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An interview with Dr. Mutakha Kangu

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Since independence, political and economic power in Kenya has been centred in the Capital City, Nairobi. Moreover, having a centralized governance system resulted in the establishment within Nairobi of the headquarters of majority of government ministries, departments and agencies which negatively impacted on access by the general public to information and services. But scholars have suggested that what had the most impact on citizens was the concentration of power in the presidency which resulted in the weakening of other state organs. Attempts at decentralization through the provincial administration were ineffective as the established structures ultimately led back to the office of the President. Thus when the opportunity to change the structure of governance came, Kenyan’s opted for a constitutionally protected devolved system that creates two levels of government- central and county, which are distinct but/yet inter-dependent.

However, the constitutional provisions are not an end in themselves. For Kenyans to fully participate and realise the benefits of the devolved system, they must understand it because this system of governance is the key to achieving the promises of the Constitution.

Under the devolved system, Kenyans will have the opportunity to elect their leaders at both levels of government. There are at least six directly elected representatives as opposed to the traditional three and the Constitution clearly delineates the national from the county leaders and spells out their respective roles. Moreover, the Constitution provides for balanced representation through requirements on two-thirds gender representation; and inclusion of persons with disabilities and the youth. Kenyans expect that by having broad-based representation of popularly elected leaders will provide them with the space to participate in the governance of our nation.

The other significant and novel feature of this new system is the right of the electorate to recall their elected representatives if they feel they are performing dismally with the exception of the President. Article 104 provides that the electorate under Article 97 and 98 have the right to recall the Member of Parliament representing their constituency before the end of the term of the relevant House of Parliament. Likewise, Article 181 provides for the removal of governor and Clause 28 of the County Assembly Bill 2012 proposes the removal of the County Assembly Representative.

This Issue of Nguzo za Haki brings to the reader different perspectives on devolution ranging from its impact on participation, to the likely challenge of devolving graft to the country level. Our lead article expounds on the constitutional basis of devolution and its architecture; and in so doing identifies its strengths and how to avoid the pitfalls of the past. Several of the articles look back to where the country has come from, with one of the writers even suggesting that we have devolved back to Lancaster. There are also articles on how effective implementation of devolution will facilitate greater participation of women and other special interest groups in the country’s political, social and economic sectors as well as how to devolve with integrity. And despite the different focus the agreement is that Kenyans must look into the future.

As Kenyans usher in the new system, KNCHR urges Kenyans to exercise their rights so as to realize the promise of the Constitution.

Rose Kimotho
KNCHR
The next elections in Kenya are eagerly awaited for various reasons, chief among them being that they are the first under the 2010 constitution and they will usher in the concept of devolution. However, even as Kenyans anticipate the new dispensation, questions linger as to how much Kenyans know about devolution?

The following article based on an interview with Dr. Mutakha Kangu, a renowned constitutional lawyer and the former chair of the Taskforce on Devolution, attempts to shed more light on devolution, its basis in the constitution and what it means in terms of governance.

What is devolution?

The primary role of any constitution is to organise or manage governance or state power. In so doing, there are two main approaches; first is the single dimensional approach and second is the multiple dimensional approach. The single dimensional approach is one that creates one level of government and systems to check the separation of powers between the horizontal organs of government. This approach is most likely to result into a centralised government.

The multiple dimensional approach creates two or more levels of government as well as systems to check power vertically between the various levels, and horizontally between the various organs at all levels. It is this latter approach that leads to devolution with two or more levels of coordinate governments. It combines self-governance at the local level and shared government at the national level. The Constitution of Kenya 2010 applies a multi-dimensional approach whereas the repealed Constitution was based on a single dimension approach.

For devolution to be well structured, the Constitution must address the following:

1. The levels of government must be specified

The Constitution of Kenya 2010 in Article 1 creates two levels of governance through which the sovereign power of the people is exercised; the national and county governments. Entrenching this architecture in the Constitution provides protection for the county governments as partners to national government and avoids a situation where the second level of government is created through subordinate legislation thereby making it a mere agent of the legislature as is the case with the current local governments that are created through the Local Government Act and administered under the Ministry of Local Government.

2. The number of units must be specified

Article 6 of the Constitution specifies the number of units/- counties and provides that the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation.

This constitutional entrenchment of counties avoids undermining the devolved system as is the case in point is Uganda where the president has continuously created new units in friendly areas to sustain and even increase his support and that of his party in parliament hence undermining the system.

However, while the Constitution specifies the number of counties, the challenge is that they are just in name and the boundary delimitations still need to be done. To achieve this Independent Electoral and Boundaries Commission will need to look at the constitution making history and the act of parliament that defined the 47 districts in 1992.

3. Assign the governance responsibilities and functions

Article 186 of the Constitution provides for the respective functions and powers of national and county governments and further expounds on the distribution of same in Schedule 4. However, there are still others that can be traced to other provisions of the constitution such as articles 183 and 185 that provide for the functions of the county executive and county assembly respectively.

4. The constitution must allocate resources for performance of functions

Resources include financial, human, and infrastructure. With regard to financial resources, governments must be able to raise revenue, spend, control, and audit its expenditure. A good constitution will distribute these powers evenly. The independence constitution did not provide for revenue sharing between the national and sub-national governments which led to underfunding of the lower levels of government thus affecting their service delivery. In our case, financing matters are dealt with in the Chapter twelve of the Constitution. Article 209 specifies the kinds of taxes and charges that the national and county governments may impose. Revenues collected by the national government are to be shared equitably between the national and county governments based on a criterion set out in Article 203. However, while the Constitution gives implementers the minimum aggregate ratios along which to share out the revenues, the more accurate guide on what ratio to use should be established by looking at the different functions that the two levels of government are supposed to play. This is to avoid a situation where one level of government has functions without the matching resources for their implementation. In the end, the development of Kenya will be measured by the aggregate development of the individual counties.

Avoiding pitfalls of the past

Currently, the disparities in the development status between different regions of Kenya are gaping. This state of affairs has been blamed on past policies that ignored areas not deemed as ‘productive’ a term whose definition was based on agricultural potential. Recognising this, the Constitution in Article 204 establishes an equalization fund, to be financed by one-half per cent (0.005 percent) of nationally collected revenues. The purpose of this fund is ‘to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible’. The fund will be maintained for a period of twenty years after which the National Assembly may extend the period.

However, in addition to the fiscal resources to be provided to the county, there is need to build the capacity of the county governments to handle the new responsibilities. Experience garnered from the current local authorities demonstrates that local authorities do not have the capacity to handle what they are already doing. Councils have been dogged by poor revenue collection, public fights and quarrels, poor management of staff and assets to name but a few. Thus moving forward, there is urgent need to build the capacity of personnel and political leadership at the county level to deliver on the new additional responsibilities.

Moreover, one of the most important shared institutions is that of law making at the national level. The law making process must be for the common good: the interests of the smaller counties must not be overlooked. Nevertheless, there is a real opportunity for elected members to be more involved in the law making process than has been the case in the past. Article 96 (1) gives one of the functions of the Senate as to represent the interests of the county governments. Most importantly, senators must be aware of the burden they will be passing on to the county governments through legislation and hence make sure there are commensurate resources to match their obligations.

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2 Njeru Kirira, Public Finance under Kenya’s new Constitution, Constitution Working Paper Series No. 5, Society for International Development
The role of county governments in delivering human rights

The primary objective of devolution as stipulated in Article 174 of the Constitution is to ensure delivery of social justice and equalization of rights and opportunities for all citizens. And whereas, Article 20 of the bill of rights binds all state organs, including those at the national and county government, it does not shift the responsibility of the implementation of human rights from the national to the county government. This responsibility will primarily remain with the national government as it is the one that signs and ratifies international instruments.

However, there is growing recognition that some fundamental human rights obligations fall within the functional competence of lower levels of governments as opposed to the national government. Even with our current system of local authorities, the following typical local government (councils) services fall within the realm of economic social and cultural rights: water and sanitation services, housing, solid waste management, and in some cases education. Under the devolved system Schedule 4 of the Constitution distributes functions between the national and county government. A close analysis of the list reveals that these functions relate to human rights and thus in fulfilling what may be seen as mere functional responsibilities county governments will in effect be delivering on rights. Furthermore the Constitution is clear, that in respect to some rights; health, housing, language, education the national government’s role is that of policy formulation with the implementation being left to the county governments.

However, Schedule 4 only serves as a broad guideline: the national government will need to identify and relinquish control of those functions that may be performed by the county government. Examples of these are basic services such as water and sanitation (which was a purely local government function until the formation of the water and sanitation boards (WASREBs) under the Ministry of Water) and solid waste management which require decentralised and efficient services that respond to the unique needs of the different communities.

The performance by county government of their functions under the Constitution will in effect lead to the actual fulfilment of human rights. As the government closest to the people, the county government will need to be sufficiently resourced to ensure that citizens have access to rights.

But at the end, the success or failure of our new governance model will be determined by how it is implemented. This calls for the implementers to understand the aspirations of the Kenyan people as captured by Article 10 on our national values and principles.

Rose Kimotho

KNCHR
Kenya overwhelmingly voted for the new Constitution of Kenya (2010), whose solid foundation is to ensure that values such as social justice, public participation, inclusiveness, equity, human rights and protection of marginalized groups, among others, are realized. One value, which could assist in the realization of all these other values, is devolution of power. In most public spaces, no subject has received as much attention as devolution of power. In many places in the country, a lot of people are familiar with the phrase but not the concept of devolution of power - many have reduced devolution to what is erroneously described in Kenya as ‘devolved funds’.

Further, many organizations, public, private and even community-based are having meetings on the same, but it seems the debate is still without fundamentals on what devolution of power actually is or its capabilities of transforming the country. Indeed, the history of Kenya, especially how and why the former ‘regional governments’ were established by the independence Constitution but later abolished is missing from these debates. Moreover, politicians are dominating the debate as they seek to fill in potential seats as senators, governors and members of county assemblies. Amidst all this, Kenyans are seeking answers to problems they face today and how devolution of power will assist. This article seeks to explain why Kenyans chose a devolved system of governance. Focus will be on the challenges of the colonial government, and the successive African-led governments in failing to meet Kenyans’ hopes. Second, this article clarifies the role, if any, of the Provincial Administration within that devolved structure of governance with a view of expressing what ‘restructuring’ means as envisaged by the Constitution.

Kenya’s Colonial History
The colonial regime existed roughly for 70 years, after which the British relinquished their colonial stranglehold having administered the protectorate and colony, as one, from about 1895. In the entire period, three key attributes inform the colonial government’s regard to State power. This first and deliberate measure was to conquer, consolidate, and use State power against all opponents of colonialism.

The second measure was to consolidate power in Nairobi but also disperse some powers to ‘native’ African rulers (chiefs and their assistants) through the oft-quoted ‘divide and rule’ policy. That is, State power was virtually centralized, with a portion of it delegated and exercised by lower-level units and individuals. This trend saw State power used, and decrees given, in Nairobi and also in the countryside.

5 ICHRP Local government and human rights: Doing good service (2005)
The third measure was to divide State power into the three traditional arms of government: a Legislative Council, an Executive Council and a Judiciary. While this trend came late in their regime, power still resided in the Colonial Office in London. For example, some laws in Kenya were unenforceable unless they were sanctioned by the Colonial Office. The three arms were basically established to appease Kenyans who wanted more representation in these decision-making organs. Through the Oliver Lyttelton and Alan Lennox-Boyd Constitutions of 1954 and 1958 respectively, Kenyans got such representation but this however did not bring about the change that they sought. Only freedom from the colonial yoke would work.

**Independence: Majimbo Constitution**

As the clamour for freedom neared independence, it was quite obvious that freedom struggles were informed by various narratives but with one unique problem: elimination of foreign rule and establishment of a State based on some of the values stated above. The freedom struggles by all groups be they workers, political parties, and all community-based struggles, were based on respect and protection of human rights that had previously been enjoyed by a ‘white minority’, and nominally, the Asian community. Africans were the ‘wretched of the earth’ in the colonial regime. Indeed, State laws applied differently for Africans as opposed to Asians and the ‘whites’ with regard to administrative matters – somehow similar to an Apartheid system.

The conferences held in Lancaster between 1960 and 1963 tried to resolve the above Kenyan problem but with successes and challenges. Some of the settled issues in the ensuing Independence Constitution included: establishment of clear citizenship status; an independent judiciary; a chapter on human rights based on the 1950 European Convention on human rights and fundamental freedoms; a bi-cameral legislature, with each House having varying responsibilities at national and local levels; and also, a split executive that separated the Head of State from the Head of Government.

With regard to devolution of power, semi-autonomous regional governments were created. Their structures and functions in complimenting the national government in running the affairs of the State were well elaborated. Notwithstanding the weaknesses and challenges of the devolved system then, it was clear that Kenyans through the Independence Constitution had decentralized State power away from Nairobi. It was this chapter on regional governments, which made the Independence Constitution be referred to as the ‘Majimbo Constitution’.

Unfortunately, Lancaster talks were unable to resolve many other injustices of the Kenyan State. For example, the ‘land question’ remained unresolved, which was really about access to, and ownership of, land and land-based resources. Indeed, the historical land claims that the Maa speaking community has with regard to their grazing land hived off by the 1904 and 1908 agreements illustrates the gravity of these claims. Other equally unresolved matters in Lancaster that regard State power included regional autonomy sought by the Protectorate that found expression with the Mwambao United Front (MUF) or even the self-determination question in the former Northern Frontier District (NFD). Proverbially these matters that were put on ice and have kept resurfacing in public discourse to date.

**Jogoo Symbolism and Centralization of Power**

Immediately after independence, Prime Minister Kenyatta working with parliament amended the ‘Majimbo Constitution’ for the first time in 1964, to make him President, and therefore both Head of State and Government. With that amendment, the then presidents of regional governments were renamed ‘chairmen’, paving way for Kenyatta as the sole holder of that title. Powers of the regional governments to set up lower-level units such as councils or establish police units were also taken away and power was centralized within the president. Subsequent amendments such as the second, third, fourth, seventh and ninth amendments further centralized power in Nairobi at the expense of the regions. Some of the changes
brought on by the amendments were the abolition of the Senate which had been created to protect interests of the regional governments and abolition of regional governments in 1968. Achieving this was easy because KADU, the main architect of a devolved system had been swallowed by KANU in 1964. This was followed by By the time former President Moi (originally a KADU adherent turned a staunch KANU supporter) came to power in 1978, the Independence Constitution had been amended 15 times, and was totally reconfigured. Most of the amendments, even during Moi’s tenure, were aimed at emasculating parliament and judiciary, with the executive arm of government (especially the presidency) consequently amassing much of the State power.

Centralization of power was lop-sided and ended up under-developing districts and communities that lived in those areas. In most of northern Kenya, people continuously felt they were not part of the country.

After many years in this system, talks to decentralize began in the early 1980s. There were many attempts, with the most famous and ambitious being the District Focus for Rural Development (DFRD), which was operational in the 1980s and early 1990s. The DFRD was however challenged by conceptual and management problems, especially where most of the representatives in the District Development Committees (DDCs) were from the Provincial Administration, under the leadership of the District Commissioner. Further still, while government programmes were to be ‘localized’, there was a lot of influence from the central government, especially since it held the ‘purse’ to fund or not fund such efforts.

Other efforts at decentralization include fiscal decentralisation, which translates to sending portions of national revenue from central government to lower-level units be they districts, constituencies or local authorities. These decentralized funds include Local Authority Transfer Fund (LATF), Constituencies’ Development Fund (CDF) and District Roads Fund (DRF), which were created to offset financial limitations at the local levels that inhibits development. In the utilization of these funds, the public is to identify projects that best meet their needs.

However, as many reports by government agencies and civil society attest, knowledge of the existence of these funds does not necessarily translate to public participation in setting priorities for development. Mechanisms for the public to use to hold leaders accountable have not worked and hence public funds have been squandered. That notwithstanding, there are positive though isolated results attesting to the fact that fiscal decentralization can bring ‘development closer to the people’.

Efforts at Decentralizing Power

Centralists argued that centralization would help the country develop faster and their machinery of choice was the Provincial Administration and Ministry of Local Government. However, even with the Ministry of Local Government, powers of the Minister were often unchecked and unregulated not to mention seemed to surpass, even sometimes suppress, those of 175 local authorities. This type of decentralization was weak since it was only giving provinces, districts and local authorities’ power to implement what the central government designed. Indeed, this type of decentralization, also called de-concentration, occurs when the central government only cedes implementation and oversight responsibilities, without ceding the initiative from the centre.

In this type of governance, Kenya’s development agenda was ‘one-size-fits-all’. For example, guided by the Sessional Paper No. 10 of 1965, KANU governed in a way that implicated: a) all Kenyan districts’ needs were thought to be similar; and b) only areas that have ‘high potential’ get more funds and investment opportunities than those with ‘low potential’. This ‘potential’ was largely based on agricultural productivity especially where cash crops were grown. So districts such as Lodwar, Wajir, Garissa, Marsabit and Samburu were all relegated to be ‘low potential’ yet they produce over 70 percent of the livestock, which is consumed by those living in ‘high potential’ areas.
Despite these efforts at decentralization, State power has remained structured in an unequal way. Most Kenyans especially those in the far-flung locations felt deprived and their development needs unmet. Poverty is endemic, regional imbalances are visible, and most areas and communities feel like ‘foreigners in their own country’ a status that was expressed by Kenyans’ during the collection of views by the Constitution of Kenya Review Commission (CKRC), between 2001 and 2005. In place of that system, Kenyans proposed for devolution of power and responsibility of the State to treat all Kenyans equally, with clear State policies and values. Most of the thoughts before, during and after the Bomas processes were retained in the Constitution of Kenya (2010).

**Katiba Mpya: National and County Governments**

Reading through the Constitution, reminiscence of the Independence Constitution is palpable from the Preamble, declaration of the Republic, the structure of State power, principles of devolution of power, objects of devolved governments, public finance, creation of the Senate, and also the First and Fourth Schedules that outline counties and their functions respectively. In essence, Kenyans are back to square one: Lancaster.

The Constitution creates two levels of government, national and county. It is envisaged that these governments shall be distinct, interdependent and should consult and cooperate. There is clear structural and systems’ framework for devolved governments, with the same principles as the national government. Each county will have executive and legislative arms but the judiciary at national level that runs into counties. The county executive will be headed by an elected governor who will be assisted by lean executive, similar to the one that will be established at the national government.

The legislative arm at the national level will be bi-cameral having both the National Assembly and the Senate. The roles of these two are clear where the latter secures the interests of county governments while the former is composed of elected and nominated representatives to make national laws among other roles.

General principles of the Constitution that tie both governments include: a) that not more than two-thirds of either sex shall occupy either the executive or legislative arms; b) that all members of the two arms are State Officers; c) that all leaders directly elected or appointed are subjected to the provisions of Chapter Six of the Constitution on the responsibilities of leader; d) that principles of public finance apply to the budgeting processes at county and national levels; and e), that principles of governance and national values apply to both governments.

From the above, the Constitution is quite clear that both county and national governments have to cooperate, especially given the functions of each, and also functions that the national government is supposed to deliver at the county. Part of the latter includes dispatching financial resources to county governments where not less than 15 percent of national revenue should be sent and also an equalization fund to the marginalized counties. The intriguing question, in this dual arrangement of the two governments, is what will be the role of the Provincial Administration.

**Restructuring Provincial Administration to What?**

The Constitution points to ‘restructuring’ the Provincial Administration to suit and accord respect to devolved governments. The Constitution envisages that each county shall recruit its own staff based on its respective needs. Only teachers are to be recruited by the national Teachers Service Commission and dispatched to counties. Undoubtedly, each county will most likely have a public service body to recruit its own staff.

So what does ‘restructuring’ mean? Attempts have been made by the Taskforce on Devolved Government (TFDG) in a report where they propose to change the Provincial Administration to National Administration with roles of ‘coordinating counties and also overseeing implementation of national government programmes’. This has been challenged by many, especially civil society groups and academics, and found to be faulty on two grounds. First, there is no role of ‘coordination...
of counties’ envisaged in the Constitution as each county is led by its elected leaders. Second, the role of ‘oversight’ is one not envisaged by the Constitution and therefore, counties cannot be ‘overseen’ by ‘strangers’ who do not account to the people.

Further discussions, especially by the Office of the President, indicate that Provincial Administration should be ‘security eyes’ of the national government, yet the Constitution creates three agencies for security which do not include the Provincial Administration.

Unfortunately, the TFDG and the Office of the President, are laying down an afterthought rationalization for existence of the Provincial Administration without convincing Kenyans. I opine that to ‘restructure’, this group should be recalled back to Nairobi and assigned roles within national government, but cannot and should not be imposed on Kenyans at county level. Kenyans should resist attempts to install these ‘president’s eyes and ears’ at the local level.

On the other hand, the role of officers from respective MDAs could be rationalized since their role is less political. However, each MDA should find a way of working with respective county governments to ensure that these professionals are incorporated into future county staff.

Conclusion

It is evident that Kenya has devolved once again. However, there are many attempts to thwart devolution by national government before counties are made operational. The MDAs, working on various bills to implement the Constitution, are beholden to the past. Civil society has tried to wrestle this. The debate, similar to that in the early years of our independence, is between centralists and regionalists. Those who benefit from centralization would want to keep the lop-sided system that benefits Nairobi and those who wield power. Those struggling to make a difference in Kenya’s governance system are seeking to ensure devolution of power works and counties operate.

The Constitution envisages a five-year transition period; from 2010 to 2015. Contestations between Nairobi and counties must be guided by the Constitution. The national government is unlikely to cede power to county governments without being compelled, but the Constitution does so. Kenyans should literally stand for what they voted for: a devolved system which holds key to realization of most of the values set out in the Constitution.

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The chronic condition of human rights violations in Kenya has over the years provoked serious political, social and economic consequences. Such violations often either included or resulted in the denial of the citizens’ right to participate fully in the country’s politics. The Independence Constitution, which was repealed on 27 August 2010 upon the coming into force of the current Constitution, could not be relied on to guarantee equal participation of citizens in governance. This is primarily because, shortly after independence, a practice of frequent constitutional amendments started, which served as an endorsement of the ‘politics of exclusion’. In the process, most citizens were unabatedly denied the enjoyment of many of their fundamental rights and freedoms, particularly the right of political participation. This article reviews Kenya’s constitutional history with the view to underscore how, by providing for a devolved system of government, the new Constitution enhances the right to political participation in the country.

Enhancing the right to political participation through a devolved system of government

The case of Kenya’s new constitutional dispensation

The chronic condition of human rights violations in Kenya has over the years provoked serious political, social and economic consequences. Such violations often either included or resulted in the denial of the citizens’ right to participate fully in the country’s politics. The Independence Constitution, which was repealed on 27 August 2010 upon the coming into force of the current Constitution, could not be relied on to guarantee equal participation of citizens in governance. This is primarily because, shortly after independence, a practice of frequent constitutional amendments started, which served as an endorsement of the ‘politics of exclusion’. In the process, most citizens were unabatedly denied the enjoyment of many of their fundamental rights and freedoms, particularly the right of political participation. This article reviews Kenya’s constitutional history with the view to underscore how, by providing for a devolved system of government, the new Constitution enhances the right to political participation in the country.

Kenya’s long search for the right to equal political participation Kenya’s constitutional history is as old as the establishment of the British East Africa Protectorate in 1895. Prior to this period, the country had no formal legal system, Constitution or government as recognised today. The declaration of protectorate status over Kenya, therefore, vested authority on Britain to govern the territory that had all along been occupied by ‘stateless’ communities with distinct political and social traits. Faced with such a challenge, it was needful for the colonialists to establish a workable system of government. Thus, in 1906, an Order-in-Council was promulgated, which provided for the establishment of an Executive Council to assist in the administration of the country. The Council passed legislation until mid-August 1907 when the Legislative Council (Legco) was formed.

Despite the fact that Africans constituted the predominant racial group in Kenya, only ‘whites’ were permitted to participate in the administration of the country. The decision to exclude Africans from governance was misinformed by the belief that ‘blacks’ were incapable of managing their own affairs and could therefore not be entrusted with any such responsibility. It was not until 1944 when the first African, Eliud Mathu, was appointed to the Legco. This came only after the African masses violently rebelled against racial discrimination, whose aftermath necessitated serious legislative reforms.

The disquiet in the then existing legislative and constitutional framework led to the formation of the Kenya Independence Movement (KIM), a political organisation intended to champion the rights of Africans and their political independence. Through this movement, African representatives in the Legco declined to co-operate in government, arguing that representation still weighed heavily in favour of the settlers who constituted a minority of the population. They demanded a constitutional conference to map their political destiny. The fruits of their agitation were eventually realised when the Independence Constitution was promulgated, leading to the country’s independence from colonial rule on 12 December 1963.

The Independence Constitution was strongly based on the principles of parliamentary government and the protection of minorities. At the time of its inception, the Kenya African Democratic Union (KADU) and Kenya African National Union (KANU) dominated the country’s politics. Whereas the latter favoured a centralised system of government, the former expressed preference for a devolved system of government. The political differences between the two parties, however, were resolved when their leaders agreed to merge them in 1964.

It is noteworthy that the Independence Constitution came with a flowery package of guarantees, including a multiparty system of government, independence of the judiciary, rule of law, and protection of human rights. However, the practice of frequent constitutional amendments that started shortly after independence watered down the letter and spirit of the document. Courtesy of such amendments, Kenyans were subjected to political regimes that sought to implement democracy and human rights within the context of violence, intimidation, corruption and the general lack of transparency and accountability. Such a context encouraged continued plundering of public resources and abuse of state institutions. It also instigated the ‘politics of exclusion’.

The ‘politics of exclusion’

Compared with most of her neighbours, Kenya is an icon of socio-economic and political stability. However, many of the factors that hamper effective political participation continue to hold the country hostage. Some socio-historical factors, for example, have been a major contributor to the ‘politics of exclusion’. In the main, colonialism perpetuated and subsequently left behind an undesirable legacy on inter-communal interactions in the country in that, the notion of statehood was imposed on communities that historically lacked
inter-communal coherence. By forcing ethnic communities that previously lived independently of each other to live together, the British colonisers did not give a thought to the possibility of the emerging state being ethnically polarised. Further, through its policies that favoured the investment of resources in only high potential areas that had ample rainfall and fertile lands, colonialism spawned asymmetrical development in Kenya. The colonial government focused on developing infrastructure and social services in ‘productive’ areas at the expense of the rest of the country, and this inequality remains largely unaddressed in the policies and practices of independent Kenya.

The resultant disconnection between the various ethnic communities and regions of the country has provided the ethno-regionalised basis for political and economic discrimination of some citizens. It is rather unfortunate that this trend has found support from a class of post-colonial political elite, who prefer it, both as a bargaining chip to bolster their political influence and as a tool to lock out of government their perceived opponents. It is therefore not surprising that the underlying regional imbalances and the attendant inter-ethnic inequalities easily inform the persistent struggles over the country’s resources such as land, and access to public services, let alone positions in government.

It is important to note that Kenya, like many other African countries, has been guilty of deliberately defining citizenship within the narrow prism of ethnic belonging. Consequently, one of the most acute problems the country has been facing is the endless struggle to integrate its different communities into a democratic modern nation, without compromising their respective ethnic identities. Generally, ethnocentrism has had manifold implications. For example, it has encouraged the politicisation and manipulation of ethnic identities to extreme measures, as well as the exclusion of some communities from government affairs.

Reversing the pain and accelerating the gains: The 2010 Constitution

With the coming into force of the new Constitution in August 2010, there is renewed hope that all citizens of Kenya shall be afforded equal opportunity to participate in the affairs of the country. One notable feature of the Constitution is the broadening of the country’s democratic space through enhanced political participation. Specifically, Chapter eleven provides for a devolved system of government. Article 174 enumerates the main objects of this system of government to include promotion of democratic and accountable exercise of power and to enhance the participation of the people in the exercise of the powers of the State. The devolved system of government will be equally instrumental in the promotion and protection of the interests and rights of minorities and marginalised communities in so far as it ensures equitable sharing of resources and opportunities.

It is therefore expected that the devolved system of government will provide equal opportunities to all citizens by creating conditions that would encourage their input in the country’s governance.

15 As above 141.
Under the devolved system, Kenya is divided into two levels of government—National and County. The County Government comprises of the County Assembly and the County Executive Committee. The County Assembly, which comprises of people hailing from the locality of the county, is mandated to make any laws necessary for or incidental to, the effective performance of the functions and exercise of the powers of the County Government as stipulated in the Constitution. The net effect of this political arrangement will not only be the redistribution of wealth and poverty alleviation, but also the empowerment of citizens to participate fully in the political processes of the country.

In the spirit of devolution, it is important to point out that, good governance is influenced by the existence of a sound democratic Constitution that enables the government to manage its affairs effectively, while at the same time empowering the citizenry to participate in the country’s social, economic and political processes. It is therefore expected that the devolved system of government will provide equal opportunities to all citizens by creating conditions that would encourage their input in the country’s governance. One would expect the system to provide for effective devolution of political power to the grassroots, thus the strengthening of legislative and administrative institutions in the country. Again, the devolved system as envisaged in the Constitution has the potential to empower citizens to hold public officials accountable for their conduct, omissions, and decisions. Lastly, the system has the capacity to ensure effective public sector management, stable economic policies, effective resource mobilisation and efficient use of public resources. Above all else, the cumulative effect and benefit of the devolved system would be the broadening of the country’s democratic space and the enhancement of citizen’s political participation.

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20 As above.
21 As above.
22 African Peer Review Mechanism (n 14 above) 49.
23 Article 174(a) & (c).
24 See Article 174(e) & (g) of the Constitution.
The Constitution and Representation of Special Interests at the County Level

Introduction

The Kenya Constitution 2010 recognizes that special interest clusters have a role in the management of the country if full integration in the socio-economic and political affairs of the state is to be enjoyed by all. Special interest clusters under the constitution include minorities and marginalized groups both at the national and regional level. These groups have invariably been marginalized and left out in the mainstream governance of the country and provision of basic social services.

The term minority is defined in the Webster online dictionary as: the smaller in number of two groups constituting a whole; specifically: a group having less than the number of votes necessary for control: a part of a population differing from others in some characteristics and often subjected to differential treatment.

Minorities can thus be understood within both national and local spheres. National minorities may be understood on the basis of population size where smaller communities constitute national minorities since they are disadvantaged when ranked against the bigger communities.

Local minorities on the other hand, may be understood based on representation at county level. The Constitution in chapter eleven has introduced the concept of devolution and within it counties. The country is poised to witness instances where groups which are national minorities will at the county level be deemed majorities and those who by tribe constitute national majorities may in some counties be considered minorities for purposes of representation at their county.

In understanding minorities we should be careful to note that ethnicity is not the only way of determining that status. Other considerations also qualify a group as a minority group to be considered and integrated in county representation. These are:

a) Gender
b) Religion
c) Race;
d) Disability;
e) Age and specifically the youth;

The reality of our nation is that some groups which would qualify as majorities when only numbers are considered have historically been subjected to marginalization despite their numerical superiority. The Constitution has adopted the use of the term marginalized groups which is a larger term addressing both the interests of disadvantaged majorities and numerical minorities.

25 Article 176(1) 2010.
26 For these functions and powers, see the Fourth Schedule to the Constitution.
27 African Peer Review Mechanism (n 14 above) 16.
Article 260 defines a marginalized group to mean a group of people who because of laws or practices before on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4).

An expanded definition of a marginalized community is further given in the Constitution to include a community that because of its relatively small population or for any other reason has been unable to fully participate in the integrated social and economic life of Kenya as a whole; an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or pastoral persons and communities whether they are nomadic or a settled community that because of, its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.

**Achieving the representation of special interest groups at the county level**

In discussing the representation of marginalized groups in devolved units we have to make reference to the objects of devolution as captured in the constitution. One of the identified objects is to protect the interests and rights of minorities and marginalized communities. This provision is an architectural foundation upon which special interests are to be accorded representation at the county level.

**a) Representation**

Chapter Seven of the Constitution sets out the principles of the electoral system. These principles are aimed at guiding the electoral sphere and representation of diverse groups in the society. Amongst identified principles are; freedom of citizens to exercise their political rights under Article 38, not more than two-thirds of the members of elective public bodies shall be of the same gender, fair representation of persons with disabilities, universal suffrage based on the aspiration for fair representation and equality of the vote and free and fair elections.

Article 90 introduces the concept of proportional representation in the allocation of additional seats under the constitution. The additional seats are to be allocated in the Senate, National Assembly and important for our purposes, County Assemblies.

Proportional representation requires that political parties are allocated seats in proportion to the number of votes they get at an election. The Constitution has however used the term allocation in proportion to the number of seats won in an election. What this means in effect is that political parties will be required to share the nomination slots based on the number of representatives elected under their party tickets in the respective County Assemblies. The viability of this position is still debatable based on the principle of equality of the vote as captured in Article 81.

With respect to county assemblies, the constitution provides that the composition of the assembly shall include inter alia, the number of members of marginalized groups, including persons with disabilities and the youth prescribed by an Act of Parliament.

Identified for consideration in sharing the allocated seats are gender; age; disability and ethnic diversity. The terminology used in the article is “including” and this phraseology should be read together with the principles of devolution which require inclusivity and participation in the management of county affairs and representation.

**b) Boundary delimitation**

Article 89 sets out the requirement for delimitation of electoral boundaries for constituency and wards. The number of constituencies has been determined to be 290 while the number of wards has not been specifically determined by the Constitution. Good governance will require that legislation sets out that number or give the electoral management body, the Independent Electoral and Boundaries Commission (IEBC) the mandate to determine the optimum number of wards and their distribution per county.

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28 Article 97(1)(c ) and article 177 of the constitution
29 We shall for the purposes of this paper use the term minority to refer to all the special interest clusters referred to under the constitution.
Significant in this article are the guidelines set out to aid the IEBC in the delimitation of constituency and ward boundaries. The article requires that the IEBC be guided by the following considerations in delimiting boundaries; geographical features and urban centers; community of interest, historical, economic and cultural ties; and means of communication. Delimitation of electoral boundaries will ensure minorities and marginalized groups are considered in the determination of electoral representative units.

Community of interest encompasses delimitation of ward boundaries taking into account local communities residing in the area and their needs or quest to representation. Under this requirement, I opine that the IEBC should delimit ward boundaries in a manner that achieves representation of ethnic/clan minorities at the counties. The creation of such wards will guarantee marginalized groups majority status in a delimited ward electoral unit. For example; in county A where ethnic group/clan Y are a minority, the IEBC would delimit ward boundaries in the county in such a way to create ward X in which the ethnic/clan minority group Y acquires majority status in the ward despite their minority status in the county.

Community of interest was defined in the case of Rangai Lemeigurian vs. AG (2006) as a common grievance that must be shared by all class members to maintain the class action: usually a group of similarly placed persons. The court went on to hold that delimiting constituencies in a manner that denies minorities the right to be represented infringes on their fundamental rights. In summation the court directed the then Electoral Commission of Kenya to consider community of interest and specifically of the Ilchamus people when drawing up new boundaries.

The import of this case, I would argue, is that any failure by the IEBC to consider community of interest in boundary delimitation will offend the constitution.

c) The National Values and Principles of governance

The Constitution in Article 10 sets out the national values and principles of governance. These principles and values are binding on all state officers and organs whenever any of them is applying or implementing the constitution or executing any policy.

The reality of our nation is that some groups which would qualify as majorities when only numbers are considered have historically been subjected to marginalization despite their numerical superiority.

Some of the identified principles and values relevant to special interest groups are; devolution of power, participation of the people, equity, social justice, inclusiveness, equality, human rights, non discrimination and protection of the marginalized.

State agencies and officers are duty bound to abide by these principles. Moreover, the Bill of Rights in Article 27 forbids discrimination on any ground. The article requires that all persons enjoy equal benefit and protection of the law. This applies to minorities and majorities alike. Therefore, laws that discriminate against minorities on the basis of their minority status will have to be repealed.
Article 44 protects the right to language and culture of a particular group. This provision protects ethnic minorities from being prevented from exercising the enjoyment of their language and cultural practices. Similarly, the practice of one’s culture cannot be a basis for denying a particular group representation at the county or national level.

d) **Affirmative Action**

Affirmative action has been defined as a policy designed to redress past discrimination against women and minority groups through measures to improve their economic and educational opportunities. Affirmative action requires positive steps to improve the lot of the disadvantaged group by those in control of the apparatus of the state or a given institution from which the disadvantaged groups seeks engagement. Affirmative action recognizes the historical hardship that disadvantaged groups have faced in the society and seeks to empower them through proactive interventions.

Recognizing the distinct injustice to minorities and marginalized groups, the Constitution has in Article 56 expressly provided that the state shall put in place affirmative action programs designed to ensure that minorities and marginalized groups: participate and are represented in governance and other spheres of life; are provided special opportunities in educational and economic fields; are provided special opportunities for access to employment; develop their cultural values, languages and practices; and have reasonable access to water, health services and infrastructure.

This provision of the Constitution is specifically speaking to the full realization of the potential of minorities and marginalized groups. It should be observed that the special rights accorded to minorities and marginalized groups does not in any way imply that they are exempt from enjoying the other fundamental rights and freedoms in the Bill of Rights. The Constitution in its own architecture deemed it fit to direct the state to take measures to ensure the realization of these rights by minorities and marginalized groups.

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Enhancing Gender Equality through Devolved Government

Introduction

I begin this article with the assertion that a centralized form of government institutionalizes, reinforces and perpetuates discrimination and fails to promote good governance. Gender inequality and discrimination have been consistently the norm in Kenya. This discrimination was sanctioned in the now repealed constitution and reinforced by laws, culture, systems and the practices and processes of public institutions. Consequently, women were systematically marginalized in the country’s economic, social and political life. The fact of women’s systematic marginalization in all spheres of the nation is demonstrated factually as follows: far less women occupy elective positions in the national assembly and local authorities; the governing structures of political parties are mainly headed by men; the literacy rate of women compared to men is much lower; far less girls transition to secondary school and higher education despite the free primary and subsidized secondary education; only 2 out of 7 of the country’s public universities are headed by women; many more men serve in higher echelons in the civil service compared to women; women are less economically empowered compared to men; and before the reforms in the judiciary took root, there was no woman serving in the Court of Appeal which was the highest court then. Further, judicial precedents enable the subjugation of women, and so on.

The Constitution of Kenya 2010 (hereafter the Constitution) is poised to contribute greatly to the transformation of gender relations in the country. Responding to the collective experience of women in Kenya, the Constitution acknowledges their systematic discrimination over time and the need for special measures to remedy the situation. The Constitution requires that affirmative action measures are put in place to redress past discrimination suffered by individuals or groups; that gender discrimination in law, customs and practices related to land be eliminated; that no more than two thirds of members in elective public bodies be of the same gender; and recognizes equality, non-discrimination and protection of the marginalized as fundamental principles that will guide the implementation of the constitution, enactment and application of laws and making and implementation of public policies.

While the provisions are progressive however, it is the restructured government that will fundamentally alter gender relations in the country. Premised on the need to take government and its services closer to the people, if implemented effectively the devolved government will contribute to equalization between women and men in relation to access to opportunities and resources.

This article explores the opportunities presented in the devolved system with particular emphasis on its ability to affect gender equality.

35 The Women’s Enterprise Fund is premised on the need to empower women to establish financially viable projects that will improve their status in life.
36 One such decision is Echaria Vs Echaria vide which the Court of Appeal determined that for a party to a marriage to have right of access to property acquired within marriage, their contribution must be direct and calculable.
Devolution and gender equality

Devolution of power from the central government to local structures is not an entirely novel concept in the country. Prior to the coming into force of the Constitution, government had undertaken some form of devolution. Fiscal decentralization was undertaken in various ways such as through the creation of the Constituency Development Fund (CDF), the Local Authorities Transfer Fund (LATF), the HIV/AIDS Fund, the Roads Maintenance Levy Fund (RMLF), the Water Services Trust Fund (WSTF), Secondary Bursary Fund (SEBF) and Free Primary Education (FPE). However, a study conducted jointly by the Kenya Human Rights Commission and the Social and Public Accountability Network found that low quality of citizens' participation in projects identification and political influence inhibited effective utilization of the funds for the improvement of the lives of Kenyans. The level of participation in the management of these devolved funds has remained a matter of concern.

Devolution as construed in the Constitution is both structural and functional. Government has been restructured through the creation of the county government which has been allocated functions carved out of what was formerly the central government. Effective devolution is determined by the extent to which the local population is involved in determining direction according to their local needs, problems and priorities.

What does this restructuring portend for gender relations and gender equality in particular? Devolution is the vehicle that will engineer the transformation of relations between women and men. It is anticipated that through devolution, women’s visibility in public life will increase; the voice of women in policy formulation and implementation will be enhanced; women will be facilitated to participate in and influence the process of determining development priorities and resource allocation for development purposes; and their capacity to participate in all levels of the county’s life will be enabled through training and sensitization.

As mentioned earlier, women’s participation in leadership has not matched that of men and they are inadequately represented in national and local leadership structures. This is bound to change because the Constitution requires that no more than two thirds of members of any county assembly or county executive committee shall be of the same gender. This provision will ensure women’s involvement in leadership at the county level. As women begin participating in leadership, the highly masculinised (patriarchal) concept or idea of leadership will crumble and pave way for inclusive definition of leaders and leadership. In other words, an increase in women’s participation in leadership at the county levels will work to recast citizens’ understanding of gender and gender roles and therefore positively affect gender relations. Role modelling will also be facilitated and more women will be encouraged and empowered to delve into leadership both at the local and the national levels. In other words, when women participate in leadership at the local level critical human resource will be generated with the possibility of deploying this at the county and national levels. Women’s visibility in county life will further increase when county governments recruit staff to deliver services and implement policies made at that level. This is because in...
recruiting staff, county governments will be required to adhere to the value of inclusiveness, equality, non-discrimination and protection of the marginalized.

Participation in policy-making

Another possible consequence of increased visibility of women in leadership will be enhanced participation in the formulation of policies. It is arguable the extent to which an increase in the number of women in legislatures and other policy formulation structures results in gender sensitive legislation and policy. One author writing on the subject holds the view inter alia that most women have been socialized into traditional roles in a patriarchal society and have integrated these traditional values of inequality between women and men hence to assume that they will transform policy formulation merely because of their gender is a fallacy; that when women are elected to office they will seek to appeal to the wider public by aligning themselves to causes that champion national as opposed to gender interests; that since women in most countries do not have a critical mass in decision-making bodies including in their political party base, if any, then espousing a platform of gender issues such as equal rights for women and men could be threatening to the male majority and hence could discourage the women members from taking on such a heroic advocacy or confrontation where the chances of winning is doubtful. I am inclined to agree with this view and it is evident in this country that some of the female leaders who ascended to leadership due to their stand on gender equality have over time had to mellow their view on the issue and adopt a “national approach” in order to remain in office.

Nevertheless, it is the potential of women to initiate change that makes their participation in leadership at the local level critical.

The Constitution proposes to change the face of politics in the country and it is anticipated that leaders will be elected on the basis of a platform that resonates with the interests of their community. Now because gender equality is a constitutional requirement, it is probable that it will be reflected in party manifestos and other campaign documents and that citizens and women in particular will want to know how candidates seeking elective office will address gender issues. If we consider this with the accountability mechanisms incorporated in the Constitution we are likely to see women begin to take an interest in the kind of policies their representatives develop and whether the same reflect their needs and concerns. Women leaders will therefore be able to champion gender based policies and laws without unwarranted concern over losing their positions. This will contribute to the re-socialization of members of society.

As women begin participating in leadership, the highly masculinised (patriarchal) concept or idea of leadership will crumble and pave way for inclusive definition of leaders and leadership.

Citizen participation in county affairs will also ensure gender is mainstreamed at that level. When making submissions before the Task Force on Devolved Government (TFDG), citizens were unanimous on the need for counties to develop modalities for engaging citizens in formulation

45 Articles 175 (c) and 197 (t)
of development agenda, in tracking resource allocation and in monitoring and evaluating functions of county governments. In enabling citizen participation, the TFDG indicated the importance of ensuring inclusiveness through engagement of all categories of citizens including women. Citizen participation is a key pillar expected to support the devolved government. It is a right reflected in the national values and articulated in Article 196 which compels county assemblies to conduct business in public and facilitate citizen involvement in legislative and other business. Read together with the values of inclusivity and non-discrimination, county governments will be required to ensure that women’s voices are heard in budget making processes, development of county development plans and in the monitoring and evaluation of functions of county governments. If this is done effectively, county governments should be able to design development projects with gender considerations in mind; to prioritize development objectives on the basis of the interests, needs and concerns of women and men; and ensure resources are allocated from a gender perspective. When the voices of women are harnessed at the county level, they can then positively inform policy formulation at the national level.

If gender relations are to be fundamentally altered, women’s capacity must be enhanced for effective governance. Therefore it will be important to utilize both formal and informal structures to train and sensitize women on leadership and the community on the importance of gender in management of county affairs. Some of the national institutions that can work with county governments in this regard include the Kenya National Commission on Human Rights (KNCHR) which is mandated to ensure observance of human rights in public and private life. The Commission which is currently engaging public officers on the rights based approach to development will have to prioritize capacity building of leaders at the county in order to ensure they are well equipped to respond to gender based policy formulation and implementation, budgeting, among other processes.

Conclusion

“Equality between women and men is a matter of human rights and a condition for social justice and is also a necessary and fundamental prerequisite for equality, development and peace. A transformed partnership based on equality between women and men is a condition for people-centred sustainable development.”

(Beijing Platform for Action, excerpt from Mission Statement). Harnessing women’s capacities at the county level is the first step towards ensuring gender equality in the country and when this is done, Kenya will be on the right track with regard to altering skewed gender relations and unequal power relations between women and men. If implemented effectively therefore devolution will positively affect women’s lives by facilitating their participation in the country’s social, economic and political life. Ultimately good governance will be realized.

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KNCHR

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48 Article 10 (2) (a)
Devolution

Doing it without Compromising on Integrity

The Constitution of Kenya 2010 has been hailed as a progressive document; one that introduces new concepts that have elicited much anticipation from the Kenyan public. Devolution is one of the concepts that has attracted a lot of attention and debate as Kenyans grapple to remove the grey areas surrounding it. Devolution will see power, resources and governance functions taken to the ground of the counties; therefore there is much excitement as Kenyans look forward to a sense of self-governance for the counties, more leadership opportunities, and increased public participation.

The other concepts introduced by the Constitution that are bound to change the quality and form of governance in Kenya is leadership and integrity whose principles are found in Chapter Six of the Constitution. The Constitution adopted by Kenyans in August 2010 has stronger accountability mechanisms than the previous Constitution that aim to safeguard citizens against corruption, abuse of office, unbalanced allocation of resources and increased citizen participation in governance processes.

The fear of devolving corruption

There have been fears, that as power, resources and functions are devolved from the central government, corruption might also be passed down to the county governments despite the fact that one of the objects of devolution is to enhance checks and balances. This fear is valid as our current governance system has entrenched certain practices that are bound to be shared with the incoming system. It is feared that at the lower levels of government, interactions between citizens and public officials are closer, more frequent and less monitored or supervised. Therein lies an opportunity for processes to be manipulated for self-aggrandizement. Also, we are coming from a highly centralised government where all the key powers were concentrated in the presidency and there was no system of checks and balances or clear separation of powers between the different arms of government to ensure accountability and transparency. The Constitution seeks to reverse the centralised and non participatory governance paradigm by institutionalising and

51 The Constitution of Kenya, 2010, Article 174(c)
52 The Constitution of Kenya, 2010, Article 174(d)
embracing a governance and leadership system based on integrity. One of the ways it attempts to entrench good governance is by enhancing public participation in governance as a bulwark against abuse of power.

However, rather than resigning to the fate of devolving corruption, we should develop strategies to protect our counties from corruption. The key tool that we have at our disposal, and which has been provided by the Constitution is public participation. This will be our key ammunition in combating corruption at the county government level.

The adoption of a freedom of information legislation should precede the establishment of county governments to ensure transparency and accountability at the county governance level.

Public participation
The Constitution is quite deliberate in targeting civic participation in public affairs. For instance, it lists one of the objects of devolution as: to give powers of self-governance to the people and enhance their participation in the exercise of the powers of the State and in making decisions affecting them. Another object of devolution is to recognize the right of communities to manage their own affairs and to further their development.

Article 196 of the Constitution further provides for public participation in the proceedings of the County Assembly. This will enhance responsible governance and accountability to the people as well as community-based monitoring and advocacy for transparency and accountability. Closely related to leadership and integrity, are the national values and principles of governance that should guide us as a country and as individuals in spirit and practice. These are defined in Article 10 (2) of the Constitution.

In the past, there was no nationally recognizable moral code that all Kenyans could identify with or which gave a sense of national purpose to guide Kenya’s collective interests and aspirations. One of the national values listed therein is participation of the people. Therefore the Constitution aspires that all state organs, state and public officers and other individuals should consider participation of the people during the application or interpretation of any law and in the making and implementation of public policy decisions. One of the hallmarks of a transparent and responsible government in a democratic state is the participation of the people in the governance structure. Already, we are enjoying the fruits of public participation granted by the Constitution as there has been heightened civic engagement in the vetting of public officers appointed recently and in the review of the laws being developed.

Platforms for public participation

a) Vetting of county leaders
The Constitution requires vetting of public officials to ensure that those appointed are suitable to hold public office; past ethical conduct should be one of the key indicators to guide determination on whether one is suitable or not. This kind of stringent vetting should be extended to those seeking appointive or electoral positions at the county level. The process of vetting should comprise seeking feedback from citizens through open, public or written submissions. Citizens should go a step further in probing the capability and suitability of those seeking their votes to serve them at the county level as governors and county assembly representatives.

Furthermore this is the normal practice for any individual seeking employment in the government, private sector or non-governmental organization; he/she has to undergo an interview process that
may include written and oral assessments as well as reference checks to get more insight on the person’s character and ability to deliver the work at hand. Citizens should adopt some of these steps before deciding which candidate they will vote for. For instance, they could organize themselves and invite individuals vying for leadership positions to appear before them to declare their plans for the people they seek to represent and their qualifications to hold that position. It is vital that individuals vying for these positions are thoroughly vetted, as they will in turn steer the process of recruiting public officers to serve in the county government, hence they must be people of integrity to demand the same of the people they recruit.

The process of demanding accountability should not end at the campaigning phase. When a person is given an employment contract, he/she agrees to perform certain functions and deliver targets which will be appraised after a specific period of time. The electorate and leaders should therefore agree on certain deliverables or targets whose progress or achievement should be reviewed periodically. Often, we elect individuals who make big promises while campaigning, but are nowhere once they reach high office. It therefore becomes difficult to follow up on the campaign pledges. Citizens should therefore organise themselves to collectively appraise their leaders and take them to task on the pledges made.

b) Regular county forums

To enhance transparency, accountability and participation at the county level, the county government should facilitate and hold regular open public forums involving, citizens, community leaders, civil society, public officials and elected leaders. This will provide an avenue to disseminate, review and discuss socio-economic development issues and provide an opportunity for citizens to keep their leaders in check.

c) Monitoring the utilisation of public resources

Public resources at the county level including money, assets and manpower must be used for the common good and be managed through the highest standards of accountability. Most importantly, citizens must have the opportunity to scrutinise the use of public resources. This will require free access to records on budgets and expenditure for instance. Transparency, accountability and civic participation at the county level require a strong access to information regime. The current Constitution guarantees citizens the right to information under Article 35. Although the right is yet to be fully realised, it is critical in ushering in a culture of openness, transparency and accountability in Kenya that will spur economic development and promote effective participatory democracy for all Kenyans. Freedom of information as envisaged by the Constitution will enable citizens to have information on county projects and programmes; engage with county governance structures on the basis of factual evidence; and reduce embezzlement of public resources through appropriate monitoring and advocacy. It is therefore vital that all legislation pertaining to devolution should have a provision for access to information to entrench openness and good governance in devolved governments. The adoption of a freedom of information legislation should precede the establishment of county governments to ensure transparency and accountability at the county governance level.

Devolution as envisaged by the Constitution holds many promises including enhanced civic engagement in democratic governance processes and improved service delivery leading to better standards of living. However the benefits will not be automatic; serious risks and threats that could undermine the impact of devolution such as corruption are real. Accountability and public participation mechanisms must be duly constructed and enhanced for devolution to live up to its promises.

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Devolution Promises to Reduce Marginalisation in Kenya

Kenya’s struggle for devolution was not a freak occurrence or a bolt from the blue; it was rooted in the desire to correct deficiencies in its post-independence governance framework which was premised on the highly centralized system inherited from the colonial masters. The main objective of this struggle has been the restoration of power to the people to manage their affairs, particularly, in matters of local development.

The post-independence governance framework was characterized by poor governance as evidenced by corruption, interethnic conflict, insecurity, biased development policies, political uncertainty and poverty. Some of the negative outcomes include the alienation of large portions of Kenyan citizenry from the mainstream economy; wasteful public investments; widespread poverty; and cut-throat political competition.

Democratic advancement was stifled as the governance of the country drifted from constitution to personal rule. The nationalist ideals of fighting poverty, disease and ignorance, which had been set at independence, were distorted. Few political cum economic elite that accumulated both political control and economic wealth captured state power for benefits of cronies, monopolized the delivery of development and used national budgets to reward support and punish opposition undermining equitable services delivery and socio-economic development.

The Constitution of Kenya 2010 promises genuine devolution of political and economic power to the lowest administrative levels by anchoring the devolution on the supreme law of the land and being clear on relative roles of the different levels of government and assignations as undoubtedly enshrined in Chapter 11, part of Chapter 12 and the Fourth Schedule of the Constitution. Article 174 identifies the objects of devolved government as the promotion of the democratic and accountable exercise of power; fostering national unity among diversity; enabling self-governance of the people towards interrogation of the state; protecting and promoting the rights and interest of minorities and marginalized groups; promoting socio-economic development; ensuring equitable sharing of national and local resources and enhancing of checks and balances and rationalizing further decentralization of states organs to ensure provision of proximate, easily accessible services to the people.

This Constitution further provides for the protection of marginalized groups as one of the national values under Article 10(2) and at the same breath outlaws their discrimination under Article 27.

Article 56 provides for affirmative action programs for minority, marginalized groups and communities. This means that county development plans, governance and public services will have specific procedures of involving marginalized groups and communities in planning, budgeting and implementation processes through target nomination in line with affirmative action under Article 56. For the first time in independent Kenya, minorities, marginalized groups and communities
are provided opportunities to identify their development needs and priorities unlike the previous prescriptive ones designed and rolled down the central government that is always aloof about what ails these groups, communities and regions.

Article 175 sets out the guiding principles of devolved governments. The County governments should be based on democratic principles and separation of powers; be availed reliable resources of revenue to enable them govern and deliver services effectively; and must ensure gender representation (Article 175 (c) no more than two-thirds of members of representative bodies at the county shall be of the same gender). These principles reinforce the reasons why Kenyans sought a new constitutional dispensation.

Devolution as enshrined in the Constitution of Kenya 2010 promises to distribute state powers throughout the country by creating centres of power for communities and parties which are excluded from the presidency. This will not only empower the communities and regions and give them powers of self governance but also neutralize the powers of hitherto imperial presidency exercised mostly under the advice of cronies that has resulted in the past in an unequal allocation of state resources and socio-economic development across the country resulting in the marginalization of regions and communities.

Further, the introduction of devolution will certainly open opportunities for public participation in state affairs. Under the previous constitutional dispensation, the public was only the subject of the decisions of the ruling elite limiting public participation in decisions affecting them. However under the new constitutional framework public participation is an obligatory requirement in matters of public interest. The people’s sovereignty is guaranteed by the Constitution under Article 1. People in rural and urban areas will decide for themselves on matters of local concern and demand accountability and more response to their needs in service delivery from government and officials at their close proximity as promised by the Constitution.

Away from the centralized system of governance, devolution has the opportunity to bring rapid and more balanced economic and social development throughout the country reversing the trend of uneven development and growing disparities of economic opportunities that have led to the impoverishment of many regions and communities. With the operationalization of county governments there will likely be greater incentives and opportunities for economic and social development as the 47 counties create new centres of growth, in which people have opportunities for investments, attraction of local and international investors and employment. This will open up regions that have been pushed to the back seat of national development and ensure proper exploitation of natural resource endowment. Article 203(2) states that not less than 15 per cent of national government revenues will be shared equitably among counties on the basis of recommendation by the Commission on Revenue Allocation using criteria such as poverty index, historical injustices, climatic conditions and economic status among others as put forth in Article 216. The 15 per cent allocation is expected to correct the past skewed allocations of the national cake to ensure even development in the country.

The people of northern Kenya, the byword of marginalization, who have suffered neglect and discrimination throughout the modern history of Kenya, will be integrated into the country through policies promised by devolution.
The Equalization Fund established by the Constitution under Article 204 will further hasten the pace of development in the less development counties to catch up with developed counties that have enjoyed political good will of the previously centralized governments. The Article further states that one half per cent of all revenue collected will be used to provide basic services like water, roads, health facilities and electricity to the marginalized areas for 20yrs (Article 204(6) and with possibility of extension under Article 204(7).

Given the foregoing, county governments, particularly, those in marginalized areas may need to develop county marshal plans on how to prudently use these funds to build road infrastructure to connect these marginalized regions and communities into the national economic system, develop thriving tourism industries in deserts, build schools, hospitals and other social amenities.

Anecdotal evidence indicates that lack of alternative life skills contributes to people in marginalized areas engaging in age-old practices like cattle raiding and rustling. Prudent use of equalization funds towards education in such areas will boost enrollment of children in schools and provide them with new skills to begin a new life and engage in more productive and peaceful search of livelihood. An offshoot of this will be ending the endemic insecurity and human resource capacity gaps in these areas.

With all these in store, marginalized communities and groups are brimming with hope and expectations that devolution of resources and power to them will end the perpetual cycle of whining over marginalization. Meetings of county professionals are gaining momentum in an effort to share the good news of the promises that the Constitution offers. Warning has also been sounded to community members against the use of old-age institution of clans as platforms for propelling one to leadership, a practice that has been credited with furthering and entrenching marginalization, poverty and lack of accountability. If heeded these groups and regions could outgrow the tag of marginalization!

Although devolution cannot be panacea to all the socio-economic and deteriorated services delivery by the government to the people of Kenya, devolution as a foundation of good governance has become the tool of social harmony and development in the world. Many examples can be cited where devolution has been the engine for national prosperity. The United States of America, Germany, Canada and United Kingdom and Switzerland are leading examples of nations where successful devolution has been practiced for a long time. In Africa where numerous ethnic communities compete for political and economic interests, South Africa, Rwanda and Uganda among others have had their fair share of success in implementing devolution. If devolution of resources and power is implemented in the spirit as it appears on the black letter of the Constitution Kenya too will join the growing list of success stories.

Salad Wato
Social and Political Communicator
Laws, institutions and policies are currently being developed to realise devolution of powers to 47 counties as provided for in the constitution. However, there are 175 local authorities established under the Local Government Act that continue to provide local services. While the 47 counties will be the principal points of devolution of power, service delivery at levels below the counties will continue to play an important role. There is thus a need to examine the current and possible future role(s) of local authorities. The book by Werner et al discusses the role and preparedness of the current 175 local authorities to take up local service delivery in the new dispensation. Werner et al argue that Information Communication and Technology (ICT) is important for local development and indeed posit that it is a precondition for development, thus the role of ICT in local governance is given prominence in the entire book.

In Chapter 1, the book discusses the policies adopted by the government from the year 2000 as means of strengthening the Kenyan economy and achieving the Millennium Development Goals (MDGs). These include the ‘Vision 2030’ economic blueprint and government strategy to enhance ICT and arrangements such as Public-Private Partnerships (PPP). The chapter concludes that despite the policies adopted, Kenya has performed dismally in terms of the quality and effectiveness of local service delivery. Kenya ranks a distant 128 out of 169 in the Human Development Index, developed by the United Nations Development Programme (UNDP). The relatively low HDI in Kenya is attributable to poor performance of the local authorities.

Chapter 2 focuses on how the government has responded to ICT through its policies and provision of public services. At an annual growth rate of 20% of internet users, the developing world is increasingly embracing technology and Kenya is no exception. However, with the exception of mobile telephone services, ICT growth is concentrated in urban areas with a wide gap in rural areas. Nairobi and Mombasa and Kiambu counties lead in usage of internet where more than 10 per cent use internet services, less than 10 per cent in all other counties use internet. Werner et al note that the government policy has already recognised the role of ICT in service delivery through adoption of the National e-Government strategy in June 2004.

Chapter 3 traces the evolution of local authorities in Kenya but also focuses on the challenges that local authorities have faced in service delivery. These include corruption and mismanagement, central control, creation of new local authorities leading to proliferation of ineffective local authorities. Using different case studies (covered in chapter 6), Werner et al have discussed institutional decline in local authorities. Despite the reforms attempted through the Kenya Local Government Reform Programme (KLGPRP) which was initiated in the 1990s, Werner et al argue that improvement has only been marginal.
Chapter 4 elaborates the role of ICT in local government. Werner et al observe that ICT is a precondition to local development and efficient local services and must be embraced by all local authorities. In 2005, the Ministry of Local Government introduced ICT in financial management, the Local Authorities Integrated Financial Operations Management Systems (LAIFOMS) which has been implemented in half of the 175 local authorities. Many of the current local authorities have hired ICT professionals with Makueni County Council leading the way in terms of ICT advancement. Chapter 5 narrows on the aspect of urban planning in Kenya, lack of a policy for urban planning, corruption, mismanagement and colonial policies have all contributed to poorly planned areas. Except for Eldoret Municipal Council, no other local authority has an urban development and planning strategy in place. Werner et al argue that ICT programmes such as Geographical Information systems (GIS) can boost the planning capacity of local authorities in the new constitutional dispensation.

Achievement of the Millennium Development Goals (MDGs) is central to realisation of the Vision 2030. Most of the MDGs centre on service provision, the main mandate of local authorities. Thus local authorities have to be prepared for purposes of realising Vision 2030. ICT and innovative ideas such as PPP will transform local authorities into vehicles for realisation of MDGs. It is in this regard that Werner et al propose that funds be set aside to connect county headquarters to their respective local authorities through the ‘National Optical Fibre Broadband Initiative’.

However, while the book has made important proposals with regard to enhancing the effectiveness of local authorities, it has not examined in detail the impact of the devolved government structure on the operations of the current 175 local authorities. For instance, the Urban Areas and Cities Act, 2011 will have a profound impact on how urban areas in Kenya will be managed. Furthermore, the Local Government Act, under which the current local authorities operate, will lapse upon the passing of the Devolved Government Bill 2012. However, the book hardly discusses the provisions of the law governing urban areas or how county structures will relate with the current local authorities.

Despite the limitations in the book cited above, the book is a reminder that vital lessons in implementation of devolution can be borrowed from the current local authorities. Some local authorities have made advancements in ICT which can be borrowed and implemented within the new county government structures and past failures can also be avoided. Werner et al note the renewed enthusiasm in devolved government in Kenya which is evidenced by emerging county-based forums by ‘professionals’, business community, NGOs and even individuals preparing to vie for county elective seats. These are important developments as they will support the process of devolution. The book makes an important contribution on how county governments can use ICT and other innovative ideas to enhance service delivery and realise effective local development in Kenya.

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Useful Resources on Devolution


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Our Vision
A nationally and globally respected public institution providing leadership on human rights

Our Mission
To enhance the protection and promotion of human rights in Kenya through strategic programming and partnerships

Strategic Objectives
The Commission will endeavour to realize the following objectives within the four year planning period.
1. Promote greater adherence to the rule of law and access to justice
2. Advocate for increased compliance and adherence to human rights principles and standards
3. Enhance the protection of human rights through investigations and redress
4. Promote human rights through public education

The Commission will achieve these through:
- Constitutional and legal reforms
- Human rights education
- Adoption of human rights standards by state and non-state actors
- Redress for human rights violations