KILLING DEVOLUTION ONE LEGISLATION AT A TIME: A CASE OF LIMITED DECENTRALIZATION IN KENYA

UNIVERSITY OF NAIROBI

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DECLARATION

I, **MWANGI ALEX RIENYE**, do hereby affirm that this is my original work for which references made to texts, articles, papers and journals, and other materials, have been fully acknowledged.

Signature:……..Date:……

MWANGI ALEX RIENYE

This research project has been presented for examination with my authority as the University Supervisor.

DR. NKATHA KABIRA

Signature: …… Date: ……

DEDICATION

This research project is dedicated to the efforts of finding and establishing the most appropriate and stable system of government in Kenya and to my mother Nyina wa Rienye.

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I give my most sincere gratitude and honour to the Almighty God whose favour and grace has been abundant throughout my time studying for this degree.

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LIST OF ABBREVIATIONS AND ACRONYMS

BEAA	British East Africa Association
CEC	County Executive Committee
CLS	Critical Legal Studies
COG	Council of Governors
COE	Committee of Experts
CPS	County Public Service
CRA	Commission on Revenue Allocation
IBEACO	Imperial British East Africa Company
IBEC	Intergovernmental Budget and Economic Council
IGRTC	Intergovernmental Relations Technical Committee
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KNDRC	Kenya National Dialogue and Reconciliation Committee
LNC	Local Native Council
PFMA	Public Finance Management Act
PWD	Persons With Disabilities
The Summit	National and County Government Coordinating Summit
USA	United States of America
WASREB	Water Services Regulatory Board

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ABSTRACT

This research project examines why Kenya's system of government remains highly centralised despite the entrenchment of devolution in the Constitution of Kenya, 2010.It argues that although the Constitution of Kenya,2010 envisions a devolved system of government, nevertheless Kenya's system of government remains highly centralised because the current constitutional design of devolution allows recentralization of political power through legislation.

This research project relies on a mixed methodological approach to examine whether all attempts to disperse power from the center have always been designed to retain control by the center. With the help of 'Kelsenian' pure theory of law, devolution is described as an order of norms, and critical legal studies theory which propounds that laws benefit those who wield political power during the making of such laws, the research project ascribes two reasons for the retention of central control in the design of devolution in Kenya. The first reason is to maintain the cohesiveness of a nation state that was forcefully forged from previously independent nations(tribes). Secondly, those wielding political power before devolution always influence the design of government to retain political power at the center.

Finally, this research project demonstrates that devolution of political power is highly limited. In this regard, it proposes a re-examination of the current design of devolution with an aim of clarifying the intended degree of deconcentration of political power.

CHAPTER ONE: INTRODUCTION

1.1 Background

In August 2010, the Kenyan citizenry welcomed a new constitution which set out devolution as part of the systems through which they wished to be governed.[1] Devolution is a system of distribution of political, fiscal and administrative powers of a centralized authority to semi-autonomous territories or sub-national units within its territorial boundaries.[2] The concept of devolution in most Kenyan political and legal discourse has been described as a novel innovation by the Kenyan people. It has received international praise and acclaim for its progressive and transformative nature.[3] It is a system that continues to inspire optimism both within and without the boundaries of Kenya. This optimism is largely informed by the so often prescription by its advocates, as a politically relevant solution to the challenges facing weak and pluralistic societies. These problems include the inefficient utilization of public resources, corruption *en masse*, widespread inequalities in accessing public services among others.[4]

These ills are attributed to certain missteps that the country made in its governance structures.[5] The system of devolution as we have it has evolved from serious struggles amongst ethnicities, vested interests and social classes.[6] Powers and functions that were traditionally within the ambit

[1] Godwin R Murunga , Duncan Okello and Anders Sjogren, 'Towards a new Constitutional Order in Kenya: An Introduction' in Godwin R Murunga, Duncan Okello and Anders Sjogren, *Kenya: The Struggle for a New Constitutional Order* (ZED Books ,2014) .
[2] ibid.
[3] Thomas Otieno Juma , Jacob Rotich and Leonard Mulongo, 'Devolution and Governance Conflicts in Africa: Kenyan Scenario' (2014) Social Science Research Network Scholarly Paper 2461292 <https://papers.ssrn.com/abstract=2461292> accessed 23 September 2019.
[4] Institute of Economic Affairs, 'Devolution in Kenya, Prospects, Challenges and the Future' (2010) IEA Research Paper 24 <www.ieakenya.or.ke/downloads/page=Devolution-in-Kenya> accessed 20th July 2017.
[5] World Bank, *The Evolution of Kenya's Devolution: What's Working Well, What Could Work Better* (World Bank ,2014) <http://www.asclibrary.nl/docs/400205343.pdf> accessed 23 September 2019.
[6] ibid.

of national government have now been conferred upon the devolved units pursuant to the Fourth Schedule of the constitution.[7]

Both governments have a legislature bestowed with legislative authority with respect to the functions of either level of government.[8] It is through the exercise of this authority, that the legislatures are supposed to make laws at their respective levels. It is through the legislative competence of the two levels of government that the distinction and independence of each level is established.[9] However, struggle and controversy for legislative competence is typical in all systems of government with federal characteristics. Often the question of legislative competence is posed in a judicial context while determining the validity of legislation. Seldom is it raised during the process of legislation or policy formulation. And when it is raised, it is usually for the purpose of formulating mechanisms of bypassing the strictures of legislative competence.

Further, in the excitement of the new system of governance, few, if any, have questioned the motive behind the design of the constitutional provisions of legislative competence. Although the constitution implies that the two levels government are equal as they both derive their legitimacy from the sovereign power and will of the people of Kenya[10], the same constitution paints a different picture where the legislative authority at the county level is largely subordinate to the legislative authority of the national government[11].

Devolution in Kenya is at its infancy. There are instances where the legislative competence of either level of government has been or will be breached. This breach can be a case of honest

[7] Juma , Rotich and Mulongo (n 3).
[8] ibid.
[9] Juma, Rotich and Mulongo(n3).
[10] Constitution of Kenya 2010, Article 1 and Article 6.
[11] Constitution of Kenya2010, Article 191.

oversight or deliberate attempts to depart from the dictates of the constitution. However, this research project will seek to show that the breaches of legislative competence in Kenya are not honest mistakes or opportunities for judicial interpretation. These breaches go to the root of the design and degree of devolution in Kenya and portend the danger of recentralization of political power.

1.2 Problem Statement

Although the Constitution of Kenya,2010 envisions a devolved governance system, nevertheless Kenya's system of government in Kenya remains highly centralized. This study therefore demonstrates that the fact that power is still concentrated at the center is not by accident but the balance of political power in favour of the national government is in the original design of devolution. The study further demonstrates that through legislation, political power is further recentralised.

1.3 Research Objectives

The objectives of this research project are:

1. To examine why Kenya's system of government remains highly centralised despite the entrenchment of devolution in the Constitution.
2. To analyse the historical development of the Kenya's governance systems with a view to establish the intended design of devolution.
3. To scrutinise the legal and institutional framework of creating the devolved system of governance in Kenya.
4. To establish whether the design devolved governance in the constitution is skewed in favour of centralization.

5. To demonstrate how current national legislation and proposed national legislation usurp the mandate of the devolved units in Kenya.
6. To recommend reforms on the design of devolution to safeguard the legislative authority of the counties as well as ensure that national legislation does not interfere with the legislative competence of county assemblies.

1.4 Research Questions

The research project will answer:

1. Why has Kenya's system of government remained highly centralised despite the entrenchment of devolution in the Constitution?
2. What is the history of Kenya's government systems?
3. What is the legal and institutional framework governing devolution in Kenya?
4. What is the constitutional design of devolution in Kenya?
5. How does national government legislation claw back on the mandate of the devolved units of governance?
6. What reforms can be made to safeguard the legislative authority of the devolved units and to ensure that their mandate is not usurped by the national government?

1.5 Hypothesis

Although the Constitution of Kenya 2010 envisions a devolved government system, nevertheless Kenya's system of government remains highly centralised because the current constitutional design of devolution allows recentralization of political power through legislation.

1.6 Theoretical Framework

1.6.1: Pure Theory of Law

The research project is mainly placed within the pure theory of law. The pure theory of law is propounded by Hans Kelsen. Hans Kelsen sees the law not as the manifestation of a super human authority, but a specific technique based in human experience.[12]This theory postulates that law designates a specific technique in social organisation.[13]

This theory demonstrates how the constitutional design of Kenya's system of government and the legislation made thereunder are deliberate efforts to organise the Kenyan society in a certain manner and to allocate power in a certain way. The pure theory of law shows that legal systems are in no way accidental or products of metaphysical benevolence.[14] They are deliberate creations of human beings and for definite purposes. This is shown by Kelsen's views of the State as personifying the legal order of the nation and this is evident in the moral-political principles upon which the State is founded.[15]

While presenting centralization and decentralization as legal concepts upon which a State may be founded, Kelsen avers that the problems of centralization and decentralization delve into the validity of legal norms, the organs enacting them and their attendant application.[16]

[12]Hans Kelsen, *General Theory of Law and State* (3rd edn, Harvard University Press, 1949).
[13] ibid.
[14] Tim Murphy, 'Hans Kelsen's Pure Theory of Law' (2004) Social Science Research Network Scholarly Paper 2616604 <https://papers.ssrn.com/abstract=2616604> accessed 29 September 2019.
[15] ibid.
[16] Kelsen (1949) n 12.

1.6.1.1 The concept of territorial division

Kelsen seeks to show the difference between centralization and decentralization using his theory of validity of norms.[17] On one hand, he defines a central order as where all norms are valid and have a uniform application throughout a given territory while in a decentralized legal order the validity of norms vary from territory to territory within a larger territory.[18] From this territorial division emanates what Kelsen calls central norms and decentral or local norms. Central norms are valid for the whole territory while local norms are the norms valid only for some part of the territory.[19] Kelsen further states that local norms form a local legal order while central norms form a central legal order.[20] Kelsen summarizes territorial division by stating that within a decentralized State, there exists both a national legal order and a local legal order for the governance of the subdivisions within that State.[21]

Kelsen also provides a justification for decentralization when he states the main reason for decenteralisation is the possibility of matters being regulated differently for different regions.[22] According to Kelsen, decentralization is necessary where the social conditions of the various territories of the state vary.[23]

This research project argues that the social conditions of Kenya manifested in the various ethnic groupings necessitate decentralization. It argues that decentralization in Kenya cannot run away

[17] Hans Kelsen, *General Theory of Norms* (Clarendon, 1991).
[18] ibid.
[19] Kelsen (1991) n 17.
[20] Ronald Moore, *Legal Norms and Legal Science: A Critical Study of Kelsen's Pure Theory of Law* (University Press of Hawaii ,1978).
[21] Kelsen (1991) n 17.
[22] Murphy (n 14).
[23] ibid.

from the question of ethnic relations as well as ethnic mobilisation for the purpose of acquiring political power.

1.6.1.2: The concept of degree of decentralization

According to Kelsen, the degree of centralization and decentralization is determined by the relative proportion of the number and importance of central to the local norms in the legal order.[24]He postulates that the quantitative degree of centralization and decentralization depends; in the first place on the number of stages in the hierarchy of the legal order to which centralization and decenteralisation applies. Secondly, it depends on the number and importance of the subject matter regulated by central or legal norms.[25] This research project argues that the importance ascribed to the two levels of government point to the degree of centralization and decentralization.

The degree of decentralization can also be described qualitatively as either perfect or imperfect.[26] Kelsen argues that decentralization is perfect when the creation of local norms is independent of the central norms.[27] He further argues that decentralization becomes imperfect when the central law dictates the general principles to be applied in the creation of local laws.[28] However, Kelsen argues that there cannot be total centralization and decentralization.[29] Towards this end he postulates that there ought to be limits to centralization in the affairs of the decentralized units and limits beyond which decentralized units can go if the two governments are to coexist harmoniously.

[24] Tim Murphy, 'Hans Kelsen's Pure Theory of Law' (2004) Social Science Research Network Scholarly Paper 2616604 <https://papers.ssrn.com/abstract=2616604> accessed 29 September 2019.
[25] ibid.
[26] Moore (n 20).
[27] H. Kelsen (1991) n 17.
[28] ibid.
[29] H. Kelsen (1991) n 17.

This research project accepts the existence of a basic norm in the form of a constitution which consists the bare minimum of the central norms.[30] It however seeks to interrogate the circumstances of the historical formation of the national legal community known as Kenya.

1.6.2: Critical Legal Theory

Proponents of this theory criticize the formalism and objectivism espoused in the positivist theory propounded by Kelsen. Unger argues that CLS is a creation of people who wish to dissociate themselves from the conservative traditions in their thinking and practicing of the law.[31] Critical legal studies describes formalism in legal reasoning as the belief that it is impossible to dispense with personal policies and principles in legal reasoning and the process of making laws.[32] According to critical legal studies there can be no separation between politics and the analysis of the law.[33] Critical legal studies shows how the struggle over power affects law making.[34] In this regard, critical legal studies proposes that the law favours those that are in power. This is better illustrated by the fact that legal and moral assumptions embedded in legal claims are founded on the need for law-makers to protect their own interests and those of persons within their circles.[35] According to Professor Unger, the spirit and letter of the law should spring from the established societal norms and values as opposed to legislators prioritizing selfish interests over or at the expense of the larger society.[36] However, he argues that this is nearly impossible because human beings are inherently selfish and all activities start and end with meeting their individual needs

[30] Van Klink and PD Bart, 'Facts and Norms: The Unfinished Debate between Eugen Ehrlich and Hans Kelsen' (2006) Social Science Research Network Scholarly Paper 980957 <https://papers.ssrn.com/abstract=980957> accessed 29 September 2019.
[31] Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard University Press, 1986).
[32] ibid.
[33] Unger (1986) n 31.
[34] ibid.
[35] Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton University Press, 1993).
[36] Roberto Mangabeira Unger, *Knowledge and Politics* (Simon and Schuster, 1976).

first.[37] In order for legislation to be bereft of these selfish interest, it would require the elimination of individual subjectivity which is nearly a tall order.[38] He further argues that for as long as legislators belong to a diverse collection of different groupings with diverse interests, the subjectivity cannot be eliminated and as such the persons in control of the tools of lawmaking will always dictate what the law will be during the pendency of such political reign.[39]

This theory is relevant to this research project, to the extent that it will show that the law making processes that have created the various systems of government in the history of Kenya were not bound by the strictures of objectivism, neither were they impersonal. It will show that those processes and the resultant laws were skewed in favour of the interests of those wielding political power.

1.7 Literature Review

Devolution has not really matured in Kenya. Therefore, in the present circumstances, there is a very limited amount of literature on the practicalities of implementing this new system. Most Kenyan authors have postulated on how the ideal system should work. Their arguments paint a picture that the design of devolution in the constitution is good and the current problem in the country is a problem of interpretation of the constitution.

Mutakha Kangu argues that devolution is riddled with complexities and it is one of the least understood provisions of the new constitution.[40] He argues that this complexity affects how the constitutional provisions are interpreted. This interpretation is germane to the implementation of the devolved system ,and as Bosire puts it ,the agencies relevant to the task of rolling out this

[37] Unger (1976) n 36.
[38] ibid.
[39] Unger (1976) n 36.
[40] John Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (Strathmore University Press ,2015).

system have to interpret the constitutional objectives and principles of the constitution.[41] In this regard, Mutakha Kangu postulates that "county empowering provisions must be interpreted liberally, broadly and generously in the favour of the counties."[42] However Mutakha Kangu places emphasis on constitutional interpretation by the courts. This departs from Bosire's argument that constitutional interpretation and implementation for the success of devolution is a responsibility of multiple agencies. The above arguments are arguments within the wider concept of legislative competence.

Bronstein argues that legislative competence is an important issue in all constitutional federal characteristics.[43] Bronstein postulates that at the heart of legislative competence is how the power apportioned between the governments affects the validity of their respective legislation.[44] According to Bronstein, "each level of government should limit the exercise of its legislative authority to the respective functions assigned in the constitution."[45] Further, Bronstein's argument suggests that when there is a conflict of legislation courts should provide creative judicial solutions to avoid legislative paralysis.[46]

The above arguments seem to suggest that State agencies should interpret the constitution to read in political powers that are not expressly stated in the text of the constitution but can be deduced as the peoples' intentions for devolution based on the social and historical circumstances of the country. This research project will however show that the problem is not merely an interpretation

[41] Conrad Bosire, 'The Constitutional and Legal Framework of devolved Government and its Relevance to Development in Kenya' in Morris K Mbondenyi, Evelyne O Asaala, Tom Kabau and Attiya Waris (eds), *Human Rights and Democratic Governance in Kenya; A Post-2007 Appraisal* (Pretoria University Press, 2014) 211.
[42] Kangu (2015) n 40.
[43] Victoria Bronstein, 'Legislative Competence' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (2nd edn Juta, 2013).
[44] ibid.
[45] Bronstein n 43.
[46] ibid.

problem but it goes to the tensions of centralisation and decenteralisation. These tensions, as stated earlier, have influenced the design of devolution in Kenya which has in turn influenced the legislative actions of the various state agencies.

In this regard, the interplay in the exercise of legislative authority is a consequence of the design of various forms of autonomy in governments. This is particularly true for ethnically diverse countries like Kenya.

Yash Ghai explores the dialectics of ethnicity and territoriality as mediated by a variety of forms of autonomy.[47] He argues that, 'autonomy provides an opportunity for the appreciation of cultural diversity and that because of the politics of identity, autonomy may set the country on the path of long-lasting and sustainable unity without disrupting the claim to self-government.'[48]

Yash Ghai explains the distinctiveness of ethnically based autonomies as 'having different structures and orientations from federations like Australia and the United States.'[49] He argues that 'ethnic based autonomies are as a result of devolution or disaggregation and start with a centralised structure.'[50] According to Ghai, 'the genesis of ethnic autonomies is a cause of unease about the potential of devolution as a means of realizing political autonomy for the different ethnic groupings and this has always made it seem like the only way to rein and prevent claims to self-determination would be by having the national government as the dominant party in this relationship.'[51] Yash Ghai writes that devolution has been criticized for incapacitating the reach of national authorities.[52]

[47] Yash Ghai, 'Ethnicity and Autonomy' in Yash Ghai (ed) in *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge University Press,2000).
[48]ibid.
[49] Ghai n 47.
[50] ibid.
[51] Ghai n 47.
[52] ibid.

It is viewed, therefore, as disruptive of the agenda of the national government in the realization of economic development and a destabilizer to law and order which arguably requires a strong and firm presence of the national government in order to be realized.[53]

Steeves shares the view that 'most of the elite in centralized institutions and systems are often reluctant to relinquish control over key areas of public policy and the instruments of control over local society.'[54] This research project will show that central political and administrative elites control the constitutional making and have had a huge influence on the constitutional design of devolution. Further, these elites continually influence the continued promulgation of legislation that further tilts the balance of political power towards centralization while citing the apparent necessity of a strong central government.

The above tension between central and local level authorities has been conceptualised as federal asymmetry. Agranoff defines federal asymmetry as the 'need to differentiate and confer different status, rights, obligations, and duties between the different units in an undiminished system.'[55] Agranoff gives us a case study of intergovernmental relations in Spain. According to Agranoff, the reason for asymmetry in Spain is the regional orientation of Spain which is characterised by ethnic pluralism.[56]Agranoff points out that Aragon, the Balearic Islands, Astoria, Galicia, Valencia, and Navarre feel like they have a separate identity from Spain while regions like the Canary Islands and Andalucía feel like they are estranged from Spain completely.[57] Agranoff postulates that ethnic pluralism brings forth ethnic sub nationalism which in turn causes citizens

[53] Yash Ghai, 'Devolution: Restructuring the Kenyan State' (2008),2 Journal of Eastern African Studies 210.
[54] Jeffrey Steeves, 'Devolution in Kenya: Derailed or on Track' (2015) 53(4) Commonwealth & Comparative Politics 478.
[55] Robert Agranoff, *Federal Asymmetry and Intergovernmental Relations in Spain* (Queens University, 2005).
[56] ibid.
[57] Agranoff (2005) n 55.

to have dual identities.[58]According to Agranoff this ethnic sub nationalism has necessitated the constitutional provisions allowing regional autonomy in Spain.

Although Agranoff shows that regional autonomy is a necessity where there is ethnic pluralism, he nevertheless argues that asymmetry is necessary for maintaining the unity of the country.[59]Although this research project does not gainsay the unity of a country, unity has been portrayed in literature as an overriding objective which must take precedence over the self-determination and political power interests of the regions and sub nations. This research project argues that the self-determination of the multiple identities that form a nation-state is equally important in maintaining the unity of the nation state. Further, this research project seeks to fill the literature gap on how ethnic pluralism in Kenya is a factor that must be considered in the designing devolution in Kenya.

Colonization of Kenya marked the onset of what Mutakha Kangu calls Kenya's ' a long history of centralized political and economic power.'[60] However, Kangu and most scholars fail to acknowledge the political self-determination of Kenyan tribes hitherto colonization. The centralized political system was imposed upon, the present day, over fourty Kenyan communities through the force of military conquest. It therefore follows that, barring the colonial military conquest; the existence of modern day African countries such as Kenya could have been through alliances of willing independent communities.

[58] Robert Agranoff, *Federal Asymmetry and Intergovernmental Relations in Spain* (Queens University, 2005).
[59] ibid.
[60] John Mutakha Kangu, *Constitutional Law on Devolution*, (Strathmore University Press, 2015).

1.8 Justification of the study

The existing literature fails to contexualise ethnicity and the ethnic identities of the different counties as a key political consideration warranting more political autonomy to the periphery in the constitutional development of Kenya.Infact, despite the onset of devolution, there is still clamour for control of the national executive and heightened ethnic mobilisation for national political power. In order to help the reader, understand the tension between centralist forces and those of devolution, this research project will go beyond the colonial and post-colonial context of the constitutional development of Kenya to show how centralist forces have used and continue to use the guise of national unity to limit the decentralization of political power and meaningful political power at the center.

It will demonstrate that the continued proliferation of powerful state agencies at the national level and the fact that political power at the national executive remains highly attractive, despite devolution, is symptomatic of the limited devolution of political power in Kenya. It also seeks to provoke a conversation around the degree of deconcentration of political power in Kenya by examining whether devolution in Kenya is not only under threat but was also was severely limited *ab initio.*

1.9 Research Methodology

The research project uses qualitative research method. It adopts a mixed methodological approach which entails historical and doctrinal research methodologies. It will involve a qualitative analysis of historical information on the development of Kenya's government systems. It will further involve an analysis of analysis of existing literature, enacted national statutes, proposed legislation, and policy in order to deduce a pattern of restricting county governments' legislative authority.

This methodology is most appropriate because the legislative actions of both levels of government in Kenya are well documented. Secondly, it is possible to deduce legislative intent and attitude from government policies and reports. Finally given the time constraints in conducting this research project, the approach chosen presents the most appropriate methodology.

1.10 Assumptions and Limitations

At this moment, there is limited academic literature on devolution in Kenya. The research will therefore rely heavily on statutes as well as the opinion of key stakeholders within County Governments. In light of this a major assumption will be that the existing information will be devoid of political nuances which might mask objectivity.

1.11 Chapter Breakdown

The research project will be arranged in the chapters outlined below.

Chapter One: Introduction

This chapter will give a brief introduction and overview of the theme of the research project. It will include a statement of the problem, research objectives, research questions, hypothesis, and justification of the study, conceptual and theoretical framework, literature review, and research methodology.

Chapter Two: The history of Kenya's government systems

This Chapter will interrogate the historical formation of the national legal order that is the Kenyan State. It begins from the existence of the people within the territory currently known as Kenya. It will then examine the colonial Kenya and finally Kenya post the colonial era before the enactment

of the *Constitution of Kenya, 2010*.It seeks find out the whether history of the Country points towards an appropriate design and degree of decentralization.

Chapter Three: The Legal and Institutional Framework of Devolution in Kenya

This Chapter scrutinises the legal and institutional framework of devolution in Kenya. It explores the different themes under which the constitution establishes devolution. It also unbundles the various provisions of the constitution on devolution. It describes the institutions established by the constitution to facilitate and enable devolution as well as the primary statutory provisions that further elaborate and operationalise the constitutional demands on devolution.

Chapter Four: The Constitutional Design of Devolution in Kenya

This Chapter examines whether the design of devolved governance in the constitution is skewed in favour of centralisation. It explores the tension in the Kenyan constitution with respect to legislative competence which is manifested by the constitution giving with one hand taking away with the other.

Chapter Five: National Legislation or County Legislation

This chapter analyses selected current national legislation and proposed national legislation that legislate on county government functions. This chapter demonstrates a systematic and deliberate effort by the central legal community to hold on political power that the constitution decentralises to the county governments.

Chapter Six: Summary of Findings, Conclusion and Recommendations

This chapter sums up the findings of the previous chapters. It also puts forward recommendations

CHAPTER 2: THE HISTORY OF KENYA'S GOVERNMENT SYSTEMS

2.1 Introduction

This Chapter interrogates the historical formation of the national legal order that is the Kenyan State. It begins from the existence of the people within the territory currently known as Kenya. It also examines Kenya under colonization and finally the post-colonial state prior to 2010. It seeks to find out whether the history of the Country points towards an appropriate design and degree of decentralization.

This chapter categorises the history of Kenya's government systems into two broad stages the pre-colonial to colonial stage and the independent Kenya. The first stage is further categorised into six parts. The first part is the pre-colonial period before Kenya was declared a British Protectorate in 1897. The second part runs from 1897 to 1905 which is characterised by the establishment of the machinery of government for colonial rule. The third part runs from 1905-1923 which is characterised by attempts by European settlers to completely take over the country and to establish their supremacy. The fourth part runs from 1924 to 1954.This period is characterised by the demands of more inclusion by other races against the Europeans. This period witnesses attempts to adjust government systems to balance the claims of the different races.1954 to 1960 is the fifth part. This period is characterised by increased agitation for independence and majority rule. In this period there are attempts to establish multiracial government systems. The sixth and final part of the precolonial and colonial period is 1960 to 1963.This period is characterised by advanced movement and negotiations towards independence. The pre-independence activities are characterised by conflict between groups of African Leaders.

The second broad stage is independent Kenya which starts from 1963.This second broad stage is further split into two parts. The first part is the existence of the independence constitution from 1963 to 1969.The second part examines the road to the Constitution of Kenya 2010.

2.2. Pre-Colonial Kenya (pre 1897)

> "*The colony and the protectorate of Kenya is traversed centrally from east to west by the Equator and from north to south by the Meridian line 37 degrees east of Greenwich. It extends from 4 degrees north to 4 degrees south of the equator and from 34 degrees east longitude to 42 degrees east. The land area is 219,731 square miles and the water area 5229 square miles making a total area of 224.960 square miles."*[61]

The above statement is the description of the territory of what was then the colony and protectorate of Kenya in the annual general report of the colonial administration. The coordinates in the above statement hugely describes the composition of the territory of pre-colonial and the same coordinates influenced the composition of present day Kenya.

Pre-colonial Kenya comprised of different ethnic communities occupying different geographical locations of the territory. The communities had adjusted to their ecological niches.[62] It is this ecological niche that formed the territories and political jurisdictions of these communities. Each of these communities possessed distinct political systems. Although there were inter-community interactions such as through trade or war, the distinctiveness of the way of life amongst the communities was maintained. In some way, it is as if the communities acknowledged and respected

[61] Great Britain Colonial Office, *Colony and Protectorate of Kenya, Annual General Report* (His Majesty's Stationery Office ,1929) <http://libsysdigi.library.illinois.edu/ilharvest/Africana/Books2011-05/5530244/5530244_1929/5530244_1929_opt.pdf> accessed 15th June 2019.
[62] Peter Ndege, 'Colonialism and its Legacies' (Lecture at Moi University Main Campus July 5th 2009) <https://africanphilanthropy.issuelab.org/resources/19699/19699.pdf > accessed 15th July 2019.

the other communities' right to self-determination. It has been argued that since the communities were highly acephalous, there was no need for the formation of a large-scale State.[63] These communities existed within the territory without the rule of a central administration.

Many scholars like to describe communities in Kenya, as politically inept societies who had to be rescued through the painful yoke of colonization.[64] This could not be further from the truth since individual tribes had developed distinct systems which were relevant to their ecological niche. For instance, communities that had an agricultural economy would have a land administration system different from those communities with pastoral forms of economy. It would therefore be illogical for the founders of a political state made up of these different communities to suggest uniform systems and uniform control from the center, for matters which are unique to these communities.[65] This is unless the founders of that political state had ulterior or selfish interests. As will be shown later, this is a fact that has been lost to successive governing authorities of the nation state we all know as Kenya. This is a fact which should always have informed the design of the governance structure of the country as it is fundamental to the history of devolution in this country.

It is during the latter stages of this period that 'outsiders' began to have contact with Kenya in what this research project calls 'the foray of the outsiders'.

2.2.1 The Foray of the Outsiders

The first point contact by 'outsiders' in the territory of Kenya has been suggested to be what is currently the Kenyan coast. This initial contact is suggested to have been by the 'Persians and

[63] Ndege n 62.
[64] ibid.
[65] Ndege n62.

Arabs trading with the coastal region of East Africa.'[66] The earliest record is by Ibn Batuta, 'an Arab explorer, who in 1331 visited Mombasa and found Arabs in undisputed possession of the coast lands.'[67] The next record is from Vasco Da Gama, a Portuguese sailor. He sailed along the East Africa Coast in 1498 and described the 'coastal towns as being under Arab rule as well as being prosperous trading cities.'[68] He would later sail north to Malindi, 'where cordial relations were established and maintained between the inhabitants of Malindi and the Portuguese.'[69]

From the records of Vasco da Gama, Mombasa was under Arab rule. However, in 1505 Mombasa was attacked by the Portuguese and fell to Portuguese rule in 1508.[70] The Portuguese would later lose control of Mombasa in 1586 only to recapture it in 1594 and build Fort Jesus.[71] Portuguese control of Mombasa would go on until 1630 when the inhabitants of Mombasa revolted against the Portuguese. Control of Mombasa would then revert to the Arabs lead by the Mazrui clan.[72] The Mazruis got into a pact with the Imam of Oman and by 1729 the Portuguese had been completely expelled from Mombasa thus bringing Mombasa under the control of Oman.[73] Later, the Mazruis would rebel against the Omanis by declaring independence from Oman. This developments led to the new Imam of Oman,Seyyid Said, to threaten Mombasa.[74] These threats ushered the start of British intervention and contact with the East African Coast.[75]By the 1870's the British had

[66] Great Britain Colonial Office, *Colony and Protectorate of Kenya, Annual General Report* (His Majesty's Stationery Office,1929) <http://libsysdigi.library.illinois.edu/ilharvest/Africana/Books201105/5530244/5530244_1929/5530244_1929_opt.pf > accessed on 15th June 2019.
[67] Yash P Ghai and Jill Cottrell, *Ethnicity, Nationhood, and Pluralism: Kenyan Perspectives* (Global Centre for Pluralism 2013).
[68] ibid.
[69] Ghai and Cottrell (2013) n67.
[70] Malyn Newitt, 'Formal and Informal Empire in the History of Portuguese Expansion' (2001) 17 Portuguese Studies 1.
[71] ibid.
[72] Malyn Newitt n70.
[73] ibid.
[74] Ghai and Cottrell (n 65).
[75] ibid.

developed various commercial interests in the East African coast. For instance, in 1872, 'Zanzibar was connected with the ports of India and Europe by the establishment of a regular line of mail steamers operated by the British East India steam navigation company.'[76]This company was led by Sir William Mackinnon who would later be the head of the BEAA and subsequently the IBEACO.[77] In this regard, British colonial interests in East Africa was preceded by private mercantilist interests. These mercantilist interests culminated in the formation of the BEAA.[78]

In the 1870s ,Sultan Seyyid Bhargash was impressed by the benefits that came with his dominion's association with British commercial interests and in 1877 'he offered to Sir William Mackinnon a concession under lease for seventy years of the customs and administration of the sultan's territories.'[79]Sir William Mackinnon however declined this offer due to lack of support and sovereign guarantees from the British Government.[80]A change in British government policy would later be triggered by German Activities between 1880 to 1895. In this period, Germans under the Society of German Colonisation were making treaties with chiefs in the East African mainland.[81] This change in policy secured the government support that Sir William Mackinnon needed leading to a period that this research project refers as the period of company administration.

[76] PL McDermott, *A History of the Formation of and Work of the Imperial British East Africa Company* (London Chapman and Hall,1895).
[77] Malyn Newitt, 'Formal and Informal Empire in the History of Portuguese Expansion' (2001) 17 Portuguese Studies 1.
[78] ibid.
[79] Newitt n77.
[80] ibid.
[81] Newitt n77.

2.2.2. The Period of Company Administration (1887 to 1897)

On the 24th of May 1887 an agreement was reached between Seyyid Bhargash-Bin-Said the then Sultan of Zanzibar and the BEAA. The sultan granted certain concessions to the BEAA for a term of fifty years.[82] Through this instrument, the sultan gave the BEAA power over the territories described as follows, 'mainland in the Mrima,and all the sultan's territories from Wanga to Kipini inclusive.'[83] The Sultan conceded the administration of these territories to the BEAA including the power to levy taxes.[84] After the death of Seyyid Bhargash, his successor Seyyid Khalifa made a further concession with the IBEACO.[85] This new agreement varied the terms of the initial concession by widening the territorial scope and administrative powers of IBEACO.[86]To the IBEACO and the British government the above treaties were in furtherance of the General Act of Brussels of 1890 which was a treaty made by several European nations.

According to the General Act of Brussels, the placement of the organization of the judicial, administrative, military and religious services of African territories in the hands of civilized nations was the surest and the most effective means by which they would counter the thriving slave trade business in Africa.[87] Further, the General Act of Brussels called upon its signatories to support and encourage private institutions to carry out activities aimed at repressing slave trade.[88]It is therefore under the mandate of the General Act of Brussels that IBEACO received its charter and went about exploring East Africa including the territory currently occupied by Kenya.

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[82] GH Mungeam, *British Rule in Kenya, 1895-1912: The Establishment of Administration in the East Africa Protectorate* (Clarendon Press 1966).
[83] ibid.
[84] Mungeam (1966) n82.
[85] ibid.
[86] Mungeam (1966) n82.
[87] Article I of the General Act of Brussels, 1890.
[88] Article V of the General Act of Brussels.

Although, IBEACO's concession with the Sultan of Zanzibar related only to the coastal dominions of the Sultan, IBEACO still ventured further inland to present day Kenya and Uganda.[89]Both the BEAA and the IBEACO increased their operational areas and sphere of influence by concluding agreements with chiefs and other rulers of the various tribes .[90]Indeed by the 1st of May 1890 IBEACO had made treaties with the following tribes; 'the Wanika, the Wagiriama, the Waduruma, the Wakauma, the Wagala, the Wakamaba, the Wagibania, Wasenia, the WaKambi, the Waribi, the Washimaba, the Wadigo, the Wataita and the Wapokomo.'[91] This *modus-operandi* by the IBEACO shows that the British at some point viewed the tribes occupying present day Kenya as distinct nation-states which had the capacity to make treaties.IBEACO would administer the territories of present day Kenya up to 1895 when the British Government declared a protectorate over the rest of the territory administered by the IBEACO.[92]

2.3 Colonial Kenya (1896 to 1963)

As stated above, the declaration of the protectorate marked the beginning of direct British government administration in what is present day Kenya.[93]Colonial administration and rule would from 1896 to independence take various degrees and designs. As earlier stated, before colonization the territory of present day Kenya comprised of communities with distinct political systems and aspirations. In the modern way of formation of large scale political units, it would be expected that the formation of a united nation comprising of these distinct communities would be federal or confederate in nature. The most natural design would be a social-contractual alliance of separate

[89] Yash Ghai and PWB McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to Present* (Oxford University Press, 1970).
[90] Yash Ghai and PWB McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to Present* (Oxford University Press, 1970).
[91] PL McDermott, *A History of the Formation of and Work of the Imperial British East Africa Company*, (Chapman and Hall,1895).
[92] Ghai and McAuslan (1970) n90.
[93] ibid.

states. However, colonization would not allow this as its *modus operandi* was to dismantle the sovereignty of the different tribes. The colonizers, drew up hitherto nonexistent boundaries, and grouped the communities that found themselves within those boundaries to form states.[94]It is often argued that the colonial regime used a divide and rule approach in order to govern with ease. This argument may be misleading as it presupposes a hitherto cohesive nation state with a unitary system of government. However, the colonial regime forcibly established political control on the territory and subjected the communities to the rule of uniform and foreign laws. Colonization succeeded in forcibly making the hitherto autonomous communities exist in the state known as Kenya. The next part will now take the reader through the various stages of Kenya's colonial history.

2.3.1: Foundation of colonial jurisdiction

The question has been asked about the origin of the power of the British crown to exercise jurisdiction in a foreign land.[95]This question is important because Kenyans ,both during the clamour for independence and after independence , accepted the system of government set up by the colonialist. The exercise of jurisdiction over foreign lands by the British was initially done using royal prerogative then later codified into the *Foreign Jurisdiction Act of 1843*.[96] This statute, which was later replaced by the Foreign Jurisdiction Act of 1890, provided for the exercise of jurisdiction by the British government over foreign territories acquired through the signing of treaties, granting usage, capitulation, and/or any other means that could be deemed lawful.[97] It is through the provisions of this Act that British colonial governments were set up.

[94] States within the meaning of the Montevideo Convention on the Rights and duties of States.
[95] Ghai and McAuslan n90.
[96] ibid.
[97] Ghai and McAuslan n90.

2.3.2: The protectorate (1897 to 1920)

In 1895 the East Africa Protectorate covered the territory between the present day Kenyan coast and Naivasha.The territory west of Naivasha was part of the Uganda protectorate.[98] A commissioner was appointed by the British foreign office to take over the administrative roles hitherto carried out by the IBEACO. This period saw an increase in the European and Indian population within the protectorate. This brought forth the need for a legal framework to govern the protectorate and this came in the form of *the East Africa Order in Council of 1897*. This statute was, arguably, the first constitutional instrument in Kenya. It provided for importation of English laws into the Kenyan legal system.[99]

Despite its enactment, the position of the native people as relates to English law was not settled. In any case, they were not formally British subjects but protectees. Further, 'until the late 1880s the general rule in countries upon which the British Crown had exercised jurisdiction, unless the treaty with the local ruler stated otherwise, subjects of the local ruler remained under his jurisdiction.'[100] This position was confirmed by the Courts at the time where it was held that the protectorate was but a foreign country whose legal framework did not recognize the natives and as such could afford them any protection.[101] The Court went ahead to state that the Maasai were under the care of the local administration.[102]

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[98] Great Britain Colonial Office, *Colony and Protectorate of Kenya, Annual General Report* (His Majesty's Stationery Office,1929) < http://libsysdigi.library.illinois.edu/ilharvest/Africana/Books2011-05/5530244/5530244_1929/5530244_1929_opt.pdf > accessed 15th June 2019.
[99] Committee of Experts on Constitutional Review (Kenya), *The Preliminary Report of the Committee of Experts on Constitutional Review* (Committee of Experts on Constitutional Review(Kenya),2009).
[100] Ghai and McAuslan n90.
[101] Ole Njogo and Others V Attorney General of the East Africa Protectorate (1914),5 EALR.
[102] ibid.

The 1897 Order gave considerable legislative and executive powers to the Commissioner. The commissioner made laws on matters relating to customs, inland revenue, post offices, land highways, railways, money, agriculture and public health.[103] The powers of the Commissioner set out above marked the commencement of centralization of government power in the territory of Kenya. Various legislative instruments continued to change the government structures of the protectorate. Notable change happened on 1st April 1905 when the protectorate was transferred to the colonial office from the foreign office.[104]Later, pursuant to an order in council dated 9th November 1906 the commissioner as replaced by a Governor. The territory continued to exist as a protectorate until 1920.

2.3.3: The Kenya Colony (1920 to 1963)

The *Kenya Annexation Order of 1920* declared the ten-mile coastal strip the protectorate of Kenya while areas that fell outside the territorial boundaries of the mainland dominions of the Sultan of Zanzibar became recognized as the Colony of Kenya.[105] The occupants of the colony of Kenya now became British subjects albeit against their will. In one fell swoop, the rights and liberties that the native inhabitants had in their own land had been extinguished. They now had to follow the laws and systems of the foreign power that had conquered them. The period between 1920 and 1963 saw various constitutional developments.

2.3.3.1 The Devonshire White Paper

The Devonshire White Paper came into force in 1923.Although it was not a constitution or a constitutional instrument, it made important policy declarations on the governance of the

[103] Ghai and McAuslan n90.
[104] Great Britain Colonial Office, *Colony and Protectorate of Kenya, Annual General Report* (His Majesty's Stationery Office, 1929) < http://libsysdigi.library.illinois.edu/ilharvest/Africana/Books2011-05/5530244/5530244_1929/5530244_1929_opt.pdf > accessed on 15th June 2019.
[105] ibid.

colony.[106] Most significantly it declared that the interests of the locals were to be given top priority. This came against a background of agitation from the European settlers for the formation of white supremacists government.[107]

However, the Devonshire white paper excluded Africans from the organs of the colonial government. It declared that Africans were not ready for direct representation in the legislative council. Subsequently, a European, Dr. John Arthur was tasked with representing African interests in both the executive council and the legislative council.[108]

2.3.3.2 Local Authority Ordinance of 1924

Although the prevailing colonial policy as espoused in the Devonshire white paper was that Africans in the Kenya colony were not competent to participate in politics at the central level, it was deemed necessary to provide a forum for them at the local level. This led to the enactment of the *Local Authority Ordinance, 1924*. The LNCs were under the District Commissioners and Africans who sat in the LNCs were nominated by European field officers.[109] The LNCs had various powers and responsibilities including; 'passing resolutions for collections of local taxes, provision and regulation of forests, water and food supplies, sanitation, provision of education, provision of markets and slaughterhouses, agricultural and pastoral land, and the collection of market fees.[110] The establishment of LNCs marked the origin of Kenya's system of decentralization. It is

[106] Constitution of Kenya Review Commission, *The People's Choice: The Main Report of the Constitution of Kenya Review Commission* (Constitution of Kenya Review Commission, 2002).
[107] ibid.
[108] Constitution of Kenya Review Commission (2002) n 106.
[109] ibid.
[110] Karuti Kanyinga 'Pluralism, Ethnicity and Governance in Kenya' in Yash Pal Ghai and Jill Cottrell Ghai, *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives* (Global Center for Pluralism ,2013).

important to note the glaring similarities between the roles of the LNCs and those of latter day local governments and present day county governments.

The fatal misconception that has always bedeviled the thinking around the establishment of LNCs was that they were a gift of greater local political autonomy. Such line of thought fails to appreciate that the LNCs were established and designed by the colonial government not to serve local interests but to serve the central colonial government's interests. The first colonial interest was to stem local challenge from an increasingly informed African population. The LNCs were formed at a time when Africans who had returned to Kenya after serving abroad in the first world war were agitating for greater political involvement. This led to the formation of various ethnic based political associations. LNCs were also a means of involving Africans into the governance of the centralized colonial government.[111] Indeed LNCs were given the unpopular responsibility of collecting hut tax. This ideological basis of local government would persist in Kenya as will be shown later in this research project.

2.3.3.3: Further local government reforms

Increasing political agitation and the need for further political control of Africans necessitated reforming the local government system. In 1928, a commissioner for local government was appointed. This office is the predecessor to the Ministry of Local Government in yesteryears and the present day the ministry tasked with dealing with devolution. The Commissioner of Local Government provided central control and co-ordination of local governments. There was no such thing as local political autonomy.

[111] Patricia Stamp, 'Local Government in Kenya: Ideology and Political Practice 1895-1974' (1986) 29 (4) African Studies Review 17.

In 1946, location councils were established in certain LNC areas as a second tier of local government.[112] The 1950s were characterised by increased nationalistic agitation by Africans. The colonial government policy response was to increase local political participation by Africans to undercut this nationalistic agitation.[113] The ideological basis of this policy was that, 'local government would provide a means of funneling political participation into narrower and more 'constructive' endeavours.'[114]

2.3.3.4: Lyttleton and Lenox-Boyd Constitutions

Although the system of local government, discussed above, persisted, the clamor for participation in central government politics never ceased.[115] This led to further constitutional reform in the colony. The first moment of constitutional reform happened in 1954 with the enactment of the Lyttleton constitution. This constitution brought about the concept of multiracialism.[116] It introduced regulated political participation by Africans at the central level by providing separate racial representation for Africans through communal franchise.[117]As a result of this development, eight Africans became members of the Legislative Council through elections.[118]

The next initiative was the Lennox-Boyd Constitution of 1960.This constitution increased the representation of Africans from eight to fourteen.[119]It also established a council of State which was tasked with the protection of minority interests.

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[112] ibid.
[113] Karuti Kanyinga 'Pluralism, Ethnicity and Governance in Kenya' in Yash Pal Ghai and Jill Cottrell Ghai, *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives* (Global Center for Pluralism, 2013).
[114]ibid.
[115] Yash P Ghai and Jill Cottrell, *Ethnicity, Nationhood, and Pluralism: Kenyan Perspectives* (Global Centre for Pluralism, 2013).
[116] Constitution of Kenya Review Commission (n 106).
[117] ibid.
[118] Constitution of Kenya Review Commission (n106).
[119] ibid.

Both the Lyttleton and Lenox-Boyd Constitutions were similar in that they did not receive a mandate from a majority of the people. They were initiatives of the central colonial government and their underlying theme was to manage the clamour for majority rule. It is the noteworthy that the African political class, at the time, was not interested in overhauling the system of government established by the colonialists but they were agitating to join and control that system.

2.3.3.5: Road to independence

By the 1920s the colonial boundaries and the centralized system of colonial Kenya was a *fait accompli*. By now the competition for colonial resources had led to the emergence of a new African elite as well as capitalistic political interests. The new African elite, who found themselves at the helm of the agitation for independence, were fighting to end colonial rule but not to demolish the colonial legal order. By now the forceful conglomeration of the tribes into the nation state known as Kenya had been accepted and would shape the discourse on the design of the post-independence Kenya government.

In this discourse, there were those who supported a centralization of state authority on one hand, and those who supported a system where state power was dispersed away from the center. From the year 1961 the players were organized in two political formations. These were KANU and KADU. The ethnic architecture of the country influenced membership and policy direction of these political formations. The leadership of KANU majorly came from the Kikuyu and Luo communities which were the largest in the country at the time.[120] This made the representatives of the other communities feel marginalized and hence they decided to form KADU.[121] KANU concerned itself with the transfer and transition from colonial to independent rule while KADU

[120] Stephen Ndegwa Mwangi, *A History of Constitution Making in Kenya* (Konrad-Adenauer-Stiftung, 2012).
[121] ibid.

restricted itself to the protection of the interests of the minority communities by limiting the power which would be transferred after independence.[122] These concerns coupled with vested interests would influence negotiations for the independence constitution in the first and second Lancaster House conferences. The dominant players leveraged on ethnic loyalties to prop up individual personalities and interests. This largely informed the system of government preferred by each party. KANU which attracted following from the majority Luo and Kikuyu tribes wanted a centralized and strong unitary government based on the Westminster model. This system would assure the leading personalities in this party unfettered control of government. They would not have to share power. They were also assured of electoral wins because of the numbers of their ethnic blocs. KANU was comfortable with inheriting the colonial system of administration. Its aim was to have power transferred to its leading personalities. It was not interested in restoring the political self-determination of communities that was forcibly taken away by the British.[123]

Meanwhile, KADU advocated for a form of federalism known as *majimboism.* This plan 'sought to defend the interests of those ethnic communities that provided the core support for the party.'[124] The competition for colonial resources had over time led to serious ethnic suspicion. This caused the fear by smaller ethnic communities of dominance by the Luo and Kikuyu. Despite the narrow and personal interests of the political elite at the time, it would appear that the importance of acknowledging the political self-determination of ethnic communities in the constitutional discourse was not completely lost. In this regard,PJH Okondo argued that "it was important to harness the forces of tribalism and use them to build the nation."[125] He argued that 'the job of

[122] Hastings Okoth-Ogendo, 'The Politics of Constitutional Change in Kenya since Independence, 1963-69' (1972) 71 Royal African Society African Affairs 9.
[123] Mwangi (2012) n 120 .
[124] ibid.
[125] PJH Okondo, 'Prospects of Federalism in Africa' in DP Curries(ed), *Federalism and the New Nations of Africa* (University of Chicago Press,1964)

nation building would be much easier if Kenya's tribes had no fear of being swamped or of being dominated.'[126] It is on this premise that he advocated for 'a constitution akin to that of the USA'[127] According to Okondo, such a constitution would 'eliminate the chances of a small clique of men trying to usurp power under cover of a parliamentary majority.'[128]

In 1962, the colonial government organized another Lancaster House Conference. The purpose was to try and avert the looming crisis by establishing a consensus on a system of government that would be suitable to both political parties. By now the bone of contention was the *majimbo* system advocated for by KADU and frowned upon by KANU. There was a compromise and a system of governance which can be loosely described as quasi-federal with a strong and centralized government was agreed upon.[129]

2.4: The Independence Constitution (1963 to 1969)

Although Kenya attained independence with the *majimbo* system, the compromise would not last long. KANU was disgruntled by regionalism being entrenched in the Constitution.[130] Its leadership confessed to having accepted the constitution in order to accelerate the attainment of independence and internal self-government with the intention of later working on amendments.[131]

The constitution at independence created a governance system comprised of a central government and regional governments with an extensive developmental and political powers deliver public services.[132] These regional governments had legislative authority vested in their legislative assemblies to legislate on matters within the jurisdiction of the regional governments.

[126] ibid.
[127] Okondo (1964) n 125
[128] ibid
[129] Okoth-Ogendo (n 122).
[130] ibid.
[131] Okoth-Ogendo (n 122).
[132] Robert M Maxon, *Kenya's Independence Constitution: Constitution-Making and End of Empire* (Fairleigh Dickinson, 2011).

However as stated earlier, the writing was on the wall for the quasi-federal system of *majimbo.* Already the leadership of KANU had expressed their intentions to do away with *majimbo.* This desire was fueled by the constitution giving so many responsibilities and powers to the regional assemblies. This state of affairs was antagonistic to the desires of the political elite and bureaucrats of the day who wanted to inherit the largesse of the central colonial state. It should be noted that, the during negotiations leading to the independence constitution, ethnic nationalism that had been dormant for long time during the colonial era jumped back into life. This ethnic nationalism, facilitated by the existence of regional governments, posed a challenge to the established central state.

Through a series of national government legislative actions by the national government the authority of regional governments was greatly diminished. This eventually culminated in their abolishment and the re-establishment of powerful central government. Further, KADU was disbanded and its members joined KANU. With this the importance of acknowledging the pre-colonial ethnic architecture of Kenya was dismissed. The fact that Kenya by default could only operate in a federal like system of government was once again swept under by forces of those who could reap benefits from a forced centralist government. These interests through a blow by blow attack killed the regional governments.

2.5: The Road to the Constitution of Kenya 2010

Soon after the *majimbo* system was abolished, there followed numerous constitutional amendments that concentrated power at the center and especially in the presidency. This resulted in what would be known as an imperial presidency. Soon networks of ethnic patronage were formed. Millions of Kenyans who were not close to the presidency felt disenfranchised.

Disgruntlement and disillusionment in the system was once again manifested along ethnic lines.[133] Various regions felt marginalised in terms of development and government handling of local affairs. In fact, the KNDRC opined that the unequal distribution and disproportionate division of national resources and perceived historical injustices with the attendant result of the exclusion of regions of the Kenya were the causes of the prevalent social tensions in Kenya.[134]

Prior to the introduction of the devolved system of governance, the country had different forms of decentralized units.[135] These decentralized units are discussed below.

2.5.1 Local Government System

The local government system was a creature of *the Local Government Act*.[136] The Act gave the Minister of Local Government authority in consultation with the Electoral Commission to establish and/or alter the boundaries or wind up an area as a municipality, county or township.[137] Each municipality was then to have a Municipal Council[138], each township a Town Council[139] and each county a County Council.[140] Of the three, Municipal Councils were the largest and exercised power over urban areas of the country. This was followed by Town Councils which were in-charge of towns whose characteristics was yet to confer upon them the status of municipalities. The elevation of a town to a municipality was usually based on the physical attributes and population.[141] Finally, County Councils were the smallest units in this decentralized system of government and were in-

[133] Yash P Ghai and Jill Cottrell, *Ethnicity, Nationhood, and Pluralism: Kenyan Perspectives* (Global Centre for Pluralism ,2013).
[134] ibid.
[135] Ghai and Cottrell (2013) n 133.
[136] Cap 265 of the Laws of Kenya.
[137] ibid, s 5.
[138] Cap 265, s 12.
[139] ibid s 28.
[140] ibid.
[141] R. Southall and G. Wood, 'Local Government And The Return To Multi-Partyism In Kenya' (1996) 95 African Affairs 501.

charge of offering public services in rural areas. They had an organization and administrative structure that was almost similar to the Municipal Council save for the fact that they were presided over by chairmen and not mayors.[142]

The local government had both civic and administrative duties which were performed by elected and nominated members of these councils and the clerks of the councils respectively.[143] Each local governments had four departments namely; the clerks' department, treasurers' department, the public works' department and the environment department.[144] Additionally, each local authority operated by and large through the committees whose composition included members of the council. *Standing Order 8* of the rules to the Act provided for the procedure for introducing motions and the procedure for making resolutions with regard to the running of the activities of the local authority. Such resolutions had to adopted by the Council which was composed of the Mayor and the elected and nominated councilors. Once adopted, the resolution became a policy which was then sent to the Minister of Local Government for approval before any action could take place within the local authorities. Such was the influence the central government had over the activities of the local government and hence the authorities could not be said to be autonomous.[145]

The Act gave the local government power to make their by-laws. The local authorities however, were restricted to making by-laws that only touched on matters such as public health and the general safety of the residents and the general proscriptions within the jurisdiction of these local authorities.[146] It must be noted that even for such by-laws to be valid, they had to get the approval of the Minister of Local Government.

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[142] John Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (Strathmore University Press, 2015).
[143] Southall and Wood (n 141).
[144] Kangu (n142).
[145] Victoria Bronstein, 'Mapping Legislative and Executive Powers over "Municipal Planning": Exploring the Boundaries of Local, Provincial and National Control' (2015) 132 South African Law Journal 639.
[146] Local Government Act (Cap 265 of the Laws of Kenya) (repealed) s201 and 202.

It is this decentralized system that ushered in devolution in the current constitutional dispensation. Unlike in the system of local governments, devolved units and the national government are now considered distinct but interdependent in serving the people of Kenya.[147] However, the devolved units still depend on the national government for the approval of their expenditure as well as a wide spectrum of policy direction. The national government, therefore, maintains some form of control over the affairs of the county governments.[148]

2.6. Conclusion: The lessons of history

The story of Kenya right from the pre-colonial period as stated above point to the fact that the social architecture of the country is not suitable for a centralist form of government. In the history of government in Kenya, colonization also marked the start of a forced rule by an authoritarian central government imposed on the communities of Kenya. This is a system which hampered the ability of people to democratically and actively participate in the governance, development and management of their own affairs.[149] Colonization therefore marked the end of the autonomous existence and coexistence of communities in the territory that would later be named Kenya. The period that followed from the Berlin Conference of 1884 led to the loss of sovereignty as indigenous leaders were replaced by colonial rulers.[150]

As a result, it became very difficult for the colonial powers to weave the African States into a united front. Moreover, a divided Africa served the intentions of the colonial powers to rule and maintain their dominance over the regions.[151] This design gave the central authority unhindered

[147] Constitution of Kenya 2010, Article 6(2).
[148] ibid, Article 190.
[149] Okoth-Ogendo (n 122).
[150] Peter Ndege, 'Colonialism and its Legacies' (Lecture at Moi University Main Campus July 5th 2009) <https://africanphilanthropy.issuelab.org/resources/19699/19699.pdf > accessed 15th July 2019.
[151] ibid.

power throughout the territory with great political and economic benefit to those that wielded the political power of the center.

The centralized colonial state and its divisive tactics bred negative ethnicity as communities had to fight it out to get the little resources that were available to them.[152] This new form of inter-ethnic competition and conflict would occupy Kenyan political contest and discourse going forward. And because of this, ethnicity remains central in the history of government in the Country. Further, refusing to take into consideration the ethnic architecture of the country would not only be wishful thinking but also a repeat of the tragic ways of the colonialists. Indeed, a centralized system is antagonistic to the ethnic architecture of the country.

The ideological history of decentralisation in Kenya as has been shown above, is not based on political autonomy or self-determination. It is however based on the need for administrative convenience for the central authorities. This ideological history has not been purged. History has also shown that there are interests that form around the political elite that thrive in a centralist system and hold on to the above ideological history of decentralisation. These interests continue to shape devolution based on the above ideological history. They undermined the *majimbo* system once and are capable of undermining Kenya's next attempt at dispersing government power from the center.

[152] Ndege n150.

CHAPTER THREE: LEGAL AND INSTITUTIONAL FRAMEWORK OF DEVOLUTION IN KENYA

3.1. Introduction

This Chapter scrutinises the legal and institutional framework of devolution in Kenya. It argues that devolution is a creature of the Constitution and all laws and institutions on devolution trace their origins to the constitution and serve to give effect to the demands of the constitution. The chapter begins by exploring the different themes under which the constitution establishes devolution. It then proceeds to unbundle the various provisions of the constitution on devolution. The third part of this chapter describes the institutions established by the constitution to facilitate and enable devolution. The fourth part delves into the primary statutory provisions that further elaborate and operationalise the constitutional demands on devolution.

3.2. The Constitution of Kenya, 2010

This constitution established the current devolved system of governance. It establishes the national and the county government as distinct levels through which Kenyans are governed. Devolution in the constitution is captured under different themes. These include devolution as the expression of the sovereignty of the people; devolution as territorial and administrative subdivision of the country; and devolution as a principle and national value of governance. The constitution also lays down the key institutions to facilitate the new system. It also sets out the objectives of devolved government and principles to facilitate its realisation.

3.2.1 Devolution as an Expression of the Sovereign Power of the People

The constitution dictates that all power belongs to the people of Kenya.[153] It may be exercised by the people either directly or indirectly.[154] The Constitution delegates this power of the people to institutions in both levels of government.[155] This sovereign power is further categorised as judicial power, legislative power and executive power. The power to make legislations is exercised at both the national level through parliament and the county assemblies at the county level.[156] Judicial power and judicial authority, however, remains centralized.

3.2.2 Devolution as Territorial and Administrative Subdivision of the Country

The physical manifestation of devolution is in the territorial subdivision of the country. The Constitution divides the country into forty seven counties.[157] The territories of the counties as listed in the sixth schedule of the Constitution form the territorial jurisdiction of the County Governments.

Further, in addition to providing the territorial jurisdiction for County Governments, the Counties also function as centers of territorial decentralization of services provided by the national government. It is a constitutional requirement that the national government must guarantee equal and reasonable access to its services to all persons in the Republic.[158]

[153] Constitution of Kenya 2010, Article 1(1).
[154] Constitution of Kenya 2010, Article 1(2).
[155] Constitution of Kenya 2010, Article 1(4).
[156] Constitution of Kenya 2010, Article 1(3).
[157] Constitution of Kenya 2010, Article 6(1).
[158] Constitution of Kenya 2010, Article 6(3).

3.2.3. Devolution as a Principle of Governance

The constitution lists devolution as one of the principles and national values that must be embraced by all persons and all state institutions in the interpretation or application of the constitution, the application or enactment of any law or the implementation of decisions impacting on the public.[159]

3.2.4. Objects and Principles of Devolved Government

The constitutional provides that the devolution of the systems of governance is a recognition of the power of the people to govern themselves while promoting accountability in the exercise of as well as democratic governance.[160] The constitution also recognizes the importance of the public participating in decision-making, effective management of their affairs as communities, and the promotion of social and economic advancement.[161]

Further, the constitutional provides is that devolution can only be realized if certain principles are observed or adhered to by the governments. These principles are that the administration of county governments ought to be founded on democratic principles, there ought to be a reliable source of revenue to facilitate the effective governing and delivery of services to the counties, and the adoption of the two-thirds rule on gender balance in the making of appointments to representative bodies.[162]

3.2.5. Institutions of Devolution in the Constitution

This part will explore the establishment of county governments in the constitution as well as institutions at the national level that have a nexus with devolution. It will also appraise the relationship between the two levels of government.

[159] Constitution of Kenya 2010, Article 10(1).
[160] Constitution of Kenya 2010, Article 174.
[161] ibid.
[162] Constitution of Kenya 2010, Article 175.

3.2.5.1 The County Government

The institutional heads of devolution are the county governments established by the constitution. The constitution subdivides the country into forty-seven counties.[163] Each of those counties have a government with a county executive committee and a legislative assembly. The constitution also creates governance structures within county governments that fall under urban areas and cities.[164]

a) The County Assembly

A county assembly consists of members elected from the wards in the respective counties; nominated members to create a gender balance pursuant to the gender rule,[165] representatives of groups that are considered marginalized within the county, the youth and women; and the Speaker of the legislative assembly.[166]

The power to legislate is vested in the legislative assembly.[167] The Assembly exercises the legislative authority in counties and oversees the management of the affairs of the county.[168]

b) The County Executive

The constitution vests the executive authority of the county in the county executive committee.[169] The county executive committee consists of the county governor and his or her deputy, and members appointed by the county governor from persons who are not members of the county assembly, with the approval of the assembly.[170] The functions of the county executive committee include the implementation of the county legislation, the

[163] Constitution of Kenya 2010, Article 176.
[164] Constitution of Kenya 2010, Article 184.
[165] Constitution of Kenya 2010, Article 27(8).
[166] Constitution of Kenya 2010, Article 177.
[167] Constitution of Kenya 2010, Article 185.
[168] ibid.
[169] Constitution of Kenya 2010, Article 179.
[170] ibid.

implementation of national legislation within the county, managing and coordinating the functions of the county administration.

3.2.5.2. Parliament

The authority to legislate in Kenya is conferred upon a bicameral legislature, that is, the National Assembly and the Senate.[171] Bicameralism is one of the most sacrosanct concepts in a devolved system of governance.[172] Therefore, its importance to the existence of devolution cannot be understated.[173]

a) The National Assembly

Article 97(1) governs membership to the Assembly. It is composed of 290 members elected from the 290 constituencies, 47 women representatives from the 47 counties, 12 nominated members representing special interests including the youth, persons with disabilities and workers, and the Speaker of the National Assembly. It performs a representative role as it indirectly represents the interests of all Kenyan and exercises power donated to it by the people of Kenya.[174] It is the key institution in the determination of the allocation of revenue between the two levels of government .[175]

b) The Senate

Article 98(1) governs membership to the Senate. It is composed of 47 elected members from the 47 counties, 16 female nominees per Article 90(a), two representatives of the youth, PWD, and the Speaker of the House. The Senate is tasked with valiantly representing and protecting the counties.[176] The main tool at the disposal of the Senate in

[171] Constitution of Kenya 2010, Article 93.
[172] Speaker of the Senate and Another v Attorney General and 4 Others [2013] eKLR.
[173]John Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (Strathmore University Press,2015).
[174] Constitution of Kenya 2010, Article 95(1).
[175] Constitution of Kenya 2010, Article 95(4).
[176] Constitution of Kenya 2010, Article 96(1).

playing its protective role, is the consideration, subjecting to debate and approving Bills concerning counties.[177]

3.2.5.3 Commissions and Independent Offices

The Constitution establishes constitutional commissions and offices.[178] They are independent of the control of the three arms of government. The mandate of almost all the commissions and independent offices have a nexus with devolution in one way or another. Each of these commissions and independent offices invariably affect county governments and devolution. However, of these institutions, there are those whose functions closely affect or directly influence the running of the county governments. They are;

a) The Commission on Revenue Allocation (CRA)

The constitution establishes the CRA under Article 215. It consists of a chairperson, two nominees from the National Assembly, five nominees from the Senate and the Principal Secretary in the Ministry of Finance.[179]

Primarily, the CRA is tasked with making recommendations for the equitable distribution of national revenue between the two governments.[180] The CRA is also tasked with making recommendations on matters such as the financial management of funds allocated to the counties as well as those raised by the counties themselves.[181]

b) The Controller of Budget

The office of the Controller of Budget is created under Article 218. The COB is a presidential nominee who must be approved by the National Assembly in order to hold the

[177] Constitution of Kenya 2010, Article 96(2).
[178] Constitution of Kenya 2010, Chapter 15.
[179] Constitution of Kenya 2010, Article 215(1).
[180] Constitution of Kenya 2010, Article 216(1).
[181] Constitution of Kenya 2010, Article 216(2).

office.[182] The COB is tasked with overseeing the implementation of the budgets of the governments and subject to *Articles 204, 206 and 207 of the constitution* authorizes withdrawals from public funds.[183]

3.2.5.4 The Judiciary

As stated earlier, the judiciary is not devolved. Judicial authority in Kenya is exercised by the established judicial and quasi-judicial institutions which include the courts and tribunals.[184] The system of courts in the constitution does not envisage a dual system of courts. In this regard, the existing system of courts affects devolution and also influences the operations of county governments in various ways. However, the greatest influence of the judiciary to devolution is the judicial authority they carry in the protection of constitutional supremacy.

The constitution also confers upon the High Court with the jurisdiction to determine any matter relating to the constitutional relationship between the two governments and any conflict of laws pursuant to *Article 191 of the constitution.* Furthermore, the constitution empowers the Supreme Court with powers to render advisory opinions on matters touching on the devolved units if its opinion is sought by a concerned State organ.[185]

3.2.5.5 The Relationship Between the National and County Governments

The constitution has detailed provisions on how the two governments should deal with each other. This relationship is with respect to, power, legislative authority and sharing of revenue.

[182] Constitution of Kenya 2010, Article 228(1).
[183] Constitution of Kenya 2010, Article 228(4).
[184] Constitution of Kenya 2010, Article 159(1).
[185] Constitution of Kenya2010, Article 163(6).

a) Power Relations

The constitution defines the relationship between the two levels of government as distinct but interdependent.[186] The relationship between them must as such be pegged on mutual cooperation and respect.[187] The aspect of cooperation is better clarified in Article 189. Both governments are called upon to exercise their powers without desecrating the institutional and functional integrity of the other. Both governments must also be mindful of the duty incumbent upon them to respect other institutions of government. The national government is particularly required to offer assistance to county governments, support and seek consultations as may be appropriate in order to facilitate a coordinated implementation of government programs.[188]

Both Article 186 and the Fourth Schedule of the constitution espouse power relations by apportioning powers and functions between the two levels of government. For instance, the national government is tasked with handling foreign affairs, policy and trade, matters to do with immigration and acquisition or loss of citizenship, the determination of the best use of international waters and resources thereof as well as matters to do with the national security and the development of sound economic policies among others.

While county governments, on the other hand, are tasked with matters such as regulating agriculture, providing health services, regulating pollution, regulating public entertainment, animal control, pre-primary education, the development of village

[186] Constitution of Kenya 2010, Article 6.
[187] ibid.
[188] Constitution of Kenya 2010, Article 189(1).

polytechnics, providing public works and services, developing trading activities, and the management of disaster among others.

b) Legislative Authority

The constitution limits the legislative authority of the assemblies to the responsibilities assigned to the county governments in the Fourth Schedule.[189] However, per *Article 186(4),* the legislative authority of Parliament is unlimited.

c) Sharing of Revenue

Sharing of revenue is another key aspect of the relations between the governments. The constitution sets out the factors that must be considered during the process of equitably sharing revenue between the governments.[190] The constitution states some of the factors that must be used in the determination of equitable shares between the governments. They include:

a) the country's public debt;
b) efficiency in the management of funds;
c) the needs of the national government;
d) the needs of the counties;
e) the levels of economic disparities among counties and the need to remedy them;
f) the need to guarantee the efficient performance of duties allocated to the governments; and
g) the need for affirmative action in certain areas of the country among other considerations.[191]

[189] Constitution of Kenya 2010, Article 185(2).
[190] Constitution of Kenya 2010, Article 202.
[191] Constitution of Kenya 2010, Article 203(1).

The constitution also sets the lower limit of the equitable share that must be allocated to the county governments during any financial year and it is set fifteen per cent of all the revenue collected by the national government.[192] In addition to the equitable share, the national government may make additional allocations to the counties from its share of the revenue with or without any terms and conditions attached to such additional allocation.[193]

3.3 The County Governments Act, 2012

This Act gives effect to chapter eleven of the constitution.[194] The statute gives effect to the objectives of devolution and also sets out the principles.[195] It also provides for the procedure for the removal of a speaker of a county assembly.[196] The Act also makes provision for the privileges, powers, and immunities of county assemblies.[197] The Act is also instructive on public participation.[198] The Act also promotes the diversity of counties, both communal and cultural, by dictating that diversity must be reflected in the county assemblies and CECs. It further makes prescription for the protection of minorities per *Article 197 of the Constitution*. The the Act also makes provisions for the publication of county legislation as required under *Article 199 of the Constitution*.[199]

The Act also makes provisions for the appointment and/or nomination as well as the removal of persons from the county government offices and procedures on quorum for county assembly and

[192] Constitution of Kenya 2010, Article 203(2).
[193] Constitution of Kenya 2010, Article 202(2).
[194] Constitution of Kenya 2010, Article 200 (n2).
[195] Constitution of Kenya 2010, Article 174 and 175.
[196] County Governments Act 2012(No 17 of 2012), s11.
[197] County Governments Act 2012, s17.
[198] County Governments Act 2012, Part VIII.
[199] County Governments Act 2012, s25

CEC meetings, the suspension of a county assembly among others.[200] Furthermore, the Act requires uniformity in the development of standards for the creation and abolition of CPS offices, the subsequent appointments, and the disciplinary mechanisms in case of misconduct. [201] The Act also provides for the procedures and criteria for the evaluation, promotion, and reporting by county public officers under Articles 10 and 232.[202]

3.4 The Public Finance Management Act, 2012 (PFMA)

This is the main statute governing the efficient utilization of public finances. Its purpose is to ensure that the management of finances at both levels of government accords to the dictates of the constitution. It also aims at ensuring that public officers tasked with the responsible management of public finances are held accountable for those finances through the legislative arms of both governments.[203]

The PFMA sets out the responsibilities of the various entities in the management of public finance. The national government has several responsibilities which include the budget-making process. The county governments, on the other hand, are tasked with the development of efficient mechanisms for the management of monies allocated to them. The Act also outlines the institutions that are key in managing public finances. They include the national treasury, county treasuries and IBEC.

3.4.1 The National Treasury

The PFMA, 2012 establishes the national treasury as a key institution in managing public finances.[204] This entity comprises of the Cabinet Secretary in-charge of finance, the Principal

[200] Constitution of Kenya 2010, Article 200.
[201] County Governments Act 2012, s60 and 61.
[202] County Governments Act 2012, s63 to 73.
[203] Public Finance Management Act 2012 (PFMA 2012), s 3.
[204] PFMA 2012, s11

Secretary for finance and the department or departments and/or offices tasked with economic and financial matters. Some of the obligations of the National Treasury include the mobilization of financial resources for the financing of budgetary requirements from both domestic and foreign sources such as the World Bank. It prescribes and designs efficient systems for the management of public finance for both governments. The systems facilitate the efficiency and transparency in managing of public finances.[205] The National Treasury is also expected to promote and/or foster good relations between the governments. It also assists in the development of the capacity of the counties to manage their finances per the provisions of the PFMA.[206]

3.4.2 The County Treasuries

Section 103(1) of the PFMA, 2012 creates County Treasuries comprised of the CEC member for finance, the Chief Officer and the departments responsible for matters akin to county finances and fiscal policy. *Section 104 of the Act* underscores the crucial role played by the county treasuries in monitoring, evaluating and managing finances allocated to the counties as well as other general matters related to the economic affairs of the county.[207] It is also tasked with the execution and development of economic policies. This includes the preparation of budgetary estimates and the coordination of the implementation of the county budget as well as the mobilization of resources to fund that budget. Furthermore, it also undertakes to manage the county public debt, act as the custodian of the county's assets and ensuring that monies allocated to the county are put into good use and financial reports of the same are prepared.[208]

[205] Constitution of Kenya 2010, Article 226.
[206] PFMA2012, s12.
[207] PFMA 2012, s104.
[208] ibid.

3.5. The Urban Areas and Cities Act, 2011 (UACA)

The constitution envisages the establishment of urban areas and cities as units of further decentralization within devolution.[209] UACA provides a legislative framework for the classifying and designating areas as either urban areas or cities as well as the governance and management of such areas.[210]

3.6. The Intergovernmental Relations Act,2012

This Act elaborates the constitutional basis for the relationship between the governments. The Constitution requires that the two governments must base their relations on consultation and mutual cooperation.[211] The specific purposes of the Act include the development of a framework for the making of consultations between the two governments as well as the need for mutual cooperation between the governments.[212] The Act extends the mutual cooperation to the relations between the individual counties.[213] It also establishes institutional structures and the principles that will govern the relations.[214] The Act also establishes a mechanism for the transfer of functions, powers and responsibilities from the national government to the county governments.[215] It also provides mechanisms for resolving any disputes that may arise in the course of the relations between the governments.[216]

[209] Constitution of Kenya 2010, Article 184.
[210] Urban Areas and Cities Act 2011, s3
[211] Constitution of Kenya 2010, Article 6 and 189.
[212]Intergovernmental Relations Act 2012, s3.
[213] ibid.
[214] Intergovernmental Relations Act 2012, s4 and Part II.
[215] Constitution of Kenya 2010, Article 187 and 200.
[216] Intergovernmental Relations Act, s3.

3.6.1. National and County Government Coordinating Summit

The IGRA, 2012 establishes the Summit as the highest institution in the relations between the governments.[217] The Summit is composed of the President or the Deputy President as the chairperson and all the governors of the 47 counties.[218] It provides a forum through which the governments can consult and cooperate. It also deliberates over matters that affect the entire country. It also evaluates reports on the performance of the county governments and makes recommendations as the situation may necessitate. The Summit also considers and harmonizes policies. It also facilitates the transfer of functions, responsibilities and powers from one level of government to the other.[219]

3.6.2. Intergovernmental Relations Technical Committee

The IGRA, 2012 creates the IGRTC.[220] The committee is composed of a chairperson, at least eight members competitively recruited and appointed by the Summit, and the Principal Secretary in-charge of devolution.[221] The IGRTC facilitates the activities of the Summit and the COG as well as the implementation of Summit and COG resolutions.[222]

3.6.3. The Council of Governors

The IGRA, 2012 establishes the Council of Governors consisting of all the governors of the forty-seven counties.[223] The COG provides a forum for the facilitation of consultations between the county governments and the national government.[224] It also provides an opportunity for sharing of information and experiences for initiating either preventive or corrective measures to challenges

[217] Intergovernmental Relations Act 2012, s 7(1).
[218] Intergovernmental Relations Act 2012, s7(2).
[219] Intergovernmental Relations Act 2012, s (8).
[220] Intergovernmental Relations Act 2012, s11(1).
[221] ibid.
[222] Intergovernmental Relations Act 2012, s12.
[223] Intergovernmental Relations Act 2012, s19.
[224] Intergovernmental Relations Act 2012, s20.

faced by the counties and the consideration of matters of common interest among the county governments.[225]It also facilitates an opportunity for the consideration of proposals and recommendations from the intergovernmental forums on mattes of national and county interest.[226]

3.7. Conclusion

This Chapter has analysed the legal and institutional framework on devolution in Kenya. It has shown that devolution is a creature of the Constitution and all other laws on devolution trace their origins to the constitution and serve to give effect to the demands of the constitution. The same is true for the institutions established in the constitution or by statute. This means that statute and institutions cannot go beyond the intent of the constitution with respect to devolution.

[225] Ibid.
[226] Intergovernmental Relations Act 2012, s20(1).

CHAPTER FOUR: THE CONSTITUTIONAL DESIGN OF DEVOLUTION IN KENYA.

4.1: Introduction

This chapter seeks to establish whether the design of devolved governance in the constitution is skewed in favour of centralization. It seeks to find out whether centralist interests placed a *Trojan horse* into Kenya's devolved system in the form of limits on the legislative competence of the counties and a wide legislative competence for the national government. It brings forth the tension in the Kenyan constitution with respect to legislative competence which is manifested by the constitution giving with one hand and taking away with the other.

4.2. Designing the System of Devolution in Kenya

One of the biggest controversies in the making of the current constitution was the extent to which political power would be dispersed from the center.[227] In fact, there were those who rejected the efforts of making a new constitution on the grounds that it will return the Country to *majimboism*.[228] Nevertheless, the design of devolution in the constitution was based on the premise that political power was concentrated at the center and there was need to distribute it to lower levels.[229]

To examine the design, this research project must start from the debates and conclusions of the CKRC then the COE.

[227] Constitution of Kenya Review Commission, *The People's Choice: The Main Report of the Constitution of Kenya Review Commission* (Constitution of Kenya Review Commission ,2002).
[228] ibid.
[229] Committee of Experts on Constitutional Review (Kenya), *The Preliminary Report of the Committee of Experts on Constitutional Review* (Committee of Experts on Constitutional Review (Kenya), 2009).

4.2.1. The CKRC Design

The CKRC was tasked with reviewing and evaluating the place of local government in the constitutional dispensation. It also was tasked with considering to what extent had power been devolved to local authorities.[230] CKRC was required to consider and make recommendations on whether Kenya should maintain the status quo as a centralized system or would a decentralized system be more befitting considering the situation in Kenya at the time.[231] The CKRC collected views of the people on the preferred form of devolution. From the information collected, there appeared to be a general consensus that the authority and power of the State should be devolved. However, there was no consensus of the form of devolution. Some, in particular the Coast, North-eastern and Rift Valley, preferred *majimboism* while those in Central, Nairobi, Eastern and Nyanza preferred devolution but with the unitary system retained in it.[232] From the CKRC report, 'people felt that important [government and policy] decisions with serious effects on their lives were being made in faraway places and without consulting them.[233]

From the foregoing, we can see that there was a section of Kenya that wanted a large degree of political self –determination through a federal system of devolution. There were also those that wanted the dispersal of some powers from the center without upsetting the centralist status quo. However, from the admission of CKRC that submissions did contain details, people did not express their desires fully to the CKRC. Perhaps it was due to lack of proper civic education prior to the collection of views. This as will be shown later in this chapter propagated the premise that the state known as Kenya as inherited from the colonial regime was a *fait accompli* and all that

[230] Constitution of Kenya Review Commission, *The People's Choice: The Main Report of the Constitution of Kenya Review Commission* (Constitution of Kenya Review Commission ,2002).
[231] ibid.
[232] Constitution of Kenya Review Commission (2002) n230.
[233] ibid.

could be done was tweak it a little bit here and a little there as opposed to a thorough reconstruction of the state.

CKRC came to the conclusion that a substantial donation of the powers of the central government to local units of governance would be proper in this regard.[234] It recommended that the constitutional design of devolution should be based on division of functions and powers and the creation of a system to check the exercise of that power.[235] The CKRC envisaged a system capable of resolving any conflicts arising from the exercise of the powers donated to the local governments.[236] It went ahead to recommend the equitable and efficient mobilization and allocation of resources.[237] According to the Commission, it was also necessary to involve the people in the governance and afford protection to all groups in the society.[238]

The CKRC process did not seek to address the colonial usurpation of political sovereignty and self-determination from the various Communities within Kenya to form the current State of Kenya. It also failed to acknowledge that the artificial nature of Kenya delineated by the colonial government without considering the need for the coexistence of the communities they were lumping together in this delineation process.[239] Just like the independence constitutional making process, the CKRC process was captured by the interests in control of the existing political economy. These interests are typical of Kenyan politics which have been described as being 'about capturing the state, for accumulating personal wealth.'[240] This is coupled with the tendency

[234] Constitution of Kenya Review Commission (2002) n230.
[235] ibid.
[236] Constitution of Kenya Review Commission (2002) n230.
[237] ibid.
[238] Constitution of Kenya Review Commission (2002) n230.
[239] Mwangi, Media Development Association (Kenya) and Konrad-Adenauer-Stiftung (Kenya) (n 116).
[240] Yash Ghai and Jill Cottrell, 'Constitutional Transitions and Territorial Cleavages: The Kenyan Case'(2019) Forum of Federations Research Paper 32 <www.forumfed.org/wp_content/uploads/2019/04/ops_32_Kenya.pdf >accessed 25th August 2019.

to sacrifice the role of ethnicity in Kenyan politics at the altar of national unity. According to Yash Pal Ghai 'CKRC and Bomas tried hard to move ethnicity out of politics, while maintaining its cultural status.'[241] This attitude would ultimately shape the design of devolution and particularly the political relationship between the governments.Further,the CKRC designed the functions and powers of the devolved units along the lines of the colonial LNCs and the local authorities existing at that time. In this regard, the devolution and decentralisation envisaged by CKRC was more of a tool for administrative ease as opposed to a process meant to dismantle the existing centralist state and giving political self-determination to the periphery.

The CKRC ran into headwinds, details of which are not relevant here. Suffice to say that what was salvaged from that process culminated into what came to be known as the *Wako draft* that would be rejected in a referendum in 2005.

4.2.2. The COE Design

The next relevant process in the design of Kenya's constitution is the COE process. This is the process that would culminate into the current constitution of Kenya. In designing devolution, the COE process laid its foundation on the work of the CKRC process. The COE design was based on the need ; "to promote the peoples' participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power; to ensure the provision of basic needs of all Kenyans through the establishment of an equitable framework for economic growth and equitable access to national resources; to respect diversities, inclusive of ethnic and regional diversity and community rights including the right of communities to organize and participate in cultural activities and the expression of their identities; to ensure that the national

[241] Submissions by Yash Pal Ghai to the Building Bridges Initiative Task Force Committee (8th May 2019) <https://www.katibainstitute.org/prof-yash-ghais-submissions-to-the-building-bridges-initiative/> accessed 16th May 2019.

interest prevails over regional or sectoral interests."[242] The latter need is a recurring theme which is synonymous with centralist interests. It is an exhalation of national unity over the need for political self-determination of the ethnic nations existing in Kenya.

Be that as it may, the COE concluded that devolution would be the most effective in the realization of democratic governance.[243] The COE just like CKRC placed the historical context of the clamor for devolution in what it described as the concentration of power in the presidency to defeat the purpose of devolution as espoused in the independence constitution.[244] In so doing the COE limited the historical context of the Kenyan society and ignored the ethnic nations that form the building blocks of Kenya. This laid the groundwork for a constitutional design of devolution based on the premise of dispersing some powers (mostly administrative) away from the center, while ensuring that not too much political power is ceded by the center to ensure that it does not loose overall control.

As seen from the basic principles guiding COE, the expected outcome was a design of devolution that emphasized on public participation not full blown political self-determination. This informed COE's design of sharing functions which proposed that the functions and duties of the devolved units must be ground in the constitution to prevent them from being usurped by the central government.[245] The COE expected these functions to "target areas of development and delivery of services better carried out with the participation of the people or services better provided closer to the people."[246]Although the COE had identified that devolution as serving both political and

[242] Committee of Experts on Constitutional Review (Kenya), *The Preliminary Report of the Committee of Experts on Constitutional Review* (Committee of Experts on Constitutional Review (Kenya), 2009).
[243] ibid.
[244] Committee of Experts on Constitutional Review(Kenya) (2009) n242.
[245] ibid.
[246] Committee of Experts on Constitutional Review(Kenya) (2009) n242.

administrative functions,[247] the assignment of functions to County Governments, as shown above, was expected to be largely administrative. The outcome of this as will be shown in the next part is a constitution that limited the legislative and policy making functions of the devolved units.

Further the design by the COE pre-empted the possibility of political competition against the center from the county governments by assigning the central government as the supervisor. Although the COE reported that "it did not see a direct supervisory role for the National Government" it nevertheless anticipated the suspension of a county government by the president and as will be shown later it subtly provided mechanisms for the National Government to direct, control and limit the legislative ability of the county governments.

4.2.3. The Design in the Objects and Principles of Devolution

The recommendations from the processes above informed the design of devolution. A summary of this is manifest in what the constitution provides as the objects and principles of devolution in Kenya. The constitution sets out the objects of devolution to include the promotion of democracy and accountable exercise of power.[248] It is also aims at fostering national unity through the recognition of diversity.[249] It further aims at promoting self-governance and recognizing the rights of minorities marginalized groups.[250] It aims at improving access to government services and the equitable sharing of national and local resources throughout Kenya among others.[251]

The above objects reflect the constant need of maintaining national unity. However, it is noteworthy that the objects do not speak to the creation of political spheres of influence in the

[247] Committee of Experts on Constitutional Review (Kenya) (2009) n 242 p54.
[248] Constitution of Kenya 2010, Article 174(a).
[249] Constitution of Kenya 2010, Article 174 (b).
[250] Constitution of Kenya 2010, Article 174(e).
[251] Constitution of Kenya 2010, Article 174(f).

devolved governments. They adopt the theme of dispersing power and that of involvement. This theme will be reproduced more clearly in the constitutional provisions on legislative competence.

Article 175 sets out the principles that the county governments should reflect. Firstly, county governments are to be run on democratic principles and the separation of powers.[252] Secondly, county governments must have reliable sources of revenue to enable them to govern and deliver services effectively.[253] Lastly, no more than two-thirds of the members of representative bodies in each county government shall be of the same gender. Similarly, these principles do not speak to political self-determination.[254] Further, both the objects and principles do not speak to the legislative competence of the levels of government.

4.3. LEGISLATIVE COMPETENCE IN THE CONSTITUTION

The previous two chapters have a laid a background of the thinking and attitudes in the processes that culminated in the current provisions on devolution in the Country. It is interesting to note that in both processes the question of legislative competence and its protection was not flagged as a contentious issue. The contentious issues as stated in the COE report were the mode of decentralizing power, the supervisory powers to grant to the national government over devolution, and the mode of guaranteeing equitable allocation of resources between the governments.[255] As indicated earlier, CKRC reported that the people did not give much details on the finer details of their preferred forms of devolution. These finer details include the legislative competence of each level of government. As earlier stated, it is in the legislative competence that political power is

[252] Constitution of Kenya 2010, Article 175(a).
[253] Constitution of Kenya 2010, Article 175(b).
[254] Constitution of Kenya 2010, Article 175(c).
[255] Committee of Experts on Constitutional Review (Kenya) (2009) n 242.

manifested and protected. The next sub chapters will now analyse the assignment of legislative competence in the constitution.

4.3.1. Legislative Sovereignty

As shown above the designing of devolution was a delicate balancing act between dispersing power from the center and maintaining national unity. Although, as previously demonstrated, the process did not properly interrogate the historical context of Kenya. Indeed, members of the CKRC had a difficult time trying formulate a definition or a description of what Kenya is. One of the Commissioners remarked;

> *"We really don't have a definition for this Kenya. We even tried, in Culture, to put a philosophy there, which of course was shot down with the rest of the Articles on the 15th. Not that it is going to change anything, but we really needed much more courage to state what Kenya is. So, here we have at least something in the beginning in that constitutive process."*[256]

Despite the foregoing conclusion the drafters of the constitution placed devolution within the sovereignty of the people of Kenya. This means that the starting point of the assignment of legislative competence is Article 1 of the Constitution which states that power belongs collectively to the people. The exercise of this sovereign power is, therefore, to be shared among the governments.[257] Further, the legislative sovereignty is shared between parliament and the County Assemblies.[258] It is because of the foregoing that in praising the state reforming aspects of the constitutional design of devolution it has been argued that "county governments do not exercise

[256] Interim Report of the Taskforce on Devolution, *A Report on the Implementation of Devolved Government in Kenya* (Taskforce on Devolution,2004).
[257] John Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (Strathmore University Press,2015).
[258] ibid.

decentralized power delegated to them by national government."[259] Article 1(4) and 6 of the Constitution recognizes two levels of government, the national and the county governments. Each of these levels exercises power derived from the Constitution itself. Under Article 1 of the Constitution, the county government does not derive its power from the national government but directly from the people of Kenya and the Constitution. These two levels of governments are therefore, in theory, equal and non-is subordinate to the other.[260]

The foregoing argument draws a picture of equality between the two levels of government and that no level of big brother to the other. It paints a picture of two levels of government sharing equal political power and capable to provide adequate checks and balances against each other. However, as the Court in *Institute of Social Accountability and Another v The National Assembly and others* remarked this equality is in theory.

Further, the constitution sets out the relationship rules of engagement between the two levels of government on the basis of cooperation and respect of the other levels functions and binds the two levels of government to perform their respective functions in a manner that respects the functional and institutional integrity of the other level.[261]

This research project postulates that the above position includes respecting the legislative competence of the other level government. The reading of the foregoing provisions gives the impression that there can be political self-determination at the counties in the exercise of the legislative authority of county governments.

[259] John Mutakha Kangu, *Constitutional Law of Kenya on Devolution* (Strathmore University Press,2015).
[260] Institute of Social Accountability and Another v The National Assembly and others [2015] eKLR.
[261] Constitution of Kenya 2010, Article 189.

4.3.2: Functional Legislative Competence

The Constitution has distributed functions between the governments in its Fourth Schedule. The national government is tasked with handling foreign affairs, policy and trade, matters to do with immigration and acquisition or loss of citizenship, as well as matters to do with the national security and the development of sound economic policies among others.[262] The county governments, on the other hand, are tasked with matters such as agriculture, the management of county health services, regulation of pollution and other nuisances within the county, the regulation of the use of public entertainment and amenities, animal control, development and the regulation of trading activities within the county, pre-primary education among others.[263]

It is with respect to the respective functions of each level of government that legislative authority is exercised. The constitution has unequivocally limited the legislative powers of the assemblies to their functions allocated to the counties. The constitution limits the legislative power by dictating that the county assemblies are only allowed to legislate on the functions and powers allocated to them by that schedule.[264] For instance, whereas the counties have the mandate to provide health services and regulate agriculture, the mandate of developing a policy to that effect still rests with the national government. This limits the legislative powers of county governments to policy directions from the national government.

4.3.3: The Conflict of Laws *Trojan* Horse

The previous sub chapters demonstrate the extent by which the legislative powers of counties have been limited to just the fourteen functions of the counties. These powers are further limited by the constitution granting the national government extensive powers in formulating policies to be

[262] Constitution of Kenya 2010, Article 185(2),186(1),187(2) and fourth schedule.
[263] ibid.
[264] Constitution of Kenya 2010, Article 185.

adhered to by the devolved units. This is consistent with the attitude of reining in the political self-determination in the counties. It also points that the design of devolution in the constitution emphasized on the administrative function of devolution as opposed to a full blown devolution of political power.

Although the constitution allows some legislative authority to the county governments, this authority is yet again clawed back by the conflict of laws provision. The constitution sets out the criteria of determining which law, county or national, prevails with respect to matters that fall within the concurrent jurisdiction of both levels of government.[265] In this regard, by the dictates of the constitution, national legislation supersedes county legislation in a number of circumstances.[266] Such circumstances include where national legislation provides for matters that county legislation may not address effectively or competently.[267] The dominance is also exerted where such legislation should be applied uniformly in the country.[268] Finally, county legislation plays second fiddle where national legislation provides for environmental protection and the protection of the common markets, economic unity among others.[269]

The superiority of national legislation is justified by the argument for the need to prevent unreasonable action by a county that may be detrimental to the economic, security, and health interests of the country.[270] Article 191 is prescriptive of when national legislation should prevail. However, it does not strongly prescribe the circumstances when county legislation should prevail save for when the neither of the circumstances where national legislation prevails applies.

[265] Constitution of Kenya 2010, Article 191.
[266] ibid.
[267] Constitution of Kenya 2010, Article 191(3).
[268] ibid.
[269] Constitution of Kenya 2010, n267.
[270] Constitution of Kenya 2010, Article 191(2).

Article 191 gives precedence to national legislation. The circumstances given in Article 191 are so wide that it is almost impossible for national legislation not to meet them. This creates a situation where any legislation by the national government can be justified using the criteria set out under Article 191.

Article 191 is intended to guide the courts in arbitrating cases of conflict of laws. However, the provisions of conflict of laws have not been tested in Kenya. This means that Kenyan courts have not yet given an interpretation on where the legislative competence of either level of government reaches.

4.4 Conclusion

This chapter has shown that county governments have a clearly defined and very limited authority. It has been argued that "often central political and administrative elites are reluctant to relinquish control over key areas of public policy and instruments of central control over local society."[271] This chapter has demonstrated that this reluctance continues to be manifested in the constitutional assignment of legislative competence between the governments.

Legislative competence is central to the division of powers between the governments.[272] It is through legislative competence that of the two government's political power is manifested. The battleground starts with the interpretation and construction of the constitution with respect to legislative competence as designed in the constitution. In this regard, an understanding of the design of devolution in Kenya is imperative. In this regard, this chapter has shown that although the constitution in some places defines the relationship between the governments as that of

[271] Jeffrey Steeves, 'Devolution in Kenya: Derailed or on Track' (2015) 53(4) Commonwealth & Comparative Politics 478.

[272] Victoria Bronstein, 'Legislative Competence' in Stu Woolman and Michael Bishop (eds), *Constitutional Law of South Africa* (2nd edn Juta, 2013).

equality, the assignment of legislative authority makes the devolved units subjects of the national government. It has also been demonstrated that the design of devolution in the constitution is one that panders to the center and avoids creating a political sphere of influence in the periphery.

It has also been shown that the devolution and decentralisation envisaged by the Constitution of Kenya 2010 is largely a tool for administrative ease as opposed to a revolutionary dismantling of the pre-existing centralist state while giving political self-determination to the periphery.

CHAPTER FIVE: NATIONAL LEGISLATION OR COUNTY LEGISLATION?

5.1. Introduction

This chapter analyses national legislation and proposed national legislation that legislate on county government functions. This Chapter demonstrates the systematic and deliberate effort by the central legal community to hold on political power that the Constitution decentralizes to the county Governments. It argues that 'more often than not leaders of centralized regimes are reluctant in relinquishing control over the instruments of political and administrative control of the societies where they rule.'[273] This reluctance continues to be manifested in national legislation and policy. It also presents the argument that legislative competence is at the heart of the apportioning of powers between the governments. Indeed, in Kenya after the excitement of having a new constitution subsides, the issue of legislative competence becomes the new battleground between centralist and pro-devolution forces. This battleground starts from constructing and interpreting the constitution with respect to the issue of legislative competence. This chapter provides various examples of national legislation and proposed national legislation that recentralise county government functions or propose to recentralise county government functions. It is divided into two main parts that mirror the two ways that the breach of legislative competence in Kenya is manifested. The first part is titled general breaches. It shows the breach of legislative competence through national legislation on concurrent functions. The second part demonstrates the breach of legislative competence by an overzealous senate which has converted itself into a county government legislature by making and considering laws that ordinarily should be made by the county assemblies.

[273] Jeffrey Steeves, 'Devolution in Kenya: Derailed or on Track' (2015) 53(4) Commonwealth & Comparative Politics 478.

5.2. General Breaches

This sub chapter will point out instances where national legislation under the guise of national policy has been used to recentralize functions that have been devolved. This has occasioned in the maintenance of a huge bureaucracy at the national level where the bulk of the service delivery functions have been devolved. This is the case in Agriculture and Health Services.

5.2.1 Agriculture

The constitution has apportioned different functions in Agriculture between the governments.[274] The national government is mandated to develop policies on agriculture and the provision of veterinary services.[275] On the other hand, the counties have the mandate to regulate animal husbandry, crop husbandry, yards for selling livestock, county abattoirs, fisheries, controlling animal diseases, and plant diseases.[276]

The national government is only responsible for the development of policies while service delivery functions and powers are apportioned to the county governments. However, the constitution does not clarify where the policy role starts and where it ends. A literal interpretation of the fourth schedule of the constitution, with respect to agriculture, is that national government should set out agricultural policy and veterinary policy. Under veterinary policy, the national government has an additional function of regulation of the veterinary profession.[277] Under agricultural policy, the national government is not therefore expected to enact legislation. However, constitutional ambiguity has resulted in the national government enacting numerous pieces of legislation

[274] Constitution of Kenya 2010, fourth schedule.
[275] ibid.
[276] Constitution of Kenya 2010, fourth schedule.
[277] ibid

ostensibly as a means of communicating agricultural policy. Some of these pieces of legislation will now be discussed here.

5.2.1.1. Agriculture and Food Authority Act, 2013

This Act generally consolidates all the laws on the regulation and promotion of agriculture. It also sets out provisions on the respective roles of the governments with respect to agriculture. The most notable feature of this legislation is the establishment of a regulatory behemoth, domiciled in the national government, known as the Agriculture and Food Authority (AFA).[278]

This legislation makes provisions that are within the operational competence of the devolved units. For instance, the prevention of plant diseases, pests and noxious weeds is a function within the legislative competence of county governments.[279] However, this legislation dedicates a whole part setting out provisions on noxious and invasive weeds.[280] Despite, the powers and functions of the county government being enshrined in the constitution, parliament in this legislation sets out provisions on the responsibility of county governments with respect to agriculture.[281]

5.2.1.2 Crops Act, 2013

The Crops Act, 2013, in its long title, states its purpose as consolidation and repealing of various laws relating to agricultural crops. It also sets out to make provisions for growing and developing crops.[282] This is one of the biggest exercises of recentralization through legislation. The Act adds to the national government another function in addition to the dual policy functions. It assigns to the national government the function of licensing and charging levies on scheduled crops.[283] It also

[278] Agriculture Fisheries and Food Authority Act 2013, s3.
[279] Transitional Authority, Transfer of Functions 2003, Legal Notice No. 137 to 182.
[280] Agriculture Fisheries and Food Authority Act 2013, part v.
[281] Agriculture Fisheries and Food Authority Act 2013, s 29.
[282] Crops Act 2013, s13.
[283] Crops Act 2013, s6.

assigns to the county governments the role of implementing policies from above, developing crops in the county, regulating markets for the crops, regulating the operations of cooperative societies among others.[284]

In addition to assigning the national government a function that is not contemplated in the Constitution, this section claws back several functions already transferred to county governments. These functions were unbundled by the Transitional Authority to include providing extension services, developing programs to guarantee food security, developing quality standards for agricultural produce, intervening in soil conservation among others.[285]

It would be expected that the national government would allow the County Governments to legislate on all matters related to crop husbandry. But this is not the case. The national government has gone ahead and legislated on matters within the legislative competence of county governments and in the process recentralized those functions. This recentralization is manifest in the functions assigned to AFA by this Act. This legislation sets out the functions of AFA to include formulating policies for developing scheduled crops, facilitating the marketing of those crops, identifying suppliers for the produce, promoting the development of wholesale markets, liaising with other stakeholders in conducting agricultural research, marketing farm produce, processing scheduled crops, conducting training programs for farmers, developing plant varieties suitable to the existing climatic conditions among others.[286]

The actions of the national government, in the enactment of the Crops Act,203, have not only infringed on the legislative mandate of county governments but have also recentralized the

[284] ibid.
[285] Transitional Authority, Transfer of Functions 2003, Legal Notice No. 137 to 182.
[286] Crops Act 2013, s8.

functions of county government. In so doing the national government has created a powerful national government entity where county governments do not have political control.

5.2.1.3 Fisheries Management and Development Act, 2016

The purpose of this legislation is to provide for the conservation, management and development of aquatic resources to enhance the livelihood of communities that are dependent on fishing. It also establishes the Kenya Fisheries Services.[287] The fisheries function assigned to county governments in the fourth schedule to the constitution includes offering extension services to fisheries, establishing county fish seed hulking units, conducting on-farm trials, developing fish auction centers, maintaining fish jetties, demarcating fish breeding areas, licensing the trading in fish, granting permits for moving with fish, enforcing regulations on fisheries among others.[288]

Just like in crop agriculture, this Act has legislated on the matters enumerated above as exclusive functions of the county governments. It has recentralized these functions within the Kenya Fisheries Service and assigned county governments administrative and consultative roles.[289] Notwithstanding the fact that most of the functions listed herein are devolved, the Act establishes the Kenya Fisheries Services, a State organ under the control and supervision of the national government, as the principal institution in the management and development of aquatic resources.[290]

Furthermore, the role of county governments has been reduced to administrative and to some extent ceremonial. For instance, the Act at gives the Director General of KFS the lead in fisheries development measures.[291] These measures include the provision of extension services, provisions

[287] Fisheries Management and Development Act 2016, s7(1).
[288] Constitution of Kenya 2010, fourth schedule.
[289] Fisheries Management and Development Act 2016, s9.
[290] Fisheries Management and Development Act 2016, s 7.
[291] Fisheries Management and Development Act 2016, s30.

of training services, conducting research, promoting cooperation among fishing farmers, stocking waters with fish, supply fish for stocking, spearheading efforts aimed at promoting fish, licensing, development of approval systems among others.[292] Isn't it preposterous that in the performance of these functions, the Director General is only required to consult county governments? This clearly shows a hierarchical nature of the relationship between county governments in practice and where the county governments are made to occupy a subordinate position that demands constant supervision by unelected officials.

5.2.2. Health Services

The unbundled functions assigned to county governments by the constitution include developing health facilities such as pharmacies, sub-county hospitals, rural health centers, dispensaries. The counties are also required to rehabilitate those facilities and maintain them in good condition. The counties as such do have the mandate of inspecting and licensing health facilities in the county.

To the national government the constitution assigns the national health referral facilities and health policy. From the foregoing, the bulk of health services have been devolved. However, through legislation a huge degree of control is still vested in the national government.

5.2.2.1 Health Act, 2017

This Act establishes a unified health system with the national government sitting at its apex.[293] Despite the constitutional mandate of county governments, this goes ahead to establish a county health system and also makes various operational provisions.[294] For instance, this Act goes to the extent of organising the county executive of the county government.[295] The Act goes further to

[292] ibid.
[293] Health Act 2017, s3.
[294] Health Act 2017, s19.
[295] Health Act 2017, s19(1).

establish an office within the county executive.[296]In so doing, the central legal community, through this national legislation, takes away the political autonomy of county governments to design their own county executives for the health function. Further the Act places a reporting obligation on county government officials to a Director –General in the national government.[297]This gives the national government official administrative and supervisory powers over county governments. This Act also establishes entities domiciled within the national government which will exercise operational control over the health sector. The net effect of this is the retention of a huge health services bureaucracy at the center.

Although the constitution limits the function of national government to health policy, this Act has extrapolated that function to include the development of laws and administrative procedures.[298]The Act also sets out the duties of county governments with respect to the health function.[299]In doing so Parliament usurps the political authority assigned to county governments in the constitution with respect to the provision of health services.

5.2.3. Water Services

Water and sanitation services is one of the functions and powers of county governments.[300]Despite this clear delimitation of this function in favour of county governments, parliament has regulated and provided for the regulation of water services through the Water Act,2016.This Act establishes the WASREB.[301]This public agency is given the power to superintend the provision of water services by county governments and the agencies established by county governments for the

[296] ibid.
[297] Health Act 2017, s19(5).
[298] Health Act 2017, s15.
[299] Health Act 2017, s20.
[300] Constitution of Kenya 2010, fourth schedule.
[301] Water Act 2016, s70.

purpose of providing water services.[302] The supervisory powers of WASREB include licensing and setting enforcement of national standards.[303]

The Act gives power to WASREB power to direct the county executive on the provision of water and sewerage services.[304] This includes ordering county executives to abide by the regulations made by WASREB.[305]The impact of Part IV of the Water Services Act is to provide for supervision of a constitutional function by a national government organ that is not established by the constitution. The Water Act creates a hierarchy in the levels of government where once again it subordinates the county governments not only to the national government but also to a non–elected national government agency. The end result is that, despite devolution, regulation of water and sanitation services is still maintained at the center.

5.3. Infringement by an overzealous senate

The senate is established by Article 93 of the constitution. The primary role of the senate is to represent the counties [in parliament].[306]It also serves to protect the interests of the counties and their governments.[307]The senate was designed to protect the county governments and the devolution system from infringement and subsequent death in the hands of centralist forces. The Senate also participates in the legislative role of parliament particularly in the enactment of bills concerning county governments.[308] Bills concerning county governments are defined as 'those that contain provisions affecting the functions and powers of the county governments set out in the Fourth Schedule; relating to the election of members of a county assembly or a county

[302] Water Act 2016, s72.
[303] ibid.
[304] Water Act 2016, s106.
[305] ibid
[306] Constitution of Kenya 2010, Article 96(1).
[307] ibid.
[308] Constitution of Kenya 2010, Article 109(4).

executive; and those referred to in Chapter Twelve affecting the finances of county governments.'[309]

The Constitution however does not enjoin the Senate to carry out the legislative authority of the county governments. This authority has been vested to the County Assemblies under Article 185.However senate has extrapolated its law making functions from considering and approving Bills concerning counties to considering and debating county laws. Currently, there are several bills in the senate which are not bills concerning counties within the meaning of Article 110 but bills on the exclusive functions of county governments and proposing mundane operational details of the county governments.

Such Bills currently being considered by the senate include; Assumption of Office of the County Governor Bill,2018;The Office of the County Attorney Bill,2018;The County Wards Development Equalisation Fund Bill,2018;The Office of the County Printer Bill,2018; The County Planning(Roads, Pavements and Parking Bays) Bill,2018;The County Outdoor Advertising Control Bill,2018;The County Statutory Instruments Bill,2018;The Petition to County Assemblies Bill,2018;TheCounty Early Childhood Education Bill,2018;County Oversight and Accountability Bill,2018;The County Hall of Fame Bill,2018;The Control of Stray Dogs Bill,2019;and The County Tourism Bill,2019.

The subject matters of the above bills are the functions of the County Governments as set out in the fourth schedule of the constitution. These subject matters are within the exclusive legislative jurisdiction of the county assemblies. In considering the above bills, the senate is abrogating the legislative competence of county assemblies. It should not be lost that, although the primary role

[309] Constitution of Kenya 2010,Article 110.

of the senate is to protect counties and county governments, the senate is an organ of the national government. It therefore cannot purport to understand the circumstances in the counties or the local political nuances while considering bills on county government functions. The actions of the senate are a recentralization of the legislative authority of the county governments and are certainly inimical to devolution.

5.4.Conclusion

This chapter has demonstrated that national government law making has, in spite of the constitution indicating otherwise, continued to subordinate county governments to the national government especially with regard to concurrent functions. It has demonstrated that in Kenya national legislation is a potent weapon wielded by central political and administrative elites in the battle for political control. For instance, the national government has maintained substantial powers in the development of policies. However national legislation is extrapolated in a manner that service delivery functions of the counties are also assigned to national government agencies. Sometimes such national legislation also assigns a supervisory role to national government agencies while subordinating county governments.

The chapter has also demonstrated that national legislation has established a hierarchy where county governments play second fiddle and are subject to the supervision of national government agencies. This is notwithstanding the fact that county governments bear the authority of the people at the ballot and should be a vehicle of political self-determination. It has also been found that through national legislation, implementation functions of the county government have been recentralised. This has resulted in an even bigger beaureucracy at the center while retaining the power of making more politically meaningful decisions. It has further demonstrated that Senate has been considering and debating bills that are within the legislative competence of county

assemblies. This is in clear breach of the legislative authority of the county assemblies. It is also a manifestation of the constitutional design of devolution that limits the political self-determination of the county governments.

CHAPTER SIX: SUMMARRY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

6.1.Introduction

The problem that this research project sought to unravel is that, although the *Constitution of Kenya, 2010* envisions a devolved governance system, nevertheless Kenya's system of government remains highly centralised. It examines the hypothesis that, although the Constitution of Kenya 2010 envisions a devolved government system, nevertheless Kenya's system of government remains highly centralised because the current constitutional design of devolution allows recentralization of political power through legislation. It sought to meet the following research objectives; to examine why Kenya's system of government remains highly centralised despite the entrenchment of devolution in the Constitution; to analyse the historical development of the Kenya's governance systems with a view to establish the intended design of devolution; to scrutinise the legal and institutional framework of creating the devolved system of governance in Kenya; to establish whether the design devolved governance in the constitution is skewed in favour of centralization; to demonstrate how current national legislation and proposed national legislation usurp the mandate of the devolved units in Kenya: and to recommend reforms on the design of devolution to safeguard the legislative authority of the counties as well as ensure that national legislation does not interfere with the legislative competence of county assemblies.

This chapter will provide a summary of the findings in response to the various research questions. It will also provide a conclusion with regard to the hypothesis as well as recommendations with respect to the findings of the research project.

6.2.Summary of Findings

The first question this study sought to investigate is what is the history of Kenya's government systems. In response to this question, chapter two describes the formation of the government of modern day Kenya. It has highlighted that the government in Kenya was established for the purpose of colonial control by the British with little or no regard to the political interests of the native inhabitants of the territory. Chapter two also found that to properly serve colonial interests central control of political power was necessary. It has further demonstrated that independence did not bring a revolution and complete overhaul of the centralist legal system established by the colonisers, but it was about the inheritance of the same government by a new political elite that sought to enjoy the political and social goods of the central political control. Chapter two has also demonstrated that the political elite that inherited central political control has always influenced legislative and legal reforms to retain as much political power at the center as possible.

The second question that this study sought to demonstrate is the legal and institutional framework of devolution in Kenya. In response, Chapter three analyses the legal and institutional framework on devolution in Kenya. It has demonstrated that devolution is a creature of the Constitution and all other laws on devolution trace their origin to the constitution and serve to give effect to the demands of the constitution. The same is true for the institutions established in the constitution or by statute. This means that statute and institutions cannot go beyond the intent of the constitution with respect to devolution.

Thirdly this research project sought to examine the constitutional design of devolution in Kenya. In response chapter four has shown that county governments have a clearly defined and very limited authority. This chapter has demonstrated that the reluctance to relinquish central control

over the local communities continues to be manifested in the constitutional assignment of legislative competence between the governments. This chapter has further demonstrated that although the constitution in some places defines the relationship between the governments as that of equality, the assignment of legislative authority makes the devolved units subjects of the national government. It has also been demonstrated that the design of devolution in the constitution is one that panders to the center and avoids creating a political sphere of influence in the periphery. It has also been shown that the devolution and decentralisation envisaged by the Constitution of Kenya 2010 is largely a tool for administrative ease as opposed to a revolutionary dismantling of the pre-existing centralist state while giving political self-determination to the periphery.

The fourth question that the study sought to investigate is how national legislation claws back on the functions of county governments. In response, chapter five has demonstrated that national government law making has, in spite of the constitution indicating otherwise, continued to subordinate county governments to the national government especially with regard to concurrent functions. It has demonstrated that in Kenya national legislation is a potent weapon wielded by central political and administrative elites in the battle for political control. It has also demonstrated that through national legislation, implementation functions of the county government have been recentralised. This has resulted in an even bigger bureucracy at the center while retaining the power of making more politically meaningful decisions. It has further shown that Senate has been considering and debating bills that are within the legislative competence of county assemblies.

6.3.Conclusion

From the foregoing, the research objectives have been met. This research project has proven the hypothesis by demonstrating that all attempts to disperse power from the center have always been designed to retain control from the center. This might have because of two reasons. The first is to

maintain the cohesiveness of a nation state that was forcefully forged from previously independent nations(tribes). Secondly those wielding political power during the discourse on the ideal design of government have always influence the design of government to retain power at the center. Indeed, these designs of Kenya's system of government have failed to acknowledge the history of the existence of the people that inhabited the territory of the state currently known as Kenya. The political significance of the many nations (popularly known as tribes) that form Kenya has been ignored in constitution making discourse and ethnic identity has been relegated to cultural realms. In light of the foregoing, it is therefore the design of devolution to retain greater control at the center by placing the national government above county governments.

6.4. Recommendations

In light of the above conclusions, this research project recommends the following

6.4.1. Short Term Recommendations

These entail actions that can be carried out in the short term and would help provide a road map for more permanent solutions.

6.4.1.1. Establishment of a National Taskforce

The President should spearhead the investigation, by a National Taskforce, of how the ethnic composition of the country affects the political governance of the country. This does not necessitate the appointment of a new taskforce. The President has already established the Building Bridges to Unity Taskforce. The mandate of this taskforce should be expanded to explore how ethnicity can be positively harnessed in the devolved governance structures of the country.

6.4.1.2. Legislative Restraint by the Senate

The Senate is part of Parliament.[310]It is therefore an institution within the national level of government.[311]In this regard, and in the short term ,the Senate should not legislate on matters within the functions and powers of county governments. This should be left to the county assemblies. In legislating and enforcing local legislation, county governments will therefore have some semblance of political autonomy and self-determination.

6.4.1.3. Protective Role of the Senate

The senate represents and protects the interests of county governments at the national level.[312]The Senate should be more vigilant in carrying out its protective role. It should ensure that national legislation does not claw back on the functions and powers of county governments. It should also ensure that national legislation does not establish state agencies, domiciled at the national level of government, that encroach on the functions of county governments.

Secondly, the Senate should commence a process to wind down the national government agencies that perform functions that are already devolved to county governments.

6.4.1.4.Vigilance by County Governments

County Governments should be vigilant in protecting the political and constitutional space of the devolved units. They should use all lawful means available to them to resist the recentralisation of power through national legislation. In this regard, County Governments through the COG

[310] Constitution of Kenya 2010, Article 93.
[311] ibid.
[312] Article 96 (n2).

should seek the intervention of the Courts to have legislations that breach the legislative competence of County Governments declared unconstitutional.

6.4.2. Medium Term Recommendations

This are recommendations whose implementation can be progressive. The implementation of these recommendations will help clarify and bolster devolution within the current legal regime.

6.4.2.1.Proactive Legislation by County Governments

County legislatures should proactively enact legislation under Article 185 of the Constitution. This will plug the legislative gap the Senate purports to fill on behalf of county governments.

6.4.2.2.Prioritizing the Enforcement of County Legislation.

County Governments should prioritise the enforcement and implementation of their own legislation where national legislation also exists on the same subject matter. In doing this they will not only stump their political autonomy, but they will be able to regulate unique matters affecting their residents using county specific legislative solutions

6.4.2.3.Clarification of the Scope of the Policy Making Function of the National Government

The County Governments should seek the intervention of the Court to define the scope of the policy making function of the national government.

6.4.3. Long Term Recommendations

These entail a change in the legal framework of governance in the country.

6.4.3.1.Constitutional Reforms

Any constitutional review process in future should answer the question whether Kenyans desire devolution for the purpose of administrative ease or for the purpose of giving political self-determination to the periphery. Further, this constitutional process should rescue the ethnic composition of the country from the confines of cultural purposes and give ethnicity an enhanced purpose in the politics and governance of the country.

In this regard, if in the constitution review process Kenyans decide to fully dispersing political power and give political self-determination to the counties, Article 191 of the constitution should be amended to further limit the occasions where national legislation prevails over county legislation. Further Article 186(4) of the constitution should be amended to remove the legislative *carte blanche* grated to the national government.

Further, if Kenyans choose to fully disperse political power to the counties, the law on political parties should be amended to allow the existence of county based political parties. This will help protect county governments from centralist political interests that may be propagated by national political parties.

However, if Kenyans still choose to retain central control, the Constitution should be amended to clarify the superiority of the national level of government and banish the illusion of political equality between the two levels of government.

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