

County governance and pluralism in Kenya

Conrad M. Bosire

1. Introduction

The transfer and sharing of power from the centre through devolution or some other form was a major driver of constitutional reform in Kenya. The centralisation of power and resources aided the divisive use of state power that led to ethnic exclusion. It was thought that devolving powers and resources would facilitate accommodation of diversity and thus consolidate national unity.

Indeed, comparative literature and state practice demonstrates that the dispersal of powers and resources from the centre to sub-national units has a potential to enhance political recognition and accommodation of sub-national groups or identities. Devolution of powers and resources from the centre to subnational units creates institutional systems, through which different socio-cultural and political identities can be expressed. Where the overall political context allows for pluralistic politics and socio-political heterogeneity, such a system may facilitate political unity and enhance pluralism within the polity. Pluralism is arguably easier to achieve in a context where state powers (and resources) are shared or devolved than in a context where the same is centralised, or in worse cases, personalised.

The Constitution of Kenya 2010 is explicit that devolution is meant to foster national unity by recognising diversity,¹ and also to promote and protect the interests and rights of minorities and marginalised communities.² These two specific objectives leave no doubt as to the pluralism intentions of the Constitution as regards devolved government. The first objective recognises that the lack of recognition of ethnic diversity has led to disunity and conflict in the past. Accordingly, the active promotion of pluralism in the current Constitution has the ability to promote national cohesion and political stability. Ethnic-based exclusion has always been identified as a cause of political violence and conflict in Kenya.³ One of the national values and principles of governance is “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised”.⁴ This objective is pursued throughout the Constitution. Accordingly, while the Constitution does not use the term “pluralism”, the objectives of devolution are directed at it.

¹ Article 10 (2) and Article 174 (b) Constitution of Kenya 2010.

² Article 174 (e) Constitution of Kenya 2010.

³ Government of Kenya, 'Report of the Commission of Inquiry into Post-Election Violence in Kenya' (2008) 30-31.

⁴ Article 10 (2) (b) Constitution of Kenya 2010.

The effectiveness of pluralism, however, is dependent on the prevailing context within which political and governance structures operate. Where the primary aim for the exercise of powers and resources (at the centre and the subnational units) is benefit for one group, minorities are bound to be excluded. There has to be a clear policy to pursue inclusiveness and diversity.

Like most African states, a common feature of the Kenyan governance system is the centralisation of power. While the 2010 Constitution aims at geographical distribution of power, there is little doubt that the political and institutional culture will impact on pluralism. The paper starts with an analysis of the socio-political context within which devolution is being implemented in Kenya, including the factors that shaped the final constitution during the constitutional review process.

Kenya's first elections under the 2010 Constitution were held in March 2013 when the county governments came into place. The paper thus examines specific aspects that demonstrate the pursuit (or lack of) pluralism during the elections and the close to four years of implementation of the devolved system of government.

2. Pluralism in Kenya: the history and context

Kenya's ethno-political identities should be understood within the context of the post-colonial state in Africa. The colonial project resulted in state boundaries that brought different communities and cultures within one state, without any consideration of their "political makeup" or compatibility. The immediate impact is that political identities within these states have to work within a pre-defined space and try to build the ever-elusive concept of the "nation-state". Colonial policies that were pursued in these states further influenced the heterogeneity of ethno-political identities.

Three main and distinctive factors define the context and approach to pluralism and devolved governance in Kenya. First, the colonial policy of establishing an ethnic "divide and rule" slowed down the development of "a mass political movement at a national scale".⁵ Colonial political and administrative units were generally made to coincide with ethnic boundaries and inter-ethnic interaction in the exclusive ethnic reserves was discouraged.⁶ Political activity was restricted to the district level until independence. These policies made it harder for the emerging political movements to consolidate and form

⁵ Y.P. Ghai & JPWB McAuslan *Public Law and Political Change in Kenya: A Study of the legal framework of government from colonial times to present* Nairobi: Oxford University Press (1970) 182.

⁶ As above.

a unifying political force that is necessary for the formation of a nation state.

The socio-political cleavages that were at play during the talks to independence are evidence of the context described above. The Somali were engaged in secessionist quest to join the greater Somalia Republic that had gained independence in 1961. The coastal peoples also had secessionist demands based on the 10-mile coastal strip that belonged to the Sultan of Zanzibar.⁷ Even the communities in the hinterland were divided along the major and smaller communities. These cleavages led to the formation of two main political parties whose main difference was on whether to devolve powers or maintain the centralist state structures that were inherited from the colonial era.

The Kenya African National Union (KANU), which was composed of the social-politically and economically dominant larger ethnic communities, had a vision of a unitary and homogenous state. However, the smaller ethnic communities (backed by European and Asian settler communities) saw this as an avenue for the larger communities to dominate. The smaller communities, under the umbrella of the Kenya African National Union (KADU) advocated for a semi-federal structure of government where powers were transferred to 8 regional governments (including Nairobi). With the colonial government on its side, the KADU side carried the day as the independence constitution provided for a regional system of government. KADU's victory was, however, short-lived as KANU (which won the independence elections) hastily did away with the regional system of government (known as *majimbo*) soon after assuming power.

The ideological differences between KADU and KANU were more apparent than real. While KANU had a stated vision of a nation-state that is homogenous identity akin to a nation-state, its actions and practices (especially in the decades after independence) was one of ethnic exclusion. Accordingly, while ethnic differences never mattered or were, at the very least, the building blocks for a nation-state identity, the party's approach to governance exacerbated ethnic exclusion. KANU opposed the *majimbo* system because it emphasised ethnic and regional differences, at the expense of common nationhood and unity. However, the subsequent actions of KANU leadership served to exacerbate ethnic exclusion and ethnic differences.

KANU leaders abused and used centralised powers and resources in an ethnically divisive manner. Successive presidents favoured their

⁷ Brennan JR 'Lowering the Sultan's flag: Sovereignty and decolonization of coastal Kenya' (2008) 50 *Comparative Studies in Society and History* 831-861.

ethnic communities in terms of development,⁸ appointments to top positions in government,⁹ and other opportunities and benefits afforded by incumbency. The centralised system of government and the personalisation of presidential power aided plunder of state resources and facilitated impunity.¹⁰ The overall effect of this was to deepen ethnic divisions and give rise to a powerful and enduring perception that ethnic incumbency of the Presidency was the only way to access development and other state-afforded benefits.¹¹ This perception is a permanent risk factor that has turned all Kenyan presidential elections into “life and death” ethnic contests, the 2007 presidential election being an appropriate example.¹²

After the unprecedented scale of violence in 2007/ 2008, devolution of power was seen as one of the means of ensuring ethnic accommodation and addressing some of the underlying ethnic-based grievances. The rationale for this was that recognition and accommodation of ethnic diversity would address the underlying grievances of ethnic exclusion, which was one of the drivers of the conflict.

The Constitution of Kenya Review Commission (CKRC), which engaged with the public during the review process, noted a feeling of widespread alienation from government due to concentration of powers at the centre.¹³ There were wide perceptions of “marginalisation and victimization due to political affiliation” and “unjust deprivation of resources”.¹⁴ The public was emphatic that central government functions should be decentralised,¹⁵ feeling that “there should be an end to the colonial and post-colonial history of excluding communities at the grassroots from participating in local governance”.¹⁶ As a result, there were strong direct and indirect calls for the strengthening of the local level to ensure that communities at level were in charge of government and public processes. There were also views that, whatever the system or levels of devolution and democratic representation chosen, it should result in greater control of resources, especially land, by local communities.¹⁷

During discussions on devolution structures at the *Bomas* talks, most delegates were in support of the establishment of units that were ethnically exclusive. Three options were presented to the delegates

⁸ Karuti Kanyinga ‘Pluralism, ethnicity and governance in Kenya’ in Yash Pal Ghai and Jill Cottrell Ghai *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives* (2013) 55-67.

⁹ As above.

¹⁰ As above.

¹¹ Ghai YP ‘Devolution: Restructuring the Kenyan state’ (2008) 2 *Journal of Eastern African Studies* 211-226

¹² Report of the Commission of Inquiry into Post-Election Violence (CIPEV) 2008.

¹³ The Final Report of the Kenya Constitutional Review Commission (CKRC) (2005) 234.

¹⁴ CKRC (2005) 234.

¹⁵ CKRC (2005) 235.

¹⁶ CKRC (2005) 235.

¹⁷ CKRC (2005) 234.

ranging from larger and more mixed units to smaller but ethnically exclusive zones. The delegates chose the third option (which had 19 units that were mostly ethnically exclusive); the CKRC further reduced the units to 14 regions, after considering other factors such as cost and economic viability.¹⁸ Marginalised communities and ethnic minorities during the conference talks also supported the creation of exclusive units, including the creation of special units to accommodate ethnic minorities found within larger ethnic communities.¹⁹

It can thus be concluded that there was a general objective to pursue the recognition of ethnic diversity through the devolved government structure. Devolved units were generally seen as a means through which the various ethnic communities could share political and economic powers and functions in a bid to create an all-inclusive state. However, the structure of devolved government was not without controversy. Those who opposed devolution did so on grounds that it was akin to re-introduction of the *majimbo* system of government and that it could lead to ethnic balkanisation.²⁰

Later, the government made far-reaching changes to the devolved government structure that was agreed by delegates. Changes made to constitutional draft that was subjected to a national referendum in 2005 included: abolishing of the second chamber and retaining the unicameral structure that was present, removing the regional system of government and providing the district level as the only level of devolution after the national level, and providing that the national government laws will override all district laws in case of a conflict. The effect of the changes was to recentralise powers and assert control over the devolved units.

Many explanations that have been put forth to explain why the government decided to weaken the devolved government structure that was agreed by the delegates at Bomas. The devolved structure sought to dismantle the centralised state structure that was controlled by political elite from the Kikuyu community. Kanyinga argues that the referendum draft (named “Wako Draft” after the then Attorney General Amos Wako (under whose office the changes were made) was defeated at the referendum “because the Kikuyu political elite, who were in central positions in government, were not keen to share political power with other tribes”.²¹ Indeed, the practice has shown that elites (and their communities) in control of the state are usually

¹⁸ CKRC/National Constitutional Conference (NCC) ‘The final report of technical Working Group “G” on devolution of powers’ (2005) 7.

¹⁹ As above.

²⁰ Verbatim report of the plenary proceedings, presentation and debate on the draft provision on culture, affirmative action and devolution at Bomas Kenya on 16 September 2003.

²¹ Kanyinga K ‘The legacy of the White Highlands: Land rights, ethnicity and the post-2007 elections violence in Kenya’ (2009) 3 *Journal of Contemporary African Studies* 327-344, 339.

not keen to share powers and resources with other communities that are at the periphery of power.²²

The 47 counties were adopted by the Committee of Experts (CoE), which managed the constitutional review process from 2009 until 2010 when the Constitution was adopted. Before adopting the 47 county governments, the CoE oscillated between three levels of government, 74 devolved units, and finally settling on the 47 counties. There was no substantial discussion on what each option presented in terms of ethnic diversity. In summary, the CoE did away with the regional units because public concerns and comments were that the regions had not been given clear functions, and there were cost implications. There was no consideration on the impact in terms of accommodation of diversity. The CoE also noted that counties were reduced from 74 to 47 in order to cover up for the removal of the regional level. According to the CoE, the 47 counties were adopted because they were large enough to act as checks on the centre, they were recognised under a previous law, and were large enough to ensure viability for the provision of services.²³

4. Pluralism in the devolved government structure of the Constitution of Kenya 2010

Regardless of the reasons advanced by the CoE, the 47 county boundaries, more or less, coincide with ethnic boundaries. The 47 county boundaries are adopted (with some minor modifications) from the colonial administrative units that were ethnically defined. While some changes (rural-urban migration, mixed ethnic settlements in rural areas, etc) have happened, the key characteristic of the current boundaries is that there are ethnic majorities in almost all the 47 counties.²⁴ Furthermore, many of the counties have the names of the dominant ethnic communities. However, and as discussed or noted above, the decision to adopt the 47 counties and the naming has little to do with a deliberate policy choice to pursue pluralism in the structuring of devolved units in Kenya. Rather, it appeared to be a pragmatic choice by the CoE, which has an inevitable impact on recognition and accommodation of ethnic diversity.

While the vast majority of the 47 county governments contain an ethnic majority, a number of other observations can be made on the impact of the structure on recognition and accommodation of ethnic diversity. First, the 47 county governments have ensured a split of the

²² Karuti Kanyinga 'Devolution and the new politics of development in Kenya' *African Studies Review* (59) (3) 155-167, 158.

²³ Final Report of the Committee of Experts (2010) 92.

²⁴ The two exceptions are Mombasa and Nairobi, which, due to their cosmopolitan nature, have no majority ethnic community.

large communities into more than one county. Each of the large communities (Kikuyu, Luo, Kalenjin, Kamba, and Luhya) are now found in several counties, as opposed to the former provinces which doubled up as the regional homelands of these large communities. Scholars have noted that creating several units (as opposed to home regions) for larger groups has “equalising” effect with the smaller groups. Roeder, for instance, argues that the fractionalisation of the three largest ethnic groups in Nigeria from three homelands to the current 36 states politically “weakened” the three communities.²⁵ In Kenya, the split of the larger ethnic communities denies the national politician a ready basis for mobilisation. The overall impact is that fragmentation of the larger and politically assertive ethnic communities has the effect of slowing down ethnic political mobilisation. This creates a more favourable condition to realise the pluralism envisaged in the Constitution, due to the space created for smaller and non-dominant communities.

Secondly, by creating “home counties” for smaller communities that had no home provinces, such as, the Kisii, Meru, the Embu, the Maasai, etc. the Constitution provides some sort of political accommodation. No presidential candidate has been elected or is likely to be elected as president from these communities in the near future. The control of devolved powers and resources ensures that some form of political accommodation is facilitated to these communities at the county level, thereby promoting pluralism

However, not all ethnic communities had a chance to get a home county. There are ethnic communities that are now minorities within the 47 county governments. These include communities such as: the Kuria in Migori, the Teso in Busia, the Sabaot in Bungoma County, among other county ethnic minorities. Nyabira and Ayele place the number of intra-county ethnic minorities at 27 out of the 43 major ethnic communities.²⁶ Furthermore, there are communities that are either “migrant communities” in other counties or have become minorities in a county due to mixed ethnic settlements, such as the Maasai in Laikipia and Nakuru Counties.

Other minorities include non-indigenous communities in Kenya (such as Kenyan Asians, Kenyan Americans, and Kenyan Europeans) who have no home county and are spread out in the country (mainly in urban areas). Accordingly, the 47 counties have to ensure recognition and accommodation of these smaller communities. Under the Bomas Draft, which had 74 district governments, most of the larger ethnic minorities had a district of their own but these units were removed

²⁵ Roeder PG ‘Ethnofederalism and the mismanagement of conflicting nationalisms’ Erk J & Anderson LM (eds) *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?* (2010) 25.

²⁶ BC Nyabira & Z Ayele ‘The state of political inclusion of ethnic communities under Kenya’s devolved system of government’ (2016) 20 *Law Development and Democracy* 131-153.

when the regional level was abolished and replaced by the 47 counties.

Two things are clear from the general structure of the devolved system of government in the Constitution, and especially the number, size and composition of the current devolved units. First, while Kenya's ethnic communities generally (with few exceptions) conform to ethnic boundaries, there was no express intention to create an ethnic-based system of self-rule system (such as Ethiopia). Secondly, constitutional objectives of devolved governance call for recognition and accommodation of diversity.

However, the fact that ethnic boundaries coincide with ethnic boundaries already provides ground for the practice of ethnic exclusion. Indeed, there are counties whose names are adapted from the name of the dominant ethnic community.²⁷ Counties, therefore, have to make a deliberate and explicit effort to pursue policies of inclusiveness so as to move away from the structural factors (names and boundaries of counties) that seem to facilitate ethnic exclusion.

4. Implementation of devolution and pluralism

It is clear that while the Constitution sets the pace for diversity in all aspects of constitutional governance, the constitutional provisions are set against a tradition of socio-economic and political exclusion along ethnic lines. Accordingly, the realisation of pluralism objectives in the Constitution is dependent on specific measures taken to depart from previous practice and implementing the letter and spirit of the Constitution. At the county level, there are a number of processes that can be analysed to test whether counties or the country in general is moving closer to or further from the pluralism objectives stated in the Constitution. This part examines the specific implementation processes.

County elections and pluralism

County government administrative and representative structures provide an appropriate avenue through which the county's diversity can be represented. The composition of the county assembly should represent the diversity of a county's populace. This is the reason why the Constitution and enabling legislation provide for not only members of the assembly elected by the assembly, but also other special members representing members and groups in the county that may not make it through popular election or representation. The electoral system is indeed "the most powerful lever of constitutional

²⁷ Kisii, Embu, Meru, etc.

engineering for accommodation and harmony in severely divided societies”.²⁸

The ideal electoral system is one that can faithfully translate an electorate’s diversity (or voting groups) to the proportionate seats in the representative assembly. Scholars recommend the Proportional Representation (PR) system of elections as one which can do this, and thus, suitable for societies pursuing pluralism in politics.²⁹ This system is usually contrasted with the majority system where the candidate with most votes, which are cast in single member constituencies, wins the seat. The PR system has two further types or variants. The first is the list PR system (where parties present lists of candidates in the order of priority for election). Votes are then cast for parties, rather than candidates, and each party is allocated elective seats from their lists in accordance with the proportion of votes won.³⁰ The second main variant is the Mixed Member PR system (MMPR) that combines PR and majoritarian features. Some seats are elected through majority, whereas others are allocated to parties.³¹

Kenya’s system is majoritarian. Ward representatives in counties are elected through majority of votes cast at the ward level. While the Constitution refers to the method of choosing special seats as PR, it is not similar to the well-known PR systems.³² Political parties are usually asked to submit lists in the different categories (women representatives, youth, minorities, etc.) before the election like in other PR systems. However, instead of determining the list members through votes cast, the list members are determined through the seats won by parties through the ward elections. This means that the most popular political party in a county (whose ward candidates have won elections) will have its list members selected to the county assembly in the proportion of seats won. Accordingly, instead of enhancing proportionality, this method of choosing list members produces further disproportionality instead of curing it.

Kenya’s electoral system, especially at the county level, is inherently inimical to pluralism. The county governor (with the deputy governor as a running mate) is elected without any requirement of a margin of votes. The MCAs are also elected through wards and lists (as explained above) in a process that favours majority groups. The end result is that the composition of county assemblies and the county governor usually reflect the county majority groups. In the 2013 general election, the political parties that are presumably supported

²⁸ Reilly B *Democracy in Divided Societies: Electoral Engineering in Divided Societies* (2004) 20.

²⁹ Oloo (2011) 3.

³⁰ Reilly (2004) 18.

³¹ Reilly (2004) 18.

³² Oloo A ‘Elections, representations and the new Constitution’ Society for International Development (SID) Constitution Working Paper No. 7 (2011) 3.

by the five largest ethnic communities in Kenya won 1074 of the 1450 ward seats that were up for election³³ which represents 74 percent of the total ward seats. Smaller parties shared the rest of the seats. While this is an aggregated result, it still shows the general trend that dominant parties and communities within counties secured a vast majority of county seats. Non-dominant political parties (and independent candidates) were left to share the remaining 26 percent of county assembly ward seats. Cottrell and Ghai who also carried out an analysis of the county elections in 2013 also arrived at the same conclusion; that the major parties took the lion share of the county assembly seats.³⁴

It is not possible to ascertain the ethnicity of all elected MCAs in the country due to the lack of disaggregated information. However, there are a number of positive points based on a general observation of the trends. First, the “home counties” of some of the ethnic minorities (at the national level) such as Turkana, Samburu, Isiolo County, Lamu, and Tana River counties, etc. These counties contain communities who are considered ethnic minorities and generally fall under the marginalised communities. The county system has, thus, provided an avenue for representation and inclusion of a number of communities at the periphery. However, across the country there are also intra-county minorities who may have been overshadowed by the county-based majorities.

Furthermore, the IEBC, which is tasked with demarcating ward boundaries, did not consider minority groups and marginalised groups in ward demarcation. In its report on boundary demarcation, the IEBC noted “boundaries delimitation does not resolve issues regarding representation of marginalised groups”³⁵ and called for other means (other than boundary delimitation) to accommodate minorities and marginalised groups. This is not entirely true. While it is difficult to enhance representation of minorities and marginalised groups, especially those who are dispersed within larger or dominant voter groups, it is possible to accommodate geographically concentrated groups.

The Elections Act provides for special representatives from marginalised groups and minorities in county assemblies,³⁶ however, the lack of clear criteria for identification of these communities has

³³ BC Nyabira & ZA Ayele ‘The state of political inclusion of ethnic communities under Kenya’s devolved system’ *Law Democracy and Development* (20) (2016) 131-153, 146.

³⁴ Jill Cottrell and Yash Pal Ghai ‘Ethnicity, nationhood and pluralism’ in Yash Pal Ghai & Jill Cottrell Ghai (eds) (2013) *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives* (Global Centre for Pluralism and Katiba Institute, Ottawa and Nairobi, 2013).

³⁵ The Revised Preliminary Report of the Proposed Boundaries of Constituencies and Wards (Vol. 1) 9 February 2012, 27.

³⁶ Article 100 provides that parliament should enact legislation to provide for representation of marginalized communities in parliament, and the Elections Act enables this section.

posed a major challenge. Before the March 2013 general election, political parties nominated names under various sections of marginalisation. However, the names appeared to be more random than well thought out. Indeed, in many of the counties, the category of marginalisation was not indicated. The IEBC report on the filling of special county assembly seats did not have clear categories or areas of marginalisation that they were being nominated under.³⁷ Furthermore, there was a conflict between two laws, the County Governments Act³⁸ and the Elections Act,³⁹ which placed special representatives of the counties at 6 and 4 respectively. The IEBC chose to go with the Elections Act and nominate 4 representatives.

Pluralism in county institutions

The pluralism objectives in the Constitution require that county institutions should reflect the community diversities in the county within their respective institutions. The Constitution envisages that all counties will have a county public service⁴⁰ and the County Government Act, which is the enabling legislation, requires each county to have a public service.⁴¹ There are a number of provisions that require diversity in the public service. The governor is expected to adhere to diversity requirements when nominating persons to the county executive committee.⁴² Where a governor does not adhere to such a criteria, the county assembly, which has the power to approve nominations, may reject such nomination.⁴³

Due to the lack of ethnically disaggregated data of county executives, it is not possible to know the exact ethnic composition of county executives. However, Burbidge has carried out an analysis of county executives (using the names of the county executives who served in the 2013-2017 term of office) and the 2009 population census data.⁴⁴ In his analysis of the 491 county executives, he found that there was an average of 84 percent representation of dominant ethnic communities in the county executive.⁴⁵ In 25 of the counties, which is over half of all counties in the country, the composition of county executives was ethnically homogenous, meaning that in 25 counties out of the 47 counties, county executives are from the same ethnic community.⁴⁶

³⁷ See Kenya Gazette Notice No, 9794 'Members nominated to county assembly wards'

³⁸ Section 7 (1) (a) of the County Governments Act.

³⁹ Section 36 (8) Elections Act (2011).

⁴⁰ Article 234 (2) (i) Constitution of Kenya 2010.

⁴¹ Section 56, County Governments Act

⁴² Article 35 (1) (a) County Governments Act.

⁴³ Article 35 (2) (c) County Governments Act

⁴⁴ Burbidge D 'Democracy versus diversity': ethnic representation in a devolved Kenya' (2020) 20.

⁴⁵ As above.

⁴⁶ As above.

Furthermore, the County Governments Act provides the county public service, which is in charge of establishing offices and hiring county public service, should ensure that at least 30 percent of all county positions in the county public service are reserved for communities from outside the county.⁴⁷ This is one of the provisions that seek to ensure that counties do not transform into exclusive ethnic enclaves as a result of the current composition of a majority of the counties. There is little doubt that where inclusion is pursued in such a manner, counties may become a means through which pluralism and ethnic accommodation are achieved.

The National Cohesion and Integration Act, which applies to all public institutions generally including the counties, also provides that no public institution (which includes a county government) should have more than one third of its employees from the same ethnic community.⁴⁸ These two provisions seek to ensure a balanced representation in the county governments.

A survey done by the National Cohesion and Integration Commission (NCIC) in 2016 on recruitment patterns of county public service boards from 2013 shows that a majority of the counties are far off the statutory mark.⁴⁹ In the report, the NCIC observe that only 15 out of the 47 county governments have ensured that at least 30 percent of vacancies in the county public service are given to persons from communities that are not dominant in the county.⁵⁰ On the other hand, 68.1 percent of county governments, representing more than half of the 47 counties, have more than 70 percent of their county government workforce from one community (usually the dominant one in the county). In a general pattern observed by the NCIC, counties with more multi-ethnic composition were found to have complied more with these rules than counties with a largely homogenous ethnic composition.⁵¹

Indeed, the NCIC observed that exclusion was highest in counties that had names that corresponded with the name of the dominant ethnic communities. Counties such as Embu, Kisii, Samburu, Tharaka Nithi, Nandi, Turkana, West Pokot, Embu, and Meru, named after the dominant ethnic communities, all had more than 90 percent of their county public service from the dominant community.⁵²

While county governance is seen as the means through which pluralism can be enhanced or pursued, the findings above demonstrate that devolution can easily replicate or even worsen the

⁴⁷ Section 65 (1) (e) County Governments Act.

⁴⁸ Section 7 (2) National cohesion and integration Act.

⁴⁹ References

⁵⁰ NCIC 'Ethnic and Diversity Audit of the County Public Service' (2016) 26.

⁵¹ As above

⁵² As above.

exclusion. The centre, in most cases, has a lot more attention and scrutiny of various than the local levels. Furthermore, the discrimination by “an immediate neighbour” is far more real and felt by minorities than the discrimination from the capital. It is for this reason that emphasis on inclusion is equal, if not of more importance, at the county level.

It is also evident that urbanisation or other factors that create a melting pot of ethnicity provide a good ground for enhancing county pluralism. The findings from the NCIC show that counties with mixed ethnicity (as a result of inter-county migration and settlement) were much better at ensuring ethnic balance than the mono-ethnic counties. If these findings are anything to go by, multi-ethnic counties, and factors that create this can provide a basis for enhancing the promotion of pluralism at the county level.

Sharing of public resources and services

The grievances that underlie exclusion in Kenya often overlap with resources and development. This, as observed by many scholars, is the reason why presidential contests are, in reality, ethnic contests. A partial cure to this perennial challenge is fair redistribution and distribution of resources nationally and within the counties. The general and specific provisions in the Constitution are cognisant of this fact as they seek to provide for fair distribution of resources, with a careful regard to the previous economic marginalisation.

The constitutional principles regarding public finance call for a fair and equitable tax system, equitable distribution of revenue raised nationally among counties, promote equitable development (including affirmative action measures for marginalise people/ areas), and even equity between generations.⁵³ Where possible, national government should, for purposes of ensuring equity, supplement counties with conditional grants.⁵⁴ These principles that are specific to the management of the country’s public resources resonate with the general national principles of governance under Article 10, which require equity, social justice, inclusiveness, equality, among other principles.

In order to achieve the above, the Constitution and enabling legislation put in place various measures. First, the Senate, which represents the counties at the national level, has a special power (which the National Assembly can only override vide a special majority) to set up the basis⁵⁵ for the division of resources between

⁵³Article 201 (b).

⁵⁴ Article 202 (2).

⁵⁵ Article 217 (5) (b).

counties and the actual division of resources amongst them.⁵⁶ The Senate debates and passes the County Allocation of Revenue Bill (CARB) which does the horizontal allocation of resources and the National Assembly needs a two-thirds majority in order to overturn this Bill.⁵⁷ The Constitution has also provided for the Equalisation Fund, whose role is to supplement the financing of specific areas in marginalised counties.⁵⁸

Secondly, the Constitution establishes the Commission on Revenue Allocation (CRA) to provide technical advice and input on the vertical and horizontal division of resources.⁵⁹ The rationale behind the creation of an independent and professional body was that an independent institution, other than a political arm, would ensure inclusivity and pluralism in the sharing of public resources. Indeed, the formula developed by the CRA to ensure equitable distribution has been described as highly redistributive.⁶⁰ The formula contains elements such as: population, geographical size, poverty levels, etc., which have a potential of having a redistributive effect across the country.⁶¹

Despite these measures in the Constitution and enabling legislation, there are a number of factors that limit pluralism in the country's public resources through the counties. First, the size of resources available to counties relative to the amount of resources that remains at the national level favour the latter. While the Constitution sets the minimum of resources to counties at 15 percent of revenue collected nationally, initial estimates demonstrated that this fraction of resources was not enough to cater for county needs.⁶² Accordingly, previous disbursements have seen counties receive an average of 20 percent of the revenue collected nationally.⁶³ The centre, thus, remains with a majority of the resources and can constitutionally justify retaining of up to 85 percent of all the resources. The effect of this is that it is the national level that retains the relative advantage, over counties, of ensuring economic inclusivity through macro-allocation of its resources.⁶⁴ Furthermore, while counties receive an average of 20 percent of sharable revenue, the overall county share, as

⁵⁶ Article 110 (2) (a) (ii).

⁵⁷ As above.

⁵⁸ Article 204.

⁵⁹ Article 216 (1).

⁶⁰ Jason Lakin & Robert Mudida 'The evolution of Kenya's revenue sharing formula 2012-2015' September 2015.

⁶¹ As above.

⁶² Special Focus: Kenya's Momentous Devolution (World Bank (Kenya) Economic Update 2011) 30-33.

⁶³ The average percentage of funds devolved to counties may vary depending on the base rate. When the value of the 'last audited accounts is used (which has a two-year lag), the percentage is almost double.

⁶⁴ Prud'homme R 'The dangers of decentralization' (1995) 10 *The World Bank Observer* 202.

a portion of total government revenue, shrinks to around 10-12 percent.⁶⁵

While the Constitution emphasises the aspect of equity, there are absolutely no explicit constitutional provisions to cater for intra-county equity in the expenditure and funding decisions of county governments. Counties are basically left with unfettered discretion, save for broad constitutional principles discussed above, on how to distribute resources at the county level. There are no national standards and guidelines on how to ensure that equity is pursued within counties. The end result is that where counties are not keen on how to distribute these resources, the constitutional goals of equity may not be actually achieved.

Elgeyo Marakwet County, for instance, has developed a formula for distributing resources. The Elgeyo Marakwet Equitable Development Act provides for a formula through which 60 percent of departmental budgets are to be allocated equally across all wards while the remaining 40 percent is to be shared equitably. The formula for distribution has the following parameters: population 38 percent, County Flagships Projects 23 percent, Poverty index 22 percent, Land area 8 percent, emergencies 5 percent, fiscal responsibility 5 percent, and arid and semi-arid areas 2 percent.⁶⁶ This is a county-based attempt to cure the deficiency of the general design that ignores dynamics within the county in the distribution of resources. Because of the lack of common criteria of ensuring equity within- the county there are no means of ascertaining whether counties are actually pursuing pluralism in the utilisation of their resources.

Finally, the lack of proper data and accurate population statistics is a hindrance to ensuring inclusivity. As has been already been indicated earlier in this paper, ethnically disaggregated data is abhorred, as a matter of unofficial government policy. Dicing up general data for purposes of planning and spending public resources equitably is not something that is institutionalised in Kenya. Accordingly, institutions at the national and county level do not seem to have reliable information to enable them to effectively pursue inclusive policies. For instance, in early 2017, the courts barred the CRA from using adjusted figures of three counties in the northern part of Kenya (Mandera, Garissa, and Wajir) since the figures which were adjusted downwards affected the overall county share from the revenue allocated nationally.⁶⁷ This case demonstrates the general lack of

⁶⁵ John Mutua, 'Highlights of budget 2016/ 17 analysis' Institute of Economic Affairs <http://www.ieakenya.or.ke/publications/presentations>

⁶⁶ John Kinuthia and Jason Lakin 'Sharing public resources within counties: How fair are emerging approaches? International Budget Partnership (August 2016).

⁶⁷ *County government of Mandera and 2 others v Commission on Revenue Allocation and 4 others*, High Court of Kenya, Constitutional and Human Rights Division, Petition 514 of 2016.

accurate population statistics upon which national and county planning can be done.

County service delivery and pluralism

Inequitable access to services and development, perceived in ethno-geographic terms, is a major factor that underlies real or perceived grievances, of ethnic exclusion. Inclusiveness and diversity can be enhanced if the perceptions and actual grievances related to socio-economic services and development are addressed. The objectives of devolution include enhancing access to basic services and the participation of the people (to identify and prioritise those needs). Indeed, even the principles of national governance in the Constitution call for equity, social justice and sustainable development, among other objectives that are geared to ensuring collective social well and development of all the people in Kenya.

The Fourth Schedule to the Constitution, which lists national and county functions, allocates functions to counties that have a potential to address the inequity in access to basic services. Counties have power to offers services such as healthcare, agricultural services, transport and public works, county planning, water services, pre-primary education and technical/ vocational training, among other services.⁶⁸ The 47 county governments are spread out across the country, including the areas where these services were not available as a result of deliberate policies of regional exclusion.

However, the transition to county governance has not been managed well. Counties (and the national government) are not yet clear on the full extent of their functions. Crucial laws and policies are yet to be put in place in areas such as health and this has brought uncertainty. In 2017, a health crisis that precipitated a 100-day strike by medical doctors, for instance, can be traced to the mishandled transition in the sector.⁶⁹ The national government is still holding on to resources and powers that would otherwise have been devolved to the county governments.⁷⁰

Despite the challenges related to transition, there is some anecdotal evidence that counties have improved access to some essential services. In some the traditionally marginalised areas, there is visible development and improved service delivery. These include: the first tarmac road in Mandera County to the North of Kenya and the first

⁶⁸ Fourth Schedule, Constitution of Kenya 2010.

⁶⁹ Kenya Health Sector: Opportunities for the Dutch Life Sciences and Health Sector (Ministry of Foreign Affairs, Netherlands)
https://www.rvo.nl/sites/default/files/2016/10/2016_Kenyan_Healthcare_Sector_Report_Compleet.pdf

⁷⁰ Conrad M. Bosire 'Concurrency in the 2010 Kenya Constitution in Nico Steytler (ed) Concurrent powers in federal systems (2016) 261-278.

delivery by caesarean section in the same county. Such improvements have a potential to gradually address perceptions of exclusion from development and access to services. Indeed, there are reports that such development projects have led to a feeling of more “Kenyaness” by people from a region, which for a long time was marginalised with the residents not feeling as part of Kenya. However, it is also true that it will take a much longer time to have an impact in terms of improved health standards and living conditions of the people in previously excluded or marginalised areas.

National level diversity: Ethnic or county-based diversity?

Beyond county-based governance processes discussed above, inclusiveness at the national level plays an important role in complementing county-level inclusion. The Constitution provides, for instance, that the cabinet should reflect the “regional and ethnic diversity” of the people of this country.⁷¹ Could the counties provide a basis for ensuring that there is diversity in national institutions? There is no doubt that Kenya did not explicitly choose to organise its national and local institutions along ethnicity (as is the case in Ethiopia, for instance). If this were the case, the larger ethnic communities (Kikuyu, Luo, Kalenjin, Luhya, Kamba), and even some of the medium sized ones (Somali, Kisii, Maasai) would have been in one home county. Instead, these communities are in several counties, some of which have contiguous boundaries.

It is also obvious that the term “regional and ethnic diversity” meant something more than the counties. Put differently, pursuit of regional and ethnic diversity through county-based policies may not necessarily satisfy this constitutional requirement. Indeed, previous exclusion practices at the centre were based more on ethnic exclusion than other grounds. However, it is also possible to achieve ethnic and regional diversity at the national level through counties. Apart from representing county interests at the national level, the Senate, for instance, has a potential to reflect diversity. Voters elect the senators from the counties and since county boundaries generally coincide with ethnic boundaries, the Senate can ensure ethnic diversity.

Despite this potential, the Senate has design flaws that inhibit the effective pursuit of pluralism. First, while most of the ethnic groups can be represented in the Senate through the direct election of senators, not all communities can be sure of a senator. In the absence of any special arrangements, and in the context of the ethnicised Kenyan politics, the intra-county minorities may not have a representation in the Senate. For example, the Kuria community in

⁷¹ Article 130 (2) of the Constitution.

Migori were only able to have an elected senator after a pre-election pact with the majority Luo community.⁷² Secondly, while the Senate provides for special representatives, the emphasis is on other marginalised sectors of the society, such as, women, the youth, and persons with disability. Ethnic minorities or marginalised communities are not guaranteed representation in the Kenyan Senate.

Therefore, unless a person from these communities is either elected or nominated into party lists of the other categories, there is no guarantee that ethnic inclusion can currently be achieved through special representation in the Senate. On the contrary, the National Assembly has 12 slots for nomination and the criteria for choosing representatives are fairly flexible. However, the 12 positions vis-à-vis a house whose total membership is 349 is insignificant. Some of the nominated members of the National Assembly⁷³ and the Senate⁷⁴ come from ethnic (national) minorities although the majority political parties nominate them.

The Senate is a relevant institution at the national level since it represents the county level. Other papers in this series have dealt with pluralism in other national institutions and agencies. However, it is clear that not much thought went into the design of the Senate as an institution that is to reflect ethnic diversity at the national level. Yet, given its functions, and the role that is given to second chambers in multi-ethnic societies, the design and composition of the Senate should, more than any other public institution at the national level, have sought to ensure accommodation of all ethnic communities, especially the ethnic minorities.

Court decisions pluralism in county governance

The courts have had occasion to consider pluralism in county governance. However, while pluralism represents multiple aspects, almost all matters that have been litigated before courts of law relate to appointments to county positions. The Constitution and enabling legislation, as mentioned earlier, requires the county public service and institutions at the county level to reflect the communal diversity at the county level. A number of cases have been brought to the court to challenge appointments to the county executive committee, the county public service board, and key positions at the county administrative level.

⁷² Conrad M. Bosire 'Concurrency in the 2010 Kenya Constitution in Nico Steytler (ed) Concurrent powers in federal systems (2016) 261-278.

⁷³ E.g. Sonia Birdi and Sarah Korere are from the Kenyan Asian and Samburu communities (minority communities)

⁷⁴ For example Senator Naisula Lesuuda, also from the Samburu Community.

The response of the courts to these cases is varied. In a few of the cases, the courts have agreed with petitioners' concerns regarding the lack of inclusivity in appointments. However, there are other cases where the courts have dismissed such petitions on various grounds.

In Bungoma County, petitioners belonging to the Bongomek Community, a minority ethnic community in the county, petitioned the court to nullify the appointment of chief directors in the county departments.⁷⁵ The court agreed with the petitioners after reviewing the appointment process. There are about five major communities in Bungoma County and all,⁷⁶ but the Bongomek, are represented in the county executive committee. The Court noted that the appointments panel needed to consider inclusion of the Bongomek Community. During the recruitment process, the appointments panel shifted candidates between different positions and theas petitioners found themselves being interviewed for positions other than those that they had applied for.⁷⁷ The Court held that this Act put the petitioners at a further disadvantage.

In another case in Migori County, the court declared the County had a duty to ensure the other communities in the county (Gusii and Somalia) are included in any recruitment.⁷⁸ The petitioners demonstrated to the court, using the number and ethnic composition of county executives and chief directors, that members of the Luo and Kuria communities who are the majority were disproportionately represented in key positions. However, the Court did not annul any appointments but instead issued a general declaration that the county government should adhere to diversity requirements in subsequent recruitments.⁷⁹

In one case involving Laikipia County,⁸⁰ the petitioner asked the court to stop the county executive from starting operations because the Samburu Community, a minority community in the county, was not represented. The petitioner argued that original Samburu nominee was substituted with a Maasai and that the Samburu community was still not represented. However, the court dismissed the petition on grounds that the nominee whose position was being challenged was

⁷⁵ *John Mining Temoi and Another v Governor of Bungoma County and 3 others* (2014) eKLR.

⁷⁶ The other four communities in the county are Bukusu, Tachoni, Bukura, Teso, and Sabaot.

⁷⁷ As above at para 46.

⁷⁸ *Benson Okero Magana and 12 others v County Public Service Board Migori County and 2 others* (2014) eKLR

⁷⁹ As above at para 53.

⁸⁰ *Mathew Lempurkel v Joshua Wakahora Irungu, Governor Laikipia County and 2 others* (2013) eKLR.

not enjoined in the suit. The Court, however, made an important statement regarding the criteria for ensuring diversity, the court noted thus:

... [H]owever hard the task the Constitution obligations remains that is to adopt a process that is rationally connected to meet the outcome of the diversity. Such a process does not demand a seat for each community nor does it require the use of mathematical precision to allocate seats. What is required is a process that shows that all these factors were taken into account and that the end product was rational in light of the Constitutional objectives. It is also important to recognise that the process of nomination, appointment and vetting is intended to ensure that Constitutional objectives are met. Each body along the process is supposed to consider the factors necessary to meet the Constitutional threshold for appointment. All these bodies have a margin of discretion in exercising their authority.⁸¹

In *Trans-Nzoia*, the High Court dismissed a similar petition on grounds that the petitioners had not proved that the minority communities in the county such as the Gusii had been left out of key county positions.⁸² The judge also noted that the complexity of sub-tribes made it more difficult to determine which communities (especially in the Luhya sub-tribe) had been left out. Furthermore, the judge was not sure whether the ethnic percentages of population that were presented by the petitioners were a true representation of the composition in the county.⁸³ The judge also noted that the petitioner had not applied for any position in the county and would therefore not claim any personal discrimination.

In *Nakuru*, the judge also dismissed a similar application as that made in *Trans-Nzoia*. The judge stated that the parties did not adduce evidence before the court on the ethnicity of the officers appointed to key positions in the county. The petitioners had also alleged lack of regional balance (between wards in Nakuru) but the judge noted that there was no evidence to support the allegations of discrimination on the basis of wards. More importantly, the judge adopted the reasoning in the *Laikipia Case* above that there was no proper basis of ascertaining the ethnic composition.

In all of the judgments above, it is clear that courts faced a similar challenge, which is, the uncertainty in the law and policy on who exactly is a minority (including the identity of an individual) in a county and how such inclusion can be achieved. In one case, for

⁸¹ As above at para 10-11.

⁸² *Joel Onsare v Governor, Trans-Nzoia County and others* (2015) eKLR.

⁸³ As above at para 36-37.

instance, the Court dismissed the petition because the petitioners had not proved whether they had applied for positions in the county.⁸⁴ Yet, there is no constitutional requirement that one should have applied for a position in order to challenge lack of inclusiveness policies. The standards of assessing whether a policy of inclusiveness has been achieved are lacking and this has impeded the effective enforcement of this principle by the courts. While the Constitution has defined terms such as “marginalised groups” and “marginalised communities”, there are no useful and specific criteria against which concrete disputes, such as those of county appointments, can be tested.

It appears, after a review of the court decisions, that the county context, rather than uniform definitions, is key in determining whether there is inclusiveness or pluralism at the county level. Ethnic composition, population size, number of positions available varies from one county to the next. Accordingly, it is important that there is critical guidance on how to apply general principles of diversity while facilitating the necessary flexibility to take into account the county context.

5. Conclusion

A review of the text of the Constitution and the implementation processes leads one to conclude that Kenya’s devolved governance (both the design of the system and the implementation) has largely paid “lip-service” to the pluralism objectives of the system. Starting with the structures and institutions, there is no serious commitment to developing institutions that have a character of pluralism. While the faults in the institutional and structural design could have been partially cured through the pursuit of policies that are truly supportive of pluralism, the emerging practice within the counties reveals a lack of attention to the goals of pluralism.

To start with, the Constitution requires counties and policies surrounding county governance to ensure the pursuit of diversity. However, the electoral system is majoritarian and favours the representation of dominant communities at the expense of minority groups. There has been no serious effort to break down and further understand terms such as “minorities”, which are very important in terms of understanding groups that require special measures of protection. Indeed, while the Kenya society is ethnically deeply divided, the official policies have been blind to this reality. Measures such as those of the NCIC that are geared towards getting ethnically disaggregated information for legitimate purposes such as planning are, as a matter of general policy, frowned upon. This may explain

⁸⁴ As above at para 36.

why careful attention was not given to vital institutional design processes such as the electoral system.

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