



Consultation, Cooperation & Coordination in Devolution

DEEPENING DEVOLUTION AND CONSTITUTIONALISM IN KENYA

A POLICY DIALOGUE



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A POLICY DIALOGUE

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Editors

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FOREWORD

I am honored to present to the constitution and devolution stakeholders this pioneer publication by the academia and Intergovernmental Relations Technical Committee (IGRTC). The publication supported by the UNDP was initiated by the now defunct Commission for the Implementation of the Constitution (CIC) and taken over by the IGRTC to its conclusion. As one of the first

documented academic discourse since advent of devolution under the Constitution of Kenya 2010, I am encouraged and believe that readers will find in the book a formidable reference material on the subject of devolution and constitutionalism . The publication forms a base for future conversations on how best Kenyans could refine their understanding and appreciation of Constitutionalism. Academics are therefore encouraged to continue their engagement with IGRTC on this subject so that further work can be undertaken in the same collaborative framework.

Constitutionalism is a practice, culture and democratic way of life that a people, society, or country progressively nurtures to improve the wellbeing of the citizenry. This happens through the socio-economic, cultural, political, environmental and technological engagements as well as interactions that individuals, institutions, organizations and governments have in their respective efforts of service delivery. Publication of these well researched academic papers that resulted from a joint Workshop between Maseno University and the defunct CIC with support of UNDP, allows IGRTC to be a repository of the knowledge and lessons learnt in expanding the performance of devolution in Kenya. IGRTC will continue to work with the UNDP to facilitate convening of forums that afford all stakeholders of devolution, with academia in the lead, an opportunity to share knowledge, identify gaps and challenges, as well as offer workable solutions towards improved devolution space in servicedelivery. With this publication, that is to be disseminated to a wider audience including the national and county governments, academic research institutions and devolution stakeholders, IGRTC looks forward to further collaboration and partnership where annual devolution discourses will be co-hosted by universities in Kenya. Outcomes of these discourses through research papers presented would then result into annual publications for documenting lessons and progress in entrenching devolution and constitutionalism in Kenya. The publication covers several aspects of devolution and constitutionalism. It has captured the critical role the academia is expected to play to strengthen devolution and appreciation of constitutionalism. It has also discussed the Kenyan model of devolution, political economy and service delivery under devolved governance system.

In addition, the publication covers issues regarding financing and impact of ethnicity on constitutionalism and devolution. As devolution is a new transformation in the conduct of our public affairs, each one of us is a student from the date the country started to implement the system. Too much push and pull in all structures of governance have been the order of the day at all levels of governance. In some instances, ignorance in the knowledge of constitutional provisions and by extension devolution reared its ugly face in disputes over mandate encroachment, power wars and relevance for control of resources. Intergovernmental relations matters have been at play between the two levels of government particularly in regard to devolved functions and service delivery.

These are pertinent issues that are directly affecting our governance system, which call for continuous dialogue. The academia must therefore focus its attention on the discourse and provide objective views that can help society understand its role in constitutionalism and devolution at large.

IGRTC wishes to once again appreciate the support of UNDP that made this publication possible.



John Burugu

AG. CHAIRMAN, IGRTC

ACKNOWLEDGEMENT

This publication is the outcome of a workshop organized by the Commission for the Implementation of the Constitution (CIC) in 2015. The workshop brought together scholars from public and private Universities in Kenya to deliberate on the role academics could play in sustaining the dialogue on the implementation of the Constitution of Kenya 2010, in general and devolution in particular. We wish to thank the participants who made valuable contributions at the workshop. In particular we wish to thank those who presented papers at the workshop. In 2020 the presenters updated their papers. This publication is therefore current. We also wish to thank those who served as discussants of the original papers that were presented at the Kisumu workshop. We would have wished to mention the discussants by name but the list is rather long. We appreciate their contribution. We also wish to acknowledge the contribution of the rapporteurs who took notes that helped the paper writers improve their original papers. Thirdly we wish to thank all the members of the secretariat from CIC who did a splendid job in making the arrangements for the workshop. Special thanks go also to the CIC Commissioners, Chairman Mr. Charles Nyachae, the Vice Chairman Dr. Elizabeth Muli and Commissioners, Dr. Kibaya Imaana Laibuta, Dr. Florence Omosa, Ms Catherine Muma, Dr. Ibrahim Ali Mr. Philemon Mwaisaka, Mr. Kamotho Waiganjo and Prof. Peter Wanyande for developing the concept that eventually resulted in the workshop at which the papers published in this book were presented. We express our gratitude to the staff of CIC led by the CEO, Dr. Joseph Kosure for their invaluable contribution and support without which the workshop would not have taken place. We also thank Maseno University for hosting the workshop. In this regard we thank the then Vice chancellor late Prof. Dominic Makawiti for his support and opening remarks at the workshop. The keynote address was delivered by Prof. Yash Pal Ghai, former Chairman of the Constitutional Review Commission of Kenya and current Director of the Katiba Institute. To him we say thank you.

Finally, special gratitude goes to the UNDP for the financial support for the workshop and for the publication of this book.

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PREFACE

Kenya promulgated the Constitution of Kenya 2010 in August 2010. A number of books have been written on various aspects of this constitution. None, however, has been devoted to one of the greatest challenges to the implementation of this governance tool, namely constitutionalism. It is against this background and in recognition of the importance of developing a culture of

constitutionalism for democratic governance that in 2015 the now defunct Commission for the Implementation of the Constitution (CIC) organized a workshop for scholars to deliberate on issues of constitutionalism. The idea was to initiate a debate on devolution with a view to encouraging scholars to keep alive dialogue on the Constitution. It was hoped that through dialogue Kenyans and particularly the leaders would appreciate the need to live by the Constitution. To this end a number of academic staff from public and private universities met at Maseno University, Kisumu Campus at the invitation of CIC at which the papers published in this book were presented and discussed by peers.

The papers were later revised and updated to take into account current development in the implementation of Kenya's devolved system of governance. This book therefore marks the beginning of continued dialogue among scholars on constitutionalism as it relates to the implementation of devolution in Kenya. The papers begin by tracing the journey from the Independence Constitution to the Constitution of Kenya, 2010 and gives insights into the struggles that Kenyans went through before the Constitution was finally approved at a referendum on 10th August 2010.

This introductory chapter is followed by a chapter that seeks to explain the type of devolution Kenyans adopted. This was influenced by the realization that not all Kenyans including the leaders understand Kenya's model of devolution. Without a clear understanding of this system of governance its implementation would be difficult. It would also be asking the people too much to respect the Constitution and live by it, if they do not understand it, hence the need to explain it.

The chapters that follow give insights into the various aspects of the constitution with a focus on devolution which is the engine of this progressive Constitution. After carefully considering what each chapter focused on, the editors found the title ***“DEEPENING DEVOLUTION AND CONSTITUTIONALISM IN KENYA: A POLICY DIALOGUE*”** as the appropriate title for the publication.

The workshop was supported by the UNDP and its partners, the Government of Netherlands and Government of Japan. Intergovernmental Relations Technical Committee appreciates UNDP for supporting the actual publication of the book. It is our hope that this publication will inspire a sustained dialogue on devolution and constitutionalism in Kenya.

A handwritten signature in black ink, consisting of a large 'P' and 'L' followed by a series of loops and a final horizontal stroke.

Peter Leley

SECRETARY/CHIEF EXECUTIVE OFFICER, IGRTC



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ABBREVIATIONS AND ACRONYMS

ADC	- Agricultural Development Corporation
AG	- Attorney General
CAJ	- Commission on Administration of Justice
CARPS	- Capacity Assessment and Rationalization of the Public Service
BBI	- Building Bridges Initiative
CBK	- Central Bank of Kenya
CDF	- Constituency Development Fund
CIC	- Commission for the Implementation of the Constitution
CIDPs	- County Integrated Development Plans
CJ	- Chief Justice
COK 2010	- Constitution of Kenya
CKRC	- Constitution of Kenya Review Commission
CUE	- Commission for University Education
CRA	- Commission of Revenue Allocation
DFRD	- District Focus for Rural Development
ECDE	- Early Childhood Development Education
IEBC	-Independent Electoral and Boundaries Commission
IGAD	- Intergovernmental Authority on Development
IGRTC	- Inter-governmental Relations Technical Committee
KADU	- Kenya African Democratic Union
KANU	- Kenya African National Union
KAU	- Kenya African Union
KCB	- Kenya Commercial Bank
KENSAF	- Kenya Social Action Fund
KGCGU	- Kenya Grain Growers Cooperative Union
KIE	- Kenya Industrial Estates
KKK	- Kikuyu – Kamba – Kalenjin
KNHCR	- Kenya National Commission on Human Rights
KPT	- Kenya Posts and Telecommunication
KWAL	- Kenya Wines Agencies Limited

LAs - Local Authorities

LASDAP - Local Authorities Services Delivery Action Plan

LATF - Local Authority Transfer Fund

LDP - Liberal Democratic Party

MCA - Members of the County Assembly

MDGs - Millennium Development Goals

MTF - Mechanical and Transport Fund

MTP - Medium Term Plan

NAK - National Alliance of Kenya

NARC - National Rainbow Coalition

NCCC - National Convention for Constitutional Change

NCBF - National Capacity Building Framework

NCEC - National Convention Executive Committee

NCPB - National Cereals and Produce Board

NHIF - National Hospital Insurance Fund

ODM - Orange Democratic Movement

PCK - Peoples Commission of Kenya

PFM - Public Finance Management

PNU - Party of National Unity

RMLF - Road Maintenance Levy Fund

SDGs - Sustainable Development Goals

SEKEB - South Eastern Kenya Economic Bloc

SID - Society for International Development

TA - Transition Authority

TDGA 2012- Transition to Devolved Government Act, 2012

UNEP - United Nations Environmental Programme



CHAPTER 1

KENYA'S DEVOLUTION JOURNEY: AN OVERVIEW

Peter Wanyande & Gichira Kibara

Introduction

The Constitution of Kenya 2010 was promulgated on 27th August 2010. It has been hailed as one of the most progressive Constitutions in the world. Kenya's constitutional journey is one of monumental triumphs and failures. Kenya gained independence from Britain in 1963 after a protracted civil and armed struggle. Like most former British colonies, Kenya was bequeathed a Westminster-type Constitution whose key features were: an extensive bill of rights; a bi-cameral parliament; devolved government; separation of powers between the arms of government; judicial independence; and a multi-party political system (Ghai, 1992). The independence Constitution was the result of negotiations and compromises between the dominant political parties of the time—the Kenya African National Union (KANU) and the Kenya African Democratic Union (KADU) and the British Government. KANU crystallized the interests of the numerically 'large tribes' (primarily the Kikuyu and the Luo) for a unitary system of government while KADU (bringing together the Kalenjin Political Alliance, the Maasai United Front, the Coast Peoples Union, the Abaluyhia Political Union and the Somali National Assembly) represented the interests of the numerically 'smaller tribes' advocating for a federal system of government (CKRC, 2005).

At the centre of the independence negotiations and the type of Constitution to adopt were fears of the 'small tribes' of domination by the 'large tribes' and the fear of the British of abuse of minority rights, particularly of British settler community who would remain in Kenya after independence. The British thus supported the imposition of various checks on executive authority and the devolution of power to secure the rights of the minority tribes and groups. The Constitution of Kenya Review Commission (CKRC) noted, in its final report, that 'under considerable pressure from the British... KANU agreed to a number of provisions protecting the minorities, and that the two 'major themes or principles of the Independence Constitution were parliamentary democracy and devolution of power as an instrument of minority protection'

(CKRC, 2005). KANU considered the checks on executive power as unnecessary fetters on the newly acquired independence by a departing colonial power but reluctantly conceded to the demands in order to fast-track the granting of independence to Kenya by the British.

Reluctant Implementer

Given the reluctance of KANU to embrace the liberal provisions of the Independence Constitution, many of these provisions were never fully operationalised. The institutions that the Constitution created were not allowed to thrive and consolidate. After overwhelmingly winning the independence elections, KANU immediately embarked on extensive constitutional amendments. The result was that the checks on executive authority were either removed or extensively watered down and the powers of the president enhanced. The Constitution was over the next more than three decades of KANU rule rendered ineffective by more than 30 amendments which substantially undermined the checks and balances on executive power, outlawed plural politics, curtailed freedoms and liberties and over-centralized power (Lumumba, 2011)¹.

The first amendments to the Constitution were geared towards strengthening the executive by abolishing the dominion status, upon which Kenya attained independence, and establishing a republic with a president who combined the roles and powers of the head of state (previously the queen represented by the Governor-General) and those of the head of government (previously the prime minister) and undermining devolution by repealing the provisions that gave regional governments financial independence, removing from the regional government most of the functions of agriculture, veterinary services and education, giving parliament the power to establish and supervise local authorities and giving the president exclusive power over government land (Lumumba (2011)). These amendments effectively recentralized power and rendered the provincial governments (*Jimbo*s) effectively appendages of the central government. Later amendments targeted the judiciary, giving the president power to appoint judges through control of the Judicial Service Commission and to initiate investigation into their conduct with a view to their removal; abolishing the regional government structures and replacing them with provinces and councils; amendments to give the president power over Parliament by empowering him to pardon Members of Parliament who absented themselves from Parliament for more than 8 days or committed electoral offences, removing Parliamentary control over presidential emergency powers, thus allowing detention without trial, abolishing the Senate, granting the president the power to appoint members of the Electoral Commission who were previously appointed by the Speaker; making Kenya a one party state by law; and removal of the security of tenure of constitutional office holders.

1 Lumumba PLO et al (editors), *The constitution of Kenya: Contemporary Readings*, LawAfrica 2011

Deterioration of the Constitutional Order and Agitation for Reforms

As a result of the changes to the Constitution the executive became exceedingly powerful. The other arms of government were rendered powerless. The judiciary became a handmaiden of the executive after losing its independence through financial dependency on the executive, presidential powers of appointment and unabated corruption. The legislature was also at the beck and call of the president who could prorogue and dissolve parliament at will and essentially controlled its calendar and agenda. The government was also over-represented in parliament through over-appointment of ministers and assistant ministers. A large cabinet was preferred because it would serve as a voting machine in parliament for executive friendly motions and bills.

Deterioration of the constitutional framework allowed for gross abuses of human rights including detention without trial, torture of government critics, assassinations, ethnic clashes, favoritism in the allocation of resources and employment in the public service; and state sponsored corruption. The new constitutional developments encouraged land grabbing, deforestation and looting of parastatals (Mbai, 2005).

Against this background a concerted campaign to open up democratic space, restore freedom and liberties and enhance transparency and accountability was launched in the 1980s and early 1990s by opposition political parties and non-state actors with considerable support from international partners. Faith based groups also supported the demand for political reforms. Popularly known as the 'second liberation', the campaign led to the restoration of multi-party politics (Kanyinga 1994; Chege 1994), repeal of some of the constitutional amendments that had taken away the security of tenure of Judges, Attorney General, the Controller and Auditor-General and Commissioners of the Public Service Commission. It also led to the repeal of many oppressive laws in what was referred to as the Inter-Parties Parliamentary Group ('IPPG) reforms' (CKRC (2005).

The Search for a New Constitution

Following the re-introduction of multi-party politics in the beginning of the 1990s, a general consensus developed in the country that there was need to overhaul the Constitution in order to provide an enabling framework for: free and fair elections, the enjoyment of human rights; democratization and development. A campaign for the comprehensive review of the constitution was thus launched in the mid 1990s (Lumumba, 2011, Mutunga, CKRC). The Campaign for constitutional reform was initially led by civil society and faith based organizations. They were later joined by opposition political parties to form the National Convention for Constitutional Change (NCCC) with its executive arm the National Convention Executive Committee (NCEC). The Government and the ruling party strongly opposed the reforms. The stalemate led to violent public demonstrations which led to loss of human lives and destruction of property.

In the run-up to the 1997 elections, the parliamentary political parties agreed to a raft of reforms to facilitate the elections of that year. The reforms were unsatisfactory both in terms of content and implementation. After the elections, religious leaders and civil society organizations launched a peoples' initiative to review the Constitution the '*Ufungamano Initiative*' and appointed a commission- the Peoples Commission of Kenya (PCK) to collect public views and draft a constitution. The government also set up a parliamentary committee to facilitate constitutional reform which recruited a commission (CKRC) to review the Constitution. The two Commissions were eventually merged into the CKRC which facilitated the collection of public views, developed a proposal for the Constitution of Kenya and organized the National Constitutional Conference, popularly known as the *Bomas Conference* (named thus after the venue where it was held) to deliberate the proposals. The conference was convened in the wake of fallout within the ruling coalition, the National Rainbow Coalition (NARC) which had overwhelmingly defeated KANU in the December, 2002 elections. The coalition fallout between the president, Mwai Kibaki of the National Alliance of Kenya (NAK) party and the minister for transport Raila Odinga of the Liberal Democratic Party (LDP) created serious tensions in the conference. It was caused by, among other grievances, the failure of the president to facilitate a review of the constitution within six months as demanded by LDP.

By the end of the conference the government delegation had walked out of the conference protesting that the conference was biased against its proposals. Nevertheless the conference adopted *The Draft Constitution of Kenya, 2004* of March 2004 popularly known as the BOMAS draft. Thereafter, the government through the Attorney –General and Parliament made substantial changes to the draft Constitution leading to what became known as the *Wako draft*. This draft was subjected to a constitutional referendum in 2005. The people overwhelmingly rejected the proposed draft by a vote of 54%. The failed effort to review the Constitution was the backdrop to the hotly contested elections of 2007. Violence broke out after the elections over the disputed presidential election results leading to the death of more than 1300 people and the internal displacement of more than 600,000 people. A number of people also fled to neighbouring Uganda where they sought refuge. International mediation was necessary to bring the situation back to normalcy. A grand coalition government bringing together the protagonists was formed. Mwai Kibaki was confirmed as president with Raila Odinga as Prime Minister. A primary mandate of the coalition government was to ensure the country got a new constitution within 24 months. A committee of experts was thereafter competitively recruited and mandated to facilitate the resolution of contentious issues arising from the *Bomas* process and draft. The committee was also mandated to prepare the proposed Constitution of Kenya for adoption through a national referendum. Through a process that involved public and expert consultations, the committee successfully steered the country to adopt the Constitution of Kenya 2010. The referendum was conducted in August 2010. The proposed draft constitution was supported by 67 % of those who voted at the referendum.

The Objectives of Constitutional Review

The campaign for a new Constitution was long and protracted (Mutunga, 1999). It took more than two decades of advocacy, by the people of Kenya, for a comprehensive review to be achieved. The desire for a new Constitution was founded on the wish, of Kenyans, for a better life. In fact the objectives of the comprehensive review of the Constitution were to: guarantee peace, national unity and integrity of the republic; establish a democratic system of government; establish measures to institutionalize separation of powers between the executive, parliament and the judiciary; promote peoples' participation in the governance of the country through free and fair elections and; ensure all Kenyans have access to basic needs through establishment of a fair framework for economic growth and access to national resources (Constitution Review Act, 2008).

The New Constitutional Dispensation

The Constitution that was adopted in 2010 provides for fundamental reforms in the national value system, the bill of rights; system of government (devolution), judiciary; exercise of executive authority; security organs; land tenure and management and minority rights among other changes that affect governance.

Key changes in Governance under the Constitution of Kenya 2010 include the following:

a) National Values and Principles of Governance.

An elaborate value system is established under Article.10 and chapter 6 of the Constitution. The values and principles include: rule of law, democracy and participation of the people, human dignity, equity, social justice ; inclusiveness, equality, human rights, non-discrimination and protection of the marginalized and good governance, integrity, transparency and accountability and; sustainable development. These values are binding on all state organs and public officers.

b) Devolution of Power

The Constitution devolves power by creating county governments that have legislative and executive power. It creates 47 county governments which are in control of development resources and programmes at the county level. The counties have power to levy some taxes and rates and may also receive conditional and unconditional grants from the national government. The county governments are entitled to not less than 15% of the nationally raised revenue. The current debate under the Building Bridges Initiative (BBI) proposes to increase this allocation to atleast 35%. A Constitutional commission, the Commission on Revenue Allocation, has also been created to ensure that county governments get their fair share of nationally raised revenue. Counties that have suffered marginalization in the past are entitled to special funding, - the Equalization Fund. Substantial functions and resources

are devolved to the counties making the counties quite powerful. The Constitution has also created a bi-cameral parliament consisting of the Senate and the National Assembly. The Senate constrains the powers of the National Assembly and guarantees the survival and independence of the counties and county governments.

c) Constraining of Executive Power.

- i) The Constitution drastically reduces presidential powers by: requiring that all important appointments must be approved by Parliament; creating independent commissions that take away substantial executive power; removing presidential control of parliament; denying the president the right to appoint his deputy; Executive control of the economy is also curtailed – revenue and land allocation are now placed under independent commissions. Land tenure and management have also been reformed through the categorization of land into public, private and community. An independent commission, the National Land Commission, to manage public land on behalf of the national and county governments has been created.

ii) Independence of the public service.

The Public Service Commission is granted greater independence and strengthened by: it is now empowered to create and abolish offices which was previously the preserve of the president; it also nominates principal secretaries for appointment by the president; The commissioners are now subject to approval by parliament; the secretary to the Commission is now a constitutional office holder appointed by the commission; and the members serve for a six year non-renewable term.

d) Independence of the Judiciary

The Constitution creates a powerful and independent judiciary to protect the rights of Kenyans. The establishment of a Judiciary Fund has given the judiciary financial independence and increased its revenue tenfold. A new powerful court –the Supreme Court-has also been established to handle presidential election petitions and give advisory opinions on devolution. Judges are now appointed upon recommendation by a re-constituted Judicial Service Commission which has representation from the Law Society of Kenya and the public while the Chief Justice and his deputy must be confirmed by parliament. Two specialized courts have also been created to deal with employment labour relations and the environment and the use and occupation of, and title to, land (Constitution of Kenya 2010, Article 162 (2) (a) and (b)).



e) The Bill of Rights

The Constitution provides for a modern, comprehensive Bill of Rights which, for the first time, recognizes and protects social, economic and cultural rights and provides for all the civil and political rights as well as solidarity/group rights. It has elaborate provisions for the protection of minorities and marginalized persons and communities. The Constitution gives the rights of women, the youth and other marginalized groups great prominence and provides for affirmative action. All laws that discriminate against women are invalidated and women married to a foreigner can now confer citizenship on their children. Not more than 2/3 of Parliament should be of the same gender. The youth, and people with disabilities are also guaranteed representation in Parliament. The bill can be easily enforced- it gives *locus standi* to interest groups and concerned persons. State funded legal aid for the indigent who would suffer substantial injustice is also obligatory under the constitution.

Implementing the Constitution of Kenya 2010

While the Constitution provides the framework for good governance, there are many challenges to its effective implementation including: resistance to change by the power and economic elites; legacy of disrespect for the Constitution or lack of constitutionalism; capacity of the two levels of government to effectively implement many of the provisions of the Constitution; turf wars between and among government institutions; cultural resistance to some of its human rights provisions such as gender equality; weak policy formulation and implementation; corruption and impunity especially by the power wielders which undermines the ability of government to deliver services and a general lack of or inadequate knowledge about the Constitution which hinders effective public participation needed for its implementation. This publication which is the first in a series of dialogues on constitutionalism, examines some of the issues that should be addressed for the effective practice of constitutionalism. There are also fears that with the exit of the Commission for the Implementation of the Constitution (CIC) the debate on implementation of the Constitution would come to a standstill and political leaders may take advantage of this silence to undermine its implementation.

It was against this backdrop that between 8th and 10th April 2015, the CIC organized a workshop for the academia whose general objective was to “establish a platform for dialogue on the effective implementation of the Constitution of Kenya 2010 and the devolved system of government in particular”. It was the first workshop to bring together members of the academic community from universities in the country, public and private, to reflect on how academics could sustain the dialogue on the effective implementation of the Constitution of Kenya 2010 and devolution in particular. This was done, in the hope that a sustained dialogue would help deepen constitutionalism in Kenya and promote the effective implementation of

devolution. In the next several paragraphs of this section of the chapter, we discuss the issues affecting implementation. Before that however, we highlight some of the major achievements that have been registered in the course of implementing the Constitution. We also highlight some initiatives that are being undertaken or proposed to improve the constitution.

Successes in Implementation

Among the early steps taken to facilitate the implementation of the Constitution was the establishment and consequent operationalization of the various institutions needed to guide different aspects of the Constitution. Among the institutions established are the Commission for the Implementation of the Constitution (CIC), the Commission on Administration of Justice (CAJ), the Police Service Commission, the Commission on Revenue Allocation, the National Land Commission (CRA) the Kenya National Commission on Human Rights (KNHCR). The second major activity aimed at facilitating the implementation of the Constitution was the enactment of laws required to give effect to the Constitution. These laws were identified by the framers of the Constitution. The required pieces of legislation are listed in schedule five of the constitution. The Constitution provide timelines within which these laws were to be passed by parliament. There were however a number of processes through which these laws were to pass before enactment by parliament. After the bills were generated by the executive, a private member of Parliament or any Kenyan, or group of Kenyans, the bills were required to go through the Kenya Law Reform Commission and the Attorney General (AG). These two institutions were charged, at this stage of the process, with ensuring that the bills were in accordance with government policies and drafted properly.

On concluding this stage, the Attorney General and the Kenya Law Reform Commission submitted the draft bills to the CIC. The role of CIC in this process is spelt out in the Constitution. Basically the Commission is charged with the responsibility of ensuring that any laws passed by Parliament are compliant with the constitution. The next stage in this process was the submission of the draft bill to the cabinet and then to parliament for enactment into law. The draft bill became law after presidential assent. The required laws have all been enacted except the law intended to ensure that no more than two-thirds of parliament is of the same gender. Members of parliament are so far unable to agree on how best to realize this requirement. The matter was taken to the Supreme Court for advisory opinion and in September 2020 the Chief Justice (CJ) advised the President to dissolve parliament for failure to pass the two thirds gender rule. The advisory by the Chief Justice has however not been effected.

The other key implementation activity was the establishment of relevant institutions and systems. This was particularly urgent for county governments. County governments each comprising an executive and legislative branches were established following the general elections held in March 2013. On coming into existence county governments embarked immediately on putting

in place systems and structures to facilitate the carrying out of their mandate and functions. The systems that were established included financial systems. The county governments also put in place County Public Service Boards to handle the human resource function of counties as required by the County Governments Act 2012. Each county government has its own Public Service Board. The County Assemblies have also been established and are enacting laws required to give legal backing to county government functions. Each County Assembly has also established a County Assembly Service Board. These Boards have similar functions as the Parliamentary Service Commissions. To facilitate intergovernmental coordination a body known as the Intergovernmental Relations Coordinating Summit was established. It comprises the President as chairman and all the 47 governors.

Challenges of Implementation

Based on the above, one can argue that on the whole the implementation of the Constitution of Kenya 2010 has been on course. There are however, a number of challenges that have been experienced in this process. One of them has been the slow process of putting systems in place especially for county governments. This could be explained by the fact that this is a new system of governance and the county managers lacked the experience necessary to get things going. This has now been largely accomplished. Secondly was the fact that the county governments lacked staff of their own. They relied on staff from the national government. These were made up of former central government employees who were performing functions that were devolved to county governments upon the promulgation of the Constitution. This posed a number of challenges. First was that it has taken a bit of time to get national government staff to report and start work at the counties. Secondly the seconded staff was uncertain about their future at the county government level. In any case they were not sure where their loyalty lay. Many felt they were loyal to the national government. Indeed there were cases where governors complained that they were frustrated by the seconded staff many of whom tended to receive instructions from the national government while ignoring instructions from county governments.

A related challenge arose from the fact that there were several categories of staff at the county government. In addition to the seconded staff from the national government, there was staff from the defunct local authorities. The County Government Act 2012 provides that all staff of former local authorities automatically became employees of the county government. This means that, for example, all local government employees in the local authorities of former Siaya district automatically became staff of the Siaya county government. The third category of staff at the county government level was those seconded to the counties by the now defunct Transition Authority (TA). The TA was established by the Transition to Devolved Government Act, 2020 to, among other functions; facilitate the transition from the centralized to the devolved system of government. As part of this mandate TA seconded some employees to assist county

governments get started. The relationship among these categories of staff was not always harmonious or collegial. This was not good for the functioning of the county government and therefore the implementation of the Constitution. Of particular concern was the fact that the staff inherited from the local authorities earned much higher salaries than those from the central government despite the low academic qualifications the former local authority staff had. They moved to their new employer with the high salaries they inherited from their previous employer. This created a feeling of unfairness which affected the morale and performance of the employees seconded from the central government as well as those seconded to the county governments by the TA. Part of the problem was the failure to manage the transition of staff well. It took a long time before the Public Service Commission began to work with the County Public Service Boards and other stake holders to address the challenge. This has not augured well for the implementation of devolution in particular and the Constitution generally.

The Rule of Law and Impunity.

The establishment of institutions, structures and the putting in place of systems and the passage of legislation to facilitate implementation is perhaps the easier part compared to the challenge of constitutionalism. Constitutionalism refers to the respect for and compliance with the constitution and exists when leaders and citizens act in accordance with the Constitution. It requires respect for the rule of law. One of the reasons why African governments tended to be dictatorial especially in the period before the current wave of democratization was precisely because their leaders did not respect the Constitution. Many of them ruled as if the constitution did not exist. This was ably captured by Okoth-Ogendo (2002) when he diagnosed the problem of governance in Africa as that of 'constitutions without constitutionalism'. African countries developed constitutions but failed to respect the constitution in the course of managing public affairs. Indeed Kenya suffered from this problem in at least three ways. First was the practice after independence of amending any provision in the Constitution that constrained the powers of the leaders and especially that of the executive. Secondly the executive on many occasions did not find it difficult to ignore or overlook the Constitution and act arbitrarily. This partly contributed to the demands for a new constitutional dispensation. Thirdly was the culture of impunity. Powerful people especially in government violated the constitution and broke the law and got away with it as no action was taken against them.

The implementation of the CoK 2010 unfortunately has also witnessed attempts to either ignore or amend some of its provisions. There was also a case in 2015 for example, when the President attempted to ignore court orders on police recruitment. He however eventually bowed to pressure from CIC and other oversight institutions and allowed the law to take its course. This failure to respect the constitution and the rule of law and the culture of impunity remains a major challenge to the implementation of the

constitution. Efforts must be made to inculcate and build a culture of constitutionalism among Kenyans and their political leaders if the country hopes to fully and effectively implement the Constitution of Kenya 2010. The focus should therefore be on building a constitutional culture.

Turf Wars among Different Arms of Government

The above challenges have been compounded by institutional wars including conflicts between the different arms of government. The most common of these wars has been that between the senate and the national assembly. The war between these two law making bodies has essentially been over jurisdictional disputes with the two accusing each other of not respecting the other or of interfering with each others' jurisdiction. There have also been conflicts between county assemblies and governors. In the case of Makueni County, the conflict was so serious that a Commission, in accordance with the constitution, was set up to advise the president on whether or not the county government should be dissolved. In Embu County, the county assembly attempted to impeach the governor. Similar attempts were made in Muranga and Kericho counties just to mention a few. The point is that these conflicts undermined the functioning of the county governments and therefore the smooth and effective implementation of the Constitution.

Conflicts have also been recorded between the national government and the county governments. These conflicts have also revolved around jurisdictions. The case that comes to mind immediately is one that occurred when the national government leased modern medical equipment and instructed county governments to accept them and install them in hospitals managed by county governments². This became a major source of conflict between the two levels of government. The county governments objected to the involvement of the national government in the purchase of the medical equipment for two reasons. First the county governments argued that they were not consulted before the equipment was purchased. Article 6(2) of the constitution requires the two levels of government to work in cooperation and consultation. Secondly, county governments argued, and rightly so, that the health function has been devolved to county governments and therefore the national government did not have jurisdiction over the function and consequently could lease the medical equipment for counties. Although counties eventually accepted the equipment, tensions remain over the procurement. The national government's reluctance to release the county roads to county government has also caused conflict³. The conflicts certainly undermine service delivery, a key objective of devolution. They also go counter to the cooperative model of devolution that Kenya adopted when it promulgated the Constitution of Kenya 2010.

2 See International Legal Consultancy Group & another v Ministry Of Health & 9 others [2016] eKLR

3 See Council of County Governors v Attorney General & 4 others [2015] eKLR

Challenges of Public Participation

Another challenge to implementation relating to constitutionalism has been the tendency by the two levels of governments to overlook constitutional requirements for public participation. The Constitution gives premium to the participation of the people of Kenya in their governance. Leaders and governance institutions are obligated to seek the input of the people in governance decisions. The people should be involved in the making of public policy, legislation and regulations and in the budget making process among other important public decisions on matters that affect their lives. Unfortunately the two levels of governments have not been very faithful to this constitutional requirement. There have been complaints by residents of various counties that they are not given opportunity to influence decisions of county governments. The residents of Kiambu County, for example, went to court in 2015⁴ to stop the implementation of a finance law passed by the county assembly on the ground that their views on the finance bill were not sought by the county government. The court agreed with the residents and annulled the law.

A number of reasons have been given by some county governments for not effecting effective public participation. Among them is the cost of organizing and facilitating public participation. Counties argue that the cost of producing documents required for effective participation is often prohibitive and out of reach of counties. Secondly many counties point to the absence of a policy on public participation as a challenge. This has resulted in unstructured and often ineffective public participation in those counties where attempts have been made to have public participation. County governments also observe that in many cases members of the public expect to be offered transport by the county governments to the venues where public participation is to take place. In some extreme cases residents of counties ask to be paid to participate. This is unacceptable on a number of grounds. First it shows that residents do not understand that their participation in their own governance is a civic duty in which they should voluntarily take part in. They should not demand payment. Secondly it is expensive for county governments to meet participation expenses such as transporting people to venues in which these events are held.

Competition between County Assemblies and Executives over Participation

A related challenge regarding public participation is the practice in which the executive and the county assembly invite residents for public participation twice over the same issue. Many county executive blamed the Members of the County Assembly (MCA) for this practice. Residents of some counties also complained about this practice. The practice is costly as it leads to double expenditure on one issue. This is perhaps one of the reasons why county governments find the cost of public participation prohibitive. County governments would save

4 See Republic v County Government of Kiambu Ex parte Robert Gakuru & another [2016] eKLR

money if they coordinated these activities in such a way that the executive and the assembly hold joint forums on any one issue. Secondly the practice discourages residents as they wonder why they should discuss the same issues more than once. It can lead to participation fatigue. It must also be pointed out that rural residents are busy people and too many government engineered meetings may cease to be attractive if they interfere with their own schedules. The question then is why are members of the two arms of government engaged in a practice that is obviously harmful to public participation and therefore to the implementation of the Constitution? Our hypothesis is that it shows a lack of cooperation between the two arms of county government. It could signify a lack of understanding of the fact that the two arms belong to the same government. Some MCAs regard themselves as competitors with the executive arm of government. Indeed there appears to be a general notion that a legislative arm of government is not part of government. Often we hear even members of the national assembly referring to the executive as the government in a manner to suggest that the assembly is not part of government. This is unfortunate as the devolution model chosen by Kenya is a cooperative one as clearly stated by Kangu in chapter three of this book.

In cases where residents of counties are invited to participate in an issue, their major complaint has been about the technical language and nature of the documents that they are given. They point out that these documents are prepared in such technical language that they do not understand their content. In any case they also observe that the documents are often too long for them to read. Finally, residents complain that usually they are given very short notice about the meetings and that this may explain the low attendance at such meetings. (see Wanyande; 2015). Some even complain about the suitability of the venues where the meetings are held. The venue of the Kiambu case we referred to earlier, for example, was at Windsor hotel where ordinary residents of Kiambu would not feel free to visit. The result is that the little participation that is undertaken is a mere token. It lacks seriousness. Its impact is therefore minimal.

While the claims by some governors that residents ask to be paid to attend public participation meetings is difficult to verify, they are serious enough to warrant attention. It is only after they have been verified or dismissed that appropriate action can be taken to promote public participation. This would be necessary also because public participation can also serve as a means for civic education. Generally many Kenyans including some political leaders are not familiar with the provisions of the Constitution of Kenya 2010. This ignorance becomes clear during informal discussion with some leaders. It must be a matter of concern that leaders exhibit poor knowledge of the Constitution. Ignorance of the Constitution is therefore another challenge to its effective implementation. It also undermines constitutionalism as one can only respect and act according to the Constitution if one is familiar with its provisions.

Arising from the above it is clear that one of the challenges to effective implementation of the Constitution of Kenya 2010 is poor intergovernmental relations. This arises partly from a misunderstanding of the devolution model adopted by Kenya, resistance to change, power struggles, and failure by some institutions to play their role effectively among other factors. Intra-governmental relations especially relations between county assemblies and county executives are also poor. It is also clear that there is some misunderstanding between the two levels of government over their respective functions. This partly arises from the failure by the TA to undertake functional unbundling and analysis as required by the Transition to Devolved Government Act. Challenges relating to funding have also emerged since implementation began. These challenges lead us to a discussion of why a book on deepening constitutionalism is important and necessary.

Why a book on Deepening Constitutionalism and Devolution in Kenya

The Constitution of Kenya 2010 is by any standards new. Its usage began only in 2013 following the general elections held in March that year. Kenyans may therefore not be familiar with all its provisions. It is for this reason that the need to continue a discourse on the Constitution becomes justifiable. It is only through sustained debates and dialogue that this can be achieved. This book provides an opportunity to start this dialogue.

A book on deepening constitutionalism is important for academic purposes as well. It will enrich the growing literature on the implementation of the Constitution from the perspective of Kenyans. Many books on constitutions and constitutionalism in Kenya are written by non-Kenyans and therefore offering what we may call non-Kenyan perspective on the subject. Thirdly, a book on deepening constitutionalism by the academia is intended to provide scholars with a forum to contribute to the debate on constitutionalism. This is because scholars have been rather silent on matters of the Constitution. The voices of scholars are not heard in national debates on the Constitution including debates on national television. This is despite the fact that scholars are not just the custodians of knowledge but are also better placed to disseminate knowledge produced by them and by other members of society. In addition many concepts in the Constitution of Kenya 2010 remain unclear to many Kenyans. Academics are in a good place to demystify these concepts and therefore make it easy for the ordinary Kenyans to understand and appreciate the Constitution. Moreover it is generally true that members of society would listen to what scholars say about national issues. Finally by engaging in a dialogue on the Constitution on a sustained basis, some of the challenges to its implementation would be identified and addressed. The book on issues to do with the implementation and observance of the requirements of the constitution by scholars is therefore a welcome move. It is our hope that this marks the beginning of a more sustained involvement of the academia on matters of the Constitution.

Summary of the Chapters

This book is divided into chapters. It has a total of nine chapters. Chapter one by the editors provides an overview and background to the Constitution of Kenya 2010. It highlights the journey travelled followed by Kenyans to get the current Constitution. It also highlights the achievements and challenges to its implementation. The chapter further provides a justification for a book on the deepening Devolution and Constitutionalism in Kenya.

Jacqueline Oduol in chapter two discusses the role of academia in deepening constitutionalism. The chapter provides a platform and framework through which scholars can contribute to continuous dialogue on the implementation of the Constitution and devolution in particular. The chapter is in response to the concerns of the CIC (now defunct) that the vacuum in constitutional debate after its exit will not augur well for the implementation of the Constitution. The exit of CIC would herald the end of the vibrant debate that the Commission sustained. The fear is that political leaders unhappy with the Constitution would take advantage of this silence to undermine the implementation of the Constitution. This, she suggests, is already evident. The author is also of the view that the academia has been rather silent in this debate and yet they are better placed to lead and sustain the debate on constitutionalism. She gives reasons why the academics are better placed to do this. The author makes the point that the Constitution has not been adequately understood and interpreted properly. It is in this area that academics can make its contribution. The academia can demystify some of the concepts used in the Constitution and therefore make it easy for the ordinary Kenyan (Wanjiku) and indeed some leaders to understand the Constitution generally and devolution in particular. Secondly the academia can sustain the dialogue on the implementation of the Constitution and constitutionalism by introducing courses on the subject of devolution so that university students are exposed to the ideas and provisions of the Constitution. When university students have a good grasp of the Constitution, the author argues, implementation and defense of the Constitution is more assured. In their role of disseminating knowledge members of the academic community can also conduct public lectures on the Constitution as a way of reaching as wide a spectrum of the public as possible. This would also help sustain the debate on the implementation of the Constitution as well as creating the necessary knowledge on the Constitution.

In chapter three Mutakha Khangu undertakes a conceptualization of Kenya's model of devolution and provides insights into the type of devolution Kenyans adopted. He begins from the premise that there are different types of devolution and each is unique. He provides a very comprehensive review of different types of systems of government as a basis for a proper understanding of Kenya's devolution model. He also observes quite rightly that a country's decision to adopt one type of devolution or the other is dependent on the county's historical and political experiences. Kenya is no exception and that although Kenya borrowed heavily

from South Africa, its model is influenced by Kenyan governance experience. The author characterizes Kenya's model as a cooperative rather than a competitive one. He notes that it is only when the national and county governments cooperate and consult each other that the system will work as expected. County governments too are expected to cooperate with each other. The author further observes that the national and county level governments are coordinate with each other and therefore none is superior to or subordinate to the other the fact that the national government can intervene in addressing problems of a county government notwithstanding. He reminds the reader that this intervention can only be done under specific circumstances. In any case, the Senate as the protector of county governments must be involved in these interventions.

The author reminds the reader that Article 189 of the Constitution requires the two levels of government to conduct their affairs in a manner that demonstrates mutual respect taking into account the constitutional and institutional integrity of each government. Kangu decries the tendency by the national government to treat county governments as subordinate entities as demonstrated by the purchase of medical equipment by the national government and subsequently imposing them on county governments. He points out that it is the lack of understanding and appreciation of the nature of Kenya's devolved system of government that will undermine the effectiveness of the system and its ability to provide services efficiently and rid the country of the governance ills that it was established to cure. He urges all actors in government to respect the provisions of the Constitution and particularly the nature of the devolved model adopted by the country.

Chapter four by Prof. Mitullah discusses the management of Kenya's transition from a centralized system to a devolved system of government. She notes that regime transition is a complex process and that there are many theories that seek to explain it. She distinguishes transition from change management, conceptualizing transition as a more complex paradigmatic shift. She recommends the adoption of reflexive governance in undertaking transition. Reflexive governance involves participation, experimentation and collective learning as opposed to a linear conceptualization of activities/action plans. Mitullah however cautions that in societies such as Kenya, where the vision, integrity and values of leaders cannot be guaranteed, reflexive governance presents a challenge and there is therefore need for a more rigid approach to transition but urges that the room for learning by doing should still be provided. Mitullah then reviews the Constitutional, legal and administrative processes of transition in Kenya. She observes that it was hurriedly done (through the adoption of a 'big bang' approach) giving counties inadequate time to acquire the capacity to assume their responsibilities leading to several challenges in the areas of personnel management, transfer of assets, capacity building and policy and legal facilitation. The author also urges that county governments be given more room to experiment and learn by doing in order to encourage

rather than punish innovation. For this to be realized the author argues that an effective monitoring and evaluation system is necessary in order to identify visionary and innovative leaders and differentiate them from those involved in mismanagement and corruption.

Chapter Five, by Prof Karuti Kanyinga, is on the political economy of devolution. The author interrogates the effects of the interaction between the economy and Kenyan politics on devolution. The author seeks to find out whether devolution has lived to the expectations of the people in terms of service delivery. He argues that on the whole it has. He further interrogates the issue of who wins and who loses in the implementation of devolution. The author is clear that even though every region has gained from devolution, the greatest winners are those regions of the country that had been marginalized during the centralized governance system from a developmental perspective. He supports this contention with statistics drawn mainly from reports of the Controller of Budget. The author further argues that devolution has experienced a number of challenges in its implementation a subject discussed in another chapter of the book.

Chapter Six by Cyprian Oduogo is on devolution, ethnicity and nationalism. The author seeks to find out the impact, if any, of devolution on ethnicity and nationalism. She reminds the reader that one of the aims of adopting devolution was to foster national unity while recognizing the country's ethnic and other forms of diversity. The author then goes on to note that even though nationalism was quite strong during the last few years of colonial rule and in the first decade of independence, this sense of common belonging among Kenyan communities was weakened by the postcolonial leadership. One of the factors responsible for this, the author notes, was the practice in which ethnicity was given pride of place in our public life. This was particularly the case in politics. She points out the fact that political leaders used their ethnic bases for re-election and support and that appointments to public offices was influenced more by ethnic considerations than merit. This led to a feeling by some communities of discrimination and marginalization, a fact that eroded any sense of common belonging or nationalism. It is against this backdrop, the author says, that she sought to find out the extent to which devolution has contributed to rebuilding of a sense of nationalism in Kenya. She identifies ways in which the Constitution of Kenya 2010 seeks to promote national unity. Put differently, the author identifies provisions in the Constitution through which the country could strengthen a sense of common belonging among its diverse ethnicities. The relevant provisions include, the Equalization Fund. The Fund is to be given to hitherto marginalized areas of the country to enable them "catch up" with the rest of the country, the 2/3 gender rule that requires that not more than 2/3 of any elective posts be occupied by people of the same gender. The other provision is one in which the youth and people with disabilities are allocated places in both parliament and in county assemblies.

The author argues that there are positive indications that devolution is working and that it has a potential to strengthen nationalism and downplay ethnicity. She however urges leaders to embrace the national values and principles of governance enshrined in Article 10 of the Constitution of Kenya 2010. The author finally calls upon all Kenyans to take advantage of devolution to hold their leaders to account.

Chapter Seven is on effective financing of devolution. Dr.Kibua, a seasoned scholar and practitioner of public finance management, reviews the management of decentralized funds and notes that it has been plagued by many institutional challenges in regard to the issues of sufficiency, effectiveness and equity. He discusses each of these issues. Dr Kibua observes that the principles of fiscal devolution are set out in the Constitution and the institutional arrangement is largely in place. He however notes that there are clear emerging challenges in operationalising the constitutional principles and intent including the poor quality of county development plans, poor budget execution/ low absorption rate, politicization of the revenue allocation process, low collection of own revenue by county governments and delayed and unpredictable county funding. The author proposes a financing framework to ensure county governments receive adequate funding which is prudently managed. The framework is anchored on planning, costing and budgeting; resource mobilization/revenue management and budget execution and controls.

In chapter eight Mudida discusses how natural resources can be used in financing of devolution. He observes that natural resources can be a transformational asset in financing devolution, if properly used. Mudida cautions that the exploitation of natural resources in many developing countries has led to conflicts and examines the causes of such conflicts. He also provides case studies. To avoid conflicts and successfully manage natural resources, the author proposes a framework for the equitable sharing of natural resources. He recommends the development of inclusive political and economic institutions which would involve the reform of existing extractive institutions that are designed to channel the benefits accrued from natural resources to a narrow elite.

The final chapter provides recommendations for sustaining the dialogue on issues relating to different aspects of devolution including deepening constitutionalism in Kenya. It arises from the belief that if devolution is to be effectively implemented it must continue to be debated from an informed perspective. Scholars must isolate issues that require further research, clarification and improvement in this process. This they can do through research, public debates and engagement with different stakeholders. The chapter therefore highlights some of the recommendations made by authors of the different chapters of the book. The recommendations arise from some of the emerging issues since the Constitution became effective. The recommendations highlighted are obviously not exhaustive.

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CHAPTER 2

ROLE OF ACADEMIA IN SOCIETY

Jacqueline Adhiambo Oduol

“Those of us who have been privileged to receive education, skills and experience and even power, must be role models for the next generation of leadership.” Prof Wangari Mathai.

Introduction

This chapter shares insights on the role of the academia in society with a focus on their engagement on matters related to the prevailing policy and practice of deepening constitutionalism in Kenya. It emphasizes the need for academics to engage in and provide leadership in the implementation of the Constitution of Kenya 2010. The chapter addresses the current state of engagement of the academia in the implementation of the Constitution, emerging challenges and lessons learnt from the first eight years experience of implementing the Constitution and the devolved system of government since the promulgation of the constitution in 2010. The chapter recognizes that even though the academia has a major role to play in matters relating to the implementation of the constitution of Kenya 2010, the level of engagement has been rather limited. It provides a framework for reflection, review and debate on what the academia can do to address the situation and to contribute to the sustenance of discussions on devolution and constitutionalism aimed at sustaining dialogue about the Constitution and the promotion of constitutionalism in Kenya,

Expected Role of Academics in Society

Events in the last thirty years have raised questions about why the academy in Africa exists, what the academic is trained in and or expected to do and most particularly what this means for each member of the academy at a personal level. In the Kenyan context there has been some concern that universities have not been active in public matters and in particular matters relating to the implementation of the Constitution of Kenya 2010 despite the unique place they occupy in society. The current state of engagement, gaps in conceptualization of Kenya’s context of devolved governance and lessons learnt are an opportunity for universities in general and academics in particular to claim their space by joining the on-going conversation on devolution and constitutionalism. This is on account of academia’s mutual interests and beliefs, capacities and skills training which is expected to inform their contribution to the development of the country. The university as the world of academics (the academy) should provide a safe space for nurturing the potential of learners through instruction, active discussions and

rigorous discourses and activities that can foster a genuine critical thinking process. In this way universities through their core activities of teaching, research and community out-reach should commit to achieving specific critical learning outcomes. Much of the literature on the role of universities focuses on what these institutions ought to be doing and what is planned for them. As an example, universities have been regarded as key institutions in processes of social change and personal development. The production of knowledge and highly qualified and skilled labour and carrying out research and disseminating research findings to meet perceived social, economic and political needs are considered explicit roles for the academia. Moreover, during times of radical change such as the implementation of the Constitution of Kenya 2010, and transition to devolved government in Kenya, universities have the additional roles of building new institutions of civil society, encouraging and facilitating new cultural values and training and socializing members of the new social elites.

In the rapidly changing circumstances regarding the implementation of the constitution of Kenya 2010, the society expects academia to fulfill diverse roles through the promotion, discovery and application of knowledge, and the acquisition of skills that can demystify concepts in the Constitution, promoting an understanding of complex realities and offering a voice of reason informed by research and objectivity in addressing societal interests, concerns, and real-life situations. Additionally, academia is expected to provide an analysis of individual and collective experiences relating to the implementation of the constitution in a clear and professional manner using procedures that can be replicated and verified by others.

In the context of the complex relationships and dynamics between constitutionalism, politics and power struggles in Kenya today, the role of universities in political change involves complicated and contradictory stages that include dismantling old paradigms and practices and charting the course for building new ones. Brennan et al (2004) in their synthesis report of the Role of Universities in the Transformation of Societies take the view that universities could perform the following divergent roles: Being important supporters of the old regime; being providers of 'protected space' in which critique and opposition could ferment; making explicit contributions by some members to regime change; and providing personnel for institution building in new civil society under construction. Thus, while the role and place of the academic is changing, it can be seen to encompass the following: knowledge production through research and innovation; cultivating an academic identity as a discourse community; serving as the conscience of society; challenging the status quo and modeling revolutions. To successfully perform these roles, universities must meet certain standards. To start with these institutions and their faculty must understand why universities are established in the first place. Secondly, managers of universities must strive to maintain an environment that encourages critical thinking and the generation of innovative ideas.

Have Kenyan universities been equal to these roles?

An environmental scan of the current state of university education indicates that the university has not been left out of Kenya's current challenge where everything has been politicized. It is also the case that even decisions concerning academic work are often made without systematic research or consultation. Chronological events leading to the rapid expansion of universities demonstrate patterns that sacrifice long term goals and standards at the altar of quick fixes. A case in point is the emerging practice to introduce doctoral studies (PhD) by course work in order to fast track date of completion and satisfy requirements of higher education accreditation bodies. This is sometimes carried out without due attention to the minimum standards of academic programs and attendant academic rigor. In this regard even the establishment of the Commission for University Education (CUE) by an Act of Parliament, (Universities Act No 42 of 2012), the successor to the Commission for Higher Education appears insufficient. CUE's mandate is to promote the objectives of university education by regulating and accrediting universities and programs with the following key functions: to monitor and evaluate the state of university education systems in relation to the national development goals; to develop policy for criteria and requirements for admission to universities and to promote quality research and innovation by universities.

The Commission needs to address the perception that academic standards in universities are increasingly threatened through policies that appear motivated by mere expansion of the number of institutions and students rather than quality assurance. An example of a policy deserving reflection and wide consultation with the academia and credible experts is the requirement that one must be a holder of a PhD to teach at the university. The other concerns the standards and basis for professional growth in the university given the demand for teaching and administrative personnel in the ever increasing number of institutions.

Implementation of these policies need to benchmark practices in the African region and beyond. At present universities are more concerned with teaching curriculums rather than fostering a genuine critical thinking process that can lead to application of knowledge or innovation. Emphasis is placed on attaining papers rather than acquiring knowledge and the time that should be spent on research is often diverted elsewhere, such as consultancy or part time teaching. Those charged with the responsibility of production and dissemination of knowledge in the academy are faced with extreme pressure of maintaining job security and sometimes end up pursuing half-baked PhDs in areas where they have no interest simply to comply with policy requirements. Others respond to the challenge of having to watch standards and ethics crumble by relaxing and taking additional loads that undermine the excellent service they would provide if set standards were observed and rewarded.

So why become an academic in Kenya today

So why become an academic in Kenya? Is it to develop an academic career and have tenure as a fulltime faculty of a specific university? Do academics who just want to teach or only undertake research without pursuing doctorate have a right to an academic career? Should diversity be celebrated at the academy by not forcing everyone to pursue a half-baked PhD in which they are not interested simply to comply with policy requirements? Does the induction into the academic community at our universities and the policies and practices of the Commission for University Education motivate faculty and students, particularly postgraduates, to contribute to the discovery and application of knowledge? Do they connect theoretical knowledge to practical everyday life experiences and challenges such that theory informs and helps refine practice and vice versa? To what extent is research inculcated as a tool for learning and understanding of how conclusions that label actions by members of the society as right and others as wrong reached?

In the context of the perceived the rather limited engagement by academia in the constitutional implementation dialogue, it is important for academics in Kenya to reflect on the claim made by Alex Hope, a UK based academic who has decided to engage in research as a consultant instead of following an academic career.

“Why am I an academic I have been trying to remember the answer to this question. I guess the main reason why I took a job at a university was because I thought I could make a difference – that I could contribute to improvements in practice, influence a new generation of professionals, and develop innovative ways of thinking about some of the key issues in my field. I seem to have forgone this recently, spending less time focusing on communicating what I see as the key issues and messages in this area, and more trying to build an academic career.

The academic career is dead. There, I’ve said it. Over the last few years I have been trying to build an academic career, in the process losing sight of why I became an academic in the first place. I decided to take stock and consider what an academic career really is and have come to the conclusion that the traditional notion is outdated and potentially at odds with the philosophy of academia...” Alex Hope

It is clear that the academic of the future is more likely to be a freelance teacher, thought leader and communicator engaged in a variety of activities and who will not be tied to an institution. As professional thinkers and communicators, academics are increasingly using their skills to provide solutions to obtaining problems as writers, speakers and leaders. They do this through emerging platforms such as blogs, videos and podcasts.

“You don’t necessarily need to be an academic employed at an academic institution to contribute to the academy. Academics need to reflect these changes in their practice. We need

to become more agile both in terms of our employment and our modes of communication. Academic tenure is the past – exibility is the future.

Am I depressed by the demise of the traditional academic career No. I welcome it. I suspect its future lies in a por olio of employed work both at higher education institutions, private organizations and freelance writing and consultancy. A career built along these lines will allow more freedom of thought, more opportunities to undertake work that contributes to society rather than an institution's reputation, and a closer understanding of the real issues in practice.

But what about job security – surely the lack of a permanent full time academic contract results in a hand to mouth existence A permanent contract means you can save for the future, buy a house, fund foreign holidays Well, a full-time contract has not resulted in any of this for me at least.” Alex Hope

How academics could contribute to deepening constitutionalism in Kenya

Of significance is the view that the role of academia in society is one of providing leadership. This is at the three levels identified by Scouller (2011) in his three levels of leadership model as a practical tool for developing one's leadership identity, knowhow and skill on the one hand; and on the other Maxwell (2011) definition of leadership as influence at the levels of position, permission, production, people development and personhood.

The concept of leadership as captured by these leadership models is a useful framework that can help us understand why the academia is not currently engaged in the discourse on constitutionalism in the manner and level expected. The society needs to hear the voice, feel the presence of academia and be clear of the direction that it is charting on the state of the implementation of the Constitution especially concerning matters devolution. Such functional placement of academia in ways envisioned by these leadership models is one way of facilitating sustained public engagement on matters relating to the implementation of the system of devolved government, now and beyond the term of office of the CIC in December 2015.

This chapter therefore adopts learning as leadership as an academic framework that explains the point of view from which the role of academia in deepening constitutionalism can be discussed. Scott (1999) defines constitutionalism as” institutionalized mechanisms of power control for the protection of the interests and liberties of the citizenry, including those that may be in the minority”. This definition supports WilWaluchow's view contained in the Stanford Encyclopedia of Philosophy that constitutionalism broadly defined is a philosophy of law or political theory that expresses the idea that “governments can and should be limited in its powers and (that) it's authority and legitimacy depends on observing those limitations.”

As clearly demonstrated by the protracted process leading to its promulgation on August 27, 2010, the Constitution of Kenya is a reflection of proposals of the people of Kenya,

popularly deemed Wanjiku's views. The people of Kenya are categorical on their values of how governments and leaders charged with authority should use power and their wish to be governed in a way that values human dignity and integrity. Yet this ideology of government and governance cherished by the people has not been shared by governance practices of those in authority. This can be seen from a close reading of the factors behind the many "Bomas of Kenya" sessions, drafts and revisions some of which (especially the parliamentary Naivasha draft) began to claw back on Wanjiku's gains and the 2020 proposals to amend the Constitution through the Building Bridges Initiative (BBI). BBI was the product of an agreement between president Uhuru Kenyatta and opposition leader Raila Odinga in March 2018 to address nine issues the two identified as major governance challenges facing the country. To address some of them the BBI task force recommended that sections of the constitution of Kenya 2010 be amended.

Thus, deepening constitutionalism in Kenya can be approached from one of two standpoints. The first, which was the focus of CIC, considers institutions, procedures and the rule of law. This approach relies on the integrity of the members of parliament to legislate. It has however faced numerous challenges. Some of these noted by the Chair of CIC in his opening remarks at the joint workshop at which the papers in this volume were originally presented, include the gaps with existing laws, leading to the adjustment of some devolution laws to meet practical needs and proposals to amend the constitution. Raising the bar of persons to serve in the public service and elections and to hold colleagues accountable also continues to be a challenge.

The other way of deepening constitutionalism in Kenya is to look at the society's perspective. The Constitution of Kenya 2010 is a set of progressive commitments made by the people of Kenya. In particular the fact that the Constitution of Kenya 2010 started as people's ideas of how they wanted to be governed, as an ideology and not as the document that is sometimes used by those in power to hold the people at ransom must be respected. Given focus of CIC, this aspect of how to deepen constitutionalism has been ignored in the dynamics of implementation arrangements and discussions. Politicians, bureaucrats, business leaders and the ruling class who are in control appear to have no time for the values contained in the Constitution and sometimes appear set to find ways of demolishing them. Yet the prevailing interpretations and discussions of implementation gaps continue to only be about the state taking action even though the Constitution has clear provisions in all areas for good governance and accountability.

The dilemma is that while the people of Kenya like the Constitution, they do not know what to do. As Prof Yash Pal Ghai, the Chairman of the Commission of Kenya Review Commission (CKRC) puts it, Kenya has "a revolutionary Constitution, but where is the revolution?" This is the dimension that accords academics an opportunity to make a contribution from their respective disciplines and specialization. They must confront this challenge. Academics must

champion the implementation of the Constitution by writing, speaking on and teaching on policies and practices that must be changed because they are stifling the revolution.

This chapter advances the position that the role academics should play in deepening constitutionalism is to provide leadership by strategizing to influence the direction of Kenya's process of implementing the Constitution. This could take three perspectives: consideration and review of concepts and current state of engagement; taking action to become the voice of reason that can provide guidance and direction and tracking progress made in the implementation of devolution and the opportunities it presents.

Martin Luther King Jr. observed that "our lives begin to die the day we become silent about things that matter," and Myles Munroe that trapped within every follower, in this case members of academia, is a leader. To make a contribution to the process of deepening constitutionalism in Kenya, academia must use their leadership position to exercise influence. And as leaders, academia must think differently about their call and responsibility because this is what distinguishes them from followers and can enable them to make a difference. The model of leadership that is required from the academia is one committed to solving problems and influencing key actors in society to view leadership as opportunity to make meaning, not money or wealth.

Taking the view that what is lacking is responsive leadership of the academy, the academia and the society, the chapter proposes the use of Maxwell's 5 levels of leadership as influence model to be used as a framework for deepening constitutionalism by academia. These levels, namely *position*, *permission*, *production*, *people development* and *personhood* communicate a largely personal message to all members of the academic community (including students). This message starts with a call to leadership, emphasizes the shared values and experiences and provides a basis for developing a strategy for action.

Implications of different leadership models for enhanced engagement of academia in deepening constitutionalism

The question that begs then is whether being silent in public discourse on the implementation of the Constitution is an option that academia consciously prefer. Are members of academia committed to using their position and skills to change the society in which they live? Since no one can change the world alone and academia need the help of other members of society, are they listening to them as they need to? It is further argued that one cannot listen to others if they are not listening to themselves. The question then is, are academia conscious of their inner will out of which their vision to make a difference can come? Have contemporary members of the academia in Kenya learnt to use their senior colleagues, both departed and living, such as Wangari Mathai, Ali Mazrui, Okoth-Ogendo, Atieno-Odhiambo, Ngugi wa Thiongo, Micere Mugo, Okot Bitek and Allan Bethwell Ogot as mirrors? A little reflection on these questions

should provide an answer to the contemporary academics as they prepare to engage in the issues regarding the implementation of the constitution and constitutionalism.

Scouller (2011) identifies the three levels of leadership that he describes as *personal*, *private* and *public*. These serve as indicators of one's ability to exercise influence over a situation. These levels define the practical tools that members of the academia who are willing to engage in dialogue on the implementation of the Constitution can apply from their positions of leadership and authority. Using Maxwell (2011) model that conceptualizes an individual's leadership development from *position*, to *permission*, *production*, *people development* and finally *personhood*, academia can enhance their current level of engagement. They can then use the practical tools of *personal*, *private* and *public* leadership strategies to deepen their engagement in constitutionalism now that the CIC is no longer in operation.

Personal leadership addresses the leader's technical, psychological and moral development and its impact on his or her leadership presence, skill and behavior. Personal leadership has three elements: (a) *technical knowhow and skill*; (b) *the right attitude towards other people*; and (c) *psychological self-mastery*. Technical Knowhow and Skill, is about knowing one's technical weaknesses and taking action to update one's knowledge and skills. In what areas of technical knowhow, skill and attitude to other people should academia improve with regard to teaching, research or community outreach? Private leadership concerns the leader's one-to-one handling of individuals. Leadership at this level involves the ability of academia to create a sense of group unity composed of individuals who vary in perspective, discipline, profession and background to participate in debating the process of implementing the Constitution in Kenya. This level of leadership can assist members of the academia overcome the tendency to avoid the intimacy of one to one handling of individuals, especially those outside the academy. Scouller (2011) argues that people who do not develop capacity at this level do not achieve the desired impact either because of a lack of skill or because of negative self-image beliefs that make them fearful of what may happen in such encounters.

The third level is public leadership and involves action or behavior taken to influence two or more people simultaneously. It also involves engaging a large group with the goal of agreeing on a motivating vision for the group which then ensures a unity of purpose. With development of capacity at this level, academia can create positive peer pressure on its membership to engage in matters constitution in an atmosphere of trust and team work. It is through this level of leadership that academia can drive successful collective action and results with regard to deepening constitutionalism. In this way, academia in the more than 64 universities in Kenya can take action to establish a platform for dialogue for the effective implementation of the Constitution of Kenya 2010 and particularly the devolved system of government. This they can do from their *position* as faculty and students.

They should seek to get *permission* from members of the society and in particular key stakeholders at the national and county level through targeted activities that address existing challenges in context. If these activities lead to the generation (*production*) of solutions to conceptual, practical and strategic challenges and to the motivation of peers and students to engage (people development), the dialogue on constitutionalism by academia would be sustainable. According to Maxwell's 5 Ps model of leadership, this demonstration of commitment to use their position as academia to address people's felt needs will give academia permission to deliver on set goals (production). Academia can then share their learning and mentor their students on opportunities available so that they too engage in constitutional matters (people development). In this way they will earn people's trust and can be the voice of reason in matters of constitutionalism in Kenya. This is the last level of Maxwell's leadership model known as personhood.

Current state of engagement

To date the implementation of the Constitution of Kenya 2010, particularly through devolved governments, has registered achievement by dispersing resources to the counties and empowering the people to make decisions on what matters to them. However, many challenges still abound. Of significance are the sentiments of key stakeholders, including the media, civil society organizations and the official opposition that anti-devolution forces continue to claw back on the gains made. As an example, for a meaningful implementation of constitutional commitments to happen, the system and process of devolution must be looked at more comprehensively. With regards to public administration there is need for greater county level control and autonomy in a number of sectors and local government operations such as running and management of towns, urban areas and cities. As concerns fiscal decentralization, there is need for greater fiscal resource allocation both from the central government transfers as well as from the county revenue. In addition, political decentralization calls for increased representation of minorities especially women in county assemblies, urban areas and towns.

As things stand now, the national and county governments continue to operate with suspicion and hostility, resources to the counties are still inadequate, legislative and administrative procedures and policies are still evolving. This has led to situations where resources disbursed to county governments are not effectively utilized and where performance and infrastructural capacities are defined by limitations.

This state of affairs is confirmed by an assessment by CIC on the operationalization of county governments conducted in the period running from March 4th 2013 to March 4th 2014. The objective of the assessment was to establish the progress made by county governments in "operationalizing the structures and systems required by each county government to deliver services to the people, as per the functions allocated to county governments in the Fourth schedule of the Constitution of Kenya 2010." It registers laying a foundation for realizing the

objectives of devolved governments as the main achievement but acknowledges primary threats that echo a sense of claw back on gains held by Kenyans. These are: *“politicization of the process of institutional reforms coupled with inadequate focus on institution building; delays in undertaking a number of critical transitional activities; a tendency of both levels of government to discharge (in some cases) functions that are not within their purview; policy, legislative and institutional frameworks that are not cognizant of devolution and low levels of capacity and skills.”*

These key features of Kenya’s political environment in which academia need to deepen constitutionalism explain why a responsive leadership model is necessary. The current state of engagement in Kenya is one where performance is sacrificed at the altar of political correctness and services are not delivered or sought. There is a sense of entitlements and impunity in policy and practice, and the state continues to weaken because institutions don’t work effectively. Politics and processes of engagement in the current situation are not about issues and inclusion but about power sharing on partisan grounds. Since the concern is which ethnic group, clan or relative to bring in, power sharing arrangements do not lead to the generation of progressive ideas or solutions to existing problems but to greater conflict.

Indeed, prioritizing the generation of relevant knowledge and clarity of understanding of the concepts of constitutionalism, devolution and accountability to the citizens, including meaningful public participation as the voice of the people in defining values and charting direction has been put on hold. Institutions, key actors in the political, public and civic leadership appear not to value the practice of using power in the interest of the people. It is this that makes the role of academia in society, particularly the matter of their engagement in deepening constitutionalism in Kenya, significant. This is from the perspective of the traditional roles of academia defined and rewarded in the university, namely teaching, research and community service. These have evolved over time to include undertaking advocacy research for civil action and providing expert advice and research on commission by different clients. It is in these capacities that academia can contribute to the discovery and application of relevant knowledge and the acquisition of appropriate skills that can address felt needs and gaps in a timely manner. From an objective stance they can reinforce or challenge concepts, conventional wisdom or arguments advanced by different actors on the basis of closely investigated information which is organized with adequate details and that follows standards set by the discourse community. Such information would need to conform to the discourse, community constraints and conventions about what an academic can say and how to say it. The information must therefore be presented in a manner that allows other scholars to question and replicate results and conclusions. When this happens the ideas expressed by academics will earn approval and respect from the wider society.

This is also why the academia is expected to be a voice of reason and of responsive leadership. Complex dynamics of transitional arrangements underpinned by conflicts and tension due to ethnicity, nepotism, corruption, greed, loss of integrity, national identity, and accountability to ethics and core values that sometime celebrates and rewards mediocrity is the norm. The society expects the academia to interpret the devolution experience in the Kenyan context, provide guidance, track progress and identify factors that contribute to the existing conditions and propose solutions.

Devolution and its Opportunities

As indicated earlier, two avenues present opportunities for deepening constitutionalism and therefore respect for the system of devolved government. The first is through institutions and procedures followed by laws and based on the integrity of members of parliament which was the focus of CIC. The second is to promote and cultivate constitutionalism as a way of restraining state power and avoiding arbitrary rule, and a belief in the values of human dignity and integrity contained in the constitution among the people of Kenya. The system of devolved government has been lauded for bringing service delivery closer to the people and involving them in decision making. This is because this is what the people of Kenya wanted and which they stated in their Oproposals on how they wanted to be governed and was incorporated in the Constitution of Kenya 2010. The main opportunities that arise from the process of devolution are derived both from expectations and realities. The devolved system of government was advocated as a political response to the ills that faced Kenyans such as conflicts, rent seeking, economic stagnation, inequities, marginalization, dominance, inefficiency in public resources utilization and corruption. It calls for a smooth and clear transfer of functions from national to county governments, a more transparent, efficient, and equitable distribution of resources to counties, and greater accountability of county governments for the use of public financial resources and the actions of county public servants. It further provides the foundations for county government service delivery that is more accountable and responsive to citizen demands and increased access to information about their county governments.

Opportunities for gender mainstreaming in the system of devolved government can be gleaned from the responsibilities embedded in the mandate of the senate that represent and protect the interest of the counties. In this respect the following questions can provide opportunities for the engagement of academia. Are senators aware of how counties are progressing on the composition of county governments? Are quotas being met in both nominations and appointive positions? If the answer is yes, how is this being done? If not, what are the challenges and how can these challenges be addressed? What challenges are women representatives facing at the county government level? What interventions do they require to make progress? Who should be tasked to make the interventions? To what extent does gender constitute a significant consideration for revenue sharing at the national level? Do we need to develop clear reward

systems for revenue allocation based on gender criteria? Or better still mobilize a gender stabilization fund from the Commission on Revenue Allocation (CRA)?

Another area deserving attention because of the potential for claw back on constitutional gains at the county level from a gender dimension is the role and performance of the nine (9) Women Deputy Governors and the two (2) Women Speakers (2013-2017) and the three (3) Governors, 9 deputy Governors (originally 7 with 2 additions) and 4 speakers, originally 5 with one lost with changes in Nairobi (2017-2022). At the County level, the functions of a deputy governor are unclear and largely left to the discretion of the governor. This is a cause for concern in the Kenyan context where political deputies are inherently disadvantaged especially in the elected executive due to poor job description and political mistrust. The situation is further compounded for the women deputy governors on account of systemic practice of gender discrimination at the structural and personal levels. There is therefore need to understand the legal and political barriers that enable Kenyans to reverse the “curse” of deputyship in the executive. It is also necessary to do some analysis of the difference if any, of the experiences and arrangements in counties where men are deputies to ensure clarity between the general and gender specific concerns.

Women County Speakers also provide an important opportunity for academic debate in the devolution process. This is because they hold a unique political role that carries multiple responsibilities and deep gender biases from both the electorate and the public. The political sensitivity of the position of Speaker means that the level of open bias might be controlled. Gender sensitivity however means that as women, these speakers should be better understood and supported in the male dominated world. Promoting the effective engagement of women leaders in the county assembly is critical for making progress in the transformation of seats, both nomination and elective, and the implementation of the Constitution of Kenya 2010.

These examples demonstrate possible areas and approaches that academia can employ to strengthen the understanding of the current state of engagement in the implementation of the Constitution. Although this can be done through other means, this chapter takes the view that research is critical and that significant progress can be achieved through better research and information capacity support. Academia is best places to undertake this task. A discussion of the features of research provided below seeks to account for this bias. It is also necessary to develop mechanisms that would help strike the right partnerships with both state and non-state actors as well as within parliament and at county government level. Agreeing on a joint framework of action on constitutionalism and devolution from which common progress can be tracked, stating who needs to do what and when, and what the shared goals and commitments for national and county leaders in devolution are, is important. It is also necessary to develop mechanisms that can ensure that public participation process at national and county levels responds to needs of the people, especially minority groups including women, youth, persons with disability and children at all times.

Opportunities for Research in the Academy

The defining characteristics of the academy and the academic community include deliberate reflection of issues and commitment to systematic and objective effort to understand why things happen the way they do. The academy and academic community is founded on the core values of integrity, freedom of thought and respect for divergent views and interpretations within conventional guidelines. In this regard therefore the academy exists to train a select group that highly values the development of intellect through exercising basic steps in critical thinking. These are the identification of a problem, brainstorming or collating different options of solving a problem, assessing the viability of each option and finally assessing which option best suits given situations in light of the overall goal of the intellectual journey.

Academia can use research to provide solutions for issues emerging from the implementation of the Constitution and the system of devolved government through “careful and systematic inquiry or examination of a field of knowledge in order to establish facts and principles” (Chandran, 2004). Opportunities abound to acquire new knowledge on constitutionalism from a neutral standpoint and to facilitate investigation into specific areas with a view to understanding it and drawing conclusions on its status. Through research academia can also study basic facts about people, situations or activities in particular contexts of implementing the Constitution. They can raise questions about programs offered at county level for public participation and study opinions, attitudes and the needs of people. Given the different contexts of engagements, academia can use research to identify relevant approaches for specific contexts and communities.

Research studies can also show why events that challenge constitutionalism occur and the relationship between events. This may include as an example, the behaviour of the leadership at the county and at the national level and how this behaviour affects efforts to implement the Constitution. Such studies would aim to provide a description and explanation through imagination and creative insight. The judgment would be based on observation of events and a logical analysis and not emotion or political correctness. While disciplines differ in ways of viewing the world, all members of the academic community prioritize research, the critique of available information and publication of emerging knowledge and information. They further agree that good research objectives are observable, measurable, and free from bias and “require a research approach and not merely a data collection exercise” (Chandran, 2004). This is what makes research a powerful tool in the effort to enhance academia’s engagement in deepening constitutionalism in Kenya.

Research in the Context of the Implementation of the Constitution

Given its clear defining characteristics, research can be cultivated and used by the academia in different ways. First it can be used to demystify concepts and promote understanding

of context. Academia can use research to enhance the understanding of the society of the current context and trends regarding the system of devolution in Kenya. This should involve the process of demystifying concepts and terms in the Constitution and the determination of indicators of essentials such as constitutionalism, functional systems, accountability, integrity, ethics, corruption and appointments based on meritocracy. By providing descriptions and explanations to events and situations academia can contribute to new knowledge that would be useful for effective implementation of the Constitution of Kenya 2010.

Secondly the academic community can use research to promote an understanding of the community (County) and its resources and as a tool to enhance understanding the community's demography and social and economic status. Given the refrain and chorus of prevailing capacity gaps, it would be useful to identify resources especially human and the specific needs in relation to understanding of and performance of respective roles as members of the Executive, the County Assembly, the National Assembly and the Senate. Special focus should be given to the role of the women representatives in order to understand among other things, why they would rather be referred to as County Members of Parliament. Whereas we are clear that the Constitution recognizes two levels of government, the national and the county level governments, the mandate of different levels, structures, institutions, and offices may not be clear to every Kenyan. Towards this end academia have an opportunity to apply the principles of neutrality, systematic data collection, and appropriate methodology to sort this out.

Thirdly, academia can use research to identify factors that contribute to the existing condition that challenge the implementation of the Constitution, prioritize strategies on the basis of magnitude of needs established through research and help to plan and offer advice. This would be informed by an analysis of specific county situation, establishment of measurable goals, development of a communication strategy, execution of the strategy, analysis of effectiveness and evaluation.

Dissemination of Knowledge

The fourth way in which research is useful to the academia in the context of deepening constitutionalism is by generating knowledge with the sole purpose of reinforcing or challenging existing concepts or prevailing arguments. This knowledge could then be circulated both within and outside the academy. This production of academic documents within the academy would enable academia to fulfill the role of training members of different disciplines and even generate new knowledge on conceptualizing the process of implementing the devolved system of government in Kenya. Given the conventions of academic writing this would provide a basis for faculty and students alike to critically read and analyze the constitution and other relevant documents. Results could be disseminated, reviewed and debated among peers variously through different academic type documents. The documents would include books; chapters

in an edited volume; reports; dissertations; essays; explication- short factual note explaining some terminology, allusions or coded references (e.g. central, non-centralized and centralized systems of government; concepts, culture and practice, constitutionalism; legislation; Kenya's constitution is a collation of people's agenda; equating devolution with devolved government); research articles; research papers; technical reports; theses; translation (not only of concepts, theories and events but of documents into indigenous languages). In other words, the academia is called upon to engage in research, documentation and dissemination of knowledge on matters relating to the Constitution and its implementation.

Academics could also prepare an inventory of challenges or essentials of constitutionalism through the implementation of the Constitution and disseminate this outside the academy. This opportunity could also be used to deconstruct concepts, describe best practices and develop public participation and community communication strategies through documentation types including: Call for papers; Documentary film script or TV script or radio script; Expert written opinion; Newspaper opinion articles; Public speeches or lectures; Review of books, film, event; Think-tank pamphlet, position paper, and briefing paper. This process could also take technical or administrative forms such as: briefs, short summary; peer review reports; policy briefs proposal for research or a book; and detailed technical specifications or performance reports.

Conclusion

There is relative passivity of engagement by academics in incorporating constitutional and devolution matters in traditional areas of work such as teaching and curriculum design, empirical research and conceptualization of the Kenyan context. This chapter argues that the academia in Kenya has the ability and responsibility to contribute to deepening constitutionalism through a more strategic engagement. With the rapid expansion of the number of universities in Kenya since the promulgation of the constitution in August 2010, academics are better placed to engage in and sustain debate on constitutionalism beyond the life of CIC that ended in December 2015. This debate should be informed by research, benefit from the lessons learnt and the rich array of disciplinary insights available across institutions of higher learning. Other areas of interest and concern include creating space for civil society to engage, as well as analysing the evolving dynamics between structure of governance, ethnicity, nationalism and transitional arrangements from the central to devolved systems. It would also be useful for the academia to develop a mechanism to take up the monitoring and evaluation role that was performed by CIC.

In the context of the joint academic workshop addressing how to deepen constitutionalism through the engagement of the academia, it is important to note the various motivations for research and clearly indicate which one will inform the project of constitutional dialogue. Since some theories are culture bound or time specific, members of the academic community can conduct research to test formal theories, concepts or proposed models. A useful example is the concept of public participation in the context of implementation of the Constitution at

the county government level. Public participation is noted as a problematic area at the level of application in the Kenyan context. It may remain as a passive constitutional provision that is conspicuous more in its neglect. The academia can investigate what models have been used to promote public participation and why they have not been effective. A comparative study would help in this regard. Through creative insight, research evidence can be used to advance explanation of phenomenon and thus develop a theory or a useful conceptual framework. Research can also be contractually conducted at the behest of an organization or as defined by a clientele, say a given county government.

It is imperative to remember that it is the weaving of the information that ultimately shifts people and creates an impression. As leaders, academics should never forget that people, including themselves are emotional creatures and it is emotion that influences intellect. Thus, the academia's engagement in deepening constitutionalism in Kenya comes down to their ability to connect with the people to influence them at a deep emotional level or getting others to do the same. Academia must therefore strive to be creative, honest and resourceful.

In this regard the chapter highlights some possible causes for the absence of the voice (loud silence) of the academia on matters concerning the implementation of the Constitution of Kenya 2010 in general and the devolved government in particular that should form the basis of dialogue for charting the way forward.

Scholarly work has an objective stance, clearly states the significance of a problem and is organized with sufficient detail to allow other scholars to replicate results. As members with mutual interests and beliefs and work regime that cuts across all disciplines when academics follow the standards set by the discourse community their ideas earn approval or respect. In agreement with the This chapter makes a strong case for their involvement in recognition and agreement that "the active engagement of academia in society would offer a sober impartial voice as matters constitutionalism are researched and presented for discussion" (CIC Concept Note).

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CHAPTER 3

KENYA'S MODEL OF DEVOLUTION

J. Mutakha Kangu

Introduction

A country's constitution may partly be defined as that law which organizes and manages the governance of a country by defining, distributing and constraining the use of state power. Because of this, Constitution making and Constitution review projects in a number of countries are perceived as efforts towards reorganization of their governance systems. It is in this context that Kenya, adopted the Constitution of Kenya 2010 with devolution of political power, responsibilities and resources to 47 counties as the major paradigm shift it introduces. Devolution is thus perceived as the centrepiece and most transformative aspect of the Constitution of Kenya 2010 (Mutakha 2015, 2). Devolution was introduced as the main solution to the problems of centralisation of power which had been long identified as the country's main governance problem. The centrality of devolution in the Kenyan constitutional design is demonstrated through regarding it as part of the exercise of the sovereign power of the people,⁵ the national values and principles of governance,⁶ and the basic structure of the Constitution (Mutakha 2015, 95-108).

Devolution was thus adopted not as an end in itself but a means to an end as a process of achieving certain policy objectives. Its main policy objects were to promote and advance democracy and accountability; promote and advance development and service delivery; promote and advance equity and inclusiveness; and limit and constrain national government and centralization generally.⁷ To achieve these objectives, the Constitution establishes and envisages a multiplicity of institutions and processes to facilitate, assist, support and protect devolution.

Devolution is however, the most complex and least understood aspect of the Constitution of Kenya 2010 (Mutakha 2015, 2-3). To begin with, although there is a popular usage of the term devolution by scholars and political practitioners in the political and constitutional law areas, there is no fixed definition of the term. Its precise meaning remains a matter of intense debate. It is often used to mean different things in different circumstances. Countries have used devolution to describe systems that differ markedly from each other. The United Kingdom's

5 See Article 1.

6 See Article 10.

7 See Articles 174 and 175.

‘devolution’, for example, is completely different from devolution adopted by Uganda. It is also different from Kenya’s devolution. Likewise, the devolution adopted by Zimbabwe in 2013 differs markedly from these others (Mutakha 2015, 9-10). Each country’s devolution must thus be evaluated within its own constitutional or statutory context to conceptualize its meaning, form and content, in order to distinguish or locate it within the conceptual framework of the other systems of organising governance such as centralized, non-centralized and decentralized systems of governance. Devolution also remains a contested subject in Kenya for a number of reasons: it has a controversial history; it plays a central role in the constitutional design; and it has a major impact on vested centralised interests (Mutakha 2015, 3). How does one then conceptualize devolution in the context of the Kenyan Constitution? While some scholars have asserted that “the Kenyan system of devolution is...not a federal system of governance” but mere decentralization (Kabau and Mamboleo 2016, 129-170 at 148); others argue that the system has all the key features of a federal system, which make it a form of federal system (Ghai, Yash 2015, 13-37).

This chapter seeks to conceptualize devolution as used in the Constitution of Kenya 2010 as a first step towards understanding Kenya’s system of governance and its implications. Since devolution has been adopted by Kenya as part of the process of reorganization her governance, this chapter examines the Kenyan devolution within a comparative conceptual framework of other known systems of organizing governance. This should help us determine whether the Kenyan devolution is a different system or merely another name for one of the known systems of governance. This is necessary to avoid a situation where those charged with the responsibility of implementing devolution through the development of policies and legislation do so from the assumption that the Kenyan model of devolution means one thing when it actually means the other. To proceed in this manner will undermine devolution as envisaged by the Constitution

Systems of Organizing Governance

Scholars identify two distinct systems of government and state structure: the centralized or unitary on the one hand and the non-centralized or federal systems on the other. Although some draw a distinction between centralized and decentralized systems, (De Visser 2005, 13)⁸ it has been argued that a decentralized system is essentially a centralized one which delegates some of its powers and functions to lower level units (Rubin and Feeley 2008, 171) (Fessha and Kirkby 2008, 249). It involves the transfer of powers by a central government to sub-national units of the same government which exercise those received powers under the control and

8 See page 13 where he observes that: “Decentralisation is an ambiguous concept and different authors, writing from different angles and disciplines, have attributed different meanings to the term. Most of the confusion arises from using broad and narrow definitions of decentralisation interchangeably.”

supervision of the centre. However, since some scholars identify and treat decentralization as a separate system, (Rubin and Feeley 2008, 172) the Kenyan devolution is in this chapter examined in the context of these three systems with a view to identifying its placement within this conceptual framework.

A centralized system and its main features

A centralised system of government is one which approaches the organization, ordering and management of governance and state power from a single horizontal dimension. This involves a country being governed as one single unit with one order of government. It is a system in which the power surrendered by the people is administered by a single government but is organized, defined, distributed, used and managed horizontally to and by different departments of the same government in the form of the traditional three arms of government (Madison n.d.).⁹ This ordinarily produces unitary states (systems) and structures of government, which are premised upon centralized power in a single central government controlling all public affairs in the state. Normally, there is a centralised political authority; administrative control; a central fiscal and financial system; budget system allocating money horizontally to line ministries or departments; and a central planning system.

No vertical dispersion of power is allowed; at least in the sense of having two or more autonomous tiers of government to govern, manage and exercise state power. Even where some sub-national units are created allowing a certain measure of management of some matters at the local level, these are ultimately answerable to the central government. The country's sovereignty lies solely with the central government and the Sub-national authorities do exist alongside the central government and may make their own individual policies, only with the permission and approval of the central government. Such lower units do not have constitutional protection as they are units of mere decentralisation within a centralised system of government which retains the power to recentralise (Moeckenfoerde, Dann and Wiesner 2007, 7).¹⁰ Kincaid while distinguishing this system from the non-centralised one has pointed out in this regard that:

9 James Madison makes reference to this issue in his Federalist Paper No. 51 in which he comments about the two organizational approaches as follows: "In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."

10 At page 7 where they observe that "in a unitary state, any sub-governmental unit can be created or abolished, and have its powers varied, by the central government. This unilateral transfer of authority is called decentralization."

In principle, a federal system of government is non-centralised; that is, there are multiple centers of power, and none has authority to centralize or decentralize the system... By contrast, in a non-federal polity, one *de jure* center of power ordinarily has the authority to decentralize and re-centralize power (Kincaid 2011, xxvi).

Watts on the other hand observes that what distinguishes federal systems from decentralized unitary systems is the fact that in a unitary system, the governments of the constituent units ultimately derive their authority from the central government (Watts, 2011).

A Non-centralized System

A non-centralised system on the other hand, is one which approaches the organization, ordering and management of governance and state power from a multi-dimensional perspective. The approach combines both vertical and horizontal dimensions in managing public affairs. It combines self-governance at the local level, and shared-governance at the national level (Elazar 1987) (Watts 2008, 1)(Watts 2011, 15) (Kincaid 2011, xxii).¹¹ As such, the power surrendered by the people is organized and administered vertically by two or more distinct levels of government each of which is also horizontally divided into separate arms of government. This approach forms the foundation of federal systems and structures of government (Kommers and Thompson 1995, 34).¹² Crucial to the normative definition of a non-centralised system is the division of the country into mutually exclusive geographic territorial units (Watts 1999, 150). The system then “grants partial autonomy to the geographically defined subdivisions of the polity”; making the system lie somewhere between a fully unitary state and an alliance of separate states working in a kind of confederation (Feeley and Rubin 2009, 22). This means that a non-centralised system is not a unitary state, neither is it a confederation of independent states. Elazar excludes hierarchy in his conception of a classical non-centralized system; his conception being of co-ordinate tiers of government (Elazar 1971), which he associates with

11 Where Kincaid says that: “As such, federalism, as a mode of governance, is concerned with combining ‘self-rule and shared-rule’ (Elazar1987), whereby the constituent members of the federal union can govern themselves autonomously while they and their citizens also participate together in the common national governing regime, which is autonomous within its sphere of constitutional authority. This shared-rule component requires some form of representation of the constituent political communities in the structure, operation, and decision-making of the general government—representation often achieved through, although not necessarily limited to, a second legislative chamber such as a senate.”

12 At page 34 the authors refer to this multi-dimensional approach and extol its benefits as follows: “A last institutional safeguard was derived from the federal system. In the compound republic of America, power was divided not only between branches of the national government but between the national and state governments as well. While the precise boundaries of this division were never specified, the very existence of dual authorities was deemed sufficient to prevent grossly unconstitutional usurpations of power from either quarter.”

the social contract theory of government and calls contractual non-centralization. It is a system under which, coordinate governments work with each other on a contractual basis; mutually respecting each other. It is different from a decentralized one which is discussed in a while, and is founded on relative co-ordinate relationships as opposed to hierarchical ones. Elazar states that:

Contractual non-centralization the structured dispersion of power among many centers whose legitimate authority is constitutionally guaranteed is the key to the widespread and entrenched diffusion of power that remains the principle characteristic of and argument for federal democracy (Elazar 2011, 79).¹³

According to Watts a non-centralised system of government affords an opportunity of organising governance in a manner that makes it possible to combine self-rule at the local level for matters that are uniquely local, with shared rule at the national level for matters that concern the whole nation. He states in this connection that “federalism provides a technique of constitutional organization that permits action by a shared government for certain common purposes in a larger political unit, combined together with autonomous action by smaller constituent units of government, directly and democratically responsible to their own electorates” (Watts 2011, 14). Hogg identifies the most essential characteristic of a federal Constitution as being the distribution of governmental power between coordinate central and regional authorities. He emphasizes that this requires a Constitution which defines the powers vested in the central and regional authorities, and which must be in writing because such a vital matter could not be left to unwritten understandings. The Constitution must be supreme, binding on, and unalterable by, each of the central and regional authorities. He observes that if either of the governments could unilaterally change the distribution of powers, then the authorities would not be coordinate since supreme power would lie with the authority having the power to change the Constitution (Hogg 1992, 115).

The system enhances participation and consensual approaches to governance; and can provide mechanisms for accommodating unity in diversity (Kincaid 2011, xxiv).¹⁴ In a country

(13 See also Kincaid J ‘Editor’s Introduction: Federalism as a mode of Governance’ in Kincaid J (ed) *Federalism Vol. 1* (2011) xxi-xxxv at p xxii where he defines federalism as follows: “To this end, federalism is defined as a mode of governance that establishes more or less unity while preserving more or less diversity (Moreno and Colino 2010) by constitutionally uniting separate political communities in a limited, but encompassing, political community... Power is constitutionally divided and shared between (a) a general (usually national) government (or state) having certain nationwide responsibilities and (b) constituent governments (or states) having broad regional or local responsibilities.”

14 At p xxiv where he says that: “A prevelant contemporary reason to form a federal polity is to unite diverse, territorially based national, racial, ethnic, religious, and/or linguistic communities into one nation-state. In these federations, each constituent government (e.g., state, canton, or

where there is a feeling of exclusion of people, by the centre in a manner that is perceived to be of ethnic groups that are territorially concentrated in specific places; the system provides opportunities for accommodation through divided loyalties and re-channelling of action, thereby enabling both the centre and the regions to co-exist harmoniously. Otherwise, according to Feeley and Rubin, the citizen has to make a choice between the dichotomy of “identification with the central regime and alienation from it in the realm of thought and between loyalty to the regime and rebellion against it in the realm of action” (Feeley and Rubin 2008, 25).

Features of non-centralised Systems

A non-centralized system of government has a number of identifiable features that distinguish it from a centralized system. Some of these may be said to be normative in nature while others are structural or what may be called the architecture and design of the system. In a number of cases these features combine normative and structural elements. The features are discussed below.

Combination of Self-rule and Shared-rule

At both the normative and structural levels the first and most important feature, is the quality of combining self-rule and shared-rule. The system seeks to give effect to and creates room for self-rule at the local level, by giving local communities an opportunity to determine their own priorities in certain functional areas; and shared-rule at the national level on matters which concern the whole country. Watts notes in this regard that the basic essence of federalism is the notion of two or more orders of government combining elements of “shared rule” for some purposes and regional “self-rule” for others thereby serving the objectives of combining unity and diversity; and of accommodating, preserving and promoting distinct identities within a larger political union (Watts 2011, 15) (Kincaid 2011, xxii).¹⁵

province) is usually dominated by a particular communal group. Switzerland, with its Protestant and Roman-Catholic and French, German, and Romansch-speaking cantons, is a leading example. Other examples are Belgium, Canada, India, Nigeria, and Russia (Moreno and Colino 2010)."

15 At p xxii he says the following regarding the concept of self-rule and shared rule: "As such, federalism, as a mode of governance, is concerned with combining 'self-rule and shared rule'..., whereby the constituent members of the federal union can govern themselves autonomously while they and their citizens also participate together in the common national authority. This shared rule component requires some form of representation of the constituent political communities in the structure, operation, and decision-making of the general government representation often achieved through, although not necessarily limited to, a second chamber such as a senate...In order to preserve the balance between the general and constituent governments, neither the general government nor the constituent governments can

This combination requires constitutional creation of two or more spheres or orders of government, with each, acting directly upon its citizens rather than indirectly through the other order or level of government. From the perspective of constitutional architecture and design, shared rule in part requires that certain governance decisions be identified and reserved for the arena of self-rule while others are reserved for shared rule; and in the case of shared-rule, institutions for making such shared decisions and others for rendering shared services must be also put in place.

Autonomy of the Levels of Government

In a non-centralized system, levels of government are autonomous in the sense that there is no order of government that is subordinate to the other as they are co-ordinate to each other, and none is a mere agent of the other. The governments are created and protected; their functions are assigned; and their financial resources are allocated by the Constitution (Watts 2011, 15). Accordingly, they can only be abolished or adjusted through constitutional amendments involving both levels of government. Hogg argues that if any of them were to be able to alone amend the Constitution, then the system would cease being co-ordinate and become subordinate. The level of government with power to unilaterally amend the Constitution would be a superior government with power to even abolish the other levels of government (Hogg 1992, 115). In respect of constituent unit governments, this autonomy is however partial. If the autonomy were to be complete, the system would cease being non-centralized and become an alliance of independent states in the form of a confederation (Rubin and Feeley 2008, 170).¹⁶ The autonomy encompasses at least three distinct aspects, namely political, administrative and financial autonomy.

Political Autonomy

The levels of government in a non-centralized system are created by an external entity; which, within the social contract theory of government, is the sovereign people expressing their will through the Constitution and thereby giving each level of government autonomy. They have political autonomy in the sense that each level of government has its own political structures and institutions whose political leaders, it elects. Autonomy requires that each of the constituent units has a democratically elected government which has distinct powers and responsibilities conferred upon it by the Constitution (Fessha and Kirkby 2008, 255). Where the national

amend the federal (or national) constitution unilaterally; instead, the concurrent consent of the general government a majority of the constituent governments is usually required for amendment.”

16 At p 170 where they say that: “Federalism, as the term is used in political science and legal scholarship, refers to a mode of organizing a political entity..., such a regime lies somewhere between a fully unitary state and an alliance of separate states.”

government nominates representatives to serve in the elected bodies of the constituent units, the autonomy of the constituent units is weakened (Fessha and Kirkby 2008).¹⁷ There must be a formal constitutional distribution and assignment of functions and powers ensuring some areas of genuine autonomy for each order. The constituent unit governments are granted a certain measure of final say in certain areas of governance; thereby giving them definitive rights against the centre (Feeley and Rubin 2008, 30). In most cases the units have legislative, executive and judicial functions and powers. In some countries, only the legislative and the executive functions and powers are allocated to all the levels of government. In such cases the judicial functions and powers are exercised by the central authority or an independent judiciary or tribunals that are free from control and influence by anyone of the levels of government.

The functions and powers are not assigned by one level of government to the other but by the Constitution giving the functional assignment, constitutional originality, permanency and protection (De Visser 2005, 14). Because of this, the functions and powers cannot be adjusted and taken away from one level of government by another. Only the Constitution can, through amendments, re-assign or adjust the functions and powers of the different levels of government. Some functions and powers are assigned exclusively to each level of government while others are assigned concurrently to two or more levels of government depending on the number of levels adopted. The areas of exclusive functions and powers ought to be significant as they emphasize the autonomy of the different levels of government. According to Feeley and Rubin, the autonomy of constituent unit governments is however, partial in nature (Feeley and Rubin 2008, 22). Breton talks about this matter in terms of ownership of powers, noting that “powers are owned more or less as capital assets are owned”. While in a unitary system with a measure of decentralization, all powers are owned by the national government; in a federal state some powers are owned by the national government and others by the constituent unit governments (Breton 2011, 91).

Administrative Autonomy

The different levels of government must also have administrative autonomy in the sense that each level has its administrative staff to execute its executive functions and policy decisions (Fessha and Kirkby 2008, 259). Each level of government must be in a position to hire, supervise, control and discipline its own staff. It must have members of staff who are answerable to it (Fleiner and Fleiner 2000, 25). A level of government that is forced to rely on staff of another level of government will have no control over the execution of its own legislative and execute decisions. Such level of government sooner or later loses its autonomy and becomes subservient

17 One of the methods the centralised government used under the replaced Kenyan constitution to undermine and weaken local government was the strategy of the Minister for Local Government nominating councillors to the local government councils. Often the Minister would nominate public servants especially from the Provincial administration..

to the other level of government. Fessha and Kirkby note that political autonomy unsupported by administrative autonomy will be meaningless. Public servants who are controlled from the centre will lack the necessary incentives to follow and respect the directives and instructions of the elected officials of the constituent unit governments (Fessha and Kirkby 2008, 260-261). Furthermore, they can very easily be used to undermine the democratically elected leadership of the level of government in which they serve. This compromises democratic accountability.

Financial Autonomy

A level of government that is not assured of financial resources to implement its programmes cannot be said to be co-ordinate to the other and is meaningless (Fessha and Kirkby 2008, 261). If it does not have power to raise revenues that are sufficient to enable it discharge its functions, there must be other mechanisms through which it receives additional resources as a matter of right and constitutional entitlement as opposed to receiving as a gift or donation. Therefore, there must be constitutional provisions setting out clear rules for the allocation of resources among the levels of government ensuring that each level of government has sufficient resources to enable it discharge its responsibilities. Constitutional creation of levels of government and the assignment of functions without a clear and constitutionally protected system of raising and sharing revenue among the different levels of government is destined to fail. This is the case because finances are at the core of the success of the system since government policies are driven by fiscal policy. According to Fessha and Kirkby a poorly designed financial system can create room for the central government to manipulate the constituent unit governments by choking them of sufficient finances and creating unfunded mandates, (Fessha and Kirkby 2008, 265) which then undermine the democratic accountability of the system.

The second aspect of financial autonomy is budgetary autonomy which enables the constituent units to determine their own budgetary policies and priorities. The constituent units must be free to budget for their own resources and determine the functional aspects they should allocate finances to and in what amounts. The national government's budgetary and financial controls must be restricted to transparency and legitimacy of the expenditures (Fleiner and Fleiner 2000, 12).

Territorial Autonomy

Another feature of a non-centralized system is the creation of constituent geographic territorial units. As noted, Feeley and Rubin view the creation of mutually exclusive constituent geographic territories as being crucial to the conceptualization and design of a non-centralized system. The different constituent units may perform the same functions but in different geographic units that are mutually exclusive (Feeley and Rubin 2008, 23). Each constituent unit has an exclusive territory over which its jurisdiction applies; but in relation to the national government, each

territory of a constituent unit is concurrent with the territory of the national government. There must be constitutional determination of the number of geographic units of governance at the sub-national level into which the country is to be divided and the clear delineation of their boundaries. In a number of non-centralized systems the territorial units are identified and fixed in the Constitution so that one level of government cannot unilaterally abolish any one of the constituents units. Fleiner and Fleiner observe in this regard that “member states within a federation have their own territory guaranteed by the federal constitution” (Fleiner and Fleiner 2000, 34). Where the territorial constituent units are not fixed in the Constitution, there must be constitutional provision of criteria and stringent procedural requirements about how the territorial units will be carved out. The Constitution also normally provides criteria and procedure for changing these territorial units and their boundaries. There are a few exceptions of federal systems that are not based on territory, but instead, on personal cultural identity or a combination of both as in the case of Belgium since the late 1970s (Fleiner and Fleiner 2000, 12).

Territorially, in a country where there is a wall-to-wall division of the country into geographic units, the national government does not have any part of the territory over which it exercises exclusive jurisdiction, except perhaps for the coastal waters, and in some countries the national capital which is normally exclusively managed by the national government (Feeley and Rubin 2008, 27). Instead, its territorial jurisdiction is concurrent with that of the various constituent unit governments. This means that whereas the constituent units have both exclusive and concurrent territory, the national government has only concurrent territory as it is shared with the constituent units. Although Nairobi the national capital of Kenya is described by the Constitution as one of the counties with its own county government, there are some countries in which the national capital is exclusively governed by the national government.

Representation of Sub-National Units in the National Decision-Making Processes

Because of the shared nature of governance in a non-centralized system, a mechanism is required for the involvement of the governments of the sub-national units in the national decision-making processes. For this reason, there ordinarily would be constitutional provision for designated representation of views of the distinct sub-national units within the federal decision-making institutions, usually provided by a federal second chamber of parliament composed of representatives of the regional electorates, legislatures or governments. Kincaid says in this regard that:

This shared rule component requires some form of representation of the constituent political communities in the structure, operation, and decision-making of the general government representation. This is often achieved through, but not necessarily limited to, a second legislative chamber such as a senate (Kincaid 2011, xxii).

Intergovernmental Relations and Dispute Resolution

The non-centralized system requires constitutional provision for a system of intergovernmental relations. There must be a constitutionally entrenched system of intergovernmental relationships with processes and institutions to facilitate intergovernmental collaboration and coordination in those areas where governmental responsibilities are shared or inevitably overlap (Watts 2011, 16). Where two or three are gathered, they are bound to step on each other's toes and therefore require some system of rules of engagement and mechanics for dispute resolution. It is therefore a feature of non-centralized systems to have arrangements to deal with such situations. Kincaid observed in this regard that:

In order to adjudicate jurisdictional disputes between the general and constituent governments, the constitution ordinarily establishes an umpire or referee, which is usually a supreme or constitutional court but might be a citizen referendum process as in Switzerland or a special legislative chamber as in Ethiopia (Kincaid 2011, xxii) (Watts 2008).

Constitutional Entrenchment of the System

Finally, there must be constitutional entrenchment of the system, to protect the autonomy, functions, resources and institutional integrity of each level of government. All the important aspects of the system are dealt with and provided for in the Constitution. The Constitution ought to be supreme and written; and one that cannot unilaterally be amended by only one level of government. The amendment process must require the consent and input not only of the federal legislature but also of a significant proportion of the constituent units through assent by their legislatures or by referendum majorities. As already noted, the national legislature normally has a second chamber which represents the interests of the sub-national governments not only in the constitutional amendment process but also in the enactment of any other laws. Through amendments, the balance of power between the two levels of government could be adjusted tilting it in favor of one level of government. Kincaid says in this connection that:

In order to preserve the balance of power between the general and the constituent governments, neither the general nor the constituent governments can amend the federal (or national) constitution unilaterally; instead, the concurrent consent of the general government and a supermajority of the constituent governments is usually required for amendment (Kincaid 2011, xxii).

Types of Non-Centralized Systems

Even though non-centralized systems are said to have specifically identifiable features, the operational reality is that there are variants of non-centralized systems across the world. Each

country adopts the variant that suits her specific circumstances. Some scholars even say that there are no two similar systems. On this matter Kincaid notes that:

Scholars and practitioners disagree on the precise definition of federalism and on which countries can properly be called 'federal' because no two federal-type systems are identical... In practice, federal ideas are applied in various ways, thus making it impossible for one definition to fit all cases exactly and for generalizations to be set forth without exceptions (Kincaid 2011, xxi).

Watts (2011) holds a similar view and even points out that some are hybrids drawing from both centralized and non-centralized systems. He maintains that every country takes a pragmatic approach and adopts a variant that would easily respond to and address its own unique problems. There is no fixed approach or clear cut uniform approach. Even when a country heavily borrows from another, there will always be some adjustments addressing the unique position of the borrowing country. He states that:

At the same time it should be noted that some political systems are hybrids combining characteristics of different kinds of political systems. Those that are predominantly federations in their constitution and operation, but which include some federal government powers to override governments of constituent units—an arrangement more typical of unitary systems—have sometimes been described as “quasi-federations”. At different stages of their development Canada, India, Pakistan, Malaysia and South Africa have been so described. On the other hand Germany, while predominantly a federation, has a confederal element in the Bundesrat, its second chamber, which is composed of delegates of the Land governments. ... Hybrids of various sorts occur because statesmen are often more interested in pragmatic political solutions than in theoretical purity (Watts 2011, 16).

When all is said and done however, two relatively clear types of non-centralized systems can be identified. These are the dualist competitive non-centralized system and the integrative co-operative non-centralized system. Simeon identifies and discusses these two models which he calls the divided model and the integrative model (Simeon 1998, 50).¹⁸

18 At p 50 Simeon says the following: “As South Africans considered how to design their federal system, and Canadians considered how to reform theirs, there were many models from which to draw. Indeed, it has been said that there are as many variants of federalism as there are federations. Each federation seems sui generis, and it is clear that the actual operation of the federal system (centralised or decentralized, conflictual or co-operative) has as much to do with the other political and institutional factors as it does with the federal design itself. Among the models which South Africa considered were those of Canada and Germany—Canada perhaps because of the Commonwealth link, and its marriage of federalism with a parliamentary system of

Competitive Non-Centralized Systems

This type has been given different names by different scholars with some calling it competitive because it creates two or more tiers of government that operate in a manner competitive with each other, while others call it a dualist or divided model. The US is the best example of this system. This is because of the integrative manner in which the system arose. The otherwise independent thirteen American states came together to form a more perfect union but each insisted on retaining very substantial powers. They feared losing power to the union government. The states negotiated a kind of contract with each other to form the union government. Because of this, the American federal system emphasizes the autonomy of the states that make up the union. In contrast to some other federal systems which assign to the state governments legislative and executive functions only, in the American system each state is a fully fledged government with legislative, executive and judicial functions which they retained after releasing some powers to the union. Canada is another example.

The USA model emphasizes the autonomy of both the general government and the governments of the constituent units. Each has its own area clearly delineated with very little interference of one in the affairs of the other. According to Simeon, “the image suggested by the divided model, as illustrated broadly by Canada, is of two separate, independent sets of political institutions, federal and provincial, which interact with each other through bargaining which often looks more like the relations among independent countries than the interactions among component elements of the same political system” (Simeon 1998, 51). This has led, he says, to the development of the terms used to describe intergovernmental relations in Canada as competitive ‘executive federalism’ or ‘federal-provincial diplomacy’.

Functions and powers are assigned with more emphasis on clear exclusive functions as opposed to concurrent functions and powers. The general rule is exclusivity and any concurrency is only but an exception to the general rule (Simeon 1998, 51-52).¹⁹ In the Canadian case even in this exceptional cases, where the 1867 Constitution Act appeared to imply very sweeping potential federal powers in the opening words of section 91, i.e. the power to make laws for the ‘Peace, Order and Good Government of Canada’, these powers have been interpreted narrowly in a

government; Germany perhaps because of other cultural affinities, and it's quite different model. The United States, India and Australia have also been sources of ideas, in the latter two cases in large part because they are relatively centralised models.” 17 He observes at pages 51-52 that: “The model here is the classical one of clearly divided sets of responsibilities. The central government is responsible for A, B, and C; the provinces for X, Y and Z. There is a minimum of overlap or formal concurrency. In Canada, these powers are set out in sections 91 and 92 of the Constitution Act 1867. Only two areas of shared or concurrent jurisdiction were included in this Act, agriculture and immigration; a third, old age pensions, in which the provinces retain paramountcy, was added in 1949”.

far less sweeping way, so as to imply a power to intervene only in national emergencies, or with respect to clearly defined national needs (Simeon 1998, 52). The narrow interpretation was informed by the fact that the Canadian system largely aimed at emphasizing autonomy and avoiding interference as much as possible. Fundamental questions regarding whether or not and when the federal government can intervene in the functional areas clearly assigned to the constituent units however arise. Simeon offers a suggested answer to some of them in the need to rely on the subsidiarity principle (Simeon 1998, 52).

In a dualist and competitive non-centralized system each level of government is assigned its own taxing powers so that it can raise its own revenue and spend it. If this system is followed to the letter and has no mechanisms for correcting regional disparities, like is the case in the US, there are bound to be entrenched extreme socio-economic disparities in the country. In Canada this has been largely mitigated by reliance on a clear system of financial equalization mechanisms which involve unconditional grants to poorer provinces as well as federal grants to finance areas such as health, post-secondary education and welfare (Simeon 1998, 53). But the equalization mechanisms are not allowed to undermine the principle of provincial autonomy since they have very few conditions attached to them and very little policy influence is gained by the centre through them. In Simeon's view, "Canadian intergovernmental transfers are highly respectful of provincial autonomy" (Simeon 1998, 53).

The point to emphasize is that in a dualist competitive system jurisdictional autonomy of the constituent units in the policy area must not be compromised because of equalization transfers. This is best achieved by ensuring that the transfers are unconditional.

Integrative Co-operative Non-Centralized Systems

The integrative and co-operative model of a non-centralized system of government is the direct opposite of the dualist and competitive model. This model is founded upon integration and co-operation among the central government and the governments of the constituent units. The two levels of government are expected to work together in an integrative and co-operative manner. Togetherness as opposed to autonomy is emphasized. The system is highly dependent on consensus-building, cooperative behavior and coordinated action among the two levels of government (Simeon 1998, 55).²⁰ In this model there is more reliance on shared or concurrent functions as opposed to strict exclusivity in the assignment of functions. There is also more national legislation which is implemented by the constituent units, necessitating a bicameral legislature in which the constituent unit governments are represented through the

20 At page 55 Simeon describes this system in the following terms: "The integrated model, exemplified in large part by Germany, is different on all these counts. It is designed to integrate and pull together central and provincial politics at all levels. The resulting institutions and horizontal federal arrangement are of the interstate variety, which, perforce, requires consensus – building cooperative behavior if any degree of coordination is "

second chamber, to make their input since they are the implementers of legislation. This is the case in Germany and South Africa.

Revenue raising power over the most important taxes that yield more money is conferred upon the national government but the revenues raised from those taxes accrue to all the levels of government which must share it equitably as is the case in South Africa, Germany and India. In addition, recognition is given to the need to address past disparities and imbalances through a financial system which forces the two levels of government to work together. Strict rules governing the sharing of the revenue raised nationally are put in place to ensure objectivity in the process. Simeon says the following in this regard in respect of the German system:

Again, the model is not one of independent states and federal governments exercising revenue raising powers autonomously: rather the model is primarily one of shared revenues and taxing powers, based on negotiated formulae. Income taxes, corporation taxes and turnover (sales) taxes 'jointly accrue' to the federation and the *lander*; and each has 'equal claims' to current revenue necessary to finance their current expenditure, based on multi-year financial planning, and implemented by federal legislation with *Bundesrat* approval. The distribution is to 'establish a fair balance to prevent excessive burdens to the taxpayer, and to ensure equal living conditions in the federal territory.' Only a limited number of revenue are allocated exclusively to either level (Simeon 1998, 56).

In this model intergovernmental relations play a very crucial role in the success of the system. The principle of co-operative government actually imposes upon the two levels of government a duty to co-operate (Woolman and Roux 2011, 8).

It is important to note as a matter of caution that even within each of these two types of a non-centralized system, there are varieties countries could choose from when designing a system in order to respond to their unique circumstances (Simeon 1998, 50).²¹ As Watts points out: Federations have varied and continue to vary in many ways: in the character and significance of the underlying economic and social diversity; in the number of constituent units and the degrees of symmetry and asymmetry in their size, resources and institutional status; in the scope of the allocation of legislative, executive and expenditure responsibilities; in the allocation of taxing power and resources; in the character of federal government institutions and the degree of regional input to the federal policy making; in the procedures for resolving conflicts and facilitating collaboration between interdependent governments; and in procedures for formal adaptation and change (Watts 2008, 1-2).

Watts therefore warns and advises against picking models off the shelf and transplanting them without first understanding the context in which they operate and adjusting and adapting them to the unique and peculiar circumstances of the country in question. He notes that even

221 At page 50 he holds the view that each country's federal system seems to be sui generis..

where similar institutions are put in place, circumstances in the adopting country may be different so as to make them operate differently.

A Decentralized System

As already mentioned, a decentralized system is not the same thing as a non-centralized system as has been defined in this chapter and must be distinguished from it (Feeley and Rubin 2008, 27-28). Neither is it the direct opposite of a centralized system. A decentralized system is considered by some scholars as being essentially a centralised system which delegates some of its powers and functions to lower level units of the same government. A decentralized system involves the transfer of powers by a central government or authority to sub-national units which exercise those received powers under the control and supervision of the central government authority that is transferring the powers to them. The central defining feature in decentralization is that the lower units are themselves creatures of the central government; the powers they exercise; the functions they perform; and the resources they use are assigned and allocated to them by the central government, which has the discretion of determining whether or not to decentralize (De Visser 2005, 14-15).²² Even the decision, whether or not to create the lower units, and of what nature and form, as well as which functions and powers to assign to them is a sole preserve of the central government. In addition, the resources they use to discharge these functions are also allocated or raised in a manner prescribed by the central government.

The lower units are completely subordinate to the central government. They are not creatures of the Constitution nor are their functions and powers as well as resources assigned and allocated by the Constitution but by the central government. They are created through either an administrative policy decision or a statute, both of which could easily be changed by the central government. Neither do they have constitutional entrenchment as is the case in non-centralized systems. They are therefore not protected by the Constitution. Because of this, the lower units can be abolished or have their powers and functions recentralized or re-adjusted by the central government at its own will. As Elazar points out, for there to be decentralization there must be a government that is decentralizing and which can recentralize. He notes that:

Decentralization implies the existence of a central authority, a central government.

The government that can decentralize can recentralize if it so desires.

22 At pages 14-15 De Visser like many other scholars identifies three mechanisms of decentralisation: deconcentration which he says is the distribution of powers and responsibilities among different units or levels within central government and creates a hierarchy between the levels; delegation which he says is the transfer of responsibility for specifically defined functions to structures that exist outside of central government; and devolution which he says is the location of decision-making power with autonomous subnational governments in a manner that appears

Hence, in decentralized systems the diffusion of power is actually a matter of grace, not right, and, as history reveals, in the long run it is usually treated as such (Elazar 1971, 91-106).

According to Elazar, a decentralized system is thus centralized because the lower units are subordinate to the decentralizing government which always retains the power to recentralize. He therefore rejects the distinction of centralized and decentralized systems of government and the use of federalism and decentralization as synonyms (Elazar 1971, 91-106) (Rubin and Feeley 2008, 172). Instead, he argues that federalism and decentralization are different and laments their being regarded as synonyms (Elazar 1971, 91-106) (Elazar 2011, 79-87). He maintains that the centralized and the non-centralized are the only systems identifiable. On the other hand, Breton identifies the confederal, federal and unitary systems, (Breton 2011, 91) but on closer scrutiny, what he refers to as the confederal is an alliance of independent states and cannot be regarded as a system of government for a single country (Moeckenfoerde, Dann and Wiesner 2007, 3).²³ This then leaves only two systems as suggested by Elazar, which some scholars describe as unitary and federal systems (Breton 2011, 91). Rondinelli et al also render a definition of decentralization that is in agreement with the notion that decentralization occurs within a centralized system (Rondinelli, Nellis and Cheema 1983, 13). Assefa Fiseha renders an even more clear definition of a decentralized system as follows:

As opposed to confederations, in decentralized governments the units, often called local governments, are subordinate to the center. However wide powers they may exercise, the local governments are merely creations of the center by a statute and as a result they may be wiped out by the center at any time. The arrangement presupposes the existence of central authority, which may for one reason or another delegate a portion of its authority to the local governments but such delegation is subject to unilateral withdrawal, amendment, or revocation by the center. Thus, the delegation of power is at the mercy and unilateral discretion of the center and not as a matter of right of the local government. Of course, in some cases absorbing the local government may be politically not sound even if it is legally possible. But this does not change the theory that they are subject to unilateral revocation by the center. The center's decision to end the local units merely requires the passage of legislation. ... Besides, in decentralized systems, the emphasis is on self-rule rather than shared rule. In a federation on the other

23 At page 3 where they note that a confederation is a union of equal independent and sovereign states that retain their own international status and remain in the eyes of the international community separate states. Sovereignty rests with the states and the centre only exercises authority delegated to it by the states. States and not the people are represented; which means that the decisions of the centre only bind the States and not

hand, the division of power is constitutionally guaranteed and the states are not creations of the federal government. Both the federal government and the states derive their authority from the federal Constitution and as a result neither level can change the terms of the compact as enshrined in the Constitution (Fiseha 2010, 107).

Jaap De Visser also recognizes that the term decentralization is easily used than it is effectively defined with exactitude. He however, agrees with the position taken by Elazar that decentralization ought to be understood within the context of a central government that then decentralizes. He states:

Conceptually, it is important to realise that decentralisation always originates from the centre. If there were no centre, there would be no decentralisation but rather two or more completely separate entities (De Visser 2005, 14).

He includes in the broader definition of decentralisation three categories: deconcentration, delegation and devolution.²⁴

Deconcentration

According to Jaap De Visser, deconcentration involves ‘the distribution of powers and responsibilities among different units or levels within a central government’ in a manner that ensures that the units or levels are agents that are, ultimately, accountable to the central government. The main defining feature is the fact that the allocation of responsibilities occurs within the hierarchy of central government (De Visser 2005, 14). Two things stand out in this definition. One, that deconcentration is done within and not without a central authority. “Within” is used to distinguish it from decentralisation which occurs when powers and responsibilities are distributed to entities outside the central authority as when the government decentralises to a corporation that is not part and parcel of the government system. This means that deconcentration is administrative in nature in that it involves the central authority distributing administrative power and responsibilities to entities within the central authority to administer on its behalf. For example, when the central authority opens its own field offices and passes certain responsibilities to them (Rondinelli, Nellis and Cheema 1983, 15). Ministerial offices in the regions and districts as well as what has been referred to in Kenya as provincial administration fall under this form of what may be referred to as deconcentration. Thus, departmental and ministerial administrative offices in the field at levels such as provinces and districts are a form of deconcentration.

Secondly there is a hierarchical relationship between the central authority and the local units to which administrative power is being deconcentrated. The central authority retains the power to direct, instruct and supervise the local units which are subordinate and must obey.

24 Rondinelli et al also identifies deconcentration, delegation and devolution as forms of decentralization..

Effectively, they are under the direct control of the central authority or government. Indeed, the administrative officers in the field are officers of the central government who are hired and can be fired by the central authority.

Delegation

Delegation involves the transfer of responsibilities for specifically defined functions to structures that exist outside of central government, which retains indirect control. The central government has discretion in deciding whether or not the power or function should be delegated (De Visser 2005, 14). It is also generally empowered to withdraw the delegated powers and functions. Litvack, Ahmad and Bird see these as being semi-autonomous since they are allowed a certain measure of discretion in decision-making. They also see them in a principal-agent relationship since they are not employees of the central government as is the case with deconcentration. Litvack Ahmed and Bird say the following in this regard:

Delegation refers to a situation in which the central government transfers responsibility for decision-making and administration of public functions to local governments or semiautonomous organizations that are not wholly controlled by the central government but are ultimately accountable to it. These organizations usually have a great deal of discretion in decision-making. This form of decentralization can be characterized as a principal-agent relationship, with the central government as the principal and the local government as the agent. From this perspective, the main design issue is to ensure that the self-interested agent (the local government or semiautonomous organization) faces incentives that induce it to act as closely as possible in accordance with the wishes of the principal (the central government) (Litvack, Ahmad and Bird 1998, 4-6).

According to De Visser, delegation takes place when a power that originally belonged to the central government is transferred to a sub-national government. The central government has discretion in deciding whether or not the power or function should be delegated. It also can circumscribe the delegated power when it is handed over but is prevented from exercising the power after delegation. It is however, generally empowered to withdraw the delegation of powers and functions (De Visser 2005, 14). The central government does not have direct control over the delegates but it has the discretion to determine whether or not and what to delegate and to whom. Whereas in deconcentration central government employees may be posted to the field offices, in delegation power is delegated to local authorities and corporations, which might have their own employees not controlled by the central government.

Devolution

Unlike deconcentration and delegation, devolution is the most tricky when it comes to definition (Faith Simiyu 2016, 83).²⁵ This is because it serves two different purposes or functions in two different ways—namely, devolution as a form of decentralisation and devolution as a form of a non-centralized system.

Devolution as a Form of Decentralization

In the one case devolution is one of the mechanisms of decentralization and therefore a form of mere decentralization in a unitary system. From this perspective, Litvack, Ahmad and Bird regard devolution as a ‘more extensive form of decentralisation’ and define it thus:

Finally, devolution, a more extensive form of decentralization, refers to a situation in which the central government transfers authority for decision-making, finance, and management to quasi-autonomous units of local government (Litvack, Ahmad and Bird 1998, 6).²⁶

Devolution in this definition involves political power, finance and administration. It remains decentralization however, because the transfer is by a central government to quasi-autonomous units which are not co-ordinate but subordinate tiers of government. The local governments that Kenya had under the replaced constitution may fall in this category.

Devolution as a Form of a Non-Centralized System

In the second case, depending on the extent, architecture and design as well as entrenchment in the Constitution, devolution becomes the tipping point at which one crosses the crucial defining line and moves out of a centralised or decentralised -centralised system into a non-centralised system of government. In this event, devolution ceases to be a mechanism of decentralization and becomes a process of creating a non-centralised or federal system of government. Whereas some federal countries are created through an integrative process by the coming together of previously separate and independent entities; others are created through a devolutionary process by a previously unitary country dividing itself into a number of constituent units (Aroney 2011, 168). In the integrative process which was used in the creation of the United States of America the hitherto independent states released some of

25 At page 86 the author observes that: “Devolution is a complex undertaking which derives different meanings in varying contexts.”

26 At page 6 the authors go further and state that: “Devolution usually transfers responsibilities for services to municipalities that elect their own mayors and councils, raise their own revenues, and have independent authority to make investment decisions. In a devolved system, local governments have clear and legally recognized geographic boundaries over which they exercise authority and within which they perform public functions.”

their powers to the federal government. In the devolutionary process on the other hand, such as happened in Belgium, Nigeria, Spain, and Germany after the third Reich, powers are taken from the previously unitary state and granted to the newly created constituent units. De Visser defines devolution in terms of autonomy on the part of the units receiving the power; and in terms of the permanency of the powers received. He states that:

Devolution can be defined as the location of decision-making power with autonomous sub-national governments. It is different from delegation in that it is always meant to be a permanent placement of power at a particular level. Therefore, it is often done by means of provisions in a Constitution or in framework legislation. This introduces a second distinguishing element, namely that devolved powers become 'original' powers in that they reside (constitutionally or in terms of framework legislation) with the sub-national government. Hence, the central government is deprived of the discretion it has when it delegates because it has to adhere to principles laid down in the Constitution or framework legislation....The sub-national entities are not accountable to central government. They have their own Constitution and legislative procedures, independent of central government (De Visser 2005, 15).

Devolution in this sense refers to the process through which a country ceases to be unitary and/or decentralized and becomes non-centralised or federal. This definition is obviously a description of devolution as a process of a unitary system becoming federal. First, it is instructive that De Visser carefully avoids talking about "transfer of power" and instead, talks of the "location of power" in local government units. It is not transfer of power by a central government to subordinate local governments but instead, location of power to autonomous local governments. This location of power is not by the central government but by the Constitution as an expression of the will of the people. And this power is original and permanent and can only be withdrawn or adjusted through an amendment of the Constitution. According to De Visser, the central government is denied the power to recentralise because the constituent units and their governments are creatures of the Constitution and not the central government. These conclusions are supported by De Visser's own definition of a decentralised system already referred to.

His definition is not of devolution as one of the mechanisms of decentralization but as a process through which a previously centralised system becomes non-centralised. In such circumstances devolution is used to refer to a non-centralized system of some kind and not a centralized or unitary system. Granted this definition and understanding of devolution, is the Kenyan devolution to be defined as a mechanism of decentralization from a centralised system in the manner presented by Litvack et al or is it to be understood as a process through which Kenya has become a non-centralised or federal system in the manner presented by De Visser?

Use of Decentralization in Both Centralized and Non-Centralized System

Decentralization can however, be used in both the centralized and the non-centralized systems. For example, a centralized system could employ some aspects and mechanics of decentralization without crossing the defining line and becoming non-centralized. Similarly, a non-centralized system may employ decentralization mechanics in dealing with certain aspects of its governance system without ceasing to be non-centralized. Each of the levels of government in a non-centralized system could employ decentralization in the process of discharging some of its constitutional functions. For example, constituent unit governments in a federal system may have both own original constitutional functions and powers and other functions and powers delegated to them by the national or federal level of government, either administratively or through legislation. The federal level of government could take back such delegated powers and functions but not the original constitutional functions of the constituent units. Similarly, in non-centralized systems in which local government is a competency of the sub-national level of government, local government units are created by the sub-national level of government by way of decentralization. The functions and powers such local governments perform and exercise are delegated by the sub-national government which creates them and can be taken back at will; and the resources they use are also provided for by the sub-national government which has a discretion to increase, reduce or withdraw them altogether. The sub-national levels of government creating them can therefore also abolish or adjust such local governments. According to Breton “federal systems are, as a matter of definition, decentralized, but so are as a matter of fact, all modern democratic unitary states; consequently, what distinguishes federal from unitary states is not decentralization” (Breton 2011, 89).

Devolution in the Kenyan Constitution

Given the foregoing comparative conceptual framework, it is important to begin this section by recognizing that the meaning of a country’s devolution depends on the instruments which the country uses to adopt its devolution. Where the instruments of adoption are a mere Act of Parliament, what is referred to as devolution may end up being mere decentralization in a centralized system. Where however, the instruments of adoption are a supreme Constitution such as in the Kenyan case, what is referred to as devolution may go beyond mere decentralization and become a non-centralized system. Thus, to determine what a country means by devolution, one must examine that country’s instruments of adoption. Yash Ghai observes in this regard that:

To describe a system as federal or devolution does not help much, for within each there can be enormous differences. In order to understand the true nature of a system we have to turn to the Constitution or laws that establish and define the system. There is then the question of the status of the law that establishes devolution or federation, particularly whether it is the Constitution or other species of law (Ghai 2015, 16).²⁷

27 At page 23 he emphasizes that “the best way to understand the nature and structure of a

What follows is therefore an examination of the Constitution of Kenya 2010, being the instrument through which the country has adopted devolution. The objective is to determine where the Kenyan devolution falls within the continuum of systems of organizing governance discussed above. Is the Kenyan devolution a different system of government or an adoption and adaption of any one of the above discussed systems? Is the Kenyan devolution mere decentralization within a unitary state or is it the adoption of a form of a non-centralized or federal system of government? Answers to these questions are imperative to avoid policy makers and other players in the devolution sector wrongly categorizing the system. If the executive and the legislature, which develop policies and legislation to implement devolution proceed on the basis that the Kenyan devolution is mere decentralization, when in fact it is a non-centralized system, the policies and laws they make will undermine devolution as envisaged by the Constitution. Indeed, the experience of the past ten years discloses that some of the policies and legislation have been developed from a wrong premise of what Kenya's model of devolution is. Likewise, if the courts which interpret the Constitution and the law wrongly categorize the system, their interpretation of the Constitution and the laws will compromise rather than implement devolution as envisaged by the Kenyan people. The overall consequence will be the failure of the policy objectives of devolution.

Before the enactment of the Constitution of Kenya 2010, the Kenyan system was essentially a centralized one. The system was constituted by a single central government controlling all the legislative, executive and judicial powers of the state. At the administrative level however, the country had several other levels below the national one; some created by statute and others by administrative action. For example, under the Districts and Provinces Act,²⁸ the country was divided into eight provinces and forty seven districts. Furthermore, below the districts the country was also divided into divisions, locations and sub-locations.²⁹ These served as levels housing central government branch or field offices for all ministries and the system of Provincial administration. A close examination of these arrangements reveals that these levels answer to what may be defined as decentralization in the form of deconcentration. The levels were creatures of the central government which could abolish them or adjust them at its own discretion. Indeed, a number of times the central government increased the districts even without bothering to amend the Districts and Provinces Act.³⁰

In addition, the country had a local government system encompassing both rural and urban local government structures. The local government system was not entrenched in the Constitution

state is to study the constitution and laws on the subject".

28 Districts and Provinces Act, Act No 5 of 1992.

29 The Divisions, Locations and Sub-locations are not creatures of statute. They seem to have been established by an administrative action.

30 The Districts and Provinces Act has 47 districts which were renamed in the new constitution as the counties. Yet at the time of enactment of the Constitution, they had been increased administratively to more than 200. Currently, they have further been administratively increased beyond 286.
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as it was a creature of statute, namely the Local Government Act.³¹ The functions that the local authorities performed and the resources they used to discharge their functions were not assigned and allocated by the Constitution. Instead, they were based on a combination of statute and administrative decisions. In an effort to improve the system, the government at one time introduced, by statute, the Local Authorities Transfer Fund (LATF) and Local Authorities Services Delivery Action Plan (LASDAP). These too were founded on statute and administrative action. When closely scrutinized, this local government system was no more than mere decentralization in the form of delegation.

The centralized system was heavily criticized for its inability to deliver effective and efficient democratic government. It was blamed for the wide spatial disparities and underdevelopment in the country. Consequently, people demanded a change in the system of governance. The government responded by introducing numerous devolved funds and services on a piecemeal basis. In addition to the Local Authority Transfer Fund (LATF) created by Act No 8 of 1998, there was the Road Maintenance Levy Fund, (RMLF) created through the Kenya Roads Act, 2007; the Rural Electrification Fund, created through the Energy Act of 2006; and the Constituency Development Fund, created through the CDF Act of 2003.³² These piecemeal changes did not assuage the people's demand for more fundamental changes leading to the adoption of the new Constitution that has a devolved system of government. The new Constitution has therefore, introduced a completely different system which can only be fully understood after examining its constitutional architecture and design.

Architecture and Design of Kenya's Devolution

The examination of the constitutional architecture and design of the Kenyan devolved system of government must set out and evaluate the following issues. Whether the system of devolution and the levels of government are created by the Constitution; whether these levels of government have any measure of autonomy; whether the functions of each level are constitutionally assigned; whether the resources to be used to discharge these functions are to be allocated in accordance with constitutional provisions; whether there is provision for a constitutional framework for intergovernmental relations; whether there is constitutional provision for resolution of disputes among the levels of government; and whether the entire system of devolution is constitutionally entrenched. Each of these issues is examined in the next sub-sections of this chapter.

31 Section 5 of the Local Government Act Cap 65 of the Laws of Kenya, conferred upon the Minister for Local Government the power to establish municipalities, counties and townships; assign to and alter names of such entities; define and alter their boundaries; amalgamate two or more counties into one; transfer a part of a county to another county of municipality; and transfer a part of a municipality to a county or township.

32 The World Bank Devolution without disruption: Pathways to a successful new Kenya (2012) at p 1

Creation of the system and Autonomy of the Levels of Government

With the adoption of devolution through the Constitution of Kenya 2010, the Kenyan system fundamentally changed. The Constitution has adopted a system described as devolution, which has been put right at the centre of the constitutional scheme of things. The Constitution deals with devolution right from Article 1 where it recognizes that all sovereign power belongs to the people of Kenya. The Article introduces the subject of devolution as part of the process of organizing and assigning the exercise of the sovereign power of the people, stating that the sovereign power of the people is to be “exercised at the national level; and the county level” of government.³³ The Constitution also delegates the sovereign power of the people of Kenya to “parliament and the legislative assemblies in the county governments”;³⁴ and to “the national executive and the executive structures in the county governments”.³⁵ consistent with the assertion by Fleiner and Fleiner, the sovereignty of the people is divided and assigned to different levels of government (Fleiner and Fleiner 2000, 15). By doing so the Constitution creates two levels of government.

Article 6 of the Constitution once again talks of devolution clearly referring to two levels of government; by providing that “the governments at the national and county level are distinct and inter-dependent”.³⁶ The Article does not only create the levels of government but also the geographic constituent units and fixes them in the Constitution.³⁷ The forty seven counties are entrenched in the Constitution and, as Fleiner and Fleiner have noted, each county’s territory is constitutionally guaranteed and protected (Fleiner and Fleiner 2000, 34). The one thing that clearly comes out in the Kenyan case is that none of the levels of government is a creature of the other. Both are creatures of the sovereign people of Kenya who have expressed their sovereign will through the Constitution.³⁸ By creating these two levels of government and the territorial units and fixing them in the Constitution, the two levels are made coordinate and not subordinate to each other. None owes its existence to the unilateral will and grace of the other. The fact that national legislation prevails over county legislation only in certain

33 Article 1(4).

34 Article 1(3)(a).

35 Article 1(3)(b).

36 Article 6(2).

37 Article 6(1) of the Constitution of the Republic of Kenya, 2010 provides in this regard the following: “The territory of Kenya is divided into the counties specified in the first schedule.” The Counties in the first schedule are the equivalent of the District defined in the District and Provinces Act of 1992.

38 See *Rev Timothy Njoya and others v Attorney General and others* (2004) AHRLR 157 (KeHC 2004); and *Patrick Ouma Onyango and others v Attorney General and others* [2005] eKLR, both of which establish that the people in exercise of their constituent power constitute a framework of government through the Constitution which creates other institutions and organs of government.

circumstances, and that when such circumstances do not exist county legislation prevails over national legislation,³⁹ emphasizes the intention of the framers of the Constitution to create counties that have a reasonable measure of autonomy along federal lines (Levy and Tapscott 2001, 8). However, this fact together with the fact that the national government is granted powers to intervene in the affairs of county governments in certain prescribed circumstances;⁴⁰ powers to suspend county government in yet other prescribed circumstances;⁴¹ and powers for stoppage of transfer of funds to county governments suggest that the autonomy of the county governments is relatively weaker as compared to that of national government.⁴²

Functions and Powers

Article 186 of the Constitution also assigns governance functions and powers to the two levels of government. In assigning the functions the Article draws a distinction between exclusive and concurrent functions for each level of government. Although the fourth schedule which deals with the functional areas does not clearly identify the exclusive and the concurrent functions, Article 186 recognizes that some of the functions assigned to each level of government are exclusive while others are concurrent.⁴³ They include both legislative and executive powers. The executive function empowers the county government to organize its own administration to implement its policy decisions. According to Article 235(1), each county government is empowered to, ‘within a framework of uniform norms and standards’ prescribed by national legislation, establish and abolish offices in its administration, appoint and confirm to offices public servants who shall also be under the government’s disciplinary control. This is an indication of administrative autonomy.

Apart from Article 186, Article 189 emphasizes the distinct nature of the two levels of government from a functional point of view. The Article emphatically requires that each level of government performs its functions, and exercises its powers, in a manner that respects the functional and institutional integrity of the other level of government. Each level of government must also respect the constitutional status and institutions of the other level of government. Indeed, even in the case of the counties among themselves, the Article requires that they similarly exhibit this respect for each other.⁴⁴ Even where the Constitution has allowed a certain measure of intervention by national government in the affairs of the

39 Article 191(2), (3) and (4).

40 Article 190.

41 Article 192.

42 Article 225.

43 Article 186 (2) for example, provides for concurrent functions in the following terms:
“A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.”

44 Article 189(1).

county government, this is to be done as an exception to the general rule of distinct and inter-dependent governments that are co-ordinate and not subordinate to each other. The Constitution has severely circumscribed the circumstances and manner of such intervention; putting in place very stringent preconditions to be met before such intervention is done, as well as checks and balances through the Senate (Mutakha 2015).⁴⁵ It provides for three different types of intervention and circumscribes each one of them. These are intervention,⁴⁶ suspension⁴⁷ and stoppage of transfer of funds.⁴⁸

Financial Resources

The Constitution similarly, makes provision for how each of the two levels of government will raise resources to enable it to perform its functions. Each level of government is assigned some power to raise revenue.⁴⁹ The counties for example, are empowered to raise revenue from property rates;⁵⁰ entertainment taxes;⁵¹ and any other tax authorised by an Act of Parliament;⁵² and trading charges and services fees.⁵³ The money raised from these sources accrues to the counties raising it, which at the same time are entitled to spend it within their own discretion, in accordance with the provisions of the Constitution.⁵⁴ On the other hand

45 See Chapter Eight in which at pages 283-284, it is argued that “although supervision is hierarchical in nature and appears to detract from the federal principle of autonomy of the levels of government, it is justified as a necessary part of any non-centralized system”. At page 312, it is further argued and concluded that the supervision and intervention powers “are expressly and sufficiently circumscribed and constrained to avoid abuse and not to detract from the federal principle of distinct and autonomous county governments”.

46 Article 190 provides for national government intervention in the affairs of county governments if the county government is unable to perform its functions; or does not operate a financial management system that complies with the requirements prescribed by national legislation.

47 Article 192 provides for suspension of a county government by the president in cases of emergency arising out of internal conflict or war; or in any other exceptional circumstances.

48 Article 225 provides for stoppage of transfer of funds due to a county government when there is serious material breach or persistent material breaches of the measures established under legislation.

49 Article 209.

50 Article 209(3)(a).

51 Article 209(3)(b).

52 Article 209(3)(c).

53 Article 209(4).

54 Article 207(1) which establishes Revenues funds for county indicates that some of the money to go to the revenue fund is money raised by the county government. It is important to note that the revenue fund is the property of the county government and it is from this fund that

the national government has power to raise revenue from income tax;⁵⁵ value-added tax;⁵⁶ customs duties and other duties on import and export goods;⁵⁷ and excise tax,⁵⁸ as well as any other tax authorised by an Act of Parliament, which shall not include taxes assigned to county governments.⁵⁹ In addition, just like the county governments, the national government is also empowered to raise money from trading charges and services fees.⁶⁰ However, unlike the county governments to which the money raised from the sources they have been assigned accrues, the money raised from the sources over which the national government has power to raise revenue does not accrue solely to the national government. The money accrues jointly to national and county governments in the form of what the Constitution describes as revenue raised nationally (Mutakha 2015, 253), to be shared in the form of equitable shares, conditional and unconditional grants.⁶¹

A close examination of Article 206 of the Constitution, which establishes the Consolidated Fund into which, all money raised and received by the national government is paid, points at the fact that the Consolidated Fund is not the sole property of the national government but of the national government jointly with the county governments.⁶² The Constitution indicates that the expenditure and withdrawals from this fund include equitable shares to be paid to the county governments as well as conditional and unconditional grants to county governments. It is instructive to note that whereas the Revenue Funds under Article 207 are established as funds for each one of the counties, the Consolidated Fund under Article 206 is not established as a fund of the national government. The money paid into the Consolidated Fund is to be made available for defraying payments of various kinds including the equitable shares of the county governments. The Constitution provides for equitable shares⁶³ and conditional and unconditional grants from the revenue raised nationally, as one of the sources of the revenue to be spend by the county governments.⁶⁴ The Constitution is also very careful not to make the process of sharing this revenue a discretionary process controlled by the national government. It is not a process under which the national government is allowed to allocate the money on the basis of political patronage; instead, it is made an intergovernmental process

each county is to finance its activities. Sub-articles (2), (3) & (4) provide for how expenditure by the county government from this account is to be lawfully effected.

55 Article 209(1)(a).

56 Article 209(1)(b)(b).

57 Article 209(1)(c).

58 Article 209(1)(d).

59 Article 209(2).

60 Article 209(4).

61 Article 203.

62 Article 206.

63 Article 202(1).

64 Article 202(2).

to be conducted on the basis of relatively objective criteria⁶⁵ translated into a formula by the Commission on Revenue Allocation.⁶⁶

Finally, the Constitution enhances the financial autonomy of the counties by empowering them to make their own budgets and determine their own expenditure priorities, subject to form, content and timing set out in national legislation.⁶⁷ The national government cannot therefore make budgets for the county governments, as its powers are restricted to ensuring transparency and accountability secured through national legislation.⁶⁸

A Combination of Self-rule and Shared-rule

In setting out the objects of devolution, the Constitution includes objects that seem to suggest that there is an effort to combine local self-rule and national shared-rule. The Constitution provides that devolution aims at fostering unity by recognizing diversity,⁶⁹ giving powers of self-governance to the people and enhancing their participation in the exercise of the powers of the State and in making decisions that affect them;⁷⁰ recognizing the right of communities to manage their own affairs and furthering their own development;⁷¹ and protecting and promoting of the interests and rights of minorities and marginalized communities.⁷² Similarly, the concept of “distinctness” and “inter-dependence” used by Article 6(2) to describe the nature of the two levels of government also captures the notion of a combination of self-rule and shared-rule.

Because of this and the fact that the functional assignment under the Constitution envisages quite a bit of concurrent functions the Constitution recognized the need for representation and participation of the counties in decision making at the national level of government. The national legislature is therefore designed as a shared institution in a bicameral manner, comprising the National Assembly and the Senate.⁷³ The Constitution specifically provides that the Senate represents the counties.⁷⁴ This emphasizes the relative coordinate nature of the relationship between the two levels of government. The national level government cannot impose anything through legislation, upon the county governments, since the process of law-making involves

⁶⁵ Article 203.

⁶⁶ Article 215 of the Constitution establishes the Commission on Revenue Allocation while Article 216 sets out the functions of the commission.

⁶⁷ Articles 220 & 224.

⁶⁸ Articles 190 & 225. ⁶⁹ Article 174(b).

⁷⁰ Article 174(c).

⁷¹ Article 174(d).

⁷² Article 174(e).

⁷³ Article 93.

⁷⁴ Article 96 of the Constitution provides for the Senate purely as a house of the counties.

the Senate. The principle of co-management and joint management of the affairs of the nation flows out of this design of decision-making.

Constitutional Framework for Intergovernmental Relations

In addition to all the matters discussed above, the Constitution has also made clear provision for what may be called intergovernmental relations and dispute resolution mechanisms. Having through Article 6(2), established a system of devolution that involves two levels of government that are “distinct and inter-dependent”, which are required to “conduct their mutual relations on the basis of consultation and cooperation”, the Constitution by Article 189 provides detailed rules regarding how these intergovernmental relations should be conducted. The article gives details on what is meant by cooperative government and what it entails (Mutakha 2015).⁷⁵ Almost in the same manner as the South African Constitution, the Kenyan Constitution requires each level of government to perform its functions and exercise its powers, in a manner that respects the functional and institutional integrity of the other level of government. Each is also required to respect the constitutional status and institutions of the government at the other level; and in the case of county governments, to show respect among them.⁷⁶ The levels of government are required to assist, support and consult each other, and as appropriate implement the legislation of each other.⁷⁷ The two levels of government are called upon to liaise with each other for the purpose of exchanging information, coordinating policies and administration and enhancing capacity.⁷⁸ For purposes of furthering co-operation in the performance of their functions and exercise of their powers, the governments may set up joint committees and joint authorities.⁷⁹ In the event of any intergovernmental dispute, the governments at the two levels are required to ensure that every reasonable effort to settle the dispute among them and not let it escalate is made. The reasonable efforts must include procedures provided for by legislation.⁸⁰ Finally, the Constitution requires the governments at the two levels, to try and settle such disputes through alternative dispute resolution mechanisms, such as negotiation, mediation and arbitration⁸¹ and only go to court as a last resort.

These provisions borrowed from chapter three of the South African Constitution which comprises sections 40 and 41 provide a clearer understanding of the concept of cooperative government from which Kenya may wish to borrow when interpreting its own provisions.

⁷⁵ See Chapter Nine presents a detailed discussion of the concept of cooperative government and intergovernmental relations under the devolved system of Kenya.

⁷⁶ Article 189 (1) (a).

⁷⁷ Article 189 (1) (b).

⁷⁸ Article 189 (1) (c).

⁷⁹ Article 189(2).

⁸⁰ Article 189 (3).

⁸¹ Article 189 (4).

189 (4).

Section 41 for example, sets out the principles of cooperative government as requiring all spheres of government to preserve the peace, national unity and the indivisibility of the Republic; secure the well-being of the people of the republic; provide effective, transparent, accountable and coherent government for the republic as a whole; and be loyal to the Constitution, the republic and its people. The spheres of government must respect the constitutional status, institutions, powers and functions of government in the other spheres; not assume any power or function except those conferred on them in terms of the Constitution; exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and cooperate with one another in mutual trust and good faith by fostering friendly relations; assisting and supporting one another; informing one another of, and consulting one another on, matters of common interest; coordinating their actions and legislation with one another; adhering to agreed procedures; and avoiding legal proceedings against one another. These South African principles are captured in Articles 6 and 189 of the Kenyan Constitution. For this reason, the jurisprudence the South African courts have developed in the interpretation of co-operative government should provide good guidance to the Kenyan courts when interpreting the cooperative government the Constitution has provided for.

Entrenchment of Devolution

The Kenyan system of devolution with all the features discussed above is entrenched in the Constitution and cannot be amended by only one level of government without involvement of the other.⁸² Yash Ghai argues that “a key factor in the protection of devolution is its entrenchment by the constitution”, and then concludes that “on this score, devolution in Kenya is fairly secure” (Ghai 2015, 35). It has already been discussed that the Constitution establishes a national legislature which comprises two chambers, with one of them representing the interests of the county level of government.⁸³ The Constitution provides for three different approaches to amendment to any of its provisions. In each of these approaches Parliament of which the Senate is a part, has a role to play. An amendment cannot be passed unless the Senate has had its opportunity to consider and pass the proposed amendment. While some amendments can be passed by a mere passage in the two houses of Parliament;⁸⁴ others can be originated by the people in a popular initiative.⁸⁵ Those initiated by the people must, once the initiation is finalized also be considered by both houses of Parliament.

There is yet another set of amendments which are more entrenched and which can only

82 Article 2 of the Constitution declares the supremacy of the constitution and categorically says that it binds both levels of government.

83 Article 96 of the Constitution provides for the role of the Senate as the representing the counties.

84 Article 256.

85 Article 257

257.

be passed in the two houses of Parliament, after having been voted for by the people in a referendum. And before amendments go to the referendum, they must first be passed by at least a half of the county assemblies. Indeed, it is arguable that these have been removed from the realm of amendment by parliament and put in the realm of the exercise of the constituent power of the people. Among the provisions that cannot be amended without recourse to a referendum are provisions on devolution. These include amendments to the provisions on the territory of Kenya;⁸⁶ the sovereignty of the people;⁸⁷ the national values and principles of governance referred to in Article 10 (2) (a) to (d);⁸⁸ and the objects, principles and structure of devolved government.⁸⁹ All these matters concern devolution and the system of devolved government. For instance, article 1 which deals with the sovereignty of the people concerns devolution because as said earlier the constitution introduced devolution through the process of organizing the sovereignty of the people and how it is to be exercised. Provisions on territory include how the territory has been divided into the devolution constituent units. Any amendments even of the external boundaries of the territory of Kenya will affect the boundaries of the counties. The values of governance in Article 10 include the value of sharing and devolution of power; while the provisions on the objects, principles and structure go to the heart of devolution. Contrary to what used to happen under the old constitutional dispensation when the President could create districts without any restraint, Article 188 of the Constitution provides that alteration of the boundaries of a county cannot be effected without a vote in both the National Assembly and the Senate.

Assessment of the Kenyan Devolution and Conclusions

Having considered the constitutional architecture and design of the Kenyan devolution, the inevitable conclusion is that what Kenya has adopted is a fundamental shift from a centralized system to a non-centralized one. It is a devolution that has effectively tipped over the system from a centralized unitary system to a non-centralized federal system. It is not merely a mechanism of decentralization in a centralized system. The examination in this chapter indicates that the Constitution creates a multilevel system of government that has all the important defining features of a federal system. For this reason the model of devolution adopted by Kenya must be conceptualized as a multilevel system of government under which the Constitution creates two distinct and interdependent levels of government – the national and county – that are required to conduct their mutual relations in a consultative and cooperative manner. The Constitution assigns them powers and functions which include revenue raising and sharing powers, and grants the counties participation rights and representation in the national legislature through the Senate. Because of the distinct and interdependent nature of the two levels of government and the manner of their functional assignment, the Constitution also provides for a system of intergovernmental relations, including dispute resolution mechanisms with the Supreme Court as umpire. The Constitution that creates all these structures cannot

⁸⁶ Article 255(1)(b).

⁸⁷ Article 255(1)(c).

⁸⁸ Article 255(1)(d).

⁸⁹ Article 255.

itself be amended without the participation of the counties as the constituent units in the non-centralized system. Thus, the system creates counties that are fundamentally different from the local government that hitherto existed under the replaced constitutional dispensation. Their distinct nature renders them relatively autonomous and coordinate rather than subordinate to the national government. However, national government is granted limited powers of supervision and intervention in county affairs which are constitutionally circumscribed and constrained, and must be exercised within the framework of cooperative government. For example, the national government can in certain prescribed circumstances intervene in the affairs of counties;⁹⁰ suspend county government;⁹¹ stop transfer of funds to county government;⁹² and enact legislation that can override county legislation.⁹³

The country has adopted an integrative and cooperative system along the lines of the German and South African cooperative federalism. Just like Germany and South Africa, both of which adopted integrative and cooperative systems because of their fears regarding the indissolubility of the nation, Kenya's history with constitution-making indicates that the country has also suffered similar fears. Through the preamble to the Constitution, the Kenyan people declare that they are proud of their ethnic, cultural and religious diversity but are determined to live together in peace and unity as one indivisible sovereign nation.⁹⁴

Taking into account these comparative lessons, Kenya's devolution is best defined as a sub species of a non-centralized or federal system under which the national government is granted some circumscribed supervision and intervention powers. It has borrowed heavily from the South African devolution, which in turn borrowed from Germany, including its integrative and cooperative form and nature. Because of this, the interpretation and application of the Kenyan devolution should immensely draw instructive lessons from the South African jurisprudence.

This assessment and conclusion is arrived at despite the fact that some Judges of the Kenyan Supreme Court have on two occasions stated that the Kenyan devolution does not create a federal system of government. The Judges of the Court instead viewed the Kenyan devolution in terms of a unitary state. In *Re the Matter of the Interim Independent Electoral Commission*, in which the Advisory Opinion of the Court was sought regarding the election date, the Court stated the following:

On the question whether election date is a matter of “county government”, we have taken a broader view of the institutional arrangements under the Constitution as a whole; and it is clear to us that an *interdependence* of national and county governments is provided for—through a devolution-model that rests upon a *unitary*, rather than a federal system of government.⁹⁵

90 Article 190.

91 Article 192.

92 Article 225.

93 Article 191.

94 See paragraph 3 of preamble to the Constitution.

95 *Re the Matter of the Interim Independent Electoral Commission [2011] eKLR para 39.*

On the other hand, in *Speaker of the Senate and another v Attorney General and others*, the Advisory Opinion of the Court was sought on the issue of whether or not the Division of Revenue Bill was a Bill concerning county governments the consideration, debate and passage of which required the input of the Senate. Justice Njoki Ndung'u in a dissenting opinion stated that:

It is important from the onset to put into context, the structure of the county unit within the model of devolution crafted under the Constitution. The devolved system in Kenya is based on a unitary system of Government that decentralizes key functions and services to the county unit. The Kenyan state model is not federal in nature and does not envisage the workings of a county as a politically and financially independent state.⁹⁶

In the light of the analysis undertaken in this chapter, these pronouncements by the Judges do not reflect the correct position regarding the Kenyan model of devolution. First, these were *obiter dicta* pronouncements which did not form the basis of the decision of the Court. They were by the way comments which were not necessary and have no precedential value. Secondly, the issue of the model of the Kenyan devolution was not raised in the two cases. The parties did not raise and canvass the question of whether or not the Kenyan devolution had resulted into a unitary or federal system of government. If the issue had arisen, the parties would have made bilateral arguments and submissions on the subject and certainly, in view of the above analysis, the Court would have arrived at a different finding. Thirdly, Justice Njoki Ndung'u's statement that the Kenya devolution was mere decentralization within a unitary system does not reflect a proper understanding of the system.

Indeed, Yash Ghai in his comments about these pronouncements by the Court holds the view that they were not necessary and the court should not have made them.

In neither case was it necessary for the Supreme Court to decide whether Kenya is a federal state or not. The judges would have been wiser not to raise the issue, especially as the judges concerned do not seem to have any understanding of it, and do not make any reference to the numerous scholarly studies on the subject. By virtue of their interpretation, two of the most vibrant federations, Germany and India, would count as unitary states! (Ghai 2015, 22).

96 *Speaker of the Senate and another v Attorney General and others* [2013] eKLR para 265

Yash Ghai correctly concludes that after careful examination of both the South African and Kenyan Constitutions in respect of devolution, “we would not only see the similarities, but we might be inclined to say that both countries are federal!” (Ghai 2015, 23). The overall conclusion in this chapter therefore is that the Kenyan model of devolution is a variant of a federal system. The system as provided for in the Constitution exhibits many characteristics of a federal system. Although in some respects the system appears to be a weak federal system, it has been argued in this chapter that there are many variants of federal systems and each country adopts its own unique variant taking into account its own historical and political context.

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CHAPTER 4

MANAGING TRANSITION TO THE SYSTEM OF DEVOLVED GOVERNMENT: GOALS, GAINS AND MOVING FORWARD

Winnie V. Mitullah

1. Introduction

Transition in any government or entity is a complex process which requires adequate conceptualization, planning and understanding by all parties⁹⁷. This complexity is informed by the fact that transitions are often unique and learning from other jurisdictions in most cases is not always helpful. Consequently, each jurisdiction or entity has to come up with its own transition process guided by its constitutional and legal framework and informed by local context and what the new system intends to achieve. This is the context within which Kenya's constitutional transition riddled with tensions between goals, gains and moving forward is conceptualized in this chapter.

The chapter begins by a brief conceptualization of transition highlighting the importance of participation, experimentation and collective learning. This is followed by the context of Kenya's constitutional transition, aimed at grounding the analysis of the transition after seven years of implementation. The second analytical part of the chapter discusses some of the key transition issues including transfer of functions, assets, management of human resource, and capacity building. Analysis is done in respect to the goals which were set and which aimed at achieving smooth transition, and the gains made for moving forward. The decision to isolate a few aspects of the transition is informed by their centrality in Kenya's transition to devolved governments and the fact that they are likely to continue for some time. These two issues are major concerns to the transition process as both the national and the 47 counties of Kenya struggle to put their act together and to negotiate the issues.

The conceptualization of the Kenya transition to devolved system of government was legally informed by the Transition to Devolved Government Act of 2012. The Act provided for a legal and institutional framework for coordinated transition to devolved system of government while ensuring continued delivery of services to citizens. It also provided for transfer of functions to national and county governments; and the establishment of the TA to facilitate

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the analysis and phased transfer of functions provided under the fourth schedule of the Constitution. The first major activity of the TA was to issue guidelines to state organs or public entities for preparation of Transition Implementation Plans (TIPs). These plans were expected to provide direction for the transition. Each state and public entity developed the plans, albeit with various shortcomings.

2. Understanding Transition

Regime transition is a complex process and many theories have been advanced in an attempt to facilitate an understanding of the process with redistributive demands being noted by many as a driver of democratic transition and consolidation. Other theories include economic, institutionalism, sociological and social movement theories of regime transition. Acemoglu and Robinson (2001) divide the theorists into two groups: 'those that emphasise the role of agency and focus on the interactive dynamics of transitions; and those that privilege structural factors'. These authors further differentiate the 'structuralist', between 'statist' approaches that highlight the autonomy of the state and accounts that see political institutions as endogenous to broader socio-economic conditions prevalent in society. This latter perspective provides a better reflection of Constitutional transition in a developing country such as Kenya where there are gross inequalities and developmental challenges facing citizens. As already noted transition is a complex matter and is different from change management. Bridges differentiates change from transition noting that change is situational giving examples of the new site, the new team, the new role and the new procedure. On the other hand, transition is the psychological process people go through to come to terms with the new situation, implying that change is external while transition is internal (Bridge 1991). Bridge further argues that transition entails taking everyone along a shared vision, building capacity for change and providing resources, including time and finances, developing a performance plan and open communication channel. Contrary to what is occurring in Kenya, transition does not require a treadmill approach with a vicious circle. People managing transition need to reflect, plan and learn (Carbon 2007). Consequently, transitions do not fall into clean management science progressive steps which entail reviewing and assessing roles, jobs, new skills and identifying and filling gaps to support new processes.

Societal change integrates a diversity of perspectives, expectations and strategies in a complex understanding which can be addressed through reflexive governance (Vob et al 2006; Szendimir et al 2006; Kemp and Loorbach, 2006). Reflexive governance is pillared on participation, experimentation and collective learning as key elements of governance. It is embedded in and intertwined with politics (Jan Peter and Basil 2011) and is more effective and legitimate in understanding transition. In reflexive governance, policy, polity and politics are central. In emphasizing the importance of politics, the authors point out that 'it is through and within politics that power is gained, and maintained, authority assigned and executed,

interests and ideas are articulated, conflicts arise and play out, collective action is organized and public problems are defined, processed and solved' (Jan Peter and Basil 2011: 2).

In reflexive conceptualization, transition is an on-going, structured and learning process that allows for constant adaptation of the management practice to deal with uncertainty of governance process. This entails learning by doing which seem not be the case in Kenya where county and national government largely use a linear approach in conceptualizing their activities and taking action. In typical reflexive governance all professionals are useful as well as alternative forms of governance such as local and indigenous systems. Policies are supposed to be conceptualized as hypothesis to be tested and refined in practice (Berkes et al 2003). This allows for large scale transition and does not concentrate on moving from A to B but rather modulates A in the direction of B (Sendzimir et al 2006).

Kemp and Loorbach observes that 'Transition Management as a management concept is considered a deliberate approach to putting hands on the systems inherent dynamics to influence the direction and speed of transitions by coordinating and enabling the process that occur at different levels in a more systemic and evolutionary way' (Kemp and Loorbach 2006: 109). To the authors, this type of governance is not about goal oriented modulation, nor an attempt to achieve pre-determined outcomes through planning and control. The approach takes a middle ground of planning and incrementalism combining best of both worlds. The approach provides general principles such as system thinking, long term thinking, back-casting, and a focus on learning by doing, an orientation towards system innovation and experimentation that serve as starting points for practitioners and researchers. According to Kemp and Loorbach all the above occur within a transition arena with open minded visionaries or forerunners selected according to transition problems at hand and with respect to competence, with ability to look beyond their domain (Kemp and Loorbach 2006: 112). Those within the arena develop sustainable visions and transition agendas, have commonly shared perceptions of transition problems, share and recast the problems and set transition pathways. The team should also be able to mobilize actors and execute projects and experiments through applicable transition programmes. Overall, the team should create public support for transition goals and related experiments, and continually evaluate and monitor progress in order to trigger the learning process.

2.1 Theoretical Dilemma

While there are many other linear theories that can be used in understanding transition, reflexive governance intertwined with politics has potential of enhancing understanding of transition management. However, the theory creates a dilemma in countries such as Kenya. The theory seems to be based on more open societies where issues of integrity and value systems are comparatively high, with likelihood of trusting the visionary leaders managing the transition. In Kenyan context, the party politics and the various tensions among leaders

charged with transition is a threat to reflexive governance and can explain why there has been more concentration on sticking to rules even in cases where rules do not move the transition forward.

Essentially, rule- based governance cannot be avoided but monitoring and evaluation for learning should provide lessons for changing gear whenever called for. This has to be acknowledged and embedded in procedures and processes of governance in any system undergoing transition. Although, the Kenya system of monitoring and evaluation has partially been in place, past experience has not been good. Most indicators of monitoring and evaluation are rarely analysed for formal feeding into on-going processes. This implies that government, including counties have to adapt formal ways of analyzing and using monitoring and evaluation outputs for institutional learning and moving forward. This is possible if capacity of both levels of governments and citizens is built including providing support in developing appropriate monitoring and evaluation tools; as well as nurturing leaders with integrity and values for steering Constitutional transition. Institutional learning is useful and complementary to the efforts of citizens who are known to pick up and manage challenges as they come along.

The other dilemma is the poor preparation of citizens for devolution. Civic education provided in Part ten of the County Government Act, 2012 lagged behind transition. Contrary to Bridges (1991) position that transition should assist 'people to leave the old situation behind by treating the past with respect, helping compensate for losses, giving people plenty of the right information, marking the endings, and helping define what is over and what is not', county governments and the national government have not been able to do this. Many citizens remain ignorant of the dynamics of the transition. This is partly because the structures for participation and civic education programme, were not developed and operationalized respectively in time as provided in Section 91 and 100 of the County Governments Act, 2012.

3. Constitutional Transition

The Kenya transition was initiated by the promulgation of the Constitution in August 2010 which provides for a devolved system of governance, with two levels of government, national and county.. The Kenya transition is informed by a long struggle for constitutional change sealed through a referendum conducted in 2010. To roll out the transition, the previous centralized government constituted a Task Force with the mandate of recommending policy frameworks for implementation of devolved government as provided in the Constitution; and to make proposals on appropriate legislation to anchor and implement the devolved government among others. The Task Force drafted six pieces of legislation to inform the development of the devolved system of government, and also came up with a Transition Road Map, with three phases. Phase 1 which was prior to August 14th 2012 was a preparatory stage, while phase 2 which was day after elections in 2013 was dedicated to County establishment. The last phase,

which was post August 14th 2015, saw full assumption of functions by county governments. In the design, the handling of finances, human resources, office facilities, land and assets, liabilities, civic education, and other related issues including the development of integrated development plans were planned to occur during the three phases in a sequenced manner.

Overall the Task Force proposed that the transition be anchored in law through a Transition to County Government Bill, 2011, and a number of overarching issues and processes be kept in mind (box 1)

Box 1: Transition Overarching Issues

- *Human Resource*: how existing human resource in central government, including Provincial Administration, and Local Authorities will be rationalized and deployed and the management of the social, political, financial implications of the process;
- *Service Delivery*: how continuation of delivery of services at both the national and county governments will be guaranteed in the transition period;
- *National Stability and Security*: how national stability and security will be assured in the course of transition;
- *Assets and Liabilities*: how existing assets and liabilities will be apportioned and managed;
- *Policy and Facilitative Legislation Framework*: how requisite policies and facilitative legislation will be formulated in a timely basis to ensure compliance with the transition schedule set out by the Constitution;
- *Capacity Building Framework*: how capacities from the perspectives of human and physical infrastructure will be built to ensure that county governments take off smoothly;
- *Ongoing Reform Processes*: how the various ongoing reform processes at both the then central government and Local Government levels will be transited into the new dispensation; and
- *Communication*: how information accruing from and relating to the transition processes will be generated, owned, managed and disseminated

Source: GOK, 2011

Although the issues listed in Box 1 were anticipated, some of them continue to confront implementation of devolution process after seven years, with issues of human resource, transfer of functions such as transport being quite problematic. The Task Force had recommended that seconded officers who are not absorbed by the counties should be redeployed to the national government who should either absorb them or deal with them appropriately. Right from the first phase of Transition this issue was addressed politically, beginning by the former President Mwai Kibaki who declared during an International Workshop organized by the Task Force on Devolved Government that none of the officers would lose their jobs. While this was politically

correct, it was indeed the beginning of complication of how to handle the transition process including staff issues.

Beyond the Task Force work which was concluded in late 2011, the transition was legally framed by the Transition to Devolved Government Act, 2012. The Act established three inter-governmental bodies: National and County Government Coordinating Summit – the Summit, Inter-Governmental Relations Technical Coordination Committee (IGRTC) and the Council of County Governors (CoG). The Public Finance Management Act of 2012 also created the Inter-Governmental Budget and Economic Council (IBEC) as a forum for consultation and cooperation between the two levels of government on fiscal matters.

The Transition to the Devolved Government Act provided criteria for transfer of functions, which required the levels of government to have legislation relating to the function applied for; framework for service delivery to implement the function; identification and establishment of administrative units related to function; undertaking a capacity assessment in relation to function; arrangement for and extent of further decentralization of function and provision of related services by the county government; availability of required infrastructure and systems to deliver the function; having a financial management systems in place; an approved county government plan in relation to the function and any other aspects as may be prescribed after consultations between the authority, county governments and the CIC and the CRA (Transition Act, GOK, 2012).

While the legal provisions looks good, it did not consider the complex and political nature of a transition, which largely undermine the requirements of the Act. For example, the Act provides for establishment of inter-governmental sector forums on sector issues of common interest to the national and county governments. Although the forums were constituted, after lengthy delays, they are yet to be institutionalized and given adequate resources to be effective (IGRTC, 2018). The delay in establishing these important forums is partly due to the conflicting interests of the two levels of government, and the desire of national government to lead the process. These delays reveal the complexity and political nature of transition as noted by the World Bank prior to the beginning of transition to devolved system of government in March 2013, The World Bank publication (World Bank 2012: pp 200) viewed transition as complex and ambitious noting the following on managing a complex transition in Kenya:

Implementing devolution will involve simultaneous changes to both political and administrative arrangements, in a context where other key government institutions (like judiciary, Parliament and, oversight bodies) are also being reformed. An entirely new layer of elected and executive government is being created, that will assume major service delivery functions. With so much change occurring concurrently, complexity is inevitable.

The World Bank publication (2012) notes the unique situation of Kenya among many unitary African states. Kenya falls among few countries where the sub national government, the counties, can only be amended by a constitutional referendum. To the World Bank, this unique situation 'involves major changes in political culture, and also require a significant effort to build the capacity of a new generation of county leaders' (p 200). The counties began struggling to build a new political culture and leadership with many challenges, right at the beginning of the transition. This was not limited to counties, the national government also encountered the same challenges. This situation is perennially intensified by the poor inter-governmental relations, which continued years after initial implementation in 2013, as noted in the TA End Term Report (TA, 2016).

Oblivious of the complexity of the transition, both national and county governments supported the 'big bang' approach of transferring all functions at the beginning of the transition, contrary to the planned phased approach. The 'big bang' approach, viewed as a simple exercise turned up to be very problematic to counties, since majority of the counties did not have capacity to run all the functions being transferred, in particular the health function which very few former Local Authorities were running before the transition. Although the transfer of functions was expected to follow an administrative procedure as outlined in the Transition Act, under the leadership of the TA, the exercise became a political affair with two competitors, the national and the county governments. The TA which was expected to mediate this process watched helplessly as counties struggled to take functions which they were least prepared to undertake. The criteria developed by the TA, was not followed nor was capacity necessary for undertaking functions built as required by the Transition Act. This exposed a number of counties to capacity and integrity questions which continue to threaten the life of county governments and leadership to-date.

The experience of counties within the seven years is not unique when a country is transiting from a centralized state shrouded with ineffective governance systems, poor leadership and related loss of confidence in leadership by the public. Consequently, assessment of devolved system of government years of implementation is done with caution, concentrating more on the systems put in place to address the governance challenges which faced the former centralized system of governance, and how the systems adapt to the new Constitutional dispensation. In relation to this, it is positive that all the county governments were established putting the country on a transition rail of devolved system of governance. Secondly, systems for operationalising the devolved system of governance were developed, albeit differently across counties indicating some progress. However, what remained unknown is how the systems in place provide lessons for feeding into the entire process of national constitutional transition to devolved system of governance. The Kenya Constitution envisaged transition to devolved governance would take five years, and hence the establishment of institutions such as CIC and

TA. However, experience after seven years reveals that transitions take longer, and Kenya will continue facing some challenges related to transition.

Transition in respect to personnel has been particularly problematic. Previous deployment in government, especially in the Local Authorities had been messed up by bad governance shrouded in nepotism and 'god father' syndrome which recruited many people who were not competent to undertake technical tasks of service delivery. There were many personnel acting on job groups which they were not competent to perform and the expectation of devolved government analysts was that the transition would be used to purge the personnel system but this did not happen. This left the county governments with bloated staff, as the county governments went ahead to hire personnel in disregard of both the bloated and the seconded personnel. Unfortunately, this was done without undertaking capacity needs assessment as provided by the Transition to Devolved Government Act (TDGA), 2012.

In 2014 a Capacity Assessment and Rationalization of the Public Service (CARPS) Program was developed jointly between the national and county governments. The objectives of CARPS were:

- To determine what skills and competencies are needed to realize a quality, efficient and effective public service in line with the mandates and functions of county and national governments;
- To achieve rational and balanced distribution of human resource, especially of skilled, technical and professional personnel, across ministries and counties; and
- To review the structures and align them to the Constitution and specific institution mandates and core function.

A staff audit of the public service was carried out in both levels of government using biometric technology. In July 2016 an intergovernmental implementation framework was established comprising of a joint steering committee of the national and county governments and committees at both levels of government. However, rationalization and harmonization of the public service, at county and national level remains incomplete.

Service delivery embedded in transfer of functions has been a mixed pack since the transition began. While at the onset of the transition only about three county governments had experience with all the functions which were to be devolved, the 'big bang' approach which took place on 19th June, 2013 after elections was a shocker to many analysts. Although this was a political decision acceptable to both the national and county governments, it was problematic to efficient delivery of services. Some counties which had never provided technical services such as health and education were expected to immediately begin providing such services. This resulted in muddling through, especially in the area of health where tension is not only limited to the different levels of government, but is also present among health personnel who tend to prefer employment by the national government.

4. Transition Issues

There are many transition issues which require discussion. However, this sub section highlights five issues, namely: personnel. Transfer of assets, county transport, capacity building, policy and facilitative legislation.

4.1 Personnel

The transfer of the devolved functions was done without a clear roadmap on the issue of personnel, an action which caused ripples especially among the medical workers. Almost all doctors and nurses rejected working under county governments, largely out of fear that the county governments would not be able to pay their salaries. They argued that the county governments did not have appropriate structures. Furthermore, they contended that there was nepotism and tribalism and many medical personnel who did not belong to respective counties would be rejected. It took the intervention of the President and his Deputy to break the impasse with medical fraternity after the devolution of medical services. The President was categorical noting that ... 'the health function is devolved and the process is irreversible' and the medical officers had to negotiate and agree with county governments.

The impasse with the medical staff could have been avoided if the 'big bang' approach was not used, and if all embraced the theory of transition. It would have been prudent prior to the transfer of the health function to expose the medical staff to pertinent issues relating to employment terms including salaries, pension and other related benefits. This did not happen, and was made more complex by the assumption by the medical personnel that devolved governments had merely replaced former Local Authorities which were known for frequent insolvency and inability to pay personnel. Theoretically, this should not be the case, since county governments are autonomous with own budget to manage, as opposed to the defunct local authorities which fully relied on the former central government through the Minister for Local Government for financial resources. There was also apparent resistance from the national government to release some health functions including procurement of drugs and other medical supplies. Financing of health services remains a challenge with considerable resources being retained at the national level, which primarily deals with health policy and regulatory issues. Many counties are still struggling to manage health personnel with incessant strikes over remuneration and terms of service due to incomplete transition

4.2 Transfer of Assets

In conceptualizing devolution and related transition, the documentation of assets and liabilities ought to have taken place during the first phase of transition. However, this did not

occur and by January 2015, some of the assets were still to be documented. Both former centralized government and the Local Authorities had assets and liabilities at the local level which required realignment in line with functions assigned by the Constitution. Most of the former LAs were not responsible for health, part of education and transport which the Constitution assigns to the counties replacing LAs. These are sectors with assets and liabilities which if not well documented could either end up being lost or being abused.

During the first phase of transition there were signs of manipulation of assets, for example the national government attempted to make level five health facilities referral hospitals to be assigned to national government. This attempt was aimed at undermining the Constitutional provision which limits the national government health function to policy, standards and referral hospitals, while all other health functions are given to county governments. TA undertook an inventory of the assets but was unable to undertake audit of the assets largely due to funding and other capacity constraints (TA 2016). The Sessional Paper on Devolved acknowledges the 'inability to determine with acceptable degree the opening balance for both assets and liabilities to be inherited by counties; absence of verifiable inventories and records on assets and liabilities which made it difficult to audit county books of accounts' (GOK, 2016: 13). Thus, by 2016, it was not clear which level of government takes over the liabilities of the defunct local authorities.

The IGRTC assumed the residual functions of the TA but faced capacity challenges during its initial establishment and had to rely on consultants. The IGRTC was expected to take up some of the tasks which were previously done by the TA, including facilitating the two levels of government, the national and county governments, in inter-governmental relation issues. Consequently, the incomplete activities of TA, including audit of assets were handed over to IGRTC, but the issues remained unclear, as the IGRTC rolled out in a low key. The first Intergovernmental Relations Workshop noted that IGRTC lacked visibility and independence for effective performance. The workshop further recommended the need to revise the Intergovernmental Relations Act of 2012 to give the IGRTC operational autonomy necessary for an organ that handles both levels of government (IGRTC, 2018). The Sessional paper on devolved government (GOK, 2016) provides for regulations to give effect to Inter-Governmental Relations Act, 2012, but by end of 2020 the development of regulations was still in progress. Overall, the institutional deficits have undermined accountability and progress during transition, including audit of assets and exposed the assets to potential loss through theft, degradation and obsolescence as noted by the Sessional paper.

4.3 County Transport

County transport function has experienced struggles between the county governments and the national government. The Kenya Roads Bill, 2015 attempted to clarify this issue but it remains contested. The Act created the Kenya National Highways Authority and the Kenya National Secondary Roads Authority. The counties maintain that these authorities are unconstitutional and should stop operating in counties, or should be county agencies. Counties contend that the national government has taken over roads that belong to counties by re-classifying them. The Council of governors had gone to court (Petition 472 of 2014) over the release of the county roads to counties. The High Court directed the national government to release the roads.

Instead of releasing the functions, the government published a bill, the Kenya Roads Bill, 2015, which reclassifies the county roads as secondary roads and places them under a body that is controlled by the national government. The Council of Governors has opposed this legislation (Council of Governors, 2016). The actions of the national government point to resistance to fully devolve roads. The national government has argued that the counties lack the capacity to build high quality roads. While this may be true, the Constitution had provided for the national government to build the capacity of county governments to handle their functions and transfer all devolved functions within three years of the establishment of county governments.

The transition period ended in march, 2016. It is therefore unconstitutional to hold on to devolved functions. In any case the national government can offer support or assistance to county governments where necessary under the provisions of Art.189 of the Constitution. The two levels of government can also enter into an agreement for the national government to perform the functions on behalf of any county government but the national government has no constitutional authority to cling to county functions. Besides this challenge, some counties have limited technical capacity, lack appropriate legislation to implement the function, have difficulty in retaining staff due to hardship in some areas, and limited resources among others (CIC 2014). These are critical issues in any transition and should have been prioritized and managed for progress.

It also took long to transfer equipment held under the mechanical and transport fund (MTF). It was not until 13th March 2015 when the Transition Authority issued an Advisory Note indicating how the equipment should be shared between county and national government, at 20 per cent to national government and 80 per cent to county governments. Through the Advisory, Ministry of Transport and Infrastructure was requested to stop using the equipment, hand over the log books but to retain the mechanical yards. Retaining the mechanical yards by the national government raised questions but opportunity exists in the inter-governmental relations. The counties have an option of negotiating with the national government for use of the yards although it would have made more sense to have the yards as shared facility

operated by agencies which serve both levels of government. Overall, the late transfer of the most needed equipment justified some of the challenges counties' faced during the initial phase of transition when the general public had too much expectation. Most counties performed public works, with many purchasing what they ought not to have purchased, using the meager resources available. At the onset of transition, it was not clear what they were entitled to, since the Ministry of Roads and Infrastructure also operates at the county level and the audit which was supposed to have been done in phase 1 was not done.

4.4 Capacity Building

Capacity building as a function is assigned to national government under Article 186 (3) and the Fourth and sixth Schedules of the Constitution. This notwithstanding, capacity building is a complex exercise which requires the joint effort of the two levels of government, development partners and civil society actors. Counties require capacity building in the areas of technical infrastructure, financial, administration and human resource; resource mobilization; development of policies, law making, administrative procedures, framework for participation, county communication framework; and functionality of county assemblies among others. These tasks have been at different levels in various counties, and a number of actors are supporting counties in building capacity. Most of capacity building is however, concentrated on planning and budgeting, administration and human resource issues. The CIC (2014) publication notes the uncoordinated capacity building in counties without any monitoring and evaluation of what is being done by different actors. Although the CIC publication notes that 'counties have fallen victims to sub-standard trainings with poor coordination, duplication, poor feedback, and without any monitoring and evaluation, the publication does not discuss the type and content of capacity building being undertaken. Efficient capacity building should be based on needs assessment of personnel skills in line with required tasks and responsibilities.

The Kenya School of Government has provided capacity to both levels of government, but most of it is done in the form of centralized training which only benefits selected personnel. The school has regional outposts, but counties are yet to effectively identify capacity gaps to be addressed by the school in their outposts or in-house in counties. The latter form of capacity building is largely not preferred by the counties, as demonstrated by the venues selected by county governments for capacity building events. Many counties prefer to travel out of their counties even in cases where they have training facilities within counties. This is largely motivated by the benefits accruing from holding such trainings out of station. It is one aspect which will need to be re-examined if counties are to maximize on resources by reducing the cost of transport, accommodation, travel time and per diem. The State Department of Devolution has developed a National Capacity Building Framework (NCBF) to facilitate the coordination of capacity building efforts in the counties. However, the capacity building efforts are inadequate relative to the felt needs of the counties.

4.5 Policy and Facilitative Legislation

Policy and facilitative legislative frame progressed during transition, all albeit slowly. Although most counties complained about the delays in publishing bills by the Government Press, and called for establishment of county press, they also faced challenges of capacity, delay in establishment of required structures, and disagreement between different levels of government on various issues, including hiring of personnel (CIC 2014). These disagreements have been both intra and inter-governmental, and cut across various institutions of county and national governments. In some cases, tension exist between the governor and deputy governor, governor and members of the County Executive Committees, governor and the county assemblies, and also among the county assembly members. Most of these tensions are triggered by political interests and alliances, convoluted by political parties who have an interest in the political dynamics at the local level. The tensions delayed formulation of policy and related legislative work with some counties such as Makueni totally coming to a halt during the first phase of devolution.

Overall, both national and county governments seem to be sticklers on what is provided in the Constitution, in particular in respect to functions. While there is some logic in strictly sticking to Constitution which provides for transfer of functions and powers between levels of government, both levels of government seem to be blind to Article 187 of the Constitution. The provision allows a function or power of government at one level to be transferred to a government at the other level by agreement. This is done when assessment indicates that the function or power would be more effectively performed or exercised by the receiving government. In cases where such an agreement is reached, resources necessary for the performance of the function or exercise of the power are transferred, and constitutional responsibility for the performance of the function or exercise of power shall remain with the government to which it is assigned by the Fourth schedule of the Constitution (Article 187 (2)). The debates and tension which have surrounded transfer of functions since the beginning of transition seem not to take this important provision of the Constitution into consideration. Furthermore, counties and the national government have not fully exploited Article 189 of the Constitution which provides for cooperation between national and county governments.

5. Managing Transition Goals, Gains And Moving Forward

The Constitutional transition in Kenya is complex and requires efficient management of goals, and gains for success. It is a political process which cannot be understood using a linear legal lens, as done by politicians and practitioners. A number of analysts including the public have largely been impatient with the progress of transition, and are more concerned about outcome and not processes being put in place towards realizing set goals. The CIC with the mandate of monitoring the implementation of the system of devolved governance was an exception in this

case. In the CIC assessment of the implementation of the system of devolved government, the CIC uses very useful concepts, 'from steps to strides', focusing on establishing the progress that the county governments have made in operationalising the structures and systems required to deliver services (CIC, 2014).

The concept of 'from steps to strides' enables understanding of the incomplete process of devolution including the establishment of county governments. The further decentralization provided in the Constitution and the County Government Act took long to realise. In particular, the urban areas and cities and village levels of government were largely not constituted during the first phase of devolution. The urban areas and cities had a legal hitch relating to classification of areas. Some counties went ahead to constitute these areas and deploy staff before the classification required by law. This prompted the Transition Authority to issue an Advisory halting the county governments from constituting municipalities and towns and deploying staff. This implies that at the onset of devolution only the three cities, Nairobi, Mombasa and Kisumu had urban authorities, leaving the rest with no management structures. This has retarded the development of urban areas and cities which are not only the engines for development in counties, but are also important in spatial development of counties and Kenya as whole.

While the counties have managed to put in place county assemblies and county executive committees, the life blood of counties, the technical arm (bureaucracy) mandated to implement policies and ensure efficient operation of counties took long to be harmonized. This affected operation of various sectors of development in the counties. Working structures at the county level require human resources with capabilities and right skill sets. However, this did not move well due to the challenge of the wobbled nature of human resource management in the county governments. A number of counties had bloated and seconded personnel whose skill sets did not resonate with the functions and required skills, albeit the national government insisted that the county governments should absorb such personnel. Besides this cadre, there were also personnel on secondment, who had the required skills but preferred to work for national government and were therefore not motivated to work for the counties.

The challenges on human resources pushed the Transition Authority to issue an Advisory on Human Resource Management under legal Notice No. 116 of 2013. In the Advisory, the TA pointed out that the seconded staff, are answerable to county governments and principal secretaries were required to have staff hand over duties and Public Service Commission was to work out modalities of secondment. The TA further advised that all the defunct Local Authority personnel were automatically transferred to county governments and all officers performing transferred functions would move with functions and become county staff. County Assembly and County Executive were both to draw staff from the same pool and share amicably to facilitate service delivery. While this advisory was given, the files and related documentation

of the personnel had not been transferred to the county governments by April 2015, two years after establishment of county governments.

The TA Advisory on Human Resource Management seemed blind to the importance of matching skills and functions, and seems to have put the counties on a wrong footing.

The issue of how to handle personnel was on table from the time the Task Force on Devolved Government was constituted. According to the Task Force Report, the staff not absorbed by county governments, were to be deployed to national government, and the government had to make contingency plans to absorb such staff or deal with them appropriately (Task Force Report, 2011: 316). This did not happen and the national government and TA left the issue pending with mixed signals. This is illustrated in the Sessional Paper on Devolved Governments of 2016 (GOK, 2016), which identified the issue of rationalization and harmonisation of the public service in both levels as one of the outstanding policy matters to be addressed for effective devolution. The policy recognizes the need to establish norms and standards for effective management and development of county public service. Unfortunately, the delay in the development of the policy seriously undermined the management and development of the county public service.

The guidelines to county governments indicated that the officers seconded would remain seconded and continue with the terms and conditions of service they held before secondment including remuneration, allowances and pension or other benefits which would not be altered to the officers' disadvantage' (GOK, 2014). Human resource management is a critical aspect of transition and unless well managed can undermine the performance of county governments. The Sessional paper ought to provide direction on how the defunct Local Authority personnel should be handled by the counties. The history of deployment in defunct Local Authorities was not good and many authorities had over-employed staff based on nepotism and the transition was expected to clean the system including the many ghost workers that existed prior to transition. As the counties went through the transition there were also allegations that employment in many counties, was not based on competence while in some cases the counties had deployed staff without due process. These are issues which need evaluation and monitoring and effective intervention if counties are to remain on the right path.

While there are many aspects of the transition, having the right human resource, setting up systems, developing relevant policies and legislation and building capacity at all levels are overarching tasks. These tasks inform efficient delivery of services which is the main objective of a devolved system of governance. These tasks were expected to be challenging to county governments during the initial phases of transition, and hence the establishment of the Transition Authority with a mandate of managing the transition. It is important to note that the Transition Authority had its challenges, which began with the political big bang approach taken

by the county and national governments in respect to transfer of functions. The functions were transferred to counties prematurely and many counties are still juggling with managing the functions. A number of counties could not effectively manage functions such as health and had to ask for support from the national government, while others continue to struggle to provide services.

As the institutions and leaders put in place to manage transition progress, they have to also manage politics embedded in the transition, not only at the county level but also at the national level. This complexity has seen struggle between the county governments and the national government, especially in respect to resource transfer. The county governments persistently claim that the percentage transferred to them is not adequate to fulfill their mandate, while the national government insists that the counties have received their entitlement and should concentrate on delivery of services. These contestations have led to confrontations between the two levels of government.

At one point during the initial phase of transition, county governments threatened to amend the Constitution through a popular initiative dubbed '*Pesa Mashinani*' but the momentum was lost, although tensions continued. Intergovernmental negotiations through the IEBC partly eased the tensions on this issue. Ideally the cost of delivering the functions should be objectively assessed to allow for equity between the two levels of government but this has not happened. Historical costs are applied and with incomplete unbundling of functions, the claims of underfunding of county functions are likely to persist. Funding of the counties is also undermined by the blotted human resource issue and delayed transfer of assets.

6. Concluding Remarks

There are a number of issues which have to be addressed if the counties are to remain on track. Foremost the issue of human resource has to be addressed through a national policy negotiated by both levels of government. The county governments have not been quite active in following and negotiating the review of the various national policies and legislation which touch on operations of county governments. This task has largely been taken by the Senate, but considering occasional tensions which exist between senate and counties, there is need for counties to effectively participate in order to directly identify provisions which might undermine devolved governments.

Secondly, the Intergovernmental Relations Technical Committee which took too long to establish should be fully operational to enable smooth interaction between county governments and national government; and between counties. This committee has to take over some of the activities, including supporting classification of urban areas and cities following the end of the term of the Transition Authority. Since the Committee is charged with coordinating the Summit and the Council of Governors as well as implementing their decisions, it should provide support to some of the counties facing challenges.

The counties seem to have no platform for discussing and resolving internal and largely political issues which face them on a daily basis.

Thirdly, moving the counties forward will require development of strategies for mobilizing resources for development. The Constitutional option which the counties have concentrated on is only one option. Resources have to be internally mobilized beginning with listing of potential revenue generating resources followed by efficient revenue collection.

This should be coupled with attraction of local, regional and global investors by ensuring that there is adequate infrastructure and services.

Managing transition to the system of devolved government is not an ordinary system management issue. It is a process which brings policy, polity and politics together and requires learning by doing and changing gear when necessary. Unfortunately, the design of the Kenya Constitution, related policies and laws and the many on-going new public management reforms do not effectively allow learning by doing. Most of the systems in place assume that the individuals operating the system are dishonest and lack integrity, and have to be checked. Whereas this approach addresses a vice which Kenya has been exposed to for many decades, it is disabling to a transition process which calls for flexibility and understanding.

As stated in the theoretical sub section, a transition process requires reflexive governance which gives prominence to participation, experimentation and collective learning. The Kenya transition process gives lip service prominence to participation but hardly allows experimentation and collective learning. The counties are expected to implement plans as designed and agreed upon and any deviation is first and foremost viewed as corrupt and symbolic of bad governance. This was glaring during the first phase of the transition when a number of county government leaders attempted to be innovative and almost lost their jobs. A case in point was when some MCAs established ward offices to assist in the implementation of designated projects. The MCAs were merely filling a missing gap, the local level structures such as the Sub County and Ward offices had not been established but millions of shillings had been disbursed to the wards for development.

The MCA example reveals the negative effect of not having a reflexive and sequenced approach to a transition. If the planned activities for phase one had been efficiently undertaken the muddle of policy makers doubling up as implementers at the ward level would not arise. The same case applies to the 'big bang' approach which was used for transferring functions. Most counties had not put the required systems in place and were therefore not ready to deliver the functions, and yet the two levels of government were unable to exploit Article 187 and 189 of the Constitution. This resulted in taking a political option which remains detrimental to smooth transition to devolved system of governance.

Besides the challenges which the counties have faced there are gains made towards achieving goals. In particular, citizens are beginning to see a difference in service delivery which is the main goal of devolution. The health service which was the most problematic seems to be highly scored by citizens (Afrobarometer, 2015). However, moving forward requires stopping business as usual and being innovative within policy and legal framework. To do this, counties must have relevant policies, legislations and administrative procedures as well as effective monitoring and evaluation framework in place. Data generated must be analysed and used for reflection, collective learning and improving performance. Secondly, the issue of personnel should be resolved through IGRTC and the Summit which bring together the President and the 47 county governors. Lastly, devolved system of governance through monitoring and evaluation has to come up with instruments of identifying and differentiating between visionary and innovative leaders and leaders abusing office and undermining devolution.

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CHAPTER 5

THE POLITICAL ECONOMY OF DEVOLUTION AND SERVICE DELIVERY IN KENYA

Karuti Kanyinga and George Michuki

Introduction

Devolution is one reform measure that continues to attract significant interest in many countries because of its implications for governance and development. Defined as the transfer of decision-making power, authority, and resources to quasi-autonomous sub-national legal units (Manor, 1999; Cheema and Rondinelli, 2007: 12-13; Oyugi, 2011), devolution often involves comprehensive restructuring of the state and the institutional context of carrying out governance and development. The potential impact of devolution raises debates on the role of centralised planning in development especially in Africa where the state has not registered adequate success in fostering social change especially in a centralized state structure.

In this debate, it is argued that devolution and other forms of decentralisation bring government and services closer to people; provide space for citizens' participation in decision making; and enable people to have their own representatives address local problems and development challenges. Support for devolution stems from the need to deliver basic services in an equitable and effective manner because the centralised state has not fully succeeded in providing equitable development. Indeed, in Africa, few states can take credit for fostering adequate democratic and development reforms. The centralised state has generally constrained participatory governance and development. The demands for devolution and other forms of decentralisation therefore arise from the need to find effective ways of fostering inclusive development alongside democratic reforms. Devolution is seen as one way of opening the political process to participation by citizens with a view to empowering them to pursue their aspirations (Cheema and Rondinelli, 2007).

Kenya introduced a devolved system of government following the promulgation of the Constitution of Kenya 2010 on 27th October of that year. The constitution creates two levels of government, national and county, and creates 47 county governments and one national government. The devolved governments have political powers and responsibilities over constitutionally determined service delivery functions.

These include delivery of services such as health, agriculture, water, and pre-primary education.⁹⁸ The county governments have elected leaders comprising the County executive (elected governor and appointed executive committee members) and the county legislature (County Assembly comprising of elected officials). The counties receive unconditional grants as a share of equitable revenue to support implementation of devolved functions. They are also entitled to conditional grants an Equalization Fund. Counties can also raise own revenue.

This is not the first time Kenya is introducing a devolved system of government. At independence in 1963, Kenya had a semi-federal system but the central government dismantled the system and attendant institutions a few years into independence. From then on, the country experimented with other forms of decentralisation without success. Centralised planning became the basis for national development. Implementation of policy choices resulted in imbalances in regional development. Disparities in basic services across the regions continued to widen and to deepen inequalities (Society for International Development - SID, 2006). These disparities in development also became the basis for disparities in levels of poverty across the country. They also became the basis of grievances against the centralised state. Conflicts would arise often at election time as different groups competed to gain access and control over the state and its resources. The constitution of Kenya 2010 and specifically the devolved system of government is designed to address some of these inequities and provide resources for local level development by county governments.

Is implementation living to this expectation? Are the county governments delivering in line with the objects of devolution? This chapter discusses Kenya's experience with devolution. The discussion focuses on how the devolved system of government is filling gaps in service delivery and whether this potentially addresses grievances over national development. The chapter also discusses the "winners and losers" in Kenya's devolution, their motivations, and what this implies for sustainability of the devolved system of government.

The chapter is divided into several parts. Following this introduction is section two that contains a brief discussion of the concept devolution and its implications for development. Section three discusses Kenya's past efforts in implementing decentralisation and devolution. Section four introduces devolution under the Constitution of Kenya 2010. Section five discusses the experience with devolution and pays particular attention to "where the county governments are putting their money". The conclusion identifies the key trends in devolution as well as the winner and losers and the implications of this for addressing grievances over development.

The Politics of Devolution and Development: An Overview

Discussions on the concept of devolution are incomplete without examining the conceptual meaning of decentralisation and the various forms decentralization takes in different contexts.

⁹⁸ Fourth Schedule of the Constitution.

Defined as the transfer of authority and responsibility for public functions from the central government to subordinate units, decentralisation comprises several dimensions (Rondinelli et al, 1983; Cheema and Rondinelli, 2007; Crook and Manor, 1998; Olowu, 1987). These include political; fiscal; and administrative dimensions.⁹⁹ Each of these dimensions has different characteristics and policy implications. Decentralisation also is one reform measures that many countries in the world have experimented with as they seek solutions to development and social change (Ndegwa, 2002).

Decentralisation takes different forms, which can appear in combination or in individual form within a country and even within a development sector. The main forms include delegation, de-concentration, and devolution. The form a country adopts is often determined by the context, political history and economic considerations. The various forms of decentralisation are distinguished by “what is transferred” and the power vested in the subnational units away from the central government. The form of decentralisation adapted in any country is governed by political and institutional dynamics and economic considerations. Decentralisation is thus not just a mere set of policies but an important political process.

De-concentration concerns handing over of some administrative responsibilities to the lower level units within the central government. It involves simple redistribution of decision making authority and management responsibilities. Responsibilities are shifted from officials in central government and the capital city to the officials working in field offices. The field level officers are however answerable to the centre. On the other hand, delegation is a relatively more extensive form of decentralisation than de-concentration. It encompasses transfer of decision-making responsibilities and administration of public functions from the centre to semi-autonomous agencies. These agencies are outside the regular bureaucratic structures of the central government. However, they are ultimately answerable to agencies within the central government.

These two forms of decentralisation are limited in terms of how much power they provide for decision making by the sub-national units. They are sponsored by the central government and therefore depend on the good will and commitment of the central government to function effectively. This commitment or goodwill of the centre varies on the basis of the motives that drove the government to decentralise in the first place. The central government will commit itself depending on the incentives that inspired it to adopt this form of decentralisation. In view of the fact that incentives and motivations continue changing on the basis of complex social-political and economic realities, these two forms of decentralisation tend to become

99 Definitions of different types and forms of decentralization vary. The same terms are used sometimes in an inconsistent manner. This paper argues that political, fiscal and administrative are broad categories in which are found actual forms of decentralization: devolution, de-concentration and devolution

an unending experiment. They are not a quick fix for development problems and therefore countries continue experimenting with different forms or combinations of these forms of decentralization.

Devolution is the most comprehensive form of decentralisation. It involves transfer of authority for decision-making, resources and management to semi-autonomous units that are governed by their own elected officials. These semi-autonomous units are distinct from those under other forms of decentralisation. The devolved units have their elected officials and are constitutionally recognised territorial units. They also have powers to raise and use their own revenue in addition to receiving grants from the central government (Mutahaba, 1996; Manor, 1999; Oyugi, 2005). Devolution, by its own nature, promotes self-governance and involvement of citizens in public affairs of the devolved units.¹⁰⁰

Eaton et al, (2010) note that the motivations for any form of decentralisation vary from one context to another. Some countries pursue devolution in response to urgent political and economic crisis. In some instances, challenging post-conflict situation inspires governments to introduce decentralisation as a means to gaining legitimate presence across the territory. Uganda introduced decentralisation reforms in the early 1990s following a decade of conflicts. The decentralisation efforts in Uganda comprised 'Local Councils' with elected officials from the village as the lowest political administrative unit to the district level. This structure enabled the state to reach the base of the society. In yet other situations, decentralisation is introduced as a mark of transition from authoritarian regimes to democratic rules. South Africa's post-apartheid constitution introduced a decentralised framework with a strong political dimension to show a radical departure from the past (Kauzya, 2007).

The motive and incentives shaping devolution or any other form of decentralisation determines the pace of its implementation as well as the sustainability of the reform initiative. A country in political and economic crisis may introduce devolution quite early but run into serious challenges much later if the motivation was not genuinely rooted in the need to address the fundamental cause of the problem. Others may introduce decentralisation without any strong motivation. Such efforts will stall mid-way because they may lack players with strong incentives to carry them forward. The form of decentralisation adopted is usually dependent on the political power and resource base of the regime in power. Barkan and Chege (1989) specifically point out that the degree and type of decentralisation appropriate for a regime varies with its resource base. On the basis of Africa's experience from the early 1960s, they note that a regime whose ethno-regional base of support comprises rich areas and numerically large groups has no incentive to decentralise and to adopt devolution. Their own groups would oppose this because they would view devolution as a measure of directing resources away from those who have to those who do not have. On the other hand, regimes with bases of power among

100 For a detail discussion of decentralization see chapter three of this volume

poorly endowed communities will encourage de-concentration and even devolution in order to improve their communities. They would prefer devolution because it would enable the national government to equitably share development resources among the various regions.

In the final analysis whether or not to adopt devolution is a political choice. It is political because it involves reconfiguration of power and institutions. And because it involves transfer of resources from the central government to the devolved units, it sets in motion different political struggles between various institutions and within the government bureaucracy itself. The struggles also spill over to affect relations between the central government and the devolved units. In these political struggles, the relative strength of the players involved and their interests determine outcomes. The players who are able to bring together a coalition of interests take a lead in influencing how implementation will take place and even how far the implementation can go. Political elites¹⁰¹, therefore, are principal actors in these struggles. Their motivation for devolution is largely electoral and partisan. They support devolution if they view it as broadening their support base and their political power. They oppose devolution if it threatens their bases of support or if they view it as motivated by a need to take resources from their regions to develop other areas.

In these struggles over devolution, political elites and even bureaucrats do not act as a monolithic entity. Even the central government itself does not operate as a single entity. Within the central government bureaucracy, there are different actors with different interests and conflicting incentives. Their ability to shape government policies also varies considerably. The various incentives among the different players mean that there are instances where there is lack of correspondence between official objectives of devolution or even decentralisation and the interests of other actors and notably the political actors. This often complicates implementation and contributes to the failure to meet objectives of decentralisation. The section that follows discusses these dynamics by paying attention to the history of decentralisation in Kenya. This is done in order to find out whether Kenya is lucky with or ready for devolution this time round.

Past Forms of Decentralisation in Kenya

Decentralisation and devolution in Kenya are not new. The colonial administration introduced the first attempts to decentralise in 1924 when the administration established the Local Native Councils to help the colonial state stamp its authority in the native areas. These Councils are the precursors of the Local Government units / authorities established immediately after independence (Oyugi: 2005). The Local Government structure played an important role in the delivery of basic services in rural and urban Kenya. The structure remained in place until as recently as 2010 when the Constitution of Kenya 2010 was promulgated (Oyugi: 2012).

101 Players with influence in the process. The concept includes individual actors with organizational capacity to cause trouble in implementation of a reform or even to enable the reform proceed in line with their interests

At independence, the government adapted a devolved system of government in the form of seven federal regions or Majimbo. The regions had powers to make decisions on development and to manage public affairs including land matters in their regions. The actual design and the nature of powers transferred to the regions were informed by politics at the time. Numerically smaller ethnic communities feared political domination by the numerically large ethnic groups. The smaller ethnic groups formed the Kenya African Democratic Union (KADU) that agitated for their rights and protection from the large ethnic groups. On the other hand, some of the numerically larger ethnic groups formed the Kenya African National Union (KANU) and preferred a unitary form of government. On the eve of independence the two parties reached a compromise and agreed on a federal form of government. KANU won the election but soon reneged on the principles of regional government. The KANU led government dismantled Majimbo alongside other institutions meant to support devolution. The central government maintained control of development planning and implementation (Ghai and MacAuslan, 1970). Later in the 1960s the government experimented with administrative districts as the centres of planning and development. These efforts failed and the government abandoned them in the early 1970s. The government then introduced a more comprehensive form of decentralisation in the early 1980s. The District Focus for Rural Development (DFRD) strategy was introduced to enable citizens make decisions on local development. Planning and budgeting moved to the districts (Barkan and Chege, 1989; Oloo, 2009; Ngethe and Kanyinga, 1998). The central government continued to exert enormous control over what happened at the districts and below. The strategy operated alongside the Local Government authorities and therefore leading to instances of duplication of efforts and wastage of resources.

These decentralization efforts notwithstanding, the central government continued to dominate development planning and implementation and resulted in widening inequalities in regional development. This in turn spawned grievances against the central government. Some communities viewed the state as biased in distributing resources in favour of the regions where the President came from. Through the DFRD strategy, President Daniel Arap Moi's region, the Rift Valley, appeared to benefit most from allocation of resources than other regions (Barkan and Chege, 1989; Ngethe and Kanyinga 1998). The biases witnessed in the previous efforts beleaguered this strategy and occasioned more disillusionment with delivery of development under the central government. Political patronage played an important role in the failure of these past efforts. Firstly, the government at independence preferred a centralised and strong executive. Regional units were viewed as undermining the nation state and the unity project. In particular, President Jomo Kenyatta and elites from his region, Central Kenya, were not comfortable with Majimbo.

They did not want the regions to enjoy enormous powers because this would dilute the powers of the central government. They wanted to have absolute control over the territory. Secondly, both President Jomo Kenyatta and his successor President Daniel Arap Moi used public resources to weave patron client relations through which they exacted their control over the

society. The provision of public goods was initially the main motivation for decentralization but the government and political elites around the president would use decentralisation to benefit their own areas and to disadvantage those that they viewed as opponents.

Thirdly, political competition meant increased attention to ethnic considerations in the distribution of public resources. Political competition took ethno-regional lines with political alliance building and fragmenting along ethnic lines. The government would use public resources to create and maintain loyalty and build strong political constituencies in general. Decentralisation provided an opportunity for the government to skew distribution of resources to loyal constituencies and to punish those opposed to or perceived to be opposed to the government.

Fourthly, economic and political conditions did not remain the same from independence. President Jomo Kenyatta favoured a unitary system of government and a laissez faire economy. He established a strong foundation for state-led development. Agriculture remained the mainstay of the economy with principal cash crops tea and coffee becoming the largest source of foreign exchange. President Daniel Arap Moi assumed office in the late 1978s and re-introduced a variant form of Majimbo, the District Focus for Rural Development Strategy already referred to above. He radically shifted the economic bases of revenue from exports of tea and coffee to cereal crops, maize and wheat (Lofchie, 1989).

While this was meant to improve food security, it negatively impacted on export crops and the economy itself. Economic growth slugged and state capacity for development considerably declined. But even without declining revenue base, political considerations and ethnic based politics remained central in determining allocation of development resources. The District Focus for Rural Development Strategy facilitated disbursement of development resources to the areas that supported the government. Distribution of resources using political considerations heightened regional inequalities in development. This also meant ethnic inequalities because regional boundaries are largely coterminous with ethnic settlement patterns. The disparities were evident in the distribution of basic services and general infrastructure for development. For instance, in 1970 primary school enrolment in central Kenya was 25%, higher than any other region. Enrolment in the Rift Valley was at 14 per cent. But following the coming to power of President Moi, the government embarked on construction of schools in many parts of the Rift Valley. By 2001, primary school enrolment in Rift Valley was at 26% while central Kenya was at 13.3 per cent. Other regions of the country did not experience these dramatic changes, which are attributable to the changes in region's political influence during the period, from Central Kenya to the Rift Valley. These inequalities reflected in other areas too. The Kenya Integrated Household Budget Survey, 2005-06, showed that 94 per cent of adult women in Northern Kenya had no education. About 94 per cent of women in Central Kenya had been to school; they had formal education. The data also shows that less than 35 per cent of residents

in Northern Kenya had access to clean water. Over 65 per cent in Central and parts of Eastern had access to clean water. Poverty is also widespread in these areas.¹⁰² There were variations in distribution of physical facilities and health services in particular. Table 1 shows the distribution of population per doctor in selected counties at the onset of devolution in 2013.

Table 1: Distribution of population per doctor in selected counties at introduction of devolved governance in 2013

County	Population per doctor	Estimated number of doctors	Minimum required number of doctors
Kisii	378,000	4	119
Marsabit	321,000	1	26
Baringo	278,000	2	56
Mandera	256,000	4	97
Turkana	285,000	3	83
Trans Nzoia	273,000	3	76
Uasin Gishu	4,000	224	86
Nyeri	5,000	139	67
Mombasa	7,000	134	89
Kericho	15,000	51	58
Kiambu	15,000	108	159
Embu	13,000	40	54
Bungoma	45,000	36	128
Busia	31,000	16	70
Homa Bay	44,000	22	92
Kisumu	15,000	65	92
Siaya	44,000	19	82
Taita Taveta	71,000	4	26
Tana River	48,000	5	26
Kwale	46,000	14	63
Isiolo	143,000	1	11
Meru	38,000	36	126
Nairobi	23,000	136	123

Source: Extracted from KIPPRA (2014), *Kenya Economic Report, 2013: Creating an Enabling Environment for Stimulating Investment for Sustainable and Competitive Counties*, p. 220¹⁰³

¹⁰² See SID, poverty profiles; for details on horizontal inequalities see Muhula, R. 2013. *Horizontal inequalities in Kenya*.

¹⁰³ This website also contains up to date information <http://www.ehealth.or.ke/facilities/>

A new government came to power after the defeat of President Moi's political party, KANU, in the December 2002 general elections.¹⁰⁴ The new government of President Mwai Kibaki under the National Rainbow Coalition (NARC) did not immediately address the challenge of regional inequalities. The new government embarked on policies to improve the economy and governance but did not address grievances of inequities in distribution of resources. These grievances continued to shape political behaviour as well as discussions on devolution. The government also continued with the constitutional review process which President Moi's government had suspended mid-stream before the 2002 general election.

The existing inequalities and forms of marginalisation of certain groups catapulted the devolution debate to the centre. These issues gave devolution an unprecedented attention relative to other issues at the centre of the debate on the review of the Constitution. The focus was now on sharing of power and resources between the central government and various regions in order to address imbalances in development. Ethnic interests, however, undermined efforts to introduce devolution. On the one hand, groups allied to the President's party argued against devolution. They observed that devolution would lead to dividing the country along ethnic blocs with potential of fragmenting the country. Those in support of devolution (mainly opposition parties) insisted that devolution would provide opportunities for equitable development. Past forms of marginalisation and discrimination in distribution of public resources would be addressed.¹⁰⁵ There were disagreements also over the number of devolved units as well as the levels of government. Some preferred two levels of government while others preferred a three-tier government. The proposal on the number of regions or devolved units under devolution varied among the parties.

This debate polarised the country along ethnic lines. The divisions widened with the defeat of the government-led referendum on the proposed new Constitution in 2005. The ethno-political divisions deepened further at the time of conducting the 2007 general election during which a dispute between the opposition (Orange Democratic Movement – ODM) and the government/the President's party (Party of National Unity – PNU) over the presidential election result caused violence that split the country along ethnic lines. International mediation, under the leadership of Koffi Anan former UN Secretary General ended the violence. The two parties agreed to form a Coalition Government charged with the responsibility of steering a broad array of changes, including constitutional and institutional reforms.

The Grand Coalition Government formed in April 2008 and the international mediation team acknowledged that perceptions of marginalisation, real or imagined, had contributed to Kenya's cycles of violence at election time as various groups competed to gain control of state power. They underlined the need to address imbalances in regional development to prevent recurrence of violence at election times. Devolved system of government thus was

[downloads.aspx](#)

104 Details on this transition are covered in Oyugi, et al (2003). The politics of transition in Kenya: from KANU to NARC. Nairobi: Heinrich Boll Foundation.

105 Constitution of Kenya Review Commission (CKRC)

embedded in the new architecture of the government to respond to the challenges of the past and present opportunity for inclusive development. Will devolution under the Constitution of Kenya 2010 suffer the same fate as the previous initiatives? How is devolution evolving to address grievances over imbalances in development? This is the subject to which we now turn.

Devolution in the Constitution of Kenya 2010

The motivation for the current devolution centred on the need to address past grievances of marginalization and exclusion in development. The groups that traditionally supported devolution included mainly those in marginal areas of the Coast, western, Nyanza and the Rift Valley parts of the country. Those who were opposed to devolution include the groups around Central Kenya. They were worried that devolution would lead to ethnic balkanization or even eviction of members of their communities who are settled in different parts of the country. What then motivated the two opposing groups to agree to devolution? Firstly, the constitutional provision that secured a guaranteed transfer of resources to counties assuaged the fears of those who opposed devolution. This galvanised the support of devolution by both groups. Secondly, those who thought resource rich areas would shoulder the burden of devolution got satisfied with a two-tier government structure; it was not seen as a financial burden. Moreover, the 47 counties were not seen as autonomous federal units. Their co-ethnics would live in any of these counties without fear of eviction because the country remains intact.

The Constitution requires the two levels of government to operate on the principle of consultation and cooperation: a 'cooperative government' in which the two levels of government are distinct and interdependent. The county governments are not subordinate to the national government. They are also not autonomous of the national government; they are not founded on the principle of absolute autonomy.¹⁰⁶ The principle of cooperation and interdependence requires the two levels of government to regularly consult, negotiate, and even compromise in order to move devolution forward as a cohesive whole.¹⁰⁷ The details of Kenya's model of devolution is adequately discussed in Chapter Two of this volume.

The Fourth Schedule of the Constitution assigns functions to the two levels of government. The functions are categorised as exclusive, the functions belonging to a particular level of government; concurrent functions, those shared between the two levels; and residual functions, those that are not identified with either level of government. The national government has the responsibility to undertake the residual functions; and responsibility for making policies to support implementation of the devolved functions. The key functions that are the exclusive responsibility of the county governments include health, agriculture, pre-primary education, county roads, and water, among others. These provisions on devolution address the challenge

106 For details on Kenya's devolution see Bosire, Conrad, 2013; Mutakha Kangu (2011) and Wanyande, Peter (2015a; 2015b); Nyanjom, 2011.

107 Technical report on Devolution

of governance and grievances of development and marginalisation. Article 174 on the object of devolution demonstrates this persuasively. The Constitution provides for devolution to promote democratic and accountable exercise of power; promote social and economic development and provide proximate, easily accessible services throughout Kenya; and ensure equitable sharing of national and local resources.¹⁰⁸ Further, the constitution provides for fast provision of services in the marginalised areas. Article 10 also identifies sharing and devolution of power as some of the key national values and principles of governance.¹⁰⁹

In addressing these issues and the challenges of the past, the Constitution secures devolution in three main ways. One, it provides for unconditional grants to the county governments. This grant financially secures the county governments. This financial independence cures the problems of the past by ensuring that all county governments have access to development resources. The grant also helps to prevent bias against any region on political considerations. National revenue is equitably shared between the national and county governments and also among the 47 county governments. Article 202 of the Constitution specifically requires that “revenue raised nationally shall be shared equitably among the national and county governments”. Article 203 further secures the county governments by embedding the minimum amount of funds that the county governments can receive through equitable share. It spells out that every financial year; the national government shall allocate not less than 15 per cent of the equitable share of the revenue collected nationally to the county governments.¹¹⁰ This insulates the county governments from financial starvation that the Majimbo governments experienced in the 1960s. It also insulates them from possible manipulation by those keen to maintain centralized development planning and budgeting. Secondly, the Constitution secures devolution by providing for enhanced development and fast development in areas hitherto marginalised. It provides for counties in marginalised areas to receive “Equalization Fund” which is equal to 0.5 per cent of national revenue. This is meant for use in assisting previously marginalized areas to catch up with development and compare with the rest of the regions. A total of 14 county governments have been identified to benefit from this Fund. They include those in poor areas of the country where more than 60% of the people live below the poverty line. They include Mandera, Turkana, and Samburu and Wajir in Northern Kenya; and Kilifi, Kwale and Lamu at the Coast.

The third insurance is built in provisions that require the county governments to receive conditional grants. These are for specific purposes including undertaking functions on behalf of the national government. Such grants ensure that counties provide certain services that are important for the achievement of service provision objectives.¹¹¹ Development partners

108 *The Constitution of Kenya, 2010, Art. 174*

109 *The Constitution of Kenya, Art.10*

110 *The Constitution of Kenya 2010. Art. 203 (2)*

111 *Examples of conditional grants thus far include grants by the Ministry of Health to counties*

have also been giving conditional grants for certain activities by the county governments.¹¹² Studies from elsewhere show that conditional grants can prevent the devolved units from addressing their needs (Jennie Litvack, et al,1998) and cause conflicts between the devolved units and the central government. In the present Kenyan situation, these grants enable the county governments to carry out additional functions. The county governments however feel that the national government is ‘hoarding’ some functions relating to the role of the county governments. The national government holds certain functions in order to retain substantial share of the budget in national government ministries¹¹³The county governments view this as undermining the role of the county governments and devolution generally.

Where the County Governments are Putting Money

The county governments were established immediately after the March 2013 general election. They received the first allocation of funds under the “equitable share of revenue” in the 2013/14 national budget, the first under devolution. The Commission on Revenue Allocation (CRA) developed a formula for sharing funds among the county governments. The formula recognised that the county governments differed in terms of population size, land size; and even levels of poverty. CRA took into account these variations and recommended sharing the equitable share of revenue on basis of population (45%), poverty (20%), equal share (25%), land area (8%), and fiscal discipline (2%).

The Constitution provides that sharable revenue allocated to the national and county governments be calculated on the basis of the most recently audited accounts of revenue received, and as approved by Parliament.¹¹⁴ This raises a problem because audits of national revenue have a time lag period of not less than two years. The size of revenue and therefore the volumes between the last audited account and the current period budget continues to grow every year. Table 2 shows the figures that the county governments have received on the basis of audited accounts. The last two columns also show the relative high amounts that they would receive were the consideration been the up to date receipted revenue figures.

to undertake the national government project on free maternity services to mothers. There is also special grant that is given to counties to support Level 5 hospitals

112 DANIDA and the World Bank.

113 December 15 Mumbi Ngugi case

114 Article 203 (3)

Table 2: Trend in allocation of equitable share of revenue 2013/14 – 2018/19

Year	Audited Sharable Revenue (Ksh. Billions)	County Equitable Allocations (Ksh. Billions)	% Growth	% County Equitable Share	Total Sharable Revenue (Unaudited, Ksh. Billions)	% County Equitable Share
2013/14	682	190		28	920	21
2014/15	529	227	19	43	1062	21
2015/16	777	260	15	33	1249	21
2016/17	936	280	8	30	1380	20
2017/18	936	314	24	34	1560	22

Source: Division of Revenue Act, (no. 31 of 2013; no 12 of 2014; no. 7 of 2015; no.9 of 2016; No 16 of 2017 and No 1 of 2018

The equitable share of revenue allocated to the counties based on not less than two year time lag of audited revenue accounts thus far is smaller than what should be the case were the calculation based on current revenue. This is on the assumption that the county governments would get the same per cent share of between 28 and 43 per cent that they have received on basis of last audited accounts. For instance, if the county governments would have received 30 per cent of Ksh. 1.3 trillion, the sharable revenue (unaudited) for FY 2016/17, then they would have received about Ksh.414 billion. If counties were to receive just a minimum of 15 per cent of sharable revenue (Kshs. 1.3 trillion), they would have received Ksh. 207 billion.

The amount allocated to the County governments has been on the increase since the start of devolution in 2013/14. In the first year of devolution, the county governments received Ksh 190 billion. The share increased to Kshs. 227 billion in 2014/15 and to Kshs 259.77 billion in the 2015/16 budget, which represented an increase of about 36 percent from the first year of devolution. The allocation increased to Ksh. 314 billion in the 2018/2019 financial year. The annual equitable share to the county governments has increased by 47 per cent in the last four years since the inception of the county governments.¹¹⁵

The county governments have been demanding for an increased share of revenue on the argument that the audit has a two-year time lag and that all the devolved functions would take up more than 15 per cent of revenue.¹¹⁶ They have been demanding for amendments of

¹¹⁵ There have been different interpretations on what constitutes the sharable revenue see for example Jason Lakin. October 11, 2014. 'Facts about Facts about funds to Kenya counties - why systematic calculations are needed

¹¹⁶ <http://www.theeastafrican.co.ke/OpEd/comment/Facts-about-funds-to-Kenya-counties/434750-2482780t6m3o6/index.html> Accessed on 14 December 2016.

the constitution to enable them get allocated close to 45 per cent of sharable revenue.¹¹⁷ This demand however is not based on the actual analysis of the costs of the devolved functions. Devolution was introduced with a 'big bang' and did not provide room for costing analysis that would determine the actual cost of implementing all the devolved functions. The Transition Authority that was mandated to undertake functional analysis including costing of functions did not do this by the time its term came to an end. Furthermore, the national government continued to hold on to some functions such as roads and some aspects of health services. These are functions that the county governments would perform but the failure to devolve them to the counties meant that the counties would get less funds while the national government ministries retains the budgets for these functions.

But how do the county governments spend their funds? The Public Finance Management (PFM) Act 2012 requires the National and the County governments to adhere to several fiscal responsibility principles. Among these is the requirement that each level of government should allocate at least 30 per cent of their budgets to development expenditure¹¹⁸ Figure 1 below shows that in 2013/14, the first year of devolution, only 10 county governments reached this threshold. These included Wajir, Turkana, Bomet and Machakos. Two of these counties allocated even more than four times this threshold: Wajir and Turkana allocated more than 50 per cent of the funds to development. In the same period 23 County governments allocated less than 20 per cent to development. Mombasa, Kisumu, Tana River and Embu did not even meet a 10 per cent mark.

117 Public Finance Management (PFM) Act, Section 15 (2) (a) requires National and County budgets to allocate at least 30 percent of their resources to development spending. If the current push for constitutional amendments sails through, counties will receive at least 35 of the equitable revenue share.

118 Public Finance Management (PFM) Act, Section 15 (2) (a) requires National and County budgets to allocate at least 30 percent of their resources to development spending.

County Development spending, % of total spending



The Counties in the marginalised areas allocated more funds to development than counties in rich areas and especially those that served as the headquarters of provinces under the previous constitution. The latter did not meet the 30 per cent thresh hold. Kakamega is the only county that came close to the threshold by allocating close to 28 per cent. Embu, Kisumu, Mombasa, Nakuru, Garissa and Nyeri were not near the threshold.

Figure 2 shows that development spending in 2015/16 improved compared to the 2013/14 period. Over 70 per cent or 33 out of 47 county governments adhered to fiscal responsibility principle; they were on the threshold and some went over. Again many of these included those in the marginalised areas: Turkana, Wajir, Mandera, Kwale and Marsabit, among others. Those that did not meet the threshold include Nairobi, Nakuru, Nyeri, Embu and Taita Taveta. Except Taita Taveta, the rest served as the former headquarters of the former provinces.

70% (33 out of 47) of the total counties met the 30% development threshold...

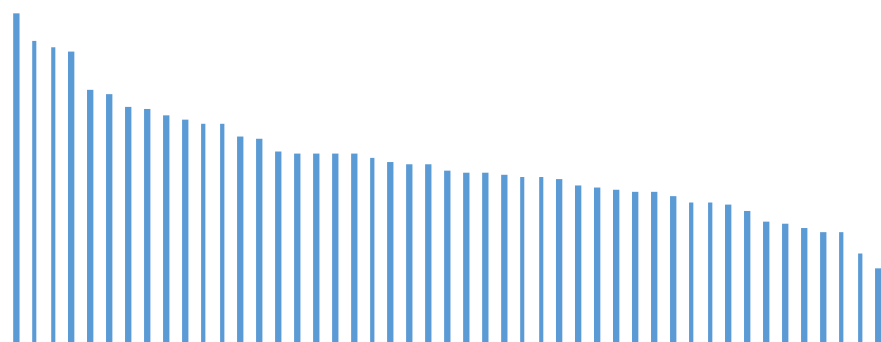


Figure 2: County development spending, % of total spending (2015/16)

Source: Controller of Budget Report

In the financial year 2016/2017 counties allocated 32.4 per cent to development, with only 15 counties meeting the 30 per cent threshold.¹¹⁹ As was the case with 2013 / 2014 and 2015/ 2016, a number of counties in the arid and semi-arid areas met the 30 per cent threshold, with Turkana, Mandera and Tana River counties spending more than 50 per cent of their county allocation to development activities. A sharp decline was witnessed during the election year (2017/2018), where county governments spent only 22 per cent of their allocations on development.¹²⁰ In 2017/2018, only nine counties met the 30 per cent threshold, with a Nairobi and Taita Taveta spending less than ten per cent of their allocations to development. This however, improved slightly after the election (2018/2019) when counties spent around 28.5 per cent of their allocations on development, with 18 of the counties meeting the 30 per cent threshold.¹²¹

¹¹⁹ For more details see *County Governments Annual Budget Implementation Review Report 2016 / 2017*, p. XX.

¹²⁰ For more details see *County Governments Annual Budget Implementation Review Report 2016 / 2017*, p. XXII

¹²¹ For more details see *County Governments Annual Budget Implementation Review*

This pattern of differentiation in allocation of budgets to development expenditure reveals the marginalised counties as having relatively better room for allocating funds to development. They are starting from a disadvantaged position in regard to basic services. The former headquarters of the provinces spend more on recurrent expenditure. This is because they absorbed staff from the former Local Governments, and the central government. These staff could not be absorbed elsewhere and therefore remained as staff in these towns under a new structure of devolved government. The counties also employed their own staff at the inception of devolution. The huge wage bill prevents them from allocating more than 30 per cent to development expenditure.

The marginalised counties are the main “winners” in the allocation of equitable share of resources. They are able to allocate more to development expenditure because the revenue transfer to these regions are more than sufficient for distribution between recurrent and development expenditure. The county governments in rich areas have a huge wage bill and less money for development. Compared to how they developed from the colonial period, one may argue that they are losers. They are not getting funds on basis of political considerations that often favoured them because of their numeric strength and high agricultural potential. They are nonetheless not heavy losers. After spending on wage bill, they have funds left for development although not as much as they would want.

Spending on devolved functions at the county

An analysis of how the County governments allocate share of their funds to different sectors is worth undertaking in order to see where they place priorities. Table 3 illustrates the county sector spending by looking at the spending in FY 2014/15.

Table 3: Sector share of total county budget

Sector	% share of total county budget
Health	20.9
County Administration	15.9
Public works, Transport, Infrastructure	13.2
County Assembly	10.5
Finance and Economic Planning	9.8
Education, ICT, Labour, Youth Affairs, Sport, Culture and Social Services	9.4
Agriculture and Livestock Development	7.2

Report 2016 / 2017, p. XX.

Water, Energy, Environment, Forestry and Natural Resources	5.8
Trade, Industrialization, Tourism, Community, and Cooperative Development	4.3
Physical Planning and Housing	3.1

Source: Computed from Controller of Budget Report, 2014/15

The county governments, combined, allocate relatively more share of the budget to health than other sectors. Public works, transport and infrastructure, and county administration receive relatively more share of the budget than agriculture, trade, information technology, water and environment. Health, public works and infrastructure also have relatively more shares of the development budget than these other sectors (Controller of Budget Report, 2014/15).

County by county analysis reveals a different form of emphasis. In 2014/15 budget Turkana allocated 18 per cent to agriculture; 15 per cent county administration; 14 per cent health. The sectors with lowest share of the budget included the County assembly (2.6 per cent); water and environment (4 per cent); and trade and tourism (5 per cent). On the other hand, Nairobi allocated 57 per cent to public works, transport and infrastructure. The County allocated 10 per cent on health; and another 10 per cent on ICT and education. Mombasa County allocated 22 per cent and 21 per cent to public works, transport and infrastructure; and health respectively. Isiolo prioritised county administration (23 per cent); physical planning, lands, and housing (19 per cent); and trade and industrialization (19 per cent). The county governments vary considerably in terms of how they prioritise allocation to sectors (Controller of Budget Report, 2014/15).

Table 4 illustrates the county sector spending by looking at the spending in financial year 2014/15 through the financial year 2017/18. The idea is to assess actual expenditure on development activities in key devolved sectors. The sectors are grouped as: public works, transport and infrastructure; health; education, information communication technology, youth affairs, sports, culture and social services; water, energy, environment, forestry and natural resources; agriculture, livestock and fisheries development; trade, industrialization, tourism, community and cooperative development. In generating these results, reference is given to the development expenditure for each of the sectors by each county for each of the financial years. The resultant figure is then subdivided by the overall counties expenditure for each of the financial years. The goal is to find out the proportion of the overall county expenditure that goes to the development component of the critical sectors of the economy.

Table 4: Share of Development Expenditure Against Overall County Budgets by Selected Sectors

	As share of overall county budgets (%)			
Sector	2014/15	2015/16	2016/17	2017/18
Public works, Transport, Infrastructure	11	10.2	8.8	7.1
Health	4.2	4.8	3.7	3.3
Education, ICT, Labour, Youth Affairs, Sport, Culture and Social Services	4.1	4.2	3.3	2.2
Water, Energy, Environment, Forestry and Natural Resources	3.3	3.9	3.2	2.4
Agriculture and Livestock Development	2.4	2.4	2	1.9
Trade, Industrialization, Tourism,	1.4	1.6	1.1	0.7
Community, and Cooperative Development Physical Planning and Housing	0.9	0.9	0.9	0.8

The findings in Table 4 shows that commitments to critical service sectors for development function declined from the financial year 2014/15 through financial year 2017/18. For instance, between 2014 and 2017, expenditure on public works, transport, and infrastructure declined from 11 per cent of the overall county expenditure to around 7 per cent. The number of kilometres of rural roads also increased. Unconditional grants under equitable share of funds have enabled some of the county governments to build their ‘first’ tarmacked roads since independence in 1963. They include Samburu, Wajir and Mandera. Generally, the county governments have opened up rural public transport by improving on existing roads and/or building new ones. They are opening up rural centres by linking inner areas to the local markets. This is opening new opportunities and making it easy to transport goods and people in rural areas. Devolution has impacted on the level of development in varying ways. Some county government have built relatively more development infrastructure under devolution than what has ever been done since independence. In 2014, Mandera performed the first caesarean birth since independence. With resources transferred to support health care functions, the county government renovated health facilities and built new ones where there were none. The county government also posted health attendants to these health facilities. This has improved the capacity of health facilities to provide health services that the counties did not receive in the past.

Changes in healthcare are visible in all the 47 counties. The number of health workers recruited and health facilities built in the last five years of devolution are on the increase. The number of health centres and dispensaries in the country increased from 8,466 in 2012 to 10,032 by end of 2016.¹²² This represents a growth of 20 per cent. These two health facilities are

¹²² Okumu, Valarie 2016. *Communicating County Results: the State of Devolution, presentation*

the most common at the lowest local level and accessed by most residents. Those whose facilities have increased by more than 50 per cent include many in the marginalized counties as well as rich regions. West Pokot, Wajir, Trans Nzoia, Samburu, Tharaka-Nithi, Nandi, and Marsabit have witnessed increase in number of facilities during the period.¹²³ The investments in health facilities has improved the overall health facility to population ratio across most of the counties. This finding is presented in Table 5, by focusing on counties that have complete data on the number of health facilities recorded in their county integrated development plans for the period 2013 – 2017 (baseline) and 2018 – 2022 (follow-up).

Table 5: Trends in Health Facility to Population Ratio, 2013 – 2018

	Baseline (2013)	Follow-up (2018)
County	Health Facility/ Population Ratio	Health Facility/ Population Ratio
Kwale	1:9,513	1:5,909
Kilifi	1:3,613	1:5,150
Garissa	1:5,551	1:4,314
Wajir	1:9,100	1:5,842
Meru	1:4,811	1:3,284
Tharaka Nithi	1:6,662	1:2,879
Kiambu	1:4,852	1:3,847
West Pokot	1:7,256	1:7,065
Trans-Nzoia	1:9,494	1:8,965
Elgeyo Marakwet	1:3,526	1:3,327
Laikipia	1:4,746	1:2,673
Bomet	1:5,753	1:7,099
Vihiga	1:7,167	1:7,167
Kisumu	1:6,922	1:5,831
Nairobi	1:12,046	1:8,969

The growth of these facilities addresses the regional inequalities in the ratio of population to health facilities. In the past, availability of a facility depended on the capacity of the community to construct their own facility especially through harambee (self-help) collective initiatives. The Counties in the North Eastern region, among others, had huge disparities in this respect. Before devolution, the region had 3.5 per cent of national facilities while the region's share of national population was 6 per cent. Counties in the western region had 6 per cent share of national facilities against a share of 11 per cent regional share of national population.¹²⁴

at the Council of Governors meeting held at the Safari Park Hotel, Nairobi, June 17, 2017. Nairobi: Council of Governors

¹²³ Source: Ministry of Health, available at <http://www.ehealth.or.ke/facilities/>

These interventions in health sector have had positive results. Counties in the marginalised areas demonstrate unprecedented change. There are studies now showing that child mortality figures, nationally, have fallen from 56 per cent in 2012 to 49 per cent in 2015¹²⁵. Although this may not be attributable wholly to devolution, it is notable that improvement and staffing of facilities especially in remote areas is enhancing accessibility to health services. Counties such as Samburu and Turkana have had patients traveling far distances but devolution enables health workers to reach previously inaccessible areas to provide services.

Table 6 illustrates the trends in doctor to population ratio and the nurse to population ratio from 2013 through 2018 for a number of selected counties where complete data is available in the County Integrated Development Plans. The findings show that significant progress has been made especially by the hitherto marginalized counties in narrowing the gap on access to critical health care personnel such as doctors and nurses.

Table 6: Doctor/Nurse Population Ratio in Selected Counties, 2013 – 2018

	2013		Follow-Up (2018)	
County	Doctor/Population Ratio	Nurse/ Population Ratio	Doctor/ Population Ratio	Nurse/ Population Ratio
Kwale	1:76,741	1:3,133	1:76,741	1:3,133
Kilifi	1:42,625	1:3,396	1:15,137	1:2,671
Tana River	1:44,309	1:2,110	1:32,405	1:1,679
Lamu	1:28,063	1:1,194	1:7,000	1:800
Taita Taveta	1:19,138	1:1,142	1:10,031	1:1,050
Wajir	1:132,000	1:4,163	1:29,413	1:2,608
Mandera	1:114,000	1:25,000	1:49,982	1:5,222
Marsabit	1:63,825	1:1,868	1:14,662	1:1,054
Kiambu	1:17,000	1:1,300	1:6,667	1:1,110
Trans-Nzoia	1:18,257	1:2,153	1:11,000	1:1:2,051
Elgeyo Marakwet	1:15,548	1:2,241	1:8,000	1:1,000
Laikipia	1:12,500	1:1,100	1:4,432	1:1,157
Bomet	1:55,895	1:2,727	1:30,763	1:2,930
Vihiga	1:85,000	1:24,000	1:11,840	1:1,947
Kisumu	1:44,634	1:2,383	1:1,395	1:1,394

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125 see for example, 'Kenya marks huge drop in infant deaths' <http://www.capitalfm.co.ke/news/2015/04/kenya-marks-huge-drop-in-infant-deaths/>

The number of kilometres of rural roads has also increased. Unconditional grants under equitable share of funds have enabled some of the county governments to build their “first” tarmacked roads since independence in 1963. The counties include Samburu, Wajir and Mandera. Generally, the county governments have opened up rural public transport by improving existing roads and/or building new ones. Between 2013 and 2016 Council of Governors’ records show that County governments have built about 36,000 Km of murram roads; and another 19,000 Km of new small feeder roads especially in rural areas.¹²⁶ These are opening up rural centres by linking inner areas to the local markets. This is opening new opportunities and making it easy to transport goods and people in rural areas.

Pre-primary school education has also witnessed increased investments across all counties in the last five years of devolution. The number of children enrolling in pre-primary school centres across the country increased by 812,225 between 2013 and 2015. This represents an increase by 47 per cent of children who have access to ECDE.¹²⁷ The number of ECDE facilities has also increased across the country as counties commit resources for their construction. Table 7 illustrates these changes by focusing on data from selected counties that have complete data on the number of ECDE facilities as well as ECDE teacher: pupil ratio in these counties. However, these increases do not reflect in growth of primary school facilities and enrolments. This raises the question of whether this high number of children enrolled through expansion of ECDE level by county government will find places in primary education. The latter is a function of the national government but expansion has not been at pace with the new and expanded enrolment at ECD level.

Table 7: Trends in ECDE Facilities and ECDE Teacher to Pupil Ratio, 2013 – 2018 in Selected Counties

County	No. of ECD Facilities (2013)	Teacher/pupil ratio (ECD, 2013)	No. of ECD Facilities (2018)	Teacher/pupil ratio (ECD, 2018)
Kwale	820	1:32	1,072	1:37
Wajir	203	1:93	264	1:25
Mandera	175	1:175	259	1:133
West Pokot	479	1:45	1,032	1:92
Elgeyo Marakwet	434	1:36	617	1:44
Laikipia	518	1:26	576	1:30

¹²⁶ Okumu, Vallary, 2016; also Speech by the Chairman, Council of Governors on State of Devolution....

¹²⁷ Office of the Auditor General. 2016. Report of the Working Group on the Socio-Economic Audit of the Constitution. Nairobi: Office of the Auditor General.

Agriculture has also witnessed important changes. Many county governments have invested in increasing agricultural production by providing farm inputs such as seeds, and fertilizer. They have also hired the services of agricultural extension officers to help improve farming methods among small holders. There are also instances where County Governments subsidise farmers' costs in ploughing their holding by providing ploughing in order to reduce the preparatory time for planting.

The county governments are spending on infrastructure not only with a view to opening up rural areas and to making it easy to improve on movement of people and goods, but also because infrastructure is visible to voters. 'Bricks and Mortar' constitute the hardware of development. These are what the voters would like to see in order to affirm that the governors are bringing resources to the counties. Thus health and infrastructure receive more funds because 'facilities are what people can see'. They give the Governor better visibility. Governors even plant their photos on sites to remind everyone that they are doing development. This approach has neglected the 'software' of development. There is limited emphasis on capacity building through training staff and institutional development. They have not prioritised institution building and human resource development.

The Challenge of Service Delivery under Devolution

A major challenge in the counties is the centralisation of executive powers in the hands of governors. Administrative costs are on increase because of centralisation of powers in the county executive. The governors are exerting their control of the local development space and delivery of services in a manner that is similar to what the centralised executive did in the past. They tend to use county resources to reward their supporters and to build loyal constituencies. This is increasing the costs of administration at the expense of service delivery. Governors do recognise that only delivery of services would lead to their re-election and therefore they are increasingly using their executive powers to award allies with development projects. Within the counties, therefore, there are concerns over inequities and imbalances in distribution of development projects. Indeed, the reports by the Controller of Budgets and the Auditor General do point at instances where many county governments cannot adequately account for funds.

The county legislature has been vigilant on the expenditure by the county executive but this has resulted in both the executive and the members of the assembly compromising each other. It has also resulted in conflicts between the two arms of county governments. To avoid sanctions and especially impeachment by the MCAs, some of the County governors have acquiesced to the demands by MCAs to set up Ward Development Funds from which MCAs can draw patronage resources for their wards. They spend such funds with limited accountability and without adequate reference to the county executive. This form of pork barrel spending

has become a common feature in the counties as the governors seek to build strong political relationships with the MCAs. In cases where the relationships between the governors and the MCAs are weak owing to the failure of the governors to provide resources for pork barrel spending, the assembly declines and/or delays in approving the county budgets, which the assembly must approve before the county government, can receive transfers from the national government. This relationship and evolving tensions between the executive and the MCAs have witnessed increase in cases of corruption as each arm of the county government seeks to compromise the other. Also where disagreement between the county executives and the assembly are not effectively addressed, some county assemblies have resorted to impeaching the governors or other members of the county executive. Where such threats are expressed, the governors develop a new working relationship with the assemblies: they compromise them with patronage projects. And if the challenges are not resolved fast and with ease, the poor relationship often spills over to affect service delivery. It leads to delays in completion of development projects and/or to intermittent provision of services. The new forms of patronage therefore affects service delivery as the executive and the assembly tussle over control of the new space for development.

Conclusion

The motivation for devolution included a need to address grievances of regional inequitable development. Poor regions of the country are, under devolution, receiving predictable amount of funds for their local development and provision of equitable services in particular. The former marginalised areas are important “winners” in this struggle to introduce and implement devolution. But this is not to suggest that the rest are losers. The former rich areas are also getting their share of resources for their own development. Although many were the beneficiaries of past forms of patronage-based development, they are not locked out from benefits of devolution. They receive their share of equitable funds like everyone else.

Division of revenue is based on and guided by law; there are no political biases in allocation of equitable share because there is a formula that CRA has developed to provide recommendations on how allocation of revenue can be done through a law on division of revenue. There is also extensive oversight by institutions such as the Controller of Budget and the Auditor General. These institutions ensure adherence to the rules and prevent politicisation of the process of allocation of revenue to the counties.

There is notable increase in the number of basic service facilities across all the counties. The devolved functions have witnessed increased improvement and number of facilities in health, early childhood education, rural access roads, and in agriculture, among others. These changes are taking place amidst the challenge of reduced development expenditure in many of the counties owing to huge wage bills inherited from the past.

The unconditional grant of equitable share of revenue that is transferred to county governments offers financial and political security and insurance to devolved units. All counties have equitable share of funds. This limits the extent to which the national government can punish those not supportive of the national government and the ruling elites. Secondly, devolution has blunted the use of public resources in creating and maintaining loyal constituencies. The transfer of funds to the counties without biases by the centre potentially reduces the dominant role of the national executive in local development. Furthermore, the national executive is no longer the guarantor of people’s hopes in development. The local constituencies in opposition controlled areas can decline to give political support to the national executive without serious negative consequences. They have their own resources.

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CHAPTER 6

DEVOLUTION, NATIONALISM AND ETHNICITY IN KENYA

Oduogo Cyprine Atieno

Introduction

This chapter interrogates the impact, if any, of devolution on nationalism and ethnicity in Kenyan politics. The assumption guiding the chapter is that ethnicity and nationalism cannot coexist. An increase in ethnicity will undermine nationalism and vice-versa. One of the reasons why Kenya adopted a devolved system of government was to rid the country of ethnicity and to enhance nationalism. The chapter therefore seeks to find out whether or not the devolved system of government has promoted a sense of nationalism among Kenyans. To do this the chapter traces the challenges of nationalism in Kenya from the colonial to the post-colonial period. It further interrogates efforts made by the post-colonial government to infuse a sense of nationalism and the effectiveness or lack of effectiveness of these efforts. Included in the discussion is an assessment of steps made by successive post-colonial governments to downplay ethnicity in Kenya's public life in the hope of promoting nationalism. The discussion focuses on ways in which the devolved system of government, introduced in August 2010, has downplayed ethnicity while at the same time promoting nationalism. In short the discussion seeks to find out whether this system of government has promoted or failed to promote a sense of nationalism in Kenya. If it has promoted nationalism what is the evidence and if not what factors account for the failure to promote nationalism?

Nationalism in Colonial Kenya

Nationalism refers to a sense of belonging among a group of people who feel united on the basis of some common factors including common historical experience including political experience, common culture and have or desire an independent government of their own. Such people may reside in one geographical territory or dispersed in different countries.

Following the conclusion of the 1884-1885 Berlin conference, present day Kenya was handed over to Britain which subsequently established colonial rule over the territory. Prior to that, what is now called Kenya was made up of small independent ethnic communities that did not have a common or central authority or government. Each exercised its own form of governance. Communities such as the Maasai operated a decentralized governance system while some subgroups of the Luhya such as the Wanga had kingdoms or centralized systems

of governance. Contact and interaction between the communities was minimal. The most prominent ones were intermarriage especially between neighbouring communities (Dar Nyawalo, 2011). Trade was also common between neighbouring communities although long distance trade beyond immediate neighbouring communities was also practiced. Because of this limited interaction, nationalism did not arise. Instead one could talk about ethnic nationalism to refer to a sense of unity and common belonging among members of each of the various ethnicities that were eventually incorporated into present day Kenya. A total of about 42 such communities existed. Currently one or two more Kenyan ethnic groups have been recognized. The colonial government did not find any good reason to unite these people. Indeed, uniting them and instilling in them a sense of nationalism would have been counter-productive in the context of colonial rule. This is because a sense of common belonging among the different groups would have made it difficult for the colonial government to prevent or successfully manage any revolt against it if it emerged. A united Kenya would have been a formidable force in the face of rebellion against colonial rule.

It was against this backdrop that the colonial government adopted a policy of divide and rule. This was quite evident in a number of ways. First was the creation of administrative units that coincided with ethnic groups. Secondly was the practice in which the colonial government encouraged the formation of ethnic based associations while outlawing nationwide political organization. These associations included the Akamba Union, the Lou Union, and the Maasai Association just to mention a few. The idea was to prevent the different ethnic groups from coming together to form a formidable political force against the colonial government. Indeed, African political organizations were not allowed in all the colonial territories and Africans had to fight hard to form such associations. The divide and rule policy practiced by the colonial government based on ethnic identities had a strong influence on ethnicity. This policy certainly contributed to the genesis of ethnicity in Kenya (Wanyande: 2009; 55).

Apart from denying the Africans the right to form nation-wide political associations, there were other injustices netted on the African people. The injustices included racial discrimination such as segregation in schools on the basis of race, lack of African representation in the colonial legislative assembly, alienation of African land and the confinement of Africans in crowded and poor quality land reserved for them, poor quality health services for Africans, forced labour, and the Kipande¹²⁸ system, among many others. Africans were required to wear an identity card called Kipande around their neck and would be arrested if found without the document. These conditions obviously became unbearable and unacceptable to the Africans after some time.

Over and above these domestic factors there were other factors. Prominent among them was the experiences of Kenyans who fought alongside British soldiers in the two World wars. They realized that the British were fighting for freedom and wondered why they were being denied this cherished value. Secondly, after the Second World War colonial rule was no longer popular

128 Kipande was an identity card in the form of a metal tied and hanged around the neck of an African

or fashionable. International mood was not in favour of colonial rule. Thus a combination of the colonially designed divide and rule policies, the injustices listed above and the change in international attitude towards colonial rule inspired and encouraged Kenyans to unite against colonial rule.

The fact that the colonial system was undemocratic and did not allow the people to exercise and enjoy their human and other rights led to sustained resistance to colonial rule. All the attempts to confine African political activity at the district – read ethnic –level were resisted (Wanyande, 2012:209).

In response to these factors Kenyan communities began to agitate for better treatment. Initially they demanded an end to the injustices that they were subjected to by the colonial government. At the very least they demanded equal treatment with the Europeans and Indians residing in the colony. When this was not forthcoming Africans expanded their demands by including a demand for independence. This marked the beginning of Kenyan nationalism. The vehicle of nationalism in colonial Kenya was political parties and the trade union movements. The first nationwide political organization formed to end colonial rule was the Kenya African Union (KAU) which had membership from all over Kenya (Okoth, 2006: Vol.2). When Jomo Kenyatta took over the leadership of KAU in June 1947, his aim was to unite Kenyans. He traversed the colony popularizing the policies of KAU. In subsequent political rallies, Kenyatta got tremendous support, not only from regional leaders but the entire citizenry. According to Okoth (2006) the power of Kenyatta's name drew huge crowds, as his campaigns were characterized by words such as unity, hard work and ordered progress. He also put a lot of effort in uniting the radicals and conservatives within KAU (Okoth, 2006: Vol.1).

Increased unity during the colonial period became visible during the Mau Mau rebellion. According to W.R. Ochieng, (1985) Mau Mau was not simply a Gikuyu movement but a rebellion that enjoyed support of other Kenyans. He notes that the Agikuyu were not the only fighters in the forest as the fighters included recruits from the Akamba, Maasai, Luo, Ameru and Aembu communities. In Western Kenya, for example, Senior Chief Mukundi was detained for administering the Mau Mau oath among the Bunyala and Abasamia. The Luos also kept the Kikuyu fighters going through different support systems (Ochieng, 1985). Joseph Murumbi, Pio Gama Pinto, Walter Odede and W.W. Awori were involved in collecting funds for the defense trial for the Kapenguria Six. KAU was also sustained by Murumbi, Awori, Pinto and Argwings Kodhelk, who showed a level of commitment to nationalistic objectives of the party (Ochieng, 1985).

According to B.A Ogot (1968), as a result of the shock created by Mau Mau, the imperial power was willing to talk with the Kenya African leaders. In the course of these dialogues, Ogot argues, the power shifted from the Europeans to the Africans, as Kenya finally got independence in December 1963. Ogot concludes that Mau Mau chose a violent path to

achieve what other nationalist associations could have achieved through dialogue (Ogot, 1968). The last demonstration of nationalism in colonial Kenya came when KANU's top leadership led by Jaramogi Oginga Odinga refused to form a government until Jomo Kenyatta was released from jail. James Gichuru even stepped down for Kenyatta, who later led the country to independence.

Nationalism in Independent Kenya

The spirit of nationalism in Kenya did not die with the attainment of independence. When Jomo Kenyatta came to power in 1963 he made several attempts to form a united nation called Kenya. One of the steps he undertook was to deal with disunity in KANU¹²⁹. He also made attempts to re-unite KANU and KADU¹³⁰, the two dominant political parties that fought for Kenya's independence. Indeed, Kenyatta turned Kenya into a one party state on the basis that multiparty system would divide Kenyans. This was a common justification for one party rule throughout independent Africa. The president also attempted to promote nationalism through "harambee"¹³¹ slogan which became the development ideology in Kenya. The President called on politicians to embrace this ideology as a way of developing their constituencies, noting that the state did not have adequate resources to meet the development expectations of Kenyans. It was intended to promote the spirit of nationalism and self-reliant development in Kenya. With time, "harambee" became associated with monetary contributions for building schools, health centers, cattle dips and paying school fees for students from less fortunate families. Kenyatta continued to preach the value of national unity. He did this in virtually every public address to the nation. The successive presidents that came after Kenyatta did the same. Initially it was referred to as nation building (Wanyande; 2012: 210).

Factors that Undermined Nationalism in Kenya

Despite the nationalistic slogans by President Kenyatta and his successor President Moi, the two leaders acted in ways that produced the opposite effect. Indeed, during Kenyatta and Moi's presidency ethnicity became the organizing ideology of the regime. Nyaura (2019) points out that ethnicity has been on the rise since Kenya's independence. Discrimination on the basis of one's ethnic background was common as ethnic considerations informed employment in the public sector and the development process in general. Even political parties were formed and drew their support largely from the ethnic group where the leader of the party hailed from. Many ethnic groups felt marginalized. Nyaura (2019) writes that the issues that arose

129 KANU – Kenya African Union was one of the first major nationalist political parties that fought for Kenya's independence and formed the first post-colonial government

130 KADU stands for Kenya African Democratic Union and fought for independence alongside KANU. KADU formed the opposition after independence in 1963

131 Harambee translates into let's pool resources together as an ideology it meant a self-help/self-reliant approach to development.

are marginalization of minority ethnic communities towards accessing resources, uneven distribution of national resources thereby bringing about regional imbalance in development. In President Kenyatta's era, the Kikuyu monopolized decision making and appropriated themselves the lion's share of resources in the country (Khamisi, 2011). Expressing his anger over the "Kikuyunization" of Kenya's Civil Service and Kenya's economy during Kenyatta's regime, the late Hon. Martin Shikuku tabled a motion in parliament in which he demonstrated that in the ministry of agriculture, the Permanent Secretary, the Deputy Permanent Secretary, the Under – Secretary and the Second Under-Secretary were all Kikuyus. The then minister of state in the office of the president – James Nyamweya confirmed Shikuku's claims and added that most politicians felt that the best way to reach their electorate was through appealing to their tribal feelings (Khamisi, 2011).

This trend continued under the presidency of Moi. During his rule, the Kalenjins occupied top jobs in the public service. In this period also the culture of "eating" was introduced in Kenya and the so – called de-Kikuyunization of the civil service including strategic parastatals, security sector, diplomatic circles, learning institutions and economy emerged (Khamisi; 2011: Koigi; 2008). Kalenjinization of Kenya's civil service under President Moi finally replaced the Kikuyunization of the service under President Jomo Kenyatta. This process was achieved by dismantling President Kenyatta's empire to enable President Moi and his close political allies take control of the government. Under the leadership of President Moi, members of the Kalenjin community headed corporations such as Agricultural Development Corporation (ADC), Kenya Commercial Bank (KCB), the Central Bank of Kenya (CBK), Kenya Posts and Telecommunication (KPT), Kenya Industrial Estates (KIE), National Cereals and Produce Board (NCPB) and Kenya Grain Growers Cooperative Union (KGGCU) while other tribes opposed to Moi's leadership such as the Luo and the Abaluhya engaged in low paying jobs and manual labor (Adar and Munyae, 2001: 5).

Ethnicity has also influenced resource distribution and the development process in Kenya. According to Adar and Munyae (2001), despite President Moi's promise to promote peace, love and unity his nationalistic statements were not necessarily meant for the good of Kenyans, but were used to promote tribalism and to sustain himself in power (Adar and Munyae, 2001). President Moi's tribal leaning showed itself in the development process. The communities that supported or at least did not resist his government were rewarded while those who were opposed were punished. The rewards included: patronage; educational opportunities; development amenities and preferential treatment in the award of government contracts and licenses. President Moi's agricultural policies, for example, favoured Kalenjins and were meant to punish the people of Central Province, where Kenyatta had favored cash crop farmers and coffee growers in Kiambu (Koigi, 2008). President Moi also embarked on promoting tea growing and made it the best export crop in Kenya. He did that by creating the Nyayo Tea Zones and the Kenya Tea Board. The president also promoted grains and cereal farming instead of coffee

and pyrethrum which were the main cash crops in Kenya during President Kenyatta. This move was possibly meant to favour the Rift Valley people who are the largest producers of tea and grains in the country. President Moi comes from the Rift Valley region. As Kanyinga observes in chapter five of this book, the shift from export crops to the growing of grains had a rather negative impact on the economy.

Other parts of Kenya received differential forms of development based on their loyalty and support for the president. The president, for example, took a number of development projects to Kisii where he had a strong support base. He also “revived” small ethnic communities that had been “forgotten”. In Suba, he revived “Subaness” and declared Suba people an almost forgotten minority group. The Suba had for a long time been treated as part of the Luo community. To show his presence in Suba land President Moi built a girls’ school in Sindo area and called it “Moi Suba” Sindo girls, while completely neglecting the “Luo” occupied parts of Suba region. To ensure his political survival, President Moi also created and empowered ethnic chieftains or kingpins handpicked to champion his interests at ethnic level and to perpetuate subservience. These leaders included Mulu Mutisia in Ukambani, Shariff Nassir at the coast, Kariuki Chotara and Joseph J. Kamotho in Central province, Joseph Lotodo in North Rift, Ezekiel Berngetuny in Uasin Gishu, William Ole Ntimama in Maasai land, Wycliffe Mudavadi among the Abaluhya, Okiki Amayo in South Nyanza and Oloo-Aringo in Central Nyanza. According to Kioli, ethnic dictatorship and in turn “ethnicizing” government and politics in Kenya pervaded in the entire 24 years of Nyayo¹³² rule (Kioli; 2010).

The people who did not support the president were however punished. Preventive detention, censorship and control over the press; limitations upon public demonstrations and public criticisms of the regime and other means were used to maintain law and order and to ensure control of oppositional behavior in general. Highly visible punishments such as detention without trial, use of brutality by the Provincial Administration, the police and KANU youth wingers, misuse of the Registrar of Societies and the courts of law were also meted out as a last resort (Kioli, 2010). Assassinations and torture were used by both President Kenyatta and President Moi. In 1975, J.M Kariuki was brutally murdered allegedly by the Kenyatta government. Between 1975 and 1977, a number of members of parliament including J.M. Seroney, George Anyona, Flomena Chelagat and Martin Shikuku were detained by Kenyatta (Kioli, 2010). These actions by President Kenyatta were slowly but surely killing the spirit of nationalism in Kenya. Detention was commonly used by President Moi after the 1982 attempted coup. In that year, the government unearthed a clandestine movement which called itself “The December 12th Movement” which had published a seditious newsletter known as PAMBANA. Although only

132 Nyayo was the name given to President Moi after he introduced what he called Nyayo philosophy which meant following on the footsteps of Kenya’s first President - Jomo Kenyatta. It later represented peace love and unity.

Wangondei Wa Kariuki was formally brought before the court of law and jailed for possessing the publication, university lectures including Edward Oyugi, K.K. Wachira, Willy Mutunga and A. M. Mazrui were arrested and detained. President Moi also had his victims tortured at the Nyayo torture chambers. Among the tortured were Raila Amollo Odinga and Kenneth Matiba (Badejo, 2006). These acts only helped in killing the spirit of nationalism in Kenya as President Moi mainly targeted people from the communities that opposed him while empowering his tribesmen (Khamis, 2011).

Ethnic divisions have also characterized elections and political re-alignments in Kenya. Such divisions worked for President Moi in 1992 elections when he consolidated Kalenjin votes together with those of smaller ethnic groups against Kenneth Matiba and Mwai Kibaki who shared the Kikuyu votes and Odinga Odinga who consolidated the Luo votes. History repeated itself in 1997, when President Moi got 46.64% of the votes cast, Mwai Kibaki 31.49%, Raila Amollo Odinga 11.6%, Michael Wamalwa 8.40% and Charity Ngilu 7.8% (Kioli, 2010). At the end of Moi's rule, the other ethnic groups formed parties that would oppose the KANU rule (Koigi, 2008, Badejo, 2006). The main ethnic groups were the Kikuyus, Akamba and the Abaluhya. According to Kioli, the ethnic calculation and patronage appeared to be the dominant factor when Raila Amollo Odinga made a pronouncement "Kibaki Tosha".

Upon coming to power however, President Kibaki revived the politics of patronage and ethnic "entitlement". The "Kikuyunization" of public service and other appointments quickly re-emerged. There was also the revival of the "Mount Kenya mafia" in the 'kitchen cabinet' appointments (Kioli, 2010). History also repeated itself during Kibaki's presidency on matters of employment. Out of the 25 Permanent Secretaries, eleven were from the Kikuyu and Meru tribes, while the other ethnic groups had one or two positions. Key positions in the Ministry of health were given to the Kikuyu. This was the case at National Hospital Insurance Fund (NHIF) and the Kenyatta National Hospital where the position of chair of the board was awarded to a close ally of the minister, a Kikuyu. Supplies manager at the NHIF was also given to a Kikuyu relative of the same minister (Khamisi, 2011). In the Treasury, virtually every key position was held by officers from one region. In the Ministry of trade, the key appointments including the chairmanships of the East African Portland Cement Company and Investments Promotion Center, the Managing Directors of the Export Promotion Council and the Kenya Wines Agencies Limited (KWAL) were held by members of the same community – the Kikuyu. The story was the same in the Ministry of Foreign Affairs (Khamisi, 2011).

As Kenya approached the 2007 general elections, ethnicity once again took centre stage as politicians strategized for elections. In the Orange Democratic Movement party (ODM), the five top members of the ODM were picked from different ethnic groups with the main objective of delivering each region. Raila Amollo Odinga would deliver Nyanza (Luos), Musalia Mudavadi –Western (Luhya), William Ruto Rift Valley

(Kalenjins), Joe Nyaga-Eastern and Najib Balala-Coast (Kioli, 2010). On Kibaki's side were Central Province (Kikuyu) and Eastern Province. The results of the 2007 elections clearly vindicated Kenya as highly ethnicized politically. From Central Province Kibaki's vote was up to the last person and so was Raila's vote among the Luo in Nyanza. Towards the end of the Coalition Government, ethnic political alliances began to form. At the beginning there was a talk of the Kikuyu – Kamba – Kalenjin (KKK) alliance against Raila amollo Odinga and his allies, with the purpose of helping Uhuru Kenyatta and William Ruto clinch the leadership of Kenya and to avoid the trials at the Hague based Court in the Netherlands (Kioli, 2011). Ethnic politics started to play as different political parties started to look for numbers in the alliances that were formed in preparations for the general elections.

Uhuru Kenyatta and William Ruto initially considered luring the Luhya votes instead of the Kamba who were fewer in number. Musalia Mudavadi, a Luhya was considered as a possible compromise candidate for the Uhuru-Ruto alliance. When the light seemed to appear under the tunnel for Mudavadi, leaders from Mount Kenya region were reluctant to support Mudavadi. They instead declared that Uhuru Kenyatta had to be their presidential candidate. The Mount Kenya region, supported by the Kalenjins finally stood with Uhuru Kenyatta as their candidate. Mudavadi stood on a separate party but lost the contest (Kioi, 2010). This was story of Kikuyu ethnic forces at work.

In the Uhuru-Ruto led government ethnicity featured prominently once again. Major political appointments and major public service jobs in Kenya have been shared between the Kikuyu and the Kalenjins with other Kenyans holding very few top jobs in government. Majority of the cabinet secretaries, ambassadors and top civil servants are from the two communities. In a visit to Bungoma County, in an attempt to capture Luhya votes, President Uhuru Kenyatta was humiliated in public over the ethnic appointments. The Daily Nation of May 18th 2014 reported that Dr Boni Khalwale, the then Kakamega Senator told President Kenyatta to his face to forget the Luhya votes come 2017. The report pointed out that according to Dr. Khalwale the Luhya tribes had been left out of Uhuru's government as top public service jobs and political appointments were rewarded to those who supported the President in 2013 elections. By the year 2014 therefore, nationalism yarned for by Uhuru Kenyatta's government had been clearly replaced by ethnic divisions.

Devolution, Nationalism and Ethnicity in Kenya

In August 2010 Kenya adopted a new Constitution with devolution as its major departure from the discredited constitution that it replaced. The decision by Kenyans to have a devolved system of government was informed by many factors. Key among them was the desire to rid the country of the many governance challenges associated with a centralized system of rule. Among the factors that undermined nationalism and which devolution sought to correct

was the inequitable sharing of development resources among different ethnic groups. This left some communities feeling marginalized and underdeveloped and therefore affecting their attachment to the country and a sense of common belonging. This sense or perception of unequal treatment has been a major source of political tension in the country since independence and has had a negative impact on nationalism.

Against this background the people of Kenya sought to introduce a system of governance that would give a sense of common belonging to all the ethnic groups. Devolution was adopted as the answer to this problem. According to Ngigi and Busolo, the adoption of devolution in Kenya was a desire of citizens who wanted access of public services closer to them (Ngigi and Busolo, 2019). The objectives of devolution are summarized in article 174 of the constitution of Kenya 2010 as follows:

Promote democratic and accountable exercise of power; give powers of self-governance to the people; enhance the participation of the people in the exercise of the powers of the State; recognize the right of communities to manage their own affairs; protect and promote the interests and rights of minorities and marginalized communities; foster national unity by recognizing diversity; promote social and economic development and the provision of services throughout Kenya; ensure equitable sharing of national and local resources throughout Kenya, facilitate the decentralization of state organs and their functions and services from the capital of Kenya and enhance checks, balances and the separation of powers.

The question that this chapter seeks to answer is whether devolution has had any impact on nationalism in Kenya. Put differently, has devolution reduced or increased ethnicity in Kenya's political economy and thereby enhancing or not enhancing nationalism? This is obviously not a question that has direct answer at this stage of time of the devolved system. This is the case because the system has only been in operation since March 2013, which is just under seven years. The year 2013 was therefore the beginning of a learning period for the managers of the system. Many mistakes that undermined the ability of the system to achieve its intended objectives were made. Some of these mistakes continue to be made.

Secondly the new system has not been embraced by all. Indeed, during the run up to the constitutional referendum, there were two camps, one supporting the draft Constitution whose center-piece is devolution, the other opposed it. Some of those who opposed the draft Constitution are now in power. There was therefore political resistance that had to be dealt with. The resistances continue to affect the system's ability to run smoothly. Such divisions are also still being experienced in the country as is revealed in the Building Bridges Initiative (BBI) Taskforce Report. The report has particularly revealed a wide spread lack of trust among Kenyans and in public institutions. The validation process sustained this sense of identity crisis

and the steering committee believes that, it is a key target for policymaking. The Committee, noted that “we cannot build a nation of shared ideals unless we have a shared understanding of what uniquely defines us, as Kenyans, the good and the bad”. What needs to be noted however, is that not all is under the bridge, a number of trends have emerged since the introduction of devolution that gives some indication of what the country can expect with regard to the impact of the devolved system on ethnicity and nationalism. It is to these that we now turn.

Share of Resources

One way through which devolution is enhancing nationalism in Kenya is by sharing resources. Ngigi and Busolo observes that previously, most of the resources including public institutions were in the cities and major urban centres. With devolution, however, each county has equal chances of growth as they share resources (Ngigi and Busolo, 2019). The fact that there is an objective criteria inbuilt in the Constitution that ensures that each county receives its development resources means that no county or region of the country will be discriminated against in terms of resource sharing. This has created a sense of fairness among the different ethnic communities. This means that communities will have themselves to blame if they fail to use the resources allocated to them for development. This realization is what perhaps explains the active involvement of residents of various counties in demanding prudent and transparent use of development resources and attempting to hold their governments to account. By creating opportunities for balanced development the devolved system of government is certainly building a sense of common belonging or nationalism among the people of Kenya.

Cornell and D’Arcy (2016) observe that county governors have proven themselves to be strong and capable of effectively fighting to protect the devolved system. Through the Council of Governors, which is the coordinating body of all the county governments, the county bosses have managed to demand resources to the counties successfully. Cornell and D’Arcy emphasize that devolution has given more groups access to power and encouraged unity. Devolution has also provided numerically smaller ethnic groups with access to resources that they have traditionally been excluded from and now they feel that they are part of Kenya (Cornell and D’Arcy, 2016). Ngigi and Busolo agree and emphasize that the Council of Governors Strategic Plan 2017-2022 intends to intensify its commitment to promoting adequate financing for devolved functions as a matter of common interest for consideration by the county governments (Ngigi and Busolo, 2019).

Under the centralized system, counties such as Mandera, Marsabit and Turkana did not feel that they were part of Kenya. According to Hon. Peter Opondo Kaluma, the Member of Parliament for Homa- Bay Town, “when someone from Nairobi went to North Eastern Region, the people there would ask the question “how is Kenya” because they never felt that they

were part of Kenya due to their level of underdevelopment. Hon. Kaluma observes that with devolution things have changed due to the resources that have been given to the counties in North Eastern region and other parts of the country by the national government. Hon. Kaluma observes further that some regions that were for a long time not accessible are now having tarmac roads and water". In the financial year 2020/2021 for example, counties in the most neglected regions were allocated more than 10 billion Kenya shillings, such are the counties of Turkana which got Kenya Shillings 10.53 billion and Mandera which got Kenya Shillings 10.22 billion. Hon Kaluma concludes that if "we define nationalism as a sense of belonging", then we can authoritatively say that devolution is promoting nationalism in Kenya (Star News Paper 9th October, 2020). Savage and Lumbasi writes that the increased infrastructure in Kajiado and Turkana are attributed to decentralization. They note that Kajiado has invested 29.9% of development expenditure to construct boreholes, which have improved water access in the county since 2013 (Savage and Lumbasi 2016).

The Equalization Fund provided in the Constitution will also ensure that hitherto underdeveloped regions or counties- will "catch up" with the more developed regions. This will inject a sense of fairness and therefore a willingness among different ethnic communities to identify with each other and the nation as a whole. Savage and Lumbasi emphasize that devolution has enhanced economic development and economic efficiency by bringing public services to the people.

While in the past it was proposed that at least 15 percent of revenue raised nationally should go to the counties, Kenyans who have seen the benefits of devolution to the local communities are demanding for more according to the Building Bridges Initiative (BBI) Report 2020. The report recommends that the allocation to the counties should be increased from the current minimum of 15% of the nationally raised revenue to at least 35% of the last audited accounts of the nationally raised revenue (Building Bridges Initiative Taskforce Report, 2020). More money will also be given to the counties through County Ward Development Fund. If Building Bridges Initiative recommendations are adopted, counties are going to get more than double the amount of money they have been getting in the last seven or so years and that will go a long way to support their development process both at the county and ward levels. What this means is that each and every region in Kenya and every clan/tribe will feel the benefits of devolution and have a sense of belonging to this country.

Compensating losing Groups:

Devolution has also enhanced nationalism in Kenya by giving numerically smaller groups within counties a chance to have representation in the county governments. In this regard, Agnes Cornell and Michelle D'Arcy observe that for the communities that don't win the presidency, devolution has given them a chance to win in their own counties. Under the centralized system, groups were straightforwardly either winners or losers, but in the devolved system there is

a layer of governance where groups still win, hence the devolved system has amplified the gains for both the larger and smaller communities (Cornell and D'Arcy, 2016). The two scholars emphasize that the feeling by Kenyan communities that losing in the national elections or the fact that the President is not from one's ethnic community does not mean getting nothing from the ruling government, has enhanced nationalism in Kenya. They conclude that devolution has given majority of Kenyans greater access to political leadership, at least in terms of ethnic representation, than they had under the centralized system irrespective of the size of their ethnic group (Cornell and D'Arcy (2016).

Ben Christopher Nyabira and Zemelak Ayele (2016) agree with this position but add that under the centralized system, Kenyan politics was such that those from small communities had a slim opportunity to rise to political leadership. Devolution through the creation of the office of governor, deputy governor and other executive positions at the county level, presents a significant opportunity of political inclusion, for those from hitherto excluded communities to have access to political positions. In a number of counties with mixed ethnic groups, the individuals holding the governorship and deputy governorship are not from the same ethnic community. In 2013 for example, we had the governors of Lamu, Migori, Trans-Zoia, Embu, Busia, Bungoma, Isiolo, Nakuru, Nairobi and Marsabit and their deputies come from different communities or clans making those communities to have a sense of belonging and to feel that their own kinsmen had real political power (Nyabira and Ayele, 2016).

Granting of Autonomy

Devolution has also impacted on nationalism by granting autonomy or self-rule to the people at the county government level and shared rule at the national government level. As Kenyans deliberated on the issue of devolution, they came to realize that the refusal of the central authorities or the dominant communities to accept autonomy for others is what imposes severe strains on national unity (Yash Pal Ghai, 2007). The fact that every county has the right to run its own affairs is enhancing nationalism as no specific ethnic group takes charge over others' issues and decides for them what to do as was done previously. The power that has been given to the people to make decisions and to prioritize their own development needs is also "de-ethnicizing" development in Kenya. The people of Kenya are increasingly keener and more concerned about what their governors are doing than what the national government is doing or not doing. At the local level, the discussions are no longer so much about whether the communities from which the president and his deputy come are getting more development than others, but is more directed into what the governor and his cronies are doing with the funds available to the county. County residents are engaged in debating the challenges of development at the county level and not at the national level. Indeed, devolution was adopted partly to demystify the presidency and make it less attractive than it was prior to the introduction of the new system of government.

Inter County Cooperation

The devolved system of government is also designed in a way that it emphasizes cooperation and not competition between the national and county governments. County governments are also encouraged through the intergovernmental relations Act to cooperate and establish joint committees and ventures even as they compete to attract investors. This means that the national and county governments need each other. Once this is recognized not just by the political leaders at the two levels of government but also by the citizens, we can expect a much more harmonious relationship among the counties on the one hand and between the counties and the national government on the other. The joint committees and economic blocs that have been formed by neighbouring counties to address common challenges and to foster development attest to this. These initiatives have the potential to encourage a sense of common belonging among Kenyans.

Inter-county trade relationships are also being built. In as much as the devolved units treasure their independence to focus on their unique challenges in efforts to improve the lives of their people, there are regional synergies they need to harness to tackle their economic woes. In North Rift, for example, Uasin Gishu, Nandi, Trans Nzoia, Baringo, Turkana, West Pokot, Samburu and Elgeyo Marakwet counties have formed a tourism trading bloc, which targets a population of about 6 million people. Isaac Ruto the first Governor of Bomet County once said that the regional blocs are good for socio-economic development and would unite populations and leverage shared resources and economic zones. “The North Rift region in particular has a high potential of tourism attraction partly because of the discovery of oil; the tourism activities cut across borders and the counties must collaborate and exchange ideas on promotion of tourism and other business ventures” (Daily Nation 23rd April, 2015). These regional blocs are uniting populations of different ethnic backgrounds and creating an environment in which benefits are accruing to each group. According to the findings of this research, the focus on inter-tribal development strategies that generate benefits for all are certainly having a positive impact on nationalism in Kenya.

Lamu, Kilifi, Kwale, Mombasa, Tana River, and Taita Taveta in the coast region, operate a socio-economic bloc called Jumuiya Ya Kaunti Za Pwani. The objective is solve the various challenges facing the region including resuscitating tourism, education, fighting insecurity and taking over maritime activities. In Northern Kenya the story has been the same. Lamu, Tana River, Isiolo, Marsabit, Garissa, Mandera and Wajir counties have forged close economic ties. This is already helping them think through programmes that would benefit from the economies of scale of such regional initiatives. According to the first Garissa Governor – Nathif Jama, the seven counties can only have meaningful growth if they work together. Speaking at the Samburu Simba Lodge during the Pastoralist Leaders’ Summit, Jama noted that the seven counties have similar demographic and geographic features that could be exploited for the benefit of their

people (Daily Nation, March 11th, 2016). Through such blocs, the seven counties also intend to plan roads and other infrastructural projects that cut across their borders and tribes. For the northern Kenya counties also, the livestock industry calls for such a regional front. Specifically, the local leaders in the region want the Kenya Meat Commission privatized and revived to develop the beef export trade.

The Ukambai counties have also formed the South Eastern Kenya Economic Bloc (SEKEB) in order to boost trade in the region. The bloc was spearheaded by Governors Julius Malombe (Kitui); Alfred Mutua (Machakos); and Kinutha Kibwana (Makueni). The purpose of the bloc is to pool and leverage on regional resources, county synergies and economies of scale in order to spur trade and investment in the region. It is also expected to broaden, deepen and accelerate socio-economic development, employment and wealth creation for the Ukambani residents. The trading bloc is expected to enhance value addition for the Ukambani products and ensure food security through revamped agriculture. According to Kivutha Kibwana, through this regional bloc, Ukambani would be liberated from the yoke of marginalization, poverty and despair.

The 14 counties of Western Kenya and the Rift Valley namely Bomet, Bungoma, Busia, Homa-Bay, Kericho, Kisii, Kisumu, Migori, Nandi, Nyamira, Siaya, Trans-Zoia and Vihiga have also come together to form the Lake Region Economic Bloc. The main objective of this initiative is to leverage economies of scale and share resources with intent to grow the economy of the region. It seeks to facilitate access to wider markets nationally, regionally and internationally. The bloc also yarms to steer economic growth by creating an enabling environment for trade and investment initiatives and by engaging in joint public investments with a view of enhancing the Lake Region's economic growth (www.lreb.co.ke). Once the trade and investment picks up among the said counties, what would follow is a form of integrated community and the end result is nationalism. The governors of the said counties believe that they could use the bloc to boost economic trade among themselves because of their proximity to one another and their uniqueness. They believe that approaching trade and investment from a regional perspective will allow them to take advantage of economies of scale that arises as a result of combined population, the availability of resources therein and combined financial contributions from the county governments and local investors. It is instructive that these counties are made up of different ethnic groups who are willing to promote unity for the betterment of their people.

As they form a regional bloc, each county has identified their priority areas in the cross border trade with the neighbouring counties so as to avoid duplication of goods that they produce. The members of Lake Region Economic Bloc particularly realized that each of them have strength in agricultural production, fishing and horticulture, what is needed is the identification of areas of synergy within the counties that would spur economic trade and development. The plan would help them to eliminate needless competition and enable them to trade in goods in

which each has a comparative advantage over the others. The proposed priority areas include: revamping the collapsed regional industries including sugar, cotton, fish and horticultural sectors, rehabilitating the poor state of roads and maximizing the utilization of the Eldoret and Kisumu International Airports so as to spur trade and investment potentials given that the two Airports are serving the entire Western Circuit. It is noted that the success of this regional bloc has spurred nationalism between the 14 counties and beyond. The hope is that similar collaborative initiatives will be replicated all over the country for purposes of unity and final integration.

Public Participation

Another way through which devolution has impacted on nationalism is by broadening the democratic space. According to Mbondenyi (2012) the most important aspect of devolution is that the people now have opportunities for participating in public affairs and could even insist on effective provision of services. In the centralized system of government, the closest that the local citizens got to in the realization of democracy was casting of the vote on Election Day (Mbondenyi, 2012). The Kenyan public thus had no opportunity to participate in the affairs of the state; neither did they expect accountability from the government. They relied on their members of parliament to hold the leadership to account. In a number of cases the parliamentarians failed to deliver on this. The power that has been given to the people to participate in the affairs of the state is now a gum that is gluing the nation together and making people to feel that they are part of the larger nation with which they can identify.

Public participation as spelt out in article 196 of the Constitution holds that those who are affected by a decision have a right to be involved in the decision-making and to influence the process. The public are allowed to participate in and engage in the work of both the national parliament and the county assemblies. These rights are provided for in Article 119 of the Constitution and Section 15 of the County Governments Act, 2012. They include the right to petition a county assembly to consider any matter within its authority and at the same time requiring a county assembly to facilitate the presentation of such petition (Mbondenyi, 2012). The provisions of Sections 27, 28 and 29 of the County Governments Act, 2012, also spell out processes through which the electorate of an Electoral Ward oversight the performance of their elected members. This includes the right of the members of the public to recall a member before the expiry of the life of that county assembly. Since public participation is inclusive, it naturally impacts positively on nationalism. According to the 4th Annual Devolution Conference Report County Governments have been conducting periodic public participation processes to sensitize the public on public finance and budget allocation and tax and levies bills in accordance with Article 10(2) (a) of the Constitution of Kenya 2010. However, the people within the counties feel left out because of the communication channels used. A number of county governments have also failed to include the public in planning, policymaking, budgeting

and implementation as is stipulated by article 125 of the Public Finance Management Act, 2012 and article 87 of the county Government Act, 2012 (4th Annual Devolution Conference Report 2017).

Unintended Effects of Devolution on Nationalism

While a number of positive developments associated with devolution are taking place, some negative developments have also been registered that may promote ethnicity while undermining nationalism. Many of these were certainly not intended by the drafters of the Constitution. Devolution has tended to encourage clanism in ethnically homogeneous counties and tribalism in ethnically heterogeneous ones. Hon. Millie Odhiambo-Mambona Member of Parliament for Mbita Constituency observes that several ethnic groups/clans now form a new minority at intra-county level since the devolved system in Kenya has not provided a county for each territorially structured ethnic community. Practice shows a trend in which the communities forming the majority in some counties are excluding those who are the minority in those counties. Hon. Millie Odhiambo-Mambona, says that clannism if not well managed will soon replace ethnicity in the county politics. In Luo Nyanza, the smaller communities like “Suba” are already feeling some form of discrimination, from the larger communities and it is becoming difficult for men and women from such smaller communities to run for the position of a governor and win neither can they be appointed as deputy governors because the politics of numbers is taking over even at the county levels. A close look at the ethnic background of governors in the successive elections shows that the governorship went to individuals from large ethnic communities or larger clans, while majority of the deputies tend to come from the second largest ethnic communities/clans in their counties. Hon. Odhiambo-Mambona concludes that the motive for this is not always a benign need of ensuring political inclusion of hitherto excluded communities, but to garner support for those running for governorship.

What the above analysis shows is that, despite the evidence of inclusivity brought about by the devolved system, there is evidence in Kenya that the problems associated with ethnic based political exclusion of minorities are far from resolved. The devolved system has instead created new minorities in almost all counties and if not checked will erase the nationalistic achievements so far realized.

Another unintended consequences of devolution is the tendency by some counties to deny employment to ethnic groups from outside the county. This includes those ethnic groups that reside in a county but originated from another county. In so doing, these counties violate the principles of national cohesion and integration and the promotion of the idea of unity in diversity as spelt out in article 174 of the Constitution. These practices also violate section 65 subsection 1 (e) of the County Governments Act 2012 which emphasize the “need to ensure that at least 30 percent of the vacant posts at entry level are filled by candidates who are not

from the dominant ethnic community in the county”. It has been observed that some counties violate this requirement and therefore giving the false impression that “outsiders” are not welcome an act that undermines nationalism.

The constitutional requirement that no more than 30% of elective and appointive jobs be held by members of one ethnic group (Article 10, 27 (4), 56 & and 232 (1) of the Constitution) is also being undermined. This is especially in view of the fact that the Uhuru – Ruto administration, has tended to share cabinet positions and other public service appointments among the Kikuyu (Uhuru’s ethnic community) and Kalenjin (Ruto’s ethnic group). This has been a source of discontent especially among the opposition political parties. The practice undermines the spirit of devolution and nationalism.

Devolution has also tended to encourage nepotism. In a letter dated January 15th 2015 addressed to the Chairman of the Public Service Board and signed by Audi Ogada, Chairman of a Kisumu lobby group, the lobby group claimed that between 2013 and 2015, one clan dominated the employment opportunities at the Kisumu County, an act that Mr Ogada says goes against Kenya’s Constitution 2010 (Citizen Weekly News Paper, Sunday, 18th January 2015). While in the past working away from home was the norm, culturally empowering and also good for national integration, devolution is changing this trend. The current recruitment by County Assemblies Service Boards and County Public Service Boards appear focused inwards. An audit of members of County Executive Committees and Chief Officers reveal an unmistakable trend where those recruited hail from groups indigenous to a county. Nyabira and Ayele (2016) observes that the statutory requirement to the effect that the appointment of members of County Executive Committee (CEC) should take into consideration the need to ensure the representation of the various ethnic groups within a county has not been observed by many county bosses.

The first Governor of Kiambu County for example, had a challenge getting his County Assembly to approve the Chief Executive Committee Member appointee from outside the County, yet Kiambu County is largely cosmopolitan. Sub-counties of Kiambu County such as Thika, Ruiru and Kikuyu are quite cosmopolitan when one takes into account the demographic facts in these sub-counties. Politics also played out in Machakos County after Governor Mutua appointed an Executive Committee Member from the Asian community. There were voices of resentment when this appointment was made. The Governor of Nakuru also appointed 4 of the 10 members of the CEC from the Kikuyu community, 3 from Kalenjin community and one each from the Luo, Kisii and Meru communities even though the county is made up of more than 10 communities. In Laikipia County, individuals from the Kikuyu ethnic group comprised 4 of the 8 members of the CEC, while a single individual represented each of the Maasai, Turkana and Kalenjin communities despite the governor being a Kikuyu. The ethnic inclusiveness of Laikipia CEC, even became a matter of litigation in the case of Mathew Lempurkel v Joshua

Wakahora Irungu County Governor, Laikipia County and 2 others. The argument was that the governor had failed to appoint someone from Samburu in the committee despite the fact the Samburu are the minority in Laikipia County (Nyabira and Ayele, 2016). The petitioner relied on Article 10 and 232 of the constitution, which emphasizes inclusiveness and protection of marginalized ethnic communities.

In Tana River which has several ethnic communities which include the Pokomo, Orma, Wardol, Malakote, Munyoyaya, Akamba, Bajuni and Kikuyu the story was not different. The Governor in 2013 appointed 9 members of the CEC from only the Pokomo, Orma and Wardei communities leaving out the other represented communities. A resident in the county then filed a case in the court claiming lack of ethnic inclusivity in the CEC in *Republic v Tana River County Assembly and 2 others*. The court ruled that the county did not comply with Article 197 (2) of the constitution, which is about the need for the committees to reflect the county cultural diversity. The court also ruled that the Governor had failed to observe Article 10 on the national principles and values of inclusiveness, Article 174 of the constitution on the objects of devolution, which includes recognition, protection and promotion of minorities and marginalized communities (Nyabira and Ayele, 2016). Bungoma County which has more than 6 ethnic communities that include the Bukusu, Batura, Tachoni, Teso, Sabout and Bangomek was also taken to court in the case of *John Mining Temoi and another v Governor of Bungoma County and 17 others* over the lack of ethnic inclusiveness in its County Chief Officers appointment. The issue was that the Bongomek community was not represented in any county administration, yet they were the most marginalized community in Bungoma County. The same concern was reported in Marsabit which has 14 ethnic communities. The 10 CEC slots were divided among the Borana, Gabra, Rendille, Burji, Garre and Asharaf leaving out eight other ethnic tribes that reside or make up the county.

Mwathane (2014) note that the ethnic lens has been rather thick in the appointments and recruitments at the county level. This is happening even to people who know no other home other than the one in the county in which they reside. Mwathane emphasize that as the counties encourage employing people considered indigenous, they should be aware of the challenges that they are likely to face in future, given that some regions in Kenya are more endowed with professionals than others. Available data also reveal that the few Kenyans who are employed in counties away from their ethnic base are facing discrimination (Mwathane, 2014). If counties continue recruiting professional cadres such as doctors, engineers, agriculturalists and finance experts through ethnic considerations, then some counties will soon find themselves with a deficit while others may have surplus. If not checked therefore such discrimination would gradually scale up ethnicity and adversely affect service delivery and national integration. This negative practice has also affected the representation of marginalized groups including people with disability and the youth in the county assemblies. When such people are excluded from the assemblies, they do not feel they belong. The requirement that 30 % of tenders be awarded to

women and the youth is also aimed at promoting inclusivity and therefore a sense of common or shared belonging by all groups and categories of people. It is imperative to emphasize that these challenges are not due to the design of devolution. They are caused by deliberate actions of those who do not appreciate the relevant provisions of the Constitution. They constitute a violation of the Constitution. The challenge therefore is the failure to implement the relevant provisions of the constitution

Concluding Remarks

This chapter looked at the impact of devolution on nationalism and ethnicity in Kenya. The chapter argued that nationalism in Kenya has its roots in the colonial period. During that period, nationalism was fueled mainly by the need for independence. In independent Kenya, it was promoted mainly by the realization that the country would be better off in unity. Unfortunately, the strong ties of nationalism that existed during the nationalist period that preceded independence did not last very long into the independence period. Ethnicity replaced nationalism as the organizing principle of Kenyan politics. Political leaders at independence and after sought support from their ethnic groups in their determination to hold on to power thus leading to enhanced ethnicity.

Devolution was introduced for a number of reasons. Among them was the need to address the challenges of ethnicity and the weak sense of nationalism. The people wanted equitable distribution of resources and inclusion in the government. The devolved system was also meant to correct historical wrongs and injustices that contributed to imbalances in development.

The impact of devolution on nationalism and ethnicity so far is twofold; there are positive and negative impacts. On the positive side, the devolved system has promoted equitable sharing of resources and ensured the recognition of the interests and rights of minority and marginalized groups; compensated the losing groups in national competition by giving them another chance of leadership in their own counties; provided self-governance or self – rule and broadened the democratic space through public participation. On the negative side, the devolved system has reportedly promoted tribalism in heterogeneous counties and clanism in homogenous ones. There are also reports of nepotism in employment and patronage. Despite its negative side devolution has registered many positive things and if well managed could unite the people of Kenya and strengthen the ties that bind the nation together. Its success lies on the development of a culture of constitutionalism.

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CHAPTER 7

FINANCING DEVOLUTION

Thomas N. Kibua

Introduction

The centralized system of government which had been in place since independence in 1963 was largely faulted by the majority of Kenyans because it failed to deliver the desired developmental results which were envisioned in Sessional Paper No. 10 of 1965 on African socialism and its Application to planning in Kenya. The key development objective as prescribed then was to eliminate poverty, disease and illiteracy or ignorance. Such would enhance the wellbeing of Kenyans and achieve the desired development.

Subsequent development initiatives and economic governance arrangements did not achieve the intended objectives either. However, the movers and shakers of the economy continued to be pre-occupied with the quest to achieve enhanced economic development. In addition, the social justice goal never changed much up to the year 2010 when the current constitution was promulgated. The socio-economic conditions of the population had not substantially improved by this time. In certain instances, they worsened as evidenced by poverty levels, economic stagnation, increasing public debt, increased unemployment, poor economic governance and management and uneven socio-economic development.

A review of public development policy, planning, budgeting and implementation up to 2002 shows that the issue of poverty alleviation has been at the centre stage since independence and that the cross-cutting and persistent problems have been slow economic growth, unemployment, poverty and income inequality and wealth distribution. Subsequent development plans have recognized these issues and also shifted their objectives and policy stance to take cognizance of changed economic circumstances and lessons from past experiences. When things did not work out as planned or performance worsened, the government of the day reacted with sessional papers, commissions, task forces, presidential decrees and cry for development partner assistance (financial and / or technical).

An institutional and capacity building needs assessment for the Kenya Social Action Fund (KENSAF)¹ in 2007 stated that “poverty reduction has remained a key concern of the Kenyan Government since independence. The matter was first highlighted in Sessional Paper No. 10 of 1965. Subsequent National Development Plans and Sessional Papers have, explicitly or implicitly, consistently emphasized the need to reduce poverty for the majority of Kenyans. Specifically, the 1979-1983 Development Plan had its overall theme as “poverty alleviation” while the 2002-2008 Development Plan had an overall theme as “Effective Management for Sustainable Economic Growth and Poverty Reduction”.

Kibua, T.N. (2007), Instructional and Capacity Building Needs assessment of the Kenya Social Action Fund, African Development Bank / GOK / Finland Ministry for foreign affairs (unpublished report)

Scanning through the country’s strategic development choices over the last 56 years, it is evident that the overall development objectives, activities and expected outputs / outcomes have been tailored towards enhancing equitable economic growth. However, the performance of the economy has been mixed and poverty has persisted and probably worsened.

The KENSAF assessment concluded that there was a compelling case for the democratization of development planning, implementation and monitoring and the concomitant need to use decentralized funding as the key instrument to enhance equity and poverty reduction. Over the years, the country’s development policy platform has evolved towards supporting development funding initiatives that are devolved. However, there exist unresolved issues and challenges to the legal, institutional, and organizational arrangements, community capacities, accountability, ownership and sustainability of such decentralized funds.

Scholarly debate complemented the political agitation for the dispersal of power to the localities from the late 1980s. This culminated in the Constitution of Kenya 2010 which introduced the devolved system of government. The public finance-related objects of devolution include “give powers of self-governance to the people and enhance the participation of the people in exercise of the powers of the state and in making decisions affecting them; recognize the right of communities to manage their own affairs and to further their own development; and promote social and economic development and the provision of proximate, easily accessible services” and ensure equitable sharing of national and local resources throughout Kenya (Republic of Kenya, 2010). With this governance arrangement, came the quest for public resource mobilization, allocation, utilization and accountability. Chapter 12 of the Constitution provides the broad principles of public finance and the Public Finance Management Act, 2012 and the attendant Public Finance Management Rules and Regulations 2015 provide for the operationalization of these principles. Devolution is now in the eighth year of implementation and for it to succeed as expected, it must be adequately funded.

Without resources, devolution is dead. As the Controller of Budget states, “The success of devolution will largely depend on appropriate management of public resources” (Republic of Kenya). Financing devolution should be seen from an effectiveness angle since the shift to devolved system of government was aimed at enhancing the pace of development in the country. Expenditures of public resources should ultimately result in real development outcomes. This means that the expected outcome of public expenditure must be sustainable development in terms of economic growth, poverty reduction, reduction in inequality and employment generation. Some specific indicators of real development would be the achievement of a significant proportion of the post 2015 Sustainable Development Goals (SDGs) and attendant targets.

The devolved system of government translated into a new paradigm in financing national development, with specific emphasis on the transfer of functions and commensurate resources to the county governments.

It is a constitutional requirement that counties should perform their functions in a manner that augments the national development agenda. In addition, devolution of functions must be followed by devolution of financial resources. The constitutional requirement is that counties should be financed primarily through transfers of nationally raised revenues. Counties should also raise additional financial resources from their own sources. Own resources are prescribed in the constitution and limited to property taxes, entertainment taxes and any other tax that counties are authorized to impose by an Act of Parliament. County governments are also allowed to contract public debt subject to approval by the National Treasury. However, debate rages on whether this arrangement provides adequate financing for counties. Further, there is intense and persistent debate on whether the funds which are already made available to counties are being allocated and utilized effectively. The quantum and efficiency (quality) of resource allocation and utilization is expected to result in desirable development outputs in the short-run and outcomes in the long-run. The underlying question is whether the current financing framework is effective and if not, what should be the most appropriate alternative?

This chapter analyses the issue of effective financing of counties (i.e. financial devolution) from the twin-angle of adequacy and effective utilization of public financial resources. It also raises issues of academic interest in the subject of public finance.

An Historical Account of Decentralized Funds

While devolution was ushered in by the Constitution of Kenya 2010, we recall that a fiscal decentralization framework had been in existence since the 1980s. It was anchored on the 1983 District Focus for Rural Development Framework. Subsequently, several decentralized funds were established through Acts of Parliament and Administrative Orders. They include: Roads Maintenance Levy Fund (RMLF) established through the RMLF Act 1994; Rural Electrification

Programme Levy Fund established in 1998 through sections 129 and 130 of the Electric Power Act (1997); Local Authority Transfer Fund (LATF) established through the LATF Act 1998; Water Services Trust Fund established through the Water Act 2002; Constituency Development Fund (CDF) established through the CDF Act 2003; National Development Fund for Persons with Disability established through the Persons with Disability Act 2003; Free Primary Education Fund established in 2003 through government policy; Free Secondary Education Fund (2007); HIV/AIDS Fund created in 1999 through Presidential order in legal Notice No. 170; Poverty Eradication Fund (1999); Youth Enterprise Development Fund (2006); and Women Enterprise Development Fund (2006/7).

It is noted that, except for the CDF and LATF funds, all other decentralized funds were ring-fenced for specific purposes. Other than being targeted, there was no robust and coordinated governance and management framework for their allocation and utilization. Subsequently, the Constitution of Kenya 2010 introduced devolved funds.

Prior to the promulgation of the Constitution of Kenya 2010, the government had mooted the introduction of a Social Action Fund which targeted poor communities in line with the aspirations of the investment programme for the Economic Recovery Strategy for Wealth and Employment Creation (2003-2007). The main objective of the Fund was to support and finance, in a transparent and accountable manner, the implementation of productive community-driven development projects, premised on the values of community needs, empowerment and accountability and aimed at creating a responsive public bureaucracy at the local levels.

The experiment with both decentralized and devolved funds has been faced with institutional and management challenges which, on the consideration of sufficiency, effectiveness and equity, constrain the attainment of the expected results of fiscal decentralization. Consequently, lessons can be drawn which may inform and enhance the effective financing of devolution. The main challenges are institutional and operational (Kibua and Mwabu, 2008).

They include:

- a) Institutional design problems whereby (i) organizational and management structures are not harmonized vertically and horizontally and lack clarification of roles and responsibilities, as is the case of the glaring overlap between CDF and other devolved funds, (ii) unplanned and uncoordinated establishment of decentralized funds lacking a planning policy framework to guide all decentralized financing; (iii) failure of government to set up various decentralized funds based on clear fiscal framework encompassing the broader national development agenda, (iv) duplication of tasks and conflicts between funds, e.g. multiple programmes controlled by various entities with little partnership between the funds at community level and with funds seen more in terms of competition rather than partnerships and (v) failure by the national government to provide effective

technical support and capacity to county units

- b) Capacity problems with (i) inadequate personnel and skills for developing and costing integrated development plans which can be translated into annual budgets, (ii) weak procurement systems, (iii) inadequate understanding of financial implications of undertaken projects, (iv) limited financing capacities and instruments at the local level, (v) projects given to or managed by unqualified people, (vi) inadequate capacities to manage budget making risks such as : unrealistic cash flow projections and plans, unrealistic revenue projections, borrowing projections, idle resource balances, procurement plans not matching the cash flow and unforeseen expenditures; (vii) underdeveloped financial management information systems; and (viii) in some cases, lack of absorptive capacity at the county level.
- c) Financial Resource Challenges with diminished capacity to deliver effective services due to (i) limited scope for raising local own revenues and low collection of own revenue,(ii) taxpayers often unwilling to pay because of inadequate provision of services and difficulties in the enforcement of action against tax defaulters, (iii) pervasive corruption draining available resources, (iv) financial management and regulations rules that are openly disregarded resulting in many undertaken projects stalling due to underfunding, (v) tendency to accumulate huge debts (pending bills), (vi) tendency to spend most money on personnel (partly due to overstaffing) with little left for operations, maintenance or capital investments and (vii) subjective allocation which hinders transparency and accountability.
- d) Lack of an efficient Monitoring and Evaluation Systems due to (i) lack of reliable information/statistics,(ii) inadequate monitoring and evaluation policies, plans and systems, (iii) lack of accountability and transparency systems at the project implementation level, (iv) weak framework and mechanisms for addressing complaints from project beneficiaries aggrieved by poor project management issues and (v) weak accounting systems in the local units with annual accounts often finalized long after the end of the financial year.
- e) Political Interference and Ownership problems reflected in the lack of policy framework to shield decentralized financing and its implementation from political manipulation and patronage; and the limited / ineffective participation by the public.

Principles of Fiscal Devolution

The current financing of counties is based on several key principles. The first is the principle of market failure whereby governments are supposed to get involved in the economic activities of their citizens in order to correct the results of market failure which include insufficient resources, inefficiency in resource allocation and lack of equity in the distribution of goods and services. The second is the principle of sound public finance management which underscores

the attribute of fiscal responsibility. In the Kenyan case, fiscal responsibility requires that: over the medium term a minimum of 30% of national and county government's budget shall be allocated to development expenditure; the national government's expenditure on wages and benefits for its public officers shall not exceed a percentage of the national government revenue as prescribed by regulations; over the medium term, the national government borrowings shall be used only for the purpose of financing development expenditure and not for recurrent expenditure; public debt and obligations shall be maintained at a sustainable level as approved by parliament for the national government and by the county assembly for the county government; fiscal risks shall be managed prudently; and a reasonable degree of predictability with respect to the level of tax rates and tax bases shall be maintained.

The third principle is that of enhancing accountability and value for money. This requires that public resources be accounted for in terms of allocative efficiency and effective utilization in accordance with citizens' preferences for development. It further requires openness and transparency towards the public about government functions, fiscal policy intentions and public sector accounts and projections.

These principles guide national and county development planning, expenditure budgeting and execution and revenue management. Some very specific provisions include: (a) Transfer of functions to the Counties: Article 187 provides for the transfer of functions and powers between levels of government and Section (2) (a) states that "Arrangements shall be put in place to ensure that the resources necessary for the performance of the function or exercise of the power are transferred"; (b) Devolved Functions: Agriculture, health, control of pollution, cultural activities, transport, trade, planning and development, early childhood education and public works; (c) Values of devolution: autonomy in revenue allocation and discretion in expenditures; democracy to enhance transparency and accountability; effectiveness in the allocation and utilization of resources; and (d) Criteria for local finance: vertical allocation of resources to reflect allocation of functions; large proportion from own resources to enhance accountability and citizen interest in local activities; and equalization to guarantee a minimum set of standard services.

There are other principles of fiscal devolution which are equally relevant. They include: (a) subsidiarity principle which requires that the higher level of government should take up a government function only if the lower level of government is unable to fulfill the function(s) efficiently; (b) equality whereby fiscal policy should aim at addressing regional disparities where regions with high tax base and low expenditures coexists with regions with low tax base and high expenditure needs and national government should maintain appropriate fiscal incentives for regions to promote own economic development, i.e. equalization funds and incentive grants to motivate county governments to increase own revenue collection; and (c) fiscal autonomy calling for each level of government to have autonomy in decision making and execute power in an appropriate and mutually beneficial manner.

These principles are clearly anchored in the Constitution and attendant statutes. There has however been no coherent and consistent way of ensuring that all the principles are working simultaneously at the moment. As devolution takes root, conversation on their necessity and efficacy continues to come on board. For example, discussion on the need for national government to take up a function only if county governments are unable to undertake the functions effectively would be impaired by two constitutional factors. First, the Constitution prescribes the specific functions to be devolved; and secondly, the Council of Governors operates more like a trade union lobbying for functions to be transferred uniformly. This led to the 'big bang' approach where all counties were given all the devolved functions at the same time instead of asymmetrically basing such transfer of functions on proven capacity as required by the Constitution and the County Governments Act 2012. Since 2013, the country's fiscal decentralization framework has changed significantly. The quantum of devolved funds has been enhanced. The mechanisms for managing these funds have been made more elaborate. They are governed by a legal and organizational framework which encompasses: The Constitution of Kenya, The Public Finance Management Act, Division of Revenue Act, and The County Allocation of Revenue Act, The County Appropriation Acts and The Finance Acts. In addition, the County Institutional Framework includes: County Assemblies, County Executive Committee, County Treasuries, Accounting Officers, Receivers and Collectors of Revenue, Boards of Cities and Municipalities and County Budget and Economic Forum.

There are also strong direct institutional linkages between the National Government and the County Governments through the National Treasury, Controller of Budget, Commission on Revenue Allocation, Auditor General, and Parliament. These institutional arrangements are put in place to facilitate the management of the funds and especially to: blend old funds with devolved funds; link functions and financial resources; establish appropriate management structures; synchronize national planning and financing cycles; and establish operational platforms for planning, budgeting and budget execution, reporting, auditing and monitoring and evaluation. Mechanisms for the management of institutional relations are also provided for.

Current Financing and Lessons

The sources of County Revenue are provided for in the Constitution. It provides for (i) Equitable Share of nationally raised revenue which should not be less than 15% of national revenue, (ii) Equalization Fund targeted to water, roads, health facilities and electricity, being 0.5% of national revenue. This Fund is to be used in those regions of the country that had been marginalized (iii) Contingencies Fund, (iv) Own Revenue levied as property rates, entertainment taxes and service charges and (v) Borrowing with national government guarantee. A public expenditure process framework encompassing planning and public sector budgeting, budget execution and accounting, reporting and monitoring and evaluation (M& E) is also stipulated. The legal

provisions also stipulate a Financial Governance Framework emphasizing accountability and fiscal responsibility. This is supposed to be guaranteed by ensuring that (i) accountability is one of the national values and principles of governance, (ii) a functional institutional framework (namely, Parliament (representing citizens), Office of the Auditor General, Office of the Controller of the Budget, Commission on Revenue Allocation and National Treasury) is effectively operational, (iii) the legal framework (i.e. the Constitution of Kenya 2010; the Public Finance Management Act 2012; Public Audit Act 2002) are implemented, (iv) an Assurance Framework (i.e., certification of accounts, continuous audit presence and service delivery assurance) is current and continuous and (v) partnering with Kenyans of goodwill is enhanced.

Based on this framework, transfers to county governments have been effected over the last seven financial years. Proposals for the 2020/21 financial year have been made and approved while those for the financial year 2021/22 have been made. Allocation of County Governments' Equitable Share of Revenue rose for the Financial Years 2014/15 to 2020/21 from KES 226.66 billion to KES 316.50 billion. The aggregate allocations to counties for the period 2013/14 to 2020/21 amounted to KES 2,206 billion. This comprises of an equitable share of KES.280 billion or 30 per cent of the most recent audited revenue. An additional conditional allocation amounting to KES 324 billion has also been given for the same period. This total amount is divided among counties depending on the developmental needs of county governments and their ability to perform the functions assigned to them. The amount going to each county depends on the parameters shown in the table below:

Table (a) Second Revenue-sharing formula

No.	Parameter	Weights
1	Population	45%
2	Basic Equal Share	26%
3	Poverty	18%
4	Land Area	8%
5	Fiscal Effort	2%
6	Development Factor	1%
	TOTAL	100%

Source: Commission on Revenue Allocation

Table (b) Third Revenue -sharing formula

Objective	Parameter	Indicator of Expenditure Need	Assigned Weight
1. To enhance service delivery	Health services	Health index	17%
	Agriculture services	Agricultural index	10 %
	Other county services	Population index	18 %
	Urban services	Urban index	5%
	Minimum share	Basic share index	20%
2. To promote balanced development	Land	Land area index	8 %
	Roads	Rural Access index	4 %
	Poverty level	Poverty head count index	14 %
3. Incentivise fiscal effort	Fiscal effort	Fiscal effort index	2 %
4. Incentivise fiscal prudence	Fiscal prudence	Fiscal prudence index	2 %
Total			100%

Source: Commission on Revenue Allocation, 2019 Hence, counties do not get equal amounts.

Through the Division of Revenue Bills, proposals are made to ring-fence some of the revenues raised nationally for specified programmes/projects. Such Conditional Grants to County Governments from National Government Revenue have increased progressively from KES 16 billion in 2014/15 to KES.77 billion in 2020/21. This is allocated for level 5 hospitals, free maternal health care, compensation for user fees forgone, leasing of medical equipment, special purpose grant supporting specialized medical access and Road Maintenance Fuel Levy Fund. Some conditional allocations, such as allocation from the Road Maintenance Fuel Levy Fund are also proposed for transfer to the county governments on the basis of the formula for equitable share. There has been additional Conditional Allocations to County Governments from Loans and Grants from Development Partners during the same period. This was ring-fenced to supplement financing for county health facilities.

The total resource allocation to the county governments is prescribed by the Constitution to be not less than 15% of the recently audited national revenues. The equitable allocation is based on shareable revenue defined in the Constitution and the CRA Act, 2011 as all taxes imposed by the national government and any other revenue that may be authorized by an Act of Parliament. Currently, such revenue emanates from: income tax from individuals and corporations, value added tax, excise taxes, licenses under the Traffic Act, customs duties,

other taxes from international trade and transactions, stamp duty, interest received, profit and dividends from the Central Bank of Kenya, other profits and dividends, rent of land, fines, penalties, forfeitures and other charges, immigration visas and other consular fees, work permit fees, passport fees, fishing rights, betting control, registration services and miscellaneous revenue. Available information from the Auditor General's Reports shows that out of the total revenue raised by the national government, about 70 percent is sharable. The actual proportion has been increasing every year since 2014/15. Counties have disputed the determination of shareable revenue contending that substantial revenue is excluded from the shareable revenue including external funding, consolidated fund services (public debt and services), local Appropriations In Aid (AIA) i.e. money collected by government agencies and money allocated to state corporations. County governments argue that the exclusion of these revenues diminishes the resources available to them.

The issue of stability and predictability of county revenue allocations requires attention if counties are going to achieve their development goals. It is observed that The County Allocation Revenue Bill 2015 and The Division of Revenue Bill 2015 clearly state that "Variance in revenue raised nationally from the expected revenue not exceeding ten per cent is not expected to affect the county governments' allocations of the equitable share of revenue raised nationally. This is because such shortfalls in revenue raised nationally shall be borne by the national government". In addition to national transfers, county governments are allowed by the Constitution to levy specific taxes, fees and charges. During the period 2013/14 to 2019/20, the aggregate collections in terms of Own Sources of Revenue were Kes 26, 34, 35, 33, 32, 40, and 36 billion, respectively. This totals to KES 236 billion for the seven years and averaged KES. 33.8 billion annually. These figures show a marginally increasing trend in the amount generated over the years and demonstrates that, notwithstanding their revenue raising potential, counties have by and large not managed to significantly enhance the amount collected from local resources. It is a clear indication that there is potential for counties to enhance their own revenue collection. Notwithstanding these trends, an analysis provided by the office of the Controller of Budget shows that for the 2015/16 financial year, no county met their revenue targets from local resources and 11 out of 47 counties did not manage to raise more than 50 per cent of their targets. In the financial year 2019/20, counties raised Kes 35.8 billion, representing 65 per cent of the targeted KES 54.9 billion. It was also a decline compared to the KES 40 billion collected in the financial year 2018/19. Only five counties surpassed their targets for the 2019/20 financial year while seven counties collected less than a half of the targets they had set for the same financial year. It is possible that the counties that met their targets may have set very low targets so that they are seen as meeting the legal requirement. Overall, this is clear evidence that counties are generally relying on the equitable share allocation.

While the current financing framework is theoretically sound and practically tenable, a retrospective assessment of its efficacy in the last seven financial years shows that there are significant challenges. The challenges which inhibit effectiveness in financing devolution are derived from an inspection of the following parameters (not necessarily exhaustive) concerning the counties' fiscal management: Whether or not CIDPs have been prepared and approved by County Assemblies; Fiscal Strategy Paper have been approved by County Assemblies ;County Budget and Economic Forum have been constituted and are effective ; Current County Finance Acts have been passed by the County Assemblies and signed into law by the Governors; there is amicable interaction between the Counties and the Office of Controller of Budget; Counties are spending at least 30 per cent of annual budget on development; Budget expenditures are within CRA recommended ceilings; Significant level of County Executive/County Assembly conflict; there exists verified registers of county assets; Counties have developed resource mobilization strategies; and Existence of serious Audit queries. The challenges include:

- (i) *Devolution without development programmes:* The County Integrated Development Plans (CIDPs) which are supposed to guide the enhancement of county revenue base as well as resource allocation are generally no better than the traditional District Development Plans. Even after the Ministry of Devolution and Planning issued planning guidelines and county development status to all counties, counties went ahead and prepared CIDPs hurriedly to meet statutory deadlines. These are, overall, non-costed development plans and inadequately aligned to national development objectives. The ensuing budgets are being produced hurriedly to meet strict legal deadlines. Planning is the principal basis of effective financing. If it is not done properly, then financial resources will be available, allocated and utilized but at less than optimal allocative efficiency and effectiveness (in terms of development outcomes). Further, there are counties which have not implemented serious development activities and have weak financial management systems. Their technical capacity is also inadequate. If this situation is not corrected, it may lead to misappropriation or misallocation of public resources. Further, an interrogation of most CIDPs shows that they are based on a line-budgeting approach which is not integrated into a coordinated county-wide development agenda. Thus, most counties have not managed to shift to a programme based budgeting. They use a silo-planning framework for the various functions rather than an integrated framework as envisaged in the devolution agenda. this leads to avoidable duplication and overlapping of activities and concomitant wastage of scarce financial resources.
- (ii) *Political considerations:* There is a persistent perception that counties are not being allocated adequate resources from the nationally raised revenues. This has translated into a push for additional resources in the name of "Pesa Mashinani" and currently through the Building Bridges Initiative push. This request for financial resources has generally

been based on political considerations. The Governors' call for additional funds has been actively politicized by mainstream politicians. The tenet of "resources follow functions" is not being strictly adhered to. Functions have been ill-defined and not costed to enable an efficient alignment with resource requirements. The outcry by County Governments for additional transfers from the national treasury is not based on any serious fiscal principle. The demand for more resources should be based on clear program needs that are costed on the basis of the devolved functions. Unfortunately, the costing of functions which was to be facilitated by the TA did not take place. Functions were devolved based on historical costs which had serious inefficiencies and wastefulness. Further, the corollary voice is also in play indicating that the currently devolved amount is not being managed prudently. Reports by the Controller of Budget and the Auditor General contain evidence to the effect that there is significant outright wastage of public resources in many counties. Also, the persistent fight over the misallocation of public resources between county Executive and county Assemblies and the concomitant push to impeach governors and county executive officers does not augur well for effective use of available resources. It creates unnecessary suspicion and impairs effective service delivery efforts.

(iii) *Adequacy of funds:* It is difficult to assess the adequacy or otherwise of devolved resources because counties tend to spend whatever amount of money they have. They are still on the traditional "Resource Envelope" approach in their expenditure planning. In addition, county fiscal autonomy is constrained by regulations relating to financial planning and spending, organization of local services, number of standards prescribing processes and procedures for allocation of resources to various functions, Salaries and Remuneration Commission prescriptions, CRA guidelines and general laws on procurement. The center continues to be overbearing and puts too much weight on restraint rather than encouraging flexibility. This constrained environment impairs innovativeness.

(iv) *Key Challenges identified by the Office of the Controller of Budget:* The Office of the Controller of Budget has identified several challenges which have persistently remained unresolved since the advent of devolution. They include continued low revenue collection, delayed and unpredictable disbursement of funds by the National Treasury; weak structures affecting development plans; failure to report revenue generated from services provided by devolved units; poor legislation and oversight by county assemblies; non-compliance with regulations issued by various government institutions pertaining to public finance management; and failure to be current on financial transactions.

(v) *Devolved budget execution:* A 2014 publication of the World Bank stated that there were significant challenges pertaining to devolved budget execution. These include: unsustainable administrative costs and wage bill (taking over 50% of county budgets)

which are crowding out fiscal space for development; low absorptive capacities where counties were, on average, spending only 63% of the county budgets; unrealistic revenue forecasts-with most counties realizing less than 50% of their revenue targets; and only ten counties are reported to spend at least 30% of their budgets on development.

(vi) *Learning from experience*: the pitfalls encountered during the implementation of decentralized funds (Kibua and Oyugi, 2008) should be used as lessons during the process of fiscal devolution. Active and comprehensive creation of awareness and public participation, institutional capacity building, enhancing coordination and pooling all decentralized funds into the county kitty could be a necessary condition for enhancing effectiveness of devolved public resources.

(vii) *Intergovernmental strain*: a scrutiny of aspects of inter-governmental relations shows that, while counties are struggling to fulfill their functions, the necessary national government support has not been forthcoming in the right measure and at the right time. In addition to delayed disbursement to the counties, there are activities which the national government should have done to facilitate the efficient functioning of county governments. Examples include: coordination of capacity building and technical assistance to county governments; completion and verification of the county list of assets (to prevent asset grabbing and/or vandalization); development and implementation of a robust human resource rationalization mechanism; failure to carry out a comprehensive and timely functional analysis and costing in order to ensure a financially sound transfer of functions and attendant financial/ resources; inability to manage information efficiently (e.g. limited information, short deadlines, and limited feedback) pertaining to planning, budgeting and budget execution; the existence of unnecessary competition between the national government and the counties (e.g. poor harmonization of national and county government activities, thereby dampening complement ability); slow pace of reforming various institutions (e.g. provincial administration, other legacy institutions and the public service) in order to conform to the devolved government order; and reluctance by national government to fully let go the devolved functions, especially health, agriculture and water.

Proposed Financing Framework

It is evident from government fiscal statements that there cannot be enough public financial resources. However, efforts should be made to ensure that predictable resources are forthcoming and that the funds devolved to the counties are prudently managed. An effective financing mechanism should be developed around the schematic framework shown in Chart below. It proposes the development of a well thought out and theoretically sound relationship between three components, namely: (a) planning, costing and budgeting; (b) resource

¹³³ mobilization/revenue management; and (c) budget execution and controls². Counties must be encouraged to develop technically sound and practically feasible development plans which are properly integrated and costed and are harmonized with the national development agenda. The attendant costing would then be used to inform the budgeting process and the resource requirements for the delivery of the planned activities. Once this is settled, the issue of resource mobilization takes centre stage followed by prudent utilization of available resources. In short, if the country is to achieve effectiveness in financing devolution, it needs to work on these three components concurrently. None of them is in itself a sufficient condition for enhancing sufficiency in resource availability and efficiency or effectiveness in resource application.

Some specific mechanisms are proposed here below:

(i) *History has Lessons*: the lessons of the past with respect to devolution and decentralized public recourses should not be in the archives of the dead efforts in Kenya's development path. Leaders and the public must be alive to the fact that mistakes are the best benchmark to a successful socio-economic transformation. The challenges alluded to earlier must, of necessity, be addressed if effectiveness in financing devolution is to be achieved.

(ii) *Expanding County Revenue Base*: Charles E. Menifield (2013, p117) states that "Revenue is the life-blood of governments..." and identifies various sources of revenue which include: Individual income Taxes, County Income Taxes, Corporate Income Taxes, Sales taxes, Property Taxes, Excise Taxes, Social Insurance, Intergovernmental transfers, Insurance Trust Revenues (taxes and fees that finance various insurance trusts to support unemployment compensation programmes, state employee pensions and other programs) and Charges, Fees and Miscellaneous. These are the standard sources everywhere in the world. However, the choice depends on potential yield (how much money can be raised), equity, efficiency (supportive of economic policy and administrative cost) and stability (depending on economic performance). It also depends on a clear understanding of County mandates and the concomitant financial instruments which are appropriate for local economic development. A prerequisite would be the preparation and implementation of strategic development plans which are based on county resource base. Further, chosen instruments should be able to attract private sector investment, for example: tax holidays, debt financing schemes, investment in infrastructure, enterprise zones and land and site development. This includes exploring platforms for enhancing accessibility to investment capital through grants, subsidized loans, use of credit markets and access to self-

133 *These should be understood in the broad context of sound public nance management.*

financing projects. In the end, it must be realized that the most efficient mechanisms for expanding the revenue base of counties is anchored on the level of growth of the economy. The attainment of a reasonable level of economic growth depends on the implementation of financially sound development plans. Additionally, the interface between funds which are transferred to the county and funds of national government, but which are used for development in the counties should be synchronized to avoid duplication and wastage. Creating incentives for counties to employ own resources and encourage county resource mobilization through enhanced fiscal autonomy which recognizes financial innovations should be undertaken. An examination of available County Budget Policy Statements shows that most counties are not giving adequate attention to economically justifiable measures which can enhance own resource mobilization and thus encouraging growth of the private sector. Some of the taxation measures being proposed by counties are definitely becoming disincentives to private sector investments. Hence, county governments must endeavor, and consistently be encouraged, to put in place policy and institutional frameworks which would reduce the cost of doing business in their areas of jurisdiction.

(iii) Strengthening Property Taxation: Counties should give serious attention to improving property management and taxation in their domains. This may be achieved by reducing speculation in the land and housing market and perfecting land sales (land use rights). Several steps are necessary: identification of property; property valuation; setting tax rates; issuing tax bills; collecting taxes; and ensuring compliance. Criteria should be ensuring fairness to taxpayers and service receivers, avoiding distortion of economic behavior, minimizing administrative cost and enhancing accountability to taxpayer.

In addition, consideration should be given to counties engaging in a (planned and deliberate) strategy of privatization centered on property e.g. county owned land, buildings, and mineral rights. County owned land should be accurately compiled and valued and put up for sale to raise funds. The terms and conditions of such sale should be based on a clear land use policy and long-term economic development consideration to avoid engagement with land speculators. Further attention should be given to measures aimed at real estate which is held by most Kenyans in towns and marketplaces where huge investments are buildings (shops and other brick and mortar structures) which do not generate incomes. Such dead capital should be liquidated and transformed into live capital (Polar, 2000). This should include enhanced taxation on privately owned land which stays undeveloped (or unused) for more than, say three years, and which for practical purposes is usually held for speculative purposes. Appropriate policies should be developed, devoid of; politics,

to liquidity dead capital in all marketplaces/urban centers. Appropriate fiscal policies as well as quantitative controls could be put in place to ensure a widened revenue base out of such investments.

(iv) *Domestic Borrowing:* Devolved units must, as a matter of priority, develop innovative sources of financial resources without discouraging private investments. Considering borrowing at low cost and prudent risk, counties should explore the possibility of mobilizing domestic resources by creating financial vehicles which can be trusted by their local organizations (such as cooperative societies, welfare association, merry-go round groups and investment clubs). These organizations usually hold a lot of financial resources which can be tapped through well-structured intermediation instruments e.g. county development bonds. These could adequately be collateralized/ guaranteed with expected county transfers from the national government.

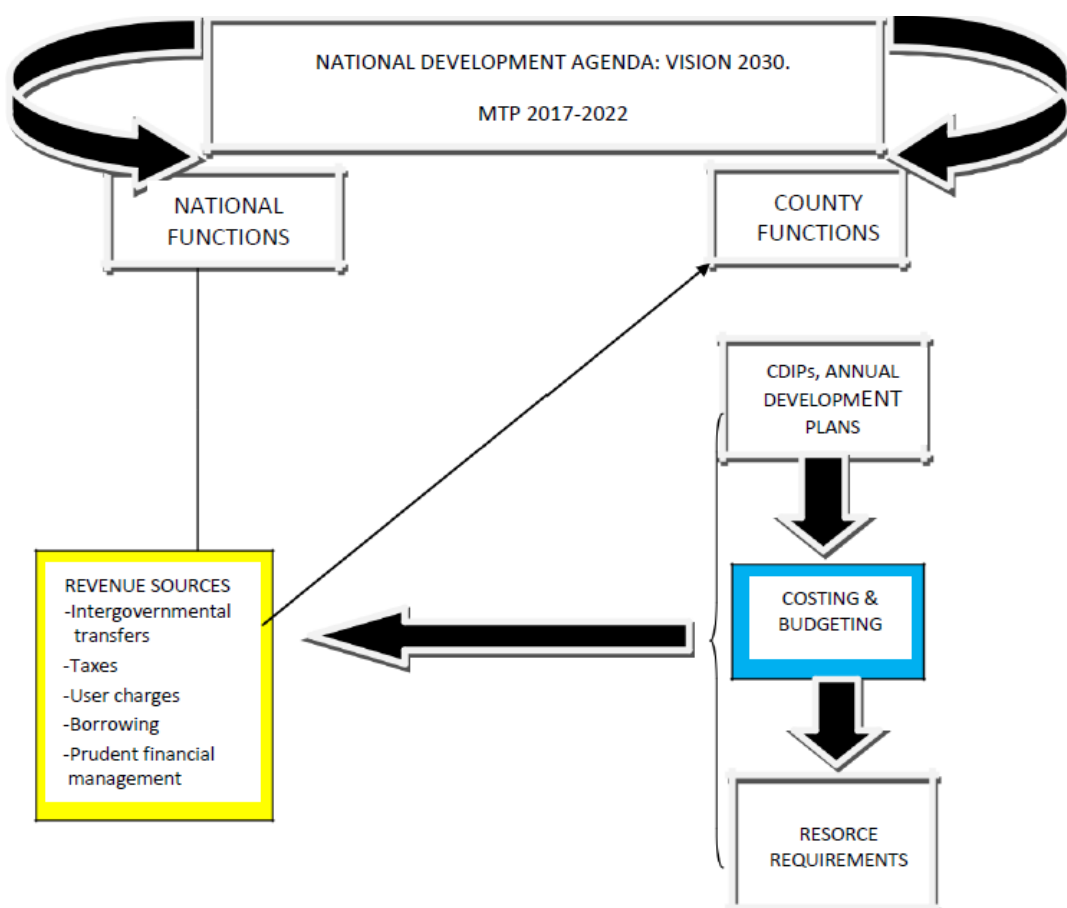
(v) *Ensuring Sustainability of County Financing:* Yinqiu Lu and Tao Sun (2013) suggest that it is important to address the revenue and expenditure mismatches at the county level, establish a comprehensive framework to regulate and supervise budgets and ensure the sustainability of financial resources. Devolved functions should be competently costed and followed with money. Transfers should be predictable and reliable. The issue of not less than 15% of nationally raised revenue provided for in the Constitution should be reviewed and fixed at a higher level with room for review every three to five years depending on the performance of the national economy. In addition, the issue of the number of counties should be boldly revisited so as to ensure that devolved units are economically and financially viable. These twin-issues must be reconsidered alongside some of the financial management constraints which are currently imposed by law and which inhibit devolved government innovation in the use of public resources. Furthermore, revenue management should be strengthened by using well-designed reputable models to forecast county revenues beyond just a few years.

(vi) *Deepening democratisation:* There is an urgent need for significantly enhancing public participation in the management of public resources especially in policy formulation, planning and budgeting, budget execution and oversight. This could be achieved through a concerted effort to change the mind set of Kenyans about public resources. It must be realized that the same mind-set which brought the problems that we face in the management of our resources cannot

be used to solve them. Resources are not “*mali ya uma*” and all Kenyans must become people of goodwill in ensuring prudence and accountability in the use of public resources. Of course, the issue of willful wastage of public resources must be discouraged at all costs notwithstanding my belief that out of every ten Kenyans, eleven are potentially corrupt—if the opportunity arises.

(vii) *World Bank Recommendations:* On the basis of the Public Expenditure Review for 2014, the Bank recommends that counties should: (a) contain the growth of administrative recurrent costs, (b) improve the efficiency of investment to ensure value-for-money in achieving desired outputs and (c) implement revenue administration reforms. These are key recommendations which must be implemented by both the national and county governments.

Chart 1: SUGGESTED FRAMEWORK FOR FINANCING DEVOLUTION



Role of Academia

The academia has been involved in various ways and aspects of the devolution process. However, one does not see a critical mass of academia involvement in a proactive way. Critical commentaries and ivory tower approach on a “**them**” and “**us**” basis may not produce desired socio-economic developmental results. While the academia should cherish and endear themselves to the cardinal philosophical calling of their respective disciplines, there should be an awakening to realize, sooner than later, that their practical input to the process of devolution is urgently required. Their contribution, notwithstanding how marginal it may be, could turn out to be the missing link required to bridge the pervasively evident Know-Do- Gap. For example, there is urgent need to assist in (a) creating innovative vehicles and instruments to mobilize resources at the devolved levels, (b) enhancing both technical and management capacities, (c) creating platforms for knowledge management, (d) developing appropriate monitoring and evaluation methodologies, (e) developing robust revenue forecasting models, and (f) developing theoretically sound and practically feasible local development models and interventions. Thus, the evasive effectiveness of the public resources expended both at the national and county levels of government could easily be enhanced and sustained if sufficient intellectual capital is made available in the devolution process and at the devolved units. Such involvement would require getting proactively connected to the real time activities of devolution by engaging directly to test theoretical solutions through participant/operational research. Waiting to analyze historical data when things have already not worked optimally is not the best way for the academia to contribute!

Summary and Conclusion

Based on the experiences of the previously decentralized funds and the seven years of the devolved system of government, it is evident that there are many issues and constraints which must be addressed, if desired development outcomes are to be achieved. All and sundry agree that devolution is the best way for the development of this country. However, when it comes to the cost consideration of delivering the development outcomes, critical issues arise concerning: the mechanisms of aggregating citizen preference (i.e. public participation), time frames, compliance with the legal requirements vs. value for money in public expenditures, and lack of fiduciary integrity and low fix rate thereto.

The overall objective of effective financing is to achieve sustainable development, namely growth of the economy, reduction of poverty and inequality and creation of employment for all factors of production, through interventions which focus on strategic objectives and activities. These strategic objectives should be based on consideration of the critique of the current development orientation of each county covering, but not limited to: its topography; economic zones; current economic activities; culture of the people; road network; market centers; water

resources; protected areas; and a mapping of the county administrative boundaries. A clear development roadmap should be designed in the name of CIDPs (Kibua, 2015) to include: anchor programmes/projects which have strong economic linkages; collateral socio-economic projects which support social progress; and quick win projects which include stalled projects and those which can be completed in a short period of time. This development framework has not been adequately put in place in most counties.

The current sources of funds, namely: shared revenues according to CRA criteria; grants and equalization schemes which are meant to ensure vertical equity, horizontal equity and assurance of a national standard of service; local borrowing (especially for capital projects and not for budget deficits and which could include disguised borrowing in terms of unremitted taxes and pensions and accumulation of pending bills); and alternative forms of service delivery (i.e. private and non-profit organizations), fall within the standard models of financing local governments. These sources conform to reputable conclusions of scholarly works. For example, ZanOplotnik and BostjanBrezovnik (2004) conclude that “The model for local financing should lean on suitable vertical allocation of resources; adequate proportion of local resources coming from own sources; and relatively fair equalization system”. However, considering the challenges which have been highlighted previously and the need to deepen devolution without creating persistent conflicts between the two levels of government, new approaches should be explored.

When everything is considered, it is clear that in order to attain effectiveness in financing devolution, Kenya needs a systemic approach whereby the country clearly unbundles devolved functions, improve on their costing, prepare sound and costed CIDPs and Annual Development Plans, execute county budgets on a value-for-money basis, mechanize a robust and consistent county resource mobilization programmes to augment national transfers and reduce fiscal controls on county governments by the national government. The mind-set to request for “more resources to the devolved units” should be massaged to incorporate “better use of resources” to deliver citizen’s development preferences. A precondition for success is to address the challenges alluded to earlier. The academia has a role cut out for them in this project.

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CHAPTER 8

Financing Devolution: Natural Resource Sharing

Robert Mudida

Introduction

According to the Constitution , natural resources refer to “physical non-human factors and components, whether renewable or non-renewable, including sunlight; surface and groundwater; forests, biodiversity and genetic resources; and rocks, minerals, fossil fuels and other sources of energy.”¹³⁴ Land is also considered an important aspect of natural resources. Natural resources are considered valuable and exist in their unmodified form. Natural resources can be considered as renewable or non-renewable. There is lack of clear legislative provisions on benefit sharing in the Constitution. There is however legislative intervention in the form of the Mining Act, 2016 which provides for benefit sharing in regard to minerals. The purpose of the Act is to give effect to Articles 60, 62 (1)(f), 66 (2), 69 and 71 of the Constitution in so far as they apply to minerals by providing for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals.¹³⁵ This Act however does not apply to petroleum and hydrocarbon gases. The Mining Act 2016 gives Cabinet Secretary for Mining extensive powers to establish institutions for the regulation of mining including the authority to establish county offices. The office is responsible for granting, renewing and revoking artisanal mining permits, maintaining a register of artisanal miners and maintaining fair-trade on the recommendations of the Artisanal Mining Committee established in every county and chaired by a representative of governor. The Natural Resources (Benefit Sharing) Bill, 2018, which is still under consideration, sought to establish a broader legislative framework for the establishment and enforcement of a system of benefit sharing in natural resources between resource exploiters, the National Government, affected county governments and local communities. This is the second time the Bill has been introduced to the Senate house with the first attempt being in 2014 when it was successfully passed by the Senate and referred to the National Assembly. The 2018 Bill applies to sunlight, water resources, forests, biodiversity and genetic resources, wildlife resources, industrial fishing, and wind.

There is lack of clarity in the Constitution on the division of roles between national and county governments in natural resource management¹³⁶. In addition, there has been inadequate

134 Article 260, Constitution of Kenya, 2010

135 Mining Act, 2016.

136 Chapter Five, Constitution of Kenya, 2010

public participation in the development of policies affecting natural resources. Natural resources have considerable transformational potential and can provide an important source of financing within the devolved structure of government. However, natural resource sharing has to be equitable to achieve its transformative potential. Natural resources can be a major cause of conflict if equitable sharing of resources is not achieved. This has been seen in several African countries such as South Sudan, the Democratic Republic of Congo and Sierra Leone. The governance of natural resources is especially critical in ethnically divided societies like Kenya since the control over benefits from local natural resources can be a key cause of ethnic conflicts.. This is particularly the case where the uneven geographic distribution of natural resources corresponds with ethnic or religious divide (Hayson and Kane, 2009).A challenge currently being faced in Kenya following devolution is that natural resources in particular counties are generating strong feelings of local community ownership over their development and resulting revenues. However, these local interests need to be balanced with the overall importance of resources to national development. If natural resources are found in a particular county, for example, Turkana, how is the revenue they generate to be shared between the national government, the county, investors and local communities? Many county governments appear to support the position that they should principally benefit from resources that are found within the counties. Another issue that arises is how are revenues generated from resources are to be shared equitably within counties themselves.

The focus of this chapter is how to come up with a framework that shares resources equitably while avoiding conflict and thereby assists in financing devolution. The Constitution makes very limited references to equitable sharing of natural resources and provides no detailed guidance on how to achieve this¹³⁷. Recent legislation such as the Mining Act has attempted to address some of these issues although with a focus on minerals as natural resources. However there is still need to develop legislation for other natural resources aspects and provide a broader framework for equitable natural resource benefits sharing.

The origins of devolution in Kenya and the vital role of equitable access to natural resources

Devolution was at the core of the constitutional review process in Kenya. Article 2A (d) of the Constitution of Kenya Review Act 1997 indicates that one of the core objectives of the constitutional review process to be “promoting the people’s participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power” (Republic of Kenya, 1997). This is further reinforced in Article 2A (f) which emphasizes the importance of “ensuring the provision of basic needs of all Kenyans through the establishment of an equitable framework for economic growth and equitable access to national resources” (Republic of Kenya, 1997). Devolution refers to those situations where a previously unitary state transfers power to other territorial units at a sub-national level

137 *Schedule Four, Land chapter*

(Oyugi, 2005). By dispersing power to different levels, devolution promotes good governance, enhances the separation of powers, strengthens bureaucratic effectiveness, transparency and accountability of government power. There was broad consensus among the delegates at the National Constitutional Review Conference popularly referred to as 'Bomas' that power and authority should be devolved.

It was traditionally assumed that only a strong national state with centralised system of government could deploy resources and capacity effectively. However, the centralised system in Kenya increasingly came under criticism because of marginalisation of minority groups, abuse of power and inequitable distribution and mismanagement of national resources. For about 60 per cent of the people the dominant concern was what the Constitutional Review Act referred to as basic needs, the most critical needs being food and water (Constitution of Kenya Review Commission, 2002). The inadequate satisfaction of human needs is closely linked to conflict in society. When resources are inequitably distributed certain segments of society cannot fully satisfy their needs.(Christie, 1997). Basic human needs relate not only to needs such as food and shelter, but also those related to growth and development such as personal identity and recognition.(Burton, 1990). Perceived marginalisation of certain groups in Kenyan society led to increased calls during the last two decades to decentralise government powers and functions.

At independence, Kenya was a constitutionally decentralised state with significant power devolved to the regions which were entrenched in the Constitution. The rationale of regionalism was that it was not enough to be protected from tyrannical rule but it was also vital to be able to participate in the processes of government (Ghai and McAuslan, 1970). Regionalism was aimed at making such participation possible even by the minority tribes. In each of the seven regions created, there was a regional assembly with elected members. The regional boundaries could not be altered unilaterally by the central legislature, and such alteration required the consent of the regions affected by the changes. Regions enjoyed certain taxation and financial powers. The situation provided for in the 1963 independence Constitution with regard to regionalism was dismantled in the period between 1963 and 1965. (Okoth-Ogendo, 1972). By the first amendment after independence through Act. No. 28 of 1964 Kenya was declared a Republic with a presidential government and nearly all non-entrenched regional provisions especially Schedule 2, which fundamentally dealt with areas of concurrent regional and central powers over some agricultural and veterinary matters and aspects of educational standards, were removed. In addition, the entire financial arrangements between regions and the centre, especially those related to regional taxation powers were revised (Muigai, 2001). Finally, the regional powers concerning the establishment and supervision of local authorities were transferred to parliament. With the second amendment, regional presidents were re-designated as simply chairmen. The power to alter regional boundaries which was formerly

vested in regional assemblies was transferred to parliament. In 1968 the regional institutions now effectively bereft of all their powers were finally abolished. The Senate, was in 1968 merged with the house of representatives to establish a unicameral house (Okoth-Ogendo, 1972).

Since the repeal of Section 2A of the Kenya Constitution which ushered in multi-partyism there was a sustained advocacy for a federal or quasi-federal system of government which has sometimes been referred to as the *Majimbo* debate (Akivaga, 2005). This debate focused on the structure and principles of devolved government, the organization of district government in terms of its powers and functions, and the relationship between the national and district government. Although the principle of devolution was broadly accepted during the Bomas Conference, there were intense debates and disagreements about the structure and levels presented in the CKRC Draft (Constitution of Kenya Review Commission, 2005).

The extent to which devolution succeeds in limiting power and enhancing good governance depends to a large extent on its design and implementation. The ideal situation is to have a model that ensures effective separation of functions at all levels, compared to a system where institutions and functions overlap. The different levels of devolution should act as locations of power and enlargements of democratic space and people's participation in government processes (Constitution of Kenya Review Commission, 2005). The location of power closer to the people also achieves public accountability because power is easier to control more at the local rather than the national level. A vital characteristic of effective devolution is that residents are regularly consulted on decisions that affect their well-being thus making them part of the decision-making process (Oyugi, 2005). Such participation nurtures the spirit of ownership of development processes and achieves more responsive and effective management of resources. Care should be taken on devolution to ensure that it does not merely serve to put power in the hands of a local autocracy. Hence the polities to which power is devolved may not automatically increase access by the people to resources or offices. Devolution does not always end up promoting the common good. It has to be designed and implemented effectively to achieve this objective.

A theoretical framework on the structural sources of natural resource-based conflicts

In the context of conflict analysis, a society characterised by structural violence is more likely to have intense natural resource-based conflicts. Structural violence refers to conditions in which human beings are unable to realize their full potential: where their somatic and mental realizations are below their potential realizations (Galtung, 1969). In conditions of structural violence there may be no actor who commits direct violence, but the structures are such that they mitigate against the realization of people's full potential. Structural violence is derived from re-conceptualising the traditional dichotomy between war and peace (Curle, 1971).

This traditional dichotomy is found to be inadequate and a third situation is visualized where societies are neither in conditions of war or peace and are therefore “unpeaceful”. In conditions of structural violence negative peace is said to prevail (Webb, 1986). Negative peace prevails where there is an absence of physical violence but where relations are marked by structural violence. In the case of such anomalous social structures, elites with vested interests seek to preserve the *status quo*. When an existing structure is threatened, those who benefit from the accompanying structural violence especially a country’s elite will try to preserve the *status quo* which serves their interests. This has in the past been a major source of constitutional conflicts in Kenya (Mudida, 2015).

Structural violence is closely tied to the inadequate satisfaction of human needs. This relationship has been explored by several scholars. Christie (1997) contends that systematic inequalities in the distribution of economic and political resources deprive needs satisfaction for certain segments of society. Human needs theory argues that there are certain ontological and genetic needs which will be pursued and that socialization processes, if not compatible with such needs, will lead to frustration and anti-social personal and group behaviour. The whole basis of law and order are threatened in circumstances in which basic needs are frustrated (Burton, 1997). According to Burton, these needs are universal motivations that are an integral part of the human being. In addition, to the biological needs of food and shelter, there are also basic human needs related to growth and development such as needs for personal identity and recognition (Burton, 1990). These ordinary and well recognized needs are often frustrated by institutions and political structures sometimes leading to aggressive responses. Fundamental needs are compulsive and will be pursued regardless of cost. A group’s fundamental needs cannot be negotiated and should be treated differently from negotiable interests.

Theories of basic needs reject the a priori assumption that violence originates in the aggressive nature of human beings or unconscious psychological dynamics (Jeong, 2000). Needs provide objective and rational criteria for analysing an emergent social situation that may have the potential for generating conflict. There are certain political and economic conditions which are essential for the fulfillment of human needs. The institutional set-up in a country should serve the needs of all its citizens. The mal-distribution of power in societies often provides opportunities for the needs gratification on the part of some at the expense of others. (Sites, 1990). As long as a state represents the interests of a few rather than the common good, the use of differential power will remain the ordering principle and the needs of many citizens will remain unmet.

As the crisis in the manner in which power is distributed becomes more overt, the state will either become increasingly coercive or manipulative and continue to serve sectional interests or it will become only an administrative structure serving the common good. It is vital that if the common interest is to be served, it must be recognised and basic human needs are one

basis for such recognition. The extent to which human needs are being met therefore provides an important criterion for judging the legitimacy of an existing order. Structural violence is closely linked to inadequate satisfaction of basic human needs because it is closely related to the inability of people to develop their full potential. When people's basic needs are not met adequately, there is a gap between their potential and actual realization which may in some cases threaten their very survival (Iadicola et. al, 2003).

The argument is made in this chapter that whenever natural resources have contributed eventually to physical violence conflict, the societies have often endured long periods of structural violence where structures in society prevented human beings from achieving their full potential and satisfying basic needs. Eventually the society becomes like a social pressure cooker and direct violence breaks out. Prolonged exploitative conditions eventually produce direct violence (Jeong, 2000). Thus structural violence if not addressed eventually breaks out into direct violence. The strongest predictor of direct violence is stagnation in economic and social development (Garfield, 2001). This is manifested by a decline in access to goods and services needed for human well-being.

An absent or weak state is often a major cause of the eventual outbreak of violence. The absence of the state can be understood in three ways: the incapacity of the public sector to respond to urgent needs, especially poor territorial coverage of services and programmes; an absence of public authority in urban or rural areas that have a high proportion of marginalized populations; and a lack of citizenship whereby certain groups in society, sometimes identified on an ethnic basis, face limited access to the public processing of their demands. An absent or weak state generates discontent and a perception that there are no clear-cut rules by which urgent problems can be resolved. This allows for the possibility that different groups can organise themselves for physical violence over a long period of time without the state or society at large perceiving the threat (Hopenhagen, 2001).

This point of view is supported by recent research by Acemoglu and Robinson (2012) who argue that political institutions can be divided into two kinds of institutions: extractive institutions in which a small group of individuals do their best to exploit the rest of the population and inclusive institutions in which many people are included in the process of governing in which case the exploitation process is either attenuated or absent. Acemoglu and Robinson then make a further distinction between extractive and inclusive institutions in the economic and political contexts. Inclusive economic institutions are those that allow and encourage participation by the great mass of people in economic activities and make the best use of their talents and skills and that enable individuals to make the choices they wish. In order to be inclusive, economic institutions must feature secure private property, an unbiased system of law, and a provision of public services that provides a level playing field in which people can exchange and contract. Inclusive economic institutions also permit the entry of new businesses and allow people to

choose their careers. Extractive economic institutions, on the other hand, are designed to extract incomes and wealth from one subset of society to benefit a different subset. They are a frequent source of conflict. Acemoglu and Robinson consider politics as the process by which a society chooses the rules that will govern it. Political incentives determine how the government is chosen and which part of government has the right to do what. Specifically, they determine who has power in society and to what ends power can be used. Inclusive political institutions distribute power broadly in society and subject it to pluralistic constraints. Power is therefore not vested in a single individual or narrow group but instead rests with a broad coalition or plurality of groups. Extractive political institutions concentrate power in the hands of a narrow elite and place few constraints on the exercise of this power. The elite therefore structures economic institutions to extract resources from the rest of society. Extractive economic institutions therefore naturally accompany extractive political institutions. Inclusive economic institutions that vest power broadly would tend to uproot economic institutions that expropriate the resources of the many.

Empirical evidence also exists on the linkages between natural resources and conflict. Collier and Hoeffler (2004) carried out a seminal study on the linkages between natural resources and civil war. They argue that natural resources provide opportunities and even motivation for cash-strapped rebel movements to emerge and survive. Ross (2004) examines 13 civil wars to explore the resource-conflict correlation. He examines several hypotheses about how resources can influence a conflict. He finds that two of the most widely cited mechanisms do not appear to be valid: that oil, non-fuel minerals and drugs are causally linked to conflict, but that legal agricultural commodities are not.

Maphosa (2012), for example, examines the causal relationship between natural resources and the outbreak of violent conflict in Africa. He argues that in Africa the problem interacts with political, social, economic and ecological factors to generate aggressive behavior. He further argues that although natural resources have often played a critical role in violent conflict, their character is often embedded in a grievance narrative within a socio-economic and political context. Natural resources are, therefore, rarely the sole cause of insurgency. Alao (2007) examines the conflict over natural resources in several African countries. He categorizes natural resources into four groups: land (including agricultural practices and animal stock), solid minerals, oil and water. He then identifies themes linking these resources to governance and conflict. He contends that neither scarcity nor abundance has been a consistent factor as a cause of conflict. For example, scarcity of land was a fundamental cause of conflict in Rwanda but has not occasioned any countrywide conflict in Gambia.

Diamonds were at the root of prolonged conflict in Sierra Leone but have been a major source of stability and economic growth in Botswana. He contends that transparency and good governance in Africa will not themselves put an end to conflicts over natural resources in

Africa. He argues that conflicts over natural resources in Africa have arisen because citizens across the continent do not have control over their country's natural resource endowments and they cannot see a way of seeking redress through the existing structures.

Lujala (2008) examines the relationship between natural resource endowment and armed conflict. His empirical study focuses specifically on whether or not natural resources have an effect on conflict through the incentives and opportunities that they provide for rebels. His approach differs from the standard statistical analysis of conflict where natural resources are considered at country level without controlling for rebels' access to the resource base.

Nillesen and Bulte (2014) examine the literature on natural resources and violent conflict. They argue that regression analysis produces mixed signals and points to a plethora of mechanisms linking resources to conflict. They contend that the empirical literature is gradually evolving from cross-country conflict models to micro-level analyses explaining variation in the local intensity of conflict. This transition they contend results in more credible identification strategies and an enhanced understanding of the relationship between resources and conflict.

An overview of existing provisions for financing devolution from natural resources and the policy context for natural resource exploitation in Kenya

Chapter Eleven of the Constitution of Kenya 2010 establishes the county governance system which is a milestone in devolution following a struggle, over several decades, to reform the Constitution. The Constitution creates two interdependent levels of government comprising of the national government and county governments. As mentioned in the introduction, Article 260 provides a broad definition of natural resources. The provisions on financing devolution from natural resources in the existing Constitution are few and not developed in detail. Section 69 (1) (h), for example, states that "the state shall utilise the environment and natural resources for the benefit of the people of Kenya." It is not, however, specified how this is to be achieved. There is a further brief provision contained in Article 71 where it is stated that "A transaction is subject to ratification by Parliament if it involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource in Kenya." One of the objectives of devolution provided for in Section 174 (g) is "to ensure the equitable sharing of national and local resources throughout Kenya". However, no specific guidelines are provided on how this is to be done. In Chapter 12 of the Constitution on public finance, section 201 (c) states that "the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations."

There are, however, no specific provisions on how this is to be done within the Constitution. However, the Sovereign Wealth Fund Bill, 2019 attempts to address some of these issues. There have been more coherent attempts to establish a legal structure for the oil sector. The

mining sector legislation, however, suffers from overlaps and loopholes (Institute of Economic Affairs, 2015).

Both Kenya Vision 2030 and the First Medium Term Plan (MTP I) did not prioritise natural resource exploitation (Republic of Kenya, 2007). Under environment management initiatives, Kenya Vision 2030 only envisaged to undertake an accurate and detailed geological mapping of the country – “which may lead to discovery of new minerals and of commercial value.” Indeed MTP I noted that Minerals and Mining accounted for 1 per cent of the GDP and 3 per cent of Export earnings. MTP I however called for operationalization of a national policy on national resources and mining.

In the Second Medium Term Plan (MTP II-2013 to 2017)), however, the Government of Kenya, recognized the importance of the new discoveries and the economic potential of natural resources. Oil and Other Minerals are indeed prioritized in Medium Term Plan II The natural resource sector is now included in the economic Pillar in the MTP II as the seventh priority sector. The Oil and other Minerals has over 20 projects to be implemented.. Another strategy is to make Kenya a Mineral Hub for the region. There is also a strategy for enhanced capacity development, including institutional capacities; and carrying out an airborne survey to identify resources available to attract investors (Wainaina, 2015).

Case studies of violent conflict arising from inequitable sharing of natural resources

The case of the Democratic Republic of Congo clearly demonstrates the transformation from structural violence into direct violence. Mobutu gradually accumulated vast power, ruling by decree, controlling all appointments and promotions and deciding on the allocation of government revenues (Meredith, 2005). He encouraged a patrimonial culture where valuable properties and businesses were distributed to his close political allies. Meredith estimates that about 40 percent of the government’s operating budget was either lost or diverted to purposes other than those intended. The benefits of Zaire’s considerable natural resource wealth did not accrue to the majority of Zaire’s population but rather to a small minority close to the ruling elite. By the 1990s state-controlled mining enterprises were looted almost completely and copper and cobalt production fell drastically with gold and diamond smuggling being rife. Mobutu was eventually overthrown in a violent rebellion with the assistance of Rwanda and Uganda.

However, since the fundamental structures remained unchanged, Kabila the new leader too handed out key positions in his government to supporters from his Equateur province and like Mobutu used the intelligence apparatus as a means of maintaining political control. Thus the anomalous structures in Congolese society remained fundamentally unchanged and eventually led to renewed outbreak of physical violence. The idea of structural violence is linked to both greed and grievance since anomalous structures contribute to legitimate grievances but they

also make looting of natural resources easier and thus make eventual violence more likely. The conflict in the Democratic Republic of Congo also drew in several states such as Uganda and Rwanda which were also part of the Great Lakes Conflict System. In order to fully understand natural resources- based conflicts in Africa it is therefore also important to utilize the idea of conflict systems which emphasizes the inter-relationships between conflicts and also identifies the interests of diverse actors within the system.

The conflict in Sierra Leone also demonstrates the transformation of structural violence into direct violence. The conflict was ostensibly started by the Revolutionary United Front (RUF) rebels in 1991 to gain control over the diamond-rich parts of the country (Renner, 2006). However, Sierra Leone had already experienced several decades of worsening structural violence. The diamond fields of Sierra Leone were its most valuable economic resource. In the three decades of the pre-war period, diamonds had constituted more than a half of the government's revenue. During the 1970s the president Siaka Stevens converted the diamond industry into his personal preserve. The one-party dictatorship of his regime provided the weak and unaccountable structural setup that permitted him to amass a personal fortune and leave Sierra Leone bankrupt by the middle of the 1980s when he retired. His successor Joseph Momoh also presided over the same corrupt one- party system and ruled by focusing on narrow ethnic interests. Most of the diamonds were smuggled out of the country leaving the government with only a small proportion of the revenue due.

Eventually the government was unable to pay teachers and the educational system collapsed. The increase of structural violence was manifested in widespread unemployment which was exploited by the rebel leader Foday Sankoh who claimed he was fighting government officials and their corrupt business interests, but his main interest was to gain control of the diamond fields for the RUF and for Taylor. Eventually widespread direct violence broke out in Sierra Leone which lasted for over a decade. The case of Sierra Leone further illustrates the argument that structural violence if not attended to eventually leads to direct violence. In addition, the conflict in Sierra Leone illustrates the role of systemic actors in aggravating conflict. Thus Liberia within the West African conflict system played a major role in exacerbating the conflict in Sierra Leone (Meredith, 2005).

A similar argument can be applied in the case of the Sudan conflict. The discovery of oil was a fundamental factor in re-igniting the civil war between Sudan's central government and the South (Meredith, 2005). However, Sudanese society had long been characterised by deep-rooted structural violence with the marginalisation of the South. At the centre of the Sudan conflict was the issue of the control of state power, and the use of that state power for state and nation-building in the complete absence of consensus on the nature of the state and nation the Sudanese wanted to build (Kok, 1993). The government in the North consolidated their hold over state power and other aspects of public life in the Sudan largely by excluding

other social and ethno-regional groups in the South and used that power to impose structures that were considered oppressive to the South. This structural violence led to the pursuit by the South of self-determination and regional autonomy which was opposed by the North particularly because of the presence of important oil reserves in the South, particularly in the Nuer and Dinka territories (Meredith, 2005). The Sudan has also been characterised by cultural violence in the North's pursuit of an Islamic Republic for the entire Sudan despite the fact that the majority of the Southern Sudanese are principally adherents to other religions. Cultural violence in Galtung's conceptualization is any aspect of a culture which can be used to legitimise violence in its direct or structural form (Galtung, 1969).

Commercial natural resource exploitation is also often a source of conflict in cases where governments are undemocratic and corrupt. In many developing states, the economic benefits of mining accrue to a small business or government elite and to multinational corporations and their shareholders. However, in many cases the diverse burdens ranging from expropriation of land, disruption of traditional ways of life and environmental degradation are placed on the local population. The affected communities which are typically indigenous are often neither informed nor consulted about natural resource extraction projects. Nigeria's oil rich Niger Delta, for example, is characterised by a violent and corrupt series of relationships between foreign oil companies, government officials, ethnic militias, smugglers and indigenous communities. In spite of the considerable oil wealth in the region, per capita income remains below the absolute poverty threshold of US\$1 per day in many parts (Meredith, 2005).

Towards a framework for the equitable sharing of natural resources in Kenya

This section of the chapter proposes a framework for the equitable sharing of natural resources in Kenya and also draws on emerging best practices from several countries while critically appraising such cases. Broadly, there is a critical need to develop inclusive political and economic institutions at both national and county government levels. Kenya is still in the process of making a transition from largely extractive political and economic institutions under a formerly centralised system to potentially more inclusive institutions under the devolved system. The case of Botswana illustrates how this can be accomplished. Botswana started out with unfavourable economic conditions at independence with only 12 kilometres of paved road when the British left. Diamonds have been important for the growth of Botswana, which has consistently been one of the fastest growing economies in the world for over five decades, and currently accounts for more than 40 percent of the country's output but Botswana avoided the natural resource curse¹³⁸. Botswana achieved this spectacular performance primarily because it developed inclusive political and economic institutions. Botswana's institutions protected the property rights of actual and potential investors, they provided political stability, ensured

138 The tendency of natural resources to create conflict, poverty and suffering due to mismanagement is often referred as a curse (rather than a blessing)

that the political elites were constrained by the political system and also the participation of a broad cross-section of society. The basic system of law and contract worked reasonably well and state and private predation have been limited. The government sustained the public service structure that it inherited from the British but developed it into a meritocratic, relatively non-corrupt and efficient bureaucracy. The government also invested heavily in infrastructure, education and health. Macroeconomic policy was also prudent (Acemoglu and Robinson, 2012).

Atsushi (2007) finds that in the case of Botswana and other countries that have avoided the natural resource curse governance determines the extent to which growth effects of resource wealth can materialise. He contends that in developing countries in particular, the quality of regulation, such as the predictability of changes of regulations, and anticorruption policies, such as transparency and accountability in the public sector, are most important for effective natural resource management and growth. His paper attempts to interpret the theme and results in the context of Botswana which is endowed with abundant natural resources yet has experienced the most remarkable economic growth in the region. Atsushi further argues that Botswana's fiscal system is very sound whereby the use of mineral revenues has followed an implicit self-disciplinary rule. Botswana utilises the Sustainable Budget Index (SBI), under which any mineral revenue is supposed to finance "investment expenditure," defined as development expenditure and recurrent spending on education and health. Other recurrent spending is funded from non-mineral revenues. In addition, there is a government asset fund, the Pula Fund, where financial assets are invested only on a long-term basis in a transparent and accountable manner. Kenya can learn important lessons from Botswana's experience since recurrent expenditure in Kenya makes up more than double development expenditure. The proposed Sovereign Wealth Fund, established under the Sovereign Wealth Bill will help to manage resources from future oil production. Kenya should develop explicit fiscal rules for the treatment of mineral revenues. Any windfall should be deposited in a special account and used for designated economic and social development. Certain aspects of Botswana's resource management could also be improved and could provide further useful lessons for the Kenyan context. Atsushi further argues that despite its good performance, Botswana needs to amplify the governance and resource effects on growth through a more explicit insulation of fiscal expenditure from the volatility and uncertainty of mineral revenues. He contends that an option could be to adopt a non-diamond deficit target rule to accelerate revenue base diversification and another is to reserve particular types of resource-related rents such as windfalls based on given medium-term projects of mineral resources to leave future generations as well off as the current one.

Gylafason and Zoega (2001) further reinforce the argument which is relevant to Botswana that economic and institutional reforms pave the way for a more efficient allocation of capital

which may enhance the quantity as well as the quality of new investment and sustain growth. The more productive the capital stock, the higher the rate of growth they contend. Torvick (2009) also explores the question of why some resource abundant countries like Botswana succeed while others do not. He identifies six dimensions that are critical: saving of resource income; presidentialism versus parliamentarism; institutional quality; type of resources; onshore versus offshore oil; and early versus late industrialisation. The ones that are most critical in Botswana's context are the saving of resource income and institutional quality. Botswana, however, still experiences some challenges as it has one of the highest adult incidences of AIDS in the world and while economic growth has been rapid, inequality has also remained high. (Acemoglu and Robinson, 2012) Botswana's vital accomplishment, however, is that it has avoided the natural resource 'curse' associated with violent conflict in many other parts of Africa discussed earlier in the paper.

It is also vital to address the issue of low income and economic decline which are further risk factors for natural resource-based conflict. Botswana partly avoided these problems because its real GDP per capita (adjusted for purchasing power parity) grew from about US\$3,500 in 1980 to almost US\$12,500 in 2010 (in constant 2005 international dollars)—an average annual growth rate of 4.3 percent (IMF:2012) Alleviating poverty is a long run task. Many poor countries have poor and inconsistent economic policy and an inadequate policy environment. The experience of the South East Asian countries, however, shows that it is possible to alleviate poverty considerably in a single generation. It is therefore critical for the Kenyan government to continue to implement policies that enhance economic growth and development. Many East Asian countries were as poor as a number of African states in the 1960s but through proper outward oriented policies and appropriate export interventions have risen almost to the status of developed economies (World Bank, 1993).

It is vital to reinforce the principle of constitutionalism in Kenya in coming years. Normally, a Constitution will be a formal document which has the force of law and embodies a selection of the most important rules of the government of a country (de Smith and Brazier, 1989). It provides means by which a society organizes a government for itself, defines and limits its powers and prescribes the relations of its various organs *inter se*, and with the citizen. However, a Constitution may be used for purposes other than as a restraint on government. This occurs where a Constitution consists of nothing but lofty declarations of objectives and a description of the organs of government in terms that import no enforceable legal constraints. In such a case the Constitution may facilitate or even legitimise the assumption of dictatorial powers by the government. Constitutionalism requires for its efficacy a differentiation of governmental functions and a separation of agencies which exercise them. A separation in procedure implies the idea of a separate agency or structure. Nwabueze argues that there has been an erosion of the principles of constitutionalism in many African countries (Nwabueze,

1973). Constitutions have tended to lack legitimacy for the masses and the ruling politicians.

Politicians in many developing countries have the wrong attitude towards the Constitution in that they often regard it as a weapon which can be used and altered to gain temporary and passing advantages over political opponents. In many developing states the values and ideas enshrined in Constitutions are different and opposed to those of the rulers. Whereas a Constitution is meant to be a check on power, politicians often tend to be impatient with, and want to break away from all constitutional restraints; and if the Constitution proves to be an obstacle, then it must be bypassed or made to bend to their desires. This situation results in a systematic perversion of the institutions and processes of government combined with amendments to the constitution where it is thought necessary to maintain an appearance of legality. We need to avoid this in Kenya by deeply entrenching inclusive institutions and accelerating the movement away from extractive institutions (Nwabueze, 1973). The idea of checks and balances seeks to make the separation of powers more effective by balancing the powers of one agency against those of another. This is achieved through a system of positive mutual checks exercised by governmental organs on one another. The concept of checks and balances presupposes that a specific function is assigned primarily to a given organ, subject to a power of limited interference by another organ, to ensure that each organ keeps within the sphere delimited to it. It suggests an oversight of one agency by another (Kurland, 1986). Respect for constitutionalism is critical for implementing an equitable framework for natural resource sharing in Kenya.

The issue of ownership of natural resources

The property ownership regime for natural resources has to be properly addressed since this is a highly emotive issue and is often intertwined with ethnic conflict. This issue needs to be properly addressed since natural resources are expected to contribute a significantly greater proportion of Kenya's national income than before and also because the geographical distribution of natural resources is uneven across ethnic groups. Ownership involves a contest between one of the following means: private title, communal or customary land rights and state ownership. In ethnically divided societies, the treatment of natural resources is often more concerned with how natural resource wealth is shared among often antagonistic communities. Ownership does not necessarily answer the question of who manages, regulates and makes money from natural resources. Clarity regarding ownership rights is also critical for political stability and investor confidence. Ambiguous ownership provisions can be a major source of risk for potential investors. This can lessen the attractiveness of a country's opportunities in the natural resource sector resulting in difficulties in attracting capital (Haysom and Kane, 2009).

Natural resources cannot be owned by an individual but are held in trust for the public by the government (Lumumba and Franceschi, 2014). In the Kenyan context, there is an expectation

gap between national, county governments and other stakeholders on the question of the ownership of natural resources. The Narok County Government, for example, on June 25th 2013 regained the administration of the Maasai Mara National Park from Equity bank. This led to a termination of the 10 year contract fee collection with Equity Bank that resulted in considerable lost revenue associated with the inefficiency of the natural resource management system and did not solve the issue of effective natural resource management. The Narok County Government now manually collects the fee itself through the issuance of receipts that though potentially less efficient will be evaluated through an upcoming audit. A fundamental concern is that the devolved units of the county government lack the capacity to undertake effective natural resource management beyond revenue collection. It may be important in the short term to have the national government second some of their experts to the counties. Many counties are, however, reasserting their rights over local natural resources despite the challenges. The counties find themselves in a difficult position as their competence is being questioned not only at national level but also by the local population that has watched many newly formed county governments struggle to begin the process of governing. The Kenya Wildlife Service has, for example, petitioned to take over the management of the Maasai Mara reserve. The county administration has failed to stop the decline in wildlife which has dropped by 70 percent as they lose territory to domestic cattle grazing. Maasai Mara sits on community land. This implies that the reserve is owned and managed by the county government, which does not necessarily have the infrastructure or environmental expertise to manage effectively. The county governor of Narok has admitted there is a crisis at the Mara, stating that buffalo and wild dogs have almost disappeared. In addition, he has stated that huge herds of wildebeests no longer pass through the region on their epic migration as they did five years ago. If the animal population falls significantly as a result of poor county administration, the entire country loses considerable tourism revenue (Khamadi, 2013).

Conflicts between county governments have also broken out over the ownership of natural resources that cross boundaries. In Murang'a County, for example, which is home to the Ndakaini dam that supplies over 70 percent of water to Nairobi County, residents want Nairobi County to pay for the water. For instance, Murang'a County has said it will take advantage of its huge water resource to earn income and also drive its economy. While the Governor has yet to initiate legal action, the dam was previously administered by the Ministry of Water under the central government, which meant that resource sharing was not an issue. According to the area governor, the county is endowed with huge rivers and dams whose water is consumed in Kenya's capital, Nairobi, while the rest is used to produce hydroelectricity. However, electricity supply is the mandate of a government parastatal, the Kenya Power. This cross-county conflict over many natural resources including water, tourist attractions and markets, will require arbitration to address management, revenue sharing and human resources, previously left to the national government (Lehman and Mudida, 2015).

Weak national legislation on the governance of natural resources adds to the confusion, while the national government is using its muscle to dilute local claims over lucrative extractive industries. The national government wants to have a huge say in the management of these resources, especially in the mining and oil sectors. The county level administration struggles to assert its claims as the government argues that only the Commission on Revenue Allocation (CRA) has the mandate to allocate the resources. Whether devolved governments will prove better stewards for natural resources than the national government or private contractors remains to be seen. It is important for both local and donor funding to be channeled into strengthening county governments to prepare them for the job of both protecting these resources and managing revenue to benefit the community. The intergovernmental relation committee which is the successor to the Transition Authority should take up this responsibility. For instance, should Murang'a levy a fee to water supplied to Nairobi County? (Khamadi, 2013).

The allocation of power to manage and develop natural resources.

The allocation of legislative and executive authority over natural resources determines who has the ability to make and administer laws relating to the development and exploitation of natural resources. This is potentially much more important than the question of ownership because the power to legislate and regulate natural-resources development determines the rights, and the limits of the rights, of ownership. Very often legislative and executive authorities are coupled with the right to collect revenues from the exploitation of natural resources (Haysom and Kane, 2009).

Article 69 (1) of the Kenyan constitution states that "The state shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of accruing benefits." Article 71 of the Constitution, which addresses natural resource management, is not specific about how to balance national and local interests in ownership and management of natural resources (Republic of Kenya, 2010). In relation to agreements relating to natural resources it states that "a transaction is subject to ratification by parliament if it involves the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya." Residents in counties are forming groups that they intend to use to lobby on issues with organizations dealing with natural resources and other devolution issues. Local non-profit organizations funded by international donors, such as Oxfam and the European Commission, are also putting resources into convening conversations between the community and local government. Weak structures are also not helpful in the communities' being able to articulate their concerns. And a perennial lack of finances to facilitate their work hampers information flow to the national government (Khamadi, 2013).

The second Mid-term Plan of Vision 2030 for the period 2013-2017 envisages a review of the legal and regulatory frameworks within the extractives sector. In Kenya the development of

new mineral reserves is moving even faster than oil exploration. There are, however, many shortcomings in the regulatory framework for the mining sector. For example, the Kenyan government has granted concessions in coal exploration in areas with about 400 million tones of proven reserves and work has already begun in the Taru Basin in Kwale and Kilifi counties (Odari, 2014).

Although the Mining Act attempts to introduce a transparent system for governing the mining sector, it gives the cabinet secretary too much discretion which can easily be abused. There is therefore a need to come up with a competitive mechanism for awarding licences otherwise this will continue to provide significant incentives for corruption. In the Mining Act 2016 the Cabinet Secretary has a range of powers ranging from establishing the criteria for determining strategic minerals, appointing ad hoc tribunal members and granting, denying or revoking mineral rights, approving licence applications and determining the conditions of community development. Thus although the Mining Act, 2016 creates institutions such as the National Mining Corporation and the Minerals and Metals Commodity Exchange, it fails to give them the functional authority to undertake their respective mandates. The power to make decisions is largely resident in the cabinet secretary, (Odari, 2014).

Much of the conflict over ownership, control and benefit from resources assumes that the resource can be cleanly found within a particular county. This is not always the case and there are obvious problems in treating a resource that crosses multiple counties as the right for one county alone to regulate and use as it sees fit. In these cases the general wisdom is to treat these resources nationally, or through an inter-county resource sharing mechanism. This needs to be carefully developed. Tensions can often exist between the need for a centrally coordinated policy on issues of national concern related to natural-resource management and wealth-sharing and the political reality of demands for power-sharing among political competitors or greater autonomy at the state or provincial level (Haysom and Kane, 2009).

This problem is being clearly experienced in the water sector in Kenya as previously mentioned and is particularly acute when it comes to inter-county waters, which are important not only for economic reasons such as industrial production and hydroelectricity generation, but also human survival (drinking water and agriculture). It is clear that where waterways cross county boundaries and may even traverse several counties, despoiling or restricting the flow of water in one county can have dramatic impacts for downstream states. The usual approach is to provide for national regulation of inter-province waters because this is an issue that cannot be managed by one province alone, and one province's treatment of water resources may harm other provinces (Haysom and Kane, 2009). With the new Constitution in 2010, the county governments were set up as devolved entities and took over the ownership of the water utility companies from the municipalities. There is however the challenge of cross-county water boards. The problem is that the counties were formed around administrative boundaries, while

the water boards managed their assets according to the natural water catchment areas. The negotiated solution was for water boards to co-ordinate the cross-country asset works and water resource transfer payments. However, there has also been disagreement about whether to found a national asset development institution or merely alter the water boards' functions. The water boards were seen as technically strong but with weak governance. In addition, the new counties which transferred water from their catchment areas to counties with urban centres, started to demand water resource transfer payments for their environmental services (Lehman and Mudida, 2015). The Water Act, 2016 provides for counties to form water provision companies to provide water in their areas and for the transfer of national assets to the counties for that purpose (sections 77, 83 and 84)

The treatment of natural resource revenues.

The raising and sharing of revenues from natural resources is a vital issue. Faced with a revenue shortfall and a growing expenditure list, county governors are looking for ways to seal the revenue deficit. One way has been to claim a share of revenue generated by resources found in their county. This will lead to a battle for control especially given the vacuum that has been created by the Transition Authority's failure to give proper guidelines on how resources are to be shared between the two levels of governance. Mombasa County has also said that it wants to be given full autonomy to manage the Port of Mombasa by charging levies over its usage. In its budget estimates, Mombasa County has in the past factored Sh2 billion as revenue from the Mombasa harbour although there is no legislation in place or an agreement between the county and the port authorities (Omwenga, 2013).

Despite other issues, such as ownership, ultimately the sharing of revenues is at the core of the debate. Natural resource sharing can be especially conflict-generating because it is subject to capture by ruling groups or communities thus worsening social divisions. There is a need for transparency and accountability in the treatment of natural resource revenues. In centralised states, the responsibility for collecting and distributing revenues usually falls on the central government. However, in devolved systems as is currently the situation in Kenya treatment of natural resource revenue sharing needs to be clearly spelt out. Two main options exist for sharing natural resource revenues (Haysom and Kane, 2009).

The first option for natural resource revenue-sharing is a formula for revenue-sharing where all the revenues from the exploitation of a given resource are collected into a single account and then distributed between the national government, the county governments and local communities. A major challenge in this system is the fear by county governments that the transfer of their fair share of natural resources from the central account will not be done in a timely, transparent and accountable manner without political interference (Haysom and Kane, 2009).

Another option is a constitutional allocation of authority to collect different types of revenues to different levels of government such as county governments. In this model county governments could be allowed to raise revenues through the royalties, contract license fee bonuses, and excise or production taxes while corporate taxes, export charges and other types of fees could be maintained at national level. The advantage of this kind of system, especially in divided societies, is that it can reduce distrust between the counties and the national governments since it would give county governments the power to raise revenue directly from natural resources. On the other hand, since the collection of natural resource revenues takes away revenues from the national government, decentralised systems could complicate the national management of the economy. In addition, given the uneven geographic distribution of natural resources heavily decentralised systems can also potentially lead to wider income gaps among the counties. It is therefore important to incorporate a certain degree of redistribution of natural resource revenues in decentralised systems. Otherwise the unequal distribution of natural resources will lead to concerns about the unequal provision of public services between the counties (Haysom and Kane, 2009).

It is vital to have clear and specific rules for natural resource sharing. This should firstly be determined by the rights and duties assigned to the national and county governments. The Mining Act provides for sharing benefits of natural resources mining. The power to impose taxes, royalties and other charges is also not made clear in the Act. This could lead to uncertainty regarding the power of the counties to impose levies on mining operations. In the current constitution, according to Article 209 (3) “a county may impose property taxes, entertainment taxes and any other tax that it is authorised to impose by an Act of Parliament” (Republic of Kenya, 2010). In addition, in our current devolved structure there are currently no clear provisions for sharing revenue received from compensation for the negative externalities by the national government. This is an issue that needs to be addressed.

The temporal aspect of the sharing of the benefits and costs equitably between present and future generations should also be addressed. A recognized way in which this can be done is through sovereign wealth funds. The Sovereign Wealth Fund Bill is expected to assist in managing revenues from oil resources for the benefit of present and future generations by investing of revenues. It is, however, important to integrate this mechanism within the Public Financial Management Act so that significant dollar reserves will not be injected into the country’s economy without adequate checks (Odari, 2014).

A clear revenue sharing framework between global partners such as multinational corporations and the Kenyan government needs to be put in place to ensure that the country benefits sufficiently from the extractive industry. A clear code of conduct for multinationals in the extractive industry needs to be established to ensure that the government and local communities benefit sufficiently from activities of natural resource exploration. This should be done at the

early stages of exploration so that a clear precedent is set for the future. The current Petroleum Act which governs exploration and production has a number of weaknesses including the lack of a compensation regime, licensing rounds, gas sharing terms, provisions of Corporate Social Responsibility, community awareness and participation as well as inadequate terms relating to environmental protection, conservation and management (Institute of Economic Affairs, 2014). Clear provisions should be put in place to avoid the natural resource 'curse' in many developing countries such as Nigeria where primarily multinational corporations and the elite have benefited from natural resource commercialization.

Public participation in the process

According to the Natural Resource Management Charter (National Resource Governance Institute, 2014), governments should avoid making decisions in a piece-meal fashion and build a shared sense of direction. It is argued that government in dialogue with stakeholders should use a national process to guide national resource sharing issues. The national strategy should take a long-term approach focusing on broader societal benefits. A long-term strategy for natural resource sharing is more likely to be successful if it is the product of inclusive processes that are transparent. It is vital that on debates on the sharing of natural resources decision makers should seek to incorporate the inputs of other stakeholders including national and county governments, parliament, private sector, foreign investors, civil society and the community at large. Since the extraction process can last for many generations, decisions made in the present must be robust to survive the cycles of governments.

Muigua (2014) considers the critical elements of meaningful public participation in natural resource management in Kenya and traces the linkages between meaningful public participation, sound natural resource governance, equitable sharing of accruing benefits and the sustainable development agenda. The paper analyses the importance of the elements of meaningful public participation in promoting equitable sharing of accruing benefits and the sustainable development agenda as provided for in the Constitution. He contends that the Constitution requires facilitation through legislation of wide, quality and meaningful public participation rights and the right to access information. It has provisions that can foster environmental democracy. Other legislation related to the management of natural resources also provides for public participation. For example, The Wildlife Conservation and Management Act, 2013 is an Act of Parliament to provide for the protection, conservation, sustainable use and management of wildlife in Kenya and for connected purposes. This Act applies to all wildlife resources on public, community and private land, and Kenya territorial waters and thus has potential to result in many decisions that require public participation. The Act defines public participation to mean active involvement of the citizenry in decision making processes through, *inter alia*, use of the national media, relevant consultative mechanisms and public hearings. He contends, however, that in order to achieve meaningful and quality

participation by the public there is a need to empower the citizenry with relevant knowledge. The challenge of public participation in practice, however, is that even though legal provisions may exist for public participation, the public is often lethargic in participating in issues that they feel do not affect them directly in the short term. It is therefore vital to educate the public on the long term benefits of participation and make it easy for them to participate.

It is therefore vital to build understanding and consensus from a critical mass of informed citizens. Actors outside the executive including the media and civil society groups are guardians of the strategy by holding decision-makers to account. Section 5 of The Mining Act, 2016, provides that the guiding principles of the Act include the national values and principles under Article 10 of the Constitution. Among the values and principles in Article 10 is democracy and participation of the people. The Act establishes a Mineral Rights Board which is obligated to advise the cabinet secretary on giving mineral rights upon consultation with affected persons or communities. The Act also makes provision for local content requirements and provides for community compensation. The Act gives the benefit sharing formula as 70% to the national government, 20% to the County Governments and 10 to the community where the resource is found.

There are important lessons on public participation in natural resource management to be learnt from other jurisdictions. Currie-Alder (2004) considers the Mexican experience in public participation in natural resource management. He argues that the existence of these processes is part of a new culture of participation that is emerging where citizens take an active role in what was previously the exclusive responsibility of government. Although government continues to administer environmental resources in the name of the public, civil society is an increasingly co-responsible partner in the stewardship and conservation of the country's natural resources. Natural resource management is complex because these resources are often public goods that belong to all, yet at the same time are owned by no one. He provides five recommendations that are relevant for Kenya. The five general recommendations for fostering a culture of participation are: create a common commitment amongst different levels of government; consider stakeholder motivations; foster discussion on the purpose of stakeholder participation; create horizontal structures; and establish mechanisms for transparency and representation. Munyinda and Habasonda (2013) argue that in Zambia public participation is driven by an inter-play of factors including individual capacity, available channels, platforms and willingness on the part of government authorities to provide platforms and engage genuinely with the public. They contend that the public participation framework remains incoherent and uncoordinated. In Zambia, it was difficult to adduce clear mechanisms through which participation is organised. They provide several reasons why citizens and civil society may find it difficult to participate in public affairs. Particularly relevant to the Kenyan context are two factors: firstly, public participation seems to be much more facilitated at

the national level, making it difficult for those located in outlying rural areas to participate and influence public policy. In many cases only a few NGOs, business entities and traditional leaders participate by giving feedback to a proposed position; in other words, participation is often reactive rather than proactive. Secondly, the extent of government accommodation and responsiveness to civil society participation appears to be limited. In terms of natural resource management, individual engagement in public participation is affected by lack of trust in future developments and a growing sense of alienation of individuals from their immediate natural resources such as land, wildlife and minerals. In many public efforts, consultations may be completed initially but consequent public consultations are rarely fulfilled. The study shows that affected communities are often sidelined once the projects have started. Furthermore, there are insufficient formal procedures at local level to ensure that once development projects have been set up and are operational, financial benefits reach the local people and the intended targets. This factor is particularly relevant in the Kenyan context and needs to be addressed by provisions for continuous public participation throughout the life cycle of a project. Of particular relevance to the Kenyan context is also for information to be widely disseminated about which platforms for public participation are available and how the public can engage with these platforms. Public participation in natural resource management issues in Kenya should go beyond meeting the minimum formal requirements and should be much more meaningful. Feedback should also be provided on how input obtained through public participation has been utilised.

Transparency and accountability

To achieve the equitable sharing of natural resources, transparency and accountability are vital. Transparency is vital for accountability to be achieved. It is vital that government discloses information about the whole chain of decisions. Revenue data should be accompanied by information on the applicable tax rates and taxable incomes. Information should be disclosed at an appropriate level of disaggregation such as location, project and product type (National Resource Governance Institute, 2014). The operations of national natural resource companies should be subject to at least the same level of disclosure as private companies. These companies should be transparent in their strategies and spending outlook. The newly enacted Access to Information Act, Act No.31 of 2016, provides opportunities to ensure transparency and accountability in the governance and management of natural resources in Kenya.

Kenya is a signatory to many global environmental agreements and has permanent representation to the United Nations Environmental Programme (UNEP) which is a specialised agency of the United Nations dealing with environmental matters that also facilitates the negotiation of many international environmental treaties. However, the extent to which these are domesticated is still limited which in turn limits the regularity and quality of Kenya's reporting to environmental convention secretariats (Matiru and Stewart, 2007). The main

challenge is that while Kenya adheres to these conventions in theory not all the accompanying international obligations are met. Vital supporting environmental legislation is sometimes not enacted and adequately implemented (Lumumba and Franceschi, 2014).

Conclusion

The discovery of new natural resources in Kenya such as oil and the exploitation of existing natural resources portend considerable transformative potential for the Kenyan economy. These resources are also critical for financing devolution in Kenya. However, many developing countries with abundant natural resources have in the past fallen victim to the natural resource curse that often resulted in protracted violent conflicts. It is especially critical for Kenya to avoid the natural resource curse by putting in place inclusive political and economic institutions both at national and county. This will often entail overhauling existing extractive institutions and anomalous social structures. This should be done in a transparent and accountable way while also emphasizing public participation. In the context of structural conflict, overcoming anomalous structures by overhauling the existing structures is vital. Overhauling existing anomalous legal, social and economic structures is vital so that individuals in such states are more fully enabled to realise their full potential. Loopholes for corruption which permit narrow elites to benefit from natural resources should be sealed. This approach is in line with resolution-oriented approaches to conflict management. In addition, it would facilitate the development of more inclusive institutions which have been the key distinguishing factor between developing countries that have harnessed natural resources to promote economic development and those that have not. In overhauling existing structures, it is vital that the structures put in replacement address the fundamental human needs both at national level and of local communities where natural resources are exploited. Holistic and inclusive development arising from natural resource exploitation is the best guarantor of long-term peace.

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CHAPTER 9

RECOMMENDATIONS FOR SUSTAINING THE DIALOGUE

As a way of prompting a sustained dialogue on the issues discussed in this book, the editors find it necessary to extract the key recommendations emerging from the various chapters. These recommendations include:

1. The voice of academia has been muted in the implementation of the constitution. Academic institutions /the academy should be actively engaged in reviewing and critiquing the implementation of the Constitution in general and devolution in particular and making proposals for better and more informed implementation.
2. Universities should introduce devolution studies in their curriculum a way of engaging the students on issues of devolution and constitutionalism in Kenya.
3. Devolution is both the most popular reform of the Constitution and also the most complex and misunderstood. This misunderstanding is reflected both in the way it is conceptualized and in the way it is implemented. There is therefore need for greater interrogation and understanding of the Kenyan model of devolution and the context in which it is operating for its effective implementation. The model is a hybrid that shares some aspects from different countries and is best conceived as a sub-species of a non centralized system of governance. It has borrowed heavily from the South African model which also borrowed from the German model, Kenya therefore can learn lessons from these two jurisprudence. However, due to the presidential system of government in Kenya, lessons from the US Federal system are also instructive.
4. For devolution to succeed , it must be adequately financed. The financing of devolution should therefore be carefully considered and planned in order to achieve economic growth, reduction of poverty, reduction of inequalities and creation of employment. This involves a well-thought out and theoretically sound relationship between planning, costing and budgeting; resource mobilization/revenue management and budget execution and controls. This requires County Integrated Develop Plans which are strategic. Counties must understand the national development agenda, identify thrust points within the agenda ,unbundle devolved functions, prepare sound costed

CIDPs and annual plans, improve efficiency and execute county budgets on a value-for-money basis, contain the growth of administrative recurrent cost; develop resource inventory and mobilize financial resources and implement revenue reforms.

5. Transition to the system of devolved government has been problematic. It was conceptualized as linear and programmed or scripted. There is need to employ a more holistic approach to transition including reflexive governance which involves participation, experimentation and collective learning. Learning by doing should be encouraged to promote innovation but enough safeguards should be put in place to ensure accountability. Challenges hindering effective transition including the lack of a national policy to guide transition; lack of decisive action on restructuring the provincial administration; failure to harmonise and rationalize the human resource at both levels of government; delayed apportionment of assets and liabilities between the national and county governments and inadequate capacity in both levels of government should be urgently addressed.
6. While devolution seeks to 'foster national unity by recognizing diversity' and has empowered local people to take charge of both power and resources, there is evidence of negative ethnicity with some counties discriminating against minorities. The impact of devolution on nationalism and ethnicity should be interrogated to ensure devolution builds on the national values articulated in article 10 of the constitution.
7. Natural resources have great potential to make devolution succeed by providing the resources necessary to finance development in the counties. The history of Africa is however replete with cases where natural resources have become a curse rather than a blessing due to conflicts arising from ethnic competition for the resources. For Kenya to successfully use natural resources for economic transformation, there is need to create a framework for equitable sharing of the benefits accruing from natural resources exploitation. Factors that engender structural violence must be removed. This requires reform of the extractive institutions and social structures that channel the benefits to a narrow elite.
8. Scholars should establish a knowledge management center for devolution, resource mobilization and sharing, governance and administrative procedures. This centre should be housed in one of the public universities in the country. Research on devolution should adopt a multi-disciplinary approach.

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