

**DEVOLVED SYSTEM OF GOVERNANCE IN KENYA: OPPORTUNITIES AND
CHALLENGES IN THE IMPLEMENTATION OF THE DEVOLVED FUNCTIONS**

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DECLARATION

This Dissertation is my original work and has not been presented for a degree at the University of Nairobi or any other university or examination body.

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Declaration by the Supervisor:

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DEDICATION

To my parents Mr. Fredrick Sikuta and Mrs. Margret Wanyama. My brothers Benjamin and Collins.

My best friend Nicholas Mate. For their love, inspiration, guidance, encouragement and support.

I will live to cherish you forever.

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ACRONYMS

DFRD	District Focus for Rural Development
LAs	Local Authorities
LATF	Local Authorities Transfer Fund
LASDAP	Local Authorities Service Delivery Action Plan
CDF	Constituency Development Fund
IEA	Institute of Economic Affairs
KLR	Kenya Law Reports
MoLG	Ministry of Local Government
PM	Prime Minister
GDP	Gross Domestic Product
KPMG	Klynveld Peat Marwick Goerdeler
NCC	National Constitutional Conference
CKRC	Constitution of Kenya Review Commission

CHAPTER ONE

1.1 Background of the Study

The devolved system of governance in Kenya was first established at independence in 1963 where the elected Local Authorities were used as units for the delivery of most public services¹. This devolved system of governance did not last long after Kenya's independence and therefore Kenya has for the better part of its independent life been a unitary state with a highly centralized government domineering over sub-national governments and other arms of government such as the Legislature and the Judiciary².

Consequently, the country has not had any real experience with devolution based on the following reasons; Firstly, the introduction of regionalism (Majimbo) did not last long.³ Secondly the first government of independent Kenya under Mzee Jomo Kenyatta amended the Constitution (independence Constitution) soon after independence in 1964 effectively scrapping the regional governments and replacing them with the central government-controlled provincial administration and the local government system. Thirdly, the local governments established under the Local governments Act, Cap. 265 were not granted significant political, administrative and fiscal powers instead the central government retained control of the local governments through the administration officers hired by the same central government and lastly, the highly centralized executive control of the country's public affairs is seen as the genesis of the country's governance and economic management problems.⁴

¹Devolved system of governance is defined as the distribution of political, administrative and fiscal power to semi-autonomous territories and sub-national units.

Institute of Economic Affairs, 'Devolution in Kenya: Prospects, Challenges and the Future', IEA Research Paper Series No. 24 (2010) pp10 -12.

²Ibid.

³Ibid.

⁴Ibid.

The introduction of the District Focus for Rural Development (DFRD) in 1983 was an attempt to coordinate development activities and service delivery at district level and as a government strategy to aid in decentralization of government services.⁵ DFRD had the following main objectives; Firstly, to broaden the base of rural development by moving most decisions on the planning and management of district specific projects closer to the point of implementation and the people who will be affected by these decisions.⁶ Secondly, encourage local participation in order to improve problem identification, resource mobilization and utilization, project design and implementation, thirdly to increase co-ordination and sharing of development resources and finally enhance utilization of local resources.⁷

Despite various constraints, DFRD resulted in the decentralization of the management of public sector inputs to the districts.⁸ Decisions at the districts were institutionalized through the District Development Committees within the district. The involvement of the people or beneficiaries of the development projects were enhanced through the establishment of local level committees.⁹ It has however been argued that, “the DFRD was a mere dispersal of central government control outside the national capital without tangible transfers of power to make decisions at local level” (Kenya Community Driven Development: Challenges and Opportunities, Report 24688, World Bank, June 27, 2002). DFRD faced several challenges such as lack of adequate resources both for development and recurrent operations, shortage of housing and office accommodation for government staff and inadequate communication facilities.¹⁰ These challenges led to the failure of DFRD and as a reaction to the failure of DFRD, there has been a renewed interest in the service delivery capacities of Local

⁵ Republic of Kenya, District Focus for Rural Development Strategy Paper, Revised Edition, (1995) p1.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid, p2.

⁹ Ibid.

¹⁰ Ibid.

Authorities that culminated into constitutional reform debates leading to the promulgation of the Constitution of Kenya, 2010(the Constitution).¹¹

It is in response to such challenges that Kenyans agitated for devolved system of governance which is enshrined in the Constitution. Kenya's devolution is one of the most revolutionary underway in the world, involving large-scale political, fiscal and administrative decentralization.¹²

Devolution is one of the hallmarks of the transition from a previously centralized political system, which was largely blamed for vast inequality, exclusion and deep divisions in the Kenyan society.¹³ It has been hailed as the great promise of the Kenya's 2010 Constitution. The March 2013 General Election in Kenya paved the way for the operationalization of the devolved functions as set out in the Fourth Schedule of the Constitution of Kenya, 2010.¹⁴ A number of key principles and objectives have been implemented through various policies and legislations enacted both at the senate and at the respective County assemblies.

It is in the process of implementation of the devolved functions that various opportunities have emerged such as employment, investment opportunities, equity in the distribution of natural resources and development, widened democratic space; people's representation, enhanced principle of citizen participation and devolution of power, opportunities for the youth and women in business and economic participation among others.¹⁵

¹¹Ibid

¹²World Bank, 'The Evolution of Kenya's Devolution: An information Note for the World Bank Staff' (2014).

¹³ Mugambi Laibuta, 'Implementing Devolution in Kenya: Challenges and Opportunities two months on': <http://www.laibuta.com/blog/implementing-devolution-in-kenya-challenges-and-opportunities-two-months> (accessed on 6th October, 2014).

¹⁴ Ibid.

¹⁵ Chispine Oduor & Abraham Rugo Muriu, 'Opportunities for Youth to Engage in Devolved Governance and Economic Development in Kenya', Institute of Economic Affairs (2013) p1.

There are however some challenges being experienced in the implementation of the devolved functions such as; issues of human resource capacity and technical competence at the county levels, lack of proper taxation system by counties, lack of transparency and accountability among the county chiefs, conflict and supremacy battle witnessed between the Senate and the National Assembly which negatively impact on counties, ethnicity and tribalism, inadequate regulatory framework and the legislative gaps, difficulties witnessed in the transition from the local governance regime to the devolved system of governance and the conflict between county assemblies and the county executives in the discharge of county functions. These challenges require urgent need, appropriate and fair mechanisms in the utilization of the emerging opportunities at the counties as well as their resolution. This paper will look into detail the opportunities and the challenges being witnessed in the process of implementing the devolved functions.

1.2 Statement of the Problem

Devolution is one of the Key pillars of the Constitution of Kenya, 2010. It is hailed as the great promise of the Constitution and one of the hallmarks of the transition from a previously centralized political system, which was largely blamed for vast inequality, exclusion and deep divisions in the Kenyan society.¹⁶ The devolved Functions as provided under the Fourth Schedule of the Constitution are being implemented and with the implementation, there has arose various opportunities that promise enhanced equitable development throughout the Country.¹⁷

There are however, several challenges that pose a great risk to the implementation of the devolved system of governance which if not checked, will ground the full operationalization of devolution in Kenya.

¹⁶ Ibid, n13.

¹⁷ The Constitution of Kenya, 2010, Fourth Schedule.

1.3 Purpose of the Study

This study examines at the devolved system of governance in Kenya with specific reference to the opportunities and challenges arising out of the implementation of the devolved functions as provided under the Constitution.

1.4 Significance of the Study

It is almost two years after the March 2013 General Election in Kenya that paved the way for the operationalization of the devolved functions.¹⁸ There is barely any academic work which comprehensively deals with devolved system of governance in Kenya especially with regard to the opportunities and challenges in the implementation of the devolved functions.¹⁹ This study shall contribute to the knowledge on the devolved system of governance in Kenya. It is believed that important lessons can be drawn from the excellence and weakness of Kenya's devolved system of governance both as an institutional arrangement for achieving the objectives and principles of devolution in the process of implementing the devolved functions as provided under the Fourth Schedule of the Constitution.²⁰

1.5 Objectives of the Study

The main objective of this research is to assess the efficacy of the implementation of the devolved functions under the devolved system of governance in Kenya. The specific objectives are:

- (i) Identify opportunities in the implementation of the devolved functions

¹⁸ Ibid, n13.

¹⁹ Seth Wekesa, *Devolution and Rights of the Marginalized Ethnic Minorities in Kenya: The Role of County Governments in the protection and promotion of rights and interests of marginalized ethnic minorities in Kenya*, Second Edition, Lap Lambert Publishing (2013) p4.

²⁰ Ibid.

- (ii) Identify the challenges in the implementation of the devolved functions; and
- (iii) Discuss possible solution in addressing the challenges in the implementation of the devolved functions.

1.6 Research Questions

Devolution seeks among others, to promote social and economic development and the provision of proximate, easily accessible services and to promote democratic and accountable exercise of power as well as to ensure equitable sharing of national and local resources throughout Kenya.²¹

It seeks to use public participation as a tool to promote the objectives and the principles of devolution hence the implementation of the devolved functions. This study seeks to answer the question as to what are the opportunities and challenges in the implementation of the devolved functions under the devolved system of governance in Kenya as provided for under the Fourth Schedule of the Constitution of Kenya, 2010.

In providing an answer to this question, the aforementioned questions are asked:

- a) Which are the devolved functions?
- b) What are the opportunities arising out of the implementation process of the devolved functions?
- c) What are the challenges facing the implementation process of the devolved functions?
- d) Are the structures, legal and institutional frameworks strong enough to maximize the opportunities and encounter challenges for the economic prosperity of county governments?

²¹ Constitution of Kenya, 2010, Article 174.

1.7 Theoretical Framework

The Constitution of Kenya, 2010 was a bold attempt to reengineer the state. The terms of the social contract by which the people were governed were radically revised because it had become frayed and fallen into disuse.²² This study acknowledges that devolution seeks to enhance social, economic and political development in Kenya.²³ The study therefore looks into the opportunities and challenges arising out of the implementation of the devolved functions. This work also looks into how the concept of devolution can be made to resonate with the aspirations of the people by enhancing public participation as one of the key principle in the implementation of the devolved functions.²⁴

Theoretically, this study makes use of two theories: Structural functionalism theory and the participatory democratic theory to the exclusion of the Conflict Theory as an alternative of Structural functionalism approach.²⁵ The reason for the exclusion of Conflict theory is that this paper focuses on the devolved system of governance with specific reference to the opportunities and challenges arising out of the implementation of the devolved functions and not conflicts between competing forces to determine the types of legislations enacted to suit their interest.

In order to attempt a concrete understanding of the relationship between the state (through legislators) and the people through the principle of public participation, I use the participatory democratic theory.²⁶ I use the structural functionalism theory to dissect the structures of the devolved system of

²² Key Note address by the Chief Justice of Kenya, at the Members of County Assemblies Forum at Flamingo Beach Resort, Mombasa, March 21, 2014.

²³ Otieno Fredrick Omondi, 'Deepening Democracy at the Grassroots Level: Citizen Participation in State Devolved Funds(CDF) in Kenya' (2013), Pan African Studies, p4: <http://www.clas.ufl.edu/users/lkkll/law&soc/trevino.conflict.pdf>, (accessed on 20th October, 2014).

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid, p5.

governance in Kenya; the institutional and legal frameworks involved in discharging the devolved functions hence the opportunities and challenges arising thereof.

Structural functionalism looks at society as a complex system whose parts work together to promote solidarity and stability.²⁷ Hebert Spencer and Robert Merton were the major contributors to this theory. The most important concepts under the theory include social structure and social functions.²⁸

To illustrate the significance of functionalism, I use Radcliffe-Brown's illustration (1958:168-169). He distinguished between social structure (arrangement of persons in relation to each other) and social organization(arrangement of activities of two or more persons adjusted to give a combined activity).²⁹

I therefore situate devolved system of governance within a structural functionality theory in an attempt to understand the opportunities and the challenges arising out of the devolved functions implementation process.³⁰ I look at the devolved system of governance under which county governments are created as structures and social institutions. The devolved system of government comprises the county executive and the County Assembly. The Judiciary serves both levels of government thus the National Government and the County Government. The composition of this forms the Kenyan state. Failure by either organ of the state or citizens to actively participate or the inefficiency of either level of government has a negative impact on the whole state.

²⁷<http://education-portal.com/academy/lesson/structural-functional-theory-in-sociology-definition-examples-quiz.html#lesson> (accessed on 15th October, 2014).

²⁸ Ibid.

²⁹ John H Chilcott, 'Structural Functionalism as a Heuristic Device', *Anthropology & Education Quarterly*, Vol. 29, No. 1(Mar., 1998) p105-106.

³⁰ Ibid, p5.

Furthermore, I use Participatory democratic theory to offer a philosophical argument on public participation and seek to remedy the inadequacies of the structural functionalism theory.³¹ It is

anchored within the larger classical theory of democracy especially the Jean Jaques Rosseau's masterpiece *the social Contract theory* which set the parameters of relationship between an individual and the state within a civil society.³² This theory is brought forth under Articles 118 and 196 of the Constitution in which the legislatures at both levels of government are required to enact legislations to foster public participation and public access to information. This further reinforced under the Fourth Schedule where public participation is provided as part of the functions of the county governments.³³

The historical approach is also of relevance to this paper since it is useful in the understanding of the history that brought about the devolved system of governance in Kenya.³⁴ Through this approach, focus will be placed on the devolved system at independence and the activities which took place thereafter through the District Focus for Rural Development and the ultimate promulgation of the Constitution of Kenya, 2010 that provides for the devolved government.³⁵

1.8 Research Methodology

The study was conducted by desktop research only.³⁶ It involved a thorough analysis of the provisions of the Constitution that touches on the devolved system of governance in Kenya. It also relied on the selected legislations touching on devolution and which have been enacted by the senate, the national assembly and selected counties.

³¹ Ibid.

³² Ibid.

³³ The Constitution of Kenya, 2010. Articles 118 and 196 and the Fourth Schedule.

³⁴ Attiya Waris, 'A draft guide to dissertation Writing', University of Nairobi (2013) p13-14.

³⁵ Ibid.

³⁶ Ibid, n19 p5.

The study as well relied on relevant books, journal articles, national and county government's policy papers, case law and other relevant materials.

1.9 Literature Review

Devolution in Kenya is an emerging area and although there is an emerging literature on it, little literature exists with specific reference to the opportunities and challenges being experienced in the implementation process of the devolved functions.³⁷ Muia discusses the impact of devolution on the local authorities and the brief historical perspective on the devolved system of governance.³⁸ His work is of importance to this study because his writing touches on devolution and public participation which are the key issues examined in this study. This study among others borrows from his study and also borrows from the World Bank publication which discusses the possible challenges in managing a complex transition and goes further by focusing on the devolution as provided in the Constitution and the opportunities and challenges being encountered in its implementation.³⁹

Article 10 of the Constitution recognizes public participation as a value that should guide the interpretation and application of laws and policies in Kenya.⁴⁰ Several statutes have been enacted for the implementation of the devolved government such as the County Governments Act, Intergovernmental Relations Act, Public Finance Management Act, Natural Resources (Benefit Sharing) Act and the Transition to County Governments Act among others. These statutes provides for the operational relations between the two levels of government, the restructuring and further decentralized units, the management of the finances and the transition from the old constitutional order to the new constitutional order.

³⁷ Ibid, n19 p4.

³⁸ Daniel M. Muia, 'Devolution: Which way for Local Authorities', in Thomas Kibua and Germano Mwabu, *Decentralization and Devolution in Kenya*, University of Nairobi Press, (2013) pp137-139.

³⁹ World Bank, 'Devolution without Disruption-Pathways to successful new Kenya' (2012) p200.

⁴⁰ A Report on the implementation of the Devolved system of Government in Kenya, (2011), p179.

Several Cases have been decided by the courts such as the *Okiya Omtatah vs Attorney General & 2 others*, eKLR(2014), *Hon. Martin Wambora & 3 others vs the Speaker of the Senate*, *International Legal Consultancy Group vs the Senate*, *Attorney General vs Kenya National Union of Nurses & 4 others*.⁴¹ All these cases touch on the challenges being experienced in the implementation of the devolved governance in Kenya.

Despite several legislations and the case laws as well as books and journals written on devolution, none of them adequately addresses the opportunities and challenges arising out of the implementation of the devolved system of governance in Kenya, and that is the gap this paper seeks to address.⁴²

1.10 Limitations of the Study

The focus of this study is on the opportunities and challenges in the implementation process of the devolved functions as provided for under the Constitution of Kenya, 2010. This study doesn't discuss all the devolved functions in detail and as well it doesn't discuss all the functions and the corresponding challenges but only on the overall opportunities and the challenges generally. Although the Constitution provides generally for devolution as a key pillar, this study focuses on the opportunities and challenges in implementing the devolved functions.

As indicated earlier, there exists little literature on devolution in Kenya and therefore the study only analyses the Constitution, implementing statutes and the relevant books, newspapers and relevant articles to assess the efficacy of the implementation of the devolved system of governance in Kenya.

⁴¹ www.kenyalaw.org (accesses on 20th October, 2014).

⁴² Ibid n34, p19.

1.10. Research Hypothesis

There exist opportunities and challenges in the implementation of the devolved functions as provided for under the Constitution of Kenya, 2010. This is because devolution as a new aspect and is common with any new project, opportunities and challenges are bound to exist. There exists investment opportunities, employment opportunities and indeed there also exists challenges in the implementation process such as lack of technical competence among staff at the county levels, lack of accountability, poor tax system among others.

1.11 Chapter breakdown

Chapter one is the Research Proposal. It provides for the background and introduction to the study as well as offer an overview of the adopted style or approach in carrying out the study or investigations.

Chapter two provides the historical analysis of the devolved system of governance in Kenya.

Chapter three focuses on the concise structure of the devolved system of governance in Kenya as provided under the Constitution and brings out the role differentials between the two levels of government and thus highlight the devolved functions.

Chapter four discusses in detail the key opportunities arising out of the implementation of the devolved functions and the challenges facing county governments in the implementation of the devolved functions.

Chapter five provides for the recommendations and conclusion.

CHAPTER TWO

HISTORICAL DEVELOPMENT OF DEVOLVED SYSTEM OF GOVERNANCE IN KENYA

1.1 Introduction

Kenya's struggle for constitutional reforms has its roots in the desire to correct deficiencies in its post-independence governance framework which was premised upon the highly centralized system started in colonial days.⁴³ The main objective of this struggle has been the restoration of the power to the people in order for them to manage their affairs, particularly in matters of local government.⁴⁴ The struggle for the dispersal and sharing of state power on a regional basis started before independence. The 1902 East Africa Order in Council divided the country into provinces and districts for administrative purposes and this was the initial process of decentralization in Kenya.⁴⁵ The history of Kenya's devolved system of governance can be best understood when illustrated in phases as follows:

2.2.1 Phase 1: The Colonial Period

The evolution of Kenya's devolved system of governance is closely related to the Kenya's historical development in the Constitution making. The 1902 East African Order in Council divided the country into provinces and districts for administrative purposes and this was the beginning of decentralization in Kenya.⁴⁶ Failure by the colonial government to lay foundation and develop an all-inclusive constitution led to the Second Lancaster House Conference in 1962 where Africans from all major

⁴³ Office of the Deputy Prime Minister and Ministry of Local Government, Republic of Kenya, 'Developmental Devolved Government for Effective and Sustainable Counties', Draft Sessional Paper on Devolved Government in Kenya, (2011) p1.

⁴⁴ Ibid.

⁴⁵ www.thestar.co.ke/history (accessed on 16th November, 2014).

⁴⁶ Media Development Association & Konrad Adenauer Stiftung, *History of Constitution Making In Kenya*, First edition (2012) p3.

communities were represented.⁴⁷ At this time, the colonial office had acknowledged that the future of Kenya was an African democratic country. The main agenda of the conference was an agreement on a constitution for internal self-government.⁴⁸

The proposals that emerged sought a quasi-federal structure with a strong central government which was responsible to a bicameral parliament.⁴⁹ As a result of the deliberations at this conference, the Internal Self Government Constitution was unveiled in June 1, 1963.⁵⁰ The Governor, acting on his own discretion was responsible for defense, including naval, military, air force and internal security.⁵¹

The executive powers of the state were thus still vested in law in the Governor.⁵² The Constitution ensured that a politically organized government supported by a popularly elected legislature was in power.⁵³ In the ensuing elections, Kenya African National Union (KANU) won with an impressive margin.⁵⁴ Its party leader, Kenyatta became the first Prime Minister of Kenya.⁵⁵

The achievement of the Second Lancaster House Conference was the unveiling of a Constitution that provided for a strong central government and a quasi-federal structure which the Prime Minister Kenyatta was in-charge after the elections. This form of devolution at this stage was a fragile one given the fact that immense powers were still retained by the central government.

⁴⁷ The Conference was intended to break a stalemate between Kadu and Kanu over the system of Government. The major point of departure was the Majimbo system of government that was supported by Kadu but vehemently opposed by KANU.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid, p7.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

2.2.2 Phase 2: 1963 – 1978

This period was the time of an independence constitution with Jomo Kenyatta as the Prime and later as President after Kenya became a republic in 1964. The Independence Constitution was long, detailed and highly complex document that sought to balance the positions of the negotiating parties.⁵⁶

It sought to capture the fragile compromise that parties thrashed out at the Lancaster House Conference.⁵⁷ While KANU was not satisfied with the entrenchment of regionalism in the Constitution, KADU felt that the regional governments were not adequately protected from the vagaries of the central government.⁵⁸ The Constitution established a bicameral Parliament, the Upper House and the House of Representatives.⁵⁹ The Upper House, the Senate, was a safeguard of regionalism or majimbo while the House of Representatives was designated to guard national interests.⁶⁰

Kenya was divided into eight regions, with Nairobi as a special region, each region having a regional legislature and Executive.⁶¹ Regionalism was a loose form of federalism. Voters in a region had to demonstrate genuine connection to the region, for example place of birth. The boundaries of the regions could not be changed by the central government without approval by the regional government.⁶² The president of a region was elected to office by elected members themselves or

⁵⁶ Githu Muigai, 'The Structure and Values of the Independence Constitution', Kenya Law Library.

⁵⁷ Ibid.

⁵⁸ Ibid n46, p7.

⁵⁹ Ibid, p8.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

persons qualified to be elected as such. The legislative powers of the regions were subject to intervention by the central government.⁶³

The Majimbo system had strong elements of political decentralization which were aimed at addressing some of the teething problems that confronted the newly independent state (for example the land question).⁶⁴

These problems had developed during the colonial period, becoming the bone of contention between the African nationalists and the outgoing colonial regime in the terminal years of colonialism.⁶⁵ The regions had their own public service commissions with the power to hire, deploy and fire. In addition, security system was also decentralized. To this end the police was decentralized by creating regional contingents in all the eight regions including the special region of Nairobi.⁶⁶ The Constitution also empowered the regions to raise revenue from specifically identified sources and spend it on specified services and a transfer system was put in place according to which certain tax revenues were supposed to be shared between the central government and the regions.⁶⁷

The ruling KANU regime was however against Majimbo from the beginning hence after independence it frustrated the opposition party members influencing them to join government. This necessitated the government to get the numbers it had always wanted to change the Constitution as a way of completely dismantling the Majimbo Constitution.⁶⁸

⁶³ Ibid, n46.

⁶⁴ Thomas N. Kibua & Germano Mwabu, *Decentralization and Devolution in Kenya: New Approaches*, University of Nairobi Press (2013) p116.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

The devolved system of governance at independence in 1963 was therefore one where the elected Local Authorities were used as units for the delivery of most public services.⁶⁹ This devolved system of governance did not however last long after Kenya's independence and therefore Kenya has for the better part of its independent life been a unitary state with a highly centralized government domineering over sub-national governments and other arms of government such as the Legislature and the Judiciary.⁷⁰

Several legal changes after independence curtailed the powers of subnational government such that in 1966, the regional governments were abolished, the senate was then joined with the House of Representatives to create a unicameral National Assembly.⁷¹ This removed any legal support structure for devolution.⁷² The Local Authorities were further weakened through significant reform measures which trimmed away major functions and diminished important revenue bases.⁷³ Through the Transfer of Functions Act (1969), functions such as primary health and health services were removed from LAs and this hampered the development of the state.⁷⁴

The highly centralized bureaucracy which Kenya inherited at independence from the colonial administration had chiefly been sustained through the institution of the provincial administration and the introduction of local government system.⁷⁵ The local governments established under the Local governments Act, Cap. 265 were not granted significant political, administrative and fiscal powers instead the central government retained control of the local governments through the administration

⁶⁹ Institute of Economic Affairs, 'Devolution in Kenya: Prospects, Challenges and the Future', IEA Research Paper Series No. 24 (2010) pp10 -12.

⁷⁰ Ibid.

⁷¹ World Bank, 'The Evolution of Devolution in Kenya', an information Note for World Bank Staff (2014) p1.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid n69, p10 -12.

officers hired by the same central government and also the highly centralized executive control of the country's public affairs was seen as the genesis of the country's governance and economic management problems.⁷⁶

Phase 3: 1978 – 2002

This was the period President Moi was in power. Key areas of concern during this period were the Local governments and the District Focus for Rural Development as means of decentralization. As earlier mentioned, the Country's most substantive experience with devolution was through the Local Authorities (LAs).⁷⁷ It must however be pointed out from the outset that the LA system was an inadequate example of devolution. This is because as stated earlier and as this study will demonstrate, had little autonomy vis-à-vis central authority.⁷⁸

According to Ndegwa Report of 1977, LAs served four main objectives.⁷⁹ First, they provided constitutionally for representative local decision.⁸⁰ Second, they provided mobilized local resources and energies for local development. Third, they served as agents for central government in carrying out their responsibilities in the field and fourth, they provided a link between citizen's participation in the rural areas and central government. To execute their mandate, they were mandated to raise revenue through taxes⁸¹. The main reason why LAs have been neglected in developing countries is that strong central governments are unwilling to share power. Often they cite national unity and stability in many situations they have since weakened colonial era local government institutions and failed to create new

⁷⁶ Ibid, p11.

⁷⁷ Ibid, p27.

⁷⁸ Ibid.

⁷⁹ Ibid, n64 p145.

⁸⁰ Ibid.

⁸¹ Ibid.

ones with significant power.⁸² The bottom line here is that as a result, LAs have been largely placed under the superintendent of the central government, a reality that curtails their growth as autonomous entities.⁸³ LAs exercised only powers delegated to them by central government. The Local Government Act, Cap. 265 of the Laws of Kenya is the legal framework in which the LAs were established to provide certain services to the community within their areas of jurisdiction. The local government system prior to the promulgation of the Constitution of Kenya, 2010 had evolved considerably through several distinct phases after the colonial era. The first is the post-colonial period under the Majimbo Constitution, immediately followed by the post-independence period under the Republican Constitution. The last phase of the evolution of local governments was under the Kenya Local Government Reform Programme (KLGPR) that ushered in the Local Authority Transfer Fund(LATF) and the Local Authority Service Delivery Action Plan(LASDAP).⁸⁴

The enactment of the Republican Constitution in 1964 marked the beginning of the decline in autonomy and performance of LAs in service delivery.⁸⁵ The powers previously exercised by the regional assemblies were transferred to the minister for local government leading to dominance and control of LAs by the central government.⁸⁶ The minister acquired power to upgrade existing authorities, create new ones, established local government electoral areas. In 1969 through the Transfer of Functions Act, the government hived off key functions namely the provision of primary education, healthcare and roads⁸⁷. The responsibilities were transferred to central government ministries, leaving provision of minor services to the County Councils.⁸⁸

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*, n69 p30.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ See the Local Government (Transfer of Functions) Act, 1969, Section 2.

⁸⁸ *Ibid.*

LAs faced myriads of problems and failed to deliver efficient services to the people. This inefficiency led to the introduction of KLRGP in the early 1990s whose objectives were to restructure the local public sector, improve local public expenditure management and strengthen local level accountability mechanisms. It is under the KLRGP that the LATF was established in 1998 under the Local Authority Transfer Fund Act, No. 8 of 1998.⁸⁹

The other major development during this period was the introduction of the District Focus for Rural Development (DFRD) in 1983 as an attempt to coordinate development activities and service delivery at district level and as a government strategy to aid in decentralization of government services.⁹⁰ The District Focus for Rural Development Strategy was based on a principle of complimentary relationship between Ministries with their sectoral approach to development and the districts with their integrated approach to addressing local needs.⁹¹ The strategy involved a bottom-up approach to planning whereby the districts had autonomy in setting their priorities unlike the previous top-down strategy where Ministries set district priorities.⁹² DFRD made districts centres of development. The decision to decentralize was made due to a realization of the shortcomings of centralized planning which had led to a situation where projects were designed centrally for districts by Ministries without thorough knowledge of the local socio-economic, physical conditions and without the local people's involvement.⁹³ It was realized that the local people needed to be involved in the decision making, planning and implementation of projects in their areas to enable development to be a self-sustaining process. With the adoption of DFRD, the responsibility for identifying, planning and implementing district projects shifted from the headquarters of Ministries to the districts.

⁸⁹ Local Authorities Transfer Fund Act, No. 8 of 1998.

⁹⁰ Republic of Kenya, District Focus For Rural Development, Revised Edition (1995) p1.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

DFRD's main objectives was firstly, to broaden the base of rural development by moving most decisions on the planning and management of district specific projects closer to the point of implementation and the people who will be affected by these decisions.⁹⁴ Secondly, encourage local participation in order to improve problem identification, resource mobilization and utilization, project design and implementation and thirdly to increase co-ordination and sharing of development resources and enhance utilization of local resources.⁹⁵

The implementation of DFRD resulted in the decentralization of the management of public sector inputs to the districts.⁹⁶ Decisions at the districts were institutionalized through the District Development Committees within the district.⁹⁷ The involvement of the people or beneficiaries of the development projects were enhanced through the establishment of local level committees.⁹⁸

It has however been argued that, "the DFRD was a mere dispersal of central government control outside the national capital without tangible transfers of power to make decisions at local level" (Kenya Community Driven Development: Challenges and Opportunities, Report 24688, World Bank, June 27, 2002). DFRD faced several challenges such as lack of adequate resources both for development and recurrent operations, shortage of housing and office accommodation for government staff and inadequate communication facilities.⁹⁹ These challenges led to the failure of DFRD and as a reaction to the failure of DFRD, there has been a renewed interest in the service delivery capacities of

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid, p2.

⁹⁷ Ibid.

⁹⁸ ibid

⁹⁹ Ibid, n71.

Local Authorities that culminated into constitutional reform debates with intention to create an equitable Kenyan society.¹⁰⁰

Indeed the Kenya's most substantive experience with devolution is through the LAs though as observed these subnational units were centrally controlled through the Ministry of Local Government (MoLG) hence had very little autonomy and therefore they could not make their own vibrant economic and social decisions to advance the economic development within their respective jurisdictions.¹⁰¹ The inefficiency and inadequacy demonstrated by the government-led decentralization efforts led to the renewed interest for the constitutionally entrenched devolved system of governance that culminated into constitutional reform debates. The first major breakthrough came in 2000, paving a path to the present Constitution. In 2000, a Constitutional Reform Commission was established, the outcome of which were several drafts of the Constitution, the Bomas, Wako and Kilifi drafts.

2.2.3 Phase 4: 2003 – 2010

This marked the period when Mwai Kibaki was in-charge as the President of Kenya. In Kenya's history, this is the most promising phase in the search of a new order. This phase was characterized by the Constitution of Kenya Review Commission (CKRC) Draft popularly referred to as the Bomas draft in 2004. This Constitutional draft proposed transferring most of the powers of the office of the President elected by the people to the Prime Minister (PM) that would be elected by Parliament. In addition, there would have been checks on executive appointments. The PM would nominate MPs to become Cabinet Ministers, the President would then appoint them.¹⁰²

¹⁰⁰ Ibid, n69.

¹⁰¹ Ibid, p1.

¹⁰² See the Bomas Draft Constitution.

In November 2005, Kenya held its first ever national plebiscite to ratify a new constitution for the Country. The National Referendum was the culmination of a protracted process in the quest for constitutional reforms.¹⁰³ This process initially involved setting up the CKRC to examine the existing constitution and draft a bill on a new constitution.¹⁰⁴ A National Constitutional Conference (NCC) was then convened to deliberate, amend and adopt the draft bill. The deliberations of the NCC, held in several phases at the Bomas of Kenya, culminated in an initial draft known as the Bomas draft. There was, however, failure to arrive at a consensus between a section of the government and other Members of Parliament on certain provisions.¹⁰⁵ This led to the amendment and development of a final draft constitution by the government section opposed to the Bomas draft.¹⁰⁶ The draft which was popularly termed the Wako draft due to the then Attorney-General, Hon. Amos Wako's instrumental role in its crafting, was thus presented at the Referendum. Kenyan overwhelmingly rejected the proposed constitution thereby regenerating the constitutional review process.¹⁰⁷ Devolution was among the key contentious issues that precipitated the stalemate between the government and other policy makers and the ensuing rejection of the Wako Draft. The calls for an alternative system of government stem from the perceived failure of the overly-centralized systems that most African countries have operated since the early independence years to secure basic services for their citizens.¹⁰⁸ Consequently, decentralization is advocated as an alternative strategy to address the administrative inefficiencies, corruption and misuse of public resources that have characterized centralized governments.¹⁰⁹

¹⁰³ Annette Omolo, 'Devolution in Kenya: Critical Review of Past and Present Frameworks', p15 in Institute of Economic Affairs, 'Devolution in Kenya: Prospects, Challenges and the Future', IEA Research Paper Series No. 24 (2010).

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*, n64.

¹⁰⁹ *Ibid.*, n103 p15.

In 2008, the parties agreed on the principles for a constitutional review process, and Parliament established a Committee of Experts on Constitutional Reform to gather views from the public, deliberate on contentious issues and come up with a draft of the new constitution. A Constitution of Kenya Review Act 2008 was enacted to govern the review process.¹¹⁰ The Committee held extensive public consultations and received many dozens of submissions.

In 2009, the harmonised draft constitution written and proposed by the Committee of Experts was released with key highlights on devolution.¹¹¹ First, transfer of executive authority from the President to the Prime Minister position who will be the Head of Government.¹¹² Second, the President to be the Head of State and maintain a more ceremonial role.¹¹³ Third, the Prime Minister to be the Head of Government and will be the head of the party/coalition with a majority in Parliament and with capacity to nominate ministers to the Cabinet.¹¹⁴ Fourth, half of the ministers in cabinet as proposed, were to be nominated from non-Members of Parliament (MPs) and the total number of MPs increased from two hundred and twenty two to two hundred and ninety-five.¹¹⁵ The upper house, Senate, was to be introduced to represent the regions with the total number of Senators proposed to be a hundred and thirteen. Fifth, devolution to the provincial level with the current 8 provinces to be referred to as regions. The 8 regions/provinces were proposed to be subdivided into 70 counties and each headed by

¹¹⁰ See the Constitution of Kenya Review Act, 2008; Preamble: An Act of Parliament to facilitate the completion of the review of the Constitution of Kenya, and for connected purposes.

¹¹¹ Harmonised Draft Constitution, 2009.

¹¹² See the Harmonised Draft Constitution of Kenya, 2009, Articles 158, 159 and 179 (17th November, 2009), Committee of Experts on Constitutional Review Pursuant to section 32 (1)(a)(i) of the Constitution of Kenya Review Act, 2008.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

executives. Sixth, was provision for Nairobi Province to be a region and have a popularly elected Mayor as opposed to having the city councilors electing the Mayor.¹¹⁶

The above provisions were revised and the revised Constitution was in August 2010 approved by a 67% margin in a national referendum and promulgated on 27 August, 2010. Devolution is viewed as the greatest milestone, the most transformational and a key pillar in this Constitution to spur Kenya's development.¹¹⁷

Indeed the Kenya's 2010 Constitution marked a milestone following a three decade effort to overhaul the country's legal, administrative and institutional arrangements.¹¹⁸ This Constitution, as earlier pointed out, the third since independence has been developed from a series of reform efforts initiated in the late 70s and 90s.¹¹⁹ It represents an emblematic departure from the previous ones and implementing it involves several fundamental changes which collectively, were central to the above reform efforts.¹²⁰ The reform sought to address multiple objectives: tackle long-term, deeply entrenched disparities between regions; increase the responsiveness and accountability of government to citizens; allow greater degrees of autonomy to different regions and groups.¹²¹ Thus, apart from devolution, the new changes include firstly, the reorganization of institutions and organs of government such as parliament, the judiciary, independent commissions and offices.¹²² Secondly,

¹¹⁶ Ibid, Article 219.

¹¹⁷ Ibid, n71.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

overhaul of the electioneering system and the reformulation of policies. Of these changes, devolution is seen as the most transformational.¹²³

The Constitution now lays down the principles and objectives of devolved government and the legislative measures to be undertaken to facilitate seamless transition from the old constitutional order to the new constitutional dispensation.¹²⁴ Under the Kenya's vision 2030 political pillar, one of the six strategic thrusts is to achieve a "people centered and politically engaged open society" through, among others, the pursuit of constitutional and legal reforms necessary to devolve power and support governance at the local level.¹²⁵ The inclusion of this aspect in the constitution is therefore a step towards the implementation of this strategy. Kenya's devolution is one of the most revolutionary underway in the world, involving large-scale political, fiscal and administrative decentralization.¹²⁶ Many Countries both rich and poor have transferred power and resources to lower levels of government.¹²⁷ Few have done so to entirely new subnational units, and with such speed.¹²⁸ The enactment of the Transition to devolved government Act which establishes the Transition Authority that has facilitated the transfer of devolved functions to counties is a key milestone in the implementing the devolved system of governance.¹²⁹

2.3 Conclusion

Kenya's experience with the devolved system of government has been faced with great challenges.

Majimbo/regionalism did not achieve much leading to its failure because it lacked the political

¹²³ Ibid.

¹²⁴ See Chapter Eleven of the Constitution of Kenya, 2010.

¹²⁵ Vision 2030, p132.

¹²⁶ Ibid n71.

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ See Transition to Devolved Government Act, section 4.
Legal Notice No. 16 of 2013.

goodwill especially from the ruling class for its effective implementation. Regions lacked financial capacity to implement their functions. The central government which regions relied on failed to offer adequate support which made it impossible for regions to effectively sustain themselves.

The country was not ready for regionalism at the time of its introduction because the colonial government had introduced and nurtured a highly bureaucratic and centralized system of governance. People were not prepared to embrace the new system of governance hence it lacked public support.

The capacity of Local Authorities to offer efficient services to the people was hampered by the strong central government that supervised and controlled their administrative and operational development. The Local Authorities as well lacked the financial capacity and independence to implement their functions. The lack of public participation in decision making at regional levels contributed negatively towards the development of regions. The DFRD strategy introduced in 1983 failed because among other reasons it lacked enough resources for its development and operations.

The Constitution of Kenya, 2010 which is hailed as the greatest milestone in Kenya's history now provides a paradigm shift in the country's political, social and economic management. The entrenchment of devolved system of government in the Constitution with clear principles and objectives is intended to spur the equitable distribution of resources and harness the development of the Kenyan state.

CHAPTER THREE

STRUCTURE OF THE DEVOLVED GOVERNMENT IN KENYA

3.1 Introduction

The quest for a devolved system of governance in Kenya has been a longstanding one.¹³⁰ The promulgation of the Constitution of Kenya, 2010 paved way for realization of this system of governance. The Constitution provides for the two levels of government thus the National government and the County Governments. At the National level there is the National Parliament which comprises of the National Assembly and the Senate. Article 6 of the Constitution provides as follows: Firstly, the territory of Kenya is divided into the counties specified in the First Schedule. Secondly, 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. Thirdly, a national state organ shall ensure reasonable access to its services in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.

The Constitution as such creates 47 county governments.¹³¹ The number is based on the delineation of administrative districts as created under the Districts and Provinces Act, 1992.¹³² Chapter Eleven (chapter) of the Constitution Provides for the setting up of county governments and spells out the various principles and objectives of the devolved government that includes democratic ideals and the

¹³⁰ www.gabriellubale.com/an-introduction-to-the-county-governments-of-kenya (accessed on 14th February, 2014).

¹³¹ See Article 6(1) of the Constitution and First Schedule to the Constitution.

¹³² Districts and Provinces Act, Chapter 105A of the Laws of Kenya: An Act of parliament to prescribe the districts and provinces into which Kenya is divided.

See also section 3 of the Act and the Third Schedule of the Act.

separation of powers.¹³³ The Constitution provides for the legal framework to be put in place for county governments to be facilitated with reliable sources of revenue to enable them govern and deliver services effectively and that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender.¹³⁴

The County Governments Act, 2012 gives effect to the chapter and provides for the County Governments' powers, functions and responsibilities to deliver services.¹³⁵ The organization, governance and management of state power is usually effected through two main approaches thus the single dimensional approach and the multi-dimensional approach.¹³⁶ The single-dimensional approach follows a one-way horizontal dimension in its organization and management of governance and state power.¹³⁷ It produces a centralized system and structure of government and is based on concentration of power.¹³⁸ The multi-dimensional approach organizes and manages governance as well as state power along multiple lines.¹³⁹ It defines, distributes and constrains the use of state power along multiple lines. It combines vertical, horizontal, lateral dimensions and forms the foundation of devolved systems and structures of government.¹⁴⁰ It is founded upon the concept of decentralization and devolution of power. The Kenya's devolved system of governance embraces the multi-dimensional approach. This chapter is going to focus on the county governments.

¹³³ Chapter Eleven of the Constitution of Kenya, 2010.

¹³⁴ Ibid.

¹³⁵ County Governments Act, No. 17 of 2012: An Act of Parliament to give effect to Chapter Eleven of the Constitution; to provide for county governments' powers, functions and responsibilities to deliver services and for connected purposes.

¹³⁶ Ibid n130.

¹³⁷ Ibid

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

3.2 Nature and Scope of devolution in Kenya

There are two levels of government namely the national government and the county government.

¹⁴¹The Constitution under Article 1 provides that the sovereignty of the people is exercised at both the national and the county level. Through this Article, the legislative and executive sovereign power of the people is delegated to parliament and the legislative assemblies at the county governments.¹⁴² The two levels of government are distinct and interdependent and must conduct their mutual relations on the basis of consultation and cooperation.¹⁴³ There should be coordination between county government and national government and no one is a mere agent of the other.¹⁴⁴

The functions of the County governments are set out in the Fourth Schedule. The Constitution also provides for the allocation of resources to the counties to enable them discharge their functions. Counties are empowered to impose taxation and other charges for the services they render to the people.¹⁴⁵ Counties also have borrowing powers to enhance development in different spheres at the counties.¹⁴⁶ There is provision for the allocation of equitable shares, conditional and unconditional grants and the equalization fund.¹⁴⁷ Indeed one of the key features of devolved government is that it is entrenched in the constitution. This means that it cannot be amended arbitrarily without the involvement of the county governments and through referendum.¹⁴⁸ Devolution under the Constitution

¹⁴¹ Constitution of Kenya, 2010, Article 1.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ Seth Wekesa, *Devolution and Rights of the Marginalized Ethnic Minorities in Kenya: The Role of County Governments in the protection and promotion of rights and interests of marginalized ethnic minorities in Kenya*, Second Edition, Lap Lambert Publishing (2013) p21.

¹⁴⁵ Ibid, n141, Article 209.

¹⁴⁶ Ibid, Articles 211, 212 and 213.

¹⁴⁷ Ibid, Articles 201, 202, 203 and 204.

¹⁴⁸ Ibid n144.

embraces both the concept of self-rule and shared-rule.¹⁴⁹ Whereas institutions are instrumentalities and functionaries of both levels of government, independent state organs which service both levels of government are not instrumentalities and functionaries of any one of the two levels of government and are independent of both.¹⁵⁰ They are state organs not within any of the two levels of government. The shared institutions included the national executive and national legislature in which the counties must be allowed to play a role.¹⁵¹ The independent organs of state rendering shared services, on the other hand, include judiciary, independent commissions and independent offices.¹⁵²

3.3 Objectives of devolution under the Constitution of Kenya, 2010

The main objective of devolution is to spread power of the state throughout the country and reduce the centralization of power which has been the root cause of the problems majority Kenyans are facing, including authoritarianism, marginalization of various communities, lack of accountability and poor service delivery.¹⁵³ Article 174 set out the objectives of devolution. These include: promotion of democratic and accountable exercise of power; foster national unity by recognizing diversity to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them; recognise the right of communities to manage their own affairs and to further their development; protect and promote the interests and rights of minorities and marginalised communities; promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; ensure equitable sharing of national and local resources throughout Kenya ; facilitate the decentralisation of State organs, their

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid

¹⁵² Ibid.

¹⁵³ Ibid, n144 p22.

functions and services, from the capital of Kenya and lastly enhance checks and balances and the separation of powers.¹⁵⁴

3.4 Principles of devolution under the Constitution of Kenya, 2010

Principles of devolution are set out under Article 175 of the Constitution meant to guide the operations of the devolved governments. County governments are required to be based on democratic principles and the doctrine of separation of powers.¹⁵⁵ They must be availed with reliable sources of revenue to enable them to govern and deliver services effectively and finally, they must ensure that each of the two genders have at least a third of the members of the representative bodies in the county.¹⁵⁶ These principles are going to be looked at in detail in the following sections.

3.5 Gender representation in county assembly and the county executive

Article 175(c) provides that not more than two thirds of the members of any county assembly or county executive shall be of the same gender. The purpose of the provision is to provide for special seats for women that will ensure at least one-third of the county assembly members are women to represent their interests at the county level.¹⁵⁷ This probably means that for some time to come women may struggle to exceed one-third of the membership of the assemblies.¹⁵⁸

¹⁵⁴ Ibid, n141, Article 174.

¹⁵⁵ Ibid, n141 Article 175.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid, n144 p25.

¹⁵⁸ Ibid.

The implication of this provision also means that women should be considered for appointments at the county level either through competitive process or by taking affirmative action.¹⁵⁹

3.6 Structure of County governments under the Constitution of Kenya, 2010

Article 6(1) provides that the territory of Kenya is divided into the counties specified in Fourth Schedule.¹⁶⁰The County government consists of a County Assembly and County Executive. Article 176 of the Constitution provides for both legislative and executive arm for each county, county assembly and county executive respectively. The following sections examine the main institutional features of Kenya's devolved system of government.

3.6.1 County Assembly

The Constitution establishes a county assembly for each county. Article 177(1) states that county assembly will comprise of the following: members elected by the registered voters of the wards, each ward constituting a single member constituency; number of special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender; number of members of marginalized groups, including persons with disabilities and the youth; and the speaker, who is an *ex-officio* member. Section 7(1) of the county governments Act, 2012 provides that the political parties shall nominate 6 members for special seats in the county assembly. While nominating them, political parties have to consider community and cultural diversity of the county as well as ensuring adequate representation of minorities in the county to protect their rights.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid, n141 Article 6(1).

See also Article 176: There shall be a county government for each county, consisting of County Assembly and County Executive.

The First Schedule. It provides for the 47 county governments.

3.6.2 The Role of the County Assembly in promoting devolved system of Governance¹⁶¹

The County Assembly plays the following roles: vet and approve nominees for appointment to county public offices as may be provided for in this Act or any other law; perform the roles set out under Article 185 of the Constitution; approve the budget and expenditure of the county government in accordance with Article 207 of the Constitution, and the legislation contemplated in Article 220(2) of the Constitution, guided by Articles 201 and 203 of the Constitution; approve the borrowing by the county government in accordance with Article 212 of the Constitution; approve county development planning; and perform any other role as may be set out under the Constitution or legislation.

Where a county assembly fails to enact any particular legislation required to give further effect to any provision of the County Government Act, a corresponding national legislation, if any, is supposed, with necessary modifications, apply to the matter in question until the county assembly enacts the required legislation.

3.6.3 County Executive Committee¹⁶²

The Constitution states that each county shall have a county executive.¹⁶³ The county executive authority at each county is vested in, and exercised by the county executive committee.¹⁶⁴ The county executive committee consists of the county governor and the deputy governor and the members appointed by the county governor, with approval of the county assembly, from among persons who are not members of the assembly.¹⁶⁵

¹⁶¹ County Governments Act, Section 8.

See also the Constitution of Kenya, 2010, Article 185.

¹⁶² Ibid, n141, Article 179.

¹⁶³ Ibid, Article 176(1).

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

The number of members appointed as executive committee members should not exceed one-third of the number of members of the county assembly if the assembly has less than thirty members and ten executive committee members if the assembly has thirty or more members.¹⁶⁶

The county governor and the deputy county governor are the chief executive and deputy chief executive of the county, respectively.¹⁶⁷

3.6.4 Functions and responsibilities of the County Governor¹⁶⁸

The County Governor performs the following functions and responsibilities: diligently execute the functions and exercise the authority provided for in the Constitution and County Government Act; perform such State functions within the county as the President may from time to time assign on the basis of mutual consultations; represent the county in national and international fora and events; appoint, with the approval of the county assembly, the county executive committee in accordance with Article 179(2)(b) of the Constitution; constitute the county executive committee portfolio structure to respond to the functions and competencies assigned to and transferred to each county; submit the county plans and policies to the county assembly for approval; consider, approve and assent to bills passed by the county assembly; chair meetings of the county executive committee; by a decision notified in the county gazette, assign to every member of the county executive committee, responsibility to ensure the discharge of any function within the county and the provision of related services to the people; submit to the county assembly an annual report on the implementation status of the county policies and plans; deliver annual state of the county address containing such matters as may be specified in county legislation; and sign and cause to be published

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ County Government Act, Section 30.

in the county Gazette, notice of all important formal decisions made by the governor or by the county executive committee.

3.6.5 The Functions of the County Executive¹⁶⁹

Functions of the executive committee are: implements county legislation; implement, within the county, national legislation to the extent that the legislation so requires; manage and coordinate the functions of the county administration and its departments; supervise the administration and delivery of services in the county and all decentralized units and agencies in the county; perform any other functions conferred on it by the Constitution or national legislation; carry out any function incidental to any of the assigned functions.

In the performance of its functions, a county executive committee shall have power to: determine its own programme of activities and every member of the committee shall observe integrity and disclosure of interest in any matter before the committee; monitor the process of planning, formulation and adoption of the integrated development plan by a city or municipality within the county; assist a city or municipality with the planning, formulation, adoption and review of its integrated development plan; facilitate the coordination and alignment of integrated development plans of different cities or municipalities within the county and with the plans, strategies and programmes of national and county governments; and take appropriate steps to resolve any disputes or differences in connection with the planning, formulation, adoption or review of an integrated development plan.

¹⁶⁹ Ibid n141, Article 183.

See also County Governments Act, Sections 36 and 37.

3.6.6 County Decentralized Units

Article 176(2) of the Constitution permits county governments to decentralize its functions and provision of its services to ensure efficiency. The County Governments Act provides for the decentralization of the functions and the delivery of services by the county governments to lower levels of the county but draws a distinction between urban and rural areas. Article 89 provides for the village units in each county determined by the County Assembly for each county. Going by the responsibilities of these units of decentralization it may be concluded that they are established for three major functions: they are units of administration; facilitation of service delivery and public participation.¹⁷⁰

3.6.7 County Public Service

Article 235 of the Constitution states that county governments have the right to have their own public services, with powers to establish and abolish offices, appoint and confirm people to those offices and exercise disciplinary control over the officers within the county. County Governments Act provides that a county government shall discharge its administrative functions through a county public service Board.¹⁷¹

3.6.8 Powers and functions of county governments

Article 186 of the Constitution and the Fourth Schedule of the Constitution provides for the functions of county governments. County governments are responsible for a range of service delivery functions, such as; agriculture, primary health services, water, transport, pre-primary education and village

¹⁷⁰ Ibid, n144, p30.

¹⁷¹ County Governments Act, 2012, Section 56.

polytechnics, transport and county roads as well as county planning and development.¹⁷² Counties have power to formulate their own policies and legislations to realize the operationalization of the functions devolved to them. These policies and laws however must not conflict with those provided by the national government as except as provided by Article 191 of the Constitution. The national government is in charge of setting standards in relation to administration of the functions of both levels of governments. Counties also have revenue raising powers as provided under Article 209 (2) to facilitate the administration of the devolved functions.

3.6.9 Relationship between county governments and national government

Intergovernmental relations are defined as interactions between units of all kinds and levels within a political system.¹⁷³ The foundations of the concept of co-operative government are the distinct powers and responsibilities which must be respected. The Constitution requires the national and county governments to perform their functions and exercise their powers in a manner that respects the functional and institutional integrity of each other and respects the constitutional status and institutions of each other.¹⁷⁴ The Constitution requires the two levels of government to liaise with each other for purpose of exchanging information, coordinating policies and enhance capacity.¹⁷⁵ Disputes between county governments and the national government are inevitable and Article 189(4) of the Constitution provides for the alternative dispute resolution mechanisms, including mediation negotiation and arbitration.¹⁷⁶ The Legislations such as the Intergovernmental Relations Act and the Transition to

¹⁷² Ibid, n141, Part 2 of the Fourth Schedule.

¹⁷³ Ibid, n144 p31.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

Devolved government Act provides for framework for the relationship between counties and the national government in realization of a stable, reliable and viable county and national economy.¹⁷⁷

1.6.0 Relations between counties

The Constitution says little about the relationship between counties, other than the desirability of cooperation and coordination. Article 189 provides for cooperative government including setting up of joint authorities and joint committees among counties for purposes of performing certain functions and delivering certain services. The County Governments Act under section 118 allows counties to enter into agreements with other counties for effective and efficient delivery of services.¹⁷⁸ Section 3 of the Intergovernmental Relations Act also provides for a framework for consultation and cooperation among counties and for mechanisms of resolving disputes between counties where they arise.¹⁷⁹

1.6.1 The Role of the Senate in County Governance

The Senate represents the counties, and serves to protect the interests of the counties and their governments. It participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113. It also determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments. The Senate also plays a key role in matters where the County is facing suspension or impeachment of the County governor.¹⁸⁰

¹⁷⁷ Intergovernmental Relations Act, Section 3.

¹⁷⁸ Ibid n141, Article 118. See also the Star News Paper, Online Version, 'COAST leaders will form the Jumuiya ya Kaunti za Pwani (Coastal Counties Community) to push the region's development agenda' (9th December, 2014).

¹⁷⁹ Ibid, n144 p31.

¹⁸⁰ County Governments Act, PART XIII on suspension of county government.
Constitution of Kenya, 2010, Article 192.

1.6.2 Conclusion

What emerges from this chapter is that the Constitution has adequately provided and protected the devolved system of government. The two levels of government are distinct. The chapter has briefly described the structure of the devolved system of government in Kenya by highlighting the structures, institutions, systems, functions and powers of the county governments. The County Assemblies exercises legislative authorities whereas the county executive carries out the executive functions thus the implementation of the county legislations, policies and plans.

The exercise of judicial authority is a preserve of the judiciary as an independent arm of national government and it is not devolved. The judiciary therefore exists to serves both levels of government. The Judicial Service Act, 2012 envisages the establishment of a High Court in every county and a magistrate's court in every district to enhance access to justice by all Kenyans. There are therefore adequate constitutional and legislative provisions to ensure proper functioning and operationalization of the devolved system of government in Kenya.

CHAPTER FOUR

THE OPPORTUNITIES AND CHALLENGES IN THE IMPLEMENTATION OF THE DEVOLVED FUNCTIONS

4.1 Introduction

The Constitution of Kenya, 2010 seeks to transform the governance and management of the Kenyan state. As such, a central tenet of the Constitution is the implementation of devolved government.¹⁸¹ It is now two years since the operationalization of county governments following the elections held on the 4th March, 2013. It is clear that commendable progress has been realized in the operationalization of the system of devolved governance.¹⁸² To a greater extent, the key institutional structures and systems in the county executive and the county assemblies have been established to enhance service delivery.¹⁸³ The devolved system of governance has created various opportunities geared towards the transformational development of the country; political, social and economic development.

It has created opportunities for; citizen participation, access to health care, employment opportunities, access to services by citizens, infrastructure development, wider democratic space, gender mainstreaming/affirmative action, youth participation in development, distribution of public resources, educational opportunities, access to information among others.

However, there are substantive challenges, which if not addressed will severely compromise the success of the system of devolved government in Kenya. Politicization of the implementation process as evidenced in the current trend of impeaching or threatening to impeach Governors, Speakers and

¹⁸¹ Commission for the implementation of the Constitution, 'Assessment of the implementation of the system of devolved government: From Steps to Strides' Report (2014): www.cickenya.org (accessed on 14th Feb, 2014).

¹⁸² Ibid.

¹⁸³ Ibid.

members of the County Executive Committees. Employment based on ethnicity, lack of technical human resources among others.¹⁸⁴

This chapter is going to focus on the key opportunities and challenges emanating from the implementation of the devolved functions as provided by the Constitution and other enabling statutes and policies.

4.2 Opportunities and Challenges

4.2.1 Introduction

The Constitution of Kenya, 2010 seeks to transform the governance and management of the Kenyan state. As such, a central tenet of the Constitution is the implementation of devolved government.¹⁸⁵ It is now two years since the operationalization of county governments following the elections held on the 4th March, 2013. It is clear that commendable progress has been realized in the operationalization of the system of devolved governance.¹⁸⁶ To a greater extent, the key institutional structures and systems in the county executive and the county assemblies have been established to enhance service delivery.¹⁸⁷ The devolved system of governance has created various opportunities geared towards the transformational development of the country; political, social and economic development.

It has created opportunities for; citizen participation, access to health care, employment opportunities, access to services by citizens, infrastructure development, wider democratic space, gender mainstreaming/affirmative action, youth participation in development, distribution of public resources, educational opportunities and access to information among others. The opportunities and challenges highlighted are also explained in relation to key government research findings namely; The Kenya

¹⁸⁴ Ibid.

¹⁸⁵ Ibid, n181.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

Economic Report, 2013 by Kenya Institute for Public Policy and Research Analysis as well as the Kenya National Bureau of Statistics on the performance of the national and county functions towards the economic development of the state.

4.2.2 Employment Opportunities/Access to procurement opportunities

Implementation of the devolved functions has resulted in employment opportunities at the counties. Devolution of health services for instance has resulted into an expanded health sector where counties in their budgets set aside funds for construction of hospitals and employment of more health staff and expansion of existing health facilities; hospitals, dispensaries and health centres. There are also other forms of indirect employment through procurement of goods and services to hospitals. Locals are given priority in supply of some goods and services as well as the 30% youth access to government procurement enables the youths within counties to supply goods and services hence giving more people opportunity to participate in the improvement of livelihood and health.¹⁸⁸

Access to procurement opportunities by the locals is one of the fundamental opportunities to help the youth, women and persons with disabilities to engage in meaningful employment to advance the development of the counties.

4.2.3 Access to health care, Trade and Development

The Constitution under Article 43 provides that every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care, reasonable standards of sanitation, clean and safe water in adequate quantities and emergency medical treatment.¹⁸⁹ This also gives counties opportunity to strengthen primary health care service delivery.¹⁹⁰

¹⁸⁸ Public Procurement and Disposal Act, 200 ;County procurement Regulations.

¹⁸⁹ <http://vihiga.go.ke/health/> (accessed on 14th Feb, 2015).

Several Counties since the transfer of functions have rolled out Emergency health care equipment such as ambulances and expanded hospitals and health centres, purchasing of drugs and other health facilities to promote access to quality health care.¹⁹¹ Some counties are in the process of enacting health laws to facilitate provision of health services to the people.¹⁹²

The expansion of hospitals, dispensaries and health centres as well as equipping the hospitals by counties is geared towards enhanced access to affordable and quality health services by the people. There is also opportunity to enhance public private partnerships in the provision of accessible and quality health services to the people.¹⁹³ The strong partnership with Faith Based Organizations, and the other Non-governmental sectors, which complement public health facilities, counties need to build on this well established relationship.¹⁹⁴ Kenya has a vibrant private sector which is rapidly expanding to rural areas through franchised networks.¹⁹⁵ It is important to effectively leverage such networks for public goods, especially for delivering reproductive maternal, newborn and child health services.¹⁹⁶

Devolution has also created opportunities for the locals to access improved health care and opening up business to enhance trade and investment in real estate to house the expanded county workforce. Counties have the opportunity as well to carry out urban planning and strategic development to improve business and investment opportunities at the county level.

¹⁹⁰ World Bank, 'Delivering Primary Health Services in Devolved Health Systems of Kenya: Challenges and Opportunities' (2014), Washington D.C, World Bank Group.

¹⁹¹ <http://www.machakosgovernment.com/PoliciesofMachakosGovernment.aspx?PolicyID=5> (accessed on 15th Feb, 2015).

¹⁹² Kitui County Health Facilities Management Committees Bill, 2014. The Bill in its long title provides, "An Act of the Kitui County Assembly to provide for; the establishment of the hospital management Committees to enhance effective management of public hospitals within the county....": www.kitui.go.ke (accessed on 15th Feb, 2015).

¹⁹³ Ibid, n190.

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

4.2.4 Public Participation

Public participation is a principle that has been given prominence in the Constitution of Kenya 2010.¹⁹⁷ It is included in the national values and principles of governance, in Article 10(2) provides that public participation is a national value and principle of governance as well as patriotism, national unity, sharing and devolution of power, the rule of law and democracy.¹⁹⁸ The principle of public participation is echoed across the Constitution including Article 69(d), which obligates the state to encourage public participation in the management, protection and conservation of the environment.

The public is expected to be involved in the legislative and other business of the assemblies and their committees. Giving power of self-governance to the people and enhance the participation of the people in the exercise of the powers of the state and in making decisions affecting them is one of the objectives of devolution provided under Article 174(c). One of the aims of devolution is to create more intense community involvement in order to adjust service delivery models to the communities' specific needs.¹⁹⁹ Article 196 provides that a county assembly shall conduct its business in an open manner, and hold its sittings and those of its committees in public. It is supposed to facilitate public participation and involvement in the legislative and other business of the assembly and its committees.

Public participation is indeed embraced as one of the key devolved functions and the two arms of county governments are supposed to involve the public in their key decision making process. This enables members of the community to air their views and ensure that county governments address their needs in this case with respect to primary health care.²⁰⁰ Public participation can make the actions

¹⁹⁷ Ibid, n181.

¹⁹⁸ Constitution of Kenya, 2010, Article 10.

¹⁹⁹ KPMG, 'Devolution of Health Care Services in Kenya: Lessons learnt from other Countries' (2013) p13.

²⁰⁰ Public Finance Management Act: this law represents a unique opportunity to enhance the role of citizens in public financial management processes in Kenya.

of local official more transparent and provide a check on corruption, appointments based on family ties or other connections and other poor practices. This can happen where there is active local political system, news outlets and therefore easy access to information and people are therefore prepared to blow the whistle where they see problems with a view that they will be listened to.²⁰¹

Several Counties have as such enacted the County public participation legislation to enhance the participation of the people in the development and the key decision making and legislative process at the county level.²⁰² The public participation principle is a mandatory requirement in the county's legislative process. In *Robert N. Gakuru & Others v. Governor of Kiambu County & 3 others [2013] eKLR*, the High Court in Nairobi declared Kiambu County Finance Act, 2013 illegal because of lack of public participation.²⁰³ Odunga J held that the County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous.²⁰⁴ I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action.²⁰⁵

The court therefore declared the Kiambu County Finance Act, 2013 to have violated the Constitution and therefore null and void. The principle of public participation is one of the best ways the

²⁰¹ Ibid, n199.

²⁰² See for example Machakos County Public Participation Act, 2014: "An Act of the Machakos County Assembly to give effect to Articles 1, 10(2)(a), 118,119,174,232(1)(d) and paragraph 14 of Part 2 of the Fourth Schedule of the Constitution; to establish modalities and platform for public participation in governance of the county...."

²⁰³ <http://kenyalaw.org/caselaw/cases/view/92660/> (accessed on 16th Feb, 2015).

²⁰⁴ Ibid.

²⁰⁵ Ibid.

Constitution has allowed the citizenry to engage the county government.²⁰⁶ Once one is empowered and knows their rights, they are able to hold the government accountable and demand for better service delivery.

4.2.5 Creation of Opportunities to raise funds

Devolution creates opportunities to generate additional, usually by charging co-payments from patients using facilities.²⁰⁷ As such, devolution is also used to limit the burden on government's budget spent on healthcare. The downside of this is that it might further constrain access to healthcare for the poorer groups of the population.²⁰⁸ Article 209(3) and (4) of the Constitution provides that a county may impose tax such property rates and entertainment taxes. Counties have power as well to impose charges for the services they provide.²⁰⁹ This is believed to enhance revenue collection which in turn is used to improve the economic and social development of counties hence contributing towards the Gross National Product (GDP).

4.2.6 Opportunity for Counties to borrow to enhance development

The implementation of devolved functions requires enough funds to drive the development agenda of counties. Much as counties are funded from the national budget, Article 212 provides for the power of counties to borrow and facilitate their development agenda.

4.2.7 Legislation by counties as an opportunity

Article 185 provides that a county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government

²⁰⁶ Transparency International Kenya. *Devolution Handbook* (2014).

²⁰⁷ *Ibid*, n199.

²⁰⁸ *Ibid*.

²⁰⁹ Constitution of Kenya, 2010, Article 209(3) and (4).

under the Fourth Schedule.²¹⁰ The County assembly may also receive and approve plans and policies for the management and exploitation of the county's resources as well as development of its infrastructure and institutions.²¹¹

This therefore empowers the assemblies to come up with laws that seek to address their specific problems so as to enhance social, political and economic development within the county and contribute positively towards overall national development.

4.3 Challenges in the implementation of devolved functions

Despite the opportunities that have been created in the implementation of the devolved functions, there exist substantive challenges which if not addressed will severely compromise the success of the system of devolved government in Kenya. Key in this regard are firstly, congruent policy, legal and institutional frameworks which are “clawing back” on the devolution of power, resources and functions.²¹² This especially with regard to lack of proper policy and strong legal framework to have facilitated the transfer of the health function for instance.

Prior to the transfer of the health function to devolved units, health workers through their representatives and the civil society had advocated for: the remuneration of health workers to remain with the national government until such time as a sound legal framework of the management of health at the county level is established; Health Service Commission be created to deal with the human

²¹⁰ Ibid, Article 185(2) and (4).

²¹¹ Ibid.

²¹² Ibid, n181.

resource function of the health sector; and unions representing health workers be consulted in the development of policies and laws.²¹³

There was also concern that: whereas certain health services had been devolved to the county governments, there was still no clear division of roles between the national and county governments.²¹⁴ In light of the same, it was unclear whether there were sufficient funds set aside for the delivery of health services and that without clarity of responsibilities the health sector was likely to crumble.²¹⁵ The emphasis laid on the need for a proper policy framework for devolution of health services; a proper handover should have been accompanied by a clear policy framework on the functions and costs of the devolving health services; and that there lacked comprehensive stakeholder engagement in the devolution of health services.²¹⁶

It was also noted that in other jurisdictions, devolution of health services requires a health policy that establishes a strong and coordinated management system, a proper distribution framework of health workers across the rural and urban areas and standardization of health codes and systems. In absence of these mechanisms, there shall be little transformation in the health sector and access of health services shall continue to be out of reach for many Kenyans. The result of this has been several strikes by the medical doctors and nurses at the counties.²¹⁷ The shortage of medical staff has also hampered the effective operationalization of the primary health services.

²¹³The Institute for Social Accountability, 'Open Letter on the Current Health Crisis' (2013): http://www.tisa.or.ke/images/uploads/TISA_Open_Letter_On_The_Current_Health_Crisis_2013.pdf (accessed on 24th March, 2015).

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ *Daily Nation* online version, 'Shortage of Medical staff bites' Tuesday March 24, 2015.

Second, politicization of the implementation process as evidenced in the current trend of impeaching or threatening to impeach Governors, Speakers and members of the County Executive Committees.²¹⁸ This disrupts the functioning of devolved system and compromises on the integrity and the oversight role of the county legislative assemblies.

Third, is the challenge in developing policies, laws and regulations.²¹⁹ Development of legislative policy and drafting of County Bill requires vast knowledge and skill in Policy formulation and legislative drafting which counties did not have the technical personnel to discharge such roles. Legislative drafters in the country are also few owing to the fact that Legislative Drafting as a course is not taught comprehensively at either tertiary or university level in Kenya. This indeed is still a challenge in formulation and drafting of policies and laws at the county level. Most counties are therefore relying on private consultants to carry out the process.

Fourth, lack of proper functional analysis by counties has resulted in failure to comprehensively establish what each function entails.²²⁰ Lack of adequate human resource capacity and skills in key sectors such as health services, planning, Engineering, legal and road construction hence slowing the development process in such sectors.²²¹ Those with skills and experience don't want to seek jobs at counties citing lack of job security and low salaries.²²²

Fifth, corruption in counties is hampering the provision of services at the county level.²²³ Almost every county government has flouted tendering rules and violated staffing guidelines by rewarding cronies

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid, n181.

²²¹ Ibid.

²²² Ibid.

²²³ <http://www.businessdailyafrica.com/Massive-corruption-in-counties-exposed/-/539546/2224876/-/dx6xjh/-/index.html> (accessed on 26th March, 2015).

and relatives. There are a lot of challenges, but nepotism in hiring of county staff and violation of public tender rules are common to all the forty-seven counties.²²⁴ The Ethics and Anti-Corruption Commission should decentralize to ensure its operation in every county to monitor corruption and where there are those found to be culpable to be prosecuted.

Funding gaps resulting in inadequate funds to finance all functions, the monthly timing of the release of fund is hampering the implementation process.²²⁵ This delayed release of funds from the national treasury to counties has led to late payment of salaries prompting strikes by health workers hence hampering the efficiency in the delivery of health care by counties.²²⁶ The high cost of public participation as well as lack of administrative capacity and the delay in designing guidelines on public participation to advance or rather execute the public participation principle.

Failure to follow the law in hiring of staff by counties. Section 65 (1)(e) of the County Governments Act provides that there is need to ensure at least thirty percent of the vacant posts at entry level are filled by candidates who are not from the dominant ethnic community in the county.²²⁷ There has been lack of compliance on this in terms of rigidity to comply with the constitution and the county government Act.²²⁸ This has been fuelled by nepotism in hiring of staff by counties such that most of the county employees are hired based on blood relations instead of compliance with the law in hiring.²²⁹ The salary discrepancies between officers at the county especially between those of the

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ *Daily Nation*, Online Version, accessed on 24th March, 2014.

²²⁷ County Governments Act, Section 65 (1)(e).

²²⁸ Ibid, n181.

²²⁹ Shocking: Alleged Nepotism in Machakos County Government: <https://www.kenya-today.com/politics/nepotism-machakos-county-gorverment> (accessed on 18th March, 2015).

defunct local authorities and the county government causing uneasy and hampering the working at the county level.²³⁰

Lack of County standards in public works. National standards may not be relevant to County owing to different conditions, soils and material.²³¹ The standards set out in the national legislations such as the National Construction Authority Act and the Standards Act may not be adequate in the management of the County public works. Counties are also grappling with the issues of huge wage bill due to alleged ghost workers and salary discrepancy between officers.²³²

Most counties have not established strong civic education units aimed at having an informed citizenry that actively participates in governance affairs of the society on the basis of enhanced knowledge, understanding and ownership of the Constitution.²³³ Counties are supposed to come up with county laws to provide requisite institutional framework for purposes of facilitating and implementing civic education programmes. This seeks to enhance the principle of public participation in counties by the people.²³⁴

Taxation by counties much as it fronts an opportunity for counties to raise funds, its lack of proper administration has resulted in conflicts and chaos in some counties.

Article 209(5) prohibits taxation regime that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour. Some

²³⁰ Ibid.

²³¹ Ibid, n181.

²³² *Daily Nation*, 'County saves Sh2m in fresh plan to weed out ghost workers', Tuesday, February, 2015: <http://www.nation.co.ke/counties/weed-out-ghost-workers/-/1107872/2634472/-/hmslyz/-/index.html> (accessed on 18th March, 2015).

²³³ Ibid, n181.

²³⁴ Ibid, n181.

counties have adopted taxation measures giving rise to conflicts in counties affecting mobility of goods and again affecting Kenya's regional obligations especially with regard to East African Community integration process.²³⁵ Some of these taxes are alleged to be too high and not based on realistic and informed decisions as was the case with the Kiambu County Finance Act, 2014 discussed above.

4.4 Conclusion

The implementation of the system of Devolved Government is way on course. The required national and County legislations, regulations, systems and structures are in place and operational.²³⁶ The progress made so far sets the foundation for the realization of the objects and principles of devolved government as provided for in Articles 174 and 175 of the Constitution respectively. That notwithstanding, it is also evident from the foregoing presentation that there is need to expedite the establishment as well as the review of existing policies, legislations and some institutions in order to ensure that they facilitate improved governance and service delivery.²³⁷

It is also evident that there would have been established a strong policy and legal frameworks before transfer of the health function. However, since it is already transferred, there is need to build up strong on-going foundations to facilitate efficiency service delivery in the health sector.

The implementation of the devolved government has created many opportunities that seeks to improve the livelihoods of the people and contribute to the overall national development goals. To realize this, there is need to strengthen the legal and institutional frameworks in place in order to tap a lot from the opportunities.

²³⁵ *Daily Nation*, Tuesday March 24, 2015, 'Counties warned against double taxation of goods'.

²³⁶ *Ibid.*

²³⁷ *Ibid.*

Some of the threats to the effective implementation of the system of devolved government include; politicization of the implementation process coupled with inadequate focus on institutional building. Low levels of capacity and skills and the ghost workers menace.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.1 CONCLUSION

This study sought to analyze the structure of devolved system of governance in Kenya as provided for in the Constitution of Kenya, 2010. To provide a clear understanding of the devolved system of government, this study examined the historical background of devolution in Kenya. This was necessary to reflect on the past developments and relate it with the current devolved system of governance under the Kenya's 2010 Constitution.

To demonstrate this, chapter two examined the historical development of devolution in Kenya by looking at the various policy and legal frameworks namely: The Kenya's independence Constitution, Local Governments Act, Cap. 265 which established the local authorities for local government; the Transfer of Functions Act, 1969 through which certain functions were transferred to local authorities; the District Focus for Rural Development (DFRD) as a government strategy for rural development; the Vision, 2030 and the analysis of the constitution making process in Kenya from 2000- 2010 encompassing various drafts of the constitution leading to the promulgation of the Constitution of Kenya, 2010.

Chapter Three examined the legal and institutional frameworks under which the devolved system of governance operates by looking at the main institutional features of the devolved system of governance in Kenya. It sought to assess the structures, institutions, functions, powers and the intergovernmental relations of county governments. In this regard, this chapter recognized that there are two arms of government at the county level namely; the county executive and the county assembly and proceeded to outline their respective functions. Human capital development at the county level is dealt with under this chapter by pointing out the County Public Service Board as the one in charge of

establishment and abolishment of offices and appointment of county public work force. It also outlined the role of the senate in the devolved system of governance in Kenya.

Chapter Four analyzed the opportunities and challenges in the implementation of the devolved system of governance in Kenya. It sought to examine the progress that has been realized in the operationalization of the system of devolved governance and affirms that to a greater extent, the key institutional structures and systems in the county executive and the county assemblies have been established to enhance service delivery. This chapter highlights several opportunities that have been created as a result of devolution such as: employment opportunities and access to government procurement opportunities; easy access to health care; trade development; public participation; taxation; county financing and county assemblies legislative authority as an opportunity. These opportunities are stated to emanate from the implementation of the devolved functions provided under the Fourth Schedule of the Constitution.

It notes the commendable progress made so far in the operationalization of the devolved system of governance in Kenya but points out the challenges being experienced in its implementation. These challenges include: Lack of proper policy and strong legal framework to facilitate efficient operationalization of the health function; politicization of the implementation process as evidenced in the trend of impeaching or threatening to impeach Governors, Speakers and County Executive Committee members; lack of skilled man power to aid in the formulation and drafting of policies, laws and regulations; lack of proper functional analysis by counties which has resulted in failure to comprehensively establish what each function entails; Funding gaps resulting in inadequate funds to finance all functions, the monthly timing of the release of funds was hampering the implementation process leading to strikes especially by the medical staff; high cost of public participation; poor

taxation regime initiated by counties; lack of civic education to help the communities participate effectively in county governance.

This concluding chapter restates the major finding of this study and makes recommendations necessary for the realization of an efficient operationalization of the devolved system of governance in Kenya.

5.2 RECOMMENDATIONS

This study has established that the implementation of devolved system of government is largely on course. There however exist a number of challenges which needs to be addressed and mitigate against other related risks. This study therefore makes the following recommendations:

5.2.1 Clear and proper policy framework for devolution of health services

Lack of proper policy and strong legal framework in the transfer of the health function has been cited as one of the causes to frequent strikes by the county medical staff. This study recommends the need to review the policy and legal framework within which the health function operates. This will then facilitate the formulation of national health policies and legislations that are alive to the devolved system of government.

These legislations should provide for the setting up of the Health Service Commission that is mandated to look into the affairs of the medical staff countrywide. This will regulate the remuneration of health workers and act as liaison between the county government and the national government on matters concerning the provision of health care services in the country. The Health Service Commission is supposed to also deal with the human resource function of the health sector and mitigate the risks associated with doctors strike in counties. The unions representing health workers to work in consultation with the county and national government in the development of health policies and laws. Transition Authority should assist in developing guidelines outlining clear division of roles between the national and county governments on matters of health care. Ministry of health together with the Council of Governors to work on an intensive stakeholder engagement program to facilitate seamless transition and operationalization of the health function.

5.2.2 End the politicization of the implementation process

There is need for the national and county government focus on building and strengthening the existing institutional framework instead of politicization which in turn affects the smooth implementation of devolution in Kenya. There is need for goodwill from both levels of government to facilitate effective transition to devolved government.

The impeachment or rather threatened impeachment of governors, speakers and other key county staff threatens devolution. County Executive of each county should establish liaison offices at the county assembly and vice-versa to foster a good working relationship geared towards the success devolution and economic development.

The senate should enact legislation to provide clear process for the impeachment of governors, speakers and county executive committee members. This legislation should set conditions necessary to be met to initiate an impeachment process. This will help to avoid the situations where Members of the County Assemblies decides at any time to impeach the Governor or speaker of executive committee members. This calls for responsive leadership by the national and county government leadership and help in realization of a society based on values and ethics, inclusivity and the promotion of the objectives of devolution.

5.2.3 Partnership in Training and Employment of qualified Legislative Drafters

Limited number of legislative drafters in Kenya is due to lack of concrete academic framework where institutions of higher learning offer Legislative Drafting as a course. None of the Universities in Kenya offer Legislative drafting as a main course of study. The only institution offering is the Kenya School of Law and only as a unit course. Owing to the importance of this course, there is therefore need for

the Commission for Higher Education working with universities, Council of Legal Education, Kenya School of Law and the Council of Governors to work on the development of a curriculum and have the course established as an area of specialization. Currently Kenyans who are interested in advanced study in Legislative Drafting or specialization go to University of London for Diploma and Masters Program in Legislative Drafting. This will therefore help in creating a pool of legislative professional to assist in better formulation and drafting of policies and laws.

As an immediate measure, there is need for the Counties with recommendation of the Kenya Law Reform Commission and the Commission for the implementation of the Constitution, to outsource legal drafters or services of credible law firms to assist in drafting of laws. Counties to recruit and train key personnel in legislative drafting as well as improve terms of service so as to attract lawyers.

Counties should also facilitate the recruitment of County Attorneys and setting up of the offices of the county attorney in each county. This will help to mitigate the challenges being experienced not only in drafting but also in litigation at the counties. County Assemblies should also partner with law schools to provide interns who under the supervision of a lead consultant can help in drafting of laws.

Lack of knowledge in the law making process by MCAs also hamper the legislative process at the counties. The Kenya Law Reform Commission as provided under section 5(3) of the County Governments Act, should provide capacity building to the County Assemblies in that respect.

5.2.4 Proper functional analysis by counties

Functional analysis is an important concept which must be looked at keenly to ensure successful implementation of devolution. It is based on this that costing of functions is made and its upon proper

functional analysis that counties can operate smoothly. The functional analysis is therefore intended to clarify what a function is in the context of devolution including components do that that level of government to which a function has been assigned understand it an allocate resources to perform it. To realize effective functional analysis, this study recommends: further review and re-unbundling and definition of functions followed by proper costing of the assigned functions and competencies.

5.2.5 Adoption effective capacity building programs and Better Remuneration Structures

Counties have challenges in staffing due to lack of attractive salaries to attract lawyers and other key sector professionals to work for counties. There is therefore need to develop and implement an effective capacity building program intended to train the already existing county personnel. In consultation with the Salaries and Remuneration Commission, map out a better remuneration package to attract qualified, competent and skilled staff.

There is also need to harmonize the different terms of service between the county government and the defunct local authorities to avoid discontentment based on salary differentials within similar job groups. Development of clear staff policies and guidelines to assist the county public service boards in discharging their mandates. County Public Service Boards may also outsource human resource consultants to assist in designing Human Resource Policies and regulations to address staffing challenges at the county level.

5.2.6 Development of guidelines for speeder allocation of funds to counties/Minimise funding Gaps

Inadequate funds to finance all functions, monthly timing of the release of funds is hampering implementation. Some counties have not created further decentralized units and some have not yet allocated funds to the decentralized units. This has a negative impact on the implementation process of

the devolved system of governance. This study recommends the development of guideline on the speedier allocation of funds to counties. To reinforce this, the senate should come up with a legislation setting the period of time within which the treasury must have send or disbursed funds to counties. This will mitigate against the delays being experienced in disbursement of funds to counties leading to salary delays and strikes. To enable county assemblies discharge their mandate properly especially with regard to oversight over county executives, the law should provide for separate allocation of funds to county executives and county assemblies.

This will minimize the struggle between the executives and the county assemblies in approving the budget since right now the assemblies don't receive funds direct from the national treasury.

National government should assist counties in exercising the powers given to them under Article 212 of the Constitution. This will facilitate counties to seek for grants from development partners in order to meet their budgetary needs and discharge of their functions. With such assistance, counties can also borrow to finance their development needs. The National Treasury therefore should design policy guidelines on the exercise of borrowing powers by counties under Article 212 of the Constitution.

5.2.7 Development of clear public participation/civic education guidelines to provide for clear public participation modules and the reduction of costs involved

The high cost of community participation as well as lack of administrative capacity to facilitate the effective implementation of public participation. Lack of public participation guidelines to help counties in carrying out public participation. Some counties are vast and to cover all the smaller administrative units in carrying out public participation has been a big problem. The lack of civic education has also affected the administration of public participation. Some people still don't understand devolution well and therefore there is need for comprehensive civic education programs to be rolled out in all counties to educate the people on devolution and the county government structures

and their roles in county governance. To address this, counties should establish mechanisms and institutional framework provided under the County Governments Act to promote civic education, public participation and access to information. The senate should enact legislation as well as counties themselves to enact legislation that enables people participate meaningfully in exercising their sovereign powers and on matters affecting them.

5.2.8 Decentralization of the Ethics and Anti-Corruption Commission to monitor and act on Corruption in Counties

Corruption in counties is hampering the provision of services at the county level. Almost every county government has flouted tendering rules and violated staffing guidelines by rewarding cronies and relatives. There are a lot of challenges, especially nepotism in hiring of county staff and violation of public tender rules are common to all the forty-seven counties. This study recommends decentralization of the Ethics and Anti-Corruption Commission in order to ensure its operation in every county to monitor corruption and where there are those found to be guilty, to be prosecuted. The commission should be vicious in the operationalization and implementation of the Leadership and Integrity Act, Constitutional principles and values of governance as provided under Article 10 of the Constitution.

5.2.9 Adherence to legal procedure in hiring of county staff/Prosecution of those who fail with the law on employment of county staff

There is failure to follow the law in hiring of staff by counties. Section 65 (1)(e) of the County Governments Act provides that there is need to ensure at least thirty percent of the vacant posts at entry level are filled by candidates who are not from the dominant ethnic community in the county. There has been lack of compliance on this in terms or rigidity to comply with the constitution and the county government Act. This has been fuelled by nepotism in hiring of staff by counties such that

most of the county employees are hired based on blood relations instead of compliance with the law in hiring. This hampers development in counties because where nepotism prevails, there is tendency to ignore competence, skills and professionalism.

Failure to follow the law in hiring especially allowing nepotism in recruitment in counties is an ethical issue which must be dealt with by the Ethics and Anti-corruption Commission to ensure compliance with the law in employment.

There is need for the development of strong civil society participation in counties to monitor, criticize and even take to court county governments found to flout the law in relation to hiring of staff. It is time for the civil society to also decentralize their services from the capital city to counties.

5.2.10 Dialogue and stakeholder engagement in the development of County Taxation System/Enactment of Finance Legislations

Taxation by counties much as it fronts an opportunity for counties to raise funds, its lack of proper administration has resulted in conflicts and chaos in some counties.

Article 209(5) prohibits taxation regime that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labour. Some counties have adopted taxation measures giving rise to conflicts in counties affecting mobility of goods and again affecting Kenya's regional obligations especially with regard to East African Community integration process. Some of these taxes are alleged to be too high and not based on realistic and informed decisions as was the case with the Kiambu County Finance Act, 2014 as well as the Kakamega County Finance Act, 2014 and other county finance legislations.

This study recommends that to deal with the problems associated with taxation, there should be consistent dialogue between county governments and citizens and other stakeholders in the legislative

process involving finance legislations as is required with other legislations. There is also need for equitable resource sharing and political will to ensure that all decentralized units within counties are catered for in coming up with the county budgets and the taxing system.

Comprehensive public participation in counties' finance laws legislative process is key to avoid conflicts and disputes which arise when county governments start implementing their finance laws.

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