



Research paper

# The Constitutional Eschatology of Decentralization in Kenya: Exploring Federalism's Role in Shaping the Future of Devolution and Regional Autonomy

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## ABSTRACT

This research examines Kenya's governance evolution from centralization to decentralization, focusing on the implementation of devolution following the 2010 Constitution and exploring federalism as a potential future trajectory. The study analyzes the successes, challenges, and limitations of the current devolved system in achieving equitable development and improved governance. It traces Kenya's governance structures from pre-colonial times through the present, employing a multidisciplinary approach to assess the impact of recent reforms on historical injustices, resource distribution, and public participation. The research also delves into the ongoing debate surrounding federalism in Kenya, examining how federal structures could potentially manage diversity, resolve conflicts, and promote national unity. Through synthesis of diverse theoretical frameworks and empirical evidence, this study contributes to the discourse on decentralization in Africa and offers insights for policymakers considering constitutional reforms to address Kenya's complex socio-political landscape and development needs.

## 1. Introduction

The evolution of governance systems in Kenya has been a complex journey, marked by shifts between centralization and decentralization, reflecting the nation's quest for an effective and equitable form of administration. This study, "The Constitutional Eschatology of Decentralization in Kenya: Exploring Federalism's Role in Shaping the Future of Devolution and Regional Autonomy," delves into the intricate tapestry of Kenya's governance structures, with a particular focus on the transformative impact of the 2010 Constitution and its devolution provisions. Kenya's transition from a highly centralized post-colonial state to a devolved system of governance represents a significant paradigm shift in the country's political landscape. The



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2010 Constitution, hailed as one of the most progressive in Africa, introduced a comprehensive framework for devolution, aiming to address historical injustices, promote equitable resource distribution, and enhances public participation in governance (Bosire, 2013). This constitutional reform has set Kenya on a path that potentially intersects with federalist principles, raising questions about the future trajectory of its governance structure.

The concept of devolution in Kenya must be understood within the broader context of decentralization theories and practices globally. Scholars like Rondinelli et al. (1983) have long argued that decentralization can lead to more efficient and responsive governance. However, the implementation of such systems is often fraught with challenges, as evidenced by Kenya's experience since 2013 when county governments were established (Cheeseman et al., 2016). This study aimed to critically examine the implementation of devolution in Kenya, comparing it with federal systems and other forms of decentralized governance. Through analyzing the historical context, constitutional provisions, implementation challenges, ethnic dynamics, and fiscal implications, the study sought to provide a comprehensive assessment of Kenya's devolved system. Furthermore, this research will explore potential future scenarios for Kenya's governance structure, including the prospects of a federal system and its implications for national cohesion and development.

The relevance of this study extends beyond Kenya's borders, offering insights into the broader discourse on decentralization in Africa and other developing nations. As countries grapple with questions of governance, resource distribution, and ethnic diversity, Kenya's experience with devolution provides valuable lessons and points of reflection (Fessha & Kirkby, 2008). Through employing a multidisciplinary approach, drawing from public administration political science, constitutional law, economics, and sociology, this research aimed to contribute to the growing body of literature on decentralization and federalism in Africa. It will engage with seminal works such as Lijphart's (1999) theories on consociational democracy and Elazar's (1987) explorations of federalism, while also incorporating more recent scholarship on African governance systems. As Kenya continues to navigate the complexities of its devolved system, this study seeks to provide a nuanced understanding of the challenges and opportunities that lie ahead. Through examining the constitutional eschatology of decentralization, the study hope to offer insights that can inform policy decisions, academic discourse, and public understanding of Kenya's governance trajectory in the years to come.

## 2. Study Material and Methodology

The methodology for this study on the constitutional eschatology of decentralization in Kenya primarily involved a comprehensive literature review. This review encompassed scholarly articles, constitutional texts, legal commentaries, government reports, and academic books focusing on Kenya's devolution process, comparative federalism, and decentralization theories. The research employed a qualitative content analysis approach to systematically evaluate and synthesize the collected data. To underpin the study, the research utilized the theory of constitutional evolutionism, which posits that constitutions and governance structures evolve over time in response to societal changes and political pressures. This theory was complemented by the concept of institutional isomorphism, which explains how institutions tend to adopt similar structures and practices over time. Together, these theoretical frameworks provided a lens through which to analyze the potential future trajectories of Kenya's devolved system and its relationship to federalist principles. The methodology also incorporated a comparative analysis component, examining case studies of federal and decentralized systems in other countries to contextualize Kenya's experience and potential future developments.

## 3. Study Questions

This research endeavor's efficacy will be evaluated based on its capacity to provide comprehensive and nuanced responses to the following inquiries. These research questions are meticulously crafted to reflect the multidisciplinary approach delineated in the introduction, encompassing diverse facets of public administration, political science, constitutional law, economics, and sociology. The questions are contextually anchored within the framework of Kenya's devolved governance system, aiming to elucidate the complex interplay between theoretical constructs and practical implementations. The questions include:

- i. How has Kenya's governance system evolved from pre-colonial times to the current devolved structure under the 2010 Constitution?
- ii. What challenges has Kenya faced in implementing its devolved system of governance since 2013?
- iii. What are the potential future scenarios for Kenya's governance structure, including the possibility of further decentralization or a shift towards a federal system?

#### **4. Historical Context of Centralization and Decentralization in Kenya**

The historical context of centralization and decentralization in Kenya offers a crucial backdrop for understanding the current devolved system of governance. This section aims to provide a comprehensive overview of the evolution of Kenya's governance structures, tracing the trajectory from pre-colonial times through the colonial era and into the post-independence period. Through examining this historical continuum, the study can discern the factors that have shaped Kenya's approach to governance, the challenges that have persisted, and the impetus behind the push for decentralization. This historical analysis is essential for contextualizing the current devolution framework and for evaluating its potential to address longstanding issues of governance, resource distribution, and regional autonomy. Through this exploration, the study seeks to illuminate the complex interplay between centralized authority and local governance that has characterized Kenya's political landscape, providing a foundation for understanding the significance of the 2010 Constitution's devolution provisions.

##### **4.1 Pre-Colonial Governance Structures**

The pre-colonial governance structures in Kenya were diverse and complex, reflecting the various ethnic groups and communities that inhabited the region. These structures ranged from centralized monarchies to decentralized systems based on age-sets and clan leadership. To understand these governance systems, it's essential to examine some of the major ethnic groups and their political organizations.

The Kikuyu, one of the largest ethnic groups in Kenya, had a decentralized system of governance based on a generational structure called the Githaka system. This system divided society into age-sets, with each set having specific roles and responsibilities (Kenyatta, 1938; Lonsdale, 1968). The Githaka system was centered on land ownership and use, with each family unit (mbari) having rights to cultivate and inhabit specific areas. Age-sets played crucial roles in this structure, with younger sets responsible for community defense and labor, while older sets took on leadership and advisory roles. Holzinger, Kern, & Kromrey (2017) underscore that the pre-colonial organization of the nine Kikuyu clans was non-hierarchical, with age-sets and lineages forming the basis of social organization at the sub-clan level. When social issues arose, ad-hoc clan councils and committees were convened to address them, demonstrating the flexibility of the system. The council of elders, known as the Kiama, played a crucial role in decision-making and conflict resolution. The Kikuyu governance structure was characterized by its egalitarian nature and the absence of a centralized authority (Muriuki, 1969). Importantly, the concept of centralized, hierarchical rule was foreign to the Kikuyu and was only introduced with the arrival of the British colonial administration.

In contrast, the Wanga kingdom of Western Kenya had a more centralized system of governance. This kingdom (formed by the Abawanga, a subgroup of the Luhya) developed a centralized, monarchical system of governance led by the Nabongo (king). The Nabongo, assisted by a council of elders, held authority over a hierarchical structure of chiefs and sub-chiefs, allowing for more efficient administration and resource mobilization (Osogo, 1966). During the British colonial period, the Wanga Kingdom's leader, Nabongo Mumia, was initially utilized within the system of "indirect rule" as a "paramount chief" overseeing several Abaluyia groups. However, this arrangement was abolished by the colonizers in the 1920s. In modern times, the Abawanga Kingdom has been re-organized with a portfolio for different members of the Wanga Council of Elders. The current structure remains hierarchical. According to Holzinger, Kern, & Kromrey (2017), the decision-making process involves the elders advising the king and voting on certain actions concerning the kingdom, with the king then making a final decision, typically following the majority. Despite some democratic elements in this process, the kingdom's autocratic structure still distinguishes it from state democracy,

highlighting the complex evolution of traditional governance systems in response to historical changes and modern influences.

The Maasai, renowned for their pastoral lifestyle, had a unique and complex governance structure based on age-sets and the institution of Laibons (spiritual leaders). The age-set system, known as "ol-porror," divided men into groups based on their age and initiation period, with each set having specific roles and responsibilities in society (Galaty, 1983). This system typically consisted of eight age-sets, each spanning about 15 years, creating a cyclical structure that governed Maasai life from youth to elderhood (Hodgson, 2001). Young warriors (Il-murran) were responsible for protecting the community and cattle, while elders held decision-making authority and settled disputes. Women, though not part of the formal age-set system, had their own age-grades and played crucial roles in household management and certain rituals (Spencer, 2004). The Laibons, while primarily spiritual leaders, also wielded significant political influence and often acted as mediators in disputes (Waller, 1976). These hereditary prophets were believed to possess supernatural powers, including the ability to predict the future and control rainfall, which gave them considerable authority in decision-making processes, especially regarding warfare and resource allocation (Hughes, 2006). The interplay between the age-set system and the Laibon institution created a balanced governance structure that managed internal affairs and external relations, adapting to the challenges of their nomadic lifestyle and the harsh environments they inhabited (Sutton, 1993).

The coastal Swahili city-states, including Mombasa, Malindi, Lamu, and Pate, developed sophisticated governance structures influenced by Islamic traditions and extensive trade connections with the Arab world, Persia, and India. Typically ruled by Sultans or wealthy merchant families, these polities featured a complex system of advisors and Islamic courts (qadi) crucial for administration and justice (Harries, 1964). The Sultan's authority was balanced by powerful merchant families and religious leaders, creating an oligarchic rule (Horton & Middleton, 2000). The hierarchical structure placed the Sultan at the apex, followed by a council of elders (wazee), religious scholars (ulama), and administrative officials (Spear, 2000). Islamic law (Sharia) formed the legal foundation, with qadis presiding over courts that handled various issues from commerce to family matters (Bang, 2004). These city-states maintained sophisticated diplomatic systems for negotiations with neighboring polities and distant trading partners (Prestholdt, 2015). Trade guilds played a significant role in economic governance (Gilbert, 2004), while the cosmopolitan nature of these urban centers led to multicultural societies with adaptive governance structures (Pouwels & Pouwels, 1987). This system allowed the Swahili city-states to thrive as key nodes in the Indian Ocean trade network for centuries, balancing local traditions with international influences and adapting to changing circumstances (Pearson, 1998).

Among the Kalenjin communities, governance was based on a sophisticated system of clan leadership and age-sets, which provided a framework for social organization, political participation, and decision-making. Elders, known as 'Kiptaiyat' (singular) or 'Kiptaiyaik' (plural), played a crucial role in community leadership, resolving disputes, and guiding societal norms (Kipkorir, 1973). The age-set system called 'ibinda', divided men into groups based on their circumcision periods, typically occurring every 15 years, and assigned specific social and political responsibilities to each group (Peristiany, 1939). The Orkoiyot, a hereditary spiritual leader, held significant influence in both spiritual and political matters, often consulted for important decisions, blessings before warfare, and prophetic guidance (Chesaina, 1991). This spiritual leader was believed to possess supernatural powers, including the ability to predict the future and control natural phenomena (Sutton, 1976). The Kalenjin governance structure also incorporated a system of councils, known as 'Kokwet', which dealt with local issues and land management (Moore, 1986). Women, while not part of the formal age-set system, had their own organizations and played important roles in economic activities and certain rituals (Oboler, 1985). This intricate system of governance allowed for a balance of power between different social groups and ensured community cohesion, adapting to changing circumstances while maintaining cultural continuity (Lynch, 2014).

It's important to note that these pre-colonial governance structures were not static but evolved over time in response to internal and external pressures. Trade, warfare, and environmental factors all influenced the development and adaptation of these systems (Ogot, 1967). These systems adapted to trade influences, as seen in the Swahili city-states' complex administrative systems (Horton & Middleton, 2000), and security needs, exemplified by the Maasai and Kalenjin age-set systems (Galaty, 1983). Pastoral communities like the Maasai



developed flexible structures to manage seasonal migrations and resource allocation (Spencer, 2004), while inter-community interactions led to hybrid governance systems (Spear, 2000). The Kikuyu Githaka system evolved to address population growth and land pressure (Muriuki, 1969), and religious influences introduced new concepts of law and leadership (Pouwels & Pouwels, 1987). Technological changes necessitated governance adjustments (Sutton, 1993), and climate fluctuations prompted adaptations for efficient resource management during scarcity (Oboler, 1985). These factors demonstrate that pre-colonial governance systems in Kenya were sophisticated and adaptive, continuously evolving to meet changing community needs.

#### **4.2 Colonial Governance Structure in Kenya**

The colonial governance system in Kenya, established by the British Empire, was characterized by a hierarchical structure aimed at maintaining control over the territory and its resources. At the apex was the Governor, appointed by the British Crown, who wielded executive power (Berman, 1992). The system employed indirect rule, utilizing local chiefs as intermediaries between the colonial administration and the indigenous population, a strategy analyzed by Mahmood Mamdani (2018) in his study of colonial governance across Africa. This approach allowed for efficient control with limited British personnel. The administration divided the country into provinces and districts, each overseen by British officers, creating a centralized bureaucracy (Lonsdale, 1989).

This colonial centralization significantly shaped the country's political, economic, and social structures during the British colonial period. This process involved the consolidation of power and authority in the hands of the colonial administration, which had far-reaching consequences for the indigenous population and the post-independence nation. The British East Africa Protectorate, which later became Kenya, was established in 1895. From the outset, the colonial administration sought to centralize control over the territory to facilitate economic exploitation and political dominance. One of the key aspects of this centralization was the creation of a hierarchical administrative structure. According to historian John Lonsdale, this structure was designed to extend British authority from the coast to the interior, with a chain of command running from the Governor down to local chiefs (Lonsdale, 1989).

A crucial element of colonial centralization was the establishment of a system of indirect rule. This system, as described by Mahmood Mamdani in his seminal work "Citizen and Subject" (2018), involved co-opting traditional African leaders and creating new "chiefs" who would serve as intermediaries between the colonial government and the local population. This approach allowed the British to exercise control over vast areas with limited personnel while also fragmenting African political structures. It is clear then that this process of centralization was closely tied to the economic objectives of the colonial regime. The introduction of a cash economy, taxation, and land alienation were all part of a broader strategy to integrate Kenya into the global capitalist system. Bruce Berman, in his book "Control and Crisis in Colonial Kenya" (1992), argues that these economic policies were designed to create a centralized state apparatus capable of managing labor and resources for the benefit of the colonial power and European settlers.

One of the most significant aspects of colonial centralization was the creation of a uniform legal system. This involved the imposition of British common law alongside customary law, which was often reinterpreted and codified to suit colonial interests. Martin Chanock's work on the creation of customary law in Africa (1985) demonstrates how this legal centralization served to reinforce colonial authority and reshape African societies. This centralization process also had profound effects on African social and political organizations. Traditional systems of governance and land tenure were disrupted, and new forms of ethnic and territorial identities emerged. Bethwell Ogot, in his "History of the Southern Luo" (1967), provides insights into how colonial policies reshaped ethnic identities and power structures in Kenya. Besides, education played a crucial role in the centralization process. The colonial government established a centralized education system that aimed to produce African clerks and low-level administrators to support the colonial bureaucracy. This system, as analyzed by Education and Social Change in Sub-Saharan Africa" (1986), contributed to the creation of a new African elite that would later play a significant role in the independence movement and post-colonial governance. As such the centralization of power under colonial rule had lasting implications for post-independence Kenya.

As argued by Daniel Branch in "Kenya: Between Hope and Despair, 1963-2011" (2011), the centralized state structure inherited from the colonial period contributed to the concentration of power in the executive branch and the persistence of authoritarian tendencies in the post-colonial era. The centralization of power under colonial rule had lasting implications for post-independence Kenya. As argued by Daniel Branch in "Kenya: Between Hope and Despair, 1963-2011" (2011), the centralized state structure inherited from the colonial period contributed to the concentration of power in the executive branch and the persistence of authoritarian tendencies in the post-colonial era.

### ***4.3 Post-Independence Governance Structure in Kenya***

The post-independence governance structure in Kenya has undergone several significant changes since the country gained independence from British colonial rule in 1963. This discussion will focus on the key periods and transitions in Kenya's governance structure, highlighting important constitutional changes and political developments, with a particular emphasis on the evolution of decentralization efforts. From the initial federal-inspired "majimbo" system at independence to the highly centralized one-party state era, and ultimately to the devolved governance structure established by the 2010 Constitution, Kenya's journey towards decentralization has been complex and marked by political struggles. These shifts in power distribution between the central government and local authorities have profoundly shaped Kenya's governance landscape, influencing everything from resource allocation to ethnic relations and democratic participation.

### ***4.4 Governance Structure Immediately After Independence (1963-1978)***

After independence, Kenya adopted a Westminster-style parliamentary system with Jomo Kenyatta as its first Prime Minister. The country initially implemented a federal structure known as "majimbo," granting significant powers to regional governments. This system was introduced following the Lancaster House Constitutional Conference in 1962 (Juma & Arudo, 2016). Majimbo represented a compromise between competing political factions: the Kenya African Democratic Union (KADU) advocated for a decentralized system to protect minority interests, while the Kenya African National Union (KANU) favored a strong central government (Anderson, 2005). Under this structure, Kenya was divided into seven semi-autonomous regions, each with its own legislative assembly and public service (Ghai & McAuslan, 1970). This arrangement reflected the delicate balance between regional autonomy and national unity that characterized Kenya's early post-independence governance.

However, this federal structure was short-lived. KANU, led by Kenyatta, quickly moved to consolidate power at the center. By 1964, the regional assemblies had been effectively dismantled, and Kenya transitioned to a unitary state. This shift was formalized when the country became a republic on December 12, 1964, with Kenyatta assuming the role of President and head of state (Okoth-Ogendo, 1993). The move towards centralization was justified as necessary for national unity and development, but it also served to concentrate power in the hands of Kenyatta and his allies. During this period, Kenya initially operated under a multi-party system, with KANU and KADU as the main political parties. However, in 1964, KADU dissolved itself and its members joined KANU, effectively creating a one-party state (Throup & Hornsby, 1998). While other parties were not officially banned, KANU's dominance and the government's control over resources made genuine political competition increasingly difficult.

### ***4.5 Governance Structure During Single-Party Era (1978-1991)***

During this period, the country experienced a significant consolidation of power in the executive branch, a process that had begun under Jomo Kenyatta and intensified under his successor, Daniel arap Moi. Following Kenyatta's death in 1978, Moi assumed the presidency and further centralized authority. The pivotal moment came in 1982 when the constitution was amended to make Kenya a de jure one-party state, with the Kenya African National Union (KANU) as the sole legal political party (Branch, 2011). This era was characterized by a governance structure that heavily favored executive power, with limited checks and balances and restricted civil liberties. The president wielded extensive authority, including the ability to appoint and dismiss key government officials, control over resource allocation, and significant influence over the judiciary and civil

service (Hornsby, 2013). Constitutional amendments, such as the 1966 change requiring MPs who defected from KANU to seek re-election, effectively stifled political dissent and entrenched one-party rule (Widner, 2023).

The centralization of power exacerbated regional disparities and ethnic tensions, as development initiatives often favored areas supportive of the ruling elite (Barkan, 1984). This period also saw the rise of a patronage system, where political loyalty was rewarded with access to state resources and positions, further consolidating KANU's grip on power (Throup & Hornsby, 1998). The erosion of democratic institutions during this era had long-lasting effects on Kenya's governance. It established a pattern of executive dominance that would persist for decades, contributing to issues of corruption, ethnic favoritism, and political repression (Branch, 2011). However, this period also saw the seeds of future reform, as domestic and international pressure for democratic change began to build, eventually leading to the reintroduction of multi-party politics in 1991 and setting the stage for Kenya's ongoing struggle for democratic consolidation.

#### ***4.6 Governance Structure after the Return to Multi-Party Politics (1991-2002)***

Facing mounting domestic and international pressure, President Daniel arap Moi repealed Section 2A of the Kenyan Constitution in December 1991, effectively ending the one-party state and allowing for the reintroduction of multi-party politics (Murunga & Nasong'o, 2006). This marked a significant shift in Kenya's political landscape, though the overall governance structure remained largely unchanged, with the president retaining substantial powers.

The return to multi-party politics led to the emergence of several opposition parties, most notably the Forum for the Restoration of Democracy (FORD), which later split into FORD-Kenya and FORD-Asili (Kanyinga, 2013). Other significant parties included the Democratic Party (DP) led by Mwai Kibaki. Despite this newfound political pluralism, the Kenya African National Union (KANU) managed to maintain its hold on power through a combination of electoral manipulation, state resources, and divide-and-rule tactics (Throup & Hornsby, 1998). The 1992 and 1997 elections, while multi-party in nature, were marred by irregularities and violence. The opposition's inability to form a united front against KANU contributed to Moi's victories in both elections (Steeves, 2006). The government's control over the electoral process, including the Electoral Commission of Kenya (ECK), further tilted the playing field in favor of the incumbent regime (Barkan & Ng'ethe, 1998).

In 1992, the first multi-party election in over two decades was characterized by widespread ethnic violence, particularly in the Rift Valley, where KANU supporters targeted communities perceived to support the opposition (Human Rights Watch, 1993). This violence led to the displacement of thousands of potential opposition voters, effectively disenfranchising them. The opposition vote was split among three main candidates: Kenneth Matiba (FORD-Asili), Mwai Kibaki (Democratic Party), and Oginga Odinga (FORD-Kenya), allowing Moi to win with only 36.6% of the vote (Ajulu, 1998).

The 1997 election saw similar patterns of violence and manipulation. In the lead-up to the election, opposition parties and civil society groups pushed for minimal constitutional reforms, known as the Inter-Parties Parliamentary Group (IPPG) reforms. While these reforms slightly improved the electoral landscape, they were insufficient to level the playing field (Murunga & Nasong'o, 2006). KANU's abuse of state resources for campaign purposes, biased media coverage favoring the incumbent, and irregularities in voter registration further compromised the integrity of the election (Commonwealth Secretariat, 1993).

The ECK's lack of independence was a significant factor in both elections. Appointed by President Moi, the commission was seen as partisan and ineffective in managing a fair electoral process. Issues such as gerrymandering of constituencies, flawed voter registers, and the mishandling of election results undermined public confidence in the ECK (Foeken & Dietz, 2000). Moreover, the first-past-the-post electoral system allowed Moi to win with a plurality rather than a majority of votes, further highlighting the fragmentation of the opposition (Oyugi, 1997). The judiciary, though theoretically independent, remained under considerable executive influence. The president's power to appoint and dismiss judges compromised the courts' ability to act as an effective check on executive power (Mutua, 2001). This weakness in the separation of powers further entrenched the authoritarian nature of the regime, despite the facade of multi-party democracy.

The president continued to wield significant executive powers. The constitution granted the president authority to appoint and dismiss key government officials, including cabinet ministers, the attorney general, and judges (Okoth-Ogendo, 1993). This centralization of power allowed Moi to maintain control over state institutions and resources, often using them to reward loyalty and punish dissent. Local government structures that were established under the Local Government Act continued to operate but with limited autonomy. The central government through the Ministry of Local Government exercised significant control over local authorities, often interfering in their affairs and limiting their effectiveness in service delivery (Smoke, 2004). Despite these challenges, the return to multi-party politics did create some space for civil society organizations and the media to operate more freely. This period saw an increase in political discourse and critique of the government, although repression and intimidation of activists and journalists remained common (Press, 2012). Towards the end of this era, particularly in the late 1990s and early 2000s, there was growing momentum for constitutional reform. Civil society organizations, opposition parties, and some elements within KANU began pushing for changes to limit presidential powers and create a more balanced system of governance (Mutua, 2001).

#### ***4.7 Governance Structure during National Rainbow Coalition Era (2002-2007)***

The 2002 election marked a significant shift in Kenya's political landscape, with the opposition National Rainbow Coalition (NARC) defeating the Kenya African National Union (KANU) that had ruled since independence. Mwai Kibaki became president, promising constitutional reforms and improved governance (Murunga & Nasong'o, 2006). This transition was hailed as a new dawn for Kenyan democracy, with high expectations for substantial changes in the country's governance structure.

NARC was a broad coalition of opposition parties and former KANU members who had defected, united under the leadership of Mwai Kibaki. The coalition's victory was largely attributed to its promise of comprehensive constitutional reforms, economic revival, and fight against corruption (Khadiagala, 2010). The Memorandum of Understanding (MoU) signed by coalition partners included commitments to create the position of prime minister and to distribute cabinet positions equitably among coalition members (Steeves, 2006).

In the early years of the NARC government, there were some positive developments. The economy showed signs of recovery, with GDP growth increasing from 0.6% in 2002 to 7% in 2007 (World Bank, 2009). There were also initial efforts to combat corruption, including the appointment of John Githongo as the anti-corruption czar (Wrong & Williams, 2009). However, the promised comprehensive constitutional reform did not materialize during this period. The governance structure remained largely unchanged, with power still concentrated in the executive (Cheeseman, 2008). The draft constitution, known as the Bomas draft, which proposed significant changes to the governance structure, including the creation of a prime minister position, was substantially altered before being put to a referendum in 2005 (Kindiki, 2007). The modified draft constitution, which maintained a strong presidency, was rejected in the 2005 referendum. The failure to implement constitutional reforms meant that the president continued to wield extensive powers. Kibaki was criticized for reverting to the same centralized, patronage-based governance system that had characterized the Moi era (Branch & Cheeseman, 2009).

This defeat marked a significant setback for the reform agenda and led to a split within the NARC coalition. The Liberal Democratic Party (LDP) faction, led by Raila Odinga, which had supported the original Bomas draft, moved into opposition (Klopp, 2009). Local government structures continued to operate under the Local Government Act, but with limited autonomy and resources. The centralized nature of the government meant that local authorities remained largely dependent on the national government for funding and decision-making (Southall & Wood, 1996).

#### ***4.8 Post-2007 Election Crisis and Constitutional Reform***

The 2007 Kenyan general election and its aftermath marked a critical juncture in the country's political history, exposing deep-seated issues in its governance structure and catalyzing significant reforms. The elections, marred by widespread violence and allegations of fraud, resulted in a severe political crisis that threatened the



stability of the nation (Kanyinga & Long, 2012). This crisis underscored the urgent need for comprehensive constitutional reforms to address the underlying structural problems in Kenya's governance system.

In response to the crisis, the National Accord and Reconciliation Act of 2008 were enacted, establishing a power-sharing agreement between the incumbent President Mwai Kibaki and opposition leader Raila Odinga. This accord created the position of Prime Minister, held by Odinga, alongside the presidency (Cheeseman, 2008). While this arrangement was a temporary measure to restore stability, it set the stage for more far-reaching constitutional reforms. The constitutional reform process that followed was extensive and participatory. A Committee of Experts was appointed to draft a new constitution, drawing on previous reform efforts and extensive public consultations. The resulting document was passed by referendum in 2010, ushering in a new era of governance in Kenya (Kramon & Posner, 2011).

One of the most significant changes introduced by the 2010 Constitution was the devolution of power to 47 newly created counties. This shift from a centralized to a devolved system of governance aimed to address long-standing regional inequalities and bring government closer to the people. Each county is led by a governor and has its own assembly, with significant responsibilities in areas such as healthcare, agriculture, and local infrastructure (World Bank, 2012). The new constitution also introduced robust checks and balances within the government structure. It strengthened the separation of powers between the executive, legislature, and judiciary, and established independent commissions and offices to oversee various aspects of governance. These include the Independent Electoral and Boundaries Commission, the Ethics and Anti-Corruption Commission, and the Commission on Administrative Justice, among others (Ghai, 2014).

The executive structure was reformed, eliminating the position of Prime Minister and retaining a presidential system, but with more limitations on executive power. The president, while remaining both head of state and government, now faces more rigorous checks, including the need for parliamentary approval for key appointments (Okoth-Ogendo, 2000). Besides, legislative reforms included the establishment of a bicameral parliament, consisting of the National Assembly and the Senate. The Senate's primary role is to represent and protect the interests of the counties, providing a crucial link between the national and county governments in the devolved system (Cornell & D'Arcy, 2014). Further, the judiciary underwent significant reforms aimed at enhancing its independence and effectiveness. These included a more transparent process for appointing judges and the establishment of a Supreme Court as the highest court in the land. These changes were designed to strengthen the rule of law and increase public confidence in the judicial system (Ghai, 2011).

While the 2010 constitutional reforms have significantly reshaped Kenya's governance landscape, aiming to address long-standing issues of centralization, ethnic tensions, and abuse of power (Kramon & Posner, 2011), implementation has faced various challenges. Issues such as resource allocation to counties, political resistance to some reforms, and the slow pace of aligning existing laws with the new constitution have been ongoing concerns (Bosire, 2013). Moreover, some pre-existing issues like ethnic-based politics and corruption continue to influence governance, indicating that constitutional reform alone is not a panacea for all political challenges (Lynch, 2018). These persistent problems underscore the complexity of political transformation in Kenya, highlighting that while the new constitution provided a robust framework for change, the deeply entrenched nature of certain political dynamics continues to pose significant obstacles to full implementation of the envisioned reforms.

## 5. The Kenya's 2010 Constitution and Devolution

Devolution has been one of the biggest changes to Kenya's political system since 2010. This radical shift in the distribution of power and resources was enshrined in the 2010 Constitution, marking a departure from the country's historically centralized system of government. Devolution in Kenya was designed to address long-standing issues of regional marginalization, promote equitable development, and bring government services closer to the people. The new system created a two-tier government structure – national and county – with distinct yet interdependent roles and responsibilities. This reform has profoundly reshaped Kenya's political landscape, fiscal arrangements, and service delivery mechanisms.

The 2010 Constitution of Kenya introduced sweeping changes to the country's governance structure, with devolution being one of its cornerstone provisions. Chapter 11 of the Constitution specifically outlines the

framework for devolved government in Kenya. One of the key provisions is the establishment of 47 county governments, each with its own executive and legislative branches. This is enshrined in Article 176, which states that there shall be a county government for each county, consisting of a county assembly and a county executive (Constitution of Kenya, 2010). This provision aimed to bring governance closer to the people and ensure more localized decision-making.

The Constitution also delineates the objectives of devolution in Article 174. These include promoting democratic and accountable exercise of power, fostering national unity by recognizing diversity, giving powers of self-governance to the people, recognizing the right of communities to manage their own affairs, protecting and promoting the interests of minorities and marginalized communities, and promoting social and economic development (Bosire, 2013). Another crucial provision is the distribution of functions between the national and county governments, as outlined in the Fourth Schedule of the Constitution. This schedule specifies 14 functions for county governments, including agriculture, county health services, control of air pollution, cultural activities, and county transport (Constitution of Kenya, 2010). This division of responsibilities was intended to ensure that counties have substantial autonomy in managing local affairs.

The Constitution also provides for the equitable sharing of national revenue between the national and county governments. Article 203 stipulates that at least 15% of the most recently audited national revenue should be allocated to county governments (Kirira, 2011). This provision was designed to ensure that counties have adequate resources to fulfill their mandates. To safeguard the interests of county governments at the national level, the Constitution established the Senate as part of the national parliament. Article 96 outlines the role of the Senate in representing and protecting the interests of counties and their governments (Constitution of Kenya, 2010). Furthermore, the Constitution provides for intergovernmental relations. Article 189 calls for cooperation between the national and county governments and allows for the transfer of functions and powers between the two levels of government (Nyanjom, 2011).

## **5.2 Kenya Counties' Structure**

In terms of county structure, county governments in Kenya are composed of two main branches: the County Executive and the County Assembly. The County Executive is headed by a Governor, who is directly elected by the citizens of the county. The Governor is assisted by a Deputy Governor and a County Executive Committee, which includes members appointed by the Governor and approved by the County Assembly. These executive members are responsible for various county departments and functions (Constitution of Kenya, 2010). The County Assembly serves as the legislative arm of the county government. It consists of elected ward representatives, nominated members to ensure gender balance and representation of marginalized groups, and a Speaker who presides over the assembly. The County Assembly is responsible for passing county laws, approving budgets, and providing oversight of the County Executive (Kenya Law, County Governments Act, 2012). In addition to these primary structures, counties also have a County Public Service Board, which is responsible for human resource management within the county government. This board handles recruitment, appointments, and disciplinary matters for county staff (County Governments Act, 2012, Section 57).

## **5.3 Division of Powers between National and County Governments**

The division of powers between national and county governments in Kenya is a fundamental aspect of the country's devolved system of governance, as established by the 2010 Constitution. This system aims to promote democratic and accountable exercise of power, foster national unity, and enhance the participation of people in governance. The Fourth Schedule of the Constitution of Kenya (2010) outlines the distribution of functions between the national government and the county governments. The national government retains control over functions that are considered of national importance or that require unified administration. These include foreign affairs, national defense, national economic policy and planning, national statistics, immigration, citizenship, education policy, national public works, and the criminal justice system among others (Constitution of Kenya, 2010, Fourth Schedule, Part 1).

County governments, on the other hand, are responsible for functions that are more localized and directly impact the day-to-day lives of citizens within their jurisdictions. These functions include county health services,

county transport, trade development and regulation, county planning and development, pre-primary education, implementation of specific national government policies on natural resources and environmental conservation, and county public works and services (Constitution of Kenya, 2010, Fourth Schedule, Part 2).

In some areas, there is concurrent jurisdiction where both levels of government have responsibilities. For instance, in agriculture, the national government is responsible for agricultural policy, while county governments handle county-specific agricultural services. This arrangement necessitates cooperation and coordination between the two levels of government (Kangu, 2015, "Constitutional Law of Kenya on Devolution"). The Intergovernmental Relations Act of 2012 provides a framework for consultation and cooperation between the national and county governments. It establishes structures such as the National and County Government Coordinating Summit and the Intergovernmental Relations Technical Committee to facilitate this cooperation (Intergovernmental Relations Act, 2012). Financially, the Constitution provides for equitable sharing of national revenue between the national government and county governments. Article 203 of the Constitution stipulates that county governments should receive at least 15% of the national revenue. The Commission on Revenue Allocation advises on the equitable distribution of revenues between the two levels of government (Constitution of Kenya, 2010, Article 203).

## 6. Implementation Bottlenecks of Devolution in Kenya

The implementation of devolution in Kenya has faced several significant bottlenecks since its inception following the 2010 Constitution. These challenges have impacted the effectiveness of county governments and the overall success of the devolved system of governance.

### *Capacity Issues at County Level*

One of the primary challenges in implementing devolution has been the lack of adequate capacity at the county level. Many counties have struggled with a shortage of skilled personnel to handle the complex tasks of governance and public service delivery. A study by the World Bank (2015) highlighted that counties faced difficulties in attracting and retaining qualified staff, particularly in technical and specialized fields. This shortage has led to inefficiencies in service delivery and implementation of development projects. Furthermore, the Kenya School of Government (2016) reported that many county officials lacked the necessary training and experience in public administration, financial management, and policy formulation. This skills gap has resulted in poor planning, budgeting, and execution of county functions. The report recommended intensive capacity building programs to enhance the competencies of county staff.

The shortage of medical doctors in Turkana County vividly illustrates the capacity challenges faced by many Kenyan counties in implementing devolution. According to a 2018 report by the Ministry of Health and the Kenya Medical Practitioners and Dentists Board, Turkana, with a population of nearly 1 million, had only 15 doctors, resulting in a doctor-to-population ratio of approximately 1:66,000 - far below the WHO's recommended 1:1,000. This severe understaffing has led to overworked medical personnel, limited access to specialized care, increased reliance on clinical officers, and contributed to high maternal and infant mortality rates. The county's struggle to attract and retain doctors, due to factors such as inadequate infrastructure, limited professional development opportunities, and challenging living conditions, exemplifies the broader capacity issues hindering effective service delivery in many Kenyan counties.

### **6.1 Resource Allocation and Revenue Sharing**

The allocation of resources and sharing of revenue between the national and county governments has been a contentious issue. While the Constitution stipulates that at least 15% of national revenue should be allocated to counties, debates over the adequacy of this allocation have been ongoing. The Commission on Revenue Allocation (CRA) has faced challenges in developing a formula that satisfies all stakeholders (CRA Annual Report, 2018). A study by the International Budget Partnership (2019) revealed disparities in resource allocation among counties, with some counties receiving significantly more per capita funding than others. This inequality has led to uneven development across the country and fueled inter-county tensions. Moreover, many counties have struggled with own-source revenue generation, relying heavily on transfers from the national government. The Controller of Budget reports (2017-2020) consistently showed that most counties failed to

meet their local revenue targets, limiting their financial autonomy and ability to fund local development initiatives.

The issue of delayed disbursement of funds to counties has been a persistent challenge in Kenya's devolved system, often exacerbating the resource allocation problems mentioned. According to the Office of the Controller of Budget (OCOB) reports (2018-2021), many counties frequently receive their allocations late in the financial year, sometimes just days before its close. For instance, the OCOB's County Governments Budget Implementation Review Report for FY 2019/20 highlighted that some counties received up to 40% of their annual allocations in the last month of the financial year. This practice of last-minute disbursements has led to rushed spending, poor project implementation, and in some cases, the return of unspent funds to the National Treasury. The Commission on Revenue Allocation (CRA) in its 2020 report noted that these delays significantly impact county governments' ability to plan and execute their budgets effectively. Furthermore, a study by the Kenya Institute for Public Policy Research and Analysis (KIPPRA, 2021) found that late disbursements contribute to the accumulation of pending bills and hinder the timely completion of development projects. This situation not only undermines the financial autonomy of counties but also hampers their ability to deliver services efficiently, thereby limiting the potential benefits of devolution.

## **6.2 Intergovernmental Relations and Conflicts**

The relationship between the national government and county governments has often been strained, impacting the smooth implementation of devolution. The Senate Committee on Devolution and Intergovernmental Relations (2018) reported frequent conflicts between the two levels of government, particularly regarding the interpretation of their respective functional mandates. The Intergovernmental Relations Technical Committee (IGRTC), established to facilitate cooperation between the two levels of government, has faced challenges in effectively mediating disputes. A report by the Kenya Institute for Public Policy Research and Analysis (KIPPRA, 2019) noted that the IGRTC lacked the necessary authority to enforce its decisions, leading to protracted conflicts and delayed implementation of key programs. Additionally, there have been instances of the national government encroaching on county functions or withholding funds, as highlighted in various court cases between county governments and national government entities (Kenya Law Reports, 2015-2020).

To illustrate the strained relationship between national and county governments in Kenya, we can look at the case of Makueni County. In 2014, Makueni County experienced a significant conflict with the national government over the control of health services. The county government, led by Governor Kivutha Kibwana, accused the national government of interfering with its constitutional mandate to manage health services at the county level. The dispute arose when the national government attempted to retain control over certain health facilities and programs, despite health being a devolved function under the 2010 Constitution. This led to a standoff that affected service delivery in the county, with some health workers caught between conflicting directives from the two levels of government. The case eventually went to court, with the Council of Governors supporting Makueni County's position. This example highlights the challenges in interpreting functional mandates, the difficulties in implementing devolution, and the tendency of the national government to encroach on county functions. It also demonstrates how such conflicts can impact essential services and require judicial intervention to resolve, underscoring the need for more effective intergovernmental cooperation mechanisms.

Further, in 2019, the County Government of Nairobi took the National Government to court over the transfer of functions, including the management of the Nairobi City County's health services, without adequate consultation or funding (Kenya Law, 2020). The court ruled in favor of the county government, ordering the national government to respect the devolved functions and provide necessary resources. This case illustrates the frequent conflicts between national and county governments in Kenya, as highlighted in the Senate Committee on Devolution and Intergovernmental Relations report, and demonstrates how the lack of clear boundaries and enforcement mechanisms can lead to protracted disputes and hinder the effective implementation of devolution.



### **6.3 Resource Mismanagement**

Resource mismanagement in Kenyan counties has led to severe financial crises and near-collapse of local governments. For instance, Nairobi County faced a major fiscal crisis in 2020 due to misappropriation of funds and poor revenue collection, resulting in billions of shillings in debt (Mutua, 2020). Similarly, Kiambu County was embroiled in a scandal where billions were allegedly misused, leading to an impeachment process against the governor (Owino, 2019). Mombasa County also struggled with financial mismanagement, accumulating massive debts and failing to pay employees and contractors (Mwakio, 2021). These cases highlight a pattern of corruption, lack of transparency, and inefficient use of public resources across Kenyan counties. The Commission on Revenue Allocation (CRA) reported that many counties have consistently failed to meet their revenue targets and mismanaged their allocations, leading to underdevelopment and poor service delivery (Ochieng, 2022). The consequences of such mismanagement include stalled development projects, inadequate public services, and increased poverty levels among county residents (Kimani, 2021).

### **6.4 Inequality and Marginalization**

Despite the implementation of devolution in Kenya, intended to promote equitable development across all regions, significant disparities persist, with certain areas remaining marginalized and underdeveloped. The Commission on Revenue Allocation (CRA) report (2020) highlighted that counties in arid and semi-arid lands (ASALs) continue to lag behind in key development indicators. For instance, Turkana, Mandera, and Wajir counties consistently rank lowest in access to healthcare, education, and clean water (Kenya National Bureau of Statistics, 2022). A study by Odhiambo et al. (2021) found that historical biases in resource allocation have not been fully addressed by devolution, with counties in former marginalized areas struggling to overcome decades of neglect. Furthermore, Nyanjom (2019) argues that political interference and corruption at the county level have hampered the effective use of devolved funds, exacerbating regional inequalities. The World Bank's Kenya Economic Update (2023) also notes that while some progress has been made, significant challenges remain in achieving balanced regional development, particularly in infrastructure and service delivery in remote areas. These findings collectively demonstrate that despite the promise of devolution, entrenched socio-economic disparities continue to perpetuate marginalization in certain Kenyan regions.

### **6.5 Citizen Participation and Representation**

While devolution in Kenya was intended to enhance citizen participation and representation in governance, significant challenges persist in realizing this goal at the county level. A study by Khaunya et al. (2015) found that despite legal frameworks for public participation, many counties struggle with implementing effective mechanisms for citizen engagement. The Kenya Institute for Public Policy Research and Analysis (KIPPRA) report (2019) highlighted that only 34% of citizens felt they had meaningful input in county decision-making processes. Furthermore, Mboga (2017) observed that county public participation forums often suffer from poor attendance, inadequate information dissemination, and dominance by local elites. The Commission on Revenue Allocation (CRA) survey (2021) revealed disparities in representation, with marginalized groups like women, youth, and persons with disabilities often underrepresented in county assemblies and executive positions. Additionally, Cheeseman et al. (2020) argued that the devolved system has, in some cases, merely decentralized corruption and patronage networks, further alienating ordinary citizens from governance processes. The Kenya National Commission on Human Rights (KNCHR) report (2022) also noted concerns about the quality of public participation, citing instances where citizen input was solicited but not genuinely considered in final decision-making. These findings collectively demonstrate that while the structural framework for citizen participation exists, practical implementation at the county level falls short of the devolution ideal of bringing government closer to the people.

## **7. Federalism as Panacea to Devolution Weaknesses in Kenya**

Federalism presents a potential solution to the various bottlenecks encountered in Kenya's devolution process, offering a more robust framework for decentralized governance. A clear delineation of powers between federal

and state governments, coupled with greater autonomy for states, could address many of the challenges that have hindered the effective implementation of devolution in Kenya.

One of the primary issues facing devolved units in Kenya has been the lack of capacity at the county level, as highlighted in the World Bank study (2015) and the Kenya School of Government report (2016). Federalism could potentially alleviate this problem through granting states more autonomy in their hiring practices and resource allocation. For instance, states could offer competitive salaries and benefits to attract and retain skilled personnel, addressing situations like the severe shortage of doctors in Turkana County. Moreover, states could invest in specialized training programs and partnerships with educational institutions to develop local talent pools, thereby enhancing their capacity to deliver public services effectively.

The contentious issue of resource allocation and revenue sharing, as reported the Commission on Revenue Allocation (2018) and the International Budget Partnership (2019), could also find resolution through a federal system. Federalism typically allows greater control of natural resources and locally generated revenue for the states, reducing their dependence on central government transfers. This increased financial autonomy could help mitigate the problem of delayed disbursements highlighted in the Office of the Controller of Budget reports (2018-2021). Furthermore, a federal constitution could provide a framework for more equitable revenue sharing between the federal and state governments, potentially reducing the disparities in resource allocation among different regions.

Intergovernmental conflicts, such as those reported the Senate Committee on Devolution and Intergovernmental Relations (2018) and exemplified the Makueni County health services dispute in 2014, could see minimization under a federal system. Federalism typically involves a clear constitutional delineation of powers and responsibilities between federal and state governments, reducing ambiguity and potential for conflict. Additionally, a robust federal system would include strong mechanisms for interstate cooperation and federal-state coordination, as well as an independent judiciary empowered to arbitrate disputes between different levels of government.

While federalism is not a direct cure for resource mismanagement and corruption, it could contribute to better governance through increased accountability and competition. Closer citizen oversight of state governments, coupled with the ability of states to develop their own financial management systems and anti-corruption measures, could help reduce incidents of mismanagement like those seen in Nairobi, Kiambu, and Mombasa counties. Moreover, the competition between states for investment and population could incentivize better governance and more efficient use of resources.

The persistent inequality and marginalization of certain regions, as highlighted the Commission on Revenue Allocation report (2020) and the study Odhiambo et al. (2021), could see more effective addressing under a federal system. Federalism would allow historically marginalized areas to have greater control over their development agenda, tailoring policies to their specific socio-economic contexts. Additionally, a federal constitution could provide for equalization payments to less developed states, helping to bridge the development gap between regions.

Further, federalism could enhance citizen participation and representation, addressing the concerns raised in the KIPPR report (2019) and the Kenya National Commission on Human Rights report (2022). Bringing government closer to the people through state-level institutions, federalism could create more opportunities for citizen engagement in governance. It could also allow for more diverse representation in state governments and legislatures, potentially giving voice to previously marginalized groups.

Arban's 2024 research article highlights several key benefits of federalism as a system of governance, which could serve as a summary of the argument of this article in relation to the question, *why federalism in Kenya?* Federalism's ability to reconcile national unity with regional diversity is emphasized, allowing for the balance of state integrity with various forms of diversity within the federal territory. The distribution of legislative powers among different government tiers is a central feature, with powers often shared or concurrent between levels. Federal systems can affect the balance of power within the federation, with factors such as the number, size, population, and wealth of constituent units playing roles. Federalism's flexibility allows for varying degrees of autonomy within a single political system, accommodating different classes of constituent units. Additionally, federal systems typically incorporate conflict resolution mechanisms, often relying on constitutional or supreme courts to safeguard authority boundaries and resolve disputes between

government levels (Arban, 2024). This comprehensive approach enables federalism to address complex governance challenges while maintaining adaptability to diverse regional needs and interests.

It is worth noting that federalism is not omnipotent, nor is it a silver bullet. Federalism is neither all-encompassing nor infallible. However, it offers a compelling framework for addressing many of the bottlenecks experienced in Kenya's devolution process. Providing clearer division of powers, greater financial autonomy, and more localized governance, federalism could theoretically resolve issues of capacity, resource allocation, intergovernmental conflicts, and citizen participation. However, it's crucial to note that the success of any system depends on its implementation and the political will to address underlying issues such as corruption and historical marginalization. The transition to a federal system would require careful planning, robust institutions, and a strong commitment to the principles of good governance.

## 8. Comparative Analysis of Federalism and Devolution

The implementation of devolution in Kenya has faced significant challenges in addressing its intended goals of equitable resource distribution, improved service delivery, and enhanced local governance. A study by Cheeseman et al. (2016) found that despite some progress, devolution has often reinforced existing power structures and inequalities rather than transforming them. The World Bank (2019) report on Kenya's devolution noted that while there have been improvements in local infrastructure and service accessibility, many counties still struggle with capacity issues and financial management. Corruption remains a persistent problem, with the Ethics and Anti-Corruption Commission (EACC, 2018) reporting numerous cases of misappropriation of funds at the county level. Moreover, D'Arcy and Cornell (2016) argue that devolution has in some instances exacerbated ethnic tensions by shifting competition for resources to the county level. The Commission on Revenue Allocation (CRA, 2020) has highlighted ongoing disputes over resource allocation between national and county governments, indicating that the fiscal aspects of devolution remain contentious. These issues suggest that while devolution has brought about some positive changes, it has fallen short of fully addressing the systemic problems it was designed to solve, particularly in terms of corruption, ethnic tensions, and equitable development across all regions.

As a result, Kenya must ask herself if federalism or maintaining the current decentralized system of government is better for her. Arguments in favor of Kenya moving toward federalism as originally envisioned are based on the devolution system's alleged inadequacies. Ghai (2015) argues that the original federal structure proposed in the Bomas Draft Constitution would have provided stronger autonomy to regions, potentially addressing the power imbalances that persist under devolution. Nyanjom (2011) suggests that a federal system could better address historical marginalization and resource distribution issues, which devolution has struggled to fully resolve. The ongoing conflicts between county and national governments, as documented by the Senate Committee on Devolution (2018), indicate that the current system lacks clear delineation of powers, a problem that federalism might mitigate through more defined constitutional divisions. Furthermore, Kirira (2019) posits that federalism could enhance fiscal autonomy and accountability at the sub-national level, addressing the financial management challenges highlighted by the Controller of Budget (2020) in many counties. Proponents argue that federalism could provide a more robust framework for intergovernmental relations, potentially resolving the coordination issues noted by the Intergovernmental Relations Technical Committee (IGRTC, 2019). However, it's important to note that this view is contested, with critics like Bosire (2017) cautioning that federalism could exacerbate ethnic divisions and inequality if not carefully implemented.

The idea of switching to a federal system of government is not exclusive to Kenya. Juma & Arudo (2016) in their study: *'The Urgency For Federalism In Africa: As A Panacea For Ethnic Conflicts And Development In Kenya'*, argued that the drive towards federalism in various countries stems from a need to address ethnic, linguistic, and cultural diversity while maintaining national unity. As pointed out in the study, in Belgium, federalism emerged as a solution to balance the interests of Dutch-speaking Flemish and French-speaking Walloons, promoting local autonomy and consensus-building. India adopted federalism to manage its linguistic and cultural diversity, moving away from centralized power to accommodate regional identities and languages. Switzerland's federal system allows for self-governance of cantons while maintaining a central authority,

respecting linguistic and cultural differences. Canada implemented federalism to protect the cultural, institutional, and religious interests of Quebec and Maritime provinces from potential dominance by the English-speaking Protestant majority. Ethiopia turned to ethnic federalism after failed attempts at cultural assimilation and unitary governance, aiming to provide autonomy to various ethnic groups and address historical inequalities. In all these cases, federalism served as a means to reconcile diverse identities, reduce ethnic tensions, promote equitable resource distribution, and foster unity while respecting differences within the nation-state.

## 9. Chronology of Federalism Debate in Kenya

The desire for federalism in Kenya has a long and complex history, dating back to the pre-independence period. In the early 1960s, as Kenya approached independence, the debate over governmental structure intensified. The Kenya African Democratic Union (KADU) emerged in 1961, advocating for a federal system they called "Majimbo," while the Kenya African National Union (KANU) supported a unitary government. This division was largely driven by concerns from smaller ethnic groups about potential domination by larger ones in a centralized system (Stanley, 1966).

When Kenya gained independence on December 12, 1963, it did so with a federal constitution that granted significant autonomy to regions or states (Jimbo). However, this federal structure was short-lived. As Musau (2009) notes, "Majimbo was scrapped barely a year before it was properly implemented. KANU, which won the first full franchise General election held in 1963, never really wanted the federal system as it considered it complex and a threat to national unity in a country of 42 tribes." The federalism debate briefly resurfaced in the mid-1960s following the publication of Sessional Paper No. 10, which addressed growing economic inequality. Some politicians, like Peter Okondo, argued that federalism was the ideal solution to regional wealth inequality and development. However, this push did not gain significant traction at the time.

During the 1980s and 1990s, under the Moi regime, the concept of federalism re-emerged, but with different motivations. Juma & Arudo (2016) suggests that during this period, it was "being advanced for political expediency by the ruling KANU elite to elicit ethnic conflicts across the country thereby creating the right environment to crack on perceived dissidents who were for multi-party." This shift in the use of federalism as a political tool marked a significant change from its earlier conceptualization. The late 1990s and early 2000s saw another resurgence of the federalism debate, this time in the context of broader constitutional reforms. In 2004, the Boma's draft constitution introduced the term "devolution" as a compromise, though this draft was ultimately rejected in a 2005 referendum. This period reflects ongoing attempts to address regional autonomy and resource distribution within the framework of constitutional reform.

In recent years, the desire for federalism has continued to be a topic of discussion, particularly during election periods. Juma & Arudo (2016) argue that this debate was driven by concerns about political and economic marginalization: "Just as then, today, the desire to have federalism is moved by the desire to have political and economic access for each of the regions in Kenya as opposed to two particular ethnic groups who have been in power since independence (Central and Rift Valley regions)."

Further, Juma & Arudo (2016) contend that the unitary system has "accelerated ethnic inequality within Kenya in terms of extraction and distribution of the scarce resources," leading to "ethnic mobilization and sensitization of the supporters along regional elites following primordial tendencies which has continually resurfaced as a threat to peace and stability." This is clearly seen that the push for federalism is not merely a political issue, but one deeply rooted in concerns about equity and representation among Kenya's diverse ethnic groups.

## 10. Federalism and the Unity Question in Kenya

Federalism in Kenya has been a topic of heated debate, with opponents claiming it could lead to division and conflict. However, this study aims to challenge that notion and demonstrate that federalism can actually foster unity within the nation. A well-implemented federal structure can promote inclusivity, equitable resource distribution, and cultural preservation. Furthermore, federalism, when properly designed, can strengthen national cohesion by addressing regional grievances, empowering local communities, and creating a more



balanced power structure. Federalism is not as a source of division, but as a potential catalyst for unity and shared prosperity. But what influences the performance of federalism?

### **10.1 Structural Influence**

The performance of a federal system is indeed significantly influenced by its structure. As Watts (1999) astutely observed, "the way unit boundaries are drawn may play a role in 'shaping the dynamics of political relationships' within a federation." This suggests that the very design of a federal system can impact its effectiveness and functionality. The demarcation of federal units is not merely an administrative exercise but a crucial factor in determining the political, social, and economic dynamics of the federation.

Burgess (2006) further elaborates on this concept, arguing that the territorial organization of a federation is fundamental to its operation. He states, "The territorial organization of federations is not just about lines on maps but about how political power is distributed and how different communities can coexist within a single political system." This underscores the importance of thoughtful and strategic boundary-drawing in federal systems, as it directly affects power distribution and inter-community relations. The impact of federal structure on system performance is also highlighted by Filippov et al. (2004), who posit that the design of federal institutions can either exacerbate or mitigate ethnic tensions. They argue, "Federal arrangements can provide institutional mechanisms for managing ethnic diversity, but if poorly designed, they can also intensify ethnic conflicts." This perspective emphasizes the delicate balance that must be struck in federal design, particularly in ethnically diverse nations like Kenya.

Moreover, Elazar (1987) introduces the concept of "federal political culture" as a crucial element in the success of federal systems. He argues that the effectiveness of federalism depends not only on constitutional structures but also on the attitudes and expectations of political actors and citizens. Elazar states, "Federal principles are as much a matter of attitude, of the capacity to work together for common purposes while maintaining separate identities, as they are of constitutional arrangements."

In the context of Kenya, these insights are particularly relevant. As Ghai and Cottrell (2013) note in their analysis of Kenya's constitutional development, "The challenge for Kenya is not just to adopt federal structures, but to nurture a federal political culture that can sustain those structures." This suggests that while the structural design of federalism is crucial, it must be accompanied by a shift in political culture and public understanding of federal principles.

### **10.2 Impact of Boundaries**

Bednar (2008) highlights the significant impact of both physical and authority boundaries on the functioning and efficacy of federal systems. She astutely observes that these boundaries "can be drawn in ways that aid or abet a federal system's capacity to bring security, prosperity and well-being, and justice to a society" (Bednar, 2008). This observation underscores the crucial role that boundary demarcation plays in federal performance, emphasizing that the design of these boundaries can either enhance or hinder the federal system's ability to achieve its core objectives.

This perspective aligns with Rodden's (2004) analysis of fiscal federalism, which argues that the allocation of fiscal responsibilities across different levels of government significantly influences economic outcomes. Rodden states, "The vertical structure of the public sector can affect everything from macroeconomic stability to the size of government to the delivery of basic public goods" (Rodden, 2004). This emphasizes how the delineation of authority boundaries in fiscal matters can have far-reaching consequences on a federal system's economic performance.

Furthermore, Simeon and Conway (2001) explore the impact of boundary-drawing on identity and social cohesion within federal systems. They argue that "federal boundaries can either reinforce or cross-cut existing societal cleavages, with important implications for conflict management and national unity" (Simeon & Conway, 2001). This highlights the delicate balance that must be struck when demarcating federal units, particularly in diverse societies where ethnic, linguistic, or religious divisions may exist. The importance of boundary design in federal systems is further reinforced by Stepan's (2001) concept of "holding together" versus "coming together" federations. Stepan argues that the historical process of federation formation influences the nature of

boundaries and power distribution. He notes, "In 'holding together' federations, the challenge is often to create boundaries that accommodate diversity while maintaining national cohesion" (Stepan, 2001). This perspective is particularly relevant for countries like Kenya, where federalism is being considered as a means to address regional disparities and ethnic tensions.

Fenna (2012) adds another dimension to this discussion by examining the role of intergovernmental relations in federal performance. He argues that "the effectiveness of a federal system depends not only on the initial boundary demarcations but also on the ongoing mechanisms for coordination and conflict resolution between different levels of government" (Fenna, 2012). This suggests that the impact of boundaries on federal performance is dynamic and evolves over time through intergovernmental interactions.

### **10.3 Balance of Power**

The number and characteristics of constituent units indeed play a crucial role in shaping the power dynamics within a federation. As Watts (1999) astutely observed, a larger number of units often serves as a safeguard against the domination of federal politics by any single unit. However, the complexity of federal systems extends beyond mere numbers, as significant variations in size, population, and wealth among units can lead to imbalances, with larger or wealthier units potentially exerting more political influence.

Burgess (2006) elaborates on this concept, noting that the relative power of constituent units can significantly impact federal governance. He states, "The asymmetry between units in terms of population, territory, and economic resources can create a *de facto* hierarchy within the federation, potentially undermining the principle of equality among constituent units" (Burgess, 2006). This asymmetry can manifest in various ways, including disproportionate representation in federal institutions or greater bargaining power in intergovernmental negotiations.

The issue of unit size and power is further explored by Samuels and Snyder (2001) in their analysis of mal-apportionment in federal systems. They argue that "overrepresentation of smaller units in national legislatures is a common feature of federal systems, often implemented as a compromise to protect minority interests" (Samuels & Snyder, 2001). While this can serve as a counterbalance to the dominance of larger units, it also raises questions about democratic representation and equity. Filippov et al. (2004) introduce another dimension to this discussion by examining how the number and characteristics of units affect political party systems in federations. They posit that "the territorial structure of a federation can influence the development of party systems, with a larger number of diverse units often leading to more fragmented party systems" (Filippov et al., 2004). This fragmentation can have significant implications for federal governance and policy-making processes.

In the context of economic disparities between units, Rodden (2006) highlights how fiscal federalism can exacerbate or mitigate power imbalances. He notes that "systems of intergovernmental transfers and revenue-sharing can be designed to address economic disparities between units, but they can also become sources of political contention and bargaining" (Rodden, 2006). This underscores the complex interplay between economic and political power in federal systems. Moreover, Anderson (2008) emphasizes the importance of institutional design in managing power imbalances among units. He argues that "federal institutions, such as second chambers designed to represent regional interests, can provide mechanisms for balancing power between larger and smaller units" (Anderson, 2008). However, he also cautions that the effectiveness of such institutions depends on their specific design and the political culture in which they operate.

In the context of Kenya, addressing the challenges of unit size, power dynamics, and representation in a federal system would require a carefully tailored approach that considers the country's unique socio-economic and political landscape. Drawing on the insights from various scholars, Kenya could consider implementing a federal structure with a balanced number of units, possibly based on an enhanced version of the current county system or a regrouping of counties. To address the concerns raised by Burgess (2006) regarding asymmetry, Kenya could implement a system of weighted representation in federal institutions, ensuring that smaller or less populous units have a meaningful voice while still acknowledging the demographic realities of larger units. This could be complemented by the creation of a second chamber in the legislature, as suggested by Anderson (2008), specifically designed to represent regional interests and act as a counterbalance to population-based

representation. To mitigate the economic disparities highlighted by Rodden (2006), Kenya could establish a robust system of fiscal federalism with equalization payments and revenue-sharing mechanisms, aimed at reducing economic imbalances while promoting overall national development. Furthermore, to address the potential for party system fragmentation noted by Filippov et al. (2004), Kenya could consider implementing electoral rules that encourage the formation of broad, nationally-oriented political parties while still allowing for the representation of regional interests. This multi-faceted approach would aim to create a federal system that balances the needs of diverse regions, promotes equitable representation, and fosters national unity while accommodating Kenya's ethnic, economic, and political diversity.

#### **10.4 Responsiveness to Local Needs**

The relationship between the size and population of federal units and their responsiveness to local communities is a crucial aspect of federal design and performance. Watts (1999) astutely observed that larger and more populous units might be less responsive to the interests of local communities and individual citizens, potentially impacting the federal system's performance in addressing local needs. This observation highlights the delicate balance that must be struck in federal design between efficiency and local representation.

Dahl and Tufte (1973) in their seminal work on size and democracy, argue that while larger units may have greater capacity to address complex issues, they often struggle with citizen participation and responsiveness. They state, "The larger the unit, the less the opportunity for citizens to participate directly in political decisions and the greater the risk that the government will become remote from the people" (Dahl & Tufte, 1973). This supports Watts' observation and underscores the potential trade-offs in federal unit design. Keating (1995) further explores this concept in the context of regionalism, noting that the size of regional units can affect their ability to balance competing local interests. He argues, "Larger regions may be better equipped to manage economic development and provide certain services, but they may also struggle to represent diverse local interests effectively" (Keating, 1995, p. 10). This perspective adds nuance to the discussion, suggesting that the optimal size of federal units may vary depending on the functions they are expected to perform.

The issue of responsiveness is also addressed by Treisman (2007) in his comprehensive analysis of decentralization. He posits that "while smaller units may be more responsive to local preferences, they may lack the economies of scale necessary for efficient public goods provision" (Treisman, 2007). This highlights the potential tension between responsiveness and efficiency in federal design. Faguet (2014) provides empirical evidence on the relationship between decentralization and responsiveness, suggesting that smaller, more localized units of government tend to be more responsive to local needs. He states, "Decentralization can improve the responsiveness of public services by bringing decision-making closer to citizens and increasing the accountability of local officials" (Faguet, 2014). However, he also notes that this effect can be moderated by factors such as local capacity and the specific design of decentralization reforms.

Hooghe and Marks (2009) introduce the concept of "multi-level governance" as a way to address the challenges of size and responsiveness in federal systems. They argue that "overlapping jurisdictions and flexible governance arrangements can help balance the need for local responsiveness with the benefits of larger-scale coordination" (Hooghe & Marks, 2009, p. 234). This perspective suggests that federal design need not be limited to a single tier of subnational units, but can incorporate multiple levels to optimize responsiveness and efficiency.

In the context of Kenya, achieving an optimal balance between responsiveness and efficiency in federal design could be approached through a carefully structured multi-level governance system. Drawing on the insights from Hooghe and Marks (2009), Kenya could consider implementing a tiered federal structure that combines larger regional units with smaller, more localized administrative divisions. The larger regional units, possibly based on the current county system or a grouping of counties, could leverage economies of scale for economic development and service provision, as suggested by Keating (1995). Simultaneously, smaller sub-units within these regions could be established to ensure closer citizen engagement and responsiveness to local needs, addressing the concerns raised by Dahl and Tufte (1973). This approach could be complemented by robust decentralization measures, as advocated by Faguet (2014), to enhance local accountability and service delivery. To mitigate the potential inefficiencies of smaller units highlighted by Treisman (2007), Kenya could

implement collaborative mechanisms between different levels of government, allowing for resource sharing and coordinated policy implementation. Additionally, considering Kenya's diverse ethnic and cultural landscape, this multi-tiered approach could help in balancing regional autonomy with national cohesion. The specific delineation of powers and responsibilities between these levels would need to be carefully crafted to suit Kenya's unique socio-political context, ensuring that the benefits of local responsiveness are achieved without compromising the efficiency and coordination necessary for effective governance at the national level.

### **10.5 Management of Diversity**

Federalism's performance in managing diversity is indeed a crucial aspect of its function, particularly in multicultural and multiethnic societies. Arban (2024) astutely observes that by dividing powers and responsibilities among various levels of government, federalism allows for the reconciliation of state unity with various forms of diversity (ethnic, linguistic, socio-economic, etc.) within the federal territory. This perspective highlights the potential of federal systems to accommodate and even celebrate diversity while maintaining overall national cohesion.

Kymlicka (2009) further elaborates on this concept, arguing that federalism can serve as a tool for minority accommodation. He states, "Federal arrangements can provide minorities with a degree of self-government and cultural protection, while still maintaining their participation in the larger political community" (Kymlicka, 2009). This underscores the dual nature of federalism in both protecting distinct identities and fostering a sense of shared nationhood. The role of federalism in managing diversity is also explored by Erk and Anderson (2009), who emphasize its capacity to provide institutional recognition of diversity. They argue that "federalism can institutionalize diversity by giving territorial expression to differences in identity, culture, or socio-economic conditions" (Erk & Anderson, 2009). This institutional recognition can help legitimize diverse identities within the broader national framework.

Moreno and Colino (2010) provide a more nuanced perspective, noting that while federalism can be effective in managing diversity, its success depends on specific institutional designs and political cultures. They state, "The effectiveness of federalism in accommodating diversity is contingent on factors such as the distribution of powers, fiscal arrangements, and mechanisms for intergovernmental cooperation" (Moreno & Colino, 2010). This highlights the importance of tailoring federal structures to the specific context of each country. Burgess (2012) introduces the concept of "federal political cultures" as a key factor in federalism's ability to manage diversity. He argues that "successful accommodation of diversity in federal systems requires not just institutional arrangements, but also a political culture that values pluralism and negotiation" (Burgess, 2012). This emphasizes the importance of societal attitudes and norms in complementing federal structures.

Fessha (2016) examines the specific challenges of ethnic federalism in managing diversity, particularly relevant to countries like Ethiopia. He notes that "while ethnic federalism can provide recognition and autonomy for ethnic groups, it can also risk entrenching ethnic divisions and complicating national unity" (Fessha, 2016). This perspective cautions against overly rigid ethnic-based federal structures and emphasizes the need for flexibility and cross-cutting identities in federal systems.

To achieve effective management of diversity through federalism in Kenya, a carefully tailored approach is necessary. This would involve designing a federal structure that recognizes and accommodates Kenya's diverse ethnic, linguistic, and cultural groups while still fostering a sense of national unity. The system should balance regional autonomy with national cohesion, potentially through a combination of ethnic-based and geographically-based federal units. Crucial to this process would be the equitable distribution of powers and resources among federal units, as well as the establishment of robust mechanisms for intergovernmental cooperation and conflict resolution. Kenya would need to cultivate a federal political culture that values pluralism, negotiation, and compromise. This could be promoted through civic education, inclusive political processes, and institutions that encourage cross-ethnic collaboration. To avoid the pitfalls of rigid ethnic federalism, the system should allow for flexibility and the recognition of multiple, overlapping identities. Additionally, strong safeguards for minority rights within each federal unit would be essential. The success of such a system would depend on widespread public participation in its design and implementation, ensuring that it reflects the unique context and needs of Kenya's diverse population.



## 10.6 Conflict Resolution

The performance of a federal system often depends on its ability to resolve conflicts, particularly those related to authority boundaries. As Bednar (2008) notes, constitutional or supreme courts play a crucial role in safeguarding these boundaries by deciding which level of government has authority over disputed matters. Constitutional courts in federal systems often serve as the final arbiters in disputes over the division of powers between federal and sub-national units. As Watts (1999) explains, "These courts play a crucial role in interpreting the constitution and adjudicating conflicts over the allocation of powers and responsibilities between different levels of government" (Watts, 1999). This judicial role is essential for maintaining the integrity of the federal structure and ensuring that each level of government operates within its constitutionally defined limits.

The importance of these courts extends beyond mere dispute resolution. According to Aroney and Kincaid (2017), "Constitutional courts in federal systems often play a key role in shaping the evolution of federalism itself, through their interpretations of constitutional provisions and their resolution of novel issues that arise as federal systems develop over time" (Aroney & Kincaid, 2017). This highlights the dynamic nature of federalism and the crucial role that judicial institutions play in its ongoing development.

However, the effectiveness of constitutional courts in federal systems can vary. Popelier, Mazmanyan, & Vandenbruwaene (2013) notes that "The impact of constitutional courts on federal dynamics depends on factors such as the court's composition, its jurisprudential approach, and the broader political and cultural context in which it operates" (Popelier, Mazmanyan, & Vandenbruwaene, 2013). This suggests that the mere existence of a constitutional court is not sufficient; its design and operation must be carefully considered to ensure its effectiveness in a federal context.

Moreover, the role of constitutional courts in federal systems extends beyond inter-governmental disputes. As Benz and Broschek (2013) point out, "These courts often play a crucial role in protecting individual rights and minority interests within the federal system, balancing these against the powers of both federal and sub-national governments" (Benz & Broschek, 2013). This highlights the multifaceted nature of constitutional adjudication in federal systems. It's also worth noting that the relationship between constitutional courts and other branches of government in federal systems can be complex. Ginsburg (2003) argues that "While constitutional courts can serve as important checks on executive and legislative power in federal systems, they must also navigate carefully to maintain their legitimacy and avoid overstepping their constitutional role" (Ginsburg, 2003). This indicates the delicate balance that these courts must strike in fulfilling their role as guardians of the federal constitution.

As clearly seen from the arguments advanced above, and given the complex role of constitutional courts in federal systems, Kenya could approach this by establishing a robust and independent constitutional court specifically designed to address federal disputes and interpret the constitution in the context of devolution. This court should be carefully structured to ensure its legitimacy, with a diverse composition reflecting Kenya's regional and ethnic diversity, and clear mechanisms for appointment that balance political interests. The court's mandate should explicitly include arbitrating conflicts between national and county governments, interpreting the division of powers, and protecting individual rights within the devolved system. To enhance its effectiveness, Kenya should also invest in building the court's capacity, ensuring it has adequate resources and expertise in federal principles. Additionally, the country should foster a political culture that respects the court's decisions, while also allowing for healthy dialogue between the judiciary and other branches of government. This approach would need to be tailored to Kenya's unique historical, political, and cultural context, recognizing that the success of such a court depends not just on its legal framework, but also on broader societal acceptance of its role in shaping Kenya's evolving system of devolved governance.

## 10.7 Challenges in Ethno-federalism

Juma & Arudo (2016) argue for the implementation of federalism in Kenya as a solution to the country's ongoing political and ethnic tensions. Their study contends that Kenya's current unitary system has failed to foster national cohesion and has instead led to tribalism, corruption, and unequal resource allocation. The proposed federalist model would divide Kenya into autonomous states based on ethnic or linguistic lines,

similar to successful federalist systems in countries like Switzerland. This approach, the author suggests, would allow for better preservation of indigenous cultures, more equitable governance, and potentially reduce ethnic conflicts. The article challenges the notion that smaller political units lead to poverty and argues that federalism could actually promote innovation and development by giving regions more control over their affairs.

While Juma & Arudo (2016) present a compelling case for federalism in Kenya, it is important to consider counterarguments and potential drawbacks to such a system. Critics of this approach argue that implementing federalism based on ethnic or linguistic lines could potentially exacerbate existing divisions and lead to further fragmentation of the nation. For instance, Horowitz (2014), cautions against the risks of ethno-federalism, stating that "dividing a country along ethnic lines can institutionalize and deepen ethnic identities, potentially leading to increased separatist tendencies and inter-group conflicts." Furthermore, opponents contend that a federal system might create new power imbalances, with economically stronger regions potentially dominating weaker ones, thus perpetuating or even worsening existing inequalities. These concerns raise important questions about the viability and long-term consequences of implementing a federal system in Kenya, especially one based on ethnic or linguistic divisions.

Roeder (2013) argues that ethno-federalism can actually exacerbate ethnic tensions rather than mitigate them. He states, "By institutionalizing ethnic identities and providing resources and autonomy to ethnic elites, ethno-federalism can reinforce and harden ethnic divisions, potentially leading to increased separatist tendencies" (Roeder, 2013). This perspective highlights the risk of entrenching ethnic identities in ways that may prove counterproductive to national cohesion. Anderson (2012) furthers this argument by pointing out the potential for what he terms "ethnic outbidding" in ethno-federal systems. He explains, "Political elites within ethnic federal units may be incentivized to adopt increasingly radical positions to maintain support, leading to a cycle of escalating demands and inter-ethnic competition" (Anderson, 2012). This dynamic can strain the federal structure and complicate national governance.

Hale (2004) offers a more nuanced view, suggesting that the success or failure of ethno-federalism depends on specific contextual factors. He argues, "The stability of ethno-federal systems is influenced by factors such as the number and relative sizes of ethnic groups, historical inter-ethnic relations, and the presence of core ethnic regions" (Hale, 2004). This perspective emphasizes the importance of tailoring federal structures to specific national contexts. Erk and Anderson (2009) highlight the potential for asymmetric power dynamics in ethno-federal systems. They note, "When federal units are designed around ethnic groups of vastly different sizes or economic capacities, it can lead to perceptions of unfairness and demands for special treatment, potentially destabilizing the federal balance" (Erk & Anderson, 2009).

However, as discussed early in reference to Juma & Arudo (2016), it's important to note that not all scholars view ethno-federalism as inherently problematic. Kymlicka (1995) argues that under certain conditions, ethno-federalism can effectively manage diversity and prevent conflict. He states, "When combined with robust protection of individual rights and mechanisms for inter-ethnic cooperation, ethno-federalism can provide a framework for peaceful coexistence and shared governance" (Kymlicka, 1995). Fessha and Van der Beken (2013) emphasize the importance of institutional design in mitigating the risks of ethno-federalism. They argue, "Careful attention to constitutional safeguards, power-sharing arrangements, and mechanisms for managing inter-ethnic disputes can help address the potential destabilizing effects of ethno-federalism" (Fessha & Van der Beken, 2013).

Therefore, given the complex and nuanced perspectives on ethno-federalism, Kenya should approach the implementation of a federal system with careful consideration and strategic planning. Rather than adopting a purely ethnic-based federal structure, Kenya could consider a hybrid model that combines geographic and demographic factors with provisions for ethnic representation. This approach should prioritize robust constitutional safeguards to protect minority rights, ensure equitable resource distribution, and prevent the dominance of economically stronger regions. Kenya should also focus on developing strong institutions for inter-ethnic cooperation and conflict resolution at both federal and state levels. The federal design should include mechanisms to promote national cohesion while allowing for cultural and linguistic diversity, perhaps through a system of asymmetric federalism that provides varying degrees of autonomy based on specific regional needs and capacities. Additionally, Kenya should invest in civic education programs to foster a shared

national identity alongside ethnic identities. Crucially, the process of designing and implementing such a system should be highly participatory, involving extensive consultation with diverse stakeholders across the country. This approach would aim to balance the benefits of regional autonomy with the need for national unity, while mitigating the risks of ethnic entrenchment and separatism highlighted by scholars like Roeder, Anderson, and Horowitz. Ultimately, Kenya's federal structure should be tailored to its unique historical, cultural, and political context, with built-in flexibility to adapt to changing circumstances over time.

## 11. Perspectives from Contemporary Federal Theorists on the "Unit Question" in Federalism

### 11.1 K.C. Wheare's Perspective

K.C. Wheare, a prominent scholar in the field of federalism, indeed emphasized the importance of socio-economic viability in federal systems. His concern with the economic capacity and resource availability of federal units reflects a pragmatic approach to the functioning of federalism. Wheare argued that for a federal system to operate effectively, its constituent units must possess sufficient economic resources and capacity. In his seminal work *"Federal Government"* (1946), he states, "The units of a federation must be fairly large in area, population, and resources... They must be viable units capable of supporting the structure of a state government," (Wheare, 1946, p. 83). This perspective underscores the notion that mere political division is insufficient; economic sustainability is crucial for the success of a federal arrangement.

The emphasis on socio-economic viability stems from Wheare's understanding that federal units need to fulfill their responsibilities and maintain a degree of autonomy. He argues that without adequate resources, federal units may become overly dependent on the central government, potentially undermining the balance of power that is fundamental to federalism. As he notes, "If the regional governments are to exercise their autonomous powers effectively, they must have under their independent control financial resources that are adequate for the purpose" (Wheare, 1946, p. 93).

Wheare's ideas have influenced subsequent scholarship on federalism. For instance, Ronald Watts, in his work *"Comparing Federal Systems"* (2008), builds on Wheare's concepts and emphasizes the importance of fiscal federalism in maintaining the economic viability of federal units. Watts notes, "The allocation of fiscal resources among governments within a federation has a major impact upon the degree of centralization or decentralization that actually occurs" (Watts, 2008, p. 95).

### 11.2 Jacob Levy's Perspective

Jacob T. Levy's work on federalism indeed focuses on jurisdictional competition among federal units, offering a dynamic perspective on how these units interact within a federal system. This approach examines how different constituent parts of a federation compete with each other in various domains, including policy-making, resource allocation, and political influence. In his article "Federalism, Liberalism, and the Separation of Loyalties" (2007), Levy argues that jurisdictional competition is a key feature of federal systems. He states, "Federal systems create the possibility for exit and competition among jurisdictions, which can discipline governments and create laboratories of experimentation" (Levy, 2007, p. 459). This view suggests that competition between federal units can lead to innovation and improved governance as units strive to attract citizens and resources.

Levy further develops this idea in his book *"Rationalism, Pluralism, and Freedom"* (2015), where he explores how jurisdictional competition relates to individual liberty. He posits that the ability of citizens to move between jurisdictions with different policies creates a form of market-like competition among governments. As he notes, "The possibility of exit disciplines local governments, forcing them to be responsive to residents' preferences or risk losing population and tax base" (Levy, 2015, p. 248). This perspective on jurisdictional competition builds on earlier work in the field, such as Charles Tiebout's model of local government provision of public goods (1956). Tiebout argued that citizens "vote with their feet" by choosing to live in jurisdictions that best match their preferences for public services and tax levels. Levy extends this concept to federal systems, considering how it applies to larger political units.

Levy's focus on jurisdictional competition also connects to discussions of fiscal federalism. In this context, competition among units can involve tax policies, regulatory environments, and public service provision. As Barry Weingast argues in "The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development" (1995), such competition can lead to more efficient governance and economic growth. It's worth noting that while jurisdictional competition can have positive effects, Levy also acknowledges potential drawbacks. For instance, competition might lead to a "race to the bottom" in certain policy areas if units compete by lowering standards or reducing public services to attract businesses or wealthy residents.

### 11.3 *Ran Hirschl's Perspective*

Ran Hirschl, a prominent scholar in comparative constitutional law and political science, indeed examines the enduring influence of the Westphalian state model on federal systems and their constituent units. His work explores how traditional concepts of state sovereignty and territorial integrity continue to shape the nature and functioning of federal units in contemporary political structures. In his book "Comparative Matters: The Renaissance of Comparative Constitutional Law" (2014), Hirschl discusses how the Westphalian model of state sovereignty continues to influence constitutional arrangements, including federal systems. He argues that "despite globalization and the rise of supranational governance structures, the Westphalian paradigm of state sovereignty remains a powerful force in shaping constitutional design and interpretation" (Hirschl, 2014, p. 69). Hirschl further develops this idea in his article "Opting Out of 'Global Constitutionalism'" (2018), where he examines the tension between global constitutional norms and the persistent influence of the Westphalian model. He notes that "even in federal systems, which ostensibly divide sovereignty, there is often a strong pull towards centralization and the preservation of a unitary international personality" (Hirschl, 2018, p. 12).

The impact of the Westphalian model on federal units is also evident in Hirschl's analysis of territorial management in divided societies. In "Constitutional Theocracy" (2010), he explores how federal arrangements attempt to balance territorial integrity with the accommodation of diverse ethnic, religious, or linguistic groups. He argues that "the Westphalian emphasis on territorial sovereignty often complicates efforts to create flexible federal arrangements that might better serve diverse populations" (Hirschl, 2010, p. 206). Hirschl's work builds on and engages with other scholars in the field. For instance, it relates to Stephen Krasner's concept of "organized hypocrisy" in international relations, which argues that state sovereignty is often more of a constructed norm than a consistent practice (Krasner, 1999). In the context of federalism, this suggests that federal units may aspire to Westphalian ideals of sovereignty while operating within the constraints of the larger federal structure. It's important to note that while Hirschl acknowledges the persistent influence of the Westphalian model, he also recognizes the evolving nature of sovereignty in the face of globalization and transnational governance. His work thus provides a nuanced view of how traditional concepts of statehood continue to shape, but do not entirely determine, the functioning of federal units in the contemporary world.

### 11.4 *David Miller's Perspective*

David Miller, a prominent political theorist, in his work on this topic is particularly notable for proposing three distinct approaches to boundary-drawing, each emphasizing different values and considerations. In his book "Citizenship and National Identity" (2000), Miller lays out these three approaches: *The Functional Approach*: This approach prioritizes the practical viability of federal units. Miller argues that "political units should be large enough to be economically self-sufficient and capable of providing the full range of public goods that citizens have come to expect" (Miller, 2000, p. 164). This perspective emphasizes the importance of creating units that can effectively protect basic rights and maintain economic stability. *The Political Approach*: Going beyond mere functionality, this approach considers the democratic legitimacy of federal units. Miller suggests that "boundaries should be drawn in such a way that the resulting units form genuine political communities whose members identify with one another and are willing to engage in collective democratic decision-making" (Miller, 2000, p. 165). This approach takes into account the social and psychological characteristics of populations, aiming to create units where citizens feel a sense of shared political identity. *The Homeland Approach*: This approach prioritizes historical and cultural ties to territory. Miller argues that "political boundaries should, where possible, coincide with the boundaries of national homelands as these are identified



in the beliefs and practices of the peoples concerned" (Miller, 2000, p. 166). This perspective acknowledges the importance of pre-existing cultural and historical attachments to land in shaping political identities and loyalties.

In his later work "On Nationality" (1995), Miller further develops these ideas, emphasizing the importance of national identity in shaping political communities. He argues that "the boundaries of nations are not simply arbitrary lines on a map, but reflect deeper cultural and historical realities" (Miller, 1995, p. 24). However, Miller acknowledges that these approaches can sometimes conflict, and that real-world boundary-drawing often involves balancing these different considerations. As he states in "Citizenship and National Identity", "In practice, boundary-drawing is likely to involve trade-offs between these different approaches" (Miller, 2000, p. 167).

### **11.5 Francesco Palermo and Karl Kössler's Perspective on federation**

While not exactly theorists, these authors are cited discussing the distinction between "coming together" and "holding together" federations, which impacts how units are formed and defined. Francesco Palermo and Karl Kössler have contributed to the understanding of federalism by discussing the distinction between "coming together" and "holding together" federations. This classification, originally proposed by Alfred Stepan, provides insight into the formation and definition of federal units. Palermo and Kössler explore this concept in their work, particularly in their book "Comparative Federalism: Constitutional Arrangements and Case Law" (Palermo & Kössler, 2017). They argue that the historical process of federation formation significantly influences the nature of the resulting federal system.

In "coming together" federations, previously independent political entities voluntarily decide to unite and form a new federal state. Examples of this type include the United States, Switzerland, and Australia. In these cases, the constituent units often retain a strong sense of identity and autonomy, which is reflected in the federal structure. The authors note that such federations typically have more symmetrical arrangements, with constituent units possessing similar powers and representation at the federal level (Palermo & Kössler, 2017). On the other hand, "holding together" federations emerge from the decentralization of a formerly unitary state. This process is often undertaken to accommodate diverse regional interests or to prevent secession. Spain, Belgium, and India are examples of this type. Palermo and Kössler observe that these federations tend to have more asymmetrical arrangements, with some regions potentially enjoying greater autonomy or special status than others (Palermo & Kössler, 2017; Kössler & Palermo, 2017).

The authors argue that this distinction has important implications for how federal units are formed and defined. In "coming together" federations, the units are often pre-existing entities with established boundaries and identities. In contrast, "holding together" federations may involve the creation of new subnational units or the redrawing of internal boundaries to accommodate regional differences (Palermo & Kössler, 2021; Palermo & Alber, 2013). Palermo and Kössler also discuss how this classification affects the distribution of powers between the federal government and the constituent units. They suggest that "coming together" federations often have a clearer delineation of powers, with the federal government having only those powers explicitly granted to it. In "holding together" federations, the process of decentralization may result in a more complex and evolving distribution of powers (Palermo & Kössler, 2017; Alber & Palermo, 2023).

## **12. Conclusion and Recommendations**

The evolution of Kenya's governance structure from pre-colonial times to the current devolved system under the 2010 Constitution represents a complex journey of political transformation. This study has traced the trajectory from diverse pre-colonial governance systems through the centralization of the colonial and immediate post-independence eras, to the current push for decentralization and devolution. The analysis reveals that Kenya's governance challenges are deeply rooted in its historical context. The colonial legacy of centralized authority, coupled with post-independence efforts to consolidate power, created a system that exacerbated regional disparities and ethnic tensions. The introduction of multi-party politics in 1991, while a step towards democratization, did not immediately address these structural issues.

The 2010 Constitution, with its emphasis on devolution, marks a significant attempt to address long-standing governance challenges. By creating 47 county governments with substantial autonomy, the new system aims to bring governance closer to the people and promote equitable development. However, the implementation of devolution has faced numerous challenges, including resource allocation issues, political resistance, and the persistence of centralized mindsets. The study finds that while Kenya's current devolved system shares some characteristics with federal systems, it remains distinct. The ongoing evolution of Kenya's governance structure suggests that the country may continue to move towards greater decentralization, potentially adopting more federal-like features in the future. However, this process is likely to be gradual and shaped by ongoing political negotiations and societal pressures.

Several key lessons emerge from this study. First, the importance of historical context in shaping governance structures and the challenges of reform is evident. Second, the complex interplay between ethnic dynamics, resource distribution, and governance systems in diverse societies plays a crucial role. Third, while constitutional reform has the potential to address historical injustices and promote more equitable governance, it also faces limitations in the face of entrenched political cultures. Finally, there is an ongoing tension between centralization and decentralization tendencies in governance, reflecting competing visions of national unity and local autonomy. Kenya's journey towards a more decentralized system of governance reflects broader trends in Africa and other developing regions. While significant progress has been made, particularly through the 2010 Constitution, the full realization of devolution's promise remains a work in progress. Future developments in Kenya's governance structure will likely depend on continued negotiation between national and local interests, the evolution of political cultures, and the country's ability to balance unity with diversity.

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