

## CHAPTER ONE

### BACKGROUND TO FINANCIAL DEVOLUTION UNDER THE CONSTITUTION OF KENYA 2010

#### 1.1. Introduction

To what extent can the Constitution of Kenya and the laws enacted under it promote equitable distribution of resources in Kenya? This has been issue of concern in Kenya's new constitutional dispensation. This therefore requires incisive evaluation and critical interrogation of laws relating to financial devolution in Kenya.<sup>1</sup> Further, a study of historical experience of financial devolution in Kenya since independence may help postulate the likely impacts of the Constitution of Kenya in addressing inequitable distribution of resources.<sup>2</sup>

Kenya is one of the most centralised states<sup>3</sup> in the world with a very powerful executive. Both centralisation and an imperial executive are features of Kenya's colonial legacy. It has been argued that a centralised government is not suitable for a country with as much cultural, geographical, ethnic, religious, historical, diversity as Kenya.<sup>4</sup>

Centralisation, poor economic and financial planning in Kenya arguably has a contribution to marginalisation of various groups and communities in Kenya especially with regard to financial resource allocation.<sup>5</sup> Centralisation of management of financial resources in the country has greatly benefitted communities which are affiliated to the occupier of the office of the presidency or communities with political influence.<sup>6</sup>

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<sup>1</sup> Koki Muli (2005) "The Draft Constitution of Kenya 2004 (Bomas Draft): Reflections and Commentary on Issues of Content and Process," Institute for Education in Democracy, Nairobi.

<sup>2</sup> *Ibid.*

<sup>3</sup> Kipkomei arap Kirui & Kipchumba Murkomen (2011) "*The Legislature: Bi-Cameralism under the new Constitution*," Society for International Development (SID), Nairobi.

<sup>4</sup> Ghai Yash (2008) "Devolution: restructuring the Kenyan state," Vol. 2, 2008, *Journal of Eastern African Studies*.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

In this way the centralised state has retarded equitable nation building and economic development.<sup>7</sup> Further, centralised financial management has been in companion with corruption and financial embezzlement.<sup>8</sup>

As a result of perceived and real problems of centralisation, there has been an ongoing debate regarding the suitability of financial devolution in remedying inequitable financial distribution in the country. Various arguments have been put forward to support and oppose financial devolution. First, financial control and management was based on the central Government and distribution of financial resources was benefiting regions and sectors of the economy that were determined by the executive. Second, there was need for public participation in the control and management of financial resources.

On the other hand, some argue that devolution of financial resources would facilitate devolution of corruption.<sup>9</sup>

Devolution of financial resources will inculcate positive changes including ensuring equitable distribution of national resources, uplifting marginalised communities, increasing employment opportunities and faster decision making in facilitating economic development. Arguments against financial devolution include devolution of corruption, promotion of ethnicity, excessive taxation and expensive governance structures.<sup>10</sup>

In the run-up to independence in 1963, the structure of Government and in particular devolution was one of the most contentious issues.<sup>11</sup> Constitutionally, devolution being the administrative tool where there exists transfer of authority for decision-making, finance and management to

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<sup>7</sup> *Ibid.*

<sup>8</sup> Some of the scandals that Kenya has witnessed in the recent past include Goldenberg, Anglo-Leasing and Triton. See also Naftal Makori (2013) "Triton Scandal haunts county nominee," Standard Digital, May8, at [http://www.standardmedia.co.ke/?articleID=2000083189&story\\_title=triton-scandal-haunts-county-nominee](http://www.standardmedia.co.ke/?articleID=2000083189&story_title=triton-scandal-haunts-county-nominee) (accessed 11/10/13).

<sup>9</sup> Kipkemoi arap Kirui & Kipchumba Murkomen (2011) "*The Legislature: Bi-Cameralism under the new Constitution,*" *op.cit*

<sup>10</sup> Koki Mulwa *et al*, (2011), "Devolution and nation Building in Kenya," Strathmore University, Nairobi.

<sup>11</sup> Okoth-Ogendo H.W.O (1972) "The politics of constitutional change in Kenya since independence, 1963-1969," 71 *African Affairs Journal* 9.

quasi-autonomous units of local government with corporate status.<sup>12</sup> Devolution usually transfers responsibilities for services to local governments that elect their own elected functionaries 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.<sup>13</sup>

The Independence Constitution of 1963 was mainly an establishment of a devolved system of government with power shared between the centre and the seven newly established regions, each with a Regional Assembly and elected local government authorities.<sup>14</sup> These regions were Nyanza, Western, Eastern, Rift Valley, Coast, Central and North Eastern. Devolution was a constitutional framework within which the Euro-Asian and minority groups hoped to protect their interests and share power in the post-independence period.

Between 1964 and 1969, regionalism was dismantled by constitutional amendments. The Constitution of Kenya (Amendment) No. 28 of 1964 created the office of the President as the executive authority of the regions (popularly called ‘*Jimbos*’ were substantially reduced to what

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<sup>12</sup> Kipkemoi Kirui and Kipchumba Murkomen, (2012) *The Legislature: Bi-Cameralism under the new Constitution*, Society for International Development, Constitution Working Paper No. 8., Nairobi, *op. cit.*

<sup>13</sup> The words devolution, decentralization, deconcentration and delegation have always been confused in their usage as being synonymous. They however, have different meanings. Decentralization is the process of dispersing decision making and governance closer to the people and includes dispersal of administration or governance in sectors. Deconcentration is considered a weaker form of decentralization and is found in unitary states. 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. Delegation is the most extensive form of decentralization where the central government transfers 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.

<sup>14</sup> H.W.O. Okoth-Ogendo (1993) “Constitutions without constitutionalism: Reflections on an African political paradox,” in D. Greenberg *et al.* *Constitutionalism and Democracy: Transitions in the Contemporary World* 65 69.

may be described as bureaucratic departments of the executive arm.<sup>15</sup> Later, the Constitutional (Amendment) Act No.14 of 1965 completely deleted the executive powers of regions.<sup>16</sup>

The Constitutional (Amendment No. 2) Act No. 38 of 1964 transferred to Parliament powers to alter regional boundaries. The independent sources of revenue to regions were diverted to Central Government. These included local taxation, establishment of regional police formations and local government authorities.<sup>17</sup> This second amendment greatly dismantled financial devolution as it existed in the Independence Constitution. Over time, this amendment resulted in poor accountability by the Central Government and unequal distribution of wealth. Regions not friendly to the government were less developed compared to regions friendly to the government.<sup>18</sup>

Despite this amendment which removed financial devolution from the Constitution, a number of decentralized funds have over time been introduced in Kenya through legislation and policy directives. Some of these funds include Constituency Development Fund (CDF), Water Service Trust Fund (WSTF), and Local Authority Transfer Fund (LATF).

In 2003, the government through the Constituencies Development Funds Act No. 10 of 2003, established the Constituencies Development Funds (CDF).<sup>19</sup> The Fund was meant to achieve rapid socio-economic development at constituency level through financing of locally prioritized projects and enhanced community participation.<sup>20</sup> Water Service Trust Fund (WSTF) under the Water Act, 2002 to mobilise resources and provide financial assistance towards capital investment costs of providing water and sanitation services.<sup>21</sup>

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<sup>15</sup> Kithure Kindiki (2007) “The emerging jurisprudence on Kenya’s constitutional review,” and J. B. Ojwang’ (1990) *Constitutional Development in Kenya: Institutional adaptation and social change*. Nairobi: ACTS Press, *op.cit.*

<sup>16</sup> Ghai, Y.P. and. McAuslan J.W.P.B (1970) *Public Law and Political Change in Kenya*, Oxford University Press: Nairobi.

<sup>17</sup> *Ibid.*

<sup>18</sup> *ibid.*

<sup>19</sup> Section 4 of the Constituencies Development Fund Act No. 3 of 2003.

<sup>20</sup> Report by the National Anti-Corruption Campaign Steering Committee on the Constituency Development Fund: An Examination of Legal, Structural, Management and Corruption Issues in Kenya, June 2008.

<sup>21</sup> Section 83 of the Water Act, 2002.

The Local Authority Transfer Fund (LATF) under an Act of Parliament in 1998 with the main objective of providing resources and incentives to enable local authorities to supplement the financing of the services and facilities as per the Local Government Act.<sup>22</sup>

Others include Poverty Eradication Loan Fund (PELF), Constituencies Bursary Fund, Free Primary Education Fund (FPE), and National Fund for Disabled People, HIV/AIDS Community Initiative Account, Community Development Trust Fund (CDTF), Road Maintenance Levy Fund, the Youth Enterprises Fund, Women Enterprises Fund and the Rural Electrification Programme Levy Fund (REPLF).<sup>23</sup> These funds are meant for specific social challenges.

These devolved funds have been criticized on various grounds. First, unclear units and limits of devolution, multiplicity and overlaps of funds, inadequate operational legal framework, shortage of capacity for both public officers and communities to effectively engage in the management of decentralized funds.

In recent years especially in the run-up to constitutional reform in Kenya, financial devolution became one of the most highly contested, even divisive, concepts in Kenya.<sup>24</sup> A consensus on the mode of devolution was at long last covered under Constitution of Kenya in August 2010 to address equity in resource distribution among other issues.<sup>25</sup> Specifically, financial powers to two levels of government: National and County Government under Articles 201 to 231 provides for public finance in Kenya.

Articles 10 and 201 of the Constitution of Kenya provide for the principle of financial devolution in Kenya. It states that financial devolution under the Constitution of Kenya is intended to ensure equitable distribution of national revenue, promote openness and accountability and encourage public participation in economic development.

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<sup>22</sup> Section 4 of the Local Authorities Transfer Fund Act No. 8 of 1998.

<sup>23</sup> Centre for Governance and Development, (2007) *National Devolved Funds Report: Institutional Structures and Procedures*, Centre for Governance and Development, Research report 3.

<sup>24</sup> Dan Juma (2008) "Devolution of power as constitutionalism: The constitutional debate in Kenya and beyond" (August 15, 2008). Ethnicity, Human Rights and Constitutionalism in Africa, International Commission of Jurists, eds., pp. 36-58, Nairobi, Kenya, 2008, available at SSRN: <http://ssrn.com/abstract=1382821>. (accessed 24/2/2010).

<sup>25</sup> Chapter 11; Art. 174-192.

The criteria for financial devolution are provided for under article 203 of the Constitution of Kenya as protection of national interest; the need to ensure that county governments are able to perform the functions allocated to them, the fiscal capacity and efficiency of county governments; development and other needs of counties; economic disparities within and among counties and the need to remedy them; the need for economic optimization of each county and to provide incentives for each county to optimize its capacity to raise revenue.

Besides the funds that are allocated to the county governments from the Consolidated Fund,<sup>26</sup> there is the Equalization Fund.<sup>27</sup> It is meant for alleviation and equalization of marginalized areas to rest of the country<sup>28</sup> The county governments have also been given powers to collect their own revenue from property rates, entertainment taxes and any authorized taxes.<sup>29</sup>

Besides the form of devolution under the Constitution, there exist other forms of financial devolution in various Acts of Parliament.<sup>30</sup> Some of these devolved funds include Constituency Development Funds (CDF), Local Authority Transfer Funds (LATF), Free Primary and Secondary Funds etc. All these forms of devolution shall be the subject of interrogation by this research.

## **1.2. Statement of the Problem**

The research problem that this study seeks to address is inequitable distribution of financial resources in Kenya with emphasis to the constitutional transformation in distribution of financial resources following the promulgation of the Constitution of Kenya 2010. The Constitution of Kenya 2010 presents a paradigm shift as far as financial resources distribution and management is concerned. The Constitution of Kenya has introduced devolution among other mechanisms that will guide management and distribution of resources in Kenya.

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<sup>26</sup> See Articles 206 and 203 of the Constitution of Kenya 2010.

<sup>27</sup> Article 204 of the Constitution of Kenya

<sup>28</sup> Article 204 of the Constitution of Kenya 2010.

<sup>29</sup> Fourth Schedule to the Constitution of Kenya.

<sup>30</sup> See Constituency Development Fund Act 2013

Studies and history have shown that Kenya today is not comparable in terms of economic development to other nations which were as young and at the same level of economic development as Kenya at the time of independence.<sup>31</sup> Inequitable financial distribution in Kenya is as old as the independent Kenya and has been attributed various factors. Theories have been developed to address the root causes of slow growth in the economy and increased poverty in various sectors and areas of the country.

First, much has been blamed on irresponsible governance and management of resources. Second, it has also been argued that lack of political responsibility among leaders in addition to ethnicized politics and governance.<sup>32</sup> Third, there have been arguments that financial centralization is the cause of marginalization of certain parts and populations of Kenya hence under development.<sup>33</sup> Juridically, some scholars<sup>34</sup> have argued that lack of institutional and effective legal and policy frameworks for addressing the challenges of marginalization and underdevelopment in Kenya is a major contributor to continued slow growth.

Specifically, centralization of power and administration of resources was a result of constitutional amendments in 1964.<sup>35</sup> The centralization of the economic administration of

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<sup>31</sup> See generally Barack Obama (2006) Speech at University of Nairobi, Taifa Hall, Nairobi, at [www.uonbi.co.ke](http://www.uonbi.co.ke) (accessed 19/9/2013). He compared Kenya to countries like Singapore which are far much a head of Kenya in terms of socio-economic development.

<sup>32</sup> E.S. Atieno-Odhiambo, (2004) 'Hegemonic enterprises and instrumentalities of survival: Ethnicity and democracy in Kenya', in Bruce Berman, Dickson Eyoh and Will Kymlicka (eds.) *Ethnicity and Democracy in Africa*, pp.167–82, James Currey. Oxford.

<sup>33</sup> Koki Muli (2005) "The Draft Constitution of Kenya 2004 (Bomas Draft): Reflections and Commentary on Issues of Content and Process," *op. cit.*

<sup>34</sup> See Ben Sihanya (2009) "Constitutional political economy of ethnic inequality and poverty in Kenya, 1963-2007 and beyond: human rights, class formation and development," Study commissioned by the Society for International Development (SID), East and Central Africa and forthcoming in Society for International Development (SID) (2009) Readings on Inequality in Kenya: Sectoral dynamics and perspectives, SID, Nairobi.

<sup>35</sup> H.W.O. Okoth-Ogendo, (2007) 'Power in the quest of constitutional order', 7th Hekima Theological Week Lecture, Catholic University of Eastern Africa, Nairobi.

resources gave rise to misappropriation of resources at the expense of development.<sup>36</sup> It has also for along time used by the political elite as a tool for political bargain and campaign during election periods. In addition, politicians have also used as a tool of blackmail and punishment to divergent electorate.<sup>37</sup>

Key in the Constitution of Kenya 2010 to address inequitable financial distribution and division in Kenya is devolution. It provides a whole chapter on devolution of services to 47 counties. Among others issues pertaining devolution the Constitution is particularly specific on financial devolution. Devolution of funds therefore offers a solution in a more profound way. It will ensure equity if implemented under the provisions of Constitution of Kenya 2010. Second, it will offer a platform for the people to participate democratically in the management of their resources at the County Government level.<sup>38</sup>

Third, it will ensure devolution of financial resources with a view to improving access, efficiency and responsiveness of service delivery, promote participation and empower citizens to demand accountability and performance.<sup>39</sup> Fourth, it is also means of democratizing governance and accommodating diverse ethnic, linguistic and religious identities. Further, financial devolution may promote equitable distribution of national resources and foster economic and social development in areas of social life.<sup>40</sup>

To achieve the above benefits of devolution, the Constitution of Kenya 2010, various pieces of legislation and policy directives have introduced mechanisms for financial devolution.<sup>41</sup> Some of

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<sup>36</sup> Okoth-Ogendo, H.W.O. (1999) 'The Quest for Constitutional Government', in Goran Hyden, Dele Olowu and Okoth-Ogendo H.W.O. (eds.) *African Perspectives on Governance*, pp. 33–59, Trenton, New Jersey: Africa World Press.

<sup>37</sup> Daily Nation Team (2005) "Rectify historical injustices," Editorial, *Daily Nation* Nairobi, Thursday, November 3, 2005, at 8.

<sup>38</sup> *Ibid.*

<sup>39</sup> Government of Kenya (2011) "A Report of Task Force on Devolved Government in Kenya on the Implementation of Devolved Government in Kenya.. \

<sup>40</sup> Government of Kenya (2003) Report of the Constitution of Kenya Review Commission, Vol. 1 Main Report.

<sup>41</sup> C.f Chapter 2

the already established mechanisms for financial devolution like the CDF, LATF and others have faced many challenges and there have been calls for their reform.<sup>42</sup>

### **1.3. Objectives of the study**

#### **1.3.1. Generic Objective**

The main objective is to identify weaknesses and strengths of financial devolution mechanism under the Constitution of Kenya 2010 and best practices to address the weakness in order to achieve accountability and equitable distribution of resources.

#### **1.3.2. Specific Objectives**

This study has three core objectives as follows:

- (i) To assess the adequacy of the financial devolution mechanism under the Constitution of Kenya 2010 in addressing inequitable distribution of resources.
- (ii) To identify and analyze cases of international best practice with a view to benchmarking and assessing the adequacy of the Kenyan model.
- (iii) To identify lessons Kenya can learn from the form of financial devolution in selected countries.

### **1.4. Research questions**

This research seeks to address the following three questions:

- i) How adequate is the financial devolution mechanism under the Constitution of Kenya in addressing inequitable distribution of resources?
- ii) What lessons can Kenya learn from the form of financial devolution in South Africa, Nigeria and Canada in order to reform Kenya's system?

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<sup>42</sup> These challenges shall be highlighted in later chapters.

iii) What proposals can be made towards attaining equitable distribution of resources under the financial devolution system provided in the Constitution of Kenya?

## **1.5. Research hypotheses**

I will test two hypotheses in this study.

First, the quest for financial devolution through equitable distribution of resources under the Constitution of Kenya is achievable despite political interests that seek to retain control over the system.

Secondly, the lessons on financial devolution through equitable and equalization of resources in South Africa, Canada, Nigeria and USA are helpful in addressing inequitable financial devolution in Kenya.

## **1.6. Literature Review**

The literature review tries to identify and correct gaps and distortions that exist in this area of research. This part covers an overview of the literature on the areas of devolution in an indicative manner. A comprehensive review of the literature is in the subsequent chapters of the study.

### **1.6.1. Devolution in Constitution Making**

Okoth Ogendo writes that devolution of power has long been a subject of interest to many Kenyans.<sup>43</sup> But in recent years, devolution has become one of the most highly contested, even divisive, concepts in Kenya. While devolution has been advanced as a means of managing Kenya's ethnic diversity and the failures of the centralized state, it is surprising that there is no agreement on how to devolve power. Even more surprising is the contestation over the advantages and pitfalls of devolution. Of the different shades of the debate, no genre has attracted as much interest, if not fear, as *majimboism*. The contested discourses revolve around the structure, spheres, and form of devolution of power. But is devolution a panacea to Kenya's problems? Is the clamour for devolution a mere search

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<sup>43</sup>.Okoth-Ogendo H.W.O (1972) "The politics of constitutional change in Kenya since independence, 1963-1969," *op. cit.*

for new institutions or means of democratic constitutionalism? What are the irreducible normative elements which devolution of power should entail? Should the primary concern of devolution be the transfer of power to territorial units, or a means of constitutional development and democratic constitutionalism?

Whereas the author delves into devolution and how it can heal social problems, the set up of the write up was under the 1969 Constitution. It does not reflect on the problem based on the new Constitutional dispensation under the 2010 Constitution.

### **1.6.2. Impact of decentralization**

Jütting, Johannes and others<sup>44</sup> argue that decentralization has been advocated by donors and development agencies as an important factor broadening citizen participation and improving local governance, thereby, promoting poverty reduction from the bottom up.

The authors find that an unambiguous link between decentralization and poverty reduction cannot be established. In some of the poorest countries characterized by weak institutions and political conflicts, decentralization could actually make matters worse. Interestingly, the poverty impact of decentralization would appear to depend less on the physical country setting, for example a country's size or quality of infrastructure, than on the capacity and willingness of policy makers to ensure a pro-poor devolution process.

Two important policy lessons emerge from this study. First, in an environment where the central state is not fulfilling its basic functions, decentralization could be counterproductive and, therefore, should not be a donor priority. Second, in countries that are fulfilling their functions, decentralization could be a powerful tool for poverty reduction, improving representation of the poor and better targeting of service delivery. To enjoy the potential benefits of decentralization, donors intervention in these countries should focus on providing technical support and improving the co-ordination of their aid policies at both the local and national level.

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<sup>44</sup> Johannes Jütting, *et al* (2004). "Decentralization and Poverty in Developing Countries: Exploring the Impact," OECD Development Centre Working Paper No. 236. at SSRN: <http://ssrn.com/abstract=583762> (accessed 12/9/13).

This author paints a negative perspective of devolution based on several case studies. This paper is useful because it makes a case against devolution and the reasons given shall be reviewed to establish if they apply to Kenya as well. The write up does not consider Kenya in the case studies handled.

Sharma argues that though decentralization for past one and half decades has become the most favoured policy priority among the policy makers, countries around the world differ dramatically in the degree of decentralization that is accommodated.<sup>45</sup> While diversity in degree of decentralization across the world is a fact yet there is no consensus in the empirical literature over the questions like which country is more decentralized? This is because decentralization is defined and measured differently in different studies.

In fact, an assessment of the degree of decentralization in a country can be made only if a comprehensive approach is adopted and rather than trying to simplify the syndrome of characteristics into the single dimension of autonomy, interrelationships of various dimensions of decentralization are taken into account.<sup>46</sup> Thus it is to be realized that there is no simple one dimensional, quantifiable index of degree of decentralization in a given country.

As there is wide diversity in the studies on degree of decentralization, so is the case with the literature on outcomes of it. Outcome varies not only because decentralization can appear in various forms and combinations across countries but also because different instruments may have very different effects in different circumstances.<sup>47</sup> Thus arriving at the precise definition of decentralization and associating it with particular outcomes is neither possible nor desirable for the simple reason that generalization of any kind can create pitfalls that can obscure rather than clarify the facts.<sup>48</sup>

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<sup>45</sup> Sharma, Chanchal Kumar (2006) Decentralization dilemma: Measuring the degree and evaluating the outcomes. Vol. 67, No. 1. *Indian Journal of Political Science*, at SSRN, <http://ssrn.com/abstract=955113> (accessed on 2/10/12).

<sup>46</sup> Albert Mwenda (2010) "Economic and administrative Implications of devolution framework established by the Constitution of Kenya" Institute of Economic Affairs, Nairobi, *op.cit.*

<sup>47</sup>NCKK (2011) "A guide for understanding decentralization in Kenya," *Institute of Economic Affairs*, Nairobi.

<sup>48</sup> *Ibid.*

What is more important is the need for a strictly contextual yet comprehensive approach while going beyond the blunt measures like expenditure decentralization and taking politics and institutional arrangements of the specific case under investigation also into account.<sup>49</sup>

Taking into account the argument by Sharma, any experiences from Canada, South Africa and Nigeria must be considered on a case by case basis. This is important because experiences of one country may not be in the same context as another. The advantages of financial devolution may not be achieved at once but may be a long gradual journey.

### **1.6.3. Decentralized Funds in Kenya**

Sharma's paper<sup>50</sup> was produced in a forum organized by Hanns Seidel Foundation with a view to identifying the principles and standards of best practice in the management of decentralized funds. It gives a summary of the historical overview of decentralization in Kenya and notes the successive funds that have been created without due consideration of past initiatives. Sometimes these funds replicate past weaknesses and in other cases abandoning strong models of implementation.<sup>51</sup> The forum, according to this paper, identified a number of challenges to devolution of funds in Kenya.<sup>52</sup>

First, it emphasized the need for the Government to clearly identify the unit of devolution to enhance democracy and good governance based on the most representative, efficient and cost effective model for the nation.<sup>53</sup> Second, it highlighted some of the institutional challenges inherent in the system, which is characterized by a multiplicity of funds with numerous overlaps, a failure to clarify roles of existing institutions in respective funds resulting in parallel administrative structures and inefficient use of resources, the absence of a clear formula regarding how and why funds are established and discontinued leaving them susceptible to

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<sup>49</sup> *Ibid.*

<sup>50</sup> Sharma, Chanchal Kumar (2006) Decentralization dilemma: Measuring the degree and evaluating the outcomes, *op.cit*

<sup>51</sup> *ibid*

<sup>52</sup> *Ibid.*

<sup>53</sup> Wanjiru Gikonyo (2006) Decentralized Funds in Kenya Working Paper, Hanns Seidel Foundation, Nairobi.

political whims, and lack of clarity between fund objectives and national development objectives.

Third, lack of institutional mechanisms to facilitate and safeguard community participation in various funds, and the need for an implementation framework which entrenches and protects public participation remains a challenge.

Fifth, the dire shortage of capacity of both public officers and communities to effectively engage in the management of decentralized funds. Capacity building is one area requiring multi-sectoral engagement to equip implementing stakeholders with relevant skills such as financial management. Sixth, poor implementation of existing anti-corruption laws and weak structures in enforcing accountability in funds management is a challenge to devolved management and usage.

In addressing these challenges the forum recommended that the decentralization process in Kenya should be clarified, simplified and harmonized. They further recommended that intensive civic education should be conducted and the capacity of public officials be strengthened.

Sharma's argument and presentation forms a good foundation for building the current research since it identifies some of the challenges to the already existing financial devolution. These challenges and recommendations are useful in extrapolating the likely problems that financial devolution under the Constitution is likely to face and possible ways of addressing them. However, the paper addresses financial devolution outside the county level of devolution. One of the challenges outlined by the paper is that the unit of devolution was not clear. With the new Constitution the unit of devolution was clearly the county. The impact of this development was not envisaged under the paper and therefore this research seeks to unravel any impact that financial devolution to the county level may have in achieving its objectives.

#### **1.6.4. Devolution and nation building in Kenya**

Koki *et al*<sup>54</sup> identify devolution through the county government as one of the key reforms brought about by the new Constitution. It underscores the objectives of devolution as recognizing

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<sup>54</sup> Koki Mulwa *et al.* (2011) Devolution and nation building in Kenya, Strathmore University, Nairobi.

the right of communities to manage their own affairs and further their development. In terms of financial aspects of devolution the paper states three ideologies of financial devolution, namely, the power to raise revenue, power to collect revenue and power to spend the revenue.

The paper further raises the various reservations that people have about devolution which include promotion of ethnicity, corruption, and excessive taxation, unclear criteria of devolution, expensive government and conflict between ethnic groups. On the positive side, the paper outlines the advantages of devolution to include equal distribution of resources, development of individual counties, economic growth of counties, subsidiarity, increased employment, faster decision making and ease central government burden of work through delegation of duties.

The paper is relevant in elaborating the key advantages and disadvantages of devolution. The stated advantages and disadvantages are hypothetical since the new devolved system has not been implemented to estimate the actual advantages and disadvantages. Further, it does not offer any possible solution on how the disadvantages may be addressed. The current research seeks to prescribe a legal solution to any problems that may be encountered during implementation of financial devolution in Kenya through a comparative study with countries that have already implemented the system.

From the literature reviewed above it is imperative that no literature is directly addressing devolution in Kenya in relation to social justice. As a result I believe this research is long overdue and shall shed light on the extent to which devolution may achieve social justice.

### **1.7. Justification of the study**

The Constitution of Kenya is three years old and still undergoing implementation.<sup>55</sup> It introduces a mechanism of financial devolution which has not yet been tested for its efficiency and effectiveness in establishing equitable distribution of resources. The available literature does not demonstrate the extent to which the Constitution of Kenya addresses equitable distribution of resources which this is research seeks to do.

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<sup>55</sup> Schedules to the Constitution especially Schedule Six establishing the Commission for the Implementation of the Constitution

This study therefore seeks to inform Kenyan policy on financial devolution given the fact that Kenya is in the process of institutionalizing devolved system of governance. Moreover the study seeks to assess the adequacy of the financial devolution mechanism under the Constitution of Kenya 2010 in addressing inequitable distribution of resources so as to inform policy makers and relevant stakeholders on the strength and weaknesses of the system anchored in the Constitution of Kenya 2010.

This study also seeks find out lessons Kenya can learn from the form of financial devolution in South Africa, Nigeria and Canada in order to reform Kenya's system so to inform the government and relevant stakeholders as well on the best possible way to address the challenges they may encounter.

### **1.8. Conceptual and Theoretical Framework**

The main objective of financial devolution is to foster the equitable distribution of public services and goods to every part of the country.<sup>56</sup> This objective has informed debates on devolution since the Constitution of Kenya review process begun.<sup>57</sup> Many Kenyans, especially in remote areas like North Eastern Province, Coast province, Upper Rift Valley Province among others, have over time felt marginalized by the political economy. The form of devolution through, the County level of Government, as provided under the Constitution of Kenya seeks to address these groups. The national values and principles as under article 10 of the Constitution seek to ensure that all Kenyans are treated equitably.

Financial devolution involves participation of the people towards a priority and need-responsive development.<sup>58</sup> Article 174 of the Constitution provides that one of the objectives of a devolved government is to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them.

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<sup>56</sup> Lamont J (2007) "Distributive Justice," Stanford Encyclopedia of Philosophy.

<sup>57</sup> Albert Mwenda K., (2010) "Devolution in Kenya: Prospects, Challenges and the Future," Institute of Economic Affairs, Nairobi.

<sup>58</sup> M. Koki B. Chege & W. Nabulumbi, (2000) "Devolution and Nation Building in Kenya," Strathmore University, at [www.strathmore.edu/ethics/pdf/DevolutionNationBuildingSU1.pdf](http://www.strathmore.edu/ethics/pdf/DevolutionNationBuildingSU1.pdf) (accessed 23/11/12)

Further, it recognizes the right of communities to manage their own affairs and to further their development.

More specifically, Article 174(g) requires that the devolved government should ensure equitable sharing of national and local resources throughout Kenya. Equitable distribution of national resources should be focused on among others the subject matter of distribution, the nature of the subjects of the distribution and on what basis distribution should be made.<sup>59</sup>

The principles of public finance under article 201 require that national income and wealth should be distributed to promote an equitable society. The values and principles of public services requires that national jobs and opportunities be represent Kenya's diverse communities, women and men, members of ethnic groups and persons with disabilities.

In the Kenyan context, the Constitution of Kenya fully takes into account this theory in the national principles and values, principles of public service, articles on leadership and integrity, principles of devolution and principles of public finance. If these principles and values are fully observed in implementing the financial devolution system under the Constitution then the equitable distribution of resources is achieved.

Distributive justice theory, therefore, underlies this research because it justifies why resources have to be distributed equitably to all Kenyans regardless of their ethnic, religious, racial, gender and physical diversities.

Moreover, the researcher also relies on institutional and legal theory in the analysis of the financial devolution as an antidote to inequitable financial distribution in Kenya. The legal and institutional theories though distinct are interconnected and interwoven.

The legal theory focuses on law as a system of rules and guidelines which are enforced through social institutions to govern behavior. Laws are made by governments through decrees from the supreme ruler, judicial interpretations and parliaments. The formation of laws may be influenced by a constitution (written or unwritten) and the rights encoded therein. The law shapes politics,

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<sup>59</sup> See also Ojwang JB (1990) *Constitutional Development in Kenya: Institutional Adaptation and Social Change* Nairobi: Acts Press, *op.cit.*

economics and society in countless ways and serves as a social mediator of relations between people.

The enactment of the Constitution of Kenya 2010 and legislations are initiatives of the government. The legislations are intended to fully give effect to Constitution. In line with the implementation of devolution as enshrined in the Constitution, County Government Act 2012, Public Finance Management Act 2013, Transition to Devolved Government Act 2012, Intergovernmental Relations Act 2013 among others. In line with the legal theory, the enacted legal instruments are meant govern among others financial devolution in Kenya.

Institutional theory focuses on the deeper and more resilient aspects of social structure. It considers the processes by which structures, including schemes; rules, norms, and routines, become established as authoritative guidelines for social behavior. Scott indicates that, in order to survive, organizations must conform to the rules and belief systems prevailing in the environment. Because of structural and procedural institutional isomorphism, the organization then earns legitimacy.<sup>60</sup> In the spirit of implementation of financial devolution in Kenya, all relevant institutions established and arms of government must therefore act within public interest.

Powell and DiMaggio quoted<sup>61</sup> to define an emerging perspective in organization theory and sociology, which they term the 'new institutionalism', as rejecting the rational-actor models of classical economics.<sup>62</sup> Instead, it seeks cognitive and cultural explanations of social and organizational phenomena by considering the properties of supra-individual units of analysis that cannot be reduced to aggregations or direct consequences of individuals' attributes or motives.

## **1.9. Research methodology: design, methods and techniques**

### **i) Primary data**

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<sup>60</sup> Scott R. (1987) "The adolescence of institutional theory", *Administrative Science Quarterly*, Vol. 32, pp. 493-511.

<sup>61</sup> Meyer J., and B. Rowan, (1977), "Institutionalized organizations: formal structure as myth and ceremony", *American Journal of Sociology*, Vol. 83 No. 2, pp. 340-63.

<sup>62</sup> Ibid.

Face to face interviewees were randomly conducted from various stakeholders in devolution including commissioners of Commission on Revenue Allocation. This data is important to capture the realities on the ground and the feelings of the stakeholders in devolution regarding the ongoing situation. It would be futile to make recommendations that are not based on the real findings. The study is also informed by analysis of various legal instruments both nationally and internationally including, the Kenya Constitutions, various Acts of Kenyan Parliament and from other jurisdictions such as Nigeria, Canada, USA and South Africa as well as pertinent Bills and other international legal instruments.

ii) **Secondary data**

This study is also informed by various secondary sources including books by prolific authors, articles from peer-reviewed journals, reports by credible commissions, newspapers articles, publications and other internet sources.

## **1.10. Organization of the Study**

### **Chapter One: Background to Financial Devolution under the Kenyan Constitution 2010**

This chapter gives a brief introduction to the subject, the theoretical framework underlying this research, justification for the research, research objectives, research questions, research methodology, literature review and statement of the problem.

### **Chapter Two: The Constitutional Framework on Financial Devolution in Kenya**

This chapter will outline and highlight the key features of the form of financial devolution provided under the Constitution of Kenya.

### **Chapter Three: Financial Devolution in Kenya: Regulatory Challenges**

This chapter discusses the regulatory challenges facing financial devolution under the Constitution of Kenya.

### **Chapter Four: Comparative Analysis of financial devolution in South Africa, Nigeria and Canada with Kenya**

This chapter examines financial devolution in South Africa, Nigeria, and Canada and are studied with a view of drawing a comparison with what Kenya has embraced and also of borrowing certain fundamental lessons

### **Chapter Five: Conclusion and Recommendations**

This chapter contains the conclusion deduced from the study and the recommendations proposed by the researcher on the implementation of the financial devolution in Kenya. It will also analyze the hypothesis in line with findings of the study.

#### **1.11. Conclusion**

This chapter has given a brief introduction to the subject, the theoretical framework underlying this research, justification for the research, research objectives, research questions, research methodology, literature review and statement of the problem. Chapter Two will discuss the key features of the form of financial devolution provided under the Constitution of Kenya.

## CHAPTER TWO

### KENYA'S CONSTITUTIONAL FRAMEWORK ON FINANCIAL DEVOLUTION

#### 2.1. Introduction

This chapter discusses various provisions of the Constitution that devolve state resources from the National Government to the county governments. It discusses the nature of financial devolution encapsulated under the Constitution of Kenya.

Remarkably, a constitution is an instrument that organizes, manages and defines governance in any country.<sup>63</sup> A Constitution may define two models of governance namely; centralized or decentralized or devolved governance. The Kenya Constitution defines governance in the devolved model by distributing sovereign power between the national level and the county level.<sup>64</sup>

Broadly, some constitutional law experts and scholars such as Prof Ben Sihanya argue that:

“A constitution has at least two broad meanings: First, a set of rules, standards or principles which govern a polity or social system; or second, an instrument, document or set of documents which act as the main reference point in governing a polity or social system.”<sup>65</sup>

According to Article 10 of the Constitution, which sets out the values and principles of governance, devolution of power is identified as one such value and principle that should guide Kenya's governance system. The Constitution of Kenya provides both exclusive and concurrent

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<sup>63</sup> Scott Gordon (1999). *Controlling the State: Constitutionalism from Ancient Athens to Today*. Harvard University Press, USA at. 4.

<sup>64</sup> Article 1(4) of the Constitution.

<sup>65</sup> Prof Ben Sihanya (2010) “Constitutional Process teaching and reading materials” University of Nairobi Law School, Nairobi. On file at Innovative Lawyering & Sihanya Mentoring, at [www.innovative-lawyering.com/pdf](http://www.innovative-lawyering.com/pdf) (accessed 17/8/2013). See also Prof HWO Okoth-Ogendo (2000) “The quest for constitutional government in Africa”, Chapter 2, in *African Perspectives on Governance op.cit.*

jurisdiction and mandate to each or all levels of government.<sup>66</sup> Several functions are assigned to the national level and other functions are assigned to the county level while others are concurrent to both the two levels of government. The Constitution of Kenya 2010 creates 47 counties through which various state activities are devolved.<sup>67</sup> It devolves sovereign power in two major areas; state resources and political power.

## **2.2. Exclusive Jurisdiction of National Government and County Government**

Unlike the past where every function of the Government was dealt with under a centralized system the Constitution of Kenya 2010 introduces a devolved system of administration whereby some duties and functions are devolved to the county government.

However, there are functions that the Constitution has retained with the National Government to the exclusion of the jurisdiction of the County Government. These functions and mandates relate to matters of international law, immigration and citizenship, judiciary, national economic policy, and planning, among others as indicated in Part 1 of the Fourth Schedule to the Constitution. This will now mean that the national Government only intervenes in matters of general national interest.<sup>68</sup>

On the other hand, there are also functions and powers that are exclusively bestowed upon the County Governments within their respective county limits. This therefore means that the National Government is divested of such powers and functions to the extent that they are provided for in the Constitution. This limitation and proper spelling out of powers, duties and functions by the Constitution will have the effect of reducing the levels and frequency if at all

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<sup>66</sup> See Schedule Four to the Constitution of Kenya 2010 on distribution of function between the National Government and the County Governments Part 1 and 2 seeking to implement Articles 185(2), 186(1) and 187(2) of the Constitution.

<sup>67</sup> Article 6(1) and First Schedule of the Constitution.

<sup>68</sup> Ghai Yash (2007) "Devolution: Restructuring the Kenyan State," Lecture for the African Research and Resource Forum at Kenyatta International Conference Centre at <http://www.arrforum.org/publications/occasional-papers/40/94-devolution-restructuring-the-kenyan-state.html> (accessed 28/8/2013).

that the two levels of government will come to conflict. The functions of the County Governments are provided for in Part 2 of Fourth Schedule to the Constitution.

### **2.3. Concurrent jurisdiction of the National Government and the County Government.**

There are areas of overlapping jurisdiction. Concurrent jurisdiction is a term that has in most cases been used in the judicial context. In this context, it denotes a situation in which the National Government and the County Government share the same powers, duties and functions simultaneously on a particular issue or matter. The Constitution thus implies certain powers, duties and functions to be handled at the two levels of government by creating those powers, duties and functions under Parts 1 and 2 of the Fourth Schedule to the Constitution.

### **2.4. The Nature of Devolution under the Constitution of Kenya**

The nature of devolution as envisioned by the Constitution is one that meant to return socio-economic, political and cultural power to the people at the grassroots level. Based on the principles of public participation<sup>69</sup> this form of governance provides a platform for the citizenry to participate directly or indirect at a less more bureaucratic manner.

It thus it gives the public to determine how their resources, including financial resources; are used without much influence that has previously been experience at a centralized level. It is also designed in manner in that the power transfer from the current centralized system to the devolved units is given constitutional assurance and safeguard.<sup>70</sup>

Moreover, the Constitution protects the County Government from arbitrary influence. For instance, relating to abuse of its provisions on suspension of County Government. It provides that in such circumstances, suspension shall not be for more than ninety days. Moreover such

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<sup>69</sup>Annette Omolo “Policy proposals on citizen participation in devolved governance in Kenya,” The Insitute for Social Accountability (TISA) at <http://www.tisa.or.ke/uploaded/resources/Policy%20Recommendations%20on%20Citizen%20Participation-TISA%202011.pdf> (accessed 6/10/12). See also Article 10 of the Constitution.

<sup>70</sup> That is upon the happening of the next General Elections (currently to held in March 2013) which compromise the elections of representatives at the devolved units, the county governments is presumed to be effective.

suspension must be by a resolution of an independent commission of inquiry.<sup>71</sup> Devolution therefore is expected to ensure equal treatment of every county government by the national government. This ensures equitable dealings amongst the counties. The functions of each level of devolved government are clearly set out in article 186(1) and Fourth Schedule of the Constitution.

However, some argue that the type of financial devolution provided under the constitution is not based on the principle of absolute autonomy but on interdependence and cooperation between the national and county level of government.<sup>72</sup>

Article 6(2) describes the governments at the two levels as being distinct and interdependent and which should conduct their mutual relations on the basis of consultation and cooperation. Although, the Constitution provides reasonable institutions, interdependence and cooperation with oversight by the senate or other constitutional agencies, the theoretical outlook of devolution seems to not show any hope.<sup>73</sup> The practical and reality on the law is that the devolved units are denied autonomy and independence.

The nature of devolution, therefore, is one which combines a measure of autonomy and interdependence. This creates what may be called a cooperative system of devolved government which follows a multi-dimensional approach to the organization and management of governance and state power. This system combines both self-governance and shared governance. None of the levels of government is an agent of the other and each is created and protected by the Constitution. It is also a view that concurrent jurisdiction under devolution will pose challenges especially in the exercise of county governments mandate and functionality in areas of conflicting interest with the National Government.

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<sup>71</sup> Article 192 of the Constitution of Kenya.

<sup>72</sup> Annette Omolo “Policy proposals on citizen participation in devolved governance in Kenya, *op. cit*

<sup>73</sup> *Ibid.*

#### **2.4.1. Principles of financial devolution under the Constitution of Kenya 2010**

The devolved government under the Constitution is founded on three main principles namely; democracy, separation of powers, effective services delivery and gender equity.<sup>74</sup>

Introduction of a devolved system of government is an essential and integral part of deepening the democratic process.<sup>75</sup> This makes decision-making as close to the people as possible. It is only when people are in close physical and psychological proximity to those who perform certain functions and deliver different services that they can get their needs met and hold them accountable.<sup>76</sup>

The country is now divided into 47 counties in which citizens are supposed to elect a governor, a senator, ward representative and women representatives. This enables county residents feel fully represented. The county assemblies also form a special forum for county residents to discuss and make decisions on issues that are of special interest to the county hence enhancing democracy. By enhancing democracy people have the liberty of participating in development activities.

Devolution under the Constitution is also based on the principle of separation of powers between the reserved and devolved functions of the national and county levels. Both the national and county assemblies have powers and functions which are distinct and concurrent.<sup>77</sup> The national government sets common and minimum standards which must be followed by county governments but in cases of any conflict between national and county standards, then national standards take precedence.

The separation of functions between the national and county government ensures that there is minimal interferences from the national on the activities of the county government. This level of independence enable county governments makes decisions that are favorable, relevant and

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<sup>74</sup>Article 175 of the Constitution.

<sup>75</sup>Seyla Benhabib, (1996) *Democracy and difference: contesting the boundaries of the political*, Princeton University Press.

<sup>76</sup>*Ibid.*

<sup>77</sup>Article 186 of the Constitution of Kenya.

beneficial depending on the local context. Previously the national governments have been influencing decisions of local authorities through the office of Minister for Local Government.

Poor service delivery to the remote parts Kenya and other regions of the country has been identified as one of the causes of inequitable distribution of resources.<sup>78</sup> An analysis of Government performance on delivery of basic services has been associated with the problems of over-centralization, massive wastage and very poor productive efficiency. Decision making as a result is centralized. This has occasioned a political economy of rent-seeking and diversion of public resources intended for service delivery.

Public office has for a long time been widely regarded, by citizens, to be an opportunity for pilferage and patronage. Well-established systems operated for the informal taxation of public resources, the marketing of positions in public office and the diversion of development funds.<sup>79</sup>

Across all major sectors – health, education, water supply, policing, and the judiciary – there has been reasonable expectation, perhaps resignation that these practices may occur with near complete impunity. Devolution has captured under the Constitution of Kenya 2010<sup>80</sup> has been seen as a way of addressing these challenges. National resources are now devolved to local areas to address some of these challenges.<sup>81</sup>

On gender equity, women have been labeled as one of the marginalized groups especially in political representation and governance at national and county levels.<sup>82</sup> In addressing this

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<sup>78</sup> Juma *op. cit.*

<sup>79</sup> Nick Manning (2003) Devolution in Pakistan - preparing for service delivery improvements, A working paper prepared for the Forum on Intergovernmental Relations and Service Delivery in Pakistan 27-29 June 2003, World Bank.

<sup>80</sup>Cf. Chapter 3.

<sup>81</sup> Fiona Imbali,(2012) “The Devolution Process And How Far Kenya Has Come” OAIC Communications at <http://www.oaic.org/382/> (accessed 6/8/13).

<sup>82</sup> Creighton Colin and Yieke Felicia, 2006, Gender Inequalities in Kenya, UNESCO

inequality, the Constitution provides that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender.<sup>83</sup>

This constitutional standard will ensure that women at least achieve a substantial number of representations in the county governments. Women representatives may ensure that decisions on sharing of national resources address gender inequity that has existed over the years. As of October 2012 Kenyan Parliament had still not agreed<sup>84</sup> on whether the more two-third gender rule should be implemented once in March 4, 2013 General Elections or it should be progressively achieved.<sup>85</sup> The Attorney-General sought an advisory opinion from the Supreme Court which ruled that two-thirds gender principle was subject to progressive realization.<sup>86</sup>

In attaining the principles outlined above, the devolved system of governance has several objectives. Article 174<sup>87</sup> stipulates the key objectives of a devolved government as follows: to promote democratic and accountable exercise of power; to foster national unity by recognizing diversity; to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them.

Moreover it provides that devolved system of governance shall recognize the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalized communities; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; to ensure equitable sharing of national and local resources throughout Kenya; to facilitate

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<sup>83</sup> Article 27(8) of the Constitution of Kenya.

<sup>84</sup> Peter Opiyo (2012) “MPs disagree on gender rule, Bill withdrawn,” *Standard Digital*, Wednesday, September 26, 2012 at [http://www.standardmedia.co.ke/index.php?articleID=2000066984&story\\_title=MPs-disagree-on-gender-rule,-Bill-withdrawn](http://www.standardmedia.co.ke/index.php?articleID=2000066984&story_title=MPs-disagree-on-gender-rule,-Bill-withdrawn).

<sup>85</sup> Judie Kaberia (2012) “AG seeks Supreme Court input on gender rule,” Capital FM News at <http://www.capitalfm.co.ke/news/2012/10/ag-seeks-supreme-court-input-on-gender-rule/> (accessed 9/10/12)

<sup>86</sup> In The Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] Eklr Supreme Court of Kenya Advisory Opinions Application 2 of 2012 at <http://www.judiciary.go.ke/portal/one-third-gender-rule.html> (accessed 21/11/12)

<sup>87</sup> 2010 Constitution of Kenya

the decentralization of State organs, their functions and services, from the capital of Kenya; and to enhance checks and balances and the separation of powers.

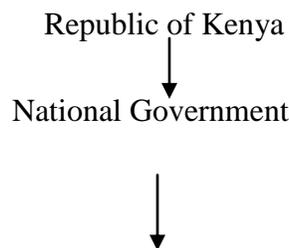
Some of these objectives, like recognizing the right of communities to manage their own affairs and to further their development; to protect and promote the interests and rights of minorities and marginalized communities; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya and to ensure equitable sharing of national and local resources throughout Kenya are critical in financial devolution.

#### **2.4.2. Structure of devolved government in Kenya**

Under the 1969 Kenyan Constitution, Kenya has a centralized government. All national activities were vested in the national government which consisted of the national executive, legislature and judiciary and were being managed from the capital, Nairobi.<sup>88</sup> The Constitution of Kenya embodies devolved government, especially the executive and legislative arms, into national and county levels as indicated in the illustrative diagram below. These two levels are independent of one another but also work in cooperation.

From the devolved structure and the functions assigned to each level of government under Schedule Four to the Constitution, it is clear that state power has been devolved to the county level. This power is meant to serve the residents at the local level. It gives powers of self-governance to the people and enhances their participation in the exercise of the powers of the state and in making decisions affecting them.

#### **Structure of the National Government**



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<sup>88</sup> 1969 Constitution of Kenya

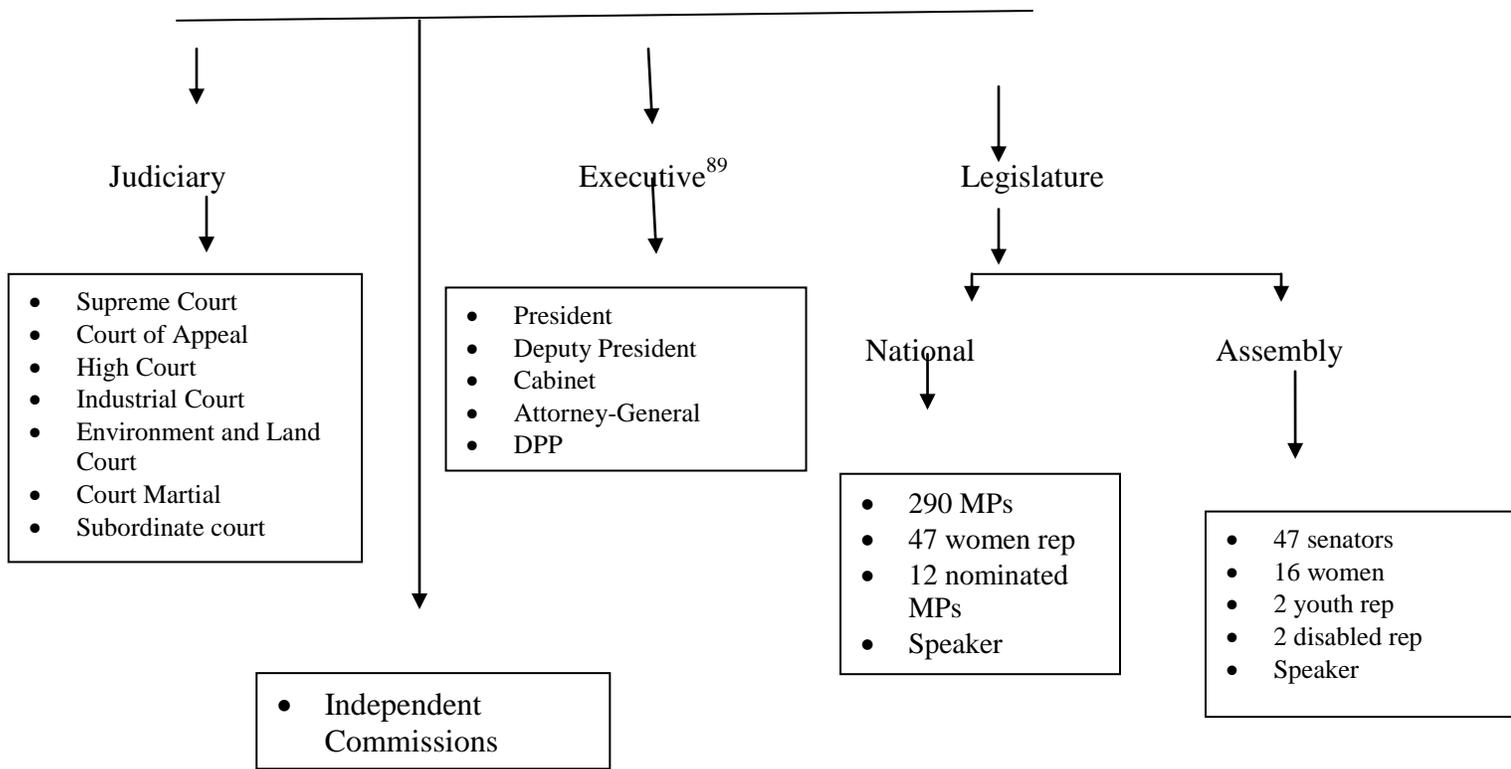
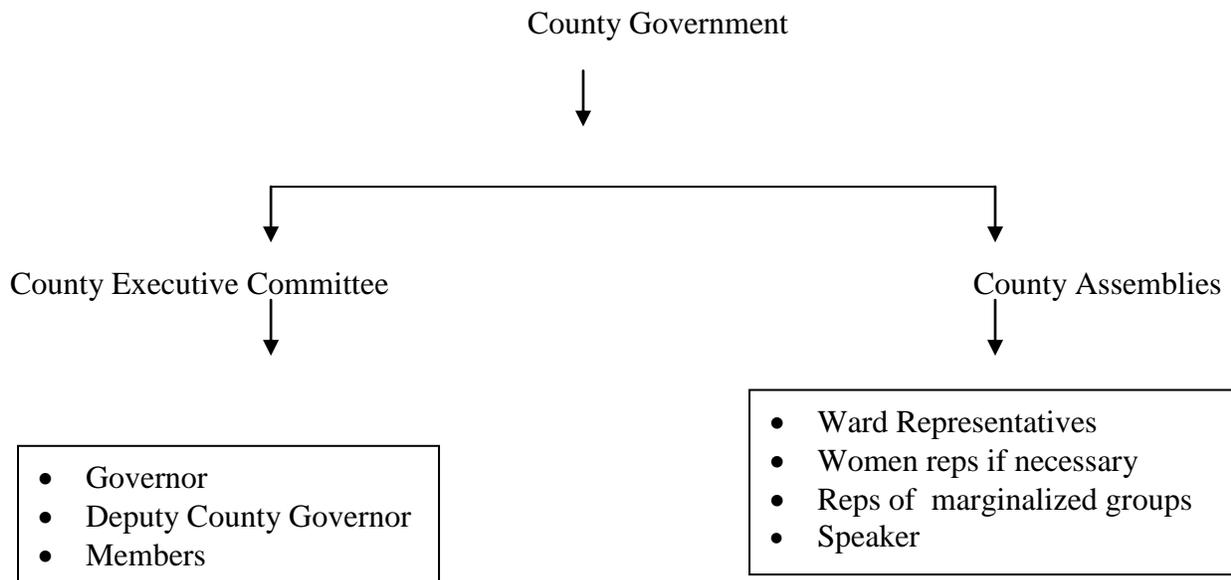


Figure 1.

### Structure of the County Government



Source: Researcher (M.J. Okumu 2013)

<sup>89</sup> Article 152(1) states that the cabinet shall comprise not less than fourteen and not more than 22 Cabinet secretaries

### 2.4.3. National Government

Kenya's central Government is structured through the Constitution with administrative and policy making powers being distributed to its three arms namely Executive, Legislature and Judiciary. However, the structure is under the 1969 Constitution supposed to be replaced by a revamped new governance system following the adoption of the Constitution of Kenya 2010.

The Constitution of Kenya 2010 outlines the structure of Government as follows.

#### 2.4.3.1. Role of the Executive in Devolution in Kenya

Significantly being one of the most crucial arms and most cases considered the key arm of the Government and other arms considered. Prof Ben Sihanya quotes a leading Nigerian constitutional scholar Prof Ben Obi Nwabueze as follows:<sup>90</sup>

“the functions involved in legislation and adjudication are easily delineable. The one is concerned with the making of laws and the other with its (*sic*) interpretation and adjudication. With the function of execution, however, such precise delineation is difficult. Executive power is indeed a term of uncertain meaning. Perhaps no other term in the science of government is so much taken for granted and yet so difficult of precise delineation. Does executive power embrace all functions that are neither legislative nor judicial? More importantly, can executive power be exercised independently of a law a provision of the constitution or statute or other law? (Nwabueze, 1974: 1)”<sup>91</sup>

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<sup>90</sup> Prof Ben Sihanya (2011) *“The Presidency and Public Authority in Kenya's New Constitutional Order,”* Constitution Working Paper series No. 2 Society for International Development (SID) Eastern & Central Africa, Nairobi Printed by The Regal Press Ltd, Nairobi (2011).

<sup>91</sup> National Assembly (2001) “Strengthening Accountability and Oversight of Key Parliamentary Committees in Kenya,” Report on the Workshop For Select Committees Dealing In Finance, Safari Park Hotel, Nairobi, Kenya, May 03-04, at [http://www.marsgroupkenya.org/Reports/OtherReports/Strenthening\\_accountability\\_and\\_oversight\\_of\\_key\\_Parliam\\_entary\\_committee\\_in\\_Kenya.pdf](http://www.marsgroupkenya.org/Reports/OtherReports/Strenthening_accountability_and_oversight_of_key_Parliam_entary_committee_in_Kenya.pdf) (accessed 12/8/13)

The Executive arm consists of the following primary members under the Constitution of Kenya 2010: President, Deputy President, Cabinet Secretaries, Attorney General, and Director of public prosecutions<sup>92</sup>

Headed by the President of the Republic, the executive is guided by an underlying framework of laws. The laws require the President to appoint between 14 and 22 cabinet secretaries reflecting ethnic and regional diversity.

Appointments of cabinet secretaries and other key positions such as that of the attorney general, Secretary to the Cabinet, high commissioners, consular representatives and ambassadors are vested in the president subject to approval by Parliament.<sup>93</sup>

The sovereign powers under the Constitution are delegated to all the three arms of government, the legislative assemblies of the county governments, the executive structures in the county governments and the commissions and independent offices.<sup>94</sup> The executive through the Ministry of Devolution and Planning and the National Treasury play a very critical coordination role in financial devolution under the Kenya devolution set up. The National Treasury is charged with disbursing funds to the counties while the ministry of Devolution is key in ensuring intergovernmental cooperation and coordination.

#### **2.4.3.2. Role of the Legislature in Devolution in Kenya**

The year 2010 will go down the annals of Kenyan history as the year that the people of Kenya finally promulgated a new Constitution, after many failed attempts in over 20 years of struggle for constitutional change. The 2010 Constitution revives a bicameral Parliament, with a Senate

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<sup>92</sup> “The Kenyan Government: a new structure under the new constitution” at <http://www.kenya-information-guide.com/kenya-government.html> (accessed 7/10/12)

<sup>93</sup> B. O. Nwabueze, (1974) “*Presidentialism in Commonwealth Africa*” London, Hurst, quoted in Prof Ben Sihanya (2011) “The Presidency and Public Authority in Kenya’s New Constitutional Order,” Constitution Working Paper series No. 2 Society for International Development (SID) Eastern & Central Africa, Nairobi Printed by The Regal Press Ltd, Nairobi (2011).

<sup>94</sup> Article 1 of the Constitution, 2010.

created to protect the devolved government, and a National Assembly to legislate mainly on issues affecting the national government.<sup>95</sup>

Scholars, constitutional law experts and academicians still critically examine the reasons why Kenya, after four years of independence, reverted to a state with a unicameral Parliament.<sup>96</sup> It is worth noting that at independence, the framers of Kenya's independence Constitution opted for a Westminster-derived bicameral legislature under a quasi-federal system.<sup>97</sup> The bicameral system, which is generally based on the English precedent, has usually followed the principle of constitutional government. Indeed, at present, most national legislatures consist of two chambers. It is hereby suggested that the experience gained between 1963, when Kenya got independence under bicameral legislature, and 1967, when the Senate was abolished,<sup>98</sup> was crucial in redesigning the current bicameral legislature under the 2010 Constitution.

The Constitution introduces a bicameral legislature including of the National Assembly and the Senate.<sup>99</sup> The National Assembly is comprised of Members of Parliament drawn from 290 constituencies in Kenya, 47 women representatives and 12 nominated Members of Parliament. The National Assembly is presided over by the National Assembly Speaker who is an *ex-officio* member elected by the National Assembly.

The National Assembly members represent people from all constituencies and special interests in at the National Assembly. They also determine allocation of national revenue between the two

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<sup>95</sup> Kipkemoi arap Kirui & Kipchumba Murkomen (2011) *The Legislature: Bi-Cameralism under the new Constitution*, Constitution Working Paper series No. 2 Society for International Development (SID) Eastern & Central Africa, Nairobi Printed by The Regal Press Ltd, Nairobi (2011).

<sup>96</sup> Ibid.

<sup>97</sup> Ghai Yash P., J. P. W. B. McAuslan, Patrick McAuslan (1970) *Public law and political change in Kenya: a study of the Legal Framework of Government from colonial times to the present*, OUP. See also Sihanya (2010) *op. cit*

<sup>98</sup> Ghai Yash P. (1986) 'The rule of law, legitimacy and governance', *International Journal of the Sociology of Law*, 14: 179–208. Gledhill, Allan (1967) *Pakistan: The Development of Its Laws and Constitution*, 2nd Edition, London: Stevens and Sons, London.

<sup>99</sup> Kenyan Government. *op. cit*

levels of government and oversee its expenditure.<sup>100</sup> This function of the Legislature is critical in ensuring equitable distribution of national resources. It is assumed that since the National Assembly is composed representative from all parts in Kenya then they will adequately represent the local interests. The women representatives and the 12 nominated Members of Parliament are assumed to represent special interests. In doing so, they are supposed to ensure that these special interests are not sidelined in the distribution of national resources.

The National Assembly enacts laws dealing with financial devolution e.g. the Public Financial Management Act 2012 which provides for effective management of public finances at the national and county government. This is the core mandate of the Parliament in addition to approving budgetary allocations and creating laws that has direct impact on the county government financial system and management.

The Senate on the other hand constitutes 47 senators from each of the 47 counties, 16 women representatives, 2 youth representatives of either gender and 2 representatives of persons with disabilities of either gender. The Senate is presided over by the Speaker who is an *ex-officio* member of the Senate. Senators represent the counties and serve to protect the interest of the counties and their governments. The Senate also approves Bills concerning counties, determines allocation of revenue to counties and considers any resolution to remove the President or Deputy President.<sup>101</sup>

The Senate lays emphasis on any action by the National Assembly that may affect the county governments. They play an oversight role of ensuring that the interests of the devolved government are taken into account while deciding national matters. The mediation committee established under article 113 mediates any disagreements between the National Assembly and the Senate on Ordinary Bills concerning county governments.

The Kenya bicameral parliament is critical in financial devolution in Kenya. Both houses are charged with the responsibility of approving financial bills before they are implemented by the National government and the executive. Moreover, parliament is mandated to legislate laws affecting counties.

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<sup>100</sup> Article 95 of the Constitution, 2010.

<sup>101</sup> Article 96 of the Constitution, 2010.

### 2.4.3.3. Role of the Judiciary in Devolution in Kenya

Under the social contract theory as envisioned by Thomas Hobbes, a democratic society where the governed relinquish a portion of their autonomy (social contract), the legal system is the guardian against abuses by those in positions of power.<sup>102</sup> Citizens agree to limitations on their freedom in exchange for peaceful coexistence, and they expect that when conflicts between citizens or between the State and citizens arise, there is a place that is independent from undue influence, that is trustworthy, and that has authority over all the parties to solve the disputes peacefully. The Courts in any democratic system are that place of refuge.<sup>103</sup>

It would suffice to say that under the 1969 constitutional dispensation, the Judiciary was not independent and an equal arm of government.<sup>104</sup> There are two types of judicial independence - institutional independence and decisional independence.<sup>105</sup> Institutional independence means that the judicial branch is independent from the Executive and Legislative branches. Decisional independence is the idea that judges should be able to decide cases solely based on the law and facts, without letting the media, politics or other concerns sway their decisions, and without fearing penalty in their careers for their decisions.<sup>106</sup>

The 2010 Constitution embodies a judiciary composed of the superior courts and the subordinate courts. The superior courts comprise of the Supreme Court, the Court of Appeal and the High Court. The subordinate courts comprise of the Magistrates courts, Kadhi's courts, Courts Martial

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<sup>102</sup> Allan Gledhill, (1967) "*Pakistan: The Development of Its Laws and Constitution*," 2nd Edition, London: Stevens and Sons, London (2<sup>nd</sup> ed.)

<sup>103</sup> Alnashir Visram (2010) "Role and responsibility of the courts under the Constitution of Kenya 2010" at [www.kenyalaw.org/.../6.%20The\\_Role\\_and\\_Responsibility\\_of\\_the\\_court](http://www.kenyalaw.org/.../6.%20The_Role_and_Responsibility_of_the_court) under the Const.. (accessed 7/10/12)

<sup>104</sup> Ibid.

<sup>105</sup> "Judicial independence is necessary for a fair and impartial judiciary" Public Confidence and Community Outreach Committee, Ohio Judicial Conference, USA at [http://www.ohiojudges.org/cms/tools/act\\_Download.cfm?FileID=3016&/PCCO%20Judicial%20Independence%20White%20Paper.pdf](http://www.ohiojudges.org/cms/tools/act_Download.cfm?FileID=3016&/PCCO%20Judicial%20Independence%20White%20Paper.pdf) (accessed 7/10/12)

<sup>106</sup> Michal Botek (2008) "The fortress of judicial independence and the mental transition of central European Judiciaries," Vol 14. Issue 1 European Public Law quoted by Prof Ben Sihanya Lecture notes and Materials in University of Nairobi Law School at Innovative Lawyering and Sihanya Mentoring, Nairobi & Siaya

and any other court or Tribunal established by statute. The court system forms the hallmark of justice in Kenya. Sound administration of justice by the courts would determine whether the fruits of devolution will be fully realized. Because devolution is one of the national values and principles of governance it is a key thread that runs across every provision of the Constitution including administration of justice.

Article 173(1) of the Constitution of Kenya establishes the Judicial Fund. This Fund is a form of devolution of funds to an arm of government to ensure smooth operations of the Judiciary. The Fund is meant to be used for administration expenses of the Judiciary and such other purposes necessary for the discharge of its functions. This form of devolution ensures minimal interferences with judicial functions from parliament and executive.<sup>107</sup> The Judiciary poses as a crucial pillar to financial devolution in the context that it offers oversight over the administrative and legislative functions of the National Government, county government and parliament. Moreover, the judiciary is key in ensuring the letter and spirit devolution laws are fully enforced and implemented through judicial intervention.

#### **2.4.3.4 Commissions and independent offices in Kenya**

According to Dr Colton Campbell,<sup>108</sup> independent commissions are “formal groups established by statute or decree for the general purpose of obtaining advice, developing common sense recommendations on complex policy issues, and finding broadly acceptable solutions to contentious problems.”<sup>109</sup>

Previously, independence of commissions and independent offices was not provided and the executive was to determine when and for what purposes they were instituted.

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<sup>107</sup> Ahmednasir Abdullahi (2011) “Restoring Public Confidence in Kenya’s discredited, corrupt, inefficient and overburdened Judiciary: the Judicial Service Commission’s agenda for reform,” paper presented at the Judges Colloquium, 2011.

<sup>108</sup> Dr Colton Campbell (1997) “Institutional independence,” Princeton University Press, Princeton, USA.

<sup>109</sup> Steve Schwalbe (2001) “Independent Commissions: their History, utilization and effectiveness,” Auburn University at [http://www.naspaa.org/initiatives/paa/pdf/Steve\\_Schwalbe.pdf](http://www.naspaa.org/initiatives/paa/pdf/Steve_Schwalbe.pdf) (accessed 7/10/12)

The Constitution establishes several commissions which are tasked with various duties of national importance. In carrying out their duties these commissions must uphold the national value of devolution of power. Failure to do so, any person has a right to institute court proceedings, claiming that a particular commission is not carrying out its duties in line with the Constitution. Of relevance to this discussion is the Commission on Revenue Allocation (CRA) and the Salaries and Remuneration Commission (SRC).<sup>110</sup> Further, the Constitution establishes the independent offices of Controller of Budget and Auditor-General.<sup>111</sup>

The establishment of the Commission on Revenue Allocation is critical in objective and equitable distribution of national revenue throughout Kenya. The Commission is established under article 215 of the Constitution of Kenya 2010. Its principal function is to make recommendations concerning the basis for the equitable sharing of revenue raised by the national Government, between the national Government and county governments and amongst the counties. It is a critical Commission in ensuring fair, just and equitable distribution of national revenue. In allocation of national revenue, the commission must give regard to the criteria set out under article 203 of the Constitution.

Besides the CRA, the Constitution establishes the Salaries and Remuneration Commission to set and review remuneration and benefits of all state officers.<sup>112</sup> This Commission ensures equitable determination of salaries for public service. In the past and even currently, there is huge disparity in the salaries payable to public servants in Kenya. This has steadily widened the gap between the poor and the rich.<sup>113</sup>

Articles 228 and 229 create the offices of Controller of Budget and Auditor General, respectively who are public officers. The functions of the Controller of Budget include overseeing the implementation of the budget of the national and county governments and authorize withdrawal from public funds. The Auditor General audits and reports on the accounts of the national and county governments.

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<sup>110</sup> Article 248 of the Constitution of Kenya 2010

<sup>111</sup> *Ibid.*

<sup>112</sup> See article 230 of the Constitution, 2010.

<sup>113</sup> SID (2004) Pulling Apart: Facts and Figures on Inequality in Kenya, Society of International Development, Nairobi.

#### 2.4.4. County Government in Kenya

The 1969 Constitution of Kenya provided for a strong unitary government which applied decentralization as a mechanism for providing services closer to the people.<sup>114</sup> The decentralization system was manifested in the provincial administration which was headed by the Provincial and District Commissioners. In that system of decentralization as opposed to devolution, there was no surrender of financial and human resource functions to the provinces and districts.

However, the Constitution of Kenya, 2010 establishes County Governments with legislative and executive powers. The powers enable the counties as devolved units to be distinct government units which are a critical element in devolution. Thus though the national and county governments are interdependent working on the basis of consultation and cooperation, the county governments have considerable and distinct legislative and executive powers within their semi-autonomous status.<sup>115</sup>

The County Government comprises of the County Assembly and County Executive.<sup>116</sup> Each county government is encouraged to decentralize its functions and provision of its services to the extent that it is efficient and practical. The County Assembly comprises of ward representatives elected by registered voters, a number of special seat members necessary to ensure that no more than two thirds of the membership of the assembly are of the same gender and the Speaker of the Assembly who is an ex-officio member. The county assemblies are vested with legislative powers and can make any laws that are necessary for effective performance of the function and exercise of powers of the county government.<sup>117</sup>

The County Executive comprises of the County Governor and the Deputy County Governor and Members appointed by the County Governor with the approval of the County Assembly.

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<sup>114</sup> Until the term of the current government expires.

<sup>115</sup> Dorah Nesoba (2012) "Countdown to Counties: Are We Ready for County Governments?" A report published by The Institute for Social Accountability (TISA), at <http://www.tisa.or.ke/uploads/Countdown-to-Counties-Are-We-Ready-Draft.pdf> (accessed 7/10/12).

<sup>116</sup> Article 176 of the Constitution, 2010.

<sup>117</sup> *ibid*

Executive members shall not exceed one third of the number of members of the County Assembly. The role of the County Executive is to implement county legislations, manage and coordinate the functions of the county administration among other duties.<sup>118</sup>

The Devolved Government Act, 2012 and the intergovernmental Relations Act, 2012, The Transition to Devolved Government Act, 2012 establishes a framework for the transition to devolved government in accordance with section 15 of the 6th schedule.

## **2.5. Devolution of national revenue and resources in Kenya**

With independence in 1963, Kenya inherited the colonial system of public finance and resources administration based on command and control structures. The Independence Constitution (1963) divided public finance powers among the three branches of the Government, but the executive soon moved to accumulate more influence than the other two.<sup>119</sup> To achieve this, the original Constitution was amended over 30 times, in the process reducing the National Assembly to little more than a parliamentary rubber stamp of the executive. This was continued through Kenyatta, Moi and Kibaki years.<sup>120</sup>

Consequently, over time the debates revolving around devolution of national resource focus on the overriding goal of bringing services and therefore government closer to the people.<sup>121</sup> It has been understood over time that local people are better “judges” of what can address their problems and what cannot. Therefore, they ought to be consulted before decisions are taken on which programs and projects to implement. This means that the local people who are the ultimate beneficiaries should be able to effectively participate directly or indirectly through their

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<sup>118</sup> Article 183 of the Constitution, 2010.

<sup>119</sup> Njeru Kirira (2011) “Public Finance under Kenya’s new Constitution,” Constitution Working Paper series No. 2 Society for International Development (SID) Eastern & Central Africa, Nairobi Printed by The Regal Press Ltd, Nairobi (2011).

<sup>120</sup> Prof Ben Sihanya (2010) Constitutional Process teaching materials, at Innovative Lawyering and Sihanya Mentoring, Nairobi & Siaya *op. cit*

<sup>121</sup> Understanding Governance and Devolution; Structures in the Proposed Constitution 2010, Center for Democracy and Development at <http://www.cgd.or.ke/documents/Understanding%20Governance%20and%20Devolution.pdf> (accessed 10/8/2013)

representatives in decision making, financial resource allocation, and the actual execution of the decisions made.<sup>122</sup>

It is a view that to achieve the set targets and objectives, decision making must be reflected in the way financial resources are allocated and followed through with actual implementation. Therefore, all these processes are inter-linked and it is only by ensuring local participation that one can possibly hope to achieve a positive impact on local development. The link then that holds these processes together is the financial resource.

The main aim of fiscal devolution is to ensure that at all levels of government there are sufficient financial resources to match the responsibilities assigned to each level of government.<sup>123</sup> Allocating local sources of revenue to county governments that can yield sufficient revenue to meet their expenditure needs would be the ideal solution.<sup>124</sup> These are referred to as local/own sources of revenue. However, in reality this is not practical because the revenue/tax bases are not uniform countrywide.<sup>125</sup> Charging county governments with the task of locally mobilizing all the revenues they need would result in significant differences in revenues per capita mobilized and thus, inability of the various county governments to finance service provision in their jurisdictions.<sup>126</sup>

### **2.5.1. Criteria for revenue allocation in Kenya**

Chapter 12 of the Constitution of Kenya 2010 provides for public finance. The chapter provides for the principles and framework of public finance and other funds, revenue raising powers and public debt, and revenue allocation among other things.

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<sup>122</sup> Ghai Yash & McAuslan (1970), *Public Law and Political Change in Kenya op. cit.*

<sup>123</sup> Muna Ndulo (2006) 'Decentralization: Challenges of inclusion and equity in governance', in Muna Ndulo (ed.) *Democratic Reform in Africa: Its impact on governance and poverty alleviation*, Oxford: James Currey, and Athens, Ohio: Ohio University Press.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> The Local Government Finance Commission, 1999, *Introduction of Equalization Grant: Analysis and Recommendation*, The Local Government Finance Commission.

The Constitution requires the allocation of national revenue to the national and county governments and among counties in an equitable manner.<sup>127</sup> The Commission on Revenue Allocation which is tasked with the responsibility of allocating the revenue is obligated to observe a criterion sets out under article 203 of the Constitution. In support of the devolved government, the Commission is supposed to observe the following;

First, the need to ensure that county governments are able to perform the functions allocated to them. Second, the fiscal capacity and efficiency of county governments;<sup>128</sup> Third, developmental and other needs of counties- the new system which allocates resources to the devolved administrations based on an explicit assessment of their relative needs is critical. Those devolved administrations which have greater needs should receive more funding, per head of population, than those with lesser needs. For this criteria to achieve maximum benefits it must be simple, clear and comprehensible. It must also be dynamic: able to be kept up to date in order to respond to changing needs across Kenya.<sup>129</sup>

Fourth, economic disparities within and among counties, the need for economic optimization of each county and to provide incentives for each county to optimize its capacity to raise revenue.<sup>130</sup>

In observance of the criteria, the Commission is supposed to allocate at least 15 per cent for the county government. If the 15 per cent is properly employed by the county governments it will see equitable developments throughout Kenya.<sup>131</sup>

### **2.5.2. Equalization Fund in Kenya**

A commitment to the principles of equality and non-discrimination is woven throughout the Constitution, driven at least in part by a desire to counteract the ethnic and regional tensions

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<sup>127</sup> Article 202 of the Constitution 2010.

<sup>128</sup> *ibid*

<sup>129</sup> *Ibid*

<sup>130</sup> Njeru Kirira (2011) "Public Finance under Kenya's new Constitution," *op. cit.*

<sup>131</sup> GOK (2011) Interim Report of the Task Force on Devolved Government: A report on the Implementation of devolved government in Kenya, Ministry of Local Government Task Force on Devolved Government in Kenya, Nairobi, Kenya, 20 April.

which played such a decisive and destructive role in the 2007 post-election violence. The Constitution reflects a widely-held belief that guarantees equality, equitable distribution of resources and balance of power represent the best way to reduce on political decision making and thereby secure a peaceful future for the country.<sup>132</sup>

The Equalization Fund is established under article 204 of the Constitution in recognition of the economic disparities that exist amongst various counties in Kenya. It is aimed at providing certain minimum levels of public services to disadvantaged regions. An equalization fund would, therefore, aim at providing extra funds to those county governments whose revenue raising capacities are weak and expenditure needs great, to enable them provide that “minimum” level of service within their jurisdictions.

The Constitution establishes the Equalization Fund comprising of one half per cent of all national revenue.<sup>133</sup> This Fund shall be used in provision of basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring quality of those services in the particular areas.<sup>134</sup> This is the most deliberate move to ensuring equitable distribution of national resources in Kenya.

## **2.6. Conclusion**

The Constitution of Kenya 2010 has devolved power into two levels, national and county levels, which are independent and yet work in cooperation. The main objective of this devolution is to ensure that services are enjoyed by all Kenyans even at the county level and that state power is exercise at the local level. Political representation is happening at both national and county levels in a manner that has never happened in Kenya hence promoting fair representation and democracy.

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<sup>132</sup> Jim Fitzgerald (2010) “The Road to Equality? The Right to Equality in Kenya’s New Constitution,” *The Equal Rights Review*, Vol. Five (2010), at <http://www.equalrightstrust.org/ertdocumentbank/Jim%20Fitzgerald%20article.pdf> (accessed 12/8/13).

<sup>133</sup> Article 204 of the Constitution of Kenya

<sup>134</sup> *Ibid*

Political devolution has been introduced by devolving both executive and legislative powers to the county level. Legislative power is now shared between Parliament at the national level and the county assemblies at the county level. The executive power is devolved from the national executive to the county executives.

Devolution of national resources has also been devolved by allocation of 15 per cent of the national budget to the county governments and equitable distribution of the 15 per cent amongst the counties. Further, an Equalization Fund has been established to ensure that certain vital services are equitably available to all Kenyans.

This form of financial devolution if properly implemented may address marginalization and inequitable distribution of resources in Kenya.

## CHAPTER THREE

### FINANCIAL DEVOLUTION IN KENYA: REGULATORY CHALLENGES

#### 3.1. Introduction

The previous chapter (Two) discusses various provisions of the Constitution that devolve state resources from the National Government to the county governments. It discusses the nature of financial devolution addressed under the Constitution of Kenya.<sup>135</sup> This chapter explores the regulatory challenges facing financial devolution under the Constitution of Kenya were discussed at length.

The main benefits of greater financial devolution are the increased efficiency and responsiveness of government.<sup>136</sup> If the units of devolution are knowledgeable and responsive to local conditions and needs then financial devolution should help in better spending by matching resources to the needs.<sup>137</sup>

In practice these benefits are not easily realizable because of many challenges.<sup>138</sup> There are five key challenges. First, there is lack of institutional clarity and transparency in matching resources and expenditure; second, lack of relevant expertise to plan and implement the system of financial devolution at the devolved units, third, poor local administrative capacity and irresponsible officials with little discretionary financial control to deliver services; fourth, weak devolved institutions and inadequate governance leading to poor enforcement of rules and interference from the local elites who capture the benefits of devolution; fifth, the potential impacts of financial devolution on the central government.<sup>139</sup>

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<sup>135</sup> Cf. Chapter Two.

<sup>136</sup> E. Wallace Oates (1972) "Fiscal Federalism, Harcourt Brace Jovanovich," *New York*

<sup>137</sup> Annette Omolo (2010) "Devolution in Kenya: A critical review of past and present frameworks," in IEA *Devolution in Kenya: Prospects, Challenges and the Future*, IEA Research Paper Series No. 24, Institute of Economic Affairs, Nairobi.

<sup>138</sup> Paulo Drummond and Ali Mansoor (2002) *Macroeconomic Management and the Devolution of Fiscal Powers*, International Monetary Fund, Working Paper WP/02/76, IMF.

<sup>139</sup> *Ibid.*

These challenges are discussed below under various headings.

### **3.2. Political debate on sharing of resources**

The CRA is created under Article 215 of the Constitution of Kenya. The principle functions of the Commission are outlined in Article 216 (1), in which the commission is to make recommendations concerning the basis for the equitable sharing of revenue raised by the national government, either vertically or horizontally. In its bid to formulate its recommendations, the commission shall seek to promote and give effects to the criteria set out in Article 203 (1), encourage fiscal responsibility and define or enhance the sources of revenue emanating from both national and county governments, whenever there is need to do so.

In February 2012, the commission proposed the criteria on sharing of revenue based on population, poverty index, land area size, institutional development, urbanization and fiscal incentives. In this criterion, the population would receive a whopping 60%, an equivalent of 120 billion Kenyan shillings, as illustrated in Table 1 of the Annexure..

Immediately the proposal was released to the public, there was a general public outcry, particularly with the elected parliamentarians and other professionals coming out with strong opposition to the Commission's proposal. The argument was that poverty, instead of population, should be given more allocation. In addition leaders protested against this initial formula on the basis that it would have seen the country's biggest five counties receive a lion's share of the national revenue in the devolved system of fiscal governance.<sup>140</sup>

The Parliamentary Budget Committee also argued that the 60% allocation of the national revenue on the basis of population and only 12% based on poverty would only perpetuate

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<sup>140</sup> Roselyne Obala and Patrick Muthuri (2012) "MPs oppose reviewed county funds formula," *Standard*, Tuesday, August 21, at [http://www.standardmedia.co.ke/?articleID=2000064453&story\\_title=Kenya:%20MPs%20oppose%20reviewed%20county%20funds%20formula](http://www.standardmedia.co.ke/?articleID=2000064453&story_title=Kenya:%20MPs%20oppose%20reviewed%20county%20funds%20formula) (accessed 20/10/12).

development imbalances across the nation.<sup>141</sup> Mr. Micah Cheserem, the Commission Chairman on his reaction to the outcry, said;

“The commission has dispatched teams to all the 47 counties to seek public views on the formula the commission has proposed on sharing of revenue. The teams will complete the exercise in the third week of June 2012. We will be able to discuss and agree as a commission on the views to incorporate in a revised allocation formula.”<sup>142</sup>

This political exchange made the Commission on Revenue Allocation to come up with a second proposal on equitable distribution of financial resources. In their recommendation, they maintained population as their first criteria but reduced the percentage from 60% to 45% and at the same time increased the poverty index allocation from 12 % to 20 %.<sup>143</sup>

In comparison, the second recommendation by CRA on financial distribution of resources made counties to have higher allocations as sampled; Nairobi County with a population of 3.1 million would receive Kshs. 10.1 billion followed by Turkana whose population is 855,399 at Kshs. 8.1 billion. Closing the list on top five allocations would be Mandera, Kakamega and Bungoma whose populations are 1million, 1.6 million and 1.6 million respectively would receive Kshs. 6.9 billion and Kshs. 6.6 billion in that order.

On the other hand, Lamu whose population is 101,539 would receive Kshs. 1.6 billion, followed by Isiolo at Kshs. 2.3 billion with a population of 143,294. Tharaka-Nithi (365,330 people would get Kshs. 2.4 billion, Elgeyo Marakwet with a population of 369,998 would take home Kshs. 2.5 billion. Finally in closing the list of last five is Taita Taveta whose population is 284,657 would receive Kshs. 2.58 billion.<sup>144</sup> According to the above allocation criteria, the Commission on Revenue Allocation (CRA)’s recommendations is informed by opinion on the various weights

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<sup>141</sup> C. Wafula, (2012) “Devolution; poverty gets more consideration: revenue team revises county cash formula,” *Daily Nation*. Thursday August 16, at <http://www.nation.co.ke/> (accessed 20/10/12).

<sup>142</sup> L. Anami (2012). CRA chair answers questions on revenue allocation, the *Standard*, Nairobi, Thursday, June 14.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

exhibited by each parameter.<sup>145</sup> The Constitution of Kenya 2010 lists a variety of factors that must inform the distribution of national revenue to the county governments.<sup>146</sup> Equity and economic disparity has been given more weight in determining what amount of revenue or support from the national treasury a county gets.<sup>147</sup>

Elsewhere in India, revenue allocations to the devolved units have been given due regard to income distance, tax effort and fiscal discipline in addition to population and area. However, there arguments that consideration should be accorded to the efficiency criterion.<sup>148</sup>

This paper therefore confirms that Kenya will be better placed to find an acceptable solution to this challenge only after 6years of CRA's recommendations regarding this aspect of the acceptable criteria for financial devolution.

However, the National Treasury, upon coming in to effect of the County Allocation of Revenue Act 2013, in accordance with section 17 of the Public Finance Management Act (PFMA), 2012 as amended by section 14 of the County Allocation of Revenue Act 2013 prepared and submitted a cash disbursement schedule to the Budget Committee which further submitted the schedule to the Senate for approval. Below is a table illustrating the allocation across the 47 counties as at 30<sup>th</sup> August 2013. See Table 2 of the Annexure.

### **3.3. Public participation in Revenue Allocation**

Devolution stresses the importance of participation in the policy-making process and of increased accountability.<sup>149</sup> Greater proximity between the regional and local governments and the local people allows them greater flexibility to respond to local needs and preferences and to

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<sup>145</sup> S. Mkawale, A. Kisia and P. Opiyo, (2012) "Commission unveils new counties revenue sharing plan," the *Standard*. Thursday, August 16.

<sup>146</sup> *Ibid*.

<sup>147</sup> Article 202 & 203 of the Constitution of Kenya 2010.

<sup>148</sup> Abhay Pethe *Aide Memoire* to the 13<sup>th</sup> Finance Commission on Devolution of Funds Department of Economics, University of Mumbai at p.7 at [http://www.mu.ac.in/arts/social\\_science/eco/pdfs/vibhuti/wp30.pdf](http://www.mu.ac.in/arts/social_science/eco/pdfs/vibhuti/wp30.pdf)

<sup>149</sup> Z.R. Ergas, (1982) 'Kenya's Special Rural Development Programme: Was it really a failure?' The Journal of Developing Areas 17(October): 51–66.

efficiently match the supply of public services to local demand. According to Dr Elias Mokuu, Director Jesuit Hakamani Centre,

“Participation is fundamental, residents should therefore have a bigger say in their county units, but there is a gap: most residents did not realize they are supposed to participate in the devolved system in order for them to work.”<sup>150</sup>

This is only achieved when residents elect leaders committed to national development.

Participation is the process through which stakeholders’ input and share control over development initiatives, decisions and resources which affect them.<sup>151</sup> Through participation, stakeholders influence policy formulation, alternative designs, investment choices and management decisions affecting their communities. Participation is important because practical experience on the ground shows that it establishes the necessary sense of ownership. Generally people tend to resist new ideas if these are imposed on them.<sup>152</sup>

Participation has greatly contributed to the sustainability of development initiatives, strengthened local capacity, given a voice to the poor and marginalized and linked development to the people’s needs. Participation has been instrumental in guarding against abuse of office by public servants and political leaders. It has also provided a control against excessive discretion being vested in civil servants in public procedures. Participation has provided checks and balances against unnecessary political interference in service delivery and disregard for professionalism and meritocracy in the public sector, amongst others.<sup>153</sup>

Contextually, public participation in Kenya has a long history. It can be inferred to have been introduced or started from the colonial use of indirect rule using traditional or local leaders such as chiefs and kings to administer Kenya. In the present day, there are so many policies and

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<sup>150</sup> Dr. Elias Mokuu as quoted in D. Okoth, (2012)“Kenyans bank their hopes on devolution,” *Standard on Sunday* (Nairobi) Sunday. August 26.

<sup>151</sup> M. Odhiambo, and A. Taifa, (2009) *Devolved Funds Development: A Handbook on Participation*. Claripress, Nairobi.

<sup>152</sup> Prof Ben Sihanya (2013) Public Participation and public interest litigation under the Kenyan Constitution, *Law Society of Kenya Journal*, Vol. 9 2013 No.1.at 1-33

<sup>153</sup> *Ibid.*

statutes in addition to 2010 Constitution of Kenya that emphasizes the need for public participation.<sup>154</sup> For instance, Constituency Development Fund (CDF) Act provides for communities to participate in development through its various committees. The CDF Committee (CDFC) members are selected by the local MP, although a framework detailing the categories of representation is legally provided for. The other is the Project Implementation Committee which is made of local stakeholders.<sup>155</sup>

Similarly The Local Authority Service Delivery Action Plan (LASDAP) provides opportunities for the local authorities to constructively engage with local communities on matters of planning, budgeting and development.<sup>156</sup>

Under the current constitutional dispensation, the enacted the Public Financial Management Act 2012 presents a unique opportunity, to enhance the role of citizen participation in public financial management process in Kenya. However, citizens must demand that the meaning of public participation be defined, and that laws and regulations governing consultative processes be drafted, in a manner that enhances, rather than undermines, the role as provided for in the Constitution of Kenya 2010.<sup>157</sup>

The landmark judicial contribution was made in *Jayne Mati and another v. Attorney General & another*.<sup>158</sup> The petitioners sued the Minister for Finance for unprocedurally making

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<sup>154</sup> Annette Omolo (2011) “Policy proposals on citizen participation in devolved governance in Kenya” TISA at <http://www.tisa.or.ke/uploaded/resources/Policy%20Recommendations%20on%20Citizen%20Participation-TISA%202011.pdf> (accessed 20/10/12), *op.cit*

<sup>155</sup> M. Odhiambo & Taifa, A. (2009) “Devolved Funds Development: A Handbook on Participation,” Claripress, Nairobi, *op.cit*.

<sup>156</sup> C. Wafula, (2012) “Devolution; poverty gets more consideration: revenue team revises county cash formula,” *op.cit*.

<sup>157</sup> Zilper Audi (2012) “Public Participation under Kenya’s New Public Financial Management Law” Institute of Economic Affairs, Tuesday, 25 September, at <http://www.ieakenya.or.ke/blog/public-participation-under-kenya-s-new-public-financial-management-law> (accessed 4/3/2013).

<sup>158</sup> *Jayne Mati and Another v. Attorney General & Another* [2011] eKLR, at [www.kenyalaw.org](http://www.kenyalaw.org) High Court of Kenya at Nairobi Milimani Law Courts Constitutional and Human Rights Division December 23 2011 (D.S. Majanja, J.) (accessed 12/8/2013).

withdrawals from the Consolidated Fund.<sup>159</sup> The court found that the Deputy Speaker of the National Assembly at a later date directed Departmental Committees of the House to hold public hearings at various venues.

The petitioners did not argue that these directions were not followed or that members of the public were denied access to the Departmental Committees to present their views, either orally or in writing or that the schedule of events did not take place subsequent to the vote. The court found that the National Assembly made every effort to give effect to the values of accountability, transparency, good governance and public participation.

In the Constitution of Kenya, citizen participation is encapsulated as a concept which is critical in ensuring transparency in matching resources and expenditure. The Constitution intends that to give powers of self-governance to the people and enhance their participation in the exercise of the powers of the State and in making decisions affecting them in addition to recognizing the rights of communities to manage their own affairs and to further their development.<sup>160</sup>

In practice, power in Kenya has been centralized with minimal citizen participation and contribution. It also proposes a legislation that shall provide for the governance and management of urban areas and cities and which will provide for participation by residents in the governance of urban areas and cities.<sup>161</sup> Under the 1969 Constitution of Kenya, most urban areas in Kenya were run by local authorities which contrary to legal requirements failed to involve the urban populations in the management and running of the urban areas.<sup>162</sup>

The Constitution also mandates the county assemblies to conduct their business in an open manner and hold their sittings and those of committees in public, and facilitate public participation and involvement in the legislative and other business of the assembly and its

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<sup>159</sup> Article 206; Mars group (2012) Unconstitutional Withdrawals from the Consolidated Fund of Kenya – Judgment in Petition 108 of 2011, at <http://blog.marsgroupkenya.org/2012/01/16/unconstitutional-withdrawals-from-the-consolidated-fund-of-kenya-judgment-in-petition-108-of-2011/> (accessed 12/8/2013)

<sup>160</sup> Article 174 of the Constitution of Kenya

<sup>161</sup> Article 184 of the Constitution of Kenya

<sup>162</sup> Zilper Audi (2012) “Public Participation under Kenya’s New Public Financial Management Law” *op.cit*

committees.<sup>163</sup> Counties are also to assist communities to develop the administrative capacity for the effective exercise of the functions and powers in governance at the local level.<sup>164</sup>

The Constitution therefore seeks to ensure that citizens in the devolved units are involved in the management of the devolved finances. If these provisions are fully implemented they will ensure that the residents of a particular county or the target groups of any form of financial devolution are involved in decision making. It will eliminate imposition of needs by the central government. However, effective local participation is hindered by low literacy levels as well as lack of resources.

Many citizens in Kenya are not well informed in policy matters and therefore may not participate effectively.<sup>165</sup> The literacy and numeracy levels in all the 47 counties are not uniform to offer quality public participation in all of them. People in urban areas generally more literate and exposed than in rural areas hence the disparity in quality of participation. According to the Kenya National Adult Literacy Survey Report, on average 38.5 per cent of the Kenyan adult population is illiterate.<sup>166</sup>

Further, there are very wide regional disparities; for example, Nairobi had the highest level of literacy, 87.1 per cent, compared to North Eastern Province, the lowest, at 8.0 per cent.<sup>167</sup> Despite the Constitution guaranteeing people participation in the management of their affairs, their literacy challenges must be addressed. With the low literacy levels, the people may not be able to fully conceptualize programs and projects that are critical to their development hence missing out on the benefits of financial devolution.

Further, the forum or criterion of matching resources to needs is not provided for under the Constitution leaving a gap that may be manipulated by the local elites who will determine how the same will be done. In response, the Government has taken steps to improve levels of public

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<sup>163</sup> Article 196 (1)

<sup>164</sup> Fourth Schedule to the Constitution of Kenya 2010.

<sup>165</sup> A.K..M Kilele (2007) “Adult Litteracy iin Kenya Kenya National Bureau off Statistics “ at <http://www.knbs.or.ke/downloads/pdf/KNALS2007.pdf> (accessed 12/4/12)

<sup>166</sup> *Ibid.*

<sup>167</sup> UNESCO (2006) *Kenya National Adult Literacy Survey Report*, UNESCO, Nairobi..

awareness, literacy and participation. In the run up to the 2005 and 2010 referenda the Government conducted civic education to educate the public on the provisions of the proposed constitutions to enable them make independent and informed choices. More civic education programme was launched ahead of the General Election of March 4, 2013,<sup>168</sup> although there were numerous challenges.<sup>169</sup>

The process and definition of participation is also not clearly stated and therefore collection and collation of views is a big challenge.<sup>170</sup> In order for rural communities to play an active role in the policy-making process, it is necessary for their members to have access to resources. These resources include adequate funding, Government training programs, education, leaders, and volunteers to support rural causes and initiatives. Many rural communities tend to lack one or more of these resources, a situation which interferes with their ability to effectively impact the policy-making process.<sup>171</sup>

Having inadequate resources negatively impacts a rural community's ability to effectively influence and develop policy compared to other players in the policy making process. For example, corporations and professional organizations often have access to large amounts of financial and human resources. This creates an inequity whereby community organizations that may be equally or even more affected by policy change do not have the same opportunity to participate in and influence the process.<sup>172</sup>

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<sup>168</sup> Athman Amran (2012) "Civic education programme launched" *Standard* (Nairobi) Saturday, March 17 <http://www.standardmedia.co.ke/?id=2000054236&cid=159&articleID=2000054236> (accessed 20/10/12).

<sup>169</sup>Global Center (2013) "The March 2013 Elections in Kenya and the Responsibility to Protect," at <http://www.globalr2p.org/media/files/march-2013-elections-in-kenya-and-r2p-4.pdf> (accessed 7/9/13)

<sup>170</sup> Annette Omolo, (2011) "Policy proposals on citizen participation in devolved governance in Kenya," TISA, at <http://www.tisa.or.ke/uploaded/resources/Policy%20Recommendations%20on%20Citizen%20Participation-TISA%202011.pdf> (accessed 20/10/12)

<sup>171</sup> Steven Dukeshire & Jennifer Thurlow (2002). "Rural Communities Impacting Policy A Brief Guide to Understanding Policy Development" Rural Communities Impacting Policy Project at <http://www.ruralnovascotia.ca/documents/policy/understanding%20policy.pdf> (accessed 12/9/2012).

<sup>172</sup> G. Rowe, and L.J. Frewer, (2000) "Public participation methods: A framework for evaluation," *Science, Technology, & Human Values*, 25 (1), 3-29.

It is also worth noting that limited access to financial resources, necessary to address problems and concerns of rural communities lead to organizations relying on volunteers to carry out community-based activities. In Kenya various Non Governmental Organization (NGOs) have stepped on many occasions to offer socio-economic assistance to various communities and other groups of people.<sup>173</sup> Low populations in rural areas results in the availability of only a small number of volunteers to carry out all the necessary activities demanded by their community organizations. This situation can lead to reluctance to become involved in the complex policy-making process.

Even more difficult is finding individuals within rural communities with the skills, abilities and desire to initiate and champion rural policy development.<sup>174</sup> Further, there tends to be a lack of programs to train, support and motivate new leaders and volunteers. As a result of a lack of these resources, some community leaders and volunteers face burnout that affects their productivity and progress in furthering the work to help their community.<sup>175</sup>

In addition, the migration of youths from rural communities to urban centers results in a depletion of potential future community leaders volunteers and labour. Another factor which can be considered contributing to the absence of a volunteer pool may be the political and social visibility that can result from becoming active in the policy-making process. Such visibility may be uncomfortable for some and emphasize the vulnerability of certain community members, for example, those of low socioeconomic status.<sup>176</sup>

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<sup>173</sup> Sellah Nasimiyu Kingoro & Professor Abdalla Bujra (2009) "Social policy, development and governance in Kenya: The contribution of Non-State Actors to Development in Kenya," Development Policy Management Forum (DPMF).

<sup>174</sup> Anami L. (2012) "CRA chair answers questions on revenue allocation," the *Standard*, Thursday, June 14,

<sup>175</sup> Roselyne Obala and Patrick Muthuri (2012) "MPs oppose reviewed county funds formula," *Standard*, Tuesday, August 21 at [http://www.standardmedia.co.ke/?articleID=2000064453&story\\_title=Kenya:%20MPs%20oppose%20reviewed%20county%20funds%20formula](http://www.standardmedia.co.ke/?articleID=2000064453&story_title=Kenya:%20MPs%20oppose%20reviewed%20county%20funds%20formula) (accessed 20/10/12).

<sup>176</sup> A. Du Plessis (2008), 'Public participation, good environmental Governance and fulfillment of environmental rights' 11(2);, *Potchefstroom Electronic Law Journal*, 170-201.(4), Nairobi.

### 3.4. Low of economies of scale in Kenya

There have been a lot of arguments that devolution is a means of achieving greater production efficiency. These arguments maintain that decentralized systems of government have a greater capacity to match service provision to the preferences of citizens and are, thus, more efficient.<sup>177</sup> From a political perspective, devolved systems are preferred because they tend to be more accountable and transparent and increase political participation. Marginalization of communities, groups of people and other sectors of the economy were the main ingredient in the clamour for devolution and political change in Kenya. These factors, in turn have an indirect positive effect on efficiency.<sup>178</sup> Economic arguments contend that lower levels of government have a greater capacity to tailor policies and the provision of services to the preferences of the population, thereby maximizing individual and collective welfare and making the supply of public goods and services more efficient.<sup>179</sup>

In the converse, any form of devolution, including financial devolution, breaks down a state into units hence compromising on economies of scale. For instance, the devolved system in Kenya has broken down the country into 47 counties. The central provision of public goods and services may be more efficient if economies of scale and scope exist.

Critics of devolution contend that there appears to be a critical mass of income, population, and activities that are necessary before the benefits of devolution can be realized. Since this mass is more easily achievable at the national than at the devolved level, central Government may be the most cost-efficient provider of some public goods and services. In particular, if the administrative units in a devolved system are too small, they will incur diseconomies of scale and thereby larger per unit costs.<sup>180</sup>

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<sup>177</sup> C M Tiebout (1956) A pure theory of local expenditures *Journal of Political Economy* 64 416-24 and Musgrave R A 1959 *The Theory of Public Finance: A Study in Public Economy* McGraw Hill, New York.

<sup>178</sup> R. D. Putnam (1993) *Making Democracy Work: Civic Traditions in Modern Italy* Princeton J, Princeton University Press, Princeton.

<sup>179</sup> O. Odinga, (1965) *Not Yet Uhuru*, Oxford University Press, Nairobi.

<sup>180</sup> R Prud'homme (1994) *On the dangers of decentralisation* World Bank Policy Research Working Paper No 1252, World Bank, Washington DC.

One of the principle considerations for intergovernmental relations is economies of scale that accrue when providing trunk or bulk infrastructural services.<sup>181</sup> This affects provision of water, roads, bridges, power among others. This implies that the production, provision and transmission of some services would transcend county boundaries and have to be negotiated appropriately with the objective of capacity and providing services efficiently and cost effectively.<sup>182</sup>

The Constitution of Kenya confers the National Government with mandate over provision such kinds of goods and services under the Fourth Schedule where it spells jurisdictions the two levels of Government. Citizens across counties require services as a basic right as contained in the Bill of Rights. However, some of such services may not be available within their counties. To provide such services, it is necessary that resource mobilization is done collectively in order to efficiently produce and deliver the services.<sup>183</sup>

Another fundamental problem confronting devolved systems is related to the difficulty of assigning powers and functions in a non-overlapping way. If, as is often the case, ambiguity exists regarding the responsibilities and functions of different tiers of government, complexity increases and the possible benefits of greater transparency and accountability disappear. Under such circumstances, citizens are unable to distinguish between responsibilities of each level of government and are thus less likely to exert pressures for a more efficient delivery of services.

Consequently a devolved system would imply greater costs of coordination among government tiers to avoid duplication or undersupply of public goods and services, and may also imply greater incentives for revenue maximization at all levels of government.<sup>184</sup>

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<sup>181</sup> *Ibid.*

<sup>182</sup> J.K. Mbugua, (1993) 'Impact of User Charges on Health Care Utilisation Patterns in Rural Kenya: The case of Kibwezi Division', unpublished PhD thesis, Institute for Development Studies, University of Sussex, UK.

<sup>183</sup> P.M. Mbithi, and R. Rasmusson (1977) *Self Reliance in Kenya: The case of harambee*, Uppsala: Scandinavian Institute of African Studies

<sup>184</sup> A., Breton (1983) *Federalism versus centralism in regional growth* in Biehl D Roskamp K W and Stolper W F eds *Public Finance and Economic Growth: Proceedings of the International Institute of Public Finance Tokyo 1981* Wayne State University Press, Detroit.

The problem of overlapping may be witnessed in the Kenyan case because of the functions of the counties and the national government.<sup>185</sup> The Constitution has tried to address this overlap through the concept of cooperation between the county and national government. Article 189 provides that cross county cooperation is necessary to ensure and enhance articulation and implementation of national government policy and cooperation in service delivery. The provision states that governments at county level are supposed to cooperate and create joint authorities and committees with the aim of performance of certain functions. The joint performance of functions has cost benefit effects, including economies of scale.

### **3.5.Relevant expertise and capacities in financial devolution**

Capacity development is an ongoing process, requiring the unleashing of a continuous supply of the appropriate legal, institutional, human and material resources and a favorable operational environment. The ingredients of capacity and capacity building come from a wide range of sources in society, including the private sector, civil society organizations, schools, universities, think tanks and research institutes.<sup>186</sup>

These resources need to be mobilized and efficiently managed to build institutional capacities that will deliver equitable distribution of resources. In essence capacity building is about people who have to be trained, adequately equipped, sufficiently remunerated and appropriately disciplined in the efficient use and management of resources.

Inadequate expertise is foreseen to create a major problem especially under the Kenyan devolved system of Government. Mobilization and deployment criteria of the current work force remain a main challenge to the Government.<sup>187</sup> Whether they will remain employees and under control of the national government or be deployed and controlled at the county level remains a challenge. The intrigue between the government and a section of the civil society over the fate of the

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<sup>185</sup> See Chapter 2 on Jurisdiction of the National and County Government.

<sup>186</sup> Eade, Deborah (2007) *Capacity Building an Approach to People-Centered Development*, Oxfam, London, UK & Ireland.

<sup>187</sup> Annette Omolo, (2011) "Policy proposals on citizen participation in devolved governance in Kenya" *op.cit.*

provincial administration is an example. It has been debated whether it should be restructured under the National Government or be done away with completely.<sup>188</sup>

The Kenyan public service has faced numerous challenges. Failure to match skills and tasks is one of the main challenges that continue to impact negatively on service delivery. To effectively manage resources at the devolved unit, there is need to hire qualified personnel. Identification and recruitment of personnel with the required knowledge, expertise, experience, competence and leadership to manage the county institutions is a challenge.

Counties, for example, have real challenges in employing qualified and skilled personnel to manage the affairs of the counties.<sup>189</sup> Unqualified staff at the county government may not adequately utilize the devolved funds in a manner that will ensure equitable distribution of resources. These unqualified staff are hired by the devolved units through corrupt means.<sup>190</sup>

The responsibility for staffing of county governments has, under Article 235 of the Constitution, been assigned to county governments. Staffing in this context goes beyond the mere deployment of staff in counties, but includes appointment, confirmation in appointment, disciplinary control and removal of persons holding or acting in offices in county public service. The establishment and abolition of offices in the county public service should be guided by the optimum number of staff required to perform the functions assigned to county governments under the fourth schedule of the Constitution. Moreover, in order to determine the optimum number of staff required, respective county governments will need to conduct workload analysis.

The environment in which capacity building takes place is very important. It requires peace and stability and an open and free political atmosphere. Only in this environment would people be free and willing to use their talents, skills and capital for productive and creative activities and in the process create wealth and employment, personal incomes and tax revenue, thereby establishing the basis for the continuous supply of the ingredients for capacity building. Thus, the

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<sup>188</sup> Obuya Bagaka (2011) “Restructuring the Provincial Administration: An Insider’s View” Society for International Development (SID), Nairobi.

<sup>189</sup> Task Force on Devolved Government in Kenya (2011) *A Report on the Implementation of Devolved Government in Kenya*, Government of Kenya, Nairobi, *op.cit.*

<sup>190</sup> Anami L. (2012) “CRA chair answers questions on revenue allocation,” the *Standard*, Thursday, June 14

government must continue to strengthen the democratization process while building the capacity of devolved institutions responsible for supplying essential public goods and services to the people such as education, healthcare and security.

### **3.6. Unhealthy competition amongst the counties**

Devolution creates counties in Kenya along defined geographical locations. These counties have differing capabilities to engage in economic activities. Some counties are likely to be powerful compared to others leading to a point of territorial competition. The phenomenon of territorial competition has been a major challenge to countries like Europe, United States, Brazil and China.<sup>191</sup> The increasing economic powers of county governments are shifting the focus of development policies away from achieving greater equality or national cohesion, towards securing greater economic efficiency at the local level.<sup>192</sup> Consequently, there is likely to be an increasing tendency for county governments to engage in competition for the attraction of foreign direct investment (FDI).<sup>193</sup>

When county governments offer incentives for the mobile industry to locate within their region, and the private sector firm chooses between the most attractive packages offered by the counties, the impact upon national efficiency could be damaging. So while the nation has nothing to gain as regions compete for investment, it has much to lose as competition for mobile investment increases and regional advertising and marketing, government grants and loans, and interest and debt concessions become greater.<sup>194</sup>

In Kenya, counties have varying degree of poverty, skills, proximity to the market, environmental conditions etc. In terms of poverty, for example, Turkana county is regarded as

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<sup>191</sup> J D Donahue (1997) *Disunited States* (HarperCollins Publishers Inc., New York) and Mytelka, L K, 2000, "Location tournaments for FDI: inward investment into Europe in a global world" in Hood, S, ed., *The globalization of Multinational Enterprise Activity and Economic Development* (MacMillan Press, London).

<sup>192</sup> P. C. Cheshire and I Gordon (1998) "Territorial competition: some lessons for policy," *Annals of Regional Science* 32 321 – 346

<sup>193</sup> Scott, A J, 1998, *Regions and the world economy. The Coming Chape of Global Production, Competition, and political order* (Oxford University Press, Oxford

<sup>194</sup> Ward P M and Rodríguez V E, 1999, "New federalism and state government in Mexico: Bringing the states back in", A.S.-Mexican Policy Report No. 9, University of Texas at Austin.

the poorest with 99.9% poverty index and Kajiado County as the richest at 12.1%.<sup>195</sup> This large disparity in terms of poverty levels may be an impediment in attaining equitable distribution of resources. Comparatively, most counties in Kenya have high poverty levels. This is attributable to poor governance by the centralized system of government and inadequate human and natural resources.

### **3.7. Inequitable distribution of resources in Kenya**

One of the traditional roles of the national government is the redistribution of resources in order to safeguard minimum levels of welfare throughout the country.<sup>196</sup> Devolution of authority and resources undermine central government's ability to achieve this in two fundamental ways. First, devolution of decision-making authority progressively transfers the responsibility for devising ways in which redistribution will occur to county government. This leads, in most cases to increase county resources at the expense of national budgets.

Second, this tier of government is multifarious, and it is often the case that larger or more prosperous regions are over-represented at this level. Hence, following devolution, a smaller role for national transfers and a larger voice for the regions in deciding how transfers are allocated are likely to result in a less progressive system of fiscal redistribution than under a centralized system in Kenya.<sup>197</sup>

The political and economic muscle of stronger regions is likely to skew public expenditure in their favor, regardless of whether the greatest legitimacy is based in the centre or in the regions and of whether the financing system of regions is based on local tax revenue or on grants from the centre. In the former case because the devolution of fiscal powers will inevitably favor wealthier areas, and in the latter because the greater political muscle of larger and richer regions

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<sup>195</sup> Kenya Open Data, Poverty Rates by County 2005/2006, available at <https://opendata.go.ke/Counties/Poverty-Rates-by-County/z6za-e7yb>. Accessed on 16th July 2012.

<sup>196</sup> Fleiner Thomas, Challenges of Devolution and Power Sharing Structures in Federations, Paper for the Conference Comparative Constitutional Traditions in South Asia of the joint conference of SAIS and SOAS November 17th to November 19th 2006 in London.

<sup>197</sup> C. Thompson (1989) "Federal expenditure-to-revenue ratios in the United States of America, 1971-85: An exploration of spatial equity under the new federalism" 7 *Environment and Planning C: Government and Policy* 445-470.

may be reflected in a greater capacity to secure transfers from the centre and to impede the evolution of a more centralized regional system of transfers or regional policy.<sup>198</sup>

### **3.8. Convoluted legislations in Kenya**

To fully implement the devolved government in a manner envisaged under the Constitution of Kenya, numerous pieces of legislation are required. The Report of the Task Force on the Devolved Government proposes that at least 700 laws should be drafted or revised to operationalize the counties.<sup>199</sup> Moreover, the individual counties must also make, amend the inherited individual county by-laws to help them effectively enforce their mandate. They are laws needed to pass finance related by-laws to help in revenue collection and management. This poses legislative challenges ranging from the capacity to churn out these huge legislative bills and ensuring consistence.

Meanwhile, local authorities have been governed separately by the Local Government Act (Cap. 265) 1998, and the Local Authorities Transfer Fund Act (No. 8 of 1998). The urban boards that replace them will be brought under the Public Finance Management (PFM) Act once they are established, after county governments are formed. Partly as a result of this legal fragmentation, there is presently no single PFM system for all tiers of government, with local authorities operating under a different chart of accounts and financial management information system to central government.

### **3.9. Inter ethnic rivalry within counties in Kenya**

Already there are tensions in multi-ethnic counties on how the power will be settled between them. These rivalries will slow down decision making leading low economic performance. Some of the counties that likely to encounter this challenge include; Mombasa, Nairobi, Nakuru, Kisii, Migori, Embu, Kiambu among others. The ethnic balancing in distribution of county resources and employment is key in ensuring the success of devolve system of governance. Nakuru County is on record among counties in which there has been inter-ethnic out-play in its management.

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<sup>198</sup> A. Markusen (1994) "American federalism and regional policy" 16 *International Regional Science Review* 3-15

<sup>199</sup> Task Force on Devolved Government in Kenya, (2011) *A Report on the Implementation of Devolved Government in Kenya*, op.cit

The Governor of Nakuru was accused favoring a community in county executive appointment positions.<sup>200</sup>

### **3.10. Conclusion**

Financial devolution under the Constitution 2010 is a noble idea that if fully implemented may result in equitable distribution of wealth. This system of devolution faces great challenges as discussed above. To be able to achieve the benefits of devolution, then these challenges must be addressed.

Kenya will be in a position to evaluate its progress on these challenges after six years of full implementation.

The next chapter will specifically examine financial devolution in South Africa, Nigeria, Canada and the United States with a view to drawing a comparison with what Kenya has embraced, as the country aims at borrowing certain fundamental lessons during her process of implementing the devolved system of governance.

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<sup>200</sup> Ismael Karimi (2013) Nakuru County Governor Kinuthia Mbugua on the spot over county appointments, Daily Nation, July 5.

## **CHAPTER FOUR**

### **COMPARATIVE ANALYSIS OF FINANCIAL DEVOLUTION IN SELECTED COUNTRIES**

#### **4.1. Introduction**

In chapter Three, the regulatory challenges facing financial devolution under the Constitution of Kenya were discussed at length. This chapter will specifically examine financial devolution in South Africa, Nigeria, Canada and the United States with a view of drawing a comparison with what Kenya has embraced, as the country aims at borrowing certain fundamental lessons during her process of implementing the devolved system of governance.

There are important lessons that Kenya can learn from the experiences of other countries with respect to their devolved system of governance. Some of these lessons include the practicalities of devolution and the historical lessons. In comparable countries like Nigeria, South Africa, United States, and Canada, this study examines some of these experiences.

Other than how devolution evolved in these countries, the study concentrates into the crucial matters of fiscal and financial devolution. The report closely examines the South African and Canadian case of financial devolution. In as much as the two countries may not be at par with Kenya either geographically or culturally, the processes they went before establishing their current system of fiscal decentralization may serve as a good lesson for Kenya.

The study mainly explores the case of fiscal devolution, its structure and workings as it draws the appropriate lessons that Kenya can learn. In concluding remarks, it is realized that the practicalities and processes of financial devolution are complex matters that even the countries that have been considered term it works in progress.

#### **4.2. Principles and criteria in both intergovernmental and public finance fiscal transfers**

The constitutional principles for management of public finance and formulation of recommendation on revenue allocation are outlined in articles 201 and 203 of the Kenyan

constitution. These principles take care of both vertical and horizontal devolution of funds.<sup>201</sup> In addition, public financial management principles are geared towards guiding either aspects of public finance in both levels of the government while adhering to the Constitution. Currently, public financial management is vested in the Ministry of National Treasury. Devolved funds are mainly managed by the treasury. For instance, CDFs are disbursed from the central bank to various constituencies. LATFs are channeled through the local government.

Another reason that pertains to the formulation of public finance management principles is to ensure openness and accountability, while taking care of public participation as far as all aspects of financial matters are concerned.<sup>202</sup> Moreover, other than promoting the existence of an equitable society, public financial management principles ensure that benefits and burdens that are associated with the use of resources and public borrowing is shared between current and the future generations.<sup>203</sup> Lastly, these principles provide responsible financial management practices and clear fiscal reporting, that ensures the realization of a more prudent and responsible utilization of public money.

In a devolved financial system, it is worth noting that county governments will only realize an equitable share of national revenue if they clearly define their criteria for rationalization. In this respect, the CRA will only achieve equitable share of all revenue collected by the central Government between the national Government and the 47 county governments in Kenya if it adheres to its laid down preliminary criteria. CRA makes reference to Article 186 of the Kenyan Constitution; that outlines the various functions and powers of the county governments. In addition, CRA is informed by the Fourth schedule that outlines the distribution of functions of both the national government and the county governments.<sup>204</sup> According to this Schedule, the

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<sup>201</sup> South Africa (2001) Multi-level Government in South Africa: A Progress Report' *Publius: the Journal of Federalism* 31 65-92

<sup>202</sup> I. Livingstone, (1976) 'Experiment in Rural Development: Kenya's Special Rural Development Programme', *Agriculture Administration* 3(3): 217-33.

<sup>203</sup> A.L. Bannon (2007) "Designing a constitution-drafting process: Lessons from Kenya," *Yale Law Journal*, Vol. 116.

<sup>204</sup> 'Multi-level Government in South Africa: A Progress Report' *Publius: the Journal of Federalism* (2001) 31 65-92

county governments are given the mandate of being responsible in a number of broad functions. Such functions include: roads, water and irrigation; agriculture, livestock development and fisheries; public works and rural electrification; public health and medical services; youth affairs and lastly housing development.

#### **4.3. Framework for intergovernmental transfers**

In many countries, fiscal transfers between governments have long been a dominant feature of intergovernmental finance.<sup>205</sup> It has to be noted that some critical aspects of intergovernmental transfers are the effects they have on policy objectives such as their allocation efficiency, macroeconomic stability and distributional equity. As circumstances and objectives differ across nations, no single criterion of federal transfers has been found to be universally appropriate. With this respect, many countries that have vast geographical areas notably the United States, Canada, Australia and India have adopted the federal form of government. The Government therefore should with keen interest implement policies that will enable the county government fiscal management most effective than have been previous seen in other countries.<sup>206</sup>

#### **4.4. Financial devolution: legal and regulatory framework**

In a devolved system of government, the constitution needs to specify the percentage of national income that goes to the district governments. For the Kenyan case, the proposed ratios are between 50 and 60 percent.<sup>207</sup> It is the auditor general who is responsible to audit the accounts of the devolved government units. Irrespective of their size the devolved governments need to share the Local Authorities Transfer Fund (LATF) equitably.

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<sup>205</sup> Murray, C., & Simeon, R. (2001) South African financial constitution towards better delivery; *Publius* 31 (4): 65-92.

<sup>206</sup> Annette Omolo (2011) "Policy proposals on citizen participation in devolved governance in Kenya" *op.cit.*

<sup>207</sup> *ibid.*

#### 4.5. The distribution of the fiscal and financial power of the state

There are three aspects of financial power of the state for the case of the devolution system. These are; the power to raise revenue; the power to administer the revenue; the power to spend revenue. The three aspects may be devolved in different ways:

First, the need for equalization is recognized and the design taken into account. Second, the power to raise major taxes like income tax, Value Added Tax (VAT), customs, corporation tax, excise duty need to be assigned to the national level of government since these resources used for equalization purposes. Third, the devolved units must also be given power to raise revenue from certain identified taxes.

Fourth, there has to be provision on how the division of the revenue raised at the national level has to be done and the factors to be taken into consideration. Such a division has to be both vertical among different levels of government and horizontal among the units at different levels of the government. Fifth, there has to be some institutions put in place to handle financial matters.<sup>208</sup>

A very well thought out and design system of the devolution of financial power within a state is very fundamental. This being the case, a less decentralization of power should be the Kenyan option that can raise adequate revenue.<sup>209</sup> However, spending this revenue would require more decentralization of power. The success of fiscal and financial devolution also requires a proper understanding of a workable formula of the concept of equalization.

In order for a design of equalization formula to be successful, it would be mandatory for Kenya to clearly understand this concept in a comparative experience of other countries that have implemented this mechanism within their system of governance.<sup>210</sup> Both vertical and horizontal

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<sup>208</sup> J. Kiringai, (2006) 'Public Spending in Kenya: An inequality perspective', in Society for International Development Readings on Inequality in Kenya, Nairobi: Society for International Development (SID).

<sup>209</sup> A.L. Bannon, (2007) Designing a Constitution-Drafting Process: Lessons from Kenya *Yale Law Journal*, Vol. 116,

<sup>210</sup> *Ibid.*

imbalances are what necessitate equalization. In as much as the national government level might be having higher power of taxation, it might have fewer functions as compared to the sub-national government level. On the contrary, different sub-national units tend to have different fiscal capacities for delivering public services to the people at the horizontal level.<sup>211</sup>

The differences are as a result of both revenue and expenditure faces of the budget. The need for different types of public services in respect to their expenditures can vary. This is mostly attributed to the different makes-ups of demographic units like scattering or high population density, varying costs of provision of services and may be topography. On the basis of revenue, different tax capacities are enacted by different units attributed to varying tax bases. Such disparities normally result from differences in economic development industrial specialization central versus the availability of natural resources and the peripheral positions<sup>212</sup>.

Differences may also result from the opportunities of different devolved units and the economic position at the economic level. Between members of the devolved fiscal and economic units, local development or opportunities tend to be very different. For instance, attributed to their raw materials or geographical positions, some units may possess higher levels of revenues. Lower tax bases may also be imposed to regions that lack marketable natural resources or the peripheral regions. Therefore, the provisions of public services at their required minimal national level of service are highly dependent on revenue raising capacity of the jurisdictions. This jeopardizes the public services. Problems of imbalances are also experienced at the cost level in which economies of scale issue come into terms. Some devolved units may fail to attain the minimum threshold or sufficient level of production capacity. This can be attributed to the scarce population density.<sup>213</sup>

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<sup>211</sup> C. Murray & Simeon, R. (2001) South African financial constitution towards better delivery; *Publius* 31 (4): 65-92. *op.cit.*

<sup>212</sup> KIPPRA (2009) Kenya Economic Report 2009, Nairobi: Kenya Institute for Public Policy Research and Analysis.

<sup>213</sup> *ibid.*

Consequently, the success of a financial equalization formula is also highly dependent on the institutional framework within its area of operation. Provisions within the devolved government system that addresses specific institution must be enacted as they dictate the mandate of determining grants and equalization questions taken time after time. In this regard, there exist several options of making fiscal and financial devolution successful. These include;

The national Government being empowered to determine the time to time arising questions on financial devolution. Critics of this approach have revealed that the idea of devolution is normally negated by this idea in that the central or national government gets an opportunity of destroying devolution through depriving devolved units their finances required for their effective operation.<sup>214</sup>

The second success factor in financial devolution lies on setting up a quasi independent body like the grants commission whose main objective is designing and reforming the fiscal devolution system. This has been the case in devolved systems in South Africa and the United States. With such an approach, more ideal than pragmatic solutions are realized. The effectiveness of such quasi independent bodies is further enhanced by separating the bodies from being represented by both devolved levels and the national level of government or political affiliations.

Thirdly, the use of sub-national committees in negotiating terms of the system as is the case in Canada is also an alternative that has been viewed to be successful.<sup>215</sup> In addition, constituting joint intergovernmental cum inter-legislative commissions like the financial commission are other alternative working system that give room for explicit political inputs from the involved jurisdictions. In respect to this, it is therefore likely for a system to opt for feasible and simple though less than ideal solution.

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<sup>214</sup> Okombo O. (ed.) Discourses of Kenya's 2007 General Elections: Perspective and prospects for a democratic society, Nairobi: Clarion.

<sup>215</sup> Nyanjom, O. (2009) 'The Political Economy of Poverty, Tokenism and Free and Fair Election in Kenya', in O. Okombo (ed.) Discourses of Kenya's 2007 General Elections: Perspective and prospects for a democratic society, Nairobi: Clarion.

In a comparative level analysis, there are some approaches that Kenya needs to emulate from countries like Canada and South Africa which have developed good mechanisms for equalization. The research output in this comparative analysis is heavily informed by literature review of fiscal and financial practices of decentralization in the mentioned countries and other related studies of the subject matter. Qualitative and quantitative data both coming from primary and secondary sources proved important in this comparative study.<sup>216</sup>

#### **4.6. Fiscal decentralization in practice**

Evidence show that the success or failure of a devolved political system is either dependent on the economic or political factors. In the case of economic factor the key element of devolution is fiscal decentralization, the relationship between the central government and the devolved units as far as the finances are concerned.<sup>217</sup> The crucial aspect of any federal government normally depends on the procedures of raising and spending the public resources. Different ways have been employed by different countries in dealing with this issue. Some have been successful while others have failed.

In the case of larger developing countries like South Africa and Nigeria, they have had problems in dealing with matters related to fiscal decentralization. This can be attributed to the fact that these nations simultaneously attempt both national development and equitable distribution of this development.<sup>218</sup> Implementing these processes at time can be unfriendly; more so when sentiments from politics reveal that natives of the economically endowed regions tend to have the feeling that their home generated wealth need to remain with them or when there is that feeling that some regions seem to be developing much faster in comparison with others.

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<sup>216</sup> Almani A., (2004) "Economy on the Up and Up: Kenya's Economic Landscape Is Looking Rosier Than It Has in Decades. The Stock Market Has Enjoyed Its Best Ever Performance, Lending Rates Are Dropping and the Flow of Aid Has Restarted. but, as Alnoor Amlani Reports from Nairobi, Political Uncertainties Cloud the Skies *African Business Vol. 1*

<sup>9</sup> Mwenda A.K (2010). Devolution in Kenya; Prospects, Challenges and the future; *journal by the Institute of Economic affairs*, Vol. 2(24)

<sup>218</sup> *Ibid.*

#### 4.7. Canadian equalization

With ten provinces and three territories, Canada is a federal state that mooted equalization idea back in 1940. Later in 1982, Canada finally decided to incorporate the concept of equalization in her Constitution, section 36(2) which states that: “parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.”<sup>219</sup> The Federation has come up with three main transfers such as;

The Canada Health and Social Transfer: this supports the provincial health care, post secondary education, social assistance and services. The block funded transfer enhances flexibility that administers and designs social programs in order to allocate funds among the social programs with respect to the specific priorities.<sup>220</sup> The transfer is made up of both tax and cash. The tax transfer takes place when the federal government reduces rates thereby allowing the provinces to raise their tax rates using the same amount.

All territories and provinces receive same amount of per capita entitlements for equal financial support in its area of operation to be realized. Kenya has no elaborate health scheme other than the National Hospital Insurance Fund (NHIF) that covers Government employees and other members of the private sector that have subscribed. Management of NHIF has been marred with allegations of corruption and mismanagement.<sup>221</sup>

Secondly Canada has the equalization transfers which federal money is provided to the provinces with less prosperity to enable such provinces afford its residents services. Such equalization payments are normally unconditional. Therefore, the receiving provinces have the liberty of choosing how to spend the devolved funds. In conjunction with the Canada Health and Social Transfer (CHST), equalization fund play a very significant role in helping the provinces improve

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<sup>219</sup> McKenna, M.C. (1993). *The Canadian and American Constitutions in Comparative Perspective*: Canada University of Calgary Press.

<sup>220</sup> *Ibid.*

<sup>221</sup> Judie Kaberia (2012) Nyong’o marooned in NHIF circus, Capital News, May 4

and maintain the quality of public services they offer.<sup>222</sup> The transfers are calculated with respect to set formula by the federal legislation. For those provinces sub-standard capacity of raising revenue, they receive equalization transfers from the federal government to bring their per capita fiscal capacity up to the required standard. Nevertheless, equalization transfers are adequately adjusted when the fiscal capacity of the qualifying province increases or declines as a result of economic growth in relation to the standard.

Lastly, Canada has implemented territorial funding based on the Territorial Formula Financing (TFF). The transfer to the territorial governments recognizes the higher costs of providing the public services in the north. In addition, these territories have some specifically designated federal funding program that reflects the higher costs of providing public services in the north, rapid growing populations, less developed economic bases from which economic revenues are raised and the vast land mass and small population.<sup>223</sup>

The territories are also protected against serious downturn in the revenues that might arise. Other than these three main programs, Canada exhibits other transfer programs under which the federal government funds its provinces in her devolved financial structure. These include; the disaster financial assistance arrangements, official language and education, federal government transfers funds to provinces, fiscal stabilization program, statutory subsidies, the provincial personal income tax revenue guarantee program and grants in lieu to municipalities.

#### **4.8. Equalization in South Africa**

South Africa has adopted a devolved government system through the 1993 Interim Constitution and finally the 1996 final Constitution, based on three government spheres; the national sphere, provincial and local spheres.<sup>224</sup> The South African country has its provincial level of government sphere divided into nine provinces. The country's constitution emphasizes on equitable

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<sup>222</sup> P. Boothe (1996) *Reforming Fiscal Federalism for Global Competition: A Canada-Australia Comparison*, Canada; University of Alberta Press.

<sup>223</sup> *Ibid*

<sup>224</sup> Murray, C., & Simeon, R. (2001) South African financial constitution towards better delivery; *Publius* 31 (4): 65-92.

allocation and sharing of its revenue and equalization. According to article 214 of the county's Final constitution, Act of Parliament must provide the following:<sup>225</sup>

First, equitable division of revenue that has been raised nationally, among the national, provincial and local spheres of the government. Second, the determination of each provinces equitable share of the provincial share of that revenue;

Third, any other allocation to provinces, local government or municipalities from the national government's share of that revenue and any conditions on which those particular allocations may be made.

The act that highlights on the equitable resource allocation in first subsection is only enacted after consultations and considerations with the provincial governments and both the fiscal and financial commission.<sup>226</sup> Before the commission considers allocation, it must consider: the national interests; positions on the national debts and obligations; the national Government needs and interests; the position of municipalities and provinces to provide basic services; the municipality and provincial fiscal capacity and efficiency; economic disparities within and among the provinces; development needs of the provinces, local governments and municipalities; the provinces and municipalities national legislative obligations; economic disparity within and among the provinces; need for flexibility when it comes to responding to emergencies or other temporary needs; and lastly, the desirability of predictable and stable revenue and share allocations.<sup>227</sup>

Kenyan Constitution lays down an elaborate framework that commission on revenue allocation must adhere to under Article 203. In addition, the national values and those spelt out under Article 201 on public financial management are adequate to guide national resource allocation>

The South African Constitution also establishes a Financial and Fiscal Commission that advices on some of the highlighted matters and their mode of formulation. The financial commission acts

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<sup>225</sup> 'Multi-level Government in South Africa: A Progress Report' (2001) 31 *Publius: the Journal of Federalism* 65-92

<sup>226</sup> 'Multi-level Government in South Africa: A Progress Report' (2001)

<sup>227</sup> José Maria Pinero Campos, OECD Economics Department Working Papers 872, OECD Publishing

independently. It is to act as a consultative body that makes appropriate recommendations and gives advice to the state, national, provincial and local sphere government organs as far as the financial and fiscal matters are concerned.

The body does so either on its own initiative or on request from one of the state organs. The commission works toward a system of sharing that takes care of equalization as an element. The overall equitable share determines the calculations of each provinces resources and needs.<sup>228</sup>

Other than the equitable share, the national sphere of the South African Government also gives to the provinces some conditional grants.<sup>229</sup> What Kenya needs to learn as it struggles to implement its fiscal and financial devolution is that resources need not to be shared on the basis of political exigencies but instead on the basis of objective criteria that take into account the needs of each of its counties and the level of development of each and every county.<sup>230</sup>

For example, according to the horizontal division of revenue for the 2000/2001 fiscal year and; the provinces, it was interesting to note that Kwazulu-Natal despite being an opposition zone received a whopping 21,128 billion rand as opposed to the Northern Cape which received 2,482 billion rand.<sup>231</sup>

#### **4.9. Fiscal devolution in the United States of America**

Several beneficial effects have been realized in the current position of financial relations existing in the states, federal, and local governments in the United States. Such include the comparatively higher levels of accountability and public expenditure responsiveness in the closely related

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<sup>228</sup> C. Murray & R. Simeon (2001) South African financial constitution towards better delivery; *Publius* 31 (4): 65-92.

<sup>229</sup> *Ibid.*

<sup>230</sup> MOH (2006) Taking the Kenya Essential Package for Health to the Community: A Strategy for the Delivery of Level One Service, Ministry of Health, Nairobi, Kenya.

<sup>231</sup> C. Murray & R. Simeon (2001) "South African financial constitution towards better delivery," 65-92.

revenue-raising powers and the assignments of expenditure.<sup>232</sup> This linkage is a reflection of the traditionally weak support for redistributions across various jurisdictions.<sup>233</sup> In the United States, grants from the federal governments to sub-national governments are majorly geared towards establishing an efficient and paternalistic nature.<sup>234</sup>

The Fiscal devolution program in the United States more so in the field of welfare has shown remarkable success in enhancing innovation as far as program design is concerned.<sup>235</sup> However, it is noted that the cost pressures in the field of health care for the poor are such that greater federal involvement might become necessary.<sup>236</sup> The erosion of tax bases mostly sales tax and corporate income has compromised the efficiency at which states raise their revenues.<sup>237</sup> This trend could however be reversed by replacing these taxes with a less distorting form of indirect taxation. As a final point, it appears as if state balanced budget requirements have had salutary effects, but more extreme forms of fiscal rules have reduced state and local governments' ability to provide the desired level of public goods.<sup>238</sup>

#### **4.10. Fiscal decentralization in Nigeria**

In the West African country of Nigeria, fiscal decentralization is made up of the financial aspects of devolution to both regional and local governments.<sup>239</sup> There are two interrelated issues that fiscal decentralization covers. These include the division of spending responsibilities and the

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<sup>232</sup> T. Laubach “(2011) Fiscal Relations Across Levels of Government in the United States” *Hansjörg Blöchliger* José Maria Pinero Campos, OECD Economics Department Working Papers 872, OECD Publishing

<sup>233</sup> South Africa (2001) Multi-level Government in South Africa: A Progress Report' *Publius: the Journal of Federalism* 31 65-92.

<sup>234</sup> *ibid.*

<sup>235</sup> José Maria & Pinero Campos, (2005) OECD Economics Department Working Papers 872, OECD Publishing

<sup>236</sup> A.L. Bannon, (2007) Designing a Constitution-Drafting Process: Lessons from Kenya

<sup>237</sup> *ibid.*

<sup>238</sup> *ibid*

<sup>239</sup> Gladwel Kunu (2002) “Financial decentralization in Federal Nigeria,” OUP, London, United Kingdom.

sources of revenue between the national, regional or local governments.<sup>240</sup> The second issue is the amount of discretion that has been given to both regional and local governments in determining both their aggregate and detailed revenue and expenditure. A combination of these dimensions has been found to have significant impacts on the reality of decentralization in its broader administrative and political sense.

In an attempt to ensure a sound financial footing of its newly established 301 local governments created on 1976, the Nigerian Federal Government decided to write off all the outstanding debts by the local governments owed to the state governments. In order to examine how these local governments would benefit from the statutory allocations by the state and federal governments, a committee was appointed. In 1981, the Nigerian federal government introduced a formula for sharing the Federal revenue amongst the three levels of the government. The statutory allocations to the local governments have been witnessing several upward reviews from 10 percent in 1981 up to the recent 20.6 percent on 2002. During these adjustments, both state and federal governments' allocations from the federation accounts have witnessed some significant drops.<sup>241</sup>

In order to strengthen its local councils, the Nigerian Federal Government initiated further steps in 1988. These included making direct payments of federal allocations to the local governments, instead of passing through the state governments.<sup>242</sup> The 1994 introduction of value added tax (VAT) was accompanied by the allocation of a 25 percent share to the local government. Such a large infusion of financial resources into the local governments in Nigeria has culminated into both positive and negative consequences. Such are some of the lessons that countries like Kenya can learn in her verge towards implementing a working financial devolution.<sup>243</sup>

#### **4.11. Lessons for Kenya with regards to financial devolution**

First, Kenya need to realize that devolution is not a magic tool that will solve all its problems. For example in the Nigerian experience, more so in the unequal allocation of the natural

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<sup>240</sup> Ibid.

<sup>241</sup> M. Tiffen, M. Mortimore and F. Gichuki (1994) *More People, Less Erosion: Environmental recovery in Kenya*, Chichester: John Wiley & Sons.

<sup>242</sup> A.L. Bannon, (2007) *Designing a Constitution-Drafting Process: Lessons from Kenya*, *op.cit.*

<sup>243</sup> L. Mishel, J. Bernstein, & J. Schmitt, (2001) *The State of Working America, 2000-2001* ILR Press

resources, devolution only exacerbate the economic problems more so when put into consideration issues like the derivation principle.<sup>244</sup> Secondly, in the situation of natural cleavages, like religion or ethno-language, instituting, devolution that adheres to these could not be wise.

Another lesson falls on how to share the country's economic output due the different regional endowment. Countries like Nigeria and South Africa have struggled with the principle of derivation for so long.<sup>245</sup> The argument in this case falls on recognizing economic gains and on determining the percentages to retain in regions of these economic gains. The most convenient means is always to have most of the economic output delivered to the national government which then decides according to the agreed principles of fiscal and financial devolution how to distribute the economic gains.<sup>246</sup> However, this has been shown to be one of the surest routes to massive corruption because those responsible in the control of economic taps normally have the largest share in terms of gain. In addition, regions that generate the most would tend to have greater say if it is being disfavored in wealth distribution.

In almost all countries under review, namely, United States, Canada, Nigeria and South Africa, it has been realized that the biggest share of the tax revenue normally goes to the central or national government. Regional governments are just involved in the collection of one or two taxes.<sup>247</sup> The fact that governments are always top heavy institution, most questions are always on how to deal with this.<sup>248</sup> The way in this case normally is that the central government makes transfers to the regions.<sup>249</sup> This is however not always the best option in that in cases where the

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<sup>244</sup> Mwenda, A.K. (2010), *op. cit.*

<sup>245</sup> Miguel, E. (2000) "Ethnic Diversity and School Funding in Kenya," Center for Labor Economics, University of California at Berkeley.

<sup>246</sup> *Ibid*

<sup>247</sup> *Ibid*

<sup>248</sup> Mwenda A.K., (2010) "Devolution in Kenya; Prospects, Challenges and the future;" *journal by the Institute of Economic affairs*, Vol. 2(24)

<sup>249</sup> *Ibid.*

central government bankrolls the region, power tends to centralize disputes irrespective of protestations in addition; the regional governments tend to be the repositories of patronage.<sup>250</sup>

However, there are many other instances where advantages of financial devolution can be outlined by the case studies. One of the biggest though least celebrated is that, when properly managed, the devolved regions serve as the training grounds in all aspects of the economy for the overall national leadership as seen in Canada and the United States. Secondly, a properly handled devolution comes along with other intangible benefits. In this case the process becomes inclusive with outcomes predicting participation at all the levels. This is an important lesson for Kenya whereby initiatives like the Constituency Development Fund (CDF) have given many Kenyan citizens a direct link between the taxes they pay and the associated services they receive.

In summary, it is evident that that the process of devolution, irrespective of the motivation associated with it; requires full understanding of its costs, risks, implications, what it can and cannot deliver. As it stands, many countries have implemented and undergone the process of devolution; therefore, it is equally important for Kenya to learn the right lessons as the country ponders over devolution process.

#### **4.11.1 Programs for financial devolution in Kenya**

There are several financial programs for devolution that have been used as a guideline towards establishing a formidable fiscal and financial devolution for the Kenyan case. These include the Kenya Financial Sector Deepening (FSD) program.<sup>251</sup> This program was established in 2005 with an aim of supporting financial development in the Kenyan market as a means of stimulating the creation of wealth and reduction of poverty. FSD works in close partnership with the financial service industry. Other than supporting the financial development, the program was also aimed at expanding access to the financial services to the low income enterprises and households.<sup>252</sup>

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<sup>250</sup> *Ibid.*

<sup>251</sup> Wambugu, A.M., & Lee, N. (2008, Nov.); Developing decentralized financial services; project review; *Financing Sector Deepening (FSD)*. Vol.1 p. 1-38

<sup>252</sup> *Ibid.*

The program operates as an independent trust but supervised by a board of professional trustees, like the KPMG Kenya.<sup>253</sup> In addition, the program is guided by the Program Investment Committee (PIC) policies.<sup>254</sup> Other than the Government of Kenya, the FSD program is funded by the World Bank, the UK's Department for International Development (DFID), Agence Française de Développement (AFD), the Swedish International Development Agency (SIDA), and the Bill and Melinda Gates Foundation.<sup>255</sup>

#### **4.11.2 The road to fiscal and financial devolution in Kenya**

As a research project in action, the Decentralized Financial Services (DFS) dates back to the 2003 in which the project was designed to improve the financial services in the rural and remote areas within the country. In its first phase the project was geared towards testing and developing the tools used for strengthening governance and management of community-based financial organizations. In 2005, the project's second phase commenced with a view to demonstrating the impact of its tools in deepening and broadening the financial services outreach within the rural zones.

Another research took place in the final quarter of 2009; a joint collaboration between the Kenya Human Rights Commission (KHRC) and the eight partners' organizations made up of the Social and Public Accountability Network (SPAN). This study was primarily focused on assessing the degree to which citizens participate in the management and decentralization of funds in Kenya.<sup>256</sup> Monitoring and evaluation was inclusive in this case. Another objective of this study was geared towards evaluating the scope of devolved fund duplication, in addition, public viewpoints as far as how the funds should be managed and be improved were sought, specifically on establishing harmonized opportunities at the least or best consolidation.

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<sup>253</sup>Wafula, C. (2012) "Devolution; poverty gets more consideration: revenue team revises county cash formula," *Daily Nation*. Thursday August 16, at <http://www.nation.co.ke/> (accessed 20/10/12).

<sup>254</sup> *ibid.*

<sup>255</sup> Wambugu A.M., & Lee, N. (2008) *op. cit.*

<sup>256</sup> Kenya Human Rights Commission (KHRC); & Social and Public Accountability Network (SPAN); (2010, Dec.) Harmonization of decentralized development in Kenya: towards alignment, citizen engagement and enhanced accountability, *A collaborative Joint Research Report, vol.1* p. 1-127

The importance of this study is that all the seven funds were taken into consideration, i.e. Constituency Development Fund (CDF), *Local Authority Transfer Fund* (LATF), Road Maintenance Levy Fund (RMLF), Free Primary Education (FPE), Secondary School Education Bursary Fund (SSEBF/Bursary Fund), *Water Service Trust Fund* (WSTF) and Human Immunodeficiency Virus Infection / Acquired Immunodeficiency Syndrome (HIV/AIDS).<sup>257</sup> All these funds take care of the education, water and sanitation, health, and roads sectors. Thus, they address the social and economic rights.<sup>258</sup> In addition, the socio-economic sectors have great impacts to the daily lives of individual Kenyan citizens, strategies for poverty reduction and the general economic growth at the national level.

Research establishes that decentralization of funds is a significant part and parcel of the developmental budget allocation for the Kenyan Government. According to the Kenya National Bureau of Statistics (KNBS) report of 2007, at least Kshs. 80 million per annum is disbursed to every constituency from all the devolved funds.<sup>259</sup> This figure translates to an average of Kshs. 16.8 billions or about 8% of the country's annual national income tax revenue. For the last seven years, a total of up to Kshs. 53 billion has been disbursed by CDF alone. At the national arena, an average of 35% of the country's local authority revenue is accounted for by LATF.<sup>260</sup> Devolved funds need to be optimally managed within the system for better results.

#### **4.11.3. Financial aspect of devolution in Kenya**

There are several underlying principles under the financial aspect of devolution that apply. Therefore, these ideologies have to be followed with respect to the current Constitution of Kenya by funds generated or received by counties.

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<sup>257</sup> Cf. Chapter 1

<sup>258</sup> Kenya Human Rights Commission (KHRC) & Social and Public Accountability Network (SPAN); (2010, Dec.)

<sup>259</sup> Aukot, E., Okendo, D.O. & Korir, K. (2007); *Decentralized Funds Regime In Kenya; A Guide To Community Participation; Kituo cha Sheria- Legal Advice Centre*, Vol. 1. p. 1-81

<sup>260</sup> Kenya Human Rights Commission (KHRC) & Social and Public Accountability Network (SPAN); (2010, Dec.) *Harmonization of decentralized development in Kenya: towards alignment, citizen engagement and enhanced accountability, A collaborative Joint Research Report, vol.1* p. 1-127

### **(a) The Power to raise revenue in Kenya**

Article 209(3) Constitution of Kenya 2010 gives the counties to raise their own revenue by imposing entertainment taxes; property rates, and any other authorized tax imposed by an Act of Parliament.<sup>261</sup> In Addition, during borrowing, a county government is only liable to borrow provided that the loan is guaranteed by the national government; moreover, according to article 212, an approval of the county government's assembly must be sought.

### **(b) Collection of Revenue in Kenya**

The collection of generated revenue is unclear in the Constitution. Revenue administration involves tax collection at the onset of determination. As it was under the 1969 constitutional system, the local authorities were supposed to take part in the collection of their own taxes. However, experience has it that most of these local authorities lacked the capacity of discharging this function.<sup>262</sup> With respect to the new constitution on the other hand, it is still a subject of debate whether the Kenya Revenue Authority will be collecting revenue on the county's behalf or whether the counties shall be assisted to build their own capacities of collecting their revenue.

### **(c) The power to spend revenue in Kenya.**

The county governments have the power of spending the revenue they raise. However, sharing of funds takes place between the national government and the county government on what is raised by the national government.<sup>263</sup>

First, the concept of equitable shares is provided by Article 202 of the Kenyan Constitution. According to this article, it is a requirement that the nationally raised revenue be equitably shared between the county and the national governments. Moreover, the county governments are liable for receiving additional allocations from the revenue share of the national Government. Just like

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<sup>261</sup> Koki, M., Chege, B.N., & Nabulumbi, W.L. (2011). Devolution and Nation Building in Kenya; *Strathmore University Report*; p. 3-10

<sup>262</sup> *ibid.*

<sup>263</sup> Decentralisation Thematic Team (no date) 'Issues in Programme Design'. The Online Sourcebook on Decentralization and Local Development at [http://www.ciesin.org/decentralization/SB\\_entry.html](http://www.ciesin.org/decentralization/SB_entry.html) (accessed 15 /2/2012).

the South African and Canadian case, the additional revenues are either given unconditionally or conditionally.<sup>264</sup>

Second, a detailed criterion to be followed is provided by Article 203. This article provides for procedures in vertically determining equitable shares between the national and county governments and the horizontal sharing among the 47 counties.<sup>265</sup> When determining the shares, the principles of financial equalization have to be followed. All these are incorporated in Article 203. Finally, fund equalization for the marginalized areas is provided for in Article 204.

#### **4.11.4. The controversy on the financial aspect of devolution in Kenya**

As much as agreeable it may seem, the financial aspect of devolution has stood to be a major source of debate between the various stakeholders involved and the different arms of government. The International Monetary Fund (IMF) has increasingly found it difficult to maneuver through the arising disputes between the Ministry of Local Government and that of Finance as far as revenue management between the county and national governments is concerned<sup>266</sup>.

It is further reported that the Local Government seems to be hatching a long term scheme, geared towards suppressing the government at the county level. In doing so the local government requires that the control of finances be vested at central Government.<sup>267</sup> With respect to these arguments, analysts claim that this scenario would ideally defeat the whole concept of financial devolution as it is in the 2010 Constitution.<sup>268</sup>

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<sup>264</sup> *Ibid.*

<sup>265</sup> *ibid.*

<sup>266</sup> Walter Menya (2011) Kenya: IMF's Input in Devolution Bill Fuels Dispute Over Control of County Cas, *Daily Nation Kenya*.

<sup>267</sup> *Ibid.*

<sup>268</sup> *Ibid.*

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1. Conclusions: Enhancing the management of decentralized funds in Kenya

##### 5.1.1. Introduction

It is important to identify the standards and principles of the best practice in a decentralized fund management system. Quite a number of rampant cases of abuse of these devolved funds exist. When brief overviews of decentralization of funds in Kenya is done, it is noted that there have been creations of several successive funds without considering the past initiatives that in most cases replicate past failures while in other cases leading to abandonment of stronger implementation models.<sup>269</sup> There is need for the government to clearly identify the unit of financial devolution in order to enhance good governance and democracy on the basis of the most cost-effective, representative and efficient model for the country.<sup>270</sup>

#### 5.2. Recommendations

For effective financial devolution, it is important to highlight some of the institutional challenges inherent in the present system, which has been characterized by fund multiplicity with numerous overlaps. For example, funds devolved under the educational system should be provided under, Constituency Development Fund (CDF), Local Authority Transfer Fund (LATF), Road Maintenance Levy Fund (RMLF), Free Primary Education (FPE), or Secondary School Education Bursary Fund (SSEBF/Bursary Fund).<sup>271</sup>

Inefficient resource utilization' lack of clarity between the objectives of the funds and the national development objective; lack of clarity on the formula on the establishment of the funds; continuous susceptibility of the funds to political impulse and parallel administrative structures

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<sup>269</sup> Gikonyo, W. (2006,) “ Working paper on: Decentralized funds in Kenya,” Hanns *Siedel Foundation*, Nairobi Kenya p. 1-9.

<sup>270</sup> S. Elischer (2008) ‘Ethnic Coalitions of Convenience and Commitment: Political parties and party systems in Kenya’, GIGA Working Paper No. 68 (February), German Institute of Global and Area Studies, Hamburg.

<sup>271</sup> *ibid.*

tend to arise in situations where there are failures of clarifying the roles of existing institutions in the respective funds.

There is critical need for the separation of powers as envisaged in the fiscal and financial devolution framework. This can be supported by the numerous cases that have been reported on abuses and excesses in the implementation of CDF.<sup>272</sup> Therefore, there is need for the legal framework of the respective funds to safeguard institutional checks and balances with a view of strengthening accountability and governance in funds implementation. In addition, institutional mechanisms that can safeguard and facilitate the participation of communities in various funds need to be put in place. This is accompanied by implementing a framework which can protect and entrench the participation of the public.

Therefore as a way forward, there is dire need of simplifying and clarifying the fiscal and financial decentralization processes in Kenya. This can be achieved by harmonizing the already existing structures and funds either vertically or horizontally. Achieving this step requires an overarching policy of decentralization that addresses the following points of concern:

First, in order to promote complementarity, continuity, predictability and sustainability, there is need to establish some in-built mechanisms that can integrate both local and national development priorities and goals, thereby compelling performance; Second, enhancing good governance and democracy on the basis of the most efficient, representative, and cost effective model for the nation, clear identification of the unit of devolution becomes very vital;

Third, the principle of power separation either at the local or national level should be safeguarded by each funds' institutional framework; Fourth, effective mechanisms for fund audit other than monitoring and evaluation should be entrenched within the decentralization framework; Lastly, in order for the public to feel the genuine representation and influence as far as the management of devolved funds is concerned, there is need for the decentralization framework to protect, streamline and enshrine public participation.

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<sup>272</sup> *ibid.*

It can therefore be concluded that a need for a comparative, evaluatory and comprehensive research on fiscal and financial devolution of funds in totality need to be done to inform the effective development of policies of financial devolution in Kenya. For an effective management of funds, the Kenya Government and other stakeholders in the implementation of financial devolution should put in place a comprehensive nationwide capacity building in order to strengthen the tools and skills for both the public and officials. Due to the larger magnitude of this challenge, there is definitely no doubt that the multi-sectorial collaboration in support of the devolved government initiatives in financial devolution should of first priority. It is a belief that this work will be of valuable contribution with regards to fiscal and financial devolution in Kenya.

## Annexures

**Table 1: County Revenue Allocation**

County	Population	Per Capita (Kshs)	Total Allocation (Kshs)	% of Total Allocation
Nairobi	3,138,369	3,108	9,754,036,101	8.1
Kakamega	1,660,651	3,108	5,161,295,503	4.3
Bungoma	1,630,934	3,108	5,068,935,206	4.2
Kiambu	1,623,282	3,108	5,045,152,826	4.2
Nakuru	1,603,325	3,108	4,983,126,564	4.2
Meru	1,356,301	3,108	4,215,377,133	3.5
Kisii	1,152,282	3,108	3,581,287,040	3.0
Kilifi	1,109,735	3,108	3,449,051,164	2.9
Machakos	1,098,584	3,108	3,414,393,908	2.8
Mandera	1,025,756	3,108	3,188,044,827	2.7
Kitui	1,012,709	3,108	3,147,494,812	2.6
Kisumu	968,909	3,108	3,011,364,618	2.5
Homa-Bay	963,794	3,108	2,995,467,222	2.5
Muranga	942,581	3,108	2,929,537,318	2.4
Mombasa	939,370	3,108	2,919,557,545	2.4
Migori	917,370	3,108	2,850,560,049	2.4
Uasin-Gishu	894,179	3,108	2,779,104,129	2.3

Makueni	884,527	3,108	2,749,105,759	2.3
Turkana	855,399	3,108	2,658,576,071	2.2
Narok	850,920	3,108	2,644,655,360	2.2
Siaya	842,304	3,108	2,617,876,873	2.2
Trans-Nzoia	818,757	3,108	2,544,692,908	2.1
Kericho	758,339	3,108	2,356,914,048	2.0
Nandi	752,965	3,108	2,340,211,681	2.0
Bomet	724,186	3,108	2,250,766,684	1.9
Nyeri	693,558	3,108	2,155,575,004	1.8
Kajiado	687,312	3,108	2,136,162,465	1.8
Wajir	661,941	3,108	2,057,309,517	1.7
Kwale	649,931	3,108	2,019,982,493	1.7
Garissa	623,060	3,108	1,936,467,551	1.6
Nyamira	598,252	3,108	1,859,364,404	1.5
Nyandarua	596,268	3,108	1,853,198,141	1.5
Baringo	555,561	3,108	1,726,680, 977	1.4
Vihiga	554,622	3,108	1,723,762, 569	1.4
Kirinyaga	528,054	3,108	1,641,189, 350	1.4
Embu	516,212	3,108	1,604,384, 470	1.3
West Pokot	512,690	3,108	1,593,438, 110	1.3

Busia	488,075	3,108	1,516,934, 806	1.3
Laikipia	399,227	3,108	1,240,795,640	1.0
Elgeyo- Marakwet	369,998	3,108	1,149,952,045	1.0
Tharaka-Nithi	36 5,330	3,108	1,135,443,923	0.9
Marsabit	291,166	3,108	904,942,559	0.8
Taita-Taveta	884,712,618	3,108	284,657	0.7
Tana-River	240,075	3,108	746,151,972	0.6
Samburu	223,947	3,108	696,026,223	0.6
Isiolo	143,294	3,108	445,357,078	0.4
Lamu	101,539	3,108	315,582,735	0.3
<b>Totals</b>	<b>38,610,097</b>	<b>3,108</b>	<b>120,000,000,000</b>	<b>100.0</b>

*Source: Commission on Revenue Allocation*

**Table 2: Status report for County Government Cash Releases as at 30<sup>th</sup> August 2013**

<b>Code</b>	<b>County Government</b>	<b>Total Equitable share</b>	<b>Cash Released as at 30/08/13</b>	<b>Balance</b>
329	MURANGA	3,917,395,471.00	332,978,615.00	3,584,416,856.00
330	NAIROBI	9,505,766,405.00	807,990,144.00	8,697,776,261.00
331	NAKURU Equitable Share) Level 5 Hospital	5,936,313,837.00	504,586,676.00	5,431,727,161.00
332	NANDI	3,477,901,827.00	295,621,655.00	3,182,280,172.00
333	NAROK	3,867,590,331.00	328,745,178.00	3,538,845,153.00
334	NYAMIRA	3,038,643,767.00	258,284,720.00	2,780,359,047.00
335	NYANDARUA	3,150,207,289.00	267,767,620.00	2,882,439,669.00
336	NYERI (Equitable Share) Level 5 Hospital	3,254,175,229.00	276,604,895.00	2,977,570,334.00
336	NYERI (Equitable Share)Level 5 Hospital	382,128,747.00	32,480,943.00	349,647,804.00
337	SAMBURU	2,598,153,222.00	220,843,024.00	2,377,310,198.00
338	SIAYA	3,653,579,335.00	310,554,243.00	3,343,025,092.00
339	TAITA TAVETA	2,420,630,003.00	205,753,550.00	2,214,876,453.00
340	TANA RIVER	2,914,328,551.00	247,717,927.00	2,666,610,624.00
341	THARAKA NITHI	2,294,827,947.00	195,060,375.00	2,099,767,572.00
342	TRANS-NZOIA	3,729,874,627.00	317,039,343.00	3,412,835,284.00
343	TURKANA	7,664,402,594.00	651,474,220.00	7,012,928,374.00

344	UASIN GISHU	3,796,628,687.00	322,713,438.00	3,473,915,249.00
345	VIHIGA	2,831,564,442.00	240,682,978.00	2,590,881,464.00
346	WAJIR	5,290,052,180.00	449,654,435.00	4,840,397,745.00
347	WEST POKOT	3,155,049,726.00	268,179,227.00	2,886,870,499.00
313	Kiambu (Equitable Share)	5,458, 860.00	464,003,173.00	4, 994, 857, 687.00
312	KERICHO	3,295,019,652.00	280, 076,670.00	3,014, 942,282.00
314	KILIFI	5,442,533,482.00	462,615,346.00	4,979,918,136.00
315	KIRINYAGA	2,587,865,089.00	219,968,533.00	2,367,896,556.00
316	KISII (Equitable Share) Level 5 Hospital	5,188,303,957.00	441,005,836.00	4,747,298,121.00
315	KIRINYAGA	211,155,681.00	17,948,233.00	193,207,448.00
317	KISUMU Equitable Share) Level 5 Hospital	4,155,298,066.00	353,200,336.00	3,802,097,730.00
318	KITUI	5,315,309,833.00	451,801,336.00	4,863,508,497.00
319	KWALE	3,748,952,670.00	318,660,977.00	3,430,291,693.00
320	LAIKIPIA	2,523,013,037.00	214,456,108.00	2,308,556,929.00
321	LAMU	1,500,755,102.00	127,564,184.00	1,373,190,918.00
322	MACHAKOS (Equitable Share)	4,950,617,061.00	420,802,451.00	4,529,814,610.00
323	MAKUENI	4,366,239,078.00	371,130,322.00	3,995,108,756.00
324	MANDERA	6,550,232,929.00	556,769,799.00	5,993,463,130.00

325	MARSABIT	3,795,591,042.00	322,625,239.00	3,472,965,803.00
326	MERU (Equitable Share) Level 5 Hospital	4,749,444,426.00	403,702,776.00	4,345,741,650.00
326	MERU (Equitable Share) Level 5 Hospital	183,151,299.00	15,567,860.00	167,583,439.00
327	MIGORI	4,269,095,296.00	362,873,100.00	3,906,222,196.00
328	MOMBASA (Equitable Share) Level 5 Hospital	3,801,758,313.00	323,149,457.00	3,478,608,856.00
328	MOMBASA (Equitable Share) Level 5 Hospital	414,381,658.00	35,222,441.00	379,159,217.00
301	BARINGO	3,247,853,215.00	276,067,523.00	2,971,785,692.00
302	BOMET	3,442,638,623.00	292,624,284.00	3,150,014,339.00
303	BUNGOMA	6,180,666,881.00	525,356,685.00	5,655,310,196.00
304	BUSIA	3,412,404,160.00	290,054,354.00	3,122,349,806.00
305	EIGEYO/MARAKW ET	2,392,011,591.00	203,320,985.00	2,188,690,606.00
306	EMBU (Equitable Share) Level 5 Hospital	2,807,082,691.00	238,602,029.00	2,568,480,662.00
307	GARISSA (Equitable Share) Level 5	4,221,433,715.00	358,821,866.00	3,862,611,849.00

	Hospital			
308	HOMA BAY	4,121,429,825.00	350,321,535.00	3,771,108,290.00
309	ISIOLO	2,235,583,337.00	190,024,584.00	2,045,558,753.00
310	KAJIADO	3,227,409,859.00	274,329,838.00	2,953,080,021.00
311	KAKAMEGA (Equitable Share) Level 5 Hospital	6,515,510,758.00	553,818,414.00	5,961,692,344.00
<b>TOTAL</b>		<b>193,418,726,021.00</b>	<b>16,440,591,712.00</b>	<b>176,978,134,309.00</b>

*Source: Commission on Revenue Allocation.*

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