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"The Cost of The Constitution: Emerging Theoretical, Financial and Legal Challenges within the Devolved Governance Framework Introduced by the 2010 Constitution of Kenya"

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ABSTRACT

At independence Kenya was handed a constitution which had been drafted and negotiated by the colonizing power. This document set the pace for the full application of a common law system in the new nation. This legal system lacked contextualization, it was built on British traditions and usages that were foreign to the country's culture. Kenya had inherited a system of laws devoid of its spirit. This opened the floodgates of manipulation where the executive progressively grew almighty to the detriment of other powers, and eventually to the detriment of the country itself and its sense of nationhood.

In 1996 the former President of Kenya, Daniel Arap Moi, announced that there would soon be a new constitution for Kenya. This promise did not materialize until 2010. Two years before, in 2008, the country had gone through the most dramatic period of its history since independence. The post-election violence of 2008 shook the country to the core. Hundreds of Kenyans died and almost 500,000 were displaced. A new constitution was not just necessary, it was a must and it was urgent. The constitution-drafting process was reignited and in 2010 Kenya voted for a new forward-looking constitution.

This constitution had to strike a difficult balance. It had to reunite the country, keeping it together, while at the same time it also had to increase efficiency in service delivery. The chosen formula for the country's governance was enshrined in the constitution as 'devolution', which consisted in 'devolving' power to smaller units. However, devolution would not succeed unless presidential powers were diluted, for the country had witnessed power manipulation at all levels, since independence, by shortsighted presidential interests.

The 2010 Constitution of Kenya is a forward looking, modern, innovative and expensive document. The cost of implementing its new governance framework, taking into consideration all additional and collateral costs and its impact on the country's revenue generation and expenditure patterns, was sadly overlooked. While Kenya's new constitutional dispensation is seen as the solution to multiple problems, it was spearheaded without a costing matrix, and in disregard of the fact that huge economic, human, political and legal resources are usually required to implement constitutional processes and institutional reforms. In effect, this study highlights the importance of constitutional drafters being explicit with, and experienced in, cost analysis and financial implications when presenting draft legislation and/or amendment bills to citizens.

This paper is informed by data from Budget Policy Statements and Budget Review and Outlook Papers published by Kenya's National Treasury; pay structures provided by the Salaries and Remuneration Commission; scholarly publications on constitutional reforms and opinion pieces on Kenya's new devolved system of governance.

The original work carried out for this research was published by The Africa Policy Journal of Harvard Law School in March 2015. The current paper is a follow up with new emerging details on constitutional implementation and new insights on pressing financial issues.[1]

Key words: Kenya, Constitution, Devolution, Finance, Expenditure, Common Law, Budget.

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1. Common law and its implementation in uncommon Africa

Kenya, as is the case with other African countries, was subjected to a colonization process that led to the imposition of legal, social and economic structures without due contextualization of local customs, usages and millennial traditions. The colonial structures were originally not interested in the social and economic growth of Africa and its peoples, but blindly aimed at the efficient depletion of natural resources for the benefit of the colonizing power and the enrichment of Her Majesty's subjects, without paying due attention to the importance of educating of the local population. This mad gold rush had been officially flagged off at the Berlin Conference which subsequently led to the declaration of Kenya as a British Protectorate on 15th June 1895.[2]

Before not too long, the colonizing power came to the realization that Africa did not have law in the Anglo-American sense.[3] Coupled with the fact that colonies were treated as extensions of the mother country, the United Kingdom, it became necessary for common law to be imported to the colony. This importation was executed sequentially through various crown ordinances into Kenya. However, this system of common law in the new African environment was common to the English settlers and law to none.

In order to give a certain stability to the quick expansion of the empire and make it sustainable and truly productive, the British imposed their Common Law system throughout the colonies. This system brought in an important array of traditions and usages common to the British people but foreign to the colonised societies.

In the pre-colonial epoch, the legal system in most African countries was predominantly defined by African traditions. These traditions broadly encompassed their customs, system of beliefs and practices.[4] However, these traditions were not codified but were rather handed down by word of mouth across generations.[5] Lumped together, it is these traditions that informed a customary law system. The African people did not have a formal judicial setting comparable to that of the English. Theirs was an informal judicial system in

[2] Van Doren, *Death African Style*, 331

[3] Osogo Ambani and Ochieng Ahaya, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era' *Strathmore Law Journal*, VOL 1 2015

[4] Kiama, E., 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159 (2) (c) of the Constitution, 2010' *Strathmore Law Journal*, vol 1 2015

[5] Fremont, J., 'Legal Pluralism, customary law and human rights in francophone African countries' 40 Victoria University of Wellington Law Review 1 92009), 150-151

which the elders, guided by customary law, settled their disputes.[6] Furthermore, there was no demarcation between customary law, on the one hand, and religion and moral preconceptions, on the other. All these were conglomerated into one mutually supportive system of customary law.[7]

Therefore, customary law was common to Africans but uncommon to the British settlers. Conversely, common law was common to the British settlers but uncommon to the Africans. In order to assert its permanent dominance, the colonizing power imposed its own legal system in which its social and political values and history were also embedded.[8] This imposition achieved the fusion of development and education; it eroded customary law and consolidated the dominant position of common law.[9]

In 1897, an executive Order in Council declared the supremacy of common law over all other systems and, where there would be an overlap, common law was to take precedence. This meant that the other factions were allowed to observe their systems but only in limited circumstances.[10] This caused the establishment of a parallel system of courts to administer justice to the indigenous people.[11] However, these courts were also creatures of common law with common law judges.

Thus, common law was the substantial product of English traditions and practices as propounded by the courts, and enriched by social, economic, cultural and political experiences. These traditions and practices were far too dissimilar to the indigenous Kenyan experience. Therefore, the wholesome, unqualified transplantation and imposition of the common law was inordinately incongruent with the Kenyan circumstances. The philosophical contradictions between the two systems were also overlooked, to Africa's detriment.[12]

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[6] Ojwang J.B., *Constitutional development in Kenya: Institutionalism adaption and social change,* ACTS Press, Nairobi 19990

[7] Pimentel D, 'Legal pluralism in post-colonial Africa: Linking statutory and customary adjudication in Mozambique' 14 Yale Human Rights and Development Journal 59

[8] Osogo Ambani and Ochieng Ahaya, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era' *Strathmore Law Journal*, VOL 1 2015

[9] Ibid

[10] Customary law was to apply only in personal law matters such as marriage, divorce and succession its application was to the extent that it was not repugnant to common law.

[11] Ojwang, J.B., *Laying a Basis for Rights,* presented at University of Nairobi Inaugural Lecture July 9, 1992

[12] Whereas, for instance, criminal law in the common law setting would be retributory, African philosophy believes in deep notions of inclusivity, communalism and reconciliation. Therefore, the overarching principle is one of restoration. See *Mayelane v Ngwenyama* where the court noted as follows: the inherent flexibility of customary law provides room for consensus-seeking and the prevention and resolution, in family and clan meetings, of disputes and disagreements; and … [that] these aspects provide a setting which contributes to the

Colonial and post-colonial legacy institutionalized a foreign legal system that progressively and persistently eroded social equality, equity, access to justice and the unity of the country by downgrading customary laws. As years went by the social fabric started to tear apart. This degeneration open the floodgates that allowed the politicians' use of powers over land allocation to further political and ethnic interests; the widespread manipulation and deeply rooted corruption; the taking their land from the poor and the displacement of people; the concentration of land ownership in a few hands; the growing poverty and human misery created by landlessness people and tenure insecurity in both rural and urban areas; environmental degradation due to a breakdown in natural resource management, particularly common property resources; the de-gazettement and alienation of forest reserves, in some cases long used and occupied by indigenous people; the lack of State organs to address complaints and resolve land disputes in a timely and even-handed manner; and gender and age discrimination in both customary and statutory law.[13]

This situation was unsustainable; it was a bubble ready to burst at the first act of provocation, and it did burst in 2007-2008 after the mismanaged and controversial 2007 presidential election that saw the death of several hundreds of Kenyans and the displacement of almost 500,000 people. A solution had to be found, and this solution was enshrined in the Constitution of Kenya 2010 as a new governance system that would bring power closer to the people, while at the same time it healed the so-much desired and damaged unity of the country. This system was called devolution.

2. Devolution: Towards a new governance structure

The most fundamental break of the 2010 constitution from the repealed dispensation was the establishment of a devolved form of government. The overriding objective of establishing a devolved government was to bring the governance structures back to the people.[14] In other words, Kenya chose to move to a multi-dimensional approach in the

unity of family structures and the fostering of co-operation, a sense of responsibility and belonging in its members, as well as the nurturing of healthy communitarian traditions. (CCT 57/12) [2013] ZACC 14.

[13] Constitution of Kenya Review Commission (CKRC), *Final Draft*, 2005.

[14] Ghai Y.P., 'Could 2002 Draft Have Saved Us From Current Problems?' The Star, available at http://www.the-star.co.ke/news/Article-112893/could-2002-draft-have-saved-us-current-problems#sthash.hBf91k3Q.dpuf, accessed on 24th January 2014.

organisation of government, one which manages State power along multiple lines. In this case, it is based on the concept of power decentralisation and devolution.[15]

The centralized system of government that Kenya had until 2010 is largely blamed for the dismal economic performance, and corruption and for promoting and sustaining poor governance in Kenya. The absence of an adequate and enforceable code of ethics and normative standards for the public service created a body which was constantly weighed down by favoritism, nepotism, tribalism and the gross mismanagement of resources.

The 2010 constitution sought to restructure fundamentally the core institutions of governance, thereby reforming the executive, legislature and the judiciary. It introduced national values and principles of governance which included, the sharing and devolution of power, the rule of law, democracy and the participation of the people; good governance; integrity, transparency and accountability; and sustainable development.

Notably, apart from the national government, the 2010 constitution also established 47 county governments in a structure of shared political, administrative and fiscal responsibilities between the two levels of government. This new structure increased the number of members of the National Assembly from 222 to 419, including 68 new senators. This new governance system would be called a "devolved government structure".

Devolution of power is defined as the practice in which the authority to make decisions in some sphere of public policy is delegated by law to sub-national territorial organs or units, such as a local authority. Devolution entails transferring governmental or political authority – with the powers of the constituent units determined by legislation rather than by the Constitution.[16] Devolution is different from federalism. The latter implies a vicarious delegation, where regions acquire essential autonomy and the *whole* is composed of an accumulation of *parts*, while in the former powers are transferred to regions in the same way as blood goes to different parts of the body. But the body continues being *one* and its parts cannot subsist outside the *whole*.

Devolution aims at bringing governmental power closer to the governed. Loveridge says that "…devolution is a movement to place governmental power in the hands of elected

[15] Kangu M., 'Operationalization of Devolution in the Constitution of Kenya,' a presentation at a workshop held at Strathmore Business School, on 22nd March 2011.
[16] Constitution of Kenya Review Commission (CKRC), *Final Draft*, 2005, at 223-224.

or appointed managers operating at a level closer to the beneficiaries of government actions."[17] Atemi and Okello argue that devolution "is meant to squeeze power out of the central government into the nerves and veins of provincial councils up to the location level where citizens will have a say."[18] It is envisioned to create a closer relationship between the government and the people, where the views of the governed are incorporated in decision making and where they have a say in decisions that closely affect them.

Political devolution encourages self-governance, higher levels of accountability, and the separation of powers and it also multiplies the incidence of checks and balances.[19] In a devolved system, the lower levels of government are not only *consulted* in the decision-making process, but are also *involved* in making policy decisions: "One of the vital characteristics of ideal devolution models is not only that the residents are constantly consulted on decisions but also are part of the decision–making process. Constant popular consultation and participation nurtures the spirit of ownership of development processes and is, therefore, able to achieve a more responsive and more effective management of resources and government processes."[20]

There are a number of ways in which a devolved system of governance may be established and there are key landmarks legal drafters must take into consideration when designing a devolved system. Some of these elements may be identified as the structure and organization of an allocation of power that includes separately elected governments at both central and regional levels; a clear fiscal relationship between the central and provincial governments; the possibility of judicial review and dispute resolution relating to the allocation of powers; mechanisms for coordination between the central and provincial government, among provincial governments themselves, and between provinces and other entities where the two levels should have well outlined competencies to avoid an overlap of responsibilities; clear methods for the modification of structures once they have been

[17] Loveridge S, 'The Origins of Devolution: A Speculative Note' Paper presented at the Southern Regional Science Association Meeting, Richmond, Virginia, April 17, 1999, Available at http://www.rri.wvu.edu/pdffiles/Devolution.PDF accessed on 25 Jan 2014.
[18] Atemi C. & Okello R., 'Taming the Devolution 'beast'' in Yawezekana Bomas Agenda, 26th May 2003, Available at http://www.awcfs.org/dmdocuments/ bomasagenda/Newsletter5.pdf accessed on 25 Jan 2014.
[19] Ibid.
[20] Constitution of Kenya Review Commission (CKRC), *Final Draft.*

established and an established mode of election for governments at both central and regional levels.[21]

In the allocation of power, it is essential that the central government retains powers over matters of national interest.[22] Provincial powers may deal with certain aspects of revenue imposition and collection, public transportation, local police, education and social welfare.[23] Meanwhile, "the national government must provide a sound macroeconomic environment for the regions, maintain a (national) transportation network, facilitate labour mobility, define taxing powers between the centre and the regions, and serve other functions key to a modern nation-state."[24]

Indeed, devolution involves the transfer of power from a superior political power to an inferior authority.[25] The functions transferred are either legislative or executive, or both. The devolved government under the Constitution, though akin to a federal system of government, should nevertheless be distinguished from the federal type of government. A federation is a system in which the relationship between the national and constituent governments, in law and in practice, is not subordinate but coordinate.[26] Certainly, according to this definition, the Kenyan system of devolved government is not a federation since the county governments are subordinate to the national government. It is noteworthy, though, that the terms 'federal', 'federalism' and 'federations' do not have a established definition. Similarly, the definition of devolution is varied.

Devolution of power has traditionally been implemented with the general objectives of seeking the common good while respecting different ethnic or human geographic factors. This approach fosters a better service delivery and respect for minority rights.

Nevertheless, while devolution holds promise, it is not a panacea and magic solution for the problems of governance. A reckless and poorly planned process of devolution may also

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[21] Ibid. See also Keating M, 'Federalism and the Balance of Power in European States,' paper prepared for the Support for Improvement in Governance and Management (SIGMA), available at http://www.oecd.org/dataoecd/61/8/37890628.pdf, accessed on 25 Jan 2014 at 7.

[22] Ibid.

[23] Part 2 of the Fourth Schedule to the 2010 Constitution of Kenya lists the devolved functions. County government functions are further elaborated in Section 5(2) of the County Governments Act No.17 of 2012.

[24] Kupchan C, 'Devolution Drives Russian Reform' in The Washington Quarterly, Spring 2000, The Center for Strategic and International Studies and the Massachusetts Institute of Technology, available at http://www.twq.com/spring00/232kupchan.pdf, accessed on 25 Jan 2014 at 73.

[25] See Bogdanor V, *Devolution in the United Kingdom,* Oxford University Press, 2002, at 2.

[26] See Verney D.V., 'Federalism, Federative Systems, and Federations: The United States, Canada, and India' 25 *The Journal of Federalism,* (1995) at 83.

devolve corruption and abuse of power, including extortion, excess taxation, and bureaucracy.

It should be recalled that the Constitution is not incorporating devolved government as such for the first time in Kenya. At independence, Kenya had a similar type of devolved government. And it is the history of devolved government that informed the debate on devolved government during the Constitutional review process. Consequently, the discussions on the nature of devolved government to be established in the Constitution were heated and many often times seemed inconclusive.[27] In most cases it was the system of devolved government at independence, popularly known as *majimbo*, that informed most of the debate with opponents viewing the proposed devolution as the institutionalisation of tribalism. Nevertheless, this view was not entirely far-fetched as *majimbo* at independence advocated exclusive, ethnically-based regionalism.[28]

The devolved government at independence consisted of the national government and seven regions which were further divided into local authorities. Each region had a regional assembly which elected a regional president from amongst its members. The executive power of the regions lay in the Finance and Establishments Committee. The independence constitution had set out a list of areas which regional assemblies had exclusive competence over, and those in which it had concurrent competence with the National Assembly. In order to entrench the place of regions, the constitution provided that regional boundaries be altered by parliament with the approval of the regional assembly. The local government system was composed of Local Authority Councils.

The independence constitution required the central government to consult with and, in some cases, secure the consent of regional authorities before the central authorities could make certain decisions (for example, about land, the Judiciary and police). This was despite the fact that the regions' exclusive powers were limited, that central authorities had several powers of intervention in regional affairs and the power to direct some of these affairs.

[27] Ibid, at 389.

[28] See also Ngunyi M, 'Resuscitating the Majimbo Project. The Politics of Deconstructing the Unitary State in Africa' in Olukoshi A & Laasko L (eds), *Challenges to the Nation-State in Africa*, Uppsala, 1996; Anderson DM, 'Yours in Struggle for Majimbo: Nationalism and the Party Politics of Decolonization in Kenya 1955-64,' 40 *Journal of Contemporary History* (2005) at 547.

Decisions over specific matters required a large majority for the decision-maker to mobilise significant support for its policy.[29]

Through a series of amendments in the immediate post-independence period the regional governments were dismantled and this culminated in the abolition of the Senate. The Senate, originally established to protect *majimbo,* was abolished in 1968 and all senators became members of the new assembly, whose life was extended by one year. The constitutional protection against the redrawing of regional and district boundaries or the creation of new regions or districts was removed in 1964 and 1968. An important consequence of the abolition of regional structures and governments was to reinstate the system of provincial administration which had enabled the central authorities to dominate affairs in all parts of the country – thus power was intensely centralised again.[30]

The former regions at independence then became provinces directly administered by the national government, and even though local councils remained, they lacked self-determination and were directly dependent on the central government. Under the repealed Constitution, therefore, the government suffered from excess centralisation. [31]

The form of devolution enshrined by the 2010 constitution is not based on the principle of absolute autonomy, but on that of interdependence and cooperation. Every county's government is founded on the separation of powers so that the political branches of the county government are able to effectively check each other, and that they have the fiscal capacity to carry out their responsibilities effectively.

Regrettably, the county boundaries established by the constitution are based on the former colonial districts and they coincide with ethnic boundaries since the districts as they were created at independence were created in such a way as to ensure ethnic homogeneous units as far as possible.[32] Indeed, even with the migration of communities across Kenya since independence, still the great majority of the residents in most of the 47 counties belong to the same ethnic group. Thus, there is a clear and present danger of turning devolved units into ethnic pockets, thus exacerbating and accelerating ethnic tensions across the country.

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[29] Constitution of Kenya Review Commission (CKRC), *Final Draft,* at 25.
[30] Ibid, at 28.
[31] Constitution of Kenya Review Commission (CKRC), *Final Draft,* at 231.
[32] See United Kingdom Parliamentary Papers, 1962, Cmd. 1899, *Kenya Report of the Regional Boundaries Commission,* at 1-16.

In any case, the number of counties created by the constitution is unjustifiably large. While forty-seven counties will certainly bring power closer to the people, it has also increased public expenditure disproportionately, making governance a heavy burden, unrealistic and unbearable for the citizen. In this sense, it will be important to strike a balance between the need and desire for devolution and the costs involved to turn this desire into a reality.

In practice, devolution was just one of the means Kenya decided to put in place in order to dilute central powers. However, devolution alone was not sufficient unless its practical financial aspects were also taken into consideration, and this is how devolution brought about also the creation of financial systems that aimed at preventing any sort of manipulation by the central government. Chapter 12 of the constitution was dedicated to the new intricate, over-checked and over-rigid public finance system.

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3. Public finance: devolving the country's financial management

Public finance is of critical importance to any polity. Taxation and the use of public funds have shaped the politics and institutional structures of modern democracies so critically that often a government is judged to be a success or failure solely on its economic performance and development record. Most revolutions have been shaped by the 'economic issue' for economics is closely associated to power.[33] In the United Kingdom, the Magna Carta signed in 1215 fundamentally influenced the direction and pace of England as a constitutional monarchy when the landed gentry refused to pay taxes on the grounds that they were not represented. Similarly, the American War of Independence (1775-1782) was partly triggered by resentment that originated from taxation without representation.[34]

The 2010 Constitution of Kenya introduced fundamental changes in the management of public finance, changes that did not receive much attention prior to the referendum and subsequent promulgation of the constitution. In 1963, Kenya had inherited a colonial public

[33] See Franceschi, L.G, & Lumumba PLO, *The Constitution of Kenya: An Introductory Commentary*, SUP, Nairobi, 2014, at 551.
[34] Njeru K, *Public Finance Under Kenya's 2010 Constitution,* Society for International Development (SID), Constitutional Working Paper Series No.5, at 3.

finance management system based on command and control structures. The 1963 Constitution divided public finance among the three branches of government but the Executive soon monopolized that control. Between 1963 and 2010, the Constitution of Kenya underwent 29 constitutional amendments. These amendments touched on almost 40 key constitutional principles which allowed the executive to gain, in practice, an absolute control of every power in the state, and the Kenyan parliament was then reduced to little more than the executive's rubber stamp.

Under President Kenyatta's rule, which favored the unitary and centralized mode of governance, there was a constitutional amendment which abolished the position of Prime Minister. The executive, led by a strong presidency, steered the budget process with powers added by Section 48 of the 1963 constitution which prohibited parliament from introducing bills related to money or making any amendments to increase taxes or expenditure. This meant that parliament was precluded from influencing the manner in which resources were mobilized and allocated.

A policy paper issued by the government in 1965[35] set out the country's preference for a mixed economy in which the private sector played a critical role in development. This was in direct contrast with East African Community partners who took a more socialist-oriented approach. The tax system in Kenya during the colonial times was retained with only minor changes to remove the overtly racial connotations and privileges conferred on the white settler community. These cosmetic changes allowed little involvement of the citizens to influence decisions on how resources were mobilized, allocated and used. The introduction of a *de facto* one-party system in 1969 further strengthened the executive's hold on fiscal matters. Parliament's role as the representative of the people was further relegated to one of ritual approval; it had completely lost its oversight control. This situation undermined governance structures and opened up public resources and offices to abuse. Within a decade of independence, the constitution had already been amended several times to allow the President to appoint and dismiss senior civil servants without due consultations with the Public Service Commission (PSC). Thus civil servants became servile to the president, who had practically absolute powers on all technical and policy issues.

President Kenyatta, the first president of Kenya, died in 1978 and was succeeded by Daniel Arap Moi, who promised to continue the footsteps of Kenyatta. Moi was the victim of

[35] Sessional Paper No.1 of 1965, on African Socialism.

an attempted coup attempt in 1982. This failed attempt aggravated the situation further. Moi's reaction was to hold a tight control on all public structures and decisions. Henceforth, nothing would be decided without Moi's approval and consent. Although parliament approved taxes, rates and expenditure proposals, this only became a formality and any member who critiqued the budgetary allocations would be vilified. The executive made all decisions including how much information could be brought to parliament. There was also a systematic erosion of the office of the Controller and Auditor General, arising from transfers of key officers, a situation that undermined its capacity to perform essential functions and led to accumulated audit arrears. This situation deteriorated so much that by 2003, Parliament was more than five years in arrears in the examination of the annual public accounts. One of the results was the gross impunity and abuse of public office, and the mismanagement of public finances that developed into mega scandals, such as Goldenberg, Maize, Sugar and Anglo-leasing scandals in all of which the government lost billions of shillings. The almighty executive had turned public budgeting into an endeavor to reward regions and personalities rather than serve the common good. Whatever was decided by cabinet would then be unquestionably assented to by parliament. The low emoluments and allowances paid to civil servants and legislators meant they had to live on hand-outs, and thus had to supplement their income through political favor and unsecured loans, which institutionalized their dependency on the will of the executive and made it easy for them to be compromised. Such abuses prompted the public to support the law-makers in wresting from the executive the control of public finance.

Interestingly, public finance as a topic did not feature much in debates prior to the 2010 Constitution referendum. This topic started to become of concern in the first decade of the 21st century, when some of those aforementioned mega scandals emerged and seriously dented the public confidence in the government's capability to manage public finances. In response to mounting pressure, the draft budget law was brought before the house in 2005. It was strongly opposed by the executive. The 10th Parliament of Kenya quickly picked up the draft and moved swiftly not only to enact it as the Fiscal Management Act of 2009, but also to establish a Parliamentary Budget Office (PBO). Subsequently, the provisions of the new law were mainstreamed in new Standing Orders of Parliament, effective from April 2009. Many of these changes were later incorporated into the 2010 Constitution. Section 9 of the Public Finance Management Act 2012 provides for the continual existence of the Parliamentary Budget Office, its composition and additional functions.

The 2010 constitution was therefore significantly influenced by the need to correct past executive excesses and abuses, including misappropriation. A comprehensive chapter[36] was drafted and all public finance management provisions were inserted in this chapter. The fact that the government was and is the biggest player in the country's economy demanded a more diligent and scrutinized use of public funds, for this matter has a great deal to do with good governance.

Chapter 12 of the constitution considers how the revenue raised is to be allocated. It deals with controls of budgeting, expenditure, and public procurement. The chapter also deals with monitoring and withholding of public funds by national regulators and provides for the institutions and offices that regulate and monitor the use of public finances.

However, the drafters seem to have overemphasized the role of parliament and the constitution seems to have shifted to the other extreme, thus making financial management intricate and rather complex. This overzealous attitude of the drafters actually swung the financial pendulum to the point of making Parliament overly powerful in determining financial issues, thus falling into the realm of the impracticable, where one body collects revenue, another borrows and yet a third one budgets on expenditure. This intricate approach makes financial flows and efficiency extremely difficult to coordinate and may eventually lead to a deadlock that can even freeze the country's whole operation.

In this matter, parliament's role should have been restricted to oversight, but it had become more of an actual manager. The decision-making power has been largely transferred to parliament, making the executive practically irrelevant and sometimes redundant, as a decision-making and executing body, thus relinquishing its own nature. This fact jeopardizes government efficiency, transparency and responsibility in the use of public funds. Additionally, this has triggered an exacerbated and unsustainable wage bill which does not go hand in hand with revenue collection.

The easy manipulation of a common law system that was foreign to African traditions, coupled with a strong desire to decentralize power and dilute presidential prerogatives led Kenya into creating an extremely intricate governance system, with independent offices and overlapping functions that have strained the country's budget and current developmental expenditure. We will now take a look at the new structures created by the 2010 Constitution

[36] Chapter 12 of the Constitution of Kenya 2010.

of Kenya in order to operationalize the desire to devolve power and reduce the executive's excessive influence in all spheres of the country's management.

4. The new governance framework created by the 2010 Constitution

After the March 2013 general elections, a new government structure came into full operation. This new structure put in place an increased number of organs, personnel and operations, with the costs that ensue. It also allowed for citizen participation that was otherwise unavailable in the pre-2010 governance framework. The new structures included:

A. The Cabinet;

The Cabinet is part of the national executive as established by Article 130 (1) of the constitution. According to article 152 (1)(*d*) the cabinet should consist of not fewer than fourteen and not more than twenty-two Cabinet Secretaries. These are nominated by the president and approved by the National Assembly. Article 155 (1) establishes the office of Principal Secretaries, who are also nominated by the president following recommendations by the Public Service Commission, and appointed upon approval by the National Assembly. Before 2013 Kenya had 40 ministers in a coalition government that allowed each side of the government to appoint 20 ministers. However, these 40 ministers were also members of parliament concurrently. Under the new regime, the Cabinet Secretaries (formerly referred to as Ministers) are not members of parliament, but newly appointed individuals.

B. Legislature

Article 93 (1) of the constitution established a two-tier legislative house comprising a National Assembly with 350 members, and a Senate with 68 senators. This meant an increase in the size of parliament from 222 members to 418 in total. The distribution of these members is as follows: the Senate consists of forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency; sixteen women members who are nominated by political parties according to their proportion of members of the Senate; two members, one man and woman, representing the youth; two members, being one man and one woman, representing persons with disabilities; and the Speaker, who shall be an *ex officio*

member. The National Assembly comprises 290 members, each elected by the registered voters of single member constituencies; 47 women, each elected by the registered voters of the counties, each county constituting a single member constituency; 12 members nominated by parliamentary political parties according to their proportion of members of the National Assembly, to represent special interests including youth, persons with disabilities and workers; and the Speaker, who is an *ex officio* member.

C. The Judiciary

Article 160 (1) of the Constitution establishes the judiciary's independence by stating that in its exercise, it shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority. The judiciary's size has increased enormously and its budget went from less than 3 billion Kenyan shillings to almost 18 billion in a short time.

D. Commissions and Independent Offices

The Commissions and Independent Offices were created by Chapter 15 of the constitution plus special Acts of Parliament. They are independent offices, free from direction or control by any person or authority. The two independent offices are: The Office of the Auditor-General, and the Office of the Controller of Budget.[37] The constitutional commissions are:

1. Kenya National Human Rights and Equality Commission[38]
2. National Land Commission
3. Independent Electoral and Boundaries Commission
4. Parliamentary Service Commission
5. Judicial Service Commission
6. Commission on Revenue Allocation
7. Public Service Commission
8. Salaries and Remuneration Commission
9. Teachers Service Commission

[37] The constitution creates an array of other independent offices such as the Director of Public Prosecutions. However, the nature of such offices is not strictly independent in the same way as those offices created by chapter 15.

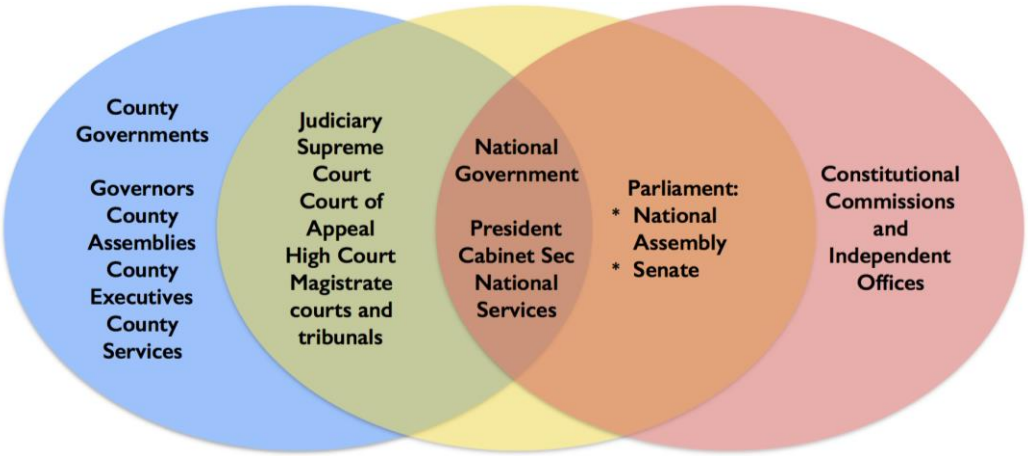
[38] Kenya National Human Rights and Equality Commission has been restructured to form three different commissions: The Kenya National Commission on Human Rights, the Commission on Administrative Justice and the National Gender and Equality Commission. The restructuring falls under article 59 (4).

10. National Police Service Commission
11. Commission for the Implementation of the Constitution, which had a life-span of 5 years since promulgation, and so it ceased to exist in December 2015.
12. The Ethics and Anti-Corruption Commission

The object of these commissions and the independent offices is to protect the sovereignty of the people, secure the observance of democratic values and principles by all state organs, and promote constitutionalism.

E. Devolved government structures

The constitution established a county government for each county, consisting of a county assembly and a county executive. Every county government decentralises its functions and the provision of its services to the extent that it is efficient and practicable to do so. County governments should be based on democratic principles, separation of powers, reliable sources of revenue and no more than two-thirds of the members of representative bodies in each county government shall be of the same gender. This new devolved structure is illustrated in the figure below:[39]



5. Implications of the new framework on public finance

The degree of devolution of spending and revenue-raising responsibilities has significant implications for the central government's ability to conduct macroeconomic

[39] Devolution should not be seen as vertical or horizontal. Rather, it is an organic distribution of functions, where all functions affect or influence each other while at the same time respecting their autonomy. All these functions are harmoniously brought together by the National Government, headed by a president, who acts as a symbol of national unity.

policies through the budget. Ultimately, the success of decentralization is dependent on the design and implementation of the decentralization framework. Mwenda asserts that,

> *''Large vertical imbalances, in favour of the national government, may have some negative effects. First, they may create expectations of gap-filling transfers by the national government to the sub-national governments. Second, they may lead to deficit financing and excessive debt accumulation by the sub-national governments, especially in respect of mandatory statutory payments. Substantial vertical imbalances in favour of the sub-national governments, on the other hand, may promote excessive spending on functions initially assigned to them through, for example, generous wage increases for their employees. Once the sub-national governments are committed to these expenditures, it becomes difficult for them to accommodate within their budgets the additional spending responsibilities that may subsequently be transferred to them. The quality, volume, frequency and source of local level information determines decentralization outcome.''*[40]

The table below illustrates the Vertical Allocation of Revenue to County Governments in the 2014/15 budget period.[41]

Budget Item	**Ksh. Millions**
Equitable share in 2013/14	190,000
Less:	
Estimated cost of remuneration and administration of the new county structures in FY 2013/14	13,622
Adjusted Baseline	176,378
Add:	
1. Adjusted cost of remuneration and administration for the new county government structures, including adjustment for pension/gratuity and increase in salaries & allowances	30,200
2. Cost of pension for staff transferred from national government	4,248
3. Cost of administration transferred from national government to county governments	7,080

[40] Mwenda, Albert K. 2010. ''Economic and Administrative Implications of the Devolution Framework Established by the Constitution of Kenya.'' *Institute of Economic Affairs* 1-36. Accessed 17/07/2014 http://dspace.africaportal.org/jspui/bitstream/123456789/34535/1/Economic-and-Administrative-Implications-of-Devolution[1].pdf?1 (The author of this paper has taken the liberty of correcting some minor grammatical errors in the citation)

[41] Source: National Treasury BPS 2014

4. Adjustment to cater for annual growth in expenditure	10,583
Total County Allocation from the shareable revenue	228,489
Less:	
Cost of Rural Electrification function that is to be transferred to county governments at a later date	7,314
Equitable share in 2014/15	221,175

The newly created offices increased civil service recruitment as well as recurrent expenditure. As at 2015, more than KSh 500bn, which accounts for over half of the government's collected revenue, was destined toward paying salaries, forcing the government to borrow to finance its development agenda.[42] The government is spending close to USD 4.6bn in salaries, leaving only USD 2.3bn for development.[43] The wage bill practically doubled, increasing from KSh 241bn in the financial year 2008/ 2009 to KSh 458bn in 2012/2013. The Salaries and Remuneration Commission (SRC) reported that this amount was in excess of 50% of the total domestic revenues, which is way above the international best practice of not more than 35% recommended for countries in Sub-Saharan Africa. The biggest spenders, accounting for 56% of the wage bill were the Teachers' Service Commission (KSh 138bn), State corporations (KSh 83bn) and County governments (KSh71.2bn). The table below provides a monthly breakdown of salaries paid out to the new offices.[44]

OFFICE	**Total Monthly Wage Bill at midpoint Pay (KSh.)**
Kenya National Human Rights and Equality Commission	5,717,461
National Land Commission	5,717,461
Independent Electoral and Boundaries Commission	5,894,000
Women Representatives (47)	29,198,750
Senate (47 elected senators, 16 nominated women senators, 2 youth representatives and the speaker)	41,799,000
Deputy President	1,227,187.50
Cabinet Secretary	924,000
Principal Secretary	765,187.50
Supreme Court Judges and Deputy Chief Justice	4,774,937.50

[42] Burrows, Olive. 2014. ''Uhuru to lead talks on public wage bill.'' Accessed 10/03/2014 http://www.capitalfm.co.ke/news/2014/03/uhuru-to-leads-talks-on-public-wage-bill/

[43] BBC (2014) Kenyan president and cabinet to take pay cut

[44] As provided by the Salaries and Remuneration Commission on their website, www.src.co.ke , with reference to *Gazette Notice Vol. CXV-No.33 of 1st March 2013*.

County governments (Governor, Deputy-Governor and Speaker of County Assembly)	74,610,667
Commission on Revenue Allocation	5,096,211
Controller of Budget and Auditor - General	1,689,187.50
Salaries and Remuneration Commission	5,717,461
National Security (Inspector-General, 2 Deputy Inspector-Generals, Chairman of National Police Service Commission and 5 Members)	5,861,398.50
Commission for the Implementation of the Constitution	5,894,000
TOTAL	**194,886,910**

The expenditure by the State corporations has increased by 5.1% from Ksh 78.9bn in FY 2013/2014. However, the county governments' expenses increased more than 15 times to KSh 71.2bn.

Kenya's wage bill has grown by 92% in the last 6 years. The average public sector wage KSh is higher than the private sector's. The Commissions and Independent Offices alone cost close to KSh2bn in salaries and allowances as illustrated below:[45]

SALARIES AND ALLOWANCES				
	REVISED	ESTIMATES		
OFFICE	2012/2013	2013/2014	2014/2015	2015/2016
Public Service Commission	147,617,078	109,883,736	87,168,560	92,234,864
Teachers Service Commission	240,197,041	110,602,153	114,948,697	127,346,641
Kenya National Commission on Human Rights	186,314,681	224,854,087	234,911,719	244,969,351
Independent Elections & Boundaries Commission	211,708,200	104,651,624	114,757,085	110,863,999
Constitution Implementation Commission	188,871,720	144,466,138	119,217,829	185,122,069
Commission on Revenue Allocation	188,631,720	153,949,089	138,423,731	142,344,215
Salaries & Remuneration Commission	65,400,000	43,860,000	43,860,000	43,860,000
National Land Commission	125,281,720	113,718,073	117,638,617	121,559,161
Parliamentary Service Commission	125,281,720			
National Police Service Commission	125,281,720	113,718,073	117,638,617	121,559,161
TOTAL	1,604,585,600	1,119,702,973	1,088,564,855	1,189,859,461

Salaries and allowances for Independent Offices.[46]

[45] Source: Controller of Budget office
[46] Source: Controller of Budget office

SALARIES AND ALLOWANCES				
OFFICE	2012/2013	2013/2014	2014/2015	2015/2016
Controller of Budget	11,471,206	14,525,430	14,900,214	15,274,998
Auditor General	-	-	-	-
TOTAL	11,471,206	14,525,430	14,900,214	15,274,998

Certainly, cutting the wage bill is not in itself the solution to the woes the Government is facing over its efforts to fill in a budgetary shortfall of KSh 300bn. Corruption, ghost workers, the new county governments and the increasing push by parliament for increased pay and allowances place a huge financial burden on the government's shoulders. In addition, there have been concerns over the lack of professional depth within the office of the Auditor General where employees tasked with financial management within the national and county governments are poorly remunerated, and many are under-qualified to do the kind of work expected of them. The Kenya Revenue Authority has also failed to meet its annual revenue targets in 2013, 2014 and 2015.[47]

According to the Parliamentary Budget Office, the government has already tapped the maximum amount it can access from an overdraft facility at the Central Bank of Kenya. The spending continues to increase the country's international debt. A wage bill which is slightly over 12% of the country's gross domestic product, is unsustainable and the country risks having stagnant or insignificant economic growth.

6. Costing the new framework

The country's strategy for economic transformation 2013-2017 covers five broad areas: (1) Creating a conducive business environment for employment (2) Investing in agricultural transformation and food security (3) Investing in first class infrastructure - logistics, transport, energy and water - for inclusive growth (4) Investing in quality and accessible social services and (5) Further entrenching devolution for better service delivery and enhanced rural economic development.

[47] Standard Reporter. 2013. ''Alarm over public sector's ballooning wage bill.'' Accessed 10/03/2014 http://www.standardmedia.co.ke/business/article/2000081006/alarm-over-public-sector-s-ballooning-wage-bill

However, despite the progress made thus far, contrasting challenges remain. They include: high costs of living driven by high food and energy prices, rising imports particularly for the exploration of oil and minerals against stagnating exports and the emerging high and unsustainable public sector wage and fiscal-related challenges surrounding devolution. Nevertheless, the economy has been resilient amidst these challenges and has recovered steadily from levels as low as 1.6% GDP growth in 2008 to 4.6% in 2012, 5.0% in 2013, 5.1% in 2014 and 5.8% in 2015.

Nevertheless, the cost of financing operations in Kenya continues to increase in disproportion to the revenue collected. The 2013/2014 budget approved by Parliament had expenditure amounting to KSh1.439.7 billion:

National Government current expenditure[48]	780.7 billion
Development expenditure and net lending	439.1 billion
County allocation	210 billion
A contingency fund	5.0 billion
Constitutional Reform	1.5 billion
Equalization fund	3.4 billion
Total expenditure	**1,439.7 billion**

These expenditures were expected to be financed by:

Total revenue (including AIA[49])	1, 028.6 billion
Donor grants	77.7 billion
Net foreign financing	226.7 billion
Domestic financing[50]	106.7 billion
Total financing	**1,439.7 billion**

[48] Including interest payment and pensions
[49] AIA – Appropriations in Aid
[50] Inclusive of KSh1.4 billion on redemption payments from Domestic loans

Evaluation of Revenue Allocation in Relation to Article 203 (1) of the Constitution[51]

	BUDGET ITEM	2012/13	2013/14	2014/15
A	**Ordinary Revenue (excluding AIA)**	849,700	955,600	1,074,700
B	**National Interest [Article 203 (1)(a)]**	360,587	472,776	478,296
1. Defence and NIS		91,275	89,444	80,071
2. Parliament		14,542	20,004	19,243
3. Judiciary		12,157	15,700	17,687
4. Presidency		9,243	5,988	4,383
5. Office of the Attorney General Office & Department of Justice		5,410	2,947	3,014
6. DPP		1,072	1,475	2,144
7. Police Services		53,441	67,386	68,481
8. Teachers Service Commission		140,412	165,739	162,345
9. Other Constitutional Commissions and IOs		7,749	8,949	8,902
10. Elections		25,286	4,160	3,816
11. National Strategic Interventions		-	90,984	108,211
C	**Public Debt and Other Obligations (Article 203 [1][b])**	361,322	381,535	414,391
1. Debt Payment		320,322	331,167	353,477
2. Pensions, constitutional salaries & other		41,000	50,368	60,914
D	**Emergencies [Article 203 (1)(k)]**	5,000	5,000	5,000
E	**Equalization Fund [Article 203 (1) (g) and (h)]**	3,000	3,400	3,400
F	**County Governments Allocations [Article 203 (1) (f)}] less Loans and Grants**	168,974	193,419	228,489
H	**Balance available to National Government after Article 203 (1)**	**(49,182)**	**(100,530)**	**(54,876)**

[51] Source: National Treasury BPS 2014

Key Budget figures relating to revenue, expenditure and deficit financing									
	Central Government Operations 2012/2013 - 2016/2017 (Billions of shillings)								
	2007/08	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16
Total Revenue	434.5	510.8	548.1	667.5	748.2	847.2	1,019.9	1,169.1	1,328.7
Expenditure & Net Lending	598.5	676.2	725.2	819.6	947.8	1,117.0	1,470.6	1,536.1	1,706.7
Recurrent Expenditure	429.6	467.5	504.4	592.4	642.2	808.3	821.9	855.7	919.0
Dvlpt Expenditure & Net Lending	168.9	205.7	214.7	219.4	300.7	298.9	428.7	442.0	534.6
County Allocation				4.6		3.0	201.0	228.0	239.0
O/W External component						3.0	16.6	13.9	15.6
Equalization Fund							3.5	3.4	6.1
Balance (incl. grants)	(125.9)	(136.4)	(156.4)	(133.7)	(184.3)	(249.1)	(372.3)	(291.5)	(285.3)
Deficit Financing	125.8	136.4	156.4	111.6	161.9	232.5	372.3	291.5	285.3
Net Foreign	24.4	41.5	22.9	28.1	98.5	62.7	238.8	100.7	117.0
Net Domestic	34.0	92.4	133.5	83.4	63.4	169.8	133.5	190.8	168.4
Funding Gap	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Nominal GDP	2,036.0	2,307.7	2,399.8	2,801.3	3,244.5	3,662.6	4,164.6	4,636.7	5,277.0

Counties' revenues and expenditures[52]

	REVENUE ('ooo KSh.)				EXPENDITURE ('ooo KSh.)					
COUNTY	GOK	OWN	GRANTS	TOTAL	RECURRENT	DEVELOPMENT	DEBT RESOLUTION	TOTAL	SURPLUS/DEFICIT	
BARINGO	3,199,023	598,652	645,556	4,443,231	3,001,131	1,787,100	0	4,788,231	-345,000	-8%
BOMET	3,861,000	221,000	525,000	4,607,000	2,056,880	3,012,107	0	5,068,987	-461,987	-10%
BUNGOMA	5,949,000	2,753,780	0	8,702,780	4,854,805	3,637,388	210,587	8,702,780	0	0%
BUSIA	4,200,000	229,799	0	4,429,799	1,656,842	2,250,326	0	3,907,168	522,631	12%
ELGEYO MARAKWET	2,918,410	100,328	499,384	3,518,122	1,996,054	1,522,069	0	3,518,123	-1	0%
EMBU	2,807,083	439,612	0	3,246,695	1,686,511	1,560,183	0	3,246,694	1	0%
GARISSA	4,405,661	150,533	290,805	4,846,999	3,275,744	1,571,256	0	4,847,000	-1	0%
HOMA-BAY	4,962,006	130,679	212,000	5,304,685	3,076,001	2,657,950	0	5,733,951	-429,266	-8%
ISIOLO	2,400,000	600,000	0	3,000,000	1,524,567	1,716,625		3,241,192	-241,192	-8%
KAJIADO	3,525,736	516,827		4,042,563	2,969,777	1,062,786	0	4,032,563	10,000	0%
KAKAMEGA	7,356,000	3,523,030	2,376,520	13,255,550	6,087,250	7,168,300	0	13,255,550	0	0%
KERICHO	3,238,911	293,152	0	3,532,063	2,139,064	1,393,000	0	3,532,064	-1	0%
KIAMBU	6,264,478	6,366,922	0	12,631,400	7,163,611	5,467,789	0	12,631,400	0	0%
KILIFI	5,820,419	2,064,085	182,169	8,066,673	5,848,260	3,111,093	0	8,959,353	-892,680	-11%
KIRINYAGA	2,829,965	437,993	0	3,267,958	2,278,748	989,211	0	3,267,959	-1	0%
KISII	5,188,346	972,876	23,576,237	29,737,459	4,466,816	25,838,697	0	30,305,513	-568,054	-2%
KISUMU	4,471,000	2,528,968	1,000,032	8,000,000	6,427,978	3,411,611	361,730	10,201,319	-2,201,319	-28%
KITUI	5,315,000	448,000	639,000	6,402,000	3,716,106	2,689,894	0	6,406,000	-4,000	0%
KWALE	3,978,000	370,159	336,924	4,685,083	3,014,948	1,074,354	0	4,089,302	595,781	13%
LAIKIPIA	3,100,000	1,200,000	300,000	4,600,000	2,706,458	3,203,468	0	5,909,926	-1,309,926	-28%
LAMU	1,746,720	353,280	0	2,100,000	843,842	1,367,397	0	2,211,239	-111,239	-5%
MACHAKOS	4,950,666	2,204,900	0	7,155,566	3,708,112	4,118,560	0	7,826,672	-671,106	-9%
MAKUENI	4,721,202	200,000	0	4,921,202	3,683,663	2,245,753	0	5,929,416	-1,008,214	-20%
MANDERA	6,797,233	243,700	230,310	7,271,243	3,656,048	4,186,810	0	7,842,858	-571,615	-8%
MARSABIT	3,906,000	44,000	0	3,950,000	2,018,786	1,966,481	0	3,985,267	-35,267	-1%
MERU	4,749,000	800,000	758,000	6,307,000	3,039,449	6,572,370	0	9,611,819	-3,304,819	-52%
MIGORI	4,142,893	0	592,387	4,735,280	4,259,665	2,240,974	0	6,500,639	-1,765,359	-37%
MOMBASA	4,828,569	7,345,847	0	12,174,416	10,594,628	11,192,491	0	21,787,119	-9,612,703	-79%
MURANG'A	4,321,869	1,300,000	0	5,621,869	3,730,869	1,861,000	30,000	5,621,869	0	0%
NAIROBI CITY	9,500,000	15,101,108	743,174	25,344,282	14,925,681	7,599,500	2,700,000	25,225,181	119,101	0%

[52] Source: cra.go ke

Counties' revenue and expenditure continued…

NAKURU	5,900,000	1,401,738	0	7,301,738	5,375,505	3,497,359	400,562	9,273,426	-1,971,688	-27%
NANDI	2,891,257	294,387	0	3,185,644	1,708,824	2,630,241	0	4,339,065	-1,153,421	-36%
NAROK	4,446,508	5,256,573	0	9,703,081	5,722,085	3,979,329	0	9,701,414	1,667	0%
NYAMIRA	3,318,760	65,000	0	3,383,760	2,635,872	3,253,261	0	5,889,133	-2,505,373	-74%
NYANDARUA	3,435,161	156,247	0	3,591,408	1,691,083	2,613,553	0	4,304,636	-713,228	-20%
NYERI	4,071,365	424,297	54,754	4,550,416	2,122,571	2,427,844	0	4,550,415	1	0%
SAMBURU	2,808,355	210,050	210,050	3,228,455	1,605,405	1,459,460	0	3,064,865	163,590	5%
SIAYA	4,000,000	153,466	0	4,153,466	2,839,202	3,098,952	0	5,938,154	-1,784,688	-43%
TAITA TAVETA	2,614,751	264,120	0	2,878,871	1,663,783	1,215,088	0	2,878,871	0	0%
TANA-RIVER	3,339,807	87,290	0	3,427,097	2,026,642	1,167,455	0	3,194,097	233,000	7%
THARAKA NITHI	2,434,590	84,000	0	2,518,590	1,060,834	1,313,993	0	2,374,827	143,763	6%
TRANS NZOIA	3,923,051	501,462	0	4,424,513	3,062,625	1,650,181	0	4,712,806	-288,293	-7%
TURKANA	7,966,000	351,839	229,995	8,547,834	2,970,834	5,275,000	0	8,245,834	302,000	4%
UASIN GISHU	4,353,931	1,467,407	0	5,821,338	3,761,638	2,059,700	0	5,821,338	0	0%
VIHIGA	3,028,000	200,000	0	3,228,000	3,705,614	2,447,706	0	6,153,320	-2,925,320	-91%
WAJIR	5,892,000	119,031	0	6,011,031	2,757,342	4,171,600	0	6,928,942	-917,911	-15%
WEST POKOT	3,037,075	0	0	3,037,075	1,865,680	1,149,339	0	3,015,019	22,056	1%
TOTAL	141,354,190	62,576,137		298,893,235	166,983,833	161,886,604		271,390,192	-27,915,051	-9%

Expenditure by Government Portfolios[53]

	RECURRENT EXPENDITURE			DEVELOPMENT EXPENDITURE			External revenue	
Vote Title	Gross Estimates	Appropriations In Aid	Net Estimates	Gross Estimates	Appropriations in Aid	Net Estimates	Grants	Loans
Min. of Interior and Coordination of National Government	89,551,142,659	364,000,000	89,187,142,659	7,661,245,473	151,000,000	7,510,254,473	63,000,000	2,231,534,141
Min. of Devolution and Planning	16,319,349,903	205,600,000	16,113,749,903	61,508,967,720	15,339,938,469	46,169,029,251	1,403,826,865	4,521,385,273
Min. of Defence	70,743,170,921		70,743,170,921					
Min. of Foreign Affairs	9,641,331,694	1,002,390,707	8,638,940,987	268,513,852		268,513,852		
Min. of Education, Science & Technology	97,214,862,593	19,815,200,000	77,399,662,593	30,414,718,477	7,401,038,477	23,013,680,000	96,000,000	220,000,000
The National Treasury	23,977,412,933	93,000,000	23,884,412,933	33,433,153,282	14,350,484,316	19,082,668,966	812,750,217	999,750,000
Min. of Health	20,324,743,113	3,861,876,477	16,462,866,636	15,893,355,964	3,607,656,770	12,285,699,194	3,858,921,735	2,031,500,000
Min. of Transport & Infrastructure	22,777,574,566	20,495,457,612	2,282,116,954	102,428,482,590	57,517,196,404	44,911,286,186		5,789,575,000
Min. of Environment, Water & Natural Resources	12,631,278,995	4,946,158,239	7,685,120,756	43,356,454,896	17,807,721,883	25,548,733,013	1,129,814,965	8,982,806,662
Min. of Land Housing & Urban Development	4,131,349,644	537,664,750	3,593,684,894	11,823,137,537	1,395,226,100	10,427,911,437	175,000,000	3,865,944,125
Min. of Information & Communications & Technology	2,355,646,803	4,000,000	2,351,646,803	9,133,725,058	3,932,712,282	5,201,012,776	32,852,000	3,050,478,868
Min. of Sports Culture & Arts	2,445,664,191	10,400,000	2,435,264,191	876,672,280	15,992,670	860,679,610	39,960,000	
Min. of Labour Social Security & Services	8,447,515,597	113,939,480	8,333,576,117	8,772,983,451	681,850,000	8,091,133,451	1,691,628,756	1,168,211,499
Min. of Energy & Petroleum	2,400,353,594	256,000,000	2,144,353,594	77,436,165,122	61,073,468,622	16,362,696,500	42,500,000	6,582,009,000
Min. of Agriculture, Livestock & Fisheries	10,890,891,117	571,500,000	10,319,391,117	26,498,010,603	3,956,406,448	22,541,604,155	1,474,588,119	4,663,817,210
Min. of Industrialization & Enterprise Development	2,759,649,528	431,097,088	2,328,552,440	3,709,784,403	149,589,000	3,560,195,403	8,600,000	
Min. of Commerce, Tourism & East African Affairs	5,181,792,595	55,100,000	5,126,692,595	1,278,953,370	105,100,000	1,173,853,370		
Min. of Mining	568,906,061	13,500,000	555,406,061	576,911,000		576,911,000		
TOTAL			349,585,752,154			247,585,862,637		

[53] Source: Controller of Budget office

Commissions' and Independent Offices' Expenditure[54]

OFFICE	DEVELOPMENT			RECURRENT			NET TOTAL
	GROSS	A-I-A	NET	GROSS	A-I-A	NET	
Kenya National Human Rights and Equality Commission	-	-	-	238,527,589	-	238,527,589	238,527,589.00
National Gender and Equality CommIssion	-	-	-	194,025,586	-	194,025,586	194,025,586.00
National Land Commission			-			-	-
Independent Electoral and Boundaries Commission	477,690,120.00	414,490,120.00	63,200,000.00	3,132,606,759	10,000,000	3,122,606,759	3,185,806,759.00
Parliamentary Service Commission	-	-	-	16,569,000,000	-	16,569,000,000	16,569,000,000.00
Judicial Service Commission	-	-	-	473,804,034	-	473,804,034	473,804,034.00
Commission on Revenue Allocation	-	-	-	294,637,054	1,200,000	293,437,054	293,437,054.00
Public Service Commission	290,000,000.00	-	290,000,000.00	717,750,033	8,000,000	709,750,033	999,750,033.00
Salaries and Remuneration Commission	-	-	-	346,861,703	100,000	346,761,703	346,761,703.00
Teachers Service Commission	-	-	-	148,612,870,015	120,000,000	148,492,870,015	148,492,870,015.00
National Police Service Commission	-	-	-	222,997,214	-	222,997,214	222,997,214.00
Independent Police Oversight Authority	-	-	-	153,871,168	-	153,871,168	153,871,168.00
Commission on Administration of Justice	-	-	-	274,340,827	-	274,340,827	274,340,827.00
Commission for the Implementation of the Constitution	-	-	-	322,531,650	-	322,531,650	322,531,650.00
			-			-	-
INDEPENDENT OFFICES			-			-	-
Office of the Auditor-General	500,000,000.00	-	500,000,000.00	2,180,505,700	110,000,000	2,070,505,700	2,570,505,700.00
Controller of Budget	-	-	-	402,552,069	-	402,552,069	402,552,069.00
The Ethics and Anti-Corruption Commission	54,000,000.00	-	54,000,000.00	1,045,066,500	11,000,000	1,034,066,500	1,088,066,500.00
			-			-	-
PARLIAMENT			-			-	-
National assembly			-			-	-
The Senate			-			-	-
							-
TOTAL							175,828,847,901.00

[54] Source: Controller of Budget office

The allocation for the Equitable Fund was expected to rise from KSh 3.4bn in 2014/15 to KSh 4.2bn in 2016/17. In view of financing constraints due to expenditure pressure, the national treasury submitted a supplementary budget to parliament. The additional spending is in respect of salary awards to teachers, lecturers, health workers and the police amounting to over KSh 16bn. This, together with additional requests for emergency interventions, imposed an additional funding request of over KSh 356.8bn which the national treasury rationalized to KSh 121.8bn.

As the national government struggled to meet increased obligations brought about by the new constitution, huge amounts of cash had to be injected to set the new devolved system into operation. The sources of funding for county governments are:

1. Equitable shares: This is an unconditional allocation by the national government to the county governments, and should not be less than 15% of the most recent audited revenue received as approved by the National government.
2. Additional conditional and unconditional allocations from the share of National Government as contemplated under Article 202 (2) of the 2010 Constitution.
3. Own revenues from specific county revenue-raising measures as authorized by an Act of Parliament.
4. Borrowing provided the national government guarantee is obtained as well as the approval of the respective county assembly.
5. Grants and donations from development partners.
6. Equalization Fund for basic services provision in marginal areas in order to bring public services in these areas up to national standards.

The total cost of salaries and administration of the new county structures was placed at around KSh30.2bn in 2014/15, where salaries just for a county's Governor, Deputy-Governor and Speaker of County Assembly amounted to KSh 74,610,667 per month.[55]

The cost of pensions for the staff transferred from the national government to county governments was close to KSh 4.2bn in 2014/15. In addition, KSh 7.1bn was transferred from the budget of the national government to county governments, being adjustments to

[55] Pay structures are as provided by the Salaries and Remuneration Commission on their website, www.src.co.ke , with reference to *Gazette Notice Vol. CXV-No.33 of 1st March 2013*.

reflect the expected reduction in administration costs for the national government following the transfer of some functions to county governments.

In the financial year 2014/15, the funds allocated to County Governments were KSh 242.4bn, representing 35.5% of the revenues audited by the national government:

County Equitable Share	221.2 billion
Allocation for Rural Electrification	7.3 billion[56]
Conditional allocation from donor loans and grants	13.9 billion

In 2014/2015, approximately 21.3% of the shareable revenue was allocated to county governments while the national government's share was 78.7%. The total county revenues was KSh 298.47bn which included the total national government transfers and the total own revenue generated within the counties. Overall, KSh 200.56bn or 68.6% was attributed to the transfers while KSh 97.92bn or 31.4% came from within the counties.

Regarding ministry portfolios, the expenditure by the top 3 ministries (excluding AIA):[57] the Ministry of Interior and Coordination of National Government, the Ministry of Education, Science and Technology, and the Ministry of Defence, accounted for 67.8% of total recurrent expenditure incurred by all the 18 ministries.[58]

It is worth noting that the recurrent expenditure of the highest spender at 26% exceeds the combined expenditure of 14 ministries (all ministries except the three highest spenders and the national treasury).

The total amount of money spent by the government in recurrent expenditure was almost a trillion, KSh 937.71bn:

Recurrent expenditure	557.416bn
Total consolidated expenditure	380.291bn
Total expenditure	**937.707bn**

[56] The allocation was managed by the national government.
[57] Appropriation In Aid accounts for 13.1% of the total gross recurrent expenditure by the government ministries.
[58] Supra note 54

In relation to constitutional commissions and independent offices, the Teachers Service Commission had the greatest expenditure accounting for 86.24% of all expenditure by commissions. The National Gender and Equality Commission had the least at 0.11%.[59]

The judiciary has not been the exception to the rule. The cost of having a functional Judiciary has surged significantly due to the 2010 constitution. In the first financial year after promulgation of the new Constitution, the judiciary cost the taxpayer more than KSh 2.7bn in new staff and extraordinary programmes. By 2012/13, this amount had increased exponentially to more than KSh 9bn and by 2013/2014 the figure had reached KSh 15,263bn, which is seven times the Budget Estimate in 2006/07.

Judiciary Budget Allocation (Kshs bn)									**Projectio**
	2006/07	***2009/10***	***2010/11***	***2011/12***	***2012/13***	***2013/14***	***2014/15***	***2015/16***	***2016/17***
Recurrent		581	589	**1,404**	1936	11215	12167	12785	13525
Capital		2639	3324	6142	10221	4048	4961	4863	4903
Total	**2,100**	**3,220**	**3,913**	**7,546**	**12,157**	**15,263**	**17,128**	**17,648**	**18,428**

The extra/margin cost incurred in the judiciary in any financial year from 2012/13 onwards is greater than the overall budget estimate for each of the years preceding the new constitutional dispensation.[60]

The judiciary's budget has not been the exception to the rule. The legislature also had its share with the creation of 80 new constituencies, 47 County Women representatives' positions, the refurbishment of the legislative house, construction of the Senate, the construction of a 26-storey office building in Nairobi, a KSh 6bn project.

The salary for the members of parliament was set and gazetted by the Salaries and Remuneration Commission at KSh 532,000 per month. However, the legislators increased the amount by a hundredfold through perks and allowances. This is in addition to benefits which include unlimited committee sittings, tax-free pensions, car grants and a cheap mortgage offer.

[59] See supra note 55

[60] For example, while the Overall Budget Estimate was KSh3.913bn on 2010/11, the additional cost for the year 2012/13 was more than KSh6bn.

As at December 2014, Kenyan legislators earned a salary higher than those of legislators in developed countries, e.g. the US, Britain, Sweden and Japan. In fact, a member of parliament in Kenya earns more money than the Swedish Prime Minister.

7. Conclusions

Kenya's social disintegration had its genesis in the erosion of a system of laws that was easily manipulated; a system that imported structures without the essential spirit that created them; a system that disregarded local customs and traditions by imposing foreign social concepts devoid of meaning.

The new constitution was perceived to be the only way to redress Kenya's self-disintegration and instil a sense of ownership in the country, its progress and its so urgently needed justice. The country embarked on a long and fruitful constitution drafting process which led to the enactment of a new constitutional dispensation after an overwhelmingly positive referendum in August 2010.

This constitution enshrined a devolved system of governance, a heavy and expensive system with intricate checks and balances to minimise any possible future executive manipulation and control of devolved units. This devolved system was designed without due costing and financial analysis and Kenya is now at pains to cover its absurdly oversized government apparatus. Moreover, the situation has been aggravated by the fact that the national government has been reluctant to reduce its size and let certain key functions move to the counties. The country is facing great challenges to meet its financial obligations, which are perceived as the expensive price to be paid by a society whose weak rule of law and manipulation of essential institutions for short-sighted political gain caused the practical disintegration of the sense of nationhood.

Certainly, a devolved system usually creates new avenues for revenue generation and collection. Governors have been working hard at increasing revenue, but until the revenue curve and the expenditure curve normalise the country will need to lean heavily on donors to finance its developmental operations and growth. For as long as the revenue does not cover government expenditure the country will need to work on reducing the number of public service offices to get rid of duplication of roles, without jeopardising the intended spirit of the 2010 Constitution; or to work on a possible reduction in the number of counties, or

incentivise greater revenue collection at the county level by devolving a few more key functions.

It is fairly clear that the new Constitution has great cost implications now and in the future. In effect, the cost associated with the new executive and legislative structures at both national and county levels of government, the constitutional commissions, the independent offices and other constitutionally-created offices might be equally extreme if not more alarming.

It is also essential that government departments mandated with budgeting become deliberately aware of the cost of the new constitution, the opportunity cost of the widened government expenditure and the effects these costs have on the country's positioning and future prospects as regards the welfare and human development of the citizenry.

Finally, owing to the wage pressures from implementing the 2010 constitution and especially the devolved government without the expected and mandated downsize of the national government, there is increasingly limited continued funding for development expenditure. A lack of proper comprehension of the amount and meaning of these costs on the part of government only translates to some undesirable but unavoidable effect: Prudent fiscal management will remain an illusion in Kenya as long as we are content with the current economic state - *We cannot manage what we don't measure with care*.