Devolution of Powers and Peace-Making in Kenya: Dividends for the 2017 General Election?

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Abstract

Kenya's devolved system of government was adopted in 2010 as part of the long-term peace processes in the aftermath of the 2008 post-election violence. Decades of ethnically divisive use of centralised state powers and resources led to a resentment of centralisation and universal support for the principle of devolution during the constitutional reform process. Kenya is now in the fourth year of implementing a devolved system of government composed of the national government and 47 devolved units known as counties. At the heart of Kenya's conflict is the struggle for control of centralised state powers and resources, a factor that has been fuelled by past use of such powers to enrich and enhance the president's community or home regions. It was hoped that devolution will occasion dispersal some of these powers and resources and thereby diffuse the unhealthy competition to control spoils at the centre. While the peace objectives of devolution in the Constitution are clear, the actual "peace dividends" of implementing devolution are not as clear. The four years of implementation of devolution, from March 2013 until the August 2017 general election, provide an opportunity to examine whether the devolved system of government has made a contribution to peace and national unity. This article investigates two main issues: the constitutional design and its relevance to peace, and the actual implementation processes.

Key words: devolution*, Kenya, political power, ethnic conflict, democracy, representation*

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1. Introduction

With a population estimated in 2013 at 44 million people and drawn from more than 43 different ethnic communities, Kenya is one of the countries in the Horn of Africa region that has to do more than most to manage diversity and ensure national unity and cohesion. Unlike those, such as Ethiopia, Uganda, Djibouti and Eritrea, which have clear ethnic majorities, Kenya has no single ethnic community making up more than a quarter of the population; at the same time, the five largest communities comprise slightly more than half its total population.[1]

However, like many countries in the Horn, Kenya's boundaries – a product of the colonial project – divide some of the communities inhabiting border areas. As a result, numerous communities on the Kenyan side of the borders share socio-cultural ties with those on the adjacent side. This is the case for ethnic Somalis in the North-Eastern region, who have been divided across the Kenyan, Somalian and Ethiopian territories; the same is true of communities straddling border areas shared with Tanzania, Uganda and Ethiopia and South Sudan. Disputes over pastures and livestock-raiding, coupled with weak border controls, have resulted in some instances in community conflicts along the borders. Moreover, trans-border criminal and terrorism-related activities along the Kenyan-Somalia border led to an invasion of Somalia by the Kenyan military in 2012 in a bid to flush out the al-Shabaab terrorist group, said to be responsible for these activities along the Kenyan border.

Internally, too, Kenya's ethnic heterogeneity is a source of political competition and conflict. This has been brought about by divisive manipulation of the country's ethnicities, first by the colonial power and, later, the Kenyan political elite, but in both cases largely through the centralization of power and resources. Accordingly, despite its potential pitfalls and the risk it carries of creating further division, the devolution of power and resources has come to be seen as an indispensable means of enhancing national unity, harmony and peace in Kenya.

From the independence talks in the 1960s to the constitutional reforms in the late 1990s and adoption of the current constitution in 2010, devolved governance featured as a central theme in

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1   The communities are the Kikuyu, Luhya, Kalenjin, Luo and Kamba.

the process of constitutional review. In the final text of the Constitution of Kenya 2010, the country adopted a comprehensively devolved political system comprised of a national government and 47 county governments, with the latter vested with certain limited executive and legislative powers and functions that are guaranteed by the Constitution.

This is the second time (after the Independence Constitution) that Kenya has attempted to devolve substantial powers and resources through a constitutional framework. While the socio-political context and environment at independence and in 2010 differ substantially, one of the broad aims of devolution was to offer some form of political accommodation capable of achieving "peace objectives." Indeed, the constitution-making review process stalled initially, but was jump-started again as one of the longer-term measures for addressing the violence that ensued after the 2007 presidential election.

This article examines the context within which the peace objectives of devolved governance were conceived. The Constitution contains extensive provisions and institutional arrangements that seek to enhance "national unity" through national governance structures, in particular the executive, given that past abuse of executive power, and specifically presidential power, made the presidency an obvious and necessary target for any cohesion-seeking and ethnic-unity arrangements. However, while national government (executive) structures are thus important factors to consider in understanding the effectiveness of national cohesion, the major focus of this article is, on devolved governance. Accordingly, only a general assessment is provided of national government structures.

The article begins with a discussion of the prevailing socio-economic and political context in the period leading up to the adoption of devolution in 2010. The article then considers the "peace dividends," if any, of the first four years of devolution's implementation. Devolved governance, it must be noted, is not the only means through which Kenya pursues inter-ethnic harmony and cohesion.After the introduction, then, the article examines the political and historical context in which Kenya's debates on devolved governance have taken shape. This is followed by an analysis of the Constitution's basic design and its immediate impact on national unity. The article then proceeds to evaluate the actual

implementation of devolution and isolates and discusses specific aspects of it that are relevant to national unity.

2. Peace through Devolution in Kenya: The Early Stages

As is typical of post-colonial African states, Kenya's ethnic communities had little to do with how they found themselves located within the new polity. Colonial boundaries had been prescribed by imperial interests (mostly economic), with little or no heed given to the cohesion or compatibility of communities within the Kenyan territory. The governance approach informally pursued by the British was that of "divide and rule," a policy which based administrative units and political activity almost exclusively on ethnicity. This ensured that there was minimal socio-political interaction between Kenya's ethnic communities in the run-up to independence (Kanyinga, 2009, p. 327).

Furthermore, unlike the case in other countries such as Uganda, where the British applied indirect rule (through traditionally established kingdom leadership structures), Kenya's colonial administrative machinery was centralized, hierarchical and without regard for local (mostly community-based) leadership structures. State power was vested in the governor-general, who in turn was answerable to London. However, at independence, the colonial government sought to discard this centralized system and replace it with one composed of regional systems of government (*majimbo*) (Ghai & McAuslan, 1970, p. 178).

2.1 Regionalism Debates at Independence

Two African political fronts emerged at independence, the one pro-*majimbo* and the other anti-*majimbo*. The latter group, operating under the umbrella of the Kenya African National Union (KANU), was composed of the upcoming African elite from the then two largest ethnic communities, the Luo and Kikuyu. As for the pro-*majimbo* group, it was backed by European settlers and comprised of an emerging African elite from smaller ethnic communities that feared domination by the larger ones (Ogot & Ochieng', 1995, p. 178).

In this context, dispersal of powers and resources to the regions

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was seen as a brake curbing the socio-political power the two largest communities were consolidating at the center. Regionalism, which was commonly understood as requiring ethnic communities to move back to their "home regions," was perceived as a threat to the Luo and Kikuyu, who had spread out across the country. On the other hand, smaller communities hoped the *majimbo* system would help lay the basis for demanding a return of tribal lands (especially those in the Rift Valley) that had been lost to white settlement and later to resettlements of other communities from outside the regions (Kanyinga, 2009, pp. 331-332). Furthermore, the Somali in the North-Eastern region and groups in the coastal province laced their respective calls for regionalism with secessionist demands and claims (Castagno, 1964, pp. 165-188).

In due course KANU won the independence elections, which were treated as a referendum on regionalism (Okoth-Ogendo, 2003, p. 277). KANU's victory spelled the end of *majimbo*: the system was weakened, and finally abolished, within two years of independence. During this brief period, *majimbo* consequently did no damage to the colonial-era governance structures, given that the KANU government frustrated every effort to implement it.

2.2 Divisive Use of Post-Independence State Power

Major changes in the post-independence era transformed the nature of ethno-political conflict in Kenya. First, the secessionist demands for the Somali and coastal regions fizzled out – crucial factors in this regard were the dismantling of the regional system of government (the platform for regional leaders) and military action in the North-Eastern region. Secondly, the dissolution of the Kenya African Democratic Union (KADU) left no substantial opposition to KANU's centralization agenda.

KANU duly sponsored constitutional amendments that created an all-powerful president by merging the functions of head of state and head of government in the person of the president. As studies have shown, successive presidents in Kenya used these powers to favour their own ethnic communities and home regions in terms of development, access to essential government services, and various state opportunities, doing so at the expense of other regions and communities (Kanyinga, 2013, pp. 56-60).

As a result, rather than addressing the socio-economic disparities caused by decades of colonial rule, the post-independence government exacerbated them, in the process fuelling perceptions of ethno-geographic exclusion and the idea that ethnic capture and control of the presidency were a key means to access development, services and state opportunities. Elections were consequently transformed into a deadly ethnic contest pitting communities against each other. Hornsby (2013) captures this aptly:

> [A] view of politics as an ethnically driven competition for resources, a survival of the fittest where the prize was control of the resources of the state, was built in the country from independence. It was reinforced by almost every act of Kenyatta, Moi and Kibaki, each seeking to rule a fractious community of sub-nationalities by a combination of patronage, incorporation and reliance on their own ethnic community for their security…. Increasingly, an individual's success or failure was interpreted as victory or defeat for an entire community. (p. 9)

The 2007 presidential election was the turning-point. In the aftermath of its disputed results, Kenya witnessed unprecedented ethnic violence that claimed more than 1,300 lives and displaced over 600,000 people (CIPEV, 2008). Peace talks brokered by the former UN Secretary General Kofi Annan led to a settlement that included constitutional reforms as part of the longer-term strategies for achieving peace. The commission that investigated the violence identified some of its main causes as the "personalisation of presidential power" and ethno-geographical perceptions of discrimination in the use of state resources (CIPEV, 2008).

While the presidential election was the immediate trigger of the violence, it became clear that ethno-political grievances, aggravated by control of powers and resources at the center, were major root causes. It was thus inevitable that constitutional reforms would have to incorporate a form of devolution of power and resources in order to assuage some of the grievances underlying ethnic conflict in Kenya.

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3. Devolving Power for Peace: Kenya's Constitutional Response

3.1 Devolution and the Deconstruction of the Centralist State

Given the trajectory described above, deconstruction of the centralized state was one of the central peace objectives. First, the dispersal of powers and resources from the center to devolved units ensures that not all state power and resources are centralized, given that centralization is prone to abuse and divisive manipulation to the detriment of national cohesion (Ghai, 2008, pp. 211-226). Secondly, dispersal of powers and resources from the center makes the center less attractive to competing groups: their focus is shifted to an extent from the centerif some of the state powers and resources are located instead at the subnational level (Ghai, 2008, pp. 211-226). The expectation, in other words, is that devolved units will provide an alternative focus to the center and an alternative means of facilitating political and economic inclusion.

To appreciate how these arrangements could impact on ethno-political relations, it is crucial to understand Kenya's current ethnic composition. The 2009 population census has the Kikuyu as the largest ethnic group, at 6.5 million, followed by the Luhya (5.3 million), the Kalenjin (4.9 million), the Luo (3.9 million) and Kamba (3.9 million). Others are the Somali, at 2.4 million, and Kisii, at 2.2 million, in addition to more than 30 further ethnic groups, including Kenyan Asians (mostly from India), Kenyan Europeans and Kenyan Americans (Ghai, 2015, pp. 2-3).

As stated in the introduction – and bearing in mind the ethnic configuration above – the contest for the presidential seat generally revolves around the "big five," which is an inherently risky situation. Therefore, the question one may ask is whether devolution so far has made the presidency any less of a shiny prize for these perennial contenders. The effectiveness of devolution as a mechanism for peace will depend in turn on whether county powers have enough significance to offer a counter-attraction or alternative to holding the presidency. (This is explored further below.)

Apart from the larger communities, there are a number of ethnic communities that are too small to capture the presidential seat

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but large enough to capture one or two "home counties" (Bosire, 2013, pp. 357-358). With respect to this group of communities, it can be argued that the devolved powers and resources provide a viable platform for socio-political and economic inclusion through their respective county governments.

Literature and comparative practice have also shown that while devolved governance can enhance inclusion, it can, in the same breath, perpetuate exclusion at subnational level, especially of minorities within the devolved units (Morrow, 2005, p. 51). Indeed, the 47 county units were a concern for the smaller ethnic communities that did not secure a devolved unit of their own. During the referendum campaign for the 2010 Constitution, leaders from two of these communities (the Sabaot in Bungoma County and the Kuria in Migori County) were arrested while campaigning specifically against the 47 units, and charged with incitement against other communities (Nation Team, 2010).

It can be concluded that in the Kenyan context the impact of devolution is not the same for all ethnic communities. For larger communities, inclusion depends on whether devolved units are viable "consolation prizes" for the presidency – indeed, it would not be a surprise if these groups were to remain keen on preserving a powerful center in the hopes of capturing it in future elections. For the smaller communities with little hopes to capture the presidency in the current Kenyan political environment, the control of some powers and resources through a county unit may offer some space for accommodation.

The other way in which devolution of powers can reduce ethno-political conflict is by addressing its underlying socio-economic grievances. It is no secret that local service delivery was impaired under the centralized system of government. Bureaucratic inefficiencies and lack of accountability led to disparities in service provision, whereas county governments are more inclined to focus on areas previously neglected by the central government. Increased access to services and development in such areas may also assuage perceptions of marginalization and deprivation.

3.2 "National Unity" Arrangements

Given Kenya's experiences with executive power, it was inevitable

that measures to enhance national cohesion would involve re-structuring the executive. During the constitutional review, Kenyans for the most entertained the idea of changing from a presidential to a parliamentary system of government.[2] A last-minute political consensus retained a pure presidential system of government (Kitonga, 2014), but nonetheless substantial changes were made to the content and exercise of presidential powers.

First, presidential powers in the Constitution are significantly reduced compared to those in the previous constitution. The president no longer has control over the agenda and activities of parliament, as was the case in the past, nor does he or she have sole discretion to make key appointments: these are subject to parliamentary approval.[3] Other powers, such as the appointment of judges, are now vested in independent institutions.[4] Furthermore, independent institutions have been created to deal with important national issues, such as equitable resource-sharing between the two levels of government and among the counties.

Secondly, the Constitution requires that national executive power be exercised in a manner that promotes national cohesion. To this end, the Constitution is clear that the relevant structures, starting with the cabinet, must reflect Kenya's regional diversity,[5] further to which Parliament is authorized to vet all appointments to ensure they respect regional diversity. The president is also expected to rise above divisive politics and be a unifying symbol for the nation.[6]

4. The Impact of Devolution Design on Cohesiveness

4.1 Size, Number and Composition of County Governments

Counties' current sizes and boundaries are based on the 1992 district boundaries,[7] which in turn were based originally on colo-

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2   All constitutional drafts, except the 2010 constitutional referendum draft, had provided for a form of parliamentary government.
3   These include appointment of the chief justice, cabinet secretaries, ambassadors, and the inspector general of police.
4   The Judicial Service Commission, for instance, has the responsibility of selecting judges, while the president has the formal powers of appointment only.
5   Constitution of Kenya 2010, Article 130(2).
6   Constitution of Kenya 2010, Article 131(2).
7   Districts and Provinces Act.

nial administrative demarcations. As mentioned earlier, colonial administrative units were ethnically defined. Accordingly, while rural-urban migration and settlement might have altered the ethnic composition of counties to some extent, most of the counties have majority ethnic communities as a result of the colonial policy of ethnically exclusive units. Opinion is divided on the impact that the counties' ethnic composition has on national cohesion. Some argue that ethnically defined counties will give communities a platform for inclusion; others maintain they are a continuation of the colonial "divide and rule" policy (Akoth, 2011).

Certainly, it was not the wish or desire of the constitution-makers to continue the colonial policy of ethnically exclusive boundaries. The Committee of Experts that recommended the adoption of the 1992 boundaries did so for other reasons: to strike a balance between economic viability and the ability of counties to check the center (Committee of Experts, 2010). Regardless of the drafters' intentions, however, the adoption of the current county boundaries has given rise to new challenges that add strain to ethno-political relations in the country.

First, while the Constitution was supported by 67 percent of voters in 2010, it was opposed by small communities who were set to become county minorities. As mentioned earlier in this regard, two leaders from the Kuria community in Migori and the Sabaot in Bungoma County were arrested and charged for incitement. Their main reason for opposing the Constitution was that it denied the smaller communities a home county. Most of the voters in the parliamentary constituencies (Kuria and Mt. Elgon) occupied by the two communities voted no in the referendum (Daily Nation, undated). The fact that county boundaries put together smaller communities with larger ones immediately creates the fearful perception that the minority communities in the counties are at risk of discrimination. Indeed, comparative literature and experience show that exclusion at the subnational level may even be more pronounced and severe than at the national level (Brodjonegoro & Ford, 2007, p. 330). These fears can be allayed, however, by pursuing inclusive policies at the county level (as discussed further below).

Secondly, the 47 county boundaries have reawakened old disputes between neighboring counties. The disputes are of two kinds. The first concerns the actual county boundaries, and can

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be settled by making reference to beacons and boundary features identified in the law (as set out in the schedules to the Districts and Provinces Act of 1992).

The second type revolves around the fairness of the 1992 boundaries. The Constitution provides for procedures for the alteration of county boundaries,[8] further to which the Senate has proposed a law aimed at resolving disputes as well as adjusting contested boundaries.[9] Nevertheless, the very fact that long-forgotten boundary disputes – disputes that turn around "belonging" – have been revived points to the potential for conflict to arise from the devolution of powers. Again, whether or not this could lead to conflict depends on how these boundary disputes are handled on a case-by-case basis. Currently, not much attention has been given to the resolution of such disputes by the two levels of government.

4.2 Electoral System and Representation

Electoral representation is an important avenue through which national cohesion can be achieved. An inclusive electoral system delivering representative structures that truly reflect the diversity of a society or an electoral unit greatly enhances the prospect of national cohesion. This is especially critical in a society where there are multiple and politicised identities. Kenya's structures of representation (comprising the executive and the legislature) are at the national and county levels. The president (who is the head of state and government) is elected. Parliament (composed of the Senate and the National Assembly) has directly elected members as well as special representatives.

Despite the overwhelming literature in favour of proportional representation (PR) as the recommended electoral system for ensuring inclusiveness (Reilly, 2004, p. 20), Kenya retained the first-past-the-post (FPTP) or majoritarian electoral system it inherited from the British. All elective seats, with the exception of the presidential seat, are won on the basis of a simple majority. One merely needs to garner the most votes in order to win a county ward seat, parliamentary constituency, or a governor's seat.

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8   Constitution of Kenya 2010, Article 188.
9   The County Boundaries Bill, 2015.

In the case of the presidency, one has to gain more than 50 percent of the vote and win 25 percent of the vote in more than half of the 47 counties.[10] This measure seeks to ensure that the president appeals for votes beyond his or her ethnic base. On the other hand, the National Assembly has 290 members who are directly elected from physical constituencies on a simple majority, 47 women representatives elected from the 47 county constituencies, and an additional 12 members who are nominated to represent special interests, bringing the total to 349 members, excluding the speaker who is an ex officio member. The Senate, on the other hand, consists of 47 directly elected senators, 16 (nominated) women representatives, and four other nominated representatives (two men and two women), giving it a total of 67 members, excluding the speaker, who is also an ex officio member.

At the county level, the county assembly is composed of ward representatives directly elected from the wards. There are 1,450 elected ward representatives across the 47 county governments. The Constitution provides that a county assembly should not comprise more than two-thirds of the same gender, and allows for a topping-up of gender seats to ensure compliance with this rule. Additionally, the Constitution[11] provides for the representation of marginalized communities, with the law[12] setting the number at four per county assembly. Kenya has 772 nominated representatives across the 47 counties, making for a total of 2,222 members of county assemblies.

While the nominated seats are supposed to ensure representation of minorities and marginalized communities, there are a number of challenges. First, the method used to choose nominees does not favour minority groups. Nominees for positions are chosen on the basis of party performance, that is, nominated seats are distributed to political parties in accordance with the party's numerical strength after the FPTP elections. This means that a party popular with the majority community will get to nominate persons for special seats (such as seats to relating to gender, youth, persons with disability, and marginalized communities or groups). In practice, persons nominated to such positions are supporters of the dominant parties, as opposed to genuine rep-

10   Constitution of Kenya 2010, Article 138(4)(b).
11   Constitution of Kenya 2010, Article 177(1).
12   Section 36 Elections Act 2012.

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resentatives of minorities. Minorities usually support the smaller parties, but such parties lose both the vote and the right to nominate representatives to the more dominant parties.

A review of the list of persons nominated to represent marginalized communities reveals a highly inconsistent method of choosing representatives (IEBC: Dispute Resolution Committee, 2013). There is no discernible way in which political parties choose the four representatives of marginalized communities to county assemblies. Minorities have the option of running as independent candidates, but independent candidates generally perform dismally given that party politics dominate electoral races in Kenya. Furthermore, the Independent Electoral and Boundaries Commission (IEBC) admitted that it focused mainly on a population-based criterion (as opposed to minorities) during the ward delimitation phase (IEBC, 2012, p. 27).

In Migori County, a pre-election power-sharing arrangement saw the governor elected from the majority Luo Community while the senator was elected from the minority Kuria Community. The deal that was brokered by the Orange Democratic Movement leader and presidential candidate, Raila Odinga, was aimed, however, at securing the Kuria presidential vote. The majoritarian electoral system, coupled with the ethno-political orientation of Kenyan elections, means that most of the representatives are chosen from the majority communities in the respective electoral units. In the absence of a special arrangement (such as a pre-election sharing of seats), no candidate from a minority group can make it to an elected position.

4.3 Administrative Structures

The Constitution provides that Parliament shall pass a law ensuring that "community and cultural diversity" is reflected in county executive and legislative structures.[13]Indeed, where administrative and representative structures reflect a society's diversity, the perception of "belonging" this engenders improves the prospects for national cohesion. A number of laws (and policies) have been put in place accordingly to ensure that administrative structures not only reflect the local diversity within counties but also give representation to other Kenyan communities that are outside the counties.

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13   Constitution of Kenya 2010, Article 197(2)(a).

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When nominating persons to serve as members of the county executive, the governor is required to ensure that nominees reflect the cultural and community diversity of a county.[14]County assemblies are thus required to ensure that county executive nominees reflect the cultural and communal diversity of a county during the vetting process. County assembly members are required to reject nominations that do not reflect a county's diversity.

The County Governments Act also provides that the county public service, which is in charge of establishing offices and hiring county public-service staff, should ensure that at least 30 percent of all county positions in the county public service are reserved for communities from outside the county.[15]Furthermore, the National Cohesion and Integration Act provides that no public institution (which includes a county government) should have more than one-third of its employees drawn from the same ethnic community.[16]

However, a survey by the National Cohesion and Integration Commission (NCIC) on the recruitment patterns of county public service boards in the period 2013-2016 shows that the majority of counties have not complied with any of these provisions. Only 15 out of the 47 county governments ensured that at least 30 percent of vacancies in their public service are filled by persons from communities which are not dominant in the county (NCIC, 2016, p. 26). Conversely, a whopping 68.1 percent of county governments have workforces in which more than 70 percent of employees come from a single community (usually the dominant one in the county). Counties with more a multi-ethnic composition were found to have complied more fully with the applicable rules than those that are largely ethnically homogeneous (NCIC, 2016, p. 26).

County assemblies have been vested with (statutory) powers to establish their own county assembly public service boards,[17] yet they too have not complied with the statutory requirements regarding ethnic composition. Only 13 counties have recruited at least 30 percent of their employees from outside the dominant ethnic community, while 34 counties have more than 70 percent of their workforce from the dominant ethnic community in the

14	Section 35(1)(a), County Governments Act.
15	Section 65(1)(e), County Governments Act.
16	Section 7(2) National cohesion and integration Act.
17	Section 12 County Governments Act.

county (NCIC, 2016, p. 26).

The NCIC report also observes that almost all counties whose names stem from the dominant ethnic community (counties such as Embu, Kisii, Samburu, Tharaka Nithi, Nandi, Turkana, West Pokot, Embu, and Meru) have more than 90 percent of their public service drawn from the community after which the county is named. The NCIC (2016) concludes that naming counties after communities drives perceptions which work to marginalize smaller or non-dominant communities (p. 26). Similarly, Burbidge's analysis of the composition of county executives finds that the dominant communities in 31 counties are overrepresented in the county executives (Burbidge, 2016, p. 20).

In Kenya there is generally a lack of ethnically disaggregated data at the national level and all the more so at the county level. Accordingly, the surveys and studies referred to above had to make a number of assumptions in their methodology in order to come to various conclusions (Burbidge, 2016, p. 20). Furthermore, while the Constitution uses phrases such as "minorities" and "marginalised communities," there is no settled or accepted practice or policy for determining who is a minority or marginalized community in Kenya. Intra-ethnic dynamics (such as sub-tribes or sub-clans) further complicate the characterization of identities at both the national and county levels.

Despite these complexities, the surveys and patterns highlighted above show a general trend of domination and exclusion by the larger communities at the national level. This is hardly surprising to anyone familiar with Kenya's socio-political environment, and the patterns at the county level have simply replicated those at the national one. Previous studies of the composition of the national public service (before 2013) revealed likewise that nationally dominant ethnic communities were overrepresented in the public service; again, the same trend was observable at the county level.

4.4 Equity and Resource-Sharing

Real or perceived inequity in the distribution of national resources has long been identified as one of the causes of inter-ethnic conflict in Kenya. The Constitution seeks to address this in a number of ways. First, there are clear constitutional principles that

are meant to guide the management of public finance. Most of these principles are geared to ensuring fair and equitable distribution of national resources (including inter-generational equity), as well as fair taxation policies, affirmative action for marginalized areas, and other measures for enhancing equity.[18] Further principles for guiding the distribution of resources include public participation, transparency and accountability.

The Senate and National Assembly have been bestowed with special and general powers to ensure equitable division and distribution of resources between the two levels of government and among the county governments. The Constitution establishes an independent institution, the Commission on Revenue Allocation (CRA), to propose the formula for vertical and horizontal distribution of resources, a formula itself based on criteria set by the Constitution. Furthermore, the Constitution prescribes that a minimum share of 15 percent of revenue collected nationally should be allocated to county governments.

Counties have received an average of 21 percent of the total sharable revenue of each year, which is well above the prescribed minimum of 15 percent. When the total county share is taken as a percentage of the last audited and approved accounts (which have a two-year lag in Kenya and are hence a little outdated) as prescribed in the Constitution, the percentage of county-government share is even higher, ranging between 32 and 43 percent. However, as a percentage of overall government expenditure (including non-discretionary expenditure such as national government debt servicing), the county share has ranged between 10 and 12 percent.

The formula the CRA developed for distribution of the county shares among counties has been described as "highly redistributive." It takes into account factors such as population, geographical size, equality of share, and fiscal responsibility. The formula has ensured that over the years county governments in areas that were previously marginalized have received significantly higher amounts of resources than was the case in the past. Indeed, counties such as Turkana, Lamu, Tana River and Isiolo now receive allocations many times higher than the net allocations they had under the previous dispensation.

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18   Constitution of Kenya 2010, Article 201.

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While the county-government allocations have been well over the minimum of 15 percent, it is clear that the bulk of resources are retained at the national level. Under the Constitution, the national government is allocated the major tax bases and sources of revenue. Counties rely mainly on the equitable share from the revenue collected nationally, given that collectively they raise on average less than 12 percent of the total expenditure locally. Furthermore, although counties' nominal share has increased, in real terms it has undergone a notable decrease of about 3 percent over the first three years.

Thus, while counties can address some of the concerns regarding equity by ensuring enhanced access to essential services and development, it is clear that the national government has a greater potential to address equity through national macro-allocations. For instance, the choice of location of national-government development projects can influence regional development heavily, and far more so than the county development projects.

The other challenge is that the constitutional design never focused on county-level equity dynamics. In fact, the constitutional and legal framework mentions practically nothing with regard to addressing within-county inequity. It is only now that counties are beginning to develop legal and policy approaches relating to equitable distribution of resources within their jurisdictions.[19]

4.5 Service Delivery

Inequitable access to services and development, as perceived ethno-geographically, is one of the causes of political conflict in Kenya. It was hoped that devolved governance would improve access to services and therefore address such perceptions of socio-economic exclusion. Given that county governments are in their first term, it would clearly be too early to gauge their impact in improving access to services. However, there are some early positive indicators in terms of access to devolved services. An assessment by the Council of Governors, an intergovernmental-relations body that brings together all the county government executives, reveals an increase in infrastructure, human resources and budgetary allocations in key sectors of county service delivery; these include increases in the number of roads constructed, in facilities for early childhood education, and in dispensaries

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19   See generally Kinuthia & Lakin (2016).

and health-care services (Council of Governors, 2016, pp. 22-24). In some areas that were marginalized, there is visible development and improved service delivery, such as the first tarmac road in Wajir County to the north of Kenya and the first delivery by caesarean section in Mandera County in the same region.

Such improvements have the potential to address perceptions of exclusion from development and service access. Indeed, there are common public discussions that these development projects have led to feelings of greater "Kenyanness" among people in various previously marginalized regions.

However, several factors may hinder the service-delivery efforts of county governments. The alignment of laws and policies to provide space for county service delivery has not proceeded as smoothly as anticipated. A number of national government institutions are still performing functions that properly belong to county governments; this also means the national institutions are holding resources meant for county governments. An example is the revelation (in mid-2016) that the national Ministry of Health procured and paid for mobile health clinics for the 47 county governments without consulting the latter, notwithstanding that basic-health service delivery is a fully devolved function (Mwakio, 2016).

The national government is visibly resistant to letting go of resources and institutions whose mandate and functions belong to county governments. This is complicated by the fact that county governments still have only nascent capacities to manage some of the functions transferred to them. The battle over functions and resources has led to several court cases pitting institutions at national level against those at county level.

Finally, and most importantly, public resources are being lost through pilferage and outright theft at both of these levels of government. The Auditor General and the Ethics and Anti-Corruption Commission (EACC) estimate that one-third of the annual budget is usually lost through corruption and theft from public coffers. Several scandals have been exposed at national and county levels, yet no serious efforts are made to address the vice of corruption. The theft of public resources at this scale threatens the delivery of services by national and county governments.

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5. Assessment of Implementation

The implementation of devolution as a peace-making arrangement rests on a number of assumptions, most of which were contextualized in the Kenyan situation discussed earlier above. The first is that devolved units offer an alternative to the center as a channel through which to pursue social, political and economic inclusion; accordingly, devolved governance stands to weaken the appetite for the center (a desire for which has spurred ethno-political conflict in the past) and at the same time, enhance the inclusion of smaller communities with no real chance of controlling it. A second assumption is that devolved government ensures access to development and service delivery. This would lead to socio-economic development and thereby address related grievances, which often have been perceived in ethno-geographic terms.

The question, then, is whether the implementation efforts discussed above have led to the achievement of some of these peace objectives.

5.1 Has Power Shifted to the Counties?

Has power really shifted to county governments? To answer this, one has to look at a range of factors. First, in terms of economic power, the center still retains most of it. Counties control around 10 percent of the overall resources. Therefore, there is little doubt that for larger communities county governance does not offer an alternative to the presidency. Moreover, the fragmentation of these larger communities into several counties makes the county level even less attractive for the perennial presidential contenders. At the time of this writing, the 2017 general elections were around the corner and the presidential race was as heated as ever. Devolution of powers and resources, and the additional weakening of presidential power and control, have done little to change the perception that the presidency is the ultimate prize.

However, it is not entirely correct to say devolved governance has had no impact nationally. A number of "high-level" national politicians opted to vie for the county governor seat. This has raised the political profile of county governments at the national level. The 2017 general election has attracted more national politicians (including many of the elected senators and some previous pres-

identical contenders). The lure of controlling county resources as well as the political patronage that comes with the office of the governor may have played a role in attracting more national politicians to the county governments. An unintended consequence of this trend is that it raises the profile of county governments, a factor which may enhance the countervailing force of counties against the center.

Furthermore, the fragmentation of the larger communities across counties has denied political leaders a ready basis for mobilization. Campaigns for presidential election among the major contenders are arguably more complicated than ever in these candidates' home regions. While the ethno-political bond is still strong and has not disintegrated, patterns evident in the 2017 presidential campaigns show that candidates not only have to focus on counties (as opposed to communities) but also demonstrate how the national government, over and above the county government, has helped or will help the county in question. In an area like the Rift Valley, matters are made even more difficult for the ethnic kingpins in that there appears to be a substantial political split in the Kalenjin community. Hence it can be concluded that county governments have served to an extent as a brake on ethnic rallying for presidential elections.

On the whole, though, actual presidential powers – and perceptions surrounding the presidency – have changed very little with the adoption of the 2010 Constitution. Ethno-political competition for the presidency seems to be a feature that will continue into the future. Indeed, the requirement for 50 percent of the vote, as well as majority votes in 23 counties, has only encouraged the larger communities to create political coalitions and counter-coalitions in a bid to meet this constitutional requirement. The presidential race is thus focused on the larger ethnic communities, with the smaller ones joining whichever side tickles their ethnic fancy.

The centralist political and institutional culture which has persisted from the previous constitutional order still prioritizes the retention of power and resources at the center. As mentioned earlier, such a culture is aided and abetted by a vague constitutional and legal framework that favours the national level at the expense of counties aids; this in turn contributes to the perception of the center as a coveted site of power, one which ethnic

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communities aspire to control through presidential elections.

5.2 Diversity through County Governance

The devolution of powers and resources provided an opportunity for county governments to ensure political and socio-economic inclusion. While many ethnic communities now have their "own" counties, the emerging practice seems to lead to county-based exclusion. Several ethnic communities find themselves in a county where a different group is the majority with a different majority other than their own, whether due to rural-urban migration, mixed ethnic rural settlement schemes or factors. The disturbing result is that majority ethnic communities are disregarding county diversity in their structures. As demonstrated earlier, in almost all counties, ethnic majorities are disproportionately represented in the county public service.

The lack of focus on "within-county disparities" in development and access to services may also lead to further exclusion in the distribution of resources. Given the absence of an overall framework to guide resource distribution at the county level, there is a likelihood of resources being "centralized" at the county level. This may perpetuate feelings of exclusion at the county level and generate conflict there.

5.3 Is there Socio-Economic Inclusion through County Governments?

Despite a marginal improvement in the equitability of access to services, it will take time for county governments time to make a meaningful impact on service provision. Counties in marginalized areas are starting from scratch in terms of building basic infrastructure for service delivery, retaining relevant and competent skills, and generally developing working systems of service delivery. However, there are indications that in time county governments will play a critical role in enhancing delivery of basic services.

6. Conclusion

The devolution of powers through the Constitution of Kenya had

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explicit "peace-making" objectives. Indeed, the post-election violence witnessed in late 2007 and early 2008 created the impetus for completing the constitution review process which had stalled in 2005. It is clear, however, that achieving some or all of these objectives will require more time, effort, focus and resources. The political and institutional culture of centralization seems to have persisted in spite of fundamental constitutional reforms.

Moreover, while comparative literature and state practice show that devolving or sharing powers and resources with subnational units may lead to an accommodation of other sub-state groups, the Kenyan case demonstrates this is a double-edged sword. It is no accident that counties with the highest levels of exclusion are those which have been given ethnic names. It is important, then, that deliberate national and county policies are adopted to ensure that all groups are accommodated in the representative and administrative structures in order to enhance inclusion and provide a basis for narratives of inclusion to develop.

Most importantly, inclusivity and national unity (in all their forms) are provided for in the Constitution and the applicable laws. Kenya requires only that national and county leaders develop a genuine interest in, commitment to, and focus on building and pursuing truly inclusive institutions and policies, as is required in the Constitution.

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