

*Animating Devolution in Kenya*  
**The Role of the Judiciary**

Commentary and Analysis  
**on Kenya's Emerging  
Devolution Jurisprudence  
under the New Constitution**



*Edited by:*  
Conrad M. Bosire  
Wanjiru Gikonyo

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## **Judiciary Training Institute**

The Judiciary Training Institute (JTI) is the organ of the Kenyan Judiciary which is responsible for meeting the training, research and capacity development needs of Judiciary staff. JTI performs this mandate in part through various training programs and seminars, public lectures, research, and other forms of discourses targeting all cadres of Judiciary staff, and, where appropriate, members of the academy, other organs of state and the public at large. As the Judiciary's institute of higher learning, the JTI is leading the Judiciary, in line with Judiciary Transformation Framework, in facilitating the growth of jurisprudence and judicial practice as the lifeblood of the institution. The JTI is the judicial think tank: an institute of global excellence and the nerve centre of rich intellectual exchange. It interfaces between the Judiciary and contemporary developments in society, on the one hand, and learning interaction between the Judiciary and other agencies, on the other. The JTI provides the intellectual anchor in making Kenya's courts the hearth and home of a robust and functional jurisprudence that meets the aspirations of Kenyans.

## **International Development Law Organization**

The International Development Law Organization (IDLO) is the only intergovernmental organization exclusively devoted to promoting the rule of law. IDLO works to enable governments and empower people to reform laws and strengthen institutions to promote peace, justice, sustainable development and economic opportunity. Its programs, research and policy advocacy cover the spectrum of rule of law from peace and institution building to social development and economic recovery in countries emerging from conflict and striving towards democracy. IDLO has its headquarters in Rome, a Branch Office in The Hague, liaison offices for the United Nations in New York and Geneva, and country offices in Afghanistan, Honduras, Indonesia, Kenya, Kyrgyzstan, Liberia, Mali, Mongolia, Myanmar, Somalia, South Sudan and Tajikistan.

## **Katiba Institute**

The Katiba Institute was established in 2011 to promote knowledge and studies of constitutionalism and to facilitate the implementation of Kenya's new constitution. Its activities include publications on the Constitution, workshops on constitutional issues, public interest litigation, development of the legal and judicial system, establishment of county governments, land reform, review of legislative bills to implement the Constitution, and promoting the participation of Kenyans in public affairs.

# Foreword

Five years ago, the promulgation of the Constitution of Kenya 2010 fundamentally restructured the Kenyan state and ushered in a new devolved system of government. Devolution was born of the real challenges that Kenyans had grappled with since independence including the need for accountable exercise of power, effective self-governance, equitable social and economic development, entrenchment of public participation, and the implementation of the subsidiarity principle in governance. Simultaneously, devolution was entrenched in the Constitution as a means of recognising and accommodating Kenya's rich diversity and ensuring robust protection for minorities and marginalised communities including women.

As the custodian of Kenya's general constitutional transformation, the Judiciary is at the core of the transformation to devolved governance. Specifically, the courts have a mandate to ensure that devolution is implemented in a way that translates into the stated constitutional objectives – breathing life into our ambitious and progressive Constitution.

This publication is unique as it compiles a myriad of perspectives from across different disciplines, institutions and actors to illustrate what devolved governance in Kenya has meant, touching on topics that range from fundamental rights, public finance management, contextual and historical analysis of devolved governance, adjudication of intergovernmental disputes, the role politics plays in devolution and innovative approaches to defending the letter and spirit of the constitutional provisions with regard to devolution such as public interest litigation. Each chapter aims to enrich the emerging jurisprudence on devolution from the Kenyan courts, while benchmarking comparative jurisdictions grappling with the challenges of devolved governance, including South Africa and Canada. Ultimately, this publication identifies and locates Kenya's emerging jurisprudence within the broader discourse on good governance and the rule of law. The publication is part of efforts aimed at the growth of sound, robust, indigenous and patriotic jurisprudence which advances law in a manner that responds to the people's

needs and national interests and which enables the Kenyan Judiciary to command respect and distinction among its peers globally, while also earning respect and legitimacy in the eyes of the public. This is in line with Key Result Area 7 of the Judiciary Transformation Framework (JTF).

In addition to thanking the authors and editors for the invaluable insights captured within, I would like to thank the Judiciary Training Institute, the International Development Law Organization (IDLO), and Katiba Institute for their tremendous effort in compiling this important publication. The judiciary seminars on devolution that led to the development publication were initially supported by the Canadian International Development Agency (CIDA) and I therefore thank the Canadian government for its initial support. Lastly, a warm thanks to DANIDA for their continued support to the Judiciary including the funding of this important publication.

It is my sincere hope that the Judiciary, and all stakeholders—other state agencies, civil society and academia included— will utilize this publication to enrich their understanding of devolution in Kenya and to continue championing the promise of devolution as envisioned in the 2010 Constitution.



**Hon. Chief Justice Dr. Willy Mutunga**

# Biographical Notes

## **WANJIRU GIKONYO, EDITOR**

Wanjiru Gikonyo has dedicated her past 10 years towards the realisation of accountable governance in Kenya. She formerly worked in the media as a producer on social issues. Wanjiru is a practitioner in participatory governance and social accountability, and an advocate for devolved government. She serves as the National Coordinator of The Institute for Social Accountability (TISA) a leading institution in decentralised governance in Kenya, which she founded in 2008. TISA is presently pioneering the county public participation and social accountability program (PP/SA) designed to effect social accountability in Kenya's nascent devolved system. TISA has been actively involved in influencing the devolved government framework to enhance social accountability through strategic policy interventions. TISA has been instrumental in the popularization of social audit practice in Kenya and continues advocacy on accountable decentralised funding to date. Wanjiru holds a degree in Business Organisation from Herriot-Watt University, Edinburgh, Scotland, and is in the final stages of her Masters of Arts in Rural Sociology and Community Development at the University of Nairobi.

## **CONRAD M. BOSIRE, EDITOR**

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## **YASH PAL GHAI**

Yash Pal Ghai is a Director of Katiba Institute and was chair of the Constitution of Kenya Review Commission and of the National Constitutional Conference, which adopted the "Bomas" constitutional draft. He has been member of or advisor to many other constitution making processes, in Africa, Asia and the Pacific. He holds degrees from Oxford and Harvard Universities including the higher doctorate (Doctor of Civil Law) from Oxford. He was a university teacher of law from 1963 till 2006, holding posts at universities in Tanzania, USA, Sweden, England and Hong Kong. He is the author or editor of some 20 books and nearly 200 articles in books and academic journals.

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Duncan Okello obtained his political science and law degrees from the University of Nairobi, and a Masters of Arts in international studies at the University of Kent, at Canterbury, United Kingdom. He has previously worked as director of programs at the Institute of Economic Affairs (IEA) and as regional director of the Society for International Development (SID), Eastern Africa Regional Office. He is currently the Chief of Staff, Office of the Chief Justice, Republic of Kenya. Some of his published works include three books which he has co-edited: *Kenya: The Struggle for a New Constitutional Order* (2014); *Tensions and Reversal in Democratic Transitions: the 2007 General Elections* (2010); and *Readings on Inequality in Kenya* (2007).

## **PETER WANYANDE**

Peter Wanyande holds PhD degree in Political Science from the University of Florida, Gainesville (USA) specializing in Comparative Politics and Public Policy. He is also a holder of a Master of Arts (MA) degree in Government and a Bachelor of Arts (BA. Hons) degree in Government and Sociology both from the University of Nairobi. In addition, he holds a Postgraduate Diploma in Mass Communication from the University of Nairobi. Prof. Wanyande has taught at the University of Nairobi for over 30 years and has published a number of books, book chapters, and refereed journal articles. Among

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Valerie Nangidi Okumu is a researcher with interest in policy and legislation development and governance affairs. She holds a Masters Degree in Development Studies from the University of Nairobi. As a Senior Programme Officer at the Commission for the Implementation of the Constitution, her area of specialty is implementation of the devolved system of government. She helped develop policy, legislation and administrative procedures for the operationalization of the devolved system of government in Kenya. She currently oversees and monitors the transition and implementation process of the devolved system of government in the country.

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John Mutua is the Head of the Programme on Public Finance Management at the Institute of Economic Affairs Kenya. He has a wealth of experience in public finance management and generally in macroeconomics spanning ten years. On this, he has conducted research and public policy analysis in fiscal policy, reviewed related legislations, authored publications. He has been involved in various initiatives on fostering public finance management reforms and budget transparency notably the National Treasury task force that developed the Public Finance Management Reforms strategy 2013 -2018, review of Kenya's progress in fiscal transparency and public participation initiatives through Coalition of Africa Budget Reforms Initiatives (CABRI) and lead researcher in Open Budget Survey. Related to this he has facilitated numerous budget literacy fora for building oversight capacity for civil society organizations and parliamentarians. In addition he also engages and participates in a number of coalitions and networks including the Parliamentary Initiative Network (PIN) and East Africa Tax and Governance Network (EATGN). He holds a Masters of Arts in Economics from the University of Nairobi.

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Mugambi Laibuta is an Advocate of the High Court of Kenya with experience in legal research and project management. He has academic and practical expertise in constitutional review, design and implementation plus legislative drafting. Currently he is a lecturer at the Kenya School of Law. He is also a Trained Mediator, a Monitoring and Evaluation Professional plus an advisor on business innovation and sustainability.

## **JILL COTTRELL GHAI**

Jill Cottrell Ghai holds degrees from the University of London and Yale University and was for 40 years a university law teacher (in Nigeria, England and Hong Kong), teaching economic social and cultural rights in her last few years. She is the author or co-author of several books, and many articles. She has been a consultant on constitution making processes in or for several countries, including Iraq, Somalia and Libya. Now she is a Director of the Katiba Institute, and spends much of her time researching for cases and other publications, writing, and being involved in the Institute's programmes for lawyers, judges and civil society, as well as commenting on draft legislation.

## **JAAP DE VISSER**

Jaap de Visser (LLB, LLM, LLD) is Director of the University of the Western Cape's Dullah Omar Institute (formerly: Community Law Centre), a research and advocacy unit focusing on democracy and human rights in Africa. He is a B2 rated scholar with South Africa's National Research Foundation and co-author of Local Government Law of South Africa. His research, teaching and consulting focuses on multilevel government, local government, good governance and federalism in Africa and he has published widely on these topics. Prof De Visser has overseen and conducted research on multilevel government in South Africa, Uganda, Zimbabwe, Ethiopia, Tanzania and Kenya. He has consulted for many national and international organisations, including the Independent Evaluation Group (Worldbank), UN-HABITAT, Forum of Federations, GIZ, South Africa's Department of Cooperative Government, the City of Cape Town and many other local authorities in South Africa. He was lead consultant on the Western Cape Land Use Planning Act of 2014 and was recently appointed by the UNDP to review Lesotho's Local Government Act.

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Nico Steytler is a professor of public law and the South African Research

Chair in Multilevel Government, Law and Policy at the Dullah Omar Institute of Constitutional Law, Governance and Human Rights of the University of the Western Cape, Cape Town, South Africa. He has been involved in the development of the new constitutional order in South Africa for the past two decades. He was a technical advisor to the Constitutional Assembly drafting the 1996 Constitution. He was a member of the Municipal Demarcation Board (2004-2014) and is a commissioner of the Financial and Fiscal Commission (2013-2017). He has also provided expertise on multilevel government internationally, most recently, as a UN expert consultant to the Yemeni Constitutional Drafting Committee and the Libyan Constitutional Drafting Assembly. He is also the president of the International Association of Centers for Federal Studies (2010-2016).

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Robin K Basu serves as General Counsel in the Constitutional Law Branch of the Province of Ontario's Ministry of the Attorney General. He received his BA from Trinity College, University of Toronto (1988) and his LLB from the University of Toronto (1990). Mr. Basu was called to the Ontario Bar in 1992 and practised with the noted Toronto litigation firm Genest Murray DesBrisay Lamek in both private and public law. In 1999, he founded Basu Morris, continuing the practice of civil and commercial litigation. He joined Ontario's Constitutional Law Branch as Crown Counsel in 2003 and was appointed General Counsel effective January 1, 2012. His government work consists of constitutional and human rights litigation, including cases on federalism, the *Canadian Charter of Rights and Freedoms* and the *Human Rights Code*, and advice to government on constitutional issues. He has acted as lead counsel for the Province of Ontario in several notable constitutional cases at the Supreme Court of Canada and other courts and tribunals in Canada. He has presented on constitutional law issues and the practice of advocacy in law schools and at leading professional conferences and has published on both private law and constitutional issues.

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*political inclusion of ethnic communities under Kenya's devolved system*?. Ben has previously worked for the International Committee of the Red Cross (ICRC) as a communication/legal intern and has completed University based research projects for the University of Pretoria and the University of the Western Cape on freedom of information laws and public participation. Ben also participated in several International Moot Court Competitions when he was undertaking his undergraduate studies, international humanitarian, economic and taxation laws and is passionate about contributing to better governance, respect for human rights, inclusive society, peace and security and regional integration.

### **WAIKWA WANYOIKE**

Waikwa Wanyoike is the Executive Director of Katiba Institute, an organization based in Nairobi Kenya which works to promote constitutionalism and the rule of law in Kenya. He practices constitutional law as a public interest litigator and appears regularly at the High Court, Court of Appeal and the Supreme Court of Kenya on groundbreaking constitutional matters. Waikwa has advised government and non-governmental agencies on constitutional implementation and policy reforms. Previously, Waikwa practiced law in Toronto, Canada with an emphasis on criminal, immigration and refugee law, human rights and constitutional law. Waikwa holds a J.D. from Queen's University in Canada. He previously studied at Kenyatta University and York University (Canada). He is an advocate of the High Court of Kenya and admitted and licensed as Barrister and Solicitor by the Law Society of Upper Canada.



# Introduction

By Wanjiru Gikonyo and Conrad M. Bosire

## 1. Background and Objectives of the Book

Judicial power, unlike executive and legislative powers, is not devolved or shared between the national and county levels under the Constitution of Kenya 2010. Yet, the few years of implementing devolution have proved that the Judiciary is a necessary, if not critical, institution to the effective implementation of the devolved system of government. While it is not part of county government institutions, the role that the Judiciary plays in the Constitution makes it a critical and indispensable part of the implementation of the devolved system of government.

Kenya's current constitutional dispensation is based on the doctrine of constitutional supremacy. The implication of this principle is that state organs and institutions are subordinate to the Constitution and are therefore bound and have to abide by provisions of the constitution. This is, for example, different from the concept of parliamentary sovereignty that is applied in the United Kingdom (Yash Ghai explains some aspects of the concept and practice of parliamentary sovereignty in Chapter 2). The Constitution vests the courts with the authority to safeguard the Constitution and specifically empowers courts to scrutinize any laws, actions of institutions and persons and any other processes to determine whether they accord with the text and spirit of the constitution.

As the arm of government responsible for the interpretation of the Constitution, the Judiciary has the important role of giving effect to the constitutional provisions on devolution. The courts are specifically tasked to ensure that implementation accords with the text and spirit of the Constitution. The Supreme Court is given a special jurisdiction to give an advisory opinion (upon a request by a state organ) on any matter concerning a county government. Furthermore, courts have a duty to settle disputes



between the two levels of government and the Constitution specifies the manner and approach that courts should in the event of a conflict between national and county laws. It is, therefore, not surprising that the Judiciary has already handled several matters concerning devolved governance.

Devolution is a core constitutional principle under the current Constitution. The principle of devolution is recognized and provided for right from the founding provisions of the Constitution to the substantive and specific provisions: sovereign power, which emanates from the people, is split between the national and county levels. County boundaries are recognized as the internal state boundaries under the founding provision of the Constitution that declares Kenya's republican status. Furthermore, the principle of distinctness and interdependence of the levels of government is also listed as one of the founding provisions of the constitution. One of the national values and principles of governance in the Constitution is "devolution and sharing of power". There are specific provisions in the Constitution that establish the institutions of devolved government and guarantee their resources, powers and functions.

While the principle of devolved governance is given a 'deep treatment' in the constitution, Kenya has no experience with devolved governance. There were attempts to have a regional system of government (known as *majimbo*) at independence but this system was "strangled at birth".<sup>1</sup> The regional system of government was abolished and replaced by a strongly centralized system of government with an all-powerful president. Local authorities survived the onslaught on sub-national institutions by the newly independent government but were subordinated to the centralized bureaucracy and denied vital resources and powers. Thus, while the Constitution envisages a system where the sub-national level plays an important role in the political and governance processes, the whole system is set against a political and institutional culture of centralization and dominance of the centre in the governance and political spheres.

The context above leads to the inevitable conclusion that for the current constitutional dispensation to take root, political and institutional players have to make a deliberate decision to cede space to county governance in the areas defined by the constitution. Willingness to embrace change and develop a new constitutional culture is, however, not assured. Resistance to the change envisaged in the Constitution leads to conflicts that end up in the courts. Courts are therefore left with the task of facilitating the development of a new institutional and political culture that is in tandem with the current constitutional dispensation.

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1 Y P Ghai 'Devolution: Restructuring the Kenyan state' (2008) 2 *Journal of Eastern African Studies* 211-226.

This book evaluates the role that the judiciary has played or should play in the implementation of the devolved system of government. Courts have handled a number of matters that directly or indirectly touch on counties and the devolved government generally. While the impact of court decisions is as varied as the decisions issued by the courts, the direction and approach taken by courts should be one that enhances and gives effect to the constitutional intentions and objectives of devolved government. The matters that come before the courts usually require the courts to go beyond the plain text of the Constitution and applicable legislation through interpretation in applying the constitutional provisions and laws to concrete disputes. Devolved governance being a relatively new aspect of constitutional governance in Kenya, the courts are now learning and adapting to the new system and its implications to disputes and conflicts between the two levels of government.

However, Kenya is not in a unique situation. From fully federal, semi-federal systems to decentralized and unitary systems, different countries are at different stages of implementation of different systems devolved governance. The approaches of courts from these jurisdictions can provide useful lessons for Kenyan courts. Kenya, for instance, borrowed heavily from South Africa in the design of the devolved system of government. Kenyan courts have made reference to jurisprudence that has been developed by South Africa and relied on some of the principles developed by the courts in South Africa to reach verdicts in similar or comparable issues. While the devolved governance may be structured or approached differently by different countries, the basic feature of this system (sharing powers and resources between the centre and sub-national units) is the same and experiences and approaches from these jurisdictions can enrich the Kenyan process.

While comparative jurisprudence is useful, it is even more important for Kenyan courts to reflect on the local context and grow jurisprudence that not only takes into account the local context but also gives effect to the constitutional purpose(s) of devolution. Kenyans had clear reasons for supporting the establishment of a devolved system of government and the views and intentions expressed by Kenyans have to find their way in the decisions of the courts. The Constitution has clearly captured the aspirations of Kenyans on devolution and it is the duty of courts to ensure that these aspirations are given effect in the disputes and matters that come before the courts.

This book examines the emerging jurisprudence from the Kenyan courts and seeks to consolidate some of the learning and experiences that have come out of the courts. While it may be early to have a complete picture of how the courts

are approaching disputes on devolution, the courts have determined a number of cases and these form the basis for analyzing the emerging jurisprudence. This book looks at specific themes of devolved governance while examining the incipient Kenyan jurisprudence and comparable jurisprudence.

## 2. Constitutional Transformation Through Devolution

The Constitution of Kenya 2010 seeks to fundamentally transform Kenya's state and governance structures. The rationale and purpose of this constitutional transformation is captured in the text of the Constitution. The Constitution contains a list of values, objectives and principles of constitutional governance in Kenya. Furthermore, each chapter of the Constitution begins with a list of objectives of the chapter that are meant to guide the interpretation and application of the respective chapters. The values, principles and objectives in the Constitution are not abstract; they represent real issues and challenges that Kenyans have endured over the years and sought to address through constitutional reform.

One of the fundamental features of the new Constitution is the devolved system of government that comprises of the national government and the forty-seven county governments. The devolved system of government provides for the dispersal of powers and resources from the national level to the forty-seven counties. The reasons for sharing powers and resources between the two levels of government are listed under Article 174. These include: facilitating equitable development and sharing of resources (including access to essential services), enhanced public participation and involvement in governance as well democratic accountability in the exercise of power, national unity through recognizing diversity, and protection of marginalized communities, among other objectives. County governments (as well as the national government) are expected to pursue these objectives through their respective institutions and roles.

The current Constitution was adopted as one of the longer-term measures to address the root causes of the violence that was witnessed in the country following the disputed presidential election results of December 2007. The Commission of Inquiry into the Post-Election Violence (CIPEV) identified three main causes of the violence 2007/ 2008 violence. These included: centralization and divisive use and abuse of state powers and resources, grievances over resources (especially land resources) that took an ethno-geographic dimension, poverty and unemployment (especially among the urban-based youth who were idle and easily manipulated), and political impunity, among other causes.

There is a close link between the objectives of devolution and the root causes of violence identified above. The dispersal of powers and resources through devolution seeks to dismantle the centralization of resources, powers and control; an inherently destabilizing factor in society with politicized ethnic identities such as Kenya's. Devolving power and resources for control by different counties can facilitate national unity by accommodating different groups to participate in state governance. Furthermore, devolving resources to counties across the country and equipping them with the necessary capacity to pursue development and service delivery can greatly address the equity gap in development and access to services. These are the very issues that were identified to be at the core of Kenya's political conflict.

Devolution is, however, not the only means of addressing the issues causing conflict; devolving of power is just but part of the larger constitutional scheme of reforming the state and governance structures in Kenya. There are numerous constitutional safeguards with the same objectives and intentions as the devolved government. These measures are as a result of years of alienation of ordinary Kenyans from governance the subversion of the collective will of the people by successive political establishments. The Constitution recognizes the people as the source of all sovereignty and state power. The Constitution requires institutions that exercise public power to do so in accordance with the will of the people. Democratic principles inform the design of all state institutions, accordingly, there is a clearer separation of powers between the three arms of government, a far cry from the previous constitutional dispensation where the executive, and specifically the President, exercised dominance and control over the affairs of Parliament and the Judiciary.

While the Constitution retained the presidential system from the previous dispensation, the powers of the president were substantially reduced and the remaining ones subjected to multiple checks and controls to ensure accountability. There is a robust Bill of Rights that recognizes a wide range of rights including socio-economic rights, and group rights that never existed in the previous dispensation. There is a whole chapter dedicated to management of public finance and it reiterates the equitable and transparent use of state resources. Devolved governance is, therefore, one of the means through which the Constitution seeks to address the issues that stand in the way of Kenya's march to statehood.

### 3. The Role of the Judiciary in Transformative Devolution

Devolution being one of the core features of the constitution, the manner in which it is understood and implemented is of relevance to the Judiciary.

Constitutional ambiguities and lack of clarity and vital areas of devolved governance sometimes require the intervention of the Judiciary, e.g. through advisory opinions. In some cases, the ambiguities in the Constitution form the basis for conflicts and disputes that in many cases end up in court. The courts also step in and supervise the manner in which institutions understand and carry out their mandate in the Constitution and this ensures that all actions and measures towards implementation are in accordance with relevant constitutional provisions. Within this general mandate, the specific role of the Judiciary begins to emerge.

The Constitution provides a general framework that requires further interpretation in order to guide specific processes of implementation. Indeed, the Constitution cannot cover every single aspect of implementation. However, some of the constitutional provisions require a further and detailed interpretation in order to make meaning in specific processes of implementation. Specific examples here include: the nature and extent of roles given to the two levels of government or other institutions, determination of resources that are allocated or due to the two levels of government, and the conduct of relations between institutions at the national and county level, among other issues. In most of these areas, the Constitution is not clear and courts are sometimes called upon to determine the meaning of the Constitution in specific contexts.

The Constitution requires the two levels of government to cooperate and consult and to specifically employ all reasonable efforts to settle any disputes amicably. Political and institutional actors are therefore required to develop a constitutional culture of negotiation and consultation in the process of implementing the Constitution. However, the implementation process that is unfolding shows that actors involved in the implementation of devolution have not embraced dialogue and consultation as required in the Constitution. Decisions are made or taken by either level without evidence of adequate consultation. The adversarial politics between national and county politicians do not allow space for the genuine consultation. This inevitably translates to real disputes that end up in courts. Some of the disputes that end up in court are of a political nature and courts have, in practice, restrained from muddling into such areas and required the parties involved to negotiate.

The constitutional ambiguities mentioned above sometimes lead to conflicting interpretation of the Constitution by different actors in implementation. Political and institutional actors who oppose the principle of devolved governance choose convenient interpretation approaches that favor their interests. This often leads to conflicts about the meaning of constitutional

provisions and courts have to make a determination. The role of the courts in this circumstances is clear, to provide a clear and objective interpretation of the relevant constitutional provisions. There are instances where the judiciary has made decisions that go against the will of other arms and institutions of government. The Chief Justice in one of the advisory opinions noted thus on the role of the courts:

The Courts must patrol Kenya's constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order.<sup>2</sup>

Indeed, the judiciary is the final arbiter on all conflicts regarding the meaning and application of constitution. This means that courts have a final say on whether any law, action or measure taken in fulfillment of the Constitution is actually within the confines of the constitution. However, the Constitution also requires public institutions and persons in positions of responsibility and constitutional implementation to avoid conflicts and instead seek a common and collaborative approach to implementation of the constitution. The Constitution generally delineates the roles and responsibilities between the different arms and institutions of government.

#### 4. The Contribution of this Book (Chapters)

##### **Part I: General Context Setting**

While “devolution” is the preferred term to describe Kenya's governance structures, its origin and usage in Kenya and even generally is unclear. The usage of the term varies across states and time. Kenyan courts have, in a few instances, waded into this terminology without clearing the debate. The Chapter by **Yash Ghai** provides a historical and comparative discussion on usage of the term. The only other known country that uses this term to describe its sub-national governance arrangements is the UK and the chapter by Ghai provides the historical background to the usage of this term.

The objectives of devolved governance, as earlier stated, are born of challenges that Kenyans sought to address through the constitutional review process. Kenya's socio-economic inequalities are traced to the colonial policy of segregated development that favored areas where Europeans had settled. Despite rhetoric to ensure equity, the independence and successive post-

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<sup>2</sup> *Senate v National Assembly* (2013) eKLR, para 161.

independence did little to address these inequalities. Devolution is seen as one of the means through which socio-economic transformation can be achieved. **Duncan Okello** presents the socio-economic policies and development path that Kenya has followed and also highlights the potential of devolution to address some of the inequities that were perpetuated by previous governments. While devolution holds the promise of transformation, he argues that the manner of implementation (including the planning and spending of resources) will determine the effectiveness of this transformation.

Politics usually determines the manner in which resources are planned and utilized. Devolved governance is a political process through which the aggregated needs of the people are identified and addressed through systems of county governance. The emergence of political institutions at the county level has led to a multiplicity of political actors. In turn, this has led to multiple conflicts between and within institutions at the national and county levels. While most of these politics have found their way to courts, **Peter Wanyande** makes a case for constructive politics that can facilitate the resolution of disputes of a political nature. Nevertheless, he concludes that the judiciary remains relevant as it offers a normative process through which political conflicts can be resolved and order maintained to ensure a cohesive pursuit of the goals of devolved governance.

## **Part II: Kenyan Systems and Structures of Devolved Governance**

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While Part I of the book is dedicated to general context and background discussions on devolved governance, the second part delves into the specific workings of the devolved governance in Kenya. This part examines various factors ranging from the powers and functions of counties, resources, county institutions and relations between the national and county levels among other factors. County governments came into operation soon after the March 2013 general election and most of this period has basically been a transition period to devolved governance. Efforts during the last two years have been dedicated at establishing basic systems and procedures at the county level.

**Valerie Okumu-Ojiambo** traces how the institutional structures at the county level have evolved and their effectiveness in the discharge of county government functions as well as the emerging challenges within the governance systems at the county. Given that counties are at their incipient stages, the counties are yet to take up their roles fully as envisaged in the constitution. The creation of county executive and legislative arms at the county level has also had an impact on the governance process. In some cases, the institutional separation of roles has led to conflicts, which have in some cases led to disruption of

service delivery and processes at the county level. This has mainly been caused by political competition between the two political arms at the county level.

The effectiveness of counties is, to a large extent, dependent on the nature and extent of functions that they perform. Different factors have determined the kind of powers that counties can exercise and the overall significance of those powers. The constitutional framework for county government functions is generally unclear and uncertain and leaves a lot to the interpretation of courts. The transition period has largely been characterized by negotiations and haggling over national and county functions. There are numerous conflicts over functional boundaries between the national and county governments; a few of these have ended up in courts. **Conrad Bosire** analyzes the approaches that courts have taken to the interpretation of county powers and functions. The emphasis in the chapter is for courts to critically evaluate the Kenyan context and develop appropriate tools that can assist in the interpretation and understanding of county powers and functions.

The Constitution provides an elaborate list of principles to be applied in the management of public finances. These principles bind both the national and county governments; the principles include: openness and transparency, equity, public participation, and efficiency and prudence in the management of public resources. **John Mutua** analyses the constitutional, legal and policy frameworks that provide for county public finance management. There are major challenges in the implementation of the constitutional provisions. The challenges mainly spring from the lack of capacity in the counties and weak supervisory frameworks to ensure adherence to laid down principles and frameworks.

Separation of powers and institutional role is meant to enhance democratic accountability and exercise of power. However, these institutions are required to work cohesively in order to promote common constitutional objectives. The multiplicity of institutions has, however, led to increased conflicts on various issues. **Mugambi Laibuta** makes a case for effective institutional relations between and within institutions at the national and county levels. Important processes such as the management and transfer of functions could be made more effective if institutions at the national and county level developed more effective forums for consultation and cooperation.

**Jill Ghai** discusses the relationship between the Bill of Rights and county governments. County governments are defined as “state organs” and are therefore bound by obligations under the Bill of Rights that bind all state organs. More importantly, performance of some of the functions allocated to the counties can lead actual realization of some of the rights provided for in

the constitution. As state organs, the counties are bound by the Bill of Rights and especially where they have direct obligations to fulfill those rights. Courts have, however, expressed doubt as to whether county governments have the same entitlements under the Bill of Rights as human beings.

### **Part III: Comparative Perspectives**

While Kenya's devolved system of government is relatively new, many other countries around the world have comparable systems where powers and resources are shared between the national level and the sub-national levels. South Africa, from where Kenya has borrowed heavily, has been implementing its system of provincial and local government for close to two decades. Countries adopt different systems for different reasons. Accordingly, even where a state has borrowed certain features, the effectiveness and impact will be different depending on the local context and the prevailing factors. The factors include: the level of development, the size of population and country, the system of government adopted (unitary or federal), the political dynamics, etc.

**Jaap de Visser** examines the impact of the South African Bill of Rights on provinces and local governments. South African courts have over the years developed jurisprudence on the obligations of local governments under the Bill of Rights and even expanded the functional areas of local governments based on the obligations in the Bill of Rights. De Visser argues that this has even led to the development of 'new rights' that are not explicitly provided for in the Bill of Rights. Provisions in the Kenyan Constitution on the construing and application of the Bill of Rights are lifted from the South African Constitution and the approach of the courts is of useful relevance to Kenyan courts.

**Nico Steytler** analyses the interpretation approach that the South African courts have taken in determining provincial and local government powers. The Constitution of South Africa provides for both exclusive and concurrent powers and functions between the three levels of government. Steytler argues that the division of powers and functions is the product of the political dynamics that existed during the negotiations for a new constitution. Local governments were seen as vehicles for local service delivery and development (especially after the racial segregation and the neglect that came with it in black inhabited areas). The courts have therefore given a generous interpretation to local government powers. Provinces were largely a political settlement and compromise due to agitation for stronger regions (especially in Western Cape and Kwa Zulu Natal that were controlled by opposition political movements).

The appropriateness of the South African approach to Kenyan courts is explored under chapter 6.

Canada, the other jurisdiction that is covered under this part, is a federal system with over one hundred years of experience with the implementation of federalism. Powers in the Canadian federation are shared between the three levels: the national/ federal government, the provinces, and local governments. There are vast differences between the Canadian and Kenyan contexts; Canada is a developed country while Kenya is a developing economy. Furthermore, Canada is fully federal while Kenya is described as devolved and exhibits both federal and unitary features in its institutional design. Powers given to Kenyan counties (the equivalent of Canadian provinces) cannot be compared. However, there are lessons that Kenyan courts can draw from Canada. Especially the development of “tools of interpretation” that can be used to understand and interpret national and county powers and functions. **Robin Basu** provides a comprehensive analysis of the principles and tools of interpretation that courts have developed and the impact of court decisions on the workings of the Canadian federal system of government.

#### **Part IV: Supporting Processes for Devolved Governance**

While the primary duty to implement the devolved system of government falls on the organs of government at the national and county levels, the implementation process has a wider stakeholder base than just the respective governments. The principle of devolving powers and resources received overwhelming support from the public during the entire constitutional review process. The Constitution provides for space for the public to participate in county governance. This is one of the means through which the public can monitor implementation and ensure that the intention behind devolved governance is pursued in implementation. **Ben Nyabira** explores the approach of the courts regarding the critical aspect of public participation.

**Waikwa Wanyoike** examines the rationale and objectives of Public Interest Litigation in devolution. The objectives of devolution are meant to enhance development, address inequities, and ensure effective public participation and accountability in governance, among other goals. There is therefore an easy entry of Public Interest Litigation in devolution issues. The Constitution opened space for any person to challenge an issue before courts and civil society organizations have been able to participate in numerous cases on devolution that have often come before the courts. Using examples from these cases, Waikwa demonstrates how Public Interest Litigation has enhanced the effectiveness of implementation of devolution in the brief period that the system has been in place.

The civil society is a central feature in Kenya's governance sphere. Indeed, the civil society movement played a major role in ushering in the current constitutional dispensation. **Wanjiru Gikonyo** provides a rich historical discussion of the journey that the civil society has walked in the constitutional reform process. There is no doubt that the Constitution has opened and recognized more space for civil society participation in governance. For instance, a number of cases on devolved governance have had a strong and visible participation of the civil society. After providing a comprehensive and contextual meaning of the term 'civil society', Gikonyo proceeds to identify spaces for participation in the current system of devolved governance.

As county governance takes root in Kenya, courts will have more issues and matters to handle and determine on devolved governance. While courts have demonstrated readiness to defend the Constitution and ensure proper implementation, there is need for continuous reflection on the kind and quality of jurisprudence that the courts will develop regarding devolved governance. The path that Kenya has trudged is all too familiar to ordinary Kenyans. Courts should be alive to the struggles that Kenyans have had and how they sought to address these challenges through devolving power and other means that are provided for in the constitution. This book provides a preliminary assessment of how courts have set off to play their role in devolved governance. The comparative jurisprudence covered in this book also seeks to highlight relevant and applicable experiences that can enhance effectiveness in implementation.

# Comparative Theory and Kenya's Devolution

By Yash Ghai

## 1. Prologue

Devolution is one of several terms which are used to denote some sharing of state power between a central government and governments of lower level units (the other terms are federation, regionalism, autonomy, and decentralization). Apart from Kenya, Great Britain is the only other country which uses this expression as a 'term of art'. I start with the British experience.

If comparative studies help us to understand our own institutions and fortunes — as the topic assigned to me suggests — then let me start the history of devolution in Great Britain. A great deal of British internal history is intertwined with the establishment and dissolution of devolution. In this study, we also learn about the emergence of the state, from the period when a monarch could be the head of two or more separate states. Of greater interest to us is the manner in which these kingdoms were integrated into a tight unitary state, and then in recent years, the relationship between the old kingdoms was modified by the autonomy of Scotland, Ireland and Wales.<sup>1</sup>

The politics of both integration and devolution are interesting, how Ireland and Scotland resisted integration, and how England pushed integration for the most part, and managed to use English institutions, suitably modified, to accommodate the unitary state — though not perceived by the others as "suitable". Great Britain then went into a long period of centralization, with London as the place of government and increasingly of the economy. With the contemporary popularity of autonomy,<sup>2</sup> the unitary basis of the United Kingdom has been challenged by Scotland, Ireland and even Wales — while

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1 Only the northern part of Ireland was involved, the south had already achieved its own independence as the Irish Republic — Catholics leaving the predominantly Anglican Britain.

2 For a recent study of the popularity of autonomy/devolution, see Y Ghai and S Woodman (eds), *Practising Self-Government: Comparative Study of Autonomy Systems* (2013).

the English seem content for the time being to maintain, for themselves, a unitary state, a situation which is likely to be untenable with the increasing devolution of other parts of the UK.<sup>3</sup> The question now facing the country is whether the autonomy of Scotland, Wales and Northern Ireland is sufficient to maintain the unitary state of the UK — highlighting the vicissitudes and dynamics of devolution. It is a problem facing many other states: does autonomy preserve the unity of the state or lead to its break up?

I skip the interesting history of the early period of the emergence of the British state, with the integration of Scotland, Wales and Ireland into the United Kingdom (UK). Instead I focus on the contemporary situation when all these regions have negotiated a special relationship with England.

England, Scotland and Wales were governed as one entity for a long time, despite differences in the legal system between Scotland and the other two.<sup>4</sup> Northern Ireland had a special relationship with Britain; it had both its own legislature and government, and representation in the UK Parliament. Towards the end of the last century, Scotland — once an independent kingdom before it united with England — renewed its demand for fresh autonomy. In 1998, Scotland obtained its own elected legislature and government, with significant law making powers. Even in areas reserved to the UK, there was an understanding that the Scottish legislature would be consulted in advance of such laws being made. However, under the British rule of parliamentary supremacy, the UK Parliament can override Scottish law. Of course, even this provision — requiring consultation of the Scottish Parliament — can lawfully be ignored by the British Parliament.

In 2012 the Scotland Act gave further powers to Scotland, by restricting matters on which the UK Parliament could pass law. But more importantly, that Act transferred very substantial power to raise revenue to Scotland so that it now relies primarily on funds it raises itself.<sup>5</sup> A substantial section of the Scots did not find these powers sufficient and demanded independence. A referendum in Scotland was held in 2014 to determine whether there was sufficient support for secession; the majority voted to stay within the UK against a large, vocal minority.

Wales also has its devolution, though not as substantial as in Northern Ireland and Scotland — as Wales is more integrated with England. Until recently, there

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<sup>3</sup> Perhaps the first step towards a separate government for England was taken in October 2015 when Parliament agreed that in matters which concern only England, only MPs representing English constituencies would be allowed to vote.

<sup>4</sup> Bingham Centre for the Rule of Law, *A Constitutional Crossroads: Ways Forward for the United Kingdom* (2015) 9.

<sup>5</sup> For an account of the devolution of powers in Scotland, see C Himsworth, 'The autonomy of devolved Scotland' in Y Ghai and S Woodman (eds), *Practising Self-Government: A Comparative Study of Autonomous Regions* (2013) 349-382.

was little demand in Wales for devolution. Arrangements in Wales have come closer to the Scottish in recent years. It now has law making powers as of right — previously it had to seek the permission of UK Parliament on an *ad hoc* basis — and the legislature and the executive are separated from the original local government model. The highest degree of devolution belongs to Northern Ireland, due to its different history. Scottish and Welsh people have for long felt themselves as British, but Northern Ireland, as part of Britain, has had a chequered history, accompanied by considerable violence and deaths — based on religious differences, and the continuing resentment of separation from the Irish Republic. The troubles in North Ireland had taken on an international dimension, quite apart from the specific differences between Britain and the Republic of Ireland.<sup>6</sup> There was also the question of the relations between the people of the two parts of Ireland, largely with a common history and culture. After lengthy and difficult negotiations, involving London, Dublin and political parties in Northern Ireland, an agreement was reached in 1998 — the Belfast Agreement. It is a complex agreement, one component being the devolution in Northern Ireland; the other the continuing role of London and Dublin through a British-Irish Council; and relations among the people from the two parts of Ireland through the North-South Ministerial Council and other state bodies.

Northern Ireland is different from the other two devolutions in another aspect — there is a measure of power sharing under which appointments to ministries are made on the basis of votes won by political parties (with the First and Deputy ministers chosen from the two leading parties) ensuring coalition government, and the system of voting in the legislature requiring majority support from the two leading (and opposed) political parties on specified topics including the budget and government plans. The purpose of these arrangements — an example of “consociation” — is to promote co-operation among the two major communities, ensure minimum rights to each, and increase national unity.<sup>7</sup>

### **Constitutional Basis of Devolution**

The legal instruments for devolution are Acts of the UK Parliament which cannot bind Parliament because the fundamental principle of the UK constitutional system is parliamentary sovereignty. A great deal of

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<sup>6</sup> Historically the Protestants, “unionists”, have looked to continuing links to, and support from, London; the Catholics, “nationalists”, have wanted re-unification with the Republic.

<sup>7</sup> It is interesting that when KADU made its claims for minorities at independence, apart from majimbo, it asked for power sharing at the national level. KANU opposed it; it was not adopted. The National Party in South Africa developed a version of “consociation” when things got difficult, to ward off genuine democracy—not something that ANC was willing to live with, other than as transitional measure.

constitutional practice in the UK is based on “conventions” or understandings as to how power would be exercised.<sup>8</sup> It is also most unlikely that the wishes of the Scottish or Welsh legislature would be disregarded in Westminster — especially given the democratic nature of British politics. A report by the Bingham Centre for the Rule of Law<sup>9</sup> says that “Inter-governmental relations in the United Kingdom are characterized by informality and to the extent to which are regulated at all, are regulated by convention, concordat, memorandums of understanding, and guidance notes.” The report also says that “Much of the MoU is concerned with dispute resolution”, noting that few disputes have been taken to courts and “some may not be susceptible to legal resolution in any event.”<sup>10</sup> Despite the rule of parliamentary sovereignty, courts in Great Britain have tried to develop some basic constitutional principles; though without great consistency because senior judges are disagreed on how far they can interfere with parliamentary law.<sup>11</sup>

## 2. Comparison

The comparison of Kenya with the UK is undertaken not because both use the term “devolution”, but because the UK experience helps to deepen our understanding of its dynamics. First, the terminological issue: to describe a system as federal or devolution does not help much, for within each there can be enormous differences. In order to understand the true nature of a system we have to turn to the constitution or laws that establish and define the system. There is then the question of the status of the law that establishes devolution or federation, particularly whether it is the constitution or other species of law. The status in Britain is, at best uncertain — see the discussion in the Bingham Centre report on the cases — but there is no doubt about the constitutional status of devolution. The British legal cases are interesting for another reason: the discussion in the courts is largely about the law. In practice, the relations between the centre and units can be determined significantly by understanding how the legal provisions governing their relationship would actually be applied. I have mentioned above that, though the United Kingdom Parliament could pass a law on a matter without the approval of the legislatures of the other, it is extremely unlikely that it would do so. The Kenyan system is too new for such conventions. However, the Kenya constitution gives more directions on how the relationship between the

<sup>8</sup> G Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (1984).

<sup>9</sup> Bingham Centre for the Rule of Law *A Constitutional Crossroads: Ways Forward for the United Kingdom* (2015) 9.

<sup>10</sup> The somewhat confused jurisprudence of British courts on devolution is well documented in the Appendix, ‘The Case Law on Devolution’ in Bingham Centre for the Rule of Law *A Constitutional Crossroads: Ways Forward for the United Kingdom* (2015) 59.

<sup>11</sup> A useful summary of the issues and approaches is contained in Bingham Centre for the Rule of Law *A Constitutional Crossroads: Ways Forward for the United Kingdom* (2015) 59-66.

national and county governments should be governed — such as that these governments “shall conduct their mutual relations on the basis of consultation and cooperation”<sup>12</sup> so that going the courts should be a last resort.

As is clear from the United Kingdom experience, within a single country, there can be different motives for devolution in different parts. That in Northern Ireland, strongly influenced by ethnic conflict, followed by years of what amounted to civil war, provided not only autonomy for the region but also a power sharing formula where the two major and bitter antagonists would form a joint government. Reasons in Scotland and Wales were less drastic, the former feeling that the south — England — dominated it and its petroleum riches, while in Wales there was a sort of feeling that it tended to be ignored in United Kingdom politics and practices. The distinctiveness of the institutional arrangements of Northern Ireland devolution points to a frequent cause of devolution in the settlement of ethnic differences or conflicts. In recent years, as opposed to older federations, a common reason for devolution or federation was to accommodate diversity, giving each sizeable community its own governance for matters of special concern to them. These types of differentiation are referred to as “asymmetry”/ “asymmetrical”.

A not unimportant feature of the negotiations for and establishment of devolution or autonomy — that of foreign or international engagement — was a feature of Northern Ireland. A number of mediators from overseas, including South Africa, played a role, but it was the engagement of the Irish Republic that was crucial. In the re-organization of Eastern Europe after the collapse of communism, the role of the European Union and the United States of America was critical. “Outsider” engagement is not unusual when the people of the neighboring state are of the same religion or language as the community which is seeking some degree of self-government. Another feature of diverse groups demanding special status, known as asymmetry, is also well demonstrated in the different solutions in UK for the three regions. Quebec in Canada and Kashmir in India are good examples as well.<sup>13</sup>

These elements were also present in Kenya, at the time of independence when claims by minority played a critical, if not always successful, role in Kenya. Asymmetry was canvassed in the run up to independence in Kenya, with special claims from the Coast and from northern Somalis, as all the units with the same arrangements were being considered under *majimbo*.<sup>14</sup>

<sup>12</sup> Constitution of Kenya Article 6(2) and Article 189.

<sup>13</sup> See, R Simeon and L Turgeon, ‘Seeking autonomy in a decentralized federation: the case of Quebec’ in Y Ghai and S Woodman (eds), *Practising Self-Government: A Comparative Study of Autonomous Regions* (2013) 32-61; J Cottrell, “Kashmir: The vanishing autonomy” in Y Ghai and S Woodman (eds), *Practising Self-Government: A Comparative Study of Autonomous Regions* (2013) 163-199.

<sup>14</sup> See Y P Ghai and J W P McAuslan, *Public Law and Political Change in Kenya* (1970)184-188.

Somalis demanded secession, wanting to join their kinfolk in Somalia. And because all Somalis professed the Muslim faith, religion was another factor in their demand. The Italian government played a minor role in the settlement of this dispute, but with less success than the Irish Republic in the case of Northern Ireland. The British response to Somali secessionists was to offer them a region of their own, with the mergers of Somali dominated districts. Another group which saw itself distinguished by history and religion were the Coastal people, with their strong links to Zanzibar. They too demanded secession; instead Britain and the Sultan of Zanzibar agreed to transfer sovereignty over the coastal strip to the new state of Kenya, with some essential safeguards for the Muslim community. The Maasai wanted special arrangements, as did the European settlers (the latter wanted the constitution to provide for intervention by the British government if guarantees to them were violated). Few of these demands were met; the constitution provided for 7 provinces with similar structures and power, with the coast as one province, and the northeast Somali districts as another. Boundaries of all provinces (and districts) were drawn on the principle of ethnic (tribal was the word used then) by a team of British officials. The current constitution adopted the 1963 district boundaries for counties — thus incorporating, though perhaps not consciously, the ethnic factor in devolution.

The emphasis in the UK on consultations and a body specializing in developing consensus is not very different from the law in Kenya (and South Africa), what we call inter-governmental relations (this is discussed in detail later in this chapter). But in Britain, it is partly to do with the rigidity of the rule of parliamentary supremacy. Although Kenya has its constitution as fundamental and enforceable law, and provisions on the relationship between the central and county governments, there is an elaborate scheme for the settlement of disputes between the central and county governments. The Kenya model is drawn largely from South Africa (where it has not been needed much due to the dominance of the ruling party, the African National Congress, at both the centre and provinces).<sup>15</sup> The emphasis on inter-governmental mechanism for dispute settlement is due to what is supposed to be the interdependence of the two levels of government and the constitutional injunction to “conduct their relations on the basis of consultation and co-operation” (Art. 6). However, in the short time the system has been in effect, politicians have shown a predilection to rush to courts rather than sit down and settle their dispute.

The relationship between the national and county governments is spelled out in considerable detail in the constitution, with the Senate carrying major

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<sup>15</sup> For a comparative study of devolution in Kenya and South Africa, and Kenya's debt to South Africa, see N Steytler and Y Ghai (eds), *Kenyan-South African Dialogue on Devolution* (2015) (forthcoming).

responsibility for the protection of devolved government — unlike the House of Lords. The powers and functions of devolved units in the United Kingdom are infinitely larger than in Kenya — despite the lesser protection in law. All the devolved counties have similar powers unlike in the UK. There is a big difference in the number and size of the units. Kenya's devolution is entirely the work of Kenyans, unlike the Northern Ireland's devolution — though the Panel of Eminent African Personalities played some “encouraging” role in Kenya<sup>16</sup>.

Another major difference between the United Kingdom and Kenya is that the national or United Kingdom Parliament makes laws for different devolved areas, but its jurisdiction to make laws differs from one area to another. For instance in England where it makes laws on everything, it should be noted that in a referendum some years ago, the counties in England voted against the option of devolution. Consequently, the laws made by the United Kingdom Parliament apply unequally through the country. Another anomaly, until recently, was that members of the United Kingdom Parliament from Scotland, Wales and Northern Ireland voted for laws applying exclusively in England!<sup>17</sup>

### 3. Why devolution?

Before we proceed to a more structured comparison of devolution, autonomy, and federation, I discuss briefly the variety of circumstances in which resort is had to them. I use the word “autonomy” to cover situations where there is a division of powers and functions between the central/national governments and sub-national governments, with substantial measure of guarantees. Sometimes autonomy is used in a specific sense of only one or more parts of the country having guaranteed functions and powers and a government to exercise these.<sup>18</sup>

The most generic term is decentralization. It covers a number of ways through which the state is re-structured and power shared<sup>19</sup>. The first distinction is in the constitutional status of the powers or functions transferred to

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<sup>16</sup> See African Union (The Office of the AU Panel of Eminent African Personalities), *Back from the Brink: The 2008 Mediation Process and Reforms in Kenya* (2014), especially chapter 8, 'The Journey to a New Constitution'.

<sup>17</sup> The problem of MPs voting on laws which affect areas with which they have no connection was raised a long time ago, called the 'West Lothian problem' but not much was done to resolve it until October 2015 when Parliament passed barring MPs from Northern Ireland, Wales and Scotland from voting on legislative proposals on topics which had been delegated to them.

<sup>18</sup> I once defined autonomy as follows “a device to allow ethnic or other groups claiming a distinct identity to exercise direct control over affairs of special concern to them while allowing the larger entity to exercise those powers which cover common interests” in Y Ghai, 'Ethnicity and autonomy: a framework for analysis' in Y Ghai (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic* (2000) 8-11.

<sup>19</sup> For a detailed discussion, see Y Ghai 'Introduction: Nature and origins of autonomy', in Y Ghai and S Woodman (eds), *Practising Self- Government: A Comparative Study of Autonomous Regions* (2013).

another level: Is it a purely administrative transfer so that the powers and functions can be recalled by the central government at any time. This form of transfer happens most commonly in relation to local authorities under a centralized system. The term “decongestion” refers to the situation where the administration of laws and policies is vested in national officials deployed to the regions or that function which is given to local institutions.

In a genuine system of power sharing, the powers and functions transferred to an area or “region” are protected against repeal or removal, usually by entrenching them in the constitution. There are variations in the legal/constitutional form of region to which power is transferred. But the difficulty with this definition is that autonomy sometimes results from independent states coming together as one state, but retaining some powers themselves. Or power is transferred to a “higher” level — an international entity — the clearest examples being the European Union, and the East African states in the days of the East African Community. But the most common examples, the ones relevant for our discussion, are transfers within the state, of which the best known is federation, under which there is a central government and a number of regions — or states or provinces, the title varies — each level with its own powers, functions and resources which are established and protected in the constitution.

Some federations are formed by creating regions within the state through “disaggregation”, such as Nigeria. Some are formed by separate states coming together “aggregation” as in the case of the United States of America, Australia, Switzerland and Germany. While in others, such as, India and Canada, a combination of the two. The diversity of federalism — and the difficulties of generalizing — is shown by these two methods of the formation of a federation. In South Africa and Kenya, a strong view that federalism divides a state led to firm resistance to it, while in other countries, federalism is seen as “uniting”, including the United States, Germany, Australia, India and Ethiopia. The Canadian experience shows the tendency towards uniting and breaking.

The way in which a federation has come about affects the division of power and its implementation. The aggregation may be consensual, while that by disaggregation is sometimes the result of internal conflicts, and therefore problematic. In general, all the regions have the same powers — though not necessarily the same internal structure — and relate to the centre in the same way. In other words, the relationship of regions to the centre is symmetrical. The division of power, the structure of institutions -including the judiciary — and the relations between them vary greatly from one federation to another.

In some states a region has a special relationship with the centre — different from the rest of the country. This is generally defined as “autonomy”<sup>20</sup>. Often its purpose is to protect the rights, customs and culture of a minority community, and applies to small, compact parts of the country. Autonomy in this special meaning can exist in a federation — and does in many federations —including Canada, United States, India, and Australia, as well as in what are often defined as “unitary” states, such as Finland, China, Denmark, France, Italy, the Sudan before secession of the south, and Ethiopia before Haile Selassie swallowed Eritrea. An interesting example of a state starting with a system of autonomy and moving to federalism is Spain after Franco —because the constitution gave choices on degree of self-government to the regions, subject to approval by the national legislature.<sup>21</sup> Although not always the case, the autonomy is generally set out in the constitution or special law.

### Provincial Government, Devolution, and Federation

Where does Kenya's county system fit into this framework of decentralization? Before one answers this question, it would be necessary to understand what is the purpose or value of the question<sup>22</sup>. We have noted that there is as great a variation between federations as there is between devolutions, in a host of matters. Therefore, to say, for example, that a country is federal tells us little about the division of powers and resources, number or size of regions, structure of institutions, relationship between the centre and regions, the mode of inter-government consultation, settlement of disputes, and the interpretation of the constitution and laws. In contrast, the reference to ‘devolution’ in the 2013 Zimbabwean Constitution suggests at most a decentralized form of government as no powers are constitutionally assigned to provinces or local government (similar to the so-called Wako draft in Kenya).

During the Lancaster House negotiations on Kenya's independent constitution, there was a vehement denial on the part of both the British and Kenya delegates that *majimbo* was federal —just *majimbo*<sup>23</sup>, although it provided much greater space and powers to regions than the 2010 constitution does to counties . And members of the current Kenya judiciary prefer to think of the present devolution in terms of “a unitary state”. In one Advisory Opinion

<sup>20</sup> There is growing literature on this subject, but I would advise gentle readers to study two books that I have edited Ghai 2000, above n 15 or co-edited, Ghai and Woodman, above n 1.

<sup>21</sup> See D Conversi, 'Autonomous Communities and Ethnic Settlement in Spain' in Y Ghai, (ed), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (2000) 122-138.

<sup>22</sup> There is of course one clear political factor: in the minds of many, federalism is associated with a substantial sharing of powers, resources, and a measure of autonomy, so that after negotiations on the structure, one group has an interest, to impress its followers, to designate the system as “federal” while the other, to, reassure its followers, designates it as “local government” or even “devolution”.

<sup>23</sup> See Chapter 3, 'Majimbo takes Centre Stage' in R M Maxon, *Kenya's Independent Constitution: Constitution-Making and End of Empire* (2011).

the Supreme Court held unanimously that Kenya was not a federal state. They said, “On the question whether election date is a matter of “county government”, we have taken a broader view of the institutional arrangements under the Constitution as a whole; and it is clear to us that an *interdependence* of national and county governments is provided for — through a devolution-model that rests upon a *unitary*, rather than a federal system of government. Article 6(2) of the Constitution provides that: “*The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and co-operation.*”

The second case where the Supreme Court took this line also involved an Advisory Opinion on the relationship between the Senate and the National Assembly on the budgetary process for counties. The majority decision by Justices Tunoi, Ibrahim, Wanjala and Ojwang stated the following:

It is important from the onset to put into context, the structure of the county unit within the model of devolution crafted under the Constitution. The devolved system in Kenya is based on a unitary system of Government that decentralizes key functions and services to the county unit. The Kenyan State model is not federal in nature and does not envisage the workings of a county as a politically and financially independent state. The role of the counties then is laid out in precise and exact terms under Chapter Ten of the Constitution.”<sup>24</sup>

In a separate judgment, Justice Ndungu endorsed this view. She said:

It is important from the onset to put into context, the structure of the county unit within the model of devolution crafted under the Constitution. The devolved system in Kenya is based on a unitary system of Government that decentralizes key functions and services to the county unit. The Kenyan State model is not federal in nature and does not envisage the workings of a county as a politically and financially independent state.<sup>25</sup>

In neither case was it necessary for the Supreme Court to decide whether Kenya is a federal state or not. The judges would have been wiser not to raise the issue, especially as the judges concerned do not seem to have any understanding of it, and do not make any reference to the numerous scholarly studies on the subject. By virtue of their interpretation, two of the most vibrant federations, Germany and India, would count as unitary states!

On the other hand, the approach taken by Chief Justice in this case is to the

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<sup>24</sup> *Speaker of the Senate v Speaker of National Assembly* [2013]eKLR.

<sup>25</sup> *Speaker of the Senate v Speaker of National Assembly* [2013] eKLR at para 265.

point: looking to history, the objectives of devolution and its place in the overall structure of the state. In a separate judgment, he said:

The Constitution of 2010 was a bold attempt to restructure the Kenyan State. It was a radical revision of the terms of a social contract whose vitality had long expired and which, for the most part, was dysfunctional, unresponsive, and unrepresentative of the peoples' future aspirations. The success of this initiative to fundamentally restructure and reorder the Kenyan State is not guaranteed. It must be nurtured, aided, assisted and supported by citizens and institutions. The Constitution's provisions on Devolution were key pillars in the deconstruction process. Indeed, a reading of the *Final Report of the Constitution of Kenya Review Commission* (CKRC) shows that, vast segments of the Kenyan population felt that they were victims of the state, either in terms of *political repression*, or in terms of *developmental exclusion*. Thus, the Constitution of Kenya, 2010 was attractive to a large number of Kenyans for many reasons. In particular, devolution was instrumental in mobilizing support for the Constitution in the referendum, because many people perceived its dispersal of economic and political power as an act of *liberation*. There is a large section of our society for whom the new Constitution is coterminous with devolution. It denotes *self-empowerment, freedom, opportunity, self-respect, dignity and recognition*.<sup>26</sup>

In South Africa, the issue of the designation has been controversial. The Africa National Congress has for long denied that its system was federal, though perhaps the opprobrium of federalism is fading somewhat.

Consequently, we consider that the best way to understand the nature and structure of a state is to study the constitution and laws on the subject. The South African constitution designates the regional system as “provincial government” which is descriptive) and the Kenya constitution designates it as “devolution” (which is a concept). If we were to try to understand the two systems and to compare them following these labels, we will get nowhere. But if we read the constitutions, we will note many similarities, and might even detect some plagiarism — Kenya copying from the South African constitution! After a careful reading of the two constitutions, we would not only see the similarities, but we might be inclined to say that both countries are federal! They have many characteristics that we associate with federalism: a written constitution recognizing different levels of government, the separation of national government and provincial/county governments,

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<sup>26</sup> *Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR.

a second national parliamentary chamber to safeguard the interests of the provinces and counties ('regions'), the jurisdiction of the courts to decide on legal disputes between the central and regional government, division of powers and functions, distribution of national revenue between, and the entrenchment of the articles dealing with "provinces" and "counties". A large part of both constitutions is taken up with devolution matters.

But before we get carried away with the "federalness" of these states, we should look again at the distribution of state powers and functions, and the raising and distribution of financial resources. We might think that these are no more, and in some cases less, than the powers and resources that local governments enjoy in numerous countries without any constitutional status. The powers of the devolved governments and their ability to raise revenue are infinitely smaller than those of Scotland or Northern Ireland (described as 'devolution') yet the *status* of counties/provinces (including constitutional entrenchment) is clearly superior to them. Moreover, at least in Kenya, the central government can suspend a county government for ninety days and then hold fresh elections. We might then conclude that South Africa and Kenya are not 'real' federations, though they may have the structure of one.

The systems of government, whether federal or devolutionary, are complex, and their nature, and more so their functioning, depends, in addition to the law, on other factors, such as the objectives of devolution, organization of political parties, modes of negotiations and settling of differences, procedures for transferring powers from one level of government to another level, the political importance of devolution regardless of precise powers, and so on.

#### 4. Kenya's Devolution in a Comparative Perspective

We have seen considerable overlap in purpose and even in structures among federations, devolution, and autonomy. There are also significant variations within each of these options. So it is not possible to designate them on the basis of the degree of autonomy. In an unpublished paper presented at a Constitution of Kenya Review Commission (CKRC) workshop on devolution by the distinguished (and the late) scholar Richard Simeon, he outlined the different approaches in federations to a number of issues. I use his model to illustrate where Kenya's devolution fits, under each issue.

- (i) *In some federal systems constitutional powers and/or political weight are tilted towards the central government, making them relatively centralized. In others they tilt towards the provinces or at least to an equal partnership of federal and provincial governments, as in Canada.*

It is clear that in Kenya the tilt is toward the centre. A large proportion of state functions and powers are retained at the centre. A significant number of powers are concurrent, with the county laws prevailing in case of conflict with national law, but subject to national law in certain circumstances which give the centre considerable scope for overruling county law — Schedule 4 and Article 191 (2) and (3) of the Constitution of Kenya 2010.<sup>27</sup> There is no list of concurrent powers; Article 186 (2) says that a concurrent power is that which appears in the list of both national and county government. And then there is somewhat puzzling statement in Article 186 (4) that for “greater certainty, Parliament may legislate for the Republic on any matter”.<sup>28</sup> Under Article 115 the President, presumably representing the national government, has limited power of veto over Bills — which covers financial matters which determine allocations to counties. Perhaps the most important departure from the normal federal law is that under Article 192<sup>29</sup> the President can suspend a county government and presumably administer it, for a maximum of 90 days when new elections must be held. However, there are some safeguards, including that there can be no suspension unless an independent commission validates allegations against the county government — what these allegations relate to is not specified — and the Senate authorizes the suspension.

- (ii) *In some, provinces are structured so as basically to represent and empower distinct ethnic, cultural, or linguistic groups (as in Ethiopia, Nigeria, Spain, Belgium and to some extent Canada and India); in others the design seeks to blur, cut across or minimize such institutionalization of distinct groups - as in South Africa, for example.*

*Majimbo* under the 1963 constitution was undoubtedly devised to protect certain ethnic minorities. The boundaries of the regions and the districts within them were drawn up on the principle of ethnic homogeneity.<sup>30</sup> Ethnicity played less of a role in the 2000 review, and does not feature prominently in Article 174 on the objects of devolution. There are references to “recognizing diversity”, and to “communities” without reference to ethnicity, and if the

<sup>27</sup> All references to an “Article” in this Chapter are to the Constitution of Kenya 2010.

<sup>28</sup> Perhaps the person who drafted this provision was misled by section 44 of the South African constitution which says, *inter alia*, that the National Assembly has the power “to pass legislation with regard to any matter...”, and over looked the qualification also in the same section, which prohibits it from making laws on matters listed in Schedule 5 (which list exclusive powers of provinces).

<sup>29</sup> The power given to the head of the central government to suspend or dissolve a county government is a sign, at the least, that may be deemed to reflect the weakness of devolution. But India, widely acknowledged to be a federation, also has provisions for the suspension of a state government, but beyond two months subject to approval of the two houses of parliament, (section 356, Constitution of India 1950). This power was massively abused by the central government for political partisan purposes. In 1994, the Supreme Court strongly condemned the wanton use of this power (*S. R. Bommai v. Union of India* ([1994] 2 SCR 644) and ruled that Article 356 is an extreme power and is to be used as a last resort in cases where it is manifest that there is an impasse and the constitutional machinery in a State has collapsed. Since then, there have been only a few instances, mostly in Kashmir (see Cottrell above n 13). In Kenya, which has greater safeguards against the abuse of this power, a commission of enquire did find that there had been major abuses of power against the Governor by the legislature and recommended suspension. But the president rejected the recommendation.

<sup>30</sup> See Y P Ghai and J W P McAuslan, above n 11.

boundaries are altered, then among the several factors, including “objects of devolution”, to be taken into account is “historical and cultural ties” in Article 188(2). The fact that in some counties there may be one dominant community is reflected in Article 188(e): “to protect and promote the interests and rights of minorities and marginalized communities”<sup>31</sup>. The objectives are consistent with the principle of “national unity in diversity” stipulated in the preamble, and ethnic considerations are to be subordinated to the importance of nation building. This is obvious in the prohibition against using a local language in the business of counties, which are restricted to national official languages, Swahili and English, in Articles 7(1) and (2).

However, the boundaries of counties specified in the constitution (Art. 6(1) and Schedule 1), are principally those established for districts under *majimbo* in the independence constitution, when the criteria was “tribalism”<sup>32</sup>. In the years since then, each of the presidents had further partitioned many of the districts (so that by the early 2000s, the number of districts had increased to 210 from 46), largely justified on the basis of tribal homogeneity, given the flexibility in the notion of tribe (or ethnicity as Kenyans now call this phenomenon) but essentially to win support of the community benefitting from the division. Most of these partitions were done in disregard of the law, and in 2009 Justice Musinga ruled them unlawful<sup>33</sup> — but to no effect. In 1992, a law was passed identifying lawfully established districts, numbering 47, based largely on the 1963 boundaries. The Committee of Experts adopted these districts — and called them counties — perhaps without realizing that they were based on ethnic lines. So we do have a sort of contradiction—in the midst of nation building when we want to minimize the role of ethnicity as a political factor, we end up with most counties having an ethnic majority.

(iii) *In some, national and sub-national governments have distinct and separate lists of powers (as in Canada); in others many or most powers are shared or concurrent (Germany and South Africa). In some, legislative and implementation powers are combined, in others, again as in Germany or South Africa, the power to write the law and the power to implement it lie in separate hands.*

Kenya has in effect three categories of powers and functions, one for the national government, another for the counties, and the third that are concurrent. If the

<sup>31</sup> The County Government Act(2010) requires that in counties with an ethnic majority, one third of the public servants must come from minorities.

<sup>32</sup> A Commission was set up to seek views on the boundaries of the regions for a system of regionalism. Its terms of reference were to divide the country into six regions, and Nairobi, and it had to take particular account of the existing administrative provinces, as well as the wishes of the people. *Report of the Regional Boundaries Commission* Cmnd. 1892 (1962)

<sup>33</sup> *Monanya v AG* [2009]eKLR.

national and county laws clash, the national prevails in circumstances listed in Article 191 which are considerably wide ranging. A problem is that there is no express list for the concurrent. When a matter appears in both the national and county lists, it is deemed to be concurrent. It is an unusual way to define concurrent powers, especially as the national and county lists have only one common, precise, item (“betting, casinos and other forms of gambling”). “Agriculture, including (a) crop and animal husbandry; (b) livestock sale yards; (c) county abattoirs; (d) plant and animal disease control; and (e) fisheries” appear in the county list. But the national list includes “Agricultural policy”, “Veterinary policy”, “Protection of the environment .... including (a) fishing, hunting, and gathering; (b) protection of animals and wildlife. How do these three items affect the scope of county powers over “Agriculture” and how does the “protection of animals and wildlife” by the national government affect the responsibilities of “Animal control and welfare”? Similar comments can be made about health: a long list of responsibilities of counties, and then in the national list: “Health policy”. Also, counties have the responsibility to plan and develop housing, but the policy about housing is with the national government.

The result is that compared with many other federal or autonomous areas, the counties have little effective policy functions, especially if the national government becomes aggressive about its “policy” functions. Policies and often laws are made whose implementation would fall on the counties. This subordinate position is also reflected in the arrangements for the funding of the counties: they will be able to raise only a minute proportion of what is needed to discharge their responsibilities. They are thus dependent on contributions from the nationally collected revenue which is somewhat narrowly defined. Article 203(3) of the constitution promises “not less than fifteen percent of all the revenue collected by the national government” calculated on the “basis of the most recent audited accounts of revenue received, as approved by the National Assembly”. The Assembly can — and so far has — manipulated this formula to the detriment of counties. So, one might ask, is county government a sort of glorified local government, with the trappings of a meaningful, independent and distinct entity?

- (iv) *In some, fiscal and revenue-raising authority is distinct from legislative authority, with the centre controlling all major revenue bases; in others provinces have considerable autonomy and responsibility for raising their own funds that will finance their programs.*

It is clear from comments in the previous section that counties are very dependent on transfers from the national revenue. To be fair, one must

acknowledge that it would make little sense to saddle 47 counties with the task of raising and collection of revenue. The constitution establishes an independent and expert commission - the Commission on Revenue Allocation (CRA) – to play an advisory role in the process of allocation of national revenue. The Senate’s primary mandate is to protect the interests of the counties in the parliamentary budget process towards the attainment of the constitutional objective “equitable share” among the stakeholders. Perhaps there are too many stakeholders, and too large a sum deducted from the national revenue before distribution, that counties are unlikely to receive significant sums. The fact that in many counties, most of that meagre allocation is creamed off by members of the executive and the legislature for themselves does not help. Another restraint on the acquisition of resources by counties is that under Article 212, they cannot borrow money unless the national government guarantees the loan, which it might be reluctant to do, both because of its own indebtedness, and because it may loosen its control over the county.

However, it is worth noting that the Senate, representing the counties, has a significant role under Article 217 for the distribution of the national revenue between the counties. It has to take into account the principles in Article 203(1), the advice of the CRA, consult county governors, the Cabinet Secretary for finance, and the general public. But its recommendation has no binding force; the National Assembly has to consider it, but under Article 217(5) it can reject it though with a vote of two-thirds of its members. Even then the Senate can require a joint committee of the two houses to mediate between them.

It is widely considered that a major source of national income is likely to be the extractive industry — particularly oil, gas and rare minerals. An earlier draft of the constitution had provided for the distribution of royalties and other income accruing to the state between the local community where the minerals are located the county and the national government. At some stage of the constitution making process, this provision was deleted leaving the national government as the principal recipient of the various forms of royalties and taxes.

- (v) *In some, law, policy and fiscal arrangements are strongly designed to achieve redistribution and a certain measure of equality among provinces in their ability to carry out their assigned functions; in others, there is a weaker commitment to interregional sharing. Disparities in access to resources, fiscal capacity, levels of development and income and the like are frequent sources of conflict in federations, as wealthier regions seek*

*to retain control; and weaker ones seek a greater share of the national wealth.*

The general ethos of the constitution is consistent with achieving re-distribution and a measure of equality among counties and their ability to discharge their responsibilities and to ensure that the distribution of revenue eliminates economic disparities within and among counties, affirmative action in respect of disadvantaged areas and groups (Art. 203(d), (f), (g), and (h)). Since the main sources of revenue are vested in the national government, it means that the income from most forms of taxes and levies from the economically better off counties will automatically feed into the national revenue and is available for re-distribution. Through the equalization grant established under Article 204(2), “one half percent of all the revenue collected by the national government” is set aside to provide the “marginalized areas” with “basic services including water, roads, health facilities and electricity”. The money so engendered is an affirmative action grant, whose spending priorities are determined by the national government on the advice of the Commission on Revenue Allocation. The amounts available to the marginalized areas, so far, have not been significant.

(vi) *In some, there are strong provisions to ensure that constituent units are strongly represented in the functioning of the national legislature; in others, such as Canada, there are weak mechanisms to achieve this.*

Counties play a limited role in the national legislature in Kenya. The principal source of county involvement is through the Senate, one of the two chambers of the national legislature. The role of the Senate is restricted to issues concerning counties in respect of specified Bills which concern counties, “The Senate represents the counties, and serves to protect the interests of the counties and their governments” (Article 96(1)). Its functions include law making. Articles 109 to 113 describe what “concerning county government” means: there are three items, “affecting the functions and powers of the county” governments”; relating to the elections of members of the county assembly or executive; and financial matters which concern counties. So it is assumed that counties have no interest in broader matters of national interests, in contrast to second chambers in federal states. This restricted role was copied from South Africa which in turn copied it from Germany. This does mean that the Senate plays no role in the bulk of the legislation or policies. Fortunately the courts have taken a broad view of “concerning county government”<sup>34</sup>

The mode of elections (through direct elections in the county) means that some or all senators from a county may have no interest in the position of

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<sup>34</sup> *Speaker of the Senate v the Speaker of the National Assembly* (2013) eKLR.

the government of the county they represent. In fact, it does happen now that some senators come from a different political party than the governor or majority of county members. For this and other reasons, there is also tension between the governor and the senator — which might lead to the senator opposing county government. In Germany and South Africa — on whose model the Kenya devolution is based — a direct link is established between the senator/senators and county governors, for it is the county executive which nominates members to the second chamber.

*(vii) Similarly in some, national party politics integrates and ties together national and sub-national politics; in others the party system reinforces the differences.*

Unfortunately, the style of Kenya politics does not lend itself easily to the analysis implicit in Simeon's statement. Most parties have no clear policies or cohesion within its members. Personal aggrandizement is the politician's highest aim. This is obvious for the quarrels between the governors and senators as well as between senators and national assembly members: who controls money is a more important consideration in forming alliances than political parties. For that obvious reason, the Council of Governors seems, so far at least, to show more unity than members of a political party.

Political alliances are made regardless of ostensible policies, but predominantly to win elections. For example, the predecessors of the leaders of The National Alliance<sup>35</sup> have always been opposed to devolution, from before independence, through Bomas to the present, but the leaders of its partner, the United Republican Party,<sup>36</sup> fought hard for *majimbo* and the current devolution. Institutional interests rather than party interests have so far dominated and fashioned the politics of devolution.

Another factor worth noting is that devolution has led to the formation of locally based parties, though the “national” parties are still dominant. Here the aims for nationally based political parties, cutting across ethnic and locality politics, expressed in the constitution, seem to go against the logic of local politics — especially given the weakness and incoherence of “national parties”.

*(viii) In countries like Canada with separate lists of functions, combined legislative and administrative authority, weak regional representation at the centre and distinct national and sub-national party politics, we can*

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<sup>35</sup> The TNA draws its membership from the Central Kenya region; it is one of the two parties that formed the 'Jubilee Coalition' (together with the United Republican Party). The Coalition won the presidential vote in the 2013 general election.

<sup>36</sup> The URP draws a majority of its membership from the Rift Valley region.

*talk of a divided, and often highly competitive federal system; in others, notably Germany with high levels of concurrent powers, strong regional representation at the centre, integrative party systems at the centre and so on, we can talk of shared or integrated federations.*

Kenya followed the German model — via South Africa. In both these countries, due to the dominance of a few national parties — in South Africa effectively only of the ANC — as well the procedures for the composition of the *Bundesrat*/National Council of Provinces, devolution has indeed been integrative. The same cannot be said about Kenya where there has been considerable tension between counties and the national government. Differences have centered around the issues of money, the continuing, large presence of national government officials in the counties, and until recently the slow pace at which powers were devolved to the counties. So far, the incipient inter-governmental relations mechanisms have been more instrumental in mediating between the national and county governments than other institutions or political parties. But the role in dispute resolution has been minimal, as the governments or officials concerned have preferred to go to the Judiciary, despite the fact that the constitution and supporting legislation provide a major role for consultation and mediation in line with the principle of consultation and co-operation.

*(ix) In some federations, especially in developing countries, central governments or institutions have a considerable role in monitoring the performance of sub-national governments; in others these governments are very jealous of their own autonomy - though in all federations, the courts also play a critical role as umpires of the system.*

There is no doubt that a major role has been given to the central/national government in monitoring the performance of county governments. The presence of a large number of national government officials at various levels in counties (though perhaps of dubious legality), reporting directly to the President's office, presents an effective surveillance. The most striking example of national government control is Article 192 which gives the President (though subject to some controls) the authority to suspend the government of a county, for up to 90 days — and thus also activating new elections.

The role of the judiciary is a major safeguard for counties against the disregard by the national government of the constitution and laws implementing it. Access to courts is easy and — exceptionally for devolution — the Supreme Court can give an advisory opinion on a matter concerning devolution. Some litigation has already taken place, and the courts have clarified the underlying

basis of devolution. The Judiciary has, more generally, interpreted many constitutional provisions to uphold the constitution, clarify the principle of separation of powers, and promote the rule of law.

As mentioned earlier, political parties, unlike South Africa, India and many other federations, play little role in co-operation between the central and county governments in Kenya.

- (x) *In some federations all provinces exercise the same powers; in others there is a considerable degree of asymmetry with one or more provinces exercising a significantly greater degree of distinctiveness, either in terms of the constitution, or in political practice. Asymmetry seems to offer major advantages where, as in Canada, one province is the clear home of a distinct minority, but it is often the subject of much conflict. And where it exists, there is a common tendency for all units to demand the same powers as the most powerful one, thus setting up a dynamic of ‘leapfrogging decentralization, ‘as in Spain today. In some, strong emphasis is placed on putting nation-wide norms and standards in place; in others, more weight is placed on the ability of provinces to enact their own values and preferences. Finally, it is critical to realize that federalism is seldom a steady or a fixed state; federations, rather, are dynamic constructs in which a wide variety of factors result in constant shifts in the intergovernmental relationship. The most fundamental difference in the dynamics that shape the development of a federation is what I call ‘building versus ‘disbuilding.’ Federations are often what we might call a coming together, of previously separate units, as with the Australian or US states, or the European Union recently. But they are also often the result of a ‘coming apart’- in which a once unitary state devolves authority to sub-units, as in Scotland, Spain, Belgium and others. The key question is whether these dynamics are self-perpetuating. Does a ‘coming apart’ find a happy balance in federalism, or does it generate irresistible pressures towards separation?*

Kenya obviously is an example of “coming apart”—unless you want to go back in history, particularly starting with the colonial origins of Kenya, when a “state” was gradually established, drawing within the frequently changing borders, communities until then with their own autonomy and sovereignty. Claims of secession were made by some communities who had been so integrated, or more accurately, lumped, with the rest of the diverse set of communities. This was a major issue at the time of independence—and one factor which pushed the idea of *majimboism* as a sort of compromise. But by the time the 2010 constitution was adopted, nearly half a century

later, the situation had changed, and the state had asserted its control over its entire territory—and established a highly centralized government and administration. So, adopting Simeon's terminology, devolution did represent a "coming apart" — though not of a serious kind, with the strong levers of power still with the national government, as I have tried to show.

Simeon's analysis forces us to think what impact devolution will have on Kenya as a state, and more importantly, as a people. But as Chou En-lai said of the French Revolution, it is too early to say. The very large number of relatively small counties and the concentration of the powers of coercion, or softer persuasion, in the national government rules out a major challenge to the state. The people of counties seem happy with their new found power and control over local issues; they want the system to work, not abandon it in favor of secession. A great deal will depend on the understanding and co-operation of the national government toward the aspirations of the people about their "self-government". I have indicated that the principle of cooperative governance (Art. 6(2) which was anticipated to implement Kenya's system has been lacking. Did we get it wrong? Is it possible in Kenya's adversarial electoral system?

## 5. Conclusion

In this section I focus on future prospects of devolution in Kenya, looking at some of the factors which tend towards "success" and those towards "problems/failure". This section will use factors that I identified in a comparative study of nearly 16 federations/autonomies.<sup>37</sup>

### *Issue of Sovereignty*

In several countries, the issues of the nature and extent of the powers of counties have been complicated by considerations of sovereignty, especially in terms of the powers devolved to or the international relations with respect to the county. Many states have found it easy to concede considerable powers to small regions, as opposed to larger entities; they are less likely to marshal international support or attempt secession. For instance Hong Kong has been given extensive powers, but Tibet — whose original territory was as large as China itself — has been granted few. In some countries when the community seeking autonomy acknowledged the sovereignty of the state, negotiations made relatively good progress. Many other states confronted with demands for autonomy in China, Sri Lanka, the Philippines, and now Nepal have been

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<sup>37</sup> YGhai, above n 16.

worried about the break up of the state—and by their resistance increased conflict. India’s relationship with Kashmir and Nagaland has been fraught because important elements in these places have agitated for secession.

This was not the issue in Kenya, but it was in respect of the Coast and the Somali inhabited areas. The process for autonomy/devolution was held up for a long time, until both regions accepted the sovereignty of Kenya. Sovereignty is no longer as issue. All disputes/negotiations are about internal entitlements and balances.

### ***International Engagement***

The international community (which often means either the UN or the West) has played a key role in several cases of autonomy or devolution. The western contact groups played a key role in the agreement about either federation or secession in the Sudan; also in Indonesia which procured the autonomy of Aceh; the divisions of territories and functions in Bosnia-Herzegovina were almost entirely the result of western initiatives and one might almost say, imposition of NATO gathering in an army barracks in the US (Dayton). After the First World War, the newly established League of Nations was responsible for several devolutions or autonomy systems, the most well known of which is Åland in Finland. The prospects of success (or at least entrenchment) of devolution are improved if the international sponsors remained engaged, though there is a tendency to pull out when the “Memorandum of Agreement” is signed.

In Kenya the role of a foreign actor has been crucial at two critical moments, the first at the time of independence, when Britain pushed *majimbo* (and was in a position to do so, as the departing colonial power). But it could not do more than entrench the arrangements in the constitution (though the European settlers wanted a provision in the constitution whereby Britain would intervene if the Kenya government reneged on *majimbo*). And in more recent time, Kofi Annan and his colleagues among Eminent African Personalities (representing the African Union), played a critical role in peace making after the horrendous violence following the rigged elections of 2007, promoting a coalition government and new constitution with devolution. But now it is clear that that role, or even influence, would not be of any significance—soon after the new constitution, Kibaki made clear that Annan and his friends were not welcome.<sup>38</sup>

When foreign, regional or international groups or organizations become involved in negotiations, and exert pressure for autonomy — especially in

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<sup>38</sup> For a, somewhat partisan, account of international intervention after the violence of 2007/8, see African Union, above n 16.

cases of conflict such as South Sudan — they have a vested interest in the success of the settlement and are likely to stay engaged for a while after the agreement. Sometimes, as in relation to Bosnia-Herzegovina, the international community not only drafted the constitution but underwrote it and its persistence is largely the result of the European Union involvement in its working. In the case of Hong Kong and Macau, the autonomy of these former colonies was greatly facilitated by the presence of Britain and Portugal respectively in establishing their autonomy through bilateral treaties. The impact of Britain and Portugal has not been so significant once sovereignty passed to China. In Åland, an island community of Swedish origin in Finland, autonomy was guaranteed by the League of Nations, and in certain naval aspects, a number of European states were involved in the negotiations, and in the guarantees of a measure of neutrality.

In Kenya, there was no express foreign involvement in devolution, but the Kofi Annan team did play a not insignificant role in mediation between the two opposing groups after the post-election violence of 2008.<sup>39</sup> The international community has shown a lively interest in the development of counties and provided not inconsiderable assistance. The international community is likely stay engaged because of Kenya's strategic location — and the interest of international capital in its economic possibilities. How far that interest would affect the central government's attitude remains to be seen. And the African Union is most unlikely to interfere if the Kenya government were to renege on its international and constitution commitments and obligations.

### ***Entrenchment of Devolution***

A key factor is the protection of devolution is its entrenchment by the constitution. On this score, devolution in Kenya is fairly secure (Art. 255). An amendment or repeal would require not only the usual support in the two chambers of Parliament — with votes of at least two thirds of all the members in each chamber — but also a referendum in which not only a simple majority of the voters is required but also the support of 20 percent of registered voters in at least half of the counties. Given the current popular support for devolution, it would be hard to dislodge devolution. On the other hand, *majimbo* was very strongly entrenched in the independence constitution, but it did not prevent Jomo Kenyatta and his friends from tearing it apart within a year—through the Kenyan device of massive bribery.

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<sup>39</sup> An account of the external assistance can be found in African Union, above n 13.

### ***Local Participation***

Another factor that may be relevant to the implementation of and respect for devolution is the degree of the involvement of the community in its formation. If there have been serious discussions, with each side sensitive to the concerns of others (and not coerced by external “facilitators”), it is likely that the autonomy would be respected. Ironically, in the negotiations for the extensive autonomy for Hong Kong and Macau, the local inhabitants had no say whatsoever, and were not even told of the framework and details of the autonomy that China was negotiating with the colonial power — though local representatives participated in the drawing of the Basic Laws. There are examples of successful autonomy when the local community had no part in designing it (Åland in Finland), failure when it was not involved (Bosnia-Herzegovina) or even when it was (South Sudan). So there is a paradox here—whereas international involvement often sidelines people’s involvement it does not inevitably result in failure.

But there is also the issue of local participation post — the constitution. If people have embraced devolution, as they have in Kenya, and participate in devolution affairs and seek to influence policies and legislation, both the county and the national government come under pressure to adhere to the constitution. On that score, the omens are positive in favor of devolution.

### ***Settling of Disputes Between the National Government and the Autonomy Government***

It is inevitable that there will be differences of views between the central government and the counties. There are often problems in setting up new institutions and the transfer of functions and resources. It is usual to have mechanisms for discussion of and resolution of differences.

The constitution and laws implementing devolution provide various mechanisms for the settlement of differences or disputes between the counties, or between counties and the national government. There is, as we have seen, consider emphasis on consultation, negotiations and mediation. Failing all these either party could refer the matter to the courts, which then have the final say. So far the judiciary has been sympathetic to the idea of devolution, and is keen to maintain its framework.

### ***Rule of Law and Independent Judiciary***

In most federal or autonomous systems disputes about the respective powers and authority of national and autonomous government and other legal issues are ultimately resolved by the judiciary, which is competent and

independent. Courts have played a critical role in maintaining the integrity of federal and autonomous areas, clarifying points of law, and protecting the rights and powers of states and autonomous areas. An independent Judiciary is guaranteed in the constitution; and in interpreting the constitution, it is required to pay regard to the values and principles of the constitution.

### *Traditions of Democracy*

Autonomy has undoubtedly been the most successful in states that already operate within a liberal framework, because the established traditions and institutions reflect the values of democracy in their formation and functioning. These values include the rule of law and pluralism, and respect for decisions commonly arrived at. There is respect for cultural and religious differences. Autonomy arrangements require give and take; they depend on frequent negotiations for adjustments of relationships and the impartial application of the law. Political parties may operate at both the central and autonomous levels, acting as a powerful political link between administrations at the two levels. And the party which dominates at the central level may be in minority at the federal or autonomous level — thus requiring different parties to cooperate as well creating a balance in the state. And because a party which is in power at central level may be defeated in the next elections, but win at the autonomous level, it has an interest in maintaining the balance between two levels. Critical is respect for the constitution — the underlying basis of the state.

Unfortunately, Kenya is not democratic in the sense mentioned above. It does have elections, but they are often marred by irregularities. Neither the legislatures nor the executive officers pay much regard to their duties or the principles of integrity. Most show ignorance of the constitution. Few of them seem to have any negotiating skills, which is not surprising because our politics are not about negotiations, fairness and conciliation. Kenya politics is about greed for state office, thirst for money, and little regard of constitutional values and principles. There are no stable parties with meaningful commitment to policies. In general, where the national political parties also play a role at the county level, there is likely to be greater integration between the central and county government — but here parties do not matter. This state of affairs may pose a threat to the proper working of devolution, for, as we have already seen, selfish interests of relevant actors determine what happens. Fortunately, there are enough competing interests that it would be hard for one group to dominate others. But that is not good enough, as it may distort the values of and balances in the scheme of devolution.



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# Devolution and Kenya’s Socio-Economic Development: A Political Economy Inquiry and Emerging Case Law

By Duncan Okello

## 1. Introduction: The Country’s Development Portrait and Origins of Devolution

Kenya has been a highly centralized political and economic entity. The fusion of political and economic power has led to the emergence of state-made rather than market-created economic elite. Indeed, Kenya’s socioeconomic character is a product of public policy choices made and pursued by the Government. State behaviour, flowing from this politico-economic fusion and expressed mainly through official policy, markedly shape the specific character of Kenya’s development outlook. Additionally, the colossal ethnic mobilization in the acquisition and retention of state power has led to illiberal and undemocratic practice, whereby the allocation of development resources tends to favour the ethnic base, with exclusion of other factors of merit. Thus, the burden of taxation is shared and remains political choice- neutral, but the benefit of public expenditure is skewed and remains politically partisan.<sup>1</sup>

The observations above provide the context within which discourses on inequality in Kenya should be held. This is because the country’s development outlook is not a product of natural forces, but rather a logical consequence of policy, political, economic, and even judicial decisions made over time. Therefore, the ensemble of constitutional and institutional interventions designed to correct and improve on this development picture will only succeed if they remain alive to the historical context of Kenya’s poverty and inequality, and the role played by structural and agency factors in this regard.

<sup>1</sup> For a Chief Justice Willy Mutunga’s concurring Opinion in *Speaker of the Senate v. Attorney General & 4 Others* (2013) eKLR at para 167.

All development indicators, both economic and human, point to Kenya as a developing country. In a general sense, low Gross Domestic Product (GDP), low-income levels, low savings, and investment standards characterize the country's economic landscape. Its human development indices show high poverty rate, high inequality levels,<sup>2</sup> poor health outcomes (such as low life expectancy, high morbidity rates, high infant mortality and maternal mortality); and low educational indicators (such as low enrolment, transition, and completion rates). Whereas this is the general national development outlook, these poor development standards are not experienced in the same way across all regions. In other words, because of differential levels of development between regions, poverty and deprivation are experienced in different ways, even among the same low-income groups or cohorts. A poor person who has to walk three kilometers to the nearest hospital is certainly 'better' than one who has to do 50 kilometers.

Kenya's poverty and inequality burden is heavy; about a staggering 45.2 percent of the country's population lives below the poverty line. The differentials in development indicators across regions are also significant – an outlook that is a result of a combination of factors, not least a skewed and discriminatory allocation of resources. Although obtaining data for de-concentrated spending by central government at local levels is not that easy, there is some available information that is nonetheless illustrative.

According to the Commission for Revenue Allocation (CRA), an analysis of national expenditure on major roads between 1990-2000 shows that (a) Rift Valley, Coast and Central provinces had the highest allocation on major roads (b) North Eastern and Western provinces had the lowest allocation on major roads and (c) Coast, Central and Eastern provinces had the highest population using piped water. Similarly, according to 1989 figures on education and marginalization, calculated on the basis of opportunity, literacy and poverty, the top 15 most marginalized districts fall in North Eastern Province, pastoralist communities and the Coastal region.<sup>3</sup>

The County Development Index (CDI) developed by the Commission for Revenue Allocation shows that 20 counties are considered marginalized with a CDI of between 0.27- 0.518. These counties are geographically dispersed across the country but the worst ten are Turkana, Mandera, Wajir, Marsabit, Samburu, West Pokot, Tana River, Narok, Baringo, and Kwale. Another 18

<sup>2</sup> Kenya is ranked as the 66th most unequal society globally. See also Society for International Development (SID), 'Pulling Apart: Facts and Figures on Inequality' (2004); SID, 'Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives' (2006).

<sup>3</sup> Commission on Revenue Allocation (CRA), 'Creating a County Development Index to Identify Marginalized Counties', (CRA Working Paper 2012/1) 15.

counties are considered moderately marginalized, with a CDI ranging between 0.519 - 0.584 and only 9 counties are considered well off with a CDI of above 0.6. The CDI is based on relative ease of access to public goods in four categories: Education (28percent, Health (28 percent), Infrastructure (28 percent) and Poverty (16 percent)- totaling to 100 percent<sup>4</sup> A total of 20 counties lie below the computed national average of 0.520 while 27 lie above it. The complete CDI for all Counties is in the table below

**Commission for Revenue Allocation County Development Index (CDI) Table**

COUNTIES		COMPONENT INDICES				CDI
		POVERTY	INFRASTRUCTURE	HEALTH	EDUCATION	
1	TURKANA	0.3250	0.4540	0.1853	0.1380	0.2697
2	MANDERA	0.5430	0.2767	0.3317	0.1910	0.3107
3	WAJIR	0.6190	0.3693	0.2917	0.1760	0.3334
4	MARSABIT	0.5780	0.4017	0.3970	0.1755	0.3652
5	SAMBURU	0.5760	0.4483	0.3953	0.1770	0.3779
6	WEST POKOT	0.7420	0.3263	0.3457	0.2655	0.3812
7	TANA RIVER	0.7010	0.3337	0.3747	0.2765	0.3879
8	NAROK	0.8980	0.2690	0.5380	0.2430	0.4377
9	BARINGO	0.7840	0.3310	0.4110	0.3950	0.4438
10	KWALE	0.7160	0.3830	0.4623	0.3640	0.4532
11	KITUI	0.7780	0.3183	0.5110	0.3690	0.4600
12	GARISSA	0.7970	0.4717	0.4373	0.3100	0.4688
13	HOMA BAY	0.8480	0.2827	0.4970	0.4255	0.4731
14	T. NITHI	0.8800	0.2277	0.5760	0.4090	0.4803
15	TRANS NZOIA	0.8490	0.4520	0.5080	0.3125	0.4921
16	KILIFI	0.7420	0.4447	0.5230	0.3765	0.4951
17	BUSIA	0.7320	0.4917	0.5840	0.3330	0.5115
18	T. TAVETA	0.8240	0.4487	0.6290	0.2870	0.5139
19	BOMET	0.8780	0.2823	0.6220	0.4305	0.5142
20	MIGORI	0.8100	0.3603	0.5997	0.4275	0.5181
21	ISIOLO	0.7160	0.5687	0.5380	0.3475	0.5217
22	KAJIADO	0.9750	0.5017	0.4830	0.3395	0.5268
23	KISUMU	0.8580	0.3880	0.6350	0.3940	0.5340
24	E.MARAKWET	0.8340	0.3740	0.6247	0.4410	0.5365

<sup>4</sup> CRA 'Survey Report on Marginalized Areas/Counties in Kenya' CRA Working Paper No. 2012/3

25	MACHAKOS	0.8020	0.3400	0.6110	0.5130	0.5382
26	MAKUENI	0.7780	0.3797	0.5710	0.5305	0.5392
27	SIAYA	0.8820	0.3383	0.7210	0.3850	0.5455
28	NANDI		0.3803	0.6513	0.4260	0.5462
29	MERU	0.9380	0.3500	0.7130	0.3615	0.5483
30	BUNGOMA	0.8230	0.4670	0.6790	0.3575	0.5527
31	LAMU	0.9370	0.4937	0.5710	0.4145	0.5641
32	LAIKIPIA	0.8590	0.4187	0.6457	0.4640	0.5654
33	VIHIGA	0.8810	0.4793	0.6330	0.4145	0.5685
34	KAKAMEGA	0.8260	0.4527	0.6907	0.4185	0.5695
35	KERICHO	0.8850	0.4213	0.6553	0.4520	0.5696
36	EMBU	0.8580	0.3690	0.6470	0.5410	0.5732
37	MURANGA	0.8930	0.3667	0.6700	0.5030	0.5740
38	NYANDARUA	0.8250	0.3790	0.7880	0.4480	0.5842
39	KIRINYAGA	0.9410	0.3940	0.7920	0.4325	0.6037
40	NAKURU	0.8790	0.4383	0.7333	0.4830	0.6039
41	KISII	0.7830	0.4143	0.7970	0.5190	0.6098
42	NYAMIRA	0.8570	0.4653	0.6793	0.5825	0.6207
43	UASIN GISHU	0.8860	0.5580	0.6823	0.4730	0.6215
44	NYERI	0.8840	0.4543	0.7663	0.5635	0.6410
45	MOMBASA	0.9130	0.5533	0.8077	0.5055	0.6687
46	KIAMBU	0.9350	0.5863	0.7760	0.5235	0.6776
47	NAIROBI	0.9310	0.7683	0.8573	0.5790	0.7663
	<b>AVERAGE</b>	<b>0.8098</b>	<b>0.414326</b>	<b>0.5881</b>	<b>0.3935</b>	<b>0.5204</b>

But this developmental picture is not accidental. It is a direct product of the political and development paradigm that the country has pursued since its founding. Kenya's inequality is firmly rooted in its history, political, economic and social organization.<sup>7</sup> Marginalization and inequality is arguably a consequence of skewed process of distribution of scarce resources.<sup>6</sup> Even though the objects and principles of devolution were politically, economically and socially expansive,<sup>7</sup> the introduction of devolution in Kenya's Constitution of 2010 was primarily driven by a desire to fundamentally alter resource

<sup>5</sup> Commission on Revenue Allocation 'Survey Report on Marginalized Areas/Countries in Kenya' CRA Working Paper No. 2012/3.

<sup>6</sup> As above.

<sup>7</sup> Constitution of Kenya 2010 Article 202.

allocation across various parts of the country, thereby spurring equitable socio-economic development. The core objective of devolution therefore is to stimulate regional development by addressing access to provision of public goods. It is this paradigm that devolution sought to reverse with the intention of crafting a new developmental trajectory for the Kenyan state and society.

## 2. The Role of the State and Developmental Outcomes

Politics performs a distributive function in any society. Political power remains the most important resource in society, and the manner of its distribution, significantly determines how all other resources are also distributed. The extent, immediacy and effect of this fact are far much larger in societies where the distinction between state and market is blurred, and where mobilization for political support is heavily sectarian.

Indeed, leading political thinkers such as Harold Laswell described politics as ‘who gets what, when, and how’<sup>8</sup> and have defined power as ‘the authoritative allocation of resources’. Jane Kiringai argues that the ‘pattern and distribution of [public] spending can increase or reduce inequalities’<sup>9</sup> and avers that ‘there is no denying in Kenya, just like many other countries, political factors, bureaucratic manipulations, and official corruption have had some influence in resource distribution and by extension created distortions in resource allocation.’<sup>10</sup> She identifies seven possible but closely related channels through which the pattern and distribution of spending can influence inequality in the economy. These are policy choices; deficit financing; interest payments; credit markets; public employment; regional distribution; and nature of spending.<sup>11</sup> All these factors are state controlled and which, therefore, makes the agency of the state a key variable in determining development opportunities and outcomes between and within groups.

Indeed, public choice theorists such as Douglas North who, in defining institutions as rules of the game, argue that political and economic institutions are critical determinants of economic performance.<sup>12</sup> In this regard, the formal rules, laws and constitutions that govern the budget process in Kenya, combined with the informal norms, behavior and conduct, and the enforcement and oversight mechanisms influence the outcomes that are observed in the economy.<sup>13</sup>

<sup>8</sup> H Laswell, ‘Politics: Who Gets What, When, and How’ (1936).

<sup>9</sup> J Kiringai, ‘Public Spending in Kenya: An Inequality Perspective’ in SID (2006) above n 2, 19.

<sup>10</sup> Kiringai above n 10, 15.

<sup>11</sup> Kiringai, above n 10, 19-20.

<sup>12</sup> D North, Institutions, *Institutional Change, and Economic Performance* (1990).

<sup>13</sup> Kiringai above n 10, 21.

The rather disfigured development portrait of the country sketched out above is a direct product of the political character of the state and the developmental path it has pursued over the years. Even in the 1980s and 1990s when through the Structural Adjustment Programs (SAPs) the state retreated from the development space, its long legacy of imbalanced development and rising poverty was not easy to cure. The demand for more equity in state behavior towards its citizenry is what led to the earnest quest for devolution in Kenya.

### 3. 'Subjects and Citizens': The Colonial Roots of Kenya's Inequality

Kenya's developmental paradigm has been statist in character. The colonial state was founded as an openly sectarian institution that was fashioned to serve the white colonialists. It was designed as an extractive and exploitative institution working for the developmental interest of a minority section of society, to the exclusion of the rest. As Mohamed Mamdani<sup>14</sup> has argued, the colonial state was founded on coercion of the indigenous people and central to this re-organization was the "native question". And "how the colonial state approached the 'native question' reproduced a bifurcated state – a state for the citizens (the colonized living in scheduled areas) and a state for the subjects or the natives who were confined to the reserves".<sup>15</sup>

Whereas the political and economic designs of the colonial state were intensely unified in its objectives, its approach to economic and human development was bifurcated. It divided the state into native and settler areas, and implemented a doctrine of separate development with separate policies for these two zones. It created what Ghai and McAuslan have called a 'dual economy'<sup>16</sup> and welded a system of government of state policy to provide 'security of land tenure for the white settlers, publicly supported credit facilities for their agricultural activities, controlled involvement of Africans in agriculture and marketing of certain cash crops to ensure monopoly by the white settlers, and coercion to ensure cheap African labor'.<sup>18</sup> Laws were enacted in the agricultural sector to 'aid white settlers and disempower the natives' the result of which was 'exacerbated inequality in opportunities and outcomes' which laid the foundations for inequalities in Kenya.<sup>19</sup> As Argwings-Kodhek notes about the agricultural sector:

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<sup>14</sup> M Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996).

<sup>15</sup> K Kanyinga, 'Governance Institutions and Inequality in Kenya', in SID (2006) above n 2, 354, 351.

<sup>16</sup> Y Ghai and JWP McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the Present*, (1970) 3.

<sup>17</sup> As above.

<sup>18</sup> As above.

<sup>19</sup> G Argwings-Kodhek, 'An Inequality and Welfare Analysis of Kenya's Agricultural Sector', in SID (2006) n 2 above 254, 255.

‘[T]he need to cover the costs of the Kenya-Uganda Railway led to two major settlement programs (in 1920 and 1946) for the British servicemen who became producers of export commodities, primarily wheat, maize, coffee and tea. These producers were supported by a system of preferential tax policy and protection from African competition large public investments in infrastructure, training, research and extension.’<sup>20</sup>

Africans and Asians were denied certificates of registration for coffee growing through a law enacted in 1914. The steady exclusion of Africans from the trade sector through discriminative legislative and administrative actions left the African population with no option but to sell their labor in the White Highlands in order to be able to pay taxes and earn a livelihood. Thus the African reserves became a source of cheap labor and the ‘migration of educated people to high and medium potential areas robbed the low potential zones of their high and medium potential human resources, which they badly needed for the development of these areas, thereby worsening the regional disparities.’<sup>21</sup>

Kenya’s development imbalance is thus the product of a ‘rigged-development’<sup>22</sup> approach and ‘the ‘rigging’ character and orientation of the state, especially in the development arena, was inherent in the colonial bearings of the state [whose] constitutive vales were partisan, divisive, and sectarian.’<sup>23</sup> As the Chief Justice stated in his concurring opinion in the *Speaker of the Senate Case*:

‘the Kenyan state was founded on a partisan, sectarian, and exclusionary logic. It is this logic that the Constitution of Kenya, 2010 sought to deconstruct. There is no doubt that Kenya is a diverse and unequal country. The inequalities within groups and between regions are manifested in the class structure of society, ethno-regional differences, rural-urban divides, and gender biases.’<sup>24</sup>

#### 4. The Post-Colonial State and the Legacy of Uneven Development

The post-independence African elite inherited this partisan state and a skewed development infrastructure. Recognition of this problem informed

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<sup>20</sup> Argwings-Kodhek above n 20, 254.

<sup>21</sup> J M Kangu, *Constitutional Law of Kenya on Devolution*, (2015) 67.

<sup>22</sup> D Okello and K Owino, ‘Socio-Economic Context of Governance in Kenya’, in A Bujra (ed) *Democratic Transition in Kenya: The Struggle from Liberal to Social Democracy* (2005) 35.

<sup>23</sup> Chief Justice Willy Mutunga in *Speaker of the Senate & Another v. Attorney General & 4 Others* (2013) eKLR at para 168.

<sup>24</sup> Chief Justice Willy Mutunga, in *Speaker of the Senate & Another v. Attorney General & 4 Others* (2013) eKLR at para 165.

the dynamic design of Kenya's independence Constitution. In the political realm, 'in the dominant variant of the post-colonial state, the distinction between citizen and subject was tuned into two types of citizenship, civic and ethnic.'<sup>25</sup> The independence constitution attempted to correct these inherited defects through an elaborate devolved system of government that was nearly quasi-federal in character. But these efforts were soon frustrated by the central government whose appetite for consolidation of political power under the guise of forging national unity, far exceeded its interests in creating an equitable society, which would have made this unity easier to achieve.

Having constitutionally dismantled the devolved system of government, the immediate post-independence government quickly moved to consolidate its politico-constitutional 'gains' in the policy realms, and in a manner that re-validated the sectarian, partisan and exclusionary nature of the colonial state itself. In Kenya's founding policy paper, "Sessional Paper no. 10 of 1965 on African Socialism and its Application to Planning in Kenya", the Government gave official state approval to developmental segregation, discrimination and exclusion. Under the section title Provincial Balance and Social Inertia, the paper proclaimed this policy bias in paragraph 133 thus:

[O]ne of our problems is to decide how much priority we should give in investing in less developed provinces. To make the economy as a whole grow as fast as possible, development money should be invested where it will yield the largest increase output. This approach clearly favours the development of areas having abundant natural resources, good land and rainfall, transport and power facilities and people receptive to and active in development

Before and after independence, policy and practice positioned the Government as the engine of development. Centralized planning was in vogue. With a small middle and bureaucratic class, a low savings rate, and a very thin propertied class among the African bourgeoisie, the state was seen as the only agency capable of mobilizing capital for major investments for national development. The state was also seen as 'more enlightened' — possessing the knowledge and wisdom in the allocation of development resources — and trusted to work fairly and impartially in this regard. As is noted elsewhere:

The Sessional Paper promoted a mixed economy where there was to be tightly controlled private sector – through licenses, and a parastatal sector where the government was to make up for the lack of indigenous capital by being the investor in state-owned enterprises managed by

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<sup>25</sup> Mamdani *ibid.* 15, 2.

a new African managerial elite. As a result, the restrictions on private marketing of agricultural commodities remained, together with the legal infrastructure of government control exercised through parastatal marketing boards, restrictive licensing, the provincial administration and the police... A well paid managerial class was created and took over the positions and benefits of their colonial predecessors.<sup>26</sup>

Not only did this state-led development model fail, leading to the introduction of Structural Adjustment Programs (SAPs) in the 1980s, but it also induced distinct political costs. Centralized state power, and the fusion of economic and political power, led to the discriminatory investment and decision making in public policy. Indeed, by the end of the first decade of independence, Kenya's system of government was highly centralized and ethnicized, leading to regional disparities in employment opportunities, infrastructure and even access to professional services. This was worsened by the migration of human capital where the professional cadre that emerged from the rural areas moved into medium and high potential areas located mainly in the urban centers where most of its incomes were spent leaving the rural areas deprived both of high quality human resource as well as financial capital<sup>27</sup>.

## 5. Devolution as the Antidote: Re-balancing Socio-Economic Development

The effect of a bifurcated state was the creation of imbalance in Kenya's development outlook. The fusion of political and economic power, running on an ethnically charged political platform, saw discrimination in resource allocation and distortions in development outcomes. The consolidation of state power through a series of constitutional amendments and establishment of a one party regime created a powerful patronage system where individuals and groups or region were punished based on their political party loyalties. In the end, the adoption of an inefficient resource management paradigm led to suboptimal development outcome overall, even though some regions suffered a lot more. Poverty experiences were different even for people falling in the same place below the poverty line.

Centralized development planning was the off-shoot of this politico-economic fusion. The state assumed an 'all knowing' posture imposing development programs from above. There was poor prioritization of projects; opaqueness in budget allocation, low level of local ownership of development programs. As Jane Kiringai notes:

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<sup>26</sup> Argwings-Kodhek, above n 20, 256.

<sup>27</sup> Mutakha above n 22, 71- 72.

The failure to address inequality through budget allocations reflects an inherent weakness of the planning process. The plans and the sessional papers identify, as a priority, the need to address income inequality and also rural-urban disparities. This is a running theme in the development plans and the sessional papers. Evidently, at the planning stage, inequality is a priority but there is no link between the plans and the budgets, except the priorities that are identified in the macro-economic framework.<sup>28</sup>

The failed centralized planning and development paradigm saw the germination of several 'development from below' initiatives over the decades. These included Special Rural Development Program (SRDP), 1971; District Focus for Rural Development (DFRD), 1983; to Local Authority Transfer Funds (LATF), 1998; to Road Maintenance Fuel Levy (RMFL) to Constituency Development Fund (CDF), 2003 among others. But even these did not satisfactorily deal with the original sin or regional inequalities but, instead, served to fortify arguments for enhanced fiscal decentralization and a viable development paradigm if properly designed. The Chief Justice notes:

The constitution provisions on devolution were key pillars in the construction process. Indeed, a reading of the final report of the constitution of Kenya review commission (CKRC) shows that vast segments of the Kenyan population felt that they were victims of state, either in terms of political repression or in terms of development exclusion Reference

Devolution was key in the renegotiation of Kenya's constitutional contract. Looking at the objects and principles of devolution, devolution was not intended to be a purely development device. It is political, personal, economic, and collectively liberating.

Devolution was instrumental in mobilizing support for the constitution in the referendum because many people perceive its dispersal of economic and political power as an act of political liberation. There is a large section of a society for whom the new constitution is coterminous with devolution. It denotes self-empowerment, freedom, opportunity, self-respect, freedom and dignity.<sup>29</sup>

One of the objects of review as captured in the Constitution of Kenya Review Act of 1997 was to require the Commission to ensure that the people of Kenya' examine the federal and unitary systems of government an recommend an

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<sup>28</sup> Kiringai, above n 10, 47.

<sup>29</sup> *Speaker of the Senate & Another v. Attorney General & 4 Others* (2013) eKLR.

appropriate system for Kenya’ and ‘examine and review the place of local government in the constitutional organization of the Republic of Kenya and the degree of devolution of powers to local authorities.’<sup>30</sup> As Mutakha observes:

Though these provisions seemed to commit these matters to the people of Kenya, it appears that in setting out the objects and purpose of review the Act had predetermined the content of the new Constitution, and that devolution of power would be part of it’... [A]lthough this Act was amended several times and in 2008 even replaced by a new Act, these guiding principles remained intact throughout, with devolution of power tagged among them as a pact.<sup>31</sup>

The principles, objects and purpose of devolution as contained in the final text of the Constitution have this genealogy and reflect this history. In Article 174 the objects of devolved government are (a) to promote democratic and accountable government; (c) to give powers of self-governance to the people in the exercise of the powers of the State and in making decisions affecting them; (d) to recognise the right of communities to manage their own affairs and to further their development; (f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya; (g) to ensure equitable sharing of national and local resources throughout Kenya; (h) to facilitate the decentralisation of State organs, their function and services, from the capital of Kenya; (i) to enhance checks and balances and the separation of powers.

According to the framers of the Constitution, county governments were extremely important features of the new governing architecture. In its dispersal, demarcation and hierarchy of power, the Constitution espouses the principle of co-equivalence and in particular in Article 6 (2) where it states that ‘the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation’. The sovereign power of the people, whether in the executive or in the legislature, is to be exercised at both levels of government.<sup>32</sup>

As Ghai and Cottrell note:

These objectives are elaborations of the national values and principles and show the importance of devolution to the new system of government. An essential purpose of devolution is to spread the power

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<sup>30</sup> Sections 17(d)(ii) and (vi) Constitution of Kenya Review Commission Act 1997.

<sup>31</sup> Mutakha above n 22, 86-87.

<sup>32</sup> Article 3 Constitution of Kenya 2010.

of the state throughout the country; and reduce the centralization of power which is the root of our problems of authoritarianism, marginalization of various communities, disregard of minority cultures, lack of accountability, failure to provide services to people outside urban areas and even within them.<sup>33</sup>

The centralized and political model that we have experimented with for fifty years has not elevated Kenya from its status at independence from a third world country into a first or second world power- an achievement realized by many other countries. Instead we have witnessed significantly high poverty levels, asymmetrical development patterns and highly ethnicized politics — basically a failed political culture and a failed development paradigm.

## 6. Devolution and Socio-Economic Development: The Interface Between Chapters 4, 11, and 12 of the Constitution

The interface between devolution and socio-economic development occurs more directly in the Bill of Rights and Public Finance chapters of the Constitution. This is because most of the socio-economic rights enumerated in Article 43, which includes health, housing, sanitation, water, food, education,<sup>34</sup> as well as right to environment in Article 42, and consumer protection in 46, fall under the functions for the devolved system of government as contained in the Fourth Schedule.

Other parts of the rights regime that have a direct import for devolved governments in its role as a driver for socio-economic development also include rights that touch on factor mobility such as free movement of people (Article 39); protection of property rights (Article 40); labor relations and freedom from forced labor (Article 30 and 41). Thus, by dint of Kenya's constitutional architecture, the service delivery responsibility lies heavily with county governments. In many ways, the constitution has imposed a burden on county governments to cure or reverse the negative development indicators that a centralized system of government has yielded, even though at a minimum of 15 per cent of all revenue raised by the national government, there is a function-financing asymmetry.

Resourcing these functions is informed by the provisions in the Chapter on Public Finance. The words 'equitable' or 'equitably' litter the entire chapter on public finance. Indeed, so strong is the constitutional commitment to equity that the public finance chapter's first four Articles, 201 (Principles of public

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<sup>33</sup> Y Ghai and J Ghai, *Kenya's Constitution: An Instrument for Change*, (2011) 11.

<sup>34</sup> Early Childhood Education is a County function.

finance), 202 (*Equitable* sharing of national revenue), 203 (*Equitable* share and other financial laws), and 204 (*Equalisation* Fund) have the derivative of the term equity in their headings or text. Indeed the principles of public finance<sup>35</sup> are very strong on theme of equality. Article 201 (b) states that ‘the public finance system shall promote an equitable society, and in particular-

- (i) The burden of taxation shall be shared fairly
- (ii) Revenue raised nationally shall be shared equitably among national and county governments; and
- (iii) Expenditure shall promote the equitable development of the country, including by making special provision for marginalized groups and areas;
  - (c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations.

## 7. Financing Devolution: Public Expenditure Trends

### 7.1 Politics of Formula

In order to deliver on the devolved functions, and enable devolution to play its corrective and prospective role in socio-economic development, the Constitution provides for a minimum of 15 percent of all revenue collected by the national government.<sup>36</sup> Whereas this provision seems fairly straight forward, its very fact and application has generated considerable economic, political and constitutional controversy. The discourses on this provision and its application, illustrate underlying concerns that may have a bearing on the success or failure of devolution. It also proves the pre-eminence of politics and power in the science of allocation of resources.

The first issue is one of resource adequacy, and the asymmetry between the relatively little allocation given to counties versus the large development portfolio that devolved units are expected to carry as contained in the Fourth Schedule. The second concern is the basis of calculating the 15 percent. The constitutional provision<sup>37</sup> of basing this on the last audited and approved accounts by the National Assembly disadvantages devolved units in two senses: one, the National Assembly approval is late by three years, and, second, while national government is allocated resources based on a prospective budget (estimated revenue receipts), County governments are being allocated resources on a retrospective basis. The third issue is the timeliness

<sup>35</sup> Article 201, Constitution of Kenya 2010.

<sup>36</sup> Article 203 Constitution of Kenya 2010.

<sup>37</sup> Article 203 (3) Constitution of Kenya 2010.

in the disbursement of this allocation; and the *fourth* issue is an attempt to marginalize the role of the Senate in the Division of Revenue Bill, a matter that had to be determined by the Supreme Court in the Senate's favor.<sup>38</sup>

## 7.2 Public Expenditure Trends

But what have been the trends in public expenditure allocations to Counties? In the first year of devolution, 2013/14, County governments' approved expenditure outlay amounted to 5.5 per cent of GDP, with county governments' targeting to raise 1.2 percent of GDP from own revenue, while National transfers projected to raise about 4.3 percent of GDP. However, county governments only collected 0.5 per cent of GDP as local revenue while national transfers totalled 3.9 per cent of GDP.<sup>39</sup> About 20 percent of total government expenditure is spent at the sub-national level.

According to the Office of the Controller of Budget (OCB), in the FY2013/2014, the aggregated budget for the 47 county governments was Ksh. 261.1 billion. This combined budget was to be financed by Ksh. 190 billion as the national equitable share of revenue and Ksh. 20 billion as conditional grant from the national government, and Ksh.54.2 billion from local revenue. However, only Ksh. 193 (instead of Kshs. 210) was released by the national government and aggregate local revenue was Kshs. 26.3 billion (instead of 54.2 billion), both below the budget.<sup>40</sup>

According to the data, aggregate expenditure stood at Ksh. 169.4 billion, with Ksh. 132.8 billion (78.4 per cent) being recurrent, and Ksh. 36.6 billion (21.6 per cent) being development.<sup>41</sup> The expenditure trends show a rather rapid rise in the administrative expenditures and only a few counties allocate at least a third of their budget to development projects. The composition of overall county approved budgets show the top expenditure items as County Executive, County Health Services, County Assembly, Transport, Finance and Economic Planning, Public Works and Services, Education, Agriculture, Environment, Physical Planning and Trade and Development<sup>42</sup>.

Health constitutes the top priority accounting for 21 percent of the counties budgets; followed by County Administration (15.9 percent), Public Works, Transport and Infrastructure (13.2 percent, County Assembly (10.5 percent); Finance and Economic Planning (9.8 percent; Education, ICT, and Social Affairs (9.4 percent); Agriculture and Livestock Development (7.2 percent);

<sup>38</sup> *Speaker of the Senate & Another v. Attorney General & 4 Others* (2013) eKLR.

<sup>39</sup> World Bank, 'Decision Time: Spend More or Spend Smart: Kenya Public Expenditure Review', (2014)1.

<sup>40</sup> National Treasury, 'Annual County Budget Implementation Review Report FY 2013/2014, (2014):'

<sup>41</sup> As above.

<sup>42</sup> World Bank, above n 40.

Water, Energy, Environment (5.8 percent).<sup>43</sup> But even within these aggregates, counties still spend differently, assigning priorities in markedly different ways. This affirms the logic of decisional autonomy in local development planning and resourcing which is usually the *leit motif* of decentralization initiatives, including devolution. Infrastructure is the top priority in a number of counties including Mandera, Wajir, Tana River, Uasin Gishu, and Nairobi, while water and agriculture are the top priorities in Garissa and Muranga respectively.

### 7.3 Where is the Money Going? A Sectoral Account

#### (a) *Spending Levels, Logic and Patterns: Responding to the County Development Index*

Counties expenditure patterns in the first year of devolution show that recurrent expenditures exceeded the spending on development, which was to be expected given that the first year was for recruiting of personnel and laying the institutional infrastructure for devolved governments. In 2013/14, the approved budget allocation on recurrent was 62 per cent and 38 per cent on development. Nearly half the counties spent less than 22 per cent of actual spending in development. Only 12 counties reached the 30 per cent threshold of development spending with Wajir and Turkana reaching nearly 60 per cent<sup>44</sup>. With the exception of Tana River, virtually all the other counties that fall under the former marginalized Northern Frontier District reached the 22 per cent expenditure on development, which suggests a greater hunger for development.

However, even these high recurrent expenditures have responded to an equity problem that devolution was designed to respond to, and that is, it has created employment opportunities for populations that had high unemployment and even lower employability probability under the centralized system. These local level jobs have certainly created an effective demand at the local level thus stimulating the local economies and stirring other positive development outcomes.

Similarly, the expenditure trend shows that most of the formerly marginalized areas - areas with the lowest County Development Index (CDI) - have a higher spending rate. Turkana, which has the lowest CDI, and Wajir, whose CDI is the third lowest both recorded the highest spending rate of nearly 60 per cent.

<sup>43</sup> In absolute numbers, budget allocation for devolved functions in order of priority for 2012/13 are health 54 billion, Infrastructure 45 billion; Public Administration 23bn; Agriculture 11bn; Special programmes 8bn; Water and Environment 4bn; Social protection 3bn; Education 2bn; Governance 1bn; Economic and Commercial Affairs 0.4bn.

<sup>44</sup> The Office of Controller of Budget, in its half-year report for 2014, identified challenges that could hinder effective implementation of devolution. They include low absorption of development funds; underperformance in local revenue collection; inadequate technical capacity to support counties in the technical areas of budget preparation and legislation; insufficient use of Integrated Financial Management System (IFMIS); and, increasing wage bill. The Auditor General has also singled out irregularities and loss of funds in counties.

West Pokot, which has the sixth lowest CDI is the third highest spender at 35 per cent. Other top spenders are Kwale at 35 per cent (CDI ranking is 10); Samburu at 29 per cent (CDI ranking is 5); Mandera at 29 per cent (CDI ranking is 2); Marsabit at 23 per cent (CDI ranking is 4).

**(b) Money Following Functions: The Trends and Events**

The statistical figures obscure some of the dramatic interventions that county governments have made in the first two years of devolution, and which are significantly changing livelihoods and the country's development landscape. According to the Constitution Implementation Commission (CIC) Report<sup>45</sup>, as highlighted below, in health, infrastructure, agriculture, trade, and education sectors County Governments have put in substantial investments that are changing the development outlook of rural Kenya.

In agriculture, all counties have improved access to extension services. Others have acquired equipment for agriculture support such as tractors<sup>46</sup>, installed milk coolers<sup>47</sup>, set up agri-businesses such as fruit processing plants<sup>48</sup> and set up green houses<sup>49</sup>. In the health sector, Vihiga has built 15 new dispensaries and renovated 4 hospitals. Kisumu opened 23 new health facilities and an 8-bed ICU unit. In Mandera, health facilities have been increased from 52 to 60. Turkana is upgrading 35 health facilities and expanding a modern maternity unit at Lodwar while Kericho has established an ICU. One of the more visible interventions in health is the provision of ambulance services by all counties<sup>50</sup>. Garissa built 21 maternity units in first year. In Migori there is an increase in deliveries in hospitals from 3 mothers to 60 mothers out of 100 deliveries; infant mortality has dropped from 695/100000 deliveries per year to 540/100000 deliveries per year.

In the transport sector<sup>51</sup>, most counties have reported expansion of road network. Kericho, for example, has constructed 1200km of gravel roads, carpeted 500m of tarmac in Kericho town, 20 lines of culverts within the

45 CIC, 'Sustaining the Momentum: Assessment of Implementation of the Transferred Functions to the County Governments' (2015).

46 Kwale has acquired 30 tractors.

47 Bomet has 15 such coolers.

48 Makueni County is one such example.

49 Nyamira has set up 60 of these green houses.

50 Several ambulances have been purchased, for example, in Kwale (11); Kiambu (10); Tana River (10); Wajir (8); Busia (7); Kisumu (7).

51 Includes county roads; street lighting; traffic and parking; public road transport; and ferries and harbours. The first transfer of this function to counties by the Transition Authority included access roads; street lighting, traffic and parking. The second transfer vide gazette notice 116 of 2013 and expanded it to include public road transport on licensing of public vehicle operations; county roads including primary roads linking all sub-county headquarters and minor roads linking markets and administrative centre excluding roads being managed by Kenya Urban Roads Authority (KURA), Kenya Rural Roads Authority (KERRA), Kenya Wildlife Service (KWS) and Kenya Forest Service (KFS).

town, and enhanced road network for tea growing areas. In Embu 182 roads covering 448 km had been rehabilitated while 91 others covering 237km were graded and graveled.

In trade and development<sup>52</sup> Counties have developed policies, legislation and regulation including trade, tourism, and cooperative and revolving fund bills. This has led to improved markets; better street lighting; revival of cooperative societies (Makueni has revived 16 dormant cooperative societies and registered 30 new ones; Mandera has revived 22 cooperatives and registered 8 new ones and 60 applications are pending. The number of cooperatives in has shot from 20 to 150. Tourist sites have been rehabilitated and Meru and Kakamega Counties have established wildlife conservancies and animal orphanage respectively.

However, a few challenges have emerged causing discomfort for the business community. These include double taxation and difficulties in the operationalization of the Single Business Permit (SBP). For example, on double taxation, Nakuru County introduced cess on all agricultural produce through its Finance Act 2013. Currently, cess is being collected from by the Horticultural Crop Development Authority based on Legal Notice No. 190 Of 2011, meaning that producers of horticultural crops are taxed twice. Further advertising, parking, offloading, and distribution are being charged per track per County and in other places per sub-county. Counties have introduced County Export Certificate, which is un-procedural, as Article 209 (3) (c) provides that a county may impose an additional tax other than property and entertainment taxes only when permitted by an Act of Parliament and so far no such Act has been passed. There is need for harmonized system of issuance of the Single Business Permits. Presently traders across the country pay for multiple SBP while trading across the country.

On pre-primary education, Counties have developed ECD Policies, youth and women empowerment, Vocational Training and Recruitment Policies; passed Education and Bursaries Acts and Vocational Training laws. Kakamega and Bomet, for example, have each hired 800 ECD teachers; Makueni 800; Kirinyaga has employed 400 caregivers, constructed 112 village polytechnics. It has provided teaching and learning resources of approximately 6 million in ECD centers contributing to an increase in enrolment in public ECD centers from 10,000 to 14000 pupils and enrolment in polytechnics has increased from 350 to 1350 trainees. As CIC notes:

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<sup>52</sup> This function includes markets; trade licenses (excluding regulation of professions); local tourism and cooperative societies. The first transfer immediately after the general elections transferred the markets, trade licenses and local tourism. The second transfer included fair trade practices and cooperative societies.

Counties are spending huge budgets in supporting even other functions of education beyond the devolved components. For example, in Kwale County, about 220 million has been allocated into Bursary Fund since 2013/14 financial year. Every student admitted to a national secondary school has his/her fees fully paid by the county government. This strategy is aimed at addressing the shortage of medical staff and taking strategic positions in upcoming mining industry.<sup>53</sup>

With respect to County Public Works and Services<sup>54</sup>, a number of life-changing development interventions have similarly been witnessed across all counties. According to the CIC Report these include rehabilitation of storm water drains and sewage plants, design of various irrigation projects, construction of water pans for run-off water harvesting, construction of boreholes, water well drilling rigs, provision of piped water and water kiosks. Vihiga rehabilitated over 200 springs and sunk 6 boreholes and laid water pipes to supply various schools and hospital with clean water; erected 10 augmentation tanks with each serving about 5000 households. Murang'a has connected 5500 households to a water supply and developed two irrigation projects for 2000 hectares for cultivation of rice. Kitui has procured 2 drilling rigs, rehabilitated 44 boreholes drilled 37 boreholes to serve 41500 people and 7700 animals by reducing walking distances to water sources from 10km to 5km. 38 water pipe extensions have been undertaken covering 103 km. The intervention has been significant in Taita Taveta where 'prior to the 4th march elections, about 30 percent of the households in the entire county (i.e. 18000 households) were connected to piped water in three sub counties. Within 2 years of establishment of the county Government, water supply in Taita Taveta is reported to have increased by about 40 percent<sup>55</sup>.

### **(c) *The Local Revenue Gap***

The Constitution grants County Government revenue-raising powers. The County Governments' capacity to collect revenue is still weak leading to lower revenue yields. According to the OCB, in FY2013/14, County Governments generated an aggregate of Ksh. 26.3 billion in local revenue, accounting for 48.5 per cent of the annual target. The World Bank notes that counties' own resource mobilization 'translates to 43 per cent fiscal effort by counties in revenue mobilization. While counties collected revenues well below the target, it is noteworthy though that the actual revenues represent an improvement from previous years' collection by the defunct local authorities<sup>56</sup>.

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<sup>53</sup> CIC, above n 46.

<sup>54</sup> This function was transferred to counties upon application.

<sup>55</sup> CIC, above n 46.

<sup>56</sup> World Bank, 40.

According to the Institute of Certified Public Accountants of Kenya (ICPACK)<sup>57</sup>, 37 percent of the counties sampled relied on Single Business Permits as their core source of local revenues; 32 percent relied on user fees with 31 percent of them relying on property rates. The study found that counties were facing serious challenges on own revenue collection with some counties collecting less than what the defunct local authorities, municipal and/or county councils used to collect when combined.

The challenge of revenue collection is likely to result in further inequalities between counties, and whereas incentives must be created to encourage Counties to improve on their revenue mobilization efforts, and reward with better fiscal effort, attention must be paid to pre-supplied advantages which make the potential revenue market much larger for some countries.

## 8. Conclusion

Examining the effect of devolution in Kenya's socio-economic development must go beyond the realms of politics and the economy. The design and interpretation of the law are just as important. In fact, given the sharp political contestations that surrounded devolution during the Constitution making process and which have persisted to date, as well as the natural uncertainties of constitutional transition, the courts are bound to play a more important and definitive role in determining the final constitutional – and therefore political and economic - character of devolution, and its overall effect on development. Indeed the question is, in executing their interpretive mandate, have courts exhibited an awareness of the historical context of devolution and its aspirational content as provided for in the principles, objects and purposes Articles of the Constitution? Does the emerging interpretative doctrine expansive or restrictive? Is the jurisprudence affirming or doubtful?

Since 2013, devolution litigation has been burgeoning, and the courts have had to address a broad range of issues that focus on institutional power relations, Bill of Rights, especially socio-economic rights, disputes on functions, labor rights among others. And, the emerging case law is generally trending strongly in support of devolution. The courts have been clear in assigning both responsibilities and power to county governments, and have successfully managed to nestle devolution in its rightful constitutional location. From the totality of emerging case law, the Courts' judicial instincts appear to be more decentralizing than centralizing. It is noteworthy that devolution-based or originated litigation has emerged as an important source

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57 ICPACK, Baseline Survey on Devolution in Kenya with respect to Public Financial Management Systems, 2014

of new jurisprudence that illuminates key provisions of Kenya's Constitution, especially on the Bill of Rights and intergovernmental relations<sup>58</sup>. Indeed, very weighty constitutional issues that are 'incidental' to devolution are getting settled in devolution-based litigation<sup>59</sup>.

There is no doubt that devolution has emerged as a significant driver of Kenya's socio-economic development and even jurisprudence. In spite of its teething problems, it is delivering on its developmental objectives, and in a remarkably radical manner. Even though it is still too early to obtain time series data on the full effect of devolution in the development arena, the emerging data shows that the economic and human development indicators are beginning to noticeably improve. Local level employment has shot up, incomes have risen, productivity in trade, commerce, and agriculture is climbing, health and educational access has increased. All this should ultimately lead to a decline in poverty and, potentially, a narrowing of horizontal inequalities between regions. As unemployment in the rural areas decline and more business opportunities open up, Kenya's dependency ratio<sup>60</sup> is likely to reduce and the well-being indicators likely to rise throughout the country. If the massive investments that County Governments are making in the economic and social sectors are sustained, then the disparities in the development indices are likely to be eliminated.

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**58** See *Republic v Transition Authority & Another ex parte Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU) & 2 Others* (2013) eKLR.; *County Government of Nyeri v. Cabinet Secretary, Ministry of Education Science and Technology & Another* (2014) eKLR, and *Republic v County Secretary Murang'a County Government ex-parte Stephen Thiga Thuita* (2013) eKLR

**59** For example in *Richard Bwogo Birir v Narok County Government & 2 Others*, the Court declared the 'Pleasure Doctrine' dead; in *Okiya Omtatah Okoti & 3 others v Nairobi City County & 5 Others* on right to clean and safe water; in *Micro and Small Enterprises Association of Kenya, Mombasa Branch v. Mombasa County Government & 43 Others* Micro right to livelihood was upheld; in *William Musembi & 13 Others v. Moi Education Centre Co. Ltd & 3 Others* and *June Seventeenth Enterprises Ltd v. Kenya Airports Authority & 4 Others* upheld right to accessible and adequate housing.

**60** According to an inequality report recently published by the Society for International Development (SID), the demographic indicators point to a national dependency ratio of 0.873; with rural dependency ratio at 1.008 while in the urban areas it is at 0.630.



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# Devolution, Politics and the Judiciary in Kenya

By Peter Wanyande

## 1. Introduction

In August 2010 Kenya adopted a new constitution. The nerve centre of this constitution is a devolved system of government. The devolved system of governance came into effect after the 4 March 2013 general election. A number of challenges have emerged in the course of its implementation. Of particular concern in this regard are the political conflicts among the key actors and institutions with the responsibility of implementing the constitution. These conflicts, which occur within each level of government, and between the two levels of government, are bound to impact negatively on the implementation of the devolved system of governance. It is also likely to negatively impact the ability of the judiciary to promote and protect the rule of law and constitutionalism. It is against this backdrop that this chapter seeks to discuss the linkage between devolution, politics and the Judiciary.

For purposes of this chapter, the term ‘politics’ is used to refer to activities involving the promotion and protection of personal, group or institutional interests. Political conflicts could take an ideological and or pragmatic dimension. In the context of the constitution of Kenya 2010, those with a stake in the old constitutional order and believe that the new constitutional dispensation will undermine their interests will protect such interests. They may do this by attempting to discredit devolution and its institutions. They may seek to achieve their objectives by resisting the new dispensation or by engaging in utterances and or activities that undermine the effective implementation of the new order. On the other hand, those who see an opportunity to benefit from the new constitutional order will support the new constitution. The new constitutional order may also receive support from those who ideologically believe that devolution of power is good for the country. This chapter therefore highlights the politics that inform this

interaction, how it impacts on the implementation of devolution, and the role of the Judiciary in this context.

## 2. The Argument

The chapter presents a number of arguments. First, it is argued that because of the transformative and progressive nature of the constitution of Kenya 2010, its implementation is bound to pose challenges to those with the responsibility for its implementation. At the very minimum, the constitution requires a radical change in the way public servants, including politicians and the Judiciary, conduct public affairs. This in turn requires a mindset change, an issue that is hardly given prominence in the debate about the implementation of the constitution.

It is further argued that the implementation of the devolved system of government is bound to generate resistance, especially by those whose vested political and economic interests are threatened by the new system of governance. This point ought to be understood against the background that there were forces that strongly resisted the introduction of the devolved system of government. This resistance may have been influenced, either by ideological convictions, or simply on account of the potential and actual threat that the system posed to their interests.

It is further argued that because of the political interests involved, and indeed because of the political nature of constitutions, it would be naïve to expect the implementation of the devolved system of government to be smooth and technocratic. The country is already witnessing scenarios in which the implementation of devolution is being subjected to political conflicts that could threaten faith in the system and the constitution generally.

Finally, the Judiciary has a special role to play in facilitating the effective implementation of devolution and the constitution generally. The Judiciary has a critical role to play not just in ensuring that the letter and spirit of the constitution is respected, but equally importantly that a culture of constitutionalism and respect for the rule of law is entrenched in the country. The Judiciary has to play its role in the implementation in spite of and indeed because of the politics that continue to define and influence the implementation of devolution. In playing this role, the Judiciary is likely to be asked to intervene even in cases of a political and policy nature including those that can be more appropriately resolved through non-judicial mechanisms. Such cases may not only lead to unnecessary backlog of cases but would not really resolve the substance of the disputes. The rest of chapter this elaborates these arguments.

### 3. Kenya’s Model of Devolved Government

There are different models of devolution and different countries adopt one or other model of devolution. The decision to adopt a particular model is influenced by a country’s history and its political experiences and realities. It is therefore useful to begin this discussion by shedding insights into the model of devolution that Kenya has adopted. An accurate conceptualization of Kenya’s model of devolution is important for at least two reasons. First, effective implementation devolution requires a proper understanding of the model adopted. Second, the politics of devolution revolve around putting into effect the principles that define the model of devolution adopted. Failure to properly conceptualize the model that has been adopted may be the cause of some of the institutional tensions and political conflicts being witnessed as the country implements the system (See Chapter 2 for a comparative analysis of the nature of Kenya’s devolved system of government).

Kenya’s devolved system of governance has two levels: a national government, and forty-seven county governments. Each county government has two arms, the executive and a county assembly. The national government has three arms, comprising of the executive, parliament (the National Assembly and the Senate) and the Judiciary. The Judiciary is a shared institution as it serves both levels of government. While the Senate is part of the national government, (being one of the two chambers of parliament,) it represents the counties, and serves to protect the interest of counties and county governments. The constitution allocates powers and functions to each of the two levels of government. The constitution provides that revenue raised nationally be shared between the two levels of government.

The two levels of government are distinct and interdependent and are required to conduct their mutual relations on the basis of consultation and cooperation<sup>1</sup>. The distinctness of the two levels of government means that one is not superior or junior to the other<sup>2</sup>. It is a model that would work well only if the two levels of governments recognize their interdependence and avoid emphasis on hierarchy in their functional relationships. As Kangu observes, “... the two levels of government are distinct and have autonomy from each other in the sense that there is no subordination of one order of government to the other, as they are coordinate with each other”<sup>3</sup>.

Indeed, the constitution requires the two levels of government to respect the functional and constitutional integrity of government at the other level and respect the constitutional status and institutions of government at the

1 Article 6, Constitution of Kenya 2010.

2 M Kangu, *Constitutional Law of Kenya on Devolution* (2015) 316.

3 As above.

other level.<sup>4</sup> However, this has not always been the case as evidenced by the supremacy battles between the National Assembly and the Senate with each house arguing that it is superior to the other.<sup>5</sup>

These contestations, which form part of the politics of devolution, notwithstanding, there is a general consensus that this new form of governance is expected to radically transform and reform the manner in which public affairs of the country will be conducted. This is true of the three arms of government at the national level and the players in each of the two levels of government. This is, perhaps, what the Chief Justice means when he says, “the constitution heralded a new judiciary and a new form of rule of law.”<sup>6</sup>

#### 4. Institutions Implementing Devolution

Since the politics of devolution take place in an institutional context, and between institutions, it is useful to briefly highlight the roles of the key institutions involved in the implementation process. This should help us appreciate the politics that define and influence the implementation of devolution which politics has often been extended to the Judiciary.

The key institutions at the national level charged with the implementation of the constitution are the executive, the national assembly, the senate, the judiciary, and other national institutions and offices such as the Attorney General and the office of the Director of Public Prosecutions. The players at the county government level are the county executive and the county assemblies. Other institutions are the National and County Governments Coordinating Summit (the Summit), the Council of County Governors, constitutional commissions, the Auditor General, Controller of Budget, the Transition Authority and the Intergovernmental Budget and Economic Council. The Summit provides a platform through which the political leadership of the two levels of government can meet and discuss issues affecting the implementation the devolved system of government. The Council of County Governments, on the other hand, is a platform for county governments to share their experiences and discuss issues of common interest. The Council has become a defender of the interests of county governments.

Other institutions include the Intergovernmental Relations Technical Committee and the sectoral working groups or committees. These committees and working groups serve as consultative fora on sectorial issues of common

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<sup>4</sup> Article 189, Constitution of Kenya 2010.

<sup>5</sup> Editorial, 'Battle between Senate, Parliament uncalled for' Standard, (Nairobi) 25 May 2013, 14.

<sup>6</sup> W Mutunga, 'A New Bench-Bar Relationship: The Vision of the 2010 Constitution of Kenya' in Y P Ghai and J C Ghai (eds) *The Legal Profession and The New Constitutional Order in Kenya* (2014) 59.

interest to the national and county governments. The County Governments Act establishes the County Intergovernmental Forum. This Forum comprise heads of departments of the national government rendering services in the county and the executive committee members of county governments or their nominees appointed by them in writing.

While each of these institutions has a specific role to play, the nature of these functions is such that the institutions have to interact with each other in the course of carrying out their respective roles. The interaction is at two levels: between the national and county governments, and within the different institutions at either level of government. This interaction is necessary and inevitable for a number of reasons. First, both levels of government serve the same citizens, the people of Kenya. Second, the functions and responsibilities assigned to each of the two levels of government are intimately connected. One level of government may, for example, be assigned policy functions while the other is assigned the responsibility of implementing the policy, as is the case with agriculture and health sectors. In both sectors, the national government makes policies while the county government implements. It is imperative to add, however, that a county government can make policy on any of its functions taking into account its unique context.

Third, a number of functions, such as disaster management, and casinos and betting control are shared between the two levels of government. Such concurrent functions require that the two levels of governments work closely together if they hope to perform the function efficiently. Failure to cooperate would lead to conflicts between the two. This would undermine the effective implementation of the constitution including devolution. Political disputes have been witnessed between institutions attempting to carry out shared mandates as explained later in the chapter (See Chapter 5 for a detailed discussion on national and county powers and functions).

Another rationale for close interaction is the fact that the constitution requires it. Interaction is thus not an option but a constitutional imperative.<sup>7</sup> Article 187 of the Constitution provides that one level of government may transfer its assigned powers and functions to another level of government. This would be done if one level of government feels that the other level of government would perform a function assigned to it better. The enabling law, the Intergovernmental Relations Act contains further provisions that require the governments involved in a transfer to enter into a written agreement.<sup>8</sup> This is best actualized through consultation and co-operation.

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<sup>7</sup> Article 6 (2) Constitution of Kenya 2010.

<sup>8</sup> Sections 24, 25 and 26, Intergovernmental Relations Act.

The need for cooperation also applies to the functions of the two chambers of parliament. There are bills that both chambers must approve for them to be enacted into law. These are bills affecting county governments. The two Houses must also participate in any resolutions to determine the removal of the president or deputy president from office. This cooperation and consultation has not always been respected; a factor that has generated conflicts between different institutions implementing devolution.

## 5. Conflicts between County Executives and County Assemblies

The relationship between the county executive and the county assemblies has been characterized more by conflicts than cooperation. The conflicts arise in the course of official interaction between the two arms of county government. Under the supervision of the governor, the county executive performs a number of executive functions including: preparation of the county budget, development plans, and ensuring prudent use of county public resources.

The county assembly has three main responsibilities: law making, representation of the people, and oversight over the county executive. The assembly also has a power to approve policies and plans from the executive relating to the management and exploitation of the county's resources and development and management of infrastructure.

It is imperative to observe that even though law making is a primary mandate of the assembly, the executive can also generate laws for consideration by the assembly. Similarly, the executive assents to laws passed by the assembly. The assembly also vets and approves some appointees (especially at the senior level) of the executive.

It is in the course of the interaction between the executive and the assembly that politics tend to emerge. Politics emerge when one arm of the government resists the involvement of the other arm in what it considers its core mandate. In a number of cases, conflict is due to a misunderstanding on the nature and extent of functional boundaries in interrelated matters. Some actors do not recognize the complementarity that one arm brings to the function of the other arm of government. In other instances, it is due to one arm of government viewing the other arm as encroaching on its mandate. Sometimes this encroachment actually happens. It could also be simply a case of resistance to change. This is the case, for example, when the national government holds on to some functions even when it is clear that the functions belong to the county government.

## 5.1 The County Assembly's Oversight Role

The most controversial role that has created conflicts between the county executive and the county assembly is that of oversight. The county assemblies have given a lot of attention to this role compared, for example, to their lawmaking role.<sup>9</sup> The controversy over the oversight role of the county assembly has also drawn in the Senate. The Senate has taken the position that it has a constitutional duty to oversight county executives. This has been a source of conflict between the senate and the governors. Some governors refused to appear before the Senate Committee when summoned. The Council of County Governors took the dispute to court.

There are a number of reasons why county assemblies give priority to the oversight role. First, most assembly members lack the capacity to generate and debate legislation. This is because many county assembly members have low educational qualifications. This makes it hard for them to clearly conceptualize their legislative role and to effectively debate proposed legislation. This point ought to be understood against the backdrop that while article 99 (1) (b) of the constitution envisages legislation indicating educational qualifications for members of county assemblies.<sup>10</sup> However, Parliament rejected the envisaged legislation when it reached the floor of the House. The result is that any person can be elected as a member of a county assembly irrespective of his or her educational qualifications. This has clearly posed a challenge to their effectiveness as lawmakers.

Second, a good number of the county assembly members were councilors in the defunct local authorities. The former councilors were not lawmakers and the law-making function is, therefore, a new role for them. It will certainly take time before they can develop the capacity and right attitude towards this role.

Third, county governments do not have enough qualified legislative drafters to assist in this role. Counties mostly rely on the national government, and especially the Attorney General and the Kenya Law Reform Commission, to assist in the drafting of Bills. Unfortunately, both the national government and the Kenya Law Reform Commission do not have enough legal drafters. To address this challenge, some county governments have established the office of a county attorney to assist in legislative drafting. One or two counties, among them Bomet County, have passed legislation giving the legal framework for

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<sup>9</sup> An assessment of the performance of the county assemblies in 2015 by the Commission for the Implementation of the Constitution indicates that county assemblies have passed very few laws since they were constituted in 2013 compared for example to the record of the national assembly in this regard.

<sup>10</sup> Article 193, Constitution of Kenya 2010.

this office. County governments have also observed that they are unable to gazette bills because they have to rely on the national government Printer. Unfortunately, the national government printer gives priority to national government publications.<sup>11</sup>

Fourth, no county government has a legislative calendar to guide the legislative process. It is therefore not possible to know when to expect a particular legislation or which Bills are given priority. To address this challenge county assemblies may wish to consider developing a legislative calendar akin to what is in schedule five of the constitution.

As indicated above, county assemblies have taken their oversight role with a lot of zeal. Such zeal would ordinarily be commended if it were being done well. This however is not the case. A number of county assembly members do not understand what this role entails. This lack of understanding was demonstrated at a meeting in Busia County involving the Commission for the Implementation of the Constitution<sup>12</sup> and members Busia County Assembly in 2014. After a discussion about the roles of the county assembly and that of the executive, in which the Commission for the Implementation of the Constitution emphasized the need for County Assemblies to respect the principle of separation of powers, one County Assembly member observed that in her view, there was no difference between oversight and implementation. Her colleagues did not seem to disagree with her either. The executive had earlier pointed out that county assemblies were usurping the role of the executive in the guise of exercising its oversight role. The executive pointed out a case in which members of the county assembly supervise the collection of market fees, a role that is executive in nature.

While the problem may be due to lack of capacity of assembly members, there is certainly a political dimension to the issue. The oversight role gives county assemblies an opportunity to demonstrate their power over the executive. It appears that many county assembly members have taken this perspective. By exercising this oversight authority members of county assemblies are able to intimidate the executive including the governor. This is usually achieved by threatening the executive with impeachment if the executive does not satisfy the needs of Members of County Assemblies, reasons that are often of a selfish nature.

Another dimension to the conflict between the county executive and the county assemblies has to do with the fact that many governors feel slighted

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<sup>11</sup> *ibid* /49 – author to confirm reference.

<sup>12</sup> The author participated in the meeting.

by the fact that while they are degree holders, they are being “supervised” by Members of County Assemblies, some of whom have not had any formal education. This observation by some governors has not been taken very kindly by members of county assemblies who become determined to show that they are the “real bosses” at the county government level.

In a number of counties including Bungoma and Makueni, the county assemblies have taken the supremacy wars to the budget making process. Two challenges have been observed in the budgeting process pitting governors and the assemblies. First is the tendency by county assemblies to take over or attempt to take over the budget making process from the executive. While it is the executive that makes the budget to enable the executive translate its policies and programs into tangible development, in many counties the budget prepared by the executive gets taken over by the assemblies once the executive presents it to the assembly. County assemblies have formed the habit of radically altering the original budget presented to them by the executive. The assemblies proceed to approve the altered budgets without reference to the executive. Essentially therefore the county assemblies end up making and approving their own budget and not the budget of the executive. Governors have in the majority of such cases refused to approve such budgets arguing, rightly, that the altered budget is not their budget. The result in many counties is a standoff leading to inability of county governments to finance their operations.<sup>13</sup>

There have also been cases where the members of county assemblies demand a budgetary allocation to be managed by the individual ward representatives. According to many governors, such requests are usually for unconstitutional expenditure. An example given by county executives is the demand by members of county assemblies to be given money to establish a Ward Development Fund. This is a Fund that is equivalent to the Constituency Development Fund, which has been controlled and managed by members of the National Assembly. Members of county assemblies insist on this Fund even after the court declared the Constituency Development Fund unconstitutional.

There are a number of reasons why members of the National Assembly and now the members of county assemblies insist on controlling these funds. By financing development projects in their constituencies and Wards respectively through this Fund, they would endear themselves to voters and this would enhance chances of their re-election. In this regard, it must be remembered that governors control the entire budget of a county and members of the

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<sup>13</sup> The stand off between the Makueni Governor and the County Assembly led residents asking for the Dissolution of the County Government A Commission to inquire into the dissolution of the County Government recommended dissolution but the president declined to do so.

National Assembly view this as giving governors an electoral advantage over them. This may explain why some Senators and members of the National Assembly have indicated their intention to vie for the seat of governor in the next general election. It also explains the incessant political wrangles between some governors and senators.

The insistence by members of the National Assembly to control the Constituency Development Fund also shows that MPs have not fully appreciated that development<sup>14</sup> is no longer their role, if it ever was. Members of county assemblies similarly do not appear to realize and appreciate that development is not one of their roles. Whatever the explanation, these conflicts interfere with the ability of county governments to deliver services. They also adversely affect the effective implementation of devolution.

## 6. Resistance to Devolution

Kenya made at least two serious attempts to adopt a new constitution between 2000 and 2010. The first attempt was made in 2000 when president Daniel arap Moi established the Constitution of Kenya Review Commission. The constitutional draft developed by this Commission led to a Constitution Bill that was defeated in a referendum in 2005. The second attempt was made in 2009. Following the post election violence of 2007/2008, a Committee of Experts was appointed by President Kibaki in 2009 to rework and harmonize the 2005 draft constitution. The new draft was subjected to a referendum in 2008 and was adopted. In both cases, a sizeable number of Kenyans either supported or opposed the constitutional referendum drafts. In the last attempt, the draft constitution was supported by 67 percent of those who voted in the referendum while 37 percent opposed the draft. Resistance to the constitution thus began during the constitution making process.

While many issues or provisions in the first and in the second draft constitutions may have informed opposition or support for the draft constitution, there is no doubt that devolution was one of the contested provisions. Both politicians and bureaucrats, some of whom serve in the current government, opposed both draft constitutions. It is not unreasonable, therefore, to assume that many of them are still uncomfortable with the constitution and would therefore resist its full and effective implementation.

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<sup>14</sup> In the past members of parliament interpreted development to mean their involvement in the actual provision of public goods such getting money from government using whatever strategy worked to build a road or construct a health facility.

This resistance takes different manifestations. It is manifested in public servants at the national level seeking to retain some of the functions that are assigned to the county governments by the constitution. A case in point is the controversy surrounding the roads sector. There is evidence that the national government is reluctant to transfer some category of roads to the county government even after the Transition Authority<sup>15</sup> transferred them to the county governments. The dispute has now been taken to court for resolution. The national government has also been reluctant to transfer some functions that were originally managed by parastatals to counties. It is argued in this chapter that some national government officials may be reluctant to let go these functions for fear of losing their jobs. Other national government officials may want these functions retained at the national level because they do not want to work outside Nairobi. The delay in restructuring the Provincial Administration is yet another example of resistance to change by the national government and to the effective implementation of the constitution of Kenya 2010. The constitution requires that this system of administration to be restructured by August 2015 at the latest to make it accord with devolution. This has not been done by December 2015.

## 6.1 Imposing Decisions on County Governments

County governments have on a number of occasions complained that the national government does not consult them on issues affecting the two levels of government. County governments have been particularly unhappy about national government imposing its decisions on county governments. The controversy surrounding the purchase and subsequent lease of medical equipment by the national government for use by county governments is an example of such tensions between the two levels of government. The national government bought and leased modern medical equipment for use by counties without consulting the county governments. At some stage the Council of County Governors advised county governments not to accept the equipment precisely because they were not consulted as required by law.<sup>16</sup>

This case demonstrates one of the major challenges to the effective implementation of the devolved system of government and political conflicts between the two levels of government. Failure to consult the county

<sup>15</sup> The Transition Authority is mandated by the Transition to Devolved Government Act to facilitate the transition to devolution including transfer of functions from the national to the county Governments

<sup>16</sup> E Mutai and B Wasuna, 'Counties get May 6 ultimatum for health equipment contract' *Business Daily*, (Nairobi) 18 March 2015, 5; E Mutai and B Wasuna 'Sign up or lose out, Cabinet Secretary warns reluctant governors', *Business Daily*, (Nairobi) 18 March 2015, 5; J Mbaka, 'Governors reject Uhuru Sh 38 billion health plan', *The Star*, (Nairobi) 10 February 2015, 1, 6; B Amadala and D Lubanga, 'Oparanya now accepts medical kit he rejected'; B Amadala and D Lubanga, '38bn-cost of the medical equipment in shillings that the National Government is leasing to counties', *Daily Nation*, (Nairobi) 9 June 2015, 24.

governments was clearly a violation of one of the critical principles that define the country's devolved system of government.

The decision by the national government not to consult the county governments gives the impression that the national government holds the incorrect view that a county government is inferior or junior to the national government. In fact county governments complain that the national government seems to hold the view that it is the county government that should consult the national government. If this is true it leads to perpetual political conflicts and wrangles between the two levels of government. This is likely to undermine effective implementation of devolution.

## **6.2 Political Dilemma Over the Medical Equipment**

The imposition of the medical equipment on county governments posed a major political dilemma for the county governments. On the one hand they wanted to be faithful to the law by forcing the national government to respect the requirement for consultation. On the other hand they were afraid that rejecting the equipment would provide the national government and the anti devolutionists with a weapon to discredit and undermine county governments and devolution in particular. This is because most hospitals in the country require modern medical equipment to facilitate improvements of health care services. The national government is aware that consumers of health services would not be too concerned about which of the two levels of governments buys the medical equipment. In fact given the limited civic education on the constitution it would not be surprising that many people do not even know which functions belong to which level of government. Their main interest is in getting services. It was, perhaps, due to this fear that many governors eventually agreed to accept the equipment and thereby avoid the risk of being portrayed as not interested in improving medical facilities in their counties.

## **6.3 Conflict Over Transfer of Functions**

One of the earliest tensions between the national and county governments was over the transfer of functions. Governors through the Council of County Governors had complained about the slow pace at which the transfer of functions assigned to county governments was being done. The Council wanted the functions transferred at once. The issue was tabled at one of the first meetings of the National and County Government Coordinating Summit. Although the transfer should be done on the advice of the Transition Authority and in phases, the National and County Government Coordinating Summit ignored the legal process and ordered the transfer of these functions to counties.

A number of possible explanations for this decision come to mind. First, the transfer was clearly done for political reasons. Although the Transition Authority would not come out openly to admit this, the fact that it was done outside the rules and laid down criteria clearly shows that the President succumbed to political pressure from the governors. As head of the national government the President did not want to be portrayed as the stumbling block to the transfer of functions. He must have feared being accused of impeding the implementation of devolution.

The county governments on the other hand demanded the transfer because they feared that if this was not effected, the recipients of these services - the voters - might wonder why governors are not providing the services. As politicians the governors were not sure that the public would understand that there is a criteria for transfer of functions. More importantly they would not understand why a county would not be ready to take up a function that belongs to it. In the view of the governors, an explanation of this kind would not be politically rational in the eyes or ears of the voters.

The position taken by the governors ought to be understood also against the fact that there exists a lot of mistrust between the national and county governments. This mistrust has a history. The regional governments under the independence constitution were dismantled by the central government barely two years of their existence (See Chapter 2 for a historical discussion of the independence regional governments). It is probable that county governments feared that the national government might have been behind the delay in the transfer as a way of undermining and subsequently discrediting county governments. Governors may also have had fears that the Transition Authority might be working with the national government to frustrate the transfer of the functions. A majority of the members of the Transition Authority were from the national government. None of them was from County Governments partly because they were appointed before county governments were established.

Whatever the explanation for the rushed transfer, the fact is that many counties were not quite ready for some of these functions. Many had not put in place the necessary systems and infrastructure to facilitate the performance of these functions. In this regard, it is instructive to note that previous districts, which form current counties, were at different levels of socio-economic development by the time the new system was introduced. This may be one of the reasons why many counties are experiencing challenges in managing and delivering some of these functions.

## 6.4 Conflicts Over Health Function

A number of health workers including their national union have expressed the desire to have the health function managed by the national government. The national government has also indicated support of this. The health workers have argued that counties are not ready to manage the health function. Indeed they have called for the establishment of a National Health Service Commission as a way of taking it away from the management of county governments.<sup>17</sup> There is no evidence however that the establishment of a National Health Service Commission will improve both the management and quality of health services. Indeed the people calling for the establishment of a Commission have not told Kenyans how a commission would improve health services. The reason must therefore be sought elsewhere. One possible explanation would be this. Under the centralized system of government, health workers belonged to one national labour union. All their union dues were deducted and managed by the national union. With devolution, each county government is at liberty to have its health workers form a union specific to that county. This would render the national union redundant; as each county would form its own union to negotiate salaries with its own health workers. There would obviously be losers in this arrangement. The conclusion that one draws is that the health workers really do not have problem with devolution of health services. It is the fear of their national union losing their power and other benefits associated with such power when that informs the attempt to reassign the health function. The unions are in short using the health workers to protect their interests.

## 6.5 Conflicts Over National Referral Health Facilities

The constitution clearly provides that the national government is responsible for health policy<sup>18</sup> and national referral health facilities<sup>19</sup>. The rest of the health function is allocated to county governments. The national referral health facilities are those to which patients from any health facility in the country would be referred if the referring facility is not able to deal with the condition of the patient. They include Kenyatta National Hospital, Moi Teaching and Referral Hospital and Mathare Mental Hospital. The other health facilities are categorized into levels, 2, 3, 4, and 5 and provincial health facilities. While the constitution is clear about which health facility belongs to either level of government, attempts have been made to reassign county health facilities to the national government.

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<sup>17</sup> E Merab, 'Workers' strikes plunge health service in crisis', *Sunday Nation*, (Nairobi) 23 August 2015, 9.

<sup>18</sup> Section 20, Fourth Schedule Constitution of Kenya 2010.

<sup>19</sup> Section 23, Fourth Schedule Constitution of Kenya 2010.

In this regard the national government drafted a Bill seeking to bring these health facilities under its management resulting in conflict between it and the county governments. The Bill which seeks to effect the transfer of the health function states” the Government shall manage and be responsible for any public health institution classified as referral facility under this law.” The drafting of the proposed law followed a resolution of the Health committee of the national assembly. In one of its reports the committee states “In accordance with Article 187 of the constitution, the national and county governments must urgently agree to transfer specific health functions to the national government, including, but not limited to Level Four and Five health facilities”.<sup>20</sup> This is clearly not what the Fourth Schedule to the constitution envisaged when it states that the national government is responsible for national referral health facilities.

If successful the position taken by the national government is likely to be the beginning of many other functions meant for the county governments being taken over by the national government. It also gives the impression that the national government has not fully accepted devolution. It is trying to hold on to powers that have been devolved. Such unilateral decisions and subsequent conflicts may cause the public to lose faith in devolution in particular and the constitution generally

Some citizens have in fact taken the dispute over this matter to court<sup>21</sup>. The petitioners sought the Court to give a declaration that the national referral health facilities existing before the effective date and referred to in Part 1 Section 23 of the Fourth Schedule to the Constitution were not devolved to the county governments, and remain a core function of the national government.

The judge saw the petitioner as asking the court to interpret what was essentially a policy matter. In his ruling the judge observed that the court is not the best judge as regards the transfer of functions and powers between the two levels of government. The judge went further to state that the constitution and Statutes have created adequate safeguards and institutional arrangements on the subject.

It is imperative to note that although private citizens took this matter to court, the court was essentially saying that this was a matter of policy and was not for the court to determine. In the words of the judge this was a mandate of the executive.,, The court maintained and correctly, that this was a matter to be resolved elsewhere and not in the courts,

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<sup>20</sup> Nation Reporter, 'House backs bid to take over hospitals', *Daily Nation*, (Nairobi) 3 July 2014, 6.

<sup>21</sup> *Okiya Omtata Okoiti & 1 other v Attorney General and 6 others eKLR* (2014).

These court cases aside; it is instructive however, that county governments have also allowed politics among them to frustrate the effective management of former provincial hospitals. Under the previous arrangements, a provincial hospital was a referral facility for districts (current counties) within the province. Counties in which these provincial hospitals are situated have taken the position that these hospitals belong to them.

One of the issues that have caused tension between counties over the former provincial hospitals has to do with funding of these facilities. A number of county governments are reluctant to offer services to patients from neighboring counties (former districts) that originally referred their patients to these facilities. They argue that they are the ones that fund the facility. Neighboring county governments have also been reluctant to share the cost of running these facilities. Although there is no law or constitutional provision for joint funding of these hospitals, there is nothing illegal for a group of counties to share the cost of running a facility that serves them.

These tensions are therefore unnecessary as Kenya's model of devolution allows for inter-county arrangements that, in the case of the former provincial hospitals, would allow two or more counties to jointly fund and equip such facilities. The facility would in fact be transformed into a regional referral hospital to serve several counties that fund its operations.

In response to the tensions between the county governments over the funding of these facilities, the national government has been giving counties conditional grants to fund the eleven<sup>22</sup> level five hospitals in the country. The challenge however has been that the national government wants to administer these funds through the Ministry of Health. County governments have resisted this.

## **6.6 Politics Between the Senate and the National Assembly**

On a number of occasions the two Houses of parliament have differed over their respective mandates. In one occasion the national assembly passed a Division of Revenue Bill and took it to the president for assent without reference to the Senate. The Senate took the speaker of the National Assembly to court for not involving it in a debate concerning the Division of Revenue Bill. The Supreme Court<sup>23</sup> determined that the Senate has a role to play in passing the Division of Revenue Bill.

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<sup>22</sup> The level 5 hospitals are, Embu, Garissa, Kakamega, Kiambu, Kisii, Kisumu, Machakos, Meru, Mombasa, Nakuru, and Nyeri.

<sup>23</sup> *Speaker of the Senate & Another V Attorney General & 4 others* (2013) eKLR.

In an advisory issued on the same matter, the Supreme Court said that the Division of Revenue Bill, 2013 was an instrument essential to the operations of county governments, as contemplated under the Constitution, and so was a matter requiring the Senate's legislative contribution. Consequently, the speaker of the National Assembly was under duty to comply with the terms of Articles 110(3), 112 and 113 of the Constitution, and should have cooperated with the speaker of the Senate, as necessary, to engage the mediation forum for resolution of the disagreement. "With regard to any future lack of accord of a similar nature, between the two Chambers of Parliament, there shall be an obligation resting on the State organs in question to resort to mediation, as a basis for harmonious functioning, as contemplated by the Constitution."<sup>24</sup> This statement by the Supreme Court is significant in that it reminds implementers of the constitution, and in this case the two Houses of Parliament, that there are other avenues for dispute resolution other than the courts. The court is essentially saying that there are some disputes that do not have to be resolved through judicial intervention, as alternatives mechanisms for such disputes exist. The articles referred to above provide for consultation and mediation between Speakers of the two Houses of parliament. The national assembly was certainly not ignorant of this fact. It simply chose to play politics in the hope that the senate might give in.

## 7. Tension between the Judiciary and the National Assembly

The relationship between the National Assembly and the Judiciary has not been cooperative either. Indeed, the National Assembly has on many occasions threatened to ignore court orders. The assembly argues that any attempt by the courts to declare decisions of the National Assembly null and void constitutes interference in its constitutional mandate. In fact, the National Assembly made true its threats by slashing the budget of the Judiciary in the 2015/2016 financial year. This reaction by the National Assembly to the Judiciary is not very different from the attempts by the county assemblies to frustrate and intimidate the county executive in the budget process.

In all these cases, the problem appears to revolve over attempts by each party to demonstrate its power over the other. This is what has been termed as supremacy battles or turf wars. The National Assembly clearly wants to frustrate, intimidate and subdue the Judiciary with a view to making the Judiciary a puppet of the legislature. The ruling Jubilee Coalition, with its numerical strength in the National Assembly, hopes that it can dictate terms for other arms.

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<sup>24</sup> *Speaker of the Senate & Another V Attorney General & 4 others* (2013) eKLR.

County assemblies too want to intimidate the governor and his executive into behaving as subordinate to the assembly. If this were to happen the country would move from executive dictatorship of the past to legislative dictatorship. This would not only undermine the implementation of the constitution, but would reverse the democratic gains that this constitution promises. The Judiciary is the only hope for Kenyans in preventing this from happening. This is because it is to the Judiciary that Kenyans and institutions would resort to for redress.

## 8.0 Role of the Judiciary

The traditional role of the Judiciary has been to interpret the constitution and the law in cases where this is not clear. The judiciary is also the final arbiter in disputes between citizens on the one hand and, between citizens and the state on the other. Because Kenya opted for an adversarial judicial system, courts wait for disputes to be brought to them and so would not proactively initiate dispute resolution. It is similar to the practice in parliament where a speaker will not stop a debate in parliament for lack of quorum unless and until a member draws the speaker's attention to this. The speaker does this even when he knows that only a handful of MPs are present. The danger is that even a house that lacks a quorum may pass laws.

Since the head of the Judiciary has acknowledged that the constitution of Kenya, 2010 heralded a new judiciary and a new form of rule of law<sup>25</sup> should the Judiciary not review the entire jurisprudence and in particular the adversarial approach to adjudication of disputes? It is unlikely that, by a new judiciary, the Chief Justice meant new personnel. He must have had in mind a judiciary that thinks differently and conducts judicial affairs differently from the inherited judiciary hence the proposal that Kenya's jurisprudence system be reviewed. This is what the Chief Justice probably had in mind when he observed that:

With regard to schools of jurisprudence, our Constitution takes a purely positivist approach. While we must master the law as contained in the Constitution, statutes and case law, it is its critique on the basis of non-legal phenomena that will breathe life into the transformation of our nation. Our Constitution allows our judges to develop and make law so that it conforms to the implementation of human rights principles and values of the Constitution, to give national direction in matters that are non-legal. It also adumbrates the skeletal elements

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<sup>25</sup> Mutunga above n 6, 59.

of a progressive and functional jurisprudence, whose key ingredients include a jurisprudence that is not legal-centric, but one that is multi-disciplinary and internationalist. Thus the job description of the judicial officers emerging from the constitutional provisions is to generate progressive jurisprudence that concretizes the human rights state created by the new Constitution and to guide society to realize the promise of social justice that is inscribed in our Constitution. It is therefore not in doubt that the Judiciary is a critical part of the engine that drives the country to its social democratic trajectory<sup>26</sup>.

What therefore should this new judiciary do to facilitate the implementation of the devolved system of government and to reassure the public that the new system is in deed reformed and transformed? We answer this question next.

### **8.1 Restoring Confidence in the Judiciary**

One of the very first things the courts should do is to act in a manner that restores public confidence in the judiciary. This is necessary because this confidence had been lost. Writing about the judiciary that existed before the enactment of the Constitution of Kenya, 2010, the Chief Justice Says; “When I was sworn in as Chief Justice, we found a judiciary that was designed to fail. It was characterized by deprivation of freedom of speech, assembly and association; lack of independence, which made it appear to be part of the civil service and therefore subjugated to the executive; and a crippling inability to stand up to external pressure. Both the bench and the bar faced a crisis of confidence and an emerging crisis of competence. Allegations about inappropriate interactions, such as bribery and improper financial ties, between judges and lawyers were the order of the day. Corruption was at home among judicial officers just as it was among advocates – indeed it was hard for judges to practice corruption without co-operation of advocates<sup>27</sup>.”

There are many ways through which the judiciary can restore this confidence. A starting point is to rid the institution of the behavior that the chief justice has narrated in the last two sentences of the above quote. These practices eroded the image of the judiciary in the eyes of the public. The Judiciary and its officers must thus conduct themselves transparently and in ways that are respectful of chapter six of the constitution on leadership and integrity<sup>28</sup>.

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<sup>26</sup> Mutunga above n 6, 66-67.

<sup>27</sup> Mutunga, above n 6, 60.

<sup>28</sup> Chapter Six, Constitution of Kenya 2010.

## 8.2 Speedy Determination of Court Cases

Another way through which the current judiciary can help to restore the people's confidence in the institution and indeed promote the implementation of the devolved system of government is by prompt disposal of matters before court. This will not only ensure respect of the principle that justice delayed is justice denied, but will also give the public confidence and hope that in the Judiciary that they can find timely redress of their grievances. In the words of the chief justice, a backlog of cases had been the order of the day in the country's courts in the past. This needs to change under the current constitutional order if the citizens are to have hope in the Judiciary.

The prompt determination of cases before the courts is also important for the implementation of devolution for another reason. Governors have complained that many people seek court injunctions whenever a governor proposes to use public land for a public purpose, such as construction or expansion of roads. Such people argue that the land in question is their property. Governors point out that such injunctions usually take years to conclude while the proposed projects stall.<sup>29</sup> As a result, people begin to ask why the governor or the county government is not fulfilling election pledges. Simply put, the people ask why the county government is not providing services. Under such circumstances, the people begin to lose faith in devolution. This can be resolved if court cases, including court injunctions, are promptly determined.

One is of course cognizant of the fact that the Judiciary may be overwhelmed by a large number of court cases brought before the courts when the institution has very few judicial officers. This problem would be compounded when frivolous cases are referred to court or when cases that can be resolved through non-judicial mechanisms are referred to the courts.

There is, however, a positive side to this phenomenon. The fact that many cases are brought to court is an indication that the public views the courts (and therefore the Judiciary) as their saviour especially given the finality of court decisions. It is also an indication that the public is ready to participate in governance generally and the implementation of devolution in particular. This enthusiasm should not be dampened by failure by the courts to ensure promptness in adjudication of disputes. Courts should also, as much as possible, avoid undue regard to technicalities and serve the ends of justice. Of course courts must do this within the provisions of the constitution. Courts must not contradict the constitution but should also bear in mind that the

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<sup>29</sup> This observation was made by Jackson Mandago (Governor, Uasin Gishu county) at the Fourth Annual Congress of the Forum of Chairpersons of Constitutional Commissions and Independent Offices held in Eldoret on 16 September 2015. This is likely to be the case in other counties.

constitution allows them to give effect to the laws through their judgments and rulings.

Thirdly, the constitutional requirement that its interpretation be done in a manner that permits the development of the law<sup>30</sup> and contributes to good governance<sup>31</sup> gives the Judiciary flexibility and latitude that they can use to make people gain confidence and hope in the institution. The public need to be assured that the Judiciary will assist in ensuring that not just the letter but that the spirit of the constitution is respected. The courts should use this provision of the constitution to make rulings that are seen to promote the spirit of the constitution and that resonates with the aspirations and expectations of a reasonable person. The point being made is that the manner in which the courts deal with issues brought to them will either promote or undermine devolution. Speedy resolution of cases before the courts is critical. Backlogs will not promote confidence in the Judiciary.

It is important that the Judiciary is undertaking the decentralization of its serves to every part of the country and especially to the far-flung areas of the country. The Judiciary has opened a number of new stations in all the counties and thereby opening access to justice to many Kenyans. This coupled with its outreach program in which members of the judiciary hold public meetings with members of the public and accord them opportunity to interact with them should help transform the institution from its hitherto isolationist image to one that the people can relate with. This will facilitate public participation, which is one of the values and principles of good governance in the constitution.

### **8.3 Promoting Constitutionalism**

The Judiciary will also be under immense political pressure to overlook some violations of the constitution. Already, parliamentarians are at war with the Judiciary over some of the judgments made by courts in cases in which parliament has an interest. A good example is the decision by parliament to reduce the budgetary allocations of the judiciary for the 2015/2016 financial year. This was parliament's response to the decision by the Judiciary to declare the Constituency Development Fund unconstitutional. Indeed, none other than the speaker of the National Assembly is on record as saying that parliament is ready to disobey court orders if the orders go against decisions made by parliament.<sup>32</sup>

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<sup>30</sup> Article 259(1) (c), Constitution of Kenya 2010.

<sup>31</sup> Article 259(1) (d), Constitution of Kenya 2010.

<sup>32</sup> J Kamau, 'Muturi: Parliament will not honour "idiotic and unreasonable court orders' *Standard* (Nairobi) 28 April 2015.

## 8.4 Separation of Powers

One of the issues that the players in the devolution process must address sooner rather than later is the respect for the constitutional principle of separation of powers. Separation of governmental powers is one of the fundamental pillars of democratic governance. It is a requirement of the Constitution of Kenya 2010 that the various arms of government should respect the principle while exercising their respective functions. Article 185(3) for example, provides that a county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs<sup>33</sup>. The principle however applies to all other organs of the levels of government. This constitutional requirement has been another source of tension and friction between various arms of government. The attempts by the Senate to establish what they called County Development Boards is an example either of a lack of respect for or simply lack of understanding of what the application of the principle entails.

In 2013, the Senate originated an amendment Bill to the County Government act to establish a County Development Board in each county. The Boards would among other things, provide a forum at the county level for consultation between the national and county governments, coordinate and harmonize county development plans and projects and consider and adopt county integrated development plans before they are tabled in the county assembly for approval. The Boards would also have broad powers to consider and advise on any issue of concern that may arise from time to time within the county.

The Boards were to be chaired by the elected senators and composed of elected representatives (national and county)<sup>34</sup> and deputized by governors while county secretaries were to be the secretaries to the Boards. The composition and role of the Boards ensured domination by politicians and subordination of governors to senators. More importantly, the Boards usurped executive and legislative functions that belong to the county governments. The Council of Governors challenged the amendment in Court and the Court declared the amendment unconstitutional.<sup>35</sup> The Commission for the Implementation of the Constitution had earlier written an advisory cautioning the unconstitutionality of the Bill.<sup>36</sup> Parliament, however, passed the Bill and the

<sup>33</sup> Article 185(3), Constitution of Kenya 2010.

<sup>34</sup> The Board was to be chaired by the senator of the county with the governor as board secretary. Other members of the Board would include women representative, nominated senators, Members of the national Assembly, Members of County Assemblies the leaders of both majority and minority of the county assembly and the speaker of the county assembly.

<sup>35</sup> *Council of Governors and 3 others v The Senate and two others* (2015) eKLR.

<sup>36</sup> Commission for the Implementation of the Constitution 'Senate's Bill an affront to devolution' (Press Release, 30 September 2013) <[www.cickenya.org/index.php/newsroom/item/336-senate-s-bill-an-affront-to-devolution#.VfZq\\_hGqqko](http://www.cickenya.org/index.php/newsroom/item/336-senate-s-bill-an-affront-to-devolution#.VfZq_hGqqko)> at 24 November 2015.

president assented to it. The court ruling will, at least for some time, deter those who may have similar ideas.

Dealing with disputes around the principle of separation of powers is one of the areas in which the Judiciary will play a critical role in helping the implementation of the constitution. The attempt by one institution within a level of government and between levels of government to encroach in the mandate of others is likely to continue until a culture of constitutionalism is firmly entrenched. There will also be continued attempts to even resist attempts by the Judiciary to play its role in this regard. Until a culture of constitutionalism is entrenched, we are also likely to witness an increase in cases of contempt of court rulings especially by the executive and the legislature. The Judiciary will be expected by Kenyans to take a firm stand on such matters.

The new Judiciary envisaged by the Chief Justice will also help the course of the Constitution 2010 and devolution by being more open and accessible to the people of Kenya. The outreach programs started by the institution is a step in this direction but need to be sustained and done more regularly than is the case currently. Officers of the Judiciary should also participate in public debates especially with scholars more often as a way of getting new developments in society that have a bearing in their work. In this regard the work initiated by the Judiciary Training Institute is useful.

## 9. In Lieu of a Conclusion

I am reluctant to end with a conclusion. This is because the issues raised in this chapter are likely to continue to dominate the debate on the operationalization of the devolved system of government for some time to come. To conclude might be misconstrued to mean that the debate has been or should be closed. I therefore propose to end the chapter by making additional remarks about the issues at hand, which remarks should hopefully inspire further interrogation of the challenges that the operationalization of this system of governance is likely to experience in the future including the role of the judiciary.

The chapter has attempted to show that many of the challenges facing devolution can be attributed to politics. The politics of devolution can of course be traced to the period when the process of developing the constitution began. Among the 37 percent of the voters who opposed the adoption of this constitution possibly includes those who objected to the introduction of a devolved system of governance.

The country has witnessed politicians at both levels of government trying to intimidate and subdue those they consider as obstructing their interests and power. The politics of intimidation by different institutions is evident in the relationship between governors and members of county assemblies. This chapter has given examples of county assemblies attempting to intimidate governors and county executive committee members. The paper has also shown how the National Assembly has attempted to intimidate the judiciary resulting in the budget of the judiciary being slashed by the national assembly. It is important for all institutions to bear in mind that whatever power they exercise must be within what the constitution allows. In other words, no institution can exercise its powers outside the constitution. Parliament is no exception to the rule.

The Judiciary has a special role to play in making all institutions including the judiciary itself abide by the constitution. This is because, if all else fails, it is to the judiciary that aggrieved parties will seek redress. In light of the attempts to intimidate the judiciary we opine that the judiciary must have the courage to resist such attempts at intimidation.

The relationship between the national and county governments has also been characterized by lack of trust. This is not helping the performance of either of these levels of government. Indeed most players with a role in implementing devolution do not seem to trust each other. This general lack of trust, the origins of which we explained already, has an adverse effect on service delivery.

The tendency by the national government and at times the Senate to portray county governments negatively has also not helped. The failure by county governments to talk about and document the successes they have recorded is also not helping. The county governments are not telling their success yet an assessment by Commission for the Implementation of the Constitution in both 2014<sup>37</sup> and 2015<sup>38</sup> indicate great strides made in development since devolution. The successes are particularly visible and appreciated by those counties in regions that had hitherto been marginalized.

Inter-governmental relations are perhaps the weakest link in the whole process. The two levels of government seem unable to find ways through which they can work in a cooperative and consultative manner as required by the constitution and the Intergovernmental Relations Act. It would appear that the two levels

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<sup>37</sup> See generally, Commission for the Implementation of the Constitution, 'Assessment of the System of Devolved Government: From steps to strides', June 2014.

<sup>38</sup> See generally, Commission for the Implementation of the Constitution, 'Sustaining the Momentum: Assessment of implementation of transferred functions to the County Governments', June 2015.

of government are not taking advantage of the inter-governmental structures such as the National and County Government Coordinating Summit, and those structures established in the Intergovernmental Relations Act to address challenges facing the two levels of government. The result is the tension and politics between the two levels of government that county is subjected to daily.

Article 96 (1) of the constitution states that the Senate represents the counties, and serves to protect interests of the counties and their governments. It does not however say what the counties are being protected from or who is likely to threaten the interests of counties and county governments. But based on the experience of the 1963 constitution, it would appear that the framers of the constitution of Kenya 2010 feared that county governments would be threatened by the national government. Regional governments under the 1963 constitution were undermined by the central government. This must have influenced the framers of the CoK 2010 to provide for the protection of county government from the national government. They saw the senate as the mechanism by which this protection would be achieved. What has emerged in practice however is that some of the fiercest threats to county governments are internal rather than external.

The power struggles between the MCAs and the county executives are perhaps the greatest threats to devolution. The case of Makueni government demonstrates the point well. It was internal power struggles between the County assembly of Makueni and the executive that made the Makueni county government dysfunctional. Many other counties have experienced power struggles between the assembly and the executive. Such power struggles offer an opportunity for anti-devolutionists both inside and outside the county government to undermine the implementation of devolution. This experience points to the need to reexamine ways and means of improving both inter and intra-governmental relations. In particular both MCAs and the executive of a county governments must understand and appreciate that the unity of county government.

The impression they have created is that the two are separate entities and that one can operate without the other. In the Makueni case, for example, many members of the county assemblies were originally of the mistaken view that only the executive arm of the government would be dissolved in the event that the county government became dysfunctional. Part of the problem is the tendency, even among members of parliament, to equate government with the executive. Hopefully, the Makueni experience will drive home the point that a county government consists of the two arms, which must cooperate and work as a team even as they respect their respective mandates. It is also

imperative to note that even the Senate has, on many occasions, behaved as if the institution is at war with the county governments instead of behaving as the protector of county governments.

## County Governance: Political and Institutional Structures and their Effectiveness

By Valerie Nangidi

### 1. Introduction

County governments are the primary means through which the objects of devolution under Article 174 should be realized. An analysis of whether or not counties are actually pursuing the objectives is important to understand the success of the implementation process. The clamour for devolution was about changing the system of governance from a highly centralized government. The centralized governance perpetuated a legacy of underdevelopment and poverty characterized by bad governance, systemic marginalization and exclusion of majority of Kenyans along ethnic and regional lines, and skewed distribution of national resources among others.

A reading of the objectives of devolution shows that counties are expected to address part of the previous challenges mentioned above. Counties have been given service delivery roles under the Constitution and powers to make laws and take other actions necessary to ensure an effective discharge of their constitutional mandate. Inadequacy of resources, incapacity, and centralised control are some of the challenges that led to deterioration of services in the past. The Constitution now protects and safeguards the constitutional autonomy, powers and functions of the counties (see chapter 6 for a discussion on powers and functions of counties).

The objectives of devolved governance should inform the manner in which counties perform their functions. Kangu argues that the objects should facilitate the interpretation of the Constitution and legislation, direct the development of policy and legislation and also possibly impose substantive limitations on the exercise of power to govern.<sup>1</sup> Indeed, the objects are

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<sup>1</sup> J M Kangu *Constitutional Law of Kenya on Devolution*,

informed by Kenya's context and history and their realization will ensure that past challenges associated with the centralized system of government are addressed.

Ultimately, the county institutional structures will determine whether and how these objects will be pursued. Effectiveness will depend on the manner in which county institutions are designed and how they approach their respective functions under the Constitution. This chapter analyzes the effectiveness of county institutions and the factors that continue to influence their effectiveness. The chapter also analyses the emerging challenges in county governance and proposes measures to strengthen county institutions, ensure service delivery and improve overall effectiveness at the county level.

## 2. Architecture of County Governments

County institutions are established on the basis of separation of powers and functions. This is not surprising given Kenya's history of subordination of public institutions to the Executive. The Constitution clearly divides power and responsibilities amongst the distinct arms of county government in order to ensure accountability and democratic checks in the exercise of the respective powers.

### 2.1 County Legislature

The Constitution states that legislative power originates from the people and it is vested in the legislative arms of national and county governments.<sup>2</sup> At the national level, legislative power is further divided between the two chambers of Parliament (the Senate and the National Assembly). At the county level, legislative authority is vested in county assemblies.<sup>3</sup> The county assembly is composed of elected and nominated members and the speaker who is an *ex officio* member. In the 2013 general election, 1,450 representatives were elected to the 47 county assemblies across the country.<sup>4</sup> The Constitution provides that there should be no less than one-third of either gender at the county level and this led to the nomination of additional 772 women representatives to ensure compliance with this provision.<sup>5</sup> There are also additional special representatives who are nominated to represent the youth and persons

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2 Taskforce on Devolved Government, 'Final Report on Devolved Government in Kenya' (2011) 64.

3 Article 176(1) Constitution of Kenya 2010.

4 Article 90 provides for political parties to nominate members based on party list seats to ensure that no more than two-thirds of the members of elective public bodies shall be of the same gender (Article 81(b)); have a fair representation of people with disabilities (Article 81(c)) and representation of marginalized groups and youth (Article 177(c)).

5 Commission for the Implementation of the Constitution (CIC) 'From Steps to Strides: Assessment of the Implementation of the System of Devolved Government' (2014) 22.

with disability.<sup>6</sup> A report of the Commission for the Implementation of the Constitution noted that all counties generally complied with constitutional requirements regarding composition.<sup>7</sup> However, the high number of women nominees was as a result of the low number of elected women to the county assemblies (only 5 percent of persons elected to county assemblies in the March 2013 election were women).

In order to enhance effectiveness of the assembly, there is an administrative section headed by a clerk and requisite administrative staff. The County Government Act establishes a county assembly public service board (a mirror of the national Parliamentary Service Commission) with a mandate to establish and abolish offices in the county assembly service. Their core function is to facilitate the effective functioning of the assembly in achieving its mandate. The county assembly public service board is institutionally separated from the county public service board (discussed below) in accordance with the principle of separation of powers. The county assemblies conduct their business through county assembly committees that are established in the respective standing orders of the assemblies.

The legislative, representation and oversight authority of a county government is vested in and exercised by the county assemblies. To this extent, the 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 under the Fourth Schedule. The County Assembly is also responsible for oversight over the county executive committee and any other county executive organs. Oversight tools include the power to commence impeachment proceedings against a Governor or a member of the county executive; the Senate carries out the actual impeachment in the case of a Governor.<sup>8</sup> The assembly is also empowered to receive and approve plans and policies for management and exploitation of resources within the county and development of its infrastructure and institutions.<sup>9</sup>

The County Government Act requires assemblies to carry out vetting and approval of nominees for appointment to county public offices, borrowing by the county governments and county development planning.<sup>10</sup> County assemblies also have powers to approve county budgets and expenditure.

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<sup>6</sup> The Constitution provides that the number of special seats will be determined by national legislation. The County Government Act provides for 6 additional seats for this category while the Elections Act specifies 4 seats, the Independent Electoral and Boundaries Commission (IEBC) implemented the latter provision.

<sup>7</sup> CIC above n 5, 22-25.

<sup>8</sup> Section 33 County Government Act 2012.

<sup>9</sup> Article 185 County Government Act 2012.

<sup>10</sup> Section 8 The County Government Act 2012.

This defines the nexus between the executive and legislature political power. In carrying out its role, the county assembly is expected to represent the collective will of the people at the county level.

## **2.2 County Executive**

The Constitution creates an independent county executive, with the powers to execute functions as assigned under the Fourth Schedule to the Constitution. The executive arm of the county government is made up of an executive committee headed by the Governor. Members of the county executive are answerable to the governor in the execution of their respective functions. Section 30(2) of the County Government Act 2012 vests roles of leadership and overall coordination of executive business in the governors. The Deputy Governor assists in the performance of some of the Governor's functions. The constitution provides for at least ten executive committee members who are appointed by the Governor to represent each of the ten major departments of the county government, with the approval of the assembly.<sup>11</sup>

The Executive Committee is supported in its mandate by the county civil service board that defines the bureaucracy of the county government.<sup>12</sup> The Board comprises a chairperson, not less than three but not more than five members and a secretary, all of whom are nominated and appointed by the Governor, with the approval of the County Assembly. The boards should ensure that the county governments strategically determine, manage and utilize its human resource for competitive and efficient service delivery. The recruitment process is supposed to be non-partisan and independent for it success. Openness and transparency in the recruitment processes is imperative. The board is institutionally separated from the Governor and the other executive organs in order to enhance its independence.

The civil service in the counties is divided into ministries/departments that are each responsible for some particular aspect of county government functions. The head of the department is the County Executive Committee member, who is constitutionally and politically answerable to the Governor and accountable to the County Assembly for its operation. The departments are generally responsible for the general policy, direction, and execution of the functions assigned. The departments are composed of chief officers (the administrative heads and accounting officers of departments), directors and other staff.<sup>13</sup>

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<sup>11</sup> Article 179(2) Constitution of Kenya 2010.

<sup>12</sup> Section 57 and 58 County Government Act 2012.

<sup>13</sup> Section 48 County Governments Act (2012) anticipates that the functions and provision of services of each county government shall be decentralized to sub-counties, wards, village units determined in respective counties and such other or further units as a county government may determine.

The county executive includes the structures of administration set up at levels below the county such as the sub-county and ward administrators.<sup>14</sup> Levels below the county ensure that provision of services covers all areas of a county. The executive arm is composed of further structures that are distinct in authority but share in responsibility of the daily administration of the executive function.

These institutions operate within the realm of public service delivery of the county government and their cooperation and consultation is critical to the effective functioning of the County Governments. These include the urban areas and cities entities that are appendages of the county governments to facilitate the delivery of urban services in the county governments. The Urban Areas and Cities Act 2012 provides for urban boards and committees, constituted by the county executive and mandated to manage the operation of the urban areas. The city and municipal boards are corporate bodies headed by managers while town boards are non-corporate and are headed by administrators.

The institutions and structures as described above make for a good institutional design for the effective delivery of the responsibilities of the County Government. Power has been distributed in line with principles of good governance. The desirable outcome is that the decisions and actions of the county governments should be those that make improved and significant impact in the daily lives of the county. However, the crucial issue is how county governments can inject principles of good governance into their operations and thus help improve relations between the two organs of county government.

### 3. Implementation of County Governance

The Constitution provides for comprehensive political and governance structures at the county level that will take time to be fully implemented. Most of these institutions mirror those at the national level and require efforts and resources (both human and financial) to effectively implement. The March 2013 general election ushered in the county executive and legislatures. The county institutions require adequate and relevant capacity to carry out the functions described above. Furthermore, the performance of these functions requires counties to have adequate resources as prescribed in the Constitution.<sup>15</sup> Most of these arrangements had to be put in place from the

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<sup>14</sup> Article 176(2) of the Constitution anticipates that provision of a county governments functions and delivery of services will be decentralized to the extent that it is efficient and practicable to do so.

<sup>15</sup> Article 175 (b) Constitution of Kenya 2010.

scratch since the former local authorities did not control significant powers and resources.

Effective performance of the county functions also implies cooperation and cohesion between the two arms at the county level. The two arms of government have shared but differentiated roles in county governance. The performance of county functions should ultimately lead to achievement of the county objectives listed in the constitution. This section evaluates the implementation of county governance.

### **3.1 County Law Making**

Counties share legislative power with the national level and the legislative power of counties extends to functions allocated to them under the Fourth Schedule. The legislative making role is primarily vested in the county assembly. The executive has power to propose legislation that can be debated and passed by the county assembly. The Governor has power to assent to legislation before the legislation comes into force.

County assembly legislative authority is key to facilitation of effective functioning of the County Governments, through development of a sound legal framework for delivering assigned functions. In 2013, the Commission for the Implementation of the Constitution developed an outline for county governments that listed the legislative interventions of counties to ensure effectiveness.<sup>16</sup> County governments have been engaged in development of various laws. According to a report by the Commission for Implementation of the Constitution, the highest number of laws (40 percent of county laws) passed by counties were those that largely concerned finance and planning; most of these laws are a statutory requirement and a pre-condition for counties to have before accessing or spending funds and this may explain the high percentage. 11 percent of the laws are on control of social services, such as liquor control. The education sector (especially management and disbursement of education) has also received the attention of counties with 11 percent of the total number of laws passed by counties being in this sector.<sup>17</sup>

Substantive areas of service delivery such as health and transport and infrastructure sector have the lowest number of laws passed by counties and

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<sup>16</sup> Commission for the Implementation of the Constitution 2013 June, Circular No. 1. Provided and outlined guideline to county executives and county state organs on the implementation of the Constitution. The guideline provided that in developing legislation, the assembly must observe constitutional provisions relating to the subject matter, ratified international legal instruments, fundamental rights and freedoms, national values and principles of governance, socio-economic rights, objects and principles of devolution. Additionally, the legislation needs to also take into account, National legislation and policy concerning the sector.

<sup>17</sup> Commission of the Implementation of the Constitution, 'Sustaining the Momentum - Assessment of Implementation of the Transferred Functions to the County Governments' 2nd Devolution Assessment Report (2015) 58.

this can be attributed to the confusion in unbundling and transfer of functions in these sectors (see chapter 6 for a discussion on the implementation of powers and functions).

While the factors such as the slow unbundling of functions have contributed to the slow pace of legislative development in counties, it is evident that there is low capacity on the part of counties. Many of the current members of county assemblies lack a basic understanding of the law-making procedures. A good number of the members served in the former local councils and thus have no experience with law-making processes at all.<sup>18</sup> The 2015 report of the Commission for the Implementation of the Commission<sup>19</sup> mentions several cases of low levels of education and in a few cases complete illiteracy among some members of the county assemblies.

Furthermore, counties generally (both the executive and the assemblies) lack technical drafters and this has compromised the quality of legislative proposals emanating from the assemblies.<sup>20</sup> Literacy levels notwithstanding, a well-resourced assembly should have or be able to develop relevant expertise among its members and staff to provide sufficient support to its legislative work. While the assemblies have developed several laws, they have for the most part not matched the same with development of requisite policies, regulations and administrative procedures for their effective implementation. It is imperative for the county governments to ensure that a complete legislative framework is in place for any particular sector.

Vested interests have also led to passing of irregular and probably unconstitutional county legislation. County assemblies have developed and passed laws establishing Ward Development Funds. In most cases, these funds are fashioned along the Constituency Development Fund that was under the patronage of the members of the National Assembly. The courts have declared the national Constituency Development Fund unconstitutional (see chapter 8). The report by the Commission for the Implementation of the Constitution reveals that many of the laws on ward funds involved county assembly members and the administrative section of the assembly in the setting up of structures to manage the funds.<sup>21</sup> Furthermore, the laws set salaries and allowances without advice and input from the Salaries and Remuneration Commission as required by the Constitution,<sup>22</sup> creating

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<sup>18</sup> Institute of Economic Affairs 'The point: What Next for Kenya's Local Authorities?' Issue No 59 (2005) 4.

<sup>19</sup> CIC, 'Sustaining the momentum: Assessment of the Implementation of Transferred Functions to the County Governments' (2015) 14.

<sup>20</sup> As above.

<sup>21</sup> Above n 19, 15.

<sup>22</sup> Article 203(4)(b), 212 and 201 Constitution of Kenya 2010.

entities with powers to borrow, and creating multiplicity of institutions to perform county functions respectively.<sup>23</sup>

### 3.2 Oversight and Relations between County Executives and Assemblies

The county assembly's oversight role over the affairs of the executive is explicitly provided for both in the Constitution and enabling legislation. While respecting democratic principles of separation of powers and Article 189 of the Constitution's provision on cooperation and consultation, the legal framework empowers the County Assembly to review and evaluate selected activities of the executive that impact on functions assigned to the County governments. In this regard, the oversight function of the assembly includes determination of approvals, appropriations, interrogating executive reports and carrying out investigations and legislative hearings by committees in a bid ensure efficiency and effectiveness in administration. These roles should be subject to constitutional legislative intent or resolution by the county assemblies, strictly on behalf of its electorate.

The oversight powers of the assemblies are critical to the effectiveness of the counties. Kangu argues that the county assembly has the authority to approve certain executive actions that is meant to ensure legality and effectiveness of the activities. Thus, without effective functioning of the county assembly the execution of functions assigned to the county government would be futile.<sup>24</sup>

Beyond the strict oversight role, the two arms of government are required to coordinate their activities and ensure overall cohesion and cooperation in the discharge of county functions. This requires counties to conduct their oversight role in a manner that promotes the achievement of the goals of devolution. County assemblies oversight's role has, however, been beset by a number of challenges. The nature and extent of the oversight role has been misunderstood and applied in a manner that fosters conflict rather than cooperation and cohesion in the conduct of county affairs.

The case of *Judicial Service Commission v Speaker of the National Assembly*<sup>25</sup> set precedence in guiding the oversight function of the legislature. The court ruled that 'oversight', which is a form of monitoring, does not entail controlling or giving instructions or 'micro managing'; rather, it involves a

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<sup>23</sup> The Constitution of Kenya 2010 Article 230(4)(b) requires national and county governments to seek the advise of SRC on remuneration and benefits of all public officers. Article 212 relates to guarantees by the National Government in borrowing. Article 201 requires prudent use of resources in governance affairs.

<sup>24</sup> Kangu above n 1.

<sup>25</sup> *Judicial Service Commission v Speaker of the National Assembly & 8 others* (2013) eKLR (Nairobi High Court Petition No. 518)

regular review of progress development of a subject.<sup>26</sup> The court went further to recommend the development of an appropriate protocol for the exercise of oversight that respects the functional and mutual integrity of all the three arms of government.<sup>27</sup>

The scrutiny and approval of senior executive appointments by the county assembly offer a chance to ensure that appointments adhere to constitutional provisions such as respect of diversity, integrity, etc. However, county assemblies have used this to frustrate the Governor by rejecting appointees on the basis of interests as opposed to objective grounds. While tools such as impeachment should, as the Constitution prescribes, be preserved for extreme case of gross violation of the Constitution, the county executive routinely receives threats of impeachment for the flimsiest of reasons, especially where actions of the executive touch on the collective self-interests of the county assemblies. In most cases, clashes between the assembly and members of the executive are about control of resources.

In order to facilitate effective oversight, the constitution requires county executive to submit to its assembly, full and regular reports on matters relating to the county.<sup>28</sup> Specific laws require different reports to be submitted to the assembly to enable the assembly review progress. The reports are usually reviewed by the relevant committees and provide information to hold the executive to account. The assemblies also have a power to summon any person to appear before it for purposes of providing information and this power can be used as a tool of oversight.<sup>30</sup>

However, the oversight by county assemblies has, in practice, led to conflict and disputes pitting the assemblies and the governors, or assemblies and the members of the county executive committee. The 2015 report of the Commission for the Implementation of the Constitution paints a picture

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**26** *Judicial Service Commission v Speaker of the National Assembly & 8 others* (2013) eKLR (Nairobi High Court Petition No. 518) para 179.

**27** *Judicial Service Commission v Speaker of the National Assembly & 8 others* (2013) eKLR (Nairobi High Court Petition No. 518) para 268. The ruling emphasized the need for Parliament to consider developing an appropriate, structured, oversight model that takes into account and facilitates strategic and structured scrutiny of state organs by Parliament with the aim of advancing our constitutional democracy, enhancing service delivery and better quality of life for the people of Kenya. It also highlighted the need for the Executive, Legislature and Judiciary engagement Protocol for between the heads of the three arms of government to facilitate amicable discussion and resolution of issues of governance and areas of potential conflict, in the spirit of cooperation and mutual respect that underlies our Constitution.

**28** Article 183(3) Constitution of Kenya 2010.

**29** The County Government Act 2012 s 30(2)(j), requires the county executive to submit reports on the implementation status of the county policies and plans; s 47(3) requires submission of annual performance reports of the county executive committee and public service; s 92(2) requires submission of annual report on citizen participation in the affairs of the county government.; Public Finance Management Act. 2012 s 104 (1)(r) & (108 (1) requires regular reports to the county assembly by the county treasury on the annual county budget.

**30** Article 195, Constitution of Kenya 2010.

of constant wrangling and an adversarial manner of conducting mutual relations between the two arms of government.<sup>31</sup> There are instances where county assemblies have held the executive hostage, almost creating a situation of “legislative dictatorship” at the county level.

In Makueni County, a Commission of inquiry that was put in place to inquire into the call for the dissolution of the County Government found that motions of impeachment against members of the county executive were in most cases frivolous and malicious. The Assembly never gave members of the executive a reasonable opportunity and time to defend themselves before impeachment and investigation. In addition, reports of the Assembly had significant inconsistencies and discrepancies.<sup>32</sup>

In Bungoma County, a member of the executive who had been impeached by the county assembly approached the court for redress. The court found that the provisions in the County Government Act that prescribes the impeachment of a member of the county executive were unconstitutional. The court noted that the provisions made the assemblies the accuser and judge and thus breached the principles of natural justice. The court also noted that the assembly did not give the member of the executive a fair chance to answer the allegations that formed the basis of his impeachment.<sup>33</sup> The court termed the actions of the assembly as malicious. The member of the executive submitted to the courts that his troubles were caused by the fact that he did not allow the assembly members to control funds meant for roads and infrastructure.<sup>34</sup>

While the county assemblies have various tools for oversight at their disposal, the power to summon attendance of the executive to the committees of county assembly has in most instances been the frequently used option. The executives, on the other hand, complain of harassment and time wasting tendencies by the assembly in the use of its power to summon. County Assemblies have also expressed frustrations with some officers from the executive who do not honour summons.

It is also important for members to carry out the oversight function with decorum and integrity. In several instances, public statements by members of county assemblies have antagonized members of the executive appearing before the committees. It is important for members of the assembly to be objective in their oversight work and avoid vendetta and vindictiveness.

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31 CIC above n 9.

32 Commission of Inquiry into the Petition to Suspend Makueni County Government ‘Final Report’ (2015) 109.

33 *Stephen Nendela v County Assembly of Bungoma & 4 others* [2014] eKLR, para 8.

34 *Stephen Nendela v County Assembly of Bungoma & 4 others* [2014] eKLR, para 60.

Committees could also strengthen their own technical capacity to enable them hold the executive to account.

In its 2015 report, the Commission for the Implementation of the Constitution report attributed poor oversight role to poor quality of reports or no reporting from the executive, inadequate funding towards oversight activities, low education level among members of the county assembly, lack of financial autonomy of the assembly and wrangles among the county assembly members due to political party differences.<sup>35</sup>

### **3.3 Management of Resources at the County Level**

The Constitution provides principles of public finance management that bind both the national and county governments. The principles emphasize openness and accountability in the use of public resources and public participation, equity, and prudence and fiscal discipline. The Public Finance Management Act 2012 provides a detailed legal framework to ensure realization of the principles enshrined in the Constitution.

County governments' resources are guaranteed in the constitution. The constitution specifically provides that the counties should have adequate resources to carry out their functions.<sup>37</sup> The Constitution guarantees a minimum of 15 percent of revenue raised nationally that should go to counties to enable them to discharge their functions. The constitutional and legal framework dealing with the management of public finances binds every county.

While the constitutional and legal framework for management of county resources is clear, the challenges emerging with regard to county finances reveal that many counties are not adhering to the constitution and applicable laws. There are reported cases of imprudent use and wastage of resources in both the executive and legislative organs of county governments. For instance, the Auditor General's report for year 2013/2014 mentioned that KShs. 3.71 billion was spent on foreign and domestic travel for "benchmarking and exchange programmes" or just routine workshops.<sup>38</sup> The auditor reported anomalies in public finance management in several counties.<sup>39</sup> The issues raised by the Auditor General included: failure to adhere to procurement laws,

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<sup>35</sup> CIC, above n 19, 114.

<sup>36</sup> Article 201 Constitution of Kenya 2010.

<sup>37</sup> Article 175 (b) Constitution of Kenya 2010.

<sup>38</sup> Auditor's report 2013/2014

<sup>39</sup> These include: Kirinyaga, Meru, Mombasa, Baringo, Homabay, Nyeri, Nairobi, Kajiado, Busia and Makeni counties.

breach of the Public Finance Management Act, disparities in revenue collected and the amount deposited and general abuse of office by county executives.<sup>40</sup>

A World Bank report released in 2014 raised concerns on the trends of county spending states that the developing trend in counties with regards to expenditure and observed that the current trends may undermine service delivery and “crowd out” growth initiatives.<sup>41</sup> The report generally paints a picture of wastage, lethargy and wrong priorities in implementing projects and weak revenue mobilization.

The Public Finance Management Act provides that 30 percent of government budget should go to development expenditure.<sup>42</sup> However, the trend in county budgeting has gone against this provision. An overview of the 2012/13 budgets demonstrates that recurrent expenditure was way beyond the 70 percent mark of the respective county budgets. County governments overspent on wages and salaries, goods and services, thus causing a deficit emanating from recurrent expenditure. That County budgets favor recurrent expenditure against development spending is a serious negation of the objects of devolution to further the development of communities (see chapter 7 for a further discussion on management of county finances).

### **3.4 Counties and Service Delivery**

The functions allocated to the counties under the Fourth Schedule are mainly geared towards service delivery. The Transition Authority was tasked with the duty of overseeing the transition to county governance and specifically ensuring that counties are able to undertake their service delivery roles (see chapter 6 for a further discussion on this). The institutional framework for public service delivery is further provided for in various laws and policy documents. The County Executive Committee is charged with the management and co-ordination of executive business including implementation of relevant and applicable county and national policy and legislation, supervision of the administration of service delivery and decentralized units.<sup>44</sup>

In delivering on its responsibilities the Executive Committee may propose legislation for consideration by the County Assembly. Further, for effective

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<sup>40</sup> Auditor general's report on County Governments, 2014.

<sup>41</sup> World Bank, 'Decision Time: Spend More or Spend Smart? Kenya Public Expenditure Review' vol. 1 (2014).

<sup>42</sup> Sections 15 (2)(a) and s 107(2)(b) of the Public Finance Management Act 2013

<sup>43</sup> See The Constitution of Kenya 2010 Article 10 on Values and principles of governance; Article 232(1 on Values and principles of public service; Chapter 6 on Leadership and integrity; Chapter 11 on devolved government; some statutory instruments that ensure high standards of public service delivery include the County Government Act 2012, the Public Finance Management Act 2012, the Urban Areas and Cities Act 2011 and Intergovernmental Relations Act 2012.

<sup>44</sup> The Constitution of Kenya Article 183.

delivery of its mandate, the executive is further obligated to plan and implement public programmes effectively.<sup>45</sup> The county executive is to this extent, expected to operate as guided by the key county interrelated plans namely, five year County Integrated Development Plans, ten year programme based County Sectoral Plans –as a component of the integrated development Plan- County Spatial Plans, County Urban Areas and Cities Plans and County Performance Plans as a basis of budgeting and spending.<sup>46</sup> This planning framework is the basis within which an individual county government is required to appropriate its funds.

For synergy in the functioning of the County government the executive is required to provide the Assembly with full regular reports on the implementation of these plans and any other matters relating to the executive functions of the county.

Effective service delivery is only possible if both arms of government have adequate finances, and relevant and qualified human resources to undertake service delivery in the different sectors. There should also be an enabling regulatory framework to regulate service delivery. There are many challenges that hamper the effective delivery of services. There is no clear and enabling legal and policy framework to guide the executive as a result of the factors discussed earlier above. The lack of clear laws and policies at the county level affect the budgeting process as functions are not clearly defined to enable the counties to budget properly.<sup>47</sup> In some cases, this situation results in under-budgeting or non-allocation of funds for critical services and thus affecting the overall effectiveness of service deliver.<sup>48</sup>

County administration and day-to-day operations have also been faced by challenges arising from the poorly developed county plans. Most of the county plans do not have relevant content and there is a lack of technical capacity for both county planning and execution. A report by the Institute of Economic Affairs stated that, soon after the county governments were established, they had to prepare budgets for 2013/2014 under pressure to have their CIDP's ready by the statutory deadline of 1 September. This was amidst establishing their structures of administration, recruiting public officers and ensuring continuity of service delivery on functions already transferred to them.<sup>49</sup>

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<sup>45</sup> As above, Article 220, the Constitution provides for mandatory planning before budgeting.

<sup>46</sup> The County Governments Act (2012) Part XI s 107

<sup>47</sup> Commission of the Implementation of the Constitution, 'Sustaining the Momentum - Assessment of Implementation of the Transferred Functions to the County Governments' 2nd Devolution Assessment Report (2015) 15.

<sup>48</sup> V E Aitken, 'Rule of Law Development Advisor, An exposition of legislative quality and its relevance for effective development' (2012) 1.

<sup>49</sup> Institute of Economic Affairs, First County Integrated Development Planning: Experience and Lessons from Laikipia, Nandi, Uasin Gishu and Meru Counties, The Futures Bulletin No. 18 (June 2014).

This mode eventually leads to misalignment of resources and processes to the priorities of county governments. Effective performance management system is critical for county governments' delivery of their core mandate and achievement of improved service delivery.

Similarly, delivering on citizen expectations, development infrastructure that helps the citizens improve their welfare and economic progress in the counties is threatened by lack of sustained governance decisions and delivery of public services due to lack of policy guidance. The Commission for the Implementation of the Constitution's findings on the status of policy development by county governments revealed that most of the policies by county governments have not been developed. The counties cited inadequate technical personnel, limited time for policy development, financial constraints and differing county priorities, as reasons for not have developed the required policies.<sup>50</sup>

The county public service board is a critical structure since it establishes structures that should facilitate the delivery of services. The boards are supposed to demonstrate objectivity and professionalism in their work, for the interest of the county public service. To this extent, membership of the board should be selected on the basis of merit and technical competence without reference to political affiliation. While the appointment procedure seeks to enhance independence and objectivity, there are situations where<sup>51</sup> boards have been held captive by political forces in the county. Where the boards have succumbed to political pressure, the result has been a bloated workforce or employees with low productivity and an unmotivated labour force. Some governors have also complained that the boards were recruiting their political opponents thus threatening the delivery of services while the assemblies have also alleged that the executive manipulates the board recruitments.

Unlike the county public service board whose plans and actions are subject to scrutiny of the county executive member in charge of public service and the county assembly, the county assembly service boards have almost a free hand in the execution of aggravated mandate. This has led to rampant recruitment by the assembly that has the problem of bloated workforce in the county governments. This has led to a rise in recurrent expenditure and further sullied relations between the two arms of government.<sup>52</sup>

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<sup>50</sup> CIC above n 19, 58.

<sup>51</sup> Section 58 of the County Government Act 2012 provides that the chairperson and members of the boards shall be nominated and appointed by the county governor, with the approval of the county assembly.

<sup>52</sup> The Public Finance Management Act 2012 s 15(2)(a)

Other challenges affecting the county public service are traceable to the bungled transition at the national level. The results from the Capacity Assessment and Rationalisation of Public Service have not been released, let alone implemented. Ideally, the assessment should have been completed before counties assumed office. Counties inherited bloated workforce from the former local authorities and the staff transferred from the national government to the counties. Counties have also recruited additional staff and this has added to the numbers without a careful evaluation of the skills requirement. In Makueni, for instance, it was reported that several County Assembly personnel were recruited for positions they did not apply for, whereas shortlisted candidates were overlooked in some positions in the county assembly.<sup>53</sup>

#### 4. Analysis

An ideal assessment of the effectiveness of county institutions is to weigh county performance against Article 174 of the Constitution, which defines the purpose, and goals, of county governance in Kenya. However, county governance in Kenya is at its very nascent stages. A comprehensive picture of the effectiveness of county governance is yet to fully emerge. Comparative experience has revealed that devolved governance takes time and the impact will take time to come.

There is anecdotal evidence that the push of resources and functions to the county level has brought some changes. Counties have managed to budget and spend resources in critical sectors of service delivery and this has potential to address access to essential services. In the health sector, county governments have purchased ambulances,<sup>54</sup> built new health facilities,<sup>55</sup> hired personnel<sup>56</sup> and provided essential equipment and supplies for healthcare. In the agricultural sector, the counties have bought farm machinery and farm inputs that are availed to farmers at subsidized costs.<sup>57</sup> The counties have also repaired roads and built new roads and other transport infrastructure. These investments have a great potential to enhance services in the respective sectors.

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<sup>53</sup> Commission of Inquiry Into the Petition to Suspend Makueni County Government, Final Report (2015) 98, positions that were not advertised were those of the position of procurement officer, commissioner II, sergeant at arms, librarian/ research officer

<sup>54</sup> Kiambu, Kwale, Tana River counties all bought more than 10 ambulances to enhance access to healthcare.

<sup>55</sup> Vihiga County has built 15 new dispensaries, Kisumu County has opened 23 new health facilities, Kirinyaga County has constructed 6 new laboratories and 2 new mortuaries, etc.

<sup>56</sup> Mandera County has increased its health personnel by hiring 360 additional health professionals and this represents a 200 percent growth in the number of staff.

<sup>57</sup> Some of the county investments in this sector include: Bomet County's 15 milk coolers, Nyandarua's mechanized potato farming project, Nyamira County's green house projects assisting 60 farmers' groups, subsidies to farmers in form of seeds, fertilizer, etc.

County governance, however, is being implemented in an institutional and political culture of centralization. Some of the challenges mentioned earlier in the chapter, such as the incomplete transfer of powers and functions and inadequacy of resources may well be a manifestation of this culture of centralization. Some functions that belong to counties are clearly being held and performed by national government institutions and yet these should be transferred to county governments. A good example is with the implementation role of Agriculture function which is exclusively a county's mandate. While the national government is strictly given the policy role, a number of its entities continue to perform some agriculture functions assigned to county government. The Agricultural Development Corporation mandated to participate in activities in agricultural production<sup>58</sup>, among a myriad other entities under this sector, continue to usurp the powers and competence of the county government. A common excuse given by the national government is the lack of capacity at the county level to perform functions; yet, the resistance to transfer functions and resources is itself a denial of the same capacity that counties need to enable effectiveness.

An emerging and major challenge to county effectiveness is within the county institutions. The separation of powers and functions between the executive and legislature was meant to enhance democratic accountability. However, this has also led to political wrangling and competition between the two arms of government. Most of these conflicts, as shown in this chapter (see also chapter 4) are about control of resources. The institutional wrangles take the focus away from service delivery to fight institutional battles and this end up harming service delivery. There has also been wastage of resources at the county level. Thus, while there are external factors that are contributing to ineffectiveness at the county level, there are emerging internal challenges at the county level that need to be addressed in order to enhance effectiveness.

A number of the challenges facing county governance can be addressed through effective consultation and deliberations between the two levels of government and within the county level. The Constitution provides for the principle of consultation and cooperation and this can provide an avenue through which common solutions can be found in order to enhance county effectiveness (see chapter 8 for a discussion on the institutions for cooperation and consultation).

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<sup>58</sup> Agriculture Development Corporation Act, s 12

## 5. Conclusion

Service delivery must among other factors that contribute to effective devolution be assured, consistent and uninterrupted. This can only be achieved when the institutions of county government function as anticipated in the Constitution and related laws. A poor understanding of the institutional roles and responsibilities that make devolution work threatens to impede practical efforts in the implementation of the system of devolved government. Subsequently, the emerging politics too threaten the effective implementation of the system of devolved government.

The independence and distinctive roles and responsibilities of the county government institutions calls for a clear understanding of their responsibilities, mutual respects and support for the functional and institutional integrity of the other. Further, there is dire need for clarity, understanding and respect for the institutional mechanism put in place to facilitate the intra-relations and workings of the institutions of county government. The leadership must respect the rule of law and conform to the explicit leadership and integrity, requirements of a public officer in the Constitution. This will enhance consultations and collaboration amongst the institutions, which can much more efficiently develop the trust and teamwork that encourages and sustains “mutually-reinforcing initiatives,” required for the success of the County governments.

Power management, resource allocation and its utilization remain central in fiscal, political and economic challenge of the counties. Even when apparently overshadowed by other governance issues, consequences of imprudent resources allocation and utilization and power management constitute the primary challenge to the realization of the aspirations of Kenyans when they chose the devolved system of governance.



6

# The Emerging Approach of Kenyan Courts to Interpretation of National and County Powers and Functions

Conrad M. Bosire

## 1. Introduction

The devolved governance structure that is provided for in the Constitution of Kenya 2010 establishes a two-tiered system of governance composed of the national and county governments. State powers and resources are divided between the two levels of government and each level government has guaranteed resources to exercise powers and perform functions that are specified in the Constitution. The county level is designed to be an integral part of the broader political, economic and institutional framework of the Kenyan state. The devolved system of government is a fundamental shift from the arrangements that existed prior to 2010.

Kenya's governance structures and powers have always been strongly centralized and this has had a negative effect on the sub-national level. The policy of centralization not only ensured that local governments did not have enough resources and capacity to deliver essential services but also denied the local governments decision-making powers by subjecting them to tight control. The combined effect of this led to a decline and decay of local governments over the years. The presence of the central government at the local level was enhanced through multiple channels of centralized delivery of local services as the local authorities lost relevance. The Constitution of Kenya 2010 was adopted after of a sustained struggle to replace the centralized governance structures with a system where powers and resources are dispersed for service delivery, local development and greater accountability.

The basic constitutional framework defines (very broadly) the functions of the two levels of governments. There is hardly a single function that is clearly and unambiguously spelt out in the Constitution. This means that the

concrete functions of the two levels of government have to be determined through interpretation of the main framework. The Constitution and enabling framework provide clear procedures to determine the functions of the two levels of government. However, a number of factors have led to the ineffectiveness in the implementation of the constitutional, legal and policy framework meant to clarify and implement national and county powers and functions.

Courts have, inevitably, been faced with issues of division of powers and functions in the course of safeguarding the Constitution and judicial adjudication of disputes. The process of unbundling and clarifying the powers and functions of the national and county governments (or simply put, determining what functions (and resources) belong to which level of government) has emerged as one of the greatest challenges in the implementation of devolution.

This chapter examines the approaches that the courts have taken in determining the powers and functions of the national and county governments. While courts have the primary duty to safeguard and uphold the Constitution, they are generally given a residual role in disputes or conflicts relating to powers or functions of the two levels of government. Nevertheless, disputes on matters touching on the division of functions between the two levels and the performance of functions have reached the courts through other avenues. Courts have therefore had to determine a number of issues regarding the exercise of national and county powers and functions. More disputes on powers and functions are being filed in the courts. These include sectors such as health, education, gambling and gaming control, roads sector, among other sectors.

While courts have heard and determined a number of functions/ powers-related disputes, it is still too early to have a complete and accurate picture of the approach of courts to the division of powers and functions. A number of important pronouncements have been made by the High Court (especially the Constitutional and Human Rights Division) on powers and functions. The Supreme Court, for instance, is yet to determine any specific question on the division of powers and functions. Kenya adopted the Constitution in 2010 and the jurisprudence from the courts is still at its very embryonic stages.

The coming into office of the county governments (in March 2013) saw an increase in the number of disputes regarding powers and functions. A few of these cases, perhaps a handful, provide a basis to analyse the initial/ emerging approach of the courts. The chapter is divided into five parts including the introduction. The second part of the Chapter starts by setting out the broad

context within which courts have had to make determinations on national and county powers and functions. The third part analyses cases that have been determined by courts on powers and functions and identifies the emerging approach by the courts. The fourth identifies issues that courts may bear in mind as they develop jurisprudential tools for interpreting powers and functions and the fifth part is a conclusion.

## 2. The Context of National and County Government Disputes over Powers and Functions

Before discussing the context of disputes on powers and functions, it is important to clarify the difference between a “power” and a “function”. While the Constitution appears to use the terms “powers” and “functions” interchangeably, there is a slight (technical) difference. The term “power” refers to the authority of a government. This authority may be exercised through legislation, regulations, or administrative directions. A “function”, on the other hand, refers to the actual activity that is undertaken by a county or national government and whose end-result is the delivery of a service or other intended objective. Put differently, the exercise of a power (e.g. through legislation, budgeting, regulations, etc.) facilitates the performance of a function.

There are a number of factors that define the manner in which national and county powers and functions are being implemented. The basis of most disputes regarding the powers and functions of the two levels of government is the serious lack of clarity in the constitutional framework that defines national and county powers and functions. Article 186 of the Constitution refers to the Fourth Schedule of the Constitution for a determination of what belongs to the two levels of government. Accordingly, the initial point of reference is the two lists in the Fourth Schedule that belong to the national and county levels respectively. However, the Constitution complicates this further by stating that a power or function that is conferred to the two levels is concurrent.<sup>1</sup> Thirdly, the Constitution provides that any power or function not in the two lists in the Fourth Schedule is residual and it belongs to the national government.<sup>2</sup> There are number of challenges with this.

First, the items in the two lists are generally stated (in fact, they are “functional areas” as opposed to a clearly defined function. For instance, Part 2 of the Fourth Schedule vaguely vests “county abattoirs” in counties. It is not clear what counties are to do with this functional area: are they supposed to build

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<sup>1</sup> Article 186 (2) Constitution of Kenya 2010.

<sup>2</sup> Article 186 (3) Constitution of Kenya 2010.

or simply licence and regulate the building of abattoirs? The same applies to several other items mentioned in the county list. Secondly, there is no separate list of concurrent powers and functions. It is, therefore, not clear what powers are concurrent between the two levels of government. Thirdly, a number of functions that are performed by different public agencies were omitted from the two lists. One could simply presume that such functions are residual and therefore national. However, the language used in the county government list of functional areas suggests that the listed items are not exhaustive.<sup>3</sup> This means that there are functions that are not listed in either list that are not necessarily residual.

Courts have been called upon to determine disputes on the meaning of “county health services” and “national health referral facilities”<sup>4</sup> Other cases that have come before courts include: division of functions in the transport and infrastructure sector, gambling and betting control, and the education sector among others. The lack of certainty in the division of functions has, therefore, led to the intervention of courts in issues of implementation of the devolved system of government.

Apart from the ambiguity in the constitutional provisions, political and institutional factors also hamper the effective division of functions between the two levels. Kenya’s political and governance culture is defined by a strong culture of centralization of powers and resources. Devolved governance seeks to substitute the culture, structures and institutions of centralization with one where powers and resources are dispersed and shared with the sub-national level. This has inevitably been perceived as loss of power and control by the political and bureaucratic structures at the centre. Experience thus far has shown that vested interests thrive in ambiguity since this allows each party to take whichever side is favourable to their interests leading to many/ intensified conflicts between the two levels of government.

A number of reports have indicated that national government institutions are still holding functions and resources that have been formally transferred to county governments.<sup>5</sup> Furthermore, the Transition Authority, the institution mandated to transfer functions to national and county governments has reported a number of challenges including underfunding, subordination to central government bureaucracy<sup>6</sup> and even a threat of disbandment.<sup>7</sup>

<sup>3</sup> Part 2 of the Fourth Schedule which lists functions and powers uses the word “including” and this suggests that the list is not exhaustive.

<sup>4</sup> *Okiya Omtata Okioti & another v Attorney General and 6 others* (2014) eKLR.

<sup>5</sup> Council of Governors Sectoral Policy and Legislative Analysis (2015) 10-47; J Kinuthia and J Lakin ‘Have state corporations changed under devolution?’ International Budget Partnership-Kenya (Budget Brief No. 29) March 2015.

<sup>6</sup> Transition Authority ‘Report on the Status of Devolution: Achievements, Challenges and Lessons Learnt’ (2015) 20.

<sup>7</sup> The proposal was made via the Statute Law (Miscellaneous Amendment) Bill, 2013.

County governments have also stepped up the pressure with demands for the immediate transfer of all functions and resources allocated to them in the Constitution.<sup>8</sup> The demands by counties for immediate assumption of all powers and functions ('big bang' transfer) in the Constitution disregards the legal framework that requires gradual transfer of functions after determining the readiness of counties to assume functions allocated to them in the Constitution.<sup>9</sup> The gradual transfer of functions was put in place to minimize the disruption of services.

The Constitution lays out a broad framework for consultation and cooperation between and within the two levels of government and this framework can be used to address some of the challenges.<sup>10</sup> A legal framework to facilitate consultation and cooperation between the two levels was put in place even before the county governments came into operation.<sup>11</sup> However, the structures and processes put in place have not been effectively used to facilitate the determination of functional boundaries. The end result is that most of these disputes have found their way to courts of law for determination, as opposed to an amicable settlement between the political and institutional actors of the two levels of government. Substantive disputes regarding functions and resources continue to be filed in courts of law across the country and this has brought the role of courts in ensuring effective implementation into sharp focus. The next section analyses how courts have approached disputes regarding the division of powers and functions between national and county governments.

### 3. Emerging Judicial Approaches to Determination of National and County Powers and Functions

Courts have generally shown eagerness to safeguard the Constitution and devolution specifically. In one of the first matters on devolution that came before the Supreme Court, Chief Justice Willy Mutunga had this to say on the significance of devolution:

Devolution was instrumental in mobilising support for the Constitution in the referendum because many people perceived its disposal of economic and political power as an act of liberation. There is a large section of our society for whom the new Constitution is

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<sup>8</sup> N Rugene 'Governors demand transfer of roads, security functions', *Daily Nation* (Nairobi) 4 April 2013.

<sup>9</sup> A Shiundu 'Auditors report says President Uhuru Kenyatta's "big bang" messed counties' *The Standard* 21 May 2015.

<sup>10</sup> Article 6 (2) and article 189 of the Constitution of Kenya 2010.

<sup>11</sup> The Intergovernmental Relations Act (IGRA) Act No. 2 of 2012.

coterminous with devolution. It denotes self-empowerment, freedom of opportunity, self-respect, dignity and recognition.<sup>12</sup>

The Chief Justice urged courts to recognize the importance of the devolved system of government and the factors that led to its adoption. The Chief Justice specifically urged the courts to safeguard the constitution and to be aware of “vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order.”<sup>13</sup> The Chief Justice made the statement in a matter where the role of the Senate, an institution established to represent and protect county interests, was under threat. The National Assembly had bypassed the Senate in the debate and passing of the Division of Revenue Bill; a Bill that determines the share of revenue that is allocated to counties. The Senate approached the Supreme Court for an advisory opinion on its role in the debate and passing of the Division of Revenue Bill. The Court not only reaffirmed the role of the Senate in passing the Bill but also explained the significance of devolution and the justification for court intervention to ensure that objectives of devolution are protected.

In another case that concerning the determination of the powers and functions of counties in the health sector, Justice Isaac Lenaola elaborated on the nature of powers and functions of county governments in the current constitutional dispensation thus:

Local authorities cannot be equated to county governments as the structure and design of the Constitution has given county governments an elevated position as one of the organ to which sovereignty of the people of Kenya is delegated under Article 1 of the Constitution.<sup>14</sup>

The statements above demonstrate the readiness of the courts to protect county government powers and functions and to ensure the realization of the objectives of devolved governance.

The political and institutional culture of centralization favours more resources and powers to the centre as opposed to dispersal of the same from the centre to counties. Courts have risen to the occasion by asserting the functional autonomy and powers of counties vis-à-vis those of national government when confronted with matters that require them to protect county powers and functions.

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<sup>12</sup> *Senate v National Assembly* (2013) eKLR, para 173.

<sup>13</sup> *Senate v National Assembly* (2013) eKLR, para 161.

<sup>14</sup> *Nairobi Metropolitan PSV SACCOs Union Ltd and 25 others v County Government of Nairobi and 3 others* (2014) eKLR, para 64.

In the case of *Okiya Omtata Okoiti & 1 other v Attorney General and 6 others*<sup>15</sup> the Court was asked to declare the decision of the Transition Authority<sup>16</sup> to transfer health institutions that were under the national government unconstitutional. The petitioner argued that the Constitution did not transfer any health institutions that were managed and operated by the national Ministry of Health before 2010 to the counties. He argued that the phrase “county health services” as used in Part 2 of the Fourth Schedule merely refers to the health institutions that were under the former local authorities.<sup>17</sup> He further argued that the phrase “national referral health facilities” in the national government list did not refer to the two or three national hospitals that offered national referral services. Instead the phrase referred to the entire health service delivery chain or system that includes even the local health institutions. The Petitioner claimed that the word “referral” meant the referral process from local institutions all the way to the national referral hospitals. The Court rejected this argument. Justice Lenaola stated thus:

the Local Government Act has been repealed and the Constitution 2010, has created a new governance structure between the two levels of government. The Fourth and the Sixth Schedules to the Constitution, 2010, deal with distribution of functions between the National Government and the County Governments and transition provisions, respectively. The Petitioners must therefore understand and know that devolution has brought in a new structure of governance and it cannot be compared with the Local Authorities system as we knew it under the Repealed Constitution. County Governments under the Constitution, 2010 have now been elevated to the level of semi-autonomous governments but inter-dependent with the national government.

The Court, therefore, refused to endorse an argument about division of functions that seeks to reinforce the *status quo*. While the Court did not make the actual determination of which institutions belong to what level (for reasons discussed later in this chapter) it readily asserted constitutional boundaries in the division of powers and functions.

In another case, *The Institute for Social Accountability (TISA) and another v The National Assembly and three others*,<sup>19</sup> the Court ruled that the Constituency Development Fund (CDF), a fund that was patronized by Members of parliament and mainly used to channel funds for local development and

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<sup>15</sup> *Okiya Omtata Okoiti & 1 other v Attorney General and 6 others* (2014) eKLR.

<sup>16</sup> Vide Legal Notice No. 137 to 183 of 2013.

<sup>17</sup> *Okiya Omtata Okoiti & another v Attorney General and 6 others* (2014) eKLR, para 8.

<sup>18</sup> *Okiya Omtata Okoiti & another v Attorney General and 6 others* (2014) eKLR, para 83.

<sup>19</sup> *The Institute for Social Accountability (TISA) and another v The National Assembly and three others* eKLR (2015) eKLR.

service delivery at the parliamentary constituency level, was unconstitutional on the basis of two grounds: first, that it infringed on the concept of separation of powers since its design and implementation placed Members of Parliament (as fund patrons) at the centre of service delivery, a function that traditionally belongs to the executive branch of government. Secondly, and more relevant to this discussion, the Court noted that the design and objectives of the fund “threatened” to infringe on county functions.<sup>20</sup> The Court observed that the Constituency Development Fund Act, the legislation that provided for the fund was vaguely worded and there was no specific function of the counties that it specifically infringed.

Section 3 of the Constituency Development Fund Act provides that the Act “shall ensure that a specific portion of the national annual budget is devoted to the constituencies for purposes of infrastructural development, wealth creation and in the fight against poverty at the constituency level.” The Court held that while this phrase made no reference to any county function, the nature of its wording and particularly the use of a further phrase of “community based projects” under section 22 of the Act had the risk of occasioning a “functional overlap” with county government functions.<sup>21</sup> The Court further noted that the objectives of the fund appeared to be in competition with the mandate of the county governments. The Court concluded that:

The creation and assignment of roles to an entity outside the structures of governance established under the Constitution is antithetical to the principles of the Constitution as it threatens to violate the functional competencies of county government within which CDF operates.<sup>22</sup>

This particular judgment is important for two reasons: first, it asserted the general and proper role of county governments in the entire constitutional architecture. While functions in the Constitution are vaguely defined, a review of the Fourth Schedule reveals that counties are largely, with a few exceptions,<sup>23</sup> in charge of delivery of essential services and development while the national government is largely in charge of policy-making and regulation. Accordingly courts affirmed the place of counties in the entire scheme of division of powers and functions between the two levels of government.

Secondly, and even more importantly, the decision of the court signifies the independence of the courts. It is public knowledge that Parliament has

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<sup>20</sup> *The Institute for Social Accountability (TISA) and another v The National Assembly and three others* eKLR (2015) eKLR, para 107.

<sup>21</sup> *The Institute for Social Accountability (TISA) and another v The National Assembly and three others* eKLR (2015) eKLR, para 120.

<sup>22</sup> *The Institute for Social Accountability (TISA) and another v The National Assembly and three others* eKLR (2015) eKLR, para 107.

ferociously defended the continuation of the CDF even after the adoption of the current Constitution. The Constituency Development Fund was established back in 2003 as part of the many “decentralized funds” through which local services and local development was channelled.<sup>24</sup> Studies have actually shown that while the Constituency Development Fund enhanced civic awareness and participation in local development, it crowded the former local authorities out of their core local service delivery role.<sup>25</sup> The CDF primarily funded local services and development projects that are now, with very few exceptions (e.g. secondary and primary schools), under the control of county governments.

Independent institutions such as the Commission for the Implementation of the Constitution and the Commission on Revenue Allocation have, on different occasions, advised about the unconstitutionality of the fund under the current dispensation.<sup>26</sup> Parliament, however, ignored this advice and resisted proposals to abolish the fund. During Parliamentary debates on this subject, politicians from across the political divide were united in fighting efforts to dismantle the Constituency Development Fund in a manner that reeked of parliamentary impunity. Parliament made good its threat by passing a “new” Constituency Development Fund Act in early 2013 that was purportedly in compliance with the current Constitution.<sup>27</sup> The new Constituency Development Fund Act was further amended (in record time) by Parliament in a bid that was largely seen as defeating the constitutional challenge of the new Constituency Development Fund Act. Courts, however, declared the new Constituency Development Fund Act (as amended) unconstitutional. Parliament responded with fury at the court decision with a Member stating in the floor of the House that “anybody who hates MPs and hates Constituency Development Fund might as well go to hell”.<sup>28</sup> Parliament appealed the decision of the Court to declare the fund unconstitutional.

It is easy to see why the court found the Constituency Development Fund Act unconstitutional despite the fact that it never infringed on a particular county function. Constituency Development Fund is part of the multiple

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<sup>23</sup> In the education sector, unlike most of the other sectors, national government has powers over education policy as well as secondary, primary and higher learning. Counties are left with early childhood and village polytechnics.

<sup>24</sup> K Wachira ‘Fiscal decentralization: fostering or retarding national development?’ in Institute of Economic Affairs (IEA) ‘Devolution in Kenya: Prospects, Challenges and the Future’ IEA Research Paper Series No. 24 (2010) 93-94.

<sup>25</sup> Y Rocaboy et al ‘Public finances of local government in Kenya’ in Daffon B & Madies T (eds) (2012) *The Political Economy of Decentralization Sub-Saharan Africa: A New Implementation Model in Burkina Faso, Ghana, Kenya, and Senegal* (2012) 165.

<sup>26</sup> Commission for the Implementation of the Constitution, ‘Constituencies Development Fund (CDF) Act, 2013 is unconstitutional’ (Press Release, 17 April 2013) <<http://www.cickenya.org/index.php/newsroom/press-releases/item/308-constituencies-development-fund-cdf-act-2013-is-unconstitutional#.Vguq8ROqqko>> at 25 September 2015; P Leftie, ‘Hasten laws on counties, says Cheserem’ *Daily Nation* (Nairobi) 21 April 2011.

<sup>27</sup> The Constituencies Development Fund Act, 2013, Act. No 30 of 2013.

centrally managed funds that were developed to provide local services during the period of centralized governance. However, while it is easier to get rid of other decentralized funds (such as the development funds that were channeled through the former districts), Constituency Development Fund's case is special as it provided MPs with an opportunity for local patronage. Accordingly, a big fight over the retention of the Constituency Development Fund by Members of Parliament was predictable. Strangely, the Senate, whose role is to protect county interests, has not come out to oppose the retention of the Constituency Development Fund and the Speaker has on more than one occasion noted that the Senate is not opposed to the continuation of the fund.<sup>29</sup> This case, therefore, demonstrates the willingness of courts to fearlessly defend the functional autonomy of county governments.

In the case of *Nairobi Metropolitan PSV SACCOs Union Ltd and 25 others v County Government of Nairobi and 3 others*,<sup>30</sup> the petitioners challenged the decision of the county government of Nairobi to raise the parking fees for cars in the Central Business District on two grounds. First, the petitioners claimed that the decision to raise fees was not subjected to public consultation and participation. Secondly, the petitioners suggested that the power to vary rates for parking fees was to be exercised in accordance with the Traffic Act (a law that was enacted under the previous dispensation). The Court dismissed both arguments. After reviewing the county government's budget making and execution process and specifically the preparation of the Finance Bill under which the new rates were proposed, it concluded that there had been sufficient participation and consultation. Secondly, and more importantly, the Court stated that the county government had revenue-raising powers under the new Constitution and could exercise the powers so long as it followed processes laid down in the relevant laws. The Court noted that the Traffic Act should be read together with the new Constitution and cannot limit the constitutionally guaranteed revenue-raising powers of the county government.<sup>31</sup> The courts, therefore, asserted the power of counties to duly raise revenue in order to fund the performance of their functions.

The conflicts over county functions have even roped in the Senate, the very institution that is meant to safeguard county autonomy and powers. In 2013, the Senate originated an amendment to the County Government Act that

<sup>28</sup> A shiundu 'MPs insist CDF will exist "at all costs" despite court ruling that it is unconstitutional', *The Standard* 24 April 2015.

<sup>29</sup> B Otieno, 'Speaker Ethuro says Senate not against CDF' *AllAfrica* 10 June 2013 (originally published in *The Star*).

<sup>30</sup> Above n 9.

<sup>31</sup> *Nairobi Metropolitan PSV SACCOs Union Ltd and 25 others v County Government of Nairobi and 3 others* (2014) eKLR, para 64.

established outfits that were known as County Development Boards.<sup>32</sup> The boards were to be composed of a number of elected members of national and county governments as well as officials of national and county governments. The main purpose of the boards was to be a forum for county-level coordination and consultation on matters of projects and development.<sup>33</sup> The boards were specifically tasked to “consider and give input” to county budgets and county developments before the same could be tabled in county assemblies in with the Constitution and relevant legislation.<sup>34</sup> The senators were to chair the boards while governors were to be vice-chairpersons of the boards.

The Council of Governors challenged the constitutionality of the boards noting that the amendment infringed on county government functions and specifically the exclusive powers of the county assemblies to approve budgets and county development plans.<sup>35</sup> The court agreed with the petitioners that Members of Parliament (both Senators and Members of National Assembly) as well as national government officers such as county commissioners have no role in the development and approval of county budgets and plans. Accordingly, the amendment that established the boards infringed on the role of county assemblies that had the exclusive mandate to debate and approve plans and budgets of counties. The court went on to note that the composition and role given to the boards further breached the principle of devolution because senators and members of the National Assembly were not part of the county government structure.<sup>36</sup>

While the courts have not dealt with the intricate details and issues regarding the division of powers and functions (to the scale of South Africa and Canada for instance) there are strong indications that they will not hesitate to give effect to the objectives and principles of devolved governance as provided for in the Constitution.

#### 4. Emerging Issues in the Interpretation of National and County Government Powers and Functions

It is clear that more disputes on functions and powers will continue to be filed in courts across the country. This, as stated earlier, is fuelled by various factors and mainly because of the lack of clarity in the constitutional scheme

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<sup>32</sup> County Governments (Amendment) Act, Act 13 of 2014.

<sup>33</sup> Section 91A (2).

<sup>34</sup> Section 91A (2) (b) and (c).

<sup>35</sup> *Council of Governors and 3 others v The Senate and two others* (2015) eKLR.

<sup>36</sup> *Council of Governors and 3 others v The Senate and two others* (2015) eKLR, para 102.

of division of powers and functions. While courts have made a number of important decisions that indicate the emerging approach to determination of national and county powers and functions, there is an evident need for the courts to develop a common jurisprudential approach and “tools of interpretation” that the courts and policy makers can use in interpreting and applying national and county powers and functions.

The use of comparative jurisprudence by Kenyan courts must be informed by the Kenyan context. Different countries adopt different approaches to interpretation that suit their context. Kenya’s approach must be one that takes relevant and appropriate factors into consideration while giving effect to the objectives of devolution. More importantly, the approach chosen by courts must be one that gives effect to the intended objects of devolved governance. This section discusses the need and rationale of developing “tools of interpretation” as well as the need to consider the Kenyan context when borrowing from comparative approaches by other courts.

#### **4.1 The Need for “tools for interpretation” of National and County Functions**

The few cases that have come to court have demonstrated the complexities involved in the determination of what belongs to the national government and to county governments under the Constitution of Kenya 2010 and enabling relevant legislation. Ineffectiveness in the implementation of the laws that govern the transfer and management of national and county governments has compounded the challenges involved in the determination of powers and functions. Courts require a definable set of principles and a framework within which disputes regarding division of functions can be addressed. Some of the principles are contained in the Constitution while others can be developed from the spirit of the Constitution and the context of implementation.

Article 191 (5) of the Constitution provides that when courts are considering an apparent conflict between national and county laws, courts are required to prefer a reasonable interpretation of such legislation that avoids conflict as opposed to an interpretation that results in conflict. This provision applies to matters where both national and county government have the same jurisdiction. This provision requires courts to explore options of harmonizing laws or actions based on laws before declaring an inconsistency. An appropriate example in this regard is to interpret the policy-making role of the national government and the implementation role of county governments in a manner that promotes cohesiveness in the performance of functions. There are no clear boundaries between what amounts to policy-

making and regulation and policy implementation. A number of the disputes in court on sectoral functions may end up to be a debate on the line between the policy-making role of the national government and implementation role of the county governments.

The principles and objectives of devolved government offer a further basis for developing tools for the interpretation of county government powers and functions. In the case about the constitutionality of CDBs, the courts stated that the composition and functions of the boards were against the “principle of devolution”. The court, however, fell short of elaborating what the spirit of devolution is. An elaboration of what constitutes the principle of devolution would provide guidance to other courts dealing with similar matters in future. The principle of devolution requires resources and powers to be transferred to counties for purposes of service delivery and local development, participation and public accountability, national unity through recognition of diversity, addressing inequity in development and access to services, among other objectives that are listed under article 174 of the Constitution.

In the case concerning the Constituency Development Fund, the court found the Act to be a threat to county powers and functions. While the Act did not infringe on any specific function of the county governments under the Fourth Schedule, the court concluded that entire design and approach of the Act was in breach of the spirit of devolution. An elaboration of the concept of “spirit of devolution” as applicable in the Kenyan context can assist to refine the courts’ approach to division of powers and functions.

## **4.2 The Kenyan Context and the Utility of Comparative Approaches**

Kenya’s structure and design as well as some of the principles of devolved government (such as cooperative government) were borrowed from systems that have had devolved structures for some time. Therefore, the approach and experience of courts in those jurisdictions is relevant to Kenya’s understanding and approach to national and county powers. However, and more importantly, Kenyan courts need to give careful consideration to the nature of Kenyan structures as well as the context within which national and county powers are exercised.

### ***4.2.1 Relevance of the Kenyan political and institutional context to interpretation of powers and functions***

The prevailing context (political and institutional) of a country determines how political and governance processes play out in implementation. For instance, South Africa has a dominant national political party, the African

National Congress (ANC), which won 62 percent of the national vote in the 2014 general election.<sup>37</sup> The ANC controls eight of the nine of provinces as well as a majority of 278 municipalities across the country. In Kenya, the ruling political coalition won the 2013 presidential vote by a slim majority and governors who belong to political parties that are affiliated to the main opposition coalition head more than half of the 47 counties.<sup>38</sup> Furthermore, while South Africa's parties have relatively strong and stable structures and have a defined political ideology, Kenya's political parties are weak, personality-based and often lack grounding in any political ideology.

The above differences have a profound impact on the manner in which the division of powers and functions is carried out in practice. In South Africa, for instance, the national government has dominated the functional areas that are listed as concurrent to the national and provincial levels of government. Accordingly, the principle of "cooperative government" has been interpreted to mean that national government should legislate on areas of concurrent jurisdiction while the provincial and local government levels implement. Obviously, the dominance of the ruling party over the three spheres of government has played a major role in shaping the division of functions between the three spheres of government. Issues regarding division of powers and functions are usually agreed through party structures and a few of these find their way into courts in form of disputes.<sup>39</sup>

The lack of strong and effective party structures and principled politics in Kenya, on the other hand, make it almost impossible to have legitimate political bargaining and settlement of questions regarding powers and functions. Political differences between the main political sides often manifest in the division of powers and resources thereby minimizing chances of amicable settlement of such disputes. Courts, therefore, become the main avenue for resolving conflicts relating to powers and functions. Kenyan courts have to ensure that constitutional boundaries are adhered to by decision-makers involved in the functional division process.

#### **4.2.2 Relevance of Kenya's design and structures to interpretation of powers and functions**

Beyond the differences in political dynamics, the courts have to keep in mind the differences in the design of comparable systems and how they impact

<sup>37</sup> N Steytler 'Implementing devolution: Lessons from South Africa' in C Bosire, YP Ghai and J C Ghai (eds) *Understanding Devolution* (2015) 101.

<sup>38</sup> JC and YP Ghai, 'Ethnicity, Pluralism and 2013 Elections' in YP Ghai and JC Ghai (eds). *Ethnicity, nationhood and pluralism: Kenyan perspectives* (2014) 107-136.

<sup>39</sup> J de Visser and A May 'South Africa: Powers and functions of devolved units' in N Steytler and YP Ghai (eds) *Kenya-South Africa Dialogue on Devolution* (forthcoming 2015).

on the realization of devolution objectives. For instance, while Kenya has borrowed some principles and design features from South Africa, there are important differences in the design and structure of devolved governance. The main difference is that South Africa is composed of three levels or spheres: national, provincial and local government while Kenya has two levels only (national and county). Some of the interpretational approaches taken by South African courts suit the design and structure of the system.

An example that suitably illustrates this difference is the manner in which South African courts have made a distinction between “provincial” and “local government” functions. Fessha and Steytler, for instance, have argued that the division of functions should have some relation with the territorial reach of a level of government. They argue, for instance, that a road that serves two municipalities is considered a provincial road and any activity whose scope goes beyond the borders of a municipality is automatically deemed a provincial function or power.<sup>40</sup> Such an approach in Kenya may not be appropriate due to the nature of the devolved government structure. In South Africa, a function that belongs to the provincial government is still a devolved function since the country has three levels of devolved government.

On the contrary, if all functions that are beyond the scope of one county in Kenya are transferred to the next level (essentially the national government), this will have a recentralizing effect on powers, functions and resources. Such an approach to the determination of powers and functions may not be appropriate to the Kenyan context and this goes against the spirit of devolution that seeks to devolve powers, functions and resources to the county level. Courts, thus, have to carefully consider the Kenyan context before applying principles that have been followed by South African and other courts in the interpretation and powers and functions.

Another important factor is the place of cooperative government in the current Kenyan structures. In Kenya, counties have to counter the limitation imposed by their size and number by embracing the principle of consultation and cooperation. In the health sector, for instance, counties are now in charge of the former provincial hospitals. These institutions were designed to provide health services on a regional scale and this means that the institutions offer services to patients across many counties. A special grant from the national government is given to counties that host these institutions. Counties will have to develop cooperation arrangements that will enable them to sustain

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<sup>40</sup> N Steytler and YT Fessha, 'Defining local government powers and functions' (2007) *South African Law Journal* 320, 321-336.

these institutions that serve them collectively and many other functions that straddle county boundaries.

On their part, courts will have to bear in mind this structural context when they adjudicate on powers and functions. In this regard, courts should be guided by the need to ensure a realization of the objectives of devolution and developing appropriate tools of interpretation that can enhance effectiveness.

## 5. Conclusion

The constitution envisages a fundamental transition through the devolved system of governance. However, this transition is only possible if powers and resources are actually devolved to the county level for the intended purpose and objectives. In turn, the extent of powers and resources devoted to county governments is dependent on how the powers and functions allocated to counties in the Constitution are allocated and understood. This chapter has identified and analysed the various factors that play a role in the determination of national and county powers and functions. It is clear that courts will end up playing a critical and leading role in the shaping of national and county government powers and responsibilities.

The role that courts are likely to play in the interpretation of national and county powers and functions invites them to carefully consider the role that the courts will play in this regard. All indications are that courts will readily safeguard the powers and functions of county government and ensure that the principle of devolution is followed through in the implementation process. In order to do this, the courts have to carefully develop tools and principles that can be applied in the interpretation of powers and functions.

The principles of interpreting the Constitution have to be in accordance with relevant constitutional provisions and have to give effect to the purposes and objectives of devolved governance. This also means that comparative approaches to the interpretation of powers and functions have to be informed by the Kenyan context.



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# Emerging Issues in County Public Finance Management

By John Mutua

## 1. Introduction

The Government exists to provide services to its citizens and is thus entrusted with its people's money. Given that resources - financial or otherwise - are scarce, their use and management calls for prioritization and prudence. This calls for efficient public finance management,<sup>1</sup> reinforced by a relationship of mutual trust and shared consensus between government and citizens which is at the core of the development process.<sup>2</sup> Kenya has faced decades of waste and abuse of public resources. To address these challenges the government has been implementing reforms in public finance management for over a decade. The promulgation of the Constitution of Kenya in 2010 has given renewed impetus to these reforms. The Constitution in departure from the past establishes a two tier devolved system of government at national and county levels. It sets out guidelines on the management of public resources juxtaposed with an elaborate system of checks and balances, the latter of which are elaborated by Peter Wanyande in his chapter entitled *Devolution, Politics and the Judiciary in Kenya*.

Article 201 of the Constitution spells out the principles of public finance which are applicable to all public entities at both levels of government. Pursuant to Chapter 11 and more specifically Chapter 12<sup>3</sup> of the Constitution,

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<sup>1</sup> Public finance management entails the mobilization of resources, the allocation of these funds to various projects and activities, spending and accounting for spent funds.

<sup>2</sup> Commonwealth Secretariat (undated) Guidelines for Public Financial Management Reform. Commonwealth Secretariat, United Kingdom.

<sup>3</sup> Chapter 11 of the Constitution of Kenya 2010 on devolved government provides for the objects and principles of devolved government, the institutional structure, mandates and powers and interrelationships between the levels of government. Chapter 12 lays out the public finance framework including the principles, revenue raising powers, budget process including the division of revenue between the two level of government and audit and control.

legislation has been enacted including the Public Finance Management Act (PFMA), 2012, which is the organic budget law.<sup>4</sup> The recent approval of the Public Finance Management Regulations 2015, has gone a long way towards strengthening the legal and institutional framework for public finance management with the only gap being the yet to be enacted Public Audit Bill 2014 and the Public Procurement and Asset Disposal Bill 2014.

The Constitution further enshrines separation of powers between the three arms of government. To this end, the executive will for example need Parliament to pass legislation and approve the budget for it to implement its policies; and the Judiciary backstops by ensuring the interpretation and application of laws is constitutional. For accountability, the executive is obligated to explain their decisions and actions to the legislature and to the broader public on the use and management of public resources. The Judiciary is the custodian of the constitution, interpreter of the law and the supreme independent arbiter. With the onset of devolution, the Judiciary has been called upon a number of times to interpret the Constitution, make court rulings or provide advisory opinions with regard to cases on public finance matters. The Senate division of revenue case is one example in which the Supreme Court advisory resolved the impasse in the national budget process by restating the constitutional role of the Senate in reviewing the Division of Revenue Bill. Other instances include the 2014 High Court nullification of the Kiambu County Finance Act on the grounds that the county did not adhere to constitutional and legal provisions for public participation in the budget process.<sup>5</sup> The Judiciary is called to upon be the voice of reason even if it means taking unpopular positions to unblock obstacles that may impede public services.

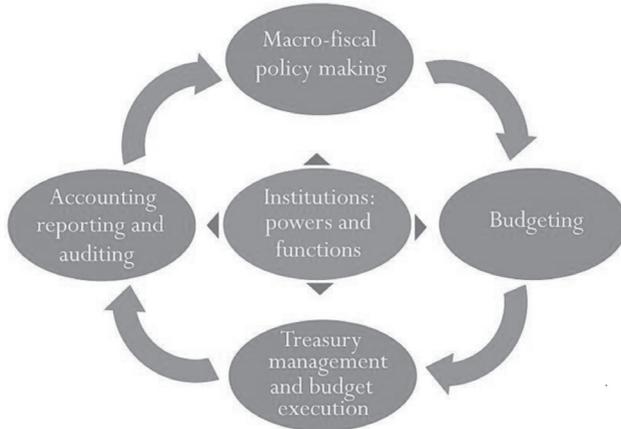
This chapter looks at emerging issues in county public finance that may inform future court cases as well as those of general interest for the effective management of public finances at county government level. To this end, the paper addresses the framework of public finance management as provided by the Constitution and the Public Finance Management Act 2012 (PFMA, 2012). It then reviews the application of constitutional principles on public finance by public entities. In conclusion the chapter touches on the weak spots and other salient issues important to the Judiciary, particularly the weakness of accountability institutions.

4 The Public Finance Management Act 2012 specifies the schedule and procedures by which the budget should be prepared, approved, executed, accounted for, and final accounts submitted for approval.

5 *Speaker of the Senate & another v Attorney-General & 4 others* Advisory Opinion [2013] eKLR; International Budget Partnership Kenya 'County Budget and Economic Forums (CBEFs) and Public Participation in Kenya' - A Synthesis of Case Studies from Five Counties (2014).

## 2. Framework for County Public Finance Management

World Bank and IMF literature show that a good public finance system comprises of five core areas which define the entire spectrum for public finance management. These areas are: macro-fiscal policy making; budgeting; treasury management; budget execution and accounting and reporting.



Framework for public finance management

Source: Adopted from the World Bank

The core area of policy and target setting is preceded by a planning process. The county is required to prepare a five-year County Integrated Development Plan (CIDP) as the basis for county budgeting and expenditure.<sup>6</sup> These CIDPs are to be aligned to the national plan - in this case the Vision 2030 and its Second Medium Term Plan. Drawing from their respective CIDPs, counties through the County Executive Committee member for finance prepare and submit the annual County Development Plan to the County Assembly not later than 1st September for approval, upon which a copy is sent to the National Treasury and to the Commission on Revenue Allocation. It is in this annual plan where every county reflects strategic priorities they identify for budgeting. Subsequently, the County Executive Committee member for finance shall within 7 days publish and publicize the annual development plans. To implement these priorities, detailed programs will be developed complete with financial implications and performance indicators. In addition, these plans also provide details on how county governments will respond to changes in the financial and environmental context.

<sup>6</sup> The budgeting process at the county government level is outlined in the Public Finance Management Act 2012, ss 125 - 134.

The foregoing process sets the stage for macro fiscal policy making which involves county governments making projections of resources they anticipate to raise (resource envelope) to finance priority and expenditure plans over the medium term. Specifically, the process starts with the issuance of circulars to guide all county government entities in their preparation of the budget. Consequently the County Treasury prepares a Budget Review and Outlook Paper (BROP)<sup>7</sup> that is submitted to the County Executive Committee (CEC). In February of each year the County Treasury in consultation with the various stakeholders prepares and submits the County Fiscal Strategy Paper (CFSP) which captures details of broad strategic priorities and policy goals to guide budget preparation. The CFSP is submitted to the CEC and thereafter to the County Assembly by 28th February for approval. As the main pre-budget document, the CFSP shall contain<sup>8</sup> the following:

- How the projections on economic growth of Kenya and other macroeconomic indicators as reflected in the Budget Policy Statement (BPS)<sup>9</sup> will impact on the economic environment for the county for the following budget year and in the medium term;
- Anticipated size of county budget based on expected growth of the county, revenue, expenditure and public debt projections over the medium term accompanied by underlying economic assumptions;
- Indicative expenditure ceilings for the various county entities; and
- Statement indicating whether the county adhered to fiscal responsibility principles.

The approved CFSP and recommendations provided by the County Assembly forms the basis of finalizing County Budget Estimates for the ensuing financial year. Counties are allowed to revise their fiscal framework<sup>10</sup> in case of a significant or an unexpected change in the County economic growth for instance and/or due to induced policy changes emanating from change of government.

On completion of their budget proposals and approval by the County Executive Committee, the County Executive Member for Finance shall submit the County Budget Estimates to the County Assembly by the 30th of April every year. As we shall see later, unlike in the deadlines on other budget

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<sup>7</sup> The County Budget Review and Outlook Paper (CBROP) is a document that captures review of government performance in the previous with regard to meeting revenue and spending targets but also provides a outlook of the same. This document is supposed to be submitted to the County Executive Committee by end of September every year.

<sup>8</sup> Kenya Gazette Legal Notice No 35, The Public Finance Management Act (2012) Regulations s 26-27.

<sup>9</sup> The Budget Policy Statement (PFM,2012 s 25) is prepared by the National Treasury by 15th February every year and lays out the broad strategic priorities an policy goals of the national government to which the County Fiscal Strategy Paper must be aligned.

<sup>10</sup> The Public Finance Management Act 2012 s 28.

documents, all counties have since 2013/14 to date complied with these timelines. In the County Assembly the budget estimates are committed to the Budget and Appropriation Committee which then reviews and provides recommendations that incorporate public input from hearings held in May. The committee subsequently tables the recommendations before the entire house. Following debate and approval of the estimates an Appropriation Bill is introduced to the House for debate and approval to authorize appropriations through the Appropriation Act by end of June.

It is important to note that the law provides some limits on the amendments the Assembly can make to the estimates; for instance, if they increase spending in a certain area or program this must be offset by a commensurate deduction in another area/vote. The objective of this is to avoid making changes in the budget that will raise the budget deficit. Further, all the amendments must be in accordance with the approved County Fiscal Strategy Paper and the County Allocation of Revenue Bill.

On the revenue side, the CEC member for finance submits the County Finance Bill with revenue raising measures to the County Assembly for debate and approval within 90 days of approval of the Appropriation Bill. However, implementation starts upon approval of Vote on Account (VOA). This is accompanied by the start of collection of taxes and levies through a county provisional collection of Taxes Order Legal Notice. Resources are consequently disbursed to the various county entities through exchequer issues and approval from the Controller of Budget. This is followed by reporting on budget implementation by the Controller of Budget every 4 months to be discussed more later.

At the end of the financial year, any amount not spent by end of the year lapses and is supposed to be repaid to the County Exchequer Account and submit a refund statement to the Controller of Budget. The Office of the Auditor-General assesses and prepares county government annual accounts and audit report to establish whether actual spending was in line with approved budget according to article 226 of the constitution. The Auditor General audits all accounts of government and state organs and reports to the National Assembly within 6 months after the end of each financial year.

### 3. Principles of Public Finance Management

The Constitution of Kenya lays out five broad principles for public finance in budgeting and the overall management of public resources.<sup>11</sup> The County

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<sup>11</sup> Constitution of Kenya 2010, Article 201 on Principles of public finance management.

Treasury,<sup>12</sup> headed by the County Executive member for finance is charged with overseeing compliance to these principles. This section highlights the extent to which county governments - since their inception in March 2013 - have adhered to these principles. How counties score is an indicator of whether resources are being managed fairly, efficiently and transparently. The principles are applied here in their broadest sense. It is noteworthy that there are some overlaps between them.

### **3.1 Openness, Accountability and Public Participation<sup>13</sup>**

This first principle captures three pillars that are the cornerstone of good governance. It speaks to the need for transparency in financial matters, involvement of the public and answerability on the same. Indeed although the link or relationship between transparency and participation is under researched, there are indications that any state or country that promotes these values is highly likely to expose corruption, enhance better decision making and increase legitimacy of the government and in turn impact positively on socio-economic growth.<sup>14</sup> The Constitution calls for disclosure of fiscal and budget information. Specifically, Article 35 of the Constitution guarantees every citizen a right to access information held by the state. It further provides that every citizen also has a right to access to information held by another person if required for the exercise or protection of any right or fundamental freedom. This provision obligates all public entities - notably the executive and legislative arms of the county - to publish and publicize any important information affecting the county, or be in breach of the Constitution.

To this end, the public finance management framework<sup>15</sup> provides that all key budget documents produced throughout the county budget process<sup>16</sup> should be published and released to the public in line with provided timelines. A majority if not all county governments have put in place communication frameworks including official websites for posting budgets and other relevant information such as reports on call for public tenders. It is noteworthy that so far, due to the tight budget calendar and with the exception of the county budget estimates, many counties are struggling to submit and release the other key budget documents to the county assemblies and the office of the

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<sup>12</sup> This office is charged with monitoring, evaluating and overseeing the management of public finances and economic affairs.

<sup>13</sup> Constitution of Kenya 2010, Article 201(a).

<sup>14</sup> A Folsher, 'Fiscal Transparency and Participation in Africa: A Status Report' (2012).

<sup>15</sup> In this case referring to the Public Finance Management Act (2012) and the Public Finance Management Act Regulations Legal Notice No 34 (2015).

<sup>16</sup> Some of the key budget documents include: County Fiscal Strategy Paper, County Budget Estimates, County Appropriation and County Finance Acts, Quarterly and annual financial statements, county audit reports and so on.

Controller of Budget in a timely fashion. Further - and contrary to section 125 of the PFMA, 2012 – a 2015 study found that a majority of county governments are providing only scanty information to the public.<sup>17</sup>

Budget information should be comprehensive for it to be useful to the public; detailed information facilitates better interpretation, and enables budget analysis and makes the linkage between policies, plans and the budget. This in turn makes for meaningful engagement. For example, the study cited above found that only three of the 10 counties surveyed had adopted program based budgeting (PBB) as required by the National Treasury.<sup>19</sup> PBB aids transparency and tends to be more comprehensive with respect to revenue and expenditure information as well as non financial information.

Public participation is now a constitutional requirement both at the national and county government level. The Constitution requires that the public be engaged in budget and policy formulation, planning and in priority setting of service delivery. Further Section 207 of the Public Finance Management Act 2012 mandates counties to create structures, mechanisms and guidelines for citizen participation. The Act also provides for the establishment of a County Budget and Economic Forum (CBEF) in each county.<sup>20</sup> This platform is intended to be a primary means of public consultation on county economic and budget matters. A report from an officer working at the Council of Governors dated 19th August 2015 indicates that there were only 28 fully established and operational CBEFs.<sup>21</sup> In six counties these CBEFs had been established but were not operational, while in another five counties this was work in progress. On the other hand, about eight counties had not established CBEFs.

Anecdotal evidence appears to confirm that county governments are indeed engaging the public in the budget process especially during the formulation and enactment stages. There is evidence of county governments placing advertisements in national newspapers inviting the public to attend budget days, as well as holding public forums. The effectiveness of this engagement is still up for question. Besides capacity constraints and governance related bottlenecks including elite capture, public participation is further hampered by administrative challenges, notably short notices for meetings and lack

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<sup>17</sup> Institute for Economic Affairs, 'Sub-national Open Budget Survey: Case of Ten Counties' (2015).

<sup>18</sup> The Public Finance Management Act 2012 provides what should constitute the content for each of the key budget documents and there are further international benchmarks that can be used to assess the level of details for these documents.

<sup>19</sup> Program Based Budgeting is a result oriented way of presenting budget information by linking expenditure to policy and program objectives, outputs, indicators and targets and useful for budget analysis and interpretation. PBB is more result oriented and unlike line item budgeting breaks information down by programs and sub-programs with details of expected outputs linked to target and indicators.

<sup>20</sup> Public Finance Management (Act 2012) s 137.

<sup>21</sup> This report was provided by an officer who works at the Council of Governors via email.

of timely access to budget information. Adequate funds are also critical for facilitating public participation and this is likely to get squeezed out by competing budget requirements of the counties.

Whereas the counties are under a lot of pressure to comply with the law, a majority have often held public consultations as a public relations exercise 'to tick the box' with very little regard to the design, the form and the structure of these engagement mechanisms. On one hand, counties may be limited in their ability to respond to citizen demands due to limited development expenditure budgets. On the other hand, the failure to comply with constitutional requirements can bear a high cost as in the case of Kiambu County mentioned earlier.

**Box 1: High Court Ruling on Kiambu County**

In the case *Robert N Gakuru & Others v Governor Kiambu County & 3 others* [2013] residents of Kiambu County in 2013 challenged the legality of the County Finance Act passed by the County Assembly on the grounds that they were not involved in its formulation and approval. The Judge drawing from South Africa case law declared that it was null and void as it had not met the threshold of public participation. In essence the Judge asserted public participation as a constitutional and statutory requirement.

Ref: *Robert N. Gakuru & Others v. Governor Kiambu County & 3 Others* (2013) eKLR.

**3.2 The Public Finance System Shall Promote an Equitable Society.**

County governments are financed through three sources; shared revenue between national and county governments through the division of revenue process, own revenue generated through the county finance act<sup>22</sup> and loans and grants. Article 203<sup>23</sup> sets out the criteria for revenue sharing and lays emphasis on equity in both the vertical - between the two levels of government - and horizontal sharing - among counties.

***Own sources of county revenue***

Article 209 of the Constitution empowers counties to impose two taxes - with immobile and narrow bases – namely the property and entertainment taxes.<sup>24</sup>

<sup>22</sup> Public Finance Management Act (2012) ss 132-133 provide for the County Finance bill which contains revenue raising proposals for the county.

<sup>23</sup> Constitution of Kenya 2010, Article 203 on equitable share and other finance laws. Under Article 216 the Commission on Revenue Allocation (CRA) in consultation with other stakeholders is the institution mandated to recommend the basis of equitable sharing of revenue raised nationally.

<sup>24</sup> A Mwendwa, A 'Economic and Administrative Implication of the Devolution Framework Established by the Constitution of Kenya' (2010).

In addition, counties can impose any other tax specifically authorized by an act of parliament. Led by the county treasuries, county governments should ensure that their tax policy design and application does not discriminate or unfairly burden certain groups or sectors.

Property taxes have potential as a progressive tax and indeed from a sample of county budgets it comprises a substantial source of revenue for county governments. However property taxes have not performed to their potential.<sup>25</sup> One of the glaring reasons for this is inefficiency in collection owing to lack of automation and the other is with regard to definition and valuation challenges. Further to this, it is seen to favor urban counties vis a vis rural based counties due to the fact that in the latter, land is characterized by low value and lack of titles.<sup>26</sup> This therefore undermines revenue realized from this source. It is important to note that, currently counties do not have a legal basis to impose and collect these two taxes other than what they inherited from the former Local Authorities (LAs). This hurdle was temporarily redressed through the County Government Public Finance Management Transition Act, 2012 which has a provision authorizing counties to continue collecting local government revenue sources.

The issue of revenue raising powers and where the power stems from has been quite contentious between the two levels of government. In this regard, the Commission on Revenue Authority, Council of Governors and Kenya Law Reform Commission with the support of the World Bank, DFID and Australian Department of Foreign Affairs and Trade have put together a handbook to guide the development of county revenue legislation.<sup>27</sup> It is also a framework for collection and administration of revenue in a more transparent and accountable manner.

The other component of county own sources of revenue comprises fees and charges levied on services offered and further on licensing. Most of these fees and charges including for example single business permit, parking fees, market fees and others constitute what was inherited from the former local authorities, albeit now at relatively higher levies. Due to the need to increase own revenues some counties have proposed to increase fees and charges such as market cess, license fees, parking fees, single business permit and so on without regard to the burden this imposes on residents and in some cases without consultation. As a result, several counties have faced opposition to their proposed increases. For example, in Malindi, Uasin Gishu, Mombasa

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<sup>25</sup> World Bank, 'The Evolution of Kenya's Devolution: What's working well, What Could Work Better' (2014).

<sup>26</sup> As above.

<sup>27</sup> Model County Revenue Legislation, CoG, KLRC, CRA < <http://www.crakenya.org/wp-content/uploads/2013/10/Model-County-Revenue-Legislation-Handbook-May-2014-COG-KLRC-CRA.pdf> > at 11th December 2015.

and again in Kiambu business people and residents held demonstrations to oppose doubling of trade license fees and other hiked levies and rates on parking, hotel room levies and so on.<sup>28</sup>

Table 1 provides a snapshot of county revenue performance for 2014/15. Interestingly, counties managed to collect 67% of their projected own revenue sources by the end of 2014/15. This is a pointer to either ambitious revenue projections or low own revenue capacity or a combination of the two.

**Table 1 : Summary County Revenue Performance for 2014/15**

	<b>Estimates (target) Ksh Billion</b>	<b>Actual Ksh Billion</b>	<b>Performance (%)</b>
Balance b/f from 2013/14	41.3	41.7	101.0
Equitable share	226.7	226.7	100.0
County own revenue	50.4	33.9	67.3
Conditional allocation ( Level 5 hospitals)	1.9	1.9	100.0
Conditional grants from DANIDA for the health sector	0.73	0.73	100.0
Total	321.03	304.93	95.0

Source: RoK (August 2015) Office of the Controller of Budget Annual County Governments Budget Implementation Review Report FY 2014/15

### **Revenue Sharing**

There are three types of county government transfers envisaged under the constitution; the equitable share, equalization fund and additional conditional or unconditional transfers.

On the equitable share, Article 202 of the Constitution requires that revenue raised at the national level be shared between the national and county governments. On this note, constitutionally,<sup>29</sup> county governments should be allocated at least fifteen percent of all nationally collected revenue every financial year. The Constitution spells out the criteria for determining the equitable share to be divided between the two levels of government. Each year the Commission on Revenue Allocation gives its recommendations on the Division of Revenue Bill. The Division of Revenue Bill provides the basis for

<sup>28</sup> via <http://www.nation.co.ke/counties/traders-protest-Burnt-Forest/-/1107872/2666408/-/rk5jy4/-/index.html>; <http://www.reuters.com/article/2015/03/23/kenya-protests-idUSL6N0WP2E220150323>; <http://www.nation.co.ke/counties/Hoteliers-protest-against-new-levies/-/1107872/2873490/-/2i6d7w/-/index.html>

<sup>29</sup> Constitution of Kenya 2010, Article 203.

dividing revenue raised by the national government between the national and county government and is anchored in the approved Budget Policy Statement. It is introduced in parliament at least two months before the end of each financial year.

The computation of equitable share is based on the most recent audited revenue accounts by the National Assembly. For example the 2015/16 equitable share was based on 2010/11 recent audited revenue. This process culminates in the enactment of the Division of Revenue Bill with details of actual share. What follows is the enactment of the County Allocation of Revenue law which shows how the equitable share of revenue will be shared horizontally among the 47 counties based on the Commission for Revenue Allocation formula.

The Equalization Fund established under Article 204 is a twenty-year affirmative action fund designed to provide additional support for provision of basic services to historically marginalized counties. The fund is calculated as 0.5 percent of all revenue collected by the National Government, with allocations informed by Commission on Revenue Allocation's recommendations. The Equalization Fund (see box 2) is supposed to provide basic services including water, roads, health facilities and electricity to marginalized areas in order to bring them to par with the rest of the country. However, disbursements under the fund have not kicked off due to disagreements over its management and administration design between national and county governments.

#### **Box 2: The Equalization Fund**

The National Treasury in Budget 2015/16, proposed to allocate Ksh 6.0 billion from the Equalization Fund to 14 marginalized counties which is 0.8% of the last audited revenue and which is above the 0.5% constitutional threshold to compensate for the years in which there was no disbursement from the Fund.

The 14 marginalized counties were selected using the County Development Index developed by the Commission on Revenue Allocation. Since inception of the Equalization Fund, very little has been achieved in terms of ensuring provision of basic services to the identified marginalized areas. Implementation has been hampered by disagreements over the guidelines and framework for its use and administration. Although the National Treasury gazetted guidelines on the fund through the Kenya Gazette of 13th March 2015 Volume CXVII-No. 26, civil society groups and other stakeholders took issue with the proposed regulations contesting the constitutionality of these amendments which seek to place the management of the fund under the Members of Parliament. Further the gazette notice fails to include county representation in the proposed advisory board of the Fund.

The third source of county government revenue comprises transfers from the national government share of revenue either conditionally or unconditionally

as per Article 202(2). The former are grants or transfers intended for a targeted use, project or beneficiary while use of the latter is discretionary.

### **3.3 The Burdens and Benefits of the use of Resources and Public Borrowing shall be Shared Equitably between Present and Future Generations**

The focus of this principle, on one hand is on the need for county governments to endeavor to strike a balance between fair sharing of benefits/returns derived from the use of resources - borrowed or otherwise - between the present and future generations. On the other hand the same logic or principle should apply in sharing fairly of the imposed burden, such as in reduced disposable income and in debt servicing. The County Executive Committee (CEC) member for finance has the authority to raise a loan on behalf of the county which must be approved by the county assembly and be guaranteed by the national government.<sup>30</sup> This also means that the county assembly should only approve borrowed funds whose terms and conditions comply with the above stated debt equity principle. Furthermore, borrowing is to be anchored in the County Debt Management Strategy prepared annually by the County Treasury. Under Article 212, for county governments to borrow funds they must be guaranteed by the national government and must in turn be approved by the county assembly. The recommendations of the Intergovernmental Budget and Economic Council must also be considered before guarantees for county government are approved.<sup>31</sup>

For oversight purposes, the document detailing the terms and conditions of planned borrowing, its purpose among other issues is to be submitted to the county assembly, to the Commission on Revenue Allocation, the Intergovernmental Budget and Economic Council and must also be made public. Like the County Fiscal Strategy Paper, this document must also be aligned to the Debt Management Strategy Paper of the National Government.

The Public Finance Management Act provides additional conditions for borrowing such as; borrowing may only be used for development purposes, the capacity to repay and service loan by the county government must be demonstrated amongst others. Borrowing by the county governments is on hold until the 2017/16 financial year when counties will be deemed to have put in place sound public finance management systems as per CRA recommendations. Short term borrowing is however allowed but shall be

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<sup>30</sup> Constitution of Kenya 2012, Article 212.

<sup>31</sup> The Public Finance Management Act (2012)§187(2) The purpose of the Council is to provide a forum for consultation and cooperation between the national government and county governments on – (c) matters relating to borrowing and the framework for national government loan guarantees, criteria for guarantees and eligibility for guarantees.

restricted to the management of cash flows and shall not exceed five percent of the most recent audited county government revenue.<sup>32</sup> This restriction is intended to deter counties from abusing the use of this window in meeting cash shortfalls and generally as a budgetary control mechanism.

### **3.4 Public Money Shall Be Used in a Prudent and Responsible Way**

Although the Constitution does not define the word 'prudent', it can be understood as the answerability of county governments to the public on whether they are exercising care and discipline in the use of public money contrary to which, they should bear the consequences. Key aspects in this regard include treasury management, budget execution and procurement management.

#### ***Cash and Treasury Management***

Cash and treasury management entails having the right amount of money in the right place and time to meet government obligations in the most cost effective way.<sup>33</sup> Each county through its treasury and in line with Article 207 of the Constitution is required to establish a County Revenue Fund and a County Emergency Fund. These two funds are to be operated through separate bank accounts with the former to be operated through a County Exchequer Account at the Central Bank of Kenya. All money received by each county - with some exceptions such as direct donor funding - must be paid into this fund. Whereas majority of Counties have complied with this requirement, some such as Mombasa and Nairobi as reported by the Office of Controller of Budget have contravened this requirement by using funds at source. The County Emergency Fund on the other hand is to be used for unforeseen or exceptional circumstances and is limited to 2% of the previous year's total county government revenue. It is worth noting that Counties may with the approval of the County Assembly establish other public funds.<sup>34</sup> A case in point is the Bursary Fund that has been established across all the 47 counties and the other one is the Ward Development Fund established by some counties. For each fund that a county establishes, the CEC member of Finance appoints an administrator as the accounting officer. For example, the administrator for the Bursary Fund is Chief Officer of Education as is the prevailing practice across counties.

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<sup>32</sup> As above ss 142(2).

<sup>33</sup> Asian Development Bank, *The Governance Brief - A Quarterly Publication Governance and Regional Cooperation Division Regional and Sustainable Development Issue 7-2003* (2003).

<sup>34</sup> Public Finance Management Act (2012) s 116.

The inflows and outflows from these funds will be managed by the administrator who is also the accounting officer appointed by the CEC member for Finance as mentioned above. The Administrators' other important role is preparation of accounts for the funds and no later than three months after the end of the financial year. They are required to submit financial statements to the Auditor General and the County Assembly.

As already discussed, county government are allowed to borrow to cover temporary cash shortfalls either through a bank overdraft or from the money market. However borrowing is costly due to interest rates charged. In order to curb this situation that often leads to unnecessary costs, section 119 (2) of the PFMA allows the County Treasury to establish a Treasury Single Account.<sup>35</sup> For accountability purposes the law empowers the CEC member for Finance to appoint a receiver of county revenue who is to ensure that money due to the county is collected and paid in the relevant fund account. The receiver can in turn appoint a collector of revenue; for instance Kenya Revenue Authority. Funds collected by other persons on behalf of the county should be delivered to the receiver of revenue within 3 days of collection.

### ***Budget Execution***

Budget execution entails the authorization of withdrawals from the County Revenue Fund to various county entities on agriculture, health, and so on. More importantly, when it comes to spending by counties, efficacy and value for money are key desirable traits. This is done through the county appropriation bill and supplementary/revised budgets. The county appropriation bill must be assented to by end of June. In the event of delays in assent the Assembly can authorize spending not exceeding 50% of the total county estimate of expenditure to ensure that county operations do not come to a halt. During the course of implementing the budget, there could be revisions or adjustment to the approved budget - necessitated by for instance an emergency case or an underfunded budget line(s). To this end the County Executive is allowed to prepare and submit supplementary/revised budget through the supplementary appropriation bill to the County Assembly seeking additional funds or budget reallocations, but the total revised budget should not be more than 10% of the approved county budget. As stated earlier, any amount not spent by end of the year lapses, is to be repaid to the County Exchequer Account accompanied by a refund statement to the Controller of Budget.

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<sup>35</sup> TSA a single account that will consolidate and link various bank accounts held by county entities in order to curb unnecessary excess borrowing charges as this facilitates borrowing from idle accounts at a much cheaper rate.

## ***Procurement***

In Kenya, public procurement consumes 45% of the national government budget, excluding local government procurement.<sup>36</sup> There is a close relationship between procurement and development. The Constitution calls for a “fair, equitable, transparent, competitive and cost effective procurement system”<sup>37</sup> for public goods and services. All public procurement is governed by the Public Procurement and Disposal Act as revised in 2010. In particular, there are Regulations that were gazetted<sup>38</sup> to temporarily prescribe how county government shall carry out procurement and asset disposal. Equally, the Constitution spells out sanctions against fraudulent contractors and protection for people who may be unfairly disadvantaged.

In practice, and on a positive note, majority of counties publish information on the launch announcement of procurement tenders through county websites, newspapers, and radio as a way of ensuring transparency and fairness. In contrast, information on the award of public tenders is seldom publicized. The procurement law also provides for dispute resolution mechanisms under which appeals and complaints are channelled to the Independent Public Procurement Oversight Authority.

### **3.5 Financial Management shall be Responsible and Fiscal Reporting shall be Clear**

The government of Kenya has for over a decade faced increasing spending pressure, in terms of rising public wages and resources for investment in infrastructure development. This budgetary pressure is exacerbated by abuse of funds, corruption and overall inefficiency in spending. Simply put, revenue collection has routinely been outpaced by expansionary spending. To this end, the government’s fiscal policy stance is to build a strong revenue base, contain the growth of expenditure and ensure sustainable public debt towards supporting rapid economic growth.

Each County Treasury is responsible for ensuring adherence to statutory requirements of fiscal responsibility principles with respect to management and control of county finances namely:<sup>39</sup>

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<sup>36</sup> Centre for Governance and Development and National Tax Payers Association

Citizens Guide to Public Procurement: Public Procurement Procedures for Constituency Development Funds (2008) <http://www.cgd.or.ke/documents/Citizens%20Guide%20to%20Public%20Procurement%20Procedures%20.pdf> accessed on 24 November 2015

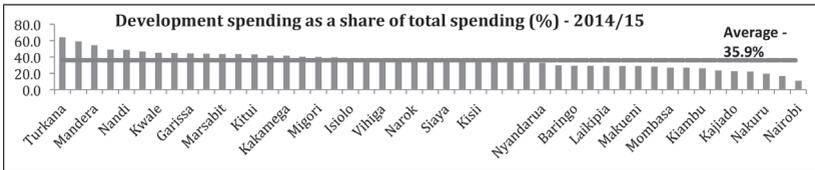
<sup>37</sup> Constitution of Kenya, 2010 Article 227.

<sup>38</sup> Special Issue: Kenya Gazette Supplement No. 53 of 5th April 2013 Legislative Supplement No.22. Legal Notice No.60.

<sup>39</sup> Public Finance Management Act (2012) s 107: county treasury to enforce fiscal responsibility principles.

- Fiscal discipline through aggregate expenditure control;<sup>40</sup>
- Efficient allocation of resources to the various sectors, consistent with policy priorities;
- Efficient use of resources, by enabling good operational management to deliver quality public services (value for money).

The fiscal responsibilities principles<sup>41</sup> are intended to ensure both the two levels of government manage their expenditure. These principles as provided in section 107 (2) of the Public Finance Management Act, 2012 emanate from the broad Constitutional principles but are more specific in terms of limits or threshold that public entities should adhere to regarding budget formulation and execution. These are:



a. *County Treasury should ensure that a minimum of 30% of the county budget over the medium term is allocated to development expenditure.*

According to reports of the Controller of Budget, in the 2014/15 financial year 43.6% of the total approved counties' budget of Ksh 321.6 billion was allocated to development expenditure.<sup>42</sup> In actual terms an average of 36% of the total county expenditure was spent on development - 6% above the legal requirement.<sup>43</sup> The report also demonstrates that sixteen out of the 47 counties fell short of the 30% threshold, thus implying poor results expected in the sixteen counties with regard to delivery of capital oriented projects.

b. *County government's recurrent expenditure shall not exceed the county government's total revenue.*

According to the budget implementation reports, the combined recurrent expenditure for county governments in 2014/15 was Ksh 181.3 billion against anticipated total county revenue of Kshs 299.6 billion. Indeed projected county revenue exceeds estimated recurrent expenditure by Ksh 118.3

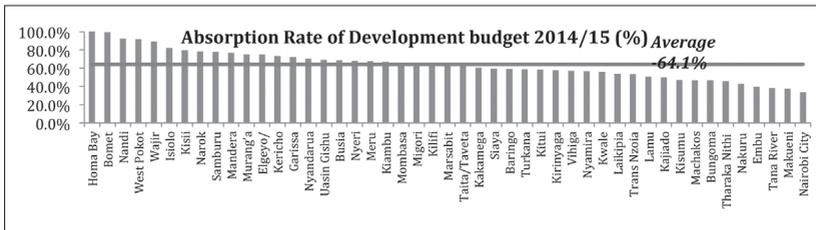
<sup>40</sup> Fiscal discipline is defined here as the ability to keep spending within limits created by the ability to raise revenue and keep debt within levels that are not prohibitively expensive to service.

<sup>41</sup> Public Finance Management Act (2012) s 107 (2) (a)-(g).

<sup>42</sup> Office of the Controller of Budget County Governments Budget Implementation Review Report Third Quarter 2014/15(May 2015) xv.

<sup>43</sup> Based on author's computation in reference to Office of the Controller of Budget Annual County Governments Budget Implementation Review Report FY 2014/15(August 2015).

billion. Further to this, counties have so far not fared well with regard to the principle of prudence in expenditure. For example, in the 2014/15 annual budget implementation report, the Controller of Budget notes that although actual average spending on capital projects was about 36% of total county spending, development spending in over half of these counties (26 out of 47) was below this average. In fact, 16 of these counties spent less than 30% of their individual total county spending. Majority of these counties are instead spending their budgets on personnel emoluments and excess on allowances especially for members of county assemblies, domestic and foreign travel and so on. Besides county executives and indeed county assemblies have been accused of wastage in the use of public funds by both the Auditor General and Officer of the Controller General. These issues together with under spending of development budget, low execution rate of 64% at the end of 2014/15 are a signal of indiscipline and irresponsible use of funds (see graph below). Of course this is linked to issue of delays in transfer of funds by county treasury to spending units and attendant IFMIS challenges that will be discussed in the next section.



c. *The county government's expenditure on wages and benefits of its public officers shall not exceed a percentage of the county government's total revenue as prescribed by regulations.*

Regulations prescribe that county expenditure on wages and benefits should not exceed 35% of the counties' total revenue (exclusive of extractive natural resources including oil and coal). The regulations note that the limit set by County Executive Committee member for Finance should first be approved by the County Assembly. Unfortunately given the limited information in the County Budget Estimates and the way this information is presented it is not easy to compute expenditure on county total wages and benefits for public officers. It therefore goes without saying that for the public and oversight institutions to hold county governments to account on this principle, counties should disaggregate information on recurrent expenditure on wages and benefits, or provide an economic classification of expenditure which normally captures a useful budget line termed as "compensation of employees".

This notwithstanding, reports from the Controller of Budget have noted the bloated workforce is occasioned by of the failure to rationalize staff during the transition process, and continued recruitment by counties, without due regard to staff already seconded from the National government and those inherited from the former local authorities. In 2013/14 counties' spending on wages (personnel emolument) vis-à-vis total revenue was 36%,<sup>44</sup> one percentage point above the recommended threshold. Spending on wages from 19 counties was above the 35% cut off. Unfortunately, it is difficult to make comparisons with 2014/15 because this information was not provided in the Controller of budget reports for this particular financial year.

Further the Regulations stipulate that approved expenditure of a county assembly shall not exceed 7% of the total revenues of the county government or twice the personnel emolument of that Assembly, whichever is lower. Again as mentioned above, expenditure information by county assemblies does not allow an analysis on the extent to which they comply with this principle.

**Box 3: Court ruling on spending limits for County Assemblies**

In a move to curb reported cases of misuse of resources and escalating spending on allowances, foreign travel and runaway personnel costs, the CRA and the Officer of the Controller General invoked their power and imposed a limit on spending particularly for County Assemblies.

As was expected, County Assemblies through the County Assemblies Forum contested the above directive challenging the authority of the CRA and Officer of the Controller General to control their expenditure and even going further to term it as unconstitutional. They further challenged this directive seeing it not only as outright interference but also as a move to cripple their operations. To this end, they filed a court case seeking suspension of the circular pending determination of the case. They further argued that the limits were arbitrary and the caps would weaken their oversight role.

The court ruled that indeed both the CRA and the COB were within their powers of overseeing budget implementation and that they are not bound to seek representation from county governments before giving any recommendations on budget ceilings.

After losing their court case, the County Assemblies have recently presented a report (<http://www.nation.co.ke/counties/county-assemblies-cash-crunch/-/1107872/2611896/-/6sx75l/-/index.html>) showing that 34 of the 47 Assemblies will face closure due to lack of funds. In their report, they have sought the intervention of the Senate for the ceiling to be raised to 40% of county staff salaries from 30%.

Ref: *Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 others* [2015] eKLR.

<sup>44</sup> Computation from information on personnel emoluments and total revenue by county sourced from the Office of Controller of Budget Annual Report 2013/14.

As is the case with national government fiscal responsibility principles limit county government borrowing over the medium term only for the purpose of financing development expenditure and not for recurrent expenditure. Both national and county levels of government shall ensure that debt is maintained at a sustainable level as approved by the respective legislatures. The PFM Regulations go ahead to indicate that public debt shall not exceed 20% of county government's total revenue at any one time to ensure debt sustainability. Lastly, taxation policy shall ensure a reasonable degree of predictability with respect to the level of tax rates and tax bases taking into account any tax reforms that will be made in future.

### *Accounting and reporting*

Counties are required to account and report on their spending. This process is critical in elucidating whether county public funds were used for their intended purposes. The Integrated Financial Management System (IFMIS) is the financial management system that the National Treasury has prescribed<sup>45</sup> to ensure transparent financial management and reporting at the two levels of government despite resistance by some counties. Linked to this, Counties must follow the Public Sector Accounting Standards (PSAS) in financial reporting as prescribed by the Public Sector Accounting Standard Board. These standards became effective on 1st July 2014 and were subsequently gazetted on 1st August 2014.

Pursuant to Article 226 of the Constitution, the accounting officer for a county entity shall prepare a quarterly report for submission to the county treasury no later than 15 after the end of the quarter. The report includes details of both financial and non financial performance of the entity. In another 15 days, the county treasury submits the consolidated quarterly report to the County Assembly and sends copies to the Controller of Budget, the national treasury and Commission for Revenue Allocation. In the same manner, the administrator of a County Public Fund must submit a quarterly report to the County Treasury within the same timelines with copies to the Controller of Budget. Within three months after the end of the financial year, all accounting officers and administrators of public funds must submit detailed financial statements to the Auditor General. The Receiver of Revenue must also send the financial statement of revenue collected and received to the Auditor General within similar timelines. This report is copied to the county treasury, the Controller of Budget and the Commission for Revenue Allocation.

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<sup>45</sup> The National Treasury is empowered through Article 190 of the Constitution and section 12 of the Public Finance Management Act, 2012.

The final round of reporting is done by the County Treasury through a consolidated detailed annual county government financial statement submitted to the Auditor General not later than four months after the end of the financial year. A copy of this report is copied to the national treasury, Controller of Budget and the Commission for Revenue Allocation.

The law<sup>46</sup> allows County governments to depart or deviate from the fiscal responsibility principles, albeit temporarily and only if deviation is necessitated by a major natural disaster or some other significant unforeseen event as detailed in the County Fiscal Strategy Paper (CFSP). On this matter, county governments must get approval for the deviation from the county assemblies and the report citing these reasons should be made public no later than fourteen days after it has been submitted to the assembly.

#### 4. Emerging Issues in County Management of Public Funds

Whereas the Constitution of Kenya provides an extensive legal framework to govern the use and management of financial resources, in practice majority of counties have struggled to observe the clearly laid out principles discussed above. Granted at two and half years since establishment counties are still in their infancy stage, nonetheless there have emerged considerable capacity deficits, indiscipline and inadequate political will that threaten budget effectiveness.

The crucial County Integrated Development Planning process has been constrained by the fact that available statistics were segregated by the former districts, division and location and not the current planning and service delivery units of the devolved system (county, sub counties and wards).<sup>47</sup> Equally, although majority of counties made efforts to involve the public in the formulation of these plans this was not done adequately due to time constraints. Many counties have been forced to review their CIDPs.

Due to the tight and overlapping national and county budget calendar, counties have so far prepared their CFSPs without aligning them to the BPS which sets out the broad national strategic priorities and policy goals to guide counties in preparation of their budgets.<sup>48</sup> In similar vein, delays in approval of the Division of Revenue Bill have forced county governments to prepare

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<sup>46</sup> The Public Finance Management Act 2012, Section 108.

<sup>47</sup> Council of Governors, Conference Report (2014) of the 1st Annual Devolution Conference Held at Leisure Lodge and Golf Resort on 3rd- 4th April 2014 <<http://cog.go.ke/index.php/best-practices/web-links/reports#devolution-conference-report-2014>> at 12th August 2014.

<sup>48</sup> World Bank "Decision Time: Spend More or Spend Smart?" Kenya Public Expenditure Review Volume 1(December 2014).

their CFSPs without concrete details on their expected transfer from the national government because of delays in approval of the division of revenue bill, see box below.

Counties have been working towards the adoption of Integrated Financial Management System (IFMIS)<sup>49</sup> as prescribed by National Government and by early 2015 IFMIS was being rolled out to all the 47 counties.<sup>50</sup> The PFM Sector Working Group<sup>51</sup> underscores its importance in transparent financial management, standard financial reporting and in managing and monitoring government transactions.<sup>52</sup> The system also helps to generate financial transaction reports. However, there has been a mixed reception to IFMIS and the system is facing increasing resistance by some Governors on account of the manner in which it is being implemented. Led by the Council of Governors, several governors are threatening to suspend the use of IFMIS and in particular the electronic procurement module. They cite delays in processing of payments for county workers or suppliers for instance, as one of the challenges of the system especially whenever there is a breakdown or due to connectivity issues. Furthermore, there are more claims from Governors that delays in release of funds to counties are linked to IFMIS, and are thus collectively viewed as a thinly veiled attempt by the national government to sabotage devolution. The counter argument is that some Governors are resistant to IFMIS because it will expose abuse of funds. Whereas the Governors have challenged the constitutionality of the system, section 12 of the PFMA, 2012 states:

“National Treasury has the responsibility to design and prescribe an efficient financial management system for the two levels of government to ensure transparent financial management and standard financial reporting as contemplated by Article 226 of the Constitution.”<sup>53</sup>

Section 12 goes on to state:

“...Provided that the National Treasury shall prescribe regulations that ensure the operations of a system under this paragraph respect and promote distinctiveness of the national and county level of government...”<sup>54</sup>

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<sup>49</sup> Integrated Financial Management Information System (IFMIS) is an automated system used for public financial management that interlinks planning, budgeting, expenditure management and control, accounting, procurement, audit and reporting. E-procurement is a component of IFMIS whose usage is submission and evaluation of procurement applications via [www.treasury.go.ke](http://www.treasury.go.ke).

<sup>50</sup> Wajibika (June 2015) A Magazine of the Public Finance Management Reforms Programme 6th Edition pp 11.

<sup>51</sup> As above.

<sup>52</sup> As above.

<sup>53</sup> The Public Finance Management Act (2012) s 12(e).

<sup>54</sup> The Public Finance Management Act (2012) s 12(e).

If unresolved this may become an issue for interpretation before the courts. Despite the skepticism by some Governors, the national government through the National Treasury and the Office of the Controller of Budget has encouraged counties to embrace use of IFMIS in processing of financial transactions. In fact, the National Treasury has stepped up efforts to enhance the adoption of this system by training more than 5,000 users at the Kenya School of Government.<sup>55</sup>

All county entities through the accounting officers and/or administrators of funds are required to undertake statutory reporting and publishing of the same for public participation purposes. However, due in part to capacity constraints many of these reports do not meet statutory reporting requirements. For instance the Office of the Controller of Budget noted that reporting and administration on county funds was inadequate in 2014/15. Further, it appears that in some counties, the County Executive Member for Finance did not appoint an administrator to oversee operation of the established funds as required by law.<sup>56</sup>

One of the biggest bones of contention has emerged as the adequacy of county revenues with respect to county service delivery needs. Both the Council of Governors and the political opposition have initiated respective constitutional amendment processes under Article 257,<sup>57</sup> both proposing an increase of the minimum share of county revenue from 15% to 45% of revenue raised nationally. Stakeholders such as the International Budget Partnership have argued that the proposals to increase county revenues are not based on facts and that they pose a threat to the sustainability of national functions. That notwithstanding a report by the same institution identified an additional Ksh 28 billion to a maximum of Ksh 65 billion which could potentially be devolved especially upon reforming state corporations.<sup>58</sup> This is obviously an issue for national debate.

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<sup>55</sup> Wajibika, A Magazine of the Public Finance Management Reforms Programme 6th Edition (June 2015) 11.

<sup>56</sup> Office of the Controller of Budget, Annual County Governments Budget Implementation Review Report FY 2014/15 (August 2015).

<sup>57</sup> Article 257 of the Constitution provides for amendment by popular initiative. The opposition campaign is titled 'Okoa Kenya' (Kiswahili for save Kenya) and that by the Council of Governors 'Pesamashinani' (Kiswahili for money to the grassroots).

<sup>58</sup> J Kinuthia and J Lakin "Devolution in Kenya: Is the National Government Still Holding Funds That Should Be Devolved?" International Budget Partnership Kenya Budget Brief No. 30 (2014).

**Box 4: Journey, in brief, of the Division of Revenue Bill 2015/16 before its enactment**

The Division of Revenue Bill 2015/16 was referred to the Budget Committee on 19th March 2015 and later adopted by the House on 30th March 2015 without amendments. It was subsequently submitted to the Senate which passed it with amendments raising the Ksh 258 billion county equitable share approved by the National Assembly to Ksh 283.7 billion. In particular, the Senate approved the need to increase the total transfers to counties by Ksh 7.7 billion comprising additional resources for level five hospitals, County Emergency Fund and improved remunerations for County Executive and County Assemblies.

Given these differences, a Mediation Committee comprising members from the houses of Parliament was constituted - in line with Article 110(4) and 113 of the Constitution of Kenya, 2010. This committee held its first meeting on 29th April culminating to the approval and enactment (5th June 2015) of a new Bill that resolved to increase the total transfers by Ksh 3.3 billion; This comprised (i) increase shareable revenue by Ksh 1.77 billion and (ii) additional allocation of Ksh 1.54 billion to level 5 hospitals amounting to Ksh 287.04 billion.

***Budgeting challenges***

*a. Capacity limitations*

It is noteworthy that the counties have shown marked improvement in the comprehensiveness of their budget estimates since their first budgets in 2013/14 to the current 2015/16 budget. This notwithstanding the format and content of majority of county budgets still falls short of the transparency requirements under the Constitution and public finance Act. For example, in some counties expenditure information is not disaggregated by recurrent and development or further by departments and programs. Moreover most budgets are presented without a multi-year framework (3 years).<sup>59</sup> Even for the few counties that have adopted program based budgeting there is a still lot of room for improvement. Statutorily the estimates are to be accompanied by a budget summary that includes an explanation on the relationship between key fiscal policies and budget objectives. In addition, this summary should contain a memorandum giving an explanation of how recommendations made by the County Assembly in the previous year's budgets are being taken into account in the proposed budget year. Majority of counties, if not all, totally failed to meet this requirement. One of the key reasons for the foregoing challenges is inadequate technical capacity.

<sup>59</sup> National Treasury Budget Policy Statement 2015.

*b. Unfriendly revenue raising measures*

There have been concerns regarding counties proposing business unfriendly revenue raising measures as with the earlier case of Kiambu County. These revenue proposals were contested on the grounds that they are contrary to the principle of neutrality as provided in Article 209 (5) of the Constitution as well as on the grounds that the public was not consulted. On the foregoing matter, the court ruled in favor of the residents of Kiambu that indeed this Act violated provisions of the Constitution and thus null and void.<sup>60</sup> For a lasting solution the Intergovernmental Budget and Economic Council (IBEC) seeks to introduce a framework for preparation and approval of County Finance Bills.<sup>61</sup>

*c. Conditional grants implemented by the national government*

First and foremost, there is need to harmonize institutional and regulatory frameworks for all grants to avoid duplication of roles across funds and line ministries and in turn curb wastage. In this respect, an effective mechanism for coordination between the two levels of government and among counties and also between agencies of the two levels of government is critical. For example, there are many facilities that have been built such as schools and health centers using Constituency Development Fund (CDF) but which remain underutilized or idle due to lack of coordination or simply resistance from public sectors.

Secondly, conditional grants lack a clear and transparent framework for distribution. For example, the health related grants earmarked in the Division of Revenue Act 2015 including the free maternal health care and leasing of medical equipment are not accompanied by a clear the mode of distribution. Will these funds be distributed based on health factors or needs, based on ratio of county population to the national population or is it based on equitable distribution using CRA formula and how sensible is this?

*d. Inadequate fiscal capacity*

In this whole debate certain issues have been left out. For instance, the fact that counties' own local revenue collection still remains low.<sup>62</sup> Some counties are struggling to maintain revenue levels of the former local authorities.<sup>63</sup> So far, there is little if any public debate and focus on what counties can do to shore

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<sup>60</sup> Robert N. Gakuru & Others v. Governor Kiambu County & 3 Others (2013) eKLR.

<sup>61</sup> National Treasury Budget Policy Statement (2015) 47 [156].

<sup>62</sup> Office of the Controller of Budget, Annual County Governments Budget Implementation Review Report FY 2014/15(August 2015).

<sup>63</sup> World Bank, "The Evolution of Kenya's Devolution: What's working well - what could work better" (2014).

up their capacity to generate own revenue which is critical in helping forge a social contract and legitimacy between citizens and the county government. This is actually one of the reasons for the clamor by governors to have more funds from equitable transfers to counties given insufficient own tax efforts.

*e. Abuse of revenue raising powers*

In line with the public finance principle of fairness, the constitution provides that:

The taxation and other revenue raising powers of a county shall not be exercised in a way that prejudices national economic policies, economic activities across county boundaries or the national mobility of goods, services, capital or labor.<sup>64</sup>

The Act further provides that prior to imposition of any tax or revenue raising measure 'the county government shall seek views of the Cabinet Secretary and the Commission on Revenue Allocation.'<sup>65</sup> As enforcement of this provision is not clear the courts are likely to be called upon to interpret the law.<sup>66</sup>

***Food for thought!***

Whereas numerous county executives have deviated from fiscal responsibility principles and accountability provisions it is not clear if any have prepared the required responsibility statement for submission to their County Assemblies explaining the reasons for deviations. In this scenario it is not clear what the sanction measures should be. For example, although the Cabinet Secretary for finance is empowered to stop transfer of funds to a county in case of serious material breach as per Article 225 it is not clear whether non compliance with fiscal responsibility principles constitutes serious material breach.

Moreover, there are questions about how realistic these principles are; for example the fact that county expenditure on wages and benefits should not exceed 35% of the counties' total revenue. The issue of inherited staff and need for staff rationalization at the county level directly impacts the county wage bill. This is a transition related challenge that is hopefully going to be dealt with in due course. As counties need a grace period for which they shall henceforth be judged on level of compliance? Another question that arises is whether some of these statutory requirements call for the need to amend requisite legislation.

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<sup>64</sup> The Constitution of Kenya 2010, Article 209(5).

<sup>65</sup> The Public Finance Management Act (2012) s 161.

<sup>66</sup> As above n 54.

**Unconstitutional practice of failure to deposit to authorized Revenue**

**Fund:** The Office of the Controller of Budget has in the recent past warned six counties for breach of the Constitution in failing to deposit locally generated funds in the authorized County Revenue Fund; these counties were as reported in the annual County Government Budget Implementation report for 2013/14.<sup>67</sup> This is compounded by the fact that some of these counties did not appoint receivers of revenue contrary to statutory requirements.<sup>68</sup> As a result this has made it difficult for the Controller of Budget to monitor revenue collection and in turn expenditure. This notwithstanding, it is not clear whether this office has invoked the powers to temporarily withhold up to half of the share of each of the culpable counties' transfer from the national government as a sanction.<sup>69</sup>

**Late submission of financial statements and other attendant delays:**

The other notable issue regards late submission of financial statements by administrators of revenue funds to the relevant oversight institutions. Of course this is not only unique to administrators of funds but quite common among some accounting officers of county entities. Late submission of financial statements at this level have as a result somewhat led to delays in release of quarterly budget implementation reports by the Office of the Controller of Budget to parliament and to the public.

**Cash management challenges:** Regarding cash management, it is important to note that the fact that the national government has also struggled to set up the Treasury Single Account (TSA) implies that a number of counties are not ready for this. Although some media reports indicate that the process is ongoing, there is no available public information that speaks to the actual state of play on the adoption of TSA by counties.

**Resistance to adoption and implementation of electronic procurement:** On procurement, the National Treasury directed<sup>70</sup> county governments to use the IFMIS electronic procurement module but this is yet to be operationalised. IFMIS is not only interpreted as interference by the national government but also deemed as unrealistic given that in practice most counties lack proper infrastructure. Similarly, some governors feel the use of this system disadvantages small scale business persons especially those in rural areas. In this respect, the Council of Governors has threatened to take the government

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<sup>67</sup> The Constitution of Kenya, Article 207.

<sup>68</sup> The Public Finance Management Act, 2012 s 157.

<sup>69</sup> The Constitution of Kenya 2010, Article 225

<sup>70</sup> Author did not manage to find the Circular speaking to this but evidence of the same is drawn the National Treasury press release accessed on December 11 via <http://www.treasury.go.ke/news-updates/319-no-reverse-on-e-procurement.htm>

to court if it continues pushing them to adhere to this directive. However on appearance before the Senate Committee on Finance, the Cabinet Secretary for the National Treasury acknowledged that the system is facing some challenges, but stated that this was confined to some counties and that there was no reverse on the e-procurement system.<sup>71</sup>

**Reporting:** There are two main issues worth noting. One is with regard to delays in meeting statutory deadlines in submission of expenditure reports and the other is on poor reporting. On the latter issue, majority of counties lack an effective monitoring and evaluation framework to assess the status of ongoing projects and whether implementation is per the approved budget and timelines. The resultant reports are often of poor quality.

## 5. Conclusion

As county governments approach the three years mark since coming into being, and the transition period framed by the constitution comes to an end, it is expected that counties would have overcome their teething problems. Undoubtedly, counties have attained significant milestones with regard to provision of health care, construction of first tarmac roads particularly in the northern part of Kenya, spurred growth in the property market among other positives. However there are certain emerging issues that have undermined performance of counties. Critical to public service delivery is how counties have so far been using and managing public funds, the focus of this chapter.

With regard to complying with public finance and fiscal responsibilities intertwined with use and management of county funds along the five themes of public finance management, counties have registered mixed performance. On disclosure and release of budget documents and reports produced throughout the budget cycle, with the exception of county budget estimates, majority of counties have struggled to meet constitutional and statutory deadlines for the other budget documents. This is compounded by the fact that the quality and level of comprehensiveness for most of these documents is wanting.

Another related challenge worth mentioning is the delays in approval of key budget formulation bills. Some of the delays have been occasioned by institutional conflicts have only been resolved through judicial intervention. Furthermore, there have been serious challenges with regard to prudence in spending by counties, compounded by low fiscal capacity. For example counties have been accused of runaway spending on wages and foreign

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<sup>71</sup> As above.

travel which and general inefficient spending contrary to fiscal responsibility principles. These pitfalls have happened under the watch of independent oversight institutions. This clearly points out to the need for strengthening and insulating oversight institutions especially the Senate and the County Assembly from executive capture and vested interests.

As far as public participation is concerned, the county governments are required to create structures, mechanisms and guidelines for public participation that are open to all and have safeguards against domination of consultations by one group.<sup>72</sup> Certain challenges have conspired to undermine effective participation including capacity constraints, lack of funds for civil education, poor form and design of public participation forums among others. Specifically citizen engagement in the budget process is a major challenge especially in the implementation and the accounting and reporting stages. Therefore, counties should seek innovative ways of engaging the citizens as well as ensuring that members of the County Budget and Economic Forum are capacitated for the forum to be functional. Organization of citizens and advance communication coupled with access to simplified and non technical budget information is critical to stem apathy in participation.

Whereas the Judiciary is called upon as a last resort to unblock bottlenecks in the use and management of county funds, it is also critical to strengthen enforcement measures as well as the role of intergovernmental institutions such as the Intergovernmental Budget and Economic Council in enhancing intergovernmental consultation and cooperation in matters of public finance management.

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<sup>72</sup> Kenya School of Government Building Public Participation In Kenya Devolved Government, Kenya Devolution Working Paper 1, February 2015.



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# Judicial Adjudication of Intergovernmental Disputes in Kenya: Defining Judicial Boundaries and Appropriate Remedies

By Mugambi Laibuta

## 1. Introduction

Kenya's Constitution turned five years old on 27th August 2015. This is no mean feat for a country which just six years ago was embroiled in post-election violence that claimed the lives of more than 1,500 people. The Constitution 2010 creates a new political, social and governance order. The Constitution has been touted as one of the most progressive constitutional texts of its generation. However, having a progressive constitutional text and implementing it are two different processes; political good will which is crucial for the implementation process has been wanting.

In constitutional design and implementation speak; Kenya's Constitution is still in its infancy stages. Prof. Tom Ginsburg in his work, *The Lifespan of Written Constitutions* posits that Constitutions in general, do not last very long. The mean lifespan of constitutions across the world since 1789 is 17 years. His research shows that in Africa, a Constitution is replaced with a government friendly one in its first years of existence.<sup>1</sup> This is true of Kenya's independence Constitution that experienced radical amendments less than two years its promulgation. The reason for the first amendments related to the Executive seeking to consolidate power at the centre by doing away with the Senate Chamber of Parliament, abolishing regional governments and granting the President sweeping and strong executive powers. In subsequent years, the independence Constitution was amended to do away with multi-party democracy, interfere with independence of the Judiciary and create an imperial presidency. There is already debate from several quarters on the need to amend the Constitution of Kenya 2010. A movement spearheaded by

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1 T Ginsburg, Z Elkins, and J Melton, *The Lifespan of Written Constitutions* (2009).

the opposition dubbed *Okoa Kenya* (Kiswahili for Save Kenya) was initiated in 2014 and proposes radical amendments to the Constitution. The current government has also been musing over its own proposed amendments to the constitutional text. These developments illustrate the frustration that the implementation of a new constitutional text brings as it seeks to deconstruct existing governance structures.

The Constitution 2010 creates a devolved system of government; a bi-cameral parliament; gives constitutional autonomy to the judiciary; provides for integrity, transparency and accountability in public institutions, and creates constitutional commissions and independent offices. These structures are still relatively new to Kenyans. Secondly the new structures are headed and run by Kenyans from diverse backgrounds many of whom worked within the aegis of the independence Constitution and had no prior experience working within a devolved system of government.

It was only logical that after the promulgation of the Constitution on August 27th 2010 and after the March 2013 general elections, the newly created institutions would work towards asserting their constitutional place, powers and functions while demanding greater respect for the separation of powers. Notwithstanding the fact that the Constitution lays out the powers and functions of the Senate, National Assembly, National Executive, County Assemblies, County Executives, Judiciary and Constitutional Commissions; these institutions have worked to see how far they can assert their constitutional roles and mandates, and in the process intra-governmental and intergovernmental disputes have arisen. For instance, supremacy wars have in the past two and a half years threatened to paralyze the operations of Parliament with the National Assembly and Senate fighting about which chamber of Parliament is superior to the other.<sup>2</sup>

Again, soon after being sworn into office, the governors demanded a full transfer of powers and functions from the national government to the counties despite the fact that the Constitution envisaged a phased approach to the transition.<sup>3</sup> One question that this chapter delves into is whether the Judiciary has also been caught up in the constitutional turf battles and whether the Judiciary has protected the devolved system of government.

Legitimacy of government depends on how it operates within set out constitutional and legal limits. Courts have the constitutional role of

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2 SUPREMACY BATTLE BETWEEN THE SENATE AND NATIONAL ASSEMBLY ON 28 MAY 2013. East African Center For Law & Justice- <<http://eacj.org/constitution/20-constitution-feature-articles/136-supremacy-battle-between-the-senate-and-national-assembly.html>> at 20th August 2015. Why senators, MPs turf wars threaten devolution rollout Read more at: <<http://www.standardmedia.co.ke/article/2000082987/why-senators-mps-turf-wars-threaten-devolution-rollout>> at 20th August 2015.

safeguarding the Constitution; this role, in some instances, touches on the constitutional roles of other arms of government. While the Constitution and legislation provide for alternative dispute resolution mechanisms for intergovernmental disputes, the courts have nonetheless been called upon to adjudicate them. The role of courts is, thus, juxtaposed with the constitutional independence of other arms or levels of government to determine specific matters. In these circumstances, the courts walk a delicate balance between their core primary mandate of safeguarding the Constitution and ensuring that other arms or levels of government have their space to make decisions. This chapter looks into the application of the principle of cooperative government in the Kenyan context and the role of the Judiciary, the place of judicial interventions in intergovernmental disputes in the Constitution, separation of powers and its application to intergovernmental disputes.

This chapter first examines the traditional concepts of constitutionalism and separation of powers and how they operate within the structure of the Constitution 2010. It then discusses how the process of transfer of powers and functions from the national to county governments has exacerbated intergovernmental disputes. It then proceeds to critically examine the constitutional and statutory framework for dealing with intergovernmental disputes in Kenya, and analyzes a selection of decisions from the courts relating to intergovernmental disputes. The chapter ends with proposals to the courts and intergovernmental institutions on how they could handle intergovernmental disputes in the future.

## 2. Constitutionalism and Juristocracy

Do judges interfere with constitutionalism when they wade into the murky waters of intergovernmental relations disputes? In this regard, are the courts respecting constitutional boundaries? Charles Louis de Secondat, Baron Montesquieu argued for the separation of powers in relation to legislative, executive and judicial powers.<sup>4</sup> The three arms of government as he posited were to be distinct with clearly stated limited powers and operate within constitutional limits to guard against the abuse of powers. Only the people possess unlimited sovereignty and the normative power to void the authority of their government or part of the government if it exceeds its constitutional limits.<sup>5</sup> Article 1 of the Constitution provides that all sovereignty belongs to the people of Kenya and that such power should be exercised only in

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<sup>3</sup> *How governors can serve counties effectively* – Business Daily <<http://www.businessdailyafrica.com/How-governors-can-serve-counties-effectively/-/539546/1760892/-/101n554/-/index.html> > at 25 October 2015.

<sup>4</sup> B. Montesquieu, 'The Spirit of the Laws, tr. (1752) T Nugent (ed) F Neumann.

<sup>5</sup> J Locke, 'Two Treatises of Government' Book II 1690 Chapters XI–XIV.

accordance with the Constitution. Sovereign power of the people is delegated to parliament, county assemblies, national and county executives, the judiciary and independent tribunals.

Traditional notions of constitutionalism evolve as world politics, the economy, diplomacy and legal structures are redefined. International law, regional integration, supra-national organizations, and human rights obligations of states are some of the contemporary factors that lend a new meaning to constitutionalism. Contemporary constitutional designs deconstruct the traditional understanding of constitutionalism. Traditionally, the judiciary, the executive and the legislature were the only organs of the state contemplated to fall within the constitutional framework. Kenya's constitutional design has departed from traditional notions of constitutionalism. While Montesquieu discussed the executive, legislature and judiciary, the Constitution 2010 has provision for constitutional commissions and independent offices that have powers to promote constitutionalism while not being under the direction of any person or authority. They also have actual and quasi-judicial, executive and legislative functions. This means that Kenya has a fourth arm of government under the guise of constitutional commissions and independent offices.

*Marbury v Madison*<sup>6</sup> provided the paradigm shift in constitutional law practice where courts could inquire into the exercise of powers by the legislature and the executive. Constitutional petitions and judicial review have become the norm in countries with written constitutions that have provision for fundamental rights and freedoms plus accountability, transparency and accountability in exercising constitutional and legislative powers. Even with powers to inquire into the conduct of other arms of the government, the courts have been accused of 'judicial activism' and 'juristocracy'.<sup>7</sup> These words have been used to describe what is touted as the growth of judicial power. This is the perception that judges are taking over the roles of the executive and legislature. This argument revolves around the fact that the executive and legislature enjoy direct mandate from the 'people' being elected officials. On the other hand, judges are unelected officials and do not in strict sense serve at the pleasure of the electorate. In the United States of America, the 'counter majoritarian' difficulty debate still rages. Alexander Bickel in 1962 stated that the problem is the extent that democracy entails responsiveness to popular will, how to explain a branch of government whose members are unaccountable to the people, yet have the power to overturn popular decisions.<sup>8</sup> Does the

<sup>6</sup> *Marbury v Madison* (1803) 5 U.S. 137.

<sup>7</sup> L F Goldstein, 'From Democracy to Juristocracy'- 38 Law & Soc'y Rev 611 2004.

<sup>8</sup> B Friedman, 'The History Of The Countermajoritarian Difficulty, Part One: The Road To Judicial Supremacy'(1998) 73 *New York University Law Review* 333

Kenyan Judiciary engage in activism and promote juristocracy in adjudicating constitutional disputes between the national and county governments?

Notwithstanding the discourses on 'juristocracy', the Constitution of Kenya 2010 explicitly grants the Judiciary powers that would otherwise be termed activist; and may signify the rise of juristocracy. Article 258 of the Constitution gives the judiciary sweeping powers. It allows any person to institute court proceedings claiming that the constitution has been contravened or is threatened with contravention. Article 258 states:

- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
- (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
  - (a) a person acting on behalf of another person who cannot act in their own name;
  - (b) a person acting as a member of, or in the interest of, a group or class of persons;
  - (c) a person acting in the public interest; or
  - (d) an association acting in the interest of one or more of its members.

Article 258 has been instrumental on granting *locus standi* for court proceedings where there is a claim that the Constitution has been contravened or is threatened with contravention. The courts have interpreted Article 258 generously to entertain diverse matters brought before them.<sup>9</sup> Article 165(3) on the other hand, grants the High Court unlimited original jurisdiction in criminal and civil matters. It further grants the High Court jurisdiction to determine questions as to whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

Article 165(6) grants the High Court supervisory jurisdiction over subordinate courts and over any person, body or authority exercising judicial or quasi-judicial functions. In *Martin Nyaga Wambora and 3 others v Speaker of the Senate and 6 others* the Court of Appeal was emphatic that notwithstanding that other organs of the state had constitutional powers vested upon them, the High Court had an oversight role. This oversight role includes inquiring into the constitutionality of decision making processes and ensuring that decisions made do not infringe on fundamental rights and freedoms. The

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<sup>9</sup> *Ali Ahmed & 49 others v County Government of Mandera* [2015] eKLR; *Communication Workers Union & another v Communication Authority Of Kenya* [2015] eKLR; *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR.

Court of Appeal also stated that –

The political question doctrine and the concept of separation of powers cannot oust the jurisdiction of courts to interpret the Constitution or to determine the question if anything said to be done under the authority of the Constitution or of any law is consistent with or in contravention of the Constitution as per Article 165(3)(d)(iii).<sup>10</sup>

Separation of powers has generally not stopped the courts from exercising their role in interpreting the Constitution. In the *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* decision,<sup>11</sup> where the Petitioners had challenged the constitutionality of the Security Laws Amendment Act, 2014, the court stated that:

...the doctrine of separation of powers does not stop this court from examining the acts of the Legislature or the Executive. Under Article 165(3) (d) of the Constitution, the Judiciary is charged with the mandate of interpreting the Constitution; and has the further mandate to determine the constitutionality of acts done under the authority of the Constitution...

Using the above stated principles, the court went on to declare eight sections of the Security Laws Amendment Act, 2014 unconstitutional. While the court was cognizant of the distinct constitutional powers given to the Executive and Legislature, it could not abdicate its responsibility to be the final interpreter of the Constitution. In another case, *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* where the issue in question was suitability of the appellant to hold public office after appointment, the Court of Appeal stated:

[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role - including the last word in determining the constitutionality of all governmental actions...<sup>12</sup>

The question about ‘judicial activism’ and ‘juristocracy’ therefore, does not arise in Kenya. However, the next section examines whether constitutional powers granted to the courts are exercised in reasonable fashion. The courts must be alive to the status of constitutional implementation and the political,

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<sup>10</sup> Paragraph 62, *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others* [2014] eKLR

<sup>11</sup> *Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others* [2015] eKLR.

<sup>12</sup> Paragraph 49, *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR.

social and economic undercurrents facing the Constitution. Courts should not adopt a patronizing stance and should allow other arms of the different levels of government to exercise their constitutional and statutory mandates.

### 3. Challenges in Implementing Devolved Governance

The last five years of implementing the Constitution have been a learning process for jurists, technocrats, politicians, citizens, civil society and academics alike. The Kenyan Constitution is a constitution *sui generis* specifically in relation to the creation of two levels of government and how they relate to each other. Adopted at a time of unprecedented crisis, the Constitution 2010 provided hope for Kenyans. The Constitution was to deal with among others inequality, perennial cycles of violence among other political and governance matters. Thus, failures in its implementation and the perpetual bickering between different constitutional organs threaten to extinguish the Kenyan constitutional dream.

The journey to devolved governance has not been without legal, constitutional and political challenges, and its implementation has been one of the main causes of intergovernmental disputes. Ideally the legal framework of the Constitution should have been fully in place by 27th August 2015. Specifically, legislation under Schedule Five of the Constitution should have been enacted, and the powers and functions to be devolved in adherence to the Fourth Schedule should have been transferred to the respective levels of government. Framers of the Constitution contemplated a staggered approach to the implementation of devolution and transfer of functions. Section 15 of Schedule Five provides that Parliament was to legislate on the phased transfer, over a period of not more than three years from the date of the first elections of the county assemblies, from the national government to county governments of the functions assigned to them under Article 185.

County governments were elected into office in March 2013 and by August 2013 almost all powers and functions had been transferred from the national government to county governments.<sup>13</sup> This was less than five months into devolution. Questions abound on whether county governments were ready to take up all these powers and functions at the very early stages of devolution. It is clear that hurried transfer of powers and functions was informed by political pressure as opposed to institutional, legal and capacity preparedness of the county governments. There have been three phases to transfer of functions and powers:<sup>14</sup>

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<sup>13</sup> Kenya Gazette Supplement No. 116 Legal Notices No. 137 – 183 of 9th August 2013.

<sup>14</sup> Transition Authority, Report On the Status of Devolution: Achievements, Challenges and Lessons Learnt (2015).

Phase One: Transfer of the Initial Functions for Transfer Ahead of the March 2013 General Elections.<sup>15</sup> The Transition Authority<sup>16</sup> identified functions that were to be transferred to county governments immediately after the elections. Most of these were functions within the powers of the defunct local authorities. The Transition Authority indicated that these functions did not require a lot of new infrastructure, structures and mechanisms to deliver services to the public.

Phase Two of the Transfer of Functions:<sup>17</sup> this phase as indicated above was informed by political pressure and the decision of the National and County Government Coordinating Summit (Summit) to transfer all functions to county governments. Phase Three of Transfer of Functions:<sup>18</sup> this phase entailed the transfer of the management and assets of Agricultural Training Centers and Agricultural Mechanization Stations under the agricultural sector.

At the same time, the national government has not completely undergone a paradigm shift to fully accept that county governments are distinct and independent levels of government. Under the now defunct Local Governments Act, the minister for local government had overarching executive powers while under the current Constitution, national and county governments are distinct and interdependent. Technocrats at the national government level still imagine they have powers similar to those of the former ministry of local government and repeatedly seek to micromanage county governments. Hence, constant intergovernmental disputes are borne out of a bungled transfer of powers process and lack of technical know-how on the running of a two-level government state.

#### 4. Framework for Disputes on Intergovernmental Relations

Having two levels of government automatically elicits tension and friction. Hence, the Constitution and the Intergovernmental Relations Act 2012 have provided mechanisms to ease the tension. Intergovernmental relations may be defined as “the processes of interactions between different governments and between different organs of state from different governments in the course of the discharge of their functions”.<sup>19</sup> This interaction should be in such a manner that it recognizes that each level of government is distinct but the

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<sup>15</sup> Kenya Gazette Notice No.16 of February 1, 2013.

<sup>16</sup> The Transition Authority is established by the Transition to Devolved Government Act, 2012. The mandate of the Authority is to facilitate and co-ordinate the transition to the devolved system of government as provided under section 15 of the Sixth Schedule to the Constitution.

<sup>17</sup> Kenya Gazette Supplement No. 116 Legal Notices No. 137 – 183 of 9th August 2013.

<sup>18</sup> Kenya Gazette Legal Notice No. 33 of 1 March 17, 2014.

<sup>19</sup> J M Kangu, ‘Constitutional Law of Kenya on Devolution’ (2015) 318.

levels of government are interdependent. Further, the levels of government should conduct their relations on the basis of consultation and cooperation.

In relation to how the two levels of government should relate to each other, Article 6(2) of the Constitution states that:

The governments at the national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation.

Article 189(1) (a) states –

Government at either level shall perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level.

Consultation and cooperation between the two levels of government should ensure that their powers and functions as set out under the Fourth Schedule of the Constitution are fulfilled. Each level of government should not work to undermine the carrying out of functions of the other. Further, the functions of the two levels of government are interdependent. For example, the national government is responsible for health policy while county governments have the obligation to take care of county health services, and while the national government is in charge of agricultural policy, county governments have powers and functions over agriculture at the county level. Intergovernmental relations involve consultations and cooperation on administrative, fiscal and political aspects of how the levels of government carry out their mandates.

It is worth noting that cooperation between the levels of government includes parliament, the executive, county assemblies and county executives. This is due to the fact that powers and functions as defined by the Fourth Schedule include oversight, policy and legislation formulation and executive functions to make the legislation and policy a reality. In exercising their judicial authority, the courts ought to positively contribute to the consultation, cooperation and mutual respect between government institutions within their respective mandates. The success of intergovernmental relations also depends on the commitment and good will of key actors working at the two levels of government. Intergovernmental relations would ideally thrive where all actors act in good faith. Intergovernmental relations may be strained by negative economic, social, political and tribal interests.<sup>20</sup>

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<sup>20</sup> Malan, L 2005, 'Intergovernmental relations and co-operative government in South Africa: the ten-year review', *Politeia*, vol. 24, no. 2 (2005) 226-243.

Lilian Malan while reviewing ten years of intergovernmental relations in South Africa set out six main objectives of intergovernmental relations that co-operative government requires all state institutions to abide by:<sup>21</sup>

- achieving key national policy goals, with clear objectives informed by provincial and local circumstances;
- cost-effective and sustainable service provision, responsive to needs of communities and accessible to all;
- clearly demarcated areas of responsibility and accountability for all state institutions;
- deliberate management of devolution to provincial and local governments while exploring asymmetrical options for devolution when capacity is poor;
- the encouragement of creativity for collaboration and partnership while strengthening performance and accountability of distinctive institutions; and
- elimination of wasteful and unnecessary duplication and avoiding 'turf battles'.

If any of the above objectives are not met, it may be an indication of failing intergovernmental relations. Intergovernmental relations should be about partnerships instead of turf battles and competition to assert supremacy by any arm of the levels of government. The courts in entertaining intergovernmental relations disputes ought to always bear in mind the purpose of intergovernmental relations. Intergovernmental relations are further guided by Article 10 that provides for national values, Article 174 on the objects of devolution and Article 201 on the principles of public finance.

Within the framework of mutual respect and cooperation, the Constitution anticipated tension between the national and county governments. The Constitution and the Intergovernmental Relations Act 2012 place the courts at the centre of the dispute resolution mechanism. However, as discussed below, courts are to be a forum of last resort and ought to fundamentally promote non adversarial dispute resolution procedures especially in relation to intergovernmental relations disputes. Disputes of an intergovernmental nature are to be handled through a distinct process that contemplates involvement of the courts only if the process totally collapses or fails to achieve its objectives. For this reason, Articles 189(3) and (4) of the Constitution provide that –

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<sup>21</sup> As above.

In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.

National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

Article 189(3) is vague as it talks about 'every reasonable effort to settle the dispute'. Such wording is not forthright as the test of reasonableness would be a long winding one. Who determines the reasonableness and what degree of reasonableness is required? Article 189(3) falls short for not expressly providing appropriate fora for the ventilation of intergovernmental disputes. The procedures for settling disputes between governments are then left to the whims of legislation. Intergovernmental dispute resolution is so crucial that it ought to have been comprehensively provided for in the Constitution. Certainty is key. The drafters of the constitution should have borrowed from Article 140 which is very clear on how to deal with questions on the validity of a presidential election. Article 140 even mentions the forum and such questions as would be entertained. Deference to national legislation provides challenges in resolving intergovernmental disputes as discussed below.

The Intergovernmental Relations Act<sup>22</sup> provides the statutory framework for resolving intergovernmental disputes. The objects of the Act are to provide a framework for consultation and cooperation between the national and county government and among county governments; and to provide mechanisms for the resolution of intergovernmental disputes where they arise. The Act is guided by principles of intergovernmental relations which include the need to minimize intergovernmental disputes while the two levels of government are exercising of their functions.

Section 26 of the Act provides that a transfer or delegation of powers, functions or competencies are to be by written agreement and that the agreement for the transfer or delegation should include the method of resolving any dispute that may arise under the agreement. These agreements are an administrative transfer of powers from national government to county governments or vice versa as opposed to constitutional transfer of powers to counties undertaken by the Transition Authority. Just like Article 189 of the Constitution, Section 26 is vague on the exact forum, process and method for dispute resolution. There are numerous dispute resolution methods on offer within the Kenyan legal system. These include mediation, adjudication, negotiations and the

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<sup>22</sup> Intergovernmental Relations Act, 2012.

<sup>23</sup> Intergovernmental Relations Act, 2012 s 29.

court system. Each has its merits and demerits but an intergovernmental dispute resolution mechanism ought to be specific and binding upon the parties. The dispute resolution mechanisms on offer include a third party arbiter, this further complicates matters as there is no constitutional or legal framework as to how such a person may be appointed.

An appropriate remedy for intergovernmental relations disputes will be realized depending on the process through which the remedy is reached. The Constitution and the Intergovernmental Relations Act provide for the dispute resolution process. The two do not however prescribe specific remedies. The rebuttable presumption would be that an ideal intergovernmental relations dispute resolution process would reach appropriate and enforceable remedies.

Part Four of the Intergovernmental Relations Act provides for the intergovernmental dispute resolution mechanisms. Section 30 applies to the resolution of disputes between the national government and a county government or amongst county governments. Section 31 provides that national and county governments should take all reasonable measures to resolve disputes amicably, apply and exhaust the mechanisms for alternative dispute resolution provided under the Act before resorting to judicial proceedings. National and county governments unlike private citizens have red tape to consider before choosing a dispute resolution mechanism. It would have been apt if the statute provided a defined alternative dispute resolution mechanism. Even in normal disputes, parties often debate and dispute the forum and procedures to be followed in alternative dispute resolution. In relation to Section 31, courts should inquire into express measures undertaken by the parties to solve their intergovernmental relations disputes. Such measures should be backed by evidence that the parties actually took steps to solve their disputes out of the formal judicial processes.

Under Section 33, before formally declaring the existence of a dispute, parties to a dispute should in good faith, make every reasonable effort and take all necessary steps to amicably resolve the matter by initiating direct negotiations with each other or through an intermediary. A party to the dispute may formally declare a dispute by referring the matter to the Summit, the Council or any other intergovernmental structure established under this Act, as may be appropriate. The Summit in this case is the National and County Government Coordinating Summit the apex body for intergovernmental relations. It is composed of the President - or in the absence of the President the Deputy President - who is the chairperson and the Governors of the forty-seven counties. On the other hand, the Council refers to the Council of County Governors which shall consist of the governors of the forty-seven counties.

Section 34 provides for the procedure after the formal declaration on an intergovernmental dispute. First, within twenty-one days of the formal declaration of a dispute, the Summit, the Council of Governors or any other intergovernmental structure should convene a meeting inviting the parties or their designated representatives. The meeting is to determine the nature of the dispute including issues in dispute and issues not in dispute. This meeting is also to identify the appropriate dispute resolution mechanisms other than judicial proceedings to settle the dispute. The parties are to make every reasonable effort to resolve the dispute in terms of that mechanism or procedure. Under Section 35, where all efforts of resolving a dispute under this Act fail, a party to the dispute may submit the matter for arbitration or institute judicial proceedings.

In relation to Sections 33, 34 and 35, the courts are guided by the express process of declaring an intergovernmental dispute. The courts should inquire into whether the parties to intergovernmental relations disputes have adhered to the stated timelines. Further, the courts ought to examine whether the meetings contemplated to resolve the disputes have taken place. In this regard records of declaration of disputes, convening of either Summit or Council of Governors meetings should be submitted before the court. If such records do not exist, it may be assumed that the parties have not exploited the constitutional and statutory provisions to exploit alternative dispute resolution mechanisms before the courts assume jurisdiction of the dispute. Hence, the courts may as indicated above, refer the parties to an alternative dispute resolution mechanism of their mutual choice.

The framework under the Intergovernmental Relations Act does not provide for a mechanism through which persons who are not operating within the two levels of government may have their issues on intergovernmental relations entertained. At present a private citizen has to ventilate their displeasure on intergovernmental relations outside the scope of the Act. However the Act provides for a “framework of public participation in the process of transfer or delegation of powers, functions or competencies by either level of government”<sup>23</sup> but this provision has yet to be operationalized. Secondly, the framework involves only the executive arms of the national and county governments through the Summit and Council of Governors. Any appropriate remedy by the courts, in view of the discussions above, should thus have undergone several steps. One, an inquiry as to whether it is an intergovernmental relations dispute. Two, an inquiry into whether the dispute includes breach of fundamental rights and freedoms. Three, an inquiry into whether it is a dispute brought before the court by government institutions at both levels of government or a matter filed by a non governmental entity. Where a

non governmental entity is involved, then the matter will not be referred to alternative dispute resolution mechanisms. Four, an inquiry into whether the dispute is one that requires alternative dispute resolution as first resort. Five, courts must look to refer the parties to alternative dispute resolution before entertaining a matter. Six, where alternative dispute resolution fails, the courts should be fully seized of the matter and deliver an appropriate remedy to the parties.

The preliminary inquiry into jurisdiction should uncover whether the parties have complied with Articles 189(3) and 189(4) of the Constitution by first referring the disputes applying mechanisms provided for by the Act. Only after alternative dispute resolution mechanisms are exhausted may the court exercise its jurisdiction under Articles 165(3), 165(6) and 258. This two tier dispute resolution process is designed to encourage cooperation and mutual respect among the two levels of governments; secondly it seeks to discourage the ventilation of political disputes within the courts and to promote the use of alternative dispute resolution in public interest matters.

It therefore follows that courts, before entertaining intergovernmental disputes should first carry out an inquiry into whether there exists an agreement to transfer of powers, and if this includes a method of resolving disputes and whether the parties have submitted themselves to the stated dispute resolution mechanism. If the intergovernmental dispute is not one arising from an agreement, alternative dispute resolution should also be the first resort. Only when satisfied that the parties have fully exhausted the alternative dispute resolution mechanisms available to them may the courts agree to entertain the dispute. Courts should make it clear that they are a forum of last resort. Courts should refer parties to an alternative dispute resolution mechanism of their choice. Alternative dispute resolution mechanisms should be sought in the first instance so as not to strain the relationship between the national government and the county governments and in the case of counties, among themselves as was stated in the *Okiya Omtatah Okoiti & another v Attorney General & 6 others case*.<sup>24</sup> Where an intergovernmental relations dispute is prematurely brought before the court, the court is entitled to either stay the proceedings until such a time as the alternative remedy has been pursued or bring an end to the proceedings before the court and leave the parties to pursue the alternative remedy. This was also the view of the court in the *Dickson Mukweluine v Attorney General & 4 others case*.<sup>25</sup> The next section considers the emerging jurisprudence on intergovernmental disputes in more detail.

## 5. Judicial Review in Intergovernmental Relations Disputes

Intergovernmental relations dispute jurisprudence is still evolving. Case law relating to intergovernmental relations has in the past not provided alternative dispute resolution mechanisms as the first port of call for intergovernmental relations disputes. This section considers how intergovernmental relations disputes have been dealt with by the Courts. The cases discussed below while not strict intergovernmental relations disputes between the two levels of government within the ambit of the Intergovernmental Relations Act and Article 189 of the Constitution, highlight some salient features of intergovernmental relations disputes.

### 5.1 Republic v Transition Authority & another *Ex parte* Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU)<sup>26</sup>

In this case, the Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) sought orders to have the court quash Legal Notices No. 137-182.<sup>27</sup> This notice was issued by the Transition Authority on the 9th of August 2013 to effect the transfer of health services to the county governments. The KMPDU sought orders prohibiting the Transition Authority or any other person claiming to act under the direction of the Authority from enforcing the notice. The petition was on the grounds that county governments at the time did not have reliable income or resources and that the transfer of health services would compromise the quality of service delivery. It stated that the respondent had acted contrary to the law, acted irrationally and in abuse of their statutory powers. This according to the petitioners compromised the right to health as provided under Article 43 of the Constitution. According to the petitioners, Section 34 of the Intergovernmental Relations Act was not available to them as the provision is an ouster clause while the issues in dispute related to public interest, public administration and fundamental rights and freedoms.

On the other hand, the respondents contended that the proceedings offended the doctrine of ripeness, were brought before the Court prematurely, were speculative and brought before the Court without *locus standi* and the Court lacked jurisdiction to presently determine the matter on account of the hierarchy of the intergovernmental dispute resolution processes that are

<sup>24</sup> Okiya Omtatah Okioti & another v Attorney General & 6 others [2014] eKLR.

<sup>25</sup> Dickson Mukwelukeye v Attorney General & 4 Others Nrb HCC Petition No.390 of 2012.

<sup>26</sup> Republic v Transition Authority & another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 Others [2013] eKLR.

<sup>27</sup> Kenya Gazette Supplement No. 116 Legal Notices No. 137 – 183 of 9th August 2013.

prescribed by the Constitution 2010, the Intergovernmental Relations Act, 2012 and Section 34 of the Act.

In determining the issues before it, the court discussed the issue of its jurisdiction extensively. Emphasis was put on Article 165(2)(a) as read with Articles 162(2) and 165(5) of the Constitution where the High Court has unlimited jurisdiction in criminal and civil matters save for matters reserved for the exclusive jurisdiction of the Supreme Court and matters relating to employment and labor relations and the environment and the use and occupation of, and title to, land. The court also indicated that the Intergovernmental Relations Act does not expressly apply to disputes by ordinary citizens arising from the exercise of powers by and obligations placed upon the Transition Authority. Hence the court could not interpret the provisions of the Act to include disputes by individuals who are aggrieved by actions or omissions of the Authority would be overstretching the said provisions. Thus, the Petitioners did not have any remedy provided for them under the Intergovernmental Relations Act.

The court in this case was right in ruling the court did indeed have jurisdiction to entertain and rule on the matter as the petitioners had no other constitutional or statutory framework to ventilate their issues. The court also recognized the attempt by the petitioners to petition the Senate on the issues raised before the court. In this decision, the court did indeed offer an appropriate remedy to the parties before it. Further, the court did acknowledge and respect the powers and functions of the institutions around the dispute. In his chapter, Waikwa Nyoike discusses the implications of aspects of this ruling on public interest litigation.

## **5.2 County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology<sup>28</sup>**

The petitioner challenged a circular by the respondents on how placement of form one students was to be carried out. The circular provided for placement of candidates in schools of their choice and through merit; equity in school placement through quotas and affirmative action where applicable; proportionate sharing of national schools places between public and private schools candidates in every district based on the number of candidates taking Kenya Certificate of Primary Education exams from either category of primary schools and harmonization of the selection policies throughout the county at all levels national county and district. The petitioner contended that the circular was not followed in schools within Nyeri county thereby violating

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<sup>28</sup> County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology & another [2014] eKLR

the constitutional provision under Article 27, in effect discriminating against students from Nyeri County and its various districts by having a negligible number of students admitted from its host district schools and a staggering number of students from other counties over and above the 40% prescribed in the guidelines.

In view of the above, the petitioner sought for:

- A declaration that the selection to form one places in the extra county secondary schools in Nyeri County was discriminating against the residents of Nyeri County against their legitimate expectation and was unconstitutional.
- An order annulling the selection of form one places in the extra county secondary schools in Nyeri County.
- An order directing the respondents to carry out a new selection for the extra county secondary schools in total and strict compliance with the guidelines dated 11st March 2013 the principles of equity and Constitution of Kenya.
- An order stopping any admission of form one students in the extra county secondary schools in Nyeri County pending hearing and determination of this petition.

The petitioner argued that the actions the Ministry of Education violated Article 27 of the Constitution. While related to intergovernmental relations, the issue at hand was primarily on the violation of fundamental rights and freedoms.

The respondents submitted that the court lacked jurisdiction as Article 159(c) provided for alternative forms of dispute resolutions including reconciliation, mediation, arbitration, traditional dispute resolution mechanism and that Article 189(3) and (4) oust the jurisdiction of this court on the dispute of the nature before it. The court ruled that what these provisions of the Constitution and statute in respect of the dispute resolution between the national and county government does is not to oust the jurisdiction of the court but to postpone the adjudicatory role of the court until the alternative dispute mechanism have been attempted. Hence, the courts ought to supervise the alternative dispute resolution mechanisms attempted by the parties.

The court determined that since the dispute related to selection of form one in county schools within Nyeri County and was brought to enforce fundamental rights and freedoms under Article 22 and 23 and 27 of the Constitution, it was not a dispute in respect of the functions of the petitioner as stated in the Fourth Schedule of the Constitution. It was therefore not an

intergovernmental relations dispute. What emerges from this decision is that courts should first exercise restraint where intergovernmental disputes are brought before them as discussed earlier in section 4 of this chapter.

### 5.3 Council of Governors & 3 others v Senate<sup>29</sup>

In this case the petitioners challenged the constitutionality of amendments to the County Government Act, 2012, through the County Governments (Amendment) Act, 2014. They alleged that the provisions of the Amendment Act granted powers to state organs in conflict with the allocation of functions in the Constitution. The Amendment Act amended the principle Act by introducing a new Section 91(a) which establishes the county development boards in each of the 47 counties in Kenya.<sup>30</sup> These boards were to comprise Members of the National Assembly representing constituencies within respective counties, Members of County Assemblies, as well as members of the executive operating within respective counties, and were to be chaired by the Senator from the county. The Act intended to provide the boards with the power to consider and adopt county integrated development plans and county annual budgets before they were tabled before the County Assembly for approval.<sup>31</sup>

The court was of the view that the composition and mandate of the county development boards would upset and was in violation of the separation of powers under the Constitution, which assigns the approval of county development plans and budget to county assemblies. The court further held that neither the Senate, Members of the National Assembly nor members of the national executive such as county commissioners have a role to play in the planning and budgeting for county development plans. The court stated that:

By establishing the County Development Boards composed of the Senator, Members of the National Assembly and women members of the National Assembly, as well as national government officers at the county level, with the mandate to consider and make inputs into county budgets and plans, the County Governments Amendment Act effectively alters the structure of devolution by involving in its

<sup>29</sup> Council of Governors & 3 others v Senate & 53 others [2015] eKLR.

<sup>30</sup> The County Government Act 2012 section 91(a) 'The county government shall facilitate the establishment of structures for citizen participation including— avenues for the participation of peoples' representatives including but not limited to members of the national Assembly and Senate'.

<sup>31</sup> CountyGovernments\_Amendment\_No2\_Bill (2013)s2 The County Development Board for each County shall:- (a) Provide a forum at the county level, for consultation and coordination between the national government and the county government on matters of development and projects in accordance with the Constitution, and more specifically, Article 6(2), Article 10, and Article 174 of the Constitution.(b)Consider and give input on any county development plans before they are tabled in the county assembly for consideration.(c)Consider and give input on county annual budgets before they are tabled in the county assembly for approval.(Emphasis added)

functioning and operations persons and officers from other levels of government. As we illustrate below, this is not the only shortcoming of this legislation. It effectively vests in the same hands the powers of planning, implementation and oversight, in clear violation of the principles of checks and balances and separation of powers, principles which we shall consider in the following section.<sup>32</sup>

The establishment of the county development boards had all indications of an attempt to bridge the intergovernmental relations gap between parliament and county governments. The wording in the Amendment Act included 'consultation and coordination', 'Consider and give input' and 'Consider and advice'. These consultations were not binding, they were to be tabled in the County Assembly for approval. This means that the County Assembly could either ratify or reject the proposals of the board at will.

Article 189(3) provides for the establishment of joint committees and joint authorities for intergovernmental cooperation purposes. Section 54 (3) of the County Government Act 2012 also provides for a County Intergovernmental Forum that is to be chaired by the Governor or the Deputy Governor of the county. Section 54(3) states that the County Intergovernmental Forum shall comprise –

- (a) the heads of all departments of the national government rendering services in the county; and
- (b) the county executive committee members or their nominees appointed by them in writing.

The function of this forum is for the harmonization of services rendered in the county, coordination of development activities in the county and coordination of intergovernmental functions. Section 54 indicates the executive focused nature of legislation when it comes to intergovernmental relations.

As indicated earlier in this chapter, transfer of functions to county governments was rushed and with this intergovernmental disputes have arisen. In the transition period where devolved government was being implemented for the first time, there is a need to have all arms of government working together within the legislative framework. The current adversarial system that continually pits the executive against the legislature slows down the comprehensive implementation of the Constitution.

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<sup>32</sup> Paragraph 111, Council of Governors & 3 others v Senate & 53 others [2015] eKLR.

#### 5.4 Institute for Social Accountability & another v National Assembly<sup>33</sup>

The Institute of Social Accountability sought a declaration by the court that the Constituencies Development Fund Act 2013 violated the Constitution. The Institute submitted that the Act contravened the constitutional principles of the rule of law, good governance, transparency, accountability, separation of powers and the division of powers between the national and county government and the public finance management and administration. This was thus a matter that affected the powers and functions of both national and county governments and in effect their intergovernmental relations. Specifically, the petitioners sought:

- A declaration under Articles 1, 2, 6(2), 10(1)(a), 186, 189(1)(a), 202(2) and Schedule 4 of the Constitution that the CDF Act is unconstitutional, because it offends the principles of public finance, division and separation of powers;
- A declaration that the numerous provisions of the CDF Act that violate the Constitution and cumulatively render the entirety of the Act untenable and therefore constitutionally invalid *ab initio*;
- A declaration that any organ or body purportedly established by the CDF Act was illegal as it was created without the authority of the law;
- A declaration that failure to involve the Senate in the consideration, deliberation and passage of the CDF (Amendment) Act 2013 was unconstitutional and therefore rendered the CDF (Amendment) Act 2013 as invalid;
- A declaration that failure by the National Assembly to provide reasonable opportunity for the members of the public to provide their views on the CDF (Amendment) Act, 2013 and failure by the National Assembly to facilitate public participation in the passage of CDF (Amendment) Act, 2013 was unconstitutional and therefore renders the CDF (Amendment) Act 2013 invalid; and
- An order striking down the Act for being unconstitutional and so as to pave way for the enactment of a valid legislation to administer conditional grants allocated to counties by the national government.

The petitioners founded their case on the principle of supremacy of the Constitution which means that the Court is obliged to invalidate an Act of Parliament, omission or any law that contravenes the Constitution. The Court declared the CDF Act unconstitutional. However, what is important in the intergovernmental dispute resolution process is what the court stated in defining an appropriate remedy. In coming up with an appropriate remedy on the issues before it, the court stated:

<sup>33</sup> Institute for Social Accountability & another v National Assembly & 4 others [2015] eKLR.

We are convinced that in order to protect the Constitution, the court must be creative in fashioning appropriate relief that is tailored to the facts of the case and is consistent with the values of the Constitution. Suspension of the declaration of invalidity would be appropriate in these circumstances as it would allow the Legislature time to correct the defective legislation while avoiding chaos and disarray in a system that has been established for over a decade.<sup>34</sup>

Whilst the court declared the CDF Act unconstitutional, it also suspended the invalidity for a period of 12 months to provide sufficient time for the national government to remedy the defect within the Act. This was an innovative way to deal with a dispute that considered the political, administrative and developmental impacts of the ruling. Bearing in mind the discussions in this chapter, the courts should be creative, look at the overall devolution objectives, the need to foster intergovernmental relations and the courts role as the final arbiter. Hence, appropriate remedies may warrant objective creativity from the courts. This would ensure that the objectives and principles of intergovernmental relations are realized without jeopardizing service delivery.

## 6. Conclusion

Kenya's constitutional dispensation is young. Intergovernmental relations are a creature of a Constitution that many actors are still trying to understand while fortifying the new devolved structure of government. Political arm twisting and weak political will has impacted constitutional implementation bringing into question the capacity for both arms of government to objectively execute their powers and functions. The transition process ought to have been undertaken with prudence and tact to avoid the numerous legal and political disputes that have pitted one arm of government against another.

With the Constitution expressly providing for unlimited powers for the High Court, the notion of creeping judicial power does not arise. The question is whether the courts do respect the provisions for alternative dispute resolution mechanism. Such respect would require that the courts do carry out preliminary assessments to ensure that intergovernmental disputes have first been ventilated within mechanisms set out in the Intergovernmental Relations Act. Here the courts will adopt an inquisitorial and innovative approach. This will one, protect the autonomy of other arms of government and two, protect and promote the need for cooperation and mutual respect.

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<sup>34</sup> Institute for Social Accountability & another v National Assembly & 4 others [2015] 148 eKLR



# The Bill of Rights and County Governments: Emerging Jurisprudence from the Courts

By Jill Cottrell Ghai

## 1. Introduction

This Court wishes to express its concern on the regularity with which the Respondent seems to be breaking the law. The Respondent seems to be still living in the old constitutional order. It appears that it has never dawned on it that the new Constitutional order came with values and principles of governance in article 10 which enjoins it whenever it enacts, applies or interprets any law to adhere to the national values and principles of governance which include equality, human rights, non-discrimination, good governance, integrity, transparency and accountability, the rule of law, democracy and participation of the people.

I wish to reiterate for the benefit of the Respondent and paraphrase the sentiments made by Warsame, J (as he then was) in *Mohamed Aktar Kana vs. Attorney General Nairobi* HCCP No. 544 of 2010 that the Respondent has not tried to understand and appreciate the provisions of the new Bill of Rights and that the yester years impunity are still thriving in that arm of the government.<sup>1</sup>

These remarks by Odunga J were addressed to the sole respondent in the case before him, the Nairobi City County, in a case filed in 2014. Kenya's Bill of Rights binds all state organs including county governments. The legal principles do not differ according to whether a case is brought against a national or county authority. Counties are obliged to observe human rights, to ensure that others observe them, and to take positive steps to ensure that

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<sup>1</sup> *Republic v Nairobi City County Ex-parte Presbyterian Foundation* [2014] eKLR.

human rights, especially those such as health, food, water and education, are fulfilled.

This chapter explores what the Nairobi City County (and all the other counties) ought to take cognizance of with respect to the realisation of human rights as laid down in the constitution of Kenya. It explores both the risks and opportunities facing the counties as a structure of government for the fulfilment of rights. This chapter takes a look at the cases that have begun to come before the courts on the enforcement of the Bill of Rights by the counties. It demonstrates that human rights have already been invoked through the cases brought to court so far, though in future a wider range of cases can be expected. Since counties are the main agency for the delivery of most sorts of services to the people, it is to be expected that in future more cases will arise relying on the economic, social and cultural rights, particularly under Article 4. Lastly the chapter argues that because counties have specific powers or functions, they may find themselves held liable for a failure to act: that is a failure to take positive steps to protect, promote and fulfil rights.

### **1.1 Is there any connection between devolution and human rights?**

It is useful to consider *a priori* how devolution and human rights might be linked, to get a sense of how human rights issues might arise. Article 174 of the Constitution sets out the objects of devolution. At first sight it appears to say nothing about human rights. But clearly, a number of these principles are closely linked to human rights, such as the right to vote, to organize, express oneself and to petition, to equality and non-discrimination or Article 43 economic social and cultural rights. In fact, you might say that devolution is itself a sort of human rights principle – of inclusion, expression and so on.

The devolved system of government presents inherent risks and opportunities to the realisation of the bill of rights. One possible problem is what is sometimes called the “Race to the bottom” meaning that counties may be tempted -in the competition to attract investment - to weaken protections for rights.<sup>2</sup> This may be less of a risk in the Kenyan context because of the fairly limited powers of counties; they cannot make employment law for example. But the risk might still be there in relation to taxation if counties feel they must ease the rates “burden” on industry they might then feel the necessity to cut back on services they fund for the people. This might violate Article 43, or even equality rights.

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<sup>2</sup> The concept is older but is now common usage (one author says it is sometimes traced to a US Supreme Court case of 1933 – see William W. Olney, “A Race to the Bottom? Employment Protection and Foreign Direct Investment” 2010, revised 2013 <<http://web.williams.edu/Economics/wp/OlneyEmploymentProtectionAndFDI.pdf>> at 13 November 2015).

Devolution may pander to local intolerances particularly the ethnic. There is evidence that this has been happening in some counties, with some reluctance to appoint people from other counties.<sup>3</sup> So the right to equality and freedom of movement might be affected. Some might point to Nigeria and the “indigenesness” concept, which has led to people not belonging to a state - or even whose whole ethnic group is not indigenous to the state - being deprived of educational and other opportunities.<sup>4</sup> Devolution in Kenya is not specifically linked to culture and custom. But local control, sensitivities and identification might lead to some strengthening of traditions and customs. And the constitution does in fact contain some sorts of endorsements of culture and custom such as Article 11 on culture and tradition, Article 45 on marriage<sup>5</sup>, and Article 67 on land dispute resolution.<sup>6</sup> The Constitution does make it clear that the Bill of Rights “trumps” custom,<sup>7</sup> but much litigation might ultimately be needed to decide what aspects of culture and tradition do violate rights, and some of the disputes might arise at county level.

The mere existence of 47 devolved governments with some legislative and considerable administrative powers creates the risk of inconsistency of approaches. Indeed, the possibility of different approaches is part of the point of devolution. But, again issues of equality might arise.

Possible benefits of devolution in terms of rights might mean more local scrutiny of governmental behaviour, leading to more litigation. More participation is one of the expressed purposes of devolution. Though participation is not expressly recognized as a right, it is – as already suggested – close to freedom of expression and the right to information. One might say that in a devolved government being closer to the people would mean that there is more understanding on the part of government of local traditions, something that should be more “rights respecting”. Competition between counties might be bad for rights, but, it might also be good for rights. If counties want to attract people to their county they may be under pressure to promote their rights, especially Article 43 rights.

Devolution itself is designed to reduce the concentration of power. When

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<sup>3</sup> See “Rejected Kiambu county board nominees file suit over bias” *Business Daily* June 18 2013. Contrast *The Star* newspaper editorial “Kericho ‘Outsiders’ Idea Is Tribalistic, Unworkable” October 7 2015.

<sup>4</sup> See Human Rights Watch, “They Do Not Own This Place” *Government Discrimination Against “Non-Indigenes” in Nigeria* (2006) <<http://www.hrw.org/report/2006/04/25/they-do-not-own-place/government-discrimination-against-non-indigenes-nigeria>> at 15 November 2015.

<sup>5</sup> Constitution of Kenya 2010, Article (4) Parliament shall enact legislation that recognises—

(a) marriages concluded under any tradition, or system of religious, personal or family law; and

(b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion.

<sup>6</sup> Constitution of Kenya 2010 Article 4 (2) (f) to encourage the application of traditional dispute resolution mechanisms in land conflicts

<sup>7</sup> Constitution of Kenya 2010, Articles 2(4) and 45(4).

various civil society groups got together in the early 1990s to produce a draft Constitution – the process that nearly 20 years later led to the current Constitution – one of their demands was that “The executive power was to be shared with Parliament, local government, civil society organisations and the people themselves.”<sup>8</sup>

## 1.2 Are Counties Bound by Rights?

We begin with the most elementary point. The Constitution says:

20 (1) The Bill of Rights applies to all law and binds all State organs and all persons.

21 (1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

And:

260 “State organ” means a commission, office, agency or other body established under this Constitution.

County bodies are state organs and governors, executive members and county assembly members are all “state officers”. Justice Majanja quoted the Constitutional Bench, “‘We must however not miss the chance to state that all organs of state namely the Legislative, Executive and the Judiciary are all subject to the Constitution.’ I would hasten to add that the same position applies to the County Assembly which is the legislative arm of the County Government in our devolved structure of governance”<sup>9</sup>

And Justice Mwongo referred to “the state – meaning the organ of state known as the County Assembly constituted as one amongst the many offices of state within the definition in Article 260”<sup>10</sup>

The importance of adherence to the Bill of Rights by county officers - and indeed by national state offices - was underlined by the Court of Appeal in *Wambora and 3 others v Speaker of the Senate and 6 others* (the Wambora case) when it said:<sup>11</sup>

We reiterate that what constitutes gross violation of the Constitution is to be determined on a case by case basis. ... Examples of the

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<sup>8</sup> W Mutunga, *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya 1992-1997* (1999) 53.

<sup>9</sup> *Republic v County Assembly of Migori Ex parte Johnson Omolo Owiro* [2014] eKLR para 22 quoting *Peter O. Ngoge v Francis Ole Kaparo NRB HC Miscellaneous Appeal No 22 of 2004* [2007] eKLR.

<sup>10</sup> *Andrew Ireri Njeru & 34 others v County Assembly of Embu & 3 others* [2014] eKLR para 36; see also *Pius Atok Ewoton v Joseph Koli Nanok Governor Turkana County & 3 others* [2014] eKLR.

<sup>11</sup> *Wambora & 3 others v Speaker of the Senate & 6 others* [2014] eKLR Civil Appeal 21 of 2014 para 46.

constitutional Articles whose violation amounts to gross violation include: ... Chapter 4 on the Bill of Rights.

The point was that “gross violation” is grounds for removal from office. Clearly from what the court itself said, what is “gross” is hard to judge. It will depend on the facts of the case. Undesirable as it may appear, there might be a minor violation of a right under Chapter 4 that would not be “gross” enough to merit removal.

## 2. Counties and International Human Rights Law

The Constitution provides, “The State shall enact legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.”<sup>12</sup> How does this play out in relation to counties? At the international level, the republic is the legal person bound by treaties. But in some countries, it is clear that international obligations give rise to an enhanced power of the national government vis-à-vis sub-national units. In Australia, the Commonwealth (national) government has been able to pass law on topics otherwise within the jurisdiction of states because of its treaty obligations<sup>13</sup>. And in India the Constitution says:

Notwithstanding anything in the foregoing provisions of this Chapter [about distribution of legislative powers], Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.<sup>14</sup>

Counties are certainly bound by international human rights treaties, because Article 2(6) of the constitution says that “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution.” The main significance of this provision is that some details found in treaties are not reflected in the constitution. Kenya is a party to International Labour Organisation Conventions on Forced Labour, Discrimination and Child Labour.<sup>15</sup> Further, Article 7(d) of the International Covenant on Economic, Social and Cultural Rights,<sup>16</sup> to which Kenya has been a party since 1972, goes

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<sup>12</sup> Constitution of Kenya 2010 Article 21(4).

<sup>13</sup> For example, *Commonwealth v Tasmania* (1983) 158 CLR 1.

<sup>14</sup> Constitution of India 1950, Article 253.

<sup>15</sup> For treaties that Kenyan has ratified see the ILO website <[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:112:0:0:NO::P11200\\_COUNTRY\\_ID:103315](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:112:0:0:NO::P11200_COUNTRY_ID:103315)> at 15 November 2015.

<sup>16</sup> International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 2200A (XXI) (entry into force 3 January 1976).

into more detail than the constitution about rights of workers, including the mention of the right to “Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays”.<sup>17</sup>

The Constitution of Kenya does not mention ‘human rights’ among the functions allocated by Schedule Four. This would suggest that as a discrete topic it would be a residual item and be a national function. But in reality most human rights promoting provisions are embedded in other laws: on health, prisons, justice, media, culture and any number of other topics. On whom the obligation falls would depend on which level of government has the function of legislating on the topic. Counties are definitely ‘state’ for domestic purposes, as seen earlier. For this reason, I have some doubt about the Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill – a private member’s Bill, which purports, in clause 6, to set out the “Obligations of the National and County Governments with respect to economic and social rights”. My hesitation is subject to the question of what Article 186(4) means: “For greater certainty, Parliament may legislate for the Republic on any matter.” If Parliament legislates on a matter within the competence of a county, is it legislating ‘for the Republic’?

### 3. The Fourth Schedule and Human Rights

This is not the place to discuss what the functions of counties are under the Constitution. But this issue of powers, as listed in The Fourth Schedule of the Constitution, will come up in cases based on human rights in two possible ways. First as an additional ground: coupled with a claim that human rights have been or are threatened with violation may be an argument that the county had no legal power to do what it did because the function in question is a national function. When Kisumu county said it planned to ban women from riding astride on motor-bikes, this might have been attacked in two ways: that it was discriminatory on the grounds of gender, and that a county has no power to regulate road traffic.<sup>18</sup>

The second way that the Fourth Schedule may relate to human rights is more central: a county cannot be held to have had a duty to do something that it has no power to do. This is particularly relevant in the case of Article 43 rights, and indeed other rights that may require positive action to fulfil, such as environmental rights. For example:

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<sup>17</sup> As above, Article 7 (d).

<sup>18</sup> Under the Fourth Schedule this is a matter for the national government.

42. Every person has the right to a clean and healthy environment, which includes the right—

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures...

If a particular protection requires legislation that a county has no power to pass, the county cannot be held liable for failure to pass that law. But of course counties do have power in relation to “plant and animal disease control”, “Control of air pollution, noise pollution, other public nuisances” and “Implementation of specific national government policies on natural resources and environmental conservation, including—(a) soil and water conservation”.<sup>19</sup>

In fact, as Nico Steytler has observed:

[T]he unique combination of provinces and municipalities with listed competencies and enforceable socio-economic rights, gives the courts an important role in defining the devolved units’ powers and obligations. ... where a provincial competence such as housing (a concurrent function of the national and provincial governments) overlaps with the right of access to housing, it becomes a concrete obligation.<sup>20</sup>

So what might seem a mere power, becomes a duty. Whatever its listed powers, a county government cannot escape the obligation to observe or respect all rights: it must not do anything positive to infringe any right, whether in the exercise of its law making, its executive or administrative powers. If it is required to execute national legislation that is unconstitutional, it runs the risk of itself being held liable for violating rights. Indeed, an interesting question might face the courts about who ought to pay damages for that violation, if any were awarded.

### **3.1 But are County Governments Entitled to the Benefit of Human Rights?**

Again Justice Majanja is the source:

[T]here is a clear distinction between a person and a County Government which is a State organ vis-à-vis the rights and obligations under the Bill of Rights. I am doubtful that the County Government qua County government can lodge a claim under Article 22 of the

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<sup>19</sup> Part 2 ss 1(d), 3 and 10 respectively.

<sup>20</sup> N Steytler ‘Implementing Devolution: Lessons from South Africa’ in C Bosire, Y P Ghai and J C Ghai (eds) *Understanding Devolution* (2015)105.

Constitution against another State organ to enforce fundamental rights and freedoms as the County Government is not a person for purposes of the Constitution and more particularly the Bill of Rights.<sup>21</sup>

Justice Lenaola applied this case to the position of Speaker and members of a county assembly -suing as such and not as individuals:

I am in agreement with the learned judge and I adopt his reasoning in the instant Petition. I do so because the Petitioners are not private individuals but officers serving in a public office as defined in Article 260 of the Constitution. The Respondents are also officers and offices in the same public office and it is inconceivable how one can violate the other's rights in the context of the Bill of Rights. In any event, in the circumstances of the Petition before me, any differences regarding the fiscal and budgetary processes between affected State Organs should not be such as to attract this Court's intervention under the Bill of Rights. Those differences are to be settled in the manner envisaged by Article 189(4) of the Constitution and not by litigation predicated on the Bill of Rights.<sup>22</sup>

It is submitted that the learned judges are right. The whole concept of human rights is predicated on the nature of the human person and his or her inherent dignity. Rights as recognized in the Constitution enable the human person to challenge acts of the state (and to some extent – under our constitution – of others too), including laws of the state. It would be strange if the state itself, that makes the laws and carries out the acts, could use those rights to benefit itself.<sup>23</sup>

On the other hand, a county is not debarred from suing under Article 22– on enforcement of the Bill of Rights permitting persons to sue on behalf of others in some circumstances – for the benefit of residents of the county, as opposed to that of the county government.<sup>24</sup> There is a later discussion in this chapter of economic, social and cultural rights. But first we look at the rights, mostly civil or political, on which there have been cases in Kenya.

### 3.2 Fair Procedures

Most of the human rights cases have involved allegations of failure to comply with proper procedures, under Article 47 on fair administrative practice,

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<sup>21</sup> *County Government of Meru v Ethics and Anti-Corruption Commission* [2014] eKLR

<sup>22</sup> *Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation* [2015] eKLR.

<sup>23</sup> Arguably different issues arise where the person complaining is not a state body but a private corporate body – but this goes beyond our current concerns

<sup>24</sup> *County Government of Nyeri v Cabinet Secretary, Ministry of Education Science & Technology* [2014] eKLR.

and Article 50 on fair trial.<sup>25</sup> And many of these cases have been what one might call “internal squabbles”; the petitioners have been county assembly speakers, governors, executive committee members, or perhaps disappointed applicants for a post.

The removal cases are particularly problematic, especially when the removal is of a governor, executive member or Speaker. In the United States (whose system of government Kenya largely copied) impeachment is treated as a political matter.<sup>26</sup> This is based on the interpretation of the Constitution, and what the court believes to have been the intention of the framers. However, Justice White of the Supreme Court, concurring in the result but not the reasoning, suggests that, at least in a Presidential impeachment, there might be situations in which the courts might have to step in.<sup>27</sup> The wording of Kenya’s Constitution is significantly different from that of the US Constitution in this regard.<sup>28</sup>

There are various ways to deal with these issues of the role of the courts in very political contexts. One is to decline jurisdiction. The Nigerian Court of Appeal said in a case about the removal of a Speaker,

It has become increasingly common for most crises of political nature to find their way in the courts. The frequency with which some of the players in the political arena resort quickly to courts for solution of what may be described as quasi political crisis is becoming disquieting. The problem is that the courts are being goaded into something more of a political matter but appears to wear legal garb.<sup>29</sup>

The Kenyan courts have been anxious to establish that no-one, and no institution is above the law, which tends to militate against any “political question” doctrine.

A second approach is for the courts to insist on the enforcement of constitutional and legal rules and legislative standing orders. In the case of the impeachment of Embu Governor Martin Wambora, the High Court held that the County Assembly process was defective because the assembly did not

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<sup>25</sup> Republic of Kenya, Constitution of Kenya Article 47 Fair administrative action, Article 50 Fair hearing.

<sup>26</sup> *Nixon v. United States* (91-740), 506 U.S. 224 (1993). In this case there was an additional policy factor: the case concerned impeachment of a judge, and it was even more clearly the case that the courts ought not to get involved.

<sup>27</sup> You can read his concurrence at <<https://www.law.cornell.edu/supct/html/91-740.ZC1.html>> at 15 November 2015.

<sup>28</sup> The US Constitution does not specify the procedure. It presumably left the reader to assume that impeachment meant the House of Representatives prosecutes before the Senate. This procedure was taken from the United Kingdom. In fact, Parliament in the UK was a court, and the procedure before the US Senate is very court-like.

<sup>29</sup> *Asogwah v Chukwu* (2003) 4 NWLR (pt.811) 540, 585. Taken from Osita Nnamani Ogbu ‘Administration of Justice and Nigeria’s Nascent Democracy’ <<http://www.schalesworthscentre.org/journals05.html>> at 15 November 2015.

follow its own standing orders, which required that he be given a fair hearing.<sup>30</sup> The court rejected an argument that the Assembly process itself was akin to the decision making process of the Director of Public Prosecutions when deciding whether to prosecute – when no hearing for the accused is involved.

In such a case it is unnecessary to invoke the Bill of Rights. And to point out that the legislature has not observed its own rules ought not to ignite any particular conflict between the branches of government. Only if its own rules were inadequate should there be any temptation to resort to the Bill of Rights.<sup>31</sup>

The third approach is to bring the Bill of Rights into the equation, particularly Article 47 which states: “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.” In the *Wambora* case the court went on to hold that this failure also amounted to a breach of Article 47,<sup>32</sup> and, distinguishing the *Nixon* case, the court rejected arguments that this was a non-justiciable political question.

### 3.2.1 Dubious uses of Article 47

Article 47 has been relied upon on in other removal cases, including that of *David Sifuna v Clerk, County Assembly of Trans Nzoia* (the Trans Nzoia Speaker Case).<sup>33</sup> It was applied in cases involving the removal by the Governor of a county executive member in *Richard Bwogo Birir v Narok County Government & 2 others*,<sup>34</sup> and *County Government of Nyeri & another v Cecilia Wangechi Ndungu*.<sup>35</sup>

County executive members may be removed by one of two different procedures. Firstly as a result of a process in the county assembly that requires (i) specified grounds such as abuse of office or gross misconduct (ii) the setting up of a

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<sup>30</sup> *Wambora & 30 others v County Assembly of Embu* [2015] eKLR

<sup>31</sup> In a case about the removal of a Majority Leader in a county assembly, Majanja J said: “In my view, the election of the Majority Leader is a prerogative of the members of the party or coalition having the majority in the Assembly. A Majority Leader must have the confidence of a majority of the members of the Assembly. His position is in the hands of the members of the party or coalition of parties, which form the majority in the County Assembly. The Court cannot impose the Majority Leader by an order otherwise it may be forced to take over the conduct of the business of the County Assembly.” *Republic v County Assembly of Migori Ex parte Johnson Omolo Owiro* [2014] eKLR

<sup>32</sup> *Wambora v Speaker of the Senate Petition* No. 3 of 2014

<sup>33</sup> *David Sifuna v Clerk, County Assembly of Trans Nzoia* [2014] eKLR . There are various problems about this decision, including that the learned judge holds that the Speaker is a public officer by virtue of Article 260, and also invokes Article 236 (on the public service). But a Speaker is a “state officer” (as a member of the county assembly).

<sup>34</sup> [2014] eKLR. The court also held that the Executive members were protected by the Employment Act, but it is submitted that the Court of Appeal's is the better view in *County Government of Nyeri v Cecilia Wangechi Ndungu* [2015] eKLR namely that the Employment Act is not relevant to a state officer.

<sup>35</sup> *County Government of Nyeri & another v Cecilia Wangechi Ndungu* above n 33. [

select committee and (iii) a majority vote in the assembly.<sup>36</sup> Secondly, the Governor may remove an executive member if he/she “considers it necessary or appropriate”.<sup>37</sup> The Bill of Rights has been invoked in connection with both procedures.

It is submitted that Article 47 is misapplied in this situation, because the dismissal of a county executive members under the County Government Act is not an administrative act, but an executive act. A county executive member as a member of the government, is the equivalent of a Cabinet Secretary at the national level.<sup>38</sup> The procedures at the county level roughly mirror those at the national level, in terms of the appointment and dismissal of executive members, whether on the initiative of the head of the relevant executive (President or Governor) or of the legislature (National or County Assembly).<sup>39</sup> In South Africa (the model for Kenya’s Article 47) the Promotion of Administrative Justice Act<sup>40</sup> specifies that administrative action does not include the executive powers or functions of the National Executive, including one item which refers to this presidential power “The President appoints the Deputy President and Ministers, assigns their powers and functions, and may dismiss them”.<sup>41</sup> Justice Albie Sachs said:

Members of Cabinet know that they are hired and can be fired at the will of the President; and if fired, they can mobilise politically, go to the press, even demonstrate outside Parliament, and hope to muster support for themselves at the next congress of their party.<sup>42</sup>

A head of government chooses the people with whom he or she can work, and if that is not the case is free to let them go. Sometimes the reason would be the collapse of a coalition; other times it would be a matter of competence or disagreements on policy. Sometimes it is simply a matter of confidence. It may be appropriate for the courts, under our constitution, to say that a particular person ought not to be appointed for want of integrity of other qualification, but if courts were to start to dictate that certain person must be in government, this would seem to be a serious infringement on the separation of powers.

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<sup>36</sup> County Government Act (CGA) s 40.

<sup>37</sup> As above, s 31(a).

<sup>38</sup> Constitution of Kenya, 2010 Article 176(1).

<sup>39</sup> There are some differences: while the Constitution says “The President ...may dismiss a Cabinet Secretary”, the CGA has the provision quoted earlier, which is addition to (“despite”) the possibility of removing an executive member for specific cause such as abuse of office and gross misconduct, under s 40.

<sup>40</sup> The Promotion of Administrative Justice Act (2000) gives effect to section 33 of the Constitution of the Republic of South Africa (1996).

<sup>41</sup> Section 91(2) of the Constitution referred to in section 1 of the Promotion of Administrative Justice Act (2000).

<sup>42</sup> *Masettha v President of the Republic of South Africa* [2007] ZACC 20.

The Court of Appeal also said on section 31(a); “We find that the provision places an obligation on the Governor to exercise the said power only when necessary or appropriate.” I am tempted to invoke Lord Atkin:

It is surely incapable of dispute that the words “if A has X” constitute a condition the essence of which is the existence of X and the having of it by A. ... And the words do not mean and cannot mean “if A thinks that he has.” “If A has a broken ankle” does not mean and cannot mean “if A thinks that he has a broken ankle.” “If A has a right of way” does not mean and cannot mean “if A thinks that he has a right of way.”<sup>43</sup>

Similarly, is it right to read “if he/she considers that it is appropriate or necessary to do so” as “if it is appropriate or necessary to do so”?<sup>44</sup>

In sum, if the Constitution, statute or Standing Orders prescribe a procedure, it is appropriate to consider if that procedure has been followed. But Article 47 need not be invoked, and should arguably not be invoked, especially if the Constitution has prescribed the procedure. It should also not be invoked if the decision in question is not an “administrative action”, even if no procedure is prescribed. We have to assume that- especially if the issue is one of personal confidence in an individual - that no fair hearing procedure was intended to be required.

### 3.2.2 *Misuse of Article 50*

Article 50 on fair trial has also been relied on in dismissal cases. Article 50 (1) relates to any “dispute that can be resolved by the application of law”, which must be “decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”. There is a circular element in this: a court would have to decide whether it is a “dispute that can be resolved by the application of law”; but if it is something the courts would keep away from, then the partiality or otherwise of the deciding body is not relevant – at least not by virtue of Article 50(1).

For politics related matters, to invoke 50(1) immediately gives rise to a problem - the deciding body will often be irremediably partisan. The issue of removal of the Speaker shows this. At both national and county level a Speaker may be removed by the legislature over which he/she presides.<sup>45</sup> At the national level

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<sup>43</sup> The extract is of course from his famous dissent in *Liversidge v Anderson* [1942] A.C. 206.

<sup>44</sup> On the other hand, in *Shadrack Wangombe Mubea v County Government of Nyeri* [2015] eKLR, the court held that The court has found that the termination was with due reasons as the 2nd respondent [Governor] has showed that he considered that the termination was appropriate or necessary.”

<sup>45</sup> Constitution of Kenya Article 106(2)(c) and CGA s. 11.

this was a deliberate drafting decision - removing the Speaker is a matter for the body that elected him/her.

In another case about the removal of a county executive member<sup>46</sup> the court relied on Article 50(1) and said:

...this court holds that Constitutionally, no County Assembly can purport to remove a county executive committee member pursuant to Section 40 (3) of the CGA. That provision negates the principal [sic] of independence and impartiality stipulated by Article 50 (1) of the Constitution and is null and void to that extent. Parliament should enact a law that provides for a separate, independent impartial and unbiased body that will be charged with the jurisdiction of carrying out investigations once a motion is passed by a County Assembly under Section 40 (2). It is that separate and independent body that should carry out investigations and report to the Assembly on its findings for the latter to vote on. To the extent that no such independent and impartial body exists, County Assemblies cannot purport to remove a member of the County Executive Committee under Section 40 of the CGA.

The problem with this decision is that section 40(3) of the Act tracks quite closely the provisions of the Constitution about the role of the National Assembly in the removal of a Cabinet Secretary.<sup>47</sup> Those provisions cannot be challenged as unconstitutional. If the county structures and procedures are designed to be, as I would argue, similar to those at the national level, and the Act achieves that, why should this procedure be unconstitutional?

In the Trans-Nzoia Speaker Case, the court looked further into Article 50 – to the fair trial provisions for an accused person. The court said:

According to Black’s Law Dictionary, the term charge means to accuse a person of an offence “inter-alia”. Any accused person is entitled to fair hearing which connotes proceedings which are conducted in a just, equitable and impartial manner. ...[A] speaker of a county assembly is placed in a position which is akin to an accused person in a criminal case, as he is likely to suffer drastic consequences.<sup>48</sup>

With all due respect, this is to go too far. For a start, the reasoning is backwards - because the Speaker was “charged” does not mean he is a criminal accused. He is facing dismissal from his state office. In fact, because according to Article

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<sup>46</sup> *Stephen Nendela v County Assembly of Bungoma* [2014] eKLR .

<sup>47</sup> Constitution of Kenya Article 152 (6).

<sup>48</sup> Constitution of Kenya, Article 43.

25 the right to a fair trial may not be limited, it is important not to apply it inappropriately.<sup>49</sup>

### 3.2.3 Other issues related to Article 47

There have been a number of rights cases against the county mostly brought by business people challenging county decisions. Article 47 is again prominent in these cases.

In *Republic v Nairobi City County Ex-parte Presbyterian Foundation*,<sup>50</sup> an application for certain construction was approved by Nairobi City Council on 12th of September 2013, but on the 13th of March 2014 the County withdrew the approval on the ground that the premises were involved in an ownership dispute, but without giving details. On the 2nd April 2014, and without any further notice the county demolished the ongoing construction. The Court said that:

The cancellation of the approval letter for the applicant's building plans was clearly an administrative action which enjoined the Respondent to ensure that its action was expeditious, efficient, lawful, reasonable and procedurally fair. To be procedurally fair, it is a requirement that persons who are likely to be affected by the decision in contemplation be afforded an opportunity of being heard before the decision is taken. Further, it is a Constitutional requirement that that person be given written reasons for the action.<sup>51</sup>

Other business related cases have included the case about removal by the Kenya National Highways Authority (KeNHA) with the assistance of Nairobi County of an advertising gantry straddling Waiyaki Way in Nairobi. Justice Majanja said:

KeNHA knew about the construction and waited 10 months for IKON to complete it, moved and demolished the gantry at the stroke of midnight without notice. I find and hold KeNHA's conduct, in this respect, was "unreasonable" within the meaning of Article 47(1) of the Constitution.

It is interesting that Article 47 was used rather than Article 40 – the latter was cited, but Justice Majanja said that the case was firmly based on Article 47.

<sup>49</sup> Constitution of Kenya Article 25 Fundamental Rights and Freedoms that may not be limited.

<sup>50</sup> *Republic v Nairobi City County Ex-parte Presbyterian Foundation* [2014] eKLR .

<sup>51</sup> See also *Rachel Auma Owiti v Municipal Council of Kisumu* [2012] eKLR , although the council had the right to revoke an allotment of land, it violated Art. 47 when it continued to take the rates, and failed to respond to questions from the petitioner; KShs150, 000 awarded. Also *Multiple Hauliers East Africa Limited v Attorney General* [2013] eKLR concerned failure to inform of intention to demolish building on a road reserve and the Court awarded KShs 2 million.

He found KeNHA liable, but not Nairobi County, which had supplied the equipment but not made the decisions.

Article 47 was also the constitutional vehicle for the decision in *Republic v County Government of Mombasa Ex-parte Outdoor Advertising Association of Kenya*,<sup>52</sup> along with legitimate expectations and the action being *ultra vires* the Physical Planning Act. The case involved a decision to forbid advertising hoardings on road reserves, and destruction of some hoardings. Justice Muriithi said:

...the two notices communicated a ready-made decision to remove the billboards which was made without hearing any representations that the affected persons may have had, a defect that the purported 4-month opportunity to be heard allegedly granted after the fact did not cure. To be sure the notice period given in the notices was seven days for any aggrieved persons to attend the respondent for a consideration their cases. The decision to remove the billboards had already been made before the invitation to go to the respondent when their 'grievances shall be looked into on a case by case basis.

There have been a few cases of evictions of hawkers and others in the *jua kali* (informal) sector. In *Moses Kiarie Kairuri and 4 others v Attorney General and 3 others*,<sup>53</sup> Majanja J again relied on Article 47 and said:

This is a case where a Notice has been issued to petitioners who have occupied premises since at least 1984 by giving a 48 hours' notice. By any measure, such a notice is in the circumstances unreasonable as it does not take into account the period of occupation, the nature of business or the opportunity for the petitioners to relocate.

On the other hand, in another case involving businesses, such as garages, carried on on a road reserve, Justice Mumbi Ngugi said,

There can be no violation of their rights under Article 47 if they have been given reasonable notice to vacate the land, and neither can their rights be deemed to have been violated with regard to land that they have no rights of use or ownership over...<sup>54</sup>

### 3.3 Right to property

Several recent cases have concerned liquor laws passed by counties. Some have argued that provisions about where alcohol may be sold, by whom and when

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<sup>52</sup> [2014] eKLR

<sup>53</sup> [2014] eKLR.

<sup>54</sup> *Veronica Njeri Waweru v City Council of Nairobi* [2012] eKLR para 35

violate the right to property under Article 40 of the Constitution. In *John Kinyua Munyaka v County Government of Kiambu* (the *Munyaka* Case), the Judge stated, “I am persuaded that the timing of when alcohol can be retailed does not deprive the petitioners of their right to property.”<sup>55</sup> The nature of the right to property is yet to be fully explored in Kenyan courts. Might an infringement not be established if an existing business was required to close? This was argued in another case: *Richard M. Kagiri v Minister for State for Provincial Administration and Internal Security* (the *Kagiri* Case), but there was no evidence of what bars had to close and why.<sup>56</sup> But in the *Munyaka* Case it seems existing bars had closed, but the Judge still held there was no infringement of property rights. Because of weakness of evidence an argument based on Article 41 on rights to reasonable remuneration and conditions of work was also rejected in the *Kagiri* Case; but while it may deserve credit for creativity, it was probably a non-starter anyway.

### 3.4 Equality and Discrimination

Some cases have tried to argue that licensing regulations are discriminatory: because people with a criminal record could not hold a liquor license,<sup>56</sup> because licensing hours did not apply to military establishments or Parliament,<sup>58</sup> or because a liquor license holder could not be a member of a District Liquor Licensing Committee.<sup>59</sup> All were unsuccessful.

In the *Munyaka* Case— on not being able to hold a liquor license with a criminal record – the Judge said:

With due respect to the learned counsel for the petitioners, I have not seen any hint of artificiality or arbitrariness in the requirement that those in the business or aspiring to be in the business of manufacture, sale or trade in alcoholic drinks must be people of certain disposition. ... If one misses out on an opportunity because of his past criminal record it is not the employer or potential employer to blame and an elimination based on this ground cannot be said to be discrimination as understood in article 27(4) of the Constitution.<sup>60</sup>

This raises an important issue about the meaning of “discrimination”. Justice Ngaah Jairus’ approach essentially takes the South African approach: that rational differentiation is not discrimination.

<sup>55</sup> *John Kinyua Munyaka v County Government of Kiambu* [2014] eKLR.

<sup>56</sup> *Richard M. Kagiri v Minister for State for Provincial Administration and Internal Security* [2014] eKLR

<sup>57</sup> *John Kinyua Munyaka v County Government of Kiambu* above n 54.

<sup>58</sup> *Richard M. Kagiri v Minister for State for Provincial Administration and Internal Security* [2014] eKLR.

<sup>59</sup> *Kagiri* case.

<sup>60</sup> *John Kinyua Munyaka v County Government of Kiambu* above n 54.

In the South African Constitution, the equivalent provision says that there is a right not to be “unfairly” discriminated against. This was in order to accommodate separate toilets for men and women, for example – wholly reasonable, but discriminating. In fact, the South African view is that if differentiating between people is unfair it must be justified under the equivalent of Article 24, or be struck down. But differentiation that is not unfair discrimination is acceptable provided it is rational.

Constitution makers in Kenya, notably at the National Constitutional Conference,<sup>61</sup> took the view that discrimination meant unfairness. There is some justification for this in dictionaries.<sup>62</sup> A recent case alleged discrimination on the grounds of marital status (and on the grounds of sex also, though it was decided on the former).<sup>63</sup> The petitioner applied for a position as member of Vihiga County Land Management Board. She was rejected in vetting by the County Assembly on the ground that, though born in Vihiga, she was married to someone from outside the county and living in Kakamega. Men who were married and not living in the county were not rejected on this ground. The court held that this was discriminatory, and a violation of the right to dignity under Article 28 and no serious effort seems to have been to sustain it as reasonable and justified on the basis of Article 24 (discussed below). In reality it was surely a case of sex discrimination. It was not so much being married that gave rise to the discrimination but the fact of being a *woman* and married.

In *Northern Nomadic Disabled Person’s Organization (NONDO) v Governor County Government of Garissa*<sup>64</sup> an interesting issue of interpretation of Article 54 arose. The Article provides for the “progressive implementation of the principles that at least 5 percent of all elective and appointive persons in public office shall be persons with disabilities”. The petitioners complained that no persons with disability were included in the county executive committee (CEC).

Firstly, the judge held that the petitioners had not shown that any members of NONDO had actually applied for appointment and had been rejected. And that Article 54(2) ... is not a right but a principle on how to implement the five percent of persons with disabilities requirement. The rights of persons with disabilities are to be found in Article 54 (1).

<sup>61</sup> For an account of the process of constitution making in Kenya from 2000 to 2004 see Jill Cottrell and Yash Ghai, “Constitution Making and Democratisation in Kenya (2000-2005)” 14 (1) *Democratisation* pp. 1-25 (2007)

<sup>62</sup> The *Concise Oxford Dictionary* gives “Make a distinction, esp. unjustly and on the grounds of race, age, or sex” as well as “Make or see a distinction”.

<sup>63</sup> *Mary Mwaki Masinde v County Government of Vihiga* [2015] eKLR

<sup>64</sup> [2013] eKLR.

With respect, this did not fully address the issue: the petitioners had been relying on Article 22 (2) that permits cases to be brought on behalf of others, or for the public interest. Having accepted that they had standing on that basis, their personal positions were not relevant. And while a person alleging discrimination should rely on Article 54(1), clause (2) is surely not intended to have no effect in law? However, the petitioners did do their case a disservice by focusing on the CEC, which had only ten members. And the “progressive realisation” provision also posed an obstacle, less than three years after the constitution came into force. Finally, the interpretation of “5 percent of all elective and appointive persons in public office” creates serious difficulties: does it mean five per cent of each body, or of the entire number of elected and/or appointed individuals, meaning that there is no problem with persons with disability holding the “lowliest” positions?

Finally, the judge did make a helpful observation on the definition of affirmative action in Article 260<sup>65</sup>:

[it] is wide enough to allow any appointing authority with the principle enunciated under Article 54 (2) of the Constitution in mind to get out of the normal way of doing things and even include in the advertisement for applications for the appointment to the County Executive Committee information that special interest groups like women, the marginalized, the persons with disabilities and the minorities in society are encouraged to apply. I think too that where such people apply and during the appointing process it comes out that these people have qualifications in relevant fields and have not qualified but are placed in second or third positions, efforts ought to be made to apply affirmative action principle and appoint them.

### 3.5 Consumers' rights

The petitioners in the *Munyaka Case*<sup>66</sup> (discussed earlier –about liquor licenses) also relied on consumers' rights under Article 46; the court rejected this ingenious argument on the basis that the applicants had not shown any breach of consumers' rights. Indeed “If anything, Article 46 itself is clear that a consumer's right to health and safety is paramount; this right would certainly be compromised if the consumers were exposed to unbridled consumption of alcohol.”<sup>67</sup>

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<sup>65</sup> Constitution of Kenya Article 260 Interpretation.

<sup>66</sup> *John Kinyua Munyaka v County Government of Kiambu* above n 54.

<sup>67</sup> As above, at para. 12.

### 3.6 Right to Information

Narok County has been shaken by intense political rivalry between the Governor and other political personalities; and the latter would say by abuse of office of the Governor. A major source of conflict has been the Maasai Mara National Game Reserve and the proceeds of this valuable county asset. Former Minister William Ntimama tried to stop deals entered into about entry fees, parking and other local revenue streams from the park.<sup>68</sup> Among other rights, and not evidently relevantly, he relied on Article 35. It is respectfully submitted that the reason Justice Emukule gave for rejecting this claim was wrong. Basically the Judge said that Article 35 claims would only succeed if the petitioner could show that the information was required for the protection of a right. But Article 35 (1) has two arms:

Every citizen has the right of access to—

- (a) information held by the State; and
- (b) information held by another *person and required for the exercise or protection of any right or fundamental freedom.*<sup>69</sup>

Referring to the emphasised words, the Judge said, “Though this provision appears to relate to the right of access to information held by a non-state actor or private person, the qualification equally applies to information held by the State or State organ.”<sup>70</sup> It is submitted that (i) if there is any ambiguity it ought to be resolved in favour of the broader approach to the right – as Article 20(3)(b) requires;<sup>71</sup> (ii) if the last 13 words in clause (1) applied to both it would not be necessary to divide the clause into sub-clauses, and (iii) there is a good policy reason for making the scope of claims against a private person/body more restricted than against the State.

He attributes his approach to Justice Mumbi Ngugi in *Nairobi Law Monthly Company Ltd v Kenya Electricity Generating Company Ltd and 2 others*,<sup>72</sup> where she said that because the petitioner in the case had said they needed the information to exercise their rights under Articles 33 and 34 on freedom of expression and of media, it was “therefore necessary to consider whether, if the 1st respondent were not a state entity [which she had held it was], it would be obligated to provide information to a citizen under Article 35(1)(b) where

<sup>68</sup> *William Ole Ntimama v Governor, Narok County* [2014] eKLR

<sup>69</sup> Emphasis added.

<sup>70</sup> Para. 45.

<sup>71</sup> Constitution of Kenya 2010, Article 20 Application of bill of rights s (3) In applying a provision of the Bill of Rights, a court shall— ...

(b) adopt the interpretation that most favors the enforcement of a right or fundamental freedom.

<sup>72</sup> [2013] eKLR.

such information is required for the exercise or protection of a fundamental right or freedom”.<sup>73</sup> With much respect I have always had some doubt about this aspect of the *Nairobi Law Monthly case*.

Further, Justice Emukule relied on a South African decision: *Cape Metropolitan Council v Metro Inspection Services (Western) CC* where Justice Streicher of the Supreme Court of Appeal had said, “[I]n order to make out a case for access to information in terms of Section 32, an applicant has to state what the right is that he wishes to exercise or protect what the information is, which is required and how that information would assist him in exercising or protecting that right.”<sup>74</sup>

But this was a case not under the wording of the current Constitution of South Africa (which is the same in wording and layout as that in Kenyan provision), but under the wording in the interim Constitution of 1993-6,<sup>75</sup> under which there could be a claim only for information from the State, and only if needed for the protection of a right. A leading book says that “the 1996 right eliminated the proviso contained in s. 23 of the interim Constitution that the information requested must be ‘required for the exercise or protection’ of the rights of the requester.”<sup>76</sup>

Article 35 has another limb: “The State shall publish and publicize any important information affecting the nation.” In one of the cases about the impeachment of the Governor Wambora, Justice Mwongo said that the Embu County Assembly was “obliged... to publish and publicise the information relating to the removal motion of the Governor.”<sup>77</sup> This was relevant to the issue of public participation.

### **3.7 Economic, Social and Cultural Rights**

Most of the cases have concerned what might be termed civil and political rights, and only a limited range of these. Article 43 on economic and social rights<sup>78</sup> has very rarely been invoked.

The Constitution has a general provision about rights that is particularly applicable to these rights: “It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and

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<sup>73</sup> As above at para 55.

<sup>74</sup> 2001 (3), SA 103 (SCA), para 28 at 1026.

<sup>75</sup> By virtue of an interim provision in Article 23(2)(a) of schedule 6.

<sup>76</sup> I Currie and J de Waal, *The Bill of Rights Handbook* (5thed) (2005) 685.

<sup>77</sup> *Andrew Ireri Njeru v County Assembly of Embu* [2014] eKLR above n 10 at para 36.

<sup>78</sup> Article 43 provides every person with the right to the highest attainable standard of health, including health care services, accessible and adequate housing, and to reasonable standards of sanitation, freedom from hunger, and adequate food of acceptable quality, clean and safe water in adequate quantities, social security and education.

fundamental freedoms in the Bill of Rights.”<sup>79</sup> Its main significance is clearer when read with the following clause: “The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43”. The “respect, protect, promote and fulfil” language is derived from the work of international human rights procedures, special rapporteurs and the United Nations Committee on Economic, Social and Cultural Rights.

### **3.7.1 Resources**

Article 20(5) provides:

If the State claims that it does not have the resources to implement any right under Article 43 ... (a) it is the responsibility of the State to show that the resources are not available.

Counties don't have unlimited resources, and for most of them most of their funds come from revenue nationally collected, and they presently have limited powers to raise own revenue. Some of their funds from the centre may be in form of conditional grants. Counties cannot be held responsible for not spending money they do not have, or is tied to another purpose. But the money from national treasury mostly does not have strings attached, so a county will rarely be able to argue the national government prevents it from using the money as it chooses, though in the transitional period inherited staff and liabilities somewhat tie the hands of some counties.

It is also important to note the next sub-clause in Article 20:

[I]n allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals.

In other words, it is not enough to say “We don't have the money”. An inquiry needs to take place into the county's priorities, as indeed into those of the national government

### **3.7.2 Progressive realization**

Nor should the “progressive realization” provision be used as an excuse for doing nothing. General Comment 3 of the UN Committee on Economic, Social and Cultural Rights says:

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<sup>79</sup> Constitution of Kenya 2010 Article 21(1).

While the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.<sup>80</sup>

And Justice Mumbi Ngugi underlined this when she said, "Article 21 and 43 require that there should be '*progressive realisation*' of social economic rights, implying that the state must begin to take steps, and I might add be seen to take steps, towards realization of these rights."<sup>81</sup>

### 3.7.3 The County Cases

Most of the cases that have invoked Article 43 have involved complaints of positive acts that infringe or threaten to infringe rights. In one case the judge said he could see no violation of Article 43 (or 40). The petitioners were complaining about being evicted from Mandera Market, which was slated for redevelopment. The judge summarized their position:

44. In the present case, the petitioners have demonstrated that they own temporary structures at the Mandera town market and claim to have operated or traded there for over 40 years. They claim that their licences were issued by the respondents monthly. My perusal of the receipts filed reveals that some payments were for auction of single animals like camels, some were for dash fees, others were for auctions. What this means is that the petitioners right to operate lasts for the period or activity indicated in the receipt. They have not challenged the period or purpose of the licence, nor have they asked for its extension. They have merely complained about the decision requiring them to remove the makeshift structures due to proposed upgrading of the market and for security reasons.<sup>82</sup>

This is one of those cases where one senses that more facts might have led to a different decision. In the *Munyaka* Case, the judge held that the provisions barring those with criminal convictions from holding a liquor license was not contrary to Article 43, while Justice Mumbi Ngugi was not swayed by invocation of Article 43 in the *Veronica Waweru* Case.<sup>83</sup>

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<sup>80</sup> Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 14 (2003)

<sup>81</sup> *Mitubell Welfare Society v AG* Petition No. 164 of 2011 [2013] eKLR (emphasis in the original).

<sup>82</sup> *Ali Ahmed v County Government of Mandera* [2015] eKLR at para 44 (Justice Dulu),

<sup>83</sup> *Veronica Njeri Waweru v City Council of Nairobi* above n 53.

However, in *Micro and Small Enterprises Association of Kenya Mombasa Branch v Mombasa County Government and 43 others*,<sup>84</sup> Justice Muriithi issued conservatory orders to evicted hawkers who invoked Article 43 and 47, saying that the more relevant Article was 43. This case went further than those declaring eviction a violation, and required positive action to be taken. The Judge issued a conservatory order that the petitioners were to be allowed to continue hawking business in areas outside the Central Business District, subject to payment. The parties were to hold meetings for allocation of business locations to the petitioners and to report to the court within 14 days. This case does not seem to have proceeded further in the courts.

Whether the cases concern counties or not, we have some way to go before there is a full understanding, and a full exposition in the courts, of the nature of economic, social and cultural rights, especially when it comes to promoting and fulfilling those rights. There seems to be a poor understanding of social security; thinking that it includes the right to work.<sup>85</sup> The UN Committee on Economic Social and Cultural Rights Committee's General Comment 19 says, "The right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection" in case of unemployment, disability, old age etc."<sup>86</sup>

### 3.8 Limiting Rights: Article 24

Article 24 allows most rights to be limited by law, provided this is justifiable in a democratic society. Its full significance is only gradually permeating the consciousness of the legal profession. It is not good enough to say it means rights are not absolute, nor just assert that the public interest must prevail. An example of this type of inadequate reasoning is as Judge Gacheru in the Mutindwa market case put it:

It is trite that where there is a conflict between the public interest and the private interest, the public interest must prevail. The social security of the Petitioner is limited by the requirement in Article 24 of the Constitution that 'the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.' Accordingly, I find and hold that the Petitioners' right ...cannot be asserted over expansion of a public road.<sup>87</sup>

<sup>84</sup> [2014] eKLR.

<sup>85</sup> *John Kamau Kenneth I Mpapale v City Council of Nairobi*

<sup>86</sup> E/C.12/GC/19 (2008).

<sup>87</sup> *John Kamau Kenneth I Mpapale v City Council of Nairobi* above n 83. See also *Susan Waithera Kariuki v Town Clerk Nairobi City Council* [2013] eKLR.

Justice Majanja approached the analysis correctly in a case challenging the forced relocation of urban refugees; he quoted a judge in an earlier case,

Although the State is not required to give a detailed account of its action it must do more than to merely assert that the action has met the threshold set by the Constitution. It must place some evidence before court that will enable the court make a judicial assessment.<sup>88</sup>

To explore Article 24 in a little more detail; it provides:

A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...

The requirement that any limitation must be “by law” means that any legislative limitations must be within the power of the body that made it. Thus it was relevant for the court to point out that a county has the power make laws about liquor licensing when a county law on the subject was attacked for violating rights.<sup>89</sup>

The Article goes on to spell out the factors that must be taken into account to decide whether a limitation of a right by law is justified. Where relevant, the following must be considered:

- (a) the nature of the right or fundamental freedom;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
- (e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

In other words, a single factor would not be conclusive, and an overall judgment of the purpose and the extent (proportionality) of the limitation must be made.

In the *Munyaka* Case, the Judge set out the reasons why regulation of the sale and consumption of alcohol were necessary. And in relation to Article 40

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<sup>88</sup> *Randu Nzai Ruwa v Internal Security Minister Mombasa* HC Misc. No. 468 of 2010 [2012] eKLR, quoted by Majanja J in *Kituo Cha Sheria v Attorney General* [2013] eKLR.

<sup>89</sup> *John Kinyua Munyaka v County Government of Kiambu* above n 54 at para 10.

(right to property) he said, “I am satisfied that the purpose for the limitation, if it is to be so regarded, is noble; it is necessary to protect the rights and fundamental freedoms of others; the extent of the limitation is such that the petitioners can still enjoy their constitutional rights as long as they are conscious of where their rights end and other peoples’ rights begin; and the limitation is proportional to the overarching objective of the Kiambu County Alcoholic Drinks Act, 2013”.

Though it is not always necessary to go through a complete Article 24 analysis, considering every listed factor, it is submitted that the Article is extremely helpful to ensure that all dimensions have been covered. Once it has been decided that there is a limitation of a right, but an attempt is made to justify that limitation, a scrutiny of the purposes of the limitation is essential. And unless it is possible to pick on a particular factor — such as that there are less restrictive means to achieve the purpose — which makes it possible to decide quickly that Article 24 is not satisfied, fairness to the party whose rights are on the face of it violated demands that each factor be considered.

### 3.9 Remedy Without Violation

In the *Veronica Waweru Case*,<sup>90</sup> about eviction from a road reserve, Justice Mumbi Ngugi rejected all claims under the constitution. In other words, the claim failed. Yet she went on to say, “as business women and men who have been operating businesses on the land for a long time, they merit a much longer period of notice to move from the land and relocate their businesses elsewhere than the 14 days given to them by the respondent.”<sup>91</sup> And she gave them 60 days to leave.<sup>92</sup> This is a remarkable decision. The Judge justified the order by referring to Article 23, “the court is nevertheless empowered under Article 23 of the Constitution to make such orders as are appropriate in the circumstances”. It seems rather creative, though to say the least, unusual.

## 4. Conclusion

Human rights litigation is in its infancy under the new Constitution, especially at the county level. The most important message must be that, like any other state institution, counties are bound by the human rights provisions.

Certain human rights issues will more likely arise in relation to the national

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<sup>90</sup> *Veronica Njeri Waweru v City Council of Nairobi* above n 53.

<sup>91</sup> As above, at para 39.

<sup>92</sup> The decision was followed in another road reserve case: *John Kamau Kenneth I Mpapale v City Council of Nairobi* above n 83.

level: the national government runs prisons, the police service is national (though the phenomenon of “city askaris” is yet to be explored in the courts), media regulation and security matters are mostly at the national level, and the courts are national.

Most of the issues are not different because they concern counties. Issues that may be different have on the whole yet to arise, notably the question of adequacy of county resources to fulfil socio-economic rights. If such a defence, under Article 20(5)(a),<sup>93</sup> is raised by a county in the future, the party claiming would be wise to add the national government as respondents in the case. Then the responsibility of the national government to use its resources in such a way that they satisfy its Article 43 obligations, if it could do so in financial terms, and has the constitutional power to do so could be inquired into. In one of the most famous South African cases, the *Grootboom* case on the right to housing, the respondents were the national government, the Western Cape Province, the Cape Metropolitan Council and a municipality within Cape Town.<sup>94</sup>

Some issues have as yet not been fully explored, such as the meaning of “administrative action”, under Article 47 and the meaning of deprivation of property under Article 40. Article 47 is the most litigated. The principles of that Article are neither complex nor demanding. From the cases discussed above, we can see what ought to be done: keeping those affected by decisions fully informed, giving them a chance to be heard, and telling them why decisions are made.

However, this chapter shows that counties have an obligation to exercise all their powers bearing in mind the requirements of the Bill of Rights; they must not positively violate any rights be they civil, political, economic, social or cultural. And when it is within their powers they must take the necessary steps, even if this involves expenditure of money, to protect, promote and fulfil human rights.

Though counties themselves do not have human rights, we have seen that they may legitimately sue to protect the rights of their people. Indeed, if suing is the only way to do so, there might be circumstances in which a county had an obligation to sue.

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<sup>93</sup> “It is the responsibility of the state to show that the resources are not available”.

<sup>94</sup> *Grootboom and Others v Government of the Republic of South Africa and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169.

One of the purposes of Article 24 on the limitation of rights and freedoms, is to try to compel legislatures (including county assemblies) to consider whether the law they are considering limits human rights, and if so to explain the extent of that limitation. Consideration of the human rights implications of their actions should be built in to the processes of county (and national) government bodies, to ensure that rights are fully respected and fulfilled.

# The Enforcement of Socio-Economic Rights against Local Governments in South Africa

Jaap de Visser

## 1. Introduction

Poverty and underdevelopment are South Africa’s greatest challenges. These are inextricably linked to uneven access to adequate public services. By all accounts, South Africa has made impressive progress in extending access to basic services to marginalised communities (see Table 1 below). However, the main challenge remains the severe inequality in access to basic services across different demographic segments of the population of 52 million inhabitants.<sup>1</sup>

A significant part of South Africa’s population reside in informal settlements, often with little or no access to adequate public services such as piped water, electricity, sanitation, street lightning and others.

**Table 1: Key Statistics<sup>2</sup>**

Type of service	Percentage of national population with access
Access to piped water	89.9%
Access to improved sanitation	77.9%
Access to mains electricity	85.4%
Use solid fuels for cooking	10.9%
Dwelling owned	66.4%
Living in formal dwellings	77.7%
Municipal refuse removal	66.0%

<sup>1</sup> R C Nnadozie, 'Access to basic services in post-apartheid South Africa: What has changed? Measuring on a relative basis' (2013) 16 *The African Statistical Journal* 98.

<sup>2</sup> Statistics South Africa, *Household Service Delivery Statistics* (2015) [http://www.statssa.gov.za/?page\\_id=739&id=2](http://www.statssa.gov.za/?page_id=739&id=2) (accessed 13 October 2015).

At the same time, the South African Constitution contains socio-economic rights. They relate to housing, education, shelter, food, water, health care and a safe and healthy environment.<sup>3</sup> These rights are justiciable, in the sense that they can be invoked in court and the court may fashion a remedy in response to a finding that the right has been violated. Indeed they are being used successfully by communities and civil society groupings to litigate against organs of state.

The socio-economic rights in the Bill of Rights are often phrased as rights for which the state must take reasonable measures, within its available resources to achieve the progressive realisation of this right. However, 'the state' in the South African context is constituted as national, provincial and local spheres of government. Each of these spheres has constitutionally guaranteed functions and powers, which, for ease of comparison with Kenya can indeed be termed a form of devolution.<sup>4</sup> This combination of legally enforceable socio-economic rights and constitutionally entrenched devolution creates an important and rather unique dynamic in the Constitution. This is because the realisation of socio-economic rights often has significant budgetary consequences for organs of state throughout the various levels or spheres of government. The combination of legally enforceable socio-economic rights and constitutionally entrenched devolution is something that the constitutions of Kenya and South Africa have in common. A brief perusal of South Africa's experience and the jurisprudence of its Constitutional Court surrounding the intersection of socio-economic rights and the constitutional division of powers may thus be of use to the Kenyan judiciary.

In this chapter, it will be argued that the jurisprudence of the South African Constitutional Court has affected the intersection between socio-economic rights and the constitutional division of functions and powers. This has occurred in particular with regard to the functions and powers of local government. The impact of enforcement of socio-economic rights on the functions and powers of local government has been threefold. First, it can be argued that South Africa has seen 'devolution through rights', whereby the Constitutional Court seems to have decentralised functions to subnational governments through the enforcement of the Bill of Rights. Secondly, it will be argued that the Court has formulated, on the basis of the division of powers and functions, a new right that can be invoked against subnational governments. A new 'right to receive basic (local) services' seems to have emerged in the Constitutional Court's jurisprudence. Thirdly, the Constitutional Court has formulated standards for the exercise of powers

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<sup>3</sup> Constitution of the Republic of South Africa 1996 ss 24, 26, 27, 28 and 29.

<sup>4</sup> As above s 40(1).

by municipalities and based these standards on the Bill of Rights and the socio-economic rights in particular. Before elaborating on the above three trends, the chapter provides a short outline of the constitutional framework for provincial and local government, which should assist in the subsequent analysis of the Constitutional Court's jurisprudence.

## 2. Constitutional Framework for Provincial and Local Government

South Africa's nine provinces, where legislative powers are exercised by directly elected provincial legislatures and executive powers by an indirectly elected Premier, are responsible for the functional areas, listed in Schedules 4 and 5 of the Constitution.<sup>5</sup> Matters not listed in any of the two Schedules are the responsibility of the national government.<sup>6</sup>

With regard to the functional areas listed in Schedule 4, national and provincial governments have concurrent legislative and executive authority: both national and the provincial governments have the same (legislative and executive) powers over the same territory.<sup>7</sup> Conflicts between national and provincial laws on the same matter are ultimately resolved by the Constitutional Court.<sup>8</sup> With regard to the functional areas listed in Schedule 5 provincial powers are exclusive.<sup>9</sup> National government is barred from exercising any legislative or executive powers in any of the functional areas in Schedule 5, unless exceptional circumstances merit national legislative intervention.<sup>10</sup>

Local government in South Africa is constitutionally recognised and its powers constitutionally protected.<sup>11</sup> Local government consists of municipalities, headed by directly elected municipal councils.<sup>12</sup> They are charged by the Constitution with critical service delivery responsibilities, such as the delivery of water, electricity, sanitation, municipal roads, street lightning etc. Municipalities derive their legislative and executive authority with respect to these services directly from the Constitution which contains a list of local government matters.<sup>13</sup>

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5 As above s 104(1)(b)(i) and (ii).

6 As above ss 44(1)(a)(ii).

7 As above ss 44(1)(a)(ii) and 104(1)(b)(i).

8 As above s 146.

9 As above s 104(1)(b)(ii).

10 As above s 104(1)(b) and 42(2).

11 As above Chapter 7ss 151 and 156.

12 As above s 157.

13 As above s 156(1), read with shcs 4, Part B, and 5, Part B.

As mentioned above, Schedules 4 and 5 contain concurrent national and provincial and exclusive provincial powers respectively. However, they also contain the above mentioned local government powers, which are nestled away in Part B of Schedule 4 and Part B of Schedule 5. In the case of Schedule 4B matters, national and provincial governments may only regulate these functional areas to “see to the effective performance by municipalities of their functions” or to provide for the monitoring of or support to municipalities.<sup>14</sup> In the case of Schedule 5B matters, it is only the provincial government that may regulate. Implicit in South Africa’s system of local government is a high degree of self-sustainability with municipalities expected to raise a considerable portion of their revenue from property taxes and service fees, revenue generating powers that are constitutionally guaranteed.<sup>15</sup> As a result, local government budgets are indeed -to a significant degree -self-funded. For example, 73 percent of the 2014-2015 local government budgets was funded out of own revenue.<sup>16</sup> It must be said, however, that local government’s ability to raise revenue varies significantly between urban and rural local governments with many rural local governments relying to a very significant degree on national government funding. Additional funding is provided by the national government, in the form of an unconditional grant which is called the equitable share,<sup>17</sup> using terminology and on the basis of equalisation principles that are very similar to the relevant provisions in the Kenyan Constitution. Furthermore, local governments receive a myriad of conditional grants that are earmarked for specific purposes.

The Constitution thus divides powers and functions between national, provincial and local government by listing concurrent national and provincial powers in Schedule 4 and exclusive provincial powers in Schedule 5 of the Constitution. The latter part of each schedule then contains the areas over which local government has constitutional authority. Local government’s constitutionally allocated powers revolve around matters such as the provision of electricity, fire fighting, municipal health services, storm water management, municipal roads, refuse removal, water and sanitation. Changes to this division of powers and functions between the three spheres of government can be made, though. The Constitution provides for the instrument of assignment, in terms of which the national or provincial governments may transfer responsibility for a function to another sphere of government.<sup>18</sup>

<sup>14</sup> As above ss 155(6),- 155(7).

<sup>15</sup> As above s 229.

<sup>16</sup> National Treasury, *Budget Review 2014*(2015) 100.

<sup>17</sup> Constitution of the Republic of South Africa 1996 ss 214 and 229.

<sup>18</sup> Sections 44(1)(iii), 99, 104 and 126 of the Constitution provide for the assignment of national or provincial functions to local government or to specific municipalities.

With respect to the assignment of functions to local government, there are statutory provisions that seek to ensure that adequate resources accompany the assignment.<sup>19</sup> This is to avoid that local governments are saddled with additional functions without resources to carry them out. In practice, municipalities perform a range of functions 'outside' their constitutional mandate on the basis of formal and informal mechanisms such as agency arrangements and sector-specific instruments.

The Constitution of Kenya uses similar concepts to arrange the functions and powers of the national government and the counties. Constitutional mechanisms such as concurrency, exclusivity, assignment and equitable division of revenue also feature in the Constitution of Kenya. This enhances the scope for a useful comparison between the two countries.

### 3. Devolution Through Rights

The first manifestation of the impact of the enforcement of socio-economic rights on the division of functions and powers relates to what can be termed 'devolution through rights'. The background to this is the following question: given that the socio-economic rights in the South African Constitution are phrased as rights that can be enforced against "the state", does this mean that they thus be claimed from any sphere of government that makes up "the state"? To underscore the suggestion that this question may be relevant for the Kenyan context, a quick excursion to the Kenyan Constitution may be useful. Article 53(1) of the Constitution of Kenya provides that "[e]very child has the right to ... shelter". It does not specify whether it is the national government or the counties that bear the duty to ensure the realisation of this right. At the same time, there are provisions elsewhere in the Constitution, particularly in Schedule IV that set out an intricate division of powers between the central government and counties with respect to housing and shelter. For example, Schedule IV provides that the national government is responsible for "housing policy" and that the counties are responsible for "country planning and development, including ... housing". The question could thus be: can this right to shelter be claimed from the county, from the national government or from both?

In South Africa, the first time the issue arose as to which sphere of government is responsible for the realisation of the right of access to housing was in the context of the landmark *Grootboom* matter before the Constitutional Court.<sup>20</sup> The judgment is one of the Court's most well-known judgments

<sup>19</sup> Local Government: Municipal Systems Act 32 of 2000 s 9-10A.

<sup>20</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

and its content and impact have been well traversed in literature around the world.<sup>21</sup> It will thus not be comprehensively presented here except for the elements, essential to understand its significance for the topic of this paper. In essence the matter revolved around a community that had been rendered homeless as a result of eviction from land that had been earmarked for development. They sued government to assert that their right of access to housing had been violated. The Constitutional Court agreed and, in applying a test of reasonableness, held that government's housing programme was not reasonable. The key reason for this was that the housing programme focused exclusively on medium and long term progress in the delivery of low cost housing and didn't cater for the destitute who found themselves in deplorable circumstances.<sup>22</sup> All three spheres of government were cited in the application and the Court spent a considerable amount of time engaging counsel on the question as to who was responsible for delivering which component of the right to housing. In the judgment, the Court opted to leave the matter to the three spheres of government to work out with reference to the principles of cooperative governance that are embedded in the Constitution:

What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government. ... The Constitution allocates powers and functions amongst these different spheres emphasising their obligation to co-operate with one another in carrying out their constitutional tasks. In the case of housing, it is a function shared by both national and provincial government. Local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities they govern. A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available. ... Thus, a co-ordinated state housing programme must be a comprehensive one determined by all three spheres of government in consultation with each other as contemplated by Chapter 3 of the Constitution.<sup>23</sup>

While this resolved the matter in the context of *Grootboom*, the question as to who is responsible for the realisation of the right to housing, kept rearing its

<sup>21</sup> See for example G Van Bueren, 'Housing' in M H Cheadle et al (eds) *South African Constitutional Law: The Bill of Rights* (2014) 21.2; C Mbazira, 'Grootboom: a paradigm of individual remedies versus reasonable programmes' (2011) 26(1) *Southern African Public Law* 60-80.

<sup>22</sup> As above, Van Bueren above n 21.

<sup>23</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) paras 39-40.

head. This is so particularly because many municipalities are deeply involved in the delivery of low cost housing. Not only do they naturally provide a basket of services related to housing (such as water, sanitation, storm water drainage, roads, local public transport and town planning), they often carry out housing projects on behalf of provincial governments. In addition, legislation such as the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (PIE),<sup>24</sup> the key function of which it is to ensure that no eviction takes place without a court order made after considering all the circumstances,<sup>25</sup> draws municipalities into legal battles over evictions.<sup>26</sup> In terms of PIE and the jurisprudence that has given effect to it, municipalities have become involved in -

- providing alternate/emergency housing for occupiers who would be rendered homeless by an eviction order;<sup>27</sup>
- mediating in eviction proceedings;<sup>28</sup> and
- placing information before the courts relating to the circumstances of vulnerable unlawful occupiers in eviction cases.

The municipality is thus part of the search for alternative accommodation when an application for an eviction order reaches the court. In terms of the law and as a result of practice, municipalities not only engage daily with issues related to the delivery of social housing but also with the question as to how to ameliorate the plight of those rendered homeless by evictions. With reference to the fact that 'housing' is listed in the Constitution as a function of national and provincial governments concurrently, municipalities have often argued that this constitutes an "unfunded mandate"; that is a transfer of functions to local government without making adequate funding arrangements.

In 2011, more than a decade after the *Grootboom* decision, which had left it to the three spheres of government to resolve this issue amongst them, the question came to the Constitutional Court very directly. This time, the setting was the City of Johannesburg where a community had been evicted by a private company from private land. In the *Blue Moonlight* matter the destitute community approached the City of Johannesburg for temporary emergency accommodation.<sup>29</sup> The City refused to accept responsibility. It claimed that it would be untenable for the City to be held responsible for the consequences of

<sup>24</sup> Republic of South Africa, Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 1998 ("PIE").

<sup>25</sup> Constitution of the Republic of South Africa 1996 s26(3).

<sup>26</sup> Republic of South Africa, Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 1998 section 4(2)..

<sup>27</sup> See section 4(7) of PIE in terms of which the Court seized with the eviction matter must consider whether the municipality can make land available for relocation.

<sup>28</sup> Republic of South Africa, Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 1998 7(1).

<sup>29</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC); See also Van Bueren, above n 21, 21.8.

each private eviction as it had not budgeted for the type of assistance that was required. Essentially, it wanted the Court to pronounce that it was the national and provincial government that should be ordered to provide emergency housing, not the City. Key to the City's argument was the location of 'housing' in Schedule 4A of the Constitution thus rendering it a function over which national and provincial governments exercise powers concurrently.<sup>30</sup>The Constitutional Court disagreed with this argument. It held that the City was indeed responsible and that it ought to find alternative accommodation. The City could not evade its responsibility for the realisation of the right of access to housing on the basis of the argument that housing is not part of its original constitutional mandate. It based its judgment on a combined reading of the right of access to housing and the housing legislation which sets out functions for local government with respect to emergency accommodation.

... the City has both the power and the duty to finance its own emergency housing scheme. Local government must first consider whether it is able to address an emergency housing situation out of its own means. The right to apply to the province for funds does not preclude this. The City has a duty to plan and budget proactively for situations like [this].<sup>31</sup>

The Court thus made it clear that municipalities are constitutionally responsible for at least certain components of the housing function. It can be argued that this is a form of devolution of function to local government, not by means of the instrument of assignment as set out in sections 44(1) (iii), 99, 104 and 126 of the Constitution but through the operation of the Bill of Rights, enforced by the Constitutional Court. The municipality's responsibility is based on its responsibility to protect the vulnerable and the destitute and it is duty bound to obtain funds from national and provincial governments to exercise this function or budget own revenue for it.

#### 4. A New 'Right to Basic Municipal Services'

The second jurisprudential trend that has affected the division of powers has been the formulation of what can be termed a new 'right to basic municipal services' by the Constitutional Court. 'Basic municipal services' could be defined as those services which are "necessary to ensure an acceptable and reasonable quality of life and, if not provided, would endanger public

<sup>30</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC) at para 50.

<sup>31</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC) para 67.

health or safety or the environment” as is the definition in local government legislation.<sup>32</sup> The Bill of Rights contains rights to housing, shelter, food, water, health care and a safe and healthy environment. It goes without saying that the content of ‘basic municipal services’ is not identical to the socio-economic rights in the Bill of Rights. In many respects it encompasses more than that. For example, even if one would be prepared to argue that there is no right of access to electricity in the Bill of Rights,<sup>33</sup> it can certainly not be argued that electricity is not a basic municipal service.

What can be discerned in the jurisprudence of the Constitutional Court pertaining to local government services is that the Court sees the delivery of basic municipal services as an enforceable duty on the part of municipalities. For example, in the *Mkontwana* judgment, dealing with the instruments for local governments to secure revenue, the Court remarked that “municipalities are obliged to provide water and electricity to residents in their area *as a matter of public duty*”.<sup>34</sup> In the *Joseph* judgment,<sup>35</sup> the argument is even clearer. In this case the municipality had disconnected electricity to a block of flats in response to non-payment by the owner. The result was that the tenants, who had paid for electricity to the owner, were being deprived of electricity.<sup>36</sup> The Constitutional Court resolved the matter with reference to the obligation on local government to provide basic services. The Court explained the origins of this obligation: “The *obligation borne by local government to provide basic municipal services* is sourced in both the Constitution and legislation”.<sup>37</sup> This obligation is not in the Bill of Rights but sourced from section 152 and 153 of the Constitution where the developmental duties of local government are set out. These provisions are part of the institutional arrangements the Constitution makes with regard to local government.

The *Joseph* judgment makes it clear that, in formulating the duty to provide basic municipal services, the Court does not conceive of a state obligation that cannot be invoked in court. It clearly recognises the concomitant right to claim the fulfilment of that obligation. This obligation and therefore the right to claim the fulfilment is aimed specifically at local government because no other sphere of government delivers ‘basic municipal services’. It is not

32 Local Government: Municipal Systems Act 32 of 2000 s 1 “basic municipal services” of the Local Government.

33 Even though it can be argued convincingly that access to basic electricity is indispensable to the realisation of other important human rights including the right to dignity of the person, the right to health, and the right to water.

34 *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 38 and 52 (emph. added).

35 *Joseph and Others v City of Johannesburg and Others* 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC).

36 N Steytler & J De Visser *Local Government Law of South Africa* 9-7; M Bishop & J Brickhill, ‘Constitutional law’ in (2010) *Annual Survey of South African Law* 199-202.

37 *Joseph and Others v City of Johannesburg and Others* 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) at para 34 (emph added).

directly based on a specific provision of the Bill of Rights but on (1) local government's developmental mandate in the Constitution, (2) statutes that give further content to that and (3) indirectly on the rights of access to housing, food and water. This must then mean that a municipality can be sued for not providing 'basic municipal services', even though the right is not explicitly listed as a right in the Constitution.

## 5. Rights Based Service Delivery Standards

The third manifestation of the courts influencing the division of powers and functions relates to the formulation of standards for service delivery that are directly based on the content of socio-economic rights. As was explained earlier, the Constitution delineates a regulatory role for national and provincial governments in relation to local government. National and provincial governments may regulate local government's constitutional functions "see to the effective performance by municipalities of their functions" or to provide for the monitoring of or support to municipalities.

What has emerged in the jurisprudence is that the courts formulate principles and standards that essentially also regulate how municipalities ought to deliver services. However, these principles and standards are formulated on the basis of the imperatives of the Bill of Rights. When a court issues rights-based service delivery standards it does not add functions to a subnational government's portfolio of constitutional functions and neither does it add substantive rights to the rights contained in the Bill of Rights. Instead, it formulates standards that are not necessarily contained in statutory law but become judge-made standards, directly based on the Bill of Rights.

There are many instances of the courts issuing broad, rights based standards for municipalities to follow when delivering services but two are mentioned in particular. The first is the Constitutional Court's judgment in *Mazibuko*.<sup>38</sup> The case dealt with the introduction, by the City of Johannesburg, of pre-paid water meters in Phiri, an area in Soweto. Pre-paid water meters may be attractive for the local authority from a cost recovery point of view but their very nature means that those who cannot pay for water are left without access to the most basic of human needs. In implementing the system, the City of Johannesburg had ensured that, despite the pre-paid system, each household would have access to 6000 litres per month free of charge.<sup>39</sup> This was broadly in line with the above mentioned national policy and the City's own policy.

<sup>38</sup> *Mazibuko and Others v City of Johannesburg and Others* 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).

<sup>39</sup> As above para 167.

The residents of Phiri approached the Constitutional Court and claimed that the City's decision and implementation of the pre-paid water system was unconstitutional for violating the rights of access to water. The Constitutional Court disagreed and held that the City's free basic water policy and the implementation of the pre-paid water metering system did not violate the right of access to water.<sup>40</sup> For the purposes of this chapter, the focus is on how the Court formulated standards for service delivery. For example, the Court had to review the adequacy of the free allocation 6000 litres per household per month. The Court acknowledged that this would be insufficient for large households, but, based on average household sizes, considered it sufficient to pass constitutional muster.<sup>41</sup> However, the Court also issued a stern warning to the City of Johannesburg (and thereby to all municipalities) that the policy on free basic water may not remain static. Socio-economic rights are to be realised "progressively" and the City was therefore duty bound to continuously review its free basic water allocation.

Not only must government show that the policy it has selected is reasonable, it must show that the policy is being reconsidered consistent with the obligation to "progressively realise" social and economic rights in mind. A policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution.<sup>42</sup>

The second example of judge-made service delivery standards relates to the Constitutional Court's jurisprudence surrounding 'meaningful engagement'. Essentially, the principle of 'meaningful engagement' requires organs of state to engage meaningfully with citizens when decisions are made that impact on their enjoyment of rights. It is thus a judge-made standard, not explicitly listed as such in the specific legislation on that particular service but formulated and applied by the courts on the basis of the Bill of Rights. It was developed by the Constitutional Court in cases involving evictions, particularly large scale evictions where communities are 'temporarily' relocated in order to facilitate new housing projects. In order for those eviction arrangements to pass constitutional muster, there should have been 'meaningful engagement' with the affected communities. One of the key judgments on 'meaningful engagement' is *Olivia Road*,<sup>43</sup> in which residents of two buildings in the City of Johannesburg challenged a decision by the City to evict them on

<sup>40</sup> As above para 166-169.

<sup>41</sup> As above para 86-89.

<sup>42</sup> As above para 162.

<sup>43</sup> *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 5 BCLR 475 (CC).

the grounds that the buildings they occupied were unsafe. Two days after hearing arguments in the case, the Constitutional Court issued an interim order, crafted in general terms, forcing the parties to engage meaningfully and report back to the Court. The Court instructed the parties to put the following at the centre of their discussions: “to alleviate the plight of the applicants who live in the two buildings concerned in this application by making the buildings as safe and as conducive to health as is reasonably practicable”.<sup>44</sup> The parties conducted the engagement and reached a settlement, which was confirmed by the Court. The agreement contained interim measures to secure the safety of the building at the City’s expense<sup>45</sup> and to provide the occupiers with alternative accommodation in the inner City of Johannesburg. In elaborating on the engagement process, the Court stated that it must be tailored to the particular circumstances of each situation: “[T]he larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement”.<sup>46</sup> Furthermore, the process must be transparent: “[T]he provision of a complete and accurate account of the process of engagement including at least the reasonable efforts of the municipality within the process would ordinarily be essential”.<sup>47</sup>

Meaningful engagement has become a standard that finds application in contexts, other than evictions. Essentially, it applies whenever an organ of state takes a decision with regard to service delivery and that decision directly impacts on the enjoyment of rights of certain specific communities, either positively or negatively. The case of *Beja* is an example of the application of this principle.<sup>48</sup> The case revolved around the City of Cape Town’s decision to build toilets for an informal settlement community in Makhaza, which is part of Khayelitsha, a township on the outskirts of Cape Town. Ordinarily such a decision by the City would be welcomed as it not that the toilets were built without walls, leaving the community members with an undignified and dangerous situation. Members of the community took the City and the provincial government to court, arguing that their constitutional rights were violated with this decision and the implementation thereof. The City, in defending the curious practice of building toilets without walls, argued that it was based on what could be termed a ‘self-help’ deal. The affected community had apparently agreed to build the enclosures, so the City’s argument went, if the City would provide the actual toilets.<sup>49</sup>

44 As above para 5.

45 It dealt with issues such as the installation of toilets, potable water, waste disposal services, fire extinguishers and a once-off operation to clean and sanitise the properties.

46 *Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others* 2008 5 BCLR 475 (CC) para 19.

47 As above para 21.

48 *Beja and Others v Premier of the Western Cape and Others*[2011] 3 All SA 401 (WCC); 2011 (10) BCLR 1077 (WCC).

49 As above para 77.

This is when the High Court applied the principle of ‘meaningful engagement’: had the City meaningfully engaged with the affected members of the community before accepting or recording that an ‘agreement’ with them existed? Upon scrutinising the history of the conclusion of the ‘agreement’ between the City and the affected community, it appeared that it was based on a small number of poorly attended and poorly recorded community meetings. The City could not prove that very serious considerations such as the need to prioritise the rights to dignity, safety and privacy were actually taken into consideration. In addition, there was no sign of specific attention being paid to the most vulnerable members of the community, such as the elderly, in designing this service delivery mechanism. On the basis of these and other considerations, the Court concluded that the City had failed in its duty to meaningfully engage the members of the community who stood to be affected by its decision.<sup>50</sup>

The above three judgments are examples of the courts formulating and applying standards for service delivery based on the Bill of Rights. In the *Mazibuko* judgment, the Constitutional Court formulated a standard for service delivery based on the principle of ‘progressive realisation’ of socio-economic rights: a city’s policy on the allocation of free basic water may not be static but must be reviewed continually. In the *Olivia Road* judgment, the Court instructed the parties to an impending eviction to meaningfully engage around the plight of those were to be evicted as well as the objectives the government wished to pursue with the eviction. In the *Beja* judgment, the High Court tested an agreement between the municipality and a community against the standard of ‘meaningful engagement’ and concluded it did not pass muster. In doing so the Court insisted on service delivery mechanisms that are genuinely participatory.

## 6. Conclusion

The above three trends in the jurisprudence indicate that there is a dynamic relationship, mediated by the courts, between the constitutional division of powers between the three spheres of government and the Bill of Rights. At times, the courts seem to have expanded the list of responsibilities of local government. In other cases the courts extrapolated new rights from provisions dealing with the division of powers and arguably expanded the Bill of Rights. Lastly, the courts have formulated and applied rights-based service delivery standards.

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<sup>50</sup> As above paras 77-106.

So are the courts going too far? Are they overstepping their role and interfering in processes that are best left to the legislature and the executive? For example, is the Constitutional Court interfering in the delicate process of intergovernmental fiscal relations by making municipalities responsible for aspects of the housing function (namely emergency housing)? For example, Van Bueren criticises the *Blue Moonlight*:

This judgment is surprising because of its lack of attention to the polycentric implications of the order, namely that evictions by private landowners could hold significant implications for the City's housing budget in general and its ability to provide permanent housing in particular. Furthermore, there was an absence of any consideration of the manner in which this judgment transfers the social costs of the private landowner acquiring dilapidated buildings from the former to the City.

Indeed, one may point at the fact that courts generally do not have the instruments, nor the expertise to engage with the myriad of complexities surrounding intergovernmental funding arrangements, let alone craft a detailed intergovernmental funding arrangement to deal with the financial consequences of its decision.

However, it is argued that such an argument, while perhaps attractive from the point of view of the need for predictable and properly researched and negotiated intergovernmental fiscal arrangements, ignores that these outcomes are the inevitable result of a transformative Constitution with a Bill of Rights at its heart. The Constitutional Court has consistently ruled that the various sections and parts of the Constitution must be read harmoniously whenever possible. This also applies when the one provision is part of the Bill of Rights and the other provision is part of the Constitution's institutional arrangements. It cannot be that institutional arrangements trump provisions of the Bill of Rights or that institutional arrangements play no role in the interpretation of the Bill of Rights.

This does not mean, however, that complaints such as local government's objection that the emergency housing mandate is an unfunded mandate should not be taken seriously. As explained in the introduction to this chapter, municipalities have limited own revenue and receive grant funding premised on a certain portfolio of constitutional functions. Additional responsibilities must be properly costed and funded.

The objections around the unfunded mandate may not, however, result in a diminution of constitutional rights. When organs of state seek to

evade responsibility for the realisation of those economic and social rights where they are clearly invested and do so on the basis of arguments around competencies and intergovernmental relations, there is a real threat that the rights start losing meaning. It is suggested that the objection must be responded to differently. The Constitutional Court has made it clear that the provision of emergency housing to those rendered homeless as a result of evictions or other similarly exceptional circumstances is a constitutional responsibility of local government. Furthermore it has formulated a right to basic municipal services and formulated rights-based service delivery standards. The stakeholders to the intergovernmental fiscal system, comprising of various organs of state in different spheres of government, the National Treasury and the Financial and Fiscal Commission, must now bring its very considerable research and negotiation capabilities to bear to investigate whether changes to the intergovernmental fiscal system are needed to achieve greater alignment between the intergovernmental fiscal system and the constitutional responsibilities.

The Constitution of Kenya contains economic and social rights that are phrased so as to make them justiciable: they are not mere instructions to the state to pursue them as objectives. Key provisions are in Article 43, which contains various rights pertaining to health care, housing, sanitation, food, water, social security and education. The rights of children and persons with disabilities (Articles 53 and 54) also contain elements that constitute economic and social rights. There is no doubt that the enforcement of these rights by the Kenyan courts is going to affect the devolution of functions and powers. There is also no doubt that the Kenyan courts will develop their own jurisprudential principles to manage the complicated intersection, tailored to the specificities of the Kenyan context. However, it is hoped that the above excursion into some of the approaches developed by the South African Constitutional Court, based on a Constitution that bears remarkable similarities to the Kenyan Constitution, may add a useful dimension to their deliberations.



# South Africa: The Role of the Constitutional Court in Defining Subnational Governments' Powers and Functions<sup>1</sup>

Nico Steytler

## 1. Introduction

The 1993 interim Constitution, which came into operation after the first democratic elections on 27 April 1994 in South Africa, introduced constitutional supremacy for the first time in the country. It thus revolutionized the role that courts with the Constitutional Court at the apex would play as guardians of the Constitution. The Constitution also entrenched devolution in the form of provinces and local government. The 1996 Constitution further strengthened the position of local government vis a vis the provinces. Given the two principles of constitutional supremacy and devolution, it was evident that the courts would play an important role in shaping the contours of the system of devolution.

Although the Constitutional Court has adopted a purposive approach to constitutional interpretation, it has over the past two decades given restrictive interpretations to provincial powers, but has been more generous in the case of local government. In this chapter leading cases on these issues will be examined, followed by an analysis of the Court's approach to devolution.

## 2. Embracing Constitutionalism

The interpretation of the division of powers should be seen in the context of how the Constitutional Court sought to embed constitutionalism in the fabric of South African society. Before 27 April 1994, the South African legal order was premised on the principle of parliamentary sovereignty. After the

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<sup>1</sup> This chapter draws on Nico Steytler, 'The Constitutional Court: reinforcing South Africa's hourglass system of multilevel government' in Nicholas Aroney and John Kincaid (eds) *Courts in Federal Countries: Federalist or Unitarists?* (Toronto: University of Toronto Press, 2016 forthcoming).

repeal of the entrenched provisions of the 1910 Constitution in the 1950s by the National Party, which protected a qualified franchise for colored people,<sup>2</sup> Parliament could by legislation implement the policy of apartheid to its fullest degree. The courts were the main enthusiastic interpreters of the ideology, and sought to find the intention of the legislature in the plain meaning of the text.<sup>3</sup> It had no powers of legislative review. There were some discordant voices that sought to give a narrow interpretation of draconian laws, introducing some elements of limited government in the area of administrative law.<sup>4</sup>

The 1993 Constitution revolutionized the legal order and the role of the courts. Section 4(1) read:

This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.<sup>5</sup>

Furthermore, the newly established Constitutional Court was under a duty, upon finding that any law is inconsistent with the Constitution, to declare such law invalid.<sup>6</sup> From the start the Constitutional Court did not hesitate to draw a pen through legislation from the apartheid era, but also legislation emanating from the new democratic Parliament.<sup>7</sup> The most challenging task for the Constitutional Court was to certify that the final Constitution adopted in 1996 was consistent with a set of broad governance principles, referred to as the Constitutional Principles.<sup>8</sup> In the *First Certification* judgment<sup>9</sup> the Court *en banc* found some parts of the constitutional text inconsistent with the Principles and thus declined to certify the text. With some minor amendments, the text was approved.<sup>10</sup> The Court thus set the tone: a fearless adherence to the enforcement of the Constitution. It was the case that the extraordinary times of building a new South Africa require extraordinary judges and they did not fail.

The point of departure for the Court was that there was no such thing as a political question doctrine in terms of which any act of the national executive

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<sup>2</sup> See, generally J Dugard, *Human Rights and the South African Legal Order* (1978); S Woolman and J Swanepoel, 'Constitutional History', S Woolman and M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> ed 2014) ch2,2-15 - 2-23.

<sup>3</sup> See JR de Ville, *Constitutional and Statutory Interpretation* (2000) 51-55.

<sup>4</sup> See R L Abel, *Politics by Other Means: Law in the Struggle against Apartheid, 1980-1994* (1995).

<sup>5</sup> Constitution of the Republic of South Africa Act 200 of 1993 4(1) -referred to as the interim Constitution.

<sup>6</sup> As above s 98(5).

<sup>7</sup> For example, Local Government Transitional Amendment Act of 1995.

<sup>8</sup> Interim Constitution Schedule 4.

<sup>9</sup> *In re: Certification of the Constitution of the Republic of South Africa, 1996 1996* (10) BCLR 1253 (CC) (*First Certification* judgment).

<sup>10</sup> *In re: Certification of the Amended Test Constitution of the Republic of South Africa, 1996/1997* (1) BCLR 1 (CC).

was beyond constitutional review. When President Nelson Mandela issued a general pardon for all mothers with young children who were in prison for non-violent offences, the Court entertained a challenge from a father in prison who cried gender discrimination.<sup>11</sup> Although the Court did not find on the facts for the father, it nevertheless affirmed that even the presidential power of pardon was not immune from constitutional review.

The next section deals with the powers of provinces.

### 3. Constitutional Court's Approach to Interpreting Devolution

The interpretation of the devolution provision was going to be a contested area, because the main challengers of the constitutionality of national legislations were the provinces controlled by minority political parties - KwaZulu-Natal (KZN) and the Western Cape. Yet the Constitutional Court, as the final interpreter of the Constitution was able to manage to separate political opportunism from constitutional analysis by adopting a purposive approach to interpretation. With reference to devolution, the Court said, in response to an argument that provincial powers should be construed restrictively, the following:

In the interpretation of those schedules [listing provincial powers] there is no presumption in favor of either the national legislature or the provincial legislatures. The functional areas must be purposively interpreted in a manner which will enable the national parliament and the provincial legislatures to exercise their respective legislative powers fully and effectively.<sup>12</sup>

Whether this claim can be sustained, is discussed below.

### 4. Provincial Powers

The government in South Africa is described in the Constitution 'as constituted at national, provincial and local spheres of government which are distinctive, interdependent and interrelated.'<sup>13</sup> The division of powers that emerges from this intermeshed or intertwined system of multilevel government is bound to be complex, and one in which the courts are bound to play an important role to define the contours of the system.

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<sup>11</sup> *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC). See also *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (10) BCLR 1059 (CC) with regard to the requirement of legality for the presidential appointment of a commission inquiry.

<sup>12</sup> *DVB Behuising (Pty) Limited v North West Provincial Government and Another*, 2000 (4) BCLR 347 (CC) at para 17.

<sup>13</sup> Constitution of the Republic of South Africa 1996 s 40(1).

## 4.1 Limits to National Government Powers

The national government has plenary power over all matters except for a small list of exclusive provincial powers.<sup>14</sup> The plenary powers include concurrent legislative powers shared with the provinces. Where there is a conflict between a national and a provincial law in an area of concurrent competence, the Constitution contains a number of qualified override clauses in favor of the national government.<sup>15</sup> The first provides that national legislation will prevail if it deals with a matter “that cannot be regulated effectively” by provinces individually.<sup>16</sup> The second makes national legislation paramount if it sets norms and standards, frameworks and policies.<sup>17</sup> The third is where the national legislation is necessary for, among others, “the maintenance of economic unity”, and “the protection of the environment”.<sup>18</sup> Finally, national legislation will also prevail when it is aimed at “preventing unreasonable action by a province ... that impedes the implementation of national economic policy”.<sup>19</sup> It is clear that the override provisions are generous and pose few obstacles to the national government in legislating in the concurrent areas.

With regard to local government’s listed powers the national government is also restricted to providing framework legislation.<sup>20</sup> In the case of provincial exclusive powers, national legislation is permissible if it meets a set of criteria.<sup>21</sup> Where these criteria are not met, the intervention is unjustifiable and hence invalid.<sup>22</sup>

These are the formal set of rules in terms of which the Constitutional Court considers the validity of national laws. The Constitutional Court has, however, opened a further ground of constitutional review in terms of the principles of cooperative government. Although an act may fall within the jurisdiction of the national government, it may nevertheless be unconstitutional if the manner in which it is expressed transgresses the cooperative government prohibition that one sphere of government may not “encroach... on the geographical, functional or institutional integrity of government in another sphere”.<sup>23</sup>

14 As above s 44(1)(a) and Schedules 5. See generally, V Bronstein ‘Legislative competence’ chapter 15; and ‘Conflicts’ in S Woolman and M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> ed 2014) chapter 16.

15 Constitution of the Republic of South Africa 1996 s 146.

16 As above s 146(2)(a).

17 As above s 146(2)(b).

18 As above s 146 (2)(c).

19 As above s 146(3).

20 As above s 155(7)) Schedules 4B and 5B. See further Nico Steytler and Jaap de Visser *Local Government Law of South Africa* (2014) 5-24(11).

21 Constitution of the Republic of South Africa 1996 s 44(2).

22 *Ex parte President of the Republic of South Africa: in re: Constitutionality of the Liquor Bill* 2000 (1) BCLR 1 (CC) (*Liquor Bill* judgment).

23 Constitution of the Republic of South Africa 1996 s 41(1)(g).

Although the Constitutional Court did not rule in favor of the Western Cape province about a very intrusive amendment to the Public Service Act in 1998, it established the principle that the courts will also look at the manner in which the national Parliament exercises its legislative authority.<sup>24</sup>

#### **4.2 Subnational Powers Found only within the Constitution**

As indicated above, the provinces have both exclusive and concurrent powers.<sup>25</sup> Additional powers may arise from the Constitution itself or be assigned by national legislation to the provinces.<sup>26</sup> The overall principle is that all provincial powers are to be found within the four walls of the Constitution. When the KwaZulu-Natal Provincial Legislature sought to pass a provincial constitution which did not meet the criteria set in the interim Constitution, the Constitutional Court held that provinces “were created by the Constitution and have only those powers that are specifically conferred on them under the Constitution.”<sup>27</sup> The provincial legislature could thus not regulate its own status by giving itself powers not conferred by the Constitution; the province could not pull itself up by its own federal bootstraps.

#### **4.3 Provincial Differences were Legitimate Differentiation**

The exercise of provincial legislative powers is, as in the case of the national Parliament, bound by the limits set by Constitution, including the Bill of Rights. The equality clause,<sup>28</sup> however, did not require that there could be no differentiation between provinces.<sup>29</sup> A bookie taking bets at horse racing complained that he was discriminated against in KwaZulu-Natal because in that province’s gambling law, only a person in his or her personal capacity could obtain a betting license, contrary to the position in all other provinces, where both a natural and a juridical person could take bets on horse racing. The Court found that because the gambling law was within the province’s competence, it did not offend the right against unfair discrimination.

#### **4.4 Restrictive Approach to Provincial Powers (Constitution-Making)**

In interpreting the various provisions of the Constitution, the Constitutional Court has tended to give a restricted interpretation of the various sources of provincial powers.

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<sup>24</sup> *Premier of the Province of the Western Cape v President of the Republic of South Africa* 1999 (4) BCLR 382 (CC).

<sup>25</sup> Constitution of the Republic of South Africa 1996 s 105(1)(b).

<sup>26</sup> As above s 105(1)(b).

<sup>27</sup> *Certification of the Constitution of the Province of KwaZulu-Natal*, 1996 1996 (11) BCLR 1419 (CC) para 13, quoting Chaskalson P in *re: The National Education Policy Bill no 83 of 1995* 1996 (6) BCLR 518 (CC) para 23.

<sup>28</sup> Constitution of the Republic of South Africa 1996 s 9.

<sup>29</sup> *Weare and Another v Ndebele and Others*, 2009 (4) BCLR 370 (CC) para 70.

#### 4.4.1 Constitution Making Power – Exclusive Provincial

A provincial legislature may adopt a provincial constitution which must, in the main, be consistent with the national Constitution. As the national Constitution is comprehensive, the scope for a unique provincial constitution is limited. It may, for example, include a Bill of Rights, but that must be consistent with the national Bill of Rights; it may not detract from the rights, but may add more.<sup>30</sup> The only real exception is that a provincial constitution could be different from the national Constitution with regard to 'legislative and executive structures and procedures'.<sup>31</sup> The Western Cape provincial parliament drafted a provincial constitution in which it set the number of seats of provincial legislature, as well as an electoral system that incorporated both party-list system and constituency-based presentation, which differed directly with the national Constitution's closed party-list proportional representation system. At the core was the interpretation of the scope of 'legislative and executive structures and procedures'. The Court held that it allows for "no more than a difference regarding the nature and the number of the elements constituting the legislative structure".<sup>32</sup> Setting a higher number of seats was in order, but that the election to those seats was not covered by the phrase. Through this narrow interpretation, the Court effectively put an end to much provincial experimentation with constitution-making.<sup>33</sup>

#### 4.4.2 Exclusive Powers Listed in Schedule 5

Although the list of exclusive competences has been termed 'anorexic', the Constitutional Court has not given even the limited power an expansive reading. When the national Parliament passed the National Liquor Bill, President Mandela had doubt about its constitutionality and referred it to the Constitutional Court because it dealt with 'liquor licenses', a Schedule 5 matter.<sup>34</sup> The Bill sought to regulate all licenses pertaining to liquor: the manufacturing, distribution, and consumption. At first the national government sought to bring the Bill under the concurrent function of 'trade', but the direct references to 'liquor licenses' certainly invoked Schedule 5. The

<sup>30</sup> *Certification of the Constitution of the Province of KwaZulu-Natal*, 1996 1996 (11) BCLR 1419 (CC) para 21.

<sup>31</sup> Constitution of the Republic of South Africa 1996 s 143(1)(a).

<sup>32</sup> *Certification of the Constitution of the Western Cape* 1997 (9) BCLR 1167 (CC) at para 48.

<sup>33</sup> See C Murray, "Provincial Constitution-making in South Africa: The (Non)example of the Western Cape" *Jahrbuch des Öffentlichen Rechts der Gegenwart*, (2001); R F Williams "Comparative Subnational Constitutional Law: South Africa's Provincial Constitutional Experiments" *South Texas Law Review* 40 (1999): 625; S Woolman and J Swanepoel, 'Constitutional History's Woolman and M Bishop (eds) *Constitutional Law of South Africa* (2<sup>nd</sup> ed 2014) ch 21.

<sup>34</sup> Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill (CCT12/99) [1999] 2000 (1) BCLR 1 (11 November 1999).

Constitutional Court held that provincial exclusive powers apply “primarily to matters which may appropriately be regulated intra-provincially.”<sup>35</sup> Intra-provincial matters are concerned with “activities that take place within or can be regulated in a manner that has a direct effect upon the inhabitants of the province alone.” Thus, excluded from the provinces purvey are matters with “a national dimension”. Consequently, on the basis of the need for economic unity, only licenses dealing with consumption within a province fell within the exclusive provincial domain.<sup>36</sup>

#### 4.4.3 Powers Expressly Assigned to the Province by National Legislation

A further source of provincial legislative authority is on those matters which have been “expressly assigned to the province by national legislation”.<sup>37</sup> The Financial Management of Parliament Act, 2009, purported to assign the power to regulate the financial management of provincial legislatures to those legislatures, but the only in reference to provincial legislation on financial management of provincial legislatures to be found in a schedule. When the Limpopo Provincial Legislature passed a bill in terms of this ‘assignment’, the premier of the province refused to assent to the bill and referred it to the Constitutional Court.<sup>38</sup> On the question whether there was a proper assignment, the Court took a narrow view: ‘the constitutional scheme shows that the legislative authority of the provinces must be conveyed in clear terms.’<sup>39</sup> Chief Justice Ngcobo held:

The assignment of legislative powers pursuant to Section 104(1)(b)(iii) must leave no doubt about the act of assigning and the nature and the scope of the powers assigned. It is a requirement of the rule of law, one of the foundational values of our constitutional democracy, that when Parliament assigns its legislative powers to the provinces it must do so in a manner that creates certainty about the nature and extent of the powers assigned. This will enable the provinces to exercise the powers in accordance with, and within the limits of, the terms of assignment.<sup>40</sup>

<sup>35</sup> As above para 53.

<sup>36</sup> As above para 76.

<sup>37</sup> Constitution of the Republic of South Africa 1996 s 104(1)(b)(iii) read with section 44(1)(a)(iii).

<sup>38</sup> Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature and Others 2011 (11) BCLR 1181 (CC).

<sup>39</sup> As above para 35. For a critique of the judgment, see Robert Williams & Nico Steytler, “Squeezing out Provinces’ Legislative Competence in Premier: Limpopo Province v Speaker: Limpopo Provincial Legislature and Others I and II,” *South African Law Journal* 129 (4) (2012):621-637.

<sup>40</sup> As above para 36.

#### 4.4.4 Constitution Envisages the Enactment of Provincial Legislation

The Court applied the same logic to the fourth source of provincial powers: “any matter for which a provision of the Constitution envisages the enactment of provincial legislation”.<sup>41</sup> The provincial legislature sought to rely on a number of sections which could provide the basis of ‘envisaged’ provincial legislature - sections 195, 215 and 216 – although none of them expressly did so. The Chief Justice applied the same ‘express’ test:

Our constitutional scheme does not permit legislative powers of the provincial legislatures to be implied. Were it to be otherwise, the constitutional scheme for the allocation of legislative power would be undermined. The careful delineation between the legislative competence of Parliament and that of provincial legislatures would be blurred. This may very well result in uncertainty about the limits of the legislative powers of the provinces.<sup>42</sup>

Not all the justices were in agreement with the restricted approach. In a dissenting ruling Justice Cameron opined as follows:

That there are unmistakably clear instances of constitutional conferral of provincial legislative power does not help to show that less clear instances are not also envisaged. Indeed, the goal of complete clarity may be a chimera, as our judgments on the schedules powers show. The supposition that it can be attained should not therefore dominate our approach to “expressly assigned” versus “envisaged”.<sup>43</sup>

Importantly he observed that “as a matter of fundamental outlook, it would seem to me surprising if the Constitution did not envisage that provinces may legislate for the financial management of their own legislatures.”<sup>44</sup>

#### 4.4.5 Concurrent Powers

The bulk of provincial powers fall within Schedule 4 which provinces share with the national government. Until now there has been remarkably little legislative activity by the provincial legislatures; the pattern established has been for the national government to pass detailed legislation and the provinces acting as implementers of such legislation.<sup>45</sup> The limited legislation that provinces have produced has not yet led to a conflict of laws. Thus, quite

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<sup>41</sup> Constitution of the Republic of South Africa 1996 s 104(1)(a)(iv).

<sup>42</sup> As above para 39.

<sup>43</sup> As above para 121.

<sup>44</sup> As above para 124.

<sup>45</sup> N Steytler “Concurrency and co-operative government: The law and practice in South Africa” *SA Public Law* 16 (2001) 241-254.

remarkable, after 20 years, there is yet no definitive interpretation of the override clauses in the Constitution.<sup>46</sup>

The Constitutional Court has, however, gave an expansive role for provinces, acting through the National Council of Provinces (NCOP), in the passing of national legislation affecting provincial interests. In terms of the Constitution, a Bill introduced in the National Assembly on a matter that “falls within a functional area listed in Schedule 4” or legislation envisaged in a number of specific sections,<sup>47</sup> as well as legislation “which includes any provision affecting the financial interests of the provincial sphere of government”,<sup>48</sup> a specific procedure must be followed for the so-called ‘section 76’ Bills. On approval by the National Assembly, the Bill must be tabled in the NCOP for its approval. In the case of a conflict between the two houses of Parliament, mediation must first be attempted and if that fails, the National Assembly may override the NCOP’s opposition by a two thirds majority vote.<sup>49</sup> A similar process applies where the Bill is introduced in the NCOP.<sup>50</sup> The NCOP’s decision on these matters is made by the block votes of the nine provinces; the ten-person delegation from each province has one vote, for which each delegation must have a mandate from their respective provincial legislatures. In terms of section 75 all other Bills must also be submitted to the NCOP for approval, but then each member of the NCOP has an individual vote. Where a majority of delegates votes against the so-called ‘section 75’ Bill, it has only a delaying effect; the National Assembly may by a simple majority override the negative vote in the NCOP. It is thus important to distinguish between the section 75 and section 76 Bills.

The decision on the nature of a Bill is done by the two presiding officers of the two houses; the Speaker of the National Assembly and the Chairperson of the NCOP must ‘tag’ a Bill.<sup>51</sup> If a Bill is wrongly tagged, for example, a Bill that affects “provincial interests”, it would deny the NCOP’s greater law-making role. The question thus arose about the test to apply in making the ‘tagging’ decision as well as the consequences of a wrong ‘tagging’.

The matter came before the Constitutional Court in *Tongoane and Others v Minister of Agriculture and Land Affairs and Others*.<sup>52</sup> A rural community and NGOs objected to the Communal Land Rights Act<sup>53</sup> which, according to the

<sup>46</sup> Constitution of the Republic of South Africa 1996 s 146.

<sup>47</sup> As above s 76(3).

<sup>48</sup> As above s 76(4).

<sup>49</sup> As above s 76(1).

<sup>50</sup> As above s 76(2).

<sup>51</sup> C Murray and R Simeon “‘Tagging’ bills in Parliament: Section 75 of Section 76?” v(2006) *South African Law Journal* v 123(2) p 232.

<sup>52</sup> *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC).

<sup>53</sup> Communal Land Rights Act 11 of 2004.

claimants entrenched the authority of patriarchal traditional leaders in land tenure matters at the expense of women's interests. The attack on the Act was, however, mainly procedural: the Act was passed as a section 75 Bill, thus not following the 'more burdensome procedure' for section 76 Bills.<sup>54</sup>

On the first question of 'tagging' the presiding officer argued that the Bill dealt with 'land tenure', a functional area falling exclusively in the competence of the national government. The applicants contended, on the other hand, that the Bill also dealt with 'indigenous and customary law', an item in Schedule 4. Parliament further argued that following the 'pith and substance' test, the Bill dealt with land and that traditional leadership in terms of customary law was incidental to land tenure. Their argument was that the test of 'tagging' legislation should be the same as determining whether the legislation falls within the competence of a legislature.<sup>55</sup>

The Court rejected the application of one test for both issues; the tagging test must be 'broader than that for determining legislative competence'.<sup>56</sup> The test for tagging is if the provisions in a bill 'substantially affect the interests of provinces' it must be enacted in accordance with the procedure stipulated in section 76.<sup>57</sup> The reason for this distinction is as follows:

The 'substantial measure' test permits consideration of the provisions of the Bill and their impact on matters that will substantially affect the provinces. This test ensures that that legislation that affects provinces will be enacted in accordance with a procedure that allows provinces to fully and effectively play their role in the law-making process.<sup>58</sup>

In this case, although the Act dealt with land tenure, it affected traditional leadership, a matter in which the provinces had a substantial interest.

The next question concerned the consequences of following the wrong legislative route? The Court's point of departure was to reassert the basic premise of constitutional supremacy. It quoted with approval the early decision of *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa*:<sup>59</sup>

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<sup>54</sup> *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (8) BCLR 741 (CC) para 45.

<sup>55</sup> As above para 50-51.

<sup>56</sup> As above para 70.

<sup>57</sup> As above para 72.

<sup>58</sup> As above para 71.

<sup>59</sup> *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa* 1995 (10) BCLR 1289 (CC) para 62.

The new Constitution establishes a fundamentally different order to that which previously existed. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution; it is subject in all respects to the provisions of the Constitution and has only the powers vested in it by the Constitution expressly or by necessary implication.<sup>60</sup>

As Parliament did not follow the correct legislative procedure, the Act was from the beginning invalid.

## 5. Generous Interpretation of Local Government Powers

Although Kenya has only one level of subnational government – the counties – the jurisprudence on the Constitutional Court on South Africa’s second level of government – the municipalities – is instructive as it deals with the problems of functional overlaps.

### 5.1 Subnational Governments have Original Powers Drawn Directly from Constitution, not Derived from Legislation

The new democratic constitutional order also meant a radical change with respect to local government; it was entrenched in the interim Constitution and further strengthened in the 1996 Constitution.

Before 1994, municipal law making powers were delegated powers, derived from provincial statutes. As a result, any municipal by-law was merely an administrative act and thus subject to administrative law review. After 1994 the powers of three levels of government were derived from Constitution. In the celebrated case of *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*<sup>61</sup> the Constitutional Court described the shift as follows:

local government is no longer a public body exercising delegated powers. Its council is a deliberative legislative assembly with legislative and executive powers recognised in the Constitution itself.<sup>62</sup>

Consequently, because the budget is deemed a legislative act, it cannot be challenged on administrative law grounds any longer.

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<sup>60</sup> As above para 108.

<sup>61</sup> *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17, 1999 (1) SA 374, 1998 (12) BCLR 1458 at paras 44 and 46.

<sup>62</sup> As above para 26

## 5.2 Local Government Powers

Section 156(2) of the Constitution provides that a municipality has the power make by-laws on matters listed in Schedules 4B and 5B. However, both the national and provincial governments have powers also over the same Schedules but in a restricted manner.<sup>63</sup> The national and provincial governments have the legislative and executive authority “to see to the effective performance by municipalities of their functions”, by regulating the exercise’ of those powers by the municipalities.<sup>64</sup> This regulatory power of the other two levels of government entails that they are restricted to framework legislation, setting norms and standards, and not determine particular outcomes.

The local government’s powers overlap with those of national and provincial governments in two ways. The first, as mentioned above, is a supervisory overlap (the regulatory powers in terms of section 155(7)) and an overlap between the powers listed in Schedules 4A and 5A (belonging to provinces) and Schedules 4B and 5B allocated to municipalities.<sup>65</sup> The Constitutional Court has sought to protect the municipal scope for making autonomous decisions against the intrusion by the other spheres.

## 5.3 In Respect of National Legislation

Local government decisions are not necessarily trumped by valid national decisions. For example, the granting of a mining license does not override any municipal decisions on land use planning. As mining is not listed in either Schedules 4 or 5, it falls within the plenary powers of the national government. In the case of *Maccsands*,<sup>66</sup> the company obtained a license from the national Department of Mineral Resources to mine sand in the Cape Town metropolitan area. The City of Cape Town refused permission as the area in which the mining was to take place was zoned for residential use. The miner thus complained that the City could veto a national decision. The Constitutional Court disagreed. Although ‘mining’ is exclusive national competence, nationally-granted mining license does not trump municipal land-use permission. Rather, dual approvals are required; without such land-use permission from the municipality, mining license cannot be exercised. The Constitutional Court said:

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<sup>63</sup> See generally, N Steytler and J Visser *Local Government Law of South Africa* 2014, chapter 5.

<sup>64</sup> Constitution of the Republic of South Africa 155(7).

<sup>65</sup> As above<sup>65</sup>(5-16); Nico Steytler and Yonatan Fesha, ‘Defining local government powers and functions’ *South African Law Journal* 124 (2007) 320.

<sup>66</sup> MEC for Local Government, *Environmental Affairs and Development Planning, Western Cape Province In re: Minister for Mineral Resources and Swartland Municipality and Others and Maccsands (Pty) Ltd and The City of Cape Town and Others* [2012] ZACC 10 (29 May 2012) (*Maccsands*).

[i]t is proper for one sphere of government to take a decision whose implementation may not take place until consent is granted by another sphere, within whose area of jurisdiction the decision is to be executed. If consent is, however, refused it does not mean that the first decision is vetoed”.<sup>67</sup>

It simply meant that permission from two bodies had to be obtained.

#### 5.4 In Respect of Provincial Legislation

There are considerable overlaps between local government’s functional areas in Schedules 4B and 5B and the provinces’ listed powers in Schedules 4A and 5A. First, in the local government functional areas of health, roads, traffic, tourism, airports and abattoirs, it is only the qualifying word ‘local’ that distinguishes these powers from similar provincial functional areas. Second, some provincial functional areas are inclusive of a local government functional area: for example, the provincial power of ‘pollution control’ (Schedule 4A) could be regarded as inclusive of the local functional area of ‘air pollution’ (Schedule 4B).

In confronting this question the courts are increasingly using a ‘bottom-up’ approach; first define the local government power and what remains falls in the jurisdiction of the provinces.<sup>68</sup> If such an approach is not followed it would lead to the obliteration of local functional areas as they inevitably fall in either of the provinces broad encompassing functional areas or the national government’s residual powers. The Supreme Court decision of *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*<sup>69</sup> supported such a bottom-up approach.

It is to be expected that the powers that are vested in government at national level will be described in the broadest of terms, that the powers that are vested in provincial government will be expressed in narrower terms, and that the powers that are vested in municipalities will be expressed in the narrowest terms of all. To reason inferentially with the broader expression as the starting point is bound to denude the narrower expression of any meaning and by so doing to invert the clear constitutional intention of devolving powers on local government.<sup>70</sup>

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<sup>67</sup> *Maccsands Pty Ltd and others v and City of Cape Town and others* 2011 CCT 103/11(2012) para 48.

<sup>68</sup> As above n 65ch 5, 5-21.

<sup>69</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (2) BCLR 157 (SCA).

<sup>70</sup> As above para 35–36.

<sup>71</sup> As above.

Although the Constitutional Court<sup>71</sup> did not explicitly express itself in the same language as the Supreme Court of Appeal, its underlying approach is nevertheless the same.<sup>72</sup> It underlined the distinctiveness of provincial powers and local powers:

The distinctiveness lies in the level at which a particular power is exercised. For example, the provinces exercise powers relating to “provincial roads” whereas municipalities have authority over “municipal roads”. The prefix attached to each functional area identifies the sphere to which it belongs and distinguishes it from the functional areas allocated to the other spheres. In the example just given, the functional area of “provincial roads” does not include “municipal roads”. In the same vein, “provincial planning” and “regional planning and development” do not include “municipal planning”.<sup>73</sup>

The Constitutional Court has followed this approach in a number of decisions. In the first major decision on determining the scope of local government powers, the Court had to decide of the constitutionality of the provisions in the Development Facilitation Act of 1992, an old order piece of legislation that gave provinces the power to set up a tribunal that could decide on the rezoning of land and the establishment of townships. The province of Gauteng argued that this Act was constitutional as rezoning fell within the broad provincial competences of ‘regional planning and development’, and ‘urban and rural development’ (Schedule 4A) and ‘provincial planning’ (Schedule 5A). The City of Johannesburg, on the other hand contended that the matters fall squarely with the ambit of ‘municipal planning’ (Schedule 4B). The Court agreed with the latter; rezoning was an essential part of ‘municipal planning’ and could not be subsumed under the broader ambit of the provincial functional areas. The interpretation method the Court followed is also instructive:

“planning” in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land. There is nothing in the Constitution indicating that the word carries a meaning other than its common meaning which includes the control and regulation of the use of land. It must be assumed, in my view, that when the Constitution drafters chose to use “planning” in the municipal context, they were aware of its common meaning.<sup>74</sup>

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<sup>72</sup> As above n 65ch 5, 5-11.

<sup>73</sup> *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (2) BCLR 157 (SCA) para 55.

<sup>74</sup> As above para 57.

The terms used in the Schedules often do not have an inherent legal meaning with a content fixed in case law. The Courts have to give meaning to broad phrases and often draw from practice. The danger is, however, one of path dependency. Whatever was done in the past should not necessarily be replicated in the future, thereby undermining the radical change the Constitution ought to effect. The Court has, however, asserted an overall purposive interpretation:

[t]he purposive construction of the schedules requires, in the present context, that a restrictive meaning be ascribed to [provincial competence of] “development” so as to enable each sphere to exercise its powers without interference by the other spheres. This restrictive approach coheres with the functional scheme of the schedules which vests specific powers in municipalities.<sup>75</sup>

The decision in the *Gauteng Development Tribunal* case was followed by two further decisions in which the Constitutional Court affirmed the pre-eminence of municipal planning competence over provincial claims to shape the local environment.<sup>76</sup>

## 5.5 Transitional Measures and Compliance

The process of establishing local government was protracted. It went through a preliminary phase, a transitional phase in terms of the Local Government Transition Act 201 of 1993, as well as a final phase when all the provisions in the 1996 Constitution pertaining to local government were implemented in 2000. The establishment of all the institutions of local government also took time and strict compliance with the various procedures and processes were not always complied with. This posed a dilemma for the courts; a strict adherence to legal requirements is necessary to build constitutionalism and the rule of law. However, visiting every infraction with invalidity could be highly disruptive to realize the objective of the new dispensation. In general, courts were reluctant to apply an overly strict review of the national and provincial governments’ efforts to build a new local democracy.<sup>77</sup> For example, when the Western Cape MEC did not give effect to an amendment to the Local Government Transition Act (LGTA) concerning the composition of district councils, tax payers sought to invalidate all the decision of the district councils including all levies imposed and collected. The Constitutional Court

<sup>75</sup> As above para. 62.

<sup>76</sup> *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* 2014 (2) BCLR 182 (CC); *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others*; *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (5) BCLR 591 (CC).

<sup>77</sup> As above n 65Sch 2 2-13.

in *MEC for Local Government and Planning of the Western Cape v Paarl Poultry Enterprises CC t/a Rosendal Poultry Farm*<sup>78</sup> ruled that the district councils did not become unlawful simply because the MEC did not give effect to the LGTA amendment. The Court stressed how important it was for courts to be mindful of the potentially disruptive effects of their decisions.

A similar approach is noticeable in a recent Constitutional Court decision dealing with the roll out of property rates by municipalities to areas which were not previously rated. The municipal efforts at rate collection met with considerable opposition of land owners who grabbed at every infraction the municipalities may have committed during the process of implementing a system which was highly complex; over a period of ten years the legal framework was controlled by provincial ordinances, the Local Government Transitional Act of 1993, and, eventually, the Municipal Property Rates Act of 2004.<sup>79</sup>

In *Liebenberg NO and Others v Bergrivier Municipality*<sup>80</sup> a number of farmers objected to paying newly imposed rates on the basis that a few procedural flaws rendered the imposition of property rates invalid. The Constitutional Court affirmed its general approach of determining the consequences of a municipality's non-compliance with all applicable statutory prescripts, as follows:

a failure by a municipality to comply with relevant statutory provisions does not necessarily lead to the actions under scrutiny being rendered invalid. The question is whether there has been substantial compliance, taking into account the relevant statutory provisions in particular and the legislative scheme as a whole.<sup>81</sup>

Writing for the majority Mhlantla AJ quoted with approval the following SCA *dictum*: “To nullify the revenue stream of a local authority merely because of an administrative hiccup appears to me to be so drastic a result that it is unlikely that the Legislature could have intended it”.<sup>82</sup> The Court split on this question. Khampepe J in her minority judgment differed sharply on the principle of legality:

Where the State purports to extract taxes from its citizens – conduct that goes to the very heart of the social contract between government

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<sup>78</sup> *MEC for Local Government and Planning of the Western Cape v Paarl Poultry Enterprises CC t/a Rosendal Poultry Farm* 2002 (2) BCLR 133 (CC).

<sup>79</sup> See J de Visser and N Steytler ‘Confronting the state of local government: the 2013 Constitutional Court decisions’ (2013) *Constitutional Court Review* (in press).

<sup>80</sup> *Liebenberg NO and Others v Bergrivier Municipality* 2013 (8) BCLR 863 (CC) (*Liebenberg*).

<sup>81</sup> As above para 26.

and its people – that extraction must be done in a lawful manner. Where a local authority purports to impose rates, that imposition must be done in accordance with the constraints that Parliament has imposed. If we are to give cognizance to the fact that the Constitution now empowers municipalities to exercise original legislative powers, we must also accept that municipal authorities may no longer adopt an informal approach to the exercise of their powers.<sup>83</sup>

Although the judge is correct that ‘the principle of legality [lies] at the heart of our modern constitutional dispensation’<sup>84</sup> the over prescription of regulatory requirements for the levying of rates makes many municipal decisions, administered by the officials not versed in the niceties of law, vulnerable to procedural challenges with potentially grave consequences for municipalities. The Court’s approach of requiring only substantial compliance with rules as long as the objects of the legislation are achieved, is appropriate for a context in which new municipalities are trying to find their feet.

## 6. Analysis

The relevance of the South African case law to the interpretation of the devolution provisions in the Kenyan Constitution of 2010 is apparent.<sup>85</sup> There are both structural and textual similarities. However, the two systems of devolution are also sufficiently different to pay due caution to the wholesale adoption of South African jurisprudence in the area of devolution.

A principal difference is the place and role of devolution in the constitutional project. In South Africa the provincial system was a compromise between the two main negotiating parties, the National Party and the African National Congress. The latter was implacably opposed to the notion of federalism as it would entrench the divide-and-rule grand apartheid system of the ethnic bantustans. The foundational value of the 1996 Constitution in section 1 is thus clear: South Africa is ‘one, sovereign democratic state’. The Constitutional Court declared in the *First Certification* judgment that this proclamation gives the Constitution a ‘unitary emphasis’.<sup>86</sup> This emphasis could be reconciled with the limited federal-type arrangements with regard to provinces through the notion of ‘cooperative government’.<sup>87</sup> Whereas devolution is a

<sup>82</sup> As above para.24, with reference to *NokengTsaTaemane Local Municipality v Dinokeng Property Owners Association* [2012] 2 All SA 46 (SCA) at para 14.

<sup>83</sup> As above para 164.

<sup>84</sup> As above para 165.

<sup>85</sup> See generally John Mutakha Kangu, *Constitutional Law of Kenya on Devolution*(2015).

<sup>86</sup> *First Certification*, para 287.

<sup>87</sup> *First Certification*, para 469.

fundamental principle and at the core of the new constitutional dispensation in Kenya, it is not the case in South Africa. It was therefore not surprising that the Constitutional Court at the beginning of our new constitutional journey placed the emphasis on building unity from our fractious past and consistently did not favor an interpretation that expanded provincial autonomy.

As second contextual element that may have motivated the Constitutional Court's pro-central stance was the perilous state of provincial governance. Where the Court saw scant evidence of the ability to provide basic services, it was not inclined to extend provincial powers. In *Mashavha v President of the Republic of South Africa and Others* the Court invalidated the assignment to all provinces of the responsibility to distribute social grants because one province could patently not execute the function.<sup>88</sup> The converse may be equally true; if provinces are showing a real value add, the courts may place more trust in them. Most recently, the Constitutional Court rebuffed a challenge from the national Minister of Police that the establishment of a commission by the provincial premier in the Western Cape was an impingement on the national competence of policing.<sup>89</sup> The commission of inquiry, which the Premier was entitled to appoint in terms of the Constitution,<sup>90</sup> was tasked to examine the breakdown in relations between the national police and the population of a township in Cape Town. The Court noted that '[t]here is much to worry about when the [national] institutions that are meant to protect vulnerable residents fail, or are perceived to be failing.'<sup>91</sup> The subtext was that it was thus appropriate for the province to act proactively and exact accountability from the national police service.

In the context of this analysis, what would explain the Court's more generous interpretation of local government's powers? First, local government is a necessity of government which poses no centrifugal threat to the nation; to the contrary, the cities have been the melting pot where the new South African nation is taking shape. Second, despite the failure of many municipalities, particularly in rural areas, the large metros and cities, which have been the litigators, are reasonably well governed.

## 7. Conclusion

Courts have played an important role in shaping the nature of devolution through the definition of powers and functions. Litigation has been limited as

<sup>88</sup> *Mashavha v President of the Republic of South Africa and Others* 2004 (12) BCLR 1243 (CC).

<sup>89</sup> *Minister of Police and Others v Premier of the Western Cape and Others* 2013 (12) BCLR 1365 (CC).

<sup>90</sup> Constitution of the Republic of South Africa 1996 s 205(6).

<sup>91</sup> As above para52.

it has originated mostly from opposition held provinces and municipalities. Litigation has also been initiated by communities and nongovernmental organizations.

So far the courts have been parsimonious with provincial powers. However, if provinces show themselves not dens of patronage and maladministration, but as capable and effective instruments of governance and development, and add value, the courts might see the value of expanding the provinces' constitutional space. The same applies to municipalities; if they are able to show that they provide effective government, the courts will no doubt also protect their area of autonomy.



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# Interpreting Divided Sovereign Jurisdiction: Federalism in Canada

Robin K. Basu<sup>1</sup>

## 1. Introduction and Overview

Animals are divided into:

1. those that belong to the Emperor,
2. embalmed ones,
3. those that are trained,
4. suckling pigs,
5. mermaids,
6. fabulous ones,
7. stray dogs,
8. those included in the present classification,
9. those that tremble as if they were mad,
10. innumerable ones,
11. those drawn with a very fine camelhair brush,
12. others,
13. those that have just broken a flower vase,
14. those that from a long way off look like flies.

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<sup>1</sup> The author thanks the Honourable Justice Constance Hunt (ret'd) of the Alberta Court of Appeal for her valuable comments on a draft of this paper. The views expressed are the author's alone. Disclosure – the author was involved as counsel in the following cases cited: *Ordon Estate v Grail* [1998] 3 SCR 437, *Rothmans Benson & Hedges v Saskatchewan* 2005 SCC 13, *British Columbia v Imperial Tobacco Canada Ltd* 2005 SCC 49, *Canadian Western Bank v Alberta* 2008 SCC 22, *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19, *Northwestern Outback Aviation Ltd v Ontario (Attorney General)* 2011 ONSC 1063, [2011] OJ No 1081, *Newfoundland and Labrador v AbitibiBowater Inc* 2012 SCC 67 and *Bank of Montreal v Marcotte* 2014 SCC 55.

***'The Celestial Emporium of Benevolent Knowledge' quoted by Jorge Luis Borges<sup>2</sup>***

To this likely fictional and certainly bizarre taxonomy of animals a Canadian jurist might add:

1. those animals of national concern that lie within the exclusive jurisdiction of the Parliament of Canada,
2. those, which by their local and private nature, lie within the exclusive jurisdiction of the provinces,
3. the remainder, over which jurisdiction is concurrent.

Not only are Canadian jurists much concerned with the classification of subjects – whatever they may be – as between national and provincial jurisdiction, they are also sharply aware of the seeming arbitrariness of dividing the world into such categories. Many subjects can fall into more than one category. Sometimes the categories overlap; some seem to be inconsistent. It is often difficult to discern – from a distance of almost a century and a half – what the rationale was for the original division of responsibility, and, more importantly, what can or should be done to make the division work in modern conditions to respond to current needs. Just as it would be difficult to subject Borges' taxonomy of animals to systematic analysis (except perhaps to prove the futility of classification), so too would efforts to develop a comprehensive theory of the allocation of powers – to derive, or explain, the respective lists of national and provincial powers from a consistent philosophy or set of rigid principles – seem destined to fail.

Faced with this reality, Canadian jurists have, for the most part, arrived at somewhat more modest goals and pragmatic approaches to expounding our federalism. We have no grand theory as to what the ideal division of responsibility should be between central and devolved authorities. Rather, Canadian jurists employ principles and techniques,<sup>3</sup> refined and tested over time that, for Canada at least, seem to allow for the near universally-accepted resolution by the judiciary of disputes about jurisdiction between different levels of government, the maintenance of a general equilibrium between the levels of government, the accommodation and encouragement of inter-governmental cooperation, the preservation of as much freedom of action as possible for the democratically-elected governments of both central and provincial levels and the retention of sufficient adaptability to permit a nineteenth century text to serve modern needs.

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<sup>2</sup> Reproduced in Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences*, (Reissue ed 1994) xv [trans of *Les mots et les choses: Une archéologie des sciences humaines* (1966)].

<sup>3</sup> Balanced federalism and respect for the written text (section 7 below); restraint in applying federal paramountcy (section 9); pith and substance (section 11); incidental effects (section 11.2); presumption of constitutionality (section 11.4); double aspect (section 12); incrementalism (section 13); and progressive interpretation (section 14).

In the leading exposition of Canadian federalism doctrine from the Supreme Court of Canada in the twenty-first century, *Canadian Western Bank v Alberta*,<sup>4</sup> the Court summed up the overall state of the jurisprudence as follows:

As is true of any other part of our Constitution — this “living tree” as it is described in the famous image from *Edwards v. Attorney-General for Canada* ... — the interpretation of these powers and of how they interrelate must evolve and must be tailored to the changing political and cultural realities of Canadian society.

As the final arbiters of the division of powers, the courts have developed certain constitutional doctrines, which, like the interpretations of the powers to which they apply, are based on the guiding principles of our constitutional order. The constitutional doctrines permit an appropriate balance to be struck in the recognition and management of the inevitable overlaps in rules made at the two levels of legislative power, while recognizing the need to preserve sufficient predictability in the operation of the division of powers. The doctrines must also be designed to reconcile the legitimate diversity of regional experimentation with the need for national unity. Finally, they must include a recognition that the task of maintaining the balance of powers in practice falls primarily to governments, and constitutional doctrine must facilitate, not undermine what this Court has called “cooperative federalism”.<sup>5</sup> ...

Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of cooperation among government actors to ensure that federalism operates flexibly.<sup>6</sup>

The road to the present state of federalism jurisprudence has not been smooth and some approaches, particularly those grounded in a rigid formalism, have proven unworkable or problematic and have been discarded or limited in application.<sup>7</sup>

The task facing Kenya's judiciary in the years to come under the 2010 Constitution is not dissimilar to that faced by Canadian judiciary over the last 148 years in interpreting the allocation of powers between national and sub-national levels of government. The purpose of this paper is to outline,

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<sup>4</sup> *Canadian Western Bank v Alberta* 2007 SCC 22.

<sup>5</sup> *Canadian Western Bank v Alberta* 2007 SCC 22 at paras 23-24.

<sup>6</sup> *Canadian Western Bank v Alberta* 2007 SCC 22 at para 42.

<sup>7</sup> Watertight compartments (section 5); inter-jurisdictional immunity (section 8).

for the non-Canadian jurist, the approaches taken by Canadian courts to the problem of interpreting the division of powers and jurisdictional conflicts under Canada's Constitution. It is hoped that some of the work Canadians have been doing may prove to be of assistance to Kenyan judges and lawyers, and perhaps to jurists from other countries with devolved systems, as they try to make their own arrangements work for them.

In the pages that follow an effort is made to supply basic background information (institutional, geographic, economic, historical) so a reader who is not familiar with the Canadian scene may appreciate Canadian federalism doctrine in context. This may assist in a more profitable reading of the sources.<sup>8</sup>

## 2. The General Structure of Canadian Government

Canada's federalism formally dates from the enactment by the United Kingdom Parliament of the *British North America Act, 1867* (now the *Constitution Act, 1867*)<sup>9</sup> which established a federal state and constitutional monarchy within the British Empire, subject to the ultimate authority of the UK Parliament. This is referred to as "Confederation" and the *Constitution Act, 1867* allocated power between national and provincial levels of government.<sup>10</sup>

Constitutional ties to the UK were severed in steps, first by the *Statute of Westminster, 1931*<sup>11</sup> which granted Canada full control of domestic and foreign affairs, then the abolition of appeals to the Judicial Committee of the Privy Council as of 1949, and lastly the *Canada Act, 1982*,<sup>12</sup> under which the UK Parliament gave up residual sovereignty over the Constitution and prescribed a procedure for its domestic amendment.<sup>13</sup> The *Canada Act, 1982* also entrenched a bill of rights.<sup>14</sup> The remaining constitutional tie to the United Kingdom is the British Monarch, who is Canada's head of state.<sup>15</sup>

<sup>8</sup> The indispensable source is P Hogg, *Constitutional Law of Canada* (5<sup>th</sup> ed supplemented, 2007). Supreme Court of Canada decisions are at <<http://scc-csc.lexum.com/scc-csc/scc-csc/en/nav/date.do>>. More Canadian court decisions and federal and provincial legislation are at <<http://www.canlii.org/>>.

<sup>9</sup> 30 & 31 Victoria c 3 (UK), renamed the *Constitution Act, 1867* by the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982, 1982 c 11* (UK). Canadian constitutional statutes (1867-1982) are at <<http://laws-lois.justice.gc.ca/eng/Const/index.html>>; supplemental constitutional materials are in the Revised Statutes of Canada (RSC) Appendix II. Much of the Constitution is contained in other instruments from the UK and Canada, and in unwritten constitutional principles, parliamentary rules and convention: Hogg, above n 8, ch 1.10; R Dawson, *The Government of Canada* (5<sup>th</sup> ed, 1970), 58, 60 132.

<sup>10</sup> The allocation of powers is in ss. 91 to 95 of the *Constitution Act, 1867*. See section 4 below.

<sup>11</sup> *Statute of Westminster 1931, 1931 c 4* (UK).

<sup>12</sup> *Canada Act 1982, 1982 c 11* (UK).

<sup>13</sup> This step is referred to as patriation. The amending formula is in Part V of the *Constitution Act, 1982*.

<sup>14</sup> *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*.

<sup>15</sup> *Constitution Act, 1867, s 9*. The British Monarch is represented in Canada by the Governor-General (for the national government) and Lieutenant-Governors (for each of the provinces). The Monarch appoints these representatives on the advice of the Prime Minister of Canada: *Constitution Act, 1867, ss. 12 and 58*, and George VI, Letters Patent Constituting the Office of Governor General and Commander-in-Chief of Canada, *Canada Gazette* 91(12) 1 October 1947.

## 2.1 National Government

The national Parliament (referred to as Parliament) consists of a bicameral legislature (House of Commons and Senate) together with the Monarch.<sup>16</sup> By their combined action they exercise legislative authority within the jurisdiction assigned to Parliament by the *Constitution Act, 1867*.<sup>17</sup> The House of Commons is an elected body with 338 seats, each representing a particular territorial constituency roughly on the basis of population.<sup>18</sup> National elections, which must be held no less frequently than every five years,<sup>19</sup> are currently dominated by three political parties (along the left-right spectrum), but there is no constitutional requirement for political parties.<sup>20</sup> At times, certain regionally-based political parties have achieved electoral success, resulting in regionally-fractured national politics.<sup>21</sup> The Senate is an appointed body in which 105 seats are allocated, by constitutional stipulation, on a broadly regional basis.<sup>22</sup> Originally conceived as a national institution to reflect regional interests, the Senate has not been nearly as effective in so doing as the provincial governments.<sup>23</sup> Lacking legitimacy as an elected body, it rarely opposes the will of the Commons.<sup>24</sup>

The executive is not fully separated from the legislature as in congressional or presidential systems. Typically, the party with the most elected members in the House will form the government, and a Prime Minister and Cabinet selected from its members serve as the executive, assisted by the politically neutral civil service.<sup>25</sup> To retain power, the executive must enjoy the confidence of a majority of the House.<sup>26</sup>

<sup>16</sup> *Constitution Act, 1867*, s 17.

<sup>17</sup> Legislation imposing taxes or appropriating public funds must originate in the House: *Constitution Act, 1867*, s 53. A bill becomes law if passed by both House and Senate and given Royal Assent by the Monarch: *Constitution Act, 1867*, s 55. Royal Assent has not been withheld in modern times: Hogg, above n 8, 9-22; Dawson above n 9, 134 and footnote 40.

<sup>18</sup> Parliament of Canada, 'Canadian Parliamentary Institutions', *House of Commons Procedure and Practice* (2<sup>nd</sup> ed, 2009) <<http://www.parl.gc.ca/procedure-book-livre>> at 1 October 2015.

<sup>19</sup> *Constitution Act, 1982*, sub-section 4(1).

<sup>20</sup> Laurier Institute for the Study of Public Opinion and Policy <<http://www.lispop.ca>>; N Ward Dawson's *Government of Canada* (6<sup>th</sup> ed, 187), ch. 1; Parliament of Canada, above n 18. <<http://www.parl.gc.ca/procedure-book-livre>> at 1 October 2015.

<sup>21</sup> B Kay 'A Regional Swing Model for Converting Canadian Popular Vote into Parliamentary Seats', Laurier Institute for the Study of Public Opinion and Policy <<http://www.lispop.ca/sites/lispop.ca/files/Improving%20Upon%20The%20Cube%20Law.pdf>> at 1 October 2015; Ward, above n 20, ch. 1.

<sup>22</sup> *Constitution Act, 1867*, s 22. Twenty-four seats are assigned to each of the four major regions: (i) the most populous province, Ontario; (ii) Québec, the second-most populous province and home to the principal French-speaking population; (iii) three relatively small Maritime provinces of the Atlantic coast; and (iv) the four Western provinces. The remaining seats are assigned six to Newfoundland & Labrador and one each to the three federally-administered territories.

<sup>23</sup> *Reference re Senate Reform* 2014 SCC 32, paras 1, 14-20; Hogg, above n 8, 9-17 to 9-22.

<sup>24</sup> As above.

<sup>25</sup> Hogg, above n 8, 9-9 to 9-15.

<sup>26</sup> As above.

## 2.2 Provinces

In 1867, there were four provinces: Ontario, Québec, Nova Scotia and New Brunswick.<sup>27</sup> The number has since grown to ten with the addition of other British colonies: Manitoba (1870), British Columbia (1871), Prince Edward Island (1873) and Newfoundland and Labrador (1949); and the creation of two provinces in the Prairie region: Saskatchewan and Alberta (1905). Canada also has three federally-administered Arctic territories: the Yukon, Northwest Territories and Nunavut.

The arrangements of government in each of the provinces vary but generally share the same structure as the national government except that all provinces now have a unicameral legislature.<sup>28</sup> Provincial legislatures are sometimes called provincial Parliament, or, more commonly, the provincial legislature or assembly.<sup>29</sup>

The provincial legislatures are understood to be sovereign within their areas of jurisdiction set out in the *Constitution Act, 1867*.<sup>30</sup> They do not owe their existence or power to the national Parliament. This concept derives from the British principle of parliamentary sovereignty: as the British Parliament is sovereign, so too are the federal and provincial parliaments in Canada, each within their respective spheres.<sup>31</sup> The legal independence of the provinces also derives from the fact that the *Constitution Act, 1867* which allocated power to them was an Imperial statute applicable to Canada and prevailed over legislation enacted by the Canadian Parliament.<sup>32</sup> Parliament could not disempower or disband the provinces.<sup>33</sup>

## 2.3 Other Sub-National Governmental Structures

Canada has other sub-national entities (many of which provide for locally-controlled or devolved democratic governance) which owe their existence and

<sup>27</sup> *Constitution Act, 1867*, s 5; s 146 allowed for the addition of new provinces. The *Constitution Act, 1871* 34 & 35 Victoria c 28 (UK) confirmed that the Canadian Parliament could create or add provinces by ordinary statute.

<sup>28</sup> Parliament of Canada, above n 18.

<sup>29</sup> Hogg, above n 8, 5-10. Technically, the legislative assembly is only part of the provincial legislature, since the Monarch is also part of the legislature but is not part of the assembly. Reflecting a tradition of French-Canadian nationalism, the Québec legislative assembly is known as the National Assembly (*l'Assemblée nationale*).

<sup>30</sup> Hogg, above n 8, 5-17 to 5-18; *Hodge v The Queen* (1883) 9 App Cas 117; *Liquidators of the Maritime Bank v Receiver General of New Brunswick* [1892] AC 437.

<sup>31</sup> As above.

<sup>32</sup> *Colonial Laws Validity Act, 1865* 28 & 29 Victoria c 63 (UK). The fact that Canadian courts were bound to apply the *Colonial Laws Validity Act, 1865* both before and during the early years of Confederation made the exercise of judicial review on constitutional grounds uncontroversial in Canada: judicial review to determine whether the national or a provincial legislature had overstepped the bounds of its jurisdiction was simply determining whether the national or provincial statute was repugnant to the Imperial statute, which had primacy over the Canadian law: Hogg, above n 8, 5-24 to 5-25.

<sup>33</sup> The Canadian Parliament is no longer subordinate to the UK Parliament, but after patriation the Constitution has been deemed by section 52 of the *Constitution Act, 1982* to be the supreme law of Canada and any law inconsistent with it is of no force and effect.

powers entirely to enactments of the federal or provincial legislatures. Most common among these are democratically-elected municipal governments (counties, districts, cities, towns), which in each province are creatures of the provincial legislature and can be changed, dissolved or have their laws<sup>34</sup> and policies overruled by provincial legislation.<sup>35</sup> Thus, although they are an important and politically legitimate third level of government, the place of municipalities is not guaranteed in the Constitution.<sup>36</sup> In some provinces, school boards and other councils are also democratically elected<sup>37</sup> but these are subordinate to provincial law.<sup>38</sup> The federal government may also establish sub-national governance structures in areas of its jurisdiction.<sup>39</sup>

In addition are governance structures for aboriginal peoples (peoples formerly referred to as “Indians” now called First Nations, *Métis* persons of mixed ancestry, and the Inuit people in the far north). Many aboriginal groups assert a right to self-government and understand their relationship to the other governments of Canada as “Nation to Nation” between sovereigns.<sup>40</sup> The conventional legal view, however, has been that their governance structures are subject to federal law.<sup>41</sup>

## 2.4 Judiciary

The judiciary is independent of government,<sup>42</sup> and has a hybrid structure when considered from the perspective of federalism. The Supreme Court of Canada is the final court of appeal for both federal and provincial courts.<sup>43</sup> The Federal Court (trial and appellate) exercises limited jurisdiction in

<sup>34</sup> Municipal laws, passed by elected municipal councils, are referred to as by-laws.

<sup>35</sup> *East York (Borough) v Ontario (Attorney General)*, 1997 CanLII 12263 (Ont Superior Ct), 34 OR (3d) 789 aff'd *sub nom Citizens' Legal Challenge Inc v Ontario (Attorney General)*, 1997 CanLII 1316 (Ont Ct of Appeal), 36 OR (3d) 733, holding that the involuntary amalgamation of municipal institutions by provincial legislation is not unconstitutional.

<sup>36</sup> As above. Provincial statutes, such as Ontario's *City of Toronto Act*, 2006, SO 2006 c 11 Sched A and the Ontario *Municipal Act*, 2001, SO 2001 c 25, create and empower municipalities.

<sup>37</sup> See for example, Ontario's *Education Act*, RSO 1990, c E.2 part II.2.

<sup>38</sup> There are limits to which the provinces may interfere in the management and control of schooling by certain minority religious and linguistic communities, under s 93 of the *Constitution Act*, 1867 (guaranteeing protections for the Roman Catholic and Protestant minorities in connection with publicly funded education) and s 23 of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982 (concerning minority language education rights); see *Ontario English Catholic Teachers' Association v Ontario (Attorney General)* 2001 SCC 15, and *Mahe v Alberta* [1990] 1 SCR 342.

<sup>39</sup> Various port authorities created by the federal government regulate the lands and operations around major ports: *Canada Marine Act* SC 1998 c 10 (Can) part 1. The National Capital Commission was created by federal legislation to govern the national capital along with the City of Ottawa in Ontario and the neighbouring City of Hull in Québec: *Munro v National Capital Commission* [1966] SCR 663.

<sup>40</sup> S Imai, *Aboriginal Law Handbook* (2<sup>nd</sup> ed, 1999), pp 4-5; J Olthius et al, *Aboriginal Law Handbook* (3<sup>rd</sup> ed, 2008) 158-162, 177-179.

<sup>41</sup> Olthius et al, above n 40, 158-162, 194-196.

<sup>42</sup> *Constitution Act*, 1867, s 99; *Valente v The Queen* [1985] 2 SCR 673; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3; Hogg above n 8, 7-10, 7-14.

<sup>43</sup> Until 1949, appeals in civil cases could be taken to the British law lords, sitting as the Judicial Committee of the Privy Council.

connection with federal laws only,<sup>44</sup> in such matters as admiralty, customs and excise, federal tax appeals, immigration and judicial review from federal administrative tribunals.<sup>45</sup> The general courts, which interpret and apply provincial and federal law, are the provincial superior courts.<sup>46</sup> They exercise an inherent, irreducible core jurisdiction.<sup>47</sup> The superior courts are administered by each province, and each province has established a court of appeal.<sup>48</sup> Judges of the provincial superior and appellate courts are appointed by the federal government, each judge from the province where he or she is to hold office.<sup>49</sup> The provinces have also established inferior courts, with provincially-appointed judges.<sup>50</sup> For regulatory matters, both levels of government have administrative tribunals which are subject to judicial review by the courts.<sup>51</sup>

### 3. Geographic, Economic and Demographic Context

The governmental structures described above function in the context of a vast and diverse nation. Canada has the second largest land area on the earth, fronting on three ocean coasts, but 75 per cent of its 35 million people live on the country's southern fringe.<sup>52</sup> It has a modern economy based on natural resources, manufacturing, services and agriculture. The individual provinces reflect great diversity in geographic, demographic and economic terms. For example, the most populous province has an ethnically mixed population almost 100 times that of the ethnically homogeneous smallest province, and a GDP 120 times larger. Some provinces have diversified economies and others are dependent on commodities. Due to these differences, economic conditions and prospects vary across the country, leading to tensions in the federation and sometimes federalism litigation.<sup>53</sup> Tensions over natural resources were

<sup>44</sup> *Constitution Act, 1867*, s 101; Hogg, above n 8, 7-29.

<sup>45</sup> *Federal Courts Act RSC 1985 c F-7*, ss 17-28.

<sup>46</sup> *Ontario (Attorney General) v Pembina Exploration Canada Ltd* [1989] 1 SCR 206.

<sup>47</sup> *Constitution Act, 1867*, s 96; *MacMillan Bloedel Ltd v Simpson* [1995] 4 SCR 725; *Re Residential Tenancies Act, 1979* [1981] 1 SCR 714; *Reference re Amendments to the Residential Tenancies Act (NS)*, [1996] 1 SCR 186; Hogg, above n 8, 7-38.1, 7-41, 7-45.

<sup>48</sup> See for example *Ontario's Courts of Justice Act RSO 1990 c C.43 ss 2-21*; Hogg, above n 8, 7-1 to 7-4.

<sup>49</sup> *Constitution Act, 1867*, ss 96-97.

<sup>50</sup> See for example *Ontario's Courts of Justice Act RSO 1990 c C.43 ss 22-48*; *Reference Re Adoption Act* [1938] SCR 398; Hogg, above n 8, 7-39.

<sup>51</sup> *Crévier v Attorney General (Québec)* [1981] 2 SCR 220.

<sup>52</sup> N Hilmer, 'A Border People', in *Foreign Affairs and International Trade Canada, Canada World View* (Winter 2005).

<sup>53</sup> Various measures, including an equalization program to redistribute federal – but not provincial – revenues, have been taken to address economic imbalances. The Constitution contains a number of commitments to assist provinces with lower per capita tax bases: *Constitution Act, 1867*, s 118 and *Constitution Act, 1982*, sub-s 36(2), but the most important measures are contained in federal legislation rather than the Constitution; see Hogg, above n 8, ch 6 "Financial Arrangements". Significantly, the federal government's spending power (and the ability to attach conditions to the spending of funds provided by the federal government to the provinces to fund provincial services) has been held not to be restricted by the division of legislative powers: *Reference Re Canada Assistance Plan (BC)* [1991] 2 SCR 525. The division of powers is with respect to legislative functions, not spending. Thus, the federal government often attaches significant conditions related to the delivery of services such as health care as a condition of a province receiving federal funding.

highlighted during patriation in 1982 and led to one of the few amendments to the constitutional division of powers, granting expanded provincial powers over such resources.<sup>54</sup>

A cleavage between English and French speakers has been a feature of Canadian life since the British conquest of New France; for much of the time since then this cleavage was often characterized in sectarian terms (Roman Catholic versus Protestant), but in recent memory it has been consistently understood in more secular terms as linguistic and cultural.<sup>55</sup> Seventy-five per cent of the seven million Canadians whose mother tongue is French live in three provinces and they comprise 80 per cent of Québec's population of eight million.<sup>56</sup> Meanwhile, ninety-five per cent of the six million Canadians identifying as "visible minorities" live in the highly urbanized provinces of Ontario, British Columbia, Québec and Alberta.<sup>57</sup> Canada's fast growing aboriginal population of 1.4 million is spread across the country but faces barriers to wellness, education and economic success, problems that are as yet unresolved in the Canadian federation.<sup>58</sup>

#### 4. Historical Context for Confederation

To understand Canada's approach to federalism it is useful to have some appreciation of the history prior to 1867.<sup>59</sup> The roots of Canadian federalism stretch back into the history of the colonies established by Britain and France.

Nearly all French territories in North America were ceded to Britain in 1763 under the Treaty of Paris following military conquest. The British found themselves with vast territories in the northern half of North America, populated by disparate nations of aboriginal peoples and 70,000 French-speaking, generally Roman Catholic colonists who had settled along the St.

<sup>54</sup> *Constitution Act, 1867*, s. 92A.

<sup>55</sup> University of Ottawa Official Languages and Bilingualism Institute (OLBI), 'Linguistic History' at *Site for Language Management in Canada* <[https://slmc.uottawa.ca/?q=linguistic\\_history](https://slmc.uottawa.ca/?q=linguistic_history)> at 5 October 2015; M Rioux, 'The development of Ideologies in Québec' (trans G Gold 1973), [trans of: 'Sur l'évolution des ideologies au Québec' (1968)], reprinted in R Schultz, O Kruhlik and J Terry (eds) *The Canadian Political Process* (3<sup>rd</sup> ed, 1979), 98-113.

<sup>56</sup> Statistics Canada <[https://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-314-x/98-314-x2011003\\_1-eng.cfm](https://www12.statcan.gc.ca/census-recensement/2011/as-sa/98-314-x/98-314-x2011003_1-eng.cfm)> at 1 October 2015.

<sup>57</sup> Statistics Canada <<http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.cfm#a5>> at 1 October 2015.

<sup>58</sup> Statistics Canada <<http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm#a2>> at 1 October 2015. Fulfilment of the aspirations of Canada's First Nations remains a significant challenge for Canada but is rarely addressed in the traditional terms of Canadian federalism. The question of greater aboriginal self-government remains controversial. Olthuis et al, above n 40, 158-162.

<sup>59</sup> This paper endeavours only to present a compressed historical outline for the non-Canadian reader. In the interest of space, detailed referencing by way of footnotes throughout the text is omitted. Sources for the text include: Hogg, above n 8; Dawson, above n 9; OLBI, above n 55; Parliament of Canada, above n 18; P Buckner and J Reid (eds), *The Atlantic Region to Confederation* (1994); E Forbes and D Muise (eds), *The Atlantic Provinces in Confederation* (1993); M Conrad, *A Concise History of Canada* (2012).

Lawrence River. Prior to the conquest, the French-speaking colonists had been subject to a quasi-feudal (“seigneurial”) system of landholding and governance. Meanwhile, Britain’s colonies on Canada’s Atlantic coast were home to English speakers who had settled there after Britain gained greater control over the region earlier in the eighteenth century.<sup>60</sup> Unlike the French-Canadians the English speakers of the Maritimes achieved a measure of representative government.<sup>61</sup>

The ceding of New France to Britain generated a long-lasting commitment to the idea of cultural survival among French-Canadians. The French Crown negotiated terms in the Treaty of Paris to protect its former subjects, most notably protections for the continued practice of Roman Catholicism. In 1774 the British sought to further address French-Canadian concerns by allowing Catholics to hold public office and confirming that French civil law would govern matters other than public law (such as criminal law, governed by English law).<sup>62</sup>

The War of American Independence (1776-1783) resulted in a large influx to Canada of American colonists who had remained loyal to Britain (“Loyalists”), as well as others who sought to take advantage of generous land grants. The influx enlarged the English-speaking population of the Maritimes and introduced an English-speaking population to Québec.<sup>63</sup> In response, the British Parliament enacted the *Constitutional Act of 1791*. It split Québec into two provinces, Lower Canada, consisting of the long-settled lower St. Lawrence River area, predominately French-speaking and Catholic, and Upper Canada, comprising the upper St. Lawrence and Great Lakes, which were subject to ongoing settlement efforts by English-speakers. Lower Canada retained French civil law, while Upper Canada was to be governed by English civil and public law. Bicameral legislative assemblies were established in each province but the legislative councils (from which the executive was drawn), consisted of appointees from the small wealthy elites.

The nineteenth century began with the build-up of English-speaking settlement in Upper Canada, interrupted by the War of 1812-1814. The war,

<sup>60</sup> In 1713 Acadia, a fertile region on the Bay of Fundy, was ceded to Britain. A large number of French-speaking Acadians were deported by the British in the middle of the century. Many of the deportees later returned, albeit to more marginal lands in northeastern New Brunswick.

<sup>61</sup> Nova Scotia had a popularly elected assembly in 1758. New Brunswick and Prince Edward Island followed in 1773.

<sup>62</sup> In addition to these measures, enacted by the *Québec Act, 1774*, Québec was greatly enlarged to include the region now part of Ontario and large areas now in the United States.

<sup>63</sup> At the end of the eighteenth century, the colonies had 350,000 inhabitants, not counting the aboriginal peoples. In addition to 200,000 descendants of French colonists, there were 140,000 British (70,000 in the Maritimes, 25,000 in each of Upper and Lower Canada, and about 20,000 in Newfoundland). Francophones constituted the vast majority of Lower Canada and the majority of the population of British North America but were in the minority outside Lower Canada: OLB1, above n 55, <[https://slmc.uottawa.ca/?q=british\\_na\\_1791](https://slmc.uottawa.ca/?q=british_na_1791)> at 5 October 2015.

an off-shoot of the Napoleonic Wars and an expansionist effort by the United States, involved extended hostilities between Canada and the United States. It created lasting nationalist and anti-American sentiment in Canada.

Upper Canada experienced considerable growth in the middle decades of the nineteenth century, outpacing Lower Canada.<sup>64</sup> Meanwhile, the Maritime colonies on the Atlantic coast benefited from economic links to the thriving New England states.

Rebellions in 1837 in both Upper and Lower Canada demanded “responsible government”, that is, government accountable to the elected assembly. The rebellions were quelled but prompted British legislation fusing the two provinces into one, granting equal representation to each, with a view to weakening and ultimately assimilating the French Catholics.<sup>65</sup> Moves toward greater responsible government then slowly unfolded in the later 1840s and early 1850s.

The political union of 1840 failed to weaken the French-Canadians, but instead resulted in political deadlock and antagonized the faster-growing English-speaking population in Upper Canada for failing to provide representation by population.<sup>66</sup> Pressure built for a new constitutional arrangement as concerns about growing American power at the end of the US Civil War motivated central Canadian and Maritime colonies towards a federation. Elite and popular support grew in response to armed raids from the US into Canada by Irish republicans seeking a change in British policy in Ireland. Economic factors also favored Confederation, particularly in relation to the desire for better inter-colonial transportation infrastructure and the creation of a common market.

## 5. The Confederation Text: Centralizing Features

The *British North America Act, 1867* (now the *Constitution Act, 1867*) was the product of the Confederation negotiations between political actors in central

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<sup>64</sup> The estimated populations for the colonies in 1840 were: Lower Canada, 650,000; Upper Canada, 450,000; Nova Scotia, 130,000; New Brunswick, 100,000; PEI, 45,000; Newfoundland, 60,000: OLB, above n 55, <[https://slmc.uottawa.ca/?q=durham\\_report](https://slmc.uottawa.ca/?q=durham_report)> at 5 October 2015.

<sup>65</sup> British policy was based on the belief that unrest in Lower Canada was grounded in ethnic hostility that could be answered by suppressing the French Catholics, who were regarded by the principal English policy-maker, Lord Durham, as a backward people with inferior culture and institutions: OLB, above n 55, <[https://slmc.uottawa.ca/?q=durham\\_report](https://slmc.uottawa.ca/?q=durham_report)> at 5 October 2015.

<sup>66</sup> The Canadian population by the time of Confederation (1871) was 3.5 million, with Ontario at 1.6 million, Québec at 1.2 million, Nova Scotia at 400,000 and New Brunswick at 300,000: OLB, above n 55, <[https://slmc.uottawa.ca/?q=politics\\_1867](https://slmc.uottawa.ca/?q=politics_1867)> at 5 October 2015. Apart from the original settlement of New France, and Acadia in the Maritimes, by pre-Conquest settlers from France, immigration by non-English speakers from Continental Europe did not really begin in Canada until the early twentieth century, when large numbers of immigrants began to be admitted. With the exception of Chinese, Japanese and Sikh workers brought to British Columbia in the early twentieth century, immigration to Canada by persons of non-European origin was limited until the period after World War II. See generally, N Kelly and M Trebilcock, *The Making of the Mosaic: The History of Canadian Immigration Policy* (1998) and OLB, above n 55, <[https://slmc.uottawa.ca/?q=territorial\\_expansion](https://slmc.uottawa.ca/?q=territorial_expansion)> at 5 October 2015.

Canada and the Maritime colonies, and also reflected the objectives of Imperial Britain. It was a compromise between the proponents of centralization and those resistant to central authority reached over several conferences from 1864 to 1867.<sup>67</sup> English-speaking proponents, especially from Upper Canada, pushed for a strong central government to assist in the project of nation-building and economic development. They were opposed by French-speakers from Lower Canada seeking to preserve their religious, linguistic and cultural autonomy,<sup>68</sup> and by Maritime politicians who feared their small communities would be effectively annexed.<sup>69</sup>

The text of the *Constitution Act, 1867*,<sup>70</sup> especially the division of legislative authority into federal and provincial areas of jurisdiction in sections 91 to 95, tends to reflect the centralizing objectives of the English-speaking central Canadians:

- (i) The opening of section 91 allocates power broadly to the federal Parliament to “make Laws for the Peace, Order and good Government of Canada in relation to all Matters” not coming within the “Classes of Subjects” exclusively assigned to the provinces. Following these opening words, a list of enumerated subject areas of exclusive federal jurisdiction is set out.
- (ii) By contrast, the opening of section 92 allocates power to the provincial legislatures more narrowly: “In each Province<sup>71</sup> the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated ...” Following these opening words, a list of enumerated subject areas of exclusive provincial jurisdiction is set out.
- (iii) Section 91, after the opening grant of power, enumerates as within exclusive federal authority, *inter alia*: “regulation of trade and commerce” (91(2)); taxation by any means (91(3)); the postal service (91(5)); the census and statistics (91(6)); defence (91(7)); navigation and shipping (91(9-11)); marine and inland fisheries (91(12)); interprovincial or international ferries (91(13)); national economic institutions and standards – namely, currency and legal tender, (91(14-15, 20)), banking (91(15-16)); weights and measures (91(17)), bills of exchange, (91(18)), interest (91(19)); bankruptcy (91(21)) and

<sup>67</sup> Hogg, above n 8, 5-6 and the sources cited above in n 74.

<sup>68</sup> As above.

<sup>69</sup> As above. After 1867 an anti-Confederation party was elected in Nova Scotia and attempted (unsuccessfully) for several years to persuade Britain to permit Nova Scotia to withdraw from Confederation; meanwhile, PEI resisted joining Confederation until 1873: Forbes and Muise, above n 59, 38-53.

<sup>70</sup> 30 & 31 Victoria c 3 (UK).

<sup>71</sup> “In each Province” is a territorial limitation not present in s 91.

- intellectual property (91(22-23)); Indians and Reserves (91(24)); naturalization of aliens (91(25)); marriage and divorce (91(26)); and criminal law and procedure (91(27)).
- (iv) Section 92(10) specifies that certain enumerated powers, related to interprovincial transportation and other infrastructure, are assigned to federal jurisdiction, in addition to granting a power to the federal Parliament to declare works and undertakings to be for the general advantage of Canada or more than one province and therefore within exclusive federal jurisdiction.<sup>72</sup>
- (v) The enumerated provincial powers in section 92, meanwhile, appear for the most part to be more limited: “direct taxation” within the province for provincial purposes<sup>73</sup> (92(2)); management and sale of public lands and timber (92(5)); hospitals, asylums and charitable institutions (92(7)); municipal institutions (92(8)); commercial licensing of shops, saloons, taverns, auctioneers and others (92(9)); local works and undertakings (92(10)); incorporation of companies with provincial objects (92(11)); solemnization of marriage (92(12)); property and civil rights in the province (92(13)); administration of justice in the province, including the organization of the courts (92(14)); fines other punishments for breaches of provincial law (92(15)); and “Generally all Matters of a merely local or private Nature in the Province” (92(16)). This final listed power in section 92(16) provides some general residual jurisdiction but section 91 stipulates that this residual power is not to be interpreted as reducing the scope of the enumerated heads of federal power.
- (vi) Section 93 provides for provincial jurisdiction over education, provided the denominational rights of the religious minority (whether it be Protestant or Catholic) in the province are respected,<sup>74</sup> with an express power vested in the federal executive to intervene to protect minority educational rights.<sup>75</sup>

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<sup>72</sup> This declaratory power to bring works and undertakings within federal jurisdiction has been sparingly used in recent history: Hogg, above n 8, 5-22.

<sup>73</sup> At the time of Confederation, the largest source of revenue was indirect taxation (from customs and excise) and was exclusively available to the federal government. Income tax (a direct form of taxation) did not become dominant until the early twentieth century. This left the provinces with lower revenue-raising capacity, which became more apparent as social programs under provincial jurisdiction (education, health care, social welfare) expanded in the twentieth century. Various measures have been taken since Confederation to address this issue. Agreements between the federal government and the provinces in respect of income tax sought to ensure that the federal government left sufficient “tax room” for the provinces to levy their own income taxes: see Hogg, above n 8, 6-4 to 6-7. By the latter part of the twentieth century, all provinces except Québec had entered into agreements with the federal government so that the federal income tax collection administration collects all personal income taxes for both itself and the provincial governments, although provincial income taxes are independently levied: Hogg, above n 8, 6-5.

<sup>74</sup> Until the middle to later twentieth century, the Catholic Church styled itself as protector of French-Canadian culture (Rioux, above n 55). Church-run schools were a mechanism of cultural survival.

<sup>75</sup> This federal power was never exercised, although it was threatened to be used to protect Manitoba's French Catholic minority during a political crisis that gripped the nation in the 1890s: Hogg, above n 8, 5-19 to 5-20.

- (vii) Some of the provincial powers referring to hospitals (section 92(7)), education (section 93), and the generally phrased power over property and civil rights and local matters (sections 92(13) and (16)), would prove expansive as public responsibility for programs like health care, education, other social and welfare services, labor law, consumer protection and economic regulation grew in the twentieth century.<sup>76</sup> At the time of Confederation this was not foreseen. Property and civil rights was assigned to the provinces primarily to respect the autonomy of the French-speaking majority in Québec to maintain their distinctive civil law tradition, which had received protection for almost a century before 1867.<sup>77</sup>
- (viii) Only two powers, over immigration and agriculture, were assigned to both levels of government concurrently, with federal law to be paramount.<sup>78</sup>
- (ix) Section 121 prescribes a common market within Canada for Canadian goods.
- (x) Section 132 provides the federal Parliament and government with all the power necessary to meet Canadian (including provincial) obligations arising under treaties between Britain and any foreign power.<sup>79</sup>
- (xi) Lastly, section 90 empowers the federal executive to disallow, within a year, any provincial enactment to which it takes objection. The effect of the disallowance power was to grant the federal government a veto over provincial legislation. In practice this power has fallen entirely into disuse<sup>80</sup> after having being used with some frequency in the first years after Confederation.<sup>81</sup> From a textual perspective, however, it reflects a strong centralist tendency.

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<sup>76</sup> Hogg, above n 8, 6-1.

<sup>77</sup> The need to protect provincial autonomy in respect of property and civil rights outside Québec was evidently less of a concern to the drafters, as they made provision in s. 94 of the *Constitution Act, 1867* for the uniformity through federal enactment of the laws of the provinces outside Québec, subject to the adoption of such federal enactment by the provincial legislatures. This harmonization never took place.

<sup>78</sup> The paramountcy of validly enacted federal law over validly enacted provincial enactments that conflict with federal law has been developed as a general rule of Canadian constitutional law (see discussion in section 9 below).

<sup>79</sup> This power does not apply to treaty obligations entered into by Canada itself rather than Imperial Britain. As a result, in modern times, Canada's treaty obligations, to the extent they involve matters of provincial jurisdiction, must be incorporated into provincial legislation to be domestically enforceable: *Canada (Attorney General) v Ontario (Attorney General)* (Labour Conventions) [1937] AC 326. See discussion in section 5.

<sup>80</sup> *Re Resolution to Amend the Canadian Constitution* [1981] 1 SCR 753 at 802.

<sup>81</sup> Dawson above n 9, 213-217. The power was used most frequently in the earliest years after Confederation (66 times 1867-1896). After that it was used principally to address situations where the provinces clearly treaded upon federal jurisdiction: of the 30 times it was used from 1896-1920, 19 were occasions where the province of British Columbia sought to restrict the rights of aliens (Chinese, Japanese and Sikh) living in that province; of the 16 times it was used between 1920 and 1943, 11 involved the disallowance of populist debt relief legislation enacted in Alberta that intruded into federal jurisdiction over banking and other matters: see Dawson, as above.

Although the text reflected many of the preferences of the advocates of centralization, it does include elements to protect local autonomy insisted upon by the French-Canadians in Québec as well as the Maritime provinces. As a result, the *Constitution Act, 1867* provides an unmistakable measure of provincial autonomy in matters of greatest concern to Quebeckers, namely religious schooling, the preservation of French civil law and control over local matters. The constitutional text thus has indicators – particularly the grant in the opening words of section 92 of “exclusive” provincial jurisdiction over enumerated classes of subjects – that autonomy in provincial areas of responsibility was intended to be genuine.<sup>82</sup>

## 6. Judicial Decentralization of the Federation: Watertight Compartments

These indications in the text of an intention to protect provincial autonomy within designated areas gave the judiciary a basis upon which to interpret the *Constitution Act, 1867* as reflecting a more balanced federalism. Under this interpretation the powers of the provincial legislatures were understood to be as plenary, ample and effective, within their assigned competence, as those possessed by the federal Parliament.<sup>83</sup> By the early twentieth century the provinces were considered sovereign in their spheres of authority.<sup>84</sup>

Judgments of the Judicial Committee of the Privy Council in the late nineteenth and early twentieth centuries were influential in transforming the centralizing text into a more decentralized federalism.<sup>85</sup> The Privy Council’s approach was summed up 70 years after Confederation in a famous metaphor – “watertight compartments” – in the *Labour Conventions* case,<sup>86</sup> which limited the ability of the Parliament to pass domestic legislation to implement Canada’s (as distinguished from Imperial<sup>87</sup>) treaty obligations in areas of provincial jurisdiction:

It must not be thought that ... Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed and if in the exercise of her

<sup>82</sup> Hogg, above n 8, 5-6.

<sup>83</sup> Hogg, above n 8, 5-17 to 5-18; *Hodge v The Queen* (1883) 9 App Cas 117; *Liquidators of the Maritime Bank v Receiver General of New Brunswick* [1892] AC 437; *Reference re Resolution to amend the Constitution* [1981] 1 SCR 753, 801-802.

<sup>84</sup> As above.

<sup>85</sup> Hogg, above n 8, 5-17 to 5-18; F Scott, ‘Centralization and Decentralization in Canadian Federalism’ (1951) 20 *Canadian Bar Review* 1095; A Cairns, ‘The Judicial Committee and its Critics’ (1971) 4 *Canadian Journal of Political Science* 301.

<sup>86</sup> *Canada (Attorney General) v Ontario (Attorney General)* [1937] AC 326.

<sup>87</sup> As noted above in section 4, the federal Parliament was given plenary power to implement Imperial treaties by section 132 of the *Constitution Act, 1867*.

new functions derived from her new international status she incurs obligations they must, so far as legislation be concerned when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. *While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.*<sup>88</sup> [Emphasis added.]

The “watertight compartments” metaphor for the distribution of exclusive legislative authority tends to favor the provinces because it conceptualizes the allocated powers as contained, rather than expansive. Accordingly, broad federal powers, particularly the general words opening section 91 authorizing federal laws for “peace, order and good government” (referred to as the POGG power), the federal trade and commerce power in section 91(2), the power to implement treaties in section 132, and the criminal law power (section 91(27)) were given narrow readings.<sup>89</sup> Meanwhile, generally worded provincial powers, particularly property and civil rights, were read broadly.<sup>90</sup> That may be because a broad reading of provincial power did not threaten the underlying structure of federalism; the provinces were contained by the fact that the federal government possessed the disallowance power and federal laws were paramount over conflicting provincial law.<sup>91</sup> Despite greater openness towards centralized power displayed by the judiciary beginning in the period after World War II, these constrained interpretations of broadly worded federal powers and broad readings of provincial powers are in many respects still operative today.<sup>92</sup>

## 6.1 Peace, Order and Good Government (POGG)

The expansively phrased federal POGG power in the opening words of section 91 was restricted to three independent but narrow branches: (i)

<sup>88</sup> *Canada (Attorney General) v Ontario (Attorney General) (Labour Conventions)* [1937] AC 326 at 354.

<sup>89</sup> *Citizens' Insurance Co. v Parsons* (1881), 7 App Cas 96 (trade and commerce); *Attorney-General of Canada v Attorney-General of Alberta* [1916] 1 AC 588 (POGG and trade and commerce); *In re The Board of Commerce Act, 1919* [1922] 1 AC 191 (POGG and criminal law) (but see, contra re criminal law: *Proprietary Articles Trade Association v Attorney General for Canada* [1931] AC 310 and *Reference re Validity of Section 5(a) of the Dairy Industry Act* [1949] SCR 1); *Toronto Electric Commissioners v Snider* [1925] AC 39 (POGG); *Canada (Attorney General) v Ontario (Attorney General) (Labour Conventions)* [1937] AC 326 (power to implement treaties); *Reference re Anti-Inflation Act* [1976] 2 SCR 373 and the cases cited therein (POGG); see discussion of POGG and trade and commerce in sections 5.1 and 5.2 below.

<sup>90</sup> *Citizens Insurance Co. v Parsons* (1881), 7 App Cas 96; *Attorney-General of Canada v Attorney-General of Alberta* [1916] 1 AC 588; *Canadian Indemnity Co v Attorney General of British Columbia* [1977] 2 SCR 504.

<sup>91</sup> In the Supreme Court's consideration of *Citizens' Insurance Co v Parsons* before it went to the Judicial Committee of the Privy Council, counsel argued as follows: “the provinces have not power to disallow these Acts, and can only look to the courts for defence against the encroachments of the Federal power, whereas Acts passed by the local legislatures might be disallowed by the Dominion parliament” and the Court repeatedly referenced the fact that the impugned provincial law had not been disallowed: *sub nom Citizens' and The Queen Insurance Cos v Parsons*, 4 SCR 215, 230, 233-237. See discussion of paramouncy below in section 9.

<sup>92</sup> Hogg, above n 8, 5-18 to 5-19, 17-23; *Reference re Anti-Inflation Act* [1976] 2 SCR 373 (POGG); *Reference re Securities Act* 2011 SCC 66 (trade and commerce); *Reference re Assisted Human Reproduction Act* 2010 SCC 61 (criminal law).

an emergency power, (ii) a power to deal with matters of genuine national concern which transcended the ability of the provinces to regulate effectively, and (iii) a power that filled genuine gaps in the assignment of jurisdiction.<sup>93</sup> The emergency power applied in obvious cases of national emergency, such as war, its aftermath or immediate consequences, or similar “extraordinary peril[s] to the national life of Canada”.<sup>94</sup> Yet the Great Depression of the 1930s was not grave enough to permit recourse to the POGG power in connection with (permanent, rather than temporary) New Deal-style economic measures establishing national labour standards, unemployment insurance and national marketing schemes for farm and other natural products.<sup>95</sup> Measures taken under the emergency branch had to be temporary, lasting only as long as called for by the emergency.<sup>96</sup> The reason for judicial caution is the potential of the POGG power to invade provincial jurisdiction: if validly enacted under the emergency power, a federal measure can substantially regulate areas normally under exclusive provincial jurisdiction. The narrowness of the emergency power in the earlier cases has persisted. The availability of the power to deal with a purported national emergency of high wage and price inflation and supply the jurisdictional basis for temporary federal wage and price controls in the mid-1970s was controversial and split the Supreme Court, although a majority upheld the measures.<sup>97</sup>

The national concern branch of the POGG power (originally developed in connection with national temperance legislation<sup>98</sup>) is restricted to matters discrete in character which, although they may have been provincial or local in origin, have acquired national dimension and are “by their nature” both

<sup>93</sup> Hogg, above n 8, 17-5 to 17-32. *Attorney-General for Ontario v Attorney-General for Canada* (Local Prohibition) [1896] AC 348; *Toronto Electric Commissioners v Snider* [1925] AC 39; *Attorney General of Ontario v Canada Temperance Federation* [1946] AC 193; *Citizens' Insurance Co v Parsons* (1881) 7 App Cas 96; *Johannesson v West St Paul* [1952] 1 SCR 292; *Munro v National Capital Commission* [1966] SCR 663; *Reference re Anti-Inflation Act* [1976] 2 SCR 373; *R v Crown Zellerbach Canada Ltd* [1988] 1 SCR 401; *Ontario Hydro v Ontario (Labour Relations Board)* [1993] 3 SCR 327.

<sup>94</sup> *Fort Frances Pulp and Power Co v Manitoba Free Press* [1923] AC 695 (wartime price controls upheld); *Toronto Electric Commissioners v Snider* [1925] AC 39 (rejecting the use of the POGG power to regulate industrial strife and labour relations and placing labour law squarely within provincial jurisdiction over property and civil rights, except for those industries that fall within a head of exclusive federal power).

<sup>95</sup> See Hogg, above n 8, 17-21 and footnote 111; *Canada (Attorney General) v Ontario (Attorney General)* (Labour Conventions) [1937] AC 326; *Canada (Attorney General) v Ontario (Attorney General)* (Unemployment Insurance) [1937] AC 355; *British Columbia (Attorney General) v Canada (Attorney General)* (Price Spreads) [1937] AC 368; *British Columbia (Attorney General) v Canada (Attorney General)* (Natural Products Marketing) [1937] AC 377; *British Columbia (Attorney General) v Canada (Attorney General)* (Farmers' Creditors Arrangement) [1937] AC 391. The Judicial Committee's decision concerning unemployment insurance prompted one of the few amendments to the division of powers since 1867. Section 91(2A) “Unemployment Insurance” was added to federal competence in 1940: *Constitution Act, 1940*, 3-4 George VI c 36 (UK). See discussion in section 14 below.

<sup>96</sup> *Reference re Anti-Inflation Act* [1976] 2 SCR 373, 427, 437, 461, 467; *R v Crown Zellerbach Canada Ltd* [1988] 1 SCR 401, 432.

<sup>97</sup> *Reference re Anti-Inflation Act* [1976] 2 SCR 373. (The federal trade and commerce power in section 91(2) could not support federal wage and price controls because it too had been narrowed in the early years. See discussion below in section 5.2.)

<sup>98</sup> *Attorney-General for Ontario v Attorney-General for Canada* (Local Prohibition) [1896] AC 348; *Attorney General of Ontario v Canada Temperance Federation* [1946] AC 193.

important to the nation as a whole and beyond the ability of the provinces to regulate individually.<sup>99</sup> The mere desire for uniform national regulation is not a sufficient basis to invoke the power, nor is the simple idea of national importance standing alone. There are many areas, such as the law of secured transactions or the regulation of securities markets, where uniformity would be highly desirable but which nonetheless have been repeatedly held to be within exclusive provincial competence.<sup>100</sup> Meanwhile the provinces retain exclusive jurisdiction over many areas of “national importance”, such as education, which would undoubtedly be regarded as critical to national success in the era of the “knowledge economy”. The national concern branch has been used to support national temperance regulation, the federal regulation of aeronautics<sup>101</sup> and nuclear facilities,<sup>102</sup> the creation of the National Capital Commission<sup>103</sup> and federal measures to combat marine pollution (as distinct from pollution generally).<sup>104</sup> In considering the potential application of the national concern branch of the POGG power, the Supreme Court has remained careful to delineate limits that preserved the overall balance of federalism. In the marine pollution case, the Court summed up the issue as follows:

For a matter to qualify as a matter of national concern ... it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.<sup>105</sup>

The national concern branch was not adequate to uphold the federal wage and price controls referred to above as inflation was too “diffuse” a subject matter, lacking “sufficient consistence to retain the bounds of form.”<sup>106</sup>

The POGG power to fill genuine gaps in the *Constitution Act, 1867* is not a residual power to cover matters not contemplated in the 1867 allocation of responsibility, but rather to deal with obvious *lacunae* in the text. For example, section 92(11) assigned to the provinces the power to regulate the

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**99** Hogg, above n 8, 17-13 to 17-14; *Johannesson v West St Paul* [1952] 1 SCR 292; *Munro v National Capital Commission* [1966] SCR 663; *Reference re Anti-Inflation Act* [1976] 2 SCR 373; *R v Crown Zellerbach Canada Ltd* [1988] 1 SCR 401; *Ontario Hydro v Ontario (Labour Relations Board)* [1993] 3 SCR 327.

**100** *Reference re Securities Act* 2011 SCC 66.

**101** *Johannesson v West St Paul* [1952] 1 SCR 292.

**102** *Ontario Hydro v Ontario (Labour Relations Board)* [1993] 3 SCR 327.

**103** *Munro v National Capital Commission* [1966] SCR 663.

**104** *R v Crown Zellerbach Canada Ltd* [1988] 1 SCR 401, upholding the federal *Ocean Dumping Control Act*, both as it applied to dumping “at sea” and within the waters of the province of British Columbia.

**105** As above 432.

**106** *Reference re Anti-Inflation Act* [1976] 2 SCR 373, 458; as noted above, the measures were upheld under the emergency branch of POGG.

incorporation of companies with provincial objects, but section 91 does not address the incorporation of companies with federal objects. The gap-filling branch of the POGG power was treated as dealing with this kind of issue.<sup>107</sup>

## 6.2 Trade and Commerce

As with the narrowed reading given to POGG, the federal trade and commerce power, despite its broad drafting, was limited to two branches: (i) the regulation of international and interprovincial trade and commerce and (ii) the “general regulation of trade affecting the whole dominion,”<sup>108</sup> but not comprising the regulation of any particular trade or industry.<sup>109</sup> Meanwhile, the provincial power over property and civil rights governed all intraprovincial trade and commerce, including the regulation of particular industries (with the exception of the industries, such as banking, interprovincial ferries and nuclear facilities, reserved for exclusive federal regulation).<sup>110</sup> Thus, most labour law (except that governing federally regulated industries) falls within property and civil rights.<sup>111</sup> Similarly, most business regulation and consumer protection measures, and a great deal of environmental regulation, fall under property and civil rights and matters of local concern. As with the limitations on the POGG power, many (though not all) of the early constraints on the federal trade and commerce power have persisted into the modern era, despite the fact that Canada now has a globally-integrated economy and uniform national regulation is often seen as being desirable.<sup>112</sup> Most recently, in the *Securities Act Reference* the Supreme Court rejected as overreaching the trade and commerce power the federal effort to create a national securities regulator.<sup>113</sup>

<sup>107</sup> *Citizens' Insurance Co v Parsons* (1881) 7 App Cas 96; Hogg, above n 8, 17-5 to 17-7.

<sup>108</sup> Such as the general regulation of anti-competitive behavior: *General Motors of Canada Ltd v City National Leasing* [1989] 1 SCR 641; *Citizens' Insurance Co v Parsons* (1881) 7 App Cas 96.

<sup>109</sup> *Citizens' Insurance Co v Parsons* (1881) 7 App Cas 96; *Attorney-General of Canada v Attorney-General of Alberta* [1916] 1 AC 588; *Canadian Indemnity Co v Attorney General of British Columbia* [1977] 2 SCR 504; *General Motors of Canada Ltd v City National Leasing* [1989] 1 SCR 641.

<sup>110</sup> As above.

<sup>111</sup> *Toronto Electric Commissioners v Snider* [1925] AC 39; *Northern Telecom Ltd v Communications Workers of Canada* [1980] 1 SCR 115; *Ontario Hydro v Ontario (Labour Relations Board)* [1993] 3 SCR 327; *Consolidated Fastfrate Inc v Western Canada Council of Teamsters* 2009 SCC 53.

<sup>112</sup> *Canadian Western Bank v Alberta*, 2007 SCC 22, para 59 (querying the banks' demand for uniform regulation). In the modern era the trade and commerce power has two branches: regulation of interprovincial and international trade, and general trade and commerce. Under the general branch, legislation must engage the national interest in a manner that is qualitatively different from provincial concerns. Relevant (but not exhaustive or necessary) indicia are (i) is the law part of a general regulatory scheme; (ii) is the scheme under the oversight of a regulatory agency; (iii) is the legislation concerned with trade as a whole rather than with a particular industry; (iv) is it of such a nature that provinces, acting alone or in concert, would be constitutionally incapable of enacting it; and (v) is the scheme such that failure to include one or more provinces would jeopardize its operation in others: *General Motors of Canada Ltd v City National Leasing* [1989] 1 SCR 641; *Kirkbi AG v Ritvik Holdings Inc* 2005 SCC 65.

<sup>113</sup> *Reference re Securities Act* 2011 SCC 66.

## 7. Allocating Power over Unforeseen Subject Areas

As noted above, the general POGG power was not seen as intended to cover areas of jurisdiction not contemplated in the 1867 allocation of responsibility. For the myriad of such situations, where new areas of governmental activity arose as Canada moved from the nineteenth into the twentieth centuries, the courts attempted to respect the underlying structure of federalism represented by the watertight compartments metaphor. The courts allocated power over new subject areas in accordance with the existing division of responsibility or, in some cases, by analogy. Thus the regulation of telecommunications was assigned exclusively to the federal government, being similar to the enumerated interprovincial communications undertaking (“telegraphs” in section 92(10)) and demanding national regulation.<sup>114</sup> Meanwhile, environmental regulation, a broad subject, was found to fall into both federal and provincial jurisdiction. It is a matter of local concern and implicates property and civil rights, the basis of most provincial jurisdiction over the regulation of business, including the pollution associated with industrial production.<sup>115</sup> In some respects it is also matter of federal concern, under specific heads of power, such as the powers over the sea coast and inland fisheries, interprovincial and international trade and commerce, the power to approve or regulate projects within federal jurisdiction<sup>116</sup> and also, in the case of marine pollution, a matter under the national concern branch of POGG.<sup>117</sup>

## 8. Balanced Federalism as a Modern Interpretive Principle

The judicial approach to interpretation that favors a balanced federalism, initially developed under the rubric of watertight compartments still finds expression in the Supreme Court’s modern approach. In the contemporary jurisprudence the inflexibility of watertight compartments as a concept has fallen into disfavor.<sup>118</sup> However, the Court has identified “balanced federalism” and the “primacy of the written Constitution” as interpretive principles in the adjudication of division of powers cases.<sup>119</sup> The principle of balance emerges from the earlier idea that broadly phrased powers should not be interpreted in a manner that undermines the *Constitution Act, 1867*’s

<sup>114</sup> *City of Toronto v Bell Telephone Co* [1905] AC 52 (at the time the lines were intraprovincial, but the courts assumed that local services would eventually expand interprovincially).

<sup>115</sup> *Friends of Oldman River Society v Canada* [1992] 1 SCR 3.

<sup>116</sup> *Friends of Oldman River Society v Canada* [1992] 1 SCR 3.

<sup>117</sup> *R v Crown Zellerbach Canada Ltd* [1988] 1 SCR 401.

<sup>118</sup> *Canadian Western Bank v Alberta* 2008 SCC 22, para 36, *Reference re Securities Act* 2011 SCC 66, paras 56-57.

<sup>119</sup> *Reference re Secession of Québec*, [1998] 2 SCR 217, para 53; *Reference re Securities Act* 2011 SCC 66, paras 7, 61-62; *Reference re Assisted Human Reproduction Act* 2010 SCC 61, paras 193, 196 (per LeBel and Deschamps JJ for four of nine judges); *Québec (Attorney General) v Canada (Attorney General)* 2015 SCC 1, para 18.

grants of authority to the other level of government. The Court expressed the principle as follows in the *Securities Act Reference*:

It is a fundamental principle of federalism that both federal and provincial powers must be respected and one power must not be used in a manner that effectively eviscerates the other. Rather, federalism demands that a balance be struck, a balance that allows both the federal Parliament and provincial legislatures to act effectively in their respective spheres.<sup>120</sup>

In modern times these principles of balance and the primacy of the written text operate not merely to protect provincial autonomy from invasive interpretations of federal powers. The jurisprudence recognizes that the broadly phrased provincial powers over property and civil rights and matters of local or private concern cannot be used to undermine federal authority over bankruptcy and insolvency, interest, bills of exchange and banking regulation, and interprovincial or international trade and commerce, for example.<sup>121</sup> While property and civil rights as a general concept would certainly cover these discrete areas, they are assigned to federal jurisdiction, and can be described as having been “carved out” of property and civil rights as exclusive federal competencies.<sup>122</sup>

The exercise of reading the scope of provincial powers in light of the scope of federal powers, and *vice-versa*, has been called “mutual modification” of the powers as one tries to read the text of the *Constitution Act, 1867* as a whole.<sup>123</sup> However, as the discussion below in sections 11 to 13 points out in connection with the interpretive methods used by the courts, it would be misleading to suggest that in all or even most cases the powers of one level are defined in light of the powers of the other level. Mutual modification is the result of the accretion of cases over the years, and is discernible with the benefit of hindsight, but the focus in any given case is more typically whether the particular challenged legislation can find an anchor in the powers of the enacting jurisdiction; not whether the law could, or would more fittingly, be enacted by the other jurisdiction.

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**120** Reference re Securities Act 2011 SCC 66, para 7.

**121** *Newfoundland and Labrador v AbitibiBowater Inc* 2012 SCC 67; *Giffen (Re)* [1998] 1 SCR 91; *Husky Oil Operations Ltd v Minister of National Revenue* [1995] 3 SCR 453, para 81; *Bank of Montreal v Hall* [1990] 1 SCR 121; *Alberta (Attorney-General) v Atlas Lumber Co* [1941] SCR 87; *Cushing v Dupuy* (1880) 5 App Cas 409.

**122** As above; *Clark v Canadian National Railway Co*, [1988] 2 SCR 680, 711-712; Hogg, above n 8, 17-4.

**123** Hogg, above n 8, 15-38.7 to 15-39; *Citizens' Insurance Co v Parsons* (1881) 7 App Cas 96 at 101-102: “the language of the two sections [in ss. 91 and 92] must be read together, and that of one interpreted, and, if necessary, modified, by that of the other”; *Ward v Canada (Attorney General)*, [2002] 1 SCR 569, 2002 SCC 17, para 2: “Classes of subjects should be construed in relation to one another” citing *Reference re Waters and Water-Powers* [1929] SCR 200, 216 (*per Duff*).

## 9. Protecting “Cores” of Federal Power: Inter-Jurisdictional Immunity

A doctrine in Canadian federalism jurisprudence related to the concept of exclusivity and the metaphor of watertight compartments is termed inter-jurisdictional immunity. The doctrine is founded upon a theory that each enumerated power – specified in the constitutional text as exclusive – must have a “basic, minimum and unassailable content” – a “core” – to be protected by the courts from intrusion by the other level of government.<sup>124</sup> The doctrine has its origins in cases from the early twentieth century which protected federally-incorporated companies from “sterilization” by provincial law, where, for example, a provincial licensing requirement undermined the companies’ practical existence or viability.<sup>125</sup> It was later developed into a more general theory of federalism, to cover not merely federal companies, but also the “vital parts” of federal undertakings,<sup>126</sup> and then later, the “core” of each allocated federal power.<sup>127</sup>

Whereas the watertight compartments metaphor often favored provincial power at the expense of broad federal authority, inter-jurisdictional immunity was theoretically applicable to the allocated powers of both levels of government, but, perhaps owing to its particular genesis in the early twentieth century cases involving federal companies, in practice it only favored the federal government. It resulted in “reading down” (that is, rendering inapplicable, though not invalid) otherwise valid provincial law of general application when that law came to be applied “within the core” of a federal competence or to a “vital part” of a federal undertaking.

Thus, for example, provincial law that applied generally to create liability in tort in favor of the dependants of a person killed or injured in an accident (a measure undoubtedly valid under the provincial power over property and civil rights), was held constitutionally inapplicable to recreational boating accidents on provincial inland waters.<sup>128</sup> The rationale for the holding was that the exclusive federal power over navigation and shipping in section 91(10) must include within its unassailable core exclusive federal authority to determine the civil consequences of maritime negligence without any role for provincial law.<sup>129</sup>

<sup>124</sup> *Bell Canada v Québec (Commission de la santé et de la sécurité du travail)* [1988] 1 SCR 749, 839-840; *Ordon Estate v Grail* [1998] 3 SCR 437, paras 81-85; *Canadian Western Bank v Alberta* 2008 SCC 22, paras 33-34, 39-41.

<sup>125</sup> *John Deere Plow Co. v Wharton*, [1915] AC 330; *Great West Saddlery Co v The King*, [1921] 2 AC 91; *Canadian Western Bank v Alberta* 2008 SCC 22, para 39; Hogg, above n 8, 15-31.

<sup>126</sup> *Attorney-General for Ontario v Winner* [1954] AC 541.

<sup>127</sup> *Canadian Western Bank v Alberta* 2008 SCC 22, paras 33-34, 39-41; *Bell Canada v Québec Commission de la santé et de la sécurité du travail* [1988] 1 SCR 749, 839-840.

<sup>128</sup> *Ordon Estate v Grail* [1998] 3 SCR 437.

<sup>129</sup> As above. Since *Ordon v Grail* [1998] 3 SCR 437 was decided there is doubt as to whether it would be similarly decided today: *Marine Services International Ltd v Ryan Estate* 2013 SCC 44, which holds that the civil consequences of maritime negligence in connection with the availability of workers’ compensation in lieu of a cause of action in tort can be governed by provincial law.

Like watertight compartments before it, this doctrine has recently fallen into disfavor as the Supreme Court recognized that it unduly upset the federal balance (being available in practice only to benefit federal power) and interfered with flexible and pragmatic federalism, which countenances a large measure of concurrent jurisdiction and permits as far as possible the continued operation of democratically-enacted legislation from both levels of government.<sup>130</sup> The inter-jurisdictional immunity doctrine also demanded the definition by the courts of not merely the outer limits of each enumerated head of power, but also each power's "essential" or "unassailable" core. This is an exercise that generated legal uncertainty and frequently yielded little benefit while requiring considerable judicial effort.<sup>131</sup>

Inter-jurisdictional immunity is not to be a doctrine of first recourse in federalism cases.<sup>132</sup> It has now been confined to situations governed by precedent and is triggered only if the provincial law can be shown to *impair* (as opposed to merely *affect*) the core of a federal power or the vital part of a federal undertaking.<sup>133</sup> The core of a federal power, or the vital part of a federal undertaking, is also to be construed narrowly. The core of a federal power is limited to the "minimum content necessary to make the power effective for the purpose for which it was conferred"; and the vital part of a federal undertaking is limited to that which is "absolutely indispensable or necessary" to "what makes the undertaking specifically of federal jurisdiction."<sup>134</sup>

This last point is illustrated by a contrast of two recent aeronautics cases. In *Canadian Owners and Pilots Association*,<sup>135</sup> (*COPA*) the Supreme Court ruled that a provincial law on the use of agricultural land could not apply to lands used as airstrips, even in the absence of a federal legislative scheme to regulate the location of landing sites. The siting of aircraft landing strips was within the core of the federal power over aeronautics. Subsequently, in *Northwestern Outback*<sup>136</sup> Ontario's Divisional Court held that a provincial law providing consumer protections for students at vocational schools (prescribing an industry-funded insurance pool for tuition refunds in the event of insolvency) was constitutionally applicable to flight-training schools. The Court held that while pilot training is within the core of federal jurisdiction over aeronautics, the consumer protection measures at issue were not.

<sup>130</sup> *Canadian Western Bank v Alberta* 2008 SCC 22, paras 35-47; *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19, para 2; *Canada (Attorney General) v PHS Community Services Society* 2011 SCC 44, paras 57-70 (rejecting an attempt to use inter-jurisdictional immunity to protect provincial jurisdiction over health care against a criminal law prohibition on medically-supervised "safe injection sites" for drug addicts); *Bank of Montreal v Marcotte* 2014 SCC 55, para 63.

<sup>131</sup> *Canadian Western Bank v Alberta* 2008 SCC 22, paras 43-44.

<sup>132</sup> *Canadian Western Bank v Alberta* 2008 SCC 22, para 47.

<sup>133</sup> *Canadian Western Bank* 2008 SCC 22, paras 48-49, 50-53; *Bank of Montreal v Marcotte* 2014 SCC 55, paras 63-64, 68.

<sup>134</sup> *Canadian Western Bank v Alberta* 2008 SCC 22, paras 50-51.

<sup>135</sup> *Québec (Attorney General) v Canadian Owners and Pilots Association* 2010 SCC 39.

<sup>136</sup> *Northwestern Outback Aviation Ltd v Ontario (Attorney General)* 2011 ONSC 1063, [2011] OJ No 1081 (Ont Div Ct).

## 10. Protecting the Exercise of Federal Power from Inconsistent Provincial Law: Federal Paramountcy

In restricting the use of inter-jurisdictional immunity, the courts have recognized that a more supple and predictable approach to protecting the exercise of federal power from incursions by provincial law is available.<sup>137</sup> This preferable alternative – itself a longstanding doctrine – is federal paramountcy, under which federal law, whether in a statute or regulation or an order made thereunder, prevails over otherwise valid but inconsistent provincial law. The effect of paramountcy is to render inconsistent provincial law “inoperative” (but not invalid or inapplicable) to the extent of the inconsistency for as long as the inconsistency exists.<sup>138</sup>

Paramountcy provides a more finely-tuned approach for protecting the exercise of federal power from incursion by otherwise valid provincial law. Unlike inter-jurisdictional immunity it is not necessary under paramountcy to divine from the text of section 91 the unassailable core of each head of federal power.<sup>139</sup> Rather, the judicial task is limited to a comparison between actual laws validly enacted by both levels of government – the impugned provincial law and the federal law which is claimed to be inconsistent – to determine whether in practice there is an inconsistency between them. This is termed operational inconsistency or “actual conflict in operation.” It is triggered only if either: (i) it is impossible to comply with both the federal and provincial laws in question – in other words, compliance with one is defiance of the other;<sup>140</sup> or, (ii) compliance with the provincial law can be proven to frustrate the purpose of the federal law.<sup>141</sup> If there is operational inconsistency, the provincial law yields; if not, compliance with both laws is required.

The modern Canadian approach to paramountcy explicitly rejects the idea that a constitutionally valid federal legislative foray into a particular area precludes the province from legislating in the same realm even though it has concurrent jurisdiction under the allocation of powers; this approach had currency prior to the 1960s but has been repeatedly rejected since.<sup>142</sup> Very

<sup>137</sup> *Canadian Western Bank v Alberta* 2008 SCC 22, para 77.

<sup>138</sup> Hogg, above n 8, 16-19. If the federal law is amended, or repealed, so that the inconsistency no longer exists, the previously inconsistent provincial law becomes operative again. This is not the case with inter-jurisdictional immunity, where provincial law is inapplicable even in the absence of federal law.

<sup>139</sup> *Canadian Western Bank v Alberta* 2008 SCC 22, paras 69, 76-78; *Law Society of British Columbia v Mangat* 2001 SCC 67, paras 52, 54.

<sup>140</sup> *Multiple Access Ltd v McCutcheon* [1982] 2 SCR 161, 190-191; *Rothmans Benson & Hedges v Saskatchewan* 2005 SCC 13, paras 11-15.

<sup>141</sup> *Bank of Montreal v Hall* [1990] 1 SCR 121, 155; *Rothmans Benson & Hedges v Saskatchewan* 2005 SCC 13, paras 11-15; *Bank of Montreal v Marcotte* 2014 SCC 55, paras 71-73, 78, 81.

<sup>142</sup> Hogg, above n 8, 16-10; *O’Grady v Sparling* [1960] SCR 804 (dangerous driving provisions in federal criminal law does not prevent province from enacting such provisions in highway traffic legislation; dissenting judges’ view of preclusion rejected by majority); *Multiple Access Ltd v McCutcheon* [1982] 2 SCR 161, 185-191; *Rothmans Benson & Hedges v Saskatchewan* 2005 SCC 13, para 21; Hogg, above n 8, 16-10 to 16-14.

clear language of federal Parliamentary intention to exclude provincial law is required.<sup>143</sup>

A rule applicable to the modern paramountcy doctrine that also stresses deference by the judiciary is a presumption of statutory interpretation under which the interpretation of legislation that avoids finding a conflict is to be preferred.<sup>144</sup>

## 11. The Dominant Tide of Canada's Federalism Jurisprudence

This brings us to a consideration of the set of related principles and techniques reflected in the pragmatic and flexible approach to interpreting the scope of allocated powers that was alluded to at the outset of this paper which, many would argue, has been a signal contribution by the judiciary to the Constitution's enduring success. The best introduction is the late Chief Justice Dickson's influential description of Canada's federalism as being predominately based on an approach that accepts, for practical purposes, concurrency between the powers of the federal and provincial legislatures, and cautions judicial restraint in finding legislation unconstitutional on federalism grounds, leaving room for issues to be worked out by the political branches through co-operative federalism. This preferred approach has been the "dominant tide" of Canada's federalism doctrine:

... in a federal system it is inevitable that, in pursuing valid objectives, the legislation of each level of government will impact occasionally on the sphere of power of the other level of government; overlap of legislation is to be expected and accommodated in a federal state. Thus a certain degree of judicial restraint in proposing strict tests which will result in striking down such legislation is appropriate. I reiterate what I said on this general theme in ... *OPSEU v Ontario* [citation omitted]:

The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines: rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues.<sup>145</sup>

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<sup>143</sup> *Rothmans Benson & Hedges v Saskatchewan* 2005 SCC 13, para 21; *Bank of Montreal v Marcotte* 2014 SCC 55, paras 72, 78.

<sup>144</sup> *Canadian Western Bank v Alberta* 2007 SCC 22 para 75.

<sup>145</sup> *General Motors of Canada Ltd v City National Leasing* [1989] 1 SCR 641, 669; *Canadian Western Bank v Alberta* 2008 SCC 22, para 36.

This most-quoted passage in the modern jurisprudence sets the tone for the application of the pith and substance and double aspect doctrines, discussed below.

## 12. Pith and Substance and Classification

The pith and substance doctrine referred to in the quotation above might perhaps more appropriately be described as a method. Since the early years of Confederation pith and substance has been the starting point for judicial analysis when a law<sup>146</sup> is challenged as invalid for being outside the jurisdiction of the level of government which enacted it.<sup>147</sup> Pith and substance places the focus on the actual law under challenge. In each such case, it is a particular law (or on a reference question, sometimes a draft law) that is impugned. The allocation of powers in sections 91 and 92 of the *Constitution Act, 1867* speaks of the two levels of government being empowered to legislate in relation to “Matters” coming within “Classes of Subjects.” The first order of business for the court is to examine the actual impugned law to characterize it for purposes of constitutional analysis: this determines the “Matter” in relation to which the legislature has acted.<sup>148</sup> After this is done, a second step follows, in which the court determines whether one (or more) of the assigned powers of the enacting level of government will accommodate the “Matter”: this determines if the “Matter” falls within the enacting legislature’s allocated “Classes of Subjects.”<sup>149</sup> The latter step may, but often does not, involve interpreting the scope of the allocated “Classes of Subjects”, that is to say, the enacting government’s allocated powers.

The analysis asks, what is the pith and substance of the impugned law? In other words, what is the law in question actually about, what is it directed at, what does it do and why, what is its dominant characteristic or purpose, or its leading feature, true nature and character or main thrust?<sup>150</sup> The approach “must be flexible and a technical, formalistic approach is to be avoided.”<sup>151</sup>

<sup>146</sup> A statute, regulation or order taken thereunder.

<sup>147</sup> Constitutional cases under federalism also arise when a provincial law is challenged as constitutionally inoperative under the doctrine of federal paramountcy due to conflict with federal law, or as constitutionally inapplicable under inter-jurisdictional immunity for impairing the core of a federal power or a vital part of a federal undertaking (discussed above in sections 8 and 9 respectively). When only paramountcy and/or inter-jurisdictional immunity are at issue, the challenged provincial law is already acknowledged as within the scope of provincial powers, so the pith and substance analysis is unnecessary.

<sup>148</sup> Hogg, above n 8, 15-7; *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19, paras 16, 24.

<sup>149</sup> As above.

<sup>150</sup> *Union Colliery Company of British Columbia v Bryden* [1899] AC 580; *Canadian Western Bank v Alberta* 2008 SCC 22 at para 28; *Global Securities Corporation v British Columbia (Securities Commission)*, 2000 SCC 21, paras 21, 22; Hogg, above n 8 15-7.

<sup>151</sup> *R v Morgentaler* [1993] 3 SCR 463, 481.

The answer to these questions is often dispositive, for once a challenged law is characterized in pith and substance it will frequently be obvious that it does in fact fall within or outside the authority of the enacting government. If the pith and substance, or main thrust, of the law is within the jurisdiction of the enacting body, it is valid. A few examples may be illustrative. A law generally regulating speed limits on highways will be found to be in pith and substance in relation to highway traffic regulation, an area long held to be within provincial competence under property and civil rights and matters of local concern. Even if the law is challenged by an interprovincial trucking company,<sup>152</sup> the provincial law will still be in pith and substance in relation to traffic regulation and therefore constitutionally valid. The incidental effect of the law on interprovincial transportation, or interprovincial trade and commerce, does not change its pith and substance for purposes of the federalism analysis.<sup>153</sup> By the same token, a provincial measure that prevents impaired or dangerous driving will also be in pith and substance about highway safety and therefore provincial, even though it may contain penalties and regulatory measures in relation to conduct that is dangerous, immoral or contrary to public order and thus in the usual domain of the criminal law, an exclusively federal responsibility.<sup>154</sup> To offer a federal example, a law regulating land use by First Nations on reserve will be in pith and substance in relation to land use on reserve, and therefore will easily fall within the federal power over lands reserved for Indians (section 91(24)), even though it also has characteristics as land regulation, which falls within the provincial power over property and civil rights and matters of local concern.<sup>155</sup>

As the examples above indicate, the pith and substance doctrine recognizes that a law may have multiple characteristics, as well as incidental effects on matters regulated by the other level of government, without changing its pith and substance for constitutional purposes:

The “pith and substance” doctrine is founded on the recognition that it is in practice impossible for a legislature to exercise its jurisdiction over

<sup>152</sup> In other words, a transportation undertaking the regulation of which is a matter of federal law.

<sup>153</sup> *R v TNT Canada Inc* 1986 CanLII 2632 (Ont Ct of Appeal). If the impact of the law, despite its validity, is so great as to impair the interprovincial undertaking, then inter-jurisdictional immunity (discussed above in section 8) may be invoked to render the law inapplicable in so far as interprovincial transportation is concerned: *Canadian Western Bank v Alberta* 2008 SCC 22. Normally, a speed limit, with which all drivers in the province must comply, will not be considered an impairment of an interprovincial undertaking: *R v TNT Canada Inc* 1986 CanLII 2632 (Ont Ct of Appeal). An example of a provincial highway regulation measure that would likely be in pith and substance in relation to interprovincial trade or transportation, and therefore outside provincial competence, would be a law targeting the total weight of cargo that could be imported into the province by trucks on provincial highways without regulating the weight of other vehicles engaged in intraprovincial transport on the highways.

<sup>154</sup> *O'Grady v Sparling* [1960] S.C.R. 804, *Canadian Western Bank v Alberta* 2008 SCC 22 para 30, *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19, para 41; *Goodwin v British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, paras 16-34.

<sup>155</sup> *Olthius et al n 58* above, 101-102; *Surrey v Peace Arch Enterprises Ltd* [1970] 74 WWR 380 (BC Ct of Appeal). See also: *British Columbia (Attorney General) v Lafarge Canada Inc* 2007 SCC 23, para 62 (federal laws regulating ports may regulate matters normally covered by provincial and municipal zoning).

a matter effectively without incidentally affecting matters within the jurisdiction of another level of government. ... [I]t would be impossible for Parliament to make effective laws in relation to copyright without affecting property and civil rights, or for provincial legislatures to make effective laws in relation to civil law matters without incidentally affecting the status of foreign nationals.<sup>156</sup>

## 12.1 Purpose and Effects

Both the purpose and effect of the challenged law are relevant in determining pith and substance. Extrinsic evidence is admissible for the analysis.<sup>157</sup> In addition to the legislation itself, any purpose clause or preamble, and regulations made under the legislation, the courts can examine the record of legislative debates surrounding a measure, government and other reports concerning the mischief sought to be addressed and similar evidence of purpose.<sup>158</sup> Affidavits from officials explaining the true purpose and object of a law have been admitted.<sup>159</sup>

The effects of the law are relevant “in so far as they reveal its pith and substance.”<sup>160</sup> The courts examine the legal effects, that is “how the legislation as a whole affects the rights and liabilities of those subject to its terms”, to be deduced from the statute itself.<sup>161</sup> This is often an indicator of legislative purpose,<sup>162</sup> but the legal effects can sometimes demonstrate that a law has legal effects that were not intended or appreciated by the enacting legislature.<sup>163</sup>

The courts may consider, with extrinsic evidence, the impugned law’s “actual or predicted practical effect” once it is implemented.<sup>164</sup> For example, a municipal by-law prohibiting leafleting except with the permission of the local chief of police was shown to be used consistently to suppress religious expression by a dissenting minority (a matter outside provincial competence),

<sup>156</sup> *Canadian Western Bank v Alberta* 2008 SCC 22, para 29. In the example from *Ordon v Grail* [1998] 3 SCR 437 described in section 8 on inter-jurisdictional immunity, the provincial law creating a right of action for dependents of persons killed or injured in accidents is in pith and substance a law relating to causes of action in tort, a matter of property civil rights. It was clearly valid provincial law, regardless of its incidental effect on federal areas of competence. However, under inter-jurisdictional immunity it was read down so as not to apply to maritime negligence matters.

<sup>157</sup> *R v Morgentaler* [1993] 3 SCR 463, 483-484.

<sup>158</sup> *Global Securities Corporation v British Columbia (Securities Commission)*, 2000 SCC 21, para 25; *R v Morgentaler* [1993] 3 SCR 463, 480; *Texada Mines Ltd v Attorney-General of British Columbia* [1960] S.C.R. 713.

<sup>159</sup> *Global Securities Corporation v British Columbia (Securities Commission)*, 2000 SCC 21, para 25.

<sup>160</sup> *Global Securities Corporation v British Columbia (Securities Commission)*, 2000 SCC 21, para 23.

<sup>161</sup> *R v Morgentaler* [1993] 3 SCR 463, 482; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)* 2002 SCC 31, para 54.

<sup>162</sup> *R v Morgentaler* [1993] 3 SCR 463, 482.

<sup>163</sup> *R v Morgentaler* [1993] 3 SCR 463, 483; *Starr v Houlden*, [1990] 1 SCR 1366.

<sup>164</sup> *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19 quoting *R v Morgentaler* [1993] 3 SCR 463, 484; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)* 2002 SCC 31, para 54.

and based on these effects, was found invalid as not being in relation to street regulation (normally a matter within provincial competence).<sup>165</sup> The Supreme Court has cautioned, however, that the actual or predicted effect of legislation need not be examined if pith and substance can be determined without reference to it: “the absence of evidence that the legislation has a practical effect in line with [its] characterization will not displace the conclusion as to the legislation’s [validity]”; otherwise courts risk inquiring into the effectiveness rather than the constitutionality of legislation.<sup>166</sup> Legislation is often challenged “before experience has shown its actual impact, and prediction of future impact is necessarily short-term.”<sup>167</sup> It would not be appropriate for legislation to be found valid and then later invalidated after its practical effect becomes known.<sup>168</sup>

## 12.2 Incidental Effects

As noted, *incidental* effects are not relevant for constitutional characterization under pith and substance. Incidental effects can be significant without disturbing the constitutionality of a law otherwise within the authority of the enacting legislature. “[B]y ‘incidental’ is meant effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature.”<sup>169</sup> For example, the federal criminal law prohibition of medically-supervised “safe injection sites” for drug addicts had a significant legal and practical effect on a provincial health care initiative, but was not invalid for this reason, its pith and substance being in relation to the prohibition and punishment of illicit drug use, a matter falling under the federal criminal law power.<sup>170</sup>

However, the courts will still be mindful of the “[t]he scale of the alleged incidental effects” which “may put a law in a different light so as to place it in another constitutional head of power.”<sup>171</sup> In 1939, an Alberta law imposing a tax on banks was held invalid because the effects of the tax were “so severe” that the “true purpose of the law could only be in relation to banking, not taxation”.<sup>172</sup> By contrast, a tax on banks by the province of

<sup>165</sup> *Saurmur v City of Québec* [1953] 2 SCR 299; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)* 2002 SCC 31, para 54.

<sup>166</sup> *R v Morgentaler* [1993] 3 SCR 463, 487.

<sup>167</sup> *R v Morgentaler* [1993] 3 SCR 488.

<sup>168</sup> *R v Morgentaler* [1993] 3 SCR, 488.

<sup>169</sup> *Canadian Western Bank v Alberta* 2008 SCC 22, para 28, citing *Global Securities Corporation v British Columbia (Securities Commission)*, 2000 SCC 21, para 23 and *British Columbia v Imperial Tobacco Canada Ltd* 2005 SCC 49, para 28.

<sup>170</sup> *Canada (Attorney General) v PHS Community Services Society* 2011 SCC 44, para 51.

<sup>171</sup> *Canadian Western Bank v Alberta* 2008 SCC 22, para 31.

<sup>172</sup> *Global Securities Corporation v British Columbia (Securities Commission)*, 2000 SCC 21, para 23, discussing *Attorney General for Alberta v Attorney General for Canada* [1939] AC 117. See also *Texada Mines Ltd v Attorney-General of British Columbia* [1960] S.C.R. 713 and *Central Canada Potash Co. v Government of Saskatchewan* [1979] 1 SCR 42.

Ontario had been upheld fifty years earlier on the basis that its incidental effects (clearly not as severe as those of the Alberta banking tax) did not change its characterization as a provincial taxing statute.<sup>173</sup>

### 12.3 “Colorability” and True Purpose

Consideration of legal and practical effects can in some cases demonstrate that the real purpose behind a law is to achieve indirectly what a legislature is not empowered to do directly, that it has disguised its legislation in a form ostensibly within its powers. This is referred to as “colorability”. Thus the onerous Alberta banking tax referred to above was “disguised” as a mere provincial tax, but its true purpose was to drive the federally-chartered banks out of the province (to be replaced with an alternative credit scheme, established by contemporaneous provincial legislation).<sup>174</sup> Few cases have actually been decided on the basis of colorability, as it suggests some form of wilful misconduct on the part of the legislature, which courts may be reluctant to impute.<sup>175</sup>

Colorability is in fact a reflection of the more general concept that the courts will examine the substance, and not merely the form, of legislation in undertaking the pith and substance analysis.<sup>176</sup> The courts must “seek to ascertain the true purpose of the legislation, as opposed to its mere stated or apparent purpose.”<sup>177</sup> On this basis, a particular provision inserted into a municipal by-law (enacted under provincial authority) generally governing the use of city streets was invalidated because it only targeted the use of the public spaces for the purposes of prostitution (a criminal law matter) and was bereft of provisions aimed at other conduct impeding the safe and orderly use of the streets.<sup>178</sup>

By contrast, a provincial law which more broadly prohibited and penalized a range of conduct, including begging or demanding money from pedestrians at various locations (such as bus stops or bank machines) or from motorists stopped at intersections, was in pith and substance “the regulation of the interaction of pedestrians and vehicles on the roadways in the interests of public safety, efficient circulation, and public enjoyment of public thoroughfares” and therefore validly within provincial competence.<sup>179</sup> The fact that the law imposed a prohibition and penalty for harassing solicitation did not displace this characterization.

<sup>173</sup> *Bank of Toronto v Lambe* (1887) 12 App Cas 575.

<sup>174</sup> *Attorney General for Alberta v Attorney General for Canada* [1939] AC 117.

<sup>175</sup> Hogg, above n 8, 15-19 to 15-21.

<sup>176</sup> As above.

<sup>177</sup> *Canadian Western Bank v Alberta* 2008 SCC 22, para 27.

<sup>178</sup> *Westendorp v The Queen*, [1983] 1 SCR 43.

<sup>179</sup> *R v Banks* 2007 ONCA 19 (CanLII) (Ont Ct of Appeal), paras 28-72.

## 12.4 Presumption of Constitutionality

Throughout the pith and substance analysis, and in federalism analysis more generally, a presumption of constitutionality applies. The democratically-elected legislature, which is charged with securing the public interest, is presumed to act within its powers unless the contrary is demonstrated.<sup>180</sup> Both the burden of proof and the burden of persuasion rest upon the party challenging constitutionality on federalism grounds. Three rules also follow from the presumption: (1) in choosing between plausible characterizations of a law in the pith and substance analysis, the court should choose the one that results in a finding of validity;<sup>181</sup> (2) factual findings required to sustain validity (such as the existence of an emergency to support recourse to the emergency branch of the federal POGG power) do not need to be made on the basis of strict proof: a rational basis is sufficient;<sup>182</sup> and, (3) as between two plausible interpretations of a challenged statute, one of which would render it constitutional and the other not so, the former should be preferred.<sup>183</sup>

## 12.5 Efficacy Irrelevant

The courts consistently hold that the wisdom and actual or predicted efficacy of a measure are not relevant.<sup>184</sup> The *Firearms Reference* upheld federal authority to establish a nation-wide registry for gun owners under the federal criminal law power.<sup>185</sup> Against the contention that compelling lawful owners of guns to register would do nothing to prevent crime, the Supreme Court observed:

We also appreciate the concern of those who oppose this Act on the basis that it may not be effective or it may be too expensive. Criminals will not register their guns, Alberta argued. The only real effect of the law, it is suggested, is to burden law-abiding farmers and hunters with red tape. These concerns were properly directed to and considered by Parliament; they cannot affect the Court's decision. The efficacy of a law, or lack thereof, is not relevant to Parliament's ability to enact it under the division of powers analysis. ... The cost of the program, another criticism of the law, is equally irrelevant to our constitutional analysis.<sup>186</sup>

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<sup>180</sup> Hogg, above n 8, 15-23.

<sup>181</sup> As above; *Reference re Firearms Act (Can)* 2000 SCC 31, para 25; *Siemens v Manitoba (Attorney General)* 2003 SCC 3, para 33.

<sup>182</sup> Hogg, above n 8, 15-23; *Reference re Anti-Inflation Act*, [1976] 2 SCR 373, 423-426.

<sup>183</sup> Hogg, above n 8, 15-23.

<sup>184</sup> *Union Colliery Company of British Columbia v Bryden* [1899] AC 580, 583-584.

<sup>185</sup> *Reference re Firearms Act (Can)* 2000 SCC 31.

<sup>186</sup> As above, para 57.

## 12.6 Challenge to Only Part of a Statute

Often only part of a statute is challenged as beyond the competence of the enacting legislature. As in the case of the anti-prostitution provision inserted in the municipal street by-law mentioned above, an unconstitutional provision will not be saved by being in an otherwise valid statutory regime.<sup>187</sup>

Questions arise as to how to apply the pith and substance approach to characterization when only part of the statute is at issue, since the characterization of the provisions in question may be affected if one focuses on the provisions in isolation or on the statute as a whole. The Supreme Court has settled the analytical approach to be applied.<sup>188</sup> First, the challenged provision should be looked at in isolation. If it is in pith and substance within the authority of the enacting legislature, the inquiry stops and the provision should be upheld. If not, then the provision is still subject to being upheld as part of an otherwise valid statutory scheme. For this, the statute as a whole must be characterized, and the provision may be upheld if it is sufficiently integrated into the overall scheme.<sup>189</sup>

## 13. Double Aspect and Concurrence

Sometimes determining pith and substance can be a more challenging exercise if the given law's characteristics cannot be divided neatly into dominant and incidental, or if the subject matter of a law seems to fall within provincial authority when viewed from one perspective, but from another perspective, it seems to fall within federal authority.<sup>190</sup> In this situation, double aspect, another pragmatic Canadian doctrine of long-standing, comes into play.<sup>191</sup>

[S]ome matters are by their very nature impossible to categorize under a single head of power: they may have both provincial and federal aspects. Thus the fact that a matter may for one purpose and in one aspect fall

<sup>187</sup> *Westendorp v The Queen*, [1983] 1 SCR 43; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)* 2002 SCC 31, para 56; *General Motors of Canada Ltd v City National Leasing* [1989] 1 SCR 641, 665.

<sup>188</sup> *Kirkbi AG v Ritvik Holdings Inc* 2005 SCC 65, paras 20-21; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)* 2002 SCC 31, paras 55-58; *General Motors of Canada Ltd v City National Leasing* [1989] 1 SCR 641, 666-669.

<sup>189</sup> *Kirkbi AG v Ritvik Holdings Inc* 2005 SCC 65, paras 20-21; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)* 2002 SCC 31, paras 55-58; *General Motors of Canada Ltd v City National Leasing* [1989] 1 SCR 641, 666-669; *MacDonald v Vapor Canada Ltd* [1977] 2 SCR, para 134, 159.

<sup>190</sup> *Canadian Western Bank v Alberta* 2008 SCC 22 para 30.

<sup>191</sup> *Hodge v The Queen* (1883) 9 App Cas 117, 130; *Bank of Toronto v Lambe* (1887) 12 App Cas 575, upholding a provincial tax on banks as being having both a provincial taxation aspect as well as a banking aspect; *Union Colliery of British Columbia v Bryden* [1899] AC 580, recognizing a valid provincial aspect to labour standards legislation of British Columbia but finding that the provision thereof singling out persons of Chinese origin as ineligible to work in the province's mines was within exclusive federal authority and outside provincial jurisdiction; *Canadian Western Bank v Alberta* 2007 SCC 22 upholding provincial law regulating the sale of insurance in the province, including the sale of insurance by federally chartered banks, which are expressly permitted by federal law to sell certain insurance products: the provincial law was in pith and substance consumer protection legislation and thus valid under the power over property and civil rights; Hogg, above n 8, 15-12 to 15-14.

within federal jurisdiction does not mean that it cannot, for another purpose and in another aspect, fall within provincial competence ... The double aspect doctrine, as it is known, which applies in the course of a pith and substance analysis, ensures that the policies of the elected legislators of both levels of government are respected. A classic example is that of dangerous driving: Parliament may make laws in relation to the “public order” aspect, and provincial legislatures in relation to its “Property and Civil Rights in the Province” aspect ... [B]oth Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered, that is, depending on the various “aspects” of the “matter” in question.<sup>192</sup>

The doctrine is illustrated by *Chatterjee v Ontario*,<sup>193</sup> which considered the validity of a provincial law providing for the civil forfeiture of property found on a balance of probabilities to be proceeds of unlawful activity. Unlawful activity was deemed by the law to include any criminal activity. The law was challenged as being outside provincial jurisdiction and instead within exclusive federal competence over the criminal law. The law had multiple characteristics: it was directed at crime in the broad sense. It sought to deter crime by ensuring that criminal proceeds did not remain in the hands of perpetrators, and it sought to prevent crime by removing proceeds that could fund further criminal enterprises. Arguably it also punished crime. On the other hand, it imposed civil consequences for certain behavior, disgorging property unlawfully acquired, as in an ordinary civil case; further, it dealt with property *in rem* (not with persons or personal liability as under the criminal law). The also law prescribed victim compensation from forfeited proceeds. The law thus could be characterized differently from different perspectives which tended to pull in different directions for a pith and substance analysis. Notably there also existed federal law providing for forfeiture of property found, during the course of a criminal prosecution of an alleged offender, to be proceeds of crime. In the result, the Supreme Court upheld the legislation as within provincial jurisdiction over property and civil rights, because the law, although when viewed from one aspect seemed directed a matter within federal competence over criminal law, from another aspect addressed civil and proprietary matters within provincial competence. Similar, or even identical laws, can be competent to *both* levels of government.<sup>194</sup>

<sup>192</sup> *Canadian Western Bank v Alberta* 2008 SCC 22, para 30.

<sup>193</sup> *Chatterjee v Ontario (Attorney General)* 2009 SCC 19.

<sup>194</sup> *Multiple Access Ltd v McCutcheon* [1982] 2 SCR 161 (insider trading prohibitions can be both criminal and a matter of provincial securities regulation); *Nova Scotia Board of Censors v McNeil* [1978] 2 SCR 662 (the province can establish a film censor board to regulate obscene materials and obscenity can be prohibited criminally); *Rio Hotel Ltd v New Brunswick (Liquor Licensing Board)* [1987] 2 SCR 59 (nude dancing in drinking establishments can be prohibited by provincial licensing laws and by the criminal law); *O'Grady v Sparling* [1960] SCR 804 (dangerous driving can be both a provincial highway traffic offence and a criminal law offence); *Bédard v Dawson*, [1923] SCR 681 (provincial law can force the closing of brothels and the criminal law can prohibit prostitution); *Robinson v Countrywide Factors Ltd* [1978] 1 SCR 753 (fraudulent preferences can be regulated by provincial debtor-creditor law and by federal insolvency law). But see, discussed above in section 11.3, *Westendorp v The Queen*, [1983] 1 SCR 43 (provincial highway traffic regulation cannot be used as a guise to punish street prostitution).

The double aspect doctrine thus countenances in practice a high degree of overlap and concurrency between the respective jurisdictions of the federal and provincial legislatures. Importantly, though, the doctrine does not make the heads of legislative authority any less exclusive, turning them into concurrent powers (such as the concurrent powers over agriculture and immigration set out in section 95 of the *Constitution Act, 1867*).<sup>195</sup> Concurrency arises from the characterization of pith and substance as having two aspects, not from a reinterpretation of the powers.

With the double aspect doctrine and acceptance of concurrency, federalism adjudication does not automatically become what it otherwise might be, namely a zero-sum, winner-take-all contest between the competing levels of jurisdiction. Just because the Court upheld the provincial legislation at issue in *Chatterjee* did not mean that similar federal legislation enacted as part of the *Criminal Code* was constitutionally infirm.<sup>196</sup> Judicial acceptance of concurrency may result in less incentive for contestation in lieu of cooperation among governments.

Conflict between the laws concurrently enacted by the two levels of government is addressed by the paramountcy doctrine discussed above in section 9.

#### 14. Incremental Interpretation of the Division of Powers

The interpretation of the scope of the heads of legislative authority need not be an exhaustive exercise in any given case. This comes from, first, the fact that the pith and substance doctrine calls for the determination of only the dominant characteristic of the law being challenged, prior to the law being classified by reference to the division of powers, and second, the fact that concurrency is accepted under the double aspect doctrine. The court need only determine if any one (or more) of the heads of power of the enacting jurisdiction is sufficient to support the law as characterized. Since the double aspect doctrine accommodates concurrency, it is not necessary to determine if a challenged law with multiple characteristics would better “fit” under the powers allocated to the other level of government: “greater suitability” is not the test for jurisdiction. Thus it is not necessary to engage in defining the scope of the powers of the other level of government. As a further result, the court need only determine if the law as characterized fits somewhere within the outer limits of the enacting government’s jurisdiction. The full contours of the enacting government’s power(s) need not be explored. Accordingly,

<sup>195</sup> Reference re Securities Act 2011 SCC 66, para 66.

<sup>196</sup> *Chatterjee v Ontario (Attorney General)* 2009 SCC 19, para 32.

<sup>197</sup> *Canadian Western Bank v Alberta* 2008 SCC 22, para 31.

any given power being relied upon to support the enacting government's authority is not likely to be fully defined in any particular case.

This focus on the characterization and classification of the law being challenged, rather than on the definition of the jurisdiction of the enacting government, means that the scope of powers is defined only over time, by the accumulation of cases, much in the way the common law develops: “[i]n this manner, the courts incrementally define the scope of the relevant heads of power.”<sup>197</sup> The task of the judiciary in any given case is made less burdensome by being less ambitious. Moreover, incremental interpretation permits the correction of missteps as courts and governments learn from experience. The task of defining each power is also concretized and made less abstract and inaccessible, because the question before the court in a case is only whether a particular law, as characterized, falls within a head of power. The late Professor Bora Laskin (later Chief Justice of Canada) described the process as “an interlocking one, in which the [*Constitution Act, 1867*] and the challenged legislation react on one another and fix each other's meaning.”<sup>198</sup> The judiciary does not require a comprehensive theory of the division of powers to resolve a given case.

In 1916, it was remarked by the Judicial Committee of the Privy Council that the “abstract” definition of the scope of constitutional provisions is not only “impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases.”<sup>199</sup> Almost a century later, in highlighting the problems posed by trying to define the “cores” of federal power, the Supreme Court made similar remarks:

... the tradition of Canadian constitutional interpretation ... favours an incremental approach. While it is true that the enumerations of ss. 91 and 92 contain a number of powers that are precise and not really open to discussion, other powers are far less precise, such as those relating to the criminal law, trade and commerce and matters of a local or private nature in a province. Since the time of Confederation, courts have refrained from trying to define the possible scope of such powers in advance and for all time. ... It was by proceeding with caution on a case-by-case basis that the courts were gradually able to define the content of the heads of power of Parliament and the legislatures, without denying the unavoidable interplay between them, always

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<sup>198</sup> *R v Morgentaler* [1993] 3 SCR 463, 481; Hogg, above n 8, 15-6; but see cautionary note in *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19, para 16.

<sup>199</sup> *John Deere Plow Co. v Wharton*, [1915] AC 330, 339 (quoted in *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97, para 9) and 341-342; see also *Citizens' Insurance Co v Parsons* (1881) 1 App Cas 96, 102.

having regard to the evolution of the problems for which the division of legislative powers must now provide solutions.<sup>200</sup>

This incremental and modest process also has the virtue of avoiding pronouncements on the law that are unnecessary for the determination of the issue before the court in a given case. This is itself a long-settled principle in Canada.<sup>201</sup>

## 15. Progressive Interpretation

Incremental interpretation has another virtue, in that it avoids casting the 1867 text in stone in a manner that would prevent it from adapting to future situations and needs. This brings us to our last item for discussion, the doctrine of progressive interpretation.

The doctrine is frequently articulated by the metaphor of a “living tree” which has its genesis in a famous 1929 case<sup>202</sup> interpreting the qualifications of Senators set out in the *Constitution Act, 1867*. It was contended against the appointment of women to the Senate that they were not qualified, since only qualified “persons” could be appointed, and in 1867 it must have been understood that only men could be such persons. The Judicial Committee of the Privy Council, overturning the Supreme Court, held that women could indeed be qualified persons. The Law Lords rejected the notion that the text of the Constitution should be interpreted by reference only to understandings that might have prevailed in 1867 but were incompatible with modern needs and conditions.<sup>203</sup> Viscount Sankey stated:

The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. Like all written constitutions it has been subject to development through usage and convention ... Their Lordships do not conceive it to be the duty of this Board ... to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation ...<sup>204</sup>

With the living tree as the metaphor for the Constitution, the doctrine of originalism seen in American jurisprudence has had little if any influence in Canadian constitutional interpretation, “ensur[ing] that Confederation can

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<sup>200</sup> *Canadian Western Bank v Alberta* 2008 SCC 22, para 43.

<sup>201</sup> *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97, paras 5-12.

<sup>202</sup> *Edwards v Attorney General of Canada* (1929), [1930] AC 124.

<sup>203</sup> *Edwards v Attorney General of Canada* (1929), [1930] AC 124, para 134-135.

<sup>204</sup> *Edwards v Attorney General of Canada* (1929), [1930] AC 12, para 136-137.

be adapted to new social realities.”<sup>205</sup> Framer’s intent, gleaned from materials other than the text itself, is relevant not decisive: reflect[ing], to a large extent, the society of the day, whereas the competence is essentially dynamic.”<sup>206</sup> This is not to say that federalism interpretation is divorced from the text of the *Constitution Act, 1867*. As discussed above in section 7, the primacy of the written text is a governing principle and the living tree metaphor does not license the courts to ignore the division of powers set out in the text.<sup>207</sup> However, liberal and modern interpretations of the text are to be preferred to narrow or archaic ones.

The living tree metaphor has been applied in federalism cases to ensure that the allocation of powers is, as far as the text will permit, flexibly interpreted in a manner responsive to modern conditions. In 2005, the Supreme Court had to interpret the scope of the power over unemployment insurance (section 91(2A)) assigned to Parliament by constitutional amendment in 1940. The amendment was a response to the earlier invalidation of a federal unemployment insurance program introduced to address mass unemployment in the Great Depression.<sup>208</sup> Immediately after the constitutional amendment, Parliament re-enacted its unemployment insurance scheme. Additions to the program decades later provided for maternity benefits and these were challenged as beyond federal competence.

In upholding the provisions as within the scope of the unemployment insurance power, the Court explicitly adopted the doctrine of progressive interpretation to adapt the Constitution to modern social realities.<sup>209</sup> It found the pith and substance of the original scheme was to provide insurance against the loss of earnings in the event of unemployment, whereas the pith and substance of maternity benefits was to insure against the loss of earnings as a result of pregnancy and child birth. Despite this difference, the Court found that the benefits were consistent with the “essential elements” of the unemployment insurance power and its “natural evolution.”<sup>210</sup> The essential elements of the power could be determined by a “generous reading” of the words used in their legal context and expanded by “having regard to relevant historical elements.”<sup>211</sup> The power, as progressively interpreted, authorizes “a public

<sup>205</sup> *Reference re Employment Insurance Act (Can)*, ss. 22 and 23, 2005 SCC 56, para 9

<sup>206</sup> *Reference re Employment Insurance Act (Can)*, ss. 22 and 23, 2005 SCC 56, para 9

<sup>207</sup> *Reference re Securities Act* 2011 SCC 66, paras 54, 61-62; *Québec (Attorney General) v Canada (Attorney General)* 2015 SCC 1, para 18.

<sup>208</sup> *Canada (Attorney General) v Ontario (Attorney General) (Unemployment Insurance)* [1937] AC 355; *Reference re Employment Insurance Act (Can)*, ss. 22 and 23, 2005 SCC 56, para 17.

<sup>209</sup> *Canada (Attorney General) v Ontario (Attorney General) (Unemployment Insurance)* [1937] AC 355; *Reference re Employment Insurance Act (Can)*, ss. 22 and 23, 2005 SCC 56, para 9.

<sup>210</sup> *Canada (Attorney General) v Ontario (Attorney General) (Unemployment Insurance)* [1937] AC 355; *Reference re Employment Insurance Act (Can)*, ss. 22 and 23, 2005 SCC 56, para 44.

<sup>211</sup> *Canada (Attorney General) v Ontario (Attorney General) (Unemployment Insurance)* [1937] AC 355; *Reference re Employment Insurance Act (Can)*, ss. 22 and 23, 2005 SCC 56, para 46.

insurance program the purpose of which is to preserve workers' economic security and ensure their re-entry into the labour market by paying income replacement benefits in the event of an interruption of employment.<sup>212</sup>

## 16. Conclusion

Scholars can debate the judiciary's role in the continuing success of Canada's federation. The federation, still a work in progress, has faced many crises – political, constitutional and existential – over the last century and a half.<sup>213</sup> It is doubtful that the doctrines of interpretation discussed above played a direct role in causing or resolving these crises.<sup>214</sup> However, it may be ventured that the judiciary has, by and large, successfully articulated an approach to federalism that, on the one hand, is pragmatic, flexible and adaptable, and yet on the other hand, adheres to general principles that have much to commend them:

- the maintenance of balanced federalism between the levels of government,
- a measured but not dogmatic respect for the written text, and
- a healthy restraint in striking down laws enacted by the democratically-elected legislatures of either level, thereby accommodating, and maybe inducing, cooperative federalism among the political branches.

The Canadian judiciary prudently acknowledges that much of the hard work required to make federalism function has to be left to politics.<sup>215</sup>

Perhaps, above all, the judiciary has succeeded in making federalism adjudication generally uncontroversial in modern Canada. Most Canadians would agree that unlike Borges' provocative writings on the futility of

<sup>212</sup> *Canada (Attorney General) v Ontario (Attorney General)* (Unemployment Insurance) [1937] AC 355; *Reference re Employment Insurance Act (Can)*, ss. 22 and 23, 2005 SCC 56, para 68.

<sup>213</sup> These crises have included unrest involving the *Métis* people in the Prairies, corruption scandals, linguistic and sectarian conflict over schooling, labour strife due to economic dislocations and the World Wars, regional economic conflicts pitting central Canadian banking and industrial interests against Western farmers, domestic terrorism in the early 1970s and a declaration of martial law, regional disagreements over economic and resource policies in the 1980s, referenda on the secession of Québec in 1982 and 1995, and failed attempts at constitutional reform. See M Conrad, *A Concise History of Canada* (2012).

<sup>214</sup> Canada has no equivalent to the US Supreme Court's fateful decision in *Dred Scott v Sandford*, 60 US 393 (1857) that preceded the Civil War, although the Canadian Supreme Court has been called upon to render judgment both on the legality of proposed unilateral federal measures to patriate the Canadian Constitution. *Reference re Resolution to amend the Constitution* [1981] 1 SCR 753 (the "*Patriation Reference*"), and to opine on the terms under which Québec would be able to secede from Confederation, *Reference re Secession of Québec* [1998] 2 SCR 217. The *Patriation Reference* did influence later events that led to patriation in 1982 with the agreement of all but one of the provinces. The substance of the *Secession Reference* has been incorporated into federal legislation, *An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Québec Secession Reference*, 2000 SC c 26 ("*Clarity Act*"). Canada's political circumstances, thus far, have not demanded recourse to the *Clarity Act*.

<sup>215</sup> The Court most recently affirmed that the Constitution does not compel recalcitrant governments to cooperate: *Québec (Attorney General) v Canada (Attorney General)* 2015 SCC 1, in which the federal government, which dismantled its own gun registry, refused to share the data to assist Québec in creating a provincial registry.

classifying the world into neat categories, federalism jurisprudence in Canada can be, for lack of a better word, simply boring. That may be no small achievement.

# Kenya's Emerging Judicial Interpretation of Public Participation under the Devolved System of Government

Ben Nyabira

## 1.0 Introduction

The Kenyan Constitution is explicit in its requirements for a participatory process in governance. Indeed, one of the main objectives of the devolved system of government is to “enhance the participation of the people in the exercise of the powers of the state and in making decisions affecting them”.<sup>1</sup> Even more specifically, one of the roles that has been allocated to county governments is “ensuring and coordinating the participation of communities and locations in governance at the local level”.<sup>2</sup> The Kenyan courts are increasingly interrogating public participation requirements and providing direction regarding how participation should be implemented. Several pieces of legislation and guidelines have also addressed the issue of public participation, all of which explain the constitutional provisions further and can be relied upon by the courts. Courts can also draw from the international law and other jurisdictions which have provisions relating to public participation and that have also been a subject of judicial interpretation. In all of this, the theoretical and conceptual basis for public participation is essential in the judicial interpretation of the normative framework.

In the last five years of constitutional implementation and two and half years of the existence of a devolved system of government, the Kenyan courts have made several rulings relating to public participation based on the existing normative framework. The decisions have looked at several issues including the definition of public participation, the extent to which the constitution of Kenya 2010 requires public participation, entities required to ensure public

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<sup>1</sup> Constitution of Kenya 2010, Article 174.

<sup>2</sup> As above, Schedule Four.

participation, the manner and what constitutes public participation. The general trend is that the courts have in most cases dismissed cases claiming lack of public participation on various grounds. The courts have also, largely, relied on the South African courts' interpretation of public participation. The main themes emerging from the courts' interpretation of public participation include the approaches to determine meaningful public participation, challenges in measuring, and conflicting interpretations. This chapter analyses Kenya's judicial interpretation of public participation. First though, it briefly discusses the theoretical, historical and normative basis for public participation, before embarking on the analysis of the judicial interpretation of public participation in Kenya all against the backdrop of Kenya's devolved governance.

## 2.0 The Concept of Meaningful Public Participation: Brief Theoretical Understanding

Public participation in public affairs has gained prominence in the recent days in many countries of the world. The concept, however, is yet to achieve a single universal meaning although the need for participation to be 'meaningful' is widely appreciated. In this regard, several theoretical approaches have emerged. Arnstein, for example, defines public participation as, "the redistribution of power that enables the 'have-not' citizens, presently excluded from the political and economic processes, to be deliberately included in the future". She further argues that "unless citizens have a genuine opportunity to affect outcomes, participation is mainly concerned with 'therapy' and 'manipulation' of participants".<sup>3</sup> Arnstein, therefore, is concerned with the redistribution of power (degree of control) as a means of ensuring that meaningful public participation takes place. Ghai too agrees with Arnstein's view with regard to the need to focus on the ability to affect outcomes. He says that, "the heart of participation is the ability to have an impact on the outcome"<sup>4</sup> Waterhouse, argues that in order to understand the concept of 'meaningful participation', it is important to understand theories of deliberative democracy and how they marry with the representative democratic systems.<sup>5</sup> She also argues that public participation is a political process and can thus only be understood through the appreciation of "social and political power and how they affect processes and the potential for public influence."<sup>6</sup> Waterhouse, like Arnstein, further

<sup>3</sup> SR Arnstein, A ladder of citizen participation *AIP Journal* July 1969 p 216. <<https://www.planning.org/pas/memo/2007/mar/pdf/JAPA35No4.pdf>> at 11 December 2015.

<sup>4</sup> Y P Ghai, "Public participation and devolution" *Understanding devolution* (2015) p 66.

<sup>5</sup> S J Waterhouse People's Parliament? An assessment of public participation in South Africa's legislatures Masters dissertation [unpublished] University of the Western Cape (2014) 24.

<sup>6</sup> As above.

argues that power relations affect how participation is implemented, the rules of engagement, who speaks and whose opinions matter, all of which have a significant impact on the outcome; and that based on this understanding participation theories are shifting “towards developing theories of citizen participation that address the transformation of power relations and the empowerment of people who participate.”<sup>7</sup> Mander agrees with this argument. He argues that empowerment which involves building ‘power within’ to build social movements, participate in governance and take action to hold the state to account’ is crucial to public participation.

Waterhouse has argued that leaders in a representative democracy have failed to be responsive enough thus the need for a deliberative democracy to help empower the citizenry to participate. The assumption of representation of the people by even the civil society simply because they have taken up their cause has also been cautioned against by The UN Special Rapporteur on Extreme Poverty and Human Rights (UNSREPHRs).<sup>8</sup> A recent report, however, points at another important ingredient for effective public participation, which is that, “Participatory democracy can be fostered only if the cultural bedrock already favors consultation, debate and participation in collective decision-making.”<sup>9</sup> This points at the need for cultural change in order to achieve effective public participation.

The theoretical development above reflects a shift in the understanding of public participation approaches from simply quantitative which is about reaching as many people as possible - to include the qualitative - which is about effectiveness. The measure of meaningful public participation therefore, should be based on how widely participation takes place but also how the power relations have been managed for the participation to be effective; and possibly the management of cultural change in favor of a more consultative one. This approach holds that power manifestations have links with social exclusion and inequality which have eventual negative effect on public participation.

Perhaps an aspect that has not been adequately addressed by these theories is how the people should be motivated to find interest in participating once they have been empowered and the power relations taken care of. While the need for change of culture can partly address this question, it also provokes

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7 S Hickey and G Mohan Relocating participation within a radical politics of development. *Development and Change*, (2005) 36(2) p 8 <[http://oro.open.ac.uk/4103/1/Hickey\\_and\\_Mohan\\_revised\\_70704.pdf](http://oro.open.ac.uk/4103/1/Hickey_and_Mohan_revised_70704.pdf)> at 19 October 2015.

8 Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/23/36 11 March 2013, 17 <<http://www.un.org/esa/socdev/egms/docs/2013/EmpowermentPolicies/Report%20of%20the%20Special%20Rapporteur%20on%20extreme%20poverty%20and%20human%20rights.pdf>> at 13 October 2015.

9 First UCLG global report, decentralization and local democracy in the world, Barcelona Spain 2008 <[http://www.cities-localgovernments.org/gold/Upload/gold\\_report/gold\\_report\\_en.pdf](http://www.cities-localgovernments.org/gold/Upload/gold_report/gold_report_en.pdf)> at 11 December 2015.

another question which is how to achieve cultural change. This author argues that the consumer theories in economics, about what motivates people to make consumption decisions- whose application is universal, can be applied in motivating people to participate. One of these theories is the Modigliani life-cycle theory.<sup>10</sup> It holds that “[i]ndividuals both plan their consumption and savings behavior over the long-term and intend to even out their consumption in the best possible manner over their entire lifetimes”. The concept here is that peoples’ decisions are largely a function of their fears or hopes over the future, particularly regarding their economic well-being. The basis of motivating public participation, therefore, is how to secure the future through the particular activity in the peoples’ eyes. A Peruvian activist defined participation as, “[f]or us, participating means leaving our isolation, breaking our silence and overcoming our fear...before I was afraid, but now I’m strong, not humbled”.<sup>11</sup> The next section provides a brief background to public participation and the devolved governance in Kenya. This is followed by a short discussion on the normative framework presented under the Constitution. The paper then assesses how the courts have dealt with the theoretical principles above and other aspects of public participation.

### 3.0 Historical Development of Public Participation in Kenya and Devolved Governance

The devolved system of governance is one of the greatest innovations of the Constitution of Kenya, 2010. The main aim of its introduction was to dismantle the centralized system of government that had regional and ethnic exclusion tendencies causing wide socio-economic disparities. As early as 1997, the political opposition in Kenya together with the church and civil society secured government support for a people’s lead constitution review process. This was achieved through the enactment of the Constitution of Kenya Review Commission Act of 1997, Cap 3A of the Laws of Kenya, after long negotiations.<sup>12</sup> The Act states one of the objects and purpose of constitutional review as; ‘Promoting the peoples’ participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power’ and ‘Ensuring the full participation of people in the management of public affairs’.<sup>13</sup> Some sections of the Act were however

<sup>10</sup> The Modigliani life-cycle theory is an economic theory named after the Italian-born American economist who received the Nobel Prize for Economics for this same theory in 1985 <<http://global.britannica.com>> at 20 October 2015.

<sup>11</sup> International Movement ATD Fourth World, *Extreme Poverty is Violence: Breaking the Silence, Searching for Peace* (2012) 60 as quoted in UN Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona. *Recommendations to States: an operational framework to ensure meaningful participation of people living in poverty*. Human Rights Council A/HR/C/23/36 11 March 2013.

<sup>12</sup> Constitution of Kenya Review Act, 1997 <<http://www.constitutionnet.org/files/KE197-005.pdf>> at 20 October 2015.

<sup>13</sup> As above sec 3(d).

challenged in court on the grounds that they did not require participation of the people in adopting the new constitution.<sup>14</sup> The court ruled in favor of the petitioners, paving way for the 2005 constitutional referendum.

In the case, the court relied on B O Nwabweze's definition of 'constituent power of the people'. He defined sovereignty as having three elements namely: 'the power to constitute a frame of government, the power to choose those to run the government, and the powers involved in governing. He added that "It is by means of the first, the constituent power, that the last are conferred".<sup>15</sup> Consequently, the subsequent Act, rightly, stipulated that the new constitution should, among other reforms, provide for devolution; and exercise of power; and the participation of the people.

AND WHEREAS for the last two decades, the people of Kenya have yearned for a new Constitution which: promotes the people's participation in the governance of the country through democratic, free and fair elections and the devolution and exercise of power and further ensures the full participation of the people in the management of public affairs.<sup>16</sup>

The next section briefly focuses on the normative framework for public participation in Kenya.

## 4.0 The Normative Framework on Public Participation

### 4.1 Public Participation under the Constitution of Kenya 2010

The Constitution of Kenya 2010 provides the main framework for public participation in Kenya providing for both representative as well as participatory democracy. Article 1 states:

all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this constitution. The people may exercise their sovereign power either directly or through their democratically elected representatives.<sup>17</sup>

Article 10 further recognises participation of the people as a national value which:

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<sup>14</sup> *Njoya and Others v Attorney-General and Others* (2004) AHRLR 157 (KeHC 2004).

<sup>15</sup> B O Nwabwezi, *Presidentialism in Commonwealth Africa* L Hurst and Company (1974) 392.

<sup>16</sup> Constitution of Kenya Review Act of 2008, <<<http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ConstitutionofKenyaReviewCap3A.pdf>>> at 23 October 2015.

<sup>17</sup> Constitution of Kenya 2010 Article 1 and 2

bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets this constitution, enacts, applies or interprets any law; or makes or implements public policy decisions.<sup>18</sup>

As earlier indicated public participation is an assigned function of the county governments which are charged with:

Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.<sup>19</sup>

Whereas public participation is not an explicit function of the national government, being a national value, there is no doubt that the national government is bound by it.<sup>20</sup> A keen reading of the public participation function of the county governments confirms this. The key word is governance, a broad term whose use points to the understanding that governments work for the people and not the other way round, thus governance begins with them not the so called 'government'. The government should be understood as an implementing body. Only when communities are empowered and not subdued can they effectively participate in governance. This is the idea behind the establishment of the county governments. This is where governance should be nurtured and used to change governance at the national level.

Indeed, elsewhere, the Constitution confirms the above arguments. It defines 'marginalised community', as those, among other reasons, that have been 'unable to fully participate in the integrated social and economic life of Kenya as a whole'.<sup>21</sup> The Constitution, therefore, attributes the existing social injustices in Kenya on the exclusion of some people from the Kenyan political social and economic life, which it seeks to correct through devolution.<sup>22</sup> Based on the constitutional definition of a 'marginalized group', which is about being disadvantaged by discrimination on article 27 grounds, and having seen the link between public participation and social justice, it can be argued that

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<sup>18</sup> Y P Ghai, "Public participation and devolution" *Understanding devolution* (2015).

<sup>19</sup> The Constitution on Kenya 2010, Fourth Schedule ss14.

<sup>20</sup> This chapter will not delve into the debate on why this is so, but some of the reasons could be to avoid functional disputes between the two levels of government; to avoid duplication; and to appreciate that participation is about empowering communities and not just involvement in government functions.

<sup>21</sup> The Constitution on Kenya 2010, art 260.

<sup>22</sup> Article 174(g).

one criteria for ensuring effective public participation is by ensuring that the grounds set out in article 27(4) are considered in facilitating public participation.

Indeed, the Commission on Revenue Allocation (CRA), in its policy on the criteria for identifying marginalized areas and sharing of the equalization fund, recognizes that:

... [P]olitical power and decision-making was centralized and confined at the centre in Nairobi before promulgation of the new Constitution in August 2010. This perpetuated marginalisation of some parts of the country, especially far-flung regions and minority groups, from full participation in social and economic activities. The result has been significant levels of disparities in economic development among different regions and communities.<sup>23</sup>

The Constitution is explicit that one of the objectives of devolution is to “give powers of self-governance to the people and enhance the participation of the people in exercise of the powers of the state and in making decisions affecting them.”<sup>24</sup> The Constitution also requires public participation: in the management and protection of the environment;<sup>25</sup> legislation and other business of parliament<sup>26</sup> and county assemblies<sup>27</sup>; in financial matters;<sup>28</sup> urban areas and cities.<sup>29</sup>

The Constitution, further, recognises that ‘the general rules of international law’<sup>30</sup> and ‘any treaty or convention ratified by Kenya’<sup>31</sup> shall form part of the law of Kenya under this constitution’. This, therefore, commits the public authorities and entities to international public participation standards. The next section looks at some of the international standards on public participation.

## 4.2 International Public Participation Framework

Several international legal instruments have enshrined the right of the citizens to participate in governance. The Universal Declaration on Human

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<sup>23</sup> CRA policy on the criteria for identifying marginalised areas and sharing of the Equalisation Fund 2011-2014, P4<http://www.crakenya.org/wp-content/uploads/2013/10/CRA-Policy-on-marginalisation-criteria.pdf> at 20 October 2015.

<sup>24</sup> Constitution of Kenya 2010, Article 174.

<sup>25</sup> As above, Article 69.

<sup>26</sup> As above, Articles 118.

<sup>27</sup> As above, Article 196(1)(b).

<sup>28</sup> As above, Article 201(a).

<sup>29</sup> As above, Article 184(1) (c).

<sup>30</sup> As above, Article 2(5).

<sup>31</sup> As above, Article 2(6).

Rights states that “everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”<sup>32</sup> The International Covenant on Civil and Political Rights (ICCPR),<sup>33</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCRs),<sup>34</sup> the African Charter on Human and Peoples Rights (Banjul Charter),<sup>35</sup> and the Convention on the Rights of the Child (CRC),<sup>36</sup> all advocate for direct participation of the people in public affairs. CRC, particularly, requires the “provision of information; support, if necessary; feedback, procedure for complaints; remedies or redress.”<sup>37</sup> Kenya is a state party to all the instruments above.

The Human Rights Council (HRC) has, on its part, taken a broad approach to include participation in civil, cultural and social activities of a public nature.<sup>38</sup> The GC No. 25, which is based on article 25 of the ICCPR, the HRC provides that “states have discretion to determine through constitutions and laws the powers, forms and means of public participation”<sup>39</sup> The Economic and Social Council (ESC), has also observed that programs that are done without “active and informed participation of those affected are most unlikely to be effective” and that this is also true for the poor.<sup>40</sup> The United Nations Special Rapporteur on Extreme poverty and Human Rights (UNSREPHRs) concurs with this position.<sup>41</sup> She also argues that freedom of information,<sup>42</sup> association,<sup>43</sup> assembly,<sup>44</sup> effective access to justice,<sup>45</sup> right to an effective remedy<sup>46</sup> and the rights to education<sup>47</sup> are fundamental preconditions for the realisation of public participation. She asserts that in order to participate effectively, all members of the public must be able to organize, meet, express themselves without intimidation or censorship, know the relevant facts and arguments,

32 UDHR, GA Resolution 207A (III). Article 21(1)(3).

33 ICCPR, Article 25.

34 Recognises education as an enabler for people to effectively participate in a free society ICESCRs Art 13(1) <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>> At 29 September 2015>.

35 ACHPRs, Article 13(1).

36 CRC Article 12.

37 CRC/C/GC/12, para. 48. Available <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>.

38 A/HRC/18/42, para.5 <[http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-42\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-42_en.pdf)> at 29 September 2015.

39 GC No. 25: Art. 25: 12/07/96. CCPR/C/21/Rev.1/Add.7, General Comment No 25 (Para 5) <<http://www.equalrightstrust.org/ertdocumentbank/general%20comment%2025.pdf>> at 9 October 2015.

40 E/C.12/2001/10 para12 <<http://www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.10Poverty-2001.pdf>> At 29 September 2015.

41 Report of the independent expert on the question of human rights and extreme poverty A/63/27413 August 2008 para. 22.

42 A/HRC/23/36 27 ICISCRs Article 13.1; UDHRs Article 26.2; CRC Article 29.1; CRPDs Article 24(c).

43 UDHRs Article 20; ICCPRS Article 22; CEDAW Article 7(c); CRC Article 15.

44 UDHRs Article 20; ICCPRs Article. 21.

45 UDHRs 8 and 10; ICCPR Article 14.

46 ICCPR Article 3) (A/67/578.

47 E/C.12/GC/21, para. 27.

be conscious of their rights and have the requisite skills and capacity”.<sup>48</sup> The CRC Committee further recognises that participation should be continuous.<sup>49</sup>

The Access to Justice in Environmental Matters (Aarhus Convention) stipulates that time and the focus on the outcome are essential for effective public participation.<sup>50</sup> The World Bank, on the other hand, has defined public participation as, “A process in which stakeholders’ influence and share control over development initiatives, decisions and the resources affecting them.”<sup>51</sup>

The UNSREPHR has also held that ‘participation is always embedded in a specific socio-cultural context and set of power dynamics’<sup>52</sup> thus should be done from the ground-up in consultation with the communities. She, however, proposes that it is important to have a common understanding of what participation encompasses and what “is appropriate minimum standards by which to measure the adequacy and quality of participation with regard to people living in poverty”.<sup>53</sup> She proposes a human rights approach, which places on states obligations: to respect, to protect, and to fulfill. With regard to public participation, the obligation to respect, requires states to refrain from interfering with the enjoyment of that right. “The obligation to protect requires States to take steps to prevent third parties (including business enterprises or private individuals) from interfering in the right to participation” while the obligation to fulfill requires “states to facilitate, promote and provide for the full realization of the right to participation, through appropriate legislative, administrative, judicial, budgetary and other measures”.<sup>54</sup> She further proposed that states should not dominate in all public participation spaces and that public participation should be a process and not a one off event. The Special Rapporteur proposes several specific actions that states should take ranging from legal and institutional frameworks, resources, equality and discrimination, access to information, accountability, empowerment and roles for national human rights commissions. The steps include: ensuring meaningful opportunities for public participation is provided; regulation of the involvement of powerful non-state actors; participation from the start; sufficient resources for public participation including for possible transport

48 UN Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona. *Recommendations to States: an operational framework to ensure meaningful participation of people living in poverty*. Human Rights Council A/HR/C/23/36 11 March 2013. (UNSRPHR) Para 27.

49 GC of the CRC Committee, para 13.

50 J. Fotiet *al.*, *Voice and Choice: Opening the Door to Environmental Democracy*, World Resources Institute, 2008, p. 19 <[http://pdf.wri.org/voice\\_and\\_choice.pdf](http://pdf.wri.org/voice_and_choice.pdf)> At 16 September 2015.

51 World Bank, *The World Bank Participation Sourcebook*. Washington: 1996. P. xi <<http://www.tikenya.org/phocadownload/adili%20newsletter%20issue%20135.pdf>> at 10 October 2015.

52 UNSREPHRS P 18.

53 UNSREPHRS P 18.

54 UNSREPHRS P 19.

compensation; special consideration for the most vulnerable communities; capacity building for the public with considerations of power inequalities; pro-active steps to ensure access to information is guaranteed through accessible channels; feedback and complaint mechanisms; involvement of stakeholders in setting the agenda and goals for participatory processes from below among other actions. The special rapporteur also proposes that judges, lawyers and law enforcement officials should be trained ‘to enhance judicial oversight and to prosecute any infringement of the right to participate’.<sup>55</sup>

### 4.3 The Legal Framework for Public Participation

Several laws implementing the Constitution of Kenya 2010 have provisions requiring public participation. The County Governments Act 2012 (CGA) requires counties to promote and facilitate public participation in the development of policies, plans and delivery of services;<sup>56</sup> the village administrator<sup>57</sup> and the village council<sup>58</sup> to facilitate and build capacity for participation of the village unit in governance; and the principles of public participation.<sup>59</sup> The principles include: reasonable access to processes that require participation; consideration for special groups; legal standing for affected groups, especially the marginalized; involvement and promotion of non-state actors roles. Counties should also establish ‘modalities and platforms for citizen participation’.<sup>60</sup> In fact the Act also gives responsibility to private citizens to promote ‘effective participation of marginalized and minority groups in public and political life’. Under section 100 of the Act registered civil society organizations can conduct civic education.

The Urban Areas and Cities Act sets as one of its objects and principles, “participation by the residents in the governance of urban areas and cities”.<sup>61</sup> In fact, the Act sets out public participation as a criteria for classification of a urban areas.<sup>62</sup> The Public Finance Management Act, Political Parties Act,<sup>63</sup> and Intergovernmental Relations Act also have provisions for public participation.<sup>64</sup> Further, the Ministry of Devolution, the Public Service Commission (PSC) and the Commission on Revenue Allocation (CRA), have

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55 UNSREPHRS P 22.

56 County Government Act (2012) s 30.

57 As above s 52(3)(a)(i)(ii).

58 As above s 53(2)(a).

59 As above s 87(a-g).

60 As above s 91.

61 The Urban Areas and Cities Act (2011) s3(c).

62 As above s 21(1) (g).

63 Political Parties Act (2011)5(a).

64 Intergovernmental Relations Act (2012)s 29.

developed guidelines relating to public participation while the Law Reform Commission has a draft county model law on citizen public participation. Most of them require selecting stakeholders that are most affected with consideration for special groups.

Several counties have also passed county legislation on public participation. These are seen to define public participation and make provision for its management and decentralization. The Nakuru County Public Participation Act, 2014, for example, requires establishment of citizen participation forums at the sub-county, ward and village levels.<sup>65</sup> The Turkana one, on the other hand, establishes directorate of public participation to be in charge of implementing administrative activities of public participation for both the county executive and the county assembly<sup>66</sup> and creates county resource centers at the sub-county, ward and village levels to make available documents, reports and records at no cost.

Several themes emerge from the above discussion on the theoretical, background and normative framework on public participation. The theory points at the need to consider and address the power differences in bid to achieve meaningful public participation. One main theme that emerges from the background is that public participation is about empowerment of the people. The normative framework has dealt with several themes including: the need to empower the people from within; involvement of the people from the beginning of the process; access to information by the people; linked social injustice to exclusion among others. In general, the idea from the above discussion is that public participation, apart from being a democratic right and an exercise of people's dignity, it is also about bridging the power differences in the society in order to achieve social transformation and a more just society. In ensuring that meaningful public participation is achieved, therefore, the focus should be about countering power differences. This discussion now turns to the main focus of this chapter: how the Kenyan courts have interpreted public participation

## 5.0 Judicial Interpretation of Public Participation

Several cases on the lack of public participation in government affairs under Kenya's devolved system of government have been brought before the Courts.

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<sup>65</sup> The Nakuru County Public Participation Bill 2014 section 5 Retrieved from <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/NakuruCountyPublicParticipationBill2014.pdf> at 28 September 2015. (The passed version of the bill).

<sup>66</sup> The Turkana County Public participation Bill, 2014 Sec 15 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/TurukanaCountyPublicParticipationBill2014.pdf> at 28 September 2015. (The passed version of the bill).

In each of these cases, the decisions have been based on a number of principles, concepts and arguments. Some of the standards have been imported from other jurisdictions and theories while some can be attributed to the Kenyan courts'. This section analyzes how the Kenyan courts have interpreted public participation in the devolved governance context. The discussion will be around the following themes: The approaches that the courts have employed to determine whether meaningful public participation has taken place; the challenges in measuring public participation; and the conflicting interpretations.

### **5.1 Approach Taken by the Courts**

Determining what amounts to meaningful public participation has been one of the main areas that the courts have been called upon to interpret, which in turn depends on the approach taken by the courts. The approach on the other hand, largely, depends on the definition that is given to public participation. Depending on the definition, the approach can either be qualitative and quantitative or both; each of which will require its own measurement tool. The approach can also be on reasonableness grounds, of which the court needs to establish a standard.

In determining cases on public participation, the courts have recognized that public participation has a central place under the Constitution of Kenya 2010 and Kenya's devolved governance.<sup>67</sup> In one determination the court said,

“One of the golden threads running through the current constitutional regime is public participation in governance and the conduct of public affairs. The preamble to the Constitution recognizes, “the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.” It also acknowledges the people's ‘sovereign and inalienable right to determine the form of governance of our country...’ Article 1 bestows all the sovereign power on the people to be exercised only in accordance with the Constitution. One of the national values and principles of governance is that of ‘inclusiveness’ and ‘participation of the people.’<sup>68</sup>

The Supreme Court, on its part, has argued that devolution was intended to enhance equity in resource allocation and ‘open up the scope for political self-fulfillment, through an enlarged scheme of actual participation in governance mechanisms by the people – thus giving more fulfillment to the concept of democracy’<sup>69</sup> The court further contends that devolution as a required

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<sup>67</sup> *Small Scale Farmers Forum & 6 Others vs Republic Of Kenya & 2 Others* [2013] eKLR.

<sup>68</sup> *Kenya Small Scale Farmers Forum & 6 Others vs Republic Of Kenya & 2 Others* [2013] eKLR para 57.

<sup>69</sup> Advisory Opinion Ref. No.2 of 2013 para 136.

constitutional practice, runs in parallel with an attendant set of values, declared in Article 10 of the Constitution which includes participation of the people. Public participation, therefore, has a high place in the context of the devolved system of government, a factor that should be considered by the courts in determining the right approach in establishing public participation.

A keen look into the cases that have already been determined by the Kenyan courts indicate several grounds upon which the cases have been determined including: the stage of an activity at which public participation should be deemed to have taken place; geographical coverage considerations; the number of people formally involved; whether the people's views are considered in the final decision; the nature of an issue requiring public participation among others.

### **5.1.1 Stage of an activity consideration**

The question to ponder here is at what stage, if any, should public participation begin and end? In the legislative process, for example, the court has ruled, a number of times that it does not have to be done at the pre-legislative process.<sup>70</sup> In one particular case, the High Court relied on the Canadian jurisprudence<sup>71</sup> to argue that, “the fact that the state did not directly involve the petitioners cannot be said to invalidate the whole process”.<sup>72</sup> The facts of the case were as follows: the discussions were at their advanced stage but the public had been involved just once in 5 years of the discussions. Most of the five years, however, were under the old constitutional dispensation that did not have explicit provisions requiring public participation. The court allowed the government to continue with the discussions but also to allow the petitioners ‘to have full access to the information relating to the negotiations so as to make appropriate contributions if they so wished in fulfillment of article 4<sup>73</sup> of the Cotonou Protocol’<sup>74</sup>

Essentially, therefore, this establishes an option of conducting public participation either just at the beginning or just at an advanced stage of a process and still satisfy the public participation requirement. Based on the above decision, the approach being developed by the courts can be seen as one defining public participation as an event within a process and not necessarily one driving the process. In addition, the court's approach also allows public

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<sup>70</sup> Kenya Small Scale Farmers Forum & 6 Others vs Republic Of Kenya & 2 Others [2013] eKLR para 66.

<sup>71</sup> Marshall v Canada, **Communication No. 205/1986, UN Doc CCPR/C/43/d/205/1986(1991)**.

<sup>72</sup> Kenya Small Scale Farmers Forum & 6 Others vs Republic Of Kenya & 2 Others [2013] eKLR para 69.

<sup>73</sup> Cotonou Protocol, Article 4 <http://www.europarl.europa.eu/document/activities/cont/201306/20130605ATT67340/20130605ATT67340EN.pdf> at 20 October 2015.

<sup>74</sup> Kenya Small Scale Farmers Forum & 6 Others vs Republic Of Kenya & 2 Others [2013] eKLR Para 71.

entities and officials, the liberty to choose when to conduct public participation. Given a continuum with qualitative and quantitative approaches one at each end, one can establish that the court's approach falls short of both the qualitative and quantitative considerations. If the court had made qualitative considerations, for example, it should have considered whether the single public participation that had taken place had an impact on the final decision or whether it kept the people in the implementation process. The quantitative consideration, on the other hand, should have, for example, considered the number of people, how representative they were, number of meetings among others. None of these was given sufficient consideration. The state, for example, was not compelled to facilitate effective participation and not just making the information accessible to people and hope that they will take an initiative to contribute. In addition, while it is true that, at the earlier stages of the legislative process the state was not obliged to conduct public participation as the new constitution had not taken effect, when that became a requirement after the passage of the new constitution, the court did not take a keen focus on the number of people that participated, nor whether they were representative of the stakeholders. Therefore, we can conclude that its decision fell short of both the quantitative and qualitative considerations. The court in the *Gakuru case*, said, "... it behooves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively".

The *Gakuru case*, was heard at a Nairobi High Court and the court declared Kiambu County Finance Act 2013 illegal for failure to meet the public participation threshold on public participation. The case was based on Article 196(1) (b) of the Constitution which reads: "A County Assembly shall facilitate public participation and involvement in the legislative and other business of the assembly and its committees". The petitioner argued that Kiambu County Assembly did not conduct sufficient public participation in the enactment of the finance bill. The county had called a few business people to Windsor Hotel, a high-end golf hotel and country club, to discuss the draft finance bill and also had placed an advert in the newspaper inviting public views. The petitioner raised two grounds: first that the information was not well communicated to the members of the public and secondly that the views were not incorporated in the final draft.

The argument that public participation does not have to take place throughout the whole process or that the whole process should be considered to determine whether public participation did take place at some point, has been relied on by the Kenyan courts in many other instances. Unfortunately, in most of the instances, it has been used to dismiss petitions that allege lack of sufficient public participation with an effect of lowering the standard of

public participation. In the *Moses Munyendo case*,<sup>75</sup> the court relied on *Law Society of Kenya v Attorney General* in which it was held that,

“[51] In order to determine whether there has been public participation, the court is required to interrogate the **entire process leading to the enactment of the legislation; from the formulation** of the legislation to the process of enactment of the statute”<sup>76</sup>

Consequently, the court dismissed the petition for lack of evidence that public participation was insufficient. The argument that the entire process leading to the enactment of legislation should be looked at has been used by the Kenyan courts in many instances without necessarily ascertaining whether the one off process being relied on was robust and had the potential to influence the legislative process and or content. Evidently, the qualitative approach is, therefore, lacking in the court decisions on this ground.

Indeed, even the quantitative considerations are not sufficient as a one-off participation irrespective of the extent of stakeholder involvement can pass for sufficient public participation. This was also the case in the Commission for the Implementation of the Constitution (CIC) Case,<sup>77</sup> where the first Amicus Curiae, Katiba Institute, relied on the *Doctors for Life Case* to argue that the Leadership and Integrity Act ‘was invalid in as far as it ignored views of Kenyans on effective enforcement hence defeating the essence of public participation’, clearly, a qualitative approach. The court, however, argued that public participation should be determined by considering the whole process leading to the enactment of the legislation and subsequently ruled that the petitioner had failed to show that public participation had not been achieved when the whole process is considered from the time CIC initiated it to its enactment. Similarly, in the *Law Society of Kenya v Attorney General*, the court declared that it needed to examine the whole legislative process to determine whether there was public participation including the parliamentary standing orders, which require that a bill must be published as a bill and to go through the various stages in the national assembly. Subsequently, the court did not find the *Statute Law (Miscellaneous Amendment) Act, 2012* unconstitutional on grounds of lack of public participation in its formulation and enactment. The ‘whole process argument has been used in dismissing cases in several other instances such as in *Association of Gaming Operators Kenya case*,<sup>78</sup> and the *Nairobi Metropolitan Psv Saccos Union Limited case*.<sup>79</sup>

<sup>75</sup> *Moses Munyendo & 908 others v Attorney General & another* [2013] eKLR.

<sup>76</sup> *Law Society of Kenya v Attorney General Nairobi Petition No.318 of 2012* [2013] eKLR para 51.

<sup>77</sup> *Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others* [2013] eKLR para 24.

<sup>78</sup> *Association of Gaming Operators Kenya & 41 Others v Attorney General & 3 Others Petition No. 56 of 2014*.

<sup>79</sup> *Nairobi Metropolitan Psv Saccos Union Limited & 25; others v County Of Nairobi Government & 3 others* [2013] eKLR.

The *Nairobi Metropolitan Psv Saccos Union Limited* case which was about the amendment of clause 6.1 of the Nairobi City County Finance Act of 2013 that changed the motor-vehicle parking levies from Ksh.140 to Ksh.300 was particularly interesting. In the case, the petitioner had argued that it failed to meet public participation requirements since it did not publish the said Act in a recognized gazette. The respondent, on the other hand, argued that the petitioner had been invited during the budget making process, which preceded the enactment of the Nairobi City County Finance Act 2013, thus there was sufficient public participation. The court held that the public was sufficiently involved in the process leading to the enactment by involving those who could be affected by the decision.

Similar arguments have had some support from the South African jurisprudence that in considering whether sufficient public participation has taken place, the whole process involved in the issue under consideration should be looked at. Unfortunately for Kenya, this concept has been used to dismiss many cases.

### 5.1.2 Coverage considerations

In order to achieve meaningful public participation, another important approach is looking at the extent of its coverage. The coverage can take geographical consideration within the relevant area or in terms of the extent it reaches the relevant stakeholders and the time period allowed. Kenyan courts have also relied on this approach in their decisions. In several instances, the court has ruled that the mode and the manner of giving effect to public participation will vary from case to case and there must be some clear and reasonable level of participation afforded to the public.<sup>80</sup> In *Moses Munyendo case*, for example, the court relied on the South Africa's *Minister of Health Case*;

“...what matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say...”<sup>81</sup>

The coverage focus in the above determination being on ‘members of the public’ and ‘all interested parties’. In *Gakuru case*, the court had a special focus on reaching as many people as possible. It said that Article 196(1)(b) of the Constitution, requires county assemblies to use *as many fora as possible* to ‘disseminate information with respect to the intended action’ such as, ‘churches,

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<sup>80</sup> *Nairobi Metropolitan PSVs Saccos Union Ltd & 25 Others v County of Nairobi Government & 3 Others* (2013) e KLR; *Moses Munyendo & 908 Others v Attorney General and Another* (2013) e KLR; *Richard Dickson Ogenjo & 2 Others v Attorney General & 5 Others* (2014) eKLR; and *Robert Gakuru & Others v Governor Kiambu County & 3 Others* (2014) eKLR.

<sup>81</sup> *Moses Munyendo & 908 Others v Attorney General and Another* (2013) eKLR para 18.

mosques, temples, public *barazas* national and vernacular radio broadcasting stations and other avenues where the public are known to converge.<sup>82</sup>

The *Gakuru* case, in contrast to most cases discussed above, stands out for invalidating an Act on mainly the lack of public participation at the county assembly.<sup>83</sup> In its decision, the court largely relied on the South Africa's Constitutional Court judgments, which in *Doctors for Life International case*, argued that representative and participatory democracy should be mutually supportive. The court stated that direct participation enhances representative democracy as the citizens become more “actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made”. The statement above points to the need for government to do everything possible to carry everyone along. The court, further, in the *Gakuru case*, relied on the *Doctors for Life case*, in its determination that the participatory democracy is more relevant to the relatively disempowered. This means that in looking at the coverage of public participation, it is important to consider the power relations in the population and put in place measures to ensure that the less powerful participate meaningfully. This finding is in line with the existing theoretical understanding and universal understanding, discussed earlier, on how to ensure effective public participation takes place.

The court, also, argued that it is important that, “...citizens have the necessary information and effective opportunity to exercise the right to political participation...”<sup>84</sup> The court concluded that that there was inadequate public participation in the enactment of the Kiambu fiance bill based on the fact that only a few people participated, in one day, at a 5 star hotel and that only one day newspaper advertisement was done. The newspaper could not reach most of the populace who survive on less than a dollar per day. Further, the court argued that the content of the advertisement did not attempt to ‘exhort the public to participate in the process of the enactment of the Bill’ thus had limited reach. The court, therefore, recognizes, as earlier argued, that public participation does not end at making information available nor at empowering the citizenry and taking care of the power differences, there is need to motivate the people to participate.

In addition, the court in *Gakuru case*, reasoned that everyone does not have to give an oral submission in the case of a public participation hearing nor compulsorily have each opinion incorporated in the final decision even when

<sup>82</sup> *Robert Gakuru & Others v Governor Kiambu County & 3 Others* [2014] eKLR para 75.

<sup>83</sup> As above.

<sup>84</sup> *Doctors for Life International vs. Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC), *Ngcobo, J* para 129.

it contradicts the constitution. However, in the said situation, the authorities should be able to explain reasons for the deviation from the community contributions. Irrespective of the circumstances, the court argued that there should not be a complete black-out of the citizens, even though cost and time can be taken account of.

Further, with regard to entities that are required to ensure public participation in their affairs, the court has given a ruling that give guidance on this. In *Okiya Omtatah Okoiti case*, the court ruled that the appointment of the board of directors for the Nairobi City Water and Sewerage Company was unconstitutional for lack of involvement of various stakeholders. The court ruled based on articles 10, 73 and 232 that even though Nairobi City County is the sole owner of the water board, it should ensure participation of the residents for whom the company exists.<sup>85</sup> This, therefore, means that an entity can be compelled to ensure public participation even when it is not a public entity as long as it provides an essential public good to the public.

### 5.1.3 *Whether people's views are considered*

Public participation would amount to nothing if notices are provided, information disseminated, public fora held with power relations considerations made but fails to take account of the views of the public in the final decisions. In the *Moses Munyendo case*, the court, relying on South Africa's *New Clicks case*, observed that what matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. The phrase; 'adequate say' means that the people's views ought to be considered. The court, in the *TISA Case*, further argued that public participation is not just a matter of form, but of substance as well, similar to the concepts of qualitative and quantitative discussed earlier.<sup>86</sup> In the *Gakuru case*, the court relied on the *Doctors for life case* finding that, by letting people's voices heard and *taken account of* their civic dignity is enhanced and promotes a democratic culture and pluralistic accommodation.<sup>87</sup> Further, the same court relied on the case to argue that the state has a duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and *effective opportunity* to exercise the right to political participation. Effective opportunity, also points at the need to have the people's views considered. The court went on to make a determination that:

<sup>85</sup> *OkiyaOmtatahOkoiti& 3 others v Nairobi City County & 5 others* [2014] eKLR.

<sup>86</sup> *The Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR para 77.

<sup>87</sup> *Doctors for Life International vs. Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)(Ngcobo J Para 115.

In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behooves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it.<sup>88</sup>

In the court’s determination, therefore, public participation should not be done just to fulfill the statutory requirements; it should be real to influence the final decisions. In the *Consumer Federation of Kenya* case the court argued that public participation does not mean that there should be direct participation of the people in the interviews but that their input is recognized.<sup>89</sup> In order to achieve meaningful public participation, therefore, the courts approach has been that the people’s input should influence the final decisions.

In the *Gakuru case*, however, the court referred to Sachs<sup>90</sup> who observed that public views may not necessarily be binding on the legislature if they are in direct conflict with policies of the government (although responsiveness to special groups is necessary) but that the government should keep an open mind and willingness to consider all views.

## 5.2 Challenges in Measuring Public Participation

In the *TISA case*, the court ruled that the petitioner had not addressed ‘the standard to apply in order to assess the level of public participation in the legislative process. It dismissed the case on the basis that the petitioner had failed to demonstrate how the national assembly had failed to achieve public participation.<sup>91</sup> The question is, what is the standard for measuring whether sufficient public participation has been achieved?

In the *National Citizens Forum Initiative case*, the court ruled that how public participation is achieved is within the discretion of the county authority and that it could only find violation if shown a specific violation which, it said, the petitioner had failed to show.<sup>92</sup> In the *CORD Case*, it was argued that the 5 days period allowed before the passage of the bill was insufficient.

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<sup>88</sup> As above 75.

<sup>89</sup> *Consumer Federation of Kenya (COFEK) v The Public Service Commission and the Attorney General* Petition No. 263 of 2013 [2013] eKLR.

<sup>90</sup> *Merafong Demarcation Forum and Others vs. President of the Republic of South Africa and Others* (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC).

<sup>91</sup> *Commission for the Implementation of the Constitution v The Parliament of Kenya & Others* Petition No. 454 of 2012 [2013] eKLR.

<sup>92</sup> In *National Citizens Forum Initiative & 3 others v Governor of the County Of Nairobi & 4 others* [2013] eKLR.

The court relied on the *Gakuru case* where the decision in *Glenister vs President of the Republic of South Africa and Others* was cited that the invitation for people to participate should allow people sufficient time to prepare and time on stage when the hearing is taking place.<sup>93</sup> It should be an opportunity capable of influencing the decision to be taken. In the case, it was said that the determination whether a notice complies with the principles depends on the facts of the case. The court also relied on the *Doctors for Life International case* to argue that measures to ensure public participation include: a notice and information about the legislation under consideration and opportunities for participation that are available to the public. It was also said that in making a consideration whether public participation was adhered to, the court would ask itself whether what parliament has done is reasonable in all the circumstances. Again, the court relied on the *Doctors for life case's* factors relevant in determining reasonableness of public participation namely: rules adopted by parliament for public participation; nature of the legislation under consideration; whether the legislation needed to be enacted urgently. The court eventually dismissed the petition.

In the *CORD case*,<sup>94</sup> it was argued that the bill was published on 8<sup>th</sup> December and made available to the public on the following day through digital technology in a limited manner. Also that the material was too bulky with the limited time to allow for any meaningful participation. In this case, the period for publication of the Bill had been reduced from fourteen days to one day and the advertisement was only made on the 10th December 2014 for a consultative meeting with the relevant committee of the National Assembly to be held on the following day. The petitioner argued that civic education was not done and that public participation was only done in Nairobi. In total, submissions could take place for 3 days and public hearings could be held for 3 days. The court ruled that there was sufficient public participation considering that the committee had advertised that it would receive oral submissions for three days and several organizations had managed to participate.

In addition, the court in the *Gakuru case*, further relied on the *Doctors for life case*, to concur that parliament should be allowed discretion to determine how best to facilitate public participation, which would vary from place to place and that in all cases, parliament should act reasonably. On what amounts to reasonable, the court further relied on Judge Sach's J's minority judgment in *New ClicksCase* where he said that it depends on the circumstances

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<sup>93</sup> *Coalition for Reform and Democracy (CORD) & another v Republic of Kenya & another* [2015] eKLR 151.

<sup>94</sup> As above.

of each case.<sup>95</sup> The Judge said that reasonableness is an objective standard which is sensitive to facts and circumstances. In the case of parliament, the determination of whether public participation has been observed will depend on; the nature and importance of the legislation; and intensity of its impact on the public.

He added that practicalities such as time and expense should be considered although on their own they should not justify inadequate opportunities for public participation. Also, that, parliament's reasoning that predicated its conduct should be considered. He concluded that public participation can be seen as a continuum that ranges from providing information and building awareness, to partnering in decision-making". The court further observed that in case of oral submissions, it is not imperative that every person must be heard orally.

Further, the court also concurred with *Merafong Demarcation Forum and Others case* that participation should not be seen simply as an instrument but also through its underlying concept which include: improving the accuracy of decisions, preserve human dignity and self-respect. He said, therefore, that the critical question in determining participation is not whether further consultation would have produced a different result.<sup>96</sup> This means that public participation is not about what a person or people can contribute to the process but about people themselves.

Another important interpretation by the Kenyan courts was delivered in the *Centre for Rights Education case* where petitioner alleged that the President failed to ensure public participation in the appointment of the County Commissioners. The court ruled in favor of the petitioner. It argued that the reason public participation was included in the values and principles of the constitution was a shift from the past where public affairs were done in secrecy to having them done transparently and with the participation of the people. The court said that had this been done in this case, it would have allowed members of the public that wished and were qualified to apply for the positions to do so. The opportunity would also let anyone that has any issue with any of the candidates, particularly those relating to integrity to raise them. In the case, the opportunity was not offered. The court invalidated the appointment.<sup>97</sup> Another important element in the measurement of public participation, therefore, is the extent of openness of a process.

<sup>95</sup> *Minister of health & another v New Clicks & 8 others* para 71.

<sup>96</sup> *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014]eKLR 71.

<sup>97</sup> *Centre For Rights Education & Awareness (creaw) & 8 others v Attorney General & another* [2012] eKLR.

### 5.3 Conflicting Interpretations

The court in *the Gakuru* case identified that the devolved system of government was introduced in Kenya to boost service delivery, address inequalities, decentralize power that hitherto benefited only a few. The court further argued that the lack of public participation would render devolution to ‘balkanise the country into fiefdoms’, which devolution sought to run the country from in the first place.<sup>98</sup> This decision, points to the intention of the devolved system of government to give voice to the less powerful to help achieve social transformation. The need to empower the people should, therefore, dominantly feature in the court decisions and would be in line with the theoretical findings stated earlier.

Several interpretations of the courts, however, still create a conflicting environment. The determination that public institutions and the legislature have discretion on public participation has not come out very clearly. In the *Gakuru case*, for example, the court relying on the South Africa’s *Doctors for life case* agreed that parliament should be allowed discretion to determine how best to facilitate public participation, which would vary from place to place. In the *TISA Case*, however, the respondent argued that there was sufficient public participation and that the National Assembly has a broad measure of discretion on how to achieve public participation objectives based on existing circumstances.<sup>99</sup> While the court did not express its interpretation of the respondent’s argument above, it found that the amendment act had fulfilled the public participation requirement except that the Senate was not involved. In other words, it can be said that the court agrees that parliament has broad measure of discretion as stated by the respondent. Indeed, in the *CIC case*, the court in its determination reiterates that ‘the National Assembly has a broad measure of discretion on how it achieves the object of public participation’<sup>100</sup> The problem, however, is that in the first instance above, discretion relates to facilitating public participation, in which case facilitations means, making it easy or easier<sup>101</sup> In the second instance, however, discretion has been used to mean that the National Assembly can determine many aspects of public participation, including what to do and what not to as opposed to simply how to make it easier for the people to participate. There should be clarity that the discretion is in their duty to fulfill and not what they can or not do in general.

Another area that has contradicting interpretation is in direct participation and participation through elected representatives. In the *TISA Case*, for

<sup>98</sup> Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR73.

<sup>99</sup> In *the Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR.

<sup>100</sup> Commission for the Implementation of the Constitution v Parliament of Kenya & 5 others [2013] eKLR74.

<sup>101</sup> Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR 75.

example, one of the respondents argued that according to article 1(2) of the constitution, the participation of the people, which is a way of exercising their sovereign power can be exercised either directly or indirectly through the representatives in parliament and in this case the latter was the case thus public participation was fulfilled. The respondent relied on *Consumer Federation of Kenya (COFEK) case*, where the court argued that public participation does not mean that there should be direct participation of the people in the interviews but that their input is recognized. The court observed that the fact that the PSC received information about the applicants and used it during the interview was sufficient public participation. The court stated that the people can participate through their representatives and that this is the reason chapter 7 of the constitution is titled; “*Representation of the People*” and a similar meaning is implicit in article 1(2) of the constitution. However, in the *Gakuru case*, observes that the Kenyan constitution, like that of South Africa, intends that we have both a representative and a participatory democracy. In the same case, the court adopts the Doctors for life observation that,

“The international law right to political participation encompasses a general right to participate in the conduct of public affairs and a more specific right to vote and/or be elected into public office. The general right to participate in the conduct of public affairs includes engaging in public debate and dialogue with elected representatives at public hearings. But that is not all; it includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation...”<sup>102</sup>

In both the TISA Case and the *Consumer Federation of Kenya (COFEK) case*, the court did not find the lack of public participation except that in the TISA Case, the lack of public participation was on different grounds. In the *Gakuru case*, however, the lack of public participation was established. It can be argued that had the *Gakuru case* used the standards of public participation set by the *Consumer Federation of Kenya (COFEK) case*, the case could easily have been dismissed. The jurisprudence, therefore, is not very clear on the application of direct and representative democracy.

Another matter that needs clarity is on the argument that in order to establish that sufficient public participation has taken place, there is need to look at the whole process. While this can be a good approach, it can also be misused. Take for example, the *Nairobi Metropolitan PSV Saccos Union Limited case*.

102 As above 53.

The respondent argued that the petitioner had been invited during the budget making process, which preceded the enactment of the Nairobi City County Finance Act 2013 thus there was sufficient public participation. The court held that the public was sufficiently involved in the process leading to the enactment by involving those who could be affected by the decision. The court further said that ‘it does not matter how participation was effected. What is needed is that the public was given some reasonable level of participation’.<sup>103</sup> However, in the *Gakuru case*, the court ruled that the county government’s advertisement, ‘apart from the mention of the *Finance Bill* in the title of the advert and the mention of the Bill in passing, there was not much mention of the said Bill’.<sup>104</sup> The comparison between the two is that in the first case, the court interpreted participation in the budget as sufficient to presume participation in the subsequent finance act. However, in the second case, the court has set the bar high requiring not just the mention of the agenda but also giving details that would ‘facilitate’ public participation. Indeed, several other cases that have set the argument of looking at the whole process have set the public participation standard very low, especially considering the definition and objective of public participation as per the constitution, the devolved system and from theory. The court has not endeavored to determine whether facilitation has been done especially for the less powerful.

The quantitative and qualitative considerations also need more clarity from the jurisprudence. In the *Kenya Small Scale Farmers Forum case*, where the discussions were at their advanced stage but the public had been involved about just once in 5 years of the discussions, the court ruled that, “the fact that the state did not directly involve the petitioners cannot be said to invalidate the whole process”.<sup>105</sup> In the case, most of the five years were under the old constitutional dispensation that did not have explicit provisions requiring public participation. The court allowed the government to continue with the discussions but also to allow the petitioners ‘to have full access to the information relating to the negotiations so as to make appropriate contributions if they so wished’.<sup>106</sup> The court in the *Gakuru case*, however, discouraged against just tweeting messages and leaving it upon anyone to respond.<sup>107</sup> The *Gakuru case* decision means that information should be provided with a view of making sense of it and making it easier for the people to use it. The interpretation of sufficient public participation, therefore, needs clarity in this area.

<sup>103</sup> Nairobi Metropolitan PsvSaccosUnion Limited & 25; others v County Of Nairobi Government & 3 others [2013] eKLR 47.

<sup>104</sup> Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR 79.

<sup>105</sup> Kenya Small Scale Farmers Forum & 6 Others vs Republic Of Kenya & 2 Others [2013] eKLR para 69.

<sup>106</sup> As above para 71.

<sup>107</sup> Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014] eKLR 75.

Further, the reasonableness test that has been proposed as a measure for sufficient public participation has not been used uniformly. In *Moses Munyendo case*, the court said that, “what amounts to a reasonable opportunity will depend on the circumstances of each case.” The same was said in the *Gakuru case*, which also relied and concurred on the *New Clicks Case* to argue that reasonableness is an objective standard which is sensitive to facts and circumstances.<sup>108</sup> It stated that, in the case of legislation, this will depend on the importance of the legislation, intensity of its impact on the public, time and expense. On time and expense, the court said that on their own they should not justify inadequate opportunities for public participation. Further, parliament’s reasoning that predicated its conduct should be considered. In addition, the *John Kinyua Munyaka case*, concurred with the *Doctors for Life case*, that reasonableness should also be about the rules, if any adopted by parliament, the nature of the legislation under consideration and whether the legislation needs to be enacted urgently. Also, based on the *Matatiele Municipality case*, the nature and importance of the legislation and intensity of its impact on the public. To apply the above understanding on the decided cases, however, does not indicate a clear application. In the *COR Case*, for example, the court ruled that there was reasonable public participation based on the fact that the committee had advertised that it would receive public participation for three days. In total, submissions could take place for 3 days and public hearings could be held for 3 days. The decision is mainly based on urgency of the decision, an aspect of time, which, according to the criteria above, should not be the sole determiner of reasonableness. The importance of the legislation, which would compel more time to be allowed, for example, was not considered.

There are other areas that are unclear including the courts considering existence of public participation superficially or considering the underlying concept of public participation in establishing whether sufficient public participation has taken place or not. The underlying concepts including the need for public participation to be viewed as a partnership between government and the people; empowerment of the public and addressing the power differences for proper public participation; and recognizing the people’s input as opposed to their direct participation.<sup>109</sup>

## 6.0 Conclusion

The interpretations of public participation by the Kenyan courts under the devolved system of government leads to various observations. Firstly, it

<sup>108</sup> As above para - 57.

<sup>109</sup> *Consumer Federation of Kenya (COFEK) v The Public Service Commission and the Attorney General* Petition No. 263 of 2013 [2013] eKLR.

indicates that there has been active use of the courts for interpretation and determination of public participation among Kenyans. This demonstrates a high appreciation for public participation. Secondly, the courts have also consistently emphasized the importance of public participation. However, there has emerged conflicting interpretation by the courts. For example, on the suggestion that public institutions have discretion on how to ensure effective public participation, it is not clear what this entails. In one instance it has been used to mean that institutions, such as the National Assemblies, can determine how they will conduct public participation. In another instance, however, discretion is with regard to how they will make it easier for the people to participate. Also, there are contradicting interpretations on direct public participation and participation through elected representatives. The court has contradicted itself on whether these should complement or replace each other. Further, the argument that the courts should look at the whole process in determining whether sufficient public participation has taken place, has not been applied uniformly by the courts. There are also conflicting interpretations on the quantitative and qualitative considerations, and the application of the reasonableness test among others.

The differing interpretations could be attributed to a number of reasons including difficulty in conceptualizing public participation, conservative versus progressive interpretations by the courts and inconsistent reliance on South Africa's jurisprudence. Further, a keen look at the discussed cases indicates that political pressure could be a factor in determining how the courts arrive at their decisions. Interpretation of the cases involving the national government, for example, tend to be in their favor while those involving the county governments can easily be decided either way.

The differing interpretations present a serious risk on the success of the devolved system of government in Kenya, which is anchored on, among others, the participation of the people. This is particularly so as more cases are likely to emerge as people become increasingly aware of their right to participate directly. In order to remedy the situation, the higher courts should give clarity on the conflicting interpretations with a focus on the objective of public participation under the devolved system of government as explained in this chapter. Public participation is never entirely uniform, as the means of interaction evolve, but the principles identified in this discussion are sacrosanct.



# Safeguarding Devolution Through Public Interest Litigation

Waikwa Wanyoike

## 1.0 Introduction

Devolution has emerged as one of the most popular yet contested aspects of Kenya's 2010 Constitution. It is popular because it has introduced an ideological shift in regard to governance. It has brought the government closer to the people, allowed for increased public participation and encouraged communities to engage with government to set priorities; because of the Constitution's design, devolution has facilitated additional government funding for local initiatives. In a nutshell, devolution offers the most visible and tangible change in governance resulting from the adoption of the 2010 Constitution.

The Supreme Court described the aspirations of the people regarding devolution in *The Speaker of Senate v. Speaker of the National Assembly*:

The Kenyan people, by the Constitution of Kenya, 2010 chose to de-concentrate State power, rights, duties, competences – shifting substantial aspects to county government, to be exercised in the county units, for better and more equitable delivery of the goods of the political order. The dominant perception at the time of constitution-making was that such a deconcentration of powers would not only give greater access to the social goods previously regulated centrally, but would also open up the scope for political self-fulfilment, through an enlarged scheme of actual participation in governance mechanisms by the people – thus giving more fulfilment to the concept of *democracy*.<sup>1</sup>

However, devolution remains contested on many fronts. First, there are many centralists who fought the idea when the Constitution was being drafted and

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<sup>1</sup> *Speaker of the Senate & another v Attorney-General & 4 others* Advisory Opinion eKLR [2013] para 136.

who still hold it is a bad idea. The political old guard still wields significant political clout and has at every turn looked for ways to undermine devolution. There has been contestation on nearly all aspects of devolution including how to interpret the Constitution, especially in regard to how distinctive the two levels of government are; the legislative scheme on who has the power to legislate on county matters and to what extent; how much money should be transferred to the counties; setting up infrastructure necessary for the new county governments to operate; the dismantling of centralization and how functions to be assigned to counties are transferred. In some instances, these centralists have tried to deliberately sabotage devolution, for example, by creating parallel national mechanisms that undermine county governments or by delaying transfers and other allocations to frustrate county operations.

This dispute is not entirely ideological, that is a fight between centralists and decentralists. A significant part of the opposition to devolution is driven by immediate political interests. Under the centralized system, the country's executive exerted significant control over the state by manipulating how and when it allocated resources to various regions.<sup>2</sup> With devolution and the Constitution's defined formula for sharing state resources, the central government has lost the ability to use resources as a means of exerting influence over government officials and the people they govern. In this regard, the political control of members of the national government has waned with devolution.

By distributing power, devolution demands recognition for the unique role of each level of government along with considerable cooperation from all parties. Those who control counties, on the other hand, have at times used their grassroots leverage to demand more than the Constitution has provided. For example, even though education remains a function of the national government, governors have been campaigning for it to be devolved. Governors have also taken a similar approach to security where they have demanded more control over security, arguing that their lack of power regarding local security matters makes security policy unresponsive to local matters. Many of these disputes have ended up in courts. Devolution is the root of many interesting cases and is significantly adding to the growth of public interest litigation in Kenya.

Undoubtedly more and more disputes relating to devolution are ending up in courts for resolution. These disputes are either brought to court by state actors

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<sup>2</sup> Chief Justice Willy Mutunga has commented on this by stating that "Devolution is the core promise of the new Constitution. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents." See *Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR para 183.

or private citizens in the form of public interest litigation (PIL). The use of PIL as a mechanism of resolving devolution disputes is the focus of this chapter. The chapter opens with an attempt at a general understanding of what PIL is, and what would qualify as PIL in the devolution context. The chapter then discusses the mandate and role of courts in protecting and promoting the constitution and the mandate of courts in resolving disputes relating to devolution. The chapter finally looks at the how PIL has helped protect and to some extent entrench devolution in two key areas –first in clarifying the extent of legislative competence of the Senate and second by resolving functional competence of county governments in regard to areas where the national government has encroached on county governments’ functional mandate.

## 2.0 The Role of Public Interest Litigation

Justice Njoki Ndung’u of the Supreme Court of Kenya has stated that Public Interest Litigation (PIL) “plays a transformative role in society.” She argues that through it numerous issues affecting different groups and interests in the society are able to be litigated.<sup>3</sup> Kenya’s constitution is transformative and one of the tools it bestows on people to advance its transformation agenda is PIL.

PIL remains an elusive concept to define. In fact, not only is the definition elusive, but so too is its nomenclature, such that many terms and phrases are used to refer to litigation undertaken in public interest. This explains the use of terms such as high impact litigation and strategic litigation. Yet regardless of the term used PIL has a common defining denominator, that is, litigation undertaken in the public interest or where the outcome has the potential to affect many more people than just those who have brought the case.<sup>4</sup>

In Kenya, there has been little effort to develop a working meaning for public interest litigation. Perhaps this is because the 2010 Constitution expanded the rules of standing to the extent that courts are less interested in who brought the case than they are in resolving the issues. Unlike the past where standing was used to block most litigation that raised public interest concerns,<sup>5</sup> the new liberal rules of standing have expanded what traditionally would have been private litigation into public interest litigation.<sup>6</sup> This change has been

<sup>3</sup> See *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR para 89.

<sup>4</sup> For a discussion on the definition, scope and applicability of Public Interest Litigation, See Kenyans for Peace with Truth and Justice, Africa Centre for Open Governance and Katiba Institute, *A Guide to Public Interest Litigation in Kenya*, December 2014.

<sup>5</sup> Change this to read, “For a discussion on the contest of standing before the 2010 Constitution see, *El-Busaidy v. Commissioner of Lands & 2 Others* (2002) 1 EKL (E&L) where Court stated that Kenya law on public interest standing was fashioned around the English law which provided that for a party to have a *locus standi* in a suit, he ought to show that his own interest particularly has been prejudiced or is about to be prejudiced. He must show that the matter has injured him over and above the injury, loss or prejudice suffered by the rest of the public. In that case otherwise matters of public interests could only be litigated upon by the Attorney-General

<sup>6</sup> As above, n 4, 5-8.

aptly captured by the Supreme Court where it has stated “in constitutional adjudication therefore, the traditional *strictures of locus* have been broken to allow every person the capacity to file a constitutional claim.”<sup>7</sup>

Moreover, beyond liberal rules of standing, the Constitution goes out of its way to encourage litigation. For example, Article 3 of the Constitution obligates all Kenyans to undertake measures to defend not just the violation of the Constitution, but threats to its violation.<sup>8</sup> Article 22 mandates that fees may not be charged for initiating litigation relating to human rights violations.<sup>9</sup> In addition, under Article 159, courts are required to focus on substantive and not procedural justice presumably to allow lay people to initiate and sustain such litigation in Kenyan courts. Courts have also encouraged PIL by regularly deciding that those who bring PIL should not be punished with costs even when they lose on merit. In fact one judge has referred to private citizens who bring up PIL matters as “warriors of constitutionalism”<sup>10</sup> who should not be vilified. In many ways, the accolade reflects the general court’s attitude towards those who initiate PIL.

There may be a nuanced distinction between public interest in the context of standing and public interest in the context of the issues. The new standing rules allow one to initiate a public litigation suit where the matter affects the public or a significant portion of the public. Nevertheless, courts have yet to develop the meaning of this requirement and in fact usually address whether a matter is one of public interest at the tail end of the process instead of doing so at the outset and employing a standing threshold. This is a reasonable approach given that even private disputes have the potential to morph into public interest matters.

PIL has grown exponentially in Kenya since the 2010 Constitution was promulgated. This can be attributed to a number of factors. First, and as already noted, the Constitution has encouraged the use of PIL through relaxed rules of standing and by excusing payment of filing fees in some cases. Second, with the new Constitution, the judiciary has become more independent and accordingly the people’s confidence that their disputes will be independently and properly adjudicated has increased substantially. Primarily due to this increased confidence in the judiciary, those who bring PIL matters tend to view the courts as another level of “political bargaining.”<sup>11</sup>

7 See *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR para 92.

8 Article 3 states “Every person has an obligation to respect, uphold and defend this Constitution.”

9 See Article 22 (2)- For a detailed discussion on when fees may be exempted, See *John Wekesa Khaoya v Attorney General* [2013] eKLR.

10 See *Lenaola J in Charles Omanga & another v Independent Electoral & Boundaries Commission & another* [2012] eKLR para 12.

11 Cheung and Wong, “Judicial Review and Policy Making in Hong Kong” (2006) 28 *Asia Pacific J. Public Admin.* 117, 131.

Third, Kenya maintains what Professor Johannes Chan has described as a “democratic deficit”<sup>12</sup>. In a nutshell, Professor Chan says that democratic deficit exists in a state where public institutions are so dysfunctional that they operate in blatant violation of the law and citizens are left with no option but to ask the courts to order these institutions or their officials to conform to the law. In Kenya, and especially where devolution is concerned, this blatant disregard of the law is highly prevalent.

Our “democratic deficit” is partly due to the resistance the national executive and parliament have shown in relation to implementing the devolution provisions of the constitution. The national government would rather centralize functions as much as possible. For example, even though there is an elaborate constitutional and statutory scheme to devolve functions, the national government continues to hold on to county functions even when there is no legal or any other justification for it. The national government also continues to duplicate and perform functions constitutionally allocated to counties even after those functions have formally been transferred to the counties. Its further disregard for the Constitution’s devolution provisions has been clearly demonstrated where it has created new institutions with the sole purpose of carrying out functions that are constitutionally allocated to the counties.<sup>13</sup>

Parliament has also fuelled disputes by passing laws regulating county matters which it is constitutionally incompetent to pass. As will be discussed in detail below, one such example was when Parliament passed the County Government Amendment Act 2014 which created the County Development Boards. Disputes have also arisen between the National Assembly and the Senate where one chamber of parliament passes a law without involving the other chamber because the Constitution requires that both houses be involved in passing a law.<sup>14</sup>

As far as meddling with assigned functions is concerned, counties are not innocent either. Despite meagre financial allocations, many counties have chosen to undertake functions that are exclusively given to the national government, most often the education and security functions. Though these two functions are assigned to national governments, there are numerous counties that are using their resources to build primary and secondary schools

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<sup>12</sup> Johannes Chan, “Administrative law, politics and governance: the Hong Kong experience” in Tom Ginsburg and Albert H.Y. Chen (eds), *Administrative Law and Governance in Asia: Comparative Perspectives* (London: Routledge, 2009) 143.

<sup>13</sup> For example, in March 2015, the Cabinet Secretary to the National Treasury created the Affirmative Action Social Development Fund Regulations which creates the Affirmative Action Social Development Committee. The Committee, although a creature of the national government, has been mandated to implement local initiatives relating to affirmative action most of which fall within the functional competence of the County governments.

<sup>14</sup> See, The Nation Newspaper Online, November 13, 2014, *Laws’ Row Heads to the Top Court*. Available at <<http://www.nation.co.ke/news/politics/Senate-Supreme-Court-Legislation-National-Assembly/-/1064/2521726/-/8u14iu/-/index.html>> at November 8, 2015

and purchase or lease vehicles for the police. For example, in 2014, Machakos County purchased 120 police cars<sup>15</sup> and Mombasa County bought 48 such vehicles in 2013.<sup>16</sup>

### 3.0 Devolution and Public Interest Litigation

#### 3.1 The Limits of Devolution Litigation

What constitutes devolution litigation is often difficult to pin down. There are various ways to classify litigation as being devolution litigation. It can be limited to cases that concern disputes between national government organs and county government organs. This classification would therefore limit litigation on devolution to intergovernmental disputes where organs of national government are pitted against county governments. In addition, devolution litigation can also involve disputes between different organs of the national government or even between county governments as long as the dispute affects how the devolved system of government works. This way a dispute between the National Assembly and the Senate (both organs of national government) which involves issues of county governments (as opposed to, for example, a dispute on the impeachment of the president) would qualify as devolution litigation. This expanded understanding of devolution litigation also includes inter-county disputes.

For the purpose of this Chapter, I take the view that devolution litigation encompasses disputes between national government organs and county government organs, disputes between organs within one level of government if the litigation involves an analysis of the nature of power or functions of either level of government as well as inter-county disputes. In this regard, I exempt from this category disputes that are purely intra-county or intra-national government where there is no need to look beyond the geographical and functional reach of the county or national government to resolve the dispute. Such excluded cases may include local labour or licensing disputes that are quite common within counties.

#### 3.2 The Place of Public Interest in Devolution Litigation

What constitutes PIL in devolution matters? Understanding the boundaries of devolution litigation may seem academic but it has a practical purpose for the

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<sup>15</sup> See, The Standard Newspaper Online, January 30, 2014, *Mutua Unveils 120 Police Cars to enhance Security*. Available at <<http://www.standardmedia.co.ke/article/2000103581/mutua-unveils-120-police-cars-to-enhance-security>> at August 14, 2015.

<sup>16</sup> See, The Star Newspaper Online, June 24, 2013, <<http://www.the-star.co.ke/news/article-125558/joho-gives-48-patrol-cars-mombasa-cops>> at August 14, 2015.

judiciary when resolving disputes. As will be discussed later, courts have been given a prominent mandate by the Constitution to ensure that devolution works. Accordingly, it is imperative for litigants and judges to be able to identify, at the earliest opportunity, what may constitute devolution litigation.

An important point to be addressed is what qualifies litigation on a devolution matter to become public interest litigation. Or put another way, is there any litigation concerning devolution matters that is not public interest litigation? The second question is perhaps more illuminating, especially when contextualized with what is considered to constitute devolution litigation as discussed above. The main concern is whether the matter involves sufficient public interest issues. Understood this way, it is hard to imagine that there is any litigation matter on devolution that does not amount to public interest litigation especially when considering how central the system of devolution is under the Kenyan Constitution and governance structure. Having established that devolution litigation as defined above is of great public interest because it touches on all aspects of governance, it is also important to note that devolution PIL should always address the institutional implications of a specific case. While devolution PIL may be brought by private individuals and may be used to promote specific interests, it is up to the courts to ensure that the wide ranging effects of this type of litigation must be evident throughout the judicial process.

#### 4.0 PIL and Devolution Matters

PIL has generally developed in the context of the human rights sphere and has therefore been undertaken primarily to pressure states to honor their obligations concerning human rights – that is to respect, protect, promote and fulfill human rights. The human rights orientation is clearly discernible in the Constitution and provides a basis for PIL as a tool to protect all aspects of the Constitution – including devolution - to protect, promote and enhance its implementation. Instructively, the Constitution has numerous provisions that support the use of PIL to protect, promote and fulfill the constitutional scheme of devolution; these include providing the courts with express mandate to deal with disputes relating to devolution.

PIL in devolution has been undertaken with varying objectives. Most of the PIL in devolution has - in my view - been litigated with an aim to meet the objectives of devolution set out in Article 174 and to affirm the distinctiveness and interdependence of the two levels of governments based on the provision of Article 6(2) of the Constitution. The rest of this Chapter will focus on analyzing how PIL on devolution matters have attempted to address these objectives.

## 4.1 The Role of the Judiciary in Protecting the Constitution

To fully understand the role of PIL in the implementation of devolution, it is critical to understand the function that the judiciary serves in implementing and safeguarding the Constitution generally. Kenya's constitution places significant responsibility on the judiciary to protect the values and principles enshrined in it as well as its standing as the supreme law of Kenya. Yash Ghai has captured this enormous task:

Perhaps realising its own ambitious project, and hence its vulnerability and fragility, the Kenyan Constitution sets, through the judiciary, its barricades against destruction of its values and weakening of its institutions by forces external to itself. Such is the responsibility of Kenya's judiciary.<sup>17</sup>

The starting point in understanding the role and mandate of the courts generally is appreciating how the 2010 Constitution changed the nature of the State. The Constitution creates a state structure based on constitutional supremacy. This principle is explicitly provided for in Article 2 which states that the Constitution is the supreme law of the land binding all persons and organs and accordingly, anything in contravention with it is void.<sup>18</sup> A constitutional democracy exists when the courts are given significant powers to determine legal questions and also to resolve policy and political disputes. As the Deputy Chief Justice Kalpana Rawal noted in the *Speaker of the Senate* case, "as part of its remit in the elaboration of constitutional principles the Supreme Court, and in fact all courts, is well placed to consider matters that may have political dimensions".<sup>19</sup>

The courts are a key part of ensuring that the Constitution delivers on its promise to limit state power and end corrupt behavior and practices. Therefore, it is a primary obligation of the courts to guard against the erosion of the values and principles of the Constitution and to require that individuals and institutions comply with and operate within the bounds of the Constitution at all times. To ensure that the judiciary can effectively assert itself and undertake its mandate of safeguarding constitutional supremacy as required, the Constitution insulates it from manipulation by providing that the judiciary "shall be subject only to the constitution and the law and shall not be subject to the control or direction of any person or authority."<sup>20</sup>

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<sup>17</sup> Quoted by Willy Mutunga in "The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court Decisions" in the University of Fort Hare Inaugural Distinguished Lectures, October 14, 2014. Available online at <[www.constitutionnet.org](http://www.constitutionnet.org)> at November 8, 2015

<sup>18</sup> Constitution of Kenya, 2010. Article 2(1) and 2(4).

<sup>19</sup> *Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR para 200.

<sup>20</sup> Article 160(1). See also, *Council of Governors & 3 others v Senate & 53 others*. Petition 381 & 430 of 2014 (Consolidated) Kenya Law Reports 2015 para 74.

The courts have been steadfast in upholding this mandate by acknowledging in their decisions that they are the final arbiter on constitutional disputes and the last in line as custodians of the Constitution.<sup>21</sup>

In a constitutional democracy there are no limits on what type of dispute a court can inquire into. Because the Kenyan Constitution expressly establishes a constitutional democracy and its overriding value is upholding the rule of law both vertically and horizontally,<sup>22</sup> as the final arbiter of constitutional disputes, there is no subject, legal, policy-related or political that is off limits for the courts.<sup>23</sup> The court's global mandate to protect the Constitution is perhaps best captured in *Council of Governors & 6 others v Senate*<sup>24</sup> where the High Court held that its duty to safeguard, protect and promote the Constitution bestows upon it a duty to "intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the Constitution has either been violated or threatened with violation."<sup>25</sup> The Court stated that not even the doctrine of separation of powers could be used to divest the Court of its powers to adjudicate grievances that arise from alleged violations of the constitution.<sup>26</sup>

However, this mandate has to be understood in the context of century-old institutional comity principle, where various institutions of the state do not interfere with each other's mandate, except when it is appropriate and necessary. On some devolution matters, for example, where there is an elaborate intergovernmental dispute resolution (IGR) mechanism,<sup>27</sup> courts should not be overenthusiastic in admitting such matters, except where it is shown that the IGR process has been used and the dispute still persists. This was the approach taken by Justice Majanja in *Law Society of Kenya v. Transition Authority and 2 others* where he upheld the objection on jurisdiction:

... judicial proceedings are a last resort as **section 35 of *the Act*** provides that, "*Where all efforts of resolving a dispute under this Act fail, a party may submit the matter for arbitration or institute judicial proceedings.*"<sup>28</sup>

The requirement that intergovernmental dispute resolution mechanisms be exhausted before the court can take jurisdiction to hear a matter is a principle

<sup>21</sup> *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR paras 68 & 74.

<sup>22</sup> Article 2.(1) states that the constitution "binds all persons and all state organs at both level of government." On Bill of Rights, Article 20(1) states that "The Bill of Rights applies to all law and binds all State organs and all persons." See also Article 3 which provides that "Every person has an obligation to respect, uphold and defend this constitution."

<sup>23</sup> See generally, Article 159 on Judicial Authority, Article 23 on Authority of courts to uphold and enforce the bill of rights and Article 259 on interpreting the constitution.

<sup>24</sup> *Council of Governors & 6 others v Senate* [2015] eKLR.

<sup>25</sup> As above para 63.

<sup>26</sup> As above.

<sup>27</sup> See generally, the *Intergovernmental Relations Act* No. 2 of 2012.

<sup>28</sup> *Law Society of Kenya v. Transition Authority and 2 others* (2013) eKLR para 10.

that has been well developed in South Africa. The South African Constitutional Court in *National Gambling Board v Premier of KwaZulu-Natal & Others* stated that “Co-operative government is foundational to our constitutional endeavour.”<sup>29</sup> Similarly, in *Uthukela District Municipality v President of the Republic of South Africa*<sup>30</sup> the Constitutional Court reiterated that all extra-judicial avenues for resolving a dispute must be exhausted before they became justiciable. Moreover, the Court resolved that there was an obligation “to avoid litigation against one another irrespective of whether special structures [for dispute resolution] exist or not.”<sup>31</sup> Mugambi Laibuta discusses this subject further in his chapter entitled *Judicial adjudication of intergovernmental disputes in Kenya: defining judicial boundaries and appropriate remedies*.

Conversely, the requirement to try and resolve the disputes through less adversarial forums should never be seen as a basis to argue that courts have no jurisdiction to hear intergovernmental disputes since the constitution has given courts unfettered mandate in resolving intergovernmental disputes. However, even though jurisdiction exists, it does not prevent the courts from declining jurisdiction where it is clear that there is a better, more effective and less adversarial way to resolve the dispute. In addition, intergovernmental matters should be handled in a cooperative manner to allow the courts remain the last resort in arbitration of intergovernmental disputes.

However, it is important that courts are not too quick to lock out PIL matters relating to devolution on account of availability of intergovernmental mechanisms, particularly those brought by private persons as they may not have a way of accessing the intergovernmental dispute resolution mechanisms or may not have the same clout as State organs. This recognition was made by Justice Lenaola in *Okiya Omtatah Okoiti & another v Attorney General & 6 others* [2014] eKLR Petition No. 593 of 2013. In that case, Mr. Omtatah, a private citizen, had questioned whether transfer of certain health facilities to county governments was in violation of the constitution. Preliminary objection had been brought on whether the matter should have initially been determined through the intergovernmental dispute resolution mechanisms. However, Justice Lenaola found, and I think rightly, that section 30 of the Intergovernmental Relations Act 2012 only contemplated a threshold dispute resolution process in regard to disagreements between national and county governments or county and county governments.

<sup>29</sup> *National Gambling Board v Premier of KwaZulu-Natal & Others* 2002 (2) SA 715 (CC), 2002 (2) BCLR 156 (CC).

<sup>30</sup> *Uthukela District Municipality and Others v President of the Republic of South Africa and Others* (CCT7/02) [2002] ZACC 11.

<sup>31</sup> As above para 22.

In so holding, it is clear to my mind that the intention of the Legislature was not to bring any issue, real or perceived, as a dispute by any person other than the two levels of government or as between counties, within the purview of the dispute resolution mechanisms under the Intergovernmental Relations Act.<sup>32</sup>

Critically, in that case, Justice Lenaola found that no dispute existed between any of the governments, since this was a private citizen's concern about how functions were being assigned to counties, and hence the matter could not be characterized as an intergovernmental one. Importantly, the finding means that litigation on devolution intergovernmental matters are the reserve of state organs but that, where necessary, members of the public are also able to bring PIL matters on IGR issues.

## 4.2 The Role of the Judiciary in Entrenching Devolution

Numerous provisions of the Constitution indicate that the courts should have a significant say in determining how devolution works. For example, and as already noted, the only advisory jurisdiction given to the Supreme Court relates to matters of devolution.<sup>33</sup> In the constitutional adjudicative context, however, one may argue that the High Court is the most critical level in the judiciary because it has original jurisdiction on both interpretation and application of the Constitution and can, without due restriction, admit any evidence relevant to the resolution of a matter before it. On devolution, the Constitution explicitly puts emphasis on two components of the High Court's original jurisdiction to interpret and apply the Constitution on "any matter relating to constitutional powers of State organs in respect of county governments; those are any matter relating to the constitutional relationship between the levels of government" and a question relating to conflict of laws under Article 191".<sup>34</sup> Both the High Court and the Supreme Court now have numerous leading judgments which demonstrates the Court's appreciation of their critical mandate in protecting devolution.

Chief Justice Mutunga has commented on the constitutional prominence given to the judiciary in regard to dispute resolution by noting that the only

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<sup>32</sup> *Okiya Omtatah Okiiti & Another v Attorney General & 6 others* [2014] eKLR para 78. But South African Courts seems to have taken a different approach stating that even matters brought up by private citizens that involve IGR issues are amenable to statutory IGR dispute resolution mechanism. For a detailed discussion on this see, Stuart Woolman, Theunis Roux and Barry Bekink, *Cooperative Government*, in **Constitutional Law of South Africa**, S. Woolman and M. Bishop (Ed), Looseleaf, 2002.

<sup>33</sup> See *Constitution of Kenya* 2010, Article 163(6) of the Constitution which provides that "The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government."

<sup>34</sup> As above Article 165(2)(d)(iii) & (iv)

two matters where the Supreme Court has been given exclusive jurisdiction are the determination of a challenge to the presidential election and advisory opinions on devolution issues. He concludes that, “in my opinion, this speaks quite eloquently as to the order of importance of devolution.”<sup>35</sup> Importantly Courts are appreciative of their obligation that their interventions and decisions are key in protecting devolution that is now just budding. Chief Justice Mutunga describes this obligation when he notes:

The Courts must patrol Kenya’s constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order.<sup>36</sup>

The Chief Justice would go on to note that Courts have a “unique constitutional mission” that was “deliberately created to oversee Kenya’s successful constitutional and institutional transition.”<sup>37</sup> The majority at the Supreme Court in the *Speaker of the Senate* case<sup>38</sup> were even more emphatic and precise about the courts’ role in ensuring the true implementation of devolution that fulfils the aspirations the Kenyan people. The Supreme Court summed up that role as follows:

... We in this Court, conceive of today’s constitutional principles as incorporating the transformative ideals of the Constitution of 2010: we bear the responsibility for casting the devolution concept, and its instruments in the shape of county government, in the legitimate course intended by the people. It devolves upon this Court to *signal directions of compliance by State organs, with the principles, values and prescriptions of the Constitution*; and as regards the functional machinery of governance which expresses those values, such as devolution and its scheme of financing, this Court bears the legitimate charge of showing the proper course.<sup>39</sup>

The courts appreciate that PIL is critical in their ability to exercise their broad adjudicative mandate but also that it is an “effective tool to realize public scrutiny of and participation in public affairs.”<sup>40</sup> Moreover, Courts have stated that PIL relating to devolution which is brought in good faith should be

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35 *Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR para159.

36 As above para161.

37 As above para 163.

38 As above para 53.

39 As above para 53.[Emphasis added]

40 See, *John Wekesa Khaoya v Attorney General* [2013] eKLR. See also, *Harun Mwau and Others v Attorney General and Other* [2012] eKLR para 180.

encouraged especially at the formative stages of devolution.<sup>41</sup> Courts therefore appreciate their constitutional mandate relative to devolution as helping to clarify the intricacies and applicability of the law and actions relating to devolution.

Most PIL cases are brought with an aim to entrench devolution and to thwart or undo the harm done or intended by centralist policies and actions. In this regard, perhaps the three most critical cases relating to protection of devolution are *The Speaker of the Senate case*, the *Institute for Social Accountability (TISA) case* and the *County Development Board case* detailed in the next section. These three cases are critical because they relate to two core and sacrosanct mandate of institutions at the heart of devolution. Those two mandates are the legislative competence of the Senate and the County Assemblies and the functional competency of County Governments.

### 4.3 PIL Role in Protecting Legislative Competency of Devolution Organs

One of the key institutions created by the 2010 Constitution is the Senate. Senate is accorded the special mandate of protecting county governments. Senate therefore sits at an interesting place. At some level, it is a creature of the national government; in fact, it is one of the institutions that constitute parliament - the other being the National Assembly. In institutional design relating to devolution, Parliament is, in the larger sense an organ for national government. Yet, the Senate has primarily two mandates. The first relates to impeachment of the President,<sup>42</sup> and the second – which is its mainstay – is to “represent the counties, and serves to protect the interests of counties and their governments.”<sup>43</sup> In this regard, the Senate is a critical organ in the survival and entrenchment of devolution. However, there have been numerous attempts to undermine the role of Senate, to the extent of questioning its relevance and suggesting it be abolished. This mirrors the unfortunate precedent of the 1960’s, when the federal system adopted at independence was killed after a systematic campaign to disable it culminated in the abolishment of the Senate as the final act.<sup>44</sup>

This decades-old tendency of recentralization resurfaced as evidenced by sustained attempts to undermine the legislative role of the Senate. This was best exemplified by the refusal by the National Assembly to involve the Senate in the division of revenue process in 2013 when the National Assembly –

<sup>41</sup> *John Wekesa Khaoya v Attorney General* [2013] eKLR para 26.

<sup>42</sup> *Constitution of Kenya 2010*, Article 96(4).

<sup>43</sup> *Constitution of Kenya 2010*, Article 96(1).

<sup>44</sup> Act No 40 of 1966.

exercising its powers under sub-Articles 95(4)(a)<sup>45</sup> and 218(1)(a)<sup>46</sup> -unilaterally passed the Division of Revenue Act (DRA)<sup>47</sup> without referring it to the Senate for debate and approval. The President subsequently assented to the Act. The Senate was able to use PIL to confirm its legislative powers and reassert its role in the division of revenue process by bringing a constitutional reference to the Supreme Court - Advisory No. 2 of 2013 – *The Speaker of the Senate v The Speaker of the National Assembly*. The Senate requested the Supreme Court to determine if the Constitution requires Senate involvement in the debate and passing of the DRA. The dispute was of great public interest and attracted participation from national governmental agencies,<sup>48</sup> independent commissions<sup>49</sup> and non-governmental organizations.<sup>50</sup>

In what has become perhaps the most celebrated judgment of the Supreme Court thus far, the Court ruled that the Senate was required to participate in the consideration and passage of the DRA. The Court reasoned that the Senate, being the legislative chamber entrusted by the Constitution to represent the counties and protect the interest of counties and their governments and more critically having the law-making function for considering, debating and approving bills concerning counties, was constitutionally required to participate fully in the debate and passage of the DRA.<sup>51</sup>

It is clear, in this case, that the Court fully appreciated that litigation had a critical role in protecting devolution. As noted earlier, Chief Justice Mutunga stated that it was the role of the Courts “to patrol Kenya’s constitutional boundaries with vigor, and affirm new institutions”.<sup>52</sup> He argued that Courts, in determining cases relating to devolution, ought to be conscious that they needed judicial protection not only because being new they were fragile but

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45 *Constitution of Kenya 2010*, Article 95(4)(a) states:

95.(4) The National Assembly—

(a) determines the allocation of national revenue between the levels of government, as provided in Part 4 of Chapter Twelve.

46 *Constitution of Kenya 2010*, Article 218(1)(a)

218. (1) At least two months before the end of each financial year, there shall be introduced in Parliament—

(a) a Division of Revenue Bill, which shall divide revenue raised by the national government among the national and county levels of government in accordance with this Constitution;

47 *Division of Revenue Act* is a law passed each year and which divides revenue raised by the national government between the national and county governments based on constitutionally guided criteria

48 Senate, the National Assembly and the Attorney General.

49 The Commission for the Implementation of the Constitution.

50 The Katiba Institute.

51 Article 96 (1) and (2) provides

96. (1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.

(2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.

52 *Speaker of the Senate & another v Attorney-General & 4 others* [2013] eKLR. Advisory Opinion No. 2 of 2013, Supreme Court if Kenya para 161.

also the “old order” was keen to undermine their existence.<sup>53</sup> The Majority in that case, admonished the Speaker of the National Assembly for his failure to engage with the Senate in the passage of the DRA and asserted that courts had a mandate in resolving such disputes to ensure proper functioning of inter-governmental institutions. They noted:

No State agency, especially where it is represented by *one person*, should overlook the historical trajectory of the Constitution, which is clearly marked by transition from narrow platforms of idiosyncrasy or sheer might, to a scheme of progressive, accountable institutional interplays.<sup>54</sup>

The question of legislative competence would also come up in two other PIL matters - the *TISA case* and later the *County Development Boards Case*,<sup>55</sup> a matter relating to the constitutionality of the amendment of the County Government Act (CGA) to provide for County Development Boards. The legislative competence issue in the *TISA case* was whether the Constitution mandated that an amendment to the Constituency Development Fund Act (CDF Act) be considered and passed by both the National Assembly and the Senate. In this case, the National Assembly had passed the CDF Act 2013 without the involvement of the Senate. The petitioners, who had already brought a PIL case questioning the interference by the National Assembly in the functional mandate of counties through CDF, brought an amendment to their case contending that an amendment to the CDF Act that was effected by the National Assembly alone was unconstitutional, given that the constitution required that the Senate participate in passage of laws that concerned county governments.<sup>56</sup>

The legislative competence issue in the *CDB case* is much more complicated. Ironically, this time, the Senate in cahoots with the National Assembly, passed legislation that overreached their mandate, usurping the roles of both the county executive and assembly. It would again take PIL and the Courts to insulate the organs of the county governments from the conspiracy of the legislative arm of the national government. In this case, the contention was whether the amendment sought to regulate areas within the functional mandate of the county government and hence the national government was not the most appropriate organ to legislate on it. Moreover, the amendment sought to allow Members of Parliament to sit on a county development board, with the respective county Senator as chair.

<sup>53</sup> As above.

<sup>54</sup> As above para146.

<sup>55</sup> *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR.

<sup>56</sup> For a fuller discussion on this, see the Ruling of the Court dated 23<sup>rd</sup> January 2014, *The Institute for Social Accountability and Another v. The Parliament of Kenya and 2 Ors.*

In the *TISA case*, the Court determined that since the amendment bill concerned county government, then the legislation was invalid in so far as the Senate had not participated in its enactment. A critical portion of the reasons is the guidance the Court gave regarding how a Bill should be evaluated to determine whether Senate participation is required:

The purpose of involving the Senate is to ensure that counties, as far as possible, get to effectively participate in the legislative business at the national level in matters substantially affecting interests of county governments. This calls for the court to look beyond the substance or purpose of the statute expressed in the text. The court must unbundle the specific provisions of the proposed legislation to see if and to what extent they satisfy the criteria set out under **Article 110(1)** of the Constitution.<sup>57</sup>

The *CDB case* arose out of a consolidation of two cases brought in public interest. The first was a suit by the Council of Governors and the second was brought by private citizens.<sup>58</sup> The case would later attract the participation of all the County Assembly Speakers, the Constitution Implementation Commission as an Interested Party as well as Katiba Institute serving as an *Amicus Curiae*. The issue of legislative competence was raised by the Speakers of the County Assemblies, who argued that the Boards “muddles national government organs and offices with county government organs and offices to undertake a task vested exclusively in county governments [which] is a violation of Articles 6(1) and (2) of the Constitution”.<sup>59</sup> The legislative competency relating to county functions is vested in county assemblies and the power of execution of administrative mandate is vested in the county executive, not with the national government. The Court eventually found that the Boards violated both the principle of division of functions and the principle of separation of powers.<sup>60</sup>

#### **4.4 PIL and Division of Functions/Powers**

Division of functions refers to the concept that sovereignty is divided between the various levels of government established by the Constitution and on this basis the performance of functions of the State is assigned to two levels of government, the county and national governments.<sup>61</sup> In fact, this relationship

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<sup>57</sup> *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR para 138.

<sup>58</sup> *Barasa Kundu, Albert Simiyu and Philip Wanyonyi Wekesa vs The Speaker of the National Assembly and Others*. High Court Petition No. 430 of 2014 (formerly Bungoma High Court Petition No. 11 of 2014).

<sup>59</sup> *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR, Petition No. 381 and 430 of 2014, High Court of Kenya (Nairobi) para 20.

<sup>60</sup> As above para 112, 114.

<sup>61</sup> For a detailed discussion on functions and powers see M Kangu *Constitutional Law of Kenya on Devolution* (2015) 177-233.

is reflected in Article 1 which states that sovereignty of the people is vested and exercised through both county and national governments. The notion of sovereignty in the definition of division of powers is key because it denotes that neither level of government is superior to the other. Article 6(2) is instructive:

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.

In simple terms, the constitution vests various powers and functions on different levels of government and each level has powers to exercise and corresponding functions to perform, mostly exclusive to those of the other level of government. Often, the Constitution will also provide for some concurrent powers or functions and corresponding criteria to determine when one level takes precedence in exercising concurrent powers or performing those functions.<sup>62</sup> The Fourth Schedule of the Constitution is the authoritative guide on division of functions. It lists those functions that are exclusive to county governments and those reserved for national government. But because the Fourth Schedule uses such general and sometimes vague terms, it sets up numerous contests between the national and county governments on the scope of their respective powers and contours of their assigned functions. Division of functions is a critical aspect in entrenching devolution. It is important because the legitimacy and relevance of devolved units hinges on their ability to undertake constitutionally or statutorily specified functions. Where one level of government usurps or interferes with another's functions, it significantly undermines design and relevance of devolution.

PIL has been instrumental in other countries in clarifying functional competence of the various levels or spheres of government.<sup>63</sup> Through PIL, courts in other jurisdictions have been able to set criteria on how to resolve functional disputes.<sup>64</sup> In functional disputes, courts, and not legislatures have been more credible in providing guidance since legislative organs of different levels/spheres of government tend to take a legislative approach that preserves the interest of the level/sphere of government they fall under.

Not many cases have come before court involving the division of functions issue. Perhaps this has to do with the fact that the two levels of government are still trying to grapple with the extent of their functional competencies

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<sup>62</sup> Article 191 the *Kenya Constitution 2010*, provides for how to resolve concurrency or conflict of powers.

<sup>63</sup> Examples are Canada, South Africa, Nigeria.

<sup>64</sup> For example, both Canada and South African Courts have adopted a "pith and substance" test to determine which head of power has the powers over a disputed function.

under the constitution. Whichever way, it can be expected that contests on functional competency will increase over the years, as devolution gets more established and understanding of functional competence gets more nuanced. No doubt such cases will be of great public interest because they will further clarify our devolution design as well as for their complexity.

However, the leading case on this point is *Institute for Social Accountability and Another v. The Speaker of National Assembly*<sup>65</sup> (the *TISA case*). The *TISA* case has provided useful guidance on how the courts should resolve disputes relating to intergovernmental relations regarding functional competence. The *TISA* case is especially relevant to the discussion in this Chapter because it shows how PIL has been or can be used to support the entrenchment of devolution in Kenya.

As briefly noted above, the *TISA* case relates to a constitutional challenge to the Constituency Development Fund Act 2013 (CDFA). *TISA* and the Centre for Enhancing Democracy and Good Governance (CEDGG), both nongovernmental organizations, had impugned the constitutionality of the nationally legislated CDF due to, among other grounds, some of the functions being undertaken were functions exclusively reserved for county governments under the Fourth Schedule of the Constitution.

The *TISA* case represents the potency of PIL in clarifying policy and statutory issues relating to devolution. For a long time, the two petitioners had been involved in advocacy to reform CDF<sup>66</sup>, including petitioning Parliament to abolish it because of its non-conformity with the devolved system of government. However, because members of the National Assembly were beneficiaries of the CDF they were unwilling to reform the CDF to bring it into conformity with the constitution. The Petitioners, left with few other options, decided to take their advocacy on CDF to court in form of PIL.

The CDF stated that the projects to be implemented “shall be community based in order to ensure that the prospective benefits are available to a widespread cross-section of the inhabitants of a particular area.”<sup>67</sup> Moreover, the CDF broadly identified the “type of projects” to be funded through the CDF as those implemented “for purposes of infrastructural development, wealth creation and the fight against poverty.”<sup>68</sup> The Petitioners argued that these provisions established that the type of functions to be undertaken

<sup>65</sup> *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR.

<sup>66</sup> See, for example, the *TISA* < <http://www.tisa.or.ke/index.php/about> > where *TISA* states that it has been previously known as the CDF Accountability Project; at December 4, 2015.

<sup>67</sup> *Constituency Development Fund Act, 2013* (CDFA) s 22.

<sup>68</sup> As Above s 3.

were local in nature and were in fact the functions assigned to the county government under the Fourth Schedule. Given that the CDF mechanism was implemented by the national government (through the CDF Boards), it was illegally performing functions constitutionally assigned to the counties. Agreeing with the petitioners, the Court noted that:

...the national government may only provide grants to county government or additional revenue but it is only the county government that has the constitutional power to execute development within the county except for the projects reserved for the national government as provided for under the **Fourth Schedule** to the Constitution. Put another way, the national government, while free to infiltrate its policies at the county levels, must do so through the structures recognised under the Constitution and not run parallel them. If it so desires, the national government may channel grants, whether conditional or unconditional to the county governments as additional revenue within the meaning of **Article 202** and not any other entity which performs the functions allocated to the county by the Constitution. The national government cannot purport to channel grants to an entity whose intended projects effectively undermine the role of the government at the county level unless the projects are specifically defined to exclude them from the ambit of **Part 2** of the **Fourth Schedule**.<sup>69</sup>

Division of function issues also arose in another PIL case - mentioned above - brought by Okiya Omtatah Okoiti regarding which level of government was responsible for various health services. The petitioners challenged the constitutionality of a 2013 Legal Notice published in the Kenya Gazette Supplement which transferred a number of health services from the national to the county governments. The Legal Notice was ostensibly based on the division of function sections of the Fourth Schedule and section 15 of the Sixth Schedule of the Constitution as read with sections 23 and 24 of the Transition to Devolved Government Act, 2012.

Of great contention was whether the Legal Notice ascribed the correct meaning to “national referral facilities” in section 23 and “County health facilities and pharmacies” in section 2(a) of the Fourth Schedule to the Constitution. The Petitioners had complained that the phrase “national referral facilities” included dispensaries, health centers, primary, secondary and tertiary hospitals classified as Level 2, Level 3, Level 4, Level 5 and Level 6 health facilities and hence, the assignment of all health facilities except Moi Referral Hospital and Kenyatta Referral Hospital to the counties violated the

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<sup>69</sup> *Institute of Social Accountability & another v National Assembly & 4 others* [2015] eKLR para 109.

division of functions principles in the Constitution and specifically the Fourth Schedule. The Petitioners were instead arguing that the Fourth Schedule should be interpreted as devolving to counties only health facilities that were previously under the County and Municipal Councils before the advent of the 2010 Constitution. The Court, however, was quick to state that devolution was intent on allocating substantive functions to the county governments:

The Fourth and the Sixth Schedules to the Constitution, 2010, deal with distribution of functions between the National Government and the County Governments and transition provisions, respectively. The Petitioners must therefore understand and know that devolution has brought in a new structure of governance and it cannot be compared with the Local Authorities system as we knew it under the Repealed Constitution. County Governments under the Constitution, 2010 have now been elevated to the level of semi-autonomous governments but inter-dependent with the national government.<sup>70</sup>

In deciding this case, Justice Lenaola did not resolve the scope or meaning of “national Referral facilities” or “County Health Facilities and Pharmacies”. Instead, he acknowledged that there was no constitutional definition provided for the terms and therefore their meaning was a matter of policy - best left to policy makers “to be determined in accordance with the provisions of Section 15 of the Sixth Schedule which establishes guidelines for the devolution of functions to be made by an Act of Parliament.”<sup>71</sup> In declining to pronounce itself on the exact meaning of the terms cited from the Fourth Schedule of the Constitution, Justice Lenaola declined to resolve the substantial dispute regarding which health facilities belonged to each level of government and noted:

Accordingly, I am clear in my mind that application of the Fourth Schedule in determining which health facilities fall within which category is the preserve of the National Government as it would be more informed in that regard by several factors and details which may not be within the knowledge of this Court.<sup>72</sup>

It is true that negotiations between different levels of government regarding who will undertake a contested function relates to policy. Nevertheless, Justice Lenaola’s judgment is problematic in two respects. First, the Judge implicitly suggests that Courts have no role in adjudicating matters relating to policy. While it is undesirable for the courts to make policy generally, it is important and in fact, required under the Constitution that the courts be able to review

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<sup>70</sup> *Okiya Omtatah Okioti & another v Attorney General & 6 others* [2014] eKLR para 83.

<sup>71</sup> As above.

<sup>72</sup> As above para 91.

any policy decision made by the executive or any other government actor. It is up to the courts to determine whether such a decision is in compliance with the Constitution. Accordingly, an interesting part of this case was the question on whether the policy decision made by the Transition Authority to assign certain health facilities to counties was in line with the requirement of the Constitution.

Secondly, Judge Lenaola's determination that "... application of the Fourth Schedule in determining which health facilities fall within which category is the preserve of the National Government..."<sup>73</sup> is highly troublesome because it presupposes that it is for the national government to assign the functions. This proposition, in my view is wrong, since functions are assigned by the Constitution, and specifically the Fourth Schedule. Within the constitutional scheme, the national government has no prerogative or monopoly in deciding which level of government is responsible for each function. Even if the two levels of government haggle with each other for their entitlement to certain functions, no level of government should have more say than the other in that bargaining process. The courts always maintain their jurisdiction to assess, if a challenge is initiated, whether the negotiation process and outcome is in line with the Constitution. If they are not, courts have no option other than to invalidate the negotiated division of functions.

Through undertaking PIL on division of powers, those who have brought the cases have helped to clarify, to some extent, the functional competency and limits of each level of government and some of the aspects courts ought to consider in determining which level of government has the mandate over a respective function.

## 5.0 Conclusion

Devolution is a critical component of the constitution. In fact, in *Commission for the Implementation of the Constitution v Parliament of Kenya and 5 Others*, **Petition No. 496 of 2013**, Justice Lenaola said that **the principles in Article 10, including devolution of power, formed part of our Constitution's basic structure which could not be amended haphazardly.**<sup>74</sup> Importantly, it is a component that was added to the constitution to assist all Kenyans - irrespective of their geographical locality or political affiliation - benefit from equitable distribution of state resources. For many Kenyans, a significant measure as to whether the 2010 constitution was worthwhile depends on the success or failure of devolution. For them, devolution is the remedy that will

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<sup>73</sup> As above.

<sup>74</sup> *Commission for the Implementation of the Constitution v Parliament of Kenya and 5 Others*, **Petition No. 496 of 2013 High Court of Kenya (Nairobi)** para 69.

fix the ills that were exacerbated by centralization, it is the hope for economic development and it presents the best opportunity for people to participate in the affairs of government. As the Court hearing the CDB case noted:

At the heart of devolution is a recognition that centralised power creates a climate for coercive state power. The people of Kenya have for long agitated for the decentralisation of power, and the right to have a say in their governance and the use of their resources. It is not surprising then that one of the key pillars of the Constitution is sharing of power and devolution, a principle which is captured in the national values and principles of governance in Article 10(2) of the Constitution. Devolved government is also recognised at the outset as one of the levels of government, the institutions to which and within which the people of Kenya have delegated their sovereign power as spelt out in Article 1(3) (b) and 1(4) of the Constitution.<sup>75</sup>

Kenyans have a great interest in ensuring that devolution works. However, a great determinant on whether or how well devolution works rests on decisions and performance of formal government actors at the national and county governments. When the public is unhappy with how those formal actors are managing devolution, the best option to ensure that devolution is not derailed is to approach the courts. PIL therefore becomes a critical tool for use by the public to enforce constitutional compliance and to protect devolution.

As I have shown, through the case studies discussed above, the courts have developed relatively progressive jurisprudence in regard to devolution. They have been keen to assert their constitutional obligation to protect devolution. Additionally, they have encouraged public spirited individuals to bring cases relating to devolution, by asserting their rights to approach the Courts under Article 22 and 258; but also by not awarding costs against them, even when unsuccessful. This judicial attitude is important given that most of the formal actors have shown that they are interested in bringing devolution related PIL matters when their power is directly implicated, but may not be so keen to do so when the issues of benefit to the public are involved. One can only hope that the Courts will maintain friendly demeanor towards members of the public who continue to litigate in public interest to protect the principles of devolution enshrined in Article 174 of the constitution. Critically, through PIL on devolution the courts have been able to affirm the relevance and the imperative of devolution and to diminish the threat of its abolishment as happened after independence.

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<sup>75</sup> *Council of Governors & 3 others v Senate & 53 others* [2015] eKLR para 107.



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# The Role of Civil Society in Promoting Devolved Governance in Kenya

Wanjiru Gikonyo

## 1.0 Who is Civil Society?

Despite the widespread contribution of civil society in countries across the globe “there is no consensus on its precise meaning.”<sup>1</sup> In Kenya, records from the NGO Coordination Bureau show that in 2012 nongovernmental organizations alone employed over 200,000 people and contributed a total of KES 80 billion - US\$ 1 billion at that time - to the national economy.<sup>2</sup> This figure does not include the civil society formations registered under different legal regimes<sup>3</sup> or those not registered at all. Civil society actors have diverse mandates and interests spanning all sectors of life, and their contribution goes far beyond the monetary to social, development, democratic governance, and so forth.

In seeking to understand civil society it is critical to note that it “is heterogeneous, made up of diverse organisations and interests that adopt different approaches towards the realisation of their objectives.”<sup>4</sup> Civil society organizations encompass a wide array of actors such as cultural and professional associations, trade unions, faith based organizations, nongovernmental organizations, community-based organizations, foundations among many others. The civil society sector also includes both local and international organizations. Some civil society groups have quasi-governmental status. The media is also sometimes defined as civil society particularly community based

1 P Wanyande, *Civil Society and Transition Politics in Kenya: Historical and Contemporary Perspectives DISCOURSES ON CIVIL SOCIETY IN KENYA* (2009) 9.

2 Y Niyiragira *Current challenges facing the civil society in Kenya*(2014) 4.

3 Civil society may be registered as nongovernmental organizations, trusts, foundations, non-for-profit companies, societies, and so forth. They may also be informal groupings.

4 As above n 1, 10.

media. So how then do we distinguish the sector in our endeavor to appreciate its contribution to the implementation of devolution in Kenya?

Civil society can be understood as actors in the public sphere who derive their authority from outside the state and private sector mandate. Civil society serves as a countervailing force to government, and is normatively dedicated to protecting the public good. It is value driven and not for profit. Civil society is “concerned with public rather than private ends.”<sup>5</sup> However, civil society mandates and interests are diverse and change in line with their interests. They may engage the state in a confrontational and/or collaborative manner.

This paper situates the work of civil society in Kenya around the implementation of devolution process. The central theme of this paper is that Kenya is in the throes of a long drawn out democratic transition; marked by the steadfast resistance by the political elite towards the establishment of a just and equitable governance paradigm. It briefly traces Kenya's democratic transition timeline considering the role of civil society since the pre-independence period to the passage of the new constitution which establishes devolved government.

This paper positions devolution as a key component of Kenya's democratization process. It interrogates how the frosty relations between civil society and the Jubilee administration have influenced the sectors methods of engagement and its contribution to the devolution implementation process. It addresses the centre's steadfast refusal to cede power and the different guises used to frustrate the implementation of devolution. The paper captures some of the approaches civil society has employed in the face of state efforts to frustrate devolution, including the use of court intervention. Lastly, the paper makes some suggestions on how to increase civil society effectiveness in the implementation of devolution process in Kenya.

## Civil Society's Role in the Democratization Process<sup>6</sup>

Since the early colonial days civil society has continued to shape the landscape of Kenya's governance albeit through different means. “There is little doubt about the critical role that civil society played in initiating and sustaining the movement for constitutional reform [in Kenya].”<sup>7</sup> The form and approach of

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5 K Masime, *The Changing Role of Civil Society in Kenya's Democratic Transition TAKING STOCK, LEARNING LESSONS AND MOVING FORWARD* (2011) citing Diamond (1997).

6 See generally, P Wanyande, *Civil Society and Transition Politics in Kenya: Historical and Contemporary Perspectives DISCOURSES ON CIVIL SOCIETY IN KENYA* (2009); Y P Ghai, *Role of Civil Society in Constitution Making, TAKING STOCK, SHARING LESSONS AND MOVING FORWARD* (2011); W Mutunga, *Constitution Making from the Middle Civil Society and Transition Politics in Kenya, 1992 -1997* (1999).

7 Y P Ghai, *Role of Civil Society in Constitution Making, TAKING STOCK, SHARING LESSONS AND MOVING FORWARD* (2011) 7.

civil society engagement has been dictated by the character of the government in power as well as the historical democratic epoch.

Democratization may be understood as the transition towards a democratic regime based on the values of liberty, equality and justice - usually from an authoritarian one. The democratization process may also be understood as having three distinct phases: political liberalization, political transition and democratic consolidation.<sup>8</sup> During the political liberalization phase the ruling elite is compelled, through civic pressure, to grant previously denied civil and political rights. During this phase civil society is at its most belligerent, and is confrontational toward government. Civil society takes the form of loose coalitions, with an ill-defined reform agenda which mainly focuses on the ouster of the incumbents. The liberalization phase in Kenya corresponds to the struggle for independence in which liberation movements - such as the Kikuyu Central Association, the Mau Mau, the Kavirondo Taxpayers' Welfare Association, Ukambani Members Association and Taita Hills Association<sup>9</sup> - employed both violent and non-violent means for the attainment of independent Kenyan rule in 1963.

The attainment of liberation is followed by the transition phase which is when the regime in power "gives in and allows for the rejuvenation of political society".<sup>10</sup> Former autocratic institutions are replaced by new democratic institutions. During this phase the push for democratization is passed onto the new institutions of the liberalization process; and civil society resumes its traditional roles of civic education, elections monitoring and arbitration of disputes between political parties. The transition will however be characterized by a struggle between the progressives and those who favor the status quo.<sup>11</sup> In Kenya's case, the post-independence government quickly fell captive to the self-interest of the ruling political elite subverting the democratization process. Instead of dismantling the institutions of colonial subjugation the Kenyatta and Moi administrations adopted them; benefitting through the use of the provincial administration for local intimidation, exploitation of appropriative land/economic policy and widespread land grabbing. A handful of political elite became the new colonizers benefitting from skewed land allocations and state capture of the economy.

The failure of the post-independence transition process provoked resistance from civil society - drawn mainly from the academia at first - and political

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<sup>8</sup> As above n 5, 5-7 (quoting Bartton, 1994:56)

<sup>9</sup> As above n 5, 10.

<sup>10</sup> As above n5, 6.

<sup>11</sup> As above n 5, 6.

opposition leaders; a number of whom distinguished themselves as outspoken critics of the Kenyatta regime. The early phase of the post-independence democratization struggle remained largely an elite project,<sup>12</sup> although there were attempts at wider mobilization such as the underground movement *Mwakenya*.<sup>13</sup>

A failed coup attempt in 1982 was brutally and decisively crushed by the Moi government. It also heralded the dark days of Moi's rule characterized by a ruthless clamp down on freedoms of association, assembly and press. Government critics were arbitrarily arrested, tortured jailed and in some cases killed - other simply disappeared. Many fled to exile. By the early 1990's the *second liberation* movement had emerged drawn from civil society, religious institutions and the political opposition. Through the use of mass protests, civil disobedience, and civic mobilization strategies - of a now more democratically aware citizenry - the second liberation succeeded in mobilizing widespread national support.

By consolidating the efforts of civil society and the political opposition, the second liberation movement succeeded in the attainment of minimum constitutional reforms during the 1990's. This in turn paved way for the ascendancy to power of Kenya's first democratic government the National Rainbow Coalition (NARC) in 2003. The National Rainbow Coalition was a coalition of Kenya's opposition parties. Several key civil society leaders subsequently joined the NARC government. It was widely expected that the NARC administration was the transition point in Kenya's democratization trajectory. However, the administration quickly reverted to former regressive habits of patrimonial governance. Two years down the line the coalition crumbled and ethnic political tussles took over; once again subverting the democratic transformation agenda. The new regime had betrayed the ideals of the transition once more. The failure of the second liberation was a significant contributor to the 2008 post election violence which rocked the country; leading to the loss of over 1,133 lives and displacement of a further 600,000. In fact it was not until the formation of the Government of National

12 W Mutunga, *Constitution Making from the Middle Civil Society and Transition Politics in Kenya, 1992 -1997* (1999) 5 "It is true that the constitution reform project has been called a middle class or elitist initiative. And so what if it is ? Does the Kenyan middle class not have the right to agitate for reforms?"

13 <mobile.nation.co.ke/lifestyle/Scores-detained-in-Mwakenya-crackdown/-1950774/2002916.html> at 19October 2015. Mwakenya is the Kiswahili acronym for Patriotic Union of Nationalists to Liberate Kenya started by Kenyan scholars at the University of Nairobi. It was active from the late 70's into the early to mid 1980's. Its leaders termed it a tool for 'democratic struggle' and 'progressive lobby group'. The Moi government responded with a major crack down, arrests and harassment of its followers forcing many into exile. The impact on the role of academia into the struggle for democracy was permanently thwarted when the Moi administration took charge of the appointment of sympathetic leadership and frustrated attempts by the union to broaden its membership base to include university workers. Cuts in funding have also served to suppress critical voice and research in Kenyan universities.

Unity (GNU) under the National Accord and Reconciliation Act (NARA), that Kenya regained its democratization trajectory.<sup>14</sup> Says Wanyande,

Political transition involves a fundamental change in the socio, economic and political order of society including the philosophy and practice of governance in all its dimensions....political transition is therefore to be distinguished from change of administration including the political leadership of a country.<sup>15</sup>

The realization of Kenya's 'second liberation' was ultimately attained upon the passage of the constitution of Kenya in 2010<sup>16</sup> ushering in a new governance epoch based on democratic, accountable, devolved government, founded on principles of inclusivity, separation of powers and equitable distribution of resources. Kenya can therefore be said to be in high gear of the democratic transition process, as it implements the democratic imperatives of the constitution of Kenya 2010, the cornerstone of which is devolved government.

According to Bratton, a successful the transition should lead to the democratic consolidation stage where democracy can be said to be ingrained in civic culture and daily life. During this phase civil society becomes steady, focused on issues of equity, inclusivity, accountability, and serves as an important training ground for democracy.<sup>17</sup> In Kenya, whereas the new constitutional dispensation signals the realization of hard won democratic gains, patrimonial interests still dominate in political leadership. Indeed, patrimony has come dominate all aspects of civic life. It can therefore be said that Kenya is in the throes of a protracted democratic transition whose gains are yet to be consolidated - and may still be considered reversible.

Civil society in Kenya is therefore operating in a 'context of complex transition politics'<sup>18</sup> marked by intense conflict between the progressives and conservatives. Civil Society is thus called upon to play a dual role of fostering the transition whilst consolidating the democratic gains; a feat easier said than done as we shall see in the next section.

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<sup>14</sup> Statistics from <kptj.africog.org./kptj-the-post-election-violence-in-kenya-seeking-justice-for-victims/ > at 19 October 2015. The post election violence was triggered by the announcement of results following Kenya's flawed 2007 elections triggering a two month org of violence hitherto unseen in independent Kenya. The violence was eventually quelled through mediated talks lead by the Kofi Annan under the Africa Union, resulting in a settlement captured in the National Accord and Reconciliation Act 2008. The NARA established a coalition government which governed Kenya between 2008 and 2013.

<sup>15</sup> As above n 1, 9; Quoting Nyong'o:2007.

<sup>16</sup> The National Dialogue and Reconciliation forum mediated by the Panel of Eminent Persons under the African Union agreed to a four point agenda which included comprehensive constitutional reform realized through the enactment of a new constitution in 2010.

<sup>17</sup> As above n 5, 7.

<sup>18</sup> As above n 1, 8.

## Jubilee and Civil Society Relations

Whereas civil society in Kenya is forced to engage in a context of complex transition politics; and whereas civil society is still grappling to regain its footing after the transition of many of its leading figures into government in 2003; and whereas civil society is confronted with reduced funding due to the changing funding landscape - civil society in Kenya is also facing an overtly hostile government determined to kill the sector. One of the first indications of trouble lay in the Jubilee manifesto which provides the apparently innocuous provision of the administration's intent to manage the government civil society relationship in accordance to 'internationally recognized best practice'<sup>19</sup> through the introduction of a Charities Act. The manifesto made no mention of the Public Benefits Organizations' Act 2013 which had been enacted and was at the time awaiting commencement, causing concern within the sector.

The passage of Public Benefits Organizations' Act, 2013, was the culmination of several years of dialogue between civil society and the Kibaki administration. The 2006 sessional paper which informed the Act recognized the contribution of civil society in fostering democracy in Kenya particularly in the constitution review process. More importantly the policy and Act were aligned to the letter and spirit of the constitution. Specifically, the Act sought to strengthen the self-regulatory framework for civil society; provide support by government for the sector through tax incentives and financial support; and establish a robust accountability framework to enhance the effectiveness of the sector.<sup>20</sup>

The Act was necessitated by dysfunctionalities in the present civil society regulatory framework which have greatly hampered the effectiveness of the sector. The present Non-Governmental Organizations Coordination Act of 1990 was passed during the single-party Moi era, and was designed to control the sector rather than facilitate it. Its leadership structure is packed with government appointees, and the registration framework so ineffective that most institutions work outside it. The body is also marred by internal wrangles, accountability and capacity challenges. The NGO Coordination Board - the apex regulatory body under the Act - has been infiltrated by the government and lack the legitimacy needed to lead the sector.

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<sup>19</sup> The Shared Manifesto of the Coalition between the National Alliance (TNA), The United Republican Party (URP), The National Rainbow Coalition (NARC) and the Republican Congress Party (RC), TRANSFORMING KENYA – SECURING KENYA'S PROSPERITY 2013-2017 (2013)65.

<sup>20</sup> See generally K Kanyinga, *The Political and Legal Environment for CSOs in Kenya* (2014) Unpublished report.

The fears of civil society were soon to be borne true. One of the first policy actions of the Ministry of Devolution and Planning was an attempt to push through parliamentary amendments to the Public Benefits Organizations' Act 2013<sup>21</sup> which would fundamentally negate the spirit of the Act. Amongst other things the amendments seek to;

- Cap foreign funding for local civil society groups to a maximum 15%
- Civil society groups receiving more than 15% of their funding from external donors to be classified as foreign NGO's
- Increase government representation on the Board whilst reducing civil society representation effectively taking over its control
- The Chair of the Board to be appointed by the President as opposed to civil society organizations
- Remove provisions for government tax incentives and funding of Public Benefits Organizations
- Compel all civil society groups to register as PBO's

One tenuous excuse for the restrictive amendments is that civil society poses a security threat. A memorandum issued by the ministry on the proposed amendments is instructive;

It is critical that from a security perspective, the Government is aware of PBOs operating in the country and the field of activities they are engaged in so as not to expose citizens and foreigners living in the country from unnecessary risks. It has been suggested at both national and international fora, that non-state actors have been used to incubate and support terrorist activities, including offering employment, legitimacy and transfer of funds. In this regard it is worth noting that the country has come under terrorist attacks leading to loss of lives and disruption of civil tranquility.<sup>22</sup>

The government has not demonstrated how the existing Public Benefits Organizations Act fails to provide an adequate framework for scrutiny of civil society organizations, but security fears provide a convenient excuse to increase government control over civil society. According to Karuti, "The amendments that the government is seeking to introduce are aimed at weakening the sector to ensure it loses the capacity to hold the government and leaders accountable."<sup>23</sup> Counter terrorism efforts are also being used as

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<sup>21</sup> The Public Benefit Organisations Act 2013 was developed through a collaborative process between civil society and government with a view to enhancing accountability and governance in the sector in line with the Constitution of Kenya and international standards. The Act was passed through a private members motion in February 2013. Although assented to it has not been operationalized.

<sup>22</sup> K Kanyinga, *The Political and Legal Environment for CSOs in Kenya* Unpublished (2014) [39].

<sup>23</sup> As above [60].

an excuse to clamp down on civil liberties, and risk taking Kenya back to the dark days of tyranny.

### **War on Terror: Moving forward to the past?<sup>24</sup>**

There has emerged in Kenya the complex challenge of terrorism which has manifested with domestic, regional and international dimensions. It is estimated that since 2012 over 600 people have lost their lives in terror related incidents in Kenya.<sup>25</sup> The Jubilee administration's counter terrorism approach however has come under increasing attack. Among other things, the government has been accused of using a heavy handed approach, racial profiling, condoning up multiple human rights violations by security agents, including extrajudicial killings.<sup>26</sup>

Critics also accuse the government for preying on public fears to claw back human rights protections including arbitrary attacks on civil society. One such move - reminiscent of the Moi days –saw the NGO Coordination Board arbitrarily deregister three coast based civil society groups on alleged grounds of violating the NGO Act 1990.<sup>27</sup> Acting in what a statement by the Kenya Human Rights Commission termed a “...repugnant trend of abuse of authority of the NGO board, Criminal Investigation Department and Kenya Revenue Authority...”<sup>28</sup> the Board suspended their operations and accounts without due process. A gazette notice by the Ministry of Interior had previously named the three NGO's on a list of terror organizations, although no evidence had been proffered to support the allegations at the time of preparing this chapter five months after the event. The Ministry of Foreign Affairs went as far as writing to their donors asking them to stop funding the organizations. One of the institutions Muslims for Human Rights (MUHURI) provides legal aid to Shimo la Tewa prison suspects and it appears this may be the basis of the allegations. Maina Kiai referred to the move as ‘entrenching the imperial Presidency where laws and due process mean nothing, and institutions are tools to be used at the service of the executive.’ He went on to posit, ‘... are we marching forwards to the past...?’<sup>29</sup>

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<sup>24</sup> Title borrowed from M Kiai, *Why Muhuri and Haki Africa are undergoing crippling harassment* <[www.nation.co.ke/oped/Opinion/Why-Muhuri-and-Haki-Africa-are-undergoing-crippling-harassment/Friday\\_May29\\_2015](http://www.nation.co.ke/oped/Opinion/Why-Muhuri-and-Haki-Africa-are-undergoing-crippling-harassment/Friday_May29_2015)> at 19 October 2015.

<sup>25</sup> TIME, *These 5 Facts Explain Terrorism in Kenya* <[time.com/3817586/ian-bremmer-facts-explain-shabab-terror-attack-kenya/](http://time.com/3817586/ian-bremmer-facts-explain-shabab-terror-attack-kenya/)> at 21 October 2015.

<sup>26</sup> Kenya National Commission on Human Rights, *The Error of Fighting Terror with Terror* September 2015.

<sup>27</sup> In December 2014 the NGO Board deregistered 540 NGO's for 'non compliance with the law'. Some of the infringements were mere administrative issues and were quickly rectified and deregistration revoked. But the manner in which the process was conducted was designed to embarrass and intimidate institutions in the sector. Another three Mombasa based organizations were deregistered in May 2015 again on grounds of infringement of the Act. These three were also on the list of suspected terrorist organizations gazetted by the Inspector General of Police earlier in the year. Yet again due process has not been followed, and the process has not accorded the targeted institutions to defend themselves.

<sup>28</sup> Kenya Human Rights Commission, 'Protest on the continued threats to CSO's in Kenya'(Press Release, 28 May 2015).

<sup>29</sup> As above n 21.

The institutions moved to court seeking conservatory orders against the freezing of their bank accounts and on the use of the label ‘terror organization’. The court ruled that the government had failed to provide evidence of terror activities but was unable to lift the freeze on their accounts due to a technicality.

In a related development, the Security law (amendment) bill 2014 was introduced in the National Assembly in late December 2014 and hastily passed despite widespread objections to several of the proposed amendments. A memorandum on the bill by MUHURI – named above – and other coast civil society organizations found that while the amendments were made in good faith with regard to the heightened threat of terror facing the country, they failed to balance the imperatives for security against respect for human rights and stated ‘...if passed will curtail the civil liberties of Kenyans, foreigners and journalists’. Specifically the memorandum found that the proposed amendments offended the constitution on several grounds by seeking to limit the application of : Article 37 Freedom of assembly, demonstration, picketing and petition; Article 25 Fundamental human rights that may not be limited; Article 50 Fair hearing; Article 31: privacy; Article 29 freedom and security of the person; Article 49 rights of arrested persons; Article 246 with regard to appointment of commissioners to the Independent Policing Oversight Authority.<sup>30</sup>

The implementation of the Act was only tempered by the speedy action of the High Court which saw Justice Odunga suspend the implementation of eight of the 22 amendments pending the full hearing.

Judge George Odunga of the High Court in issuing conservatory orders against those provisions which ‘disclose a danger to life and limb or imminent danger to Chapter Four: The Bill of Rights’, declared that the issues raised by the petitioners were important constitutional issues, and stated, ‘what is at stake is the balancing of the need to secure the country on one hand and the protection of the Bill of Rights on the other both of which the State is enjoined to attain.’<sup>31</sup>

The Jubilee administration emerges as one uncomfortable with the democratic freedoms guaranteed in the constitution; unable to navigate its security agenda whilst respecting fundamental freedoms. This ideological schism is also apparent in the administrations’ handling of the media, where numerous attempts have been made to curtail freedom of media and expression through legislative amendments.

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<sup>30</sup> Republic of Kenya, Constitution of Kenya 2010.

<sup>31</sup> As above n 2, 2-3.

## Threats to Media

After suffering under the yoke of repressive media laws, Kenya's media was liberalized in the 1990's and has since witnessed exponential growth in electronic (now digital) and increasingly social media forms. Kenya has established itself on the continent as a technology innovation leader, and is the second most active country in Africa on Twitter.<sup>32</sup> The Jubilee government has been dubbed the digital government due to its proficient and active use of social media. However, the 'digital government' has emerged as an enemy to free speech intent on employing media for its own propaganda purposes whilst curtailing the flow of information and critical voice.

In the wake of the Arab spring autocratic regimes have woken up to the power of civil society and through media laws sought to curb media freedom. In Kenya, Parliament enacted the contentious *Information and Communications (Amendment) Act, 2014* and *Media Council Act 2013* within the Jubilee administrations' first year office. The law is informed by the need to prevent incitement particularly in the wake of the post election violence and hate speech in 2008. However the laws have been criticized for introducing undue state interference in media regulation, severely restricting press freedom and breaching constitutional protections granted journalists through the establishment of a government-controlled body with unilateral power to determine the code of conduct for journalists and powers to punish journalists and media houses on breach of the code of conduct.<sup>33</sup>

Bloggers too fear the use of the broad and ambiguous definitions in the Media Council Act 2013 may curtail their freedoms, through direct regulation by the state and the provision for excessive and punitive fines. The arrest of blogger Abraham Mutahi on charges of 'using a media platform to cause anxiety' is one such example. Mutahi's twitter page was deactivated after he posted a blog about mismanagement of funds in Isiolo County. He was subsequently released and his account reinstated.<sup>34</sup> Irungu Houghton, a blogger and activist is quoted as saying "There is a growing attempt to switch from self to direct regulation by the state, and this government does not see self-regulation as desirable or effective."<sup>35</sup> The legislation has been described in the Kenyan press as "one of the harshest in the region" "punitive," "unlawful," and "draconian."

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32 NEELAM VERJEE, *In Kenya, Bloggers Say New Media Bill Makes Them Vulnerable to Prosecution* <<http://techpresident.com/news/wegov/24688/kenya-bloggers-media-bill-vulnerable-prosecution>> at 21 January 2014.

33 Daily Nation, *Controversial media bill signed into law* <<http://mobile.nation.co.ke/news/Media-Bill-Uhuru-Kenyatta-Justin-Muturi/-/1950946/2114230/-/format/xhtml/-/enasn7/-/index.html>> at 16 December 2013.

34 #FreeSpeechStories:Arrested for a tweet <[www.bbc.com/news/blogs-trending-30922600](http://www.bbc.com/news/blogs-trending-30922600)> at 21 October 2015.

35 As above n 27.

It is also argued to be contrary to the Constitution which provides for media freedom and freedom of expression.<sup>36</sup>

Article 34 (2) The state shall not exercise control over or interfere with any person engaged in broadcasting, the production or circulation of any publication or the dissemination of information by any medium...

Article 34 (5) Parliament shall enact legislation that provides for the establishment of a body which shall be independent of control by government, political interests or commercial interests...<sup>37</sup>

The Editors Guild and others filed a case challenging the constitutionality of the two laws and the judgment is awaited.<sup>38</sup> It is noteworthy that the Official Secrets Act also remains in force despite its blatant conflict with Article 35 of the constitution of Kenya.

### **Global Trend of Shrinking Civil Society Space**

Guardian newspaper citing a report by the Carnegie Endowment shows that the democratic space is shrinking around the world as countries pass legislation curbing the operational space of civil society. According to the report over 60 countries have drafted laws that curtail activities of nongovernmental organizations and civil society. "Ninety-six countries have taken steps to inhibit NGOs from operating at full capacity in a 'viral-like spread of new laws' under which international aid groups and their local partners are vilified, harassed, closed down and sometimes expelled."<sup>39</sup> These include China, Israel, Ecuador, Hungary, Egypt, Uganda and India.

Factors behind the clamp down can be attributed to shifting global financial alliances away from the West towards China and the Eastern countries with low democratic freedoms and human rights records.<sup>40</sup> In Kenya the contribution of foreign donors to the annual budget has fallen to below 10% of the development budget and so traditional conditionalities cannot be used to push for democratic freedoms.<sup>41</sup> Another factor is the adoption of the autocratic developmental model popularized by the Far East Asian countries such as Singapore. As observed by Sall;

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<sup>36</sup> As above n27.

<sup>37</sup> Republic of Kenya, Constitution of Kenya 2010.

<sup>38</sup> Petition No.30 of 2014 <<http://judiciary.go.ke/portal/assets/files/DCl%20speeches/Ruling-%20Petition%20No%2030%20of%202014.pdf>> at 11<sup>th</sup> December 2015.

<sup>39</sup> The Guardian, *Human rights groups face global crackdown 'not seen in a generation'* <<http://www.theguardian.com/law/2015/aug/26/ngos-face-restrictions-laws-human-rights-generation>> 26 August 2015.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid n 20 [6].

“...some argue that the state, particularly if it is a developmental state will by its very existence, confine CSO's to a marginal role as it will deal successfully with issues of development, human rights and so forth.”<sup>42</sup>

Of course countries like Brazil have demonstrated the success of a democratic developmental state, and it would be incorrect to suggest the two – democracy and guided government lead development - are mutually exclusive. As we shall see next, the stance of civil society over the International Criminal Court trials is yet another factor that has sullied relations between the sector and government.

### **Frosty Relations**

Perhaps no other factor has prejudiced the Jubilee's relationship with civil society than the International Criminal Court (ICC) trials in which the President and Deputy President were indicted for international crimes during the post election violence in Kenya. Civil society's role in the provision of evidence to the Waki Commission, rejection of the nominations of the President and his Deputy as presidential candidates, and sustained advocacy for Kenya's adherence to the obligations of the Rome statute have inexorably colored working relations between the sector and the Jubilee administration. The Jubilee campaign effectively whipped up nationalistic sentiment to discredit the ICC process and win the elections. They have similarly sought to demonize civil society as foreign agents through extremely sophisticated use of propaganda.

The ICC was portrayed as an 'imperial tool' for use by the West and their allies (including CSOs) against African leaders. This created a diplomatic wedge between the government and the West. This of course spilled over to the CSOs and particularly those involved in governance work because they were vocal in their demand for accountability for crimes committed during the post-2007 elections.<sup>43</sup>

One key civil society formation the Kenyans Peace Truth and Justice (KPTJ) established in the aftermath of the 2008 post election violence brings together civil society institutions and individuals focused on transitional justice around the post election violence, specifically the prosecution of its perpetrators. KPTJ has maintained a steadfast focus on the International Criminal Court (ICC) trials lobbying in the international arena to ensure Kenya upholds its commitments under the statute. The Jubilee administration has engaged in

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<sup>42</sup> A Sall, Reflections on Civil Society Driven Change *DISCOURSES ON CIVIL SOCIETY IN KENYA* (2009) 4.

<sup>43</sup> *Ibid* above 24, [8] case filed by Coalition for Reforms and Democracy and the Kenya National Human Rights Commission, Article 19 amicus curiae. The ruling was given on 26<sup>th</sup> February 2015.

a sustained campaign to discredit civil society leaders through social media destroying hopes for future collaboration.

Related to this are negative statements that senior leaders in and outside government make about CSOs and their relationship with ‘foreign masters’ implying the donors and the use of courts to undermine the capacity of CSOs to engage in public interest litigation. CSOs that filed cases seeking to compel the courts to make judgment on suitability of the President and the Deputy President because they had cases at the International Criminal Court (ICC) have been presented with huge bills and the matter is now a subject of litigation.<sup>44</sup>

On its part the Jubilee administration has courted fringe civil society groups who serve as tokens of civil society government cooperation, whilst some have become ardent apologists for government policy. In much the same way former president Moi sought to quell government criticism by systematically controlling or dismantling platforms of alternative power, the Jubilee administration has set about co-opting platforms such as Maendeleo Ya Wanawake and the Non-Governmental Organizations Council to create a facade of civil society-government cooperation.

Another bee in the ruling party’s bonnet was civil society’s presidential election petition over the disputed presidential poll. A few months later civil society staged the ‘m-pigs’ demonstration to protest attempts by members of the National Assembly to intimidate the Salaries and Remuneration Commission into increasing their salaries. Members were incensed at the implication that they were ‘greedy pigs’ and promised their revenge on the sector. Despite the bad blood civil society was able to muster up enough support to defeat The Public Benefits Amendment Bill 2013 - discussed earlier- through the efforts of the Civil Society Reference Group which is active on the issue.

### **Ideological Stand-off?**

A picture emerges of a government very uncomfortable with civil society, and ready to deploy its considerable arsenal to suppress the sector. One of the factors for this may be the fact that both the President and Deputy President cut their political teeth under the dictatorial Moi regime. Unlike the former president Kibaki, who was grounded in the democratic opposition, they are grounded in intolerant and repressive autocracy. They are thus ideologically opposed to open democratic governance. A second reason is the ICC-factor. The quest for presidency appears to have been greatly motivated by the need

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<sup>44</sup> As above n 20 [2].

to escape the ICC court process. Thus civil society's role in the supporting the ICC process inevitably sets the sector on a collision course with the ruling administration and its leadership.

The continued dependency of civil society almost exclusively on foreign donors is indeed a challenge to the extent that it undermines the sectors negotiating power. It also creates a disconnect between the sector and the grassroots especially where programs have a heavy donor lead design. Civil society is widely perceived as propagating foreign democratic ideologies which pose a threat to the country. Lastly, the Jubilee party draws its support primarily from the central and rift valley sections of the country. These formed the single largest voting bloc against the constitution in 2010. Thus, the administration – leaders and members- may be considered unlikely to support the exercise of democratic governance or devolution. Further, due to their statistical numbers central Kenya and rift valley have managed to monopolize power since independence. Inclusive government and affirmative action principles pose a primordial threat to their access to state power and - in their view - peace and stability in the country. Of course, evidence on the ground shows that devolution is indeed beginning to work and be felt; but it is to this ideological rift that we now turn our attention, and how it is impacting the implementation of devolved government in Kenya.

## 4.0 The Role of Civil Society in the Implementation of Devolution

### Implementation Context

Kenya's devolution implementation process marked its fifth year since the promulgation of the Constitution on 27<sup>th</sup> August 2010. As key proponents of the Constitution - and devolution in particular - civil society is already considerably invested in the implementation process. Part 4 of the Fifth Schedule of the constitution provides for a phased transfer from the national to the county government.<sup>45</sup> During this period Parliament is to enact the necessary legislation provided in the Fourth Schedule. Such legislation shall among other things provide the way for national government to 'assist county governments build their capacity' and 'support county governments'.<sup>46</sup> The Transition to Devolved Government Act 2012 establishes the framework for this support. However, the transition process has been marred by resistance from the national government resulting in intense political contestation

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<sup>45</sup> Constitution of Kenya (2010) Article 262/Fifth Schedule - Part 4, Section 15.

<sup>46</sup> As above, section 15(2).

between the two levels of government. This is not all together surprising because despite considerable decentralization architecture in the country since independence,<sup>47</sup> the transfer of power to the local level has mostly been some form of deconcentration with only tokenistic attempts at public participation.<sup>48</sup> Thus resistance from the centre is not only expected, but has been the norm in Kenya's local governance. It is also no surprise that national government resistance to cede power has emerged as one of the biggest barriers to the effective implementation of devolution. This has lead to intense turf wars and raging intergovernmental disputes. The implementation process has also witnessed the Jubilee party use its control of parliament to pass legislation inimical to the new dispensation. This has forced numerous court cases to prevent the implementation of some enacted legislation, some of which are blatantly unconstitutional.

‘With more numbers in parliament than the opposition, the Jubilee alliance influences the making of laws in a manner that suits their alliance and their interests. They have the numbers to shape institutions in line with their desire. This is a position that they can abuse in and out of parliament, for instance, by making laws that suit the parochial interests of the alliance rather than the interests of the public.’<sup>49</sup>

Civil society has contributed towards the implementation of devolution through the use of its platforms in defense of devolved government. Civil society is also actively supporting the implementation process through provision of technical support as well as through the promotion of accountability under devolved government.

### **Civil Society in Defense of Devolution**

Civil society groups have utilized their platforms to defend the implementation of devolution through dialogue forums, press meetings, press statements and social media campaigns. Civil society groups have also not shied away from the use of public interest litigation in defense of devolution. This section details a few of those cases.

(a) There has emerged bad blood between the Senate and County

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<sup>47</sup> Since independence Kenya has always practiced one form of decentralization or the other through local authorities, through programs such as the Special Rural Development Program in the 1970's; the District Focus for Rural Development in the 1980's; decentralised funds like the Constituency Development Fund and Local Authorities Service Delivery Program in the 2000's and so forth.

<sup>48</sup> See generally Kenya Human Rights Commission and Social and Public Accountability Network, *Harmonization of Decentralized Development in Kenya: Towards alignment, citizen participation and accountability* (2009) <file:///C:/Users/Ciru/Downloads/Harmonization%20of%20Decentralized%20Development%20In%20Kenya-%20Towards%20Alignment,%20Citizen%20Engagemnet%20and%20Accountability%20(1).pdf>

<sup>49</sup> As above n 24 [13].

Governments stoked by succession politics whereby many Senators see themselves as Governors in waiting. This has seen the Senate take an unduly hostile stance towards the counties contrary to its mandate 'the Senate ... serves to protect the interests of the counties and their governments.'<sup>50</sup> The highhanded manner in which the Senate sought to exercise oversight through summons to the Governors is one example. The International Legal Consultancy group challenged the Senate's conduct on the premise that the manner of the summons sought to subjugate the county governments.<sup>51</sup> Whereas the court ruled that the Senate does have the power to summon Governors in the exercise of its oversight mandate, it advised that such powers are to be used with restraint.

... it is the respectful view of this Court that when these powers are exercised in reference to members of the County Government, there must be a measure of restraint by the Senate. Put another way, when the Senate uses its powers to summon with regard to its oversight mandate under Article 96(3), it must not do so arbitrarily and capriciously. It must exercise caution and refrain from acting in a manner that could be construed as micro-managing devolved units at the county level.<sup>52</sup>

- (b) In yet another example of political turf wars between Senators and the Governors, the Senate passed an amendment to the County Governments Act 2012 establishing the county development boards. Concerned over the lack of visibility of the Senator in the county, the county development boards sought to give the Senator a role in the approval of county development plans and projects. Ignoring public submissions on the blatant unconstitutionality of the bill, and in a rare show of solidarity between the Senate and National Assembly, the bill was enacted on 24<sup>th</sup> July 2014. The Council of Governors challenged the constitutionality of the Act in the High Court. The Commission on the Implementation of the Constitution and Katiba Institute appeared as *amicus curiae* in the case. On 10<sup>th</sup> July the High Court declared the Act *unconstitutional, null and void*.<sup>53</sup>

Interestingly, section 91(f) of the County Government Act 2012 requires the counties set up a platform to facilitate the participation of the county legislative representatives – senator, women's representative, Member of Parliament and members of county assembly- in county planning and development. Most counties have however not complied with this statutory requirement. It is

<sup>50</sup> Constitution of Kenya (2010) Article 96(1).

<sup>51</sup> As Above Article 96(3) '...and exercises oversight over national revenue allocated the county governments'.

<sup>52</sup> International Legal Consultancy Group v Senate & Clerk of the Senate [2014] [67] eKLR

<sup>53</sup> Council of Governors & 3 others v Senate & 53 others [2015] eKLR [103,104].

telling that the Senate sought to amend this section of the Act to arrogate itself the power to set up this mechanism, as opposed to compelling the county governments to effect it.

- (c) Civil society institutions were forced to seek recourse to the courts once more to demand a stoppage of the Constituency Development Fund on grounds that it contravenes the principle of separation of powers and undermines the functional mandate of the county governments.<sup>54</sup> Experience shows that conditional grants may be used by national government organs to undermine the authority of sub-national government. Despite a landmark ruling against the fund, the National Assembly appealed the ruling, and increased the allocations to the fund in the subsequent financial year. The Womens' Representatives of the National Assembly subsequently established a similar fund named the Affirmative Action for Social Development Fund - The battle continues.
- (d) In late 2012 – pursuant to Articles 131(b) and 132 (3) b<sup>55</sup> - the Kibaki administration strategically moved to enact the National Government Coordination Act in 2012. The Act provides a basis for transforming the provincial administration to conform to the constitution.<sup>56</sup> The Act establishes a national government administrative and service delivery coordination structure at county, sub-county, ward and location levels. The Act was challenged in court by the Law Society of Kenya (LSK), fearing that its ambiguous and broad wording could readily be used to encroach and duplicate county functional mandates. The LSK also argued that it was not financially prudent for the national government to retain a nationwide grassroots structure as previously done through the provincial administration.

However, in this case the court dismissed the petition arguing that the matter 'was not ripe for determination.' It instead referred the matter to the intergovernmental disputes mechanisms as explained by Mugambi Laibuta in his earlier chapter.<sup>57</sup> One could say that the suit was driven more by civil society's suspicion of national government's intentions than fact. In

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<sup>54</sup> The Constituency Development Fund was established by the national assembly in 2003 by an act of the same name. The 2013 Act presumably aligns the fund with the new constitution. The controversial fund gives members of the national assembly extensive and multiple powers which civil society groups argued is inconsistent with the constitution.

<sup>55</sup> Article 131 provides for the executive authority of the president whilst 132(3)b empowers the president to direct and coordinate the functions of ministries and government departments.

<sup>56</sup> Article 262/Schedule 5(section 17) of the constitution of Kenya provides five years for the restructuring of the provincial administration system. The provincial administration dates back to the colonial government and was used as a tool of local control and intimidation by the colonial government. It was retained by the Kenyatta administration and continued to wield widespread discretionary power around the country. Under the Moi regime the provincial administration became a symbol of terror and extortion. Today's' administration has been extensively restructured, but still is still viewed with skepticism and deep disaffection in many circles.

<sup>57</sup> *Law Society of Kenya v Transition Authority & 2 others* [2013] [9] eKLR.

September 2015, the national government issued regulations to support the implementation of the Act. With two years experience of the implementation of the Act civil society now has the opportunity to revisit the functional clarity of the national government administrative structure based on practical experience.

- (e) Whereas civil society institutions in Kenya are for the most part committed to the defence of devolution some- such as the national service unions whose power base has been eroded by the devolution – are not. One example is the health workers unions which have waged a sustained campaign against the devolution of health staff management to the counties; using civil action, court action and intense legislative lobbying. Further, a shoddy and partisan report prepared by the National Assembly Departmental Committee on Health<sup>58</sup> proposed to return some health functions to national government from county governments under the pretext of low capacity at county level.

On 15<sup>th</sup> August 2015 the High Court ruled against an *ex parte* application by the unions which sought to quash the transfer of health functions to the county governments citing inadequate capacity at county level, and the lack of an adequate policy framework. This whilst true to a large extent, it is on account of the mismanagement of the transition process by the national government itself as alluded to earlier in this section. Had the suit been successful then national government could successfully frustrate the transfer of powers to county, through its own failure to provide requisite support – as required by the constitution. This would sound the death knell for devolution. Fortunately, the court saw through this disingenuous reasoning, and ruled against the application.<sup>59</sup> Having failed to convince the court, the unions and the Ministry of Health are presently working with the National Assembly to achieve the same end through the national health bill which is currently under review. Again we witness the determination of the National government and in this case some non state organs to circumvent or blatantly disregard the constitution and court rulings.

### **Civil Society in Support of Devolution**

Civil society has actively contributed to key legislation under the schedule with a view to ensuring it corresponds to the constitution both in letter and spirit. However, the reluctance of the National Assembly to respect principles of the constitution has witnessed a delay in certain key legislation such as

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<sup>58</sup> Republic of Kenya, National Assembly Report of the Departmental Committee on Health, March 2014.

<sup>59</sup> Republic v Transition Authority & another Ex parte Kenya Medical Practitioners, Pharmacists & Dentists Union (KMPDU) & 2 others [2013] [86] eKLR.

the community land, audit, and natural resources legislation. There have also been attempts to amend legislation already enacted such as the proposed amendments to the County Government Act to establish county boards and security laws amendments. Civil society's role in monitoring of national legislation and policy remains critical in the protection of devolution.

Civil society is also working actively at county level in assisting county governments set up their institutional structures. Examples in this regard include trainings of county governments on the budget process by the International Budget Partnership and Institute for Economic Affairs; the application of human rights monitoring standards by The Kenya Human Rights Commission. Civil society groups among them The Institute for Social Accountability have also actively supported county governments in the establishment of public participation frameworks, including the critical county budget and economic forums. Civil society through the leadership of URAIA has also contributed towards the national civic education curriculum to be implemented at county level through a joint initiative with the Transition Authority and Ministry of Devolution and Planning.

### **Civil Society on Accountable Governance**

Of course it is not only intergovernmental disputes that are of concern to civil society. The transfer of odious governance practices from national to county governments through corruption and other financial abuses posed a considerable threat to the success of devolution. Whereas Article 201 provides principles for public finance including prudent use of resources, accountability, transparency, equity and public participation, these are unlikely to be realized without instrumental interventions such as social audits, procurement monitoring, service delivery monitoring and so forth. Civil society is therefore actively engaged in the accountability work at county level through participatory budgeting and monitoring processes. At county level, many county governments are equally wary of civil society, particularly when it comes to matters of accountability. Civil society is therefore faced with hostility at national level, as well as subtle or overt antagonism at county level - forcing institutions to navigate the engagement terrain very strategically.

### **Keeping On ...**

As so a picture emerges of civil society grappling with multiple challenges. The first being the threat of reversals to the democratic transition process on account of an intransigent government ideologically opposed to the constitution. Another challenge confronting civil society is the relentless

onslaught by government determined to silence it through funding restrictions and relentless propaganda wars. Civil society capacities are also low with most lacking the institutional complexity to counter the “hegemony of political parties in the alternation process in the political arena.”<sup>60</sup> According to Sall, civil society institutions in Africa are relatively young in age, have weak organizational capabilities and limited scope of work hampering their ability to force the needed democratic change.<sup>61</sup>

Yet despite these challenges, civil society in Kenya has steadfastly contributed towards the entrenchment of devolution in Kenya by providing a voice in defence of devolution, providing technical support, accountability efforts and civic mobilization to activate the sovereignty of the people. The democratic process in Kenya is at a critical stage and civil society will do well to disregard the negative propaganda against it, and continue to push for the consolidation of the gains of the constitution through the entrenchment of effective devolved governance in Kenya.

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<sup>60</sup> As above n 12, 2.

<sup>61</sup> As above n 12, 2.



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## Conclusion

By Wanjiru Gikonyo and Conrad M. Bosire

The Constitution of Kenya 2010 seeks to reorder the country's political and economic institutions, the intentions and objectives of such restructuring are clearly expressed in the constitution. Almost all chapters in this book mention that the devolved system of government and the constitutional framework seek to address previous challenges that Kenya has faced. The objectives of the new constitution include: redress of historical inequalities and socio-economic and political exclusion, ensuring accountability in the use of state power and resources, enhancing national unity, among other objectives. Almost all chapters in this book have alluded to the transformative nature of the constitution and particularly the devolved system of government.

The fulfillment of these constitutional goals and objectives on devolved governance will, to a great extent, depend on how the nature of the system we have adopted is understood and implemented. Kenya being a developing economy, developmental objectives were at the heart of the design of institutions and allocation of functions. Most functions allocated to county governments are relevant to development, enhancing access to essential services and generally ensuring socio-economic development. However, a look at the objectives of the devolved system of government and the discussions in the initial chapters by Ghai and Okello reveal that devolved governance is meant to deal with issues beyond development. Devolution is meant to enhance national unity by facilitating political inclusion and ensuring equitable development as opposed to mere growth without distribution. Devolution also seeks to enhance democratic exercise of power and overall accountability in governance.

## Understanding the nature of Kenya's devolved system

Looking at the breadth of issues handled under the respective chapters of this book, one concludes that devolved governance is a concept that is heavily laden in the Kenyan context. Kenyans expect devolution to facilitate peacefulness and political stability, enhance development and equity, and ensure democratic governance. Ghai's chapter gives a historical analysis of devolution where sub-national claims at independence bordered on secession and fragmentation of the Kenyan state, although these claims have withered with time. The multi-faceted objectives of devolution have, perhaps, led to the differing approaches to the definition of devolved governance in Kenya. Ghai's chapter analyses the few times that Kenyan courts (including the Supreme Court) have attempted this discussion and it has largely been a feeble attempt. Ghai concludes the nature of the system Kenya has adopted requires a deep understanding of the philosophy, background and context of the system vis-à-vis the structures adopted and the goals being pursued. Courts have hardly done this in the few cases that have come before them.

As the chapters have demonstrated, courts are usually faced with concrete disputes that sometimes require practical solving as opposed to characterization of the nature of the system Kenya has adopted. However, the decisions and rulings that courts make must be a manifestation of the philosophy and intention behind the structure of the devolved system of government. This calls upon the courts to reflect on the nature of the system and its impact on relevant and specific matters that come before the courts. Inevitably, the transition sought under the devolved system of government is, as confirmed by various chapters, deeply political and with vested interests. The political nature of this discourse has manifested itself in debates on whether Kenya is "federal" or "unitary". Courts may sometimes (and properly so) steer clear of politics of nomenclature, especially where this does not provide guidance or help with implementation. However, where courts see it necessary to clarify concepts, it is important, as Ghai emphasizes in his chapter, for judges to reflect more than they have on the nature of the system Kenya adopted and its impact in the implementation process.

## Utility of comparative approaches and contexts

The chapters by Steytler, de Visser, and Basu on the South African and Canadian approaches multi-level governance demonstrate the common challenges (despite the different contexts) that countries face in the process of implementation of multi-level governance (federal, devolved, decentralized, etc). The background discussions to these three papers give an insight into the

prevailing contexts (mostly political) that influenced the nature of structures that were adopted. In South Africa, the structures were as a result of political compromises between the negotiating parties during the constitution-making process. The compromise was weak provinces and strong local governments. Both papers demonstrate that the jurisprudence of the courts seems to give effect to these compromises (expanding powers of local authorities through interpretation) that found their way to the text of the 1996 Constitution of South Africa. While the Canadian provinces started off as relatively weak in the formal structures of the federation, the enthusiasm of the Privy Council and later the Canadian courts has led to stronger Canadian provinces.

Sometimes, the Kenyan uniqueness goes against the norm. Ghai, for instance, identifies two general weaknesses in Kenya's national and county institutional design. Whereas the Kenyan Senate is intended to defend the counties, the lack of representation linkages between the two institutions negates this possibility. Mechanisms for the election of Senators by the counties were removed during the latter stages of the constitution making process. This stands in contrast with the South African and Canadian systems where members of the second chamber are delegates of provinces (in South Africa) or nominated (in Canada). While second chambers perform generally similar roles across systems where they are established, the impact of their design cannot be ignored.

The above context invites a deeper reflection on the interpretation approaches adopted in these countries (and others that Kenyan courts may refer to) before adopting what the courts in the comparable jurisdictions have done. A clear example is that which is cited by Cottrell where she discusses the implementation of the right to information.<sup>1</sup> In one of the Kenyan cases, the Judge denied the request for information; having drawn from an earlier ruling which borrowed from a South African ruling. The South African ruling was, however, informed by the South African interim constitution of 1993 that had more restrictive provisions with regard to access to information than the current Constitution. There is a need to pay careful attention to both the time some decisions were made as well as the prevailing general context in which decisions were made.

What is clear in Kenya, though, is the concept of devolved governance was embraced and pushed by ordinary Kenyans. While politicians and other vested parties may have appropriated Kenyans' wishes politically, there was a shared view that sharing powers and functions may facilitate the achievement of the collective aspirations of the people. Kenyans' wishes were consistent

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<sup>1</sup> William Ole Ntimama v Governor, Narok County [2014].

throughout the review process. It is up to the courts to review the reasons that Kenyans fought to have the devolved system of government and what this means in terms of the concrete matters that the courts have to handle. The chapter by Okello is very useful in this respect. The chapter gives a clear picture of the rationale of devolved governance in Kenya today. The history of the path that Kenya has traveled can assist courts to make rulings that give effect to Kenyans' expectations with devolved governance.

## Developing “Kenyan approaches”

While generally there are common challenges and issues that run through the Kenyan system and the comparable systems discussed in this book. The “Kenyan chapters” have demonstrated the unique challenges that have manifested themselves in the different aspects of devolved governance covered by the different chapters. These range from the institutional and political culture of centralization, the lack of a strong and effective political party system, lack of integrity and ethics in governance, among other challenges. These factors have formed the basis of devolution disputes that have been handled by the courts.

The chapters on the Kenyan system have highlighted specific challenges that devolved government is facing in specific areas. The factors and causes of these challenges are as varied as the cases or issues discussed. A careful review of the issues covered in the chapters (powers and functions, management of finances, institutional structures, relations between institutions, etc.) reveals a set of factors (internal and external) that hamper effectiveness of devolved governance. At the national level, the institutional and political culture of centralization seems to pose the greatest threat. It has led to resistance to devolve powers, resources and the necessary controls to pave way for county governance. While the complexity of the transition (lack of capacity, magnitude of change, etc.) may have hindered initial effectiveness, even the lack of change of attitudes and mindsets is a partial contributor.

Secondly, there are internal weaknesses and challenges that largely spring from county institutions, as explained by Nangidi. Counties lack essential capacities to deliver on the functions allocated to them under the constitution. Furthermore, the institutional separation of powers at the county level as a means of checks and accountability has instead become a source of wrangles. Again, the wrangles affect a wide range of aspects of county governance that include: management of finances, service delivery, relations with the national government and virtually every other aspect that is common to the arms of

government at the county level. Needless to mention that all these issues go against the text and spirit of the constitution.

Borrowing from the South African concept of “cooperative government”,<sup>2</sup> the Kenyan constitution provides for consultation and cooperation. Ideally, all the institutional challenges within the county level and between the two levels of government should be addressed through mutual consultation. However, the implementation process is a far cry. Laibuta has elaborated on the structures that have been put in place to facilitate institutional relations. However, these structures have not featured in actual conflicts between the two levels of government. There was no proper reflection at the time of passing enabling law to ensure that there are inclusive structures of consultation and cooperation. Laibuta, for instance, decries the absence of legislative intergovernmental relations structures in the enabling law (Intergovernmental Relations Act); the law is heavy with executive structures and ignores the legislature that is critical component to the success of effective relations.

More importantly, effective cooperation and consultation requires all players to abandon the adversarial style of carrying out governance affairs (inherited from the centralization period when the centre made all decisions) and embrace the county level as an equal partner in the constitutional governance of the country. Not much will be achieved from the current structures if there is no deliberate attempt by relevant institutions and persons in positions of responsibility to adopt a new culture of governance that is concordant with the constitution of Kenya 2010. Again, the different political contexts between Kenya and South Africa manifest here. The political culture prevailing in South Africa (defined by the dominance of the ruling party, the African National Congress) has ensured relatively effective political cohesion and governance across the three spheres. This is unlike Kenya where political control is split right in the middle between the ruling and opposition political coalitions. Political parties too play little or no direct role in governance issues.

The elevation of the principle of consultation and cooperation has, ideally, relegated courts to the residual role in dispute resolution (after reasonable exhaustion of all alternative remedies). Laibuta argues that in order to operationalize this chapter, the courts need to make this a substantive requirement. Some courts have actually enforced this provision.<sup>3</sup> However, the effectiveness of consultation and cooperation, especially in areas where there is evidence of disputes, is unlikely in the current political and institutional context. Courts have to address their minds to the issues at hand and the

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<sup>2</sup> Chapter 4 of the Constitution of South Africa is dedicated to the principle of cooperative government.

<sup>3</sup> Law Society of Kenya v Transition Authority & 2 others [2013] eKLR.

context within which political negotiations will be held and the impact on the constitutional boundaries that courts are required to protect.

The Bill of Rights provides an additional constitutional avenue through which effectiveness of county governance can be realized. Most of the functions allocated to counties are translated into fundamental rights and obligations. Cottrell observes that while the Bill of Rights has not been robustly litigated especially in areas such as socio-economic rights, there is potential for it to be used ensure county effectiveness. De Visser has adumbrated how, years on, the courts have used the South African Bill of Rights to interpret socio economic rights in a manner that has expanded the responsibilities of municipalities in provision of essential services.

Kenya's civil society has been an active and indeed a central player in democratic reforms in the country. Gikonyo has traced the path that civil society has followed up to the enactment of the Constitution in 2010. Given the transformation required under the Constitution of Kenya 2010, the civil society is an indispensable partner in the process. The chapter by Waikwa illustrates the important milestones that have been achieved through Public Interest Litigation. Incidentally, almost all of the cases undertaken as a public interest matter have either been instituted by or had the participation of civil society organisations. This has been made possible by expansion of constitutional space to access to courts. The context above requires courts and civil society develop an approach that enables both players to push for the constitutional objectives while retaining their separate places in the implementation process.

As devolution tenuously takes root in Kenya, the courts must be commended for their performance so far. As the century old Canadian example demonstrates devolution is dynamic and the rules of interpretation must constantly evolve to remain effective. The courts are called upon to adopt a learning approach as pioneered by the Judicial Training Institute in collaboration with its partners in this publication. The courts must remain alive to the reality that they stand as the ultimate protector of the aspirations of the people as enshrined in the constitution of Kenya. When other arms of government fail - as they often will do - the onerous calling of securing the gains of the constitution rests upon the decisions the court.



## THE JUDICIARY

