

DEVOLUTION: THE KENYA CASE

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INTRODUCTION

For close to three decades Kenyans clamoured for a new constitution and a change in the way the country was governed. The search for a new constitution was informed by many factors. One key factor was the dissatisfaction with the highly centralized model of governance, associated with imbalance in resource allocation resulting in ethno-regional development inequalities, marginalization of some communities and failure to involve the people in governance processes, among other ills. The people therefore yearned for a more equitable distribution of national resources and an end to development inequalities between regions of the country, fuelled largely by ethnicity. It is against this backdrop that on 27th August 2010 the country promulgated a new constitution, the Constitution of Kenya 2010¹ (CoK, 2010). The nerve centre is a devolved system of government, comprising one national government and 47 county governments. The implementation of the devolved system of governance commenced in March 2013 following the general elections held that year. It may therefore be too early to conclusively assess the impact of the new system of governance and its intended objectives. We have, however, observed some trends that may give a fairly accurate picture of what to expect as the system is implemented.

This paper seeks to examine emerging issues relevant to the implementation of the new system of governance and what counties and their governments are doing to drive devolution. The discussion will include some of the challenges that the new system of government is facing since its adoption three years ago.

VIABILITY OF COUNTY GOVERNMENTS

We begin with the fact that the counties that were newly established by the Constitution of Kenya 2010 following extensive stakeholder and parliamentary deliberation were at different levels of socio-economic development at the time of establishment. While some counties were comparatively more developed others were not so lucky.

Secondly, some counties were better endowed with natural resources such as rich agricultural land, livestock and more friendly climatic conditions compared to others. Thirdly, some counties were smaller in geographical size than others. Lamu county for example has an area of approximately 6,273.1 square kilometers and a population of 101,539. Kakamega County on the other hand has an area of approximately 3,051.2 square kilometers and a population of 1,660,651. Turkana County has an area of approximately 68,680.3 square kilometers and 855,399 inhabitants while Siaya County has an area of approximately 2,530.4 square kilometers and a population of 842,304.² We provide these few examples for two reasons: To demonstrate the differences between counties because they have implications for the economic viability of the counties; as well as to show that some counties had a head start compared to others.

It was due to these realities between and among counties that the transition to the Devolved Government Act 2012 provides criteria for the transfer of functions from the national level to county government. In this regard the Act provides that the Transition Authority³ (TA) would identify initial functions to be transferred to counties immediately following the March 4th 2013 general elections. Further, transfers of functions could only be made after the TA was satisfied that a county was ready to take on such additional function(s). In this regard, each county was required to apply to the Transition Authority for any transfers to be made. However, counties had varied levels of resources. While some counties were rich in resources such as fertile agricultural land, a strong tax base, skilled manpower, infrastructure such as road networks and port facilities,

other counties were not so lucky. In short, some counties were economically more viable than others and therefore had a significant head start. Many of these differences have their genesis in the colonial era. The colonial government deliberately invested in those parts of the country that had a potential for returns. Regions such as Northern Kenya for example were neglected and economically marginalized. Regrettably, successive post-colonial governments did little to reverse this situation. This was despite the many initiatives introduced after independence to address ethno-regional development inequalities. The most recent attempt to address these challenges is the introduction of devolution of power and functions between the national and county governments. Among the objectives of devolution are: to protect and promote the interests and rights of minorities and marginalized communities; to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; and to ensure equitable sharing of national and local resources throughout Kenya.⁴

In view of the fact that counties vary in terms of levels of development and resources for development, achieving equitable development is not an easy undertaking. This was recognized by the framers of the Constitution: they made provisions to facilitate efforts to promote equity in development. The major provisions in this respect are the Equalization Fund,⁵ conditional grants⁶ to counties by the national government and the share of nationally raised revenue between the national government and the county governments.⁷ The Equalization Fund is intended to be used by the national government to provide basic services, including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of the services in those areas to the level generally enjoyed by the rest of the nation, in so far as is possible.

Two observations are worth making at this point about the Equalization Fund. First, its inclusion in the constitution is an admission that some regions of the country have been disadvantaged and marginalized in terms of development, and that this situation

requires remedy. Secondly, it is a reminder that the situation cannot be remedied through legislation or administrative action as was assumed in the past. In this regard it is worth noting that past interventions aimed at eradicating regional development inequality were mainly legal and administrative in nature. It is hoped that by anchoring these interventions in the Constitution there will be greater commitment to the eradication of regional development inequality than was the case previously. This is because the Constitution is binding to all, including those charged with administering the Fund. This is not the case, however, with legal and administrative interventions. Equalization Fund is thus one way of managing the economy in such a way that weaker regions (counties) are supported to reach the level of the strong counties. This differs from those systems where higher taxes are imposed on wealthier regions to finance the weaker regions. The Fund is a form of affirmative action intended to correct a historical injustices suffered by some regions.

In light of the above, however, it is necessary to make a third point, namely that the implementation of the Equalization Fund has experienced a number of challenges, two of which will be specified here:

The first challenge has to do with the failure to agree on the definition of marginalized areas. The Constitution itself does not define a marginalized area, resulting in different definitions of marginalized areas by different actors. Consequently two schools of thought on this matter have emerged:

One school takes the view that a marginalized area means a county that for historical and / or for other reasons has been unable to fully benefit from national development compared to other counties. To this school of thought, therefore, marginalized areas refer to marginalized counties. This is the position taken by the Commission for Revenue Allocation (CRA). In developing the formula, the CRA identified a number of counties to benefit from the Equalization Fund. The Commission obviously did not buy the idea that an area within a well endowed county can be margina-

lized. It is on this basis that CRA did not envisage a county with this description benefiting from the Equalization Fund. Another school of thought views a marginalized area as any area within a county, and not necessarily a county as a whole, that has suffered or suffers from inability to develop due to a variety of factors.

The two schools of thought are motivated by one common factor, namely the desire to use the Equalization Fund to benefit their constituencies. A leader from a marginalized county would want the definition to be confined to counties. On the other hand a leader in a county that is generally developed but would want a share of the equalization fund would advance the argument that some areas within that county are marginalized. This argument fits well with the definition of marginalized communities and marginalized groups given in the constitution of Kenya 2010. The Constitution defines a marginalized community as:

- 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;
- A traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside 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 lifestyle of Kenya as a whole.

A "marginalized group" means 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).¹

Failure to agree on the definition has obviously been one of the reasons why the Equalization Fund has not been utilized to date. Our own view is that a marginalized community can be found within a county or even across counties. Similarly a marginalized community or group can be found within a county.

The second challenge has to do with the attempts by members of the National Assembly to take away the control and management of the fund from the national government and to have it controlled and managed by themselves. In this regard, a bill by one of the members of the National Assembly to convert the Fund into some form of Constituency Development Fund has been passed. The law has however not been implemented because the Constituency Development Fund had been declared unconstitutional just as the Bill on the Management of the Equalization Fund was passed. The significance of this situation is that the Equalization Fund has not, as yet, been used to uplift marginalized areas or counties.

SHARE OF NATIONALLY RAISED REVENUE

The process of sharing nationally raised revenue between the national government and county governments has also had its share of controversy. This revenue is given to each county to enable each county to finance the functions allocated to it, as per the fourth Schedule to the Constitution. This means that each county should have enough money to finance its development, including development projects. The assumption is that the share and subsequent allocation of nationally raised revenue would be fairly done, as opposed to the previous system in which the centre has decided arbitrarily how much revenue to give to a particular region. The complaint was that sometimes some regions were disadvantaged while others got the lion's share, hence the disparities in development. While the nationally raised revenue has been disbursed to counties on a regular basis, concern has been raised about whether the amount allocated to county governments is sufficient for financ-

ing the functions of the county governments. The opposition party CORD has argued that it is insufficient and is preparing to conduct a referendum to have the amount raised to a minimum of 45 % of the nationally raised revenue. County governments through the Council of Governors are also demanding that the amount be raised from the current minimum of 15 % of the nationally raised revenue to at least 45 %.

OWN REVENUE BY COUNTY GOVERNMENTS

County governments are also allowed, and expected to raise their own revenue by imposing certain taxes in their respective areas of jurisdiction. This is provided for in article 209 (3) of the Constitution. The taxes that a county government may impose include property rates, entertainment tax and any other tax that a county is authorized to impose by an Act of Parliament. A county government may also impose charges for services it renders to its residents and clients. All counties have undertaken this law with tremendous zeal. They have introduced all manner of taxes including chicken taxes in counties such as Kakamega. The problem, however, has been resistance from the counties' residents. The general perception is that the people are being overtaxed. This is because the same residents pay taxes to the national government and feel that additional taxes are too heavy a financial burden on them. In some counties such as Kiambu, residents have successfully gone to court to stop the imposition of some taxes by the county government.

The significance of the above is that the viability of a county government and therefore of devolution depends heavily on the capacity and ability of a county government to be economically strong, viable and independent of the centre. Counties are aware of this; hence the demand for an increase in the amount of money raised nationally. Their enthusiasm about raising their own revenue is also a demonstration that they need some measure of economic independence to be viable and effective.

DECISION MAKING POWERS OF THE TWO LEVELS OF GOVERNMENT

As indicated earlier, Kenya's model of devolution has two levels of government. These are the national government and county governments. A total of 47 county governments were established by the Constitution of Kenya 2010. Each county government has a legislative assembly, known as the County Assembly, and an executive arm. The executive arm is headed by the Governor, who is elected by residents of the county qualified to vote in an election. The two levels of government are distinct,⁸ meaning none is subordinate nor superior to the other.⁹ It is imperative at this point to observe that article 189 of the Constitution reiterates the need for the two levels of government to respect each other's functional and institutional integrity, the constitutional status and institutions and, in the case of county governments, the respective functions within each county.¹⁰

Even though the two levels of government are required to consult and cooperate with one another in the course of carrying out their functions and exercising their respective powers, the county governments enjoy a large measure of space and autonomy from the National Government. County Governments have the freedom and power to make and implement decisions without reference to the National Government. These powers are clearly spelled out in Chapter 11 of the Constitution. County assemblies, for example, make laws that apply in a county after approval by the respective Governor. The National Government has no role in this process. The only time the National Government may intervene in the powers and functions of the county level of government is when a county law is inconsistent with national law. But even this is permissible only under specified conditions.¹¹ There are also circumstances whereby a county and national legislation are in conflict, county legislation would prevail.¹²

Three further observations are in order at this point. First, the model of devolution adopted by Kenya attempts to respond to both

historical and contemporary governance challenges that the county has experienced in the past. The problem associated with centralization of power was a significant consideration in drafting the Constitution of Kenya 2010. Secondly, the three years of devolution have not been smooth. They have been characterized by resistance that sometimes border on attempted sabotage of the new system. Thirdly, if properly and effectively implemented, the devolved system would certainly reduce, if not eliminate ethno-regional development inequalities that have been a feature of the county's governance system and socio-economic development.

REGIONAL DEVELOPMENT CONCEPTS

What goes without saying is that as progressive a Constitution as the Constitution of Kenya 2010 is, devolution is the one aspect that has most captured the imagination of the people of Kenya. With good reason, too! As has been alluded to previously, the previous governance structure was centralized, and thus regional development was dependent upon the goodwill of the centre, or political patronage whereby a region (or its political elite) was sufficiently close to the centre. With the onset of devolution, marginalized regions and communities have, in some cases, for the first time since independence received significant resources, enabling them to embark upon meaningful and long-overdue development projects. In some cases, this has been manifested in the first kilometres of tarmac roads, opening the regions up to the tourism circuit, and much needed health and water projects. All this enables these regions to begin to feel more a part of the growing Kenyan nation, rather than a victim of a new constitutional order.

While there is no question that Kenyans have come to accept and appreciate devolution, the sustainability and viability of 47 county governments and assemblies in a country with a population of roughly 44 million presents a different challenge altogether. While it may not be possible to adequately evaluate the merits and

demerits of this particular model of devolution within the confines of this paper, suffice it to say that 47 regional units are a significant burden on the limited and precious resources of a developing country such as Kenya. By way of example, the State of California in the US has a similar population of roughly 40 million people, yet is represented by only one Governor and 2 Senators. With some already advocating for changes to the Constitution so as to do away with this "over-representation", and given that devolution has so captured the imagination of Kenyans, the suggestion that any County be disbanded is likely to meet with extreme consternation. That notwithstanding, it is necessary to begin a discussion about how to manage this situation.

While the solution to the conundrum above may not appear to be readily apparent, it would seem that the beginnings of those solutions have begun to organically materialize. Various counties have begun to form regional blocs, so as to promote and protect unified regional interests. Some regions, loosely based on former provinces, have begun to look at regional interests with a view to collaborating in the pursuit of those interests. The Commonwealth of Coast Counties (Jumuiya ya Kaunti za Pwani) was one of the first to emerge, bringing together the 6 coastal counties of Kwale, Mombasa, Kilifi, Tana River, Lamu and Taita Taveta. With historically marginalized populations, the coastal counties are also abundant in natural resources, perhaps prompting the desire to collectively leverage such a partnership. Recognizing that working in isolation was unlikely to achieve the kinds of results their residents yearned for, the Governors of the six counties came together resolving to seek meaningful sustainable development and equitable economic growth.

The North Rift Economic Bloc (NOREB)¹³ is another regional cooperation effort representing the geographical area on the northern-most part of the Rift Valley. An area of outstanding natural beauty, the bloc is made up of 8 counties, namely: Turkana, Baringo, Elgeyo Marakwet, Nandi, Uasin Gishu, West Pokot, Samburu &

Trans Nzoia. NOREB, too, is awash with natural resources, and seeks to encourage investment within the region. Resources such as wildlife, beautiful scenery and agricultural potential remain largely untapped, presenting great opportunities for the region.

Other regional groupings have also emerged. Some of these include the Mount Kenya and Aberdares Counties Trade and Investment Bloc (in formation) bringing together Kiambu, Embu, Kirinyaga, Laikipia, Meru, Murang'a, Nakuru, Nyandarua, Nyeri, Tharaka-Nithi and Isiolo in an economic bloc seeking to address employment creation and economic growth, tariff reconciliation and attraction of foreign investment. From the Western region of the country, the Regional County Forum on Trade and Investment in Western Kenya Region is a smaller collaboration between Kisumu, Busia, and Siaya Counties. This particular effort includes counties that all lie on the Lake Victoria Basin and share boundaries. Specifically, the objective of the collaboration is to catalyze the development of a regional trade and investment plan for the counties through identification of areas of synergy within the counties to spur economic trade and development.¹⁴ Finally, the Lake Region Economic Blueprint (LREB) includes the counties in the greater Lake Victoria region, including Bungoma, Busia, Homa Bay, Kakamega, Kisii, Kisumu, Migori, Nyamira, Siaya, and Vihiga. These counties share similar ecological zones, natural resources, and cultural histories, making a partnership a natural occurrence. The blueprint presents the socio-economic aspirations of the ten counties and seeks to secure and share the regions destiny.¹⁵

The initiatives described above have all come about from a single underlying premise: that most counties in their current form are too small to leverage economies of scale, and are thus unable to tap into the requisite pool of skilled labour or funding resources to make their aspirations a reality. Therefore, strategic cooperation between counties with shared interests seems to be becoming a necessity in order to realize the immense potential existing in the counties. Whether in the long term this will lead to a more formal integration

of counties within the blocs remains to be seen. Over time, the viability of these regional efforts will become clearer and will inform their sustainability. One thing, however, appears certain: devolution is here to stay, and a majority of Kenyans are better off as a result.

Beyond this, a further compelling pro-devolution argument can be made, given the recent history of the country. On the one hand, Kenya has been and continues to be a deeply polarized society, along ethnic lines. On the other hand, following the post-election violence in 2007–2008, Kenya has existed in something of a "post-conflict" state, with various initiatives seeking to foster and improve national cohesion and integration. Devolution, in this case, has a significant role to play. As it stands, the 47 counties (with the exception of the largest, most cosmopolitan few) are largely homogenous, consisting of one dominant ethnic group, and various smaller ethnic groups. Thus, political and electoral processes tend to center around the one dominant ethnic group. By extension, employment within the county or county government tends to be dominated by the dominant ethnic group, to the detriment of others, in contravention of constitutional principles on freedom from discrimination.¹⁶ Essentially, this means that those who do not belong to the dominant ethnic group within a county are in perpetual danger of marginalization.

This is not an ideal situation for an already-polarized nation, and can indeed be toxic where political mobilization continues along ethnic lines.¹⁷ Regional development initiatives, such as those described above, have the potential to begin to address underlying drivers of ethnicity and ensure greater inter and intra county (therefore also across ethnicities) collaboration towards commonly agreed upon objectives. This may present a logical "next step" to some of the constitutional, legal, and administrative steps that have been taken thus far to foster broader national cohesion.

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NOTES

- ¹ National Council for Law Reporting with the Authority of the Attorney General: The Constitution of Kenya. Revised Edition, 2010.
- ² Kenya Population and Housing Census, August 2009.
- ³ Transition Authority is a statutory body established by the Transition to Devolved Government Act, 2012 to facilitate the transition from the hitherto centralized system of government to the devolved system of government.
- ⁴ Article 174 (e) (f) (g), Constitution of Kenya, 2010.
- ⁵ Article 204, Constitution of Kenya, 2010.
- ⁶ Ibid.
- ⁷ Ibid.
- ⁸ Article 6(2)b, Constitution of Kenya, 2010.
- ⁹ Kangu, John Mutakha: Constitutional Law of Kenya on Devolution, Nairobi 2015.
- ¹⁰ Article 189, Constitution of Kenya, 2010.
- ¹¹ Article 191, Constitution of Kenya, 2010.
- ¹² Article 191(40), Constitution of Kenya, 2010.
- ¹³ www.noreb.co.ke
- ¹⁴ Society for International Development.
- ¹⁵ Deloitte East Africa.
- ¹⁶ Article 27, Constitution of Kenya, 2010.
- ¹⁷ Cheeseman, Nic / Lynch, Gabrielle / Willis, Justin: Decentralisation in Kenya: the governance of governors, in: The Journal of Modern African Studies 54/2016, pp. 1-35.