

**TOWARDS DECENTRALISATION: A CRITICAL ANALYSIS OF DECENTRALISING
GOVERNANCE IN KENYA**

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Declaration

I, Wilson Kamau Muna declare that this thesis is my own unaided work. All citations, references and borrowed ideas have been duly acknowledged. It is being submitted for the degree of Master of Social Science (Policy and Development Studies) in the College of Humanities, School of Social Sciences, University of KwaZulu-Natal, Pietermaritzburg, South Africa. None of the present work has been submitted previously for any degree or examination in any other University.

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Dedication

To My Family

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ABSTRACT

This study analyses democratic governance, focusing on the processes leading to decentralising governance in Kenya. It examines issues of decentralisation as applied to the recent decentralisation of governance in Kenya.

In Kenya, centralisation has been associated with the monopolisation and abuse of power, political patronage, and the marginalisation of certain groups and communities. There is a belief among the majority of Kenyans therefore, that dispersing political, administrative, and fiscal powers and responsibilities to regional governments, will deepen democracy, maximise opportunities for all Kenyans to participate in the process of decision-making, and consequently improve regional social and economic development. The new Kenyan Constitution 2010 is the result of many years of deliberation among Kenyans who, together with the international community, called the government to open up to more participation and shared power across the country. This pressure heightened with the re-introduction of multiparty politics in Kenya since 1992.

The study has taken the form of a selective and critical literature analysis of decentralisation, and particularly the rationale and process of decentralisation in Kenya. It has introduced decentralisation in Kenya from a historical and political perspective. It also analyses the process of constitutional reform, from Moi's regime to the inauguration of the new constitution in 2010. The Constitution has significantly restructured the governing system in Kenya, as well as defined new power relationships for the benefits of many Kenyans. This has been determined in the study by assessing the extent to which previous powers that were exercised by the executive, particularly the presidency, have been restructured and redesigned, curtailing its powers. This study argues that the reforms introduced and formalised by the 2010 Constitution have introduced decentralisation as the official form of governance in Kenya.

LIST OF ACRONYMS

APIC	-Africa Policy Information Center
CoK	-Constitution of Kenya
CKRC	-Constitution of Kenya Review Commission
CDF	-Constituency Development Fund
CGFMB	-County Governments Financial Management Bill
DDC	-District Development Committee
DFRD	-District Focus for Rural Development
ERS	-Economic Recovery Strategy
ECK	-Electoral Commission of Kenya
EPG	-Empowered Participatory Governance
FY	-Financial Year
GoK	-Government of Kenya
IMF	-International Monetary Fund
LA	-Local Authority
LATF	-Local Authority Transfer Funds
KADU	-Kenya African Democratic Union
KANU	-Kenya African National Union
KRA	-Kenya Revenue Authority
IPPC	-Inter-Parties Parliamentary Committee

IPPG	-Inter-Parties Parliamentary Group
MP	-Members of Parliament
MOU	-Memorandum of Understanding
NARA	-National Accord and Reconciliation Act
NARC	-National Alliance Rainbow Coalition
NAK	-National Alliance Party of Kenya
NCC	-National Constitutional Commission
ODP	-Orange Democratic Movement
PA	-Provincial Administration
PNU	-Party of National Unity
PCK	-Peoples Commission of Kenya
TISA	-The Institute of Social Accountability

CHAPTER ONE

TOWARDS DECENTRALISATION: A CRITICAL ANALYSIS OF DECENTRALISING GOVERNANCE IN KENYA

1.1 Introduction

As pointed out by Mazrui (1983) (cited in Olowu and Wunsch, 2004: 29), African States have been centralised since their colonial origins. Stephens (1974: 52) defines centralisation as an approach to governance whereby the State controls basic public policy, allocates resources, and delivers public goods and services. Centralisation of government accumulates a lot of power and control at one point. This power is susceptible to manipulation and corruption. In other instances, those holding political power manipulate the opportunity of controlling power to serve their individual and group interests, leaving others marginalized and excluded. According to Dahl (2000:335), it is the close association of centralisation and authoritarian rule (that) explains why calls for decentralisation have often accompanied the struggles of peoples in favour of democratisation through decentralisation of these powers.

According to Cheema (2005: 5), governance addresses the allocation and management of resources to respond to collective problems; it is characterized by principles of participation, transparency, accountability, the rule of law, effectiveness, equity, and effective vision. In addition, Hyden (2000: 9) views governance as referring to the management of public affairs that involves rules and norms of policy making and implementation. Similarly, these principles associated with governance may be put into practice to translate into certain tangible aspects, such as: 'free, fair, and frequent elections; a representative legislature that make laws and provides oversight; and an independent judiciary that interprets laws. They also translate into the guarantee of human rights and the rule of law, and into transparent and accountable institutions' (Cheema, 2005: 5). In order to achieve these principles, decentralised systems of governance have been favoured more than traditionally centralised systems, which are typically characterised by abuses of power in developing countries, especially in Africa.

Olowu and Wunsch (2004: 4-5) define decentralisation as part of the process of democratic reform. They refer to democratic reform as those legal acts and administrative measures that

initiate a transfer of responsibility (authority), resources (human and financial), accountability, and rules (institutions) from central government to local entities. This involves a long political, fiscal, and administrative process.

This study examines Kenya's move from a highly centralised structure of governance to a decentralised form. It also establishes how these changes have been encapsulated in Kenya's new Constitution, adopted in 2010. The evolution of decentralisation in Kenya is not an isolated African case, it is however the most recent. Contemporary trends in Africa reveal that many governments are increasingly favouring a decentralised form of government, and regard it as the most suitable mode of governance through which poverty eradication interventions may be implemented. Amolo (2010: 14) affirms that African countries have increasingly adopted decentralisation as a strategy to improve governance and to remedy institutional deficiencies that highly centralised governments have engendered. These include corruption and the marginalisation of communities from the mainstream policy process. The literature on decentralisation argues that the dispersing of power and authority increases discretion among local communities. Singh (2007: 230) argues that a well implemented system of decentralisation engages local people in their development process and strengthens their capacity for decision-making by having greater access to local political participation.

Attempts to establish local governance in Kenya have a long tradition, both from the customs of ethnic groups, and from the formal local government system created during the British colonial era (Smoke, 2007: 138). The power of local government in Kenya was weakened immediately after independence in 1963. This scenario led Kenyatta, the first president of the Republic, to opt for a nationalist government under central control. This was made possible through several constitutional amendments that aimed to unite Kenya by creating a strategic power centre. Kenyan governance became a one-party state system. In effect, political competition was curtailed and efforts to establish local autonomy were undermined. According to a report on devolved government commissioned by the Government of Kenya (GoK, 2010: 11), poor performance of local government intensified after that. The central government pursued interests that benefited a few individuals through patronage, whereas those who opposed the regime were marginalised, tortured, and killed with impunity.

This study argues that in Kenya, the failure of the central system of government to ensure the equitable distribution of the country's resources, and to eradicate the marginalisation of certain groups and communities from decision-making and from participating in their own development, led to a country-wide call for a change to centralised governing structures. This study will show that in the last two decades, pressure was placed upon Moi's government, both nationally and internationally, and led to the inception of the constitutional review process in 1997. This culminated in the adoption of a new constitution which was inaugurated in 2010. The new constitution established 47 local counties to be run by independent governments, with shared responsibilities between the counties and national government. In essence, for the first time in Kenya, decentralisation became formally instituted and legally protected.

In order to examine the changes in governance in post-independence Kenya, a brief descriptive historical background of Kenya will be presented. This entails looking at the system of governance during the colonial era, through to the subsequent post-independence regimes under the presidencies of Kenyatta, Moi, and Kibaki. The process of reforming government within a constitutional framework is closely analysed, beginning with Moi's regime in the 1990s, and ending with Kibaki's regime that facilitated the inauguration of the new constitution in 2010. Thus this study pays particular attention to how governance problems associated with the centralised nature of previous regimes, have been addressed by the establishment of a decentralised system of governance in the new constitutional framework. This study seeks to explore why decentralisation has been adopted, and why it is deemed to improve governance in Kenya. It attempts to explain why government decentralisation is perceived by the Kenyan people as a better alternative to centralisation.

The literature on decentralisation identifies it as having three main dimensions: political, administrative, and fiscal. Kauzya (2007: 76) regards political decentralisation as the transfer of political leadership and representatives from central governments to local governments. He also refers to it as the transfer of power and authority for making social, political, and economic decisions, from central government to local government and communities. Omolo (2010: 16) defines administrative decentralisation as the transfer of responsibility for the planning, financing, and management of certain public functions, from the central government and its agencies, to field units of government agencies, subordinate units or levels of government, semi-

autonomous bodies, public authorities, corporations, or regional or functional authorities. According to Neyapti (2010: 155), fiscal decentralisation is defined as the devolution of policy responsibilities for public spending and revenue collection, from central to local governments. Omolo (2010: 16) points out that it involves the transfer of financial resources from the central government to autonomous local agencies. It may be done directly through the assignment of tax powers to facilitate the decentralised agents to implement their responsibilities. Cheema (2005: 122) distinguishes between three forms of decentralisation, namely: (1) deconcentration, where the central government disperses responsibilities for certain functions to regional branch offices that implement decisions made at the centre; (2) delegation, referring to the shifting of management of authority for specific functions to semi-autonomous or parastatal organizations, including public corporations, regional planning- and area development authorities, and multipurpose and single purpose authorities; and (3) devolution, whereby political, administrative and fiscal power is distributed to semi-autonomous territorial and sub-national units. Devolution is regarded as the most extensive form of decentralisation.

1.2 Research questions

The research questions for this study have four components:

1. What is decentralisation? And why is decentralisation perceived to improve democratic governance?
2. What is the rationale behind the shift from a centralised to a decentralised form of governance in Kenya?
3. What are the key governance reforms introduced by the 2010 constitution in Kenya?
4. What are the prospects for the devolution of governance in Kenya?

1.3 Methodology

This is a qualitative and non-empirical study. It is predominantly a literature review based on secondary and primary sources. Secondary information was sourced from books, journals and theses. Literature on decentralisation was scrutinised in order to provide the theoretical framework of analysis. Primary data included reports from various commissions and Acts, like the Constitution of Kenya (2010); Constitution of Kenya Review Commission (CKRC); and the Commission on Devolved Government. The data consulted provided relevant information that was vital in addressing the research questions pertaining to decentralisation in Kenya. Relevant themes were identified and analysed within the framework of the decentralisation process in Kenya. Analysis of texts and documents guided this research to underscore the main rationales behind decentralisation and the governance system in Kenya. The data in this study was analysed by gathering information from sources widely selected to enhance the reliability and validity of the data collected.

1.4 Structure of research

Chapter One introduces the research topic and objectives. The research methodology adopted and how the thesis is organised, is explained.

Chapter Two constitutes the theoretical framework of the study. It critically analyses the concept of decentralisation. Different dimensions and forms of decentralisation are analysed and provide the framework for analysis of decentralisation in Kenya.

Chapter Three explores the evolution of the governance system in Kenya. It does so by looking at governance systems in Kenya operated by the colonial State, as well as by the post-independence State, with the centralisation of governance during Kenyatta's and Moi's regimes.

Chapter four presents an analysis of the constitutional reforms process, with particular reference to the introduction of decentralization of governance in Kenya. It highlights various contentious issues surrounding the issues of power structures and processes, pointing to the outcome of the referendum that saw the rejection of the Draft Constitution in 2005, until the second national referendum in 2010.

Chapter Five demonstrates how the new Constitution of Kenya (2010) has addressed the previous concerns under the centralised form of government, concerns that pushed for the review of the governance system in Kenya. It reveals provisions made by the Constitution that demonstrate how powers and functions of government have been disbursed from the central government to national and sub-national established county governments.

The thesis concludes that decentralisation is now formally legislated as the official system of governance in Kenya. However, in practical terms, it is too early to assess the implementation of decentralisation in Kenya as yet. Nevertheless, attempts are made at considering the prospects of decentralisation by analysing the nature of the systems and processes put into place.

CHAPTER TWO

DECENTRALISATION: A CONCEPTUAL FRAMEWORK

2.1 Introduction

This chapter conceptualises decentralisation as a system of governance in a democratic dispensation. Decentralisation is part of some of the ongoing democratic reforms all over the world, including in developing countries. This chapter will discuss some of the main rationales behind democratic states adopting decentralisation. It will identify the different forms and dimensions of decentralisation. It will also highlight some of the challenges and concerns that have been associated with decentralised forms of government. The objective is to establish a conceptual framework in order to trace the evolution of the governance system from a centralised to a decentralised system in Kenya.

The debate on decentralisation is part of the larger discussion on democratic governance. Blunt and Turner (2007: 117) explain that ‘decentralisation dates back to John Stuart Mill in the nineteenth century and rests on the twin pillars of participation and local knowledge. Successive generations have elaborated on Mill’s pioneering work to identify the benefits that should accrue from democratic decentralisation’. By definition, a ‘decentralised state is one in which local governments control public policy, allocate whatever resources they have at their disposal, and deliver public goods and services to the residents’ (Stephens, 1974: 52).

According to Cheema and Rondinelli (2007: 1), the concept of decentralisation has ‘changed rapidly over the past quarter of a century in tandem with the evolution in thinking about governance’. Olowu and Wunsch (2004: 4-5) define decentralisation as part of the process of democratic reform. They refer to democratic reform as ‘those legal acts and administrative measures that initiate a transfer of responsibility (authority), resources (human and financial), accountability, and rules (institutions) from central government to local entities. This involves a long political, fiscal and administrative process’.

Falleti (2005: 328) sees decentralisation as a process where the governance of responsibilities, authority, or resources is dispersed to lower levels of government. Decentralisation includes

transferring central government functions towards the periphery in varying degrees. Dahl (2000: 335) describes that the adoption of a decentralised form of governance in a democracy can be aimed at removing the concentration of power of a single central ruler which is prevalent in centralised systems of governance. The nineteenth century French writer, Alexis de Tocqueville (cited in Dahl, 2000: 335), contrasted the negative consequences of centralisation with the benefits of freedom and democracy in America. The local community was considered the “fundamental cell” of democracy, the place where citizens experimented with basic rules of the democratic government.

Kickert, Klijn, and Koppenjan (1997: 8) regard the extent to which central policies provide local actors with sufficient resources and policy discretion to tackle the problems they encounter as central focus in analysing decentralisation. This approach regards effective governance as the ability of the governing structure to create participation spaces for policy formulation and implementation, not only for government agencies, but for local actors as well. Furthermore, Kickert, Klijn, and Koppenjan (1997: 8) argue that making public policy and governance can be regarded as an essentially political process in which local actors assess their interests and purposes. They call for a radical shift and the retreat of the central government, making a plea for decentralisation. Public policies and governance are judged successful if they leave room for local decision making, and provide local actors with sufficient resources. Proponents of the bottom-up approach such as Kickert, Klijn, and Koppenjan (1997: 8) assume that policies fail because there is too little local policy discretion, local actors are excluded from policy formulation, and resources are lacking. Public policies and governance can be improved by increasing the discretion of local actors, by providing more resources, and by strengthening the autonomy of these actors. Brinkerhoff and Brinkerhoff (2001: 171) argue that decentralisation is deemed to redefine the relationships between national and subnational entities (regional, state, and local), and between those entities, civil society, and the private sector.

2.2 Rationales behind decentralisation

Litvack, Ahmad, and Bird (1998: 5) claim that in the literature and in practice, many rationales for decentralisation may be discerned. Not all will be relevant in any one country, nor are they all consistent or equally important in all relevant parties. This chapter discusses four of the main

rationales for decentralisation as identified in the literature, namely that decentralisation improves: participatory democracy; socio-economic development; good governance; and central government efficiency.

2.2.1 Decentralisation improves participatory democracy

Schmidt (1997:45) argues that decentralisation, has a considerable promise in terms of ensuring citizen participation in development. Ginter (1992: 66) argues that decentralisation strengthens participation while governments are brought closer to the people that they are intended to serve. Brinkerhoff and Crosby (2002: 53) observe that decentralisation is a process through which interested parties influence and share control over development initiatives and the decisions and resources which affect them.

Wight (1997: 370) traces the foundations of public participation in a global evolution in governance towards participatory democracy. Bekker (1988: 28) observes a close connection between decentralisation and participation. He acknowledges decentralisation as valuable because of its potential to promote participation in the government process and provide a channel for grass-roots involvement. Consequently, Brinkerhoff and Crosby (2002: 56) contends that better policy outcomes are achieved when the stakeholders, local communities, and interest groups are involved in making decisions over development initiatives that affect them, for example health, security, infrastructure, and environment. In decentralising governance, therefore, participation is central to policy implementation. Citizens have increasingly organised to expand their influence over policy debate, to pressure their governments to be more responsive and accountable, and to demand a greater role in governance. Brinkerhoff and Brinkerhoff (2001: 170) argue that participation is an important factor in developing democratic governance because it leads to better policy targeting - that is, a closer fit between the needs and demands of beneficiaries. Thus, policy solutions can be achieved more effectively and at a lower overall cost (2001: 170).

Decentralisation, as it is argued by Brinkerhoff and Crosby (2002: 75), increases the opportunities for citizens to lobby local officials and to hold officials accountable at elections and in public hearings. Furthermore, participation is expanded to greater numbers of citizens.

Ismail, Bayat, and Meyer (1997: 28) note that decentralisation tends to emphasise on people's direct involvement in the decision-making process. However, Brinkerhoff and Crosby (2002: 75) caution that decentralisation may not guarantee that participatory opportunities, especially for the poor and disadvantaged, will automatically increase. However, evidence indicates that decentralisation is an important factor in contributing to the supply side of participation.

Wampler (cited in Shah, 2007: 21) asserts that citizen participation in governance is indispensable because it improves local performance and development by enhancing the quality of democracy. Narsiah (2011: 88) argues that approaches to public participation range from decentralisation to many other empowerment perspectives. She further affirms that decentralisation has been used as a key tool to evoke visions of democratic participation and as an argument against centralised bureaucratic control (2011: 88). Heller (2001: 132), too, argues that local government must be strengthened and empowered, not only on the grounds of making local government more efficient, but also on the grounds of increasing accountability and participation. For Fung and Wright (cited in Narsiah, 2011: 91), downward centralisation of State power to the local scale is a necessary feature of decentralisation. This form of decentralisation entails both conceptualising and the implementation of locally based solutions and accountability. Specifically, these local structures do not act in an advisory capacity but have substantial authority and capacity.

2.2.2 Decentralisation improves social-economic development

Another rationale for a decentralised form of government is the premise that it expands the opportunity for citizens to directly contribute to the social and economic development of their localities. Smith (1985: 85) regards decentralisation and its manifestations as a necessary condition for social and economic development. Kofi Annan (2000), the former Secretary General for the United Nations (cited in Ndulo, 2003: 317) once argued that in a country where those who hold on power are not accountable, but use their power to monopolise wealth, exploit their fellow citizens and repress peaceful dissent, conflict is too predictable and investment will be scarce. But in a country where human rights and property rights are protected, where government is accountable, and where those affected by decisions play a part in the decision-making process, there is real hope that poverty can be reduced.

Miller (2002: 10) also links decentralisation to local social and economic development. She notes that decentralisation facilitates mobilisation of local resources in support of local the development process. This, she argues enables value-added contributions to the provision of services and development efforts. She further commends the maximisation of local potential where local people are able to identify and mobilise local/indigenous resources which would not be available to centrally run programmes, and because citizens are often willing to volunteer free labour and expertise, and other forms of in-kind contributions, in order to support local initiatives (Miller 2002: 10). Even though one cannot in conclusive proof that there is a clear connection between decentralisation and social-economic growth, Scott (2009: 13) maintains that local government can improve social and economic development by its concentration on service delivery. He argues that improvements in effective, reliable provision of basic services show how local governments could foster local social and economic growth.

2.2.3 Decentralisation improves good governance

Litvack, Ahmad and Bird (1998), claim that good governments are those closer to the people. Such governments are able to tap local knowledge in problem identification, fomulation and implementation. Decentralisation has been likened to have the potential of ensuring good governance. According to Cohen and Peterson (1999: 22), foremost among the benefits of decentralisation are strengthened governance, increased transparency and accountability, and more effective and efficient production and delivery of public goods and services.

Cheema (2005: 5) argues that decentralising authority and resources to government at the local gives citizens a greater role in governance yielding to good governance. Furthermore, other actors outside government may not be ignored in the construction of good governance. Cheema (2005: 5) acknowledges that civil society is likely to play an active role in setting priorities and making known the needs of the most vulnerable people in society. In sum, governance is regarded as good if it supports a society in which people can expand their choices in which people can expand their choices in the way they live.

Muia and Oloo (cited in Omolo, 2010: 16) assert that the main objective of decentralisation is to bring about greater citizen participation and higher levels of accountability to citizens. This leads

to institutional responsiveness in service delivery and low levels of corruption in government. Accountability to citizens increases in the face of reduced accountability to the central government. Grindle (2007: 2) notes that the rhetoric and theory of decentralisation promises better governance and deeper democracy as public officials are held more directly accountable for their actions and choices and citizens become more engaged in local affairs. In other words, advocates of democratic decentralisation such as Blunt and Turner (2007: 117), stress on such benefits as accountability to local populations, the participation of the poor and disadvantaged in decision-making, the improved coordination of governmental activities, and the accessibility of officials.

2.2.4 Decentralisation improves central government efficiency

The rationale behind the move towards decentralisation points to a fundamental assumption that centralisation, as such, has failed to provide solutions that yield to the promotion of values of participation and equality that people are seeking. According to Commonwealth Secretariat and Commonwealth Local Government Forum (cited in Othieno, 2011: 3) a decision to decentralise is often based on the failure of the central government to deliver, such as in revenue collection or in service delivery'. In this regard, citizens, local and international agencies continue to press governments to opt for a shift to decentralised structures. Thus, the issue of inefficiency of the central government is brought to the fore thereby justifying the decentralisation of governance. There is an assumption that decentralising functions of government 'to the lowest feasible level of decision making and implementation will optimise information flows and reduce transaction costs' (Othieno, 2011: 3).

According to Nel and Binns, (2003: 108) the widespread failure of 'top- down' development interventions has led to a move in both developed and developing countries towards the decentralisation of developmental responsibilities to local government and community-based agencies. The rationale behind decentralisation is essentially promoted under the platform of the failure of the central system of governance to ensure the equitable distribution of the country's resources and the marginalisation of grassroots communities in decision-making regarding the affairs that affect their daily lives. Grindle (2007: 4) traces the shift in fiscal, political, and administrative responsibilities in the process of the reconstructing a democratic governance.

Cheema and Rondinelli (2007: 1) noted some elements that facilitated increased levels of efficiency and accountability in governments by the early 1980s: increasing international trade and investment; growing economic, social, and political interaction across the national borders; and rapidly emerging technological innovations that increased the scope and reduced the costs of communications and transportation and helped spread knowledge and information worldwide, changed perceptions of governance and of the appropriate functions of the state.

Litvack, Ahmad, and Bird (1998: 5) identify the attainment of efficiency in governance as the most common rationale for decentralisation. Decentralised government, they argued, creates a more favourable environment where local actors are actively involved in policy formulation and implementation. Due to this fact, Brinkerhoff and Brinkerhoff (2001: 170) (cited in Thompson, 1995) argues that decentralising government is likely to bring about ownership for policy solutions among beneficiaries and implementers, which can lead to higher use rates of policy goods and services, reduced maintenance and operating costs, and better conformity between policy intent and outcomes.

Brinkerhoff and Brinkerhoff (2001: 171) notes that empowering local actors is significant from a democratic perspective because of its empowerment potential, bringing about accountability, transparency, and responsiveness features of good governance that are components of building an efficient governance system in the delivery of public goods and services. Similarly, Robertson (2002: 59) argues that among the reason behind decentralisation and devolution for this matter is that it will increase efficiency of government and meet demands for special sections of community for a degree of control over their own affairs. In this regard, efficiency is judged by the level at which a government is committed to answer needs of the local actors and communities.

2.3 Forms of decentralisation

Authors such as Grindle (2007: 4), Rondinelli, Nellis, and Cheema (1984) distinguish between three forms of decentralisation, namely deconcentration, delegation and devolution. Different forms of decentralisation can be distinguished based on the extent to which power and authority are being transferred and/or the type of authority being transferred to lower levels of

government. Oxhorn (cited in Grindle, 2007: 4) argues that while distinctions among forms of decentralisation are important in defining the relationship of the centre to the periphery and for the management of particular programs and functions, most local governments experience all types of decentralisation at the same time. Stanton (2009: 30) argues that '[t]his transfer can be within formal political structures, within administrative or parastatal structures, or from the state sector to the private sector, or a combination of all'.

2.3.1 Deconcentration

Cheema (2005:122) defines deconcentration as the shifting of responsibilities from central ministries and departments to regional and local levels of government. It could include the establishment of field offices of the national departments, and transfer some decision-making to the field staff. In a similar note, Omolo (2010: 16-17) refers to deconcentration as a form of administrative decentralisation where responsibilities are dispersed from the central government for certain functions to regional branches that implement decisions made at the centre. This decentralisation involves assignment of authority by central administration to public servants in the field. These administrative decisions are expected to be implemented on behalf of the central administration.

However, control by the central government over regional or local governments remains strong. In other words, the central government plays an authoritative role in this form of decentralisation. Blunt and Turner (2007: 120) argues that the central government assumes the responsibility for the design of decentralisation, oversees the implementation of the laws governing decentralisation, determines the financial transfers to subnational government, set standards for service delivery, monitors the progress of decentralisation, and provides advice and support for decentralisation.

Olowu and Wunsch (2004: 5) uphold that deconcentration is when only responsibility or authority is shifted, but resources or local accountability remains at the control of the central government. Cheema (2005: 122) recognises the limitation of this form of decentralisation. He claims that even though this form of decentralisation provides a very limited transfer of authority to groups and individuals outside the central government, this is the first necessary step in

moving the process of program planning and implementation closer to the people. Blunt and Turner (2007) suggest that deconcentration of governance may at times be regarded as an alternative to political decentralisation. They also point out that in deconcentration, delegation of decision-making powers to locally based public servants could lead to welfare gains. It could also lead to greater efficiency in resource utilisation, and effectiveness in the form of reduced poverty (Blunt and Turner, 2007: 120).

2.3.2 Delegation

Another form of decentralisation is delegation. Cheema (2005: 122-123) points out that it can be defined as the ‘shifting of management authority for specific functions to semiautonomous or parastatal organisation including public corporations, regional planning and area development authorities, and multipurpose and single purpose authorities’. On a similar note, Muia (cited in Omolo, 2010: 17) points out that in delegation the responsibility for making decision and delivery of services are passed by central government to semi-autonomous organisations not wholly owned by the government. The organisations can include local government, parastatals, the private sector and NGOs’. Specifically, as Olowu and Wunsch (2004: 5) claim, it is when responsibility, authority, and resources are transferred, but accountability still resides at the center. Thus, specific tasks and projects for implementation are passed to particular governmental enterprises. Cheema (2005: 123) notes that this form of decentralisation brings decision-making about specific activities closer to the people who are affected, though too, as it is the case in deconcentration, it does not provide direct channels for local political control as in the case of devolution.

2.3.3 Devolution

Smith (1985) and Adamolekun (1999) (cited in Olowu and Wunsch, 2004: 5) define devolution as the process whereby there is a transfer, by law and other forms of actions, of responsibility, resources and accountability. Therefore, local government enjoys the autonomy of decision making over the issues affecting their respective regions under the framework of the law, often protected in a constitution. Similarly, Muia (2008) (cited in Omolo, 2010: 17) views devolution as a ‘political arrangement where political, administrative and fiscal power is distributed to semi-

autonomous territorial and sub-national units'. Cheema (2005: 122) argues that devolution is aimed at creating or strengthening independent units of government by devolving functions and authority. Its fundamental characteristics are the autonomous nature of local units of government, the legally recognised geographic boundaries within which they exercise their authority, and the power of local governments to mobilise resources to perform their tasks. Devolution is therefore geared towards empowering communities to take charge in deliberating on the needs of their individual communities. This initiative goes along with empowering local actors with problem identification, policy formulation and implementation. In other words, this form of decentralisation also implies that local governments are seen as “institutions” that provide services to local citizens who have control over them. Local governments are one part of many levels of the national political system, each with mutually beneficial and legally recognised roles and responsibilities (Cheema, 2005: 122).

2.4 Dimensions of decentralisation

The available literature divides decentralisation into three dimensions, namely political, administrative, and fiscal decentralisation. Each of these dimensions refers to the types of power and authority that is being decentralised.

2.4.1 Political decentralisation

Kauzya (2007: 76) understands political decentralisation as the transfer of power of shifting political leadership and representatives from central governments to local governments; and transferring the power and authority for making social-politico-economic decisions from the central governments to local governments and communities. Omolo (2010: 16) describes political decentralisation as a movement that tends away from a monocentric, or a central ruler to a polycentric structure of political power where the same power is shared among many regional representatives. Falleti (2005: 329) observes that political decentralisation comprises of the set of constitutional amendments and electoral reforms designed to open new or activate existing but dormant or ineffective spaces for the representation of subnational polities. Political decentralisation policies are designed to decentralise political authority or electoral capacities to subnational actors.

Kauzya (2007: 78) argues that beyond the provision for local elections, political decentralisation can also entail putting in place structural adjustments and practices that would empower and facilitate local governments and communities to influence the making, implementation, monitoring, and evaluation of decisions that concern their local leadership. Kauzya (2007: 78) considers both senses fundamental in the construction of good governance. In the first sense, political decentralisation ‘refers to the vote, while the second one refers to the voice. A combination of both enhances the influence of local people of the decisions that concern them’. This requires structural arrangements that go beyond putting in place local governments. It requires a process that combines vertical and horizontal decentralisation: horizontal, where institutions that promote separation of powers and accountability of the executive for its actions such as the legislature and courts are strengthened, and vertical decentralisation, involving assigning powers to local government structures (Omolo, 2010: 16).

2.4.2 Administrative decentralisation

Omolo (2010: 16) defines administrative decentralisation as the transfer of responsibility for the planning, financing and management of certain public functions from the central government and its agencies to subnational government agencies, subordinate units or levels of government, public authorities or corporation or regional or functional authorities. According to Stanton (2009: 37), ‘administrative decentralisation is concerned with the functional tasks of decentralisation. It relates to the assignment of service delivery powers and functions across levels of government and determining where responsibility is situated’. Cohen *et al* (cited in Stanton, 2009: 37) states that ‘administrative decentralisation is focused on the hierarchical and functional distribution of powers and functions between central and non-central units’. Falleti (2005: 329) states that administrative decentralisation comprises the set of policies that transfer the administration and delivery of social services such as education, health, social welfare, or housing to subnational governments. Falleti (2005: 329) elucidates that administrative decentralisation may entail the transfer of decision-making authority over these policies, but this is not a necessary condition. If revenues are transferred from the center to meet the costs of the administration and delivery of social services, administrative decentralisation is funded and

coincides with a fiscal decentralisation measure. If subnational governments bear these costs with their own pre-existing revenues, administrative decentralisation is not funded.

Oloo (cited in Omolo, 2010: 16) highlights that decentralisation has a fundamental objective in strengthening of field administrative units of the civil service in a country, including capacity building efforts at national and local levels. Cohen and Peterson (1997: 1) expound the fact that decision-makers and aid agency professionals in many transitional and developing countries are increasingly turning to administrative decentralisation as a strategy for addressing a number of critical governmental needs. Administrative decentralisation is deemed to enhance better governance due to local governance potential to attend to specific issues affecting specific local communities.

2.4.3 Fiscal decentralisation

Fiscal decentralisation can be defined as the ‘devolution of (policy) responsibilities for public spending and revenue collection from the central to local governments’ (Neyapti, 2010: 155). It involves the transfer of financial resources from the central government to autonomous local agencies. It may be done directly through assignment of tax powers to facilitate the decentralised agents to implement their responsibilities. Alternatively, it may be done indirectly through financial deregulation where regulation of financial institutions is shifted away from the major capitals (Omolo, 2010: 16). Similarly, Falleti (2005: 329) argues that fiscal decentralisation means the set of policies that is planned to increase the revenues or fiscal autonomy of subnational governments. Therefore, fiscal decentralisation policies can assume different institutional forms such as an increase of transfers from the central government, the creation of new subnational revenue and the delegation of tax authority previously controlled by the national government.

Neyapti (2010: 155) claims that decentralisation can be associated with economic reforms based on the following arguments, that (i) decentralisation of spending increases efficiency because local governments have better local information and hence can better match policies with the preferences of citizens; (ii) decentralisation of fiscal activity increases accountability and

transparency of public good delivery (de Mello, 2000a); and (iii) taxpayers are more willing to cooperate with the accountable local governments (Wasylenko, 1987: 58).

Smoke (2007:131) argues that decentralisation assigns ‘expenditure and revenue responsibilities to subnational governments’. In this regard, ‘decentralisation is expected to improve efficiency in resource use because residents in each subnational governments can choose the mix of public services and revenues that best meets their preferences’ (Smoke, 2007: 132). As observed by Kaiser (2006) (cited in Wachira, 2011: 76), other advantages that go along with fiscal decentralisation are that it ‘helps in the reduction of information asymmetries; enhances transparency and accountability, allows for a better matching of local preferences and makes government more responsive through inter-jurisdictional competition for investment’. In addition, Wachira notes that this initiative facilitates the exploitation of local innovation; increases the legitimacy of the state; and promotes democratic governance by involving previously marginalised stakeholders such as the poor, women and minority ethnic groups (Wachira, 2011: 76). In the same reverberation, Gituto (2007), (cited in Wachira, 2011: 76) argues that fiscal decentralisation is also viewed as a means for improving the service delivery. It enables the citizens or beneficiaries to relate the services with money paid for the services through taxes and user charges (Wachira, 2011: 76). In order to contrast the benefits associated with fiscal decentralisation as opposed to fiscal allocation of resources by the central government. Wachira (2010: 76) argues that fiscal decentralisation enables those with knowledge and awareness of the local preferences and development needs to make the fiscal decisions that are relevant and sensitive to regional diversity. This is because different regions have diverse preferences and needs therefore the centralised system that is usually applied uniformly and is inflexible may not be relevant across all regions. For example all district development plans follow similar theme across all regions without appreciating the unique regional concerns and therefore ends up not addressing the needs of the intended beneficiaries.

2.5 Challenges of decentralisation

Countries which have implemented decentralisation have encountered various pitfalls and challenges in the process of its implementation. They have experienced problems that are associated with defects and challenges in political, administrative or fiscal arrangements. Cheema (2005: 121) cautions that decentralisation is not a panacea for developing democracy and good governance. Many dangers and pitfalls associated with decentralisation can impede the design and implementation of elements of liberal democracy. In conceiving decentralisation, Blunt and Turner (2007: 116) argue that decentralisation does not always yield accountability and transparency, in fact they say, the reverse may happen. They claim that both theoretical and empirical studies reveal that opportunities for corruption can, in fact increase under particular decentralisation arrangements.

Lipset, Seong and Torres (1993) (cited in Cheema, 2005: 121) note that a decentralised political system can create niches for authoritarian figures (or movements) to consolidate their fiefdoms, safe from interventions from central authorities. This nature of power capture by the local elites may hinder the advancement local community interests and limit the participation from the local public. In a decentralised system with autonomy for making decisions at the local level, political representatives may take longer to deliberate on the way forward on policy issues as opposed to a centralised system where decisions are simply imposed from the central government. Similarly, Blunt and Turner (2007: 116) argue that local councils may be unable to agree on policies to resolve key problems as well as the public may remain seemingly inattentive to local affairs. In other words, public participation and local decision making may slow down decision making.

Cohen and Peterson (1999: 22) argue that decentralising service delivery functions to local government can become contentious when shared across spheres of government, where each sphere has a degree of autonomy. This is especially so in a unitary state where the central state wishes to retain a degree of control and sustain a system of hierarchy (Cohen and Peterson 1999: 22). Grindle (2007: 4) affirms that even though this process of decentralisation brought significant new resources and power to local decision makers, it also brought dilemmas. For example, institutions for local decision making, in some cases weakened from decades of centralisation, had to be revived to take on complex problems. Service providing organisations had to be created or restructured; employees needed to be trained and new procedures had to be

put into effect. Kaiser (2006) (cited in Wachira, 2011: 77) stipulates some factors which may limit the provision of public goods in needy areas such as constraints in local capacity as well as the lack of clarity in the roles and responsibilities of national and sub-national entities. In addition, there is the potential for functional conflicts between the national government and the sub-national units over issues such as the management of local development and investment projects; the process of implementation of national policy plans; and strategies to be adopted (Wachira, 2011: 77). As a result, according to Olowu and Wunsch (2004: 9), decentralising governance may lead to local administrative personnel being disconnected from the leadership at the community level.

Cohen and Peterson (1999: 22) state that, decentralisation has its own risks if the resources deployed to the management of subnational governments are inefficient. Decentralisation may bring with it some financial burden to the local governments as they are expected to raise much of their own revenue to deliver local services and to accelerate local social and economic development. Grindle (2007: 4) argues that fiscal management become more exacting even as citizens were increasingly aware that local officials could be appealed to, blamed, or supported for the delivery of a range of public services. Therefore, despite the improvements in the levels of efficiency and accountability at the local level, residents have to bear the increased financial burden of maintaining the local governing systems. Olowu and Wunsch (2004: 9) indicate that the establishment of local governments may encounter serious fiscal constraints due to local institutions being unable or unwilling to raise funds locally. Kaiser (2006) (cited in Wachira, 2011: 77) argues that disparities in local revenue capacity may constrain public services, especially in poor areas.

To sum up the above concerns, if checks and balances are not put in place to monitor and/or support regional social and economic development, decentralisation can yield significant risks and disadvantages. In countries where decentralisation has been adopted, the prospective benefits have not always been realised.

Turner and Hulme (1993: 15) highlight six overall anomalies and hurdles that have adversely affected the implementation of decentralisation plans. These are:

- i) parochialism, which encourages disunity;

- ii) cynical shedding of functions by governments unwilling or unable to shoulder the fiscal responsibilities of service provision;
- iii) the maintenance of the central control through regulations; the capture of decentralisation's benefits by local elites;
- iv) the unpopularity of decentralisation among citizens or public servants;
- v) limited capacity at the local level to undertake the required work;
- vi) and the exclusion of the poor and the disadvantaged by means such as manipulative or passive participation.

In addition, Diamond (2009: 138) submits that for decentralising governments to succeed in establishing an effective and democratic local government, they must address several key challenges. These challenges include weak state capacity, resistance to change, as well as inadequate financing both from its own revenue sources and from the national budget. As noted by Clarke (cited in Olowu and Wunsch, 2004: 9), even when many elements of decentralisation are present, improved governance does not always emerge.

2.6 Conclusion

This chapter has introduced the concept of decentralisation, focussing on both its benefits and challenges. It has also investigated the rationale that has necessitated nation states to shift from centralised to decentralised system of governance. Despite the concerns, challenges and pitfalls associated with decentralising of governance, if enough checks and balances are put in place, this process is likely to benefit the overall population by expanding the levels of participation in the processes that promote the development of social and economic wellbeing.

CHAPTER THREE

CENTRALISED GOVERNANCE IN KENYA: COLONIAL, KENYATTA, AND MOI REGIMES

3.1 Introduction

This chapter focuses on the various waves of centralised and decentralised governance reform in Kenya. It offers a descriptive analysis of how centralised power was exerted first by the colonial powers for nearly six decades (1884-1960), and later by Kenya's own governments. In 1963, Kenya gained its Independence and a new government under the leadership of the Kenya African National Union (KANU) when Mzee Jomo Kenyatta became the first president of the Republic. Of interest is that at Independence, the constitution signaled in an era of decentralisation. It was based on regionalism, which was popularly supported by both the ruling party and the then opposition party, the Kenya African Democratic Union (KADU). Shortly thereafter, efforts to consolidate regional government were undermined. Nationalism replaced regionalism and a strong central government was established.

Moi headed the government after the death of Kenyatta in 1978 to 2002. Both Kenyatta's and Moi's regime became both very centralised. This chapter will also demonstrate that, in the latter days of Moi's rule, he acceded to introduce decentralised programmes. However, these failed to take root largely because of a lack of political support and funding from the central government.

Kenya lies across the equator. It is located in East Africa. It borders Ethiopia and Sudan to the North, Uganda to the West, Tanzania to the South, and Somalia to the East. Its total area is 224,960 square miles, of which 5,230 square miles is covered by water. The country falls into four main physiographical regions: a large region poorly watered and infertile covering about three-fifths of the total area; a plateau raised by volcanic to a height of 3,000 to 9,000 feet; the great rift valley containing lakes (Turkana), Naivasha, Nakuru and many others; and in the extreme west a portion of a lake of the lake Victoria in Nyanza which lies 3,726 feet above sea level' (Hinden, 1950: 121).

In 2009, Gifford (2009: 6) records that a census conducted in Kenya revealed a population of 38.6 million people. The peoples that populate Kenya 'are generally classified into 40 district groups, the main groupings being Kikuyu (19 percent), Luhya (14 percent), Kalenjin (12 percent), Luo (11 percent), Kamba (10 percent' (Gifford, 2009:6) with the rest comprising of other smaller tribes.

3.2 The colonial government

The colonial government established its presence in Kenya within a context of fragmented ethnic governments that were concentrated along tribal lines with very little norms among them. Before colonialism, (the time before the 1880s), none of the ethnic groups in Kenya 'had unified government; none a unified line of patriarchal decent; almost none practiced only one mode of subsistence; no ethnic group had a standard language; there was no power larger than the smaller community; and no structure of competition that could encourage leaders to make of their group a force against other such groups (Gifford, 2009: 6). In other words, Gifford argues that the institutional structures of governance before the colonial times were very basic, and did not illustrate any peculiar form of political competition. However, he does not refute the question of power relations at all within these basic communities. On the contrary, Gifford (2009: 6) argues that rural livelihoods were always perilous, and to cope with uncertainty, groups had to rely on relations of kinship, exchange, and clientage. There were divisions within these groups. Implicit moral contracts were obtained between the more wealthy and powerful and their poor clients and dependents. Those who claimed leadership through their wealth and power, and those who accepted such claims expected to be protected and rewarded for doing so, which meant that both were bound in community of trust and reciprocity. Wealthy men were bound by a morality of generosity and sociability. As indicated by Barkan (2011: 5), political patronage was not just a moral duty; it brought honour as well. With the advent of colonialism in Kenya, such practices were reshaped and governance took on decentralised structures that excluded the natives from sharing benefits from public resources to their own interest.

In the wake of colonisation (1884-1960), Kenya became occupied by the British. Kenya was declared part of British East Africa Territory. The colonisers encroached into the interior through building and operating a railway line. 'Nairobi was created by the railway; it is last expanse of

flat land suitable for marshaling trains before the line rises to the Rift Valley escarpment. Settlers came with the railway, taking over the fertile, temperate area which came to be called the white island, dispossessing mainly the Maasai and Kikuyu'. (Gifford, 2009: 7). According to Loomba (2005: 109) 'Africans were dispossessed from the best lands and settled in adjacent reserves. Such a process was facilitated by the creation of African chiefs, contrary to the custom hitherto prevailing in most Kenyan communities'. Chiefs in most Kenyan communities became a creation of the whites, positions they used to control and manipulate communities for their own social and economic gains. These 'new chiefs were commissioned to supply men to construct roads, railways and docks and act as porters, away from their place of residence. The fees paid to them were low, and refusal to cooperate was treated with harsh punishment' (Loomba, 2005: 109). The colonialists also developed a squatter system whereby African communities were encouraged to live on European lands in return for a certain quantum of labour power. A tax on cash was imposed, which Africans were forced to raise by selling their labour for a wage. 'Chiefs were also used to persuade Africans to enter the labour force and these measures were defended on the grounds that they would eliminate "idleness and vice" among the local population (Loomba, 2005: 109). Due to the economic power that the whites maintained, black communities were always undermined and enslaved as they were harshly treated with very low wages that would barely support their families. (Loomba, 2005: 109).

The displacement of people from their native lands, and their enslavement to working in farms, changed the then existing fabric of the Kenyan society. Few Africans appointed by colonialists acquired new responsibilities of linking with other communities. These new networks 'of power came to link elders, appointed chiefs, traders and more senior officials. In addition, educated (African/Kenyans who were appointed by colonialists) individuals like clerks and teachers acquired increasingly important patronage over resources' (Gifford, 2009: 7). It were these groups that would constitute the political elite and control public resources soon after Independence. Colonialism in Kenya resulted in the widening of the gap between the rich and the poor. By and large, '[o]pportunities for enrichment now came to depend significantly with these patrons with access to state resources' (Gifford, 2009: 7).

As pointed out by the Report on Devolved Government commissioned by the Government of Kenya (GoK, 2010: 11) in 2010, the 'economy of the colonial state was organised and managed

along racial lines and geared towards exploiting the Africans for the benefit of the Colonial State. Through legislation drafted by the colonial state, Africans were deprived of most of their productive land which was allocated to the white settlers'. Many Africans were restricted to occupying marginal land reserved for them known as African reserves designed as reservoirs for cheap labour extracted through coercion by way of legislation and taxation. Africans were reduced to squatters, a problem that has persisted to date. GoK scrutinises the strategies that the white community used to their own economic advantage to the detriment of the native population. As stipulated by GoK (2010: 11), various policies and legislation were developed to give whites economic advantage and undermine the non-white economy. For example, non-whites were not allowed to grow certain crops including coffee. Marketing of produce was highly controlled by the state. Through policy and legislative measures, therefore, the State determined the pace of economic development of the areas occupied by Whites and Africans. Over time, this created regional economic disparities that persist to this day.

According to GoK (2010: 11), the highly authoritative and centralised governance system in Kenya now has its origin in the exclusive colonial system which was primarily established to serve the interests of the minority white community. The system did not allow representation for the majority Africans in the Legislative Council. Power was centralised in the Governor who represented the imperial government. Governors were accountable to the central colonial government. Furthermore, the GoK (2010: 11) specifies that there was no separation of powers as the Executive exercised immense power over both the Legislature and the Judiciary. The Governor was president of both the Executive and the Legislative Council and was supported by a powerful administrative system, namely, the provincial administration. The system was based on central command-and-control. The provincial administration acted as an imprint of the central authority. It used its delegated power to command and control local communities. Africans who formed the majority of the population were excluded from streams of decision-making powers. They had no rights to decide how the political, administrative, and economic benefits were to be constructed.

In order to largely control the movement and socialisation, the colonial powers adopted the strategy of "divide and rule" to local communities. They 'helped fix ethnic and local boundaries, defining new arenas of competition for state resources, thus creating different relationships

between local peoples and localities. Through these processes, ethnic groups became political tribes'(Gifford, 2009: 7). Eventually, these divisions would later translate into means of social political and economic marginalisation.

The colonial government took the form of centralisation. Governance activities and policies were regulated from a central position. The central government was in control of all major decisions in all the provinces mostly by way of delegation. According to Hinden (1950: 125-126), local government in Kenya was classified under two distinct headings of native local government and non-native local government of which the latter had naturally developed in line familiar to British settlers. The native local government system was, however, different from other local government systems adopted in other African countries under British occupation. 'Kenya had not adopted the system of 'indirect rule', making use of traditional tribal authorities as instrument of local government. It is said that failure to use these traditional authorities was due to the absence of strong tribal organisations which might have proved efficient organ of administration in the early days' (Hinden, 1950: 126). Hinden (1950: 125) observes the lack of a strong organised tribal system was more favourable and advantageous for the colonial authorities. He alludes to the fact that this phenomenon had the advantage of allowing more advanced tribesmen, those who had received some education, and came under the influence of Western habits and modes of thought to play an increasing part in local affairs as their influence among the masses grew.

Across Africa, colonial powers were well known to be highly centralised with the aim of exercising control and regulating the decisions that came from localities. Therefore, the centralisation of the state became a character of the colonial government that made it practically very difficult for local groups to mobilise their power and exercise their rights. In order to achieve their objectives in tapping maximum social, political and economic advantages, the colonial government succeeded in resisting reform agenda that was pushed by the Africans which was geared in opening government to greater participation to the majority African populations. The colonialists adopted a campaign that portrayed Africans as not worth equal dignity as humans and were treated as slaves who were expected to serve the interest of their colonial masters. 'For about seventy years, the colonial government and its officials abused human rights with impunity. They engaged in forced labour; communal punishment; extra-judicial killings (of those who resisted colonial rule); detention without trial; rape, war crimes

and the grabbing of African land for white settlement, among other violations’ (GoK, 2010: 11). This they did, by exerting power through a strong system of centralised government.

3.3 Towards decentralisation

The constitutional negotiations preceding Kenya’s Independence were held in Lancaster, Britain. The outcome of these negotiations produced what is historically known as the Lancaster Constitution, or the Independent Constitution. This Constitution provided for a bicameral parliamentary system comprised of the Senate and the House of Representatives. Slade (1975) (cited in Kirui and Murkomen, 2011: 4) states that the Legislative Council (that was in existence during the colonial years) was replaced by two houses – the Senate and the House of Representatives. The Senate was comprised of 41 members, one drawn from each of the 40 districts in the country and one from the Nairobi area, and the Speaker. The House of Representatives consisted of 117 constituency elected members, 12 specially elected members chosen by the house sitting as an electoral college, the Speaker and the Attorney General.

The political dispensation that ushered in the post-colonial government was commonly known as *majimboism* or regionalism. Authors, like Anderson (2005: 547), explain that regionalism was initially promoted by KADU (Kenya African Democratic Union) during the pre-independence negotiations as a way to protect smaller minority communities from the dominance of larger communities. A regionalism was deemed to produce a more representative and equitable society. Unlike the House of Representatives, which would not necessarily produce equality of representation by numbers, ‘the Senate had one representative from each district. That meant that the minority groups received greater representation than would have been the case, if population was considered’ (Kirui and Murkomen, 2011: 4). Therefore, the Senate was meant to serve as a counter balance to the excesses of power, and controlled the dominance of larger tribes over smaller ones. It provided for regional autonomy and representation of local interests was diversified.

The rationale for the bicameral system of governance was not unanimously agreed upon. Opponents, mainly from KANU, were opposed to the idea of a regionalised form of government. KANU supported a centralised system of government. KADU was calling for a construction of a decentralised form of government. Their call for decentralisation proposed an ‘even federation,

in which six or more provinces comprising independent Kenya would each have equal status' (Anderson, 2005:547). The reasoning behind KADU's regionalism proposal was to create a system of government with considerable powers passed down to local authorities. However, 'elections to form the first independent government had been held at the end of May (1960) and KANU had defeated its rival KADU'. According to Branch (2011:2) 'KANU's victory was not simply a victory of one party over another: it was about the triumph of one vision of Kenya's constitutional future over another' (Branch, 2011: 2). KANU did not like the idea of regionalism. They expressed their fear that a regional government would compromise the idea of national unity by creating more divisions among Kenyan peoples who were already politically ethnicised by the colonial government. They came up with the proposal of a national government that would unite groups in Kenya under a central government. According to Branch, 'Kenyatta was determined to see devolution destroyed'. In an address rally in Nairobi, he asked:

“For more than forty years now, I have been telling the imperialist that we must rule ourselves, but he refuses; but we have been struggling with him like a man fighting a lion, and just when we have overpowered him, would you like somebody else to tell us to split our country into pieces?”

Nevertheless, after colonial rule, decentralisation was introduced for a short period (1963-1964) when local governance was implemented in Kenya. At Independence in 1963, Kenya adopted a fairly progressive liberal Constitution with primary features such as 'an extensive Bill of Rights; a bi-cameral Parliament; devolved government; the separation of powers between the arms of government; judicial independence; and a multi-party political system' (GoK, 2010: 12). The Constitution adopted at Independence had a vision of building communities that were autonomous in terms of decision-making. 'The Constitution created regions with extensive political and development powers for delivery of public services. The powers of the regions were protected by various mechanisms including entrenched constitutional provisions, a Senate and exclusive assignment of functions and sources of funding' (GoK, 2010: 12).

'This quasi-federal system was achieved as a compromise between the centralist KANU and the federalist KADU' (GoK, 2010: 12). As noted by Anderson, 'heated politics of the early 1960s, the rhetoric of KANU turned the federalist goal of regionalism into a slur: regionalists were

derided as tribalists who opposed the broader goals of nationalism'. In fact, Ronald Ngala, 'the leader of the opposition was labeled a tribalist for making a speech in parliament advocating for the interests of the regions' (Proctor, 1964) (cited in Kirui and Murkomen, 2011:5). The regions were constitutionally empowered to make laws through an elected regional assembly.

As alluded by Othieno (2011: 12), the design of the Independence Constitution was informed by the experience and the desire to deconstruct the colonial state that had systematically discriminated against non-whites; divided society along racial and ethnic lines; impoverished large sections of the population; and denied the people, particularly the Africans, a chance to be responsible for their affairs. Regional autonomy sought to empower the local communities to be responsible for local governance. This was to be achieved through decentralisation of political and economic power to the regions.

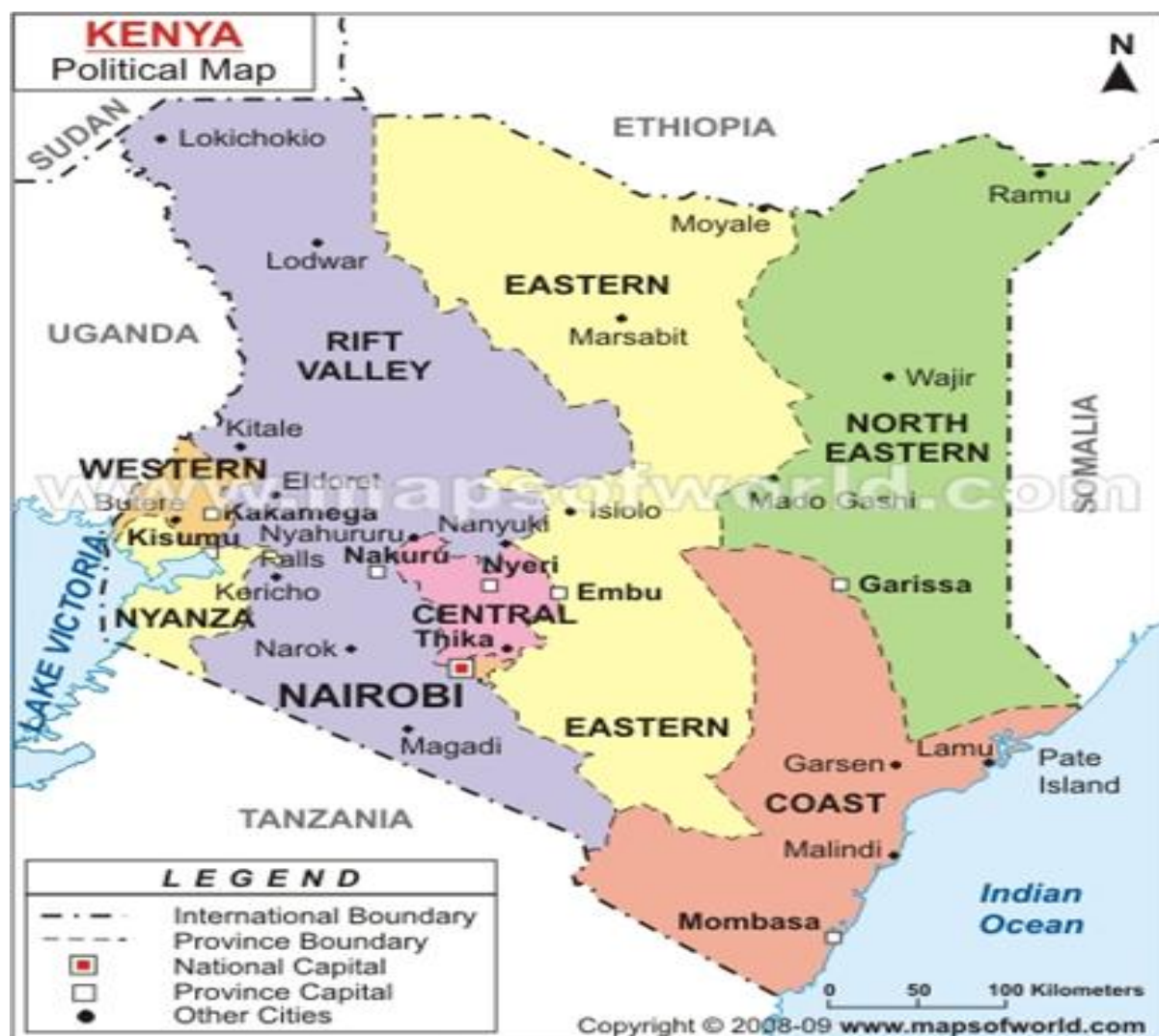
Notwithstanding, the Independence Constitution was not allowed to consolidate and flourish. KANU felt that 'the Independence Constitution curtailed majority power. As a result, it undermined the regional governments by withholding funds and enacting legislation to circumvent the powers of the regional governments' (Akech, 2010: 23). Branch (2011: 14) informs us that soon after Kenyatta assumed office, he led KANU in 'dismantling the devolved constitution agreed with KADU'. Within one year of Independence, the process of amending the constitution to recentralise power commenced, resulting in a highly centralised and personalised rule' (GoK, 2010: 12). As Kenya became a de facto one-party state with the opposition KADU MPs rapidly crossing the floor in the months following Independence, 'the impetus for *majimboism* quickly gave way to Jomo Kenyatta's call for unity through *harambee* ('all working together'). Everyone was by then a nationalist, and *majimboism*'s troubled history was best forgotten' (Anderson, 2005: 547).

The end of a decentralised system followed and the unfolding of a centralised system of governance championed by Kenyatta, and manipulated by Moi, both seeking ultimate control over the Kenyan population.

3.4 The re-emergence of a centralised state

As illustrated above, decentralisation in Kenya was shortlived. Shortly after Independence, the government under the leadership of the first president of the republic of Kenya, Mzee Jomo Kenyatta, followed by his successor Daniel Arap Moi consolidated powers around the presidency. The role of the presidency in Kenya is critical towards understanding governance dynamics that existed in Kenya. 'The government determined to preserve national unity, sought to establish a unitary state with power concentrated at the center. It also considered a single party system crucial for political stability' (Omolo, 2010: 20).

Figure 1: Kenya's eight provinces created at Independence controlled by the central government



Eight provinces were established (See Figure 1 above). Each province had regional offices, staffed with government officials appointed and accountable to the central government. According to Omolo, (2010: 20), the government feared losing control over the Kenyan economy and its population. 'The effect was the creation of institutions where the head of state held immense power over all public policies'. Kimenyi (2002) (cited in Omolo, 2010: 20) notes that this immense central control conglomerated by the presidency was further 'compounded by the fact that there were no constitutional limitations to constrain the central authority in its exercise of power'.

Both Moi and Kenyatta campaigned for amendments to the Constitution that would give even more power to the position of the president. 'Between 1963 and 1990, the Independence Constitution was amended by more than 30 constitutional amendments. Historical analysis points out that these were primarily geared towards securing the monopolisation of power by the ruling party and the centralisation of power around the Executive personified by the President' (Anderson, 2005: 551). Smoke (2007: 139) points out how Moi re-positioned himself to capture more control over state affairs this was reinforced by a 1982 coup attempt against president Moi, which resulted in restrictions on political competition, the effective creation of a one-party state, and efforts to recentralise that undermined local government accountability to its constituents. Central neglect and poor local performance intensified after that. The center came to view local governments as problematic entities to be controlled rather than developmental entities to be supported.

These acts only served to suppress any opposition. During this period, 'political competition was muzzled and civil society withered as it was increasingly intimidated, co-opted or banned by the state. Over time, the state occupied the entire public sphere crowding out both political actors and the civil society' (Anderson, 2005: 551).

Centralisation, even though it was posited as enhancing nationalism and reducing regional functionalism, did not reflect the projected impact. 'The policy on centralised planning reinforced the marginalisation of the areas that had suffered neglect during the colonial period. There was no appreciation of the need to correct the imbalances created by the discriminatory practices of the colonial government' (Anderson, 2005: 14). In 2002, Nasong'o (cited in Omolo,

2010: 20) had argued that in Kenya, excessive centralisation of power meant that the leader of the ethnic group that captured the state had control over enormous amount of resources.

At Independence, Kenya was performing well economically and ‘from 1964 to 1973, economic growth performance was very impressive, achieving rates in excess of 6 percent per annum. During this period, industry expanded annually by about 10 percent with the Import Substitution Strategy yielding good results’ (Anderson, 2005: 14). The problem was not the profits and economic growth that Kenya was recording, rather, ‘the benefits of this growth and improved performance in the economy were not equitably shared ... The instruments for ensuring such distribution, the regional governments and other measures, were removed, curtailed or ignored’ (Anderson, 2005: 14). These economic benefits however, landed into the hands of the few elites, a situation that led to the marginalisation of more communities and the gap between the rich and the poor loomed large. As Anderson (2005: 14) further noted, [t]his elite, sought to exercise unlimited control over state resources through centralising and monopolising power. This allowed them to dispense patronage to both individuals and ethnic communities and it inevitably led to massive abuses of power’.

The discourse on power distribution in Kenya became Kenya’s highly debated policy issue; ‘centralisation of power in the presidency, showing how this centralisation encouraged state intervention in the economy that benefited a few political actors while gradually eliminating political and economic competition’ (Nasong’o and Murunga, 2007: 263). This character from the government acted as a strong stumbling block for building good governance for the benefit of all. Ostensibly, as has been noted by Ochieng’ (1989, 1995) (in Nasong’o and Murunga, 2007), the ‘political problems that affected Kenya’s economic performance in the 1980s must be located in (the) history of personalised rule initiated by Kenyatta and inherited by the Moi regime’ (Nasong’o and Murunga, 2007: 263). In 2005, Ogot and Ochieng’ (cited in Bannon, 2007: 1831) attested to the fact that although Kenya had been at peace since achieving Independence, it has been a repressive one-party state throughout most of its history.

It is significant to note that the powers bestowed on the president were enormous. ‘The president was above the law; he appointed and fired the cabinet, top civil servants, and the provincial administration at will, reigned over the bureaucracy, and determined judicial tenure and the

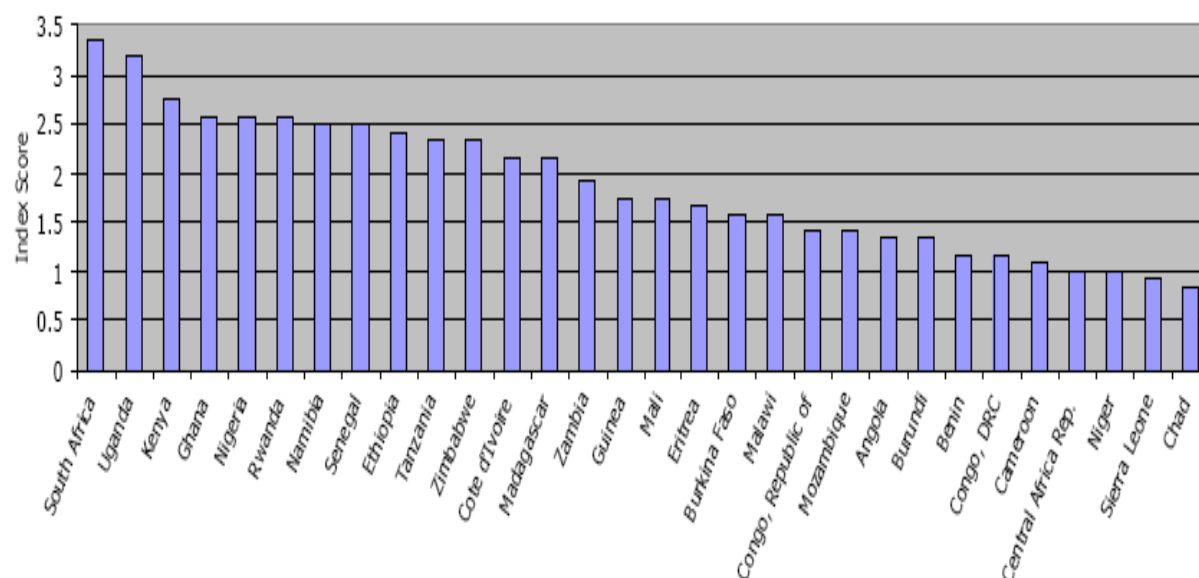
parliamentary calendar’ (Murunga, 2007: 269). It is appalling to realise how they managed to maintain control all over the country. Kenyatta put in place a domineering network of loyal provincial and district officials who represented him at various local levels. He appointed loyalists to top positions in lucrative public enterprises including the major parastatals. The idea of a one-party system came into vogue with power centralised and intensely personalised (Nasong'o and Murunga, 2007: 269). Members of the provincial administration and the police understood that it was sometimes in the interest of their personal survival to follow what they understood to be the direction or inclinations of the president in their areas rather than to uphold the law. That such *modus operandi* negated public accountability in the exercise of power and bred human rights violations, corruption and impunity is no surprise (Bagaka, 2011: 3).

The presidency took over control over almost all the sectors of the Kenyan economy. Moreover, it had control over state finance which was exercised with little, if any, accountability. As Amutabi and Gimonde (cited in Nasong'o and Murunga, 2007: 269) reveal, ‘Kenyatta and Moi controlled the armed forces, the police, the civil service, (and) the provincial administration. Their hold on the key levers of governance put them in control over patronage resources and gave unparalleled holdover the key sectors on the economy and politics’.

However, along the way, both Kenyatta and Moi had made some attempts at decentralising central power and authority. Nevertheless, it is argued here that these were rather insignificant. According to Bagaka (2008:3), since Independence, the Kenyan government formulated an array of development programmes that were delegated to local officials to implement. Among them the District Development Grant Programme (1966); the Special Rural Development Programme (1969/1970); District Development Planning (1971); The District Focus for Rural Development (1983/1984); and the Rural Trade and Development Center (1988/1989). However, these programmes failed to deliver. Ogutu, (1989); Khadiagala and Mitullah (2004) (cited in Bagaka, 2008:2) explain that all ‘these programmes suffered the same fate – a lack of funding and excessive bureaucratic capture by the central government’. Therefore, even though the government created a picture for the international audience that it was moving towards decentralisation, there was little if any political will to support such initiatives.

Towards the end of the 1990s, due to international and local pressure from political parties, civil society organisations, religious groups, and social movements, Moi's acceded to open up governance to local structures, though with a high level of central control. Decentralised initiatives started taking shape in the form of deconcentration where some functions were to be performed with some visible local discretion. Nevertheless, such projects were regulated through centralised frameworks and remained accountable to the central government. According to a World Bank report by Ndegwa, (2002: 12), a baseline survey of decentralisation in Africa was published in 2002, and ranked Kenya's local government third (out of 30 in the sample). These initiatives were aimed at bringing services closer to the people.

Figure 2: *Extent of decentralisation in Africa*



However, these initiatives did little more than highlight the fallacy of decentralisation in Kenya. For example, as demonstrated by Bagaka (2011: 2), these decentralisation initiatives remained largely symbolic and they continued to receive very limited funding and more control of public resources remained in the powers of the central government. Ndii (2010: 4) explains that by 1983, 'the government embarked on an ambitious deconcentration initiative, the District Focus for Rural Development. The purpose was to change from top-down sector based, to integrated, participatory, bottom-up development planning'. The government's vision in this programme was to establish smaller structures other than the main provincial blocks. It was a way of

bringing the government closer to the people and to encourage district communities to participate in decision-making. Development planning was delegated to the ‘District Development Committee (DDC), a consultative forum that brought together civil servants at the district level, elected representatives and community leaders’ (Ndii, 2010: 4). However, this initiative lacked political will, skills and revenue allocation and resulted in its failure. Chitere and Ireri, (2004) attribute this failure to various reasons:

- its lack of basis in an Act of Parliament;
- its reliance on an institutional framework that did not facilitate meaningful local decision making and mobilisation of resources;
- its lack of adequate capacity in participatory planning among civil servants;
- the financial allocations by ministries headquarters which, though inefficient, justified continued control of their field units;
- the dominance of the strategy by civil servants, especially staff of the provincial administration; and lack of people’s awareness of and participation in planning and implementation.

By and large, people were not satisfied with the manner in which the central government framed these decentralised initiatives. There was no significant impact that indicated any serious attempt by the central government in addressing the root causes of Kenya’s social and economic problems. They demanded for the rigorous constitutional reform that would guarantee legitimacy and strengthening of local development and initiatives.

3.5 Conclusion

This chapter has shown that governance in Kenya has wavered back and forth between centralised and decentralised forms of government since colonial times. It seems that centralisation, however, has for the most part been the more dominant form of government. Kenya's first two presidents, Kenyatta and Moi increasingly controlled their governing institutions and processes by monopolising political power through impunity, political patronage, abuse of human rights, and marginalising other communities from accessing public resources. However, in the last decade or so, the relevance of international and local pressure upon Moi's presidency has resulted in the implementation of some decentralised development initiatives. While these have largely failed, they did result in people calling for more substantial change in how they are governed. This is the focus of the next chapter.

CHAPTER FOUR

TOWARDS DECENTRALISATION: TRANSITION AND THE COALITION GOVERNMENT IN KENYA

4.1 Introduction

The previous chapter showed how governance processes and government structures unfolded in Kenya from the colonial times through Kenyatta's regime to the end of Moi's presidency. It highlighted the tension that existed between, on the one hand, a dominant central government that maintained a firm grip on controlling public resources through patronage, and, on the other hand, those calling for reform (including civil society, political parties, and religious groups). The pressure mounted on the central government to have powers and functions shared among other arms of government and the public for the benefit of all citizens. In other words, calls for decentralisation were beginning to mount.

This chapter examines the transition from a once between a highly centralised government towards a government that has adopted a negotiated decentralised system of governance. It does this by identifying the key role players and how they influenced the outcome of the protracted constitutional review process. It briefly describes the context that preceded the new political dispensation in 2002. This context is significant because it heralded the introduction of the significant changes into government structures, systems and processes, bringing an end to more than four decades of a one-party, centralised state. This chapter focuses on the governance reform proposals in Kenya. It offers an analysis of the constitutional review process which enabled the National Alliance Rainbow Coalition (NARC) to come into power in 2002. The chapter will show that the constitutional review process centered mainly on debates about how to reform Kenya's centralist governance regime. Dominant debates were such as the distribution of powers and functions from the central government to other organs of government and public sphere. The constitutional review process that took place in Kenya eventually culminated in the enactment of a new constitution in 2010 and the formalization of a decentralised system of governance.

4.2 Pressure for reforms

Major pressure for reforming governance in Kenya emerged since the 1990s. As Kiai (2008: 163) points out, Kenya has been on a forward democratic trajectory since 1992, when multiparty politics was restored. Since then, democratic space has been painstakingly and painfully expanding each year, and exploded wide open with the defeat of the President Daniel Arap Moi's party in the 2002 elections. Kenya became a multiparty democratic country with the first multiparty election held in 1992. However, the aftermath of these elections did not seem to change much in governance as Moi continued to rule despite the majority of Kenyans having voted against him. He was voted by a simple majority of 36 percent in 1992, and 40 percent in the 1997 (Oloo, 2011: 4). Despite the fact that Moi was successively voted into power through a simple majority vote, the opposition parties remained fragmented and the remainder of the votes were split among many candidates. The divided opposition gave a chance to Moi to advance control over state organs and the government became more and more defensive.

International pressure, especially that from the International Monetary Fund (IMF), the World Bank and the United States of America forced Moi to accede to reforming institutions of governance in Kenya. In 1997, for example, in accordance to the report by Africa Policy Information Center (APIC 1998); the IMF suspended \$220 million in loans and credits to Kenya due to high-level governmental corruption and lack of accountability for financial management. The World Bank took similar action, suspending a \$71.6 million structural adjustment credit. These were the measures taken against the Government of Kenya in order for it to open spaces for broader democratic reforms. On the other hand, the US policy towards the Moi government continued to be firm, with minimum aid going to the country, most of which was channeled through NGOs. According to the APIC (1998), 'the U.S. government had started its support for constitutional reform process. Ambassador Bushnell had spoken repeatedly in support of a broad-based process of constitutional reform'. The government of the U.S., the IMF, and the World Bank were not the kind of institutions that Kenyan government would have wished to cut ties with. These institutions also pushed for a broad-based scenario where all interested parties were to participate meaningfully in the constitutional reform process.

APIC (1998) pointed out some of the effective strategies that came from the international community that accelerated reforms in Kenya:

- i) Active and consistent support to an open and participatory reform process. Donor consensus about the reform process was instrumental in ensuring that the process is truly democratic. The United States also played a key role in promoting a unified donor position.
- ii) There were high-level visits to Kenya to express support for the constitutional reform process. Such visits (those of U.S. special envoy Jesse Jackson, for example) were effective in influencing president Moi. They were deployed to emphasise international concern for an open and participatory reform process.
- iii) The international financial institutions maintained their conditionality in providing loans and credits until significant changes were implemented to address corruption and ensure accountability.
- iv) Calls were made for constitutional reforms that would bring Kenya into accordance with international human rights standards.

One could argue that were it not for these international institutions tightening their lending capacity to Kenya, there was no much, if any, political will from the ruling party, KANU in opening government to greater, transparent and accountable participation by the Kenyan people.

The late 1990s began the first initiatives to review the constitution. The pressure for open democratic governance emerged from Kenyan populations. According to Bagaka (2011: 3), one of the main the main rationale behind the move towards decentralised government in Kenya is that it is seen as being able to address distributional grievances, which in turn have contributed to the political strife. Many communities supported the decentralisation of governance in Kenya due to the fact they felt marginalised, neglected, and discriminated against on the basis of their ethnicity or social status. Accordingly, they asked for the decentralisation of governance so that they could participate meaningfully in the governmental decision-making at the local level (Akech, 2010: 23).

As noted by Diepeveen (2010: 233-234), ‘public unrest provided a backdrop for organised groups to advocate for change. After the December 1997 elections, the government allowed the Inter-Parties Parliamentary Committee (IPPC) to bring together interest groups to renegotiate the amended Constitution of Kenya Review Act. Although Moi presented this opportunity as a token to calm the overwhelming pressure from political parties and civil society organisations, the Inter-Parties Parliamentary Group (IPPG) and the members of parliament, according to Nasong’o and Murunga (2007: 44), resolved to appeal and/or revise some of the draconian colonial laws that gave the executive excess powers that protected the government from being accountable to the public.

4.3 The Constitutional review process

The constitutional reform process in Kenya was a forum that negotiated new government structures and processes of governance that were deemed to address problems that were associated with the monopoly central government, abuse of power and human rights, political patronage, as well as marginalisation of certain political groups and communities. This process went through four distinguished phases: The first phase focusses on the initial years of the inception of the constitutional reform process in the late years of Moi regime from 1997 to 2002. The second phase looks at the process under the steering of the new NARC government from 2003 to its first constitutional referendum in 2005. The third phase focuses on the post-Bomas Draft Constitutional negotiations until the inauguration of the new constitution in 2010.

4.3.1 The first phase (1997-2002)

Soon after the second multiparty elections in 1997, the parliament passed the Constitution of Kenya Review Act, which sought to create the Constitution of Kenya Review Commission (CKRC) to review the Constitution (Gifford, 2009: 45). Onalo (2004) (cited in Bannon, 2007: 1830), asserts that Kenya's constitutional review process grew from a broader democratic reform movement and was designed to be “people-driven”, with broad consultation across the country and a representative constitution-drafting conference. Kenya was even cited as a model for the participatory approach to constitution-drafting (Bannon, 2007:1830). Largely, as established by Diepeveen (2010: 232), the formal constitutional reform process, between 2001 and 2005, was

founded on 'open public consultations in every constituency in Kenya. The scale and breath of discussions through these consultations provided a unique moment for Kenyans to construct a national, popular vision of Kenyan politics'. Furthermore, as noted by Diepeveen (2010: 232) and Lonsdale (2000: 112) (cited in Diepeveen, 2010: 232), Kenya created a forum where relationships between citizens and those in high politics were negotiated from the basis of legitimate power structures.

However, the process was in danger of being controlled by the Parliament, going against the envisaged participatory idea of drafting the constitution. If parliamentarians were allowed to exclusively review the constitution, other stakeholders outside parliament were likely to be left out of the proposed reform process. Against this background, 'the NCEC and other civil society organisations contested both the procedural and constitutive provisions of the Constitutional Review Act, demanding an all inclusive process that would culminate in a national conference' (Nasong'o and Murunga 2007: 45). Those that advocated for an all inclusive constitutional review process did not have the believe that the government had the political will to reform government institutions. According to APIC (1998), 'the reform process must not become an empty parliamentary exercise. All sectors of Kenyan society must have an opportunity to present their views and influence the process. To that end, the government was expected to play a facilitative role than a controlling one.

Nasong'o and Murunga (2007: 46) explain that as a result, a parallel initiative, the Peoples Commission of Kenya (PCK) was formed on the 15th December 1999. 400 people (representing civil society organisations) and some opposition political parties convened, together with the Catholic, Hindu, Muslim and Protestant leaders. The PCK undertook to the mosques, temples and churches as forums for collecting and collating views from citizens for the constitutional review process. This attempt was labelled as the Ufungamano Initiative. Sihanya (2011: 7) describes this initiative as 'a people driven constitution review process that was run parallel to the constitution of Kenya Review Commission (CKRC) appointed by President Moi'. Professor Yash Pal Ghai was appointed to chair the CKRC and brokered 'a merger between the Ufungamano initiative and the CKRC, paving the way for the review to commence in 2000' (Nasong'o and Murunga 2007: 47). The civil society organisations in Kenya must therefore be credited for taking broad measures against the strong arm of the central government in opening

spaces for good governance. Kiai (2008: 166) commends Kenya's broad and vibrant civil society (from NGOs to religious groups) for having 'played a significant role in the expansion and protection of this space – legitimising the culture of protest born in the 1990s; mobilising the public around issues such as constitutional reform and accountability; providing safe havens and alternative viewpoints; and giving voice to the voiceless'.

In 2002, the work of the CKRC stalled to pave way for the general elections. The constitutional review process by the CKRC commenced in 2003, under the steering of a new government. The promise of a new constitution by the incoming government became a major factor, and a condition, under which the people were ready to entrust their mandate.

4.3.2 The second phase (2003-2005)

In 2002, the opposition political parties drew lessons from the electoral experience of 1992 and 1997. They negotiated a coalition government in order to be able to remove the incumbent KANU from power and finally to reform the governance system. The merger of opposition parties before the 2002 elections led to the formation of a coalition government, namely the National Alliance Rainbow Coalition (NARC). The new movement, NARC won by a significant margin. The party's presidential candidate, Mwai Kibaki, won 62 per cent of the total votes cast, while Kenyatta of KANU got 31 per cent. The remaining votes, (6 per cent) went to the third candidate, Simeon Nyachae. According to Ndegwa (2003:148), this event emphatically signaled the collapse of the traditional ruling party's hegemony. It was this robust conglomeration of 15 opposition parties to a united coalition movement that accelerated the road to governance reform in Kenya. The NARC victory was a fundamental factor of the governance reforms in Kenya. The people had high expectations that a new political dispensation would guarantee a review of the legal framework that would consequently ensure accountability, transparency in public affairs, and balance the distribution of benefits and resources across the country. These values would best be served in a system of governance where power was no longer centralised in the presidency.

Ndegwa (2003: 153-154) points to four structural factors that mattered and necessitated the beginning of a phenomenal moment for change in Kenya:

Firstly, he points out that once Moi had committed himself firmly to stepping down no matter what (as a constitution amendment adopted in the mid-1990s required), the political landscape was fundamentally transformed.

Secondly, the slowly unfolding constitutional-reform process served the opposition well in smoothing the way towards a compromise settlement with which each significant party could live and benefit as well as participate in the reform process that was underway. The direction in which the reform appeared to be heading looks towards the introduction of cabinet government, with which an executive prime minister chosen by parliament to be the head of government, with a ceremonial presidency to serve as head of state. In keeping with this, the Memorandum of Understanding (MoU) entered among NARC member parties, envisioned a relatively copious number of influential posts to be distributed among leaders of the signatory parties. Had the constitution-reform process not been going on at the time of the general election's campaign, it is virtually inconceivable that any opposition leader would have agreed to give up his or her slim chance at the imperial presidency and settle for the certainty of exclusion in its shadow.

Thirdly, given the widespread belief among many Kenyans that KANU had cheated in 1992 and 1997, it was not enough to build a coalition. A way had to be found to make sure that votes which Kenyans cast for it would count. Ndegwa (2003: 154) points out that owing to the fact that Moi was leaving power necessitated by law, the Electoral Commission of Kenya (ECK), long suspected of being less than independent took a big step toward coming into its own by expanding its assertiveness in 2002. In addition, the expansion of the information technology was a major contributing factor to more transparency. As pointed out by Ndegwa (2003: 154), 'the opposition parties added insurance by deploying an army of agents and volunteers who used cell phones to relay precinct-level tallies to party headquarters as soon as the counting was complete'.

The NARC government ended the manner in which decisions were made under Kenyatta and Moi's rule, and instead it enabled interaction between the presidency and the coalition partners. Kibaki's party in the coalition, National Alliance Party of Kenya (NAK), could not dominate the rules that guided the management of public affairs. Other members could not simply be ignored as they held significant powers in numbers and influence within government. Since members of

the coalition government represented all regions of the country, there was a perception that the traditional domineering character of the central government would no longer exist.

The coalition arrangements opened up spaces for public debates. Interest groups had an opportunity to raise their concerns. Despite their varying interests and concerns of a reformed governance in Kenya, the 'two principles and their respective parties (and within their parties), the Grand Coalition scored a historic moment by negotiating a new constitution for Kenya, and then securing its adoption in a special referendum on August 8, 2010' (Barkan, 2011: 21). This means that the constitution process and outcome was comprehensively debated and incorporated diversified visions and interests from various parties and stakeholders. As Sihanya (2011: 8) points out, the coalition arrangements were politically significant to the extent that major government programmes demanded consultation and concurrence between coalition members. In effect, this was a break away from the previous one party control over decisions and policies of public interest. This meant that the executive could no longer manipulate decision-making powers as many of their policies were thoroughly scrutinised ranging from political parties and civil society organisations before those decisions would pass for implementation.

Kibaki (a leader from the Kikuyu community comprising 22% of Kenya's population) was voted into the presidency with a promise to deliver a new constitution within an ambitious 100 days after the elections (though the actual delivery of a new constitution was delivered 8 years later in 2010). Raila Odinga, a prominent leader of the Luo community (comprising about 13% of the total population) had agreed to form an alliance with Kibaki with a pact that once they formed the next government, there would be two premier posts, a ceremonial president and a more powerful prime minister (of which Raila would be the Prime Minister). Kramon and Posner (2011: 91) argued that 'Odinga would have greater trouble winning the plurality of the vote to capture the presidency, so he preferred a system with a prime minister appointed through parliamentary majority more subject to political bargaining and cross-group coalition building'. This parliamentary approach to governance was largely supported by smaller ethnic groupings which was deemed to offer a higher possibility to form the government and reduce the influence of other bigger tribes. Therefore, forming autonomous subnational governments would be more favourable for many smaller tribes and expand development across the country. In the process of constitutional negotiations, the two factions were equally divided on the subject of the nature of

the decentralised government. As Kramon and Posner (2011: 91) claims, Kibaki and his Kikuyu allies opposed decentralisation, in part because of fear of too much power dispersed away from the center would threaten Kikuyus living outside their home area of central province-particularly those living in the Rift Valley, where Kikuyus reside in substantial numbers but would be minorities in most decentralised units. By contrast, Odinga and others, particularly Kalenjin Leaders such as Ruto, had long been strong supporters of a system that decentralised much power away from the center.

In the wake of the new government in 2002, the Kenyan people expected an end to the culture of impunity and corruption that characterised the Moi years and the prosecution of the government critics; they expected fair public appointments that reflected the face of Kenya and renewed efforts to reclaim Kenya's international reputation for stability and hospitality to tourists and foreign investors (Chege, 2008: 138). Kenyans hoped that these issues should be addressed within an authoritative legal framework. They supported the move of the new government that came in on a promise to secure a reviewed constitution for Kenya. Towards decentralising governance in Kenya, two phenomenal steps are worth understanding the rationale behind the need for change. As pointed out by Kalechi (cited in Ndegwa, 2003: 156), one has to do with "transition," while the other focuses on the deeper and wider question of transformation. On the one hand, the transition had now largely occurred. The forces of civil society and constitutional reform seek not merely a change of administration but a change in the nature of the regime. On the other hand, they want to the transformation of the basic character of the state and its relations with society.

By 2003, CKRC had already set a framework where public hearings would take place at constituency level all over the country. The aim of this comprehensive process was to ensure public participation in the constitution-making process. The citizenry were brought on board to contribute their views on what they expected to see in the reviewed constitution. This was also meant to take the process from the capture by parliamentarians who were feared to manipulate the process for their own interest.

President Kibaki had failed to honour the MoU that was entered among member parties in the coalition. He rewarded his close allies with strategic positions in the government and other

members felt excluded. This led to disintegration of NARC. As Kenya quickly moved towards 2007 general elections, new alliances emerged to replace the dishonest NARC that was created just before the 2002 elections. NARC was all but dead by 2005 (Amutabi, 2009: 74). This painstaking disintegration of the NARC as a mass movement sent out a clear message that reform was something that run deeper than a mere gathering-together of opposition parties to form the government.

4.3.3 The Bomas Draft Constitution (2005)

Omolo (2010: 13) attests that in November 2005, Kenya held its first ever national plebiscite to ratify a new constitution for the country. In order to foresee this process, a National Constitutional Commission (NCC) was then convened to deliberate, amend and adopt the draft Bill. The deliberations of the NCC, held at different phases at the Bomas of Kenya, culminated in an initial draft known as the *Bomas* draft. Omolo (2010: 15) further explains that the failure to arrive at a consensus between a section of the government and other members of parliament (MPs) emerged on certain provisions regarding power sharing and distribution. This led to the amendment and the development of a final draft constitution by the government section opposed to the *Bomas* Draft. The draft popularly termed the *Wako* Draft due to the Attorney General, Hon. Amos Wako's instrumental role in its crafting, was thus presented at the referendum.

The NARC disintegration spilled over to determine the outcome of the first referendum to the Bomas Draft Constitution. As Amutabi (2009: 73-74) argues, the defeat of the Kibaki's government support for the Bomas Draft Constitution during the 2005 referendum by the Orange group was significant in determining the events of the 2007 post-election violence. Major issues, especially those dealing with the sharing of executive power and that of forming autonomous subnational governments took the center stage of discrepancy between the two camps.

Bannon (2007: 1836-1837) notes three major contentious issues that were highly debated during the drafting of the Bomas Draft Constitution: (1) the structure of the executive (whether there should be a Prime Minister in addition to the president, and if so, what powers the position should enjoy); (2) devolution (whether Kenya should have a federal system with significant law making powers at the local level); and (3) Kadhi courts (whether Kenya should codify separate

civil courts for Muslims). However, as Bannon (2007: 1837) pointed out, the issue of the executive power was by far the most publicised issue and the most divisive among delegates. There were two opposing factions regarding how power should be distributed in the new political dispensation: The Odinga led coalition called for a powerful Prime Minister, while President Kibaki's supporters strongly opposed the idea, arguing that executive power should be concentrated and that checks and balances through other branches could be used to balance the President's power. 'Odinga's followers and KANU opposed the new draft (in their campaign), arguing that it failed to reflect the will of the people regarding essential reforms and that it ignored the views expressed through the commission and Bomas for a Parliamentary system of government and a devolved participatory form of local government' (Bannon, 2007: 1840).

The Bomas Draft Constitution had elements of decentralisation. It proposed:

- four levels of government (national, provincial, district and community),
- the devolution of most functions (except defense and foreign affairs) to different levels

However, there were no clear provisions of how the new institutions were to be financed, a phenomenon that indicated a lack of political and fiscal feasibility.

In the referendum, majority of 'Kenyans rejected the proposed constitution thereby regenerating the constitution review process' (Omolo, 2010:15). Andreassen and Tostensen (2006), (cited in Bannon, 2007:1830) affirms that 'the constitution lost in seven of Kenya's eight provinces in an up-or-down vote, with 57% of voters choosing "No" overall'. The constitution was taken back to the drawing board. People expected a constitution that released the grip of power away from the centre to other organs of government and the general public where each would feel as part-and-parcel of the decision making processes of the issues that affected their communities.

Kimenyi and Shughart (2008: 2) pointed to other disputed 'issues that revolved around the distribution of power between the chief executive and the national legislature'. They indicated that the principal reason for defeat was that the proposed constitution, much like the one it was meant to replace, endowed the executive branch with excessive political authority (Kimenyi and Shughart, 2008:2). The majority of voters, as evidenced by the "NO" vote against the proposed constitution, instead wanted a system which substantial powers would be decentralised and more

powers given to the national legislature, with the prime minister serving as the head of government. In other words, the failure of the proposed constitution to constrain executive power was the proximate cause of its overwhelming rejection.

Regionalism and ethnicity played a significant role in the rejection of the Bomas Draft Constitution. The Kenyan regions are divided largely ethnic group. As noted by Kimenyi and Shughart (2008: 4), while 38% of the voters approved it nationwide, 92.28% voted “Yes” in the Central Province, but only 15.04% in the Nyanza Province. Differences in the level of support for the constitution were also evident across ethnic groups: 93.28% of the Kikuyus favoured it, for example, compared with only 1.43% of the Luos. These statistical representation are substantial in establishing how ethnic and regional affiliation in Kenya shaped the outcome of the referendum in 2005.

According to Kimenyi and Shughart (2008: 7), the regions and ethnic groups that benefited from a constitution that concentrated power in the presidency would therefore have tended to vote “Yes” in order to preserve their previous gains. On the other hand, those who had been left behind under the status quo would have tended either to abstain or to vote “No” because they expected to continue to be marginalised if the proposed constitution was ratified.

Bannon (2007:1833) attributes the referendum voting in 2005 as powered along ethnic lines and a referendum on Kibaki’s leadership than a vote on draft’s content. Therefore, the rejection of the Bomas Draft Constitution gave space for more negotiations that could harmonise these polarised groups in reaching a compromise that would be desirable to majority of Kenyan people.

4.3.4 The third phase (2007-2010)

After the 2007 general election, another coalition was brokered between Kibaki’s party, the Party of National Unity (PNU) and the Orange Democratic Movement (ODP). This was due to the disputed results between the Raila and Kibaki factions. This phase was facilitated by the National Accord and Reconciliation Act (NARA) mediated by the former United Nations Secretary General Kofi Anan. According to Okello (2010) (cited in Sihanya, 2010:9), NARA ‘created the office of the Prime Minister in the context of a power sharing agreement on the basis

of portfolio balance. It thus created a contextualised idea of a dual or semi-presidency'. This power sharing deal created a scenario that attempted to share executive powers and responsibilities among members in the Grand Coalition Government. Therefore, the traditionally all powerful presidency powers were dispersed. In this scenario, it was clear that Kenyan people and leaders were more concerned with who is holding on political power rather than on policy issues that would advance democracy and wellbeing for all. Kiai (2008: 163) argued that what the Kenyan governing system needs is to 'look beyond the forms and façades of democracy to the subsistence of it. Democracy must mean more than having legislators who simply endorse the wishes of the executive or who, when they do differ, do so merely to advance their personal interests'. Decisions must be debated among interested parties, groups and communities.

Despite this new power sharing dispensation, 'the political antagonism between ODM and PNU spilled into the rank and file of the public administration, where the President re-asserted unitary executive control of the administrative bureaucracy, and hence government implementation machinery' (Sihanya, 2011: 8). Adversely, the president continued to refer to the powers vested in the presidency and often ignored the influence that emanated from other members of the coalition.

The Constitution that was to be subjected to a second referendum in 2010 was supported by the President Mwai Kibaki and Prime Minister Raila Odinga who were once political rivals during the 2007 general election that ended in a post-election violence across the country. According to Kennedy and Bieniek (2010: 10), some observers, both local and in the U.S., suggest that Obama administration had too loud a voice in the constitutional reform process, inappropriately seeking to influence Kenya's internal politics by supporting individuals and weighing in favour of the constitution. The Constitution passed with 68 percent of the vote. The majority of Kenyans were convinced that the changes that were proposed in the Draft constitution were significant to pave way for the implementation of a reconfigured functions and powers of a new government. The new Constitution was expected to provide for an enormous shift of power from the central government to largely autonomous county governments. The national government would later be offloaded some functions and powers and play a marginal role in coordinating matters of national interest as well as coordinating the relationship among county governments.

On August 27th 2010, President Kibaki officially signed the new Constitution into law, marking the beginning of a new constitutional order for Kenya. This meant the reduction of executive powers, dispersed authority to the counties and formally guaranteeing a host of social and economic rights to previous marginalised groups and communities (Kramon and Posner, 2011: 89). The constitutional changes have a profound potential impact on the nature of governance in Kenya. These changes have addressed areas that alienated majority of Kenyans for decades. The changes focused on the transfer of power from a powerful central government to County governments and provided autonomy to the Judiciary, the Parliament and other independent commissions previously under the control of the presidency. According to Kramon and Posner (:89), prospects of the new Constitution have the potential to transform Kenyan politics.

4.4 Conclusion

This chapter has identified significant changes that occurred as a result of reforming the Kenyan government, governance and processes since 1997, when the first constitutional reform negotiations were initiated. Real commitments and efforts have been underlined with broad steps from civil society organisations, political parties, and religious groups. More importantly, this chapter has reviewed the process that led to the making of a new constitution that materialised in 2010. This chapter commences by analysing the extent to which pressure was mounted upon the Moi's government to accede to calls for constitutional reforms in Kenya. The chapter focused on three main phases: The first phase demonstrated how the process for constitutional reforms started and the interaction of the parties involved. The second phase showed how the negotiations under the NARC government unfolded, how power disputes emerged leading to the rejection of the proposed Draft Constitution in 2005. The third phase highlights the conditions that facilitated for the enormous support for the second Draft Constitution across the country.

The following chapter analyses the extent of how the Constitution of Kenya (2010) has addressed the problems raised by Kenyans, previously associated with the centralisation of government. It will establish how political, fiscal and administrative powers have been dispersed from the centre and to what extent they are deemed to protect the Kenyan people and especially the minority groups and communities.

CHAPTER FIVE

THE CONSTITUTION OF KENYA 2010 AND DECENTRALISATION OF GOVERNANCE IN KENYA

5.1 Introduction

Chapter Three and Four have presented the rationales, context, and processes that have influenced how the Constitution of Kenya 2010 was constructed. The common thread highlights the failure of (both the colonial and post-independence) central governments due to monopolisation of power, political patronage, abuse of human rights, failure to provide a decent livelihood, and marginalisation of certain groups and communities regardless of the diverse nature and fabric of the Kenyan society.

The Constitution of Kenya 2010 is the end result of a broad consultative process including some of Kenya's major stakeholders. It is a culmination of widespread public participation across and within the general public, political parties, civil society organisations and religious groups. This chapter will examine the Constitution of Kenya and determine governance structures, processes and institutions. A closer review of the Constitution of Kenya will be undertaken in order to determine to what extent previously centralised functions are now disbursed to other levels of governments. This chapter will also shed light on the relationship between national government and the county governments as envisaged in the constitution. The analysis on the nature of decentralisation in Kenya as reflected in the Constitution will be done by referring to the three dimensions of decentralisation as conceptualised in Chapter two of this thesis, namely political, administrative and fiscal decentralisation.

5.2 The Constitution of Kenya 2010

On the 4th of August 2010, Kenya acquired a new constitution. According to Kirui and Murkomen (2011: 13) the single most important achievement of the people of Kenya in the last decade was successfully negotiating a new constitution. They argue that it enhanced popular sovereignty and redemption from the shackles of executive powers. The Constitution of Kenya demarcates the country into 47 counties, to which political, administrative and fiscal powers and

functions will be dispersed. According to Ndii (2010: 2) this is the most far reaching institutional and public finance reform undertaken in Kenya to date.

The objectives set out in Article 174 are identical to the premises of decentralisation:

- to promote of democratic and accountable exercise of power;
- to foster of national unity by recognising diversity;
- to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- to recognise of the right of communities to manage their own affairs and to further their development;
- to protect and promote of the interests and rights of minorities and marginalised communities;
- to promote of social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- to ensure of equitable sharing of national and local resources throughout Kenya;
- to facilitate decentralisation of State organs, their functions and services, from the capital of Kenya (Nairobi); and
- to enhance the checks and balances and the separation of powers

Article 6 (2) establishes provisions for decentralisation of substantial political, administrative and financial powers from the central government to county governments. According to the GoK (2011: 250), this has been done with a view to improve access, efficiency and promote participation and empower citizens to demand accountability and effective service delivery. It also provides appropriate and adequate operating systems, procedures, and provides effective mechanisms for citizen participation.

Article 6 (2) indicates that the government in Kenya is founded on two levels of government: national and county governments. The two levels of government should conduct their mutual

relations on the basis of consultation and cooperation. These two levels are not completely autonomous but are inter-dependent. In other words, it is a system that is rooted both with a degree of autonomy and interdependence. Governments at the county level are largely expected to come up with policies that are able to mobilise people and resources for the development and sustainability of those particular counties. The national government must play a role in harmonising activities and policies across the counties. It must ensure that counties are treated equally as directed by the Constitution.

5.3 Political decentralisation in Kenya

Political decentralisation in Kenya provides for the separation of powers, both horizontal and vertical. According to Othieno (2011: 2), ‘In these instances, decentralisation is between or among agencies of comparable status, such as the executive, legislature and judiciary, or vertically to agencies that relates hierarchically, such as local authorities’. It means that local communities have a direct and open opportunity to participate in decision making that affect their localities. Thus, the county government framework opens opportunities for public participation. According to Oloo (2011: 5), the Constitution 2010 advocates inclusive representation. In the preceding centralised governance system in Kenya, the of marginalisation of certain groups and communities was rampant. To address this gap, Article 100 of the Constitution 2010 provides a provision that aims at the promotion of representation of marginalised groups. It instructs Parliament to enact legislation that promote the representation in Parliament of: women; persons with disabilities; youth; ethnic and other minorities; and marginalised communities. The proposed wider representation in Parliament is enhanced to ensure equalisation in political participation representing peoples from diverse Kenyan society.

This was one of the major shortcomings that was overlooked by the ammended Independence Constitution. Under the previous regulatory framework, there was lack of equity of voice in the legislature and local authorities. It meant that minorities in Kenya have either had very weak representation in the representative bodies or none at all. Such minority groups include especially women, and the disabled. The citizens, now more than ever before, have a chance through a vote to elect their own representatives that would represent their interests at regional and national level. In order to address these inequalities, the Constitution 2010 bestows the electoral system

with a number of guiding principles. Firstly, the freedom of citizens to exercise their political rights (Article 97); secondly, the provision that not more than two-thirds of the members of elective public bodies shall be of the same gender (Article 98); thirdly, fair representations of persons with disabilities (Article 97); and fourthly, universal suffrage based on aspirations towards fair representation and equality of vote.

The constitution provides for the elections of representatives to four institutional bodies: (i) the national assembly, (ii) the Senate, (iii) the County Assemblies and (iv) the Presidency (Article 138). These offices have been established to act as checks and balances and protect the public from being alienated from participating on issues that pertain to their social, political and economic lives.

The first institutional body established by the Constitution 2010 is the national Assembly. Members elected from constituencies constitute the National Assembly. In accordance with Article 97, the National Assembly shall consist of 290 members, each elected by the registered voters of single member constituencies. More particularly, it will contain 47 women, each elected by the registered voters of the counties, each county constituting a single member constituency. Special groups interests shall also be represented by twelve members nominated by parliamentary political parties of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers. The Constitution 2010 has therefore embraced a wide representation including groups that have traditionally been alienated and marginalised from participating and sharing in matters of their own development and sustainability. Especially, the inclusion of 47 women representatives elected at County level in parliament is a significant step towards expanding the role of women in participating in public sphere.

The second institutional body established by the Constitution 2010 is the Senate. In accordance with Article 98 of the Constitution, the Senate will comprise 47 members each elected by the registered voters of the counties, each county constituting a single member constituency. In addition, 16 women members shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90. Clause (90a) states that each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for

within the time prescribed by the national legislation. The Senate will also consist of two members, a man and a woman, representing the youth. Another pair, a man and a woman will represent persons with disabilities in the Senate. Both the youth representatives, and representatives for persons with disabilities shall be elected in accordance with Article 90 referred above. All in all, the Senate shall be comprised of 67 members including the 47 governors elected from the each County; 16 women members nominated from party lists in proportion to the number of seats; and two members representing the youth and persons with disabilities respectively. In this case, the Senate becomes an organ of the state where matters representing all Kenyans comprising major groups and communities therein are discerned, debated, and decisions can be made. The Senate is to ‘play a vital role in formulating policies and legislation on various aspects including the functions and/or mandate of the county institutions of governance like the county assemblies, of county executives; accountability of public officials; monitoring the funds allocated to the county government’ (Kirui and Murkomen, 2011: 15). The Senate will therefore oversee the activities of the county governments, that is, ensuring functions and powers vested in the county governments are well delivered to the target populations in the counties. The Senate is also charged with the responsibility to administer the ‘delivery of services like agriculture, health, transport, county planning and development’ (Kirui and Murkomen, 2011: 15).

The third institutional body established by the Constitution 2010 is the County Assembly. There shall be a County Assembly to deliberate on issues of social and economic development. Article 177 of the Constitution 2010 indicates that those who shall form the County Assembly must be voted in at the local ward level, with each local ward producing a single member to the County Assembly. The composition of the County Assembly embraces a gender dimension. In this regard, there shall be a ‘number of special seat members necessary to ensure that no more than two-thirds of the membership assembly are of the same gender’ (Article, 177). In addition, Article 177 provides for the inclusion of members from the marginalised groups, including persons with disabilities and the youths, to be prescribed by an Act of parliament. Article 196 asserts that a County Assembly shall conduct its business in an open manner, and hold its sittings and those of its committees, in public; facilitate public participation and involvement in the legislative and other business of the assembly and its committees. In order to allow the public to have a chance to follow proceedings of debates by the County Assembly, Article 196 allows the

public and media to attend any sitting unless in exceptional circumstances established by the Speaker after providing justifiable reasons for doing so. These forums are regarded as essential in allowing citizens to have a chance to listen if their representatives are committed to advancing their constituencies' interests. Consequently, this phenomenon gives the public a chance to demand accountability from their leaders. In this way, it promotes accountability and transparency.

The County Governor presides over the County Assembly. He/She is to be elected in office by registered voters in that particular county (Article 180). In other words, the people from respective counties have the power to elect people to administer their affairs within the county. Article 180 (4) directs that if two or more candidates are nominated, an election shall be held in the county and the candidate who receives the greatest number of votes shall be declared elected. Each candidate for election as county governor shall nominate a person who is qualified for nomination for election as County Governor as a candidate for Deputy Governor.

The fourth institutional body in the Constitution 2010 is the presidency. According to Article 130 (1), the National Executive shall comprise of the President, the Deputy President and the rest of the Cabinet. Accordingly, the composition of the National Executive shall reflect the regional and ethnic diversity of the peoples of Kenya. This will avoid the presidential discretionary elements that were in existence in the previous regimes where the President could select the Cabinet from among his circle of political affiliates. Chapter 9 of the Constitution 2010 defines the principles and the structure of the National Executive. The members elected to the Executive are therefore mandated by the people of Kenya and may not exercise their powers and functions for their personal, or any exclusive right. Article 129 (2) outlines that the Executive authority shall be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well being and benefit.

The new political configuration in Kenya consists of five offices that are elected by registered voters in accordance with the Constitution. These are:

- (i) The Office of the President;
- (ii) The Office of the County Governor;

- (iii) The Office of the Member of Parliament;
- (iv) The Office of Woman representative to the National Assembly; as well as
- (v) The County Ward representative.

They are aimed to maximise representation of the Kenyan citizens in public matters.

Other State organs like special commissions and independent offices have been established to balance the exercise of power for protection and benefit of all Kenyans. For example, Article 248 of the Constitution 2010 establishes nine commissions and independent offices, including the Kenya National Human Rights and Equality Commission; the Independent Electoral and Boundaries Commission; the Commission for Revenue Allocation; The Parliamentary Service Commission; the Judicial Service Commission; and the Public Service Commission. These commissions are independent and free from the interference of the presidency, and protected by law to ensure that checks and balances are put in place against the abuse of power and human rights by political elites. They are meant to guarantee and protect citizens from unfair treatment. Article 249 defines the objects and authority of these independent commissions as to protect sovereignty of the people; to secure the observance by all State organs of democratic values and principles; and to promote constitutionalism. The commissioners who head the respective commissions and the holders of independent offices are subject only to the constitution and the law; and more importantly, they are independent and not subject to direction or control by any person or authority. In this regard, the constitution has opened space where Kenyans are protected from the manipulation by other state organs, such as the Executive. Under the previous Kenyatta and Moi centralised regimes, members of commissions were appointed by the President for indefinite periods of time. As such, they became part of the ruling class and became susceptible to being used and controlled by those in power for their own political gain. Those in such commissions could not resist these pressures as long as they wanted to retain their jobs. The Judiciary for example, as noted by Akech (2011: 342) was equally culpable due to allegations of abuse of power and corruption, significant segment of the citizenry perceived the judiciary as having lost its legitimacy as a dispute resolution forum. In fact, Akech (2011: 342) notes that the breakdown of law and order in the aftermath of the results of the 2007 presidential election is partly attributable to the public's perception of the Judiciary as partisan. Article 250

defines the limits to which members of commissions and holders of the Independent Commissions may remain in office. A member of a commission, or holder of an independent office (unless *ex officio*) shall be appointed for a single term of six years and is not eligible for re-appointment; and (unless *ex officio* or part time), shall not hold any other office or employment for profit, whether public or private. Similarly, Sihanya (2011: 12) outlines that these commissions differ from commissions set up by the Independence Constitution because they have an express provision outlining their independence from other arms of government and they are administratively and financially delinked from the Executive.

5.4 Administrative decentralisation in Kenya

According to Othieno (2011:2), ‘administrative decentralisation transfers responsibility of functions from a central agency to one or more of its lower levels internally, or to peripheral agencies, such as a state corporation – which may itself also transfer responsibilities to subordinate agencies’. In Kenya, administrative decentralisation is provided for in the Constitution 2010 by the transfer of powers and functions of government from the central government to the counties.

Accountability of public goods and services within the counties are to be closely monitored by the office of the County Governor. In order to manage the affairs of the County government, Article 179 (6) states that members of the county executive are to be accountable to the County Governor for the performance of their functions and exercise of their powers. In addition, Article 196 demonstrates that a County Assembly shall (a) conduct its business in an open manner, and hold its sittings and those of its committees, in public; (b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees. The Constitution 2010 provides the ground rules for the distribution of administrative functions across the different levels of government. In order to facilitate this arrangement, the Constitution has given the mandate to the elected parliament to enact legislation providing for all matters necessary or convenient to transfer of functions and powers by one level of government to another, including the transfer of legislative powers from the national government to county governments (Article 96).

The County Assembly is charged with matters of administration. Article 183 of the Constitution establishes County Committees. A County Committee shall:

- implement county legislation;
- implement, within the county, national legislation to the extent that the legislation so requires;
- manage and coordinate the functions of county administration and its departments; and
- perform any other functions conferred on it by the constitution or the national legislation

Article 186 outlines the principles that guide assignment of administrative functions and recognises three categories of functions: Firstly, are the *Exclusive Functions*. Article 186 (1) of the Constitution 2010 differentiate between exclusive powers of the county and national government. It says that ‘[a] function or power not assigned by this constitution or national legislation to a county is a function or power of the national government’. Those that are due to the County governments are defined within the constitutional framework. These particular functions will be performed by only one level of government and not the other. For example, there shall be functions that are categorically reserved for the county government which may not be performed by the National Government and vice versa.

Secondly, are the *Concurrent Functions*. These are functions that will be performed by two or more levels of government. As it has already been established, the new system of government in Kenya establishes that there should be cooperation and collaborations in executing functions between the two levels of governments, county and national as well as among county governments. In other words, as established in Article 186 (2), ‘a function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government’.

Thirdly, are the *Residual Functions*. These functions reside with the original level of government which existed before the creation of other levels of government. That means, as stated in Article 186 (3), a function or power not assigned by the Constitution or national legislation to the county is a function or power of the national government. This will minimise doubts or conflicts that

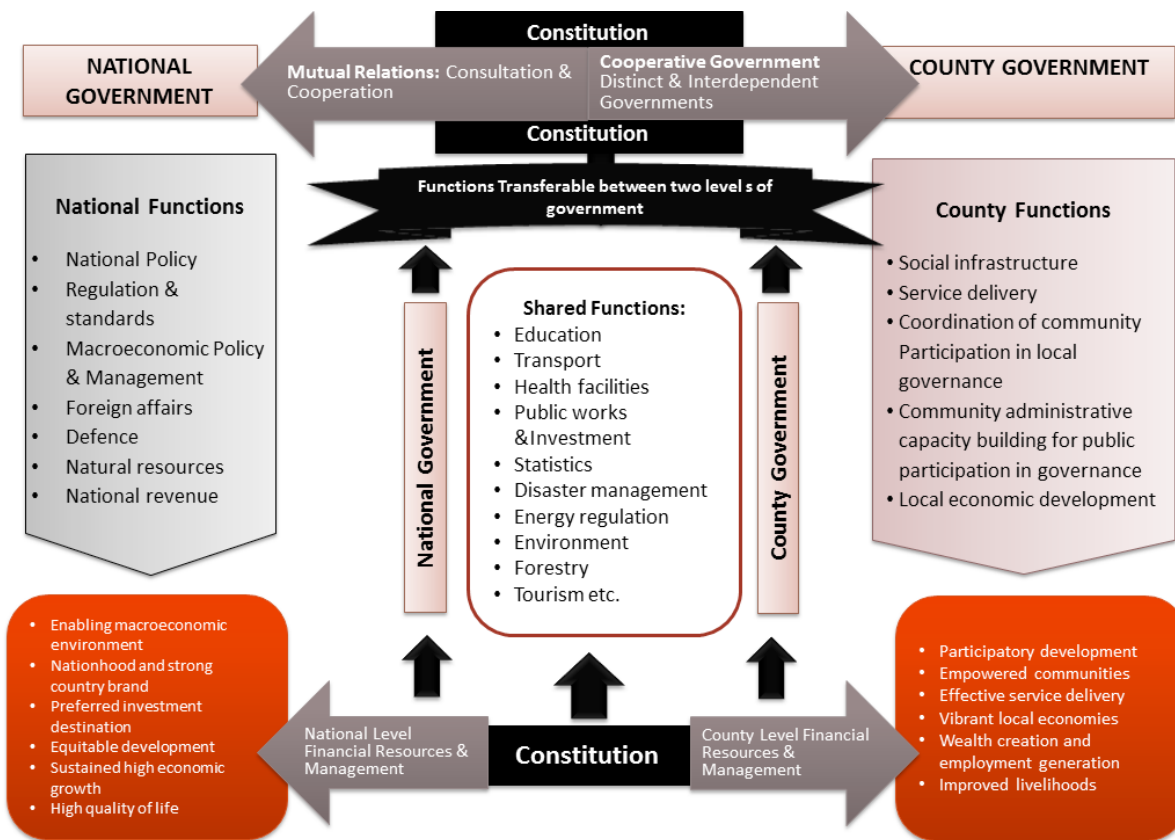
may arise due to the determination of powers or functions. In order for a functioned to be designated for the national government, it is to be determined by the national legislation in accordance with the principles laid out in the constitution.

The Constitution 2010 points out that ‘in a number of respects, the national government has been assigned policy functions only while county governments have been given the implementation function. Counties have the function of actual production of delivery of goods and services to the Kenyan people’. The county governments are therefore to be in direct contact with local people and create participation opportunities for regional development. In addition, the county government is solely responsible for the provision and maintenance of social infrastructure. This is to take the form of service delivery at all levels in the county. For example, they are to manage the roads, schools, hospitals, garbage collection, and security that are connected to their counties. According to Article 174 (f), the county government should encourage local initiatives and creativity in enhancing local economic developments. They are to fund the development of skills and build capacity to empower local managers and community leaders across all sectors of the county’s social and economic affairs.

In accordance with Article 189, the two levels of governments are not expected to be mutually exclusive. They are to create a web of networks and share certain functions in promoting national and local economic development. Some of these shared sectors include education, health, transport, health facilities, statistics, disaster management, tourism as well as public works and investments.

This relationship is captured in Figure 3 below:

Figure 3: Decentralisation Conceptual Framework for Kenya



Source (GoK, 2011: 251)

In the previous regimes, the presidency enjoyed the right reserved for them under the Independence Constitution over each of the three arms of government, (namely the Executive, Judiciary and the Legislature). Administration over these functions was predominantly centralised. Under the Constitution 2010, these functions have significantly been decentralised.

5.5 Fiscal decentralisation in Kenya

Fiscal decentralisation is concerned with transferring authority and management of fiscal resources from the centre to other levels of government. According to Othieno (2011: 2-3), fiscal decentralisation may involve ‘changing the locus of revenue generation, primarily, but also offers expenditure autonomy. Through this dimension, the central agency assigns some revenue generation responsibilities to sub-national agencies, whether the product enters the central kitty or is retained at the collecting agency for local spending’. The GoK (2010: 251) argues that the

rationale for fiscal decentralisation in the Constitution lies in the potential to enhance the ability of county governments to plan, prioritise, and use public resources to deliver public services and infrastructure in response to local needs. The aim is therefore to bring public services closer and accessible to the people. The distribution of financial resources must resonate with the demands of the local communities.

As outlined by Article 95 (4), it is the function of the National Assembly to determine the allocation of national revenue between the levels of government. It plays the role of appropriating funds for expenditure by the national government and other State organs. It also exercises oversight over national revenue and its expenditure. Essentially, it forms checks and balances in the exploitation of public resources and marks a shift from the control of the Presidency to a more accountable and strategic arena. In fact, according to Article 95 (5), the National Assembly is charged with the role of reviewing the conduct in the Office of the President, the Deputy President and other State officers and initiates the process of removing them from office. With regard to the counties, Article 96 (3) points out that the Senate is charged with the responsibility of determining the allocation of the national revenue among counties and exercises oversight over national revenue allocated to the county governments. This very scrutiny over the Executive significantly limits it from abuse of power and political patronage.

Kennedy and Bieniek (2010: 7) note that ‘an entire chapter of the constitution is devoted to public finance, shifting significant control of expenditures from the Executive to the Legislature and creating a more transparent and accessible budget process’. Kramon and Posner (2011: 97) note that ‘decisions about resource allocations to the counties will be made in the new Senate—composed of representatives drawn from the counties—rather than in ministries controlled by the Executive, further reducing presidential discretion in the allocation of resources’. All these initiatives reveal direct evidence that the powers to control public resources that used to be claimed by the presidency have been significantly decentralised. The provisions in the constitution are meant to ensure a more equitable and transparent distribution of resources (Kennedy and Bieniek, 2010: 2). All arms of government established in the Constitution 2010, including independent commissions, have greater flexibility in ensuring checks and balances on the distribution and exploitation of public resources.

GoK (2010: 249) states that ‘the Constitution 2010 assigns four different aspects of the financial power of the state to different levels of government and institutions; namely: the power to raise and collect revenue; the power to spend revenue; the power to control revenue; and the power to audit revenue’. Therefore, different levels of government will be guided by a financial framework that will guide them in executing these functions. As stipulated by GoK (2010: 249-250) both the national and county levels of government have been assigned revenue raising powers, whereby the national level of government has been assigned the power to raise and collect the most buoyant and lucrative taxes that generate the bulk of revenues, and the county levels of government assigned revenues that are not sufficiently lucrative to adequately finance the functions assigned to county government under the constitution.

The Constitution outlines a formula for fiscal decentralisation by suggesting that ‘at least 15 percent of the national government’s revenues must go to the 47 county governments, which will have a range of duties in areas such as the provision of primary health care, the implementation of agricultural policy, and the management of county-level transportation issues’ (Kramon and Posner, 2011: 97). Article 201 sets out the norms under which fiscal responsibilities are to be operationalised for both national and county governments. This Article outlines five principles that shall guide all aspects of public finance in the Republic of Kenya. These are:-

- (a) there shall be an openness and accountability, including public participation in financial matters;
- (b) the public finance system shall promote an equitable society, and in particular-
 - (i) the burden of taxation shall be shared fairly;
 - (ii) revenue raised nationally shall be shared equally among national and county governments and
 - (iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;
- (c) the burdens and benefits of the use of resources and public borrowing shall be shared equally between present and future generations;
- (d) Public money shall be used in a prudent and responsible way; and
- (e) Financial management shall be responsible, and fiscal reporting shall be clear.

The regions with higher levels of poverty and underdevelopment, as established by law, will receive special attention through the allocation of funds by the national government. This takes

place through the Equalisation Fund, which sets aside 0.5 percent of the budget for traditionally marginalised areas (Article 204). In parallel with the Equalisation Fund is the Constituency Development Fund (CDF). While this fund was introduced back in 2003 (prior to the Constitution 2010), it has become an important mobiliser to redistribute funds depending on the level of poverty in respective constituencies. The CDF is Kenya's most significant fiscal equalization programme. As argued by Bagaka (2011: 6), the establishment of CDF specifically addressed the issue of unbalanced resource allocations whose routine political manipulation had continued to privilege the previous regime sympathizers. The disbursement of the CDF has persisted from its inception in 2003 to the present date, after the inauguration of the Constitution of Kenya in 2010. The CDF is aimed at creating equity across the different levels of governments and communities in Kenya.

For many years, there has been overconcentration of financial benefits and allocation to regions from which most influential elites and politicians came from or resided. Akech, for example, (2011: 283) points out instances where previous presidents in Kenya used their power as a resource to dispense political patronage and subvert the democratic process. Other regions that regarded as marginalised were neglected and they lagged behind in development as other areas progressed. Particularly in Kenyatta's and Moi's regimes, legislators who acted as representatives of the people at the government level were given limited funding that would promote their respective constituencies. Some loyalists, and their constituencies, 'depended on executive patronage for their political survival ... the president often gave legislatures cash handouts to enable them to meet their demands of their constituents' (Akech, 2011: 365). Article 202 of the Constitution 2010 should end such practices. It proposes that '(1) Revenue raised nationally shall be shared equitably among the national and county government. (2) County governments may be given additional allocations from the national government's share'. This would vary depending on the needs and status of any of the county at any particular point in time. Some factors that may determine additional revenue allocations may be due to population density, size of the counties, or counties struck by natural calamities such as drought, floods, or disease.

GoK (2011: 254) outlines streams of revenues raised at the national level: revenues raised by Kenya Revenue Authority, money received from national government entities in form of

dividends, sale of securities, divestiture, and so on; sale of bonds and other financial instruments unless excluded as provided for in Article 206; unspecified borrowings which are not excluded as provided for in Article 206; and other receipts including concessional fees, tolls, appropriation in aid, amongst others.

5.6 Conclusion

This chapter has focused on the Constitution of Kenya as adopted in 2010. In this regard, key aspects pertaining to decentralisation have been identified and analysed. These have been discussed according to the three dimensions of decentralisation namely: political, administrative, and fiscal decentralisation. As argued by GoK (2010: 251), decentralisation system should promote greater access to adequate and relevant services that satisfy local needs and preferences. These preferences should be articulated through a mechanism that promotes popular participation; and leverages local knowledge and resources to enhance cost effectiveness in service delivery and sustainability of local development projects.

CHAPTER SIX

CONCLUSION

This study has analysed how decentralisation has been adopted in Kenya. This was done by providing a descriptive narrative of the history of centralisation in Kenya and the consequences of centralised rule. This study explored the lengthy governance reform path towards decentralisation in Kenya. It was determined that the people of Kenya wanted reform, and while they did not call it *decentralisation*, the premises are that of decentralisation. Particular analytical attention in this paper was paid to the contents of the Constitution of Kenya (2010). This was based on the conceptual framework of decentralisation (as presented in Chapter Two of this paper). The objective was to identify to what extent the Constitution of Kenya (2010) decentralised political, administrative and fiscal powers to the regional Counties.

Centralised systems in many African countries have been characterised by weak governance institutions that favoured a small minority of elites who took advantage of public resources at the expense of the wider population. Weak governance institutions became the character trademark of developing countries, especially in Africa. In these countries, the economic riches of the country are not dispersed; people remain poor; development remains absent; and central government tends to be too powerful and too far removed from its people. This study has shown that in Kenya, this phenomenon has resulted in its people calling for the decentralisation of power. Decentralising government structures was posited as a move that would: improve the delivery of services to the Kenyan people; promote the development of previously disadvantaged groups and communities; and create a wider representation that will diversify the interests of those concerned. In short, it would foster democratic governance.

The post-independence governance framework in Kenya was characterised by ‘poor governance as evidenced by corruption, ethnic conflict, insecurity, political uncertainty, and poverty’ (GoK, 2010:27). The outcome of this environment produced the alienation of large portions of society from the mainstream economy; wasteful public investments; massive poverty and ethnic animosity; and unfair political competition and intolerance. These weaknesses that affected the delivery of public goods and services by government have been traced back to the

recentralisation of power in the Executive through post-independence constitutional and legal amendments. This resulted in the monopolisation of power as opposition parties were initially frustrated and eventually outlawed (GoK, 2010: 10).

According to Ndulo (2003: 315), the future of democratic governance in Africa depends on the development of political systems that give people a sense of ownership of the political process. The transition from authoritarianism to greater participation in decision-making called for determined long-term efforts and huge investments in the development of institutions to support decentralised structures. These institutions should be established to guarantee all equal opportunities in accessing public goods and services. Institutions and processes of democratic governance must include a credible electoral body system, parliament, judiciary, government, political parties and civil society. All these institutions must be guided by a comprehensive vision that protect and provide for all. The quality of these institutions and processes must therefore display a substantial degree of access, participation, accountability, transparency, rule of law, equity, subsidiarity, effectiveness, responsiveness, efficiency and sustainability. Furthermore, this transition to decentralised system of governance cannot succeed unless the economic conditions in African countries improve and develop to a level where they are able to sustain the institutions necessary for good governance (Ndulo, 2003: 315). This study concurs with Ndulo's argument and concludes that the same argument holds for Kenya.

As Cheema (2005: 11) rightly points out decentralisation cannot be enforced upon a regime. He argues that implementing decentralisation reforms must take into consideration the national culture, history, ethnicities, conflict, civil-military relations, external donor support, level of economic development, media, and global governance architecture. This study has shown that even though it was established that significant pressure to reform governance in Kenya emanated from international funding institutions like the World Bank and the International Monetary Fund; local people, the media, civil society organisations, political parties and religious groups were as adamant in driving the government reform process. This popular support bodes well for Kenya's future prospects of decentralisation.

This paper has argued that many of the governance problems that Kenya has experienced under central rule have been comprehensively addressed in the new constitutional framework. The

legislative framework encapsulated by Kenya's 2010 Constitution has reconfigured a previously centralised system into a decentralised system of governance. The 2010 Constitution now provides for structures that will act as checks-and-balances on government power, something never before seen. The expectation, therefore, is that these new institutions will result in a more accountable and transparent government.

As pointed out earlier, administrative functions and powers are decentralised between the two layers of government. According to the Constitution, this is aimed at improving efficiency, accountability, and service delivery to the grassroots communities. According to the Constitution, both levels of government will play their exclusive functions, and cooperate with the other governments in mutual relations. These layers of government are designed to function as checks and balances in order to empower local administration in managing the social and economic affairs of their regions. However, at this point in time, it is too early to assess whether this is actually the case.

A significant change brought about by the Constitution is the extensive decentralisation of fiscal authority. The management and distribution of fiscal resources in the previous regimes was done primarily at the discretion of the Presidency. Regions, groups and communities that showed loyalty to the ruling party were rewarded while regions that supported opposition parties lagged behind and minimal development agenda were supported or established.

The Constitution now stipulates that a new fiscal reconfiguration in the collection and distribution of fiscal resources. Financial resources are no longer the exclusive domain of the Executive and the Presidency. County governments will be able to use revenue collected within their boundaries for their own development. In addition, 15 percent of the revenue collected nationally will be redistributed to the counties, with 0.5 percent of the budget allocated to the Equalisation Fund set to be distributed to traditionally marginalised counties as established by law.

Kirira (2011: 1) highlights that public finance is critical to relations between the governed and the governors because without resources, nothing gets done. Finance gives meaning to powers and lies at the heart of the political and institutional structures of every nation. According to GoK (2010: 249), '[t]he philosophy of governance that the new Constitution of Kenya 2010 has adopted informs the architecture and design of public finance management. This philosophy is

founded on the principles of solidarity, insurance and the equitable sharing of resources'. This philosophy is well informed by the previous political culture of marginalisation that had created huge gaps largely attributed to unbalanced distribution of financial resources.

While it is too early to make any significant assessment of the newly decentralised system of governance in Kenya - based on an analysis of its constitutional framework, one can conclude that decentralisation is formally entrenched as a system of democratic governance in Kenya. It is premised on the assumptions, as discussed in Chapter Two of this paper, that decentralisation improves participatory democracy; socio-economic development; good governance and central government efficiency.

The success of its implementation will be gauged on its application of the constitutional framework to balance the excesses of the state that the country has endured due to over-centralisation of powers and functions of government. In effect, if the new system is to produce a positive impact, impunity will be significantly reduced, and open access to justice for all regardless of their social, economic, political or cultural background will be facilitated.

While decentralisation has been hailed for its potential to redeem governance of social and economic functions in developing countries, it carries with it significant risks and concerns. Othieno (2011: 4) identified six risks and concerns that are worth noting: Firstly, the ignorance and participation capacity: As it has been identified in Chapter 2, an underlying rationale of decentralisation is that it brings development prioritisation nearer to prospective beneficiaries who are assumed to know their objective (as opposed to subjective) interests. However, as Othieno (2011: 4) demonstrates, this is not always so. A majority or popular decision can be misinformed and parochial to the disadvantage of intended beneficiaries.

Secondly, the problem of people power: The dilemma is created between the objectives of people either by seeking to control or participate in improving governance. Linked to the previous concern, the demands of people power could be about controlling government without necessarily having alternative slate of more efficacious development priorities or interventions, or even commitment to participation as an ideology.

Thirdly, the non-existent or weak sub-national institutions: The heritages of nature and/or 'bad' governance may result in glaring regional inequalities in capacities to manage devolved responsibilities – often forming one basis of the demand for devolution. Othieno (2011: 4) points out that the dilemma is that decentralising reform in the face of such initial inequalities could either deepen the inequalities or lead to a suboptimal operation of the chosen devolution framework.

Fourthly, the transfer of inefficiency and corruption: there is a risk of transferring inefficiencies and corruption from a centralised to a decentralised structure of government. Where there is a widespread culture of corruption and of the failure of service delivery, decentralisation of government is unlikely to be the solution since national bottlenecks are replicable at subnational levels. There must, for instance, be concern not to transfer national level corruption to subnational levels.

The fifth concern is the risk of elite capture: This is related to the transfer of inefficiencies noted above, where elite capture is replicated from a centralised national structure to a decentralised subnational government. Therefore, this may lead to duplication of corruption and manipulation of local beneficiaries by local elites.

Finally, the deepening of inequality: If the above pointed concerns become a real threat to the established decentralised structure, the inequalities and marginalisation of communities and the poor are likely to loom large. Even in the urge of the need to reform inefficiencies associated with a central government, the reform is likely to deepen inequalities despite devolution frameworks incorporating affirmative action.

Othieno (2011: 5) argues that while decentralisation assumes greater involvement of and participation by target communities in needs assessment, policy design, implementation and oversight; such participation may remain merely symbolic. These and other risks need to be noted from the onset of the establishment of a new governance structure. Measures, checks and balances against devolved abuse of power must be put in place in order to expand the benefits for social and economic level even to the basic communities.

The Institute of Social Accountability (TISA, 2012) contends that the devolved government as designed is the most transformative aspect of Kenya's governance in the Constitution of Kenya. It seeks to redress ingrained regional inequality, unemployment and low growth of devolving political and financial responsibility to the counties. As noted by Kivuva (2011:21) if these proposed changes are fully implemented, they could bring the much needed governance reforms to Kenya. Reforms called for, first and foremost, by the people of Kenya.

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