



Devolution

System made Simple

A Popular Version of
County Governance System

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Introduction

Devolution is one of the major changes that the Constitution adopted by Kenyans at the referendum held on 4th August 2010 and promulgated on 27th August 2010 has made to the arrangement of government in Kenya. It is a unique and new experience to a majority of Kenyans. This is in spite of the fact that Kenya experimented with a similar system at independence.

This flier has been produced to make the new devolved system easy to understand and to avoid confusion which normally comes with very many interpretations from equally very many sources.

A. Understanding Devolution And The Devolved System

What is Devolution?

- The devolution that Kenya has adopted is provided for this in Article 1 (3) and (4); Article 6 (1) and (2); Chapter Eleven and in the First Schedule and Fourth Schedule of the Constitution of Kenya 2010.
- Devolution is the proper distribution of State functions and powers amongst and between the three arms of government. The three arms of government are: -
 - ▶ The Legislature or the law and policy making body;
 - ▶ The Executive or the arm that implements laws and policies made by the Legislature. The Executive also runs the day to day operations of government; and
 - ▶ The Judiciary, which resolves disputes between the Legislature and Executive, between and amongst the citizens and also interprets and enforces the laws.
- In a genuine devolved system, the distribution of functions and powers of government is set out by the supreme law of a State, that is the Constitution.

What are the characteristics of Kenya's devolution?

- There are two levels of government created on equal basis by the Constitution. These are the County and National governments.
- The Constitution divides Kenya into forty-seven (47) counties with clearly defined geographical boundaries. This is found in Article 6 (1) and in the First Schedule. The boundaries of each of the counties has been drawn by the Independent Electoral and Boundaries Commission (IEBC) as provided for by the Constitution.

- Although the Constitution has created two levels of government and forty-seven counties, Kenya is still a unitary state.
- Although the two levels are distinct, they are required to respect each other and work in harmony. This is provided for in Article 6 (2) of the Constitution. This means that relationship between the two must be consultative and cooperative.
- Neither the County nor the National Government is senior or superior to the other.
- Both levels of government have power to secure resources
- The two governments and institutions established under them are required by the Constitution to ensure participation by citizens in their affairs.
- The two levels have democratically elected representatives and autonomous political authority. The elected representatives are for Senate, National Assembly, the President, the County Assembly and the Governor in each of the forty-seven counties.
- The two levels of governments have clear mandate to provide a range of significant services. These are outlined in the Fourth Schedule of the Constitution.
- The two governments can be taken to court or can take others to court. This is to say they are body corporate.
- The two governments can hold bank accounts and employ staff.
- They have the power to control own budget and accounts and the ability to raise own revenue.
- The county governments have been given constitutional authority to make and enforce local legislation.
- Citizens equal access to available resources at either level is guaranteed.

What are the objects and principles of devolution in the Constitution?

The Objects (Article 174)

- Promote democratic and accountable exercise of power;
- Foster national unity by recognizing diversity;
- Give powers of self-governance to the people and enhance the participation of the people in the 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 development;
- Protect and promote the interests and rights of minorities and marginalized communities;
- Promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- Ensure equitable sharing of national and local resources throughout Kenya;
- Facilitate the decentralization of State organs, their functions and services, from the capital of Kenya; and
- Enhance checks and balances and the separation of powers.

The Principles (Article 175)

- County governments shall be based on democratic principles and the separation of powers;
- County governments shall have reliable sources of revenue to enable them to govern and deliver services effectively; and
- No more than two-thirds of the members of representative bodies in each county government shall be of the same gender.

Are all the counties the same?

There are three three broad types of counties, namely:

- ▶ Rural Counties
- ▶ Counties with both rural and urban characters; and
- ▶ Urban and City Counties

How many levels of devolved units does the Constitution and the law provide for?

- There are four main levels with room for a fifth level through county legislation.
- Under Article 176 (2) the Constitution provides that “every county government shall decentralize its functions and the

provision of its services to the extent that it is efficient and practicable to do so.” This means that county governments have power to establish other units below the County.

- The County Governments Act, 2012 provides for the following levels: -
 - The County level, whose head is the Governor.
 - The Sub- County level, which is the same level as the electoral constituency for members of parliament and is headed by a Sub-County Administrator appointed by the Governor and approved by the County Assembly
 - The Ward level, which is represented by an elected County Assembly Member and headed by a Ward Administrator appointed by the Governor and approved by the County Assembly
 - The Village level, headed by a Village Administrator appointed by the Governor and approved by the County Assembly; and
 - The Village Council appointed by the Governor through the Village Administrator and approved by the County Assembly.
 - The County Government Act allows the County Government to further decentralize its functions and services below the village with the approval of the County Assembly.

B. Devolved Structures

How does the Constitution structure the County Government?

- The County Government has two arms, namely the Legislature, which is the County Assembly and the County Executive Committee, which is the Executive arm.
- The Judiciary, which is usually the third arm of government is a shared institution and has its operations within counties.

Illustration 1: County Government – The County Assembly Administration is overseen by the County Assembly Service Board, which hire staff and takes care of their welfare and those of the County Assembly Members. The County Administration is overseen by the County Public Service Board

How is the County Assembly established?

- This is done through direct and indirect elections.
- The direct elections are where registered voters in a County go to a polling station and cast votes for their preferred candidates for County Assembly Members.
- For purposes of direct election of County Assembly Members, each County has been divided into Wards by the Independent Electoral and Boundaries Commission (IEBC).
- These Wards are not the same wards we were used to in the Local Authorities. They are bigger. In addition, the representatives we used to elect to the Local Authorities were known as Councilors because they were representing us in Councils.
- The name Councilor therefore comes from one who sits in a Council.
- On the other hand, the one elected to represent us in the new County Assembly is known as County Assembly Member. They

are members of parliament at the County level, because the County Assembly is a local parliament since it also makes laws.

What are the types of candidates to be directly elected from the County Wards?

- There are two types of candidates to be elected directly at the Ward level. These are candidates presented or sponsored by political parties and those contesting as independent candidates.
- For either of the candidates to be allowed by the IEBC to run for elections as County Assembly Member, they have to be supported by at least five hundred (500) registered voters in the Ward. Candidates sponsored by a political party must have their forms signed by members of their parties only and not members of other parties.
- Independent candidates must also NOT belong to a political party and their nomination forms must be signed by supporters who are not members of any political party.

What are the indirect ways through which County Assembly Members are elected?

This is done through Party Lists as follows:

- Special Seat members to meet the principle of two-thirds in the Constitution.
- Marginalized groups, including Persons with Disabilities, minorities and youth

The number of members from these categories is determined by the IEBC after all the results of the County Assembly elections have been announced. The number of seats in each case will depend on the number of seats a political party has won during the direct elections. Those running as independent candidates are not beneficiaries of this arrangement.

What other category of the County Assembly membership does the Constitution provide for?

- The Speaker of the County Assembly who is neither an elected nor nominated member.
- The Speaker is nominated and elected by County Assembly Members during the first sitting of the County Assembly.

What are the duties and responsibilities of a County Assembly Member?

- Maintain close contact with the electorate and consult them on issues before or under discussion in the county assembly
- Present views, opinions and proposals of the electorate to the county assembly;
- Attend sessions of the county assembly and its committees;
- Provide a linkage between the county assembly and the electorate on public service delivery
- Extend professional knowledge experience or specialized knowledge to any issue for discussion in the county assembly.

What qualifications must one have to be a County Assembly Member?

- A registered as a voter
- Sound mind
- Not an undischarged bankrupt
- Not serving a sentence of imprisonment of at least six months
- Has not been found by law, to have misused or abused a State office or public office or to have contravened Chapter Six of the Constitution of Kenya
- Satisfies any educational, moral and ethical requirements prescribed by the Constitution or an Act of Parliament. The Elections Act requires one to have at least form four level of education
- Nominated by a political party or is an independent candidate

supported by at least five hundred registered voters in the ward who are not registered members of any political party

- Is not a State officer or other public officer, other than a member of the county assembly
- Has not been, at any time within the five years immediately before the date of the election for which the person is a candidate, held office as a member of the Commission
- Must have been a citizen of Kenya for at least ten years immediately preceding the date of election

How is the County Executive established?

- The Constitution has provided for a County Executive Committee in the devolved system. This Committee is the Cabinet of the County Government.
- It is headed by the County Governor, who also appoints its members. The members appointed by the Governor must be vetted by residents of a county and approved by the County Assembly.
- The maximum number of Executive Committee members is twelve (12) including the Governor and Deputy Governor.

What are the duties and responsibilities of the County Governor?

- Appointment of members of the Executive Committee and other county public officers with the approval of the County Assembly
- Preside over meetings of the Executive Committee
- Diligently execute the functions and exercise the authority provided for in the Constitution and legislation;
- Perform State functions within the county as agreed with the President;
- Represent the county in national and international fora and events;
- Prepare reports for consideration by the County Assembly and county citizens.
- Facilitate participation by citizens in the county governance affairs

What are the requirements for election as a County Governor?

- A registered voter
- Qualified to be elected a member of the National Assembly of Kenya
- Has been a resident in County for past 12 months before the election
- Holder of a degree from a university recognized in Kenya.
- Is not of unsound mind
- Is not an undischarged bankrupt

How are urban areas and cities in counties classified and managed?

- Under Article 184 (1) the Constitution provides that “National legislation shall provide for the governance and management of urban areas and cities”
- There is already a law, the Urban Areas and Cities Act, 2011, which makes provisions on how the urban areas and cities within a County are classified and managed
- The Urban Areas and Cities Act, provides for the following categories of urban areas within a County: -
 - > Cities
 - > Municipalities
 - > Towns
- The Act provides that urban areas and cities will be under the County Government and will be managed by boards appointed by the Governor with the approval of the County Assembly.
- Urban areas within counties will be headed by Managers appointed by the Governor and approved by the County Assembly.
- With the passage of the Urban Areas and Cities Act, the existing local authorities cease to exist. So there will be no city, municipal, county or town council clerks. There will also be no Councilors.

C. Functions and Powers of Devolved Structures

What are the functions of the County Assembly?

- Makes laws
- Elects County Assembly Speaker
- Has power to remove the Governor from office if the Governor fails to perform
- Vets and approves appointments by the Governor
- Vets and approves County government budgets, expenditure and development plans
- Approves County Government borrowing

What are the functions of a County Assembly Member?

- Maintain close contact with the electorate and consult them on issues before or under discussion in the county assembly
- Present views, opinions and proposals of the electorate to the county assembly;
- Attend sessions of the county assembly and its committees;
- Provide a linkage between the county assembly and the electorate on public service delivery
- Extend professional knowledge experience or specialized knowledge to any issue for discussion in the county assembly.

Can County Assembly Member be removed from office before the end of her/his term?

A County Assembly Member can be removed in the following instances:

- When one resigns
- When one dies
- When one is incapable of performing functions because of

- severe illness or other cause
- When one is convicted by a court of law and is imprisoned for more than six (6) months
- When one fails the integrity test set out in Chapter Six (6) of the Constitution

What is the method through which a County Assembly Member may be removed from office?

- The Constitution provides for the RECALL clause, which allows citizens to remove President, Governor, Senator, Women Representative, Member of Parliament and County Assembly Member from office.
- The details of how this is actually done is provided for in the Elections Act and the County Government Act.

What are the functions of the County Executive Committee?

- Implement county and national legislation;
- Preparation of proposed legislation to be considered by the county assembly;
- Management and coordination of the functions of the county administration and its departments;
- Perform any other functions determined by the Constitution or national legislation.

What are the functions of a County Governor?

- Appointment of members of the Executive Committee and other county public officers with the approval of the County Assembly;
- Preside over meetings of the Executive Committee;
- Diligently execute the functions and exercise the authority provided for in the Constitution and legislation;
- Perform State functions within the county as mutually agreed

- with the President;
- Represent the county in national and international fora and events;
 - Prepare reports for consideration by the County Assembly and county citizens.
 - Facilitate participation by citizens in the county governance affairs

Can the County Governor be removed from office before end of her/his term?

- The reasons for the removal of a Governor are the same as those for a County Assembly Member
- The procedure for removal is also similar to that of removal of a County Assembly Member.

D. Citizen Participation

The Constitution of Kenya provides in Article 1 (1), (2), (3) and (4) that “All sovereign power belongs to the people of Kenya and Sovereignty of the shall be exercised only in accordance with this Constitution”; “The people may exercise their sovereign power either directly or through their democratically elected representatives. ”; “Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

- a) Parliament and the legislative assemblies in the county governments;
- b) the national executive and the executive structures in the county governments; and
- c) the Judiciary and independent tribunals”; “The sovereign power of the people is exercised at--
 - a) the national level; and
 - b) the county level.

Because the Constitution gives sovereign power to the people of Kenya, it emphasizes citizen participation in all the Chapters in the form of values and principles. So citizen participation in the governance processes in Kenya is a constitutional requirement.

So in what ways can citizens participate in the governance of counties?

- As registered voters electing county leadership
- As candidates themselves
- In the making of laws through petitions
- In budgeting and planning processes through memoranda
- In County Referendum on major issues affecting them.

The importance of participation by citizens in the devolved system is illustrated below.

E. Finances of County Governments

The Constitution provides in Article 203 (2) that “For every financial year, the equitable share of the revenue raised nationally that is allocated to county governments shall be not less than fifteen per cent of all revenue collected by the national government” This is the money to be given to counties. The national government remains with eighty-five percent (85%). This is the first source of revenue for counties. The law guiding management of county government finances is the Public Finance Management Act, 2012.

What are the other sources of revenue for counties?

- Own revenue raised through levying taxes approved by the residents of a county
- Borrowing
- Commissions from investments
- Income generated from partnerships with private sector
- Grants from the national and other development partners.
- The Equalization Fund, established by the Constitution in Article 204. This Fund is strictly for special groups and regions that over time were left out in terms of development

F. Transition to County Governance

What are the mechanisms for movement from the current system to the devolved system?

- A special law has been passed to make movement from the current system to the devolved one. The law is called the Transition to Devolved Government Act, 2012.
- The Act establishes the Transitional Authority as the body responsible for the movement

What is the work of the Transitional Authority?

- Co-ordinate the transition to the devolved system of government
- Analysis and the phased transfer of the functions provided under the Fourth Schedule to the Constitution to the national and county governments;
- Determine the resource requirements for each of the functions;
- Develop a framework for the comprehensive and effective transfer of functions as provided for under section 15 of the Sixth Schedule to the Constitution;
- Facilitate the development of the budget for county governments during Phase One of the transition period;
- Establish the status of ongoing reform processes, development programmes and projects and make recommendations on the co-ordinated management, reallocation or transfer to either level of government during the transition period;
- Ensure the successful transition to the devolved system of government;
- Prepare and validate an inventory of all the existing assets and liabilities of government, other public entities and local authorities;
- Make recommendations for the effective management of assets of the national and county governments;
- Provide mechanisms for the transfer of assets which may

include vetting the transfer of assets during the transitional period;

- Develop the criteria as may be necessary to determine the transfer of functions from the national to county governments;
- Carry out an audit of the existing human resource of the Government and local authorities;
- Assess the capacity needs of national and county governments;
- Recommend the necessary measures required to ensure that the national and county governments have adequate capacity during the transition period to enable them undertake their assigned functions;
- Co-ordinate and facilitate the provision of support and assistance to national and county governments in building their capacity to govern and provide services effectively;
- Advise on the effective and efficient rationalization and deployment of the human resource to either level of government;
- Submit monthly reports to the Commission for the Implementation of the Constitution and the Commission on Revenue Allocation on the progress in the implementation of the transition to the devolved system of government.

How has the Transition to Devolved Government Act arranged the transition process?

The law provides for two major phases. These are: -

- **Phase One (Section 7 (1))**; which is the period running from the date of promulgation to midnight of the first general election under the Constitution, i.e. 4th March 2013.
- **Phase Two (Section 7 (3))**; which is the first day following the first general election under the Constitution.

Each of the phases has detailed activities to be undertaken.

G. Devolution Laws

The following laws have been passed by the National Assembly to guide implementation of the devolved system: -

- The County Governments Act, 2012
- The Intergovernmental Relations Act, 2012
- The Urban Areas and Cities Act, 2011
- The Public Finance Management Act, 2012
- The Transition to Devolved Government Act, 2012
- The National Government Loans Guarantee Act, 2011
- The Elections Act, 2012;
- The Leadership and Integrity Act, 2012; and
- The Political Parties Act, 2009

The Devolution Working Group

The DWG is made up of like-minded Kenyans with a long history in the constitutional reform movement, especially on issues of devolved governance. The group has expertise in matters of governance reforms including constitutionalism, devolution, gender, disability, judicial and electoral governance and development. The DWG is motivated by the wide ranging interests of the peoples of Kenya as espoused in the Constitution of Kenya, and with a collective interest of realization of a governance system fully informed by the CK 2010 and related Bills and Acts of Parliament.



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