



COUNCIL OF GOVERNORS

# REPORT ON THE FUTURE OF DEVOLUTION IN KENYA

SAROVA WOODLANDS, NAKURU  
NAKURU COUNTY  
JULY 25, 2019

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# List of Acronyms

BVR	Biometric Voter Registration
CAF	County Assemblies Forum
COG	Council of Governors
CRA	Commission on Revenue Allocation
CS	Cabinet Secretary
EACC	Ethics and Anti-Corruption Commission
IEBC	Independent Electoral Boundaries Commission
PFM	Public Finance Management
REB	Regional Economic Bloc(s)
SRC	Salaries and Remuneration Commission
MCA	Member(s) of County Assembly
MOU	Memorandum of Understanding
NGCDF	National Government Constituencies Development Fund

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# Executive Summary

This report summarizes the deliberations of a conference that was held on July 25, 2019, at Sarova Woodlands, with the theme “The Future of Devolution”. The Council of Governors in consultation with the Senate and the County Assemblies Forum convened the conference to appreciate what devolution had achieved in the past years. The focus was on identifying key opportunities that devolution had created as well as encouraging counties to maximize on them. One of the key deliberations at the conference was the challenges and threats that devolution is facing which may compromise its existence in future. Delegates, therefore, underscored the need to ask hard questions as well as to speak candidly on the threats, to address the bottlenecks to the success of devolution and its ability to create a better and secure future for generations to come.

The report captures the opening remarks of the Cabinet Secretary, Ministry of Devolution and ASAL, Hon. Eugene Wamalwa, EGH, Chair, County Assemblies Forum, Hon. Johnson Osoi, MBS, and Chairperson, Council of Governors, Governor H E FCPA Wycliffe Ambetsa Oparanya, EGH, CGJ.

The report also captures key issues from the discussions, challenges, opportunities, and key recommendations. The communiqué, which highlights the key conference resolutions, is also included in the report.

The discussions were categorized under the following sub-themes:

- How can the country solve the current fiscal crisis that is affecting the implementation of devolution?
- What constitutional challenges affect the effective implementation of devolution and could the new system of government be at risk of extinction?
- How is corruption truly affecting devolution?

Kamotho Waiganjo, a lawyer with a special interest in devolution, highlighted the major role devolution has played since its introduction in 2013, particularly in addressing historical challenges that include exclusion, inequity and lack of services. He also spoke on the financial challenges experienced by County Governments as a result of frustrations linked to the allocation of funds by the National Government.

Dr David Ndii, an economist with expertise in public finance management, discussed the decline of the revenue collection nationally which has affected the proportion allocated to county governments. He projected that this amount will most likely fall to less than 15 per cent by 2021. Dr Ndii further explained the implications of the overcrowding of government's investments on private investments, noting that it has affected the country's economy negatively.

Wanjiru Gikonyo, the National Coordinator of the Institute of Social Accountability, discussed the importance of establishing ideological and political strategies as a mechanism to protect devolution. In her presentation, she noted that the National Assembly and the National Government have both ignored incorporating devolution aspects while developing policies and legislation. Gikonyo urged the Senators and Governors to pay attention to legislative and policy formulation initiatives touching on devolution to ensure that they entrench and not undermine devolution.

Dr Mutakha Kangu, a constitutional law expert, presented on lack of proper understanding of the Constitution among the key stakeholders and its implications on the effective implementation of devolution. Dr Kangu pointed out that the National Government and National Assembly have made deliberate misinterpretations of the Constitution while developing some policies and legislation. He further advised the Governors and Senators to seek a proper constitutional interpretation of such policies and legislation.

Prof. Peter Wanyande, a Political Scientist, presented on the challenges facing devolution noting that they have emanated from Kenya's historical background, intergovernmental relations institutions, ideological, legal and misconceptions on devolution. Prof. Wanyande emphasized the importance of the governors to fully understand devolution to be able to implement it successfully.

Wachira Maina, a Constitution Lawyer, presented on constitutional reforms and noted that the referendum will either improve the current Constitution or take away its gains. He presented on some radical changes which the country could adopt to protect devolution and improve the Constitution at large.

Joash Dache, the C.E.O of Kenya Law Reforms Commission, acknowledged that devolution has contributed towards immense development and improved governance in counties. However, he noted that there are various challenges facing devolution which should be addressed to make the new system of government successful.

Irungu Houghton from Amnesty International in his presentation talked about corruption and the dysfunctionality it had caused within counties especially on leadership and the use of public resources.

Eric Matara who representing the Nation Media Group discussed issues on widespread corruption and how it affected the functionality of devolution.

The chairperson of the Ethics and Anti-Corruption Commission (EACC) Archbishop Eluid Wabukala summarized his presentation and concluded that corruption was a moral and integrity issue and that one had to decide on doing the right thing. He also highlighted that corruption was an impediment to development within County Governments.

Lastly, David Gichana from the office of the Auditor-General highlighted how misappropriation and wastage of public resources have become corruption avenues in counties.

# 1

## Introduction

Devolution and its intended purpose has and continues to be the most practical step Kenya has taken since independence. It is a concept that was adopted to address, question and correct the political economy of the past where a small group of people often hoarded public resources and denied Kenyans from accessing government services. Since devolution came into effect in 2013, various counties have appreciated the subsequent transformations, lauding devolution as a game-changer. It aimed to increase citizen participation, foster inclusiveness, improve service delivery and enhance democracy. True to its purpose, the change has been experienced where paved roads, hospitals, and schools that didn't exist have been constructed.

Despite its successful implementation, there have been challenges and threats that continue to hamper its growth. For instance, corruption cases among other issues have been reported in various counties, thereby becoming a stumbling block to the achievement of the objectives of devolution. Therefore, a meaningful discussion that will help get sustainable practical solutions that ensure devolution is a success is needed.

The following were the objectives of the conference:

- To provide a forum for collaboration, consultation and cooperation in matters of devolution.
- To have a candid discussion on practical solutions to some of the threats that are hampering the success of devolution, such as corruption.
- To provide a platform where Governors can assess some of the available opportunities to enhance partnerships and ultimately secure and strengthen the future of devolution.
- To review the proposed amendments to the Constitution and whether these are necessary in the first place.



## Opening Remarks

### 2.1 Eugene Wamalwa, EGH Cabinet Secretary, Ministry of Devolution and ASAL

Hon. Wamalwa started by recognizing the governors and other participants present. He conveyed the apologies of the Cabinet Secretary, Interior, and Coordination, Dr Matiang'i who was not able to attend the forum due to other commitments. Hon. Wamalwa noted that the conference would have been a good platform for the newly appointed Cabinet Secretary in charge of the National Treasury to engage with the Governors and listen to the issues discussed. He was pleased to join the participants at the conference that focused on an in-depth look at the state and the future of devolution in the country.

Hon. Wamalwa acknowledged that seven years after devolution, there is a need to appreciate the development steered by the Governors that is not only transforming the counties but Kenya as a whole. He added that the general election in 2013 altered the Governance paradigm in a very significant way particularly in ensuring that there is a national value system that did not exist before the promulgation of the 2010 Constitution. The most radical change in the Constitution was the establishment of the devolved system of Government and a strong independent Judiciary that made history in making decisions that had never been made before in the African Continent. For instance, the nullification of the presidential election in 2017.

The Constitution decreed a gradual transfer of functions for three years but due to political insurgencies, all the functions were transferred to counties within one year. Hon. Wamalwa noted that Kenya has been made a case study for benchmarking from countries within the continent that are eager to learn how Kenya managed to establish 47 counties as well as devolve functions and resources in such a short period. He urged participants present to appreciate the achievements made after the change of the constitution in 2010. Despite its achievements as noted by Hon. Wamalwa, there are challenges that Devolution has continued to face. He expressed his concern with the current face-off on the division of revenue and assured the governors on the president and the National Government's commitment to devolution. Hon. Wamalwa highlighted some of the experiences since the inception of Devolution in 2013 with a focus on the equitable share of revenue and noted that there has been a steady increase over the years from about 200 Billion shillings up to 314 Billion shillings in 2019 which is exclusive of the conditional grants that have been given to counties. Hon. Wamalwa noted that it was worrying to see that the own-source revenue from the Counties has been dwindling since 2013. He noted that counties need to reflect on strategies that can be used to boost their own-source revenue. He further stated that the National Government had already developed a policy on own-source revenue and are doing their best to support the counties so that there is no overreliance on National Government. He further said that the National Government had instituted capacity building programs which can help the counties. Through these programs, counties have received additional funding.



He noted that there is need to appreciate the development partners, particularly, for the funding Kenya had received in support of Devolution under the Kenya Devolution Support Programme (KDSP) of 20 Billion shillings and National Agriculture and Rural growth project of over 20 Billion shillings. Further to this, there has been additional funding through the urban support program where the country received over 30 Billion shillings for improving infrastructure in urban areas. He complimented the counties on how they are allocating money to the various projects as well as their use.

The CS commended Kisii, Makueni and West Pokot Counties for encouraging local economic development pointing out that they are transforming lives in the counties and Kenya at large. These projects include a bananas factory in Kisii, mango food processing factory in Makueni and leather processing plant in West Pokot. He mentioned that the Counties have done well on matters of ECD and it is quite transformative. Hon. Wamalwa pointed out that it was impressive to learn that since Devolution there have been improvements on the ratio of doctor to patient and nurse to the patient in Turkana County as presented during the previous Devolution conference which was held in Kirinyaga County. Furthermore, medical equipment's and beds for the hospital had been procured. This progress has improved service delivery as well as reduced Malaria and HIV prevalence in Turkana County. He urged the Governors to emulate other counties' achievements and apply the drawn practical lessons in their respective Counties.

Hon. Wamalwa also noted that Kenya Bureau of statistics provided gross product report of the counties which provide a monetary measure of the market value of the final goods and services produced in each of the 47 counties for the period 2013- 2017. The report indicated that in 2013 the gross product of the County was at 4.3 Trillion shillings and improved by 7.0 Trillion shillings in 2017. The per capita product has been growing and there was a need for the Counties to be proud of the achievements and the steps they have taken to ensure Devolution grows and that it reaches citizens. Devolution has had its fair share of challenges but there is a need to continue working together.

Hon. Wamalwa emphasized on the need to look at the challenges that are facing Devolution and work on them. These challenges include;

- Lack of an intergovernmental framework on planning, resource allocation and investment which has made it difficult to implement activities such as the big four agenda;
- There is a mismatch between function and responsibility, revenue assignment, overreliance on the equitable share, underperformance and underreporting of own-source revenue by Counties.
- Unsustainable high wage bills which are worrying as it affects the development agenda in the Counties.
- Supremacy battles among the various arms within the devolved administrative units

- Another challenge is the borrowing powers by the counties which is limited but could be an area of engagement.
- The challenge of fiscal discipline and huge pending bills

The CS noted that the lesson that needs to be learned on the future of devolution depends on the principles of consultation, coordination, and cooperation. There is the need to make efforts in strengthening the institutions such as the Summit and the Intergovernmental Budget and Economic Council, as well as anchoring the COG Secretariat in law.

Hon. Wamalwa emphasized on the need for the Devolution family to look at the challenges, identify solutions as well as opportunities, particularly on Regional Economic Blocs. He noted that the National Government has already developed a policy and as such is keen on seeing the Blocs grow. He stated that he was pleased with the North Rift Economic Block (NOREB) who recently signed a memorandum of Understanding (MOU) on Climate change. He recommended that all Blocs should come up with ways of building resilience on climate change since it is a reality and there is need for the county to allocate funds to deal with these emergencies and challenges of climate change.

Hon. Wamalwa commented on the ongoing discourse on a potential referendum and constitutional change and was pleased because Governors had formed a team towards the same. He encouraged them on the need to speak candidly on issues of constitutional amendments. He finally concluded by stating that the referendum discourse could be used as an opportunity to strengthen Devolution consequently helping to address the bottlenecks that devolution is currently facing.

## **2.2 Remarks by the Chairperson, County Assemblies Forum (CAF) Hon. Johnson Osoi, MBS**

Hon. Osoi began by recognizing the Chairman of CoG, the Cabinet Secretary in the Ministry of Devolution and ASAL, Governors, development partners (USAID, UKAID), Secretariat of both the Council of Governors and the County Assemblies Forum and other participants present. He conveyed the apologies of some of his colleagues stating that the meeting was very critical and that the speakers ought to have been present.

Hon. Osoi mentioned that he was pleased to be in attendance in a conference whose discourse focused on the future of Devolution and that he has had the privilege of having served in the first and second term as the speaker of the County Assembly of Kajiado. He has, therefore, walked the journey of Devolution since its inception in 2013. Hon. Osoi noted that Kenya made tremendous steps in 2010 when it adopted a paradigm shift seeking to deconstruct the colonial state. He mentioned that Devolution from his understanding can be simplistically put as a response to the feeling of marginalization over time, where many Kenyans felt they were not part of the centre. In 2013, the Governments took office amidst a lot of challenges where Devolution was characterized by disputes, disagreements between various arms of Government and everyone was swimming in deep seas and none seemed to understand what their roles were.

Some of the challenges as he recalls were that the National Assembly attempted to move a motion to do away with the Senate calling it “Nyumba ya Wazee.” The Senate realized that they could summon Governors and started to do it even when there was no reason to do so. On the other hand, MCAs also learnt that they had similar powers to impeach Governors. He noted that it took time for them to understand that each of the arms had a constitutional mandate that they must perform.

Hon. Osoi was happy that seven years later after the inception of Devolution, they are looking back and are very grateful to the Council of Governors for inviting them to be part of the discourse to look at the challenges seen in Devolution, the opportunities that lay before them and how to proceed into the future as they get along. Thereafter, Hon. Osoi outlined the challenges facing Devolution from the County Assemblies Forum’s perspective. He noted that the issue of the Division of Revenue needs to be addressed and ensure that the National Assembly does not take it as a concept of tokenisms to counties. He further noted that the National Assembly holds too much power where it holds Government institutions at ransom including the Judiciary in the budget processes. For instance, they reduced budgets for commissions such as the SRC for as long as they do not agree with them. He stated that he was glad because the experts were present at the conference and they will guide through the process to understand the Public Financial Management (PFM) issues. He noted that the division of revenue is a matter that the Devolution family must speak about very strongly and ensure that a lasting solution is arrived at.

The Chair of CAF pointed out that the autonomy of County Assemblies is another issue. He further explained that the framers of the Public Finance Management Act had envisaged a scenario where the Department of Finance for the County Treasury reflected the National Level. However, this has not been the case because the Governors and CECs finance have excessive powers when it comes to the control of County funds. This means that oversight cannot be objectively done for as long as the county legislatures depend on County Executive to get resources to do so. According to Hon. Osoi something must be done on the PFM architecture to mirror on what happens in the National Parliament so that the legislature at the County level is financially independent. He also noted that corruption is an issue and that it is not a function that was devolved thus it is not helpful to the Country or Devolution. He added that corruption is a matter of individual officeholders and everyone should be held accountable and be prosecuted instead of stereotyping all the devolved units including the Governors and County Assemblies.

Hon. Osoi pointed out that as devolved units seek for funds, they are not seeking to replace accountability with more funds. He noted that the National Assembly is asking counties to account for money previously allocated to them before they request for more and stated that the two concepts are of different discussions that need to be handled separately. He added that if any county is unable to account for its money, it should be held accountable but should not be denied resources.

Hon. Osoi was impressed that Devolution had come of age and appreciated the fact that the Council of Governors, County Assemblies Forum, the Senate and National Government represented by the Ministry of Devolution could sit together and speak as one family with a common approach on matters of common interest such as division of revenue among others.

He said that such forums should be encouraged since they create opportunities that will ensure devolution's future is sustainably secured.


Hon. Osoi noted with concern that there were superiority conflicts on who is more powerful than the other and said that such battles are not helpful. Despite various issues facing Devolution, he noted that there will be opportunities as long as the Devolution family speak in one voice and engage in meaningful debates. For instance, on matters of Constitutional reforms as well as revenue allocation. He noted that as the debate on the Constitution review rages on, the County Assemblies have started to formally receive the Punguza Mzigo initiative Bill and are considering it. He highlighted that County Assemblies had asked a few constitutional lawyers among them Kamotho Waiganjo, Wachira Maina, Collins Odote and Abdikadir Mohamed to look at the Bill and advise the members on the merits and demerits of the Bill to enable them to vote from an informed point of view.

Finally, Hon. Osoi noted that constitution review was an opportunity for County Governments to engage in an ideological debate so that those for and against Devolution can air out their views on the merits and demerits of the devolved system of Government. He emphasized the need to encourage such discourse and having a more meaningful debate that will help to understand what has worked, what has not worked and found the way forward. He was hopeful that the meeting will be interactive and successful.

### **2.3 Remarks by Chairperson, Council of Governors Governor Hon. FCPA Wycliffe Ambetsa Oparanya, EGH, CGJ**

Hon. Oparanya welcomed all the participants and thanked them for attending the conference. He mentioned that the meeting was convened by CoG in consultation with the Senate and CAF. He noted that the Senators were not able to attend the meeting because of some other commitments and that they will join future meetings. He stated that the meeting was aimed at assessing whether Devolution is working since its inception in 2013. Hon. Oparanya said that the governors are keen to hear the sentiments of Kenyans on whether the devolved system of government is what they had envisioned and if it is working. The governors are also keen to know whether Devolution needs to be fixed and which particular key areas need to be rectified. The Chair of CoG mentioned that Kenya adopted the Constitution in 2010 that created 47 County Governments with a functional elected Executive and County Assembly. The Constitution also guaranteed fiscal transfers of resources from the National Treasury to the County Governments. The PFM Act states that on the 15th of every month, resources shall be transferred to the devolved units. However, Hon. Oparanya was doubtful whether the laws were being followed to the latter.

Hon. Oparanya said that Devolution of resources was able to address historical injustices and inequalities that was a result of a centralized system. There have been development achievements in most counties for the last seven years. These include paved roads, tarmac roads, equipped hospitals, citizen engagement, and ECD schools. He noted that Kenyans appreciate the transformation that Devolution has so far achieved and if implemented as per their expectations, it will provide an opportunity not only for distribution of resources but also for improving Government's accountability.



Going by the evidence from media and reports, the Chair of CoG noted that there are complaints from citizens adding that Devolution has lately, been failing to deliver its promises particularly on areas of accountability. According to Hon. Oparanya, the citizens seem to be confused about who they should hold accountable and for which particular services. He added that inequality between counties has been experienced and it is even worse when the inequality is within a county where some wards are favoured than others. Cases of corruption within the devolved units have also been reported thereby tainting the image of Devolution among the citizens. Consequently, there is a risk of destroying what has already been built over time. If not addressed, Devolution will quickly lose support among the citizens.

Hon. Oparanya noted with concern that Devolution had not been implemented as comprehensively as it was intended or envisioned by Kenyans as well as the drafters of the Constitution. According to the Chair of CoG, it appears as though the version of Devolution that is being implemented is again centralizing control of administrative units. As Kenyans are beginning to question the functions of devolved units and express frustrations around overgrowing inequalities, corruption and even tribalism within the counties, Hon. Oparanya advised the leaders to have a closer look at the realities around them. He noted that the conference was a good platform for asking some hard questions and examining all structures critically.

Further, the Governor urged all the participants to critically examine all that has been happening both at the County and national levels on matters of Devolution and accountability. He sought to understand whether the National Government, the Senate, the National Assembly, and the Country are paying attention to the objectives and principles of Devolution as stipulated by the Constitution. He encouraged the participants to make recommendations on the existing gaps and how they can be fixed. This could either be through a referendum or other legal process.

The Chair of CoG noted that it will be important to understand the deeper feelings of the citizens as well as remember the promise the leaders made to them and as such find ways of how the County Governments can better deliver. He sought to understand how political leaders have responded to feedback and perception from the citizens. According to Hon. Oparanya there is need to respond to the citizens on why the devolved administration units in Kenya seem not to have improved accountability, has not fostered better provision of public goods and services and promoted democratic consultation. There is a need to also respond to the issues of political affiliation, ethnic fragmentation and how they have been addressed at the county level.

Hon. Oparanya noted that the Governors went to the Supreme Court for interpretation of some of the provisions within the constitution and those in the legal documents of how to proceed concerning issues related to the budget processes because of the stalemate that keeps reoccurring between the County Governments and the National Government. He thanked all Governors present for their commitment to the task.

The Chair of CoG noted that it will be critical at the end of the meeting to have answers on the following questions:



- How has governance been brought closer to the people through administrative and political decentralization?
- Unequal development and allocation of resources are still regionally and ethically skewed despite Devolution, why National and County Governments' projects are still patronized?
- How can citizens boost citizen engagement and accountability?
- What information do citizens need to hold County Governments accountable and what information do elected leaders at both levels of Governments need to perform better?
- How can Sub National fiscal independence improve the quality of Governance and the provision of public goods and services?

Hon. Oparanya mentioned that the forum was not set to blame one another but to critically look at the Devolution journey since its inception to date.

The Governor was pleased with the Cabinet Secretary for speaking positively about Devolution. However, he noted that counties have experienced a lot of frustrations from the Controller of Budget specifically on funds. He further noted that one of the Regional Economic Blocs came up with projects but did not receive funding to implement its initiatives, hence the need to address the issue of funding. Hon. Oparanya admitted that the counties may not be able to do much without the necessary funding.

Hon. Oparanya noted that the counties reviewed the budget of 2019 Financial Year and found out that there is a budget provision of 150 Billion shillings budgeted for functions of County Governments. The stalemate on finance can be solved if functions for County Governments are left for counties to perform and any funds to support those functions transferred to County Governments. He further stated that there is a clear provision within the Constitution that stipulates that there will be a proper consultation, coordination, and cooperation between County Governments and the National Government. Hon. Oparanya said that this is a big concern given that the last Summit meeting was held in 2017. The Chair of CoG pointed out that resolutions have been made during the Summit meetings but it is not clear how many of them have been implemented. Finally, he noted that as a Devolution family there was the need to know how to move forward. He finally noted that it was important for the Governors to have a position on the issue of the referendum, the challenges that have been experienced given the progress of Devolution and the opportunities that exist.



## Plenum Session

### 3.1 Sub-Theme 1

The country is currently in a fiscal crisis. The economic performance is heavily affected by the ballooning debt. The net effect being reduced basket for sharable revenue and money for development. This is a reality we have to face. How do we solve this crisis?

#### 3.1.1 Introduction

There is currently a stand-off over revenue allocation between the County Governments and National Government that has led to the delay of disbursing money to counties for the 2019/2020 Fiscal Year. This is a big blow to devolution since the County Governments are unable to deliver crucial services to the citizens. The National Assembly rejected Senate's amendments to the 2019 Division of Revenue Bill that proposed an allocation of Sh335 billion for counties. On the other hand, the National Assembly allocated Sh316 billion to counties.

The Council of Governors and Senate have now moved to the Supreme Court to seek judicial intervention and interpretation of the law on Division of Revenue Bill 2019. As the legal battle over the matter continues, the president has retaliated that the government does not have enough money and counties should work with what they have.

The session sought to find out from the panellists and discussant how the two levels of government reached the standoff point and how the financial crisis can

**Moderator: Dr Mutakha Kangu, Constitutional Law Expert**

#### Panellists

Kamotho Waiganjo, Devolution Expert

Dr David Ndi, Public Finance Management Expert

Wanjiru Gikonyo, National Coordinator, The Institute of Social Accountability

#### Discussant

Hosea Kili, OGW, Legal Expert and Chief Executive Officer, County Pension Fund

#### 3.1.2 Emerging Issues and Recommendations

##### Kamotho Waiganjo, Lawyer and Devolution Expert

During his presentation, Waiganjo noted that devolution is one of the fundamental responses to Kenya's fundamental problems and as such all Kenyans should be concerned about it. He pointed out that before the kick-off the new system of government in 2013, the citizens suffered from exclusion, inequity, and lack of services from the Central Government.

According to Waiganjo, Devolution has offered sustainable solutions to the aforementioned issues that Kenyans have experienced in the past. He added that all stakeholders including the National Government, County Governments and Non-State actors need to have a common understanding of the significance of Devolution to solving the outlined fundamental issues.

Waiganjo further explained that the crisis of revenue allocation will affect the County Governments more than the National Government. This is because the National Government will continue to function while the counties will shut down its operations and service delivery due to lack of finances. The following were the key issues that emerged during Waiganjo's presentation:

- The issues facing devolution are not technical problems but rather fundamental ideological problems that explain the difference in people's thinking on certain issues. For instance, there are centralists who believe that power should be at the centre. Currently, probably working under devolved governments, it becomes a challenge since they may not support devolution fully hence a threat to it. The more centralized the system is, the more centralized the patronage and resources are hence the continued issues of inequity, exclusion and lack of services.

- **Delay in processes of transferring funds to counties**

The Division of Revenue Bill is very critical. Unfortunately, the National Assembly does not approve the budget process in good time thereby affecting county governments' operations. The National Treasury and the National Assembly are both entities of the National Government that are mandated to allocate funding between the national government and the county governments. Constitutionally, this was not the intended approach as the institutions with this role were supposed to be decentralized. Therefore, the Supreme Court should relook on this and guide both the national government and county governments.

- **Reduced revenue allocation**

Although the actual amount of the shared allocations to county governments has increased over time, the percentage, however, has reduced below the inflation levels. This hinders county governments from providing the same services as they did in previous years because of the rise of cost.

- **Conditional funds**

The National Government has over time increased its allocations of conditional funds to counties. Nevertheless, instead of county governments managing the funds as it should, the national government has taken fiscal independence from the counties.

- **The delay of the actual release of money to counties**

There is a deliberate delay of the actual release of money to counties hence affecting operations in counties. The law requires a monthly release of money to counties but the National Treasury releases funds to counties almost at the end of the financial

year when they cannot be able to utilize it. This has a big effect on development as the counties are only able to fund their recurrent expenditures. The counties can only afford to conduct developmental agenda from the loans and using services from suppliers hence accumulation of huge debts by county governments

- **IFMIS system breakdown**

Due to the technical breakdown and issues of connectivity of the system, the county governments are not able to spend the money even after it is released

- **Favouritism by the National Government**

The National Government favours some counties over others when allocating government projects across the country. This is against the intended objectives of devolution that aim at addressing the issues of inequity and marginalization

To address the above issues, Waiganjo made the following recommendations:

- CoG needs to understand that the issue over revenue allocation is not a technical issue but a political and ideological one that requires joint discussions between the National Government and County Governments for practical solutions to be achieved
- CoG need to recognize that it requires to partner with more partners such as the private sector to come up with developmental agendas that can help raise revenue through tax. They also need to partner with non-state actors, the media and professionals so that they can be advised from an information point of view on how to run the counties effectively

Development partners have an interest in the economic and political stability of Kenya and will, therefore, be keen to ensure that devolution works

- **Corruption requires a technical approach**

There is a need to conduct an informed study that will clearly show the cost of corruption in numbers on both the National Government and County Governments. The results of the study should be profiled to the nation

- **There is a need to be selective on which cases CoG should take to courts**

The Devolution family needs to be strategic on cases that require the intervention of the court and be open to using other dispute resolution mechanisms. The county governments may suffer major setbacks in their efforts to protecting devolution if they end up losing most of their cases in the courts

- COG needs to be non-partisan, united and speak in one voice on the issues affecting devolution. The Council seems not to be as united as it used to during the previous regime

## ■ Perceptions of the public on county governments

There is a need for the CoG to win the perception of the public by demonstrating their efforts towards fighting corruption and addressing issues of accountability in counties

- There is a need for the CoG to fast-track the development of a policy framework on a conditional grant to enable the County Governments to respond to the needs of its people. If not addressed, the National Government will continue to undermine the fiscal independence of County Governments thereby hindering the intended objective of Devolution

### **Dr David Ndii, Economist and Public Finance Management Expert**

During his presentation on the fiscal crisis, Dr Ndii highlighted how the revenue collection nationally has declined over time hence affecting the equitable share amount. It is approximated that in the Financial Year 2018/2019 the foregone revenue was between Ksh300 billion and Ksh400 billion. Dr Ndii explained that if the economy is growing it should generate revenue as well. However, if it fails to generate revenue it indicates that the country's economy is not working. He went further to explain that if a growing economy does not generate revenue it is evident that the private investment has collapsed and taken over by the government's investment in the market. Consequently, there are no profits and job creation which then leads to the shrinking of the tax base. Therefore, the country's economy grows from deficits which also incur high interests. Due to lack of private investment the capital stock shrinks and in return affects the country's economy. This finally leads to a decline in revenue yields.

Using the Fiscal Strategy Paper, Dr Ndii pointed out that the projections of revenue allocation to counties will fall to less than 15 per cent by 2021. According to the Finance Management Expert, this is an indication that the National Government intends to reduce the percentage of revenue allocation to less than 15 per cent in future. This is a violation of the Constitution which mandates the National Government to share a minimum of 15 per cent of its total revenue to counties. Dr Ndii noted that the county governments will be forced to adjust their expenditures while the National Government will continue to protect its share thereby killing devolution.

The following were the key issues that emerged during Dr Ndii's presentation:

- The informal and formal private investment at the local level or otherwise has collapsed and taken over by the government's investment in the market. They have not been supported in coming up with developmental agendas in the counties thereby weakening the partnership. Consequently, there are no profit and job creation which then leads to the shrinking of the tax base. Therefore, the country's economy grows from deficits which also incur interests. Due to lack of private investment the capital stock shrinks and in return affects the country's economy. This finally leads to a decline in revenue yields.

- Devolution created a legitimate deficit at the national level. The National Government in its effort to outdo the counties is clawing back by implementing mega infrastructure projects
- Clinging to the functions of County Governments. The National Government continues to cling unto functions that have already been devolved. For instance, it recently procured medical equipment for counties while the function of health is absolutely a function of the county governments
- Clinging to the administrative structures. The National Government was reluctant in the restructuring of the Provincial Administration as required by the Constitution. The provincial administration was supposed to be replaced by the counties and therefore it is not relevant in the devolved system of government. This structural and political problem has consequently created a structural economic problem

**Dr Ndii made the following recommendations:**

- There is a need to address the existing debt as it is and prevent excessive future borrowings. Although the debt is used to develop the country's infrastructure, it is accumulating huge interests and the projects do not generate profit thereby leading to the shrinking of the tax base
- There is a need to create an independent fiscal commission. There is a risk of having the National Assembly becoming a rubber stamp for the National Government on matters of finances
- Kenyans are divided between the top-down control ideology and a bottom-up ideology. Therefore, there is a need to know what our vision for the centre is as far as Devolution is concerned

**Wanjiru Gikonyo, National Coordinator, The Institute of Social Accountability**

Gikonyo kicked off her presentation by reiterating that Devolution is an ideological and political debate that requires ideological and political strategies in addressing the issues affecting it. She urged the governors and senators to focus on establishing ideological and political strategies as part of their efforts to protect devolution.

During her presentation, Gikonyo noted that the previous regime, as well as the current one, overlooked the development of Devolution policy which is very critical to the operationalization of the devolved system of government. She further noted that the National Assembly as well as demonstrated centrism while developing legislation by ignoring some key decentralization aspects. She urged the governors and the senators to be keen when the two entities are developing policies and legislation. Gikonyo urged them to pay attention to the titles, objectives, and principles to ensure that devolution aspects are put into consideration. According to Gikonyo, the County Governments will face challenges in implementing some of the policies and legislation if devolution aspects are side-lined.



The following were the key issues that emerged during Gikonyo's presentation

- There is a lack of political goodwill from the national government on the development of devolution laws which emanates from the lack of consensus between the County Governments and the National Government. The National Government during the previous regime failed to adopt the functions of devolved government policy while the current regime developed separate legislation that enabled them to continue clinging on some functions that ought to have been decentralized
- Urban areas are critical to the County Government as they are a key source of generating revenue. However, the County Governments have not been able to institutionalize urban boards as required by the law due to a lack of resources to fund their functioning
- The MCAs are demanding to push for the establishment of the Ward Development Fund which is similar to the NG CDF. The legislature fund has been marred with cases of unaccountability thereby resulting in calls for its abolishment from the civil society and a section of the members of the public
- While the majority of the counties have established the Sub-County administrators, there are concerns of the centralization of power at the top level by the governors. Therefore, the county administrators lack information and real power to make key decisions in their units which render their positions ineffective

**Gikonyo made the following recommendations:**

- The National Government should have consensus with the County Governments and ensure it abides with the principles of the Constitution while developing laws on Devolution. On the other hand, the CoG should ensure it protects the interests of devolution when the National Government is generating such legislations.
- There is a need to bring in experts for analyzing the Urban Areas Act whether it is in line with the local realities and international standards. There is a need to focus on the establishment of structures such as sector groups that will aid managing services as well as generating revenue thereby contributing towards urbanization
- There is a need to develop a Public participation framework in counties that will help to address the issues of unaccountability by the legislatures on the (National Government Constituencies Development Fund (NG-CDF) and Ward Development Fund. These funds should be used to address the county needs in a transparent way
- There is also a need to ensure that all counties develop structures of Public Participation up to the village level as required by the law. This will give citizens the power of voice to participate effectively on matters that affect them
- There is a need for County Governments to create a public participation framework for the legislative members to engage in matters of the counties at the local level. This platform is aimed at facilitating intergovernmental coordination among leaders



both from the County Government and National Government on matters affecting counties such as priorities and budgets

- There is a need for the county Government to strengthen the structural institution within the devolved system that will effectively deal with issues that affect devolution hence achieve effective service delivery
- There is a need for the governors to prioritize the defence of devolution in a bottom-up structure through implementing sovereignty in counties as it was envisioned in the Constitution. This is through the establishment of decentralized units up to the village level and empowerment of the administrators

### **Hosea Kili, OGW, Legal Expert and Chief Executive Officer, County Pension Fund**

Kili kicked off his presentation by noting that the Complex of superiority is the major challenge facing every stakeholder of devolution. He further noted that none of the stakeholders is willing to listen to the other thus hindering effective communication. Without effective communication, Kili said that the involved stakeholders cannot be able to deal with disputes in a sober manner.

Kili emphasized the importance of creating a strategic partnership with the private sector. He said that there is need for the governors to establish mechanisms to attract investors in counties to have sustainable development in counties. According to Kili, County Governments need a partnership with the private sector to have a sustainable solution to issues of development. He urged the governors to focus on creating a conducive environment in counties to attract the private sector.

Kili reminded the governors that the Constitution allows the County Governments to borrow money internally and externally. He urged them to invest in the County Pension Fund as one of the primary sources of lending.

The following were the key issues that emerged during Kili's presentation:

- The National Government and County Governments have been entangled in supremacy battles and power struggles since the onset of devolution. This has led to the escalation of conflict between the two levels of government on critical matters affecting devolution due to lack of communication
- The County Governments are over-relying on the equitable revenue allocation from the National Government. Unfortunately, this allocation has continued to decrease over time because of the private sector investment has been overcrowded by the government thereby affecting the tax base

### **Kili made the following recommendations :**

- The National Government and County Government need to realize that they are both key stakeholders of Devolution and should work together for the betterment of the nation. The alternative dispute resolution mechanism should be revived and exhausted to solve conflict issues between the two levels of government before moving to courts

- County Government should not rely only on the sharable revenues from the National Government to carry out development in their counties. There is a need to strategize on a sustainable solution to the fiscal problems facing counties by considering a strategic partnership with the private sector and creating suitable policies which make investments sustainable
- The Constitution permits County Governments to borrow for purposes of development. The County Pension Fund could be the first primary source for borrowing for the County governments. This borrowing can be used to strategically support investment in counties. The County Governments need to invest in treasury bills and bonds which will enable them to borrow at a fair rate as compared to other financial institutions. The fund is a good opportunity for the counties to invest in power generation, property development, manufacturing industry, and infrastructure development

### 3.2 Sub-Theme 2

Devolution is on its death bed. What Constitutional challenges affect the effective implementation of devolution?

#### 3.2.1 Introduction

There is a lack of political goodwill from the National Government on the implementation of Devolution following the Constitution. Some of the challenges facing the devolved system of government have emanated from deliberate efforts by the National Government to frustrate devolution. Furthermore, there is a lack of understanding of devolution matters from the Constitution which has led to conflict among various stakeholders with some opting to seek the interpretation of the court. Unfortunately, the courts have misinterpreted the Constitution in some of the rulings which are a confirmation that the Judiciary also lacks a proper understanding of the supreme law.

The Constitution is clear on the role of CRA in the division of revenue allocation yet parliamentarians have always ignored their recommendations. Devolved Functions as established in Schedule Four are also very clear yet the National Government has developed policies that have facilitated them in clawing back these functions from the County Governments. The CDF that lost meaning in the devolved system of government was supposed to be removed from the system but instead, it was retained as NGCDF. There have also been supremacy battles between the Senate and National Assembly over their roles and powers. However, the law is very clear on the roles of each House. Finally, there are calls for a referendum which could be used by those against devolution to dramatically change the Constitution.

All the above are symptoms of the death of devolution and if not properly addressed could lead to the extinction of the devolved system of government. This session, therefore, sought to understand the Constitutional challenges affecting the effective

implementation of devolution. It also sought to identify the possible ways of protecting it as well as analyzing some Constitutional reforms that could help to improve devolution.

**Moderator:** Irungu Houghton, Amnesty International

**Panellists**

Dr Mutakha Kangu, Constitutional Law Expert

Prof. Peter Wanyande, Political Scientist

Wachira Maina, Devolution Expert

**Discussant**

Joash Dache, C.E.O, Kenya Law Reforms Commission

### 3.2.2 Emerging issues and Recommendations

#### Dr Mutakha Kangu, Constitutional Law Expert

In his presentation, Dr Kangu acknowledged that the major issue affecting devolution is lack of commitment and political goodwill among the key players. Dr Kangu further said that failure of proper understanding of the Constitution among the key stakeholders is also a big hindrance to the effective implementation of the devolved system of government. All the key stakeholders need to have a proper understanding of the Supreme law to be able to execute their roles effectively.

Dr Kangu pointed out that the National Government and National Assembly have made deliberate misinterpretations of the Constitution while developing some policies and legislation. He advised the governors and senators to seek for proper Constitutional interpretation of such policies and legislation.

The following were the key issues that emerged during Dr Kangu's presentation:

- There has been a failure by various stakeholders to properly interpret the Constitutional provisions on Devolution. Therefore, these stakeholders do not have a proper understanding of the supreme law when carrying out their mandate
- The National Government has misinterpreted the model of Devolution in Kenya as a mere decentralization and this affects their approach when developing policies and legislation on devolution
- The primary role of the Senate is to protect counties but there has been a misinterpretation of the Constitution leading to conflict between the Senators and Governors. The Senate has misinterpreted their oversight role which was originally meant to protect the counties from the National Government. Instead of overseeing that the National Government allocates a fair share to County Governments, it supervises how the counties spend the allocated money

- The Court of Appeal has misinterpreted the Constitution by ruling that the Senate has an exclusive oversight over the equitable share while the County Assembly has oversight over local revenue. Nevertheless, the budget expenditures do not indicate whether the counties are using money from the local revenue or equitable revenue and therefore this is misleading
- There is a failure by the Senate and National Assembly to realize that the Bicameral Parliament is one of the key intergovernmental institutions and therefore both Houses play a critical role on devolution. Although the National assembly has various functions which impact on Devolution, it seems not to have any interest, therefore, leaving the Senate to carry the burden alone
- The National Treasury is one of the intergovernmental institutions which were established through an act of Parliament. The PFM Act established the National Treasury as part of the National Government and therefore it always favours the National Government at the expense of the County Governments when determining the equitable share. Furthermore, it always frustrates counties when disbursing funds thereby jeopardizing counties' operations
- IFMIS, which was established through the financial management reform sought to centralize rather than devolve according to the spirit of the governance reform which aimed at moving from centralization to devolution. Therefore, the counties can only plan but do not have control over resources to implement development projects

**Dr Kangu made the following recommendations :**

- The Constitution is very clear that County Governments are distinct from the National Government and therefore counties are not mere agents of decentralization. There is a need for political goodwill and commitment from the key players of devolution to understand and implement the devolved system following the Constitution
- There is a need for the National Assembly to realize that it is part of the devolution family and therefore has an important role to play to ensure that devolution succeeds. One of its major roles is the division of revenue which is critical for the survival of County Governments hence it needs to approve the Division of Revenue Bill in good time for effective functionality in counties
- There is the need for Constitutional interpretation on whether the National Treasury should be part of the National Government
- Following the spirit of devolution, the National Treasury was meant to be an independent organ that serves both levels of government without favouritism
- To address the issue of late disbursement of funds, there is a need to re-look on whether the National Treasury is following the guidelines as provided by the Constitution when disbursing funds to counties. The National Treasury and the National Government are not justified to deny counties of funds. Furthermore,

according to the Constitution, the counties which have been proved to breach the fiscal law are required to receive at least 50 per cent of their budget

### **Prof. Peter Wanyande, Political Scientist**

Prof. Wanyande kicked off by stating that politics is the major cause of the possible extinction of Devolution in the country. He further explained that the challenge facing devolution has several dimensions with politics at the top. These include challenges emanating from Kenya's historical background, intergovernmental relations institutions, ideological, legal and misconceptions on devolution.

Prof. Wanyande emphasized the need for governors to fully understand Devolution to be able to implement it successfully. According to Prof. Wanyande, majority of the key players of Devolution including the governors do not have a proper understanding of the new system of government. He added that Devolution is different from the centralized government and as such should work differently from how the old system used to operate.

The following were the key issues that emerged during Prof. Wanyande's presentation:

- Due to the problems of misconceptions on what devolution is, majority of the key players do not have a proper understanding of the new system of government
- The civil servants in counties who might still be working (in the devolved system) and have the old mentality of centralism are a big threat to devolution. Devolution is different from the centralized government and should work differently from how the old system used to. Some of the governors may not be for devolution and therefore think centralism could be the best system for Kenya. Furthermore, some of the national leaders, based on their public utterances, are not pro-devolution.
- The National Government is playing politics with County Governments and doing it effectively. They have tainted the counties badly with allegations on wastage of resources, corruption, and impunity. Yet the National Government is not better off on these allegations than the County Governments. Consequently, the citizens have lost faith in devolution

### **Prof. Wanyande made the following recommendations :**

- There is a need for all the governors to understand what devolution is and what they should do to make it work
- There is a need to analyze how the Civil Servants in counties are working and whether they still have the old mentality of centralized government or have adjusted to the new system of government. All the Civil Servants must adapt to working differently from how they used to during the old system of centralized government
- There is a need for governors to stand strong and protect devolution. The governors should have a spokesperson to address the propaganda and share information with the citizens on what the County Governments have done



- There is a need to have an improved working relationship between the County Governments and the National Government. There should be consultation and proper coordination between these two spheres of government

### **Wachira Maina, Devolution Expert**

Wachira began his presentation by stating that there is no need for constitutional reforms and instead the country should focus on implementing the Supreme law as it ought to. Nevertheless, he said that there is a high probability of the country going for a referendum. He further said that the referendum will either improve the current Constitution or worsen it by taking away its gains. In his presentation, Wachira highlighted some radical changes that can be adopted during the referendum that could help to protect Devolution and improve the Constitution at large.

The following were the key issues that emerged during Maina's presentation:

- Kenya has a presidential system of Government with the logic of a parliamentary system where both the representatives of the Upper House and Lower House are directly elected. Consequently, this leads to conflict due to competition between the two
- Since the inception of Devolution in 2013, the National Assembly has failed to follow the Commission on Revenue Allocation (CRAs) recommendations on the division of revenue allocations. Instead, it follows the advice of the IPEK which is not a constitutional body and which gets secretariat support from the National Treasury hence the conflict of interest
- The Constitution has given more powers to the executives than the legislatures on the matters of defence, security, and treaties. In some countries, the executive misuse their powers to make key decisions on such matters
- The police are democratically accountable and the oversight of the police is weak
- There is a deficit democratic problem in the way the governors are impeached by the senators. The impeachment can take place where every senator from the governor's county objects as well as without the participation of the County Assembly and the citizens
- Kenya is one of the countries on the continent which runs expensive elections. One of the major reason is that the country lacks inventory control over the equipment used during the previous elections such as Biometric Voter Registration (BVR) kits
- A referendum that only has two alternatives of Yes or No as a question may hinder the opportunity for the devolution family and citizens to push for reforms that will address the issues affecting the devolved system. The question may create ambiguities and lack clarity on the major proposed reforms



### Maina made the following recommendations:

There are various Constitutional reforms' proposals that Kenya can adopt in its effort to protect and strengthen devolution. These include:

- **Reconstructing the architecture of the Senate**
  - ❖ To have a Presidential System, the functions of the Senate will remain as they are but have Constitutional amendments to keep it as a full legislative chamber with equal powers with the National Assembly. Alternatively, under the Parliamentary system with two-chamber Houses, the senators will be directly elected or selected by the County Assemblies and County Executives where its duty would be exclusive to protect the regions
  - ❖ There should be a proposal to have all the legislation introduced in either House except for financial legislations. To avoid any conflict, the two Houses should have a rule on which House should be the final one to consider the law and how many rounds of negotiations should take place
  - ❖ There is a need to give the Senate a set of tools on legislation and expand their oversight power over both domestic and international borrowings
  - ❖ There is a need to give counties power to introduce legislation through a vote of 50 per cent plus one of the counties which should then go to the second reading and not first reading
  - ❖ There should be a parliamentary option where two-thirds of the county assemblies can propose Constitutional amendments and if three-quarter of the counties support it then it should go to the referendum directly

- **Budget system**

There is a need to convert CRA into a Fiscal Commission with fiscal powers and independence to protect both the County Governments and National Government

- **Defence, security, and treaties**

The Constitution has given more powers to the executives than the legislatures on the matters of defence, security, and treaties. In some countries, the executive misuse their powers to make key decisions on such matters. Therefore, there is need to give parliament powers of having a control before the executive enters into such treaties. The CoG can develop a mechanism which can enable them to make a contribution

- **Reconstructing the architecture of the police**

The police are democratically not accountable, and the oversight of the police is weak. The police service, therefore, needs to be devolved to counties

## ■ Separation of powers at the county level

It is important to have financial independence of county assemblies which will also enable them to provide effective oversight. Nevertheless, the Assemblies can also go rogue and therefore there should be a mechanism for the Executive to hold them accountable

## ■ Enforcing accountability, impeaching governors and holding elections again

- ❖ The governors need to strengthen the process of impeachment by the senate to ensure it is similar to the process of removing the president as well as the participation of the citizens and the County Assemblies
- ❖ The Constitution should be amended to ensure the cost of impeachment and elections are paid from the County's budget. It will be unfair for the country to pay for such elections especially where the county government is responsible for misusing funds
- ❖ There is a need to have an inventory control bill over the equipment used during the previous elections such as BVR kits to ensure their maintenance and reuse
- ❖ IEBC should be disbanded into 47 bodies and each county should be responsible for its electoral matters which include appointing commissioners and secretariat. Consequently, this will help to address the issues of cost as well as rigging
- ❖ Kenyans need to have a referendum which has alternatives of reforms to select from and vote instead of two options for Yes or No. For example, have three proposals such as Self-Governance, Punguza Mzigo, and Hand-shake/Power sharing and ask citizens to vote for the ones they want

## Joash Dache, C.E.O, Kenya Law Reforms Commission

Representing Attorney General Paul Kihara, Joash Dache stated that Devolution is one of the transformative elements of the Constitution as evidenced in the counties. Dache further said that County Governments have made immense achievements in development as well as governance. However, he noted that there are various challenges facing Devolution which should be addressed to make the new system of government success.

Dache reported that the National Government has finalized the development of the Devolution Policy and Public Participation Policy which are awaiting the approval of the Cabinet.

The following were the key issues that emerged during Dache's presentation:

- Supremacy battles between the senate, National Assembly and COG
- The National Government is deliberately developing legislations and policies which facilitate in clawing back the devolved functions from the County Governments. By doing so the National Government weakens devolutions by working against its intended objective

#### Dache made the following recommendations :

- The Regional Economic Blocs are a good opportunity for economic growth in counties and regions. CoG must, therefore, ensure these Blocs function effectively towards achieving the intended goal
- The Senate needs to review national policies which have facilitated the National Government in clawing back the provisions of the Constitution hence affecting devolution
- The Senate, Council of Governors and National Assembly need to use intergovernmental institutions to resolve their disputes without necessarily going to court

### 3.3. Sub Theme 3

Is Corruption truly affecting devolution? How?

#### 3.3.1 Introduction

Corruption is the abuse of power by people who have been entrusted with power and resources and are otherwise using it for private gain. Corruption corrodes the society and may impact it in a multitude of ways and worst scenarios may cost people's lives, people freedom, health and money. Its cost has been a major obstacle to democracy and the rule of law. Cases have been reported where politicians are using power and resources within counties just for private gain. Cases of misuse of money, tribalism and nepotism have been reported and Kenyans are not happy about how devolution is being conducted hence slowly losing its support.

Corrupt politicians have invested scarce public resources in projects that will line their pockets rather than benefit communities and priorities projects such as a dam, power plants, pipelines and refineries over more urgent projects such as the building of schools, hospitals and roads. Corruption also hinders the development of fair markets structure and distorts competition which in turn affects investment.

Corruption has corroded some of the devolved systems in Kenya and has undermined peoples trust and support of the system, institutions and its leadership. Note, with the rate of corruption in the country, counties will be deprived of its economic wealth. This is very harmful to emerging democracies such as the 47 County Governments which is in still in the process of fully establishing itself hence a stumbling block to the development. Therefore, this session will contain meaningful debate on corruption and find practical solutions to the menace.

#### **Moderator: Dr Mutakha Kangu, Constitutional Law Expert**

##### **Discussants**

Irungu Houghton –Amnesty International

Eric Matara – Representing Nation Media Group

Archbishop Eliud Wabukala

David Gichana Representing FCPA Edward Ouko, CBS, Auditor General

### **3.3.2. Emerging Issues and Recommendations**

#### **Irungu Houghton – Amnesty International**

During his presentation, Houghton mentioned that Governors were looked at as the custodians in fostering unity and ensuring that the wellbeing of the people was taken care of. According to provisions of article 174 of the constitution, the objectives of devolution were to enhance democracy, accountability, self-Governance, protection, and promotion of the rights of the minority and marginalized communities. He further stated that goal number 16 of the sustainable development goals aimed at achieving a peaceful, inclusive and just society for all which Governors were to help in their implementation.

Despite the provisions in the constitution and the sustainable development goal number 16, some challenges hampered the achievements of the same. For instance, Houghton noted various levels of dysfunctionality from the report of Ethics and Anti-corruption as well as from the office of the Auditor-General that brought out flaws on how the County Governments were operating. He noted the irregular staff recruitments of persons within County, the inside training and contracting where Governors were doing business with their Government noting that it was not an institutional failure, but the systems were designed to give those results. He underscored the fact that leaders in the county had a lot of influence on the people, therefore a need to strive to build a society that they could be proud of.

The following were the key issues that emerged during Houghton's presentation:

- There have been cases of dysfunctionality with Devolution in the counties where systems are not functioning as they ought to. For instance, there are irregularities on how things are done, how services are delivered to the people and how the Governors are doing business with its Government.
- There is dysfunctionality with the Ecosystem where there is bad leadership, corruption, nepotism, unequal distribution of services, ineffective service delivery, ineffective communication to citizens on activities that are conducted in the counties among other issues reported;
- Several mega projects or Government conservation projects are being implemented yet the majority of Kenyans cannot sustain themselves

- Few Kenyans trust the police to even report some crimes. This may explain the increase in the number of Defilement and morality sex crimes
- There is too much centralization of power and reluctance to create independent checks and balances within the counties. It is of concern that counties are emulating how the National Governments are operating. Some Governors and MCAs have had cases which required them to account for the use of public resources, but they seem to be spending more time finding ways of getting away from the issues of accountability

**Irungu Houghton made the following recommendations:**

- There is a need for Governors to stop doing business with their Government to ensure that other Kenyans are also benefiting from Devolution. It is wrong for Governors to give tenders to their own companies, relatives, and friends yet the majority of Kenyans are eligible for the same opportunities. Therefore, professionalism within counties should be highly encouraged
- Corruption is a behavioural and human problem that needs human intervention. One of the approaches is to sensitize people on good code of conducts in churches, through the education systems so they may make a moral decision of being persons of integrity.
- There is a need to strengthen institutions, have proper structures and mechanisms that can help deal with corruption cases. For instance, it was presided by Judge Mumbi Ngugi that if any Governor is charged with an offence, he or she will not continue to serve the citizens in office but will step aside for investigations hence a good starting point in solving the corruption.
- There is a need to do more listening and learning on how to solve the issues of corruption as opposed to political rallies
- There is a need for the Governors to create systems and institutions that could help raise a generation that appreciates and embraces devolution
- There is a need for citizens to participate in the development of their counties so that they can perform oversight functions, as a result, keep the County Government accountable

**Chairman of Ethics and Anti-Corruption Commission (EACC) Archbishop Eluid Wabukala**

Archbishop Wabukala thanked the CoG for inviting the EACC officials to the conference and noted that it was a great opportunity for them to share their thoughts on Devolution matters. He reminded the Governors that they are leaders and role models in their communities. Citizens believe that they have solutions to some of the problems affecting them. He applauded Governor Oparanya for the good infrastructural development specifically the roads that were being built in his County.

Archbishop Wabukala noted that the constitution provided a provision where citizens had the right to participate in the developments of their own County Government. It also stated that it will promote social, economic development and ensure that citizens receive services that they require. Therefore, Governors are expected to be custodians in ensuring the constitution's provisions are attained. He also reminded Governors that moral integrity was key in influencing the lives of the people at the county level.

The following key issues emerged during Archbishop Wabukala's presentation:

- There is a lack of development initiative in Various County Governments despite money being allocated to them. Other counties are using the little money allocated to them for developments yet there are no development projects in others
- Widespread Corruption in the county has affected how Devolution is supposed to operate and as a result, many Kenyans have lost hope in decentralization. The most worrying part is the fact that leaders instead find mechanisms to defend themselves against corruption as opposed to tackling the issue

**Archbishop Wabukala made the following recommendations :**

- Governors need to be custodians of Devolution. They have the opportunity to make people have faith and believe in Devolution as well as impacting the lives of people in a positive way
- There is a need to observe Chapter Six of the Constitution and follow its principle to the latter
- EACC will do its best to ensure that corrupt leaders are held accountable. It will use all the alternative dispute resolutions to recover public resources from those who illegally acquired them

**David Gichana Representing FCPA Edward Ouko, CBS, Auditor General**

Gichana conveyed the apologies of Auditor General Edward Ouko who was not able to attend the conference. During his presentation, Gichana noted that Devolution was a good idea and that steps had been made in transforming the lives of people in various parts of the country. This implies that Kenya is progressively becoming a more inclusive society that enhances democracy. However, despite the strides made, corruption within the counties has become a major issue that needs deliberation to get practical solutions to address it. Gichana contended that leaders needed to be diligent by protecting public resources and ensuring that Kenyans receive services they ought to.

The following key issues emerged during Gichana's presentation:

- Devolution since its inception was introduced to inexperienced actors and people did not understand how the system operated hence leading to ineffective service delivery



- There is also the issue of human resources where capacity is the major challenge. In some counties, people handling public resources have not been properly trained in their respective profession. For instance, if a person is not able to handle a responsibility, he or she may find someone else to do the job for him hence less effective service delivery by that officer or if dealing with funds it could be misappropriated
- There is a lack of clarity of roles between the County Governments and National Government on who is supposed to perform certain functions. This may lead to misappropriation of funds, poor service delivery, wastage, lack of transparency and misuse of resources due to the duplication of roles
- There is a lack of effective citizen participation in activities within the counties as well as civic education on corruption issues. Lack of citizen participation may lead to increased corruption as people may not be aware of what is happening and who they should hold accountable
- There is a lack of formalizing the legal structures within the counties. Most counties do not adhere to the regulations and legal framework that are supposed to guide their activities within the county hence implementing activities without a plan
- There is a lack of prioritization of what the citizens need in the Counties. Most leaders prioritize their own needs which is a wrong approach. This means that the leaders will just be implementing ideas for their selfish interest and not for the benefit of the people
- The use of technology in the counties has not been adopted as a proper mechanism in ensuring that there is accountability in the management and use of public resources. There is also a lack of documentation on how resources are used within various counties hence lack of transparency
- There is a lack of proper and effective Governance such as (appointed office committees and internal audit committees) within the County Governments that can advise on financial management. If various structures within the Government were effective then the challenges of corruption could have been minimal.

**Gichana made the following recommendations :**

- The use of technology to manage public resources will be a game-changer. It will digitize management and use of resources hence encourage accountability, transparency and ensure proper service delivery is achieved
- There is a need to capacity build the human resource of the county for more effective service delivery so that they can be able to track cases of corruption when it comes to managing public resources.
- There is the need of coming up with effective legal frameworks that will encourage public citizen participation and that it should not be done just for the sake of it. But to make citizens own projects within the county to make Governments accountable.

- There is a need for counties to follow the rules and regulations stipulated in various guidelines.

### **Eric Matara Representing the National Media Group**

Matara noted that the media represented a group of people who would be judged harshly if Devolution did not succeed. He said that the media plays the role of a watchdog and ensures that citizens are informed on matters of the counties. Matara pointed out that corruption was a major issue in counties and that there was a lack of enough capacity to tackle it. He applauded the office of the Auditor-General and the EACC for exposing corruption cases. However, he noted that there was a lack of punitive punishment on offenders.

The following key issues emerged during Matara's presentation:

- Widespread corruption among leaders entrusted to protect Devolution is a stumbling block to its success. The high-level corruption cases that have been reported since the inception of Devolution have never been handled with the magnitude that they deserve. Leaders associated with corruption are normally arrested but no major convictions have been witnessed
- There is a lack of strategy or proper mechanism to protect public resources to avoid its misuse. If there is an existence of any mechanisms, they may not be effective in counties. Some counties lack internal audit committees which can help in ensuring money is spent well.
- The offices given the responsibility of dealing with corruption have not been enabled to deal with the issues effectively. The offices of Auditor General and EACC lack enough financial resources to perform their oversight roles as well as educating the public on how to safeguard the public resources
- Some County Governments do not follow the rules, laws, and regulations on procurement hence poor service delivery, misuse, misappropriation or even fraud. For example, they may not follow rules on procurement when issuing tenders
- There is a lack of inclusivity within counties where other wards are favoured in terms of development projects and service delivery than others
- MCAs could also be a threat to devolution because they at times delay budget approvals hence affecting the schedule of implementing development activities.

### **Matara made the following recommendations:**

- There is a need for EACC to visit counties and conduct civic education to the citizens to make them aware of how to safeguard their resource, sensitize them on what corruption is and how to handle such cases when it arises in their counties

- EACC and the steering committee need to be attending such forums to engage Governors on issues of corruption, to attain practical solutions to the menace. The steering committee also needs to support the EACC in solving corruption issues.
- There is a need to ensure that the office of the Auditor-General is well funded so that it can be able to perform its functions effectively
- There is a need for corrupt cases to be dealt with seriously. Agencies dealing with corruption issues should not only expose suspects but also ensure a speedy and expeditious conclusion of the cases

The following recommendations were made by the participants:

- There is a need to conduct a lifestyle audit to public servants when being interviewed for jobs so that applicants can declare their wealth before taking office. It will be easier to question an officer if wealth has been acquired most unreasonably. Performance information audit can also help track any corruption concerns.
- As the Governors engage on the debate of amending the constitution, there will be a need for EACC to be an independent body where officers working at the commission are not selected by the Executive arm of the Government and parliament. This may guarantee independence and objectivity even as they handle corruption cases.
- It was also suggested that electronic media should be allowed to air such conferences to educate the citizens on agendas discussed. It will also be a way of allowing citizens to participate by allowing them to suggest what they think can be done. The media also needs to report some of the success and strike a balance between the positive and negative issues on corruption so that the enforcement of good behaviour is not tampered with
- The EACC commission should implement some of the proposals of a report that was commissioned by president Moi years back on good code of conduct.
- Corruption has been politicized in the country where political rivalry may give rise to the allegation that may be unfounded. The challenge is that there are no proper mechanisms to deal with the situation that arises from such allegations

## Overall Resolutions

In line with the overall conference theme “The Future of Devolution’, the conference made the following resolutions, that:

- i. That the County Governments will come up with systems and structures within the devolved institutions that will help achieve developmental agenda, enhance accountability and minimize corruption within the counties (Action: CGs)
- ii. That the Council of Governors will hold individuals accountable for corruption allegations and speak in one voice not only on matters of devolution but also matters of accountability (Action: CoG)
- iii. That National Government should ensure it complies with the Constitution to respect the framework which has transferred power, functions, and resources to the County Governments (Action: NG)
- iv. That the National Government and County Governments will enhance consultation, cooperation and collaboration in the proper coordination of various frameworks in ensuring devolution is a success (Action: NG, CG)
- v. County Governments will strengthen the structural institutions that will effectively enable them to deliver services to its citizens up to the village level (Action: CG)
- vi. That the County Governments will partner with the private sector at the local level to enhance growth and development cushion the private sector against the overcrowding of investment by the National government (Action: CG)
- vii. That governors need to recognize the importance of other stakeholders in the devolution space and look for the partnership to protect devolution (Action: CG)
- viii. County Governments will hold frequent forums to review and look at their failures and achievements (Action: CG)
- ix. That there should be a separation of budget allocations between the County Assembly and County Executive (Action: CG)
- x. That the County Governments and the Council of Governors should have a spokesman to protect and champion Devolution (Action: CG)
- xi. That the call for National Dialogue should focus on strengthening devolution and make sure all legislation is introduced in both Houses apart from the finance bill and ensure that the CRA is converted into a Fiscal Commission with independent Fiscal powers (Action: CG)
- xii. County Governments should develop a public participation framework that is related to the county needs hence encouraging effective citizen engagement (Action: CG)
- xiii. That Council of Governors will soon share with the County Assemblies and the country its proposals for Constitutional referendum and will hold meetings with all stakeholders countrywide to popularize its document (Action: CoG)



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