

ANALYSIS OF LEGAL AND DEVELOPMENTAL IMPLICATIONS OF THE
COUNTY SYSTEM OF GOVERNANCE IN KENYA

PRESENTED BY

ADHIAMBO SOPHIA SHARON

LLB/16198/72/DF

A DISSERTATION SUBMITTED TO THE FACULTY OF LAW IN PARTIAL
FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF BACHELOR OF
LAWS DEGREE IN KAMPALA INTERNATIONAL UNIVERSITY


NOVEMBER 2011

DECLARATION:

I Adhiambo Sophia Sharon LLB/16198/72/DF

declare that the dissertation is a result of my own efforts. To the best of my knowledge, it's original and has never been submitted to any university or institution for any academic awards.

SIGNATURE:



DATE:

30th March 2012

APPROVAL:

This dissertation compiled by Adhiambo Sophia Sharon
LLB/16198/72/DF under the Topic "ANALYSIS OF LEGAL AND

DEVELOPMENTAL IMPLICATIONS OF THE COUNTY SYSTEM OF
GOVERNANCE IN KENYA", has been under my supervision and guidance as the
Kampala International University supervisor. I hereby approve it as ready for examination.

NAME OF SUPERVISOR KALINAMU JOSEPH EDMOND

SIGNATURE:

Kalinamu

DATE:

28/08/2012

ACKNOWLEDGEMENT:

First I thank God for enabling me to reach this stage of my academic life. Indeed without you, God I would not have achieved anything

I would like to greatly appreciate and acknowledge my Supervisor **Mr. Kalinaki Edmond Joseph** for his assistance and feedback during the entire research period.

Progress through the research would not have become a reality without the input of my Mother, **Ms. Wagoro Miriam C. A.** who assisted me morally, psychologically, academically and above all financially to see my research become a success. Mum without you, I would not have come this far and I thank God for you.

I would also like to acknowledge the assistance of my family my brothers, **Robert** and **Elisha** and my sister, **Joyce** for their constant prayers, moral support, and input of all nature that led to the compilation of this dissertation.

And last but definitely not the least is the assistance of **Rev. Ofula Kenneth** for his help in the success of this research. May God richly bless you.

DEDICATION:

I dedicate this dissertation to my Family, **Wagoro**, with all my love and appreciation for their support. I thank you for your prayers, encouragement, and inspiration and for being there through my academic journey. May GOD richly bless you as you have been a blessing in my life.

AUTHORIZATION FOR REPRODUCTION OF DISSERTATION FOR

LIBRARY USE

KAMPALA INTERNATIONAL UNIVERSITY

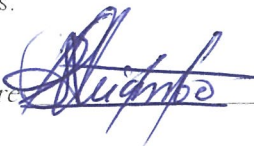
FACULTY OF LAW

AUTHORIZATION FOR REPRODUCTION OF DISSERTATION FOR

LIBRARY USE

This is to certify that I, Adhiambo Sophia Sharon LLB/16198/72/DF being a candidate for the degree Bachelor of Laws am fully aware of the policy of the University relating to the retention and use of higher degree theses and dissertations, namely that the University retains the bound copies and is free to allow them to be consulted or borrowed. The University may reproduce a thesis/dissertation in electronic format for archival purposes.

Signature



Witness

Date

30th March 2012

TABLE OF CONTENT:

TABLE OF CONTENT

DECLARATION	i
APPROVAL	ii
ACKNOWLEDGEMENT	iii
DEDICATION	iv
AUTHORIZATION FOR REPRODUCTION OF DISSERTATION FOR LIBRARY USE	v
TABLE OF CONTENT	vi
LIST OF ABBREVIATION	vii
LIST OF STATUES	x
ABSTRACT	xi
CHAPTER ONE: INTRODUCTION	1
1.1 BACKGROUND OF THE STUDY	1
1.2 STATEMENT OF THE PROBLEM	4

1.3	PURPOSE OF THE STUDY	6
1.4	RESEARCH OBJECTIVES	6
1.5	RESEARCH QUESTIONS	7
1.6	RESEARCH HYPOTHESIS	7
1.7	SCOPE OF STUDY	7
1.8	SIGNIFICANCE OF THE STUDY	8
1.9	LITERATURE REVIEW	9
1.10	RESEARCH METHODOLOGY	11
1.11	CHAPTER BREAKDOWN	12
CHAPTER TWO: LITERATURE REVIEW		18
2.1	THEORETICAL FRAMEWORK	18
2.2	CONCEPTUAL FRAMEWORK	20
2.3	RELATED LITERATURE	25
2.3.1	RATIONALE FOR DEVOLUTION	25
2.3.2	ARGUMENTS FOR DEVOLUTION	28
2.3.2.1	MARGINALIZED COMMUNITIES	28
2.3.2.2	THE IMBALANCE OF POWER	34
2.3.3	BENEFITS OF DEVOLUTION	35

2.3.4 ARGUMENT AGAINST DEVOLUTION38
2.3.5 CONCLUSION40
CHAPTER THREE: ANALYSIS45
3.1 PROBLEMS TO BE ENCOUNTERED IN IMPLEMENTATION....	45
3.2 HOW THEY WILL BE TACKLED47
3.3 LESSONS LEARNT FROM OTHER COUNTRIES50
3.4 SUMMARY53
CHAPTER FOUR: RECOMMENDATION54
CHAPTER FIVE: CONCLUSION82
REFERENCES83

LIST OF ABBREVIATION

CDF	Constituency Development Fund
CDFC	Constituency Development Fund Committee
CEDA	Convention on the Elimination of all forms of Discrimination
CIPFA	British Chartered Institute of Public Finance and Accountancy
CKRC	Constitution Kenya Review Commission
CoE	Constitution of Kenya 2010
DFRG	District Focus for Rural Development
FACTs	Functional and Competency Assignment Teams
GOK	Government of Kenya
ICPAK	Institute of Certified Public Accountants of Kenya
IIBC	Interim Independent Boundaries Commission
IIEC	Interim Independent Electoral Commission

ILO	International Labour Organization
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KEPSA	Kenya Private Sector Alliance
KIA	Kenya Institute of Administration
KLA	Kenya Land Alliance
LAs	Local Authority
LSK	Law Society of Kenya
NARC	National Rainbow Coalition
NGO	Non Governmental Organization
PSC	Public Service Commission
TJRC	Truth Justice and Reconciliation Commission
TWG	Technical Working Group
UN	United Nations

LIST OF STATUTE

1. The Counstitution of the Republic of the Kenya, 1963.
2. The Constitution of the Republic of the Kenya, 2010

ABSTRACT

Kenya is in urgent need of a more intense shift towards a focus on development. No one is more aware of this need than the citizens as was discerned from the county visit submissions done by the Task Force on Devolved Government and published in their draft report. They made it clear that the mission for the counties would and should be that of achieving positive development outcomes for the citizens. Some of these outcomes included job creation, harnessing local potential, integrating the counties with the nation, amongst others. It is on this basis that the counties will be premised. On the foundations of developmental devolved government committed to incorporating citizen participation to determine inclusive and sustainable mechanisms for growing county competitiveness, building and maintaining quality places, promoting inclusive growth and generally managing counties for prosperity. The prosperity of the new counties and therefore that of the Kenyan people, individually and as a whole is dependent on enhancing access to opportunity to all citizens while ensuring adequate environmental protection. As the nation struggle to attain and maintain economic competitiveness, the constraining effect of administrative boundaries becomes a matter of concern.

The ability of the new counties to create wealth and enhance welfare outcomes of their citizens will depend on how well they are able to leverage the endowments, natural and otherwise, within the national, regional, and global operating contexts. Attracting the jobs that improve welfare for citizens will not be achieved through lone ranger efforts.

✓ Given the diverse developmental conditions in the country, it will be critical, and in adherence to the need to build a more equal society the funding mechanisms and instruments should not only ensure a predictable and sustained flow of funds to counties, they should also ensure that county governments are actively directed to ensure that revenue due is collected. The foundations of the Constitution are to ensure effective citizen participation in facets of governance, to which the county governments must respond.

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND

At independence, in 1963, the *majimbo*¹ Constitution Kenya adopted provided for devolution of the government to regional assemblies in the context of a bicameral, Westminster type parliament² with the Senate and National Assembly– the Lower and Upper houses. These Constitutional provisions were premised on the need to secure right of the ethnic minorities grouped in the KADU³ party against the domination by the ‘big tribes’ grouped in KANU⁴ party. Barely a year later, however, the 1964 dissolution of the opposition KADU rendered devolution moribund⁵ as its very championing party integrated itself in to KANU, which had demanded a unitary state during the Constitutional talks in, London. Not only, had the KANU government hardly undertaken any substantive devolution of administrative functions and attendant budget and personnel

¹ Jimbo is the Kiswahili word for ‘region’ (singular) the *ma*-prefix forms the plural. Majimbo was a philosophy that emerged in the 1950s meaning federalism and regionalism in Kiswahili. It was intended to protect local rights and ensure that various regions developed. However in 1991 when the then President reintroduced multi-partyism in politics he used the word to refer to tribalism and hence it was coined to mean non-natives of a certain area would be expelled from certain areas in order to protect the interest in terms of land of the community that was living there. This lead to the distortion of the word majimboism and thus when mentioned many always associate it with ethnic cleansing and Xenophobia

² Consisting of 117 members of the House of Representatives and 41 members of the senate.

³ **Kenya African Democratic Union.** This is a party that was formed around 1960 when an agreement between the colonizers and the Africans did not agree. Its slogan was *uhuru* meaning freedom. It was led by James S. Gichuru assisted by Tom Mboya then it was later handed over to the Late Mzee Jomo Kenyatta

⁴ **Kenya African National Union.** As a result of disgruntled member in KANU there was a Split and there was a break away party called KADU led by R. Ngala and M. Muliro.

⁵ In a state of being inactivity or obsolescence.

resource to sub national agencies by the time of KADU's dissolution, but KANU soon even usurped functions such as social service delivery that the colonial government had allocated to the local authorities. In the 1960s and 1970s, the Government of Kenya (GOK) argued about its superior service delivery capacity– reflected in the aspirations of the development blueprint, *Sessional Paper Number 10 of 1965 on African Socialism and Its Application to Planning in Kenya* (GOK, 1965). This led inevitably to various Constitutional reforms that created an almighty 'imperial presidency'⁶

Into the third decade of independence, however, deteriorating government service delivery raised questions about the efficacy of an excessively centralized government⁷, leading to minimal and eclectic decentralization measures such as President Daniel Arap Moi's weakly implemented District Focus for Rural Development (DFRD) planning and budgeting framework. Persisting demands by a heavily repressed political opposition and a robust civil society for a return to political pluralism as a means of fostering greater government accountability, along with global liberalizing power bore fruit in 1991 when Kenya returned to plural party politics. The demand for extensive Constitutional reforms

⁶ Here the president has more powers than is allowed by the constitution. He is seen as being above the law.

⁷ A centralized government is a form of government in which power is concentrated in the hands of a few executive officers and therefore a few people mainly the elite. It undermines the courts, legislature and regional government (Ndulo, 2006 a).

however, notably incorporating the devolution of government to sub national agencies, were eventually only met in the new millennium after a two decade gestation period. August 2010 saw Kenya adopt a new Constitution with far reaching provisions for the devolution, including the devolution of government to 47 counties.

The critics of the devolved system of government look at the flaws of the devolution in two folds. The first is that they have concentrated on the labels of *majimbo*⁸ (Swahili for federalism) rather than on the content because too much focus on the narrow ethnic interest rather than the interest of the broad masses of the Kenyan society. Secondly they have not taken cognizance of the fact that the current system of provincial administration was not subject to the popular mandate but rather was imposed on Kenyans undemocratically. By maintaining the adopted current centralized form of governance the people of Kenya abdicated important responsibility to the government. The consequence was a glaring gap in governance whose remedial measure is long overdue. When the current system was made the overriding interest was that of the ruling elite. The provincial administrators lack even the basic knowledge of the communities they purport to serve.

⁸ Supra note 1

1.2 STATEMENT OF THE PROBLEM

✓ Evidence from several countries indicates that devolving state power to sub national institution and entities is done for different reason and with different motivation. In an analysis of Nigeria's system, Metz (1991) says that, "given the territorially delineated cleavages abounding in Nigeria and the historical legacy of divisions among ethnic groups, regions and sections, the federal imperatives was so fundamental that even the military government that were characteristically Unitarian, hierarchical and centralist attached importance to the continuation of a federal system of government. He goes on to add that the federation that began as a Unitarian colonial state later disintegrated into regions" (Metz 1991). In 1967 the regions were abrogated and twelve states created in their place.

✓ In the case on Papua New Guinea it embarked on a series of policies which among other things aimed to overcome two legacies of the colonial experiences: the high degree of centralization of political and administrative power and the great geographical inequality of wealth and distribution of government services within the country. The creation of a decentralized political system to provide a basis for wider participation in the political process (Kulwaum, n.d).

Many examples can be cited where perfect harmony between democratization and devolution has been registered. In the United States, Germany, Canada, the United

Kingdom, and Switzerland among others, devolution has been the driving force of social harmony and an engine for development. In Africa, despite the numerous ethnic communities with competing political and economic interests, South Africa, Rwanda, and Uganda, among others, have appreciably implemented modern devolved systems of governance with ease. In all of these instances, positive aspects of ethnicity and pragmatic approaches to decentralization have been recognized to contribute to stability and enhance human development.

In countries where there is constant contestation for state power between the government and the people, genuine devolution of power has in many instances provided a panacea⁹ for resolving the conflict. In addition, devolution, as a foundation of good governance has become a reality of global norms and practices. In any part of the world where democratization is not in tandem with devolved governance, democracy can only be synonymous with legitimizing the elites' accession to power. Therefore as Kenya looks at its devolution options, it will help to undertake a comparative study of how it has been done in other countries especially those with similar level of development. The researcher

⁹ An answer for difficulty or problems.

will look at the experience, the lessons learned and the mistakes made and how Kenya can avoid all those.

1.3 PURPOSE OF THE STUDY

The problem under investigation is the legal and developmental impact of the county system of governance in the country of Kenya. The researcher endeavours to look at the legal and developmental characteristics of the county system and what it means for a country that was divided into regions along ethnic lines for more than three decades and how these various characteristics of the county system will ensure that the country has developed, and ensure that the aspects of accountability will be achieved

1.4 RESEARCH OBJECTIVES

The objectives under investigations in this study include:

1. To assess the developmental impact of the county system of governance in Kenya
2. To assess the legal impact of the county system of governance in Kenya.

1.5 RESEARCH QUESTIONS

The study intends to answer the following questions:

1. What developmental impact will the county system of governance have in Kenya?
2. What legal impact will the county system of government have in Kenya?

1.6 RESEARCH HYPOTHESIS

This research hypothesis is that:

1. The county system of governance has a positive impact on the legal structure and development of the country, Kenya.
2. The county system of governance has no impact on the legal structure and development of the country, Kenya.

1.7 SCOPE OF THE STUDY

The study is about the developmental and legal impact of the county system of governance in Kenya. It will therefore be conducted in Kenya.

The Republic of Kenya is a country of 50 million people in Eastern Africa. It shares borders with Ethiopia, Somalia, Tanzania, Uganda, and Southern Sudan. Its coastline borders the

Indian Ocean. Peace had prevailed since an uprising in the former British colony in the 1950s. It gained independence in 1963 and had its first president as the Late Mzee Jomo Kenyatta. A political crisis exploded into violence in early 2008, with a resolution finally reached in mid-April. Kenya faces Herculean challenges, as the poor nation must deal with a fast-growing population, exploding slums and diminishing available land. During the crisis Kenya's infrastructure suffered severe damage with countless houses, shops, businesses, factories and schools burned out, and the lucrative safari tourist business almost shut down. The crisis ignited long-standing ethnic grievances, which violently split the nation along ethnic lines.

1.8 SIGNIFICANCE OF THE STUDY

This study will help the country understand the short comings of the previous system of governance and help the country know the how this new system of counties will develop the various regions and thus translating into the development of the whole country. It will also help the country understand the legal implications of the county system. With examples of other countries that have county systems the country will learn the benefits of the county system and put in place measures that will help deal with the cons of the county system that other countries will have faced. Being the first change it will have in three decades it will also learn to prepare for the eventualities that come with the county system.

1.9 LITERATURE REVIEW

The literature reviewed in this dissertation is a collection of research reports that have been done by various agencies in the country that have looked at the various aspects of the county system and have tried to demystify the concept of the county system and differentiate the county system from the other form of decentralization that was present and the type that was adopted at independence.

1. IEA (2010), *Devolution in Kenya: Prospectus, Challenges and the future*,

IEA Research Paper Series No. 24, Institute of Economic Affairs. Nairobi.

This paper is by Albert Mwenda and he looks at the past type of government that Kenya had and the history of how that came about and he also looks at the challenges that were presented and looks at the county system of government and what it is meant to achieve while contrasting it with other countries which share the same type of government structure.

2. SID (2011), *Devolution in Kenya's New Constitution*, SID Constitutional

Working Paper No. 4, Society for International Development. Nairobi.

This paper is by Dr. Othieno Nyanjom and Mr. Njeru Kirira, they separately look at the administrative and fiscal consequences of Kenya's shift from the unitary- state to a quasi-federal state' system. They examine the anticipated administrative and development planning imperativwes of devolving power and theyalso examine the anticipated revenue and expenditure concerns which may arise in a state with two levels of government and all this is in the context of a presidential system of government that the new Constitution embraces.

3. Saad Abdullah Paracha (2002–2003), *Devolution in Pakistan: Context, Implementations, and Issues*.

The author talks about the road Pakistan took to achieve the county system and the issues it faced and the challenges it had to overcome for it to achieve this.

4. **The internet.**

The internet offers information about the country of Kenya and gives a history of its devolution history. It also gives countries that have successfully used the county system and the ones that the county system failed and I will use this to help compare and contrast Kenya and the desired outcome.

My Conclusion

Though many authors have talked about the county systems of government as a form of devolution they have not analyzed successfully the problems that it comes with and how these are to be tackled and they have not shown how the majimbo system of government was the initial idea but was corrupted.

In this dissertation I will seek to show the problems that the previous system of government had and the way the new system of government seeks to rectify this. By looking at the various literature present on the topic I intend to show how my dissertation is different by focusing my attention on the impact of the new system on the law and the development of the country and show how previous forms of government had a negative impact on the development of the country and the law of the land. I intend to look at the challenges that this new system will bring to the law and the development of the country and I was also talk about the idea of majimboism and why it can still be used since it was the initial idea behind the county system of government but was corrupted.

1.10 RESEARCH METHODOLOGY

This study has relied on desk research as primary source, internet search, and written material such as online books, online journals, news articles, reports, policy documents, and

legal documents which include both international and domestic documents on the county system of government.

1.11 CHAPTER BREAKDOWN

1.11.1 CHAPTER ONE: INTRODUCTION

Chapter one gives an introduction of the whole disseratation. In this chapter, i have given an introduction of what i have written on in my dissertation. The chapter divides the dissertation into smaller sections to wit:

1.1 Back ground of the study.

Here i have given the history of the problem. By first starting from where the idea came from and why the idea was brought forth. And i have also given a brief history of Kenya's political history so as to be able to understasnd where the conflict developed from.

1.2 Statement of the problem

Here i have looked at the problems that the current system of governance and devolution have and what are the implications and forms of development that it has achieved and the the problems that have made it an inefficient form of devolvution and hence being the catalyst for the seararch of a new form of devolution that has been entrenched in the new Constitution and what are the possible benefits that the new system has over the old system

and how other countries have benefited from the county system and what we should expect from it.

1.3 Purpose of the study.

Here i have looked at why this study is important and why i should look at it yet others have done similar research. I have also shown the fact that my research is based on finding out the developmental implications of the county system which thereby makes my reasearch a new one and seeks also apart from bringing new information, to add to the knowledge present on the county system as a form of devolution and shed more light on the lacunae left by the other research done by others.

1.4 Research objectives.

Here i have outlined the objectives that i intend to achieve with this research.

1.5 Research questrions.

Here i have outlined the questions that my research seeks to answers.

1.6 Research hypothesis.

Here i laid down the propositions that i will be looking at.

1.7 Significance of the study.

Here i have shown how my research will help the country and how important it is to the understanding of the county system.

1.8 Literature review

Here i hae looked at the main literature that has been produce in realtion to this particular topic and i have endevooved to distinguish my research from theirs by looking at the areas which they have not covered.

1.9 Research methodology

Here i have given the various methods that i used to collect the data i used fr the research and from where i got my literature and what criteria i used to determine what to use in the research.

1.11.2 CHAPTER TWO: LITERTURE REVIEW

2.1. Theoretical framework.

Here i have looked at a few theories that talk about governance and a few that talk about devolution and what they have said on devolution. I have also looked at theories that have juxtapositioned development and county government and the possible positive results of it.

2.2. Conceptual framework.

I have drawn a model that seeks to explain how the county government will work hand in hand with the national government and how the duties between the two are separate yet complimentary.

2.3. Related literature

2.3.1 Rationale for devolution

Here i have looked at the reason as to why devolution would be a good idea and why the county system in particular would be more beneficial to our country as opposed to the forms of devolution.

2.3.2 Argument for devolution

2.3.2.1 Marginalized communities and groups.

Here i have looked at how this group of people will benefit from this form of devolution (county system) as opposed to the other forms of devolution.

2.3.2.2 The imbalanced of power

Here I have looked at how the system will be able to handle the issue of imbalance of power and the methods it will use and the possible outcomes as a result of this.

2.3.3 Benefits of devolution

3.2 How they will be tackled

Here i have looked at how these problems will be tackled to ensure that there is smooth transition implemenation of the county system and there by causing a swift trelocation from the initial system of governance to the new design.

3.3 Lessons to be learnt from another country

Here i have looked at Papua New Guinea that has county system and the lessons they went through during the process of implementing this system of governance and what lessons Kenya can learn from them.

1.11.4 CHAPTER FOUR:RECOMMENDATION

Here i have given my recommendation of the varous policies that have been discussed.

1.11.5 CHAPTER FIVE:CONCLUSION

I have given a conclusion on what I have discussed and I have concluded what should be done and how the county system has a positive legal and developmental impact in the country.

I have looked at the benefits of this particular type of devolution as opposed to the other types and why this is the best type for our country.

2.3.4 Arguments against devolution

I have looked at the negatives of devolution and what our country is to expect as the negatives that may be present in implementing this type of devolution.

2.3.5 Conclusion

I have concluded by looking at the pros and cons of the devolution and in particular the way the county system will impact the country and therefore the benefits outweighed the negatives and therefore it would be the best way for the country.

1.11.3 CHAPTER THREE

3.1 Problems that may be encountered in implementation.

Here i have talked about the problems the country is likely to face in implementing this change from districts and provinces to county system of governance.

CHAPTER TWO: LITERATURE REVIEW

2.1 THEORETICAL FRAMEWORK

The Social Contract Philosophy saw the state as a creation of the general public- an incorporeal construct existing merely because real persons exist. Rousseau calls that crucial fiction the “Sovereign,” but then goes on to clothe it with tangible legislature to divide and define the public’s will. Hence, when Rousseau ([1762] 1999b) describes the totality of the “sovereign” and its relationship to the general will.

Governance refers to the development of governing styles in which boundaries between and within public and private sectors has become blurred. The essence of governance is its focus on mechanisms that do not rest on recourse to the authority and sanctions of government. Governance for (some) is about the potential for contracting franchising and new forms of regulation. In short, it is about what (some) refer to as the new public management. However, governance is more than a new set of managerial tools. It is also about achieving greater efficiency in the production of public services. (1998, p 17–18).

Governance is ultimately concerned with creating the conditions for ordered rule and collective action (Stoker, 1998; Peters and Pierre, 1998; Milward and Provan, 2000). As Stoker notes, the outputs of governance are not different from those of government; it is instead a matter of a difference in process (1998, p. 17).

Obviously governance means different things to different people. Despite some overlaps, it has one meaning for the economists of the World Bank and another for the political scientists engaged in the Local Government and Whitehall Programmes. The reasons for this are not hard to find. The two groups understand governance differently because they construct the concept from within very different narratives¹⁰. In 1992 the World Bank introduced the concept of good governance as part of its criteria for lending to developing countries¹¹, it invoked governance to refer to changes in the public sector associated with the new public management, marketization, and even privatization.

The Organization for Economic Cooperation and Development, like the World Bank, appeals to a neoliberal concept of governance to describe desirable changes in the nature of public services¹². It understands governance in terms of the increased efficiency in the public sector allegedly ensured by measures such as marketization, contracting out, new management techniques, staff cuts, and stricter budgeting. The state reasonably might make

¹⁰ A narrative stands here as a form of explanation that unpacks human actions in terms of the beliefs and desires of the actors. It embodies particular theories about the rationality of actors, their institutional embeddedness, and their capacity for agency, as well typically as a historical story.

¹¹ The World Bank. Governance and development (Washington: World Bank, 1992)

¹² OECD, Governance in Transition: Public Management in OECD Countries (Paris: OECD/PUMA, 1995); and OECD, Ministerial Symposium on the Future of the Public Services (Paris: OECD, 1996). Professional organizations often accept much of the neoliberal narrative while expressing fears about its impact upon a traditional public service ethos. The British Chartered Institute of Public Finance and Accountancy (CIPFA), for example, suggest a "commercial style of management" in the public sector requires "extra vigilance and care" to maintain "sound systems of corporate governance."

CIPFA, Corporate Governance in the Public Services (London: CIPFA, 1994), p. 6.

policy decisions, but instead of delivering services itself, it should promote an entrepreneurial system based on competition and markets – "less government" and "more governance"¹³.

2.2 CONCEPTUAL FRAMEWORK

Decentralization or decentralizing governance refers to the restructuring or reorganizing of authority so that there is system of co-responsibility between institution of governance at the central, regional and local levels of according to the principle of subsidiary (i.e. the local authority will have the authority and responsibility to address all the problem that are in their determination within their ability to solve) thus increasing the overall quality and effectiveness of the system of governance while increasing the authority and capacity of sub national level

Decentralization is often used as a concept without strict definitions. The World Bank for instance uses the term "decentralization" to describe a broad range of *public sector reorganizations: Decentralization – the transfer of authority and responsibility for public functions from the central government to intermediate and local governments or quasi-*

¹³ D. Osborne & T. Baebler, Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector (Reading, MA: Addison-Wesley, 1992).

independent government organizations and/or the private sector- is a complex multifaceted concept. Different types of decentralization should be distinguished because they have different characteristics, policy implications, and conditions for success. (World Bank, 2003).

A distinction is made between three main types of decentralization De-concentration is often considered to be the weakest form of decentralization; it redistributes decision-making authority, financial- and management responsibilities among different levels of the central government. It can merely shift responsibilities from central government officials in the capital city to those working in regions, provinces or districts, or it can create strong field administration or local administrative capacity under the supervision of central government ministries. De-concentrated functions are normally not entrenched in laws and can easily be withdrawn at any point of time. Delegation is a more extensive form of decentralization. Through delegation central governments transfer responsibility for decision-making and administration of public functions to semi-autonomous organizations not wholly controlled by the central government, but ultimately accountable to it. Governments delegate responsibilities when they create public enterprises or corporations, housing authorities, transportation authorities, special service districts, semi-autonomous school districts, regional development corporations, or special project implementation

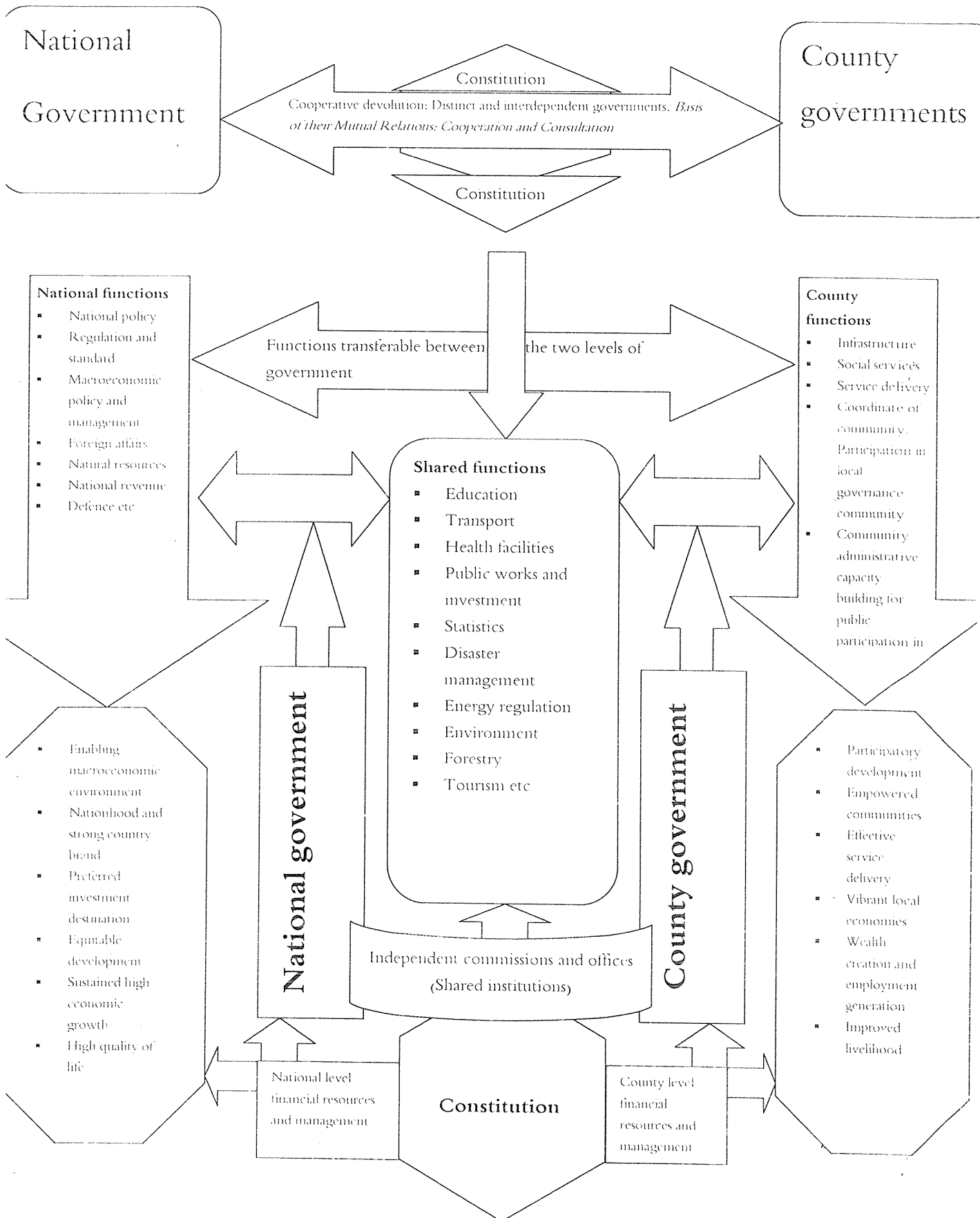
units. Usually these organizations have a great deal of discretion in decision-making. They may be exempt from constraints on regular civil service personnel and may be able to charge users directly for services. Delegation is often legally recognized. Devolution is a third type of decentralization. It is legally entrenched, often in the Constitution. When governments devolve functions, they transfer authority for decision-making, finance, and management to quasi-autonomous units of local government with corporate status. Devolution usually transfers responsibilities for services to municipalities/district councils etc that elect their own mayors and councils, raise their own revenues, and have independent authority to make investment decisions. In a devolved system local governments have clear and legally recognized geographical boundaries over which they exercise authority and within which they perform public functions.

The diagram below underscores the fact that the Constitution has established two levels of government, the National Government and the County Government, that are distinct and interdependent and which are required to conduct their mutual relations through cooperation and consultation. It is noteworthy that, unlike in other countries, the Kenya Constitution has avoided the creation of a hierarchical unitary system of government where power and functions are given to sub-national governments by the central government which also retains the power of recall of such power. National Government is, among

other roles, charged with the responsibility for national economic policy and planning, national standards, regulation, national public works, national statistics, immigration and citizenship, macroeconomic management, foreign affairs, defense and natural resources (Schedule 4). On the other hand, county governments have been assigned a central role in the development, delivery, and maintenance of infrastructure in the new Constitution.

The top part of the diagram below underscores the fact that the Constitution has established two levels of government, the National government and county governments, that are distinct and interdependent and which are required to conduct their mutual relations through cooperation and consultation. It is noteworthy that, unlike in other countries, the Kenya Constitution has avoided the creation of a hierarchical unitary system of government where power and functions are given to sub-national governments by the central government which also retains the power of recall of such power. The National Government is, among other roles, charged with the responsibility for national economic policy and planning, national standards, regulation, national public works, national statistics, immigration and citizenship, macroeconomic management, foreign affairs, defense and natural resources (Schedule 4). On the other hand, county governments have been assigned a central role in the development, delivery, and maintenance of infrastructure in the new Constitution.

Fig. 1.1 DEVOLUTION CONCEPTUAL FRAMEWORK



2.3. RELATED LITERATURE

2.3.1 THE RATIONALE FOR DEVOLUTION IN KENYA

African states with centralized system of government have suffered multiple symptoms associated with poor governance. Ghai (2006) citing a World Bank (1992) analysis on governance, enumerates these symptoms as firstly failure to make a clear separation between what is public and what is private. This engenders a tendency to direct public resources for private gain. Secondly, the system does not establish a predictable framework of law and government conducive to development and encourages arbitrariness in the application of rules and laws. Thirdly, the system fosters excessive rules, regulations, and licensing requirement which impede functioning of markets and encourages rent seeking. Fourthly, it encourages the setting of priorities inconsistent with development and non-transparent decision making.

Ghai (2006) argues that the afore-mentioned facts combine to create an environment hostile to development since authority of government over their people is progressively eroded. The resultant effect is reduced compliance with decision to which government responds through populist measure or coercion. (Ghai, 2006).

Ndulo (2006a) argues that the unprecedented economic decline and mismanagement is further fueled by unhealthy state and civil society relation. The relations are characterized

firstly by erosion of boundaries between the state and the civil society and secondly by limited participation in governance by the citizenry. Finally the preferential access to power and resources is determined by religious, ethnic, or geographical considerations.

The state of affairs in majority of the centralized African states ignited the quest for alternative system of governance and this is inclusive of Kenya. For a long time it was believed that the pervasive rise of conflict in post-colonial Africa was a factor of ethnic heterogeneity. The last decade has, however, witnessed growing consensus among scholars (Chabal and Daloz, 1999; Nasong'o, 2002) that ethnic loyalties and parochial identities are not the only root cause of conflict. Instead scholars advance the argument that the political conflicts are often precipitated by political competition over state resources within a context devoid of effective political institutionalization. The low levels of institutionalization engender conditions where resource allocation is skewed in favour of the self-aggrandizing activities of incumbent regimes and their supporters. Subsequently, the discriminated social groupings are forced to mobilize to articulate their interest, resulting in political antagonism that has invariably led to conflict (Nasong'o, 2002).

A clearer perspective of inter-ethnic conflict over resources necessitates delving into the colonial history of Africa. Colonialists interested in maximizing economic gains neglected to develop democratic institutions. Their divide and rule policy heightened ethnic divisions

which were manifested during the struggles for independence and continue to impact ethnic relations today (Kimenyi, 2002)

The excessive centralization of power meant that the leader of ethnic group that captured the state had control over an enormous amount of resources. As a result, allocation of state resources has not followed universally acceptable principle. Pertinent principle such as economic criteria, merit or a basic needs approach was often overlooked. Instead, resources have been allocated on such subjective criteria as regionalism, ethnic consideration, political loyalty and the idiosyncratic disposition of the individual ruler (Nasong'o, 2002).

Critics further argue that a centralized system of government suffers informational disadvantage that negatively impact its capacity to provide an effective and balanced distribution of services (Barret et al, 2007). This occurs predominantly where the distribution of resources endowments within nations is heterogeneous. Additionally, where the needs, constraints and aspiration vary across communities the central government is limited in its knowledge on the specific intricacies of each region. The concept of rural development is grounded on the foregoing logic. Barkan and Chege (1989), argue that rural development proceeds most rapidly where there exists a process of consultation and bargaining between the rural groups and the state. In such a process the macro policy

objectives of the state and the self- defined needs of rural residents are adjusted to each other.

Under the highly personalized centralized system, institutions of government were weakened to become mere instruments of support to the ruling party. The electoral process for instance was exploited to serve it, and there were no effective separation of powers. The effect was that parliament, the judiciary and other Constitutional offices became subordinate to the executive and there were thus few institutions for accountability. Further, merit as criterion for appointment or promotion in the civil service was replaced by ethnic, political or monetary payments. In this context, social groups were marginalized or suffered privations because they were seen to be opposed to the government (Ghai and Cottrell, 2007).

2.3.2 ARGUMENTS FOR DEVOLUTION

2.3.2.1 Marginalized of communities and marginalized communities.

Marginalization of communities presents one of the strongest cases of advocacy for devolution. It must be noted, however, that calls for ethno-regional equity in Kenya as

elsewhere in Africa, have historically been made by representative of 'have not' groups or regions.

At the advent of the Moi's administration, there were calls to end corruption that marked the Kenyatta era. These were accompanied by the new development theme, *Nyayo*, philosophy which promoted equitable development. It essentially emphasized the need for the poorer regions to catch up with the relatively prosperous areas and equality for all. Barkan and Chege (1989) point out that the interaction was to reduce disparity between Kenya's incomes remained neglected. Consequently, there were substantive efforts to redirect the flow of resources from Central province to the less developed regions. The new president did this by recruiting new permanent secretaries and reducing the ethnic influence in the cabinet¹⁴.

Land has been among the essential resource that was at the centre of the inequality in Kenya. Political influences, abuse of power and mismanagement have thus played a big role in creating inequality in land distribution in the country (Syagga, 2006). There have been situations where contrary to the provisions of the law, land has been allocated by officers without authority to do so in particular the provincial administration and politicians. Land had been used to as a resource to be dished out to politically correct people for personal

¹⁴ The permanent secretary is the most influential position in the civil society

enrichment. The irregular allocation of land has not only created inequalities but interfered with the protected lands with ecological integrity, cultural relevance or strategic location (Syagga, 2006). It is for the afore-mentioned reasons that the land activist proposed for the formation of an institution that would provide for effective checks and balances within its structure in the form of decentralized semi-autonomous and elected divisions at local levels (KLA, 2004a).

The drawing of colonial lines brought an end to the co-existence of the traditional societies with colonial policies confining communities in exclusive native reserves. The borders embraced ethnic specific territorial jurisdiction and thus helped foster ethnic identification. In addition, the colonial policy diverted attention of Africans from national politics and instead promoted tribal politics (Jonyo, 2002). The post colonial government's decisions to retain the colonial districts made it difficult for Kenyans to live in multi-cultural and multi-ethnic societies that would encourage diversity and interaction (Ogot, 2000). The effect of this continues to be felt even currently in the election process. Indeed in parliamentary and presidential elections political parties sell not only ideologies or policy options but ethnic sentiments. This trend has engendered widespread political cynicism among disadvantaged ethnic groups making it difficult to achieve any meaningful national political participation. The result has been demands for self-determination at the local level.

The Constitution of Kenya 2010 (the Constitution) provides a legal framework for the recognition and protection of the rights of the minorities and the marginalized communities and groups (herein after referred to as the marginalized). The Constitution introduces a right based approach to development, that is, an approach where everyone is entitled to development as a right and not as a favor from the state.

The principles that guide this area are public participation and affirmative action¹⁵. *Article 10 of the Constitution*¹⁶ recognizes public participation as a core value and principles that guide the interpretation and application of the Constitution. Affirmative action performs three key functions; First its remedies past discrimination through programs that can benefit individuals or society as a whole. *Article 56 (a) of the Constitution*¹⁷ provides for both. Second, affirmative action enhances diversity so that a state will be able to grow with better values, peace and stability. Third, affirmative action increases political power of the marginalized thus enabling them to influence decision making.

Article 260 of the Constitution defines marginalized community as: a community that, because of its relatively small population or for any other reason, has been unable to fully

¹⁵ Affirmative action is often used to denote a positive step taken to reverse or mitigate past discrimination and historical injustices.

¹⁶ National values and principles of governance.

¹⁷ 56. The State shall put in place affirmative action programmes designed to ensure that minorities and marginalized groups— (a) participate and are represented in governance and other spheres of life;

participate in the integrated social and economic life of Kenya as a whole; 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; an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or pastoral persons and communities, whether they are—nomadic; or a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.

Under the existing international legal framework, there is no definition of indigenous people or communities. But there are indicative characteristics that can define such a group. According to the *ILO Convention No. 169 Indigenous and Tribal Peoples Convention*, the following characteristics define indigenous peoples; Traditional life styles; Culture and way of life different from the other segments of the national population, e.g. in their ways of making a living, language, customs, etc.; Own social organization and political institutions; and Living in historical continuity in a certain area, or before others “invaded” or came to the area. In addition, such group must be non-dominant. There are factors that can point to the concept of non-dominance They are; Numerical inferiority; their ways of life and social organization; and their distinctive cultures.

Article 260 of the Constitution defines a marginalized group as a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in *Article 27 (4)*; i.e. any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth. In this case women, youth and people living with disabilities are considered marginalized groups in Kenya.

But all definition is based on relative numerical disadvantage based on age, sex, religion, ethnicity, race etc. There are two ways of defining minorities. First are national minorities who are afforded protection for being a minority in relation to the national demographics. The second is by looking at the minorities within the geographical boundaries of the County. In the case of devolved units there is need to protect minorities based on the demographics in a County. However to benefit from such protection and affirmative action programs one must have substantial ties with the County.

There are the various factors that must be considered in determining minority groups: poverty index, numerical inferiority, climatic conditions, baseline data, infrastructure development, economic status, historical Injustices, Special groupings e.g. persons living with disabilities, language, religion and age.

Devolution is seen as a solution under *Article 174 of the Constitution of Kenya*. This provides that the objective of devolution is to facilitate diversity, sharing of resources and participation and protection of disadvantaged groups. But without further units of decentralisation devolution may lead to further marginalisation. In the Kenyan case this remains a key issue especially in counties with ethnic minorities such as Bungoma, Elgeyo–Marakwet, Migori, and Tharaka–Nithi among others.

Article 10 of the Constitution provides the protection of marginalized as one of the national values, *Article 27 of the Constitution* outlaws discrimination, *Article 56* provides for affirmative action programs for the minority and marginalised groups and communities, *Article 91* mandate political parties to respect and include marginalised groups in leadership and *Article 200* provide that one principle governing public finance is the protection of the marginalised.

2.3.2.2 The imbalance of power

The president wields imbalanced power in an election. This arises from the disrespect for the separation of private resources from public (Jonyo, 2002; Omukuda, 2002). Devolution of power to other existing political and economic institution is thus herald as a starting point for any meaningful and lasting reforms (Ndulo 2006; Kimenyi 2002).

2.3.3 THE BENEFITS OF DEVOLUTION

The arguments for devolution are thus grounded in the political and economic benefits it presents. One important political contribution that a well constructed sub-national system offers is the enhancement of a democratic culture. Ndulo (2006a) states that by creating a number of governments below the national level, devolution multiplies the opportunity for political participation. Barrett et al (2007) and Oloo (2007) further point out that the community not only engages in the local political process but are able to demand effective provision of service. This is because when things go wrong, physical proximity makes it easier for citizens to hold officials accountable for their performance (Ndulo, 2006a). In empowering communities to manage their own resources more effectively, devolution simultaneously strengthens local institutions. Further, by affording the local community opportunity to participate in the planning and implementation of development projects enhances their sense of ownership of the projects (Barrett et al, 2007; Oloo 2007). Devolution ensures that varying interests of stakeholders are balanced, and that decisions are made in a rational, informed and transparent fashion. The decisions contribute to the overall efficiency and effectiveness of the institutions (Private Sector Corporate Governance Trust, 2002).

Devolution creates sub-national entities which provide an additional accountability mechanism by reducing the concentration of power at the centre thus hindering its arbitrary exercise.

Another key political advantage a devolved system of government has over centralized systems is that it is more inclusive. It provides channels for expression of regional sentiments and encourages national policies to become more sensitive to regional variations. This, as has been illustrated in the case of Kenya, is a limitation of the centralized system. Further devolution provides minority parties which might otherwise be excluded from political power the opportunity to exercise policy influence. Devolved levels of government have their *raison d'être*¹⁸ in the provision of goods and services whose consumption is limited to their own jurisdictions. Since outputs of such goods and services are tailored to the particular preference and circumstances of their constituencies, decentralized provision increases economic welfare of the constituents. This is because, the level of welfare is often higher if consumption occurs at each jurisdiction than if any single uniform level of consumption is maintained across all jurisdiction (Oates, 1999).

Another key economic benefit of the devolved government is the ability to effectively promote efficiency in the provision and use of public service and the allocation of

¹⁸ A French word meaning the reason for existence

resources. The core idea is that sub-national government by virtue of their proximity to the beneficiaries of policies outcomes can allocate and better extract resources more efficiently than central government. This is because, they have better access to local information, are more directly accountable to local constituents and can more effectively identify and articulate regional needs (Barrett et al, 2007). Donahue, (1997) in his assessment of Tiebout's (1956) economic model of decentralization argues that collective choices are less error prone. In terms of poverty alleviation, Barrett ET all (2007) argues that devolution provides a more effective governance framework for advancing pro-poor policies. Since the sub-national institutions are likely to be more familiar with the local circumstances and cost conditions, they are better equipped to distribute resources more equitably. In doing so, they target poverty more efficiently.

Another benefit of devolution is that by introducing inter-jurisdictional competition, it extinguishes the opportunity for bribery and rent seeking. Such opportunity are often created by the lack of competition that a central government monopoly supply of public goods and services presents (Barrett et al, 2007) devolution encourages innovation in the delivery of services as individual have a greater incentive to participate in all aspects of community life and to seek solutions to individual and collective choices (Kimenyi, 2002).

2.3.4 ARGUMENTS AGAINST DEVOLUTION

Despite the sound arguments for adopting a system of devolution, it is not without risks. If not properly designed and implemented, devolution leads to the translation of the central government bureaucracies, inefficient utilization of resources and lack of accountability at the sub-national level.

Devolution may facilitate elite capture by the local government and the persistence of anachronistic institution based on patron-client relations. If devolution rules and systems are poorly designed, there is a risk that politicians at the local level could use resources at their disposal to perpetuate themselves in to power. They accomplish this by skewing allocations in favor of their kinsmen, supporters, sycophants and all manner of political hanger-on to purchase political loyalty (Barrett et al, 2007; Nasongo, 2002). For instance, the legitimacy of the Constituency Development Fund (CDF) has been compromised by the power vested upon MP to single-handedly select members of the CDF Committee (CDFC).

By moving allocative decision further out of the limelight, devolution risks permitting greater levels of corruption and mismanagement of resources (Barrette et al, 2007). This is prevalent, as this study demonstrates where there is lack of awareness as to their roles and

capacity to execute them. The risk of corruption is higher in the absence of mechanisms to enable the community effectively monitor and evaluate usage of funds.

Some scholars (Kimenyi, 2002) argue that reduces inter-ethnic conflicts, devolution, must of necessity involve the creation of autonomous ethnic government. Based on geo-ethnicity each government would have an ethnic group as its unit of collective choice. This argument however, remains controversial since devolution may in actual effect undermine national unity and could inflate ethnic, religious, and cultural diversities. It has the potential to lead to even greater marginalization of minorities and minorities within minorities (CKRC, 2002a). The fact that the colonial government succeed in heightening ethnic division through restrictive community interaction may provide strong justifications against ethnic governments.

Devolution may also diminish the power and value of the national government to redistribute resources which creates a drawback to the less developed units. This may result in dependency and eventually instability where the dependency is chronic (CKRC, 2002a)

The debate on devolution of power I Kenya has revolved along similar lines. With the revival of the Constitutional review process, several issues remain outstanding which oblige a systematic analysis of Kenya's historical and present experiences with devolution. The aim of the analysis is twofold, firstly to determine whether efforts at decentralizing power have

translated into the benefits that should accrue from devolution. Secondly, to identify successes and shortcomings of these attempts at devolution as a foundation for ultimately charting an effective and acceptable way forward for democratic governance in Kenya. The next section therefore interrogates Kenyan efforts of devolution since independence.

2.3.5 CONCLUSION

Successful devolution requires an efficacious design for the context within which it is to be undertaken, especially in a situation such as Kenya's where core elite has mastered the art of self-reinvention with changing times. This ability had enabled the elite to embed it strategically to reap the fruits of a unitary government presiding over a weak political system with similarly weakly performing governance institutions that often belie the existence of relatively substantive governance frameworks. It is thus significant for devolution initiatives, that Kenya had addressed integrity in governance since the NARC government's 2003 accession to power on a reformist agenda¹⁹. Nevertheless, even though the NARC government was able to revive the economy²⁰, it performed less notably with

¹⁹ Among NARC's pertinent reforms were the enactment and implementation to varied levels of the Anti-Corruption and Economic Crimes Act (2003), the Public Audit Act (2003), Government Financial Management Act (2004), Public Procurement and Disposal Act (2005), Public Officers Ethics Act (2005), and Fiscal Management Act (2009), alongside various institutional reforms.

²⁰ Between 2003 and 2007, economic growth averaged above 4 per cent, up from negative real growth in 2000/01.

respect to improved governance, its reluctance to act against the indiscretions of the previous regime soon manifesting itself in strong, persistent attempts to cover up grand corruption within its ranks²¹. Consequent to the foregoing and other governance shortcomings, the 2010 Constitution underscores the need for transparency in governance.

Article 10 lists the national values and principles of governance that should bind all state organs towards sustainable development. Leadership and integrity in governance are also addressed in *Chapter 6*²², and *Chapter 4* includes a Bill of Rights identified as being integral to the Kenyan democratic state. These provisions reflect the government's obligations as a stakeholder, but also implicitly touch on individuals' responsibilities and obligations. To these ends, *Article 132* requires the president to annually "report...to the nation, on all the measures taken and progress achieved in the realization of the national values..." *Article 174* lists the nine objectives of the governance approach, while *Article 175* lists relevant principles, including democracy, separation of powers, reliable revenues, and gender sensitivity. *Article 176* (read together with the First Schedule) establishes 47 county governments that will each have a county assembly and county executive committee.

²¹ For the revelations of NARC's first and only Secretary of Ethics who resigned and "Ed into self-exile, see Wrong (2009). The NARC government instituted a judicial inquiry into what is arguably Kenya's most notorious scam, the Goldenberg scandal, but promptly dismissed its findings by exonerating a former vice president and finance minister alleged to be at the centre of the scandal. On the scandal, see 'Report of the Judicial Commission of Inquiry into the Goldenberg Affair', at <http://www.tkenya.org/documents/Goldenberg%20Report.pdf>. Accessed 12 April 2011.

²² Leadership and integrity.

Article 188 provides for subsequent alteration of county boundaries and the criteria for doing so. County governments are to decentralize functions and service provision while heeding efficiency and practicability. *Part 5 of Chapter 11* addresses the functional relationship between the national and county governments, while the *Fourth Schedule* elaborates the distribution of service delivery responsibilities. With the exception of omitted functions, which are to remain the preserve of the national government, functions may be duplicated across the levels of government. *Article 187* does permit the transfer of functions and requisite resources for their delivery between government levels. On the composition of the five-year county assembly, *Article 177* provides for an *ex officio* Speaker, an elected member for each ward (county constituency), special seat members to ensure that no more than two-thirds of members are from the same gender, and representatives of marginalized groups (i.e., the youth and disabled). In the case of these last two categories, the members are to be identified to reflect party strength across the county. The county assembly will legislate as necessary to facilitate delivery of its mandated functions, review the county executive committee's development planning proposals, and supervise the committee's implementation of priorities (*Article 185*). The county executive committee will include a directly elected governor, a deputy and members appointed by the governor – with the approval of the county assembly – from among persons not of the

county assembly (*Article 179*). The governor and the entire governor's office will be removable on the grounds of gross misconduct and/or abuse of office and/or lack of mental or physical capacity (*Article 181*). The county executive committee shall act as advisor to its legislative assembly, implement county and national legislation, originate legislation, and manage the affairs of the county (*Article 183*). County governments will establish offices as necessary and fill them, and will be responsible for the good conduct of such officers within the context of a national framework legislated by the National Assembly (*Article 235–236*). In the performance of its duties, and in concert with the provisions for the National Assembly, the 2010 Constitution empowers a county assembly to summon persons to give evidence, enforce such attendance under oath, compel production of documentary evidence and even interview witnesses abroad (*Article 195*). On the other hand, the Constitution also compels county assemblies to conduct their business transparently, including facilitating public and media participation in their proceedings and publishing legal materials in the Kenya Gazette. While encouraging cooperation between the two levels of government (*Article 189*), the 2010 Constitution nonetheless recognizes the potential for conflict, especially with regard to respective legislation over which the national government is superior (*Article 191*). The Constitution requires Parliament to ensure that county governments are adequately resourced for their effective service

delivery, but it also mandates Parliament to ensure county compliance with national financial management systems, failing which, the national government may intervene as appropriate (*Article 190*) and suspend the county government (*Article 193*).

CHAPTER THREE: ANALYSIS

3.1. PROBLEMS TO BE ENCOUNTERED

3.1.1 THE POLITICAL ENVIRONMENT

Kenya continues to place high hopes albeit naively in law reforms to pave way for rapid improvement of less than desirable socio-economic and political state of affairs. Indeed, the law does play a central role in governance. As Oyugi (2002b) and Ghai (2006) point out, however, legislation is not in itself sufficient in achieving the objectives for which it is often advanced. The legislation authority often times manipulates legal provisions for different purposes. The aim is usually to circumvent implementation of the law. In other cases legislation is only symbolic- to buy off domestic and international pressure but often backed with little intent to implement it. This was the fate of the Majimbo Constitution of 1963. More recently, the current Constitutional process which began in the year 2000 was a result of pressure upon the former KANU by internal and external forces (Ghai and Cottrell, 2007). The process took five years during which was characterized by delaying tactics and stand offs due to dissimilar motives among politicians. Some just wanted the former administration out of power and others used it to propagate views based on tribal biases and sectarian interest. Devolution is very sensitive because it is often forced upon

government that is reluctant to cede power. Lack of political will is therefore by and large the greatest obstacle to devolution.

The greater challenge however lies not in the entrenchment of the law but in how to arrive at broad political consensus and support for it. Such consensus will ensure the provisions are not frustrated but upheld and implemented because the politicians appreciate the sound rationale behind devolution.

3.1.2 FINANCES

The amount of money allocated to the implementation of this system is 10% of the national budget. This allocation is not sufficient for the proper implementation of this system and therefore this will be a hindrance to the implementation. Other counties are bigger than others and require more and therefore expecting the same amount of money to be used in all the 47 counties will not be practical and therefore this may be a challenge in the implementation stage and therefore the challenge is real.

3.1.3 ILLETRACY

The levels of illiteracy in some of these counties is so high and most of them are the elderly and yet the young people who may be sent to those areas may not know the language

and it therefore becomes difficult to communicate with the local and they may therefore reject the idea on that basis without knowing what it is and the history of majimboism also may make them biased on that ground.

3.1.4. MINORITY

There is always a minority that will feel disgruntled and does not want this system because of the prejudice brought about by the politicians and their intent to make the county system to look like majimboism and this will make them to reject the ideology.

3.1.5. TRUST

The politicians have not shown cause to be trusted and yet they are the same people who want to run for offices of the governor and senator in the new system of county and this leaves a bad taste in the mouth of the people

There is also the idea of it bringing conflict and the ideology is similar to majimboism that had brought about xenophobia and people do not want such kind of conflict to ensue.

3.2. HOW THEY WILL BE TACKLED

3.2.1 THE POLITICAL ENVIRONMENT

To surmount the challenge of political will, it would be essential to entrench devolution in the constitution. This will give devolution a strong foundation of legitimacy that would make it difficult to repeal. This is because the Constitution is the fundamental law of the

land and therefore commands more seriousness²³. The fact that the devolved system is found in the Constitution means that it is supposed to be obeyed by every single person and therefore there is no one who can go against the Constitution.

To avoid the danger of provisions that a reluctant government would seek to introduce to neutralize the law, the legal stipulations must not be broad. They should be precise and detailed in showing how the devolution of power will be implemented at each level. This may further draft of Acts of Parliament, preferably a Devolution Act. The Act should specify the strategies for achieving devolution, the units of devolution, and the procedures and mechanisms of operation for the units.

To achieve such broad political consensus that would be successful would be through putting in place administrative and other accompanying measures that would ensure effective implementation of the law. Most importantly, however, it would be accomplished through the gradual transformation of the political culture. For instance. Political competition presently founded on a culture of communal logic where the principle point of reference is the tribe. It needs transformation to a culture based on a strong party system

²³ Article 2 (1) of the Constitution of the Republic of Kenya, 2010. "This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government."

Article 2 (3) "The validity or legality of this Constitution is not subject to challenge by or before any court or other State organs."

Article 2 (4) "Any law, including customary, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."

Article 3 (1) "Every person has an obligation to respect, uphold and defend this Constitution."

with well established norms and traditions. This would ensure that ideology and not ethnicity determines the direction of voting in competitive election. The county system of government seeks to bring this kind of harmony where people are not thought of as an ethnic block but as Kenyans who need to be helped and that unity is more important in the diversity that we have as a country.

3.2.2. FINANCES

The government will have to increase the budgetary allocations for each county and since not all the counties are at the same level of development and of the same size it is important for the government to look how it can ensure that resources are distributed according to the needs of each county system.

There should also be a committee to ensure that the money allocated for the implementation is used as such and not used for other things and thereby ensuring checks and balances.

3.2.3. ILLETRACY, MINORITIES, AND TRUST

This can be surmounted by sensitization and ensuring that the locals have people who can tell them what the county system is all about without prejudice.

The main problem is the fact that the county system is not understood by everyone and therefore before implementation there should be some form of sensitization and thereby

ensuring that people know what it is they are entering in to and what is expected from them.

3.3. LESSONS LEARNT FROM OTHER COUNTRIES

3.3.1. PAPUA NEW GUINEA

It has the reputation of being one of the most ethnic diverse countries in the world. With more than eight hundred and fifty ethnic group among a population of just six million, it is evident that Papua New Guinea is a country ripe for a form of government that will enable the administration, and proper representation, of such a diverse populace. The key to delivery of devolution on the part of the new government was the Organic Law on Provincial Government and Local-level Governments, enacted in 1977. In this law, the principle of devolved government was codified, and it is important to quote its provision to this end. In it the people of Papua New Guinea resolve to:

- a) To make such changes as are necessary now contained in this Organic Law for the purposes of—
 - i. Maintaining our identity as a sovereign united nation; and
 - ii. Promoting equal opportunity and popular participation in government at all level;
- and

- iii. Providing especially the basic human needs for water, health education, transportation, communication, accommodation and social order through economic self-reliance; and
 - iv. Promoting responsible citizenship through self-management, control and accountability for one's actions; and
- b) To establish provincial Governments and Local-Level Governments (LLGs) in order to achieve the goals referred to in paragraph (a)

This law notwithstanding, Papua New Guinea has had to face, throughout its independent history secessionist movement. According to Francis Fukuyama, 'many outside observers and many residents of the country have noted that the country is weak and ineffective in delivering basic government services in large parts of its territory (Fukuyama, 2007). This is similar to the Kenyan situation. He identifies the lessons Kenya has to learn for the effectiveness of devolution.

These are:

- i. The political system is a quasi-Westminster, Fukuyama says 'the primary manifestation of this weakness' (of having a Westminster system) is, of

course the absence of strong national political parties, which are the primary vehicle by which other Westminster system generate strong governments.

- ii. The lack of proper delegation. Just as a significant extent in Kenya, political processes impact inordinately on the function and performance of the executive,
- iii. The administrative boundary is much more blurred, and the efforts of legislators to reach into the executive realm, weakens the ability of the latter to act cohesively. Part of the reason that politicians get involved in administrative issues in the first place is the fact that bureaucratic capacity was always weak and unable to deliver important services.
- iv. Lack of political accountability characterizes the system as a whole, and therefore the relatively weak for equitably distributed public goods.
- v. Lack of capacity for monitoring local projects at national level; 'severe lack of basic capacity and infrastructure at the district and Local Level Governments levels, particularly in remote areas', meaning that 'any devolution of power from the provincial to the district level may lead to service not being provided, or a de facto increase in the power of the national MP for the district ; and 'confused and unclear reporting lines

between LLG, district, provincial, and national levels of government' (Fukuyama, 2007).

3.4. SUMMARY

Kenya has experienced failure from time to time. These failures include– corruption, economic, stagnation, inequality, and poverty. These failure and episodic instability can be linked to the quality of governance (Kimenyi and Meagher, 2004). Quality of governance is in turn dependant on institution²⁴. These institutions can take different forms ranging from the constitution to local authority by laws to self regulation in informal business setting. It is these institutions that collectively determine the governance framework in a country.

²⁴ Institution have been defined as structure of rules and procedure and organization whether state provided or otherwise (Kimenyi and Meagher, 2004).

CHAPTER FOUR: RECOMMENDATIONS

Policy Options and Recommendations

Policy options and recommendations to be considered for effective implementation of the levels and units of governance are as follows:

This include a suggestion for the development of National guiding principles for further decentralization in all County Governments; development of a Devolution Act, National Cities and Urban Areas Act and development of a County Municipal Act by County Governments. The Devolution Act and policy is expected to provide for further decentralization in both urban and rural parts of Counties among others. The same law should also provide direction for rationalization and fit of other prevailing governance structures operating at County level, including Provincial Administration and line Ministries. National Cities and Urban Areas Act will provide for classification, structures, management and relationship with decentralized units and the County. The County Municipal Act will provide a mechanism/body for designation of cities and urban areas. Once a criterion is developed, the body can reassess the existing cities and urban areas and reclassify them accordingly. In terms of procedure, urban areas which qualify can apply to the established body for status upgrading.

The Constitution of Kenya, 2010 has made major strides in responding to the nation's governance challenges. This notwithstanding, the assignment of functions to the national and county governments through other provision of the CoK, 2010 and especially the Fourth Schedule point to the need for a unifying framework for the progressive transfer of functions. It is therefore proposed that a *Framework Policy Paper on Functional and Competency Assignment* be developed to act as the reference point for efforts aimed at transferring functions in government.

To avoid a multiplicity of uncoordinated efforts across the public sector, it is proposed that the Executive lead a unified process of distribution of functions, competencies and responsibilities between the national and county governments in the first instance. This process should be, in the first phase, largely administrative and guided by the Cabinet Committee on Implementation of the Constitution as the final policy decision point. This committee will be supported by a mirror committee of Permanent Secretaries, who will in turn work through a Technical Working Group (TWG). The TWG will guide actual implementation through sectorally defined Functional and Competency Assignment Teams (FACTs). The main implementation document for these teams will be the Framework Policy Paper on Functional and Competency Assignment and their main outputs will be Draft Sector Functional and Competency Assignment Policy Papers that will be cascaded

up to the Cabinet for approval. This will form the principal basis for transfer of functions in the public sector. In order to anchor the process and to accord with good international practice, it is proposed that the Devolution Bill be formulated to incorporate matters pertaining to transfer of functions. In addition, this process must be supported by a targeted public communication and engagement strategy supportive of the goals of the functional and competency reassignment exercise.

INTEGRATED DEVELOPMENT PLANNING AND EFFECTIVE PUBLIC SERVICE DELIVERY

Integrated development planning is a process through which devolved governments can actualize their short, medium and long-term plans. The resultant plans are comprehensive, strategic planning frameworks that will assist counties to achieve their developmental mandate. +They will assist the devolved governments to align national and devolved government development and to align spending priorities, and financial and institutional resources behind county policies and programmes. The plans will also serve as a basis for engagement between local government and the citizenry at the local level, and with various stakeholders and interest groups. This is important because participatory and accountable government only has meaning if it is related to plans and resource allocations.

The counties face challenges in addressing the development constraints arising from the demands of the new Constitution and improving the welfare of their citizens. The imperative of building attractive and sustainable settlements to improve the livelihoods of local communities is necessary. These challenges, including uncoordinated planning and development, could be addressed by harmonizing sectoral, national, and local planning processes. This will be achieved by developing a clear and compelling economic and social vision for their areas.

The Constitution assigns development planning to both levels of government. County governments are in particular assigned county planning and development, including statistics, land survey and mapping, boundaries and fencing, housing, electricity and gas reticulation and energy regulation. Other function areas include county transport, county agriculture, county health services, as well as trade development and regulation.

If counties are to benefit from integrated development planning, there will be need for legal and institutional mechanisms to foster and guide the progressive realization of a society led by planning. In this regard, it is proposed that a County Development Planning & Facilitation Bill, 2011 to provide a general framework for integrating economic and spatial planning be passed. The objectives of this Bill should be to facilitate and guide the development of a strategic, integrated development planning framework for counties in

Kenya. The legislation will in particular: provide for clear spatial objectives, including land use and settlement patterns; require them to develop clear service delivery objectives in terms of standards and levels of services as well as time bound plans for their achievement; link national, regional, county, sub-county and ward level planning and development control activities

The legislation will require that county plans are linked to national development vision and strategy and that plans are coordinated at the national and county levels. The bill will require that the following instruments be compulsory requirement for all county governments, namely: County Spatial Plan: this will provide a spatial expression of the social and economic development programme of the county, with clear statements of how it is aligned to and at the regional and national level in a manner that harmonizes the sustainable development of the county and Kenya. It forms the basis for other sub-county plans and will be a prerequisite for appropriation of resources. County Institutional Plan: this will elaborate the capacity building measures required to strengthen County Level institutions, organisations, laws, regulations and processes, in a manner that will lead to the effective application of the plans; County Human Resources Plan: will focus of enhancing the skills levels within the county to enable adherence and achievement of county and national development imperatives; County Performance Management Framework: will be

designed to facilitate the objectives of the county as articulated in the County Spatial Plan by ensuring that it responds to the needs of individuals and communities; prioritises actions and activities including resource acquisition and utilization; promotes accountability for public service delivery; ensures citizens get value for money and motivates county staff to strive for enhanced performance.

It is proposed that County Government plans are translated to 5-year delivery programs and projects. More importantly, county plans will be a major tool for budget and expenditures by county governments. In the transition process, the inaugural Governors should be mandated to develop plans and have them approved by the county assemblies within the first 12 months. Each county Governor would in addition be required to make an annual “State of the County Report” that would provide indications as to progress in achieving the plans by their administration, including a statement of the challenges they face.

The areas of potential conflict between the two levels of Government include issues relating to financial management and resource allocation criteria and intervention in and suspension of Counties by National Government. There is a likelihood of abuse of power by National Government when exercising oversight authority over County Governments.

The County Governments could, also, abuse the powers granted to them by the

Constitution and therefore fail to deliver services to the citizenry. Mechanisms of co-operation and co-ordination must address those concerns.

The recommendations are therefore that: intergovernmental relations legislation and where practicable, concrete decision-making mandates be assigned. An intergovernmental/co-operative National Government ministry and corresponding County departments / ministries to co-ordinate matters of intergovernmental co-operation a policy direction that National Government should endeavor to focus on policy formulation and enhancing the capacity of the County Governments, while the latter concentrate on implementation of projects and efficient delivery of services

National Government provides transitional model legislation where practicable pending the enactment by the County Assemblies of their own context specific legislation, An association of organized municipal authorities be underpinned in the intergovernmental relations legislation

A National and County coordinating council be established comprising the National President, Deputy President, Cabinet Secretaries, the 47 County Governors and the Chairperson of the association of the organized municipal authorities

The County Executive ministries are coordinates to the national ministries where practicable. Sectoral Forums/Working Groups comprising of Cabinet Secretaries, the

corresponding County Executives be established in order to facilitate and co-ordinate the execution of national government functions (police services, health, education, immigration and citizenship etc) within the Counties. The Committees of the County Assembly coordinate to the National Assembly Committees where practicable. Working Groups be established.

The areas of potential conflict between the County Governments include issues related to utilization of trans-county shared natural resources (forests, game reserves, rivers, lakes etc), sharing of existing assets in the provincial headquarters and developing joint infrastructure projects (roads and water projects). This requires the establishment of joint fora for co-ordination.

Recommendations:

The enactment of intergovernmental relations legislation to guide inter county co-operation. The incorporation of legislation by reference be underpinned in the intergovernmental relations legislation to enable Counties that are subject to the asymmetrical devolution of the legislative function or those that are yet to legislate a particular law to adopt the legislation of another County on a related field. There be established a Council of Counties comprising the 47 Governors with the chair on rotational basis, and shall hold a minimum of two sittings per year. Its steering committee be

composed of senior public servants responsible for intergovernmental affairs from each County. This would report to the National and County Co-ordinating Council on matters of national concern and progress on the implementation of national policy and legislation within the County. Additional fora to address issues of trans-county concerns be constituted on a needs basis

An inter-municipality forum comprising the elected representatives to convene at least twice a year

Intra County Co-operation

The County Government comprises of the County Executive and the County Assembly. There are other elective positions including the Senators and the Members of the National Assembly. It is also envisaged that some sub county units (cities and urban areas) will have elected members. It is, therefore, imperative that mechanisms of co-operation and co-ordination be established in order to improve service delivery. The principle that the devolution design ought to assume a broad institutional interpretation requires that public participation including also the involvement of non-state actors is emphasized. In this regard, also, the role of the public private partnerships is critical.

Recommendations

The relationship between the Senate and the County Assembly be coordinated by requiring the County Assembly to provide full and regular reports to the Senate on a bi-annual basis and the Senate to in turn provide the County Assembly with feedback on a bi-annual basis. Members of the National Assembly in their specific County be required to attend at least three County Assembly meetings a year but without the right to vote. An intra-County forum comprising of the Senator, Governor and Members of the National and County Assemblies be established to hold consultative meetings on a bi-annual basis. An inter-municipality forum be established between the County government and its sub units. County working groups comprising representatives of Civil Society Organizations, Community Based Organizations (with representation of minority and marginalized groups), private sector, professional associations and respective County Executive technocrats be established.

Concept of Cooperative Government

Article 189 of the Constitution lays the framework for cooperation between National and County Governments. Each level of government is supposed to perform its functions in a manner that respects the functional and institutional integrity of the government at the other level. The government at either level is supposed to assist, support and consult and as appropriate implement legislation of the other level.

Need for Joint Committees and Joint Authorities

The Constitution provides for the formation of Joint Committees and Joint Authorities to facilitate co-operation at both levels and also inter county co-ordination in the performance of functions and exercise of power. We recommend that the Joint Committees and Joint Authorities be inclusive in representation by: Having representatives of both levels of Government and representatives for County Governments be nominated by the Council of Counties, approved by the Senate, and appointed by the Governor. Representatives of the National Government will be nominated by the relevant Cabinet Secretary/competent authority, approved by the National Assembly and appointed by the President.

Intergovernmental Dispute Resolution

Article 189 of the Constitution provides that both Governments shall exercise their powers in a manner that respects the functional and institutional integrity of each level. It further states that Governments shall make every reasonable effort to settle disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration. The potential areas of conflict include the exercise of functions that lie within the concurrent jurisdiction, allocation of resources and national government intervention and suspension of a County Government. Agreements between Governments that exclude key partners

could also strain relations. The signatories to such agreements also need to be determined. Shared resources, if not properly managed, could occasion inter-county conflicts and conversely, well managed joint activities between Counties will enhance mutual co-operation. At the intra county level also, poor governance and a leadership disconnected from the citizenry could fuel discontentment.

Recommendations

The intergovernmental relations legislation makes provisions for, inter alia, The “National Arbitration Council” and dispute resolution managers and functions assigned Protocols and codes of conduct Village Council of Elders and specify their mandate. A dispute resolution role for some cadre of the restructured Provincial administration, for example, the Chiefs Counties submit draft legislation to the Kenya Law Reform Commission in order to assure that conflict of laws on account of concurrency of functions is detected early and appropriate measures taken to avert the potential conflict. There be specification of signatories to National and County Government agreements and designation of agreements that must be approved by Cabinet, those that are concluded on the basis of a signature by the Cabinet Secretary responsible for intergovernmental affairs and those where the signature of the sector Cabinet Secretary will suffice. A Requirement that cities and municipalities be included as signatories to agreements concluded through municipal

infrastructure programmes Require that for purposes of co-ordination of the exercise of concurrent jurisdiction, both Governments define and agree upon their respective roles and responsibilities Require that Counties enter into horizontal agreements that address trans-border issues and clarify signatories. Provide for the granting of incentives for Counties to undertake joint projects. Provide that Counties enact legislation to guide the conclusion of inter-county agreements.

Article 190 provides that National Government may intervene if a County Government is unable to perform its functions or fails to operate a financial management system that complies with the requirements prescribed by national legislation. Intervention by National Government must therefore only occur in the most clear of circumstances. The interim arrangement during the suspension must also reflect the oversight role of the National Executive and at the same time provide assurance to the affected County that the object and principles of devolved government are not eroded.

Recommendations

With regard to intervention in Counties by National Government, the Council of Counties be consulted and involved in decision-making. A Commission be established to run the affairs of the County during its suspension. Its composition includes as chair, the Governor of a well-managed County nominated by the Council of Counties, approved by

Senate and appointed by the President, representatives of the Public Service Commission (PSC), the Kenya Private Sector Alliance (KEPSA), and the Institute of Certified Public Accountants in Kenya (ICPAK), the Law Society of Kenya (LSK), Civil Society Organizations and the Attorney General.

Recommended Legal, Policy and Institutional Interventions

First, units of decentralisations should be created considering the needs of marginalised groups. The boundaries of these authorities should take cognizance of the interests of minority and marginalized communities so that some authorities are carved specifically for such interest groups.

Second, there should be mandatory county development plans that will have specific procedures for involving marginalised groups and communities. The process and implementation of the plans should involve these disadvantaged groups. Budgeting processes should also involve them. There should be mandatory monitoring and evaluation mechanisms that will target disadvantaged groups.

Third, marginalised groups and communities should be involved in county governance and public service through targeted nominations in line with the affirmative action requirements of Article 56.

Fourth, delimitation of Wards should consider creation of wards that will target minority and marginalised groups to ensure that they are able to elect a representative to the county assembly instead of relying only on nominations.

Fifth, the Kenya Human Rights and Equality Commission National Equal Opportunities to come up with Policy to guide the all country in the issues of protecting marginalised groups. They should also have officers that will monitor protection of marginalised groups at the County. A department within the commission should be created that is focused on marginalised groups and communities. The County government should establish a department that deals specifically on issues of marginalised groups and communities and to advice the county government on the appropriate measures to be undertaken in line with national policies and legislations.

Sixth, the County Government as a Facilitator of Minority and Marginalised Groups Rights should ensure that: Indigenous peoples are allowed to maintain their distinct identities, to maintain their languages, and to maintain the integrity of their relationship with their traditional lands. Thus, developmental acts by the County governments must not violate these rights. County governments should facilitate the attainment of such rights.

What are the policies on education in mother tongue? In this case, Counties are key in so

far as pre-primary education is concerned as being at the centre in relation to national legislation and policies.

Counties should also protect marginalized groups from harmful and repugnant cultural beliefs and practices. They should work towards changing attitudes and perception of members of the public regarding marginalized groups through such acts as the naming of streets and towns using minority languages.

Counties should invest in culture and cultural activities with special consideration for the minorities. The County government is empowered by the Constitution and allocated the resources to manage minority issues under *Schedule IV of the Constitution*.

There must also be a deliberate effort to allow the minority and the marginalized to access employment opportunities in the County.

Finally, Counties should protect of intellectual property of minority and marginalized communities, including sciences, technologies, medicines, and knowledge of flora and fauna as well as arts and performances.

Recommended Legislations

In terms of legislative proposals is recommended that a Minorities and Marginalized Communities Act be enacted to: define minorities and marginalized communities;

consolidate the benefits accorded to these groups; Provide legal and institutional mechanisms for realizing the benefits outlined in Art.56 and 204 of the Constitution.

Other legislations relating to Marginalized groups shall be provided for in the respective laws e.g. Persons with Disability Act of 2003, and international conventions ratified by Kenya such as the Convention on the Elimination of All Forms of Discrimination (CEDA) and the UN Convention on the Rights of Persons with Disabilities. Other legislation on youth can be enacted.

CIVIC EDUCATION ON DEVOLVED GOVERNMENT

Civic education is political education or, the cultivation of the virtues, knowledge, and skills necessary for political participation. It integrates both formal settings (schools) and informal settings (families, communities, libraries, houses of worship, workplaces, civic organizations, unions, sports teams, campaigns and elections, mass media).

Integrated civic education is a key factor in building a symbiotic culture of accountable government and responsive citizens this is why The Task Force has been mandated to ensure that policy and legislative frameworks that anchor devolution are buttressed with civic education to enable Kenyans understand, embrace, support, promote, and protect the gains of devolution.

Civic education is critical in post-Constitution making and Constitution implementation phase in Kenya due to: Conflictual referendum where political positions for and against were adopted, a large mass of the population remain ignorant of the Constitutional provisions, lack of experience with a new system ushering in major institutional, structural and political changes, a volatile political situation where changes will have an unprecedented impact on the countries' future and the need to sustain democracy, because of its combination of numerous and more varied points of shared common interest and its requirement of continuous readjustment through meeting the new situations produced by varied intercourse.

Civic education on devolution is critical in enhancing Kenyans' participation in the success of the devolved system particularly in post-implementation legislative phase. This will help enhance Kenyans' passionate participation in the economic and the political socialization of the devolved system.

Civic education should therefore be accessible to all the diversity of Kenyan people. The information conveyed should be sensitive and collaborating the Constitution and related legislation; and designed on the basis of relevance to building a united Kenya. Of particular importance is the need to create a culture in which Kenyans are encouraged to participate in self-actualization.

The main objective of civic education is to convey knowledge of Kenya's political system and context. This will include information on the devolved system of government; the nature, powers and operations of the National and County institutional offices (distribution of functions); inter-governmental and intra-County relationships; allocation and distribution of resources; and structures and institutions of devolved government, among others, including transitional issues related to elections, the principal economic, social and political issues facing County administration.

Through civic education, Kenyans can be taken out of a narrow circle of personal and family selfishness, to the comprehension of joint interests, the management of joint concerns so that they may act from public or semi-public motives which unite instead of isolating them from one another.

There is the inspirational notion that through devolution, Kenyans will act through justly administered institutions that will stabilize and perpetuate the good society.

Civic education on devolution will be used to describe and explain the Constitutional provisions on devolution; the legal, structural governance and political changes; and for the dissemination of information, materials and programmes designed to inform the people

about the changes, their rights and responsibilities; and the specific and mechanics of County governance and relationships with the National government.

This will inherently involve providing information on who is responsible for what functions. Additionally, civic education may incorporate voter education; who will be candidates; where and how to register; political parties lists; how electors can check the voter lists to ensure they have been duly included; what type of elections are being held; where, when and how to vote; and how to file complaints.

Information will be made available and accessible to all so as to achieve universal coverage of the Country allowing for use of different languages in a county, even if there is only one official language. Specially target groups will be; minorities, internally displaced persons, the youth and other marginalized segments of society.

Information will be relayed in; informal settings, educational institutions, through live, interactive coverage on national TV stations, online blogs and online interactive questionnaires. Stakeholders will be engaged in the development of a sensitive message that disseminates a positive image of devolution through mobilizing public opinion in favor of maintaining the tempo of reconstruction under devolution, integrating the media to play a key role in breaking down negative stereotypes against devolution and encouraging

Kenyans' full participation and mobilizing the international community to make constructive contributions to civic education, drawing on its substantial experience in promoting democratic participation worldwide. Because Kenya is emerging from conflict, civic education on devolution curriculum should motivate all Kenyans to positively support and promote the ideas of devolution. It should also begin with an explanation of the National Accord of February 2008 and the attendant mechanisms such as the Krigler and Waki Reports; the institutional reform process setting in place the Interim Independent Electoral Commission (IIEC); Committee of Experts (CoE); the Interim Independent Boundaries Commission (IIBC); Truth Justice and Reconciliation Commission (TJRC); and National Cohesion and Integration Commission; the outcomes of these Commissions and how they have contributed to the reform process. It should describe the Constitution-making process, culminating in the new Constitution focusing citizen desire for a democratic and equitable society, human rights of all citizens (especially their civil and political rights with regard to governance); desire for full participation in the political process and finally it should highlight the importance of citizen knowledge and expertise in the areas of reconstruction and national reconciliation, as well as the importance of citizen equal involvement in the political process. On policy issues, it is proposed that a national comprehensive curriculum on Civic Education on devolution should be developed

through partnership of the government and non-state actors, policy should ensure that the material developed for civic education is accurate, relevant and politically neutral.

All materials should be reviewed to ensure they are politically neutral and gender-sensitive, sufficient resources should be provided to ensure such programmes reach all citizens, and all people should have access to civic education on devolution. Special civic education programmes should be initiated targeting women, minorities, displaced persons, youth, and people with disabilities, and others less likely to access mainstream delivery. Gender-sensitisation programmes be developed for personnel responsible for civic and voter education and all civic education programmes should be monitored. Devolution messages should highlight the capacities of devolution institutions, encourage and promote citizen's full participation in the devolution implementation process, the country's leadership and citizens need to understand that deviation from set principles and objects of devolution are not acceptable and constitute fraudulent impunity and linkages should be created between civic education and training for the public servants and politicians.

With regard to legislation, it is proposed that the national law entrench the permanent creation of National Civic Education Body. Existing legislation be reviewed to take into account the proposed curriculum suggested for national civic education e.g. The Education Act, the NGO Act and the Communication Commission Act. There are several

outstanding issue on civic education, these include; comparative models for civic education, integration of civic education on devolution in national civic education on the Constitution, legislation on civic education is required and design of civic education curriculum.

Conclusion and Recommendations

The current institutional, governance and human resource structures which were developed and evolved under a different Constitutional and legal order need to be reformed to be in tandem with the provisions of the Constitution. Towards this end the existing public service human resource management policy framework, statutes and practices and the attendant challenges that constrain the public service in effectively delivering on its mandate will need to be addressed. In particular, a creation of a County Public Service Board to carry out the responsibility assigned by the Constitution in *article 235* is recommended. Other issues that need to be ensured include: Drafting of legislation of a County Public Service bill to provide for staffing of county governments as provided for under *Article 235*. Audit of the existing human and technical capacities in the Public Service disaggregated into different cadres to document the number of employees and the skills available in the civil service, local authorities, state corporations and regional bodies; facilitate re-distribution and deployment of staff to counties. Imposition of an immediate

embargo on non essential employment in the entire public service to facilitate deployment of existing capacity and avoid staff retrenchment once the counties are operational; avoid overstaffing through unscrupulous and supply-driven recruitment during the transition period. Existing terms and conditions of service for both the national and county staff to remain unchanged until a framework for harmonizing terms and conditions of service is in place.

Developing a Capacity Building Framework that identifies human resource and institutional capacity gaps and specific interventions especially on; training programmes, optimal staffing; financial requirements, physical infrastructure (office facilities etc). This will be aimed at equipping identified county staff with skills necessary to deliver functions at the county government level and avoid overwhelming counties with responsibilities they are unable to carry out.

Undertaking institutional capability assessment for Kenya Institute of Administration (KIA) and all the Government Training Institutes to determine their readiness to effectively implement training and capacity building programmes for transforming the public service.

Developing and implementing training programmes that target the political leadership, Permanent Secretaries, Chief Executive Officers of state corporations and Heads of department on legal and policy implications of the Constitution.

To facilitating cooperation between the various levels of Government, prepare a reporting system that would enhance the co-ordination of all public service staff in the country.

Developing guidelines on the development of organizational structures and staff establishment to be used by county governments consistent with the distribution of functions for both national and county governments at the county level. This will assist county governments in having an initial framework for the establishment and abolition of offices.

Developing a phased implementation Plan based on the timelines stipulated in the Constitution. The activities and stakeholders that would be required to bring to life and implement policies on devolved governments are varied. The coordination of the implementation of these activities and the involved stakeholders will determine the success of the process. This process is anticipated to be undertaken in three phases, which cover the period before the next elections, the period after and that after August 2015 when the county governments will be fully operational. In this chapter we are only concerned with the last two phases because activities identified to be carried out within this period are critical for the establishment of the system of devolved government.

The transition period as defined by the Constitution is three years after the establishment of the county governments that is between August 2012 when the county governments come

into being after the next elections and August 2015. However, for our purposes we define two transition periods, the first being that after the passage of Bills necessary for effecting devolved governments, including that provided for by Article 200, and August 2012. Within this period arrangements will be made to ensure that county governments start on good footing after August 2012, when the second phase of the transition period starts.

It is proposed that Transition Processes be anchored in law through a Transition to County Governments Bill, 2011. The bill will provide a framework and regulations governing the process for establishing the county governments, including: roles of relevant stakeholders, in particular, MDAs, LAs, Constitutional and other state organs milestones for key activities a mechanism for resolving disputes arising during the process. It is proposed that the bill provides for the establishment of a Transition Authority that will coordinate the transition process. This authority is proposed to be in place until all the counties are fully established.

Some of the issues to be articulated during the transition period include: Human Resource: how existing human resource in the central government, including the Provincial Administration, and local authorities will be rationalized and deployed for the effective service delivery; Service delivery: how continuation of delivery of services at both the national and county governments will be guaranteed in the transition period; National

stability and security: how national stability and security will be assured in the course of transition; Assets and liabilities: how existing assets and liabilities will be apportioned and managed; Policy and facilitative legislative framework: how requisite policies and facilitative legislation will be formulated on timely basis to ensure compliance with the transition schedule set out by the Constitution; Capacity building framework: how capacities from the perspectives of human and physical infrastructure will be undertaken to ensure that county governments take off smoothly; Ongoing reform processes: how the various ongoing reform processes at both the current central and local government levels will be transited into the new dispensation; and Communication: how information accruing from and relating to the transition process will be generated, owned, managed and disseminated.

TRANSITION AREAS

The attainment of the issues outlined above over the transition period will be important for the success of counties. Some of the activities to be undertaken during the first period are summarized in Table 1, indicating why the actions are necessary, who the actor are, the supporting policy measures/legislation, the expected outcome and the timelines. The implementation of some these proposals are already in progress, for example audit of assets

and liabilities of local authorities and audit of central government staff in counties have started. The audit of the assets and liabilities of LAs is necessary to assist in the clearing of their financial obligations as required by the terms of reference of the Task Force. The audit of current government and local authority staff stationed in counties is to assist in their secondment to county governments during the transition.

CHAPTER FIVE: CONCLUSION

Having examined Kenya's experience with devolved systems of governance, this study draws several conclusions on their fundamental weakness.

Much of the interethnic conflict in Africa has been due to competition for resources in the absence of strong democratic political institutions. The centralized state has greatly contributed to the skewed development of regions. Strong arguments for devolution are therefore based on its principle advantages of ensuring equitable distribution of resources and participation of the local community in their development.

Kenya's first experience with majiboism failed because its adoption was not based on a sound principle of governance. It consequently lacked political will for successful implementation. The region lacked financial independence from the centre critical for their sustainability. The socio-economic environment in which Majimbo was introduced was politically immature and unprepared for the radical change from the centralized system colonialists had nurtured. There was also belief that regionalism would fuel national disintegration, thus it lacked public support.

The capacity of Local Authority (Las) to deliver satisfactory service has over the years been eroded by a strong central government that has exercised control over decisions and administrative operations of Las. Lack of financial independence and resources, overlap of

roles and conflict with central government and its arms are major obstacles to the autonomy of LAs. Other difficulties are interference by the political wing of the council and a poorly developed human resource base. Failure to integrate development activities with other decentralized funds and lack of capacity of the community also hamper efficient operations of LAs.

The study also concludes that devolved funds such as CDF have registered some significant achievement in poverty alleviation and equitable distribution of resources. These funds, however, have institutional weakness that should be addressed to ensure their effective operation. The funds exhibit strong tendencies towards the elite capture. This has led to the unequal distribution of resources within the sub national units and lack of community support for the devolved structures.

It has been shown that county governments have powers to decide on their administrative structures, including exclusive control of its public service. The structure is expected to be designed around functions that the counties identify as important for their development. The structure is also expected to be cascaded to lower administrative units, primarily the sub-county, the ward and the village where necessary.

It is proposed that during the transition, before county governments appoint their own staff national staff is retained in counties. This is necessary to ensure that service delivery is not

interrupted. Thereafter county governments through their Public Service Commission's will appoint their own staff.

In the case of the Provincial administration and the security arrangements in counties, it is proposed that a taskforce be established to restructure the system; and, an evaluation be undertaken to establish the optimal staff establishment after the proposed restructuring.

REFERENCES:

1. Barret, C.B, Mude A, G and Omiti J.M., 2007. *Decentralization and the Social Economics of Development: Lessons from Kenya*. Nairobi: CAB international
2. Bekke, H., W. Kickert and J. Kooiman. 1995; "Public Management and Governance." In Kickert and F. A. van Vught, eds. *Public Policy and Administrative Sciences in the Netherlands*. London: Harvester-Wheatsheaf.
3. CIPFA. *Corporate Governance in the Public Services* (London: CIPFA, 1994), p. 6.
4. Cotrell, J and Ghai, Y., 2007. Constitution Making and Democratization in Kenya (2000-2005). *Democratization*, Vol. 14. No. 1, pp1-25.
5. D. Osborne & T. Baebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Reading, MA: Addison-Wesley, 1992).
6. Donahue, J. D. (1997) Tie? Or not Tiebout? The Market Metaphor and America's Devolution Debate. *Journal of Economic Perspectives*, Vol., No. 4 pp 77-82
7. G. Stoker, ed., *The New Management of British Local Governance* (London: Macmillan, 1999); G. Stoker, ed., *The New Politics of British Local Governance* (London: Macmillan, 2000);

8. Ghai, Y. P., 2006. *Law in the Establishment and Management of Decentralization*.
Hong Kong: University of Hong Kong.
9. Jonyo, F., 2002. Ethnicity in Multi-Party Electoral Politics. In: Chweya, L. Ed.
Electoral Politics in Kenya. Nairobi: Clarion, pp86–107.
10. K. Ohmae, *The Borderless World: Power and Strategy in the Interlinked Economy*
(London: Collins, 1990);
11. Kulwaum, G., n.d. *Problem of Devolution of Papua New Guinea Education*.
Available at
<http://www.pngbuai.com/300socialsciences/education/policy/development/kul-devolution-chap1.html> [Accessed 10 July 2009]
12. M. Foucault, *The Order of Things* (London: Tavistock, 1970);
13. M. Porter, *The Competitive Advantage of Nations* (London: Macmillan, 1990);
14. Metz, H. C., 1991 ed. *Nigeria: A Country Study*. Washington: GPO for the
Library of Congress. Available at: <http://countrystudies.us/nigeria/77.htm> on 13
July 2009. Accessed 10th January 2012.
15. Milward, H. B. and K. Provan. 2000. "How Networks Are Governed." In C.
Heinrich and L. Lynn, eds. *Governance and Performance: Models, Methods and
Results*. Washington, DC: Georgetown University Press.

16. Milward, H. B., ed. 1996. Symposium on "The Hollow State: Capacity, Control and Performance in Interorganizational Settings." *Journal of Public Administration Research and Theory*. Vol. 6, No. 2:193–313.
17. Morwe, K., 2007. Khutsong is Democracy gone Wrong, Letter to the Editor. *Sunday Times*, 13 May 2007.
18. OECD, *Governance in Transition: Public Management in OECD Countries* (Paris: OECD/PUMA, 1995);
19. OECD, *Ministerial Symposium on the Future of the Public Services* (Paris: OECD, 1996).
20. R. Rhodes, ed., *Transforming British Government*, 2 vols. (London: Macmillan, 2000).
21. Rhodes, R. 1996. "The New Governance: Governing without Government." *Political Studies* No. 44: 652–657.
22. Rhodes, R. 1997. *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability*. Buckingham: Open University Press
23. Stoker, G. 1998. "Governance as Theory: Five Propositions." *International Social Science Journal*, Vol. 50, No. 1: 17–28

24. T. Kuhn, *Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1970).
25. The World Bank, *Governance and Development* (Washington: World Bank, 1992).
26. W. Reinecke, *Global Public Policy: Governing without Government?* (Washington: Brookings Institution Press, 1994)
27. Kimenyi, M., 2002. Ethnicity, Institutions of Governance and conflict Avoidance. KIPRA Discussion Paper No. 23. Nairobi: KIPRA.
28. Nasong'o, W. S., 2002. Resources Allocation and the Crisis of Political Conflicts in Africa: Beyond the Inter Ethnic Hatred Thesis. In: Okoth, P.G., and Ogot B. eds. 2002. *Conflict in Contemporary Africa*. Pp44-55
29. Peters, B. G. and J. Pierre. 1998. "Governance Without Government? Rethinking Public Administration." *Journal of Public Administration Research and Theory*, Vol. 8, No. 2: 223-243.

