Devolution as a panacea to deeply divided multi-ethnic (national) states: The continuing Kenyan experiment

*Harrison Mbori**

Abstract

The multiple designers of Kenya's 2010 Constitution intended that devolution should address the many years of economic exclusion that many Kenyan communities had suffered. While this paper concedes that the design of the 2010 Constitution to a large extent achieves this role, the same constitution fails at engendering national multi-ethnic unity. This paper uses three broad approaches to assess Kenya's devolution experiment under Kenya's 2010 Constitution and ethnic unity: the first is Daniel Posner's Institutional Politics approach, the second is Donald Horowitz's Constitutional Ethnic Federalism approach, and the final one is Yash Pal Ghai's Constitutional Autonomy approach. The author argues that limiting our focus to these three approaches as applied in this paper, there is no constitutional design that can easily achieve the lofty objective of national multi-ethnic unity in Kenya. This is because Kenya has had deeply ethnicised politics and social relations that are tied to ethnic political patrons and elites who are always at the forefront of constitutional design outcomes. This explains why even with the 2010 Constitution's attempt to weaken the imperial presidency, many Kenyans still perceive ascendancy to the presidency as the zenith of social, economic, and political actualisation. The paper, therefore, concludes that the Posner and Horowitz approaches above have merits and demerits and have also been variously applied under the 2010 Kenyan Constitution. The Ghai approach has neither been contemplated nor applied in the 2010 Kenyan Constitution. It emerges that even if the demerits under the Posner, Horowitz, and Ghai approaches were eradicated, which might be quite difficult or even impossible, and yet the zero-sum competitive politics for the presidency persists, the politicisation of ethnicity and the conflicts that stem from this will persist.

* LLB (UoN), LLM, SJD Candidate (Loyola University Chicago), Post Grad Dip (Kenya School of Law), Doctoral Fellow Strathmore University, Nairobi, Kenya, Advocate of the High Court of Kenya, & Research Fellow Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, Luxembourg. Many thanks to Professor James Thuo Gathii for his mentorship and many ideas on writing this article.

1 Introduction

One of the quintessential concerns of African governance and statecraft is the management of the broad axes of social division.[1] A distinction can be drawn on these axes of social division based on two categories: identity categories and category sets.[2] Identity categories are the labels that people use to define themselves such as Muslim, Tutsi, Igbo while category sets are broader labels in which the identity categories can be sorted: race, sex, ethnic or social origin, religion, class, marital status, health status, colour, age, disability, culture, dress, language, birth, or gender.[3] These broad axes of social division are manifested and managed variedly in the three different epochs of Africa's history: pre-colonial, colonial, and post-colonial. Obiora Okafor argues that 'in all the three momentous epochs, statecraft has been pre-occupied with the question of the domination exercised by empires or empire-like political formations over resistant sub-units.'[4] In pre-colonial times this domination was politically managed through different forms of government in both state and stateless societies.[5] According to Albert Boahen, 'by as late as 1880, about as much as 80% of the continent of Africa was being ruled by her own kings, queens, clan, and lineage heads, in empires, kingdoms, communities and polities of various sizes and shapes.'[6] Clearly, as the esteemed African historian Cheikh Anta Diop has persuasively demonstrated, the idea and operation of large centralised states is not alien to pre-colonial Africa.[7] If, however, we use the Weberian conception of a state as 'a (human community) that claims the monopoly of the legitimate use of physical force within a given territory,'[8] we end up with the dubious conclusion that all, if not most, of pre-colonial Africa was stateless.[9] In fact, using the Weberian

1 Mahmood Mamdani M, *Define and rule: Native as political identity*, Harvard University Press, Cambridge, 2012, 2. *See also* Horowitz D, *Ethnic groups in conflict*, University of California Press, Los Angeles, 1985.

2 Harvey Sacks & Gail Jefferson (ed), *Lectures on conversation*, Blackwell Publishers, Cambridge, 1992.

3 Daniel Posner, *Institutions and ethnic politics in Africa*, Cambridge University Press, Cambridge, 2005, 9. *See also* Article 27, *Constitution of Kenya* (2010) (Differences in the context of anti-discrimination).

4 Obiora Okafor, *Re-defining legitimate statehood: International law and state fragmentation in Africa*, Martinus Nijhoff Publishers, The Hague, 2000, 19.

5 *See* Ali Mazrui, 'The reincarnation of the African state: A triple heritage in transition from pre-colonial times' Nouvelle série, No. 127/128 *Présence Africaine*, 1982, 114. (Arguing that the state in pre-colonial was a miracle of diversity ranging from empires to stateless societies, from elaborate thrones to hunting bands, and from complex civilisations to rustic village communities).

6 Albert Boahen, 'Africa and the colonial challenge' in Albert Boahen (ed), *General history of Africa VII: Africa under colonial domination 1880-1935*, Heinemann & UNESCO, Paris, 1989, 2.

7 Cheikh Diop, *Pre-colonial black Africa,* Lawrence Hill, Westport, 1987.

8 Max Weber, 'Politics as a vocation', Free Students Union of Bavaria, Munich, 1919, 1.

9 *See* Dominic Burbidge, 'Security and devolution in Kenya: struggles in applying constitutional

paradigm in current post-colonial Africa will also likely lead to the conclusion that certain parts of the vast continent are still stateless.[10]

In the colonial era these axes of social division were mainly fomented by racial relations and the settlement of the native question: this was the dilemma of how a tiny and foreign minority racial group would legitimately rule over an indigenous majority racial category.[11] This era witnessed the use of indirect rule as a tool of domination and subjugation of the 'racial other.' This marked the continuation—after more than two centuries of enslavement of black African people as chattel property—[12] of drawing what Boaventura de Sousa Santos has called the abyssal line (the line dividing metropolitan and colonial realities)[13] and Mahmood Mamdani as the line that divided citizen and subject.[14] The most dominant mode of statecraft was highly-racialised and citizenship which conferred civil and political rights was only granted to the white minority at the expense of the black majority.[15] Mamdani has argued that this process could only be achieved through the use of lethal force especially in settler colonies like Kenya, South Africa and Zimbabwe.[16] It is not only after decolonisation and

provisions to local politics' 3 (1) *Strathmore Law Journal*, 2017, 132-135 (using the Weberian framework to analyse the security mandate and devolution in Kenya's 2010 Constitution). *See also* Dominic Burbidge, *An experiment in devolution: National unity and the deconstruction of the Kenyan State*, Strathmore University Press, Nairobi, 2019. (He again uses the Weberian conception in the African context).

10 Robert Jackson, 'Juridical statehood in Sub-Saharan Africa' 46 (1) *Journal of International Affairs*, 1992, 1-2. (Robert argues that most African states lack essential requirements for empirical statehood and are ramshackle regimes whose writ often does not extend throughout the country. Their only claim to legitimacy lies on the internationally recognised right to self-determination as the moral and legal foundation of statehood). Gerald Helman and Steven Ratner, 'Saving failed states' 89 *Foreign Policy Review*, 1992. (The authors argue that the Africans have an inherent incapacity to run complex polities).

11 Mahmood Mamdani, *Citizen and subject: Contemporary Africa and the legacy of late colonialism*, Princeton University Press, New Jersey, 1996, 16.

12 Kris Manjapra, 'When will Britain face up to its crimes against humanity' The Guardian, 29 March 2018 -<https://www.theguardian.com/news/2018/mar/29/slavery-abolition-compensation-when-will-britain-face-up-to-its-crimes-against-humanity?CMP=share_btn_tw >- on 8 December 2020.

13 Boaventura de Sousa Santos, 'The resilience of abyssal exclusions in our societies: Toward a post abyssal law' 22 *Tilburg Law Review*, 2017, 237-258.

14 Mahmood Mamdani, *Citizen and subject: Contemporary Africa and the legacy of late colonialism.*

15 This was not always the case. For example, in French Africa, a minority of black Africans could become French citizens and even sit in the French parliament as Members of Parliament (MPs). See, for example, accounts of colonial politics in Ivory Coast and, especially, the life of Félix Houphouët-Boigny. (I thank one of my blind reviewers for drawing my attention to this important point).

16 Mahmood Mamdani, *Citizen and subject*, 23. (Mamdani argues that 'the third notable consequence of an all-embracing customary power was that the African colonial experience was marked by force to an unusual degree. Where land was defined as customary possession, the market could be only a partial construct. Beyond the market, there was only one way of driving land and labour out of the customary: force.')

through the hard-fought right of a peoples' self-determination that most African states acquire legitimacy and sovereignty in the eyes of international law.[17] The Africans who were mostly subjects saw decolonisation as an opportunity to cross the racial/abyssal line and acquire citizenship and the appurtenant rights that accompany such designation such as civil and political rights. However, many peoples in Africa found themselves locked up in territorial entities designated by colonial powers through the artificial partitions mapped out in 1884-1885 at the Berlin Conference; consequently, at and after independence, the partitions were put under lock and key by African political elites through the international principle of *uti possidentis* in a classic case of kicking the ladder.[18] It is the peoples of these countries, such as in Katanga region of the Democratic Republic of Congo, that later demanded to use the right to self-determination that was successfully used by their own territorial overlords to demand autonomy. Many of such agitations were met with brutal resistance by the central powers in these states making Africa the scene of some of the most brutal civil armed conflicts witnessed after World War II.

Consequently, in the post-colonial epoch, the management of the axes of social division has mainly been the balancing of the interests among the different communities, peoples and nations in non-racialised administrative regimes. In other discourses, the concern of governance is tied firmly to questions of the rise and fall of nation-state building and national unity.[19] This calls into sharp

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17 *See* Wiktor Osiatyński, *Human rights and their limits,* Cambridge University Press, Cambridge, 2009, 17. (Wiktor presents the role of Carlos Romulo who succeeded in inserting the formulation of 'self-determination' in the United Nations Charter and on behalf of Brazil, Egypt, India, Panama, Uruguay, Mexico, the Dominican Republic, Cuba, and Venezuela pressed for antidiscrimination provisions)..*See also* Kéba Mbaye, 'Human rights and rights of peoples' in Mohammed Bedjaoui(ed), *International law: Achievements and prospects*, UNESCO, Paris, 1991, 1052.

18 OUA Resolution of border disputes, 1964, reprinted in Ian Brownlie (ed) *Basic documents on African affairs,* Clarendon Press, Oxford, 1971, 360. *See also* Thomas Franck T and Paul Hoffman, 'The right to self-determination in very small places' 8 (3) *New York University Journal of International Law and Politics*, 1976, 331-386. Obiora Okafor, *Re-defining legitimate statehood: International law and state fragmentation in Africa,* 33-34. Martti Koskenniemi, 'National self-determination today: Problems of legal theory and practice' *International and Comparative Law Quarterly*, 1994 241-269.

19 Wanjala Nasong'o, 'Kenya at fifty and the betrayal of nationalism: The paradoxes of two family dynasties' in Michael Kithinji, Mickie Koster & Jerona Rotich (eds), *Kenya after 50: Reconfiguring historical, political, and policy milestones,* Palgrave Macmillan, 2016, 165-187. Makau Mutua, 'Why Kenya is a nation in embryo' in Susan Wakhungu-Githuku (ed), *50 years since independence: Where is Kenya?*, Footprints Press, Nairobi, 2013. Steve Akoth, 'Challenges of nationhood: Identities, citizenship and belonging under Kenya's new constitution' Society for International Development (SID), Constitution Working Paper No. 10, 2011, -<http://constitutionnet.org/sites/default/files/challenges_of_nationhood-identities_citizenship_and_belonging_under_kenyas_new_constitution-wp10.pdf >- on 8 December 2020.

focus the constitutional designs that are set to prevent negative ethno-politics, civil strife, and internal armed conflicts that Africa is now infamous. All these processes and discussions exist within the wider context of creating political stability. Sharing power between central governments and regional or sub-central/regional governments is used together with other strategies in multi-ethnic and deeply divided societies to foster multi-ethnic national unity.

Conceptual framework

This contribution uses three approaches; Daniel Posner's institutional politics approach, Donald Horowitz's constitutional ethnic federalism and Yash Pal Ghai's constitutional autonomy approach to analyse Kenya's devolved governance system's contribution to national multi-ethnic unity. Posner's institutional politics approach is based on the view that how political institutions are structured will determine which social cleavages show salience in that society. Horowitz's constitutional ethnic federalism is anchored on the view that that 'the skilful division of authority between regions or states and the centre has the potential to reduce conflict,' including ethnic conflict and thus foster multi-ethnic national unity. Ghai's approach views constitutional autonomy as a device that allows ethnic or other groups claiming a distinct identity to exercise direct control over affairs of special concern to them while allowing the larger entity to exercise those powers which cover common interests.

Kenya, like most African states, suffers from the historical associations of decolonisation and immigration that created states that consisted of nations or peoples who are not distinguishable from others by language, religion, culture, history or region.[20] Kenya, therefore, falls within the mound of states moulded through colonisation by European powers as both lacking in history and socio-culturally artificial.[21] The Kenyan State is birthed from the 'artificial' and externally engineered process of colonial history that has confronted almost all constitution-makers in Africa.[22] As Ali Mazrui and Isawa Elaigwu assert,

[20] Yash Ghai and Jill Ghai, 'Introduction' in Yash Ghai and Jill Ghai (eds), *Ethnicity, nationhood and pluralism: Kenyan perspectives*, Global Centre for Pluralism, Ottawa & Katiba Institute, Nairobi, 1, available at <https://www.pluralism.ca/wp-content/uploads/2017/12/Ethnicity-Nationhood-pluralism4-returned.pdf> on 8 December 2020.

[21] Makau Mutua, 'Why redraw the map of Africa: A moral and legal inquiry' 16(4) *Michigan Journal of International Law*, 1995, 1115.

[22] Yash Ghai, 'Ethnicity, nationhood and pluralism: The 2010 Kenya constitution' in Yash Ghai and Jill Ghai (eds), *Ethnicity, nationhood and pluralism: Kenyan perspectives*, Global Centre for Pluralism, Ottawa & Katiba Institute, Nairobi, 75. (Ghai correctly argues that in Kenya, people's primary identity is the tribe, often with culture and values not shared by others. Nationalism may surface occasionally, but mostly briefly, when a citizen wins the marathon or when a sports team brings home a trophy).

'Independent [Kenya] is therefore a country colonially-created struggling to become a coherent nation-state.'[23] The tension is between the fashioning of consensus in a society generally and how to govern societies that are multi-ethnic with ethnicities that are 'tearing themselves apart with parochial, tribal loyalties, and competing claims to the access of power and over resources.'[24] Therefore, Kenya emerged from colonialism as a heterogeneous state in search for the almost-elusive yet genuine nation-building and unity. The problem of language-based ethnicity and tribalism was exacerbated after independence with sharp divisions within the African nations. These communities have exhibited these divisions more in the political than in the social domain.[25] Despite the ethnicity question, Kenya is lucky that not a single community has a dominant majority in terms of spoken language and unlike in some parts of West Africa and Uganda, the ethnicities in Kenya do not have a hierarchical structure. Additionally, Kenya and Tanzania are spared divisive language politics as most Kenyans and Tanzanians are content to communicate both formally and informally in Swahili and/or English.[26] Yet, Kenyan ethnicity challenges are still fundamentally framed on the basis of language.

The multiple designers of the Kenya's 2010 Constitution intended that a devolved government should address the years of economic exclusion that many Kenyan communities had suffered. In 2002, the first draft by the Constitution of Kenya Review Commission (CKRC), also known as Ghai Draft, proposed four levels of government outside the national government: village, location, district and province.[27] The National Constitutional Conference of 2004 (Bomas Draft) with an intention of accommodating ethnic diversity divided the country into three tiers: regional, district and location with fourteen regional governments which Yash Ghai and Jill Ghai argue would have ensured national unity and would have been economically sound.[28] Under the Wako Draft that was rejected in the 2005 referendum, the three tiers were reduced to one level below the national government namely the district. Later, after the 2007 post-election violence and the formation of a unitary government, the first 2009

[23] Jonah Elaigwu and Ali Mazrui, 'Nation-building and changing political structures' in Ali Mazrui and Christophe Wondji (eds), *General History of Africa, VII: Africa since 1935,* Heinemann and UNESCO, Paris, 1993, 435.

[24] Yash Ghai, 'Ethnicity, nationhood and pluralism: The 2010 Kenya constitution', 75.

[25] Yash Ghai, 'Ethnicity, nationhood and pluralism', 83.

[26] Yash Ghai, 'Ethnicity, nationhood and pluralism', 75.

[27] Constitution of Kenya Review Commission, *Draft Constitution*, 2002, Article 215.

[28] Yash Ghai and Jill Ghai, 'How plan for 14 Counties was hijacked to create 47' Daily Nation, 6 September 2020 <https://nation.africa/kenya/news/politics/how-plan-for-14-counties-was-hijacked-to-create-47-1932452> on 8 December 2020.

Harmonised Draft Constitution by the Committee of Experts (CoE) maintained the Bomas Draft's three tiers, it had eight regional governments (based on the former provinces) and 74 counties (based on the existing districts at the time). This was rejected after public participation led by the CoE, which then reduced the levels of government to two tiers and proposed the 47 Districts enacted in 1992 by District and Provinces Act (No. 5 of 1992) as proposed counties. This was the proposal that was put forward by the CoE and presented to the Parliamentary Select Committee on Constitutional Review on 8 January 2010 ahead of the Members of Parliament's retreat in Naivasha.[29] However, the 47 districts reintroduced in 2010 were themselves based on colonial partitioning that were based on ethnicity. Thus, South African leading federalism scholars Jaap de Visser and Nico Steytler have concluded that the 2010 Constitution reintroduced ethnic entities through the backdoor.[30] This is the definition of ethnic federalism for purpose of this paper: dividing counties in Kenya based on ethnic identity rather than on any other identity markers.

This arguably explains why even with the Constitution's attempt to weaken the imperial presidency, many Kenyans, because of the executive arm of government led by the Presidency of Uhuru Kenyatta's subversion of the rule of law, still falsely see the ascendancy to the presidency as the zenith of social, economic, and political actualisation despite the changes introduced under the 2010 Constitution.[31] This means, therefore, that owing to/without addressing the root causes of malignant ethnicity, the creation of national unity cannot be achieved through a perfect constitutional design and implementation in Kenya. The drivers of this kind of consequence must be viewed with a wide historical, social, and institutional lens. The role of the colonial and early post-colonial Kenyan state must be adequately questioned and the root causes of ethnic division: the history of violent colonialism, the history of politicisation of ethnicity by the Kenyan founders, the history of land grabs by political elites, the normalisation of election rigging by the political class, and the history of economic exploitation and human rights violations by successive regimes, must be addressed. With these fundamental issues tackled the question of how

[29] Oliver Mathenge, 'How plan to have regional governments failed 10 years ago' The Star, 20 February 2020 - <https://www.the-star.co.ke/news/2020-02-02-how-plan-to-have-regional-governments-failed-10-years-ago/> on 8 December 2020.

[30] Jaap Visser and Nico Steytler, 'Multilevel government in South Africa, Ethiopia and Kenya: Observations from the practice of designing and implementing multilevel government systems' Forum of Federations, Occasional Paper Series No. 20, 2018 - <http://www.forumfed.org/wp-content/uploads/2018/01/OPS_20_Multilevel_Government1.pdf > on 8 December 2020.

[31] Nic Cheeseman, Karuti Kanyinga, Gabrielle Lynch, Mutuma Ruteere and Justin Willis, 'Kenya's 2017 elections: Winner-takes-all politics as usual?' 2 (13) *Journal of Eastern African Studies*, 2019, 215-234.

federalism in the form of devolution can resolve the national unity question in Kenya can be answered more pointedly.

This contribution proceeds as follows, the first section introduces, describes and shortly analyses devolution under the 2010 Constitution. The second section uses three approaches to analyse how devolution under the 2010 Constitution addresses questions of ethnicity; the first is Daniel Posner's institutional politics approach, the second is Donald Horowitz's constitutional ethnic federalism approach and the final one is Yash Pal Ghai's constitutional autonomy approach. The paper concludes that the Posner and Horowitz approaches above have merits and demerits and have been variously applied under the 2010 Constitution and the Ghai approach has neither been contemplated nor applied in the 2010 Constitution. It emerges that even if the demerits under the first two were eradicated, which might be arduous or impossible, and yet the zero-sum competitive politics for the presidency persists, the politicisation of ethnicity and the conflicts that stem from this will persist.[32]

2 Devolution under the 2010 Constitution

The 2010 Constitution re-introduced a decentralised system of government termed *devolution*.[33] The system includes 47 decentralised units called *counties*. The Kenyan choice is well-categorised as quasi-federal system based on the powers and functions bestowed on the devolved units.[34] The sovereign power of the people of Kenya pre-delegation is provided under Article 1(1) where all sovereign power belongs to the people and is exercised in accordance with the Constitution. The basis for this delegation is the strong anchor of a Madisonian Republican

[32] Nzamba Kitonga, 'Is the ghost of Naivasha beginning to haunt us?' Daily Nation, 23 August 2014 - <https://nation.africa/kenya/news/politics/is-the-ghost-of-naivasha-beginning-to-haunt-us--1017410> on 8 December 2020. (Nzamba describes the challenges caused by a pure presidential system where presidential candidates do not contest for parliamentary seats yet they have broad national support). *Contrast with* Nic Cheeseman, Gabrielle Lynch and Justin Willis, 'Democracy and its discontents: Understanding Kenya's 2013 elections' 8(1) *Journal of Eastern African Studies*, 2014, 15. (The authors argue that devolution in 2013 was one of the factors that lessened the zero-sum game for the presidency). *See* Patrick Mutahi and Mutuma Ruteere, 'Violence, security and the policing of Kenya's 2017 elections' 13 *Journal of East African Studies*, 2019, 253-271. (The authors argue for a nuanced assessment of the reduced election-based violence post the Kenyan 2017 election). *See also* Yash Ghai, 'A short history of constitutions and what politicians do to them' The Elephant, 30 March 2020- <https://www.theelephant.info/features/2020/03/30/a-short-history-of-constitutions-and-what-politicians-do-to-them/> on 8 December 2020. (Yash outlines how the political elite drive political processes for their own benefit).

[33] Article 6, *Constitution of Kenya* (2010).

[34] Morris Mbondenyi and John Ambani, *The new constitutional law of Kenya: Principles, government and human*

form of government.[35] In such a system, central sovereign power fundamentally belongs to the people(s).[36] This power of governance is then voluntarily delegated to the different organs of government setting in place an emanation of the quintessential social contract theory.[37] Post-delegation, the peoples of Kenya exercise their sovereign power at two levels: national and county.[38] This system of governance comes as a cumulative point of the desire of 'nation-building' started in the late years of colonial rule. The question at this early stage of nation-state formation in most of colonial Africa was mainly a question of constitutional design. The Kenyan constitutional design is therefore not only a socio-legal and political process but also a historical process. The history of pre-colonisation, colonialism, and post-colonialism paint the appropriate context for understanding devolution as structured under the 2010 Constitution.

The 2010 Constitution is applauded as a transformative and transformational constitution.[39] It was designed to transform the Kenyan State in unprecedented ways. This desire of transformation has a long history tied both to the colonial and post-colonial systems of administration. The 2010 Constitution introduced a robust bill of rights; changed the previous parliamentary system to a presidential system; introduced a bicameral parliament; re-legitimised a new system of classifying land into public, private, and community land; established new provisions on leadership and integrity; enhanced judicial independence; established permanent constitutional commissions and offices; and created a new system of decentralisation called devolution.[40] This paper focuses on the latter innovation of the 2010 Constitution as relates to governance, that is, the re-introduction of a new decentralised system of governance termed devolution. Devolution in this case refers to a system of multilevel governance under which the 2010 Constitution has created two distinct and interdependent levels of government.[41] The 2010 Constitution further provides that any matter

rights, LawAfrica, Nairobi, 2012.

35 *See* John Kangu, "'We the people" as the sovereign in the theory and practice of governance' 2 *Moi University Law Journal*, 2007, 197. (He argues that James Madison placed the people at the centre of governance in defining a Republican form of government in Federalist Paper No. 39).

36 John Kangu, "'We the people" as the sovereign in the theory and practice of governance', 198-199.

37 John Kangu, 'The social contractarian conceptualisation of the theory and institution of governance' 2 *Moi University Law Journal*, 2007.

38 Article 1(4), *Constitution of Kenya* (2010).

39 Godfrey Musila, 'Realizing the transformative promise of the 2010 constitution and new electoral laws,' in Godfrey Musila G (ed) *Handbook on election disputes in Kenya: Context, legal framework, institutions and jurisprudence*, Law Society of Kenya, Nairobi, 2013.

40 Chapter(s), 4, 5, 6, 8, 9, 10, 11, & 15, *Constitution of Kenya* (2010)

41 John Kangu, *Constitutional Law of Kenya on devolution,* Strathmore University Press, Nairobi, 2015, 98.

relating to the objects, principles, and structure of the devolved government can only be amended through a referendum.[42] Additionally, Article 1(3) delegates the legislative sovereign power of the people to 'parliament and the legislative assemblies in the county governments' and executive authority to 'the national executive and the executive structures in the county governments.' This means that the counties do not exercise decentralised power delegated to them from the national level.[43] They share sovereign power delegated directly by the people of Kenya.[44] Therefore, this power is not derivative from the National Government as the centre but original as granted by the people. The High Court of Kenya succinctly captures this position in *Institute of Social Accountability and another v National Assembly and others*:

> Article 1(4) of the Constitution recognises two levels of government, the national and county governments. Each of these levels exercises power derived from the Constitution itself. Under Article 1 of the Constitution, the county government does not derive its power from the national government but directly from the people of Kenya and under the Constitution. These two levels of governments are therefore, in theory, equal and none is subordinate to the other.[45]

Furthermore, Article 10(2)(a) of the 2010 Constitution includes 'sharing and devolution of power' among the national values and principles of governance. This makes devolution a core constitutional principle.[46] The 'sharing' in Article 10 refers to the measure of autonomy anchored on self-rule at county level that is endowed on counties and a measure of shared rule at the national level.[47] Mutakha Kangu demarcates this sharing into three dimensions: 'First, some powers are divided and separated, and assigned and exercised exclusively. Second, other powers are exercised concurrently,[48] and third, the county governments have participation rights in some decision-making processes at the national level.'[49] 'In essence,' Kangu notes, 'the Constitution splits state sovereignty and power into national and county power. As such, counties are not mere subnational entities but polities that, based on the concept of shared sovereignty, are meant to enjoy

42 Article 255(1)(i), *Constitution of Kenya* (2010).

43 John Kangu, *Constitutional Law of Kenya on devolution,* 96.

44 John Kangu, *Constitutional Law of Kenya on devolution,* 96.

45 *Institute of Social Accountability & another v National Assembly & 4 others* (2015) eKLR.

46 Conrad Bosire, 'Devolution for development, conflict resolution, and limiting central power: An analysis of the Constitution of Kenya 2010', Unpublished PhD Thesis, University of Western Cape, Cape Town 2013, 210.

47 Conrad Bosire, 'Devolution for development, conflict resolution, and limiting central power: An analysis of the Constitution of Kenya 2010', 210.

48 *See* Article 186, *Constitution of Kenya* (2010).

49 John Kangu, *Constitutional law of Kenya on devolution,* 98.

the same constitutional and political legitimacy as the national government.'[50] Additionally, Article 6(2) of the 2010 Constitution describes the government at the two levels as being distinct and interdependent thus buttressing the sharing principle described above. The two levels are to conduct their mutual relations based on consultation and cooperation,[51] which means that this system is based on the principle of interdependence and cooperation. The Kenyan form of devolution established under Article 6(2) and operationalised under Article 189 is based on the principle of distinctness, interdependence, cooperation, and consultation.[52] The two levels of government are meant to be distinct from each in terms of constitutional functions, institutions, resources, and legal frameworks. They are to coordinate their functions and not be subordinate to each other. None is a mere agent of the other and neither can be abolished by the other.[53]

Consequently, the aim of devolution in Kenya is not only connected to the 2010 Constitution but is also closely linked to the histories of early and late colonialism in Africa.[54] The rejection through armed struggle, civil disobedience, and non-violent resistance of colonialism in most of Africa created the urgent need for state formation through nation-state building.[55] The history of Kenya is riddled with the centralisation of power by an over-empowered executive generally and an imperial presidency specifically.[56]

The discourse on decentralisation in Kenya is not novel. By the independence year in 1963, the placement of *majimboism* in the independence Constitution (Lancaster Constitution) provided for a quasi-federal system of autonomous regional governments.[57] By 1969, Kenya had effectively dismantled all the structures of decentralisation (*majimboism*). This system

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50 John Kangu, *Constitutional law of Kenya on devolution,* 98.

51 Article 6(2), *Constitution of Kenya* (2010).

52 Republic of Kenya, Taskforce on Devolved Government, *Final report*, 22, available at <https://sentaokenya.org/wp-content/uploads/2019/03/Final-Report-of-the-Taskforce-on-Devolved-Government.pdf> on 8 December 2020.

53 Taskforce on Devolved Government, Final report, 110-111.

54 Yash Ghai, and Patrick McAuslan, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present,* Oxford University Press, Oxford, 1970.

55 Paul Zeleza, 'Introduction: The causes and costs of war in Africa from the liberation struggles to the "war on terror"' Alfred Nhema and Paul Zeleza P (eds) *The roots of African conflicts: The cause and costs*, Ohio University Press, Athens, 2008, 1.

56 Makau Mutua, *Kenya's quest for democracy: Taming the Leviathan*, Lynne Rienner Publishers, Boulder, 2008. Willy Mutunga, *Constitution-making from the middle: Civil society and transition politics in Kenya 1992-1997*, Sareat & Mwengo, Nairobi, 1999.

57 Chapter 6, *Constitution of Kenya* (1963).

of decentralisation, with many differences, is re-introduced under the 2010 Constitution. This contribution will attempt to answer the ever-present concerns of how devolution as a nation-state construction process has dealt with division concerns of Kenya as a deeply divided state.[58] The division here is mainly defined ethnically. Yet this construction of ethnic division is mainly fallacious as this ethnic division is elite-based and not ordinary citizen-based.[59] The political elites inspire ethnic nationalism yet they remain united through business and kinship ties that remain multi-ethnic.[60] This means that the illusion of Kenya as a deeply divided state should be deconstructed based on its political history and socio-legal background.

This paper presents a transformative view of the history of ethnicisation, de-ethnicisation and their imperial backdrop. The author questions, critiques, and exculpates the definition of Kenyan and African communities or nationalities as ethnicities or tribes. This then well positions the argument that the Kenyan system of devolution while set up inadvertently based on ethnicity, improperly called ethnic-federalism, if properly and faithfully implemented might not reach the intended consequence of enhancing national unity in a widely diverse state. This is argument is derived from and assessed using the three approaches by Posner, Horowitz, and Ghai. Posner's approach which is labelled the institutional politics approach uses ethnic instrumentalism and constructivism to show that any divisions of ethnicity to manage ethnic diversity in a country such as Kenya with many ethnicities can be difficult. Horowitz approach labelled constitutional ethnic federalism shows that the skilful apportioning of authority between the central governments and lower levels of government has both significant and benign effects on ethnic conflicts both at the micro and macro levels. Finally, Ghai's constitutional autonomy approach which strictly is closest to allowing complete self-reliance and self-determination only short of statehood can also solve ethnic conflict and engender national unity with the main problem only being that the central government in many cases finds it difficult to cede such extensive authority. In Kenya the history of centralisation of power and the benefits and largesse of power that the political elite have accumulated and

[58] Christina Murray, 'Political elites and the people: Kenya's decade long-constitution-making process' in Gabriel Negretto (ed) *Redrafting constitutions in democratic regimes: Theoretical and comparative perspectives*, Cambridge University Press, 2020.

[59] Nic Cheeseman, Gabrielle Lynch and Karuti Kanyinga, 'In Kenya elite collaboration is more important than ethnicity for political power and stability' Quartz Africa, 21 February 2020 - <https://qz.com/africa/1806009/kenya-kenyatta-odinga-elite-cohesion-important-over-ethnic-rule/> on 8 December 2020.

[60] Nic Cheeseman, Gabrielle Lynch and Karuti Kanyinga, 'In Kenya elite collaboration is more important than ethnicity for political power and stability' Quartz Africa, 21 February 2020.

currently enjoy have made this almost impossible to negotiate and have in the constitution This paper is, therefore, a contribution to one of the most urgent problems of contemporary Africa: "the political organisation of multi-ethnic states."[61]

3 Three approaches to managing ethnic diversity in divided societies

Three approaches emerge from a survey of the literature on question of constitutional structure management of divisive ethnicity: Posner's institutional politics, Horowitz's constitutional ethnic federalism and Ghai's constitutional autonomy. These three approaches are used to assess whether Kenya's model of federalism termed devolution and inaugurated in 2010 can address the ethnic divisions present in Kenya. It is evident from the wider political competition in both general elections held under the 2010 Constitution in 2013 and 2017 that there is a heightened competitive environment accentuated by language and regional-based ethnic identification.[62] Following the general elections in 2007, 2013, and 2017 Kenya emerged as a deeply divided society at the macro-level. This deep division is, however, illusory because of the view that the political elite drive and incite such division through political violence with many ordinary Kenyans being used as pawns in the political game. Yet these political elites remain cordial and maintain social, political, and economic ties. The narrative is a little bit complicated at the micro-level for certain ethnic groups (e.g Pokot and Turkana or the Somali clan in Wajir) who have been in conflict for a long time over natural resources, land, and cattle rustling.[63] Thus, The quasi-federalism design adopted under the 2010 Constitution is also assessed from the perennial discourses on unity and disunity in the country.[64] The concern here is whether

[61] Yash Ghai (ed), *Autonomy and ethnicity: Negotiating competing claims in multi-ethnic states,* Cambridge University Press, Cambridge, 2000.

[62] Benn Eifert, Edward Miguel, and Daniel Posner, 'Political competition and ethnic identification in Africa' 54(2) *American Journal of Political Science*, 2010, 494-510. James Gathii, 'Assessing the Constitution of Kenya 2010 five years later' in Tom Ginsburg and Aziz Huq (eds) *Assessing constitutional performance,* Cambridge University Press, Cambridge, 2016. *See also* James Gathii, 'Implementing a new constitution in a competitive authoritarian context' in Cambridge University Press, Cambridge, 2020, 208-236.

[63] Ken Menkhaus, 'The rise of a mediated state in Northern Kenya: The Wajir story and its implications for state-building' 21(2) *Afrika Focus*, 2008, 23–38. (Ken describes the infighting between the Somali clans of Ajuraan, Degodia, and Ogaden over land).

[64] *See* Thomas Juma and Ian Kiplagat, 'Going federalism! A reality or an option?: Redefining Kenya' 9(4) *IOSR Journal of Applied Chemistry*, 2016, 26-36.

devolution will exacerbate politicised ethnicity[65] or it will reduce it and thus engender more national unity.[66]

Posner's institutional politics

Posner conceptualises ethnicity in the constructivist and instrumental tradition as a fluid and situational construct.[67] This approach rejects the primordial view of ethnicity based on a historical, regional, or individual context.[68] As an instrumental construct, Posner argues that the situation someone finds themselves provides a perceptual frame that subconsciously shapes their way of thinking about who they are and how they relate to their environment.[69] This instrumental conception is problematic for the Kenyan experience of ethnicity, which is mainly influenced by both ethnic identity ("tribe") and religion. In patrilineal societies like among the Meru or Luo, once you are born from this ethnic group mainly distinguishable by language but also sharing many cultural practices, one cannot defect or fluidly change either through intermarriage or trade to 'become' a non-Luo or a non-Meru.[70] The SM Otieno decision is a famous Kenyan case that involved a dispute over where to bury the remains of a renowned Kenyan lawyer Silavano Milea Otieno. His wife, Virginia Edith Wamboi Otieno wanted his remains buried in his "Nairobi" home in Ngong, Upper Matasia in the former Kajiado District while Otieno's younger brother, one Joash Ochieng Ougo, and a clan member and distant nephew of the deceased, one Omolo Siranga wanted the deceased buried at Nyamira Village, Nyalgunga Sub-location, Central Alego Location, of the former Siaya District.[71] It is important to note that Wamboi was from the Kikuyu ethnic extraction while Otieno was of Luo ethnicity extraction. The Court of Appeal (the highest court in Kenya then) finally ruled in favour of Otieno's brother and distant nephew to have the deceased's body buried in

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65 Rok Ajulu, 'Politicised ethnicity, competitive politics and conflict in Kenya: A historical perspective' 61(2) *African Studies*, 2002.

66 Yash Ghai, 'Devolution: restructuring the Kenyan state' 2 *Journal of East African Studies*, 2008, 211-226.

67 Daniel Posner, *Institutions and ethnic politics in Africa*, 9.

68 Daniel Posner, 'The colonial origins of ethnic cleavages: The case of linguistic divisions in Zambia' 35(2) *Comparative Politics*, 2003, 127.

69 Daniel Posner, 'The colonial origins of ethnic cleavages: the case of linguistic divisions in Zambia', 6.

70 Evans Monari, 'Burial law: Reflections on the SM Otieno case' 31(4) *Howard Law Journal*, 1988, 667-674; Van Doren J, 'Death African style: the case of S.M Otieno' 36(2) *American Journal of Comparative Law*, 1988, 329-350.

71 *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR.

Nyalgunga village in what can arguably be ranked as one of Kenya's trial of the century cases of the 20th Century.[72]

The Court of Appeal decision to have Otieno buried in Nyalgunga embeds the primordial approach to culture, that views one's attachment to culture as static and based on a non-evolving cultural past linked to where one was born, what the Igbo of Nigeria refer to as "the place where their umbilical cord was buried."[73] This is the approach that Posner seems to reject with his instrumentalist/constructivist view of ethnicity and certain legal commentators especially those with a feminist bent, now also seem to reject.[74] The bigger question is still debated to date on whether it is possible to defect from one's ethnic group for example through cultural modernisation and acquisition of a Western lifestyle like Wamboi argued in the S.M Otieno case.[75] Despite the S.M Otieno's decision's support of the primordialism view, it is also true that ethnic identity in Kenya is not as fluid, for instrumental purposes, as with religion because a 'Kikuyu-Christian' could easily convert to become a 'Kikuyu-Muslim' or vice-versa based on the kind of social payoffs that Posner presents in his instrumental/constructivist approach. The idea of social payoffs is tied to what an individual thinks will be an advantage or a disadvantage at a particular time e.g. when they go to vote. For purposes of changing the religious identities, it is easier to convert for whatever purpose than it is to change one's ethnicity in Kenya.

Thomas Eriksen has criticised the instrumental view by arguing

> if ethnic identities are created wholly through political processes, then it should have been possible to create any identity at all. Then it would have been possible, for example, to persuade members of the Maasai ethnic category in Kenya that they were really Kikuyus. Since such a feat is evidently impossible, ethnicity must have a non-instrumental, non-political element.[76]

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72 *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR.

73 Chinwe Nwoye, 'Igbo cultural and religious worldview: an insider's perspective' 3(9) *International Journal of Sociology and Anthropology*, 2011, 304-317. (Chinwe argues that in traditional Igbo religious worship, people pray that they may die in the soil of their birth, where their umbilical cords were buried. For this reason, Igbo civil servants who have attained the age of 70 and above prefer to go back to the village and await the journey into the ancestral world. In this way, Igbo cultural norms bind the society, and the village norm still dominates the attitudes of the people including the elites and the Christians among them).

74 Patricia Stamp, 'Burying Otieno: The politics of gender and ethnicity in Kenya' 16(4) *Women, Family, State, and Economy in Africa*, 1991, 808-845. Winifred Kamau, 'SM Otieno revisited: A view through legal pluralist lenses' 5 *Law Society of Kenya Journal*, 2009, 59.

75 *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another* (1987) eKLR.

76 Thomas Eriksen, *Ethnicity and nationalism: Anthropological perspectives*, Pluto Press, 3ed, London, 1994, 64.

This non-instrumental space is, however, not the conceptual space and experience for other ethnic groups like the Luyha and the Kalenjin. For their purposes, Posner's support of Robert Bates' instrumentalist approach of defining ethnicity is important.[77] Bates defines an ethnic group as a social group with the following three elements: first, organised about a set of common activities either social, economic, or political; second, contain people who share a conviction that they have common interests and a common fate; and third, propound a cultural symbolism expressing their cohesiveness.[78] This conception is further anchored on the Bates' coalition-building thesis that ties the conception with modernisation and thus views ethnic groups 'as coalitions which have been formed as part of rational efforts to secure benefits created by forces of modernisation.'[79]

Consequently, to understand the Luhya and Kalenjin as instrumental ethnicities, this paper makes the argument that the modernisation concept under Bates' coalition-building thesis above, should be replaced with the influence of colonialism on these ethnicities. First, it is important to note that 'even before the advent of colonialism, identities in Africa were not uni-dimensional and stable nor was the colonial influence always intentional and straightforward.'[80] Second, the idea of ethnicity at least in the primordial sense was not present since most communities were affiliated through kinship ties more in the sense in which Posner defines a 'tribe.'[81] The Luhya and the Kalenjin fit in well with John Comaroff's instrumental view of ethnicity originating in asymmetric incorporation of structurally dissimilar groupings into a single political economy.[82] For these ethnic groups, the colonial experience had the impact of globalization and hierarchisation for the political end of indirect rule.[83] The post-colonial governments inherited this politicized ethnicity not just among the Luhya and Kalenjin but also among other communities and expanded it for political and

77 Daniel Posner, *Institutions and ethnic politics in Africa,* 2.

78 Robert Bates, 'Ethnic competition and modernization in contemporary Africa' 6(4) *Comparative Political Studies*, 1974, 458.

79 Robert Bates, 'Modernization, ethnic competition and rationality of politics in contemporary Africa' in Donald Rothchild and Victor Olorunsola (eds), *State versus ethnic claims: African policy dilemmas*, Westview Press, Boulder, 1983, 152-171.

80 Laura-Catalina Althoff, 'Identities and the colonial past in Kenya and Tanzania' Published BA Dissertation, University of Zurich, Zurich, 2009, 9.

81 Daniel Posner, *Institutions and ethnic politics in Africa*, 1.

82 John Comaroff, 'Of totemism and ethnicity: Consciousness, practice and the signs of inequality' in Richard Grinker, Stephen Lubkemann and Christopher Steiner (eds) *Perspectives on Africa: A reader in culture, history, and representation*, Blackwell, Cambridge, 1997, 69–85.

83 John Lonsdale, 'Moral ethnicity, ethnic nationalism and political tribalism: the case of the Kikuyu' in Peter Meyns (ed), *Staat und gesellschaft in Afrika -Erosions- und reformprozesse,* Lit Verlag, Hamburg, 1996, 93–106.

economic domination.[84] Against this background, Posner defines political institutions as 'the formal rules, regulations, and policies that structure social and political interactions.'[85] He quickly accepts that this definition is narrow as it does not capture other social phenomena such as markets, traditional lineage structures, and other norms outside of the formal sources. He argues that how states structure their political institutions determines which ethnic cleavages will have more political salience.[86]

The 2010 Constitution's re-introduction of decentralisation (through devolution) after it was dismantled under the independent Constitution as the apex political institution in Posner's terms would still have to deal with the question of division. In order to attain the objects of devolution in Article 174 of the 2010 Constitution of fostering national unity by recognising diversity while at the same time granting ethnic groups the powers of self-governance, the designers of the 2010 Constitution decided on a structure that closely fits the elements of ethnic federalism at least for ten large ethnic groups in Kenya as shown in table 5 below, namely: the Embu, Kalenjin, Kamba, Kikuyu, Kisii, Luo, Luhya, Maasai, Somali and Turkana. Each of the main ethnic groups in Kenya get at least one county that is ethnically homogenous under the First Schedule of the 2010 Constitution. This means that Kenya's version of devolution is more ethnically divided than territorially divided (division without regard for ethnicity). There are two main downsides of this ethnic-based territorial division according to Posner: the first is that it has the potential of further marginalising smaller ethnic groups; and the second is that it has the potential of aggravating intra-ethnic differences e.g. among clans.[87] Conversely, for counties that have high levels of ethnic conflicts, some scholars suggest ethnic federalism as an appropriate remedy.[88] Posner cautions against this view and uses Nakuru County in Kenya to explain the second prong of the deficiency of the ethnic federalism structure as being unable to generate ethnically homogeneous units. Table 1, 2, and 3[89] below explain this further.

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84 Makau Mutua, *Kenya's quest for democracy: Taming the Leviathan,* 20-24.

85 Daniel Posner, *Institutions and ethnic politics in Africa,* 9.

86 Daniel Posner, 'When and why do some social cleavages become politically salient rather than others?' 40(12) *Ethnic and Racial Studies*, 2017.

87 Daniel Posner, 'When and why do some social cleavages become politically salient rather than others?'.

88 *See* Donald Horowitz, *Ethnic groups in conflict*, University of California Press, 1985. Michael Hechter, *Containing nationalism*, Oxford University Press, Oxford, 2000. Alemante Selassie, 'Ethnic federalism: Its promise and pitfalls for Africa' College of William & Mary Faculty Publications, Paper No. 88, 2003.

89 *Adopted from* Daniel Posner, 'When and why do some social cleavages become politically salient rather than others?'.

Table 1: Pre-partition

		Tribe		
Sub-tribe / clan		Kikuyu	Kalenjin	
	Nyeri Kikuyu	40	0	40
	Kipsigis	0	23	23
	Kiambu Kikuyu	15	0	15
	Tugen	0	12	12
	Turkana	0	5	5
	Nandi	0	3	3
	Keiyo	0	2	2
		55	45	

Table 2: Post-partition a new Kikuyuland

		Tribe		
Clan		Kikuyu	Kalenjin	
	Nyeri Kikuyu	73	0	73
	Kiambu Kikuyu	27	0	27
		100	0	

Table 3: Post-partition a new Kalenjinland

		Tribe		
Sub-tribe		Kalenjin	Kikuyu	
	Kipsigis	51	0	51
	Tugen	27	0	27
	Turkana	11	0	11
	Nandi	7	0	7
	Keiyo	4	0	4
		100	0	

Table 1 shows the distribution of the different ethnic groups including the different intra-ethnic groups such as Nyeri Kikuyu and Kiambu Kikuyu. The rest are the different ethnic groups that form part of the larger Kalenjin community. Table 2 and 3 show the distribution of the intra-ethnic groups after the partition of Nakuru into two 'ethnically' homogenous territories. The consequence is that the intra-ethnic identities are further aggravated.

Thus, it emerges from Posner's analysis that for all it is worth, ethnic federalism does not necessarily create further ethnic or national unity. The point of ethnic federalism is to try to create ethnic homogeny yet Posner argues that this is not possible as other markers of identity will still emerge even when we think we have created ethnic homogeneity. Importantly, the drafters of the 2010 Constitution significantly wrestled with this question from the beginning of the constitution review process in 2000 when the Constitution of Kenya Review Commission (CKRC) was set up. The draft developed by the CKRC after extensive public consultations, the Ghai Draft, had extensive devolution of power to subnational units. These were at four levels: village, location, district, and province.[90] There were to be eight provinces and 69 districts.[91] These districts were based on an extension of the existing districts in 1992 that had been mapped out by executive orders.[92] Under the CKRC arrangement, smaller ethnic groups like the Kuria, Keiyo, Mbeere, Teso, and Suba had their own districts. Many of these ethnic groups are now subsumed in bigger counties under the 2010 Constitution. This is a nuanced form of ethnic federalism that Posner rejects.

There were three more drafts that were developed before the 2010 Constitution. The 2004 Bomas Draft had a similar extensive system of devolved units of government as the Ghai Draft where provinces were replaced with 13 regions and Nairobi as a metropolitan region with 4 boroughs. Later, through political manoeuvring by former President Mwai Kibaki and his allies, the Bomas Draft was amended through a parliamentary initiative resulting in the Wako Draft which had a significantly weakened form of devolution and was rejected in the 2005 referendum.[93] Finally, the constitution-making process was revamped and granted new impetus after the 2007/8 post-election violence with the formation of a Committee of Experts (CoE) that culminated in the Harmonised Draft Constitution. Initially, this draft had three levels: national, regional, and county. It was later amended to two levels: national and county after what the CoE refers to as public participation. It is this draft that introduced the 47 counties based on the 1992 Districts under the District and Provinces Act, No. 5 of 1992. This is the draft that a bipartisan Parliamentary Select Committee (PSC) retreated at Naivasha to amend in January 2010 and ended up with a Revised Harmonised Draft followed by the Proposed Draft Constitution with two levels

90 Constitution of Kenya Review Commission, *Draft Constitution*, 2002, Article 215.

91 Constitution of Kenya Review Commission, *Draft Constitution*, 2002, Fourth Schedule.

92 *See Job Nyasimi Momanyi & 2 others v Attorney-General & Another* (2009) eKLR.

93 Attorney-General and the Parliamentary Select Committee on Constitution Review, The Proposed New Constitution of Kenya, 2005, Article 6 (had two levels of governments and referred to the national level as 'government' and to the other level as 'district government').

of government: national and county comprising 47 counties based on the 47 districts partitioned in 1992 for both political expediency and practical reasons.[94]

Table 4: Evolution of devolution

1963	Majimbo proposed between KANU and KADU
1964	KADU dissolved rendering Majimbo moribound
2002	Ghai Draft proposed 4-level devolution: Village, location, district and province
2004	Bomas Draft proposed 3-level devolution: Regional, district and location
2005	Wako Draft proposed 1 level of devolution: District
2009	CoE Harmonised Draft proposed 2-level devolution - Regional and county
2010	CoE Revised Harmonised Draft proposed 1 level of devolution: County
2010	MPs reinstated Regional Governments then they removed them in Naivasha
2010	Kenya adopted 1 level of devolution: County
2020	Building Bridges Initiative (BBI) proposes to introduce regional governments (excludes any changes to devolution in its final text)

Horowitz's constitutional ethnic federalism

It was in 2016 that Kenyan economist David Ndii proclaimed Kenya a cruel marriage that had reached its time for divorce.[95] He cited the renowned Kenyan historian Bethwel Ogot who had proclaimed that Kenya was 'project dead.' Ndii argued that nationalism was dead and had been replaced by tribalism and that the tribe had eaten the nation and that this was the cause of the 2007/8, 2013 and arguably 2017 post-election violence. In his view, the 2010 Constitution had failed as part of the glue that was supposed to patch up the country together. Yet these fractures, including secessionist claims, were present before the promulgation of the 2010 Constitution with the rise and fall of the Mombasa Republican Council

[94] Eric Kramon and Daniel Posner, 'Kenya's new constitution' 22(2) *Journal of Democracy*, 2011, 89-103.

[95] David 'Ndii, Kenya is a cruel marriage, it's time we talk divorce' Daily Nation, 26 March 2016 -<https://nation.africa/kenya/blogs-opinion/opinion/kenya-is-a-cruel-marriage-it-s-time-we-talk-divorce-1183504> on 8 December 2020. *Contrast with* Dominic Kebaso, 'Ndii's intrusion into nationalism a disaster' Nation, 4 July 2016 -https://nation.africa/kenya/oped/opinion/David-Ndii-intrusion-nationalism-disaster/440808-3142940-format-xhtml-gcve24/index.html> on 9 December 2020.

(MRC).[96] These secessionist claims in Coastal Kenya were anchored on two factors; the historical agreements between the British and the Sultan of Zanzibar over the 10 mile coastal strip, and significantly on the regionalist independence system referred to as *majimboism*.[97] This is the conflictual background of ethnic disunity and animosity that Kenya has perennially faced.

Horowitz argues that 'the skilful division of authority between regions or states and the centre has the potential to reduce conflict.'[98] Using the Nigerian federalism experiments, he argues that federalism can either exacerbate or mitigate ethnic conflict.[99] Accordingly, the increase of the number of federal units in Nigeria closer to the re-emergence of civilian rule in 1979 transferred a good deal of conflict from the all-Nigeria level to the state level.[100] The structure of devolution in Kenya under the 2010 Constitution has marginally and situationally reverted ethnic contestations to the county levels by creating a new and important arena of political contestation that de-emphasised the zero-sum competition over the national presidency that has characterised Kenyan elections since the introduction of multi-party politics in 1991.[101] Yet the aftermath of the 2017 general election showed the re-emergence of the ugly head of competitive politics over the presidency, which was accentuated by language and region-based ethnic identification.[102] The 2010 Constitution through devolution has also introduced a vast system of county bureaucracy that has jostled for political control pitting some county assemblies against the governors. For instance, members of county assemblies in Bungoma, Embu, Kericho, Makueni, Nairobi and Taita Taveta have attempted and variously succeeded to impeach the governors.[103]

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96 Justin Willis and George Gona, 'Pwani C Kenya? Memory, documents and secessionist politics in Coastal Kenya' 112 (446) *African Affairs*, 2013, 48-71.

97 *See* David Anderson, 'Yours in struggle for Majimbo: Nationalism and the party politics of decolonization in Kenya' 40(3*) Journal of Contemporary History*, 2005,547-584.

98 Donald Horowitz, *Ethnic groups in conflict*, 602.

99 Donald Horowitz, *Ethnic groups in conflict*, 603.

100 Donald Horowitz, *Ethnic groups in conflict*, 604.

101 *See* James Gathii and Harrison Otieno, 'Assessing Kenya's cooperative model of devolution: A situation-specific analysis' 46 *Federal Law Review*, 2018, 597.

102 James Gathii, 'Implementing a new constitution in a competitive authoritarian context', 208-236.

103 Nic Cheeseman, Gabrielle Lynch and Justin Willis, 'Decentralisation in Kenya: The governance of governors' 54(1) *Journal of Modern African Studies*, 2016, 1-35. Renson Mnyamwezi, 'MCAs now impeach Governor Samboja after mediation fails' Standard Digital, 10 October 2019 -<https://www.standardmedia.co.ke/coast/article/2001345021/mcas-now-impeach-governor-samboja-after-mediation-fails>- on 8 December 2020. Judah Ben-Hur, 'Governor Mike Sonko impeached' The Standard, 3 December 2020 - <https://www.standardmedia.co.ke/nairobi/article/2001396144/governor-mike-sonko-impeached> on 8 December 2020.

Additionally, Horowitz formulates eight ways through which federal institutions can have benign effects on ethnic conflicts.[104] First, units placed below the central government can allow a group that is a minority in the country as a whole but a majority in a sub-state unit to exercise governmental power in ways that would be foreclosed if the whole were one undifferentiated territory. This is accurate for many Kenyan counties. Most of the 47 counties though not strictly divided on ethnic lines, have enabled minority ethnicities to exercise considerable hitherto unavailable governmental power. The 2010 Constitution's creation of devolution has enhanced the opportunities for the political inclusion of formerly excluded communities.[105] The upside of this advantage is that there are now more minorities at the intra-county level. Smaller ethnicities such as the Suba in Nyanza or the Ogiek in Rift Valley are a good example of this phenomenon. Ethnic communities such as the Borana, Embu, Marakwet, Pokot, Somali, Taita and Turkana are able to control single counties whereas nationally they would have less access to political power as shown in table 5 below.

Ethnic communities	**Counties**
Kalenjin	Uasin Gishu, Kericho, Bomet, 'Nandi', Baringo
Kikuyu	Kiambu, Muranga, Nyandarua, Nyeri, Kirinyaga, Nakuru, Laikipia
Luo	Siaya, Kisumu, Migori, Homa-Bay
Luhya	Kakamega, Vihiga, Bungoma, Busia, Trans-Nzoia
Kamba	Makueni, Machakos, Kitui
Kisii	Kisii, Nyamira
Meru	Meru, Tharaka-Nithi
Embu	Embu
Maasai	Samburu, Narok, Kajiado
Somali	Garissa, Wajir, Mandera
Turkana	Turkana
Borana	Marsabit, Isiolo
Waswahili, Durma, Giriama, Rabai, Boni, Digo,	Mombasa

[104] Donald Horowitz, 'The many uses of federalism' 55 *Drake Law Review*, 2007, 958.

[105] Ben Nyabira and Zemelak Ayele, 'The state of political inclusion of ethnic communities under Kenya's devolved system' 20 *Law, Democracy and Development*, 2016, 131.

Ethnic communities	Counties
Mijikenda	Kwale, Kilifi, Tana River, Lamu
Taita	Taita Taveta
Pokot	West Pokot
Marakwet	Elgeyo Marakwet
Mixed	Nairobi

Table 5: Sourced from Ministry of State for Planning, National Development and Vision 2030 (2010)

Second, the existence of sub-state units can quarantine conflict within those unit boundaries. The evidence for this is quite scanty in Kenya. For the North Eastern (former Northern Frontier District) counties of Mandera, Wajir, and Garissa, the question of security has always been a contested issue. Historically, the *Shifta* wars,[106] and currently the presence of the violent extremist group, Al-Shabaab, operating from neighbouring Somalia has made security a serious imperative for devolved governance.[107] In these counties, the presence of government can be equated with the presence of security.[108] Thus, the case for devolution in these counties cannot be made without the challenge of security taking centre stage. Devolution might, however, not quarantine the ethnic conflicts that are experienced at the inter-clan level among the Somalis and against other communities through the infiltration of Al-Shabaab, inter-clan animosities, and small arms proliferation.[109] This is also true for inter-ethnic conflicts between the Turkana, Samburu, and Pokot in North Western Kenya based mainly on cattle-rustling.[110] These areas have witnessed little government presence historically.[111] The devolution structure under the 2010 Constitution does little to alleviate

[106] Keren Weitzberg, 'Rethinking the *Shifta w*ar fifty years after independence: Myth, memory, and marginalization' in Michael Kithinji *et al* (eds), *Kenya after 50: Reconfiguring historical, political, and policy milestones,* Palgrave Macmillan, 2016, 65-82.

[107] Dominic Burbidge, 'The Kenyan state's fear of Somalia identity' *Conflict Trends*, 2015, 2.

[108] Dominic Burbidge, 'Security and devolution in Kenya: Struggles in applying constitutional provisions to local politics', 131. (He argues that discussing how security is administered is therefore in part a discussion of what and where the state is).

[109] International Crisis Group, 'Kenya's Somali North East: Devolution and security' 17 November 2015 - <https://www.crisisgroup.org/africa/horn-africa/kenya/kenya-s-somali-north-east-devolution-and-security> on 8 December 2020.

[110] Karen Witsenburg and Wario Adano, 'Of rain and raids: violent livestock raiding in Northern Kenya' 11 *Civil Wars*, 2009, 514-538.

[111] Dominic Burbidge, 'Security and devolution in Kenya', 139 (Arguing that the colonial legacy ensured that most of legitimate physical force was restricted to areas where the colonials resided. A trend that continued after independence with police mainly deployed to protect the interests of the higher class).

these challenges. The Fourth Schedule of the 2010 Constitution retains security as a function of the National Government. The challenge is how the national security apparatus can be mediated with the local politics that is created by devolution. A strong recommendation can be made here for the introduction of asymmetrical devolution to specifically address the insecurity faced by these periphery counties.[112] This recommendation ties in to Horowitz third reason on how federalism can affect ethnically divided societies: make it possible to mitigate discontent by making special, asymmetric arrangements for regions with special problems or distinctive identities.

Fourth, in ethnically heterogeneous states (counties), regional governments provide a site at which politicians of various groups can encounter each other, become familiar with each other, engage in bargaining, and learn about the needs and aspirations of groups other than their own before they rise to the national level, where more complex and delicate issues of national policy may need to be resolved. The implementation of devolution in Kenya has indeed had the effect of bringing politics closer to the people enabling interests that previously would not make it to the national level get to this level.

Fifth, division of a country into sub-units can create incentives for political actors to see at least some issues in terms of competition among those sub-units, rather than among ethnic groups. This is arguably true especially among the counties of the dominant tribes such as the Kikuyu, Kalenjin, and Luo.[113]

Sixth, federalism may activate sub-ethnic cleavages that drop conflict down to the sub-national level from the national level or, to put it differently, from the intergroup to the intragroup level. This factor has been mixed in terms of outcomes in Kenya as we see with sample examples of the North Eastern county of Marsabit[114] and the Maasai dominated counties of Laikipia and Narok respectively.[115] In the Northern county of Turkana, one study has shown a

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112 *See* George Githinji, 'Internal security should be devolved to counties' *Kenya Monitor*, 4 November 2015 - <https://www.monitor.co.ke/2015/11/04/internal-security-should-be-devolved-to-counties/> on 9 December 2020.

113 *See* Table 1, 2, & 3 above.

114 Patta Scott-Villiers, 'Small wars in Marsabit County: Devolution and political violence in Northern Kenya' 17(3) *Conflict, Security & Development*, 2017, 234-264.

115 Murithi Mutiga, 'Violence, land, and the upcoming vote in Kenya's Laikipia region' International Crisis Group, 25 July 2017 - <https://www.crisisgroup.org/africa/horn-africa/kenya/violence-land-and-upcoming-vote-kenyas-laikipia-region> on 8 December 2020. Murithi Mutiga, 'August election tensions rise in storied Kenyan county' International Crisis Group, 14 June 2017 - <https://www.crisisgroup.org/africa/horn-africa/kenya/august-election-tensions-rise-storied-kenyan-county> on October 16, 2020.

nuanced correlation between devolution and the heightening of the risks of sub-national political violence because there are more resources to compete over at the sub-national level.[116]

Seventh, federalism can serve as a de facto electoral reform. Dominic Burbidge has provided evidence from the 2017 Kenyan elections to show that county elections were more than likely not marred with the kind of irregularities in the presidential election.[117] This arguably shows a correlation of enhanced de facto electoral reform and devolution at least at the county level in Kenya.

Finally, the eighth reason is that federalism can provide a stimulus for interethnic alignments and coalitions. This had been present even before the introduction of devolution in Kenya and has only been entrenched by the introduction of devolution.

Ghai's constitutional autonomy

Most conflicts in Africa have been associated with a history of multi-ethnic states, where most ethnicities are constantly jostling for claims of access to and design of state-generated power.[118] The problem of state administration in post-colonial African states has, therefore, been the ethnic inclusion question. This question deals with the concerns of accommodating diverse ethnic claims and agitation by ethnic minorities on governance. States have responded to this challenge through two main approaches: oppression and ethnic cleansing; and accommodation of ethnic claims through affirmative policies, special forms of representation, power-sharing, and the integration of minorities.[119] Kenya's ethnic conflicts have been present since its colonial and post-colonial periods. These ethnic conflicts can be broadly divided into two: the first involves the dangerous ethno-nationalism that was perpetuated through political patronage fuelled through centralisation of power by an imperial presidency;[120] and secondly the ethnic claims of socio-economic marginalisation and natural resource claims

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116 Jeremy Lind, 'Devolution, shifting centre-periphery relationships and conflict in Northern Kenya' 63 *Political Geography*, 2018, 135-147.

117 Dominic Burbidge, 'Transition to subnational democracy: Kenya's 2017 presidential and gubernatorial elections' 3 *Journal of Regional & Federal Studies*, 2020, 384-414.

118 Francis Deng, 'Ethnicity: An African predicament' Brookings, 1 June 1997, <https://www.brookings.edu/articles/ethnicity-an-african-predicament/> on 8 December 2020.

119 *See generally*, Yash Ghai (ed), *Autonomy and ethnicity: Negotiating competing claims in multi-ethnic states*.

120 *See* Githu Muigai, 'Jomo Kenyatta & the rise of the ethno-nationalist state in Kenya' in Berman B *et al*, *Ethnicity & Democracy in Africa*, Ohio University Press, Athens, 2004, 200. See also Ben Sihanya, 'The presidency and public authority in Kenya's new constitutional order, SID Constitution Working Paper No. 2, 2011.

by these marginalised communities among themselves. These two variations have created a society deeply divided along ethnic lines. The high watermark of these divisions was manifested in the post-2007 election violence that threatened the existence of Kenya as an aspiring nation-state.[121] This conflict was mainly of the first variant: involving the role, structure, and polices of the state and social justice.[122] It is arguably the political settlement that ended the violence that led to the promulgation of the 2010 Constitution.[123]

Ghai's approach ties in with the two key ingredients scholars suggest for a successful democracy in divided societies: sharing of power and group/territorial autonomy.[124] According to Ghai, 'autonomy is a device that allows ethnic or other groups claiming a distinct identity to exercise direct control over affairs of special concern to them while allowing the larger entity to exercise those powers which cover common interests.'[125] Further, Ghai considers the concept of autonomy to also connote a state of being rather than a legal category per se. This means that the law or formal legal institutions do not necessarily need to exist in order for autonomy to be present. Importantly, autonomy is connected to 'the state and to tendencies towards decentralisation, away from monopolisation of power at the centre.'[126] Additionally, autonomy is different conceptually from federation since autonomy accommodates 'peoples on the periphery, the unusual, the recalcitrant, and almost outsider;' reconciles citizens to the state or its democracy; and is a tool for celebration of diversity, identity, and spaces.[127] This is the inclusionary vision of devolution in Kenya that is applied as one of the objects of devolution in Article 174 of the 2010 Constitution. Ghai's conception of autonomy is, therefore, wider and encompasses not only the formal rules that demarcate the contours of autonomy but also the attitudes of politics, dialogue and openness

[121] Karuti Kanyinga, 'Pluralism, ethnicity and governance in Kenya' in Yash Ghai and Jill Ghai (eds) *Ethnicity, nationhood and pluralism: Kenyan perspectives*, 48. (The post-2007 elections conflict in Kenya displaced over half a million people and left over one thousand dead).

[122] Karuti Kanyinga, 'Pluralism, ethnicity and governance in Kenya', 48. Yash Ghai, 'Ethnicity and autonomy: framework for analysis', 1.

[123] Karuti Kanyinga and Sophie Walker, 'Building a political settlement: The international approach to Kenya's 2008 post-election crisis' 2(2) *Stability: International Journal of Security & Development*, 2013.

[124] Arend Lijphart, 'The wave of power-sharing democracy' in Andrew Reynolds (ed), *The architecture of democracy: Constitutional design, conflict management, and democracy*, Oxford University Press, Oxford, 2002, 39.

[125] Yash Ghai, 'Constitutional asymmetries: Communal representation, federalism, and cultural autonomy' in Andrew Reynolds (ed), *The architecture of democracy: Constitutional design, conflict management, and democracy*, Oxford University Press, Oxford, 2002, 155.

[126] Yash Ghai and Jill Ghai, 'Introduction', 5.

[127] Yash Ghai and Jill Ghai, 'Introduction', 5.

that encompass a framework of mind and national orientation.[128] In 2013, Ghai transformed his definition of autonomy made in 2000,[129] that covered ethnic self-government intermediated by a national (federal) government to encompass the power of 'a region or community to organise its affairs without interference from the central government or neighbouring regions or communities.'[130]

This explains how the CKRC Draft Constitution, overseen by Ghai, proposed an extensive form of decentralisation. In the Kenyan case, the innovation that Ghai suggested to deal with the highly ethnically-divided societies is 'devolution federalism;' the creation of sub-state units created to respond to problems of ethnic diversity.[131] The desire of relatively small states for the sharing of power is contrasted with the desire of large states such as the United States where the argument that small-sized states was an essential ingredient for republican government was refuted through the creation of checks and balances like the bill of rights to check the excesses of national power.[132] This does not go anywhere near the extensive power of autonomy that he conceptualises to involve complete separate governance only short of complete statehood. This is an option that political centrists in Kenya have rejected and both the *majimbo* (regionalism) Constitution and the 2010 Constitution do not contemplate it. This is unlike Ethiopia, which contemplates some entitlements to autonomy in Article 39 of its 1994 Constitution, with nationalities and peoples of Ethiopia granted the unconditional right to self-determination, including the right to secession. This provision if implemented goes further than just granting autonomy; it grants statehood.[133] Thus, the 2010 Constitution does not consider autonomy as a way of dealing with the ethnic differences present in Kenya.

4 Conclusion

What emerges from the analysis above is that Posner's and Horowitz's approaches have their own merits and demerits and have been differently applied under the 2010 Constitution. These two approaches have their own merits and

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128 Yash Ghai and Jill Ghai, 'Introduction', 5.

129 Yash Ghai, 'Ethnicity and autonomy: a framework for analysis' 8–11.

130 Yash Ghai and Jill Ghai, 'Introduction', 5.

131 Donald Horowitz, 'The many uses of federalism', 957.

132 Donald Horowitz, 'The many uses of federalism', 957.

133 Article 1, Montevideo Convention on the Rights and Duties of States, 26 Dec 1933, 49 Stat. 3097, T.S. No. 881 ('the state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states').

demerits and even if the 2010 Constitution were to deal with all the demerits formally the politicisation of ethnicity in Kenya will persist. Ghai's autonomy approach has not been envisioned or applied under the 2010 Constitution and thus we can only speculate about its efficacy. Ghai's approach, however, shows the importance of the range of repository options that constitutional drafters have when structuring governance systems and since the Kenyan devolution is a continuing experiment, there are more options in the laboratory of experimentation that can be deployed. This does not, however, mean that devolution should not be strengthened in a way that would accommodate the ethnic interests of the wider population base of the country. At a preliminary and textual level, the 2010 Constitution has little to say about devolution as a tool of dismantling political ethnicity. While Article 174 recognises the fostering of national unity through diversity as one of the objects of devolution, the same provision grants powers of self-governance and the right of communities to manage their own affairs. The provision is carefully worded to prevent any possibility for legitimate claims of self-determination that can lead to statehood by any nation or peoples in Kenya.

Therefore, this paper concludes with the following statements of dilemmas in lieu of recommendations. Since one of the objectives of devolution is fostering national unity by recognising diversity, the current system of devolution as structured under the 2010 Constitution only marginally achieves this aim. This means that Kenyans have to consider the hard question of whether to tinker with this structure again, a mere less than 15 years after its institution and implementation. Ghai and a section of the political elite through a process termed the Building Bridges Initiative (BBI)[134] are suggesting going back to the 14 regions initially suggested under the Bomas Draft to ensure national unity and economic strength.[135] The first dilemma here is to recall that even under this system, there is a lower level under the regions that were linked to the former districts. If this recommendation is adopted, then it might be advisable to have only two levels as under the 2010 Constitution with 13 regions and Nairobi governed as a special metropolitan area. The second dilemma is that the CoE that drafted the 2010 Constitution stated that the idea of having two levels of government, which were divided provisionally into 47 counties based on the 1992 districts, originated directly from Kenyans through public participation.

[134] The Presidential Taskforce on Building Bridges to Unity Advisory, 'Building bridges to a united Kenya: From a nation of blood ties to a nation of ideals' available at - <https://www.theelephant.info/documents/building-bridges-to-a-united-kenya-from-a-nation-of-blood-ties-to-a-nation-of-ideals/> on 8 December 2020.

[135] Yash Ghai, 'How plan for 14 counties was hijacked to create 47' Daily Nation, 6 September 2020.

Maybe after ten years of the 2010 Constitution, Kenyans have had time to see the demerits of this structure and would now want a change? Yet leading constitutional expert Ghai is also presenting Kenyans with yet a third dilemma. He is ambivalent about amending the 2010 Constitution. On one hand he accuses the BBI process of being elite-led for personal political expediency[136] and on the other hand he sees the need to change the structure of devolution from 47 counties to 14 regions.[137] Additionally, he suggests that Kenya should change from a pure presidential system to a parliamentary system.[138] The fourth dilemma is that it should not be forgotten that marginalised ethnic groups in the Bomas Draft system suggested above will again find themselves subsumed within larger ethnic groups in these 13 regions thus, enhancing the possibility of economic and political marginalisation and secessionist conflicts if the system is not carefully and skilfully structured and managed. This is in fact what colours my argument; that the process of having a perfect formula is either too arduous or actually impossible. The response to this dilemma here, however, is that because of regional governments with representational structures, the interests of these marginalised or small ethnic groups will be represented. Why doesn't Ghai recommend the constitutional autonomy approach for Kenya? This paper has shown that this kind of approach might make the lower levels more distant from the central government and enhance self-determination and self-reliance in a way only short of full statehood. The fifth dilemma here is that the realities drawn from Kenya's political economy and history prevent many commentators to make this radical suggestion. Too many dilemmas, pending questions, controversies and unfortunately very few concrete and realizable recommendations. The process of nation-making and building is difficult and the more Kenya experiments, in using the lower levels of government as laboratories for inclusion, the better Kenya might actually get at managing its ethnic diversity and differences.

[136] Yash Ghai, 'Please Kenyans, reject the false promise of BBI' Katiba Institute, 7 June 2020 - <https://katibainstitute.org/yash-pal-ghai-please-kenyans-reject-the-false-promise-of-bbi/> on 8 December 2020. Yash Ghai, 'A short history of constitutions and what politicians do to them' The Elephant, 30 March 2020 -<https://www.theelephant.info/features/2020/03/30/a-short-history-of-constitutions-and-what-politicians-do-to-them/> on 8 December 2020.

[137] Yash Ghai, 'I support introduction of PM office' The Star, 29 November 2019 - <https://www.the-star.co.ke/news/2019-11-25-i-support-introduction-of-pm-office-yash-pal-ghai/> on 8 December 2020.

[138] Yash Ghai, 'I support introduction of PM office' The Star, 29 November 2019.

Strathmore University
Press

Strathmore Law School
Madaraka Estate, Ole Sangale Road
P.O. Box 59857 00200
Nairobi – KENYA
Tel. +254-703-034601
editor.sup@strathmore.edu
www.press.strathmore.edu
www.law.strathmore.edu
Twitter: @strathmorelaw

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