

From A Centralized System to A Devolved System of Governments: Past, Present and Future Dynamics

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At the FES Conference on State of Implementation of the Constitution since 2010

PROLOGUE

Constitutional reform and particularly decentralization of governance have been considered as the two main initiatives aimed at reforming the Africa State and deepening democracy and development for a country. Devolution which is a substantive form of decentralization of government is yet to be researched on sufficiently to help governments manage devolution effectively and ensure that the goals of devolution are achieved. The main objectives of devolution are to enhance service delivery to the people, increase public participation, enhance inclusivity and national unity and enhance accountability in governmental processes.

This Paper traces the challenges that decentralization has faced, and in particular devolution over the past five decades of independence in Kenya, what the main dynamics are in the post constitution period and lastly what the future dynamics are likely to be.

The goal of this paper is to help those who are interested in governance identify the dynamics and study how those dynamics are playing out at the moment but also to prepare the nation on the coming pressures and tensions around devolution with a view to seek for a structured process of responding to the various pressures and tensions around devolution in order to make devolution work rather than fail.

1. UNRAVELING DEVOLUTION IN DECENTRALIZATION

1. 1 Five decades of Centralized Government:

Before The Constitution of Kenya was promulgated in August 2010, Kenya had survived a five decade legacy of underdevelopment where:

- (i) Misuse of power and bad governance under a powerful presidency under centralization raked havoc on the people leading to gross human rights violation. The people wanted a response to this misuse of power by establishing principles of good governance including separation of power and the institution of strong checks and balances
- (ii) There existed a systemic Marginalization and exclusion of peoples along ethnic and region lines
- (iii) Skewed distribution and not sharing of resources by the centralized government
- (iv) A legacy of poverty, lack of participation and the infantilization of citizens took root and disempowered citizens extensively.

In 1999/2000, the Institute of Economic Affairs facilitated the development of four Scenarios for Kenya's development namely the El Nino, Maendeleo, Katiba and the flying geese Scenarios. During the five decades one could argue that we suffered the El-Nino Scenario in the 1970s, 80s and 1990s which entailed the ethnic and political violence, a corrupt state, economic decline and numerous pressures on the state. The NARC- Kibaki I facilitated Maendeleo without (economic recovery and growth) without governance reforms and the Maendeleo edifice collapse in the PEV situation. The Grand Coalition administration focused on and spearheaded the Katiba (governance reforms) Scenario including the facilitation of the making of the Progressive Constitution of Kenya (COK 2010) without a focus on economic and social democratization in terms of ownership of the factors of production and access to better opportunities against a rapidly growing population and the emergence of a youth bulge. The enactment of the Constitution offered the nation a platform to pursue the Flying geese model/ Scenario for democratic- developmentalism.

1.2 Our Constitution and Devolution

Devolution is a System of decentralization that effectively (through the constitution) locates political and economic power at sub-national levels and that is controlled democratically by the people and not the national/central government. It differs with Local governance or delegation which is a system of decentralization that is controlled by the national Government through local representation in national governance and control¹.

The constitution of Kenya in Chapter eleven has effectively provided for the devolved aspects of devolution in 1.3 below which include political devolution, administrative, fiscal, service delivery and the opportunity for the participation of the people effectively and made our devolution accountable not to the national government but to the people directly and through their elected representatives at the County Assembly level of course with the relevant inter-governmental relations and cooperation with the national government.

1.3 What was devolved?

There are several aspects that were devolved. They include the following;

- Political aspects of the devolution mainly feature the establishment of the County Assembly which is not related in any to the Local government Councils/ Authorities that existed before the enactment of the constitution.
- The Administration in devolution is embodied by the County Executive Committee headed by the governor and the other executive offices.
- Fiscal devolution entails the effective devolution of financial resources through the sharing of revenue between the County and National levels as outlined through the constitution and the Public Finance Management Act (2012).
- Service delivery is one of the major factors that were devolved as outlined in the Fourth Schedule of the Constitution on the Sharing of Functions between the national and county governments.
- Similarly, the opportunity for participation of women and men in governance as well as minorities and other marginalized groups is a factor

¹ See Wanjohi N, Modern Local Government in Kenya (1997)

that was devolved or made possible through devolution but most people are yet to come to terms with this key feature of our devolution.

1.4 The Era of Devolved System of Governments

The enactment of the new constitution pushed the country into the era of a devolved system of governments. One of the main challenges of governance in Kenya in post constitutional promulgation has been the inability to appreciate the fundamental shift that has taken place since the promulgation. There are five developments that need to be underlined. First, is that the country no longer has a central government but has a national government which has clear mandate. There are also 47 county governments. Third, the transitional processes and mechanisms were put in place through the Transition to devolved Government Act (2012) to facilitate a smooth transition from the centralized to the devolved system. Similarly, the Intergovernmental Relations Act (2012) has outlined the mechanisms and modalities of managing the relations between the national and county governments². Finally is that the National Government Coordination Act (2012) which re-sets the Provincial administration has already restructured the provincial administration but essentially retained a highly administrative and non-participatory governance system which deprives the nation the opportunity to reform the Kenyan State in a fundamental sense from an anti-people to a responsive government.

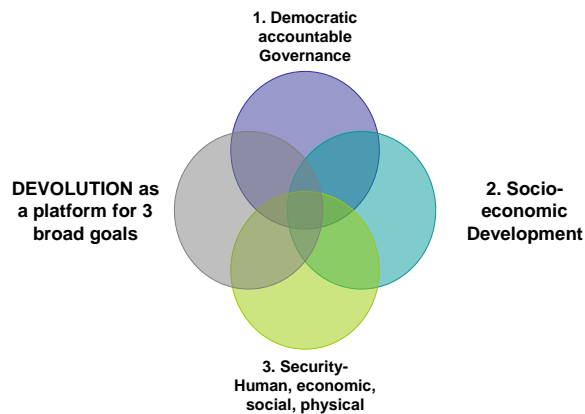
1.5 Devolution for development

As we have outlined above, the main motivation that drove the people of Kenya to demand for a devolved system of government was to facilitate the realization of development which was not feasible without the effective devolution of the said aspects. Devolution is a platform for three main goals namely to facilitate

² Devolution in Kenya is governed by the following legal framework The Constitution of Kenya (2010), The County Governments Act (2012), The Transition to Devolved Government Act (2012), The Urban Areas and Cities Act (2011), the Intergovernmental Relations Act (2012) and the Public Finance Management Act (2012)

democratic governance, spur socio-economic development and to advance holistic security for the people as seen in this diagram below:

1.5 Devolution for development



2. THE PAST DYNAMICS

The independence constitution negotiated by KANU and KADU had a strong devolution structure which KADU mainly saw as important to safeguard the interests of the smaller ethnic communities in the wake of a dominant KANU dominated by the big ethnic communities.

That strong system of devolution was rolled back by the independence government. The dissolution of senate, the regional assemblies and regional governments heralded the start of the end of devolution/ decentralization and consolidation of centralization under the presidency. The passage of Act No. 10 of 1967 that became the constitution of the republic up until 2010 with numerous amendments aimed at strengthening the predatory state followed the amendments that dismantled the devolved system of governance.

The delegated system of the Provincial Administration which was established to facilitate public administration was largely a tool for institutionalizing exclusion, abuse of power, marginalization, human rights violations and state terrorism. Centralized power generally means unaccountable power. The legacy

of impunity and corruption that followed the dismantling of the decentralized/ devolved system is well documented.

Why do we have devolution in Our Constitution?

It can be argued successfully that the dynamics witnessed over since independence motivated Kenyans to ensure that devolution was secured in the constitution substantially for various reasons. First was to inform the directive principle of state policy and legislation as regards governance and the delivery of public services. Secondly, devolution has been provided in the constitution to secure it from sabotage as the history of undermining devolution in Kenya remains fresh and widely experience by the masses. Similarly devolution was secured in the constitution to facilitate citizens' participation in governance as basic principle and value outlined in the constitution. Lastly, it was to guard against the establishment of governments that are not sanctioned by the constitution.

3. PRESENT DYNAMICS

As Kenya is implementing the constitution and rolling out the devolved system of governments various dynamics are playing out that policy makers and advocates of devolution need to pay close attention to. These dynamics include Power, Administrative, Financial/fiscal, Service delivery, Participation: regional and ethnic dynamics, Participation: gender and demographic dynamics and Conflict and Security dynamics.

Let us consider these dynamics in some detail herein:

Power and administrative dynamics: A Chaotic Transition to devolution Process

It is worth noting that the power-play and dynamics that relating to devolution have been paralyzing and intriguing at the same time. The chaos, albeit not entirely surprising, have posed great concern. These are some of the areas that need mention;

- The processes of transition? The Transition to Devolved Government Act 2012 established the Transition authority to facilitate the smooth transition

from centralized government to devolved governments. The various process including the transfer of assets, secondment of staff, establishment of the payroll, capacity building of the county government and the setting up of civic education units among others have been chaotically operated leaving devolution suffering. The main problem has been that the national government has been allocating less than twenty percent of the resources that the Transition Authority requires to discharge its mandate. The intention of dissolving the Transition Authority and facilitative transitional mechanisms to allow devolution on the terms of the National Executive has outlined in the Statute (miscellaneous) Amendment Bill 2013 presents serious challenges to the transition processes. The Council of governors which has supported the move to dissolve the Transition Authority may find itself in a difficult place once the Authority has been dissolved and a committee established.

- There are serious human resources gaps and deficits, administrative weaknesses while chaos around pensions and the secondment of staff to the counties still persist.
- There is evident lack of institutional capacity at the County Executive and County Assemblies. While this is not entirely surprising, what is of concern is that the process of acquiring this capacity is not entirely clear.
- The Constitution Commissions have not been decisive in supporting the faithful roll out of devolution and this is of concern. The conflicts relating to the Transition Authority's operations, the stand off between the Ministry of lands and the National Land Commission, the tensions between medical practitioners and the county government and other conflicts that have followed are mainly due to the inability by the Constitution Implementation Commission (CIC) to give strong advise to the government agencies involved on the appropriate channels to follow towards executing governmental functions.

Participation dynamics: Principles of Citizens Participation

While the County Government Act (2012) provides for a very clear process that will institutionalize public participation into the county governance system³, modalities for citizen participation have not been set save for the formality one day meetings that have been convened to discuss the budget without proper structure and availing of information to the public in good time. The framework for Civic education at the county level has not been established and facilitated as required by the CGA (2012) which has outlined the Principles of civic education, Purpose and objectives of civic education, Design and implementation of civic education and the Institutional framework for civic education.

It is therefore clear that public participation in the devolved system of governments is a problem that the national and county government does not want to bring on itself and that is why important bodies like the Kenya National Integrated Civic Education (KNICE) Programme seem to have faded off without a trace at a time when the country needs civic education on the constitution and particularly devolution the most.

Fiscal dynamics at the National and the County Government

The Budgeting process has theoretically shifted public finance Management power to the Legislature at the National and county levels as provided for in the Public Finance Management Act (2012). Unfortunately the architecture retains the executive at the National Level as the main decision maker on financial matters. The National Treasury remains totally in control of decision making on fiscal policy and the county governments are yet to set up systems and capacities to handle much of the county treasury operations.

Similarly, and of great concern, is that County Governments have indeed received dismal fractions of the expected revenue and they are so far by the end of the year 2013 most if not all county governments were putting the basic systems in place. What is of concern is that the National Government and Controller of Budget have gone out of their way to depict the county

³ These process and mechanisms include provisions on Citizens right to petition and challenge, Duty to respond to citizen's petition and challenges, Matters subject to local referenda and the Establishment of modalities and platforms for citizen participation

governments in eyes of the public as incapable units not worth of the public's trust.

The service delivery dynamics: How services will be delivered at the county level

Whilst the principles of public service delivery in the county are very clear and the standards and norms for public service delivery have been outlined, the current situation is informed by the tensions around the transfer of functions and decision making on what services should be offered by the county government in the wake of the reality that the county governments do not have the requisite resources and technical capacities⁴.

The transfer of functions remains highly heated and politicized with the aim to retain financial resources at the National Level but transfer functions to the County Governments⁵.

The end result of this irrationalized transfer of functions and lack of capacity and resources to deliver services by the county governments is that most counties have only concentrated on recruiting staff and therefore applied most of the financial resources available from the share of national revenue and county sources to salaries and overheads in the process straining or stalling service delivery entirely⁶.

Participation dynamics: Gender, ethnic and conflict dynamics in the Second republic

In the wake of the promulgation of the constitution and the setting up of the county governments the debate rages on as regards the place of women and men in the leadership and governance of the counties as well as at the national level. Given the fact that all the elected senators and governors are male couple

⁴ The CGA 2012 has also outlined guidelines on shared services, the citizens' service centers and tariffs and pricing of public services

⁵ The President unilaterally in a meeting with the governors in State House decreed that all the functions be transferred to the County Governments as the Governors had demanded without a structured process informed by the Transition Authority on the capacities, preparedness and resources availability to the County Governments to deliver services.

⁶ The Example of the total closure of Pumwani Maternity in Nairobi under the County Government, a thing that had never been heard of before illustrates just how strained service delivery under the County Governments is.

with the fact that only 85 out of the 1450 Members of the County Assembly were elected, there persists a serious concern why women's participation has not improved significantly under the new constitution. While citizens generally have not stepped up their engagement within the county governments, women are largely structurally excluded from governance and leadership processes both nationally and at the county level.

Further, ethnic and identity dynamics in the counties have generally been poorly managed leading to the tensions, conflicts and persistent break out of violent conflicts in certain Counties in the country. The issues of minority communities in rural counties that are considered to be of certain ethnic communities like Samburu, Turkana, Migori, Isiolo and Bungoma among others remains a key challenge in the current devolution roll out.

Security Situation: Institutional vulnerability and unwillingness to secure the people and their values;

The constitution has established a security system that is directed by the national government especially in terms of the management of the police services. The country is yet to see how this system will work when citizens have to still complain to the national government on insecurity in their counties whereas their county government can hardly take action to secure the people and their values.

This is a difficult system of security management which lacks in two areas. Firstly, it is a system that attracts sabotage by the county stakeholders to show that the national government is incompetent in the delivery of security and secondly because it alienates the citizens' and public participation in providing security. The youth particularly ought to be significantly involved in the conflict and security conversations at the county level. There is need for a deeper conversation regarding security management under the devolved governments system.

The main triggers of insecurity at the Counties include the prevalence of organized crime and gang crimes, politically inspired violence, Cattle rustling, banditry and terrorist attacks.

It is therefore incumbent upon the various stakeholders in the security management at the county level including non-state actors to inform the discussion on strengthening security management in the era of a devolved system of governments.

Protecting vulnerable groups is largely lacking because of institutional vulnerabilities of security agencies. There is need for system wide reforms that will focus on Security sector reforms. Such reforms should see that communities and particularly women are effectively involved in security management being key users of the security services.

4. FUTURE DYNAMICS

From observing the current dynamics informing the devolution process, it will be in order to predict that the coming days will be marked by prolonged power and resources tensions that will be driven and shaped by the emerging forces of counter reform and those for progressive reforms to make the Constitution of Kenya to work for the people of Kenya and their national values and aspirations. Currently, there are counter-reform forces gathering momentum in the campaign to show that devolution and the constitution can not work as is. They are proposing small but effective steps that will eventually return effective power back to the center by showing that devolution is inherently a failed system of decentralization and that it will not deliver services nor facilitate development.

Secondly, while the reform of the anti-people and predatory State remains unsuccessful since most measures have not been put in place to make devolution and the constitution take root, it seems that the forces that will transform the Kenyan state into a democratic and developmental State remain weak and disarticulated at the moment. It can therefore be expected that the genuine push for reforms to capture the vision of devolution and democratic consolidation as envisioned in the Bomas Draft Constitution will gather momentum in the coming years⁷.

⁷ Some of the issues being raised at the moment by the Bomas proponents is that the Devolved Units are too many and too expensive for Kenya's economy as Bomas Proposed fourteen and the CoE proposed Constitution settled for 47 units. The size of the National Assembly and the Senate has also been seen as being too large.

As the counter-reform and the progressive reform forces contend in the coming days, the seven dynamics will be right at the centre of the debate as would be expected⁸.

Conclusion

Devolution is the touch stone of the new constitution and its success is the true measure of the success and viability of the constitution that Kenyans struggled for so many years to give to themselves. For devolution to work, a strong movement for supporting devolution has to be put in place led by forces within government, politics, and the academia as well as citizens groups. Similarly, there is need for pushing for increased resources for the county governments to deliver services and develop the counties. The county government needs resources but also increased capacity in order to deliver services.

Further, there is need to build the capacity of citizens through civic education and other strategies in order for them to participate substantively and in an informed manner in governance processes of our country. Kenyan women and the youth, persons with disability as well as minority communities in the various counties ought to be organized and involved in the governance processes in order to create a foundation of inclusivity and productivity for county development.

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⁸ The dynamics include the political/power dynamics, the administrative, fiscal/financial, service delivery, gender and demographic, regional and ethnic and the security and conflict dynamics