nominate five of the commissioners of the CRA while the National Assembly nominates two persons to the CRA.<sup>143</sup> In view of the important role that the CRA plays in matters of revenue division and county finances generally, the power of the Senate to appoint the majority of the CRA members is significant. Given that the Senate is mandated to safeguard county interests, it is intended that the political parties represented in the Senate will act with county interests in mind. This can only be reflected through nominating persons who have relevant qualifications and can promote and safeguard county interests in the vertical and horizontal division of revenue and other matters that the CRA will attend to.

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<sup>136</sup> Article 145 (3) (a).

<sup>137</sup> Article 245 (2) (a).

<sup>138</sup> Article 155 (3) (b).

<sup>139</sup> Article 152 (9).

<sup>140</sup> Ghai & Cottrell (2011) 141-142.

<sup>141</sup> Article 240 (8) (a) and (b).

<sup>142</sup> Article 102 (2).

<sup>143</sup> Article 215 (3) (b) and (c).

Kirira criticises this power for having the potential to introduce politics into resource-sharing.<sup>144</sup> However, the requirement that persons nominated should be professionals and serve in their personal capacity for a non-renewable term may enhance the independence of the CRA. The Senate also has power to nominate a member to the Salaries and Remuneration Commission (SRC), which is mandated to set salary scales for the national and county governments.<sup>145</sup>

#### 4.5 Oversight power

By definition, oversight means the “follow-on activity” on implementation of laws and policies by the executive.<sup>146</sup> However, oversight can also extend to preparation of policies and laws.<sup>147</sup> Common oversight tools include, among others, committee hearings, hearings in plenary sessions, commissions of inquiry, questions, and question time.<sup>148</sup> It is thus clear that while review powers have a “hard” edge capable of “frustrating” the executive, oversight basically entails scrutiny and “soft” measures that may not necessarily alter the direction of executive decisions.

The Constitution empowers the Senate to exercise oversight over national revenue allocated to the county governments.<sup>149</sup> Only the national executive has measures such as intervention or stoppage of funds in cases of material breach by a county. The Controller of Budget (CoB) can also reject any proposed expenditure that is not in accordance with the pre-determined county budget.<sup>150</sup> The Senate is thus limited to oversight over the national executive conduct with regard to revenue belonging to counties.

The Senate has power to summon a cabinet member to answer a question on any matter when required.<sup>151</sup> The CoB is also required to submit reports after every four months to each House, including Senate, on the implementation of the budgets of the national and county governments.<sup>152</sup> All commissions and independent offices established in the Constitution are

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<sup>144</sup> Kirira N ‘Public Finance under Kenya’s new Constitution’ (Society for International Development (SID) Working Paper No.5) (2011) 5.

<sup>145</sup> Article 230 (2) (b) (vii).

<sup>146</sup> Pelizzo R & Stapenhurst R ‘Tools for legislative oversight: An empirical investigation’ World Bank policy research Working paper 3380 September 2004 (2004) 4.

<sup>147</sup> Pelizzo & Stapenhurst (2004) 4.

<sup>148</sup> Pelizzo & Stapenhurst (2004) 4.

<sup>149</sup> Article 96 (3).

<sup>150</sup> Article 228 (4).

<sup>151</sup> Article 153 (3).

<sup>152</sup> Article 228 (6).

required to submit annual reports to the Senate, National Assembly and the president.<sup>153</sup> The National Security Council is equally required to report to both Houses.<sup>154</sup> At any time, Senate, National Assembly or the president can also require a commission or holder of an independent office to submit a report on a particular issue,<sup>155</sup> which report will be published and publicised.<sup>156</sup>

The Senate also has powers, like the National Assembly and the county assemblies, to summon any public official or any other person before it to provide evidence required by the Senate.<sup>157</sup> However, the nature of the oversight power itself is limited to scrutiny and “naming” and “shaming” without any real power comparable to the review powers.

## **5. Assessment of the Senate**

The Senate has the potential to facilitate the pursuit of the three purposes of devolving power. This can only be achieved if its structure reflects and enhances ethnic diversity and representation at the national level. In addition, powers of the Senate must be relevant to the root causes of ethnic conflict. Furthermore, the Senate should also have powers that can guarantee the autonomy of counties to pursue local preferences and local development. A critical assessment of the structure and powers of the Senate in terms of the three purposes reveals potential benefits as well as risks for all of the three purposes.

### **5.1 The Senate and development**

Important processes for devolved development carried out at the national level include supervision and regulation of devolved units. Effective devolved development also requires cooperation between devolved units and the national level. Most of these functions are performed by the national executive through its sectoral ministries and departments, which formulate and implement national policies as well as coordinate service delivery.<sup>158</sup> The Senate, on the other hand, is part of the national legislature and is therefore not directly involved in regulation and supervision of county governments. Indeed, the World Bank recommends that due to the often constrained powers of the second chamber, decentralised development issues

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<sup>153</sup> Article 254 (1).

<sup>154</sup> Article 240 (7).

<sup>155</sup> Article 254 (2).

<sup>156</sup> Article 254 (3).

<sup>157</sup> Article 125 (1).

<sup>158</sup> World Bank (2012) 187.

should be generally deliberated in the first chambers that usually have “unconstrained” powers.<sup>159</sup>

In the Kenyan context, the Senate has been entrusted with powers which have the potential to facilitate the pursuit of development. By virtue of the Senate being part of the national legislature, the bulk of its powers relate to horizontal checks and balances, some of which have the potential to protect county interests. The Senate functions which have a potential to protect counties include: the review power, legislative function, and determination of the horizontal distribution of resources among counties.

### **5.1.1 Design aspects which enhance development**

The Senate has power to end national government intervention in a county<sup>160</sup> and can also terminate the suspension of a county government.<sup>161</sup> While intervention and suspension of counties is an important part of ensuring efficiency and effective service delivery, the possibility exists that these avenues could be used to shrink the space and autonomy of county governments. Indeed, past experience shows how local authorities were subjected to central control and political subordination that led to breakdown of service delivery.<sup>162</sup> The power of the Senate to end interventions and suspensions can counteract any attempt to interfere with county autonomy.

While the Constitution provides that counties can be assigned additional powers by national legislation,<sup>163</sup> the Senate can ensure that, through its legislative power, counties are not assigned powers without additional resources, thereby avoiding the problem of unfunded mandates. The Senate can also veto legislation that may be aimed at intruding into or infringing on the autonomy of county governments. The legislative power of the Senate thus ensures that county interests are considered and safeguarded whenever national legislation is passed.

The special veto power of the Senate with regard to horizontal division of revenue – along with the resolution setting the basis for horizontal division of revenue – can facilitate effective devolved development.<sup>164</sup> Both the resolution and CARB lay the basis for equitable

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<sup>159</sup> World Bank (1999) 113.

<sup>160</sup> Article 190 (5) (d).

<sup>161</sup> Article 192 (4).

<sup>162</sup> Republic of Kenya ‘Report of the Commission of Inquiry on Local Authorities in Kenya: A strategy for local government reform in Kenya’ (1995) 16.

<sup>163</sup> Article 186 (3).

<sup>164</sup> Article 110 (2) (a) (ii).

development, and the Senate has effective power to determine both with the assistance of the CRA. The Senate hence has the potential to enhance equitable development.

The ability of the Senate to protect the autonomy of counties is also dependent on its political strength in the national political scene, strength which is considerably enhanced by its popular mandate through the direct election of the senators. To this extent, the structure of the Senate facilitates developmental autonomy as it grants the Senate the political voice necessary to safeguard county autonomy. The broader constitutional structure, which has enhanced horizontal separation of powers and checks and balances, also gives the Senate the necessary political space to exercise its powers. For instance, the national executive has no control over other arms of government as it did in the past. As such, the Senate is free to exercise its powers aimed at protecting the autonomy of counties without any interference from the executive.

### **5.1.2 Design factors which hinder development**

The structures of the Senate, as well as the bulk of its powers, are relevant to devolved development. However, there are certain design aspects that may hinder the pursuit of effective devolved development. The Senate has special powers to determine the horizontal division of revenue but has no equivalent power in the determination of the vertical division of revenue. Accordingly, the Senate might not play an effective role in determining the vertical share of counties – which is important in that it will further determine the amount of horizontal share that is available.

The Senate is also denied powers to review appointments of key offices which are relevant to the operation of counties. For instance, while the CoB has constitutional power to authorise all expenditure by counties, the Senate, however, has no role to play in the appointment of the CoB.<sup>165</sup> Furthermore, the Senate has no role to play in the appointment of cabinet secretaries and principal secretaries of ministries.<sup>166</sup> Most of the ministries will formulate and supervise implement sectoral policies that impact on county governments. While the Senate can use its oversight power to protect county interests, reviewing appointments to these crucial offices would have been a more effective way of protecting the interests of counties.

The weak institutional link between the Senate and county governments has the potential to affect development negatively. A “federal chamber” composed of “governmental representatives” from the constituent units is arguably in a better position to represent county

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<sup>165</sup> Article 228 (1).

<sup>166</sup> Article 152 (2).

interests in line with the priorities of the subnational legislature and executive. A directly elected federal chamber, on the other hand, has weak institutional links with the subnational governments. Nevertheless, it remains possible to build such links and cooperation between the Senate and organs of the county government, albeit that there is no ready basis for this in the structural design of the Senate.

## **5.2 The Senate and ethnic accommodation**

As an institution of shared rule, the Senate should enhance representation of diversity and facilitate inclusiveness in central decision-making.<sup>167</sup> Furthermore, the institutions of shared rule should have powers to address issues that define conflict, issues that often revolve around resources and political power.<sup>168</sup> In the Kenyan context, the Senate should be in a position to address equitable sharing of resources and facilitate the sharing of powers with other ethnic communities not in the control of the presidency. In this way, the Senate would address issues that underlie ethnic conflict in Kenya.

### **5.2.1 Design aspects which facilitate ethnic accommodation**

The senate is composed of senators elected from what are mainly ethnically exclusive counties.<sup>169</sup> If the ethnic majorities in the respective counties elect their own as senators, the Senate may well end up being the national forum for ethnic representation. Furthermore, equality in Senate representation, as illustrated, for instance, by the Nairobi and Lamu counties, grants the smaller ethnic communities a stronger voice than in the National Assembly.

The equal representation of counties also makes the Senate an appropriate forum for inter-ethnic dialogue. Smaller ethnic communities have 47 percent representation in the Senate as opposed to 38 percent in the National Assembly. Therefore, while the overall effectiveness of the Senate in addressing ethnic conflict depends on the specific powers exercised by the Senate, the structure already provides a basis for addressing issues that define ethnic conflict.

Most of the powers granted to the Senate are relevant to the root causes of ethnic conflict in Kenya. The special powers of the Senate regarding horizontal division of national revenue enhance objectivity and transparency in the division of revenue. More specifically, smaller ethnic

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<sup>167</sup> Watts (2008) 152.

<sup>168</sup> World Bank (2011) 83.

<sup>169</sup> Akoth SO 'Challenges of nationhood: Identities, citizenship and belonging under Kenya's new Constitution' (Society for International Development (SID) Constitution Working Paper No. 10) (2011) 15.

communities will participate in processes leading to division of resources. This may dispel the perceptions of resource-exclusion held by smaller ethnic communities that had no voice at the national level. As already noted, successive regimes in Kenya have seen ethnically skewed allocation of state resources for development;<sup>170</sup> however, Senate powers can address this by providing a transparent and equitable way of dividing national resources.

The review powers of the Senate are also relevant to ethnic accommodation. Resolution of ethnic conflict is dependent on the different ethnic communities exercising control over political powers and resources. Therefore, any measures taken by the national government to claw back the autonomy of counties is likely to be interpreted as domination by the ethnic community in control of the presidency. It is the case, though, that the Senate has powers to terminate national government interventions in county governments; it can also terminate the suspension of a county government. These powers have the potential to protect county autonomy and thus ensure ethnic political accommodation. In addition, the broader constitutional framework of separation of powers and limited presidential powers also enables the Senate to exercise its functions more effectively.

### **5.2.2 Design aspects which hinder ethnic accommodation**

A number of structural and functional aspects of the Senate may hinder ethnic accommodation. Representation of ethnic diversity is important for the purposes of enhancing inclusiveness. However, while ethnic communities with “home counties” are likely to be represented in the Senate, “in-county ethnic minorities” are unlikely to make it through the direct vote at the county level. This means that a number of ethnic communities might not have the opportunity to be represented in the Senate.

The plight of county minorities is worsened by the absence of a provision enabling special representation for minorities and marginalised communities in the Senate, as may be the case in the National Assembly and county assemblies. It is likely, therefore, that the current structures of the Senate will exclude “in-county minorities.” While arrangements can be made to share seats with “in-county minorities” as was the case in Migori County where it was agreed

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<sup>170</sup> Chege M and Barkan JD ‘District focus and the politics of reallocation in Kenya’ (1989) 27 *Journal of Modern African Studies* 436-437; Southall R & Wood G ‘Local government and the return to multi-partyism in Kenya’ (1996) 95 *African Affairs* 509; Tordoff W ‘Decentralisation: Comparative Experience in Commonwealth Africa’ (1994) 32 (4) *The Journal of Modern African Studies* 568-570.

that the Senate seat is to be allocated to the Kuria community, such initiatives depend on the political will of the ethnic majority.

While “in-county minorities” do not pose a danger to national political stability, they are capable of being disruptive within counties where they have a commanding presence. Indeed, the Kuria community in Migori County has been identified as a possible threat to stability in the event of their real or perceived marginalisation by the locally dominant Luo community.<sup>171</sup> The Senate structure minimises any chances of “in-county minorities” being elected into its representative structures. It is for this reason that Ghai argues that perceptions of exclusion from the Senate and the National Assembly by ethnic minorities might fuel ethnic minority conflict.<sup>172</sup>

While the Senate structure provides a possibility for the protection of the rights of smaller ethnic communities, the effectiveness of the structure depends on factors that are external to the design. First, the Senate structure can only effectively facilitate ethnic representation if the FPTP system of voting produces the expected ethnic composition. That is, each county will vote in a senator from the majority ethnic community. Second, the effectiveness of the structure will also depend on whether the smaller ethnic communities will vote together as a bloc in order to take advantage of their enhanced presence in the Senate collectively.

However, there is no guarantee that the expected ethnic composition will be realised and that smaller ethnic communities will vote as a bloc. Indeed, in Chapter 5 it was noted that while independence politics pitted the larger and more dominant ethnic communities against the smaller communities,<sup>173</sup> political dynamics have since changed. The larger ethnic communities that worked together at independence are now adversaries in political contests, with the smaller ethnic communities taking whichever side is expedient to them. The Luo and the Kikuyu, ethnic communities who are arguably the most politically active and whose leaders were allies at independence, are now locked in bitter political rivalry.<sup>174</sup> Often, the smaller ethnic communities take sides with one of the two large ethnic communities. It is thus not assured that representatives of smaller ethnic communities will defend the genuine interests of the smaller ethnic communities or counties.

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<sup>171</sup> Sing'oei (2012) 23.

<sup>172</sup> Ghai & Cottrell (2011) 137.

<sup>173</sup> Kanyinga K 'The Legacy of the White Highlands: Land rights, ethnicity and the post-2007 elections violence in Kenya' (2009) 3 *Journal of Contemporary African Studies* 329.

<sup>174</sup> Barkan JD 'Ethnic fractionalization and the propensity for conflict in Uganda, Kenya and Tanzania' in Herbst J, McNamee T & Mills G (eds) *On the Fault Line: managing the tensions and divisions within societies* (2012) 150.

With regard to powers, some aspects of the design may also hinder effective ethnic accommodation. The Senate has no special power regarding vertical division of revenue collected nationally. Accordingly, it has no effective control over the vertical equitable share of counties. Official and independent estimates show that counties need more than the minimum constitutionally guaranteed share of 15 percent.<sup>175</sup> Indeed, the main ethnic conflict can be resolved only if the larger ethnic communities are able, through their respective counties, to control resources that provide a political alternative to control of the centre. However, the Senate does not have special powers to facilitate such an arrangement. Furthermore, given the ethnically exclusive nature of counties, the lack of adequate resources may easily be interpreted as ethnically-based exclusion and so pave the way for grievance and conflict.

The legislative power of the Senate is limited to laws concerning county governments.<sup>176</sup> While there are many laws that would affect counties in actuality, a conservative speaker of the Senate may exclude the Senate from crucial matters impacting on ethnic accommodation. For instance, the role of counties in land matters is limited to community land only.<sup>177</sup> It is thus possible that land matters not directly related to community land could be tagged conservatively as not affecting counties; in other words, it is possible that certain matters at the heart of ethnic conflict in Kenya may be tagged as not affecting counties and thereby limit the Senate's ability to deliberate about them.

### **5.3 The Senate and the counterbalancing of central power**

Effective representation and participation of devolved units in central-decision making enhances the ability of the devolved units to influence central decisions and thus actually counterbalance centralised power at the centre.<sup>178</sup> This in turn depends on the structure as well the powers exercised by the institutions of shared rule. The structure should enable effective incorporation of the interests of devolved units in central decision-making. With regard to powers, the institution of shared rule should be vested with powers that can enable the devolved units to participate in important central decision-making and thus effectively co-exercise and co-determine the central government agenda. The structure and powers of the Senate discussed earlier have the potential to facilitate counterbalancing of central power; at the same time, there

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<sup>175</sup> CRA 'Recommendations on sharing of revenue raised by the national government between the national government and county governments and among county governments' (2012).

<sup>176</sup> Article 96 (2).

<sup>177</sup> Article 63.

<sup>178</sup> Baldi (1999) 7.

are certain design aspects that could hinder the Senate's ability to counterbalance central power.

### **5.3.1 Design aspects which enhance the counterbalancing of power**

The ability of the Senate to counterbalance central power depends on its political significance at the national level. Directly elected senators give the Senate the political muscle to assert itself and therefore counterbalance central power.<sup>179</sup> The equal representation of counties in the Senate also facilitates smaller counties to have a stronger voice at the national level and therefore participate in the counterbalancing of central power.

In regard to powers, the Senate has general and special powers that have the potential to enable effective counterbalancing of central power. The Senate co-determines legislation concerning counties with the National Assembly. The Senate has special powers over laws that touch on the structures of counties and over the CARB, which divides revenue among counties. The special veto enables the Senate to counterbalance power in these specific matters. The Senate also shares powers of impeachment of the president with the National Assembly as well as powers over some appointments. The Senate thus plays an integral role in determining the suitability of the president. For instance, the power to impeach the president and the deputy president gives the Senate semi-judicial powers.<sup>180</sup>

The review power of the Senate on matters such as national government intervention in county governments, suspension of counties, and the transfer of powers also enables the Senate to effectively counterbalance central power on these matters. Using these review powers, the Senate can "frustrate" any effort by the national executive to use powers of intervention to intrude into counties.

### **5.3.2 Design aspects which may hinder the counterbalancing of power**

Some design features may hinder the Senate's ability to effectively counterbalance central power. The Senate's special power over division of resources is limited to the horizontal division of the county equitable share. It is thus likely that the Senate may not influence the vertical division of resources. The vertical share is limited to 15 percent, and this is, as noted, said to be insufficient to meet the resource needs of counties.<sup>181</sup> The bulk of revenue raised nationally may

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<sup>179</sup> CoE (2010b) 114-115.

<sup>180</sup> Kirui & Murkomen (2011) 16-17.

<sup>181</sup> World Bank (2012) 73-74.

end up remaining with the national government, and the Senate will have limited influence in terms of enhancing the vertical share of counties.

The legislative power of the Senate is excluded from laws that do not affect counties. However, the boundary between laws that concern counties and those that do not is not clear. This means that, depending on the interpretative approach taken by the Speaker of the Senate, some laws may fall in either category. A restrictive interpretation of laws that affect counties could exclude counties from matters that do in fact concern their interests.

Regardless of the Senate's structure and composition, its ability to counterbalance central power in actuality depends on how Senate politics are conducted. Although smaller counties have an equal voice with the large counties, there is no guarantee they will use their power to influence central decision-making. It is likely that senators from the counties with smaller ethnic communities will vote alongside those from the larger counties on the basis of party interests. In this event, the Senate will not be significantly distinctive from the National Assembly. Indeed, a directly elected Senate was rejected in Germany on the grounds that it "would merely duplicate the central parliament, its composition, and party politics".<sup>182</sup>

#### **5.4 Is there a balance of purposes in the design of the Senate?**

A few trade-offs between the three purposes are visible in the structure and powers of the Senate. A Senate with stronger institutional links through, for instance, "governmental representation" would have assured representation of development priorities in the Senate. However, direct elections were chosen because they enhance the political significance of the Senate at the centre and hence its ability to counterbalance central power. Direct elections also enhance inclusiveness at the centre. This can thus be interpreted as a trade-off between development and the other two purposes of devolved government. However, the compensation is that the Senate has powers to protect the autonomy of counties through matters such as horizontal division of revenue and terminating interventions in, and suspension of, counties; in turn, this can enable counties to pursue local preferences.

Indeed, most of the powers of the Senate are important for the pursuit of the three purposes as they safeguard the general autonomy of counties, enhance "federal decision-making", and promote inclusiveness at the centre. It can thus be concluded that, save for the preference of "political power" over strong "institutional links", there is no other major trade-off in the design of the Senate.

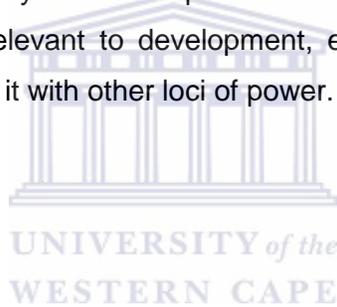
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<sup>182</sup> KAS 'The example of Federalism in the Federal Republic of Germany: a reader' (1994) 67.

## 6. Conclusion

This chapter has analysed the structure and powers of the Senate which represents counties at the national level. The preceding discussions conclude that the structure and powers are generally relevant to the protection of county interests; by implication, they are relevant to the three purposes of devolution. The Senate has powers to protect the developmental autonomy of county governments, although its structure does not provide a ready basis for cooperation with county governments. Furthermore, while the Senate structure is unfriendly to representation of county ethnic minorities, most or all ethnic communities with “home counties” will be equally represented in the Senate and this may enhance ethnic accommodation. The equal representation of counties also enhances the ability of the Senate to counterbalance power.

Therefore, while factors such as the size and number of counties have limited the ability of counties to counterbalance central power, the Senate is likely to fill this void by claiming political space at the national level. This may form an important basis for representing county interests. The powers of the Senate are relevant to development, ethnic accommodation and limiting central power by counterbalancing it with other loci of power.



## CHAPTER NINE

### CONCLUDING ANALYSIS

#### 1. Introduction

Development, conflict resolution and limiting central power are the most common purposes that the devolution of power serves in developing states. In the literature and state practice, distinct design features are associated with each purpose, but the congruence or dissonance between these respective designs has not been made explicit in both literature and practice. There is no doubt that states have long been confronted simultaneously with the three issues and that, as evidenced by the varying designs that have emerged, they have thus made trade-offs between them – whether deliberately so or not – in order to facilitate the combined pursuit of these three purposes. Using the Kenyan context as its site of exploration, this thesis has examined the kind of trade-offs that are made to enhance effective pursuit of the three purposes in a single system.

The congruence or dissonance in the design of devolved government for each of the three purposes is examined using the Kenyan context. First, as Chapter 3 shows, underdevelopment, ethnic conflict and abuse of centralised power are historical, systemic, and indeed fundamental challenges with which Kenya continues to struggle. Second, Chapter 4 shows that during the constitutional review process, devolution of power was specifically considered as one of the principal measures to deal with these three fundamental challenges. This is confirmed by the objectives of devolved government listed in Article 174 of the Constitution, objectives which, as discussed in Chapter 5, revolve around these three purposes of devolving power.

While the preceding chapters have focused separately on aspects of county and national design, the first part of this concluding analysis examines how the entire devolution system (county and national mechanisms) accommodates the three purposes. The implications of the analysis and assessment of the Kenyan system are of general relevance to other developing countries. Indeed, an essential aim of this conclusion is to identify lessons that can be drawn from the Kenyan approach and used for comparative purposes by other developing states and interested parties. As such, the second part of this analysis suggests constitutional design features that serve potentially as a “Kenyan contribution” to other states in the same quandary.

An examination of the entire system of devolution reveals that the three purposes were given varying treatment in different parts of the devolved system. First, development is easily the most

prominent purpose informing the primary design of the Kenyan system. Both the structures and the bulk of powers of both county and relevant national institutions are mostly designed to pursue development. Second, while the devolved system of government may partially address issues pertaining to ethnic conflict, the system will not address the main ethnic conflict in Kenya. Lastly, while counties are weak in terms of limiting central power, this deficit may be partially corrected by the Senate which represents counties at the national level. Both the structure and powers of the Senate have the potential to limit and even counterbalance the exercise of central power.

At a general level, the most significant aspect of the Kenyan system is its apparently unique devolved government structure. The county level is essentially a “hybrid level” that merges the typical regional and local levels into a “hybrid level” which is neither regional nor local. The “hybrid level” combines “regional type” and “local type” functions, and this is bound to have a profound impact on the three purposes. More specifically, the “hybrid level” creates uncertainty and difficulties that have the potential to hinder the achievement of the three purposes. Therefore, while the effectiveness of a system depends mainly on its operating context, the second part of this concluding analysis cautions that the “hybrid level” may not be the most appropriate compromise to adopt between the three purposes.

## **2. Development, ethnic accommodation, and limiting central power through devolution design in Kenya: a concluding analysis**

While Chapters 5, 6 and 7, and Chapter 8 analysed self-rule and shared-rule arrangements, respectively, this section examines the entire devolved system from the prism of the three purposes. The main focus of this thesis, however, is on how trade-offs are made between the conflicting design aspects in order to enable effective pursuit of the three purposes. Accordingly, the second part discusses how, if at all, the entire system accommodates the three purposes in order to facilitate their effective pursuit.

### **2.1 Development**

The devolved system of government in Kenya is primarily designed to pursue the developmental purpose. The structure and powers of the subnational and national institutions relevant to devolved government mainly suit devolved development. Emphasis on the developmental purpose can be seen directly from the objectives of devolved government, where six of the nine objectives deal specifically with the developmental purpose.

However, the emphasis on development is not misplaced in the light of past experience. As outlined in Chapter 3, a combination of factors led to breakdown of local service delivery and general underdevelopment. Local authorities were subjected to central administrative and political control which affected their overall effectiveness.<sup>1</sup> The local authorities had no clear powers or sources of revenue since the minister in charge of local government had to approve administratively any functions performed by local authorities or any revenue-raising measures.<sup>2</sup> The national ministry, too, had no institutional capacity, and this led to central bureaucratic inefficiencies that had a negative impact at the local level.<sup>3</sup> The net effect is that local authorities had no fiscal or political autonomy to address local preferences.<sup>4</sup> There was poor accountability, and local authorities descended into public irrelevance.<sup>5</sup>

As a result, effective local service delivery was at the centre of deliberations in the constitutional review process. The public was emphatic during the review process that vital services should be devolved to the local level.<sup>6</sup> There was overwhelming public support for the view that local governments should be strengthened to deliver services,<sup>7</sup> and it was also emphasised that local service delivery should be expanded to previously neglected areas in order to ensure equitable development.

The World Bank suggests that in order to have effective development, devolved units should be neither so small as to be unviable nor so large as to hinder meaningful local participation in development.<sup>8</sup> It was also suggested that devolved units should have adequate political and fiscal autonomy, subject to local accountability processes,<sup>9</sup> in order to address local preferences. Supervision and cooperation were identified as key elements for effective

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<sup>1</sup> Southall R & Wood G 'Local government and the return to multi-partyism in Kenya' (1996) 95 *African Affairs* 503.

<sup>2</sup> Southall & Wood (1996) 514-515.

<sup>3</sup> Republic of Kenya 'Report of the Commission of Inquiry on Local Authorities in Kenya: A strategy for local government reform in Kenya' (1995) 47.

<sup>4</sup> Republic of Kenya (1995) 71.

<sup>5</sup> Republic of Kenya (1995) 71.

<sup>6</sup> Constitution of Kenya Review Commission (CKRC) *The final report of the Constitution of Kenya Review Commission* (2005) 235.

<sup>7</sup> CKRC (2005) 235.

<sup>8</sup> World Bank (1999) 115.

<sup>9</sup> World Bank *World Development Report 1999/2000: Entering the 21<sup>st</sup> Century* (1999) 121, see also World Bank 'World Bank decentralisation website' at [www1.worldbank.org/publicsector/decentralization/what.htm](http://www1.worldbank.org/publicsector/decentralization/what.htm), cited in De Visser (2005) 42.

development.<sup>10</sup> The question, therefore, is whether the entire devolved system incorporates these elements regarded as key to effective development.

With regard to the size and number of units, the counties are neither local nor regional units and hence too large to facilitate effective local service delivery. However, the Constitution provides for urban local government and decentralisation to the sub-county level in rural areas. Therefore, there is the potential for truly local units to be created for effective service delivery; realising this potential depends on how the framework for urban and rural local government is implemented.

While the bulk of the powers granted to counties are largely relevant to local development, the merging of the regional and local levels creates uncertainty. Counties are either too small to assume some of the regional functions or too large to carry out certain of the local functions effectively. The lack of clarity on performance of functions may lead to low accountability as there could be no clear actor to be held to account. More risky is the fact that most “regional-scope” functions may be centralised on the grounds that counties cannot effectively perform such services. At the central level, the Senate participates in passing laws affecting counties and may thus protect county interests when laws which further define the powers of counties are passed. For instance, the Senate can resist an overly restrictive approach which seeks to narrow county powers. Therefore, while county powers are poorly designed as a result of the “hybrid level”, the Senate can, through its legislative power, ensure that counties retain essential powers and functions.

There are central and local measures to ensure that county autonomy is guaranteed and protected. County functional areas are constitutionally entrenched<sup>11</sup> and county revenues guaranteed through locally generated revenue and guaranteed central transfers.<sup>12</sup> The powers of the Senate to terminate, at any time, a national government intervention<sup>13</sup> in a county government or to end the suspension of a county government<sup>14</sup> also further safeguard county autonomy. This power is important in view of the history of centralised control and political subordination of the former local authorities. The Senate’s power to determine horizontal revenue division can also ensure that resources for development are distributed equitably.

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<sup>10</sup> World Bank *World Development Report 1997: The State in a Changing World* (1997) 128; World Bank (1999) 114.

<sup>11</sup> Article 186 (1); Part II of the Fourth Schedule to the Constitution.

<sup>12</sup> Article 209 (3) and Article 203 (2).

<sup>13</sup> Article 190 (5) (d).

<sup>14</sup> Article 192 (4).

It can therefore be concluded that the structures and powers of county and national institutions are generally relevant to the developmental purpose of devolution. Counties are equipped with powers that can ensure effective pursuit of development. While there is some uncertainty with regard to powers and functions, the Senate can exercise its legislative power and ensure that counties are not denied powers vital for effective local service delivery and development.

## 2.2 Ethnic accommodation

After a careful review of the structures and powers of county and national institutions of devolved governance in Kenya, one comes to the inescapable conclusion that ethnic accommodation is not given serious consideration in the design. Ethnic accommodation<sup>15</sup> and the protection of marginalised communities and ethnic minorities are expressly listed as part of the main objectives of devolution.<sup>16</sup> However, this is not reflected in the actuality of the entire design. The devolved system can address ethnic conflict only partially because the main ethnic conflict still remains unresolved. County and national institutions, as well as the powers, are not effectively designed to facilitate ethnic accommodation and address the root causes of ethnic conflict.

The main ethnic conflict is between the large ethnic communities who are embroiled in a destructive competition to control the presidency.<sup>17</sup> The desire to capture the presidency is driven by perceptions that the “ruling ethnic group” is entitled to state resources and other benefits to the exclusion of other ethnic communities.<sup>18</sup> Indeed, past experience shows that state resources, political appointments and other public opportunities were skewed in favour of the successive presidents’ home regions or ethnic communities.<sup>19</sup> Other issues that define ethnic conflict in Kenya include land and land-based resources, which revolve around dispossession and other injustices often perceived along ethnic lines.<sup>20</sup>

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<sup>15</sup> Article 174 (b).

<sup>16</sup> Article 174 (e).

<sup>17</sup> Kanyinga K ‘The legacy of the white highlands: Land rights, ethnicity and the post-2007 elections violence in Kenya’ (2009) 3 *Journal of Contemporary African Studies* 340.

<sup>18</sup> Republic of Kenya (2008) 30.

<sup>19</sup> Chege M and Barkan JD ‘District focus and the politics of reallocation in Kenya’ (1989) 27 *Journal of Modern African Studies* 436-437.

<sup>20</sup> Republic of Kenya ‘Report of the Commission of Inquiry into Post-Elections Violence’ Commission of Inquiry into Post-Election Violence (CIPEV) (2008) 30.

In order to address the above issues, the devolved system of government must provide an avenue for political and economic inclusion. Indeed, structures and powers of the local and national institutions must enhance inclusiveness in order to solve internal conflict.<sup>21</sup> In the Kenyan context, the county structures and the structure of the Senate must facilitate ethnic accommodation by reflecting the ethnic diversity of Kenyan society. Furthermore, the counties and the Senate must be equipped with powers to address issues underlying ethnic conflict, such as access to state resources and development. The counties and the Senate should also have power to address land matters – matters which are at the heart of ethnic conflict in Kenya.

The county structure generally excludes “in-county minorities”, and while it provides for special representation of marginalised communities, the method used to select the representatives negates this intention. First, the FPTP system of electing the county governor without any vote margin or proportional vote requirement is most likely to favour the election of a member from the county ethnic majority. Second, “in-county minorities” are unlikely to make it as county representatives because of the FPTP system and also because geographically concentrated county minorities were not considered in the delineation of county ward boundaries.<sup>22</sup> While the CGA provides that counties can nominate six representatives from marginalised communities,<sup>23</sup> the mode of choosing the representatives favours the majority political parties. This effectively means that only the major party, which incidentally belongs to the county ethnic majority, will have its nominees chosen to fill the special seats. This process excludes “in-county minorities”, as the major parties are unlikely to nominate genuine representatives of county minorities.<sup>24</sup>

At the national level, there is equal county representation in the Senate. This is a positive aspect as it ensures that all ethnic communities with a “home county” are represented at the national level via the Senate. Therefore, many of the smaller ethnic communities that are big enough to secure a county will be represented in the Senate. However, the FPTP method of electing senators also means that most senators are likely to be from their respective county ethnic majorities. It is thus likely that county ethnic minorities will be excluded from representation in the Senate. While county structures provide for special representatives from county minorities,

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<sup>21</sup> UNDP ‘Local Governance, peace building and state building in post-conflict settings’ A UNDP discussion paper (2010) 4.

<sup>22</sup> IEBC ‘The revised preliminary report of the proposed boundaries of constituencies and wards’ Volume 1 (9 February 2012) (2012) 27.

<sup>23</sup> Section 7 (1) (a) CGA.

<sup>24</sup> Oloo A ‘Elections, representations and the new Constitution’ Society for International Development (SID) Constitution Working Paper No. 7) (2011) 8.

the Senate has no such provision and provides only for the special representation of women, the youth, and persons with disabilities.

With regard to powers, the counties can only address the main ethnic conflict in Kenya if the counties provide a viable “consolation prize” to the larger ethnic communities that miss out on the presidency. Put differently, control of a county should be a viable political alternative to control of the presidency. However, the bulk of county powers are mainly local government-type functions focused on local service delivery.<sup>25</sup> Furthermore, the counties are constitutionally entitled only to a paltry minimum of 15 percent of revenue collected nationally. It is therefore unlikely that the limited powers and resources of county governments will pacify the ambitions of the large ethnic communities seeking to control the presidency. The counties have marginal powers over land matters and so cannot address key issues defining ethnic conflict in Kenya.<sup>26</sup>

While the Senate has a special power with regard to horizontal division of resources, it has no effective control over the vertical division of revenue.<sup>27</sup> The Senate therefore cannot guarantee effective economic inclusion of counties through equitable vertical division of resources. The Senate also has limited review power over most of the critical public appointments, such as members of the national cabinet, principal secretaries and even the CoB who authorises county expenditure. The Senate hence cannot guarantee matters such regional and ethnic balancing as it has no power to review the appointments. The Senate does not have any special powers over land and may thus not be in a position to address the root causes of conflict. Indeed, there is a possibility that land matters may be conservatively interpreted as not affecting counties and therefore exclude the Senate.

Positive aspects include the fact that a number of ethnic communities with “home counties” are represented in the Senate and may thus influence important matters vested in the Senate. These include passing laws concerning counties, horizontal distribution of the county share, and other checks and balances exercised by the Senate. Furthermore, most of the powers vested in the Senate have direct relevance to facilitate economic and political inclusion. For instance, the Senate has special powers over the horizontal division of state resources and laws which touch on county structures. These powers have the potential to ensure that the political integrity of counties is protected and state resources are distributed equitably to county governments.

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<sup>25</sup> Ghai YP & Cottrell JG *Kenya's Constitution: An Instrument for Change* (2011) 26.

<sup>26</sup> Article 67.

<sup>27</sup> World Bank *Devolution Without Disruption: Pathways to a Successful New Kenya* (2012) 143.

Furthermore, the “fragmentation” of the large ethnic communities into several counties denies the large communities a ready platform for negative ethnic mobilisation.<sup>28</sup>

At the county level, the service delivery mandate of counties has the potential to address some of the underlying issues of ethnic conflict. Lack of basic services has always been perceived along ethnic lines. However, all counties now have powers to enhance service delivery and this may serve to address some of these perceptions. Furthermore, the Senate review powers may ensure that there is no unnecessary central government interference in operations of county governments, a situation which stands to enhance efficiency.

Despite the positive aspects with regard to ethnic accommodation, it is argued that the structures and powers of the county and Senate might not effectively address ethnic conflict in Kenya. While the structure of the Senate enhances representation of smaller ethnic communities at the national level, “in-county minorities” are locked out at both levels. Furthermore, the powers of the counties and the Senate have critical limitations that may not effectively facilitate accommodation of the larger ethnic communities whose real or perceived exclusion is the major cause of ethnic conflict in Kenya.

### 2.3 Limiting central power

A review of the entire system of devolved government reveals that while counties are too weak in themselves to counterbalance central power, the structure and powers of the Senate may add considerable weight to the counterbalancing of central power. Abuse of central power, and lack of accountability at the national level, is indeed one of the main challenges facing post-colonial Kenya. Chapters 3 and 4 highlight that centralisation and personalisation of power were indeed the root causes of underdevelopment and ethnic conflict in Kenya. In a script familiar to most post-colonial states, Kenya retained centralised and hierarchical colonial structures, structures which successive Kenyan leaders used to their political advantage.<sup>29</sup> Personal rule manifested itself in decentralised governance through tight political, administrative and fiscal control of local governments.<sup>30</sup>

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<sup>28</sup> Barkan JD & Mutua M ‘Turning the corner in Kenya: A new Constitution for Nairobi’ *Foreign Affairs* (Published by the Council on Foreign Relations) (2010).

<sup>29</sup> Singh C ‘The republican Constitution of Kenya: Historical background and analysis’ (1965) 14 *The International and Comparative Law Quarterly* 929-930.

<sup>30</sup> Republic of Kenya (1995) 387.

Indeed, during the constitutional review process, the bodies in charge of the reform process received views that local institutions of government should be granted autonomy and subjected to local democratic accountability.<sup>31</sup> The public specifically called for abolition of the Provincial Administration, an institution that has been used for political control and personal rule.<sup>32</sup>

Devolved units can be powerful and have political significance if they are few<sup>33</sup> and homogenous in composition.<sup>34</sup> This is because large units offer a basis to consolidate powers and resources and can thereby enhance autonomy from the centre.<sup>35</sup> Too many units, on the other hand, are too fragmented and have the effect of “diluting” powers. The powers allocated to devolved units should also reflect a substantial vertical division of state and political power so as to enhance their political significance in the entire system.<sup>36</sup>

The 47 counties are too “fragmented” to limit or counterbalance central power effectively. Their size and number is a structural limitation as it makes them fragmented and therefore weak.<sup>37</sup> Having fewer counties could have facilitated consolidation of resources and power and made the units politically significant. The bulk of county powers are basic “local government-type functions” concerned with service delivery. This diminishes the “political significance” of the counties vis-a-vis the centre in the national political scene. The national government can constitutionally retain up to 85 percent of revenue collected nationally while counties are entitled to only 15 percent; this creates a pronounced imbalance in the control of national resources, an imbalance in favour of the centre. WESTERN CAPE

Nevertheless, there are other factors that enhance the significance of counties. County powers are constitutionally entrenched and cannot be easily altered to their detriment. While they are fragmented, they cannot easily be further fragmented due to a rigid constitutional procedure that possibly includes a constitutional referendum. While the guaranteed minimum share of national revenue is small, the national government at least cannot go below that specified minimum, a

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<sup>31</sup> CKRC (2005) 235.

<sup>32</sup> CKRC (2005) 236.

<sup>33</sup> Leonardy U ‘Demarcation of regions: International perspectives’ in de Villiers B & Sindane J (eds) *Regionalism: Problems and Prospects* (1993) 4.

<sup>34</sup> Watts RL ‘Comparative conclusions’ in Majeed A *et al* (eds) *Distribution of Powers and Responsibilities in Federal Countries: A Global Dialogue on Federalism* (2006) 324.

<sup>35</sup> Ghai & Cottrell (2011) 134.

<sup>36</sup> World Bank (1999) 112.

<sup>37</sup> Ghai & Cottrell (2011) 134.

state of offers that offers some certainty. County governors are also directly elected, which potentially enables them to stand up to central government intrusion.

While the county system is structurally and functionally weak in limiting central power, the Senate structures and powers partially address this deficit. First, the Senate is composed of one elected senator from each county, which ensures equal representation of both large and small counties. Furthermore, direct election of senators enhances the democratic legitimacy of the Senate, thus giving it a stronger voice with which to assert itself at the national level. The legislative and review power of the Senate can facilitate the Senate to counterbalance central power in the relevant matters. The Senate's power to decide horizontal revenue division also ensures that county interests are factored in the distribution of revenue. Some of the limitations on Senate powers, such as those pertaining to the vertical division of revenue and key appointments, may limit its ability to counterbalance central power.

### **3. Is there a balance of the three purposes in the entire system?**

After examining how the entire system of devolved government responds to each of the three purposes, it is equally important to evaluate how the entire design accommodates the three purposes. The complementary, conflicting, and neutral aspects of the three designs include aspects such as the number and size of units, the number of levels of government, institutional structures, powers and functions, and finances. As underdevelopment, ethnic conflict and abuse of central power are at the epicentre of Kenya's challenges to progress, the devolved system of government is intended to address these three purposes. This is confirmed by the deliberations on devolution during the constitutional review process that explicitly considered the three issues. The main compromise is the "hybrid level" or the county level which merges the regional and local levels. Other areas that warranted trade-offs include institutional structures, powers, and finances.

#### **3.1 The "hybrid level": A weak balance of purposes**

The "hybrid level" was a result of a series of compromises during the review process. The initial draft of the CoE had provided for three levels of government: national, regional and local.<sup>38</sup> The CoE justified the three levels on grounds that there were overwhelming views on the need to devolve services to the local and economically viable units.<sup>39</sup> The regional level was initially

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<sup>38</sup> CoE 'Final report of the Committee of Experts on Constitutional Review' (2010b) 68.

<sup>39</sup> CoE (2010b) 68.

seen as important for ethnic accommodation, and representation of regional interests at the national level,<sup>40</sup> as well as “coordinating regional matters.”<sup>41</sup> However, the CoE later reverted to the current structure composed of national and county levels only.

The reasons advanced for the abandonment of the three levels reveal a further attempt at balancing the three purposes. First, the 74 counties provided in the third level were seen as economically unviable.<sup>42</sup> Second, the regions did not have a clear role and were seen as an unnecessary economic burden.<sup>43</sup> Indeed, the calls for a two-level structure were motivated largely by cost considerations.<sup>44</sup> Third, the 74 county governments were, after the removal of the regional level, seen as too “fragmented” to provide additional checks and balances at the national level.<sup>45</sup> While the regional level was identified as important for ethnic accommodation and “nation-building”, this point was not examined by the CoE.

The eight regions and 74 counties in the initial draft of the CoE were abandoned and replaced by a new subnational level composed of 47 counties.<sup>46</sup> The CoE indicated that removal of the regional level necessitated the reduction of counties from the initial 74 to 47 in order to enhance their ability to provide additional checks and balances against the centre.<sup>47</sup> The CoE also stated that the 47 counties were adopted because they are economically viable.<sup>48</sup> For unexplained reasons, the impact of removal of regions on ethnic accommodation and nation-building was not examined, despite the fact that regions were seen as important for peace. The “hybrid level” was, thus, arrived at mainly through trade-offs between the need for development and the need to counterbalance central power.

However, even after the conscious trade-offs between development and the limiting of central power, the “hybrid level” appears to be an inappropriate compromise or a weak balance between the purposes. The current counties are too big and there is a clear need for levels below counties for effective local service delivery.<sup>49</sup> While there is a general constitutional

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<sup>40</sup> CoE (2010b) 68.

<sup>41</sup> Article 215 (2) HDC.

<sup>42</sup> CoE (2010b) 90.

<sup>43</sup> CoE (2010b) 91.

<sup>44</sup> CoE (2010b) 90.

<sup>45</sup> CoE (2010b) 91.

<sup>46</sup> CoE (2010b) 91.

<sup>47</sup> CoE (2010b) 91.

<sup>48</sup> CoE (2010b) 90.

<sup>49</sup> World Bank (2012)162.

recognition of the need for lower levels, the constitutional framework to facilitate sub-county structures is uncertain.<sup>50</sup> Furthermore, the 47 counties are still too many to counterbalance central power. It can thus be concluded that while certain structures may be adopted with a particular intention, it is not automatically the case that structures will effectively serve the intended purpose behind the design even where there is a visible compromise.

Indeed, the “hybrid level” may end up serving other purposes better than the core purposes that informed its design. For instance, at no time during the review process was the idea of “fragmenting” the large ethnic communities into several counties mooted. However, the 47 counties have the effect of slowing down ethnic mobilisation by denying the large communities a “home region” that could facilitate ethnic mobilisation. The 47 counties have a further effect of “equalising” the smaller ethnic groups that have “home counties” with the larger ethnic groups. The structure is, however, likely to give rise to minority ethnic conflict, as several county minorities, most of whom had “home counties” in the initial proposed 74 counties, were incorporated into the 47 counties against their will.<sup>51</sup>

Due to the varying nature of conflicts, it is hard to identify a universal structure that can lead to ethnic accommodation.<sup>52</sup> The appropriate structure is one which addresses the root causes of conflict in a particular context, and this may be large units, small units or a combination of both, depending on the local context. In the Kenyan case, for instance, regions were singled out as important for ethnic accommodation during the constitutional review process.<sup>53</sup> However, it has also emerged that there is value, in terms of ethnic accommodation, in splitting the “home regions” into several counties.<sup>54</sup> It is therefore clear that there is no universal or perfect way of accommodating the conflicting aspects of design.

In sum, while the “hybrid level” was primarily designed as a compromise between development and the limiting of central power, it is a weak compromise that half-heartedly pursues the two purposes. On the other hand, the “hybrid level” has an unintended impact on ethnic accommodation that is both positive and negative. The “hybrid level” denies the larger ethnic a basis for ethnic mobilisation, thereby “equalising” them with smaller ethnic communities.

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<sup>50</sup> World Bank (2012) 159.

<sup>51</sup> <http://thedailynation.blogspot.com/2010/08/kenyan-referendum-results-constituency.html> (accessed 5 March 2012).

<sup>52</sup> UNDP (2010) 7.

<sup>53</sup> Article 215 (2) HDC.

<sup>54</sup> Barkan & Mutua (2010).

However, the “hybrid level” also has the potential to form a basis for “in-county minority conflict” as it denied these minorities their own units.

### **3.2 Institutional structures**

National and subnational institutional structures should reflect diversity and enhance inclusive decision-making in order to address conflict. For development, institutional structures should enhance accountability and facilitate institutional autonomy, which also important for limiting central power. In turn, overall autonomy enhances the ability of devolved units to assert themselves and therefore limit central power. The electoral design determines whether diversity will be reflected in the representative structures. The design of the executive and administrative structures also determines whether devolved units will have autonomy. While the three purposes were explicitly considered in the Kenyan design, the actual design of the entire electoral system, and the institutional design at the county level, accommodates development and limits central power – but to the detriment of ethnic accommodation.

#### **3.2.1 The electoral system**

The Constitution adopts a pure FPTP system for electing county ward representatives, the county governor and senators. The CoE admits receiving public views urging it to consider including the PR system of elections<sup>55</sup> on the grounds that a PR system would enhance the inclusion of marginalised communities and other vulnerable groups such as the youth, women and persons with disabilities.<sup>56</sup> However, the CoE retained the FPTP system inherited from the British. The CoE purports to have adopted a PR system for choosing special representatives.<sup>57</sup> However, the purported PR system serves only to perpetuate the dominance of the majorities in both the Senate and the county.<sup>58</sup>

Both development and ethnic accommodation fare better in a PR system of elections. The PR system faithfully translates the number of votes cast into seats and thus reflects diversity, which is important for an ethnically divided society.<sup>59</sup> A majority-plurality system, on the other hand, creates “wasted votes” and this may lead to a minority win in the case of a split vote. For development, the diversity element inherent in the PR system can enhance effective

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<sup>55</sup> CoE (2010b) 90.

<sup>56</sup> CoE (2010b) 90.

<sup>57</sup> CoE (2010b) 90.

<sup>58</sup> Oloo (2011) 8.

<sup>59</sup> Oloo (2011) 2.

participation of all sectors of society, especially vulnerable groups and the “weakest” sections of the society.<sup>60</sup> While the FPTP system enables voters to hold political leaders accountable individually,<sup>61</sup> this is one trade-off that development could have made in order to ensure that ethnic accommodation is also pursued. Accordingly, the PR system would have been the ideal compromise between development and ethnic accommodation.

However, the CoE chose to retain the FPTP system for county and Senate elections, and also settled for a “PR system” that creates further disproportion by perpetuating the dominant groups in the name of enhancing minority inclusion. The FPTP system will thus enable the communities to hold leaders to account individually. It is also clear that the FPTP system will enable elected representatives, and especially the governor, to assert county autonomy. The FPTP system will thus facilitate the pursuit of development and the limiting of central power. However, the FPTP system of elections is not appropriate for ethnic accommodation as it is likely to lead to the inclusion of minorities.

It can thus be concluded that while the current electoral and representative structures could have been further balanced, Kenya chose to retain the FPTP system of elections which it inherited from its British colonial masters to the detriment of ethnic accommodation. Indeed, as Reilly observes, there is generally no careful deliberation on the type electoral systems to be used.<sup>62</sup> Colonial inheritance is one of the factors that heavily influence a system, and rather than change to a new system, states normally emphasise the benefits of their current electoral systems.<sup>63</sup> In Kenya, the individual accountability of elected representative is generally used to defend the retention of the FPTP system.<sup>64</sup>

### **3.2.2 Executive and administrative structures**

Executive and administrative structures can promote ethnic accommodation by reflecting local ethnic diversity and enhancing inclusive decision-making.<sup>65</sup> Development generally emphasises a competent and efficient executive for purposes of effective service delivery. Limiting central power, on the other hand, emphasises administrative and executive autonomy. However, these areas of emphasis are not mutually exclusive. Indeed, institutional resilience in the face of

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<sup>60</sup> World Bank (1999) 121.

<sup>61</sup> Oloo (2011) 8.

<sup>62</sup> Reilly B *Democracy in Divided Societies: Electoral Engineering in Divided Societies* (2004) 14.

<sup>63</sup> Reilly (2004) 14.

<sup>64</sup> Oloo (2011) 8.

<sup>65</sup> UNDP (2010) 4.

conflict implies capacity and competence, which are central elements in ethnic accommodation. Furthermore, there may be no effective service delivery if there is no autonomy to make decisions. Thus, while the central areas of emphasis differ, there are common aspects.

The Constitution provides for the creation of a County Executive Committee (CEC) in which the exercise of executive power is collectively vested.<sup>66</sup> Potentially therefore, the CEC can be used to enhance and reflect the diversity of a county, especially in “prominently multi-ethnic counties” where such inclusiveness is important for ethnic accommodation. However, this potential to enhance diversity is negated by a legislative requirement that all CEC members must have degrees and considerable professional experience relevant to their county portfolios.<sup>67</sup> Given the focal areas of emphasis, this can be interpreted as a trade-off between development and ethnic accommodation which is in favour of the former. On the other hand, the extensive powers granted to the county governor over the CEC can also be interpreted as a trade-off between limiting central power and development, both of which emphasise a strong executive head to the detriment of ethnic accommodation, which emphasises a coalition government in order to enhance inclusion and collective decision-making.

### 3.2 Powers

All the three purposes require powers to be devolved, and this is inherent in the concept of devolution. The nature and extent of power devolved, however, differs with the purpose. Development requires devolved units to exercise powers that are relevant to local service and development.<sup>68</sup> These are typical local government powers which deal with basic services and development. Effective limiting of central power, however, implies an effective vertical divide of power which can enable devolved units to claim political space nationally<sup>69</sup> and perhaps become a counterweight to the centre. For ethnic accommodation, the nature and amount of powers devolved should facilitate political inclusion where this is the cause of conflict.

In the Kenyan context, the combined county and national measures should ensure counties have powers over matters relevant to local service delivery and have adequate discretion to address local preferences. The nature and extent of powers devolved should provide a viable alternative to capturing the presidency for the larger ethnic communities, and the Senate powers

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<sup>66</sup> Article 179 (1).

<sup>67</sup> Section 35 (3) (b) and (d).

<sup>68</sup> De Visser (2005) 40.

<sup>69</sup> Saunders C ‘Legislative, executive and judicial institutions: A synthesis’ in Saunders, Le Roy & Kincaid (2006) 351.

should enable counties to influence decisions at the centre. Effective political accommodation of the larger ethnic accommodation essentially implies that counties have effectively limited central power. To this extent, it can be argued that development requires a lower level of powers than ethnic accommodation and limiting central power, which require a significantly higher level of power and autonomy. The ideal balance would be to devolve powers that would not only enable service delivery but also facilitate effective political accommodation and therefore limit central power.

The bulk of county powers and the powers of the Senate at the national level are most suited for development. This is because the county governments have mainly what can be termed a service delivery mandate. While important functions such as education are significantly limited, counties can effectively provide local services. Most of the Senate powers are geared at protecting the autonomy of counties to pursue development. These include powers over national interventions, suspensions, and transfer of powers. It can thus be concluded that the design of county and Senate powers is largely intended to facilitate the pursuit of development.

However, it is clear that ethnic accommodation and limiting of central power at the county level is not possible because county powers are too limited to serve these two purposes. The Senate, on the other hand, partially fills this as it has powers that actually limit the exercise of powers by the national executive. It can thus be argued that while ethnic accommodation and limiting of central power are weakly provided in the design of county power, the limiting of central power is partially pursued through the design of county power.

To this end, it can be concluded that development is accommodated in both the county and senate design of powers. Furthermore, while the limiting of central power is not well factored in the design of county powers, this is partially compensated through the Senate powers. Ethnic accommodation, on the other hand, is weakly provided for in both the county and Senate powers.

Ethnic conflict is a major concern in Kenya, and is indeed the reason why the second phase of the constitutional review process was commenced after the 2007/2008 violence. However, the design of powers shows it was not given any serious consideration in the actual design. Some general reasons may explain this situation. Devolution design for conflict resolution has not been adequately developed partly because it is a controversial issue which, unlike development,

never receives national government support and cooperation.<sup>70</sup> Governments tend to deny the existence of internal conflict and are generally unwilling to devolve real power to enhance accommodation because the power is placed in the control of “opponents” deemed to be challenging the government of the day.<sup>71</sup> In Kenya, devolving power to other major ethnic communities is likely to be interpreted as weakening central control.

Similarly, facilitating devolved units to effectively limit central power implies that the centre cedes control over powers. It is unlikely that a central government will cede its major powers; arguments such as “the need for national unity” would be cited to justify retention of powers at the centre. Development, on the other hand, is a “politically neutral” problem that all developing states eagerly admit to as they set about engaging partners to tackle the problem.<sup>72</sup> The scale and nature of powers required for local service delivery and local development are not a threat to central power and control, and the government can still supervise the local authorities and thus exert control. This may explain why the design of county and senate powers is heavily slanted in favour development while ethnic accommodation and the limiting of central powers are mainly excluded from the actual design.

### 3.3 Finances

Fiscal and financial autonomy is a generic requirement for the three purposes. However, the nature and extent of the resources required, and the control exerted over those resources, differs according to the purpose. Development requires a fiscal design enabling devolved units to have adequate resources and control over such resources in order to match them with local preferences. Ethnic accommodation requires effective economic inclusion of ethnic communities that are a threat to political stability. Limiting central power implies that resources are devolved to the extent that there is a substantial limit to the resources controlled by the centre; indeed, counterbalancing means that devolved units have resources that are equal, or almost equal, to those controlled by the centre.

The 15 percent minimum national revenue that counties are entitled to is hardly enough to fund development, let alone facilitate ethnic accommodation or limit or counterbalance central power. The Senate, on the other hand, has no special powers to determine the vertical division of

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<sup>70</sup> Crawford G & Hartmann C ‘Introduction: Decentralisation as a pathway out of poverty and conflict’ in Crawford G & Hartmann C (eds) *Decentralisation in Africa: A Pathway out of Poverty and Conflict?* (2008) 21.

<sup>71</sup> Crawford & Hartmann (2008) 21.

<sup>72</sup> Crawford & Hartmann (2008) 21.

revenue collected nationally, which could have assisted in increasing the overall county share beyond the minimum. However, the developmental purpose can still be achieved through additional conditional or unconditional funding. Indeed, the World Bank even recommends that funding beyond the 15 percent minimum should be made through conditional funds just to ensure that national priorities are implemented at the county level.<sup>73</sup>

While additional conditional funding may be appropriate, and is even recommended, for development, it is not appropriate for ethnic accommodation or limiting central power. Ethnic accommodation implies that counties have control over resources for effective self-rule, and centrally imposed control over resources is likely to be interpreted as domination by the “ruling ethnic group”. The centre can remain with up to 85 percent of state resources, and counties may not manage counterbalance this with the paltry 15 percent revenue. Major tax bases are also allocated to the national government.

It can thus be concluded that while the resources controlled by counties may partially assist in the pursuit of development and service delivery, the finances are insufficient to facilitate ethnic accommodation and effectively limit central power. Furthermore, while the deficit in funds can be addressed through conditional funding for development, conditional funding is in dissonance with ethnic accommodation and the limiting of central power. In these circumstances, it can be safely stated that, with regard to finances, the entire devolution design is most suited to pursue development to the exclusion of ethnic accommodation and the limiting of central power.

There are reasons that can explain the unwillingness to devolve resources generally. The central government is likely to hold on to state resources. In developing states, devolution of major finances to subnational units may foment a fiscal crisis.<sup>74</sup> Furthermore, a powerful region with resources equal to or greater than the centre may threaten the political stability of a country.<sup>75</sup> The quest by the region of Catalonia to secede from greater Spain is a case in point.<sup>76</sup> Although there is no real political threat of secession in Kenya equivalent to that in Spain, arguments about effective fiscal policy and macroeconomic stability can be easily deployed to justify the retention of resources at the centre.

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<sup>73</sup> World Bank (2012) 94.

<sup>74</sup> World Bank (1999) 107.

<sup>75</sup> Siegle J & O'Mahony P 'Assessing the merits of decentralization as a conflict mitigation strategy' (2006) 6.

<sup>76</sup> Euronews 'Catalonia's parliament adopts declaration of sovereignty' <http://www.euronews.com/2013/01/24/catalonia-s-parliament-adopts-declaration-of-sovereignty/> (accessed 6 February 2013).

### 3.3 The broader constitutional framework: complementing devolution

Underdevelopment, ethnic conflict, and centralisation of power are, as noted in Chapter 5, broader systemic challenges in Kenya. The Constitution thus seeks to address these three issues through a range of measures that include devolution.<sup>77</sup> Indeed, some of the objectives may be better realised through means other than the devolved system of government.

The central government can control to up to 85 percent of national revenue under the Constitution, while counties may remain with a measly 15 percent. This means that the centre has greater potential to pursue development than counties due to the fact that it controls resources that dwarf the county governments' entitlement. Indeed, it has been argued that, with political will, the centre is better able to enhance development through macro-allocation from the centre than the fiscally weak counties.<sup>78</sup> Therefore, while counties have powers that are relevant to local development, it is likely that the national government will play a more instrumental role in achieving overall development than the counties.

Ethnic accommodation is weakly provided for in the entire system of devolved government. The powers and resources available through the devolved system of government cannot effectively facilitate ethnic accommodation. This makes it almost certain that ethnic accommodation will have to be sought through other avenues outside of devolution. If anything, the system of devolution may be inconsequential to ethnic accommodation or even perpetuate further exclusion. Powers and resources are likely to be concentrated at the national level, which means that processes aimed at enhancing transparency, accountability and inclusiveness in the national government are equally, if not more, important for purposes of effective ethnic accommodation. For instance, land matters, which are at the core of ethnic conflict in Kenya, are in the hands of the National Land Commission (NLC), an independent public institution. Resolution of the land question thus depends on the national policies on land and the effectiveness of the NLC in addressing land injustices.

While the Senate will play a substantial role in counterbalancing central power, the Senate has been denied powers that could have made its role in limiting central power more effective. These include vertical division of revenue and powers over key appointments. There must be processes of broader accountability which can ensure that the vertical division of revenue and appointments not reviewed by the Senate are handled objectively and in a transparent manner.

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<sup>77</sup> Article 174.

<sup>78</sup> Ghai & Cottrell (2011) 185.

The main measures taken to enhance inclusiveness and accountability in the exercise of central power include strong checks and balances as well as effective separation of powers between the executive, legislature and the judiciary. Public finance management processes, including budget formulation, have been made more transparent, objective and participatory, thus enhancing accountability. Independent public commissions, a strong Bill of Rights, effective checks and balances, and other measures are aimed at enhancing constitutionalism and the rule of law. If well implemented, these measures may not only provide a favourable environment for counties to operate in but will also directly complement devolved government in the pursuit of the objectives of devolved government. However, the effectiveness or not of the broader constitutional framework is beyond the scope of this dissertation.

### **3.4 The “Kenyan context” dimension**

Of the three purposes, ethnic accommodation is the least accommodated in the devolution design. Despite there being recognition of the need for ethnic accommodation and protection of minorities and marginalised groups, institutions are not appropriately structured to reflect these objectives. Institutions are also denied the powers necessary to effectively address the root causes of ethnic conflict. The ethnic conflict witnessed in early 2008 is what spurred the second phase of the constitutional reform process, a phase that led to adoption of the current Constitution in 2010.<sup>79</sup> One would thus have expected ethnic accommodation to have been given prominence in the design of devolution and the broader constitutional framework. It thus comes as a surprise that, of all the three purposes, ethnic accommodation was the least considered in the actual design.

Given that the issue of ethnic accommodation was a priority during the review process, it is possible that the “lukewarm” treatment of ethnic accommodation in the devolution design is based on certain assumptions. For instance, the design of devolution is strong on development, and it may have been assumed that this would address the underlying ethnic conflict through a “trickle-down” effect; in this way, the ethnic conflict would fizzle out once the systemic issues, most of them development and resource-related, were addressed.

However, a broader understanding of the Kenyan context may also explain the neglect of explicit accommodation through devolution design. Right from the early days of independence, the emphasis was on homogeneity and national unity; in such an ideological framework, explicit

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<sup>79</sup> Kenya National Dialogue and Reconciliation (KNDR) ‘Longer term issues and solutions-constitutional review’ (4 March 2008).

recognition and consideration of ethnic differences are abhorrent.<sup>80</sup> For instance, while the Kikuyu and Luo communities dominated the public service, the government explained it away by saying it was a mere coincidence that persons with competence and skills were mainly Kikuyus and Luos.<sup>81</sup> The government maintained there was no favouritism and that any ethnic quotas, in the public service, for instance, would promote tribalism.<sup>82</sup> However, despite this official denial, ethnicity has flourished in post-colonial Kenya and has in many cases defined the patterns of access to state resources, government appointments and other opportunities.<sup>83</sup>

The use of ethnicity in access to resources and opportunities in Kenya stands in a stark contrast to the official policy of insisting on homogeneity and denying ethnically-based benefits. Indeed, except for a few ethnic and cultural minorities that seek to preserve their identity and lifestyle, ethnic identity among the mainstream communities is but a way of accessing opportunities and benefits. However, explicit recognition of ethnic identity and providing a clear and express process of sharing benefits across ethnic communities is seen as divisive. Of course, there is a danger that such an explicit treatment may lead to a freezing of identities and slow down the pace of integration, but this has always been the argument ever since independence, where ethnic exclusion flourished amidst the gospel of “one nation” and “one Kenyan tribe”. The next step, perhaps, is to be explicit about ethnic differences and have an objective debate about how the same can be designed and incorporated in local and national structures in order to enhance accommodation.

The Constitution already recognises diversity and the need for national unity, albeit in general terms. There is a need for boldness in confronting the issue of ethnicity in public institutions and processes. Efforts are already under way to shift matters towards this debate: the National Integration and Cohesion Commission (NCIC) and other national ministries have in the recent past released ethnic audits that provide a picture of ethnic composition in the public service.<sup>84</sup> Indeed, in the past such reports were unheard of, so this marks an initial step towards generating solutions capable of bringing about ethnic inclusion. However, it is also important to

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<sup>80</sup> Rothchild D 'Ethnic inequalities in Kenya' (1969) 7 (4) *The Journal of Modern African Studies* 704.

<sup>81</sup> Rothchild (1969) 705.

<sup>82</sup> Rothchild (1969) 705.

<sup>83</sup> Chege & Barkan (1989) 436-437.

<sup>84</sup> NCIC 'Towards cohesion and unity in Kenya: ethnic diversity and audit of the civil service' (abridged version); Republic of Kenya 'Rapid result initiative: Staff audit in the civil service and the Teachers Service Commission' (2011).

note that ethnicity and its role in conflict is a complex subject that requires a deeper and specific analysis which goes beyond the scope of this thesis.

#### **4. Drawing lessons from the Kenyan approach**

The deliberations during the constitutional review on the most appropriate devolution design and the final design represent a process familiar to most or all developing states. Therefore, certain decisions taken regarding the design of devolution in Kenya, and the grounds advanced to justify those decisions, have potential significance for devolution debates in other developing states and possibly elsewhere, too. While some aspects of the design and intended purpose may be so peculiar to Kenya that their comparative utility is diminished, important lessons can be gleaned nevertheless from the Kenyan process. The following part of the analysis attempts to draw general lessons from that process, lessons which can be of useful application to other states seeking to address the challenges of underdevelopment, internal conflict and the centralisation of power and personal rule.

##### **4.1 The “hybrid level”: A viable Kenyan contribution or a dangerous experiment?**

A necessary starting-point in the comparative analysis is Kenya’s unique “hybrid level”, which combines regional and local levels to form a new level between the region and the local level. Soon after adoption of the new constitution, commentators lauded this measure as an emerging way of managing ethnic conflict. Among these commentators was Barkan, who sees the “fragmentation” of mono-ethnic regions as an important trend in managing multi-ethnic states with larger and dominant ethnic communities. Citing Kenya, Nigeria and Uganda as examples of this emerging trend,<sup>85</sup> he argues that while the idea of semi-federal arrangements was rejected at independence, it has now been embraced as a means of managing fissiparous tendencies in multi-ethnic states characterised by a few ethnic communities that are dominant majorities.<sup>86</sup>

However, while there are similarities in terms of ethnic composition in Kenya, Uganda and Nigeria, their respective subnational structures should be compared with caution. Nigeria’s fragmented units have typical regional/state functions for all intents and purposes. Indeed, Nigeria has a distinctive and constitutionally entrenched local level of government, unlike Kenya’s counties which can hardly be called regions. While Nigeria’s 36 states may be considered as too fragmented for a typical federation, the country’s population is big enough to

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<sup>85</sup> Barkan JD ‘Ethnic fractionalization and the propensity for conflict in Uganda, Kenya and Tanzania’ in Herbst J, McNamee T & Mills G (eds) *On the Fault Line: managing the tensions and divisions within societies* (2012) 168.

<sup>86</sup> Barkan (2012) 168.

make the numerous constituent units into “regional-size populations”. Uganda, on the other hand, is for all intents and purposes a unitary state that makes no pretence about its district governments’ lack of autonomy.<sup>87</sup> Furthermore, the Constitution of Uganda recognises a procedure according to which a group of district governments can combine to form a region.<sup>88</sup> This context has to be taken into account before the fractionalisation approach is hailed as heralding a new approach to managing ethnicity in developing states.

With the Nigerian and Ugandan examples having been distinguished from each other, it is important to look at the structural advantages, or lack thereof, in the adoption of the 47 counties in Kenya. Kenya did away with “home provinces” for each of the four major ethnic groups and instead split them into several counties. Admittedly, there is some value in splitting the large mono-ethnic regions, since it denies the regions an important basis on which they could otherwise mobilise politically; indeed, there is some recorded success with this strategy in managing ethnic conflict in Nigeria.<sup>89</sup> However, the complexities that arise from abandoning regional and local levels in favour of a “hybrid level” may, in some instances, negate the possible benefits of such a compromise. For instance, with regard to powers and functions, the units may, due to their fragmented nature, be unable to exercise certain functions; in turn, the national government may find it convenient to centralise those powers. This may mean in effect that resources and powers will still be centralised, a situation that could see the large ethnic communities continue to fight for control of the centre. However, political and economic inclusion can be achieved more easily by devolving substantial powers and resources to larger units with the capacity to utilise the devolved powers and resources. Of course, this has to be balanced against the risk posed by larger units, which have the potential to threaten stability and adopt a secessionist agenda.

The “hybrid level” causes confusion; typical “local government functions” are lumped together with typical “regional functions” at the county level and this may affect overall effectiveness. Some powers vested in counties, such as participation in constitutional amendment, make counties appear like units with political significance. However, the bulk of powers are typically local government functions. Furthermore, important factors such as coordination of regional

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<sup>87</sup> Singiza DK & De Visser J ‘Chewing more than one can swallow: the creation of new districts in Uganda’ (2011) *Law Democracy and Development* 8.

<sup>88</sup> Article 178 (1) Constitution of the Republic of Uganda, 1995.

<sup>89</sup> Elaigwu JI ‘The Federal Republic of Nigeria’ in Majeed A *et al* (eds) *Distribution of Powers and Responsibilities in Federal Countries* (2006) 211.

activities are faced with uncertainty in the “hybrid level”. It is therefore possible that the “hybrid level” may lead to a confusion of roles and, ultimately, to overall inefficiency and ineffectiveness.

Removal of regions also means the units are “fragmented” and therefore structurally weakened in terms of limiting central power. Unless there is a strong second chamber like the Kenyan Senate to fill the void left by removal of regions, constituent units will be left vulnerable to the centre. Second, apart from limiting central, regions perform coordinative and supervisory functions over local governments. If regions are scrapped, these important coordinative functions may fall to the centre and add to central bureaucracy. It is for this reason that provinces in South Africa, though weak in terms of political powers and resources, are said to play a significant but less apparent role in ensuring effective decentralisation. With the removal of regions, a state may have to reduce the number of units in order to ensure viability, and this may, as in the Kenyan experience, have the effect of denying the tiny minorities their own units.

Generally, as a result of the danger associated with large units, the political leadership at the centre will be quick to have the regions abolished or fragmented, as happened in Nigeria<sup>90</sup> or as was suggested by the president of Indonesia after Suharto’s demise.<sup>91</sup> However, a deeper analysis of the role of the region in relation to the three purposes reveals that absence of regions creates far more complexities than retaining them and dealing with the potential risks associated with them. Accordingly, systems such as the “hour-glass structure” of weak regions and strong local governments may be an option in managing potential risks. An exception perhaps is Macedonia, which opted out of regions; nevertheless, this was due to the special question of the independence of the Albanian State of Kosovo. There were fears that the creation of an Albanian region in Macedonia could have fomented a secessionist conflict by ethnic Albanians who could use the mono-ethnic Albanian region to break away and join the greater Albanian state of Kosovo.<sup>92</sup> However, this may not be of much comparative utility as these were special circumstances: the Albanian region was fragmented into several of the country’s 80 municipalities, and federal-type arrangements were expressly excluded from the peace settlement.<sup>93</sup>

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<sup>90</sup> Elaigwu (2006) 211.

<sup>91</sup> Bennet R ‘Decentralizing authority after Suharto: Indonesia’s “big bang”, 1998-2010’ (Princeton University: Innovations for Successful Societies) (2010) 4

<sup>92</sup> Ragaru N ‘The Former Yugoslav Republic of Macedonia: Between Ohrid and Brussels’ in Batt J (ed) *Is there an Albanian Question?* (2008) 54.

<sup>93</sup> Basic principle 1.2 of the Ohrid Agreement 2001; Ragaru (2008) 43.

It thus seems that the appropriate approach is one which retains the primary features for each design without making concessions to such an extent that the concessions end up completely hurting or excluding the other purposes. For instance, elimination of a region fundamentally affects the ability of subnational units to check national government. In the case of Kenya, a directly elected and politically powerful senate may come to the rescue of the units. However, in a case like South Africa where the second chamber is weak,<sup>94</sup> elimination of the provinces may cause the centre to consolidate even more power at the expense of subnational units.<sup>95</sup>

An assessment of the Kenyan approach leads to the conclusion that rather than abolishing the traditional levels to create a “hybrid”, the solution may well lie in seeking a balance within the three traditional levels of decentralisation: national, regional and local. Kenya struggles to balance the three purposes in a structure that already systemically or structurally weakens their pursuit. The structure also affects the nature of powers and functions to be exercised at the “hybrid level”. It is for this reason that the elimination of a level – or the correlative introduction of a “hybrid” level – may not be the ideal strategy for balancing the design of devolution so that it can respond to the three purposes. It is not necessary, however, to recommend any “model” to be applied by states, for the good reason that there is no single, universal model capable of perfectly accommodating the three purposes of devolution. Design in and of itself does not guarantee effectiveness, since contingencies external to it, such as political will, may indeed prove to be the factors that most strongly determine its effectiveness or lack thereof.

#### **4.2 Design versus effectiveness: why the context prevails**

The assessment of the Kenyan devolution design confirms that effectiveness does not automatically follow design. Accordingly, even the most perfectly balanced design may be negated by other factors external to the design. Many of the design features intended to serve a particular purpose may in actuality achieve a contrary end. For instance, reducing the counties from the initial 74 proposed counties to the current 47 counties was important as a step towards limiting central power, but the 47 counties are still too many in number to be able to do so.

Indeed, even generally, design features that are effective in one system may not necessarily achieve the same results when transplanted to other systems. For instance, governmental

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<sup>94</sup> Bosire CM ‘Evaluation and impact of the National Council of Provinces’ Paper presented at the 6<sup>th</sup> Annual Conference on Democracy and Development (Democracy Development Programme) Durban, South Africa 14-15 October 2010.

<sup>95</sup> Murray & Simeon (2011) 249.

representation is effective in counterbalancing central power in Germany, but the same structures have failed in South Africa, not because of bad design, but because of the ruling party's dominance which blurs the lines of federal governance. In Kenya, the only way that the Senate could counterbalance central power is if senators were directly elected. It is thus clear that design and effectiveness are not automatic and almost always depends on the context.

Even with the size, number and composition of devolved units, there is no pre-determined set of design features that ensure the realisation of a purpose. While the fragmentation of mono-ethnic regions is seen as important for managing ethnic conflict, in Ethiopia a "home province" is important for ethnic accommodation; in Kenya, a "home province" would lay a basis for negative ethnic mobilisation. It can thus be concluded that context is equally or even more important when it comes to effectiveness. However, this does not completely eliminate the need for design as some aspects of the design remain important for achieving intended and default purposes.

## **5. In lieu of recommendations**

The concurrency of challenges related to development, internal conflict and centralisation of power is a factor that developing states will continue to face. On the other hand, despite the weak evidence of the link between development, states continue to devolve or decentralise powers and resources to new or existing subnational governments. While the prominent objective of devolving power is development and service delivery, other purposes such as internal conflict resolution and limiting central power are increasingly becoming drivers of devolution. The hope that devolution of power can effectively pursue and address the three purposes makes a study of how they can be accommodated through design an important one.

If there are explicitly identified purposes of devolution, there is need to ensure that these purposes are followed through with design. Where there is more than one purpose with potentially contradicting design features, trade-offs are inevitable. However, trade-offs must be made, not only with the original intent or purpose in mind, but also with regard to the context and the effectiveness. Ultimately, however, it appears that the prominent purpose will lay down the primary design. In Kenya, as it would be in many developing states, development is the prominent purpose and it thus provides the primary design. While trade-offs between conflicting design aspects can be made for effective pursuit of the three purposes, the key lesson that seems to emerge is that the definitive features of each purpose should be retained and compromises and trade-offs sought within those core features.

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