DEVOLUTION IN KENYA

A Journey from Centralised to Devolved Governance Under the Constitution of Kenya 2010

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TABLE OF CONTENTS

TABLE OF CONTENTS iii
LIST OF FIGURES viii
ABBREVIATIONS AND ACRONYMS ix
FOREWORD xi
ACKNOWLEDGEMENT xii
PREFACE xiii

CHAPTER ONE
INTRODUCTION
1.1 Background 1
1.2 Objectives and purpose of the devolved system of government 2
1.3 De!ning devolution 4
1.4 Structure of the book 6

CHAPTER TWO
KENYA'S PRE-2010 SYSTEM OF LOCAL GOVERNANCE
2.1 Introduction 8
2.2 Local governance during the colonial period in Kenya 9
2.3 The Independence Constitution and the Majimbo system 10
2.4 The local government system after independence 11
2.5 Local government challenges and decentralisation reforms in the 1990s 12
2.6 Conclusion 15

CHAPTER THREE
THE SEARCH FOR A DEVOLVED SYSTEM OF GOVERNMENT DURING THE CONSTITUTION MAKING PROCESS
3.1 Introduction 17
3.2 Devolution deliberations under the CKRC 18
Kenyans' views to the CKRC on devolution 18
CKRC's recommendations on devolution 20
3.3 The Committee of Experts' deliberations on devolution 21
The Harmonized Draft Constitution 22
Public views on devolution proposals by the Committee of Experts 23
3.4 Conclusion 23

CHAPTER FOUR

THE SYSTEM OF DEVOLVED GOVERNMENT UNDER THE CONSTITUTION OF KENYA 2010

4.1 Introduction 25
4.2 The constitutional significance of devolution in Kenya 25
4.3 County structures and institutions 27
The County Assembly 27
The County Executive 29
County public service and administration 31
4.4 County powers, functions and responsibilities 32
4.5 Devolved governance at the national level 35
The role of the national Parliament 35
The role of the national executive 36
The role of the Judiciary 37
The role of commissions and independent offices 38
4.6 National and county government relations 39
Laws that govern intergovernmental relations 40
Intergovernmental relations structures established through practice 43
4.7 Conclusion 44

CHAPTER FIVE

TRANSITION TO DEVOLVED GOVERNANCE

5.1 Introduction 45
5.2 The constitutional, legal, and policy framework for transition to devolution 45
5.3 The Inaugural County governments (2013-2017) 47
The role of IGRTC and pending issues in transition to county governance 51
5.5 Conclusion 52

CHAPTER SIX

FINANCING COUNTY GOVERNMENTS AND RESOURCE MOBILISATION

6.1 Introduction 53
6.2 The funding of county governments 54
Own source revenue 54
Equitable share 58
The Equalisation Fund and conditional grants 61
Loans and grants 62
6.3 Conclusion 63

CHAPTER SEVEN

COUNTY GOVERNMENTS AND DELIVERY OF HEALTH SERVICES

7.1 Introduction 64
7.2 Expansion of health infrastructure and facilities 65
7.3 Human resources for health 66
7.4 Improved healthcare and services 66
7.5 Community health services 69
7.6 Universal Health Coverage 70
7.7 The emerging impact of county government investments in health 72
7.8 Life changing stories in access to healthcare 73
7.9 Challenges in the realization of the right to health 75
7.10 Conclusion 76

CHAPTER EIGHT

IMPROVING ACCESS TO WATER AND SANITATION SERVICES

8.1 Introduction 77
8.2 The role of county governments in the provision of water and sanitation services 78
8.3 Water service provision 79
8.4 Success stories in the provision of water 80
‘Mai Mekoni’ water project in Lamu County 81
Kwambila Dam in Kathonzweni Ward, Makueni County 82
8.5 Water supply in urban and peri-urban areas 83
Kaimosi Water Plant in Vihiga County 84
Kericho water treatment plant 84
Improved water supply in the Kisumu City environs 85
8.6 Sanitation services 87
8.7 Challenges in the provision of water and sanitation services 88
8.8 Conclusion 89

CHAPTER NINE

TRANSFORMING EARLY CHILDHOOD EDUCATION IN KENYA

9.1 Introduction 90
9.2 Construction of ECDE facilities 91
9.3 Hiring of ECDE Teachers 92
9.4 Enrollment of children into ECDE facilities 92
9.5 Challenges in provision of ECDE services 94
9.10 Conclusion 95

CHAPTER TEN
ENHANCING AGRICULTURAL PRODUCTIVITY IN THE COUNTIES
10.1 Introduction 96
10.2 County Investments in Crop Farming 96
Avocado Seedlings 97
Village Based Advisors in Agriculture 97
Subsidized Agriculture Mechanized Services 98
10.3 County Investments in Animal and Fish Farming 99
"One cow, one homestead" initiative 99
Fish Hatcheries in Vihiga county 100
10.4 Conclusion 100

CHAPTER ELEVEN
ENHANCEMENT OF OTHER COUNTY SERVICES AND DEVELOPMENT
11.1 Introduction 101
11.2 Investment in roads and other infrastructure 101
11.3 Urban solid waste management 105
11.4 Environmental and natural resource management and protection 105
11.5 Building of markets and business places in urban areas 107
11.6 Strengthening farmers cooperatives and access to markets 110
11.7 Construction of processing plants for farmers 111
11.8 Technology and innovation in service delivery and development 113
11.9 Supporting business and enterprise 115
11.10 Conclusion 117

CHAPTER TWELVE
CITIZEN ENGAGEMENT AND PARTICIPATION IN DEVOLVED GOVERNANCE
12.1 Introduction 118
12.2 The legal and policy framework for public participation in county governance 119
Voting and participation in election 120
Participation in non-election development process- county planning 121
Participation in county budgeting 121
Participation in law making 122

12.3 Success stories of public participation in county governance 122
Structuring of public participation in the Makueni County Government 123
Project Sustainability Committee of Kwambila Earth Dam, Makueni County 125
Village Based Advisors in agricultural services in Kiambu County 126
Mobilising communities for climate change and adaptation in Laikipia and Vihiga Counties 127
12.4 Conclusion 127

CHAPTER THIRTEEN
GENDER AND SOCIAL INCLUSION IN DEVOLVED GOVERNANCE
13.1 Introduction 129
13.2 Gender equality, inclusion and representation in devolved government structures 130
County assemblies 130
County Executive 131
13.3 Gender and delivery of county government services 132
Gender and health services 132
Gender dimensions in water and sanitation and water services 133
Education and gender 133
Gender in county planning and development 134
Gender sensitive county facilities 134
13.4 Conclusion 135

CHAPTER FOURTEEN
KENYA AND THE FUTURE OF DEVOLUTION
Enhancing service delivery and development 136
Securing resources for service delivery and development 137
Devolution and national unity 137
Towards future of county governance and devolution 137

BIBLIOGRAPHY 138

LIST OF FIGURES

Figure 1: Graph showing the trend of own source revenue between 2013/14 and 2020/21 55
Figure 2: Total own source revenue by county between Financial Years 2013/14 to 2020/21 57
Figure 3: Total Equitable Share of County governments from FY 2013/14 to 2021/22 60
Figure 4: Equitable share per county from Financial 2013/14 to 2021/22 60
Figure 5: Kilifi Medical Complex 67
Figure 6: Facilities at the new Kilifi Medical Complex 67
Figure 7: A community health promoter during a house visit in Ahero, Kisumu County 70
Figure 8: Marsabit County Referral Hospital – Renal Unit 73
Figure 9: Differentiated Water Functions of National and County Governments 78
Figure 10: An elderly woman of Kizingitini Village in Lamu fetches water from her outdoor tap. 82
Figure 11:Kwambila Dam, Makueni County 83
Figure 12: Vihiga Water Treatment Plant 84
Figure 13: Kericho County water treatment plant 85
Figure 14: Kericho County water treatment plant and KIWASCO offices 86
Figure 15: NAWASSCOAL processing plant in Nakuru County 88
Figure 16: A worker NAWASSCOAL processing plant in Nakuru County 88
Figure 17: Obligations of National and County Governments on Provision of Education 90
Figure 18: School feeding programmes in West Pokot and Nairobi City County 93
Figure 19: ECDE Centre, Kakamega County 94
Figure 20: A farmer checks on avocado fruits in his farm in Gacanjiru, Murang'a County 98
Figure 21: Village based advisors in Kiambu County 98
Figure 22: A farm under the management of Village Based Advisors (VBAs) in Kiambu County 98
Figure 23: Vincent Shikombe at his home in Sheywe Ward, Kakamega County 100
Figure 24: Thwake Bridge in Makueni County 102
Figure 25: Mandera County Greening programme 103
Figure 26: Refurbished Nyayo Gardens in Nakuru City County 104
Figure 27: Kachok dumpsite in Kisumu County before and after rehabilitation 105
Figure 28: Segregation of waste at Dunga recycling plant in Kisumu County 106
Figure 29: The Bio-digester at Dunga recycling plant in Kisumu County 107
Figure 30:Oloitiptip Market in Kilifi town 108
Figure 31: Customers at Oloitiptip Market, Kilifi County 108
Figure 32: Ruiru Market complex in Kiambu County 109
Figure 33: Ruiru Market market sheds 109
Figure 34: A trader at Ruiru market sheds 110
Figure 35: Ice processing plant and cold storage in Kizingitini Village, Lamu County 111
Figure 36: Kalamba Fruit Processing plant in Makueni County 112
Figure 37: Kitui Textile Company (KICOTEC) Kitui County 112
Figure 38: Makueni County ICT Centres 113
Figure 39: Isiolo Youth Innovation Centre 114
Figure 40: The Vihiga GIS Lab 115
Figure 41: Delivery of drugs using drones in Kisumu County 115
Figure 42: Fishermen and women at the Turkwel Dam in West Pokot County 116
Figure 43: A creche in Chuka open air main Market, in Tharaka Nithi County 135

ABBREVIATIONS AND ACRONYMS

ADC	African District Council
ATC	Agricultural Training Centers
AMS	Agricultural Mechanization Stations
CDF	Constituency Development Fund
CoG	Council of Governors
CRA	Commission on Revenue Allocation
CoE	Committee of Experts on Constitutional Review
CBEF	County Budget and Economic Forum
CKRC	Constitution of Kenya Review Commission
CGA	County Governments Act
CIC	Commission for the Implementation of the Constitution
CRA	Commission on Revenue Allocation
CIF	County Intergovernmental Forum
CEC	County Executive Committee
CEBF	Constituency Education Bursary Fund
DORB	Division of Revenue Bill
DO	District Officer
DC	District Commissioner
DAC	District Advisory Committee
ECDE	Early Childhood Development Education
FPE	Free Primary Education Fund
HDC	Harmonised Draft Constitution
IGRTC	Intergovernmental Relations Technical Committee
IBEC	Intergovernmental Budget and Economic Council
JSC	Judicial Service Commission
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KCPE	Kenya Certificate of Primary Education

KUSP	Kenya Urban Support Programme
LNC	Local Native Council
LATF Act	Local Authority Transfer Fund Act
LASDAP	Local Authority Service Delivery Action Plan
MCA	Member of County Assembly
MOD	Ministry of Devolution
NAWASSCO	Nakuru Water and Sanitation Services Company
NDITC	National Development Implementation Technical Committee
NDICCC	National Development Implementation, Coordination and Communication Committee
NCGCCS	National and County Government Co-ordinating Summit
OCOB	Office of the Controller of Budget
OSR	Own-Source Revenue
PC	Provincial Commissioner
PFMA	Public Finance Management Act
PSC	Parliamentary Select Committee (on constitutional review)
PVCA	Participatory Vulnerability Capacity Assessment
REPLF	Rural Electrification Programme Levy Fund
RMLF	Roads Maintenance Levy Fund
RHDC	Revised Harmonised Draft
RDA	Regional Development Authority
SGBV	Sexual and Gender Based Violence
SRC	Salaries and Remuneration Commission
SWG	Sectoral Working Groups
SOCATT	Society of Clerks at the Table
TA	Transition Authority
TFDG	Taskforce on Devolved Government
TDGA	Transition to Devolved Government Act
VBA	Village Based Advisor (Agriculture)

FOREWORD

After decades of searching for a new Constitution, Kenyans woke up on 4 August 2010 to vote in a referendum to decide on a new constitutional dispensation. Kenyans chose to adopt the Constitution of Kenya 2010, which was promulgated on 27 August 2010.

The devolved system of government, which forms a central plank in the Constitution of Kenya 2010, holds the promise of a new Kenya. Specifically, Kenyans aspire to take charge of their collective destiny by participating in governance processes shaping their future. Furthermore, Kenyans hope to build a more united nation, and devolution provides the building blocks for nation-building.

For the last decade, Kenya has implemented the devolved system of government with the vision and mission of devolved governance in mind. While progress has been made in most critical aspects, implementation still needs to be improved. This book examines the country's journey towards realizing the fruits of devolution since 2013.

County governments are at the frontline of service delivery, development, and the pursuit of constitutional objectives and the purpose of devolution. In this regard, the Council of Governors has played a crucial role in harnessing the collective voice of counties and assisting most to enhance and perform their functions.

This book showcases the impact that devolution is beginning to have on the lives and livelihoods of Kenyans, as well as great plans and the future of devolution.

H.E. Anne M. Waiguru, EGH, OGW.
Chair, Council of Governors

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Ms. Mary Mwiti,
Chief Executive Officer, Council of Governors

PREFACE

This book opens readers, scholars, agents of democracy, current and previous governors, and promoters of people-centric democratic and development processes to Kenya's local governance journey. It broadly examines the effects of centralised decision-making, planning, and programming, whose culture of domination over local planning and governance is rooted in the colonial heritage that this country holds and slowly departs from.

After a long search for an appropriate local governance system, the country, through a referendum and on promulgation of the Constitution of 2010, settled for a devolved two-level government system comprising of constitutionally entrenched national and 47 counties. The process of choosing the two levels of government, and significantly, the deliberations and discussions that were exchanged in the entire process, illuminate the aspirations and vision that Kenyans have on devolution, similarly demonstrating its place in the constitutionalism of the country. These include enhancing accountability in governance, addressing inequity and inequalities in service delivery and development, and enhancing national unity.

The existence of the two distinct levels of government, and the fact that both are expected to pursue the same broader constitutional goals and objectives, presupposes a harmonious operation and co-existence. The necessity of cooperation is based on the fact that the two levels' sovereignty emanates from the same source, the people. Even more specifically, Article 6 (2) of the Constitution provides that both levels of government are distinct and interdependent and shall conduct their relations based on consultation and cooperation.

The 6-year transition period in two phases (2010-2013, 2013-2016) was important for ensuring that devolved governance is rooted in Kenya's constitutional governance. The devolved system of government required a fundamental change from the governance arrangement that existed before 2010. In many cases, this required cautiously establishing new institutions to maintain the delivery of essential services. While the process is not complete yet, the milestones achieved during the transition and the setting up of service delivery systems have enabled county governments to deliver services that are starting to impact the lives and livelihoods of the people. The rest of the book describes county governments' successes and emerging impacts.

CHAPTER ONE

INTRODUCTION

1.1 Background

On 4 August 2010, Kenyans voted overwhelmingly in a national referendum in favour of the current Constitution, promulgated on 27 August 2010 (CoK, 2010). Upon promulgation, the Constitution introduced fundamental changes to Kenya's governance and state structures that existed before August 2010. Critical to these changes was the comprehensive devolved governance system comprising 47 county governments and the National Government.

The Constitution recognizes that all power emanates from the people and is vested at the national and county levels.[1] The Constitution further provides that executive and legislative powers at the county level are vested in the County Executive and County assembly, respectively.[2] The Fourth Schedule to the Constitution provides two lists that detail the roles and responsibilities of each level of government, one being for the national government, while the other for the county government level. Further, the Constitution directs that the National government allocates a minimum of 15% of the total revenue collected annually to the counties to enable them to perform their functions. This is in addition to the county governments raising local revenue from taxes on functions allocated by the Constitution, besides service charges for the services they offer.

Implementation of the devolved system of government began soon after August 2010. Between then and March 2013, when the first county governments were elected into office, the country put in place measures to ensure the smooth transition from the pre-2010 system of local governance to the current system of county governments. This entailed the passing of new laws and policies to facilitate the entry of county governments and the repeal of old laws. The Constitution also provided for establishing institutions to guide the implementation of devolution and oversee the entry of county governments. The transition generally entailed establishing systems and structures that were required to enable county governments to start operations while restructuring national government institutions and structures to align with the devolved system of government.

The country has made remarkable steps and progress in the implementation of devolution, partly manifesting as three general elections held under the current Constitution (2013, 2017, and 2022) and county governments transitioning three county executives and their respective legislatures. Over these years, county governments have made significant investments in their areas of responsibility (health, education, agriculture, urban services, county planning, environmental management, etc). There is a marked improvement in structures for service delivery in these sectors as a result of the interventions of county governments.

[1]Article 1(1) Constitution of Kenya, 2010.
[2]Article 1(3) Constitution of Kenya, 2010.

While extensive arrangements were made to ensure the smooth entry of county governments and the transition to devolution, as a process, it has faced several challenges that have hampered the achievement of the objectives and purposes of devolution.

This book documents the journey of devolution that finds its cradle in the Constitution of Kenya (2010) and the commencement of county governments in March 2013. Kenyans universally endorsed the idea of devolving and sharing power. The reasons for the unanimous support by Kenyans for the principle of devolving power during the constitution-making process are well documented. These include the desire to access services and development at the local level, to ensure equity in the distribution of services, and to enhance accountability by those in leadership and governance positions. More importantly, the purpose and objectives of devolution are provided for in the Constitution. Article 174 captures the rationale for devolving power through a comprehensive list of objectives, giving the purpose of devolution. It is imperative to note that the objectives of devolved governments are the basis upon which the implementation of devolution is analysed and understood.

1.2 Objectives and purpose of the devolved system of government

Article 174 of the Constitution lists down nine objectives that the devolved system is meant to serve, these are:

a) To promote democratic and accountable exercise of power;

b) To foster national unity by recognising diversity;

c) To give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the state and in making decisions affecting them;

d) To recognise the right of communities to manage their own affairs and to further their development;

e) To protect and promote the interests and rights of minorities and marginalised communities;

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 functions and services, from the capital of Kenya;

i) To enhance checks and balances and the separation of powers.

Article 175 provides for the principles of devolved government, and these are: County governments shall be based on democratic principles and separation of powers; County governments shall have reliable sources of revenue to enable them to govern and deliver services effectively; and that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender.

The principles listed under Article 175 seek to further reinforce and reify the objects of devolution under Article 174. The effectiveness of county governments depends on whether they are allocated adequate resources to provide services and address the needs of their citizens. Furthermore, the requirements for gender equity in appointive and elective positions address the historical marginalization of women from governance and ensure equity in governance, representation, and decision-making.

In the context of Articles 174 and 175, the nine objectives can be summarized into five broad purposes that devolution is meant to serve, thus:

i. **Empowering communities at the local level to participate in development governance:** One limb of devolution is to enable people to participate in development besides taking charge of their affairs and influencing attendant decisions. The transfer of powers and resources to the county level aims to facilitate communities to participate in development by determining their priorities at the local level. County governments' proximity enables consultation with people at the county and ward level and to understand and respond to their needs and priorities. Furthermore, people's needs and preferences can differ from one local area/community or county to the next. This advantages county governments to facilitate people at the local level to participate in governance and to pursue their development agenda. Thus, county governments are expected to further decentralize functions to levels below the counties to reach all communities.

ii. **Enhancing equitable access to services:** Devolution is seen as an anti-dote to geographic discrimination, unequal access to services, and inequitable distribution of financial and technical resources. This is a departure from when Kenyans decried regional disparities in access to healthcare, water, education, and technologies and infrastructure distribution. It is assumed that devolution provides every Kenyan and resident an opportunity to realise their right to development as provided for in the Constitution and many other international instruments binding the country.

iii. **Devolved governance as building blocks to national unity:** Article 10 of the Constitution provides the foundational tenet of inclusivity, human dignity, diversity, good governance, and national unity. Devolution is one of those governance instruments that recognises and enhances national unity by recognition of diversity. This can be achieved by creating a sense of belonging and nationhood among Kenyans. Devolution facilitates all Kenyan communities' participation in governance and development. By creating 47 governments with resources and powers, the devolved system of government enables the expansion of development and service delivery to areas where Kenyans have never had access to development. Equitable services and development, alongside the opportunity to participate in governance for all Kenyans, lays the basis for all Kenyans to feel part of the nation, thereby enhancing inclusion and national unity.

Moreover, while the National government is responsible for developing national policies and laws that lay broad frameworks that apply in all 47 counties, individual county governments can develop their own implementation details that consider their unique circumstances and need not be similar to those used in other counties. In this manner, unity in diversity is realized.

iv. **Protection of minorities and marginalized communities:** The devolved governance system aims to ensure that all minorities and marginalized communities are protected and provided space to participate in governance. For this reason, county government structures (executive and assemblies) are expected to reflect the county's diversity and ensure that even those whose numbers may be too few to get them elected are nominated and are part of the political and governance structures. This will create national unity and ensure that all Kenyans, regardless of whether they are minorities or marginalized communities, can participate in governance.

v. **Accountability in governance:** The Constitution provides that the government and people in decision-making positions should do so in consultation with and while respecting the people's views. While devolution has enabled powers and resources to be located at the community level, it is essential that elected officials and county government officers serve the people's interests. This is why the objectives of devolution emphasize democracy and accountable exercise of power. The county-level powers are divided between the county executive and the county assembly. The county executive is required to implement programmes and perform functions according to the people's expectations. The county assembly is required to ensure (through a separation of powers framework) that the county executive remains true to the people's wishes. Furthermore, the separation of powers between the two levels of government (national and county) also enhances overall accountability between the two levels of government. It enables county governments to act as checks and balances on the national government.

1.3 Defining devolution

The Constitution of Kenya 2010 does not define the term "devolution" or the phrase "devolution of powers." Still, it uses the same word to describe the governance arrangements comprising the National and county governments. In general literature, the term devolution is used alongside other related terms such as decentralisation, de-concentration, and delegation; some experts identify devolution as a form of decentralisation.[3]

The term decentralisation, in turn, has been defined differently by different authors. Some authors define decentralisation as "the transfer of powers from the central government to lower levels in a political-administrative and territorial hierarchy."[4] Devolution has been

[3] Rondinelli DA et al. Decentralization in Developing Countries: A Review of Recent Experience (1984) 9-10.

[4] Agrawal, A and Ribot J. 1999. Accountability in Decentralization: A Framework with South Asian and West African Environmental Cases. The Journal of Developing Areas 33: 473-502.

defined as “a more extensive form of decentralisation”[5], and this implies that the extent of powers and resources transferred is more extensive or more defined in a devolved system of government. Another author equates Devolution with “political decentralisation.”[6]

The definitions above can be contrasted with other terms, such as “deconcentration” and “delegation,” which are defined as forms of decentralisation but appear weaker. For instance, deconcentration is defined as the “shifting of the workload from centrally located officials to staff or offices outside of the national capital.”[7] This implies that only workload is shifted, and there is no transfer of power and resources, as with devolution. An appropriate example of deconcentration is the former Provincial system of government, where District Commissioners were posted to the various districts but acted on the strict instructions from the Ministry where they were deployed.

Delegation, on the other hand, is defined as “the transfer of responsibility for specifically defined functions to structures that exist outside central government ... delegation takes place if a power that originally resides with the central government is being transferred to a subnational government”.[8]

From the definitions of the related terms above, **devolution may be considered a form of decentralisation; however, it is a more elaborate system that transfers powers and resources under which the lower units exercise greater control and autonomy from the centre.** In a devolved system of government, such as the Kenyan one, the subnational units exercise power and control over resources guaranteed to them by the Constitution. For example, while the system of local governments that existed before 2010 may be considered a form of decentralisation, the powers and resources that were vested in the 175 local authorities and the level of control and autonomy over the resources and powers is comparatively lesser than that of the current 47 county governments.

Indeed, since adopting the devolved system of government, there have been debates about whether Kenya is a federal system of government. The Supreme Court has stated that Kenya’s devolved structure “rests on a unitary, rather than a federal system of government”[9], and the Court of Appeal has also stated that “it is quite obvious and indeed clear…that although Kenya is a constitutionally devolved State, it does not have a federal constitution and that the county governments are not independent but semi-autonomous and an integral part of the unitary State, exercising delegated sovereign power for purposes of governance.”[10] In another case, the High Court has noted that “although Kenya is a unitary state, it has features of federalism in its 2010 Constitution”.[11]

[5] Litvack et al. Rethinking Decentralisation in Developing Countries (1998) 4-6.
[6] Oloo A ‘Devolution and Democratic Governance: Options for Kenya’ in Kibua TN & Mwambu G (eds) 2008 Decentralization and Devolution in Kenya: New Approaches 109.
[7] Rondinelli et al (1984) 10.
[8] De Visser (2005) 14.
[9] In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR.
[10] National Assembly of Kenya & nother -v- Institute of Social Accountability & 6 others [2017] eKLR, para 24.
[11] Royal Ballon Ltd v County Government of Narok [2018] eKLR

The debates about the meaning of devolution and the system adopted under the Constitution of Kenya 2010 indicate the significant and fundamental change brought about by the devolved system of government. **While there may be no agreement on the precise meaning of devolution in the Kenyan context, it is clear that the 47 county governments have greater autonomy and control over resources and powers allocated to the county level of government and for the purposes and objectives discussed earlier.** Indeed, some leading Kenyan scholars on constitutionalism and devolution have criticized the Supreme Court for characterizing Kenya's devolved system as unitary without any examination of the abundant literature on the topic.[12]

1.4 Structure of the book

The book is divided into fourteen chapters and deals with distinct but related themes and issues in the devolution journey. Chapter 1 provides a background to devolved governance in Kenya and opens a detailed discussion on the objects and purpose of devolution, the meaning of the term devolution, and the phrase "devolution of powers" in the Kenyan context.

Chapter 2 provides a brief history and analysis of the roots of the country's pre-2010 structures and culture of centralized governance and its persistence to the current period of devolution. While the country moved away from centralized government structures by adopting the Constitution of Kenya 2010, the culture of centralisation is a challenge to fully and effectively implementing devolved governance.

Chapter 3 is a reflection that interrogates and analyses the views and suggestions submitted by Kenyans on devolution during the constitution-making process that led to the adoption of the Constitution of Kenya 2010. Kenyans' concerns and the collective wishes they expressed regarding devolution were born of the challenges experienced under decades of ineffective and unaccountable centralized bureaucracy that sought to manage the provision of local services and development.

Chapter 4 provides a comprehensive discussion of the devolved system government, looking not just at county governance but also examining the broader constitutional processes that directly and indirectly affect devolution, including at the national level. The thrust in this chapter is devolution being an overarching theme in Kenya's constitutional governance, and the implementation of the system has to be given this broad approach, as opposed to narrowly focusing on county systems of governance only.

Chapter 5 discusses the processes in place to facilitate the entry of county governments from March 2013. The transition to county governance started much earlier, soon after

[12] YG Ghai, 'Comparative theory and Kenya's Constitution' in CM Bosire & W Gikonyo (eds) Animating Devolution in Kenya: The Role of the Judiciary (Commentary and Analysis on Kenya's emerging devolution jurisprudence under the new Constitution) IDLO and Judiciary Training Institute (2015), p.22. JK Mutakha 'Kenya's model of devolution', in Intergovernmental Relations Committee (IGRTC) Deepening devolution and constitutionalism in Kenya: a policy dialogue' (2021) pp.71-73.

promulgating the Constitution of Kenya 2020. The chapter concludes that many issues that the country set out to achieve in the transition are still pending and are a challenge to the implementation of devolution.

Chapter 6 discusses the financing and resource mobilisation channels available to county governments to fund their functions.

Chapters 7 to 11 are dedicated to the milestones and successes in the implementation of the devolved system of government, particularly service delivery efforts in health, water, sanitation, education (early childhood), agriculture, and other county services. Chapter 12 emphasises the place of public participation in county governance since the idea and principle of devolution is all about the involvement and inclusion of people and governance. It highlights the avenues for the public to get involved in governance, the impact and successes, and the challenges facing citizenry participation in devolved governance. While Chapter 13 discusses gender inclusion, chapter 14 provides a concluding discussion.

CHAPTER TWO

KENYA'S PRE-2010 SYSTEM OF LOCAL GOVERNANCE

2.1 Introduction

This chapter briefly highlights the country's history of local governance and the issues that have defined the effectiveness and challenges of decentralisation and local governance from colonial rule until the adoption of the Constitution of Kenya 2010.

Before 2010, Kenya had a system of local government comprising 175 local authorities provided for under the then Local Government Act,[13] recognising four categories: the municipalities, county, town, and urban councils. These structures had their origin in the local government system that was adopted during the colonial period.

The local authorities existed alongside the system of Provincial Administration (now renamed the National Government Administration in the post-2010 period) that was composed of Provincial Commissioners, District Commissioners, District Officers, chiefs, and village headmen.[14] This too had its roots in the colonial system of government and was the first administrative mechanism set up by it, throughout the entire colony, to assist in the effective governing of the territory.[15]

With increased European settlement in the Kenyan colony, there were demands for representation, leading to establishment of local councils in the European-settled areas. Similarly, Local Native Councils (LNCs) were established in the African reserves. These formed the basis of the colonial period's racially segregated local government system. At independence, the local government system in the African reserves and the European settled areas were merged to form the local government structures that remained until 2010, when they were repealed by the Constitution of Kenya 2010.

In the run-up to independence, the African leaders who participated in the independence talks were divided on what form of government the country would have after gaining independence. One group of leaders wanted a centralized and unitary system of government. In contrast, the other wanted a fully federal system of government.[16] The compromise between the two political groups (with the British colonial government as the mediator) was the establishment of a regional system of government that was generally a semi-federal system and structure of government known as *Majimbo*.[17] However, after KANU, which was opposed to any form of devolution of power, won the independence elections, it oversaw the dismantling of the Majimbo system. It replaced it with a strongly centralized system of government.[18] Local government structures that were initially under

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[13] Cap. 265 Laws of Kenya (repealed).

[14] Gertzel C 'The Provincial Administration in Kenya' (1966) 4 (3) Commonwealth & Comparative Politics 201-215.

[15] *ibid.*

[16] Maxon RM Kenya's Independence: Constitution-Making and End of the Empire (2011) 36-37.

[17] *ibid*

[18] G Muigai (with Dan Juma) Power, Politics and Law: Dynamics of constitutional change in Kenya, 1887-2022, (2022), p. 196-204.

the regional governments were placed under the control of the central government (through a Ministry in charge of local government).

2.2 Local governance during the colonial period in Kenya

Before the entry of colonial rule, the communities and people in the land and territory of present-day Kenya lived in separate regions and areas. The people had communal leadership structures that relied on elders, traditional chiefs, and other traditional community and clan-based leadership structures. While there were no overarching leadership and governance structures that brought the different communities together, the communities co-existed and had social interactions, and even economic activities such as barter trade.[19]

The entry of colonial rule in the 1890s led to the consolidation of the present-day territory of modern Kenya and marked the beginning of formal governance structures.[20] While the Kenyan territory was declared as an area of British influence from the 1870s, it was not until 1895 that the British Government formally took over its administration and set up administrative structures throughout the territory.[21] The colonial government established regions (Provinces) and districts that were headed by Provincial Commissioners and District Commissioners respectively.[22]

To ensure effective control at the local level, the British government passed a law (The Village Headman Ordinance of 1902) which empowered the Provincial Commissioner to appoint village headmen.[23] In 1912, another colonial law, the Native Authority Ordinance, was passed, which expanded the powers and functions of village headmen. The 1912 ordinance also gave powers to the Provincial Commissioner to appoint chiefs, under whom village headmen or village councils would operate.[24]

The broader system of local government (distinct from the system of Provincial Administration) followed after the establishment of provinces and districts. From 1905, European settlers who had arrived in Kenya formed informal committees in areas of the territory set aside for European settlement. The committees were meant to represent the collective interests of farmers and other settlers and negotiate on behalf of the settlers with the colonial government.[25] In 1919, these informal committees were formally established as District Advisory Committees (DACs), and the following year (1920) the Committees were charged with a mandate of maintaining roads within the European (rural) areas in the colony.[26]

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19 Ndege PN 'Colonialism and its legacies in Kenya' Lecture delivered during Fulbright – Hay Group Project abroad programme, Moi University, Main Campus 5 July-6 August 2009

20 *ibid.*

21 Ghai YP & McAuslan JPWB Public law and Political Change in Kenya (1970) 5.

22 *ibid.*

23 Regulations No. 22 of 1902 (Village Headmen).

24 See Ghai & McAuslan (1970) 40; Akivaga et al. Local Authorities in Kenya (1981) 24-25.

25 Smoke P Local Government Finance in Developing Countries: The Case of Kenya Nairobi: Oxford University Press (1994) p. 65-66.

26 *ibid.*

In 1928, the colonial government passed the District Councils Ordinance, which transformed the District Advisory Committees into local authorities and provided for elective positions. However, these councils only existed in areas that were set aside for European settlement and were all composed of Europeans, except the Nyanza District Council, which had one Asian representative.[27]

In African areas, the Native Authority Ordinance of 1912 was amended in 1924 to provide for Local Native Councils (LNCs).[28] However, unlike the European areas where the settlers elected members, the members of the LNCs were appointed by the Provincial Commissioner. The District Commissioner had control over the affairs of the LNC, including recommending to the PC the removal of members considered "errant" by the colonial government.[29] Pressure for further reforms led to another amendment in 1937 that provided for the election of representatives to the LNCs. The LNCs were also mandated to carry out services in the African reserves. Among the functions allocated to LNCs included: health; education; land use; establishment and regulation of markets; provision, regulation, and maintenance of food and water supplies; and matters such as agriculture and livestock.[30]

In 1952, the colonial government reformed the local government system significantly. The reforms saw the transformation of Local Native Councils to African District Councils (ADCs). The ADCs were established as professional local authorities, although their functions mainly remained the same. The ADCs remained primarily in place until independence.[31]

The local government system in the European areas remained the same until 1952 when a two-tier local government system was introduced. The two-tier structure, borrowed from England, consisted of county councils created out of the former district councils, and below were established urban and rural councils. This structure remained until independence in 1963, when the local government system was unified. At independence, the racially segregated system of local government was unified, and regulations were passed to govern the unified system of local government.

2.3 The Independence Constitution and the *Majimbo* system

Towards the end of colonial rule, there were negotiations between the departing colonial government and the Kenyan African leaders on the system and type of government to be formed after independence. As talks on the independence constitution progressed, two political groups emerged that had opposing views on the form of government to be adopted in the Independence Constitution.

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[27] Oyugi WO Local Government and Development in Kenya (1978) p. 15-18.
[28] *Ibid.*
[29] *Ibid, 27*
[30] Oyugi WO 'Local government in Kenya: a case of institutional decline' in Mawhood P (ed) Local Government in The Third World: The Experience of Tropical Africa (1993) 126.
[31] Oyugi WO Local Government and Development in Kenya (1978) p. 15-18.

One group, led by the Kenya African National Union (KANU) and represented by leaders such as Tom Mboya, James Gichuru, Oginga Odinga, and others, called for a centralized government. They argued that this was necessary for maintaining the much-needed unity and development after independence.[32] The second group, led by the Kenya African Democratic Union (KADU), advocated for a federal system of government. KADU leaders such as Ronald Ngala from the Coast region and Daniel Moi from the Rift Valley, and Masinde Muliro from the Western region supported a federal system of government on the basis that this would enable each region to pursue its development priorities and give communities an opportunity, through the region, for self-rule.[33]

When Kenyan leaders met at the independence talks that were held at the Lancaster House in London, an agreement was reached to have a semi-federal system of government (*Majimbo*).[34] The Independence Constitution provided for the establishment of eight regions (Coast, North Eastern, Rift Valley, Nyanza, Western, Eastern, Central, and Nairobi (the capital) as a special region). Each of the regional governments was to be headed by a President who the representatives in the regional assembly indirectly elected.[35]

The Constitution created a civil service led by civil secretaries to the regions in charge of public administration. During the transition to independence, the Provincial Commissioners from the colonial era were to act as heads of civil service in the regions.[36]

At the national level, the Senate represented the regions that were part of Parliament. The senators were elected from the 40 districts, and the Nairobi region (total of 41 senators) represented the interests of the regions (much the same as the current Senate and the 47 counties).[37]

However, this system of government lasted only a short time. The KANU government, which won the independence election, frustrated the operationalisation of the *Majimbo* and finally sponsored a series of constitutional amendments in Parliament that weakened the regional system of government before eventually abolishing it in 1966.[38]

2.4 The local government system after independence

At independence, Local Government Regulations were developed, which guided the operations of the local authorities that were unified from racially segregated local

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[32] Okoth-Ogendo HWO 'The Politics of Constitutional Change in Kenya since Independence, 1963-69' (Revised version of a paper presented in January 1971 at St. Anthony's College, Oxford, United Kingdom and first published in African Affairs 9-34) in Report of the Constitution of Kenya Review Commission, (Volume Five Technical Appendices Part I) (2003) 277.

[33] *Ibid.*

[34] Section 91, Independence Constitution; Part II of Schedule 11 to the Independence Constitution, the regions were Western, Nyanza, Coast, Rift Valley, Central, Eastern, North-Eastern, and Nairobi.

[35] Sections 92, 94 Independence Constitution.

[36] Section 116, Independence Constitution.

[37] Section 240 (1) (d) Independence Constitution.

[38] G Muigai (with Dan Juma) Power, Politics and Law: Dynamics of constitutional change in Kenya, 1887-2022, (2022), p. 196-204.

government structures of the colonial era.[39] The regulations remained in place until the Local Government Act was passed in 1977.[40] In the post-independence period, the four types of local governments were maintained.

First, county councils generally corresponded to the 40 administrative district boundaries established across the country. Secondly, major urban areas became municipal councils managed separately from the county councils. Thirdly, town councils were established for the smaller urban areas. Fourthly, urban councils (also referred to as county divisions) were established for much smaller areas that could later grow into town councils. Nairobi remained a city council under a Royal Charter of 1952.

Functions that were performed by the local authorities included: health, education, road maintenance, markets, slaughterhouses, water and sanitation, and street lighting. In practice, the pre-2010 local authorities engaged in garbage collection, maintenance of markets, and maintenance of local roads. A few larger and older municipalities ran primary schools and health services.[41] There needed to be more differentiation of the roles performed by the different local authorities. Furthermore, the local authorities required administrative approval by the central government, through the Minister of Local Government, to perform any of the functions.[42]

The Minister of Local Government had extensive powers over the local authorities, which included: the power to alter boundaries, create more local authorities, dissolve any local authority, hire senior staff, and exclusive power to authorise even minimal operational expenditure for the local authorities. In 1963, there were 39 county councils and seven municipalities, and by 2010 when the current Constitution was promulgated, there were 175 local authorities (one city council, 45 municipal councils, 67 county councils, and 62 town councils).[43]

2.5 Local government challenges and decentralisation reforms in the 1990s

Post-independence local governments faced several challenges highly linked to centralisation policies that impacted their operations and effectiveness, particularly limiting their autonomy. For example, while local governments were in charge of health services, the newly independent government decided to scrap hospital user fees without consultation with local governments.[44] The central government also directly negotiated with the teachers' union for salary increments without involving local authorities. Yet, local authorities were in charge of paying the salaries.[45] Local authorities generally struggled with performing

[39] Oyugi WO 'Local government in Kenya: a case of institutional decline' in Mawhood P (ed) Local Government in The Third World: The Experience of Tropical Africa (1993) 126.

[40] Local Government Act, Cap. 265 Laws of Kenya (repealed).

[41] These include the former Nairobi City Council, Eldoret Municipality, and Mombasa Municipal Council.

[42] Republic of Kenya 'Report of the Commission of Inquiry on Local Authorities in Kenya: A strategy for local government reform in Kenya' (1995)

43 H Mboga, Understanding the local government system in Kenya: a citizens' handbook (Institute of Economic Affairs) (2009), p. 11-12.

44 Oyugi WO Local Government and Development in Kenya (1978) p. 25-27.

45 *Ibid.*

their services as a result of a series of central government decisions and the underfunding of local authorities.[46] In 1969, the central government took over most of the functions that were performed by the struggling local authorities.[47]

The functions taken over by the central government in 1969 included primary and secondary education, health services, and roads and infrastructure; the functions were vested in the respective sectoral ministries at the national level.[48] The transferred functions accounted for around 80 percent of the total revenue for local authorities.[49] Without replacement of the vital revenue lost through the transfer, local authorities were severely affected.[50] Furthermore, the transfer of crucial local services such as education, health, and roads rendered the local authorities irrelevant to the pressing needs of the people.[51]

After the transfer of functions in 1969, local authorities relied on central government grants and Graduated Poll Tax (GPT); a surcharge that was imposed on specified personal incomes and remitted to local authorities.[52] However, the grants and the GPT were abolished in 1973 and 1974 respectively.[53] It was not until 1989 that the government introduced the Local Authority Service Charge (LASC) to assist local authorities to raise revenue for service delivery.[54] However, this intervention came in late as most local authorities were in fiscal and financial crises as a result of years of neglect by the central government, and weak and undependable sources of revenue.[55]

Meanwhile, the central government attempted to revamp the Provincial Administration structures and make the districts the focal points of development planning and sectoral service delivery.[56] This was tried in the 1970s through Special Rural Development Programmes (SRDP) and the District Focus for Rural Development (DFRD) from 1983.[57] However, the main challenge with this model of development planning is that it was dominated by civil servants at the local level, who were not accountable to the citizens.[58] Centralized decision-making, bureaucratic inefficiencies, and discordant local and national planning, made it difficult for the effective implementation of programmes at the local level.[59]

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[46] Southall R & Wood G 'Local government and the return to multi-partyism in Kenya' (1996) 95 African Affairs 509.

[47] Vide the Local Government (Transfer of Functions) Act, 1969.

[48] Hal K. Colbatch 'Some political implications of service provision: Roads and schools and health services' Institute of Development Studies, University of Nairobi, Working Paper No. 79 (February 1973) 8.

[49] Oyugi WO Local Government and Development in Kenya (1978) p. 25-27.

[50] Southall R & Wood G 'Local government and the return to multi-partyism in Kenya' (1996) 95 African Affairs 509.

[51] *Ibid.*

[52] Oyugi WO 'Local government in Kenya: a case of institutional decline' in Mawhood P (ed) Local Government in The Third World: The Experience of Tropical Africa (1993).

[53] Oyugi WO Local Government and Development in Kenya (1978) p. 25-27.

[54] Oyugi WO 'Local government in Kenya: a case of institutional decline' in Mawhood P (ed) Local Government in The Third World: The Experience of Tropical Africa (1993).

[55] *Ibid.*

[56] Wallis M 'District planning and local government in Kenya' (1990) 10 Public Administration and Development 437-452

[57] Chitere P & Ireri O 'District Focus for Rural Development as a decentralized planning strategy: An assessment of its implementation in Kenya' in Kibua TN & Mwabu G (eds) Decentralization and Devolution in Kenya: New Approaches (2008) 9.

[58] Tostensen A and Scott JG Kenya Country Study Bergen – Norway: The Chr. Michelsen Institute (1987), quoted in Chitere & Ireri (2008) 35

[59] *Ibid.*

Significant attempts were made in the mid-1990s to reform the local government system.[60] The reforms included the enactment of the Local Authority Transfer Fund Act (LATF Act),[61] which replaced the Local Service Charge. LATF provided for 2-5 percent of the national income tax to be allocated to local authorities.[62] A policy was prepared to guide the allocation to local authorities; the Local Authorities Service Delivery Action Plan (LASDAP).[63] The LASDAP sought to ensure community and public participation in project identification and prioritisation, transparency, the appropriate allocation between recurrent and development expenditures, and general efficiency, as a condition to accessing funds.[64]

The local government reforms, which the World Bank supported, led to some progress in the local authorities. The local authorities got more revenue to boost service delivery.[65] The conditions under LASDAP, such as having service delivery plans in place and meeting statutory obligations such as remittance of statutory deductions and public participation bore some fruit.[66] However, the reforms were confronted by a centralised bureaucracy, especially at the Ministry of Local Government, which slowed down reforms and affected efficiency.[67]

The challenges experienced by the local authorities led to a rapid decline in the provision of local services. Essential services such as water supply, waste management, and other urban services suffered from neglect. Parliament enacted the Constituency Development Fund Act in 2003 to plug this gap. The Fund comprised 2.5 percent of national revenue and funds disbursed through parliamentary constituencies.[68] Regulation and management of the Fund was by a CDF Board. Still, MPs had the ultimate decision-making power on all aspects of the Fund, including funding proposals. The MP was the patron of the Fund and was in charge of coordinating community participation in identifying projects and submitting the same to the projects committee, which in turn forwarded them to the national CDF Board.

The fund enabled the provision of essential services, such as health, education, and water, especially in rural and marginalised areas of the country.[69] While the active involvement of Members of Parliament in local projects brought political visibility to local development, it transformed national legislators to providers of local services, a competence traditionally

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[60] Kenya Local Government Reform Programme commenced in 1995 under the Ministry of Local Government.
[61] Act No 8 of 1998.
[62] Ibid, Section 5
[63] Cifuentes M 'Better services for all: The impact of LASDAP in an informal settlement in Nairobi' in Kibua & Mwabu (2008) 239.
[64] Oyugi LN & Kibua T 'Planning and budgeting at the grassroots level: The case of Local Authority Service Delivery Action Plan' in Kibua & Mwabu (2008) 202.
[65] *Ibid.*
[66] *Ibid.*
[67] Tostensen A and Scott JG Kenya Country Study Bergen – Norway: The Chr. Michelsen Institute (1987), quoted in Chitere & Ireri (2008) 35.
[68] Constituency Development Fund Act, 2003.
[69] Wachira K '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.

left to lower levels of government, such as the local authorities.[70] Indeed, studies have demonstrated that CDF had the structural effect of weakening local authorities by creating "a new local bureaucracy that then entered into competition with the Local authorities."[71]

After the promulgation of the Constitution of Kenya 2010, the constitutionality of the Constituency Development Fund was challenged in court. The parties that brought the case argued that the objectives of the fund (supporting local service provision) conflicted with the objectives of the devolved system of government.[72] In August 2022, the Supreme Court declared the CDF unconstitutional because the fund was in breach of the principle of separation of powers (primarily due to the role of legislators in its operations) and had the potential of infringing on county government functions.[73]

The period before 2010 witnessed a proliferation of nationally/ centrally managed funds dedicated to various aspects of local service delivery. This was in a bid to address the local service delivery gap that was left after the collapse of the local government system. Funds that were established during this period included the Free Primary Education Fund (FPE), the Constituency Education Bursary Fund (CEBF), the Rural Electrification Programme Levy Fund (REPLF), and the Roads Maintenance Levy Fund (RMLF), among others.

2.6 Conclusion

The pre-2010 system of local government and decentralisation was implemented in a governance culture that was defined by central government domination and the subordination of local authorities to the central government. The attempts to reform local government and make districts the focal points of development planning and service delivery largely failed due to centralized local planning and development control.

More significantly, decades of centralised planning and decision-making created a governance culture of domination over local planning and development processes. This culture has emerged as a challenge to implementing the devolved system of government, whose core features include county autonomy in decision-making and performance of their functions and a new governance culture based on cooperation between the national government and county governments. The World Bank, for instance, has remarked that "National MDAs [Ministries, Departments, and Agencies] are finding it difficult to make the transition from a former "command and control" line ministry *modus operandi* to a quasi-federal model … they are accustomed ordering the introduction of policy or standards rather than acting as national custodians who need to "negotiate" policy implementation and regulation with semiautonomous county governments."[74]

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[70] Rocaboy Y, Vaillancourt F & Hugounenq R 'Public finances of local government in Kenya' in Dafflon B & Ladies T(eds) The Political Economy of Decentralization Sub-Saharan Africa: A New Implementation Model in Burkina Faso, Ghana, Kenya, and Senegal New York: World Bank (2012) 161-206

[71] *Ibid.*

[72] The Institute for Social Accountability and another v The National Assembly and 3 others, Supreme Court Petition No. 1 of 2018.

[73] *Ibid.*

[74] Abdu Muwonge, Timothy Stephen Williamson, Christine Owuor, and Muratha Kinuthia Making Devolution Work for Service Delivery in Kenya World Bank (2022), p. 55.

Indeed, as county governments perform their functions and seek to activate their full roles as provided for in the Constitution of Kenya 2010, the governance culture created by the pre-2010 constitutional and political order may continue to present a challenge. This means that there has to be a deliberate effort to transition from this culture and to learn and embrace the workings of the devolved system of government, as provided for under the Constitution of Kenya 2010 and enabling laws and policies.

CHAPTER THREE

THE SEARCH FOR A DEVOLVED SYSTEM OF GOVERNMENT DURING THE CONSTITUTION MAKING PROCESS

3.1 Introduction

This chapter briefly analyses the mandate and responsibility that the CRKC and the CoE had concerning the search for a system of devolved government, a summary of the views and opinions of Kenyans regarding devolution, and the proposed structures of devolution that were recommended by the CKRC/ National Constitutional Conference, and the CoE.

After years of agitation for constitutional and political change in Kenya, the process of review and search for a new constitutional dispensation commenced in 1998 with the establishment of the Constitution of Kenya Review Commission (CKRC) to collect views from Kenyans and provide recommendations for the new Constitution. The CKRC went around the country gathering views from Kenyans on a new constitutional dispensation. The process resulted in a draft constitution (the CKRC Draft) that was subjected to a national Constitutional Conference in 2003.

The deliberations and discussions at the constitutional conference resulted in another draft, the National Constitutional Conference Draft, adopted by the delegates at the National Constitutional Conference in 2004 (popularly known as "the Bomas Draft" named after the conference venue, the Bomas of Kenya).

The Office of the Attorney General reviewed the Bomas Draft to become the Constitution Bill 2005, which was subjected to a referendum in November 2005. However, the Draft Constitution Bill (popularly known as the Wako Draft, named after the then Attorney General Amos Wako) was defeated in the November 2005 national referendum.

The Constitution-making process was jump-started in 2008 as part of a long-term solution to the widespread violence in the country in the aftermath of disputed presidential election results that were announced in late December 2007. The 2008 constitution-making process was part of efforts to address the root causes of the political conflict that was witnessed in the country and to consolidate peace and long-term stability. The process was led by a Committee of Experts (CoE) composed of local and international experts. This time, the Constitution Bill that was subjected to a referendum in August 2010 was endorsed overwhelmingly by Kenyans with a 68 percent "YES" vote.[75]

Throughout the constitution-making process, Kenyans remained steadfast and consistent in their demand for the devolution of powers and resources from the centre. Indeed, the CKRC and the CoE both noted that while Kenyans were divided on what form or structure the devolved system of government should take, they were unanimous that the principle of

[75] Alan Masakhalia Wanga,' The Kenyan Constitutional Referendum of 4 August 2010: a case study "Democracy International (April 2011) at p. 2, accessible at https://www.democracy-international.org/sites/default/files/PDF/Publications/2011-04-28_kenyareferendum.pdf.

devolution and sharing of power had to be a fundamental part of the new constitutional dispensation; Kenyans would accept any form of government other than a centralized system of government.[76]

3.2 Devolution deliberations under the CKRC

The Constitution of Kenya Review (CKR) Act, which in its architecture recognised people's participation in the governance of the country, including devolution and exercise of power, and being the law that guided the Constitutional review process, mandated the CKRC and CoE to collect and collate the views of Kenyans on devolution and ensure adequate public participation and consultation in the review process.[77] This law provided a threshold upon which the two institutions were to base this critical constitutional review and making process. First, they were to facilitate Kenyans an opportunity to examine various structures and systems of government, including federal and unitary ones, and recommend one that could fit Kenya appropriately.[78] Secondly, they provide Kenyans with adequate opportunity to examine and review the place of local government in the Constitutional organisation of the Republic and the degree of devolution of powers to local authorities.[79]

Thirdly, and as part of their mandate, the two constitutional making bodies were to ensure that the review process guaranteed peace, national unity, and integrity, in addition to respecting ethnic and regional diversity besides community rights.[80] Even further, the law demanded of CKRC and CoE to adhere to principles of constitutional governance, respect for human rights, gender equity. Economic, social, religious, political, and cultural development.[81]

In the afore-described context, CKRC established extensive structures for public consultation during the CKR process, which included offices in all the then 210 parliamentary constituencies across the country and regional offices in all eight former provincial headquarters. The CKRC also facilitated numerous public meetings and stakeholder forums where views on constitutional review were gathered.[82]

Kenyans' views to the CKRC on devolution

As the CKRC went around the country seeking Kenyans' views, the Commission noted widespread feelings of "marginalisation and victimization due to political affiliation" and "unjust deprivation of resources."[83] Members of the public who spoke to the CKRC

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[76] Oyugi WO 'The Search for an appropriate decentralisation design in Kenya: Historical and comparative perspectives' in Kithure K & Ambani A (eds) The Anatomy of Bomas: Selected Analyses of the 2004 Draft Constitution of Kenya (2005) 75.
[77] Section 20 of the CKRC Act, 1998.
[78] Section 17 (d) (ii) CKRC Act 1998
[79] Section 17 (d) (vi) CKRC Act 1998.
[80] The Final Report of the Constitution of Kenya Review Commission (2005) 41-42.
[81] Section 17 (d) (iii); The Final Report of the Constitution of Kenya Review Commission (2005) 45.
[82] The Final Report of the Constitution of Kenya Review Commission (2005).
[83] The Final Report of the Constitution of Kenya Review Commission (2005) 234.

believed that this might be remedied through the devolution of powers and resources that can facilitate participation in governance and the sharing of resources for all Kenyans.[84]

While Kenyans supported the establishment of regional and local levels of government in a devolved structure, a clear majority of views submitted to the CKRC specifically called for the locating of powers and resources at the local level nearest to communities.[85] Furthermore, members of the public took cognisance of the challenges that the then local authorities faced leading to calls for "strengthened local government to support the state in local administrative, management and development activities."[86]

In context, Kenyans had a chance to examine the options of a federal system. The CKRC noted sections of the public, mainly from the Coast, North Eastern, and Rift Valley regions, called for a regional system of government with federal-like features, akin to the independence-era *Majimbo*.[87] The rest of the public in regions like Central, Nairobi, Eastern, Western, and Nyanza called for a devolved system of government, with emphasis on transfer of resources to the local level.[88] However, in all cases, and perhaps due to the complexity of devolution structures, there were no detailed views on what form the devolved system of government should take.

There were strong views calling for devolved governments to control/regulate land.[89] Views on the transfer of the management and administration of land to regional governments were motivated by historical land injustices that communities faced during the colonial era and after independence.[90] The people told the CKRC that there should be mechanisms for local community involvement in land and other community resource management.[91] Members of the public also called for formal recognition of traditional leadership structures in the devolved system of government.[92]

Lastly, with regard to the Provincial Administration system, Kenyans told the CKRC that the system should either be abolished or restructured by making it accountable to the public.[93] Concerns that Kenyans raised against the pre-2010 Provincial Administration included the fact that apart from the chiefs and sub-chiefs, the provincial administrators were appointed from outside and had little knowledge of local issues and concerns.[94] People specifically recommended that representatives of the Provincial Administration at the local level, such as DCs, District Officers (DOs), chiefs and assistant chiefs should be elected in order to enhance accountability.[95] The people also told the CKRC that the Administration's close association with the then ruling party (KANU) was an obstacle and that the elections

[84] *Ibid.*
[85] The Final Report of the Constitution of Kenya Review Commission (2005) 232.
[86] *Ibid,* 83
[87] The Final Report of the Constitution of Kenya Review Commission (2005) 237.
[88] *Ibid.*
[89] The Final Report of the Constitution of Kenya Review Commission (2005) 235.
[90] *Ibid.*
[91] *Ibid.*
[92] *Ibid.*
[93] The Final Report of the Constitution of Kenya Review Commission (2005) 234-237.
[94] *Ibid.*
[95] *Ibid.*

in the past, heavily relied on the administration.[96] Specific grievances against the Provincial Administration (PA) included: refusal to co-operate with the local authorities and ignoring their views, denying local authorities public funds and licenses for meetings.[97]

CKRC's recommendations on devolution

In its final report, the CKRC recommended a gradual process of abolition of the PA and transfer [of] its functions to a new local government system.[98] If retained, the CKRC recommended that the Provincial Administration should be made accountable and answerable to the people, through elections and other mechanisms.[99] However, with regards to the claims over land and the specific demands to devolve land administration from the national level to the lower levels, the CKRC observed that land issues had complex historical grievances which required a distinct and separate process that would examine the issues holistically and make appropriate recommendations.[100]

The CKRC developed a draft towards the end of 2001, which incorporated Kenyans' views on the devolved system of government. The CKRC Draft provided for five levels of government: national; provincial; district, locational; and village government.[101] The regional level was to be composed of eight provincial governments and 70 district governments (including Nairobi as a special district).[102] Communities at the village level were to decide the leadership structure of the village government, that is, whether it was to be a council of elders or local elected persons.[103] Representatives from the village government would constitute locational governments. In line with the majority views, the district government was to be the main point of devolution of powers, and it was justified that the district level would be close enough to the communities.[104]

Concerning functions, the provinces were to coordinate district activities and take care of regional-scale development. The functions of district governments were provided as local service delivery, including urban service, garbage collection, health services, and district planning, among other functions, and cities and municipalities had the status of district governments. At the national level, Parliament was to have a second chamber named the National Council, which was to be composed of elected members from the 70 districts to represent the devolved units. The CKRC draft also proposed to abolish the Provincial Administration.[105]

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[96] *Ibid.*
[97] *Ibid.*
[98] CKRC (2005) 236.
[99] *Ibid*
[100] CKRC (2005) 271.
[101] Clause 215, CKRC Draft (2001).
[102] *Ibid.*
[103] *Ibid*
[104] *Ibid*
[105] Clause 223, CKRC Draft (2001).

The CKRC Draft was subjected to discussions at the National Constitutional Conference. The delegates examined the CKRC proposals regarding devolution and the sharing of powers. After lengthy deliberations, the National Constitutional Conference adopted, in March 2004, the "Bomas Draft." The draft eliminated the "village government" level and remained with the national, regional, district, and location governments.[106]

The district councilors were to be directly elected by voters, and the Regional Assembly was to be composed of persons nominated from district councils. The location government, the lowest level, was to be composed of elected representatives in the locational council and an elected location administrator.[107] Nairobi was made a "special region. The Bomas Draft created 14 regions, including Nairobi, and 68 district governments.[108]

The Bomas Draft was subjected to discussions in Parliament and handed over to the Office of the Attorney General for redrafting and publishing a Proposed Constitution Bill ahead of the referendum. However, in redrafting and publication, numerous fundamental changes were made to the draft, especially the devolution provisions.

First, the Wako Draft did not have the regional and locational levels of government, and the district level was the only recognised level below the national government.[109] Secondly, provisions on instances where district laws could prevail over national laws were deleted and the "Wako Draft" provided that national law shall prevail over district laws in case of conflict.[110] Thirdly, the Senate that was provided for in the Bomas Draft as the upper house[111] was also eliminated and the Wako Draft provided for a unicameral legislative structure.[112] In place of the Senate, the Wako Draft established a loose structure referred to as "National Forum for District Governments and Other Fora" with no clear role.[113] The Wako Draft was defeated by a 58 percent vote in the national referendum held in November 2005.[114]

3.3 The Committee of Experts' deliberations on devolution

The CoE was established in 2008 to assist in completing the constitutional review process. The push for a new constitution was informed by the belief that some of the root causes of the violence that claimed over 1 300 lives and caused the displacement of over 500,000 people could be addressed through a new constitutional dispensation. The new constitution would lay a basis for pursuing and achieving political stability and national unity, which was much needed then. However, the CoE's mandate was limited to evaluating the CKRC process and isolating contentious issues that required consensus building and facilitating

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[106] Clauses 211, 217, and 223, Bomas Draft (2004).
[107] Articles 223-225, CKRC Draft (2001).
[108] First schedule, Bomas Draft (2004).
[109] Clause 207, Wako Draft (2005).
[110] Clause 202, Wako Draft (2005).
[111] Clauses 114-116, Wako Draft (2005).
[112] *Ibid.*
[113] Clause 206, Wako Draft (2005).
[114] Bård Anders Andreassen and Arne Tostensen, 'Of Oranges and Bananas: The 2005 Kenya Referendum on the Constitution' Bergen: Chr. Michelsen Institute (CMI Working Paper WP 2006: 13).

consensus on the issues to conclude the review process.[115] The CoE, thus, had both a limited time (2008-2010) and mandate to complete the exercise.

Specifically, the law provided that the experts consider the following; the public views submitted to CKRC, the drafts generated by the CKRC: the Bomas of Kenya delegates' draft: and the Wako Draft.[116] This law retained all the objectives of the law that lapsed in 2005,[117] similarly adding another objective of "committing Kenyans to peaceful resolution of national issues through dialogue and consensus," perhaps due to the events that disturbed the peace at the time.[118]

The Committee of Experts developed working principles to guide it in the review process: to decentralise power; constrain executive power; embrace the separation of power with checks and balances; deepen democracy; ensure accountability and equity in the distribution of resources, ethnic, regional and gender balance.[119]

The Harmonized Draft Constitution

After a review of the past constitutional drafts and reports and after carrying out public consultations, the experts developed a **Harmonised Draft Constitution** that retained the 74 districts that were proposed in the *Bomas* Draft.[120] The experts retained the 74 units in their first draft because the number balanced service delivery needs and capacity, as well as giving communities a feeling of belonging.[121]

The Harmonised Draft Constitution also provided for a regional level of government comprising 8 regions, which, as they stated, was necessary for accommodating ethnic and cultural diversity and contributing to nation-building. They also noted that the regions would coordinate cross-county development and delivery of services.[122] The experts opted for 8 regions as opposed to the 14 regions that had been proposed in Bomas because they were looking at larger and fewer units that were better placed in ensuring checks and balances at the national level.

The experts also decided to eliminate the village and locational levels but left the creation of these lower levels of government to the discretion of the districts.[123] Borrowing from the Bomas Draft, the experts also proposed the abolition of the Provincial Administration in the Harmonized Draft Constitution.[124]

115 Section 5-8 of the CKRC Act, 2008.
116 *Ibid.*
117 Section 4 CKRC Act 2008 is almost a replica of Section 3 CKRC Act 1998.
118 Section 4 (k) CKRC Act, 2008.
119 Final Report of the Committee of Experts on Constitutional Review (2010) 37.
120 Final Report of the Committee of Experts on Constitutional Review (2010) 37.70.
121 *Ibid.*
122 *Ibid.*
123 *Ibid.*
124 *Ibid.*

Public views on devolution proposals by the Committee of Experts

The CoE received comments and inputs from the public on the Harmonized Draft Constitution (HDC), which formed the basis of the second draft, the Revised Harmonized Draft Constitution (RHDC). While considering views and submissions on the HDC, the experts observed a change in support for three levels to two levels. Views in support of two levels instead of three justified this on the basis that three levels would be costly.[125] Others said that having a third level with 79 counties would make them too small and fragmented and that they may lack resources (due to their numbers) to govern effectively.[126] The experts also noted that 79 counties were too small to provide checks on the exercise of power at the national level.[127]

Based on the concerns above, the levels were reduced to two (national and county government) "following the majority's preferences."[128] The 79 districts were abandoned, which left the experts to settle for 1992 administrative districts (which were 47 in number). The 47 were chosen because they were relatively larger and fewer and could play a role in checking the centre, especially after the removal of the regional level.[129]

About the Provincial Administration, the experts were told that it was accessible to people at the village level and should be retained.[130] To accommodate this view, the experts provided for a 5-year transitional period within which the Provincial Administration would be restructured.[131]

3.4 Conclusion

After a long search for a devolved system of government, the country settled for one with two constitutionally entrenched levels; the national government and the county government. The process towards the choice of the two levels of government, and most importantly, the deliberations and discussions in the entire review process, illuminate the aspirations and vision of Kenyans regarding devolution and its place in Kenya's new constitutional dispensation.

First, the concerns and issues Kenyans raised regarding the structure of devolution resonate closely with the challenges that Kenyans faced in the pre-2010 period with regard to local governance, service delivery, and development. Many Kenyans decried the weak and ineffective local authorities, the lack of accountability in local administration institutions, and the general decline in the provision of essential local services and development. With this broad concern in mind, Kenyans called for a genuinely local and practical level of devolution to address the needs and priorities of Kenyans at that local level.

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[125] Final Report of the Committee of Experts on Constitutional Review (2010) 90-91.
[126] *Ibid.*
[127] *Ibid.*
[128] *Ibid.*
[129] *Ibid.*
[130] *Ibid.*
[131] *Ibid.*

The experience with the unaccountable and repressive pre-2010 Provincial Administration led to calls for its abolishment or restructuring to make it accountable.

Secondly, the inequitable distribution of resources, services, and development and the perceived and actual discrimination in access to opportunities for minority and marginalized communities and groups led to calls for devolution as a means of redress. Socio-economic inequalities could be addressed through a devolved system of government designed to address disparities in access to development among communities and social groups. Indeed, during the discussions at the National Constitutional Conference, the voices of marginalized communities, the youth, women, and persons with disabilities, among others, were apparent during the entire Conference.

Thirdly, and as a result of the above observations, the constitution drafters (both under the CKRC and the CoE processes) struggled to balance the different but legitimate factors that required accommodation in the devolution structure under the new constitutional dispensation. Indeed, while we ended up with a two-tier system of devolution comprising the national government and the counties, there were legitimate and inbuilt mechanisms to accommodate all voices and views in the structure. For instance, under the current Constitution, while we have 47 counties as the focal points of devolution, the county governments are required to devolve functions to the lowest possible level,[132] including village units.[133]

Most importantly, the objectives and purpose of devolution under the Constitution of Kenya 2010, which were discussed in the introduction to the book, accommodate all the voices and views made regarding devolution during the entire constitution-making process. In essence, the current structure of devolved government is not only conscious of the views presented by Kenyans but also requires the implementation of devolution to give effect to the wishes of Kenyans.

[132] Article 176 (2) Constitution of Kenya, 2010.

[133] Section 53, County Governments Act, 2012.

CHAPTER FOUR

THE SYSTEM OF DEVOLVED GOVERNMENT UNDER THE CONSTITUTION OF KENYA 2010

4.1 Introduction

The Constitution of Kenya 2010 establishes the devolved governance system. Chapter 11, titled 'Devolved Government', remains insightful on Constitutional objectives, principles, and purposes upon which the devolved governance system is anchored, operationalised, and sustained; however, as the concept of political leadership and democracy, devolved governance is a constant core theme that runs in the entire Constitution's architecture. The Preamble and Article 1 have direct and indirect references to the devolved system of government. In essence, the detailed structures and institutions of devolved governance at the county and national level hold, present, and represent a higher Constitutional significance in the system of Constitutional governance and its purpose. Nonetheless, Chapter 11 details the various institutions of devolved governments, their relationships with county and national-based institutions, and their functions and powers, including operations and working. Importantly, it demonstrates clear and binding guidance on how devolution should be implemented to fulfill the aspirations of Kenyans, who sought inclusion, equitable access to service and development, and political accountability.

4.2 The constitutional significance of devolution in Kenya

Article 1 of the Constitution, which recognizes that all sovereign power belongs to the people, provides that the power is vested in, among other state organs and institutions, legislative assemblies in the county governments[134] and the executive structures in the county governments.[135] The Constitution further recognizes under the first article that sovereign power of the people is exercised at the national level and the county level.[136]

Article 6 of the Constitution, which is titled "Devolution and access to services," also provides fundamental guidance on the place of devolution in the Constitution of Kenya 2010; it recognizes boundaries of the 47 county governments as the internal state unit boundaries of the Kenyan territory.[137] Article 6(2) of the Constitution lays down a critical operational principle for the devolved system of government at both national and county levels. It states that "the governments at national and county level are distinct and inter-dependent and shall conduct their mutual relations based on consultation and cooperation." This provision elevates the constitutional status and place of the county governments and

[134] Article 1(3)(a) Constitution of Kenya, 2010.
[135] Article 1 (3) (b) Constitution of Kenya, 2010.
[136] Article 1 (4) Constitution of Kenya, 2010.
[137] Article 6(1) of the Constitution of Kenya, 2010.

their structures, and the national government is required to negotiate and consult with county government structures instead of controlling and directing county governments.

The Constitution further states that a national state organ shall ensure reasonable access to its service in all parts of the Republic, so far as it is appropriate to do so having regard to the nature of the service.[138] Access to services is, thus, not limited to county government institutions and services offered by county governments; there is a constitutional requirement that all institutions, national or county, ensure access to services is extended to all parts of the country. This point is reinforced under the devolution objectives in Article 174 of the Constitution of Kenya 2010.[139]

Article 10 of the Constitution, titled "National Values and Principles of Governance," lists binding values and principles to all state organs, state officers, public officers, and all persons who apply or interpret the Constitution, who enact or interpret or apply any law, or who makes/ implements public policy decisions.[140] Among the principles and values under Article 10 is "sharing and devolution of power."[141]

A review of the other national values and principles of governance under Article 10 of the Constitution reveals a close relationship between the values and the objectives of the devolved government under Article 174. Indeed, values such as national unity, democracy and participation of the people,[142] equity, inclusiveness, equality, non-discrimination and protection of the marginalized,[143] good governance, and transparency and accountability,[144] are values that easily relate to what devolution aims to achieve under Article 174(1) of the Constitution of Kenya 2010. The structures of devolved government are especially entrenched and protected in the Constitution; the Constitution provides that any amendment that relates to "the objects, principles, and structure of devolved government" shall have to be approved by a national referendum.[145]

The Supreme Court of Kenya in *In the Matter of the Speaker of the Senate & another*[146] succinctly captures the overall constitutional significance of devolution under Kenya's post-2010 constitutional dispensation. The Senate had approached the Supreme Court for an advisory opinion on whether it should (as the representative of county governments) play a role in enacting the Division of Revenue Bill, which divides resources between the national and county governments. The Court stated that:

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[138] Article 6 (3) Constitution of Kenya, 2010

[139] Article 174 (h) Constitution of Kenya, 2010.

[140] Article 10 (1) Constitution of Kenya, 2010.

[141] Article 10 (2) (a) Constitution of Kenya, 2010.

[142] Article 10 (2) (a) Constitution of Kenya, 2010.

[143] Article 10 (2) (b) Constitution of Kenya, 2010.

[144] Article 10 (2) (c) Constitution of Kenya, 2010.

[145] Article 255 (1) (i) Constitution of Kenya, 2010.

[146] [2013] eKLR.

… 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*. This perception is captured succinctly in the principles and objects of devolution …[147]

The structures, functions, and processes of devolution established under the Constitution serve a fundamental purpose, and the implementation process is required to take cognizance of this constitutional purpose and give effect to it in concrete implementation processes.

4.3 County structures and institutions

The Constitution has vested the mandate to legislate and carry out executive functions into the County Assemblies and County Executive, respectively. The powers given through these two institutions are constitutional and are accompanied by structures that facilitate the execution of county affairs.[148]

The County Assembly

The County Assembly consists of four-member categories. First are those directly elected from the wards.[149] Secondly, those who occupy nominated slots that curtail against either gender to exceed two-thirds as required by the Constitution. Third, the group that represents special interests and marginalised, including people with disabilities and youth:[150], and fourth, the office of the county speaker and their deputy. The former is ex-officio[151] elected from outside the assembly,[152] while the deputy is elected from among the assembly members. However, the County Assembly standing rules and procedures[153] for removing the county speaker apply to both.

In the 2013 general election, female candidates won 83 of the 1450 wards.[154] This necessitated the nomination of an additional 708 women Members of County Assemblies (MCAs) to ensure compliance with gender composition requirements in the Constitution.[155] In 2017,

[147] The concurring judgment of Chief Justice Willy Mutunga, at para. 123 of the judgment.
[148] Article 1 (3) (a) and (b), Constitution of Kenya, 2010.
[149] Article 177 (1) (a) Constitution of Kenya, 2010.
[150] Article 177 (1) (b) and (c) Constitution of Kenya 2010.
[151] Article 177 (1) (a) Constitution of Kenya, 2010.
[152] Article 178 (1) Constitution of Kenya, 2010.
[153] Neither the Constitution nor legislation explicitly provides for the position of deputy speaker.
[154] Baringo, Embu, Garissa, Kajiado, Kwale, Lamu, Mandera, Marsabit, Nandi, Narok, Nyandarua, Nyeri, Samburu, Siaya, Taita Taveta, Tana River, Tharaka Nithi, and Turkana.
[155] https://educationnewshub.co.ke/iebc-final-list-of-all-nominees-for-all-parties-2022-2027/

there was a slight improvement to 96 ward seats for women. In the 2022 election, a total of 115 women were elected by voters as ward representatives.[156]

Two laws, (the Elections Act[157] and the Independent Electoral and Boundaries Commission (IEBC Act), provide for the nomination of 6 and 4 special representatives, respectively. There is an apparent contradiction in the two laws regarding the number of nominated representatives from special categories (marginalized, youth, persons with disability, etc.), and the IEBC has implemented the IEBC Act that provides for four. In the 2013 general election, a total of 97 males and 98 females were nominated from the party lists to represent various categories of "marginalized groups" and "marginalized communities."[158] Courts have held that the election of a speaker of the county assembly should not be held until all members of the county assembly (elected and nominated) are gazetted.[159] Courts have also held that all members of the county assembly (nominated and directly elected) hold the same rights and specifically held that nominated members can be appointed as chairpersons and vice-chairpersons of county assembly committees.[160]

The nomination of candidates to the county assembly is done by the various political parties contesting ward elections, having shared their nomination lists with IEBC before the general elections.[161] The number of nominations allocated is pegged on the seats won by each party.[162] In allocating such nominations, IEBC is guided by the preferences of the nominating party. Thus, a party with majority seats will have the highest number of nominated county assembly members across the various categories. This method of choosing nominated representatives has been criticized for perpetuating the dominance of the majority parties, especially in counties where minorities and marginalized communities are in smaller or non-dominant parties that may not win any seat and will therefore miss a nominated or special seat in the county assembly.[163]

The County Government Act provides for the Office of the Clerk to the county assembly, appointed by the county assembly service board with the approval of the county assembly.[164] The clerk is the accounting officer of the county legislature and is in charge of the administration of the county assembly and county assembly staff. The legislation also provides for the County Assembly Service Board (CASB), established as a corporate body. The board consists of the speaker as the chairperson, the leaders of the minority and majority parties, and a county resident.[165] The CASB is charged with establishing and abolishing offices and administrative structures in the assembly.

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[156] https://educationnewshub.co.ke/iebc-final-list-of-all-nominees-for-all-parties-2022-2027/

[157] Section 36 (8) Elections Act (2011).

[158] https://www.iebc.or.ke/docs/4TH%20MARCH%202013%20GENERAL%20ELECTION%20DATA.pdf

[159] *Republic v Transition Authority and Another; ex parte Crispus Fwamba and 4 others* [2013] eKLR.

[160] *National Gender and Equality Commission v Majority Leader, County Assembly of Nakuru and 4 others; Jubilee Party and another (Interested Parties)* [2019] eKLR.

[161] Article 177(2) Constitution of Kenya, 2010.

[162] Article 177(3) Constitution of Kenya, 2010.

[163] Oloo A' Elections, representations and the new Constitution' Society for International Development (SID) Constitution Working Paper No. 7 (2011) 2.

[164] Section 13, County Governments Act.

[165] Section 12 County Governments Act.

The County Governments Act provides that English and Kiswahili are the only languages used to transact official business of the county assembly, thus excluding local languages from county assembly proceedings.[166] While the two official languages (English and Swahili) are widely spoken in the country, the express barring of the use of local languages may, in some cases, limit members of the county assembly who may not be fluent in the two languages, or members of the public who may wish to follow proceedings in the county assembly but are not conversant with English or Swahili.[167] Where the two languages are a challenge for a member of the assembly or the public, they may be limited in expression or following debates in the assembly unless different arrangements (such as translation services) are employed. However, this is rare in the county assemblies.

The County Executive

The county executive is headed by the county governor, who (alongside the deputy governor as running mate) is elected directly by voters (no vote margin is required)[168] and can only be re-elected (as governor or as deputy governor) once only.[169] The Constitution lays down the grounds for removal of a county governor from office[170] but leaves the procedure to be determined by national legislation.[171] The grounds provided in the Constitution are: gross violation of the Constitution or any other law, where there are serious reasons for believing that the county governor has committed a crime under national or international law, abuse of office or gross misconduct, or physical or mental incapacity to perform the functions of the office of county governor.[172]

The County Governments Act provides that County assemblies can institute[173] proceedings for the removal of the governor,[174] but the actual impeachment happens in the Senate, where the final decision is made on the floor by a vote of a simple majority.[175]

Since 2013, several impeachment proceedings have been brought against governors and their deputies, most of which failed while some were successful. Some of those successfully impeached were reinstated into office through court orders after the governors challenged the decisions of the Senate and the county assemblies. Between 2013 and 2022 (the first two terms of the county government), there were a total of 11 impeachment proceedings that were commenced against 9 governors (and two deputy governors).[176] Of these, only three Senate impeachment proceedings resulted in the removal of governors from office

[166] Section 18 (1) and (2) County Governments Act.
[167] https://businesstoday.co.ke/illiteracy-crisis-hits-kisumu-county-assembly/
[168] Ghai YP & Cottrell JG *Kenya's Constitution: An Instrument for Change* (2011) 127.
[169] Article 180 (7) (a) Constitution of Kenya 2010.
[170] Article 180 (1) (b), (c), and (d) Constitution of Kenya 2010.
[171] Article 181 (2) Constitution of Kenya 2010.
[172] Article 182 Constitution of Kenya 2010.
[173] Section 33 CGA Constitution of Kenya 2010
[174] Article 181 (1) Constitution of Kenya 2010.
[175] Section 33 (2) to (10) County Governments Act.
[176] The governor of Embu County (twice), Kericho County, and the deputy governor of Machakos County.

(Embu,[177] Kiambu,[178] and Nairobi[179] governors). However, in the case of Embu, the county governor stayed in office after the courts set aside the impeachment, and the governor continued to serve his two full terms.[180]

In December 2022, five months after the election into office, the County Assembly of Meru voted to impeach the governor. The governor's impeachment was the first in the third term of county governments to be considered by the Senate. However, the Senate Committee set up to canvass the grounds of impeachment decided that the impeachment did not reach the threshold required for impeachments as per the provisions of the law, relevant jurisprudence from the courts, and the previous decisions of the Senate on impeachment.[181] The Siaya County Assembly also voted to have the Deputy Governor impeached in July 2023, however, majority of the Senators rejected the recommendation of the Select Senate Committee to have the Deputy Governor impeached and voted to have the Deputy Governor stay in office.[182]

Apart from the governor and the deputy, the county executive also consists of members of the county executive. In practice, candidates for the office of county executive are nominated by the governor after a competitive process of selection and have to be vetted by the respective county assembly before being confirmed.[183]

The governor is also required to ensure that a county's community and cultural diversity is reflected in the composition of the County Executive Committee Member CECM. This is a requirement of both the Constitution and the laws. The nominations and appointment of CECMs have, in the past, been challenged in court on the basis that the governor should have given the diversity of the county consideration in the nomination or by the county assembly during the approval of names. The court pronouncements on the cases are varied, depending on the evidence submitted to the court and the issues laid before the court for determination. The principle emerging clearly from the court, though, is that implementation and operationalization of the principle of diversity is different from county to county and depends on what rational criteria were applied and how they were applied.[184] On this basis, several appointments have been annulled and others upheld by the courts.[185]

All CEC members must be holders of a university degree and have at least five years of relevant experience.[186] The Constitution caps the CEC membership at ten or less.[187] While

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177 *Martin Nyaga Wambora v County Assembly of Embu & 37 others [2015] eKLR.*
178 Hon. Ferdinand Ndung'u Waititu v County Assembly of Kiambu & 4 others [2019] eKLR
179 Mike Sonko Mbuvi Gideon Kioko & another v Clerk, Nairobi City County Assembly & 9 others [2021] eKLR
180 *Martin Nyaga Wambora v County Assembly of Embu & 37 others [2015] eKLR.*
181 https://nation.africa/kenya/news/politics/meru-governor-kawira-mwangaza-survives-impeachment--4070842
182 http://www.parliament.go.ke/node/20097#:~:text=The%20Senate%20has%20voted%20to,voting%20to%20support%20the%20charges.
183 Article 179 (2) Constitution of Kenya 2010.
184 CM Bosire, 'County governance and pluralism in Kenya' Katiba Institute (Research Series), 2017.
185 *Ibid.*
186 Section 35 (3) CGA.
187 Article 179 (3) (b).

the Constitution vests executive authority collectively in the CEC,[188] it specifies that CEC members are accountable to the county governor.[189]

County public service and administration

Constitutionally a separate public service system is provided to serve national and county governments autonomously.[190] The County governments shall be responsible for their public service. Still, within the national legislative framework.[191] The County Government Act, in operationalising Article 235 (1) of the Constitution, provides for an independent public service[192] mandated to establish and abolish offices for each county service.[193] The governor appoints the board members between three to five county public service board members, with the approval of the county assembly,[194] for a non-renewable term of six years.

The Constitution, however, provides that the National Public Service Commission shall "hear and determine appeals in respect of county governments' public service."[195] The appeals to the National Public Service Commission can cover recruitment, selection, appointment, and qualification attached to any office.[196] Appeals can also be made in respect of remuneration and terms and conditions of service, national values and principles of governance, retirement or other removal from service, pensions, and gratuity, and other matters the National Commission considers as falling within its constitutional competence.[197]

There is little linkage between the County Public Service Boards and the Public Service Commission at the national level. While the CPSBs implement national laws concerning public service, there are few or non-existent linkages between the national and county boards in charge of the respective services at the two levels of government, especially on the matters specified by the law, such as appeals. This can be partly linked to the uncertainties of the transition to county governance, where many processes and issues needed to follow the laws and policies that were laid down to guide and facilitate the transition process. Furthermore, activating such links would require intergovernmental dialogue to develop interaction modalities as the law envisages.

Appointments that require approval of county assemblies include appointments to the County Public Service Board (CPSB),[198] the county secretary,[199] county chief

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[188] Article 179 (1).
[189] Article 179 (6).
[190] Article 235 (1); Article 234 (3) (b).
[191] Article 235 (1).
[192] Section 56 (1) CGA.
[193] Section 58 CGA.
[194] Section 58 CGA.
[195] Article 234 (2) (i).
[196] Section 77 (2) (a) CGA.
[197] Section 77 (2) CGA.
[198] Section 58 (1) (b) County Governments Act.
[199] Section 44 (2) (b) County Governments Act.

officers,[200] the clerk to the CA,[201] and any other appointments as may be provided by other legislation.[202] The county secretary is in charge of overall administration at the county and supervises county public service. The county executive committee may allocate the county secretary further functions.[203] National legislation provides that the governor may dismiss the county secretary subject to the terms and conditions of appointment. The law also provides that the county secretary may resign by giving a 30-day notice to the governor. The only categories of persons within the county that are state officers are: the governor, deputy governor, county executive members, the speaker, and members of the county assembly.[204]

County institutions can also extend administrative structures to levels below counties (sub-county, ward, and village levels).[205] In the case of urban areas, cities, and municipalities have separate administration from that of the county. Boards manage cities and municipalities. Some members of city and municipal boards are partly appointed by the CEC through a recruitment process, while some are nominated to the boards (with the approval of the county assemblies) through stakeholders that include: the private sector, neighbourhood associations, informal sector, and an association of urban areas and cities.[206] Other urban areas, such as towns and market centres, are managed directly by county government departments.[207]

4.4 County powers, functions and responsibilities

Constitutionally, county powers are divided into the legislative and executive powers, and are vested in the county assembly and executive, respectively. The traditional concepts of separation of powers and oversight and accountability are also provided for in the two arms of county government. The county assemblies exercise oversight over the county executive within a framework of separation of powers.[208] County assemblies are also constitutionally empowered to enact county laws necessary or incidental to the exercise of county powers and performance of allocated functions

The county executive, on the other hand, is required to implement county legislation and national legislation within the county and, where necessary, manage and coordinate affairs of the county administration, and prepare proposed legislation for the county assemblies.[209] The county governor assents to county legislation.[210]

[200] Section 45 (1) (b) County Governments Act.
[201] Section 13 County Governments Act.
[202] Section 8 (1) (a) County Governments Act.
[203] Section 44 (3) County Governments Act.
[204] Article 260, Constitution of Kenya 2010.
[205] Section 48 County Governments Act.
[206] Section 13 and 14 Urban Areas and Cities Act.
[207] As provided for under the Urban Areas and Cities Act 2011
[208] Article 185 (3) Constitution of Kenya 2010.
[209] Article 183 (1) Constitution of Kenya.
[210] Section 30 (1) CGA.

The Fourth Schedule to the Constitution of Kenya 2010 provides for the specific functional areas of the county governments as well as the national government.[211] The Fourth Schedule contains two parts: Part 1, which provides for national government functions, while Part 2 provides for county government functions.[212]

The county functions include agriculture, health, transport and communication, infrastructure and development, planning, and trade. In agriculture, counties have powers over crop and animal husbandry, livestock yards, county abattoirs, plant and animal disease control, and fisheries.[213] In the health sector, functional areas that fall under the county domain include:

- "County health services" are disaggregated as county health facilities and pharmacies.
- Ambulance services.
- Promotion of primary health care.
- Licensing and control of undertakings selling food to the public.

Other county health services include veterinary services, cemeteries, funeral parlours, and crematoria, refuse removal, refuse dumps, and solid waste disposal.[214] County functional areas also include control of air and noise pollution and other public nuisances and outdoor advertising.[215]

The Fourth Schedule allocates "county transport" to counties, which includes county roads, street lighting, traffic and parking, public road transport, and ferries and harbours. Regulation of international and national shipping is, however, reserved for the national government.[216] In trade development and regulation, counties have powers over markets, trade licenses, fair trading practices, local tourism, and cooperative societies.[217] Concerning planning and development, counties have powers over "county planning and development," which includes statistics, land survey and mapping, boundaries and fencing, housing, and electricity and gas reticulation and energy regulation.[218] In addition, counties have powers over "county public works and services" which include stormwater management systems in built-up areas, and water and sanitation services.[219]

In the education sector, counties have a mandate over pre-primary education, village polytechnics, home craft centres, and childcare facilities.[220] Counties also have powers over "cultural activities, public entertainment, and public amenities." These include betting,

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[211] Article 186 (1) Constitution of Kenya 2010.
[212] *Ibid.*
[213] Item 1 Part 2, Fourth Schedule.
[214] Item 2 Part 2, Fourth Schedule.
[215] Item 3 Part 2, Fourth Schedule.
[216] Item 5 Part 2, Fourth Schedule.
[217] Item 7 Part 2, Fourth Schedule.
[218] Item 8 Part 2, Fourth Schedule.
[219] Item 11 Part 2, Fourth Schedule.
[220] Item 9 Part 2, Fourth Schedule.

casinos and other forms of gambling, racing, liquor licensing, cinemas, video shows and hiring, libraries, museums, sports, and cultural activities and facilities, and county parks, beaches, and recreation facilities.[221] Counties have powers, too, to ensure the coordination and participation of communities and locations in governance at the local level. Specifically, they have powers to assist communities and locations to develop the administrative capacity for the effective exercise of the functions and powers as well as for participation in local governance.[222]

Other areas listed as county functions in the Fourth Schedule are "animal control and welfare," which include licensing of dogs and facilities for the accommodation, care, and burial of animals.[223] Counties have powers over fire-fighting services, and disaster management,[224] as well as powers over the control of drugs and pornography.[225]

While the Constitution creates two lists of functions for the national and county governments, it provides that a function or power that is conferred on more than one level of government is function or power within the concurrent jurisdiction of the national and county government.[226] The Constitution also provides that a function not assigned by the Constitution or any national law is a function or power of the national government.[227] Therefore, the power or function that exclusively belongs to a county government can only be determined, through interpretation and clarification of the national and county functions from the two lists.

The constitutional significance of the powers and functions allocated to a county government has been emphasized in several court matters. In one case, the Court noted that:

> **"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 organs to which sovereignty of the people of Kenya is delegated under Article 1 of the Constitution."**[228]

In another case, the Court struck down a law that sought to establish County Development Boards (chaired by senators and governors made secretaries) whose primary role was scrutinising county plans and budgets. The Court held that this law was unconstitutional as it attempted to fetter the constitutional power of counties to pass budgets and develop plans.[229] The Supreme Court of Kenya has also declared the Constituency Development Fund (CDF) unconstitutional on the basis that it breaches the doctrine of separation of

[221] Item 4 Part 2, Fourth Schedule.
[222] Item 14 Part 2, Fourth Schedule.
[223] Item 6 Part 2, Fourth Schedule.
[224] Item 12 Part 2, Fourth Schedule.
[225] Item 26 Part 2, Fourth Schedule.
[226] Article 186 (2) Constitution of Kenya, 2010.
[227] Article 186 (2) Constitution of Kenya, 2010.
[228] *Nairobi Metropolitan PSV SACCOs Union Ltd and 25 others v County Government of Nairobi and 3 others* (2014) eKLR, para 64.
[229] *Council of Governors and another v Senate and 6 others* (eKLR 2014).

powers, and it has a potential of infringing on county powers and functions.[230] The courts have also affirmed the powers and functional autonomy of counties in several areas, including the power to raise revenue through outdoor advertising on major highways;[231] offer health services; raise the parking fees for cars in Nairobi's central business district;[232] and charge agricultural tax.[233]

4.5 Devolved governance at the national level

Devolved governance, as mentioned at the beginning of this chapter, is not just about county government structures and institutions or the county level only. Several national-level institutions perform functions and are vested with responsibilities critical to the functioning and effectiveness of the devolved system of government.

This is why devolution objectives and principles bind not just the county governments but all institutions with a role in the devolved system of government. As discussed below, the specific roles and mandates of various national institutions reveal their crucial and indispensable role in ensuring county governance runs smoothly and per constitutional objectives.

The role of the national Parliament

Parliament, composed of the Senate and the National Assembly, are charged with the role of enacting national laws.[234] Parliament also plays an important oversight role, especially at the national level, which ensures that national institutions play their role in a manner that adheres to the Constitution, including the constitutional objects and purpose of devolution.

More significantly, the Senate, which is the second chamber of Parliament, is charged with the constitutional mandate of representing and protecting county interests at the national level.[235] In this regard, the Senate's legislative role is limited to participating in the making of laws that concern county governments only.[236] The Senate is also vested with a special role of exercising oversight over national revenue allocated to the county governments.[237]

The current Constitution was passed in August 2010, when there was no Senate or county governments. The Constitution provided for a transition phase, from the time of promulgation of the Constitution until the first county governments were elected to

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[230] Yvonne Rocaboy, Francois Vaillancourt and Rejane Hugounenq, 'Public finances of Local Government in Kenya' in Benard Dafflon and Thierry Madies T (eds) The Political Economy of Decentralisation in Sub-Saharan Africa: A New Implementation Model in Burkina Faso, Ghana, Kenya, and Senegal (World Bank 2012) 161–206

[231] Real Deals Ltd v Kenya National Highways Authority and 2 others (2014) eKLR.

[232] *Nairobi Metropolitan PSV SACCOs Union Ltd and 25 others v County Government of Nairobi and 3 others* (eKLR 2014) Petition 486 of 2013.

[233] *Cereal Growers Association and another v County Government of Narok and 10 others* (2013) eKLR.

[234] Article 93, Constitution of Kenya, 2010.

[235] Article 96, Constitution of Kenya, 2010.

[236] Article 110-114, Constitution of Kenya, 2010.

[237] Article 96(3), Constitution of Kenya, 2010.

office in March 2013. During this period, the then unicameral chamber of Parliament played the critical role of passing laws required to facilitate county governments' entry. Such laws included: the County Governments Act, Intergovernmental Relations Act, the Public Finance Management Act, and the Transition to Devolved Government Act, among other laws that were critical for the entry of county governments.

After March 2013, the Senate played a critical role in revising the pre-2013 legislation and the revision of laws that required amendment to address legal gaps identified in the implementation of the devolved system of government. These included amendments such as those concerning the assumption of office of a governor and deputy governor, replacement of a governor by a deputy governor, and impeachment of speaker and governors, among other laws (and proposed laws) deemed necessary for the effective implementation of devolution.

The Senate and National Assembly debate and pass the Division of Revenue Act (DORA) and the County Allocation of Revenue (CARA); both Bills facilitate the distribution and release of funds to county governments.[238] Other national laws lay the national legal framework and provide a basis for the performance of county government functions. Furthermore, the Senate plays an oversight role over national revenue allocated to county governments.[239]

Parliament collectively has a general parliamentary oversight role, which ensures that institutions, especially those relevant to county governments, play their role effectively. On many occasions, institutions such as the Controller of Budget, the Commission on Revenue Allocation, the National Treasury, and others are routinely summoned by Parliamentary committees to answer issues such as delays in the disbursement of funds to county governments. This also extends to oversight of county government funds, and county officials, including governors, are routinely summoned whenever concerns are raised over county government finances.

The role of the national executive

The national executive (composed of the President, the Deputy President, and the cabinet secretaries) exercises executive authority on behalf of the people.[240] The national executive formulates national laws and policies that are then considered and approved by Parliament. Furthermore, the national and county executives share many county government functions in the sectors. The national executive is expected to develop its policies by the Constitution. After due consultation with the county governments.[241] Such consultation is critical in areas where there is no clarity on the respective roles of the two levels of government.

[238] Article 218 Constitution of Kenya 2010, see also In the Matter of the Speaker of the Senate & another [2013] eKLR.

[239] Article 96 (3) Constitution of Kenya 2010.

[240] Article 129 (1) Constitution of Kenya 2010.

[241] Articles 6(2) and 189, Constitution of Kenya 2010.

Furthermore, the national government has policy-making roles in many sectoral functions, while the county government has to ensure service delivery. Such a division of roles requires both levels of government to work together in developing policies and implementing functions. The national and county executives have formed sectoral committees to ensure coherence in formulating and implementing national and county policies.

An appropriate example of the national government's role is in conditional grants. These are non-discretionary funds (as the name suggests) provided to county governments for specific functions that the national government identifies as critical to fulfilling national objectives or priorities. In some cases, the national executive (through its sectoral ministries) can utilize conditional funds for the provision of certain services (some of which fall in the space of county governments).[242] A County Governments Grants Bill is under consideration by Parliament to guide how conditional funds are managed.

The role of the Judiciary

The Judiciary and the courts have a constitutional mandate to safeguard constitutionalism and ensure respect to and adherence to the rule of law.[243] Whenever disputes arise regarding devolution, the courts have to resolve those disputes and give directions following the Constitution. In the past, such disputes have revolved around issues such as the nature and extent of county government powers and responsibilities, the role of the national government in devolved functions, disputes between employees and county governments, public participation in county governance processes, county finances, matters pertaining relations between the national and county governments, among other numerous issues.

The first case that the Supreme Court heard regarding devolution in 2013 was a request for an advisory presented by the Senate.[244] The Senate was aggrieved by the decision of the National Assembly speaker to bypass the Senate and submit the DORA for presidential assent. The Senate argued that it was imperative for it as a chamber that represents county governments, to be part of the enactment of DORA, whose purpose is to divide revenue vertically between the national and county governments.[245] The Supreme Court agreed with the Senate and ruled that ignoring the Senate in the passing of such an important piece of law not only diminished the role of the Senate to protect county government interests but also had the potential to undermine the objectives of devolution.[246] Many other court decisions have been passed to affirm the place, role, and significance of devolution to Kenya's system of constitutional governance.

The Judiciary also deploys judicial officers to county courts, which enforce laws that county governments pass. While county governments do not exercise judicial power, the Constitution vests the county governments with the power to exercise any other power

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[242] Article 202 (2) Constitution of Kenya 2010.
[243] Article 159 and 165, Constitution of Kenya 2010.
[244] In the Matter of the Speaker of the Senate & another [2013] eKLR.
[245] *IIbid.*
[246] *Ibid.*

or function that is incidental to the realization of their powers and functions under the Fourth Schedule.[247] This constitutional provision provides the basis for the establishment of county courts to assist in the enforcement of county laws and regulations.

County courts commonly deal with offences such as: littering, operating without business licenses, and breach of occupational safety rules, among others. This practice, now based on the Constitution, has been maintained by the Nairobi County government and other county governments that have established county courts to enforce county laws. Discussions are in the process to allow county governments to retain money collected by county courts to be applied for county purposes as opposed to remitting the funds collected to the National Treasury.[248]

The role of commissions and independent offices

Apart from Parliament, the national executive, and the Judiciary, the Constitution also establishes a number of commissions and independent offices that exercise devolution-related mandates and functions. The objectives of these institutions and offices are to "protect the sovereignty of the people," "secure the observance by all state organs of democratic values and principles," and "promote constitutionalism." [249] The commissions and the holders of independent offices are subject only to the Constitution and the law and are independent and not subject to direction or control by any person or authority.[250] Commissions and offices whose core roles are relevant to devolution include the Commission on Revenue Allocation, Office of the Controller of Budget (CoB), Office of the Auditor General, and the Salaries and Remuneration Commission among others.

The Constitution establishes the Commission on Revenue Allocation, and its mandate is to make recommendations on the sharing of revenue between the two levels of government and between the 47 county governments, consider and make recommendations on any matters concerning the financing, financial management of county governments, and define and enhance the revenue sources of the national and county governments.[251] The CRA is also mandated to encourage fiscal responsibility for national and county governments and is required to develop and regularly review the criteria for identifying marginalized areas in the country for purposes of utilization of the Equalization Fund.[252]

The Office of the Controller of Budget (CoB) is in charge of overseeing the implementation of the budgets of the national and county governments. The OCOB does so by approving the withdrawal of public funds per the set budgets submitted to the OCOB.[253] The Controller of Budget is required to approve withdrawals of public funds following the

[247] Article 185(2) Constitution of Kenya 2010.

[248] Under the auspices of the Intergovernmental Budget and Economic Council.

[249] Article 249 Constitution of Kenya, 2010.

[250] Article 249(2) Constitution of Kenya, 2010.

[251] Article 215 and 216, Constitution of Kenya, 2010.

[252] Article 215 and 216, Constitution of Kenya, 2010.

[253] Article 228 (5) Constitution of Kenya, 2010.

law. In other words, the expenditure approvals must meet the conditions of the law; for example, the expenditure has to separate recurrent from capital expenditure.

The Constitution establishes the office of the Auditor General and vests the office with powers to audit the finances of all public entities, including national and county governments. At the end of the financial year, the Auditor General is required to release a report showing how national and county governments (and indeed all other public entities using public money) have utilized their funds.[254]

The audit aims to determine whether a national or county government or other entity expending public money did so under the law. The Office of the Auditor General must also check whether the money was used effectively. This means that the office has to check whether money utilized by the national government or county governments was used in a manner that avoids waste.

The Constitution provides for the establishment of the Salaries and Remuneration Commission. The central role of the Commission is to set and review the remuneration and benefits of all state officers. The CRA is, thus, responsible for setting the salaries and allowances of governors, deputy governors, members of county assemblies, and speakers. The SRC can also advise on the salaries of other categories of employees that are not state officers.

In the performance of its work, the Salaries and Remuneration Commission is supposed: to ensure that the salaries that are paid to those working in the public sector/ government are sustainable and not overly costly to *mwananchi,* ensure that the public sector or governments at both levels can attract qualified and competent people to undertake services. The SRC is also required to recognize the productivity of people and performance by ensuring adequate salaries are paid and to enhance transparency and fairness in the setting of salaries.[255]

The Kenya National Commission on Human Rights, the Commission on Administrative Justice, and the National Gender and Equality Commission all ensure the two levels of government and public institutions adhere to human rights obligations.

4.6 National and county government relations

The Constitution requires that the National and County governments embrace the principle of cooperation and consultation in performing their functions. Article 6(2) of the Constitution states that "the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations based on consultation and cooperation." Article 189 of the Constitution further provides that the national and county levels shall carry out their activities in a manner that respects the other level of government.

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254 Article 228 (4) Constitution of Kenya, 2010.
255 Article 230 (4) Constitution of Kenya (2010).

A further requirement is that the two levels of government assist, support and consult, and, whenever necessary, implement the laws passed by the other level and that both shall share information and coordinate policies and administration and in building capacity.[256] About the performance of functions, the Constitution guides that the two levels of government shall cooperate in the performance of functions and may, where it is deemed fit, form joint committees or authorities to facilitate the implementation. In the event of a dispute between the national and county governments, the Constitution requires the two levels of government to make every reasonable effort to settle the dispute, including by means provided by the law.[257] Parliament is required to make a law that will provide for how disputes between the national and county governments can be resolved, including through negotiation, mediation, and arbitration.[258]

The national and county governments are bound by common constitutional objectives, which include those that apply to devolution. Therefore, the two levels must identify and pursue common goals. Secondly, while roles are divided between the two levels of government, many are related and apply to the same sectors and functions. The only way to perform these functions is to jointly agree (through cooperation) on the respective functions and plan for targets in the separate functional areas.

The success of devolution does not solely depend on county governments or the county level of government. Essential processes and decisions are made at the national level, which ultimately impacts the functioning and effectiveness of county governments, as demonstrated in the discussion in the preceding sections of this chapter.

Laws that govern intergovernmental relations

In the period before the March 2013 general election, when county governments were elected into office, Parliament enacted several laws to implement the constitutional provisions on the relations between the national and county government. The laws established structures and processes meant to facilitate consultation and cooperation between the two levels of government. The IGRA was enacted in 2012 to provide a framework for collaboration and consultation between the National and the 47 county governments. The IGRA also aims to facilitate consultation on matters affecting the national and county governments, the resolution of disputes, and to provide a procedure for transferring functions between the two levels.

The IGRA established the National and County Government Coordinating Summit (the Summit), which consists of the President and the 47 county governors, thus, bringing together all the heads of the executive from the national government and the 47 county governments. The Summit is described as the apex body for intergovernmental relations.

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[256] Article 189, Constitution of Kenya, 2010.
[257] Article 189(3) Constitution of Kenya, 2010.
[258] Article 189 (4) Constitution of Kenya, 2010.

It is headed by the President, who is the chair, and the chairperson of the Council of Governors, who is the Summit's deputy chairperson.

The functions of the Summit include consultation and cooperation between the two levels of government, promotion of the national values and principles of governance, promotion of national cohesion and unity, consideration and promotion of matters of national interest, and review of reports from other intergovernmental forums and other bodies on issues affecting the national interest. The Summit is also vested with the duty of evaluating the performance of national or county governments and recommending appropriate action and receiving progress reports, and providing advice as appropriate.[259]

Other roles of the Summit include, monitoring the implementation of national and county development plans and recommending appropriate action, considering issues relating to Intergovernmental relations referred to the Summit by a member of the public, and recommending measures to be undertaken by the respective county government.[260] The Summit is also charged with coordinating and harmonizing the development of the county and national government policies, facilitating and coordinating the transfer of functions, power of competencies from and to either level of government, and performing any other function allocated by law or deemed necessary by the Summit. The Summit is meant to meet twice a year to conduct its business and is required to submit reports to the National Assembly, the Senate, and county assemblies on its activities.[261]

One of the first major decisions of the Summit in its early days was the decision to adopt a "big bang" transfer of functions, different from the gradual and phased approach that was provided for in the transition laws.[262] This resulted in the transfer of functions uniformly to all the 47 counties without a case-to-case assessment of capacity and readiness as was initially envisaged under the law.[263] Over the first two terms, the Summit met a few times where significant decisions were taken. Challenges that face the Summit include: a lack of mechanisms to ensure follow-up of decisions made and reporting back and adequate follow-up of resolutions.[264]

The Intergovernmental Relations Act established the Council of County Governors (CoG), composed of county governors of the 47 county governments. The chairperson and vice-chairperson of the CoG are drawn from among the county governors and serve for one year. They are eligible for re-election once.[265] The responsibilities of the CoG, as provided for under the Act, include:

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[259] Section 8, Intergovernmental Relations Act.
[260] *Ibid.*
[261] Section 9, Intergovernmental Relations Act.
[262] Transition to Devolved Government Act.
[263] Section 23, Transition to Devolved Government Act 2012.
[264] Council of Governors, Annual Statutory Report 2017/2018, 7-8.
[265] Section 19, Intergovernmental Relations Act.

- Consultation amongst county governments.
- Sharing of information on the performance of the counties in the execution of their functions with the objective of learning and promoting best practices and, where necessary, initiating preventive or corrective action.
- Considering matters of common interest to county governments.
- Dispute resolution between counties.

Other functions of the CoG include:

- Capacity building for governors.
- Receiving reports and monitoring the implementation of intercounty agreements on inter-county projects.
- Consideration of matters referred to the Council by a member of the public.
- Consideration of reports from the intergovernmental forums on issues affecting national and county interests or relating to the performance of counties.

The CoG has become a critical body and forum and is the primary consultative structure on matters affecting county governments. The CoG is a national voice for county governments, and a forum for consensus negotiation for all county executives. The CoG has formed further structures below the Council (such as CEC forums, Committees of Governors, and a Secretariat), all assisting in furthering and deepening county government consultation.

Under the IGRA, the Intergovernmental Technical Relations Committee (IGRTC) is vested with the responsibility of coordinating the day-to-day administration of the affairs of the Summit and the Council of County Governors. Specifically, the IGRTC is meant to facilitate the activities of the two bodies and to implement the decisions of the two bodies. Specific roles of the IGRTC include:

- Taking over the residual functions of the Transition Authority.
- Preparing the agenda for the Summit.
- Submitting reports to the Summit and the CoG.

The IGRTC runs its affairs through a secretariat headed by a Chief Executive Officer to perform these functions. Apart from these statutory structures, the IGRA provided that the IGRTC and sectoral ministries can form intergovernmental consultation structures.

The Intergovernmental Budget and Economic Council (IBEC) brings together the members of the county executive in charge of finance and the national executive institutions and national institutions in the finance sector. The IBEC is composed of the Deputy President (who chairs it), the Cabinet Secretary in charge of finance, representatives from the judicial service commission and the parliamentary service commission, as well as chairpersons of the Commission on Revenue Allocation, the Council of Governors, and the Cabinet Secretary in charge of devolution and intergovernmental relations. The IBEC is a forum for consultation and cooperation between the national and county governments.

Specific matters that form the business of the IBEC include national and county budget documents (budget policy statement, the budget review outlook paper, and the medium-term debt management strategy) and any other matters relating to budgeting and financial management and integrated development at the national and county levels. The IBEC also considers issues relating to government borrowing at national and county levels, proposed laws or policies that have financial implications for counties, and recommendations on the equitable sharing of revenue between the two levels of government and among the counties.

To enhance intergovernmental cooperation and consultation at the county level, the County Governments Act establishes the County Intergovernmental Forum (CIF).[266] The CIF is to be headed by the governor, the deputy governor, or a CECM designated for that purpose by the governor. The CIF consists of all heads of department of the national government rendering services in the county and members of the CECM nominated to the CIF in writing. The primary responsibilities of the CIF include the harmonization of services rendered in the county, coordination of development activities in the county, and coordination of intergovernmental functions.

In 2013, the Senate introduced an amendment to the County Governments Act that created County Development Boards (CBDs) that were chaired by senators and whose role was to be a forum of consultation between elected leaders in the county. The county governors were to be secretaries of the boards.[267] Among the roles of the boards was to scrutinize plans and budgets that were to be tabled in the assembly to receive input from other elected leaders such as members of Parliament from the specific county.[268] The Council of Governors challenged the constitutionality of the CDBs on the basis that it infringed on separation of powers and sort to usurp the powers of the assembly to debate and pass budgets and plans. The courts declared the CDB unconstitutional, and now there is an attempt to introduce another amendment that addresses the concerns that the court raised.[269]

Intergovernmental relations structures established through practice

Not all current structures for intergovernmental consultation are sanctioned by statute. Some have evolved through practice in the years of implementation of devolution. These include the County Assembly Forum (CAF) and the Society of Clerks at the Table (SOCATT). The CAF brings together all county assemblies (the county legislative arm) for consultation and cooperation on legislative affairs. The CAF is the umbrella body for the speakers and members of county assemblies. The body seeks to identify and address issues of concern that are common among the county assemblies. The speaker of the Senate is

[266] Section 54(2) County Governments Act.

[267] County Government (Amendment) Act 2014.

[268] Section 2, County Government (Amendment) Act 2014 (declared unconstitutional).

[269] *Senate and 48 others v Council of Governors and 54 others*

the CAF's patron, which assists in creating and facilitating legislative IGR with the Senate at the national level.

Society of Clerks at the Table (SOCATT) brings together the staff of county assemblies (excluding the speakers who are members of CAF). Like the other IGR bodies, SOCATT seeks to address issues of common concern and focus on the teams working in the county assemblies. The patron of SOCATT is the clerk to the Senate. Other IGR forums formed through practice include the County Attorneys Forum, a caucus of Deputy Governors, and sectoral CECs Forums.

4.7 Conclusion

There is no doubt that while the mandate and structures of the national and county governments are distinct, inter-governmental cooperation and consultation is the bedrock of devolved governance under the Constitution of Kenya 2010. The national and county governments are united by common constitutional goals and objectives, which imply a harmonious co-existence and common purpose. Even more critically, the effectiveness of both levels of governments depends on engagement and interaction on common areas and functions due to the shared nature of functions.

In turn, the two levels of government have to develop and implement structures and processes that can facilitate their interaction and the Constitution provides for broad principles to guide such structures and their operations. An assessment of the IGR structures that were provided for in 2013 shows a number of challenges in the operation and effectiveness. Experience has shown that it is only through genuine commitment and willingness to embrace the spirit of consultation and cooperation by the two levels of government can the constitutional principle of cooperation and consultation be achieved.

CHAPTER FIVE

TRANSITION TO DEVOLVED GOVERNANCE

5.1 Introduction

This chapter discusses the legal and policy framework that guided the entire transition period, the activities and issues that defined the transition, and a brief analysis of the status of the transition to county governance.

With the promulgation of the Constitution of Kenya 2010, Kenya was set to move from a highly centralized system of governance to a devolved one. The transformation of governance structures (both at the national and sub-national levels) required time and planning to implement the government system that was constitutionally envisaged. This entailed the revision of pre-2010 laws and policies, establishing new institutions (including county government institutions), and similarly abandoning or restructuring old and existing institutions to abide by the Constitution.

The transition provisions in the Constitution of Kenya 2010 envisaged the challenges and processes involved in fully implementing the devolved government system. Accordingly, the Constitution provided time to allow preparations for devolution and the institutions to oversee preparations for county governments from 2013.

Preparation for the county governments and devolved governance in general commenced shortly after the promulgation of the Constitution in August 2010. The Constitution and laws provided for two phases of transition: the first phase covered August 2010 until March 2013, when the first county governments were elected into office, and the second phase commenced in March 2013 until March 2016 (three years after the entry of county governments).

5.2 The constitutional, legal, and policy framework for transition to devolution

The Constitution of Kenya 2010 put in place extensive provisions to safeguard the process of implementing devolution. These included: mechanisms and institutions to monitor the implementation and a timeframe within which enabling legislation was to be enacted. The Constitution established the Commission for the Implementation of the Constitution (CIC) for five years[270] to coordinate, monitor and report on the general process of implementation of the Constitution.[271] In this regard, the Constitution explicitly stated that no enabling legislation was to be enacted by Parliament before the establishment of the CIC.[272] Both the Commission on Revenue Allocation and the CIC were to be consulted and their recommendations considered by Parliament before enactment.[273]

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[270] Section 5 (7) Sixth Schedule.
[271] Section 5 Sixth Schedule.
[272] Section 14 (1) Sixth Schedule.
[273] Section 14 (2) Sixth Schedule, Constitution of Kenya 2010.

The Constitution further established the Parliamentary Constitutional Implementation Oversight Committee (PCIOC) to provide oversight in the implementation process.[274] The PCIOC was specifically mandated to oversee the preparation of various laws, establishing of new commissions, establishing the infrastructure necessary for the proper operation for each county including locating county premises and the transfer of staff.[275] The Fifth Schedule to the Constitution provides a timeframe (ranging from one to three years) within which various laws on devolution are to be passed[276] and Parliament could, with a two-thirds vote extend the period by one year only.[277]

As a constitutional safeguard to ensure the implementation of devolution and the Constitution generally, any person could petition the High Court if a law is not passed within the period specified in the Constitution, and the Court could then issue a declaratory order on any matter, directing Parliament and the AG to take steps to ensure that the required legislation is enacted, within the period specified and report the progress to the Chief Justice.[278]

In 2010, the then Ministry of Local Government formed a Taskforce on Devolved Government to advise on the laws and policies to be put in place to facilitate the implementation of devolution. The Taskforce carried out public consultations on the implementation of devolution. It came up with a comprehensive report on the implementation of devolution, as well as several Bills that were later adopted and enacted by Parliament at the commencement of devolution.

Among the laws that the Constitution required Parliament to pass was legislation to provide for a phased transfer of functions to county governments for not more than three years from the first county elections[279] and aid county governments in taking up their functions.[280] Parliament enacted the Transition to Devolved Government Act (TDGA) to ensure a coordinated transition to devolved governance. The Act established the Transitional Authority (TA) for three years to lead the change to devolved governance.[281]

The functions of the TA, as listed in the TDGA, included the facilitation of the comprehensive and effective transfer of functions to national and county governments.[282] This entailed the analysis and clarification of the Fourth Schedule to the Constitution and facilitating a phased transfer of functions to county governments.[283] The TA was also charged with assessing and addressing the capacity needs of both the national and county levels[284] as well as reporting on the progress with the implementation of devolution.[285]

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[274] Section 4 Sixth Schedule, Constitution of Kenya 2010.
[275] Section 4 Sixth Schedule, Constitution of Kenya 2010.
[276] Article 261 (2) Constitution of Kenya 2010.
[277] Article 261 (2) Constitution of Kenya 2010.
[278] Article 261 (6) (b) Constitution of Kenya 2010.
[279] Section 15(1) of Sixth Schedule.
[280] Section 15 Sixth Schedule.
[281] Section 5 Transition to Devolved Government Act.
[282] Section 24 Transition to Devolved Government Act.
[283] Section 7(2)(d) Transition to Devolved Government Act.
[284] Section 7(2) (j) to (l) Transition to Devolved Government Act.
[285] Section 25 Transition to Devolved Government Act.

The specific issues that the TA was to address included: auditing national and the then local authorities' assets and liabilities, auditing staff of the former local authorities in preparation for their transition, facilitating civic education on devolution, preparing county profiles information, providing a mechanism for the transfer of assets and liabilities, and assist county governments in setting up financial information management systems, among other transition management processes.[286]

After the March 2013 general election, the county governors and members of county assemblies came into office and found transition teams with whom they began operations. The transition arrangements addressed some initial challenges for the incoming county governments.

5.3 The Inaugural County governments (2013-2017)

The TA was required to publish, 30 days before the election, a list of functions that were to be immediately transferred to county governments after elections.[287] This was done in February 2013, a month before the election[288] According to the list, county governments would, immediately assume responsibility over livestock sale yards and county abattoirs/ slaughterhouses, cemeteries, funeral parlours/ mortuary services and crematoria, refuse removal, refuse dumps and solid waste. In the health sector, only five counties: Nairobi, Mombasa, Kisumu, Nakuru, and Uasin Gishu, were allowed to assume county health facilities and pharmacies, and ambulance services, and the rest was deferred. Counties were also allowed to take control of outdoor advertising, betting services, liquor licensing, video shows and hiring, sports and cultural activities and facilities, county parks, beaches, and recreation facilities. In the transport sector, counties would take over access roads, street lighting, traffic, and parking. Other functions listed in the notice were: licensing dogs and facilities for the accommodation, care, and burial of animals.

Under trade development and regulation, counties would immediately assume powers over markets, trade licensing (excluding regulation of professions), local tourism, county planning and development, land survey and mapping, and housing. In the education sector, counties would take pre-primary education, home craft centres, and child care facilities. Under county public works, counties were allowed to take over the protection of water springs, protection of walls and dams, county public works, and services specific to water management systems in built-up areas. Counties were also allowed to take over fire-fighting services, disaster management, and control of drugs and pornography. All other functions under the Fourth Schedule were presumably deferred.

The TA needed to clarify what the transferred county government functions entailed. Therefore, and without any interpretation, the scope and extent of the functions that counties assumed needed to be more precise. Functions such as "control of drugs

[286] Fourth Schedule to the Transition to Devolved Government Act.
[287] Section 23 (1) Transition to Devolved Government Act.
[288] via Legal Notice No. 16 of 2013.

and pornography" needed further clarification on the nature and extent of the county government's role in controlling matters related to drugs and pornography. Furthermore, the bulk of the functions transferred were typically those performed by the former local authorities, while the rest were deferred.

5.3.1 The Role of TA and first generation of county governments

On 4 March 2013, county governors and members of county assemblies were elected into office. The TA assisted in initial preparations for the incoming county governments. There were advanced transition teams in each of the 47 county governments that were posted there by the TA. The TA had organised office space and equipment for the governors; there were preliminary lists of assets and liabilities (from the former local authorities) and arrangements for the swearing-in and assumption of office for the governors and deputy governors. The TA also ensured that county assemblies had basic systems and structures to assist the house in starting its business.

With the entry of county governments, deliberations on transition management now incorporated the county governments, who formed the Council of Governors to represent the collective interests of the county governments during the transition.

5.3.2 The transfer of functions to county governments

The county governments rejected the phased transfer of functions, as was provided for in the transition laws. This led to the informal adoption of a policy of "big bang" transfer of all functions to county governments at a Summit meeting between the then President and the then newly elected governors.[289] The phased transfer of functions on a county-by-county basis was, thus, abandoned and functions were transferred symmetrically to all county governments.

On 9 August 2013, the TA, vide Legal Notice 137 to 183, transferred the second phase of functions to county governments. In the second Legal Notice, most of the Fourth Schedule items deferred in March 2013 were formally transferred to county governments. Unlike the first Legal Notice, the TA attempted to break down the generally stated functional areas in the Fourth Schedule. Items such as: "crop husbandry," "animal husbandry," "fisheries," "county health services," "county transport," "trade development and regulation," "cooperative societies," "county planning and development," "boundaries and fencing" were disaggregated to clear and specific areas.

In the second Legal Notice, some functions were postponed by at least six months. In the Agriculture Sector, the Legal Notice stated that "the management of agricultural training centers and agricultural mechanization stations shall be transferred after six months." In the Health Sector, the TA specified that all counties should continue to "procure medical commodities from the Kenya Medical Supplies Agency [(KEMSA), a national government

[289] No law was changed, or formal policy or direction was adopted to reflect this important change in powers and functions.

agency] until "alternative intergovernmental arrangements are made." Other postponed functions included: roads pending agreement on classification, mechanical and transport equipment functions, and electricity and gas reticulation and energy regulation, among others.

The TA later transferred further functions, which included: the transfer of the management of Agricultural Training Centers (ATCs) and Agricultural Mechanization Stations (AMSs) under the agricultural sector.[290] The mechanization stations and training centers are shared between counties. Agreements were to be reached between counties involved on how the facilities would be used jointly.

The Transition to Devolved Government Act provided for some critical processes that were to take place to streamline the transfer of functions to the national and county governments. These included: the unbundling of functions to understand the nature and scope of national and county government functions (including concurrency of functions), the costing of national and county government functions to have clarity on county government and national government budgeting, and the verification of assets and liabilities and assignment of the same to the two levels of government. Other essential processes included the rationalization of national and county public services to align them to the assigned functions, among others.[291]

However, these critical processes were not complete by the time the TA was transferring functions to county governments or at the time the TA exited the stage in March 2015.[292] The lack of clarity on the nature and extent of county and national functions in the various sectors has been a source of confusion in the implementation of devolution. The lack of clarity is the basis of the current uncertainty over the management and approach to functions that are concurrent to the two levels of government, the extent of functions devolved from the national level to county governments as required in the Constitution, and the amount of resources needed to accompany the functions that are deemed as transferred to the county governments.[293]

The TA played an important role in paving the way for the entry of the first county governments by facilitating the county governments with skeletal systems and processes upon which county structures were built. The TA also participated in developing laws and policies in the pre-2013 period when the county governments were not in place. This is in addition to the various laws and policies passed to lay the ground for devolution.

However, the TA could also have delivered important and expected outcomes from the transition process. Some of the key issues that TA missed included the comprehensive analysis and unbundling of national and county government of functions, a comprehensive costing of the functions in each level of government, overseeing the complete transfer

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[290] Via Legal Notice No. 33 of 2014.

[291] Section 7 (2) (m) Transition to Devolved Government Act.

[292] Transition Authority, 'Report on the status of devolution: Achievements, challenges, and lessons learnt' (June 2015), p.27-28.

[293] Mitullah WV, 'Managing the transition to the system of devolved government: goals, gains, and moving forward' in IGRTC, Deepening devolution and constitutionalism in Kenya (2021), 77-96, at pp. 92-94.

of functions, and the apportionment of assets and liabilities between the two levels of government. In its reports, the TA noted some of the challenges that it encountered in the delivery of its mandate, which included: being starved of resources necessary to complete its functions, political interference from the Executive (including a proposal to disband the TA before the end of its mandate), and a general lack of political goodwill to ensure a complete transition.[294]

5.3.3 Uncertainty and disputes over national and county government functions

As a result of the incomplete transition process, the uncertainty over the boundaries of functions and powers between the two levels of government has prompted numerous cases and disputes pitting the two levels of government. Courts have settled some disputes and interpreted the law on specific issues. Many other cases are pending before the courts, instituted by third parties such as civil society organizations and individuals. Typically, these cases have revolved around the nature and extent of county government powers vis-à-vis national government powers, relations between the two levels of government, and the amount of resources for devolved services, among other issues. The Court's decisions have affirmed county powers in specific areas but have also dismissed cases that have challenged the powers of the national government over some functions.

In 2013, the High Court affirmed the power of the Nairobi County Government to revise parking fees in the Central Business District through county legislation.[295] This was after the Taxi Association challenged the decision of the then-new county government to raise parking fees because the action was against national legislation (The Traffic Act).[296] The High Court, in another case, also rejected the argument that county powers in health services were limited to those that were exercised by the defunct local authorities. The Court held that the current constitutional dispensation provides for original constitutional powers that are not subject to the previous constitutional order.[297] The Court of Appeal upheld the decision of the High Court regarding the power of county government over health services.[298]

The courts have ruled that the Constituency Development Fund (CDF), a pre-devolution era fund that was channeled through MPs for local service delivery, unconstitutional. The High Court decision was challenged at the Court of Appeal and the Supreme Court. The Supreme Court eventually upheld the decision of the lower Court declaring CDF unconstitutional because it infringed on county government functions.[299] The CDF continues to be administered under another law that was enacted by Parliament (different from the one that was challenged for unconstitutionality).[300]

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[294] Transition Authority, 'Report on the status of devolution: Achievements, challenges, and lessons learnt' (June 2015) at p.9.

[295] In Nairobi Metropolitan PSV SACCOs Union Ltd and 25 others v County Government of Nairobi and 3 others [2014] eKLR.

[296] Traffic Act, cap. 405 Laws of Kenya.

[297] Okiya Omtata Okoiti and another v Attorney General and six others [2014] eKLR.

[298] Okiya Omtata Okoiti and another v Attorney General and six others [2014] [2014] eKLR.

[299] Institute for Social Accountability & another v National Assembly & 3 others & 5 others (Petition 1 of 2018) [2022] KESC 39 (KLR) (8 August 2022)

[300] The National Government (Constituencies Development Fund) Act of 2015; the 2015 law was subsequently challenged in Court, but there is a court decision yet.

The courts have also affirmed county powers over liquor licensing,[301] power to hire teachers for Early Childhood Education,[302] powers to levy a service charge on minerals extracted within their counties,[303] among many other functions.

Many of these cases resulted from the failure to clarify the functions of the two levels of government to guide issues such as county and national government budgeting in sectoral areas. The country was emerging from an era of centralized governance where most of the resources and sectoral functions were (and most are still held) by Ministries, Departments, and Agencies at the national level. Litigation over functions was undertaken to claim the constitutional space of county governments in the current dispensation.

The role of IGRTC and pending issues in transition to county governance

The second phase of the transition came to an end in March 2016. By this time, transition issues such as analysis and clarification of functions, the costing of functions, the development of the capacity of county governments, and verification of assets and liabilities would have been completed. However, by the time the TA wound up operations, most issues had yet to be resolved or concluded.

The law provided that all pending transition matters were to be transferred to the Intergovernmental Technical Relations Committee (IGRTC).[304] The IGRTC is established to manage intergovernmental relations between the two levels of government and to act as the secretariat of the Summit and the Council of Governors[305] and is also tasked with resolving intergovernmental disputes.

The IGRTC is in the process of completing the pending transition issues that were handed over from the Transition Authority. The IGRTC has since published gazette notices transferring various functions to county governments, including libraries, museums; betting, casinos, and other gambling services; cooperatives, and disaster management.[306] The IGRTC has faced many challenges in the performance of its functions, key among them being resources and capacity to undertake core functions that were transferred from the Transition Authority.

In a National Government and a County Government Summit that was held in February 2023, the IGRTC was tasked to take urgent measures to wind up all the pending functions, including the transfer of remaining functions and the identification and verification of assets.[307]

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[301] Meru Bar, Wines & Spirits Owners Self Help Group v County Government of Meru [2014] eKLR.
[302] Kenya National Union of Teachers v Attorney General & 4 others [2016] eKLR.
[303] Base Titanium Limited v County Government of Mombasa & another [2018] eKLR.
[304] Section 12(b) Intergovernmental Relations Act.
[305] Section 12 (a) and (b) Intergovernmental Relations Act.
[306] Legal Notices 85 of 2021, 86 of 2021, and 142 of 2019.
[307] Communique of the National and County Government Coordinating Summit (February 2023).

5.4 Conclusion

The 6-year transition period in two phases (2010-2013, 2013-2016) was significant for ensuring that devolved governance is rooted in Kenya's constitutional governance. The devolved system of government required a fundamental change from the governance arrangement that existed before 2010. In many cases, this required building new institutions, with the caution that such processes should maintain the delivery of essential services.

While the processes still need to be completed, the milestones achieved during the transition and the setting up service delivery systems have enabled county governments to deliver services. They are starting to impact the lives and livelihoods of the people. The next chapter describes county governments' successes and emerging impact.

CHAPTER SIX

FINANCING COUNTY GOVERNMENTS AND RESOURCE MOBILISATION

6.1 Introduction

This chapter analyses the significant patterns and trends in the financing of county governments and the impact this has had on the objectives and purpose of the devolved system of government. It further examines the issues, challenges, and opportunities that have defined the process of financing county governments.

The exercise of devolved powers and the performance of functions assigned to county governments largely depend on the resources guaranteed and available to support and facilitate county governments. Indeed, the hallowed principle of "funds follow functions" is a core component for the effectiveness and success of any devolved system of government.[308] During the constitution-making process, and perhaps informed by the experiences and challenges of the defunct local authorities, Kenyans provided for constitutional principles and specific measures to guarantee resources for county governments.

The Constitution provides that at least 15 percent of revenue collected nationally should be allocated to county governments in every financial year.[309] The Constitution also assigns the county government powers to administer some taxes and raise revenue from services provided.[310] Furthermore, the Constitution provides for a procedure through which county governments can borrow funds to support the performance of their functions.[311] Finally, county governments have, either individually or through the support of the Council of Governors or the national government, secured funding through grants from development partners to undertake various projects and activities that form part of their functions.

The public finance management framework, through which county government resources are planned and implemented, provides some principles that should guide the resourcing and funding of county governments. The Constitution calls for transparency and openness, fairness, and equity (including affirmative action measures for previously marginalized regions and communities) in the division of resources between the two levels of government and amongst the 47 county governments.[312] The Constitution also calls for the prudent and optimal use of public resources, predictability in the allocation of resources to allow and facilitate effective planning, and accountability in the planning and use of resources, including public participation.[313]

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[308] Litvack J, Ahmad J & Bird R Rethinking Decentralisation in Developing Countries Washington DC: The World Bank (1998).
[309] Article 203 (2) Constitution of Kenya 2010.
[310] Article 209 (3) and (4) Constitution of Kenya 2010.
[311] Article 212, Constitution of Kenya 2010.
[312] Article 204, Constitution of Kenya 2010
[313] Article 203 (1) Constitution of Kenya 2010.

To achieve the constitutional objectives and expected outcomes regarding the management and utilization of public resources, the Constitution puts an elaborate system of planning, budgeting, implementation, and audit and accountability processes in place. This system is further bolstered by appropriate laws and policies to realize the set constitutional objectives. The laws include the Public Finance Management Act,[314] the Controller of Budget Act,[315] the Commission on Revenue Allocation Act,[316] and the Public Audit Act,[317] among other laws. Specific regulations have been passed under various laws to support specific implementation processes, such as the PFMA Regulations.

6.2 The funding of county governments

There are diverse sources of funds and revenue for county governments recognized in the Constitution and enabling law. These include guaranteed transfers from revenue collected nationally, conditional grants from the national level, and local revenue. County governments can also get grants and donor funds. These sources are discussed in the next section.

Own source revenue

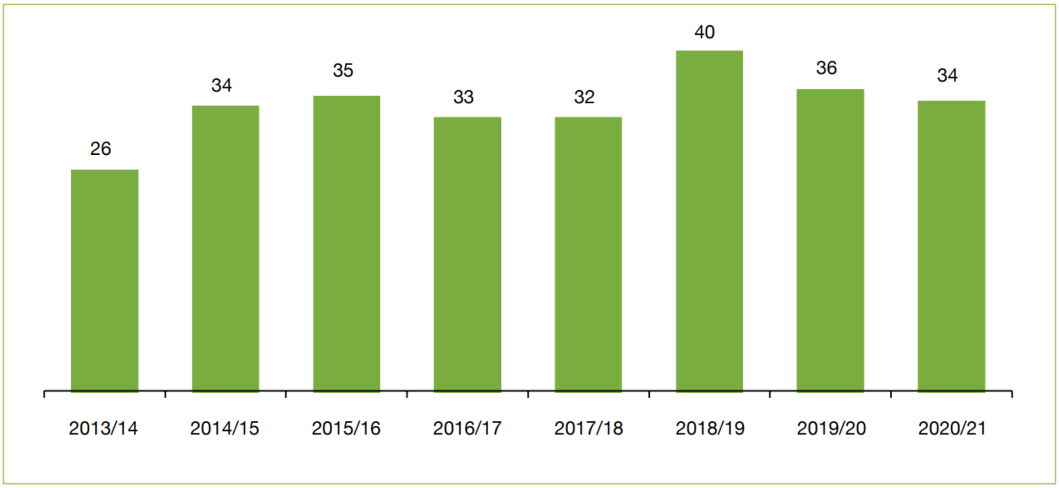
Constitutionally, county governments are mandated to impose property and entertainment taxes,[318] similarly charge for services they provide.[319] The "own source" revenue plays a critical role in shaping both the autonomy of county governments as well as accountability. First, own source revenue signifies the financial independence of county governments as counties can invoke their constitutional power to raise the revenue required to perform functions.[320] Secondly, the local nature of taxes and fees charged can form the basis of public accountability for citizens.[321] Local taxes provide a basis for the demand for better services by county governments as the citizens seek to see how their funds are utilized.[322]

Despite the importance and significance of own revenue to county governments' autonomy and local accountability, own-source revenue is not the primary funding source for counties. County governments heavily rely on transfers from the national level to perform their functions. Indeed, the equitable share is approximately 90 percent of the county government's finances (excluding loans, grants, and conditional grants from the national government). This is partly a result of the design of the devolved government that placed the bulk of the revenue and revenue-raising powers in the national government. However, this does not eliminate the need to maximise the local revenue potential of county governments as required by the Constitution.[323]

[314] Act No. 18 of 2012.
[315] Act No. 16 of 2011.
[316] Act No. 26 of 2016.
[317] Act No. 12 of 2003
[318] Article 209 (3) Constitution of Kenya 2010.
[319] Article 209 (4), (a) and (b) Constitution of Kenya 2010.
[320] Litvack et al. Rethinking Decentralization in Developing Countries (1998) 6-7.
[321] *ibid.*
[322] *ibid.*
[323] Article 203 (1) (i) and Article 216 (3) (b) Constitution of Kenya 2010.

Between the Financial Year 2013/14 and 2021/22, county governments collectively raised KES 271 Billion through own source revenue.[324] This can be compared with the transfers from nationally generated revenue that were KES 2.586 trillion during the same period. Other funds included KES 142 Billion from national government conditional grants and KES 191 from loans and grants from donors.[325]

The Controller of Budget reports a decline in the collection of own-source revenue for the county governments. In the Financial Year 2020/2021, for instance, county governments generated a total of KES 33.44 Billion which was 64.2 percent of the target that county governments aimed to collect during that year[326] and was less than the KES 35.77 Billion that county governments collected the previous Financial Year (2019/20).[327] The report of the first half of the Financial Year 2021/2022 also indicated a decline in collection of own-source revenue, from KES 13.11 Billion down from KES 14.06 Billion in the first half of 2020/2021.[328]



Graph sourced from 'Kenya County Fact Sheets (third edition, 2022). Source of data: Office of the Controller of Budget (figures in KES Billions)

Figure 1: Graph showing the trend of own source revenue between 2013/14 and 2020/21

The Office of the Controller of Budget estimates that between Financial Year 2013/14, when the county governments came into office, and 2020/22, they have raised KES 270 Billion. During the same period, the county governments received a total allocation of

[324] Commission on Revenue Allocation, Kenya County Fact sheets' (third edition) (2022) at p.9.

[325] Commission on Revenue Allocation, Kenya County Fact sheets' (third edition, 2022) at p.9.

[326] Controller of Budget, 'County Governments Budget Implementation Review Report for the Financial Year 2020/21' p.3.

[327] Controller of Budget, 'County Governments Budget Implementation Review Report for the Financial Year 2020/21' p.3.

[328] Controller of Budget, 'County Governments Budget Implementation Review Report for the first half of Financial Year 2021/22' p.3.

KES the Equitable Share of KES 2.6 Trillion.[329] This makes own revenue as a percentage

of the revenue to counties just around 10.5 percent of the total revenue of the county governments (excluding loans and grants, and conditional grants).

As stated earlier, the Constitution provides that county governments should optimize their local revenue potential to raise funds to perform their functions.[330] The Commission on Revenue Allocation (CRA) is tasked with the role of defining and enhancing revenue sources for county governments.[331] While county governments have put in place various measures to strengthen the sources and amount of local revenue collected, the statistics show that counties are yet to optimize the local sources of revenue. A study commissioned by the World Bank study of 2017 that analysed the local revenue potential of 26 counties demonstrated that own revenue potential could rise to as high as 43 percent of the total county budget.[332] This means that despite the limited tax and revenue, county governments have potential to enhance their local sources of revenue significantly.

Among the factors identified as the causes of the low revenue collection include: manual revenue collection, which has encouraged revenue leaks, and low levels of accountability in revenue collection. Other factors include a lack of updated fiscal cadasters to provide a basis for the mapping and administration of property taxes and weak institutional capacity to plan and manage local revenue generation systems, among other factors.[333]

However, it is also important to note that the capacity to collect revenue and the potential or actual revenue base differ for all counties. Urban-based counties with substantially larger urban populations and a few with natural resources managed by county governments (such as game reserves) are at a more relative advantage to the other counties that are largely rural or in the country's Arid and Semi-Arid (ASAL) regions. Indeed, the revenue raised by Nairobi City County is much higher due to its cosmopolitan population compared to the other counties with lesser populations and less development.

The top revenue collectors (in terms of the amount collected) include Nairobi, Mombasa, Kiambu, Nakuru, Narok, Machakos, Kisumu, and Uasin Gishu. These are the counties with the most extensive urban spaces in the country, save for Narok, that collects and manages revenue from the Maasai Mara National Game Reserve, which contributes substantial revenue to the County.[334] Even so, a county like Nairobi City County is said to be collecting far below its potential mainly as a result of the factors that were pointed out earlier.

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[329] Controller of Budget, 'County Governments Budget Implementation Review Report for the first half of Financial Year 2021/22' p.3.

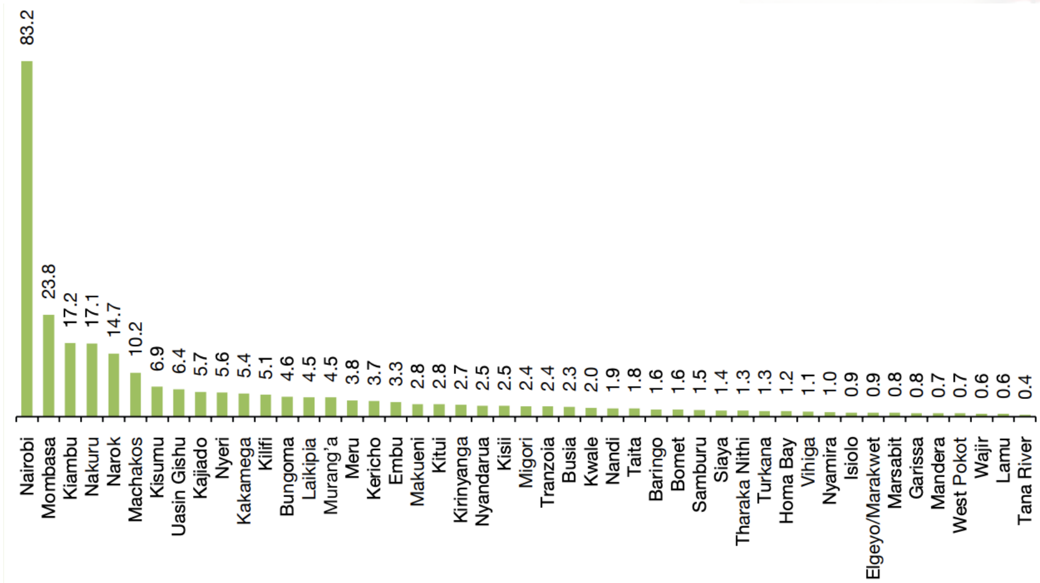
[330] Article 203 (1)(i) Constitution of Kenya 2010.

[331] Article 216 (3) (b) Constitution of Kenya 2010.

[332] Adam Smith, Nick Spyropoulos, Alexander Key Graeme, Mary Hazel Granger, Desmond Boi, Johannes' Own Source Revenue Potential and Tax gap study of Kenya's county governments' (Commissioned by the World Bank) (2020).

[333] Commission on Revenue Allocation & World Bank Group, 'Comprehensive own source revenue potential and tax gap study of county governments' (June 2022).

[334] Institute of Economic Affairs' Enhancing Mobilisation of Own Source Revenue in Nairobi City County: Issues and Opportunities' (2021).



Graph sourced from 'Kenya County Fact Sheets (third edition, 2022). Source of data: Office of the Controller of Budget (figures in KES Billions)

Figure 2: Total own source revenue by county between Financial Years 2013/14 to 2020/21

The Commission on Revenue Allocation and the World Bank note in a 2022 study that county governments have greatly improved in the manner they report their own source revenue growth over the years.[335] County governments that have taken steps to diversify revenue have also increasingly defined that sources of revenue and reported clearly in their financial reports.[336] However, in many of the counties, the development of frameworks and tools relied upon to levy charges or collect other revenue lack harmonization and proper directions to those administering revenue collection and reporting system.[337]

To address this challenge, county governments are increasingly sharing information on revenue collection and also working with the CRA to enhance their capacity and wherewithal to efficiently collect and manage their own source revenue.[338] Transparency and efficiency in local revenue collection can increase the potential of local revenue and efforts by county governments are paying off. In October 2022, Murang'a County piloted its automated revenue collection system, which has seen a doubling of its local revenue.[339] Mombasa County Government has also put in place a digital identification of revenue officers, which

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[335] Commission on Revenue Allocation & World Bank Group, 'Comprehensive own source revenue potential and tax gap study of county governments' (June 2022).

[336] *Ibid.*

[337] Commission on Revenue Allocation & World Bank Group, 'Comprehensive own source revenue potential and tax gap study of county governments' (June 2022).

[338] https://cra.go.ke/2022/10/06/county-governments-can-collect-216-billion-from-local-revenues/

[339] Nzei Mwende 'Murang'a County doubles revenue collection through automation' (Council of Governors, Maarifa Centre) 26 April 2023.

has increased revenue collected from markets within the county.[340]

The requirement in the PFMA that all revenue collected by county governments be deposited in the County Revenue Fund has created a challenge for counties.[341] However, the same Act allows the development of frameworks that can allow the use of locally generated revenue and for county governments to report on the use of funds. In the health sector, for instance, county governments have enacted health facilities improvement fund laws to allow the management and appropriation of fees collected from health facilities, and this has dramatically improved efficiency in service delivery through the immediate ploughing back of resources to assist in service delivery.[342]

Equitable share

The Equitable share is the most significant revenue source supporting county government functions and determines their overall effectiveness. The Constitution has defined measures and safeguards to guarantee the allocation, disbursement, management, and accountability for using the Equitable Share.

First, and was mentioned earlier, the Constitution provides for the allocation of at least 15 percent of revenue collected nationally.[343] This is a constitutional public finance minimum to ensure that county governments are not denied resources and that there is a predictable basis upon which to plan county government activities.

Secondly, the Constitution provides a national process of determining the total share that should go to county governments. It has offered inbuilt mechanisms, measures, and processes to cater to the interests of county governments in determining the equitable share. The Senate, whose primary role is to represent and safeguard county interests, has a responsibility to pass, every five years, a resolution determining the basis of revenue allocation among county governments and is required to consult the CRA, county governments, the public, and other stakeholders. The resolution is then passed by the National Assembly, which requires a special majority to overturn and then forms the basis of the allocation of the Equitable Share.[344]

County governments are required to prepare County Integrated Development Plans (CIDPs), which form the basis for annual plans and budgets over the next five years.[345] In addition, county governments are also required to develop sectoral plans, spatial plans, and city/municipal plans for governance of urban areas.[346] These plans collectively form the basis for county budgets.

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340 Nzei Mwende 'Mombasa County increases revenue collection from markets by embracing digital identification of county revenue officers' (Council of Governors, Maarifa Centre) 25 August 2022.

341 Section 109 (2) Public Finance Management Act, 2012.

342 https://www.the-star.co.ke/counties/western/2022-07-18-counties-urged-to-pass-health-facilities-improvement-fund-bill/

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344 Article 203 (2) Constitution of Kenya 2010.

345 Article 217 Constitution of Kenya 2010.

346 Section 180, County Governments Act, 2012.

The Constitution and the Public Finance Management Act provide a straightforward budgeting process that includes timelines that should be strictly followed to ensure that county governments receive their equitable share on time. The Constitution requires the Commission on Revenue Allocation to use the basis for division of resources resolution by the Senate and prepare estimates on the vertical division of revenue between the national and county governments and amongst county governments.[347] The division of national and county government resources is determined through the Division of Revenue Bill while the division of revenue between counties is determined through the County Allocation of Resources Bill, both Bills are prepared annually.[348] Parliament can adjust the CRA proposals but must provide reasons for such adjustment.[349]

While the Constitution is clear that both chambers (Senate and National Assembly) should debate and pass the CARB, it needs to be clarified in the Constitution whether the National Assembly should send DORB for debate and approval. The Supreme Court, through an advisory in 2013, clarified and stated that the Senate should also debate DORB.[350]

As stated, the Equitable Share forms the largest source of finances for the county governments. The involvement of the Senate (which protects county interests) and the role of the CRA in preparing recommendations for the sharing of revenue are all aimed at ensuring transparency in determining the basis for the division of resources and the actual county equitable share.

The total Equitable Share is determined by the constitutionally set criteria under the Constitution, which include: national interests, public debt obligations, needs of the national government determined through objective criteria, county government functions and the need to perform effectively, fiscal capacity, and efficiency of county governments, developmental needs of counties, economic disparities and within and among counties, affirmative action in respect of disadvantaged groups and areas, the need for economic optimization for each county and provision of incentive to optimize revenue-raising capacity, and the need for flexibility to respond to emergency and other temporary needs.[351] County governments have received a total of KES 2.6 Trillion[352] as the Equitable Share from 2013/14 to 2021/2022 Financial Year.

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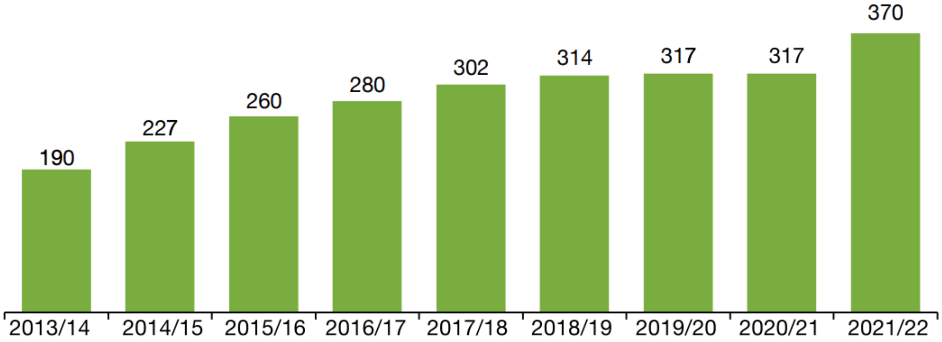
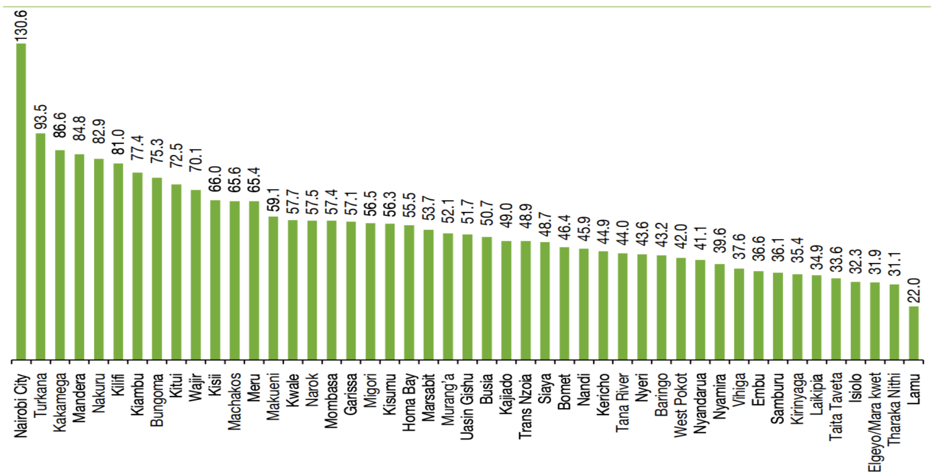
[347] Section 109-111 County Governments Act, 2012.
[348] Article 216 and 217 of the Constitution of Kenya, 2010.
[349] Article 218 Constitution of Kenya, 2010.
[350] Article 218 (2)(c) Constitution of Kenya, 2010.
[351] Senate v National Assembly (Advisory Reference No. 2 of 2013)
[352] Controller of Budget, 'County Governments Budget Implementation Review Report for the first half of Financial Year 2021/22' p.3.



Graph sourced from 'Kenya County Fact Sheets (third edition, 2022). Source of data: Office of the Controller of Budget (figures in KES Billions)

Figure 3: Total Equitable Share of County governments from FY 2013/14 to 2021/22

The horizontal division of revenue raised nationally (among the 47 county governments) is based on the resolution adopted by the Senate and criteria developed by the CRA to operationalise the resolution of the Senate. The elements or components in the criteria have varying components that determine the final share of each of the 47 counties. The components of the formula and the weight of each are in the third formula of the CRA (which was adopted in December 2020) and are: health services (20 percent), agricultural services (10 percent), other county services (18 percent), basic equal share (20 percent), poverty (14 percent), land area (8 percent), revenue collection (2 percent), financial management (2 percent), urban services (5 percent), and roads (4 percent).[353]



Graph sourced from 'Kenya County Fact Sheets' (third edition, 2022), Commission on Revenue Allocation. Source of data: County Allocation of Revenue Act

Figure 4: Equitable share per county from Financial 2013/14 to 2021/22

[353] https://cra.go.ke/2020/12/01/explanation-of-the-third-basis-for-revenue-sharing-among-county-governments/

While the Constitution sets the minimum financial disbursement to county governments at 15 percent of national revenue, allocations have always been above the specified minimum, mainly because the functions allocated to county governments go far beyond the guaranteed minimum. The Constitution also requires that once the county share is determined, it should be transferred without undue delay and deduction unless the law sanctions such deduction.[354]

Despite the requirements for efficient disbursement of funds to counties, the management and administration of Equitable Share has encountered several challenges in implementation. There have been perennial delays in the release of disbursements to county governments.[355] This has occasioned disruption of service delivery and delays in the payment of county government salaries in most counties.[356] While the Senate intervened by developing a schedule of transfers to county governments with the National Treasury, the schedules have generally not been adhered to by the National Treasury.[357]

Almost every financial year, a stalemate in determining the Equitable Share of the county governments, pitting the Senate and the National Treasury, has delayed releasing funds to county governments at the end and beginning of the financial year. The Supreme Court has held that to avoid disruption, a fraction of the Equitable Share can be released to county governments if the process of finalizing the DORB stalls.[358]

County governments have also raised concerns about the adequacy of the Equitable Share. The counties have called for an increase in the county share, noting that the current allocations are insufficient to cater to county governments' needs. In the past, these concerns have led to calls for revision of the minimum allocation of resources through constitutional amendments.[359] The inadequacy of the Equitable Share has also been linked to the duplication of functions between the two levels of government with the county governments claiming that resources meant for functions allocated to county governments are routinely retained at the national level. [360]

The Equalisation Fund and conditional grants

The Constitution established the Equalisation Fund as an affirmative action fund to support specific services in marginalized areas. The Fund consists of 0.5 percent of revenue collected nationally.[361] The Fund is meant to provide basic services, including water, roads,

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[354] Article 219, Constitution of Kenya 2010.

[355] https://www.capitalfm.co.ke/news/2023/04/governors-threaten-to-shut-counties-in-2-weeks-over-funds-delay/

[356] https://www.standardmedia.co.ke/counties/article/2001341138/the-pain-of-county-staff-not-getting-paid-for-months

[357] http://www.parliament.go.ke/sites/default/files/2021-08/schedule%20of%20cash%20disbursements%20to%20counties%20FY%202021-2022.pdf

[358] Council of Governors and 47 others v Attorney General and 3 others (interested party); Katiba Institute and 2 others (Amicus Curiae) *Advisory Reference No. 3 of 2019*

[359] These include the 'Pesa mashinani' initiative by county governments, the "Okoa Kenya' initiative, and the Building Bridges initiative, all called for an increase of the Equitable Share to counties.

[360] Council of Governors, 'Report of the audit of national and county legislation' (2015).

[361] Article 204, Constitution of Kenya 2010.

and health facilities in the identified marginalized areas, and is intended to ensure that these areas catch up with the rest of the country.

The utilization of the Fund was delayed in the first three financial years of implementation due to an initial delay in the formula identifying marginalized areas[362] and the development of a policy and legal framework for the absorption of the fund.[363] The fund is meant to lapse after 20 years, but subject to extension by Parliament for a further fixed period.

The Fund has since been appropriated twice (through the Equalisation Fund Appropriation Acts of 2017 and 2018), and the Appropriation Act 2023 was finalized in early 2023. As of June 2023, the total fund is approximately KES 54 Billion.[364] The CRA developed criteria for sharing the fund that considered inter-county and intra-county disparities[365] and has formed the basis for the distribution of the Fund.

Conditional grants from the national government have also played a significant role in funding county functions. These are usually given from the national government for specific functions or designated expenditure areas and are recognized under the Constitution.[366] Conditional grants from the national government include: Level 5 hospital funds, hospital user fees forgone by county governments, universal health care, free maternal health care, and leasing of medical equipment.[367] Conditional grants have ranged between KES 2 Billion to 23 Billion between the Financial Years 2013/14 and 2021/22, 2021/22 being KES 8 Billion.[368]

Loans and grants

County governments can borrow to raise local revenue.[369] However, this must be supported by a national government guarantee[370] and with the approval of the county assembly.[371] The Public Finance Management Act further restricts to capital financing only.[372] In 2020, the National Treasury issued the Public Debt and Borrowing Policy, which laid down steps for national and county borrowing.[373] Laikipia County borrowed KES. 1.16 Billion through the Infrastructure Bond under this framework.[374] Loans and grants from donors

362 https://cra.go.ke/2023/03/31/cra-submits-memo-on-the-equalisation-fund-appropriations-bill-2023-2/

363 *Ibid.*

364 *Ibid.*

365 https://cra.go.ke/wp-content/uploads/2021/12/CRA-37-Second-Policy-on-Marginalised-Areas-June-16th-2018.pdf

366 Article 202 (2) Constitution of Kenya, 2010.

367 CPA Stanley Igati (FRU – National Treasury 'Sensitization on conditional grants/allocations' (Kenya School of Government (KSG) 6 December 2018.

368 The drastic drop is because four conditional grants (Road Maintenance Levy Fund (RMLF), the grant to level-5 hospitals, the compensation for user fees foregone, and the rehabilitation of village polytechnics) were converted to equitable share in FY 2021/22.

369 Article 212.

370 Article 212 (a).

371 Article 212 (b).

372 Section 58 (2).

373 https://ntnt.treasury.go.ke/wp-content/uploads/2021/02/Debt-and-Borrowing-Policy-2020-Final-June-2020.pdf

374 http://www.parliament.go.ke/sites/default/files/2022-06/Proposed%20borrowing%20of%201.16B%20by%20County%20government%20of%20Laikipia%20through%20infrastructure%20Bond.pdf

have cumulatively amounted to KES. 191 Billion between Financial Years 2013/14 and 2021/2022.[375]

6.3 Conclusion

The devolution of powers to the county levels can only be meaningful where there is optimum resource support to facilitate the exercise of powers and the transferred functions. The Constitution has ensured this by putting in place mechanisms to assist in the determination of county resources as well as principles to ensure that the resources are used in a manner that enhances the objectives and purpose of the devolved system of government. Since 2013, the process of determining resources has improved, and institutions with a role in ensuring that county governments are adequately facilitated have stepped up their role. However, the clarity of what each level of government is in charge of and what the functions cost to deliver will significantly enhance the planning of resources and the adjustments required to have an optimally functioning fiscal system of multi-level governance.

[375] Commission on Revenue Allocation 'Kenya County Fact Sheets (third edition, 2022) p.9.

CHAPTER SEVEN

COUNTY GOVERNMENTS AND DELIVERY OF HEALTH SERVICES

7.1 Introduction

The Constitution substantially restructured how health services are provided and accessed in the country. County governments are empowered under the Constitution to provide basic health services, while the national government is in charge of national health referral facilities and health policy. The Constitution also recognizes the fundamental right to health and provides. Article 43 (1) of the Constitution provides that every person has a right to the highest attainable standard of health, which includes the right to health care services, including reproductive health"

The constitutional entrenchment of the right to health is further recognition of the international and regional commitments that Kenya has made regarding the protection and realization of the right to health. These include treaties and instruments such as the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the United Nations on Convention on Elimination of all Forms of Discrimination Against Women (CEDAW), the African Charter on Peoples' Rights, the UN Convention on the Rights of the Child, among other regional and international instruments where the right to health is protected.

The devolved system of government required fundamental changes and restructuring of the health sector. Before 2013, health services were mainly provided by the Ministry of Health at the national level, with only a handful of the former local authorities providing limited health services. The Constitution now requires all 47 county governments to provide a range of health services and related services, leaving the coordination of policies and a few national health services to the national government.

Under the Constitution, county governments are in charge of county and sub-county hospitals, rural health and dispensaries, and the maintenance of these facilities. County health services also include county health pharmacies, ambulance services, and the promotion of primary healthcare. Other county government functions include licensing and controlling undertakings that sell food to the public, solid waste management and disposal, and veterinary services.

Since 2013, county governments have pursued a sustained investment in health, with counties committing an average of 30 percent of their resources towards delivering health services, usually the highest allocation in all county budgets.[376] These resources have been invested in expanding healthcare infrastructure, hiring more health professionals to provide care and services, and promoting primary healthcare nationwide. The emerging outcome of these investments is improved access to health services, as evidenced by increased visits to health facilities, increased number of skilled birth attendants, and reduced infant mortality

[376] Council of Governors, 'The impact of devolution on women and girls in Kenya' (2022) p. 15.

rates, among other positive indicators. This chapter highlights the achievements and life-changing stories in the provision of health services since 2013.

7.2 Expansion of health infrastructure and facilities

Reports and statistics in the health sector show rapid growth of facilities in the health sector. Before the onset of devolution in 2013, there were a total of 3 127 dispensaries (Level 2 facilities) in the entire country.[377] The number rose to 4,546 in 2018[378] and to a total of 10, 677 dispensaries as of August 2022.[379] County referral hospitals (Level 5) were 17 in 2013, and this number has grown to 23 facilities across the country.[380]

Across the country, and in almost all urban centres, new public health facilities have been built by county governments. The growth of health facilities has been witnessed in the smaller facilities (dispensaries and health centres) at the community level to middle-level facilities such as county and sub-county county hospitals. In Isiolo, health services have been brought closer to the people, and access has been established where there was none in the vast county. Before devolution, the distance between one facility to another was approximately 50 km. With the entry of devolution, the county government has facilitated the construction, equipping, and employing of staff in 20 more health facilities in the county.[381]

Kilifi County had as few as 59 dispensaries/ health centres before devolution in the vast county. Due to the vastness of the district, residents could walk for hours and long distances to access dispensaries. Areas such as Bamba, Ganze, and Magarini were inaccessible, with bad roads that limited mobility and response in health emergencies. Kilifi now boasts up to 140 dispensaries, with the number set to increase following the current County Integrated Development plan. From just about 1000 health professionals working in the area in 2013, the workforce has grown to nearly 1,800 workers. The additional numbers have boosted the capacity of health institutions to deliver results, with a positive impact emerging in the health indicators.[382] In Nakuru County, there were only 130 health facilities comprising 1 level-5, 7 level-4 hospitals, and smaller health facilities. The facilities have now increased to 204.[383]

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377 A Muwonge, TS Williamson, C Owuor, & M Kinuthia Making Devolution work for service delivery in Kenya (2022) The World Bank (2022) 16.

378 A Muwonge, TS Williamson, C Owuor, & M Kinuthia Making Devolution work for service delivery in Kenya (2022) The World Bank (2022) 16.

379 Council of Governors 'State of Devolution Address' (2022).

380 A Muwonge, TS Williamson, C Owuor, & M Kinuthia Making Devolution work for service delivery in Kenya (2022) The World Bank (2022) 16; Council of Governors 'State of Devolution Address' (2022).

381 Interview with the Chief Officer, Medical Services, Isiolo County.

382 Interview with Dr. Bilal Madzoya, the Chief Officer in charge of medical services at Kilifi County.

383 Interview with Dr. Asha Maina, Medical Superintendent, Nakuru Level 6 Hospital.

7.3 Human resources for health

There is a corresponding growth in the number of health professionals recruited to offer services in public health facilities in the Country. In 2012, before the county governments came into place, 874 doctors and 6620 nurses were in the Country. Since the entry of county governments in health services, an additional 4,080 doctors have been hired at the different county health facilities. As of 2022, county governments had hired 4,080 doctors working at various county facilities and 557 doctors working for the national government's referral facilities, making it a total of 4,637 doctors.

In 2012, there were 3,757 nurses in public health facilities in the Country. Counties have hired 24,373 that work in county health facilities while there are 1,224 nurses in national health referral facilities, making it a total of 25,597 nurses in public health facilities in the Country.[384] As of June 2023, the total county health core workforce of 125, 900 accounted for 66 percent of the entire core health workforce in the country's public and private sectors.[385]

7.4 Improved healthcare and services

Investing in human resources for health and infrastructure has enhanced healthcare services nationwide. Kenyans can now access health services in their home counties, including complex medical treatment.

Before devolution, patients with conditions such as kidney failure, cancer, and health conditions that generally required advanced medical attention, could only get such services at the provincial general hospitals or the two biggest referral hospitals; the Kenyatta National Hospital in Nairobi or the Moi Teaching and Referral Hospital in Eldoret (Uasin Gishu County). The other options were top private health facilities in major urban centres across the country (Nairobi, Mombasa, Kisumu, Nakuru, etc.) or treatment abroad. However, the cost of accessing private facilities is way out of the means of the ordinary Kenyan.

Many cases went undiagnosed, even when a few were diagnosed; it was often too late for the healthcare experts to do anything meaningful. Many patients who managed to get treatment for conditions like cancer and kidney transplants did so after selling their properties, using up their lifetime investments, or carrying out fundraising from well-wishers.

There are 23 county referral hospitals that offer a broad range of advanced medical services, and these include theatre and surgical services, oncology centres that offer radiotherapy and chemotherapy sessions as well as diagnosis, renal units that carry out dialysis sessions for patients, orthopaedics, ophthalmology, dental care, and many other health services. The county referral hospitals also have Intensive Care Units and High Dependency Units for patients that require critical care.

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[384] Council of Governors (Health Committee Statistics) https://www.cog.go.ke/health-committee

[385] CoG, Annual State of Devolution Address (2023) p.5.

The Kilifi Medical Complex in Kilifi Town, Kilifi County, completed in 2022, will revolutionize healthcare in Kilifi County and the greater coastal region. Construction of the facility began in 2017, and the full operationalization started in July 2022. The facility has four theatres, trauma care services for victims of accidents, a minor theatre, ICU and HDU beds, laboratory services, an ophthalmology centre, and oncology services.[386]

Figure 5: Kilifi Medical Complex

Figure 6: Facilities at the new Kilifi Medical Complex

Before establishing the facility, patients from Kilifi and the surrounding region visited Mombasa for advanced medical services and care. The Medical Complex will significantly reduce the traffic of patients to Mombasa, and the neighbouring counties on the Coast (Lamu, Kwale, Tana River, Taita Taveta, and others) will find it easier to visit the Kilifi facility for advanced healthcare services.[387]

386 Observations from field visits and discussions with health professionals at the Kilifi Medical Complex.
387 Interview with Dr. Bilal Madzoya, the Chief Officer in charge of medical services at Kilifi County.

The 23 county referral hospitals nationwide serve patients from host and neighbouring counties. The scale and nature of investments required to start facilities that offer advanced medical care are high, and this may explain the current number of 23 Level 5 facilities in the 47 counties. The Kericho Referral Hospital, for instance, serves patients from the neighbouring counties of Bomet, Nyamira, Kisii, and Kisumu Counties.[388]

In 2015/16, the national government initiated a project, Managed Equipment Service (MES), as an "alternative health care financing option to scale up health infrastructure for the provision of specialized medical care."[389] County referral hospitals were equipped with facilities, which have assisted in providing advanced medical services.

The Kericho Referral Hospital uses digital imaging services that are critical for purposes of diagnosis of various health conditions, including the innovative use of imaging to detect and treat COVID-19.[390] The modern machines that were provided through the MES by the Ministry of Health and the county government replaced the old x-ray machines.[391]

In the case of cancer treatment, the national government supported county governments in establishing 14 regional cancer centres across the country in different counties. Three of the centres (Kisumu, Nakuru, and Garissa) offer comprehensive care that includes: screening, chemotherapy, surgery, and radiotherapy services which started in 2022.

Prior to devolution, patients from Kericho and neighbouring counties had to travel to Eldoret, Kisumu, Nakuru or Nairobi for such services as CT scans. However, the Ministry partnered with Kericho County to provide a digital medical imaging system that assists in diagnosis. Staff at the facility have been trained on the use of the machines. Once images of patients have been taken, they are uploaded to an online access and retrieval system where the doctors can log in from any section of the health facility and access the digital images for analysis.[392]

7.5 Community health services

County governments have primarily invested in promoting primary health care by retaining community health workers/community health volunteers and community health assistants to assist in community health work. Community health services are a vital part of healthcare services. Preventive health services can help reduce the disease burden in a county's health facilities and thereby reduce the amount of resources spent on curative services.[393]

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388 Interviews with health professionals and patients at the Kericho County Referral Hospital.
389 Institute of Economic Affairs (IEA), 'Leasing of Medical equipment project in Kenya: value for money assessment' (2020) 9.
390 https://maarifa.cog.go.ke/county-initiatives/kericho-county-mitigates-inadequacy-reagents-using-radiology-test-covid-19-and
391 Interview with health professionals at Kericho Referral Hospital.
392 Observations during a visit to the Kericho County Referral Hospital.
393 Ministry of Health, 'Kenya Community Health Policy 2020-2030' 7, 21.

In the community, healthcare workers educate and inform members of the community on behavior change to adopt healthy lifestyles and basic healthcare precautions; they assist in the nurturing care and early childhood development, newborn care, and ensuring that children in the neigbourhoods receive prescribed immunization.[394] Community health workers also advise communities on basic nutrition, environmental health, primary home-based care for terminally ill patients, and assist in administering medication for basic illnesses such as malaria and basic assistance and education on communicable and non-communicable diseases. The community health workers educate members of communities on mental health and sexual and gender-based violence, link orphans and vulnerable children to assistance programmes, carry out community health surveillance, and ensure that vulnerable persons in the community fully participate in health programmes.[395]

The country is bound to international commitments regarding community health services. In 2013, the Kenyan government committed to recruiting 40,000 community health extension workers by 2017 and undertook to advocate for the establishment of community health services by county governments and the operationalization of 9294 community health units.[396] Community health services are a fundamental part of the broader right to health commitments by the government.

While government policies on community health services preceded county governments, the coverage of services was limited under the national Ministry of Health programmes. The focus on community health by county governments has led to a rapid increase in coverage of even up to over 90 percent in some counties,[397] although there are some disparities with some counties that are yet to scale up community health services.[398]

In Kisumu County, the county government established 274 community health units which around 3,000 community health workers serve. The health workers move around and check on issues like regular attendance of pre-natal and ante-natal clinics, use of prescribed drugs by home-based patients, linking up patients with the 141 healthcare facilities in the county, and general health education. The County Government of Kisumu has developed a Community Health Management System, which the community health workers use to access and manage patients at the community level. The community workers also promote public health and have assisted in increasing toilet coverage to almost 90 percent of the county.[399]

Nationally, with the help of development partners, 13 counties across the country have managed to put up around 8,778 such community units[400] with an average of ten volunteers in each unit. About 6200 units were fully operational and equipped by 2022, while 2200

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[394] Ministry of Health, 'Kenya Community Health Policy 2020-2030' 17-23.
[395] *ibid*
[396] During the 2013 Global Human Resources for Health (HRH) in Brazil, see Ministry of Health, 'Kenya Community Health Policy 2020-2030' at p.5.
[397] Ministry of Health, 'Kenya Community Health Strategy 2020-2025' at p 16.
[398] Some counties have as low as 17 percent coverage of CHS; see 'Ministry of Health, 'Kenya Community Health Strategy 2020-2025' at p. vii.
[399] Interview with Dr. Gregory Ganda, CEC in charge of health, Kisumu County Government.
[400] Figures as at August 2022. See State of Devolution Address (SODA) 2022.

others were still gaining full levels of operations, while about 300 were yet to commence operations. Counties where these units have been established include: Kisumu, Turkana, Marsabit, Elgeyo Marakwet, Kilifi, West Pokot, Nakuru, Garissa, Migori, Nairobi, Samburu, Kakamega, and Mombasa.[401] In total, the CoG estimates to have retained around 107, 839 community health workers.[402]

The digitisation of community health services in Kisumu has helped the county government reach patients and community members to plan and provide assistance. Digitisation has enabled the registration of approximately 600 000 (about half of the county population) persons to map community health services.

The community health workers use their phones to locate the patients within their community areas and provide services such as testing and treating malaria, diarrhea, and other basic illnesses. In Siaya County, using mobile applications by community health workers has ensured timely and real-time reporting on community health issues to the county health department.

Figure 7: A community health promoter during a house visit in Ahero, Kisumu County

7.6 Universal Health Coverage

Universal Health Coverage (UHC) means that all people can access the full range of health services they need at any time or place and without financial strain.[403] UHC also means that all health services (promotion and preventive, treatment, rehabilitation, and rehabilitative care) are all available and accessible in a sustainable manner. Globally, UHC was adopted

401 *ibid.*

402 Council of Governor, 'Annual State of Devolution Address' (June 2023) p.5.

403 World Health Organization, 'Universal Health Care https://www.who.int/news-room/fact-sheets/detail/universal-health-coverage-(UHC)

in 2015 as a target under the Sustainable Development Goal (SDG Indicator 3.8.1), and countries have recognized access to UHC as a vital indicator for socio-economic progress.[404]

In 2017, the government adopted UHC as one of its core national priorities. Three pillars were identified as critical to the success of UHC: optimizing the delivery of service, healthcare financing, and good health governance.[405] Most of the funds under the UHC were to be dedicated to basic and specialized healthcare with a portion of the funds allocated to components such as Community Health Services and public health services. Where UHC is successfully implemented, the people have access to a comprehensive range of quality medical services, the people do not strain to access services and especially the complex and advanced procedures and medical care, and there is accountability in how resources allocated to healthcare are utilized.

The roll-out of the UHC programme in 2017 targeted Kenyans who are most vulnerable and cannot afford healthcare in four counties (selected based on different criteria)[406] were chosen for the pilot programme (Isiolo, Kisumu, Machakos, and Nyeri). Approximately 1.2 million Kenyans were identified and registered under the programme. The UHC programme is yet to be rolled out to all 47 county governments, mainly because of inadequate financial and human resources to support UHC nationally, but there are plans by the Government to revive the programme to extend the benefits to the rest of the counties that were not covered in the pilot phase and ensure national coverage by the year 2030.[407]

In Nyeri County, where 86.2 percent of the population (716 947 people or 349 901 households) was registered under the UHC programme, Level 4 and 5 facilities recorded increased patient attendance, including specialist clinic attendance that recorded significant numbers.[408] The study compared with neighbouring Embu County that was not covered in the pilot phase and where there was a declining attendance of similar county health facilities. They concluded that the cost of treating non-communicable diseases such as diabetes and cancer was prohibitive to many Kenyans, and the UHC programme made it possible for Kenyans to seek treatment.[409]

In Isiolo County, another of the four beneficiary counties of the UHC Pilot Programme, most residents were also registered and could access free health services. The UHC also enabled the construction of local health facilities and thus expanding access, and the rampant shortage of medical supplies in the county health facilities was reduced significantly during the trial phase of UHC.[410]

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404 *ibid.*

405 Wairimu Mwaniki & Leon Ogoti 'Challenges facing the attainment of Universal Health Coverage in Kenya' Kenya Medical Association (Public Health Committee).

406 Nyeri because of a high burden of non-communicable diseases; Kisumu because of the high prevalence of infectious diseases such as Malaria; Machakos due to the high prevalence of accident injuries and Isiolo because of high maternal mortalities.

407 https://health.go.ke/kenya-government-affirms-commitment-achieving-universal-health-coverage-2030

408 J Njuguna 'The effect of a pilot universal health coverage program on hospital workload: A comparative study of two counties in Kenya' Dialogues in Health Volume 2, December 2023, 100100.

409 *ibid.*

410 Strategic Purchasing for Primary Healthcare 'A review of Afyacare – The UHC Pilot Programme in Isiolo County' (Kenya Brief No. 5) 11 September 2020.

In Machakos County, the deployment of ambulances using UHC funds has enhanced the capacity to respond to emergencies, and this has significantly reduced deaths due to road traffic accidents.[411] The UHC pilot programme also assisted in decongestion of the health facilities through expanded infrastructure, and the hiring of the qualified health workforce in the county health facilities.[412] Similar experiences were reported from Kisumu County which also benefited from the pilot phase of the UHC programme.[413]

County governments have also started separate public insurance schemes, targeting vulnerable and low-income families to access healthcare. In Kisumu County, 'Marwa Kisumu Solidarity Health Insurance Cover' has extended health coverage to 42 564 households and 79 761 dependents. The cover gives them access to 49 pilot public health facilities and will ultimately benefit 90 000 persons from the low-income groups within the County. Similar schemes in Kakamega,[414] Makueni,[415] Lamu,[416] Muranga,[417] Nyamira (15, 351 households covered through Nyaribocare),[418] and other counties.

7.7 The emerging impact of county government investments in health

The investments in health services by county governments since 2013 are now impacting better access to health care and improved health. A variety of indicators have shown progress and improvement. These include: the number of visits to health facilities, reduced maternal mortality and child mortality, improved immunization rates for children, and improved number of births by skilled birth attendants, among other indicators.[419]

In 2013, just about 800 000 women gave birth under the care of skilled attendants. This number increased to 1.1 million in 2018.[420] With the measures taken by county governments to retain more community health workers, the numbers are poised to rise further; the Kenya Demographic Health Survey of 2021, for instance, observes that the national coverage of skilled birth deliveries are at an impressive 89 percent.[421] Similarly, the number of mothers who died (due to health complications and other factors) in health facilities has reduced. In the first year of devolution, 116.4 deaths were recorded per 100 000 births. However, this has reduced to below 100 deaths per 100,000 births.[422] Child mortality (under five years) decreased from 47.78 percent to 40.34 percent of every 100,000 births.[423]

[411] N Mwende, C Ngave, abd P Njibu 'The Impact of UHC implementation in Machakos County' (25 August 2022).

[412] *ibid.*

[413] G Walukana, S Maru, P Karimi, PC Kayumba 'Effect of Universal Health Coverage on the Availability of Medicines in Public Health Facilities in Kisumu County, in Kenya' Rwanda Journal of Medicine and Health Sciences Vol.4 No.2, August 2021.

[414] Then known as "Oparanya-care," named after the pioneer Governor.

[415] Makueni-care.

[416] https://www.standardmedia.co.ke/coast/article/2001301218/county-gives-thousands-nhif-cover

[417] Nzei Mwende, 'Muranga County provides free medical cover to vulnerable households' Council of Governors (Maarifa Centre) https://maarifa.cog.go.ke/county-initiatives/muranga-county-provides-free-medical-cover-vulnerable-households

[418] https://maarifa.cog.go.ke/county-initiatives/nyamira-county-provides-free-medical-insurance-vulnerable-families

[419] Council of Governors, 'The impact of devolution on women and girls in Kenya' (2022) p. 15 -16.

[420] Abdu Muwonge, Timothy Stephen Williamson, Christine Owuor, and Muratha Kinuthia *Making Devolution Work for Service Delivery in Kenya* World Bank (2022), p. 13.

[421] Reported in the Annual State of Devolution Address (June 2023) p.5.

[422] Council of Governors, 'State of Devolution Address 2022'

[423] *ibid.*

There is also an increase in the number of pregnant mothers attending clinics; between 2013/14 and 2021/2022, there was an increase from 46 percent to 51 percent of expectant mothers attending at least 4 antenatal clinics.[424] The proportion of skilled birth attendants also increased from 53 percent in 2014/15 to 78 percent in 2021/2022.[425] Daily visits to county health facilities have also increased substantially, from 9 visits per day in 2013 to 13 visits per day as of 2018.[426]

These positive indicators result from county governments' consistent investment in health services. The health sector budget has consistently been the largest budget item in county budgets since 2013, and this is beginning to bear fruit. In Kisumu County, community health workers and volunteers have mapped out pregnant women in the communities, encouraged them to attend clinics and give birth in health facilities, and assisted them in getting immunization for children, among other duties. This has contributed to positive statistics over the years.[427]

In Isiolo County, the county hired 50 community health assistants to work in 50 health units and retained 760 community health workers on a stipend. Community health workers live within the communities and advise people on basic health care.[428] There is a recorded increase in persons seeking health services and a noticeable "health-seeking behavior" in the population. Other positive outcomes include reduced cases of maternal mortality and increased skilled-birth attendant deliveries in the county.[429]

7.8 Life changing stories in access to healthcare

The sustained investment in health services is changing lives and livelihoods nationwide. Access to healthcare and treatment in Kenya was and still is a challenge. There are many stories across the country where diagnoses of chronic illnesses such as cancer, kidney disease, or other life-threatening conditions have led to the impoverishment of families as they try to access treatment. The lack of health insurance, especially for lower-income earning families, is an ever-present risk of economic disruption whenever medical emergencies arise.

While many challenges persist and all Kenyans are yet to comfortably access healthcare, there are life-changing stories among Kenyans due to the investments in healthcare through the devolved system of government. In the 23 county referral hospitals across the country, patients are trooping in for various services, which range from common illnesses to advanced processes such as dialysis, cancer treatment sessions, and other advanced medical services.

424 *ibid.*

425 *ibid.*

426 Abdu Muwonge, Timothy Stephen Williamson, Christine Owuor, and Muratha Kinuthia *Making Devolution Work for Service Delivery in Kenya* World Bank (2022), p. 13.

427 Interview with Dr. Gregory Ganda, CECM Health, Kisumu County.

428 Council of Governors (Maarifa Centre) 'The Impact of UHC Pilot in Isiolo County' https://maarifa.cog.go.ke/county-initiatives/impact-uhc-pilot-isiolo-county

429 Interview with Dr. Hussein Abdi, Medical Superintendent, Isiolo County Referral Hospital.

Before devolution, these services could only be accessed at the Kenyatta National Hospital in Nairobi or the Moi Teaching and Referral Hospital in Eldoret.

With most sub-county referral hospitals equipped with fully functioning renal units, county residents who used to travel to Nairobi for dialysis can now easily access these services. Access to these facilities is also subsidized through the NHIF cover. In counties where Universal Health Coverage was piloted, patients can access complete medical services without payment.

Most notably, the expansion of health services in the counties through the devolved system of government addressed historical disparities in access to health services. Neglect of the health sector in some regions led to poor or no access, even to the most basic services. The devolution of health services to all counties across the country is an impetus to correct this situation. The country has many stories regarding the revolutionary progress made in ensuring that all Kenyans can access health services. In October 2014, the first cesarean birth in Northern Kenya was conducted at Takaba Sub County Hospital in Mandera County. Similar procedures were followed in the counties of Garissa and Wajir.[430]

In May 2023, doctors at the Wajir County Referral Hospital conducted the first-ever laparoscopic surgery in the entire Northern region of the country.[431] Before devolution, most of the health facilities in the Northern and Eastern regions of the country lacked facilities, and only offered the very basic health services to its citizens. These milestones in medical services and the fact that residents of the hitherto neglected regions of the country can access world-class health services within their home counties are evidence of the revolutionary progress achieved by devolving services in the health sector.

THE STORY OF ASHA GUYO ARERO

MARSABIT COUNTY

"My name is Asha Guyo Arero, I am 54-years old and I stay in Marsabit Town. I was diagnosed with kidney failure many years back and I used to travel to Nairobi for dialysis sessions. The two-day journey to Nairobi became unbearably exhausting both economically and physically; the journey from Marsabit to Isiolo alone took a full day … I was forced to relocate to Nairobi in 2009 in order to cut costs. I rented a one-roomed house in South B that I shared with a relative who was assisting me. I used to pay KES. 12, 000 (KES 6000 per session) at the Kenyatta National Hospital. I spent around KES. 30,000 in total per month. I came back to Marsabit after a Renal Unit was established in the County Referral Hospital here. I am registered with the NHIF Scheme and I only pay only KES. 500 per month, which enables me to access all the dialysis sessions. I stay in Marsabit town with my family and therefore incur minimal transport costs to access the services at the Renal Unit"

Source: interview with Asha Guyo Arero at the Marsabit County Referral Hospital on 25 June 2022.

430 https://twitter.com/kenyagovernors/status/752939654459092992?lang=ar-x-fm

431 S Astariko, 'Wajir County performs first laparoscopic surgery in the ASAL region' *The Star* 15 May 2023. https://www.the-star.co.ke/counties/north-eastern/2023-05-15-wajir-county-performs-first-laparoscopic-surgery-in-asal-region/

Figure 8: Marsabit County Referral Hospital – Renal Unit

The consistent investment in health services by county governments since 2013 has not only led to the expansion and reach of services across regions. Still, it has also ensured that marginalized groups can access general and specialized health services. Most county referral facilities have "Mother and Child Centres" focusing on maternal health, child health, and family planning services.

These investments, some of them made in partnership with development partners and corporate sponsors, have had the effect of enhancing inclusion in access to health. The outcomes include reduced child and maternal mortality rates, reduced costs of access to health services, and an increase in clinic attendance.[432] A study by the Council of Governors on the impact of devolution on women and girls in 14 counties (Busia, Garissa, Isiolo, Kajiado, Kilifi, Lamu, Mandera, Marsabit, Narok, Samburu, Tana River, Turkana, Wajir, and West Pokot) reveal positive progress in terms of increased access to health services, reduced mortality rates among women and children, and a generally expanding health sector despite the challenges experienced.[433]

7.9 Challenges in the realization of the right to health

Despite the significant investments and progress made in realizing the right to health in Kenya, the health sector continues to face substantial challenges at the national and county levels. While most counties have done well in expanding health physical infrastructure (building dispensaries and expanding existing ones), this is yet to translate to the optimal delivery of services. The full realization of the right to health requires more than just physical facilities, which includes hiring qualified health professionals, ensuring adequate and consistent supplies, and adherence to set standards in the delivery of health services. Most of the resources dedicated to the health sector are mainly spent on salaries, leavinglittle resources for procuring supplies and other vital components.[434]

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[432] Council of Governors, 'State of Devolution Address' (2022).

[433] Council of Governors (Maarifa Centre) 'The Impact of UHC Pilot in Isiolo County' https://maarifa.cog.go.ke/county-initiatives/impact-uhc-pilot-isiolo-county

[434] Laura Di Giorgio, Katelyn Jison Yoo & Thomas Maina, 'Staying ahead of the curve: challenges and opportunities for future spending on health in Kenya' Kenya Public Expenditure Review for the Health Sector - FY2014/15-FY2019/20, p. 42.

Furthermore, investment in health services by county governments has led to increased demand for services as more Kenyans become aware of their rights and the kinds of services offered at the county health facilities. Programmes such as the UHC have raised awareness among members of the public regarding the services available. County governments, in consultation with the national government, need to devise means and strategies to effectively meet this increased demand.

There still are glaring disparities between and within counties in terms of the coverage of health services. For instance, it has been noted that the coverage of community health services varies highly between counties, with some being as low as 17 percent and others as high as 90 percent.[435]

The challenges in implementing UHC, including the delayed rollout of the scheme to other counties, have affected the uptake of health services, especially the lower-income and marginalized groups that were to benefit from the coverage. In some counties, renal units have closed down due to a need for more supplies after the end of the pilot phase of the UHC,[436] thus eroding the gains made.

While a bulk of functions and services in the health sector are devolved, the bulk of resources are retained at the national level. There is a duplication of some health functions at the national level, which are devolved to county governments. This is coupled with poor coordination and coherence in the approach to functions that may be concurrent to the two levels of government. This has led to wastage of resources and a need for a more harmonious implementation of services. For instance, while the Managed Equipment Services (MES) had a noble objective of equipping county health facilities with modern machines, the lack of or inadequate involvement of counties and opaque processes harm the intended outcomes.[437]

7.10 Conclusion

The right to health, guaranteed under Article 43 of the Constitution of Kenya 2010, forms the basis of the county governments' investments in health services. The national government has also made interventions to ensure the overall realization of the right to health. As evidenced by the discussions in the preceding sections of this chapter, the devolved system of government has facilitated access to health and the realization of the right to health. However, as the chapter has further demonstrated, there are many challenges facing the full realization of the right to health for every Kenyan. While there is a need for more investments in the health sector, there is a need for better and more effective planning of the resources for optimal delivery of services. This includes aligning resources and functions between the two levels of government as required in the Constitution and the relevant laws and focusing on eliminating barriers to access to health by all Kenyans.

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435 Ministry of Health, 'Kenya Community Health Strategy 2020-2025' at p.

436 Council of Governors (Maarifa Centre) 'The Impact of UHC Pilot in Isiolo County' https://maarifa.cog.go.ke/county-initiatives/impact-uhc-pilot-isiolo-county

437 Wachira K '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) 13-28.

CHAPTER EIGHT

IMPROVING ACCESS TO WATER AND SANITATION SERVICES

8.1 Introduction

The right to water and sanitation is one of the fundamental rights that are protected in the Constitution of Kenya 2010. The Constitution provides that every person has the right to "accessible and adequate housing, **and to reasonable standards of sanitation**"[438] and further provides that every person has the right "to clean and safe water in adequate quantities."[439] The constitutional recognition of the right to water and sanitation is a major milestone in the legal protection and safeguarding of this essential right. The Constitution binds both levels of government to take measures to ensure the realization of this right for every Kenyan.

It is evident that the global community has recognized the importance of the right to water and sanitation. In 2010, the United Nations General Assembly (UNGA) averred that clean drinking water and sanitation are essential to the realization of all human rights.[440] Earlier in 2002, the UN Committee on Economic, Social, and Cultural Rights (ICESCR) had recognized that "the human right to water is indispensable for leading a life in human dignity. It is a pre-requisite for the realization of other human rights."[441]

The right to water encompasses four components: sufficiency (which the UN places at 50-100 litres per person per day); acceptability (referring to colour, smell and other cultural factors related to water); physical accessibility (should be accessible within 1000 metres); and affordability (which should not exceed 3 percent of household income).[442]

The duty to provide water and sanitation services is bestowed upon county governments with shared sectoral functions with the national government. The national government is mainly vested with the national legislative and policy-making function while the actual provision of water and sanitation services is left to the county governments. Water and sanitation sector reforms began in 2002, with the passing of the Water Act 2002.[443] However, the promulgation of the Constitution of Kenya 2010 necessitated the realignment of water and sanitation functions in order to align with the current constitutional order.

Kenya experiences persistent water scarcity and this determines the level of access to water in the country. The diversity of the country (different climatic and weather conditions, urban/ rural divide, level of development, among others) has directly affected the access to water and other basic services such as sanitation. While a large part of the country is composed of arid and semi-arid areas, communities carry out socio-economic activities (such as farming and livestock keeping) which depend on water. On the other hand, the

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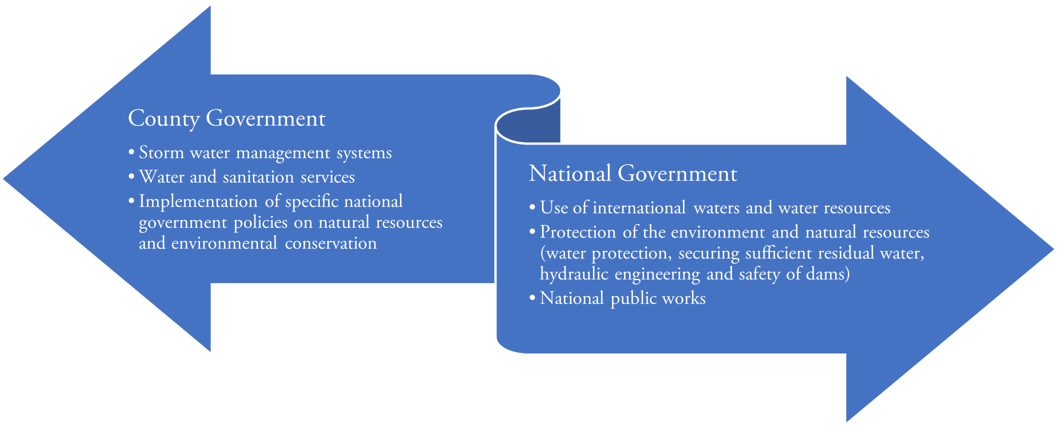
[438] Article 43 (b) Constitution of Kenya.
[439] Article 43 (d) Constitution of Kenya.
[440] UNGA Resolution A/RES64/292
[441] General Comment No. 15 of the UN CESCR.
[442] Scanlon, John; Cassar, Angela; Nemes, Noémi, IUCN, Environmental Law Programme, Water as a human right? (2004).
[443] Now repealed with the enactment of the Water Act 2016.

growth of urban centres has put pressure on the limited water supply and the ease access to water and sanitation in urban areas is declining when compared with the growing number of Kenyans in urban areas that require water and sanitation.

There are significant gaps in access to water and sanitation services in Kenya. At global level, the 2022 GLAAS Report argues that the world is off-track on its journey to ensure water and sanitation for all by 2030.[444] in the country and county governments have made investments in addressing this gap. This chapter highlights the successes in enhancing water services and sanitation in the country and ensuring the realization of the right to water as provided for in the Constitution.

8.2 The role of county governments in the provision of water and sanitation services

The duty to provide water and sanitation services is shared between the two levels of government, with differentiated responsibilities and duties.



Source: Schedules to the Constitution of Kenya 2010

Figure 9: Differentiated Water Functions of National and County Governments

The figure above illustrates that under the Fourth Schedule to the Constitution, county governments are responsible for county public works and services, including: storm water management systems in built-up areas and water and sanitation services.[445] The county governments are also responsible for implementation of specific national government policies on natural resources and environmental conservation, including "soil and water conservation".[446]

The national government, on the other hand, is responsible for: the use of international waters and water resources,[447] protection of the environment and natural resources with

[444] UN WATER & WHO, (2022). Global Analysis and Assessment of Sanitation And Drinking-Water GLAAS 2022 Report. UN

[445] Section 11, Part II of the Fourth Schedule.

[446] Section 10, Part II of the Fourth Schedule.

[447] Section 2, Part 1 of the Fourth Schedule.

a view to establishing a durable and sustainable system of development, including, water protection, securing sufficient residual water, hydraulic engineering and safety of dams,[448] and national public works.[449]

Comprehensive water and sanitation sector reforms commenced in 2002 with the passing of the Water Act 20o2. The thrust of the reform was to separate water resource management and water services and to vest these responsibilities in different public institutions and agencies.[450] Under the 2002 Act, national policies and coordination of water and sanitation services were to be managed by regional and national bodies established for that purpose. On the other hand, water and sanitation services at the local level were to be provided by water service providers (licensed by the regional bodies) to provide services. Management of water resources was made an obligation of both the national body and regional authorities that were tasked with the protection of water resources and catchment areas.[451]

8.3 Water service provision

The provision of water services is regulated by the Water Act of 2016, which stipulates that county governments are responsible for the establishment of Water Service Providers (WSPs). These WSPs shall ensure supply of water and develop assets to support supply of water.[452] There are around 142 WSPs across the country providing water services and a further 4,562 informal water service providers in the country, including community water service providers.[453] However, there is a substantial gap in realizing the right to water in the country; national statistics show that only 60 percent of Kenyans have access to water,[454] meaning that 40 percent of them do not have access to clean and safe drinking water. In fact, only 34 percent of the population has access to safely managed water services while the rest of the population rely on unregulated water sources.[455]

The population in the service areas covered by WSPs is 26.3 million, representing only 54.3 percent of the entire 48.4 million people in the country. The coverage of more than half of the country is attributed to migration to urban areas where there are more utilities providing water.[456] This accounts for approximately 4.02 million households of 6.74 million households in the country.[457]

In order to address the current gap, county governments are expected to develop a 5-year development plan for water services that includes development and financing. [458] The Water Services Regulatory Board (the body charged with setting national standards for

[448] Section 22, Part 1 of the Fourth Schedule.
[449] Section 19, Part 1 of the Fourth Schedule.
[450]
[451] Water Services Regulatory Board, 'A Performance Report of Kenya's water sector services 2020/21' (June 2022) 2.
[452] Section 77 and 78, Water Act 2016.
[453] Council of Governors, 'Annual State of Devolution Address' (June 2023) p.15.
[454] Water Services Regulatory Board, 'A Performance Report of Kenya's water sector services 2020/21' (June 2022) p.13.
[455] *Ibid at* p. 29.
[456] *Ibid at p. 52.*
[457] *Ibid at p.28.*
[458] *Ibid at p. 52.*

water service provision) is assisting the county governments to map out small scale service providers (SSSPs) so as to enhance coverage to areas that are not reached by the larger service providers.[459]

8.4 Success stories in the provision of water

County governments have implemented varied initiatives to enhance access to water in urban and rural areas. These include the drilling of boreholes, construction of water pans and small dams, installation of domestic rainwater storage, and erection of piped supply of water in urban areas. As of August 2022, the 47 county governments had constructed 11,163 boreholes across the country[460] with the highest number of boreholes built in Siaya, Turkana, and Nairobi counties. County governments have also constructed a total of 1,661 small dams to enhance access to water for rural communities experiencing scarcity and shortage.[461] Small dams and water pans are a common way of addressing water shortage in the arid and semi-arid areas. They help in mitigating the effects of unpredictable rainfall and weather patterns.

County governments have cumulatively constructed about 3,200 water pans. Of these, about 1,000 were constructed in Nyeri County, 273 in Garissa, 290 in Mandera, and 215 in Isiolo counties, just to mention a few. The counties of Wajir, Laikipia, and Turkana constructed 110, 183 and 56 small dams and pans respectively.[462]

The Garissa County Government has taken major steps to increase water access in a county where only 23.8 percent of the population has access to safe water.[463] The government budgeted for 100 boreholes to address the perennial water shortage, and sunk 14 boreholes within Garissa town sub-county.[464] During severe droughts, the County Government distributes water using water bowsers. While the average distance to the nearest water point is 25 kilometres, the County Government has gradually reduced this distance thereby steadily improving access to water.[465] In neighboring Wajir, the County Government has drilled 272 boreholes, 15 mega pans and 260 water pans. While the average distance to the nearest water source remains 30 kilometres, the County Government has (with the help of development partners) progressively reduced the distance to water sources.[466]

Kajiado County Government, on the other hand, increased access to clean water from 35 percent in 2017 to 45 percent in 2022.[467] Narok County Government has also enhanced water supply connections in urban areas from 3,800 in 2013 to 6,085 in 2022. Besides water supply, Narok county also improved restoration of water supply infrastructure.[468]

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459 Water Services Regulatory Board, 'A Performance Report of Kenya's water sector services 2020/21' (June 2022) 6.
460 Council of Governors, 'State of Devolution Address' (2022).
461 Water Services Regulatory Board, 'A Performance Report of Kenya's water sector services 2020/21' (June 2022) 6.
462 *Ibid.*
463 *Ibid at* 33
464 *Ibid at* 33
465 *Ibid at* 33.
466 *Ibid at* 124.
467 *Ibid at* 47.
468 *Ibid at* 92.

The overall number of households with access to piped water in the county increased from 11,642 in 2013 to 34,000 in 2022.[469] While Narok remains the county with the highest population (80 percent) without access to improved water sources, the County Government has made effort to bridge this gap.[470]

'Mai Mekoni' water project in Lamu County

Lamu County is an archipelago composed of many islands. Access to water in these islands is a challenge since all ground water is saline because of the surrounding Indian Ocean. As such, drinking water as well as water for domestic use comes from the mainland or from the main Lamu Island. In Kizingitini village of Lamu County, a flagship project of the county dubbed, "*Mai Mekoni*" (generally translated as "water in the kitchen" or "maji jikoni" in Swahili) has revolutionized issues of access to water.

Currently, 687 households in the village are connected to piped water (serving approximately 16,000 people) thanks to the "*Mai Mekoni*" project. Accessing fresh drinking water for domestic use from the comfort of the house, is a dream come true for the aging men and women in Kizingitini village. Most of the two-year long beneficiaries of this project never imagined having running taps in their homes. Similar projects have been extended to villages in neighboring islands of the county, including Kiunga, Mpeketoni, Ndau, and Mkononi.

THE STORY OF KIZINGITINI VILLAGE, LAMU COUNTY

"This village [Kizingitini] used to rely on make-shift water pans (locally known as "jabias") that stored rainwater. A water crisis would be experienced as soon as the water pans dried up. The alternative sourcing was the use of boats to ferry fresh drinking water in drums to the shores of the village. Distribution of water from the boats was an exercise of survival for the fittest as each family had to take a maximum of three jerrycans (or less depending on the amount available). This water would have to sustain a family for at least one week till the next delivery date. The supply was unreliable and the water was too costly by the time it got to the shores. But now, we are able to get water for domestic use in the comfort of our homes"

Interview with the Chairman, Kizingitini Village Water Project.

[469] *Ibid at* 92.
[470] *Ibid at 92.*

Figure 10: Residents of Kizingitini Villlage in Lamu fetch water from their outdoor taps.

Kwambila Dam in Kathonzweni Ward, Makueni County

Makueni County is located within the arid and semi-arid areas of Kenya with mainly rural-based communities. Water is a scarce commodity in the county. During prolonged dry seasons, residents dig the dry riverbeds for water (known as scoop holes) and get whatever is left in the shallow depths of the dry riverbed.

Kwambila Dam in Kathonzweni Ward of Makueni County has enabled water access to the more than 1500 households that benefit from the dam. The dam serves an approximated population of around 5,000 people. Prior to the construction of the dam in 2015 (works were completed in 2017), the county residents could walk for 10-15 kilometres in search of water.

Kwambila dam now provides water for both domestic and animal use as well as some limited small-scale irrigation to nearby farms. Furthermore, water from the pump is channeled through pipes to nearby villages where it is sold via water kiosks to residents. The small fees collected cover service and maintenance costs for the pumps that distribute the water.

Figure 11:Kwambila Dam, Makueni County

Kwambila Dam is one of the many dams that have been built in the many rural arid areas of Makueni County. Inhabitants prefer the water from the dam compared to water from wells which is saline. The dam was expanded to hold up to 150,000 cubic metres (m^3) of water.[471]

County government efforts and investments in increasing water access and improving water safety have triggered a positive impact across the country. Women and girls who bear a greater burden of collecting water have experienced some ease as they travel shorter distances to get this precious commodity.[472] In some cases, this has translated in enhancing the school performance of girls who find an opportunity to stay in school and concentrate on learning instead of spending long hours fetching water for their families.[473] Clean and safe water has also contributed to a healthier demography in the counties and the country in general.[474]

8.5 Water supply in urban and peri-urban areas

As Kenyans move into urban areas in search of greener opportunities, there is increased pressure on and demand for basic urban services, including water and sanitation. Unfortunately, the expansion of basic water service provision is slower compared to the rate of growth of population in urban areas. Consequently, the cost of water access plumets, the amount of water available declines, illegal water connections increase, while the quality of water available for urban residents deteriorates.

[471] Interview with site engineer and members of the Kwambila Dam Project Sustainability Committee.
[472] Council of Governors, 'The impact of devolution on women and girls in Kenya' (2022).
[473] *Ibid.*
[474] Water Services Regulatory Board, 'A Performance Report of Kenya's water sector services 2020/21' (June 2022).

In many urban areas and towns, water supply systems were set up decades ago and have not been well maintained over the years. The water supply systems either broke down or could simply not cope with the rising population pressure across urban areas such as Kisumu, Nairobi, Nakuru and Eldoret.

Kaimosi Water Plant in Vihiga County

The Vihiga county government has improved the production of the Kaimosi Water Plant to the current 1,500 cubic meters (m^3) per day. Nevertheless, this does not adequately supply clean water in the county. The national government (with assistance from the Government of Belgium) came up with what is known as the Vihiga Cluster Water project. The project produces 2,500 cubic centimeters (m^3) of clean water per day and has complemented county government efforts in the supply of water.

Figure 12: Vihiga Water Treatment Plant

Kericho water treatment plant

Kericho town and its environs also relied on an old water supply system. However, with the increase in population in Kericho town and the surrounding peri-urban areas such as Kapsuser, Kapsoit, and Ainamoi, there was need to revamp the water supply system. The County Government of Kericho sourced and secured land for a new and expanded water treatment facility while the national government provided capital for the putting up of the project on the outskirts of Kericho Town with the support of the German Government. After the project is complete, the management of the facility will be handed over to Kericho County Government, and specifically to the Kericho Water and Sanitation Company Ltd, which will receive technical and financial support to ensure sustainability.

The old water supply system in Kericho town generates approximately 8.8. million litres of water per day. The new plant will complement this with a supply of 21 million litres. There still is a huge shortfall as more than 30 percent of the residents are yet to be covered. Even the 70 percent that can access water, do so on a rationed basis. The new plant will cater for the needs of at least 200, 000 people, based on the WHO standards of 70 litres per person per day. As such, the current estimated population of 150, 000 residents will be served with the expanded water treatment facilities.[475] Similar projects are near completion in the neighboring Kisii and Nyamira counties.

Figure 13: Kericho County water treatment plant

Improved water supply in the Kisumu City environs

Kisumu city had a perennial and acute water shortage. Hand drawn carts hawking water in jerrycans was a common sight in the City Centre and adjoining estates. Kisumu City was indeed an irony of a water-scarce city standing next to the largest freshwater lake in the world. The entry of county governments created an impetus and opportunity to enhance water supply. It is noted that during this period (before devolution) the City relied on an old water treatment and pumping system that was constructed in the 1920's. Water supply efforts met the needs of only a fraction of the city's 400,000 residents. Due to poor quality of water and drainage, cholera and other water-based outbreaks were common in the city.

Water sector reforms that commenced in 2002 witnessed increased investment into the expansion of water treatment and bulk supply facilities in the city. Currently, the city sources its water from the nearby River Kibos and Lake Victoria. Water from River Kibos is preferred as it flows with gravity thus reducing the cost of distribution.

Kisumu Water and Sanitation Company (KIWASCO), the water service provider, is tasked with connectivity of water to the city's residents. KIWASCO, which was formed after

[475] Interview with Fabian Masinde, the project engineer, Kericho Water Treatment Plant.

the 2002 water sector reforms, got a renewed impetus from the investments to expand connectivity and coverage throughout Kenya's third largest city. Based on this renewed focus, water supply doubled from 40,000 cubic metres (m^3) per day prior to devolution to 80, 000 cubic metres (m^3) in 2023. Similarly, water coverage has reached slightly over 83 percent of the city's population.

The city's residents, including those in lower income settlements, execute their domestic chores more comfortably with a reliable supply of water throughout the week. The prevalence of water-borne diseases has drastically reduced as the quality of water is certified to be greater than 96 percent by the Kenya Bureau of Standards (KBS).

Figure 14: Kericho County water treatment plant and KIWASCO offices

8.6 Sanitation services

Sanitation refers to access to facilities and systems that enable the safe disposal of human waste as well as treatment and disposal of wastewater from domestic or industrial use.[476] This encompasses sewered and non-sewered sanitation facilities that include flush or pour flush to piped sewer systems, septic tanks, ventilated improved pit latrines, and improved pit latrines with a squatting slab. [477] Sanitation coverage, on the other hand, refers to the number of people with access to sanitation services as a percentage of the total area of a sanitation service provider. [478]

Sewerage coverage stands at 16 percent nationally as of 2021. These services are only available in 35 urban centres in 23 counties while the remaining the 24 counties rely on "onsite solutions for the management of wastewater."[479] Overall sanitation provision in the country is, however, at 93 percent high.[480] The slow expansion of sanitation coverage, especially sewerage services is as a result of the capital required to construct sewer lines and piped connections for waste disposal. Most of the planned and current projects are mainly donor financed.[481]The slow growth of sewerage coverage has prompted the adjustment of the sanitation target from a universal (100 percent) access to an average 40 percent for sewerage services and 60 percent for non-sewered sanitation by 2030.

The sanitation situation across the counties demonstrates the lack of investment in proper sanitation systems. In most of the counties, wastewater management is mainly done through open surface. At the same time, coverage of latrines is still substantially low in many counties. Indeed, most urban facilities such as markets lack proper toilet facilities.

In Nakuru County, there are efforts to bridge this sanitation gap by recycling solid human waste. The Nakuru County government formed the NAWASSCOAL Company, a subsidiary of Nakuru Water and Sanitation Services Company (NAWASSCO) of the County. The company is wholly dedicated to the recycling of human waste. The main products from the recycling plant are charcoal briquettes that are manufactured for sale.[482]

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[476] Centres for Disease Control (CDC) 'Sanitation & Hygiene' https://www.cdc.gov/healthywater/global/sanitation/index.html#:~:text=1%2C%202,and%20wastewater%20treatment%20and%20disposal.

[477] Water Services Regulatory Board, 'A Performance Report of Kenya's water sector services 2020/21' (June 2022) P. 30.

[478] *Ibid.*

[479] *Ibid at p. 31.*

[480] *Ibid at p. 11.*

[481] *Ibid at p. 8.*

[482] Interview with James Irungu, General Manager, NAWASSCOAL.

Figure 15: NAWASSCOAL processing plant in Nakuru County

Figure 16: A worker at NAWASSCOAL processing plant in Nakuru County

8.7 Challenges in the provision of water and sanitation services

There are several impediments to the realization of the right to water, as set out in the Constitution. This is evidenced by the fact that per capita consumption of water in Kenya is estimated at 30 litres per day,[483] a volume far below the global average recommended at 100-150 litres per person per day. Although county governments have established some water and sanitation companies to assist in the provision of water and sanitation services, they still lack adequate resources to push for the expansion of these services.

[483] Water Services Regulatory Board, 'A Performance Report of Kenya's water sector services 2020/21' (June 2022) p.10.

It is estimated that county governments can only access less than 50 percent of the resources required to maintain and expand water provision services. [484]A substantial amount of resources meant for provision of water services and sanitation is controlled by national government agencies in the sector, adding a further squeeze on resources at the disposal of county governments.[485]

Additionally, there is a huge loss of water that is meant to be metered and supplied. It is reported that counties lose an average of 45 percent of water produced for metering and distribution. 14 counties lose more than 50 percent of the water they produce for distribution, with some losing as high as 70 percent. [486] The extreme loss of water prompted the formation of a water unit in the police to crack down on Non-Revenue Water (NRW), which refers to water lost through illegal connections and other clandestine means.

8.8 Conclusion

Access to water and sanitation services is critical to improvement of lives and livelihoods. The duty to deliver these services was vested in the county governments under the devolved system of government. County governments have made remarkable progress in the provision of water services, while taking into account varying factors such as population density in rural and urban areas as well as the c0rresponding needs. As a result, there is improved access to water services in the country. However, county governments are impeded by the inadequacy of resources required to ensure that the right to water and sanitation is fully realized.

On the other hand, the amount of investment and resources required to put in place sewerage systems in built up areas of the country have proved a challenge to many county governments. Indeed, without external support, not many counties are able to undertake the construction of sewerage systems, which is an important ingredient in the realization of the right to sanitation.

[484] *Ibid* at p. 7.

[485] JK Kinuthia, 'Kenya: How Equitable Was the Distribution of National Roads and Water Projects in 2016/17?'(International Budget Partnership - Kenya) January 2018.

[486] Water Services Regulatory Board, 'A Performance Report of Kenya's water sector services 2020/21' (June 2022) p. 7.

CHAPTER NINE

TRANSFORMING EARLY CHILDHOOD EDUCATION IN KENYA

9.1 Introduction

This chapter provides a summary of the role and emerging impact of county governments in the realization of the right to education in the country in early childhood education, one of the core functions that fall under county governments in the education sector.

The Constitution guarantees the right to free and compulsory basic education for every child.[487] Further, it requires the state to take measures, including affirmative action programmes, to ensure that the youth have access to relevant education and training.[488] The Constitution also calls upon the state to put in place affirmative action programmes to ensure that minorities and marginalized groups are provided with special opportunities in educational and economic fields.[489]

The duty to ensure the realization of the right to education is bestowed on both the national government and the county governments. In the education sector, the county governments are in charge of pre-primary education, village polytechnics, homecraft centres and childcare facilities.[490] The national government, on the other hand, is in charge of: education policy, standards, curricula, examinations and the granting of university charters.[491] The national government is also in charge of universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary school and special education institutions.[492]

National Government

- Education policy, standards, curricula & examinations
- Universities
- Tertiary educational institutions
- Research and higher learning institutions
- Primary schools
- Special education institutions
- Secondary schools

County Government

- Pre-primary education
- Village polytechnics
- Homecraft centres
- Childcare facilities

Figure 17: Obligations of National and County Governments on Provision of Education

[487] Article 53 (b) Constitution of Kenya 2010.
[488] Article 55(a) Constitution of Kenya 2010.
[489] Article 56 (b) Constitution of Kenya 2010.
[490] Section 9, Part II of the Fourth Schedule to the Constitution of Kenya.
[491] Section 15, Part I of the Fourth Schedule to the Constitution of Kenya.
[492] Section 16, Part I of the Fourth Schedule to the Constitution of Kenya.

The Early Childhood Education Act of 2021 spells out in detail the obligations of county governments regarding provision of Early Childhood Education (ECDE). These include; to implement free and compulsory ECDE in public centres without discrimination;[493] to refrain from acts that can undermine the realization of this right and ensure availability and accessibility;[494] to provide funds and facilitate the development of infrastructure, and to retain human resources required to realise the right; and to involve the public and communities while raising awareness on ECDE matters among other obligations.[495]

The entry of county governments in 2013 kickstarted significant changes in the education sector, and especially in early childhood development. County governments have made Early Childhood Education (ECDE) a visible element in primary schools by constructing ECDE facilities across the country. They have also hired ECDE teachers, with a steady though notable increase since 2013. These two factors have influenced the ease of access to school and assisted children in many areas particularly rural areas to begin school at an early age.

County governments have also assisted in the construction of upper primary classes and buildings, provision of bursaries, and the construction of village polytechnics and other tertiary learning institutions that are designated as a function of the county governments by the Constitution. In areas where communities are affected by famine and drought, county governments have introduced school feeding programmes to enhance school retention as well as improve children's health and nutrition by providing a balanced diet.

9.2 Construction of ECDE facilities

County government investment in ECDE facilities has recorded a substantial increase in the number of ECDE centres in the country since 2013. The country has marked a 14.5% increase in ECDE centres and facilities from 24,767 in 2013 to 28,383 in 2019.[496] Prior to devolution, ECDE had not taken shape as a result of a lack of funds to fully implement it in the country.[497] The growth of private ECDE centres based on direct investment between 2013 and 2019 was even higher standing at 17.5 percent (from 15,443 in 2013 to 18, 147 in 2019). The CoG estimates pre-primary centres (both private and public) increased from 46, 671 in 2021 to 48, 412 in 2022 with total classrooms estimated at 39, 244.[498]

The requirement that there should be ECDE facilities within a 2 kilometres radius laid the basis for county governments and private education providers to invest in ECDE facilities. While trying to meet the stipulated threshold, county governments and private investors enhanced access to ECDE within their areas.[499]

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[493] Section 5(1) and (2) Early Childhood Education Act, 2021.
[494] Section 5 Early Childhood Education Act, 2021.
[495] Section 6 Early Childhood Education Act, 2021.
[496] The Senate (The Senate Standing Committee on Education), 'Report on inquiry into the Early Childhood Education landscape in the country' (May 2022), p.7.
[497] Republic of Kenya, 'Education Sector Report 2013/14 – 2015/16 Medium Term Expenditure Framework' (October 2012) at p.27.
[498] Council of Governors, 'Annual State of Devolution Address (June 2023) p.18.
[499] *ibid.*

In rural and poorer areas, children only joined school once they were older and stronger enough to walk for long distances with other older children. In Kilifi County for instance, children stayed home much more due to the longer distances between homes and schools in the vast county.[500] This is partially because, not all schools had proper ECDE facilities, and even when they were ready to start school, available schools were several kilometres away. Furthermore, in areas prone to drought and famine, children's learning is affected by their long absences from school as families moved from one place to another in search for food, water or pasture.

9.3 Hiring of ECDE Teachers

County governments have hired ECDE teachers to assist in the ECDE centres across the country. While the country had a total of 88, 154 ECDE teachers in 2014, it grew to 112, 703 in 2018.[501] At the time, 68,823 ECDE teachers were employed by county governments. However, this number declined to 52,780 in 2019[502] as a result of the adoption of schemes of service in 2018, which required all ECDE teachers to have a certification in ECDE.[503] In August 2022, 50,964 ECDE teachers were employed by county governments while 20,840 were employed by private centres, making a total of 71,804 ECDE teachers retained by public and private ECDE centres in the country in 2022.[504] The total number of teachers employed in ECDE increased to 78, 804 in 2023 with 54, 637 employed by county governments and 25, 232 employed by private ECDE facilities; this translates to a national average pupil to teacher ratio of 41:1[505] The county government of Kakamega has 2,024 teachers teaching ECDE. The county is also working closely with the national government to ensure that the teachers are trained on new curricula.[506]

9.4 Enrollment of children into ECDE facilities

There has been an overall increase in the number of children enrolled in ECDE facilities across the country since 2013. The Gross Enrollment Rate (GER) increased from 71.6 percent in 2013 to 78.4 percent in 2019 while the Net Enrollment Rate (NER) increased from 68.7 percent to 77.2 percent over the same period.[507] However, a decline in enrollment of 6 percent and 18 percent was witnessed in 2016 and 2019 respectively. This was largely attributed to the transition from 8-4-4 to the two-tier Competence Based Curriculum (CBC) which is believed to have caused temporary disruption.[508]

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[500] Interview with Kilifi County Government officials.
[501] The Senate (The Senate Standing Committee on Education), 'Report on inquiry into the Early Childhood Education landscape in the country' (May 2022), p.21.
[502] The Senate (The Senate Standing Committee on Education), 'Report on inquiry into the Early Childhood Education landscape in the country' (May 2022), p.21.
[503] *ibid.*
[504] Council of Governors, 'State of Devolution Address, 2022'
[505] Council of Governors, 'State of Devolution Annual Address' (June 2023) p.18.
[506] Interview with Dr. George Akolo Lutomia, CEC Education.
[507] The Senate (The Senate Standing Committee on Education), 'Report on inquiry into the Early Childhood Education landscape in the country' (May 2022), p.50.
[508] *ibid.*

Nevertheless, county governments have sustained their investment in the hiring of teachers and construction of additional ECDE facilities within their respective counties. In Kakamega County, 124,750 children were enrolled in ECDE facilities in 2022 compared to only 30,055 in 2013.[509]

In order to sustain children at school, county governments like Kajiado, Turkana, West Pokot, Samburu, and Machakos among others have initiated school feeding programmes[510] particularly in areas affected by famine and drought. In 2020, at least 29 county governments reported to have free school feeding programmes with the aim of keeping children at school and ensuring a balanced diet for healthy growth.[511] Some of the school meals included school lunch and milk/ porridge. To ensure sustainability of school feeding programmes and school attendance, the County Government of Nairobi has provided for an annual capitation grant programme for each student admitted to an ECDE facility in the county.[512]

Figure 18: School feeding programmes in West Pokot and Nairobi City County

The county routinely partners with other organisations (including Masinde Muliro University) in the provision of furniture, learning materials, solar panels for lighting up the class, and other supplies. Due to the increasing need of facilities, the county government has secured more land for building ECDE facilities. The county seeks to ensure that each of its 60 wards is served by a minimum number of ECDE centres.[513]

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[509] Abdu Muwonge, Timothy Stephen Williamson, Christine Owuor, and Muratha Kinuthia Making Devolution Work for Service Delivery in Kenya World Bank (2022), p. 18.

[510] Nzei Mwende 'Machakos County rolls out the ECDE feeding programme to keep pupils in school' Council of Governors, Maarifa Centre) 12 April 2023 https://maarifa.cog.go.ke/county-initiatives/machakos-county-rolls-out-ecde-feeding-program-keep-pupils-school

[511] The Senate (The Senate Standing Committee on Education), 'Report on inquiry into the Early Childhood Education land scape in the country' (May 2022), p.8.

[512] Nzei Mwende 'Nairobi County supports holistic education for ECDE learners with the annual capitation grant programme' (Council of Governors, Maarifa Centre) 25 August 2022.

[513] Interview with Dr. George Akolo Lutomia, CECM Education.

Figure 19: ECDE Centre, Kakamega County

9.5 Challenges in provision of ECDE services

Despite the remarkable progress in access to ECDE services demonstrated by national trends and success stories from the counties, there still exist surmountable challenges. Although jurisprudence has clarified and endorsed the role of county governments in hiring ECDE teachers,[514] there is no clarity on the role of the two levels of government in training of teachers, for instance in CBC syllabus.[515]

While there is a positive and encouraging growth of ECDE facilities and an impressive national average of pupil to teacher ratio, the actual number and distribution of ECDE facilities still falls short of the national demand. While there is a notable increase in ECDE enrolment, the current numbers do not reflect the envisaged population. In fact, there are areas where ECDE facilities are still inaccessible. In some counties, ECDE facilities were established but faced closure due to various sustainability factors.[516] Furthermore, many established ECDE centres lack basic facilities and materials for learning as well as amenities to support their effective functioning.

Counties still have low numbers of ECDE teachers and caregivers due to resource constraints. This contributes to the ineffectiveness of the ECDE institutions as they are not adequately staffed to assist in the discharge of their duties. While national averages place teacher to pupil ratios at 1:38,[517] some areas have as low ratios as 1:79.[518] Furthermore, equipment and other teaching aids and materials and supplies are still a challenge in many of the ECDE facilities.

514 *Kenya National Union of Teachers v Attorney General & 4 others* [2016] eKLR.

515 Abdu Muwonge, Timothy Stephen Williamson, Christine Owuor, and Muratha Kinuthia *Making Devolution Work for Service Delivery in Kenya* World Bank (2022), p. 44.

516 The Senate (The Senate Standing Committee on Education), 'Report on inquiry into the Early Childhood Education landscape in the country' (May 2022), p.51.

517 Council of Governors, 'State of the Nation Address, 2022'

518 Abdu Muwonge, Timothy Stephen Williamson, Christine Owuor, and Muratha Kinuthia *Making Devolution Work for Service Delivery in Kenya* World Bank (2022), p.32.

County governments routinely allocate funds for bursaries to support pupils and students in pre-primary, primary, secondary, and post-secondary institutions. As of 2022, county governments had disbursed a total of over KES. 3.5 Billion.[519] While these funds have the impact of cushioning poor families, there is no clear legal and policy framework elaborating the role of county governments beyond ECDE and village polytechnic levels.

9.10 Conclusion

The allocation of the responsibility of pre-primary education in county governments ensured that ECDE is placed at the centre of government planning and delivery of services. Indeed, while there was some investment in pre-primary education prior to devolution, the sub-sector has grown in leaps and bounds, mainly as a result of the efforts and resources that have been committed by county governments to this cause. Despite these investments, and as this chapter has demonstrated, there are many challenges in the delivery of pre-primary education. The two levels of government should develop national standards in the delivery of services covering quality and related aspects to ensure that all children receive the same quality. This should include minimum qualifications of teachers, equipment required, buildings, among other components. Furthermore, there is need to pay specific attention to accompanying but essential factors without which ECDE will be derailed. These include funding as well as sustenance of school retention programmes such as school feeding interventions particularly in drought prone and famine-stricken areas.

[519] *ibid.*

CHAPTER TEN

ENHANCING AGRICULTURAL PRODUCTIVITY IN THE COUNTIES

10.1 Introduction

This chapter explores the investments that county governments have made in Agriculture and the difference they are making. County governments have made diverse investments in the sector, which are now bearing fruit and contributing to the transformation of lives among Kenyans, mainly in rural areas where agricultural activities are concentrated.

Agriculture remains an important part of the country's economic development. Being the second largest contributor to the country's GDP, at 22.43 percent in 2021,520 and the largest employer of the country's economic sectors (at 53.8 percent) in 2020,521 the sector is an indispensable part for the country's development.

Indeed, for many families in Kenya's rural areas, agriculture and agriculture-based activities are the social and economic mainstay. Across the country, many families wake up to till their lands, take out their animals for grazing, tend to their crops, harvest, or sell their produce. Indeed, agriculture provides employment to many Kenyans in the informal sector and accounts for peoples' lives and livelihoods, whether the engagement is for subsistence or commercial purposes.

The Constitution of Kenya 2010 devolved agricultural services to county governments but retained policymaking with the national government. The Constitution states that county governments are in charge of: crop and animal husbandry, livestock sale yards, county abbatoirs, plant and animal disease control, and fisheries.[522] The national government, on the other hand, is in charge of Agriculture Policy and Veterinary Policy.[523]

The specific functions that are devolved to county governments under the sub-sectors include: extension services and farmer advisory services, farm inputs, soil and water management of agricultural mechanization stations, control of plant pest and diseases, among other functions. In all these functions, county governments have a responsibility and duty to facilitate the improvement of agriculture so that the sector becomes a channel for meaningful economic activity.

10.2 County Investments in Crop Farming

In 2022, the 47 county governments distributed 507, 786 avocado seedlings, 401,000 coffee seedlings, and 38,000 coconut seedlings among other plant varieties made available to farmers. Additionally, county governments distribute an annual average of 66,718 50-kg bags of assorted fertilizers to farmers.[524]

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[520] Republic of Kenya (National Treasury), 'Agriculture, Rural, and Urban Development (ARUD) Sector Report' 2022/2023-2024/2025 Medium Term Expenditure Report (October 2021)

[521] *ibid.*

[522] Section 1, Part II of the Fourth Schedule to the Constitution.

[523] Section 29 and 30 Part I of the Fourth Schedule to the Constitution.

[524] Council of Governors, 'Annual State of Devolution Address (2022).

Avocado Seedlings

In Murang'a County, avocado growing is taking root as the demand for avocado fruits for export grows. The county government took advantage of this and has distributed almost 2,000,000 avocado seedlings to farmers across the county. The seedlings belong to an improved variety known as HASS, that is in demand on the market. Currently, Murang'a County is among the leading counties in the production of the Hass avocado fruit.[525]

THE STORY OF ALEX NGUGI FROM GACANJIRU, MURANG'A COUNTY

"My name is Alex Ngugi, a Hass Avocado farmer. Kandara grows and sells avocado through a county-wide union of Hass Avocado farmers. I own 9 acres of farmland that currently has maturing avocado trees. The county government has provided me with free recommended pesticides which have enabled me to protect my trees and fruits from disease. This will contribute to a maximum yield during harvest. Avocado growing has enabled us to diversify into goat rearing; another project that is facilitated by the Murang'a County Government. I sell goat milk, which is in high demand, thereby getting additional income for the family."[526]

Kiambu county is adjacent to Nairobi City and has taken a lasting advantage of its farmers' proximity to the giant market for their produce. Approximately half of the households in Kiambu County are involved in one kind of farming or another. The County Government has invested in boosting and improving the different kinds of farming activities taking place within the county. These include: distribution of fertilizers and/or improved seed variety of various crops to farmers, and additional subsidies in form of money to boost production.

Village Based Advisors in Agriculture

Some counties have surmounted several challenges pertaining to extension services, including the lack of adequate resources to cover the areas under their control. Kiambu County Government for instance introduced a unique and innovative programme dubbed the 'Village Based Advisors (VBAs)'. VBAs are basically a group of farmers (around 1, 000 of them in the county) who are educated by the county government on any new farming methods or new variety of seeds/breeds. The farmers are taken through a "Training of Trainers" (ToTs) and then they cascade the training to other farmers in the entire county government. Through this method, the county government can teach and replicate methods of boosting agricultural productivity.[527]

525 Interview with Chairman, Muranga Avocado Farmers Association.
526 Interview with Alex Ngugi, farmer, Gacanjiru, Muranga County.
527 Interview with Chairman, Muranga Avocado Farmers Association.

Figure 21: Village based advisors in Kiambu County

Figure 22: A farm under the management of Village Based Advisors (VBAs) in Kiambu County

In order to improve grain storage, county governments in grain producing areas have, in total, constructed 7 grain stores and carried out the restoration of two grain stores, which will assist in ensuring safe storage of grain after harvest.[528] Extension services of county governments have also so far benefited 3, 955, 182 individual farmers in the country.[529]

Subsidized Agriculture Mechanized Services

County governments invested in various farming machinery, which they hire out to farmers at a subsidized rate. As of June 2023, the county governments had a total of 362 tractors in 29 agriculture mechanization stations across the country that assist the farmers in preparing their farms.[530] The county governments also distributed 2,386 irrigation kits by 2023 and supported the construction of a total of 104 green houses to farmers as of June 2023.[531]

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[528] Council of Governors, 'Annual State o Devolution Address' (June 2023) p.3.
[529] *ibid.*
[530] Council of Governors, 'Annual State of Devolution Address' (June 2023) p.2.
[531] Figures based on the cumulative totals in the , 'State of Devolution Address of 2022 and 2023.

10.3 County Investments in Animal and Fish Farming

Through their animal husbandry programmes, county governments have assisted farmers with doses of various vaccines for livestock vaccination. The Council of Governors estimates that by 2022, county governments distributed a total of 10,782,369 doses of various vaccines. Additionally, a total of 535,593 straws of semen were procured for farmers across the country while 369,788 subsidized Artificial Insemination services (AI) were carried out by county governments by June 2022.[532] In the same period, county governments distributed 4,376 cattle, goat, and sheep breeding stock to farmers across the country. In the fisheries sub-sector, county governments distributed almost 3,000,000 fingerlings to fish farmers.[533]

"One cow, one homestead" initiative

Kakamega and Murang'a started the **"one-cow" initiative** which was basically the distribution of an improved cow breed per homestead with the hope and plan that the cows will get offspring that will eventually cover farmers in the county. The project in Kakamega started with 1,290 initial households selected to participate in the exercise. Since then, 1,016 more households from the county's 60 wards have received calves from the project.[534] The same has been replicated to improved breeds of goats, sheep, and even poultry with the distribution of 1,608,108 improved *kienyeji* chicken to poultry farmers.[535]

THE STORY OF VINCENT SHIKOMBE FROM KAKAMEGA COUNTY

"My name is Vincent Shikombe. I live here with my wife and 5 children. We benefited from the One-Cow Initiative in 2015. I named my cow 'Susan' after the Livestock Officer who handed it over to my family. It produces 24 cups of milk (equivalent to 12 litres) per day. We consume two litres and sell the rest to our neighbors. So far, the cow has produced 2 calves – male and female; and we passed on the heifer calf to another beneficiary as required under the project. The project has uplifted my family's nutrition and income. I have managed to build a house and educate my eldest son who is currently in college. I also grow maize, beans, peanuts, sweet potatoes, arrowroots and bananas, among other food crops and I have started beekeeping."

[532] *ibid.*
[533] *ibid.*
[534] Zipporah Muthama and Jane Kimbwarata 'One cow initiative excels in providing sustainable livelihoods and nutrition for vulnerable households in Kakamega County' (Council of Governors, Maarifa Centre) 3 March 2023.
[535] *ibid.*

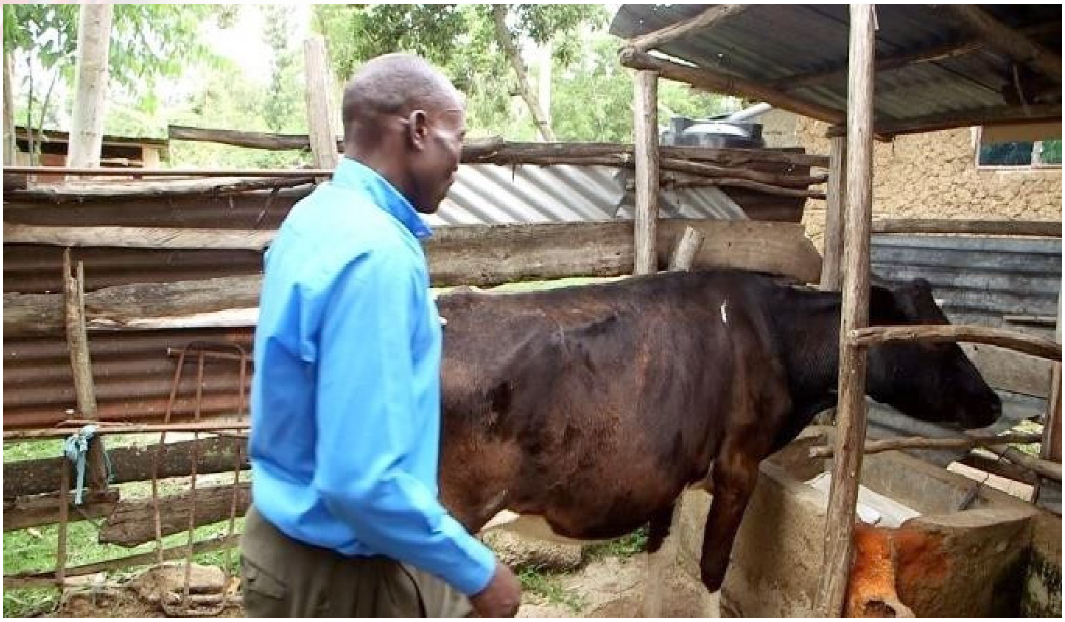

Figure 23: Vincent Shikombe at his home in Sheywe Ward, Kakamega County

Fish Hatchery in Vihiga County

The Mwitoko Fish Hatchery and Aquaculture Training Centre in Vihiga county was established under the economic stimulus program which was set up between 2009 and 2011. This project was mooted to provide high quality tilapia and catfish fingerlings to fish farmers within the county and beyond. The County Government of Vihiga reinforced the initial investment by establishing a modern hatchery, and constructing additional ponds thereby increasing them from 4 to 31. The production capacity stands at about 100,000 - 200,000 fingerlings per month with plans to enhance these numbers to 1 million - 2 million fingerlings per month. The farm plans to expand and provide other services including a training facility and establish other agricultural related production facilities[536]

10.4 Conclusion

Agriculture plays a critical role in sustaining livelihoods in Kenya and remains the largest employer and contributor to Kenya's economic growth. Acknowledging their key role in ensuring that agricultural services are provided effectively, county governments have steadily invested in agriculture and in the improvement of agricultural services since their commencement in 2013. While there are a number of pending transitional issues in the sector, investments already made by county governments are bearing fruit. It is critical that the pending alignment of resources and functions between the two levels of government is completed to enable a more optimal investment in service delivery in the sector.

[536] Interview with Macrae Mbalanya Omuluma, Facility Manager.

CHAPTER ELEVEN

ENHANCEMENT OF OTHER COUNTY SERVICES AND DEVELOPMENT

11.1 Introduction

County governments are in charge of a range of urban services including control of pollution, transport and infrastructure, street lighting, development of markets, among other functions. In pursuit of these responsibilities, county governments have made investments in services and infrastructure that are visible across the urban centres in the country. These investments range from new markets in urban areas, roads and infrastructure, and industries. County governments have also stepped up their efforts to enhance urban services and ensure that urban spaces provide a conducive environment. Many counties are also adopting sustainable urban governance practices, recycling of waste, solid waste management, and general environmentally sound practices.

County governments are also in charge of trade development and regulation including cooperative societies. In this regard, the county governments have passed laws and policies to facilitate farmers to organize themselves and to access markets through cooperatives. Through the facilitation of county governments, farmers have managed to collectively bargain for fair prices for their produce and to achieve economies of scale in the production, transportation, and storage of their farm produce.

If embraced, technology has a great potential to enhance the efficiency of delivery of services by county governments. Those that have embraced technology are already seeing great benefits in terms of planning and actual delivery of services. This chapter also showcases use of Geographic Information Service (GIS) in some counties in the mapping out of areas and identifying the service needs, and other technology.

11.2 Investment in roads and other infrastructure

In rural areas, county governments have put up street lights to enhance safety and security during movement at night. The state of the roads made it impossible for farmers to move their produce from their farms to the local markets or even movement to other parts of the country. Maintenance of or construction of roads requires intensive capital and only the government is able to plan and implement such programmes.

In tea growing areas, for instance, the produce faced perennial challenges of delays as a result of rains and bad roads. Currently, the road network connecting tea buying centres to tea factories have routine maintenance and new rural access roads have been opened up by county governments, thus enabling the efficient transport of the perishable product to the factory in good time.

In total, county governments have constructed a total of 212 kilometres of roads within municipalities and 171 kilometres of non-motorised transport (pedestrianized streets and walkways in urban areas). Counties have also installed 4, 533 street lights country-wide, most of them using solar energy, and 192 kilometres of storm water drains constructed.[537]

Rains and floods not only disrupted the movement of people, but actually posed a risk to lives. Thwake Bridge, completed by Makueni County Government in August 6 2022, has put an end to the lives lost when people try to cross the river boundary between Wote and Kalawa areas of the county. Prior to the construction of the 110 metre bridge, flooding led to loss of lives. The completion of the bridge was a great relief to the residents of the area.[538]

Figure 24: Thwake Bridge in Makueni County

County governments have a duty to provide and maintain urban services, such as, construction and maintenance of urban roads that fall within their control, controlling and regulating urban construction, putting up other infrastructure in town areas, transport and urban traffic control, refuse and garbage collection, among other services to urban areas. Counties are gradually transforming urban centres across the country into habitable spaces fit for thriving urban communities.

In order to ensure the growth and maintenance of urban spaces, counties have moved to prepare spatial plans, with five counties (Lamu, Kericho, Tharaka Nithi, Kajiado, and Kericho) having approved plans in 2022 and 23 others at different stages of preparation. County have also established municipalities and town boards as separate entities for the management of urban areas and for the planning and development of urban services in the respective areas.[539]

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[537] Council of Governors, 'State of Devolution Address, 2022.'
[538] https://makueni.go.ke/site/files/2019/07/PC-2019-20-ROADS-TRANSPORT-ENERGY-AND-PUBLIC-WORKS.pdf
[539] Council of Governors, 'State of Devolution Address, 2022.'

The Transformation of Mandera Town

A few years ago, Mandera town was a dusty town with no single tarmac in site. There was no sign of any government services and save for the few old government buildings in site from back in the day, there was not any clear visible investment. Come devolution and the dusty sleepy town is now a bustling urban space, thanks to the investments made by the county government over the last 10 years. Most of the town's streets are now tarmacked and providing easy access and movement within the town.

Taking advantage of the space available, the county government has embarked on a spacious and planned urban space known as "Mandera Green County". This is a well-planned space that contains facilities such as county government offices, planned housing, health facilities, shopping malls, and other components of a green city. The buildings and installations in the site have made use of the solar energy that is abundant in the region, in a bid to rely on clean and renewable energy.

Figure 25: Mandera County Greening programme

Nakuru City became the first municipality to transform into a city status under the law (Urban Areas and Cities Act).[540] The City's general infrastructure and services have improved and have been enhanced to ensure the urban spaces are within the threshold of a city as expected in the law. Major improvements include: more resources to provide facilities and equipment such as fire station, recreational parks and facilities (improvement of existing ones), and even the plans to have the upgrading of the Lanet Airstrip into an international airport to serve the city, and the upgrading of Afraha Stadium. There is, indeed, changes to the urban spaces, as a result of the new status.[541]

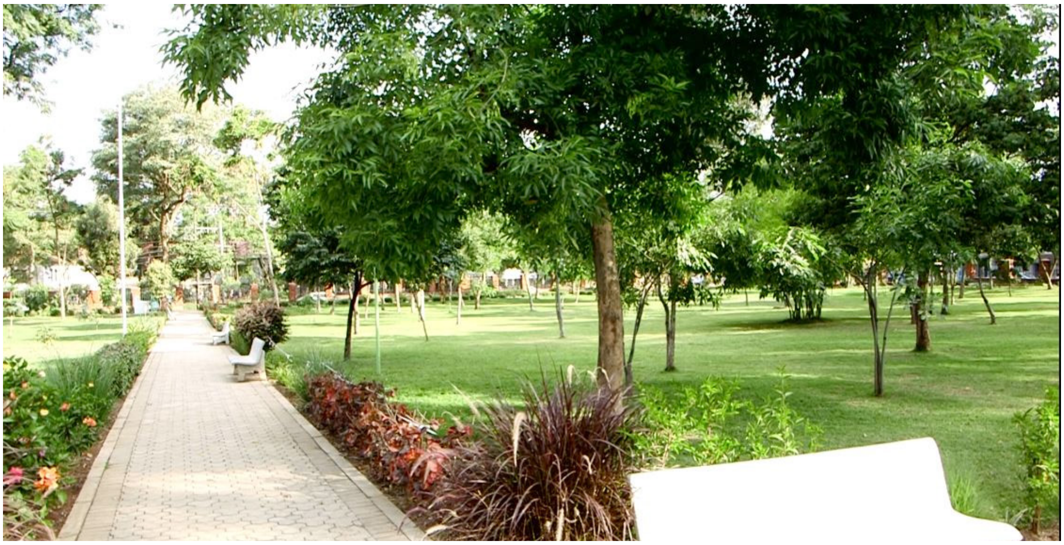

Figure 26: Refurbished Nyayo Gardens in Nakuru City County

540 https://www.theeastafrican.co.ke/tea/news/east-africa/nakuru-becomes-kenya-s-fourth-city-3637712
541 Interview with City Manager, Nakuru City County.

11.3 Urban solid waste management

For many years, Kisumu city was sinking under garbage that remained uncollected or was dumped on streets. From 2017, the county government of Kisumu embarked on an ambitious process of solid waste disposal in the city. Kisumu city generates an average of 500 tonnes of waste a day.[542] Most of the waste ended up in dumping sites across the city, and in the main Kachok Dumpsite near Nyalenda area. The dumpsite had become full, an eye sore, and required urgent action. A new dumpsite in Kasese area of Muhoroni Sub-County was identified. The process of decommissioning Kachok Dumpsite began.[543] The county government is in the process of completing the rehabilitation of the Kachok Dumpsite. The mountain of garbage was removed and the dumping site converted into a green park.

Figure 27: Kachok dumpsite in Kisumu County before and after rehabilitation

11.4 Environmental and natural resource management and protection

County governments have responsibilities to ensure the protection of the environment and the sustainable use of natural resources and protection of the same.[544] In this regard, county governments are required to implement specific national government policies on natural resources and environmental conservation, including soil and water conservation, and forestry.[545]

Counties with large and forested areas are involved in ensuring forest conversation and doing so in partnership with the national government and members of the communities. This is to ensure that there are sustainable ways of conserving forests and the environment. In Elgeyo Marakwet, the county government has passed a law that establishes a forest conservation and tree growing law and policy that incorporates representatives of indigenous

[542] Interview with Salmon Orimba, CECM Environment and Acting CECM Lands, Kisumu County Government.
[543] *ibid.*
[544] Section 10, Fourth Schedule to the Constitution of Kenya, 2010.
[545] *ibid.*

communities in order to ensure and realise community led conservation efforts.[546] Human settlement, logging, and other activities have depleted the indigenous forests in the county and this has had a negative effect on the climate and productivity of the region.[547] The representatives of the indigenous communities, such as the *Sengwer, Kiptani, Ogiek,* and *Cherangany,* will assist the county government to integrate Indigenous knowledge in their planning and responses in environmental governance.[548]

In urban areas, the main objective is to ensure that the residents of urban areas live in a clean environment and easily access clean water, housing land, decongesting the urban spaces and ensuring proper planning. County governments are alert to the challenges associated with solid waste that is generated in urban areas and have come up with innovative ways to manage the waste. Two counties (Nakuru and Kisumu) have partnered with, or come up with innovative ways of recycling solid waste as a way of managing waste generated.

As mentioned earlier, Kisumu generates approximately 500 tonnes of waste each day. In order to manage part of this, the County Government has partnered with private entities that recycle solid waste by using the biodegradable waste to produce biogas and other by-products such as organic fertilizer.[549] Biogas International, the investor who has partnered with Kisumu County Government, manages to recycle only 7 percent of the total solid waste that is generated in the City.[550] While it is a small step in the management of solid waste currently, such a measure has a great potential to assist in prevention of population and enhancing environmental protection within the City.

Figure 28: Segregation of waste at Dunga recycling plant in Kisumu County

[546] *Elgeyo Marakwet County Sustainable Forest Management & Tree Growing Bill & Policy.*
[547] Council of Goevrnors (Maarifa Centre) 'Elgeyo Marakwet County Integrates Indigenous Communities In Forest Conservation And Management For Community Ownership And Sustainability.' https://maarifa.cog.go.ke/county-initiatives/elgeyo-marakwet-county-integrates-indigenous-communities-forest-conservation-and
[548] *ibid.*
[549] Interview with Project Manager, Biogas International.
[550] Sharon Atieno, 'Reusing, recycling to stop plastic pollution in Lake Victoria' Infornile https://infonile.org/en/2021/04/reusing-recycling-to-stop-plastic-pollution-in-lake-victoria/

Figure 29: The Bio-digestor at Dunga recycling plant in Kisumu County

The Biogas that is generated from the project is sold to businessmen and women who then use the biogas generated from the plant to fry fish that they sell in market stalls.[551] At the recycling plant, there are youth who are engaged in duties such as sorting out the solid waste and making it ready for the recycling plant. There are also those who are involved in collecting and transporting waste to the site for sorting. The end products from the recycling plant is used as organic fertilizer for the gardens that surround the plant.[552]

The various laws and policies adopted by county governments to save the environment through proper solid waste management have laid the basis for increased measures to protect the environment. For instance, the CoG reports that by June 2023, the number of waste recycling companies had increased from 95 to 187.[553] Other environmentally sound practices promoted by county governments include the use of solar power for water pumps in service provision, environmental education and awareness, and the establishment of organic fertilizer facilities.[554]

11.5 Building of markets and business places in urban areas

Across the country, modern market facilities are being built by counties and enabling traders to sell their wares. The collection of garbage has improved and business activities are being carried out in clean environment. Many of the modern markets have been put up in partnership with the World Bank's Kenya Urban Support Programme (KUSP).[555]

[551] Observation at the Dunga public beach fish stalls.
[552] Observation at the Dunga beach recycling plant.
[553] Council of Governors, 'Annual State of Devolution Address' (June 2023) p.15.
[554] *ibid.*
[555] https://documents1.worldbank.org/curated/en/357091501293684377/pdf/Kenya-Urban-PAD-07072017.pdf

It is estimated that the new markets have assisted a total of 100, 000 traders across the country.[556]

In Kilifi County, markets in Kilifi were old and dilapidated, and were done by the former local authorities. Poor urban planning, a lack of services in the main urban areas and upcoming urban centre that were not well planned. However, Kilifi town now has a modern market (Oloitiptip), which was developed under the World Bank's urban support programme. There are modern markets in all sub-counties. smaller markets also completed.[557]

Figure 30:Oloitiptip Market in Kilifi town

Figure 31: Customers at Oloitiptip Market, Kilifi County

[556] Council of Governors, 'Annual State of Devolution Address' (June 2023) p.10.
[557] Interview with Patience Tsimba, Chief Officer, Department of Trade and Tourism, Kilifi County Government.

In Ruiru Market of Kiambu County, the new market is fully operational and traders have taken up stalls from where sell their wares. Before the construction of sheds and the new market complex, fresh produce traders from Kiambu faced the challenge of rain, cold, and unpredictable weather as they went about their business in the market. However, this perennial problem was solved with the construction of the new market sheds under the KUSP.[558]

Figure 32: Ruiru Market complex in Kiambu County

Figure 33: Ruiru Market market sheds

[558] Interview with market traders, Ruiru Market, Kiambu County.

Figure 34: A trader at Ruiru market sheds

In Isiolo, the new market is among the major infrastructures done by the county government of Isiolo and it will support more than 1,500 traders from Isiolo County and indeed the neighbouring counties, such as Meru that supplies fresh produce to Isiolo and environs. Once complete the market under construction will have 3,000 stalls to decongest the urban centers. The old market is congested and the new one will address the challenge of congestion and overcrowding.[559]

11.6 Strengthening farmers cooperatives and access to markets

County governments are changing lives by encouraging and facilitating the formation of cooperative and marketing societies for various categories of farmers. Where farmers are better organised, they can negotiate for better terms of their produce, have a coordinated voice in terms of demands from the county government, and even pool resources together for purposes of investments meant to benefit them as farmers. Indeed, if the farmers act alone, they weaken their chances for better market and are exposed to risks such as exploitative middlemen who take advantage and get their produce cheaply.

In Murang'a County, the Avocado farmers' Cooperative Union assists in securing better rates and a stable market for its members. The Union was formed in 2018 by self-help groups in Murang'a and covers all the 8 sub-counties.[560] As a result of coming together as farmers, the National Agricultural and Rural Inclusive Growth Project (partnering with World Bank) assisted the Union in access of pest control products that are recommended for use. On

[559] Interview with Osman Halakhe, Municipal Manager, Isiolo County Government.
[560] Interview with Chairman, Muranga Avocado Farmers Association.

the other hand, the county government has distributed over 2 million improved seedlings to the farmers for planting. The Union has secured land (through members contribution) in the county (Kandara) where the farmers plan to put up a cooling facility to store mature fruits until they find suitable market.[561]

The potential advantage of having farmers organised led the Kiambu County Government to spend KES 1.3 Billion in a bid to mobilise farmers into unions, based on their specific agricultural activities. As a result, coffee and dairy farmers in the county have formed umbrella unions to bring them together. In the coffee sub-sector, 23 coffee societies have been brought together under one umbrella dubbed Kiambu coffee Growers Association. On the other hand, 20 dairy societies haven brought together under the Kiambu Dairy association. These have created potential for farmers in the county to secure their interests and have stable and reliable markets for their respective farm produce.[562]

11.7 Construction of processing plants for farmers

In some cases, county governments have assisted farmers and communities to commence manufacturing concerns aimed at adding value in their economic activities. In turn, these manufacturing and processing concerns have added value to the work of farmers, and, in some cases, created economic opportunities and employment for communities.

In Kizingitini village in Lamu, the County Government invested in an ice producing plant. The plant was installed in 2017 and assists in generating income by selling blocks of ice for fish storage to local fishermen. Fishermen also store their fish in the plant while waitingfor market. Before installation, the nearest ice producing plant was a distance and it created an extra inconvenience to local fishermen who have to travel to the Lamu main island in order to get ice to store their fish.[563]

Figure 35: Ice processing plant and cold storage in Kizingitini Village, Lamu County

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[561] *ibid.*

[562] Interview with CECM member Agriculture, Kiambu County.

[563] Interview with Project Chairman and village elder in Kizingitini, Lamu County.

In Makueni County, the county government assisted farmers in coming up with a fruit processing plant that sought to eliminate exploitative middlemen and guarantee market. The plant has capacity to process 5 metric tonnes of mangoes and produce 3,000 litres of mango juice per hour.[564]

Figure 36: Kalamba Fruit Processing plant in Makueni County

In Kitui, the county established the Kitui County Textile Company (KICOTEC) to assist in the making of clothes for sale. The company was instrumental in the manufacturing of protective equipment (mainly masks) during the COVID-19 pandemic.[565] Finally, the county governments established a total of 68 milk cooling plants to dairy farmers in various counties across the country.[566]

Figure 37: Kitui Textile Company (KICOTEC) Kitui County

564 https://makueni.go.ke/download/kalamba-fruit-processing-plant/
565 https://kitui.go.ke/countygovt/works/kicotec-kitui-county-textile-center/#:~:text=KICOTEC%20%E2%80%93%20Kitui%20County%20Textile%20CenterTrade%20and%20Manufacturing,a%20County%20government%20in%20Kenya.
566 Council of Governors, 'State of Devolution Address, 2022.'

11.8 Technology and innovation in service delivery and development

With the technological revolution and changes happening, people's lives and livelihoods are increasingly connected to technology, including access to basic services. These include essential services such as registration of births and deaths, application for Identity cards and passports, and other government services. ICT is, thus, becoming a necessity in order to access services, including employment and entrepreneurship. County governments are now supporting various initiatives that seek to bring technology closer to the people for various purposes.

Makueni County has invested in an ICT Innovation Hub. Located at the Makueni Green Park in Wote Town, the centre runs numerous programmes aimed at placing ICT at the centre of people's lives. These include: "Tusome computer" literacy skills to the youth across the county. 120 youth from the 30 wards (4 from each ward) are selected for the training. The centre also runs a kids' boot camp where children are trained on basic computer literacy; in the last boot camp, 102 kids benefited.[567]

The county government has partnered with tech giants such Google, Facebook, and others in income generation and basic tech knowledge. A total of 4,000 people in Makueni are benefiting on a monthly basis. There are 14 ICT centres across Makueni County that offer similar services.

Figure 38: Makueni County ICT Centres

In Isiolo County, the County Government established a youth innovation center in partnership with the United Nations Development Programme (UNDP) and works works closely with the department of youth in the county government.[568] In its pilot phase, 52 youth from Isiolo participated in a training. This project has given the youth the platform to be able to get training on different aspects such as entrepreneurship and a space for nurturing their talents.[569] Over 2000 youths have been trained on different aspects of digital skills ranging from hydroponic farm training in which over 260 youths have been trained. 12 youths have been trained and have secured various jobs in the county government, the Judiciary and various NGOs operating in the county.

[567] Interview with Alice Wambui, Coordinator of the ICT Innovation Hub, Makueni County Government.
[568] Interview with Mohamed Gololcha, Project Manager, Isiolo County Government Innovation Hub.
[569] *ibid.*

Figure 39: Isiolo Youth Innovation Centre

In a technological leap that has revolutionised mapping and planning service delivery, County Government of Vihiga established Geographical Information Systems (GIS) Laboratory. The Laboratory assists in maintaining various sets of data for the county government, which is then used in decision-making. The Laboratory started as a platform for mapping out projects within the Emuhaya parliamentary constituency but is now expanded to cover county-wide mapping.

The Director GTS, trained GIS expert, runs the GIS Lab operations under the CEO who is the CECM in charge of Public Participation. Because the Lab is under the Governor's Office, departments through their lead officers are more than willing to provide data and information to the GIS Lab for processing.

The County aims at becoming a model user of ICT and Geospatial Technologies in planning and decision-making processes in the country. GIS technology enables objective and equitable distribution of resources across all wards. 25 county governments have visited Vihiga County to benchmark, out of which 16 have already set up GIS labs. Through the GIS Lab, the county government has managed to facilaite the equitable development of ECDE facilities in the entire county and distribution of health facilities. The GIS has helped the county map out various aspects including water projects, water towers, herbalists, floodlights, businesses, road network, land parcels, land cover, bridges, forests, rivers, chicken resources, dairy cooperatives, goats, etc.[570]

[570] *ibid.*

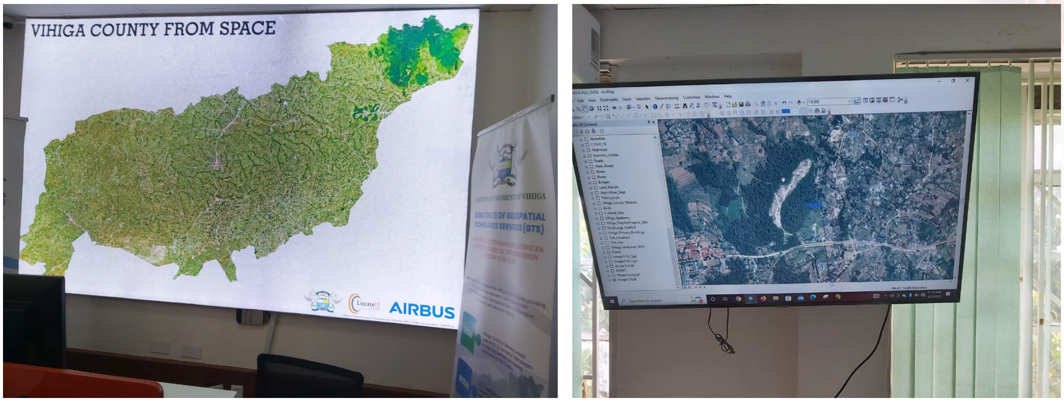

Figure 40: The Vihiga GIS Lab

Kisumu County has also pioneered the use of drones to deliver drugs in a timely manner and to ensure effective health coverage. This is a simple example of embracing technology to enhance access to services.[571] The mode of delivery was borrowed from Rwanda and is now assisting patients have timely access to drugs.

Figure 41: Delivery of drugs using drones in Kisumu County

11.9 Supporting business and enterprise

County governments have established frameworks and entities to support investment and development within the counties. These initiatives by various countries are aimed at spurring business, enhancing trade, investments, and economic activity and ensuring the inclusion of different groups or categories in business and economic growth.

In 2019, the County Government of Nyeri established a Ward Development Fund that is used to fund income generating projects for the youth, women, and persons with disabilities. The selection of groups and the vetting of beneficiaries is done with the assistance of the Social Development Office of the national government. The County Government allocated

[571] Jane Kimbwarata 'Kisumu pioneers drug delivery using drones to enhance timely universal health access' (Council of Governors, Maarifa Centre) 28 March 2023.

KES. 30 million per ward for such investments.[572] The funds have been used to support youth projects such as car wash, fish farming, and other income generating projects.

Embu County has established a Youth Talent Academy that incubates skills and offers pathways to employment in the creative industry. The Academy serves approximately 500 young people weekly and has seen many youths either get employment or employ themselves.[573] Baringo County has developed an innovative way of sharing part of the revenue generated from Lake Bogoria with local communities in a way that is meant to improve livelihoods.[574] Ten percent of the fees collected is used as bursaries for families around the reserve, while some of it used for livelihoods improvement projects and 6,000 students have benefited from the bursary.[575]

Laikipia County is supporting over 1600 owners of Micro, Small, and Medium Enterprises (MSMEs) by providing free working spaces and helping them come up with business plans. Through the Laikipia Innovation and Enterprise Development Program, the County has upgraded 322 working spaces and provided a decent trading environment and this project has seen the employment of over 22,000 persons in the sector.[576]

West Pokot County has improved the livelihoods of fishing communities around the Turkwel Dam by periodically restocking the dam with fingerlings (150, 000 after every eight months) to ensure continuous fishing and harvesting. The County Government also provided boats to the fishermen to enable them carry out their fishing activities in the dam.[577]

Figure 42: Fishermen and women at the Turkwel Dam in West Pokot County

[572] Nzei Mwende 'Promoting economic development and sustainable livelihoods: the nyeri youth, women, and persons with disabilities empowerment programme' (Council of Governors, Maarifa Centre) 8 June 2023.

[573] https://maarifa.cog.go.ke/county-initiatives/embu-county-establishes-talent-academy-boost-youth-creativity-and-offer

[574] https://maarifa.cog.go.ke/county-initiatives/baringo-county-government-shares-revenue-collected-lake-bogoria-local

[575] *Ibid.*

[576] https://maarifa.cog.go.ke/county-initiatives/laikipia-county-provides-free-business-development-services-over-1600-micro

[577] https://maarifa.cog.go.ke/county-initiatives/west-pokot-boosts-food-security-reviving-turkwel-dam-and-giving-fish-farmers

11.9 Conclusion

County governments are expected to spur local economic development and ensure that the lives and livelihoods in the counties have improved. County governments have done this by providing an enabling environment for businesses to thrive and also in direct investments in income generating activities. Communities have, in turn, taken advantage of these initiatives and organized into groups and association to ensure inclusion in investments. Where Ward Development Fund have been established, they have proved to be an important channel through which resources for development projects are channeled.

CHAPTER TWELVE

CITIZEN ENGAGEMENT AND PARTICIPATION IN DEVOLVED GOVERNANCE

12.1 Introduction

The devolution of power to the 47 county counties and below was to facilitate citizens to participate in government. The Constitution in Article 1 (1) is clear that all power exercised by county governments and all other state agencies emanates from the people. The county governments, therefore, are obligated to consult and listen to people through various channels to have their voice in critical decisions.

The only way that county governments can legally implement the priorities, needs, and concerns is if citizens effectively participate in the decision-making processes of the county governments. County governments have a constitutional mandate to consult people before any major decisions, especially where such decisions affect the people or group of people concerned. There are many cases where the courts have struck out laws or nullified decisions and actions taken by county governments, where such laws or decisions and actions were not subjected to public participation and consultation.

The Constitution identifies county governments as the appropriate level to entrench and ensure public participation in governance. However, the Constitution does not define public participation and what it entails. In this regard, one of the functions allocated to the county governments is "ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations in developing administrative capacity for the effective exercise of the functions and powers and participation in governance at the local[578]"

Citizen participation can enhance transparency and accountability in governance. When citizens have information regarding the cost of community projects, the beneficiaries of the projects, and the mode or means through which the project and beneficiaries were arrived at, suspicion is reduced. Public trust is earned.[579] Where members of the public are aware of what the county government is doing or trying to do; they will likely understand the objective and play their role. Indeed, even after the project, the community will play a more significant role in sustaining the project post-implementation and utilizing the services.

This chapter interrogates and paints public participation experiences, especially where counties consult the public to deliver their Constitutional governing mandate. The Constitution, alongside various national and county laws, requires county governments to put in place measures and structures to facilitate the participation of people in multiple

[578] Section 14, Fourth Schedule to the Constitution of Kenya 2010.

[579] Kenya School of Government (Centre for Devolution Studies) 'Practical approaches for County Governments to facilitate public participation' Working Paper 6 (February 2015), p.1.

processes, including law-making, development of policies and plans for the county government, and development of budgets, among other decision-making processes. The national and county governments have developed policies and guidelines to guide public participation. The chapter highlights how the frameworks guiding public participation have been implemented and experiences from the counties on how county governments are engaging communities and members of the public in governance, service delivery, and development.

12.2 The legal and policy framework for public participation in county governance

The County Governments Act,[580] in pursuance to Articles 10[581] and 35[582] of the Constitution, lays down the principles of public participation, which include; timely access to information in the hands of the government, access to the decision-making process, including law-making and policy decisions, facilitation of minorities' voice in governance, provision of complaints and feedback mechanisms, balancing the roles of different stakeholders, encouraging and engaging community structures in consultation and civilian oversight.[583]

The Act provides for the rights of citizens in public consultation. These include the right to petition and challenge[584] and the corresponding duty for the county government to respond.[585] The County Governments Act further provides that the counties have the option to organize referenda in questions regarding major investments and plans.[586] The Act also specifies the channels and means for public participation, which includes: ICT-based platforms, townhalls, budget approval, and validation forums, notice boards, development project sites, citizen fora, and forums of peoples' representatives such as parliament.[587]

The Urban Areas and Cities Act (UACA)[588] calls on a city or urban area to develop structures and systems for the participation of residents in the plans, budgets, performance review, and other governance processes.[589] The Act further provides that residents of a city, municipality or town can form themselves into various fora for purposes of participation in processes such as budgets, plans, laws and policies, and any other matters concerning citizens.[590]

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[580] Act No. 17 of 2012.
[581] National values and principles of governance
[582] Right to access information
[583] Section 87, County Governments Act 2012.
[584] Section 88, County Governments Act 2012.
[585] Section 89, County Governments Act 2012.
[586] Section 90, County Governments Act 2012.
[587] Section 91, County Governments Act 2012.
[588] Act No. 13 of 2011.
[589] Section 2(1) UACA 2012.
[590] Section 22 UACA 2012.

The Public Finance and Management Act (PFMA)[591] contains provisions requiring county governments to put public participation and consultation measures in place. The Act provides that the CEC Finance shall publish guidelines for public participation in the county budgeting process.[592] The Act also provides that an accounting officer for an urban area or a city may publish guidelines for public participation in the budget process.[593] The PFMA also provides for the development of guidelines for public participation in public finance management, including on components such as structures of public participation, mechanisms and processes of participation, petitions, public hearings, participation of special needs groups, and issues that need to be subjected to public participation.[594] The PFMA Regulations (2015) specify issues and channels for public participation.[595]

Several policies and documents have also been developed at the national level to make a practical public participation process. These include the Draft Public Participation Guidelines for County Governments,[596] the Draft National Policy on Public Participation (2018),[597] and the Public Service Commission Guidelines on Public Participation in policy development.[598] These documents provide guidance on the realization of the constitutional and legal provisions regarding public participation and provide specific directions on matters such as administrative structures and processes to guide public participation, the financing of public participation, stakeholder management in public participation, and steps involved in public participation, among other areas.

County governments have also developed and enacted laws and policies customized to their contexts. This has helped guide the establishment of public participation structures at the county level, the hiring of staff to facilitate public consultation, and the coordination between the different arms and institutions of county government, among other critical county-level processes of public participation.[599]

Voting and participation in election

Ideally, elections provide an avenue for *mwananchi* to determine which leaders and what policies will run the next government. Voters should choose candidates based on their manifestos and those of the political parties that have sponsored their candidature. Accordingly, voters need to pay attention to the agenda of candidates seeking office and cast their votes on that basis. Our system of elections also allows individuals to stand as

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[591] Act No. 18 of 2012.

[592] Section 125 (2) Public Finance Management Act 2012.

[593] Section 175 (9) (1) and (2) Public Finance Management Act 2012.

[594] Section 208, Public Finance Management Act 2012.

[595] Section Public Finance Management Regulations (2015).

[596] Developed by the Council of Governors together with the World Bank.

[597] Developed by the Office of the Attorney General.

[598] Public Service Commission (2015).

[599] See, for instance, World Bank Group, 'Inclusive and effective citizen engagement; participatory budgeting in Makueni and West Pokot Counties' (2017).

independent candidates (they do not need a political party), and voters can also assess the individual based on leadership, performance, and the candidate's agenda.

Where a candidate seeks re-election to the office they were occupying, such as a county governor seeking a second term, the voters have an informed basis for selecting the candidate based on their track record. In this regard, voters must actively seek information, understand the development and service delivery plans that candidates have implemented, and use the same to determine where to vote. In 2017, only 376 of the 1450 MCAs elected in 2013 were re-elected into office,[600] and only 12 county governors elected in 2013 retained their seats in the 2017 general election.[601] Some of those rejected on the ballot in 2017 were re-elected in 2022. There needs to be a clear and coherent justification of the reasons or factors for the high turnover in elective seats. Still, the pattern demonstrates the potential of elections as an accountability tool, especially where voters make informed choices at the ballot.

Participation in non-election development process- county planning

County governments are required by law to develop 5-year County Integrated Development Plans (CIDPs) highlighting the major plans and projects the county government prioritizes over the next five years. The CIDPs are usually conceived and pegged on the election cycle. In developing CIDPs, the county governments are required to consult the people and ensure meaningful participation to include their voices, priorities, and concerns in the development of the plans. Communities should pay due regard to the proposals in the five-year development plans because the CIDP is the county's blueprint, and these will form the basis of the county project. [602]

The CIDP's goals and targets are usually broken down into Annual Development Plans (ADPs),[603] which then inform the budgeting and expenditures of the county government in a particular year. The forums availed for public participation in annual development plans form the basis of annual plans.

Participation in county budgeting

The county budgeting process allows county governments to plan annually on how resources will be spent. County governments are required to consult the people on their priorities in the allocation of resources. The feedback and input from the public should inform the choices that a county government settles on in a particular financial year. In some counties, a portion of funds are usually set aside for each ward for communities to determine areas of spending.[604] The Council of Governors notes that the Project Management Committees

[600] https://www.standardmedia.co.ke/politics/article/2001436368/why-politicians-are-jostling-for-mca-jobs-despite-high-turnover
[601] https://www.standardmedia.co.ke/article/2001250838/waiguru-ole-lenku-biggest-winners-as-23-governors-seal-re-election
[602] Section 108, County Governments Act 2012.
[603] Section 126 (1) Public Finance Management Act 2012.
[604] Interview with Dr. Zipporah Wambua, Head of Public Participation Directorate, Makueni County Government.

(PMC) approach is being implemented in twelve (12) counties out of the 47. The PMC Model (described later) facilitates members of the public and communities to decide on development priorities of up to 70 percent of the development budget.

The Project Management Committees also play an oversight role in the implementation of projects in conjunction with the County Assembly. This method emerged as a best practice during the COVID-19 pandemic in 2020/21. The Council of Governors is working jointly with the World Bank to develop Project Management Guidelines to assist counties in taking and implementing this model.[605]

Participation in law making

County governments exercise their powers and responsibilities by the Constitution, national laws, and those passed by the county assemblies and assented to by the county governor. Laws lay the framework, rules, and processes to be followed in performing county functions. The laws also set up offices, institutions, and systems that will hold various responsibilities within the county government.

The county executive will develop laws necessary for the functioning of the county government, and the laws are passed on to the county assembly for debate and adoption. Where the county approves such laws after following laid down procedures, the county governor is required to assent to such a law. However, county assemblies can also develop their laws or amend the existing law. Still, such laws have also to undergo the same procedure (tabling, first reading, committee stage, second reading, and third reading) before they can apply.

During the preparation of a law, the county executive and the county assembly are obligated to involve the public. The county department preparing a law will call for public forums to consult on a proposed law before the same is submitted to the county assembly for approval. In the county assembly, after a Bill is tabled for debate, it is usually referred to the relevant county assembly committee, which in turn carries out public consultation.

12.3 Success stories of public participation in county governance

Several county governments have established diverse public participation mechanisms and structures, including specific laws, directorates, and locational units (wards) within the county public service to facilitate structured engagement and consultation with the public. Some of these units are particularly in charge of public participation.

While the basic structures and systems to facilitate participation are in place in many counties, there is a continuous need for county governments to innovate and be inclusive in engaging their communities and other stakeholders in providing services and development.

In this regard, county governments have developed an approach of establishing project management committees (PMC), which are fully formed and operational in 12

[605] Council of Governors, 'State of Devolution Address' 2022.

counties. The PMCs work with county assemblies to oversee county government project implementation. With the assistance of the World Bank, the Council of Governors has developed project management guidelines to assist the committees.

Structuring of public participation in the Makueni County Government

The County Government of Makueni has taken extensive measures to ensure the involvement of its residents in county governance processes.[606] The county government has a full-fledged directorate under the Department of Devolution and Finance. The Directorate is in charge of coordinating public participation. Specific roles include:

- Ensuring the mainstreaming of public participation in all programmes.
- Organising communities and establishing structures for public participation.
- Managing public participation data.

Other functions include: managing public complaints and grievances about service delivery, capacity building of community structures for the effective engagement in service delivery, formulation of pro-poor policies tied to public participation which seek to empower citizens, and overseeing the implementation of laws and policies on public participation within the county.[607]

Structures of public participation: The lowest level/ forum of public participation is the Village Development Committee. There are 3,643 such committees across the 30 wards of Makueni County. The village committees are the primary and initial mobilisation points for the entire county.

Above the village committees are the Cluster Development Forums, which comprise 5 to 6 village development committees. Above the cluster development forums are about 60 sub-county forums. Above the sub-county forums are about 30 ward development forums. Each of these levels is composed of elected representatives from the lower levels. Each of these levels deals with mobilisation, feedback mechanism, and redress of grievances. Most counties still need to implement public participation structures at the village level, as required in the Constitution.

The Makueni Peoples' Forum is the largest and highest level of public participation at the county level. The peoples' forum comprises around 3,000 representatives from all the levels above, opinion leaders, elected leaders, and even the business community.

Identifying needs and priorities in any planning cycle starts at the village level. All projects and ideas are identified at the village level, and the issues and priorities are harmonised and agreed upon along the levels of consultation and processing. The clusters come up with Community Action Plans. At various levels, there is the inclusion of special groups such as children and the youth, persons with disability, and women, among others.[608]

[606] Interview with Dr. Zipporah Wambua, the Director of Public Participation, Makueni County.

[607] *Ibid.*

[608] *Ibid.*

At the ward level, community proposals for projects are subjected to a joint technical evaluation with county officials, who take the committees through factors such as viability, cost, resources available, capacity required, etc. Where suitable projects seem beyond the community's ability to deliver, such are taken over by the relevant county departments at the county headquarters. For example, the idea of setting up the Kalamba Fruit Processing Plant came up from the village and ward levels, but due to the scale and complexity of the project, the county government took up the idea. The Makueni County Peoples' Forum is invited to validate all the projects identified from the village level.

Other roles played by the participation structures in county governance include:

- Vetting of county officials (through sub-county committee forums) and information is considered before hiring
- Participation in law and policy making
- Vetting of local contractors (to ascertain and provide information on the authenticity of those required to be residents)
- Assist in the choosing of local labour for projects
- Oversight of county officials managing projects

Financing of community projects: In the county's annual budget, a minimum amount of resources is usually set aside by the county government to support projects identified by the communities. An average of KES. 33 Million per county is generally set aside to support these projects. After the technical evaluation of the priorities, the costing and prioritisation of the projects proposed are undertaken. Currently, each ward allocates about 5 million of the 33 million to bursaries.[609]

Post-project sustainability: Each project has a sustainability committee composed of community members to ensure sustainability. The committee members oversee the running of the project and manage all aspects related to the project. As part of capacity building, the directorate of public participation trains community members on basic management and administrative skills to ensure the project is kept running. The project sustainability committees submit regular reports on the management of the project, including financial issues.[610]

Lessons from the Makueni Public Participation model

First, the ability to reach communities at the lowest level (through village committees) has increased legitimacy and support to the county government, thus making public participation a viable pathway of community engagement. It has created and strengthened actual community project ownership and agency.

Secondly, the constant political goodwill and undivided commitment to the success of public participation. The first governor of Makueni County, Prof. Kivutha Kibwana,

[609] *Ibid*
[610] *Ibid.*

was committed to establishing a working structure of public participation from the very beginning.

Thirdly, teams in the directorate have made an extra effort to learn about public participation and develop systems and structures that may assist. In partnership with institutions such as the World Bank, officials from the directorate have learnt from systems like the Panchayat in India and benchmarked in places such as Porto Alegro in Brazil and South Korea. This enriched the understanding of public participation among the officials in the directorate and assisted them in managing the processes within the county more effectively.

Fourthly, despite the high cost of public participation, which tends to make it unsustainable, the county government has innovatively managed this issue. Directorate members and other county teams visit the villages and attend meetings under trees, in schools, and in other venues. There is no need to hire venues, refund transport, or provide lunch for attendees as they are within their homes. Furthermore, meetings are limited to one and a half hours to allow community members to go for other engagements. KES. 30 Million availed for facilitation of public participation; more is needed to facilitate all meetings for all levels, hence the rules to manage meetings in the 3,146 village committees.

Fifthly, committee members of the various levels of structures maintain a strict code of ethics that requires them to avoid active partisan political activity. They take an oath on the date of appointment and are required (as a condition before taking office) to have stayed away from active politics for a certain period. Typically, the committee members are drawn from local professionals who are residents of the county, businessmen, and women, and general residents with the ability to represent community interests in the structures.[611]

Project Sustainability Committee of Kwambila Earth Dam, Makueni County

The Kwambila Dam project, whose success story was highlighted in Chapter 7, is managed by a Project Sustainability Committee. After the dam's construction, the project was handed over to a committee drawn from the communities benefitting from the water. The PSC is composed of nine members who are officials that are in charge of managing the dam. There is a chairman, secretary, treasurer, and six members.

The PSC oversees various activities involving the management and operations of the dam; the mandate and responsibilities of the committee include the following:

- Levying of user fees for various users of the dam water (commercial water vendors, irrigation, etc.)
- Maintenance and expansion of pumping and reticulation systems for water distribution
- Manning of water kiosks and water vending points within the area of distribution
- Purchase of fuel and equipment required to keep the distribution systems running
- Protection and maintenance of the dam and its environs

[611] *Ibid*

- Monitoring water usage and directions on sustainable utilisation of water
- Maintaining records and administrative systems

Money that is collected from the dam project is applied to project expenses such as payment of water kiosk operators and pump technicians and defraying of other costs related to the dam. The county government has provided basic training and skills to committee members, including maintaining financial records and accounting, and administrative skills, to ensure that the committee effectively runs project management operations.

The county government steps in to support the operations of the committee by providing critical and technical skills. In this regard, a site engineer is provided by the County Government, who presides over maintenance works on the dam, such as control de-silting and other structural aspects. The sub-county and ward administrators are also on hand to assist the committee and act as a link between the project and county government.

The PSC files monthly reports at the water and sanitation department of the county, which usually include: monthly revenue collected, a summary of expenditures and expenses, and project management issues. There are reporting templates that the county government provides.

In the next planning and budgeting phase, the project committee submitted a proposal to use the ward allocation to purchase solar equipment that would assist in cutting down the cost of fuel to run the diesel-powered pump that reticulates water to other distribution points.

Village Based Advisors in agricultural services in Kiambu County

In Kiambu County, the Department of Agriculture has found an innovative way to engage farmers and effectively participate in county government programmes. The county government has engaged around 1,000 farmers across the county who are the first line of introduction to a new variety of seeds, farming methods, and agricultural technology. Whenever there are any new programmes or information that requires dissemination, the department uses this established channel to reach farmers with information and feedback channel.[612]

The World Bank, in its November 2021 report on devolution, stated extension services in the agricultural sector have, for various reasons, declined. Working with VBAs, as the county government of Kiambu is doing, is an innovative attempt at bridging the gap created by inadequate agricultural extension services within communities. Each of the VBAs is in charge of around 200 other farmers in terms of disseminating new programmes or providing information, and this covers a critical mass of farmers across the county.[613]

612 Interview with CECM Agriculture, Kiambu County Government.

613 Interview with Village-Based Advisors in Kiambu Count.

Beyond the sharing of new farming methods and farm inputs from the county government, the establishment of VBAs and the creation of a network has the overall additional impact of creating an active citizenry who participate in broader governance issues within the county. Other counties are in the process of borrowing from the VBA model to enhance the engagement of farmers.[614]

Mobilising communities for climate change and adaptation in Laikipia and Vihiga Counties

Counties in arid and semi-arid lands long suffer from the effects of climate change. These have manifested in unreliable rainfall and weather patterns that disrupt food production, floods and drought that destroy infrastructure, displacement of families and loss of lives, and socio-economic disruptions. Laikipia has acknowledged this fact leading to a county strategy for public participation in developing the County Climate Change Act of 2021. Subsequently, this has enabled the formation of Ward Climate Change Committees in all 15 wards. The Committees, composed of all sections of the communities, are to participate in selecting projects and overseeing implementation.[615] This, in part, is an inclusive response to align adaptation and mitigation to community realities. The county denotes the absence of meaningful community participation as synonymous with excluding certain demographics, geographies, and groups detrimental to the larger community's well-being.

Similar climate change impacts have been experienced in Vihiga County despite being in the rainfall-rich belt of the western part of the country, manifesting unprecedented trends of soil erosion and reduced water levels. In response, the county government formed Ward Climate Change Planning Committees through which local communities, groups, and stakeholders promote water and soil conservation.[616]

12.4 Conclusion

The Constitution recognizes the sovereign and collective will of the people as the fundamental source of all power and governance. The Constitution further calls on elected officers and those appointed into public offices to consult the people and involve them in decision-making processes. County governments are also given the specific constitutional power of implementing public participation. Many county governments have taken steps to ensure the realization of the constitutional principle of public participation. As demonstrated in the chapter, there are rich examples of how county governments have secured the involvement of the public in decision-making processes across all sectors, including the budgeting and financing of county governments. Counties have also put in place mechanisms for receiving public feedback.[617]

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[614] Interview with CECM Agriculture, Kiambu County Government.

[615] https://www.laikipia.go.ke/1632/public-participation-climate-change-creating-awareness-ward-level/

[616] https://www.preventionweb.net/news/vihiga-undertakes-climate-change-resilience-investments

[617] https://maarifa.cog.go.ke/county-initiatives/county-government-nandi-launches-toll-free-number-receive-feedback-public

Innovativeness in reaching out to the people and harnessing their collective voice on issues affecting them is critical for the legitimacy of any action or decision. Leveraging technology can also widen the space and number of participants and reduce the cost and time taken. This chapter has demonstrated the different approaches taken by county governments, and this can be a basis for shared learning.

CHAPTER THIRTEEN

GENDER AND SOCIAL INCLUSION IN DEVOLVED GOVERNANCE

13.1 Introduction

This chapter analyses the impact of devolved governance and the gains for women and girls in Kenya. Women's rights movements and gender activists participated actively in the entire constitutional review process that led to the promulgation of the Constitution of Kenya 2010. The active participation of women in the review process resulted in the inclusion of provisions on gender equality in the Constitution. During the review process, both the Constitution of Kenya Review Commission (CKCRC) and the Committee of Experts (CoE) noted that in the past, the participation of women in politics and governance was minimal owing to social-cultural and economic factors. The CKRC report noted that between 1969 and 1998 when the constitutional review process commenced, the representation of women ranged between 1.2 percent and 4.1 percent.[618]

To facilitate the representation and participation of women in political and governance processes, the Constitution recognizes the principle of gender equality, including the principle of affirmative action with the intention of remedying exclusion of women from governance and political processes in the past.

The Constitution recognizes non-discrimination, equity, social justice, inclusiveness, equality, human rights, and protection of the marginalized as part of the national values and principles of governance.[619] The Bill of Rights specifically provides that, "women and men have the right to equal treatment including the right to equal opportunities in political, economic, and social spheres"[620] and explicitly prohibits discrimination on the basis of sex, pregnancy, and marital status, among other grounds.[621] The Constitution further provides that Parliament shall enact legislation to promote the representation of women and other marginalized groups in parliament.[622]

Devolution of power and resources expanded spaces for political participation of women in both governance and development. Recognizing the history of marginalization of women, the Constitution and enabling laws provide for affirmative action measures to enhance participation of women in governance. The Constitution obligates the state to take legislative and other measures to implement the principle that no more than two-thirds of any elective and appointive bodies shall be of the same gender.[623]

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618 CKRC Main report, pp. 60.
619 Article 10.
620 Article 27(3) of the Constitution, 2010.
621 Article 27 (4) of the Constitution of Kenya, 2010.
622 Article 27 (a) Constitution of Kenya 2010.
623 Article 27 (8) Constitution of Kenya, 2010.

The two-thirds principle is further given effect in the composition of county assemblies where the Constitution states that there shall be special seat members necessary to ensure that no more than two-thirds of the membership of a county assembly is of the same gender.[624] County governments are also constitutionally bound to follow gender balance provisions in appointive bodies, such as the composition of County Executive Committees (CECMs) and other appointive positions in the county public service.[625]

Finally, the Constitution devolves resources and powers that are relevant to the realization of gender balance. The emphasis of gender equality in all aspects of development, including service delivery and development requires county governments to ensure the optimal elimination of barriers to the participation of women and girls in development and their optimal participation in governance and development.

13.2 Gender equality, inclusion and representation in devolved government structures

County assemblies

County governments are required to adhere to constitutional and legal provisions that require gender equality in the composition of political and governance structures. Specifically, the Constitution provides that all appointive and elective bodies should have no more than one third of the same gender.[626] In the case of county governments, this principle should be reflected in the composition of county assemblies and the county executive.

The election of ward representatives is through the First-Past-the Post (FPTP) system of elections. Due to the socio-cultural and economic barriers that exist in the Kenyan society, women candidates have performed dismally. The number of women who offer their candidature for elective office are relatively few and those who finally get elected to office even fewer.[627] In the 2013, 2017, and 2022 general elections, voters elected less than 100 female ward representatives, out of the 1,450 county wards in the country.

To meet the gender quota, the Constitution stipulates that there shall be special seat members necessary to ensure that no more than two-thirds of the membership of the assembly are of the same gender. The low numbers of women elected as members of county assemblies has meant that political parties nominate women in the special seats to ensure compliance with the Constitution. To ensure compliance with the gender requirements in the Constitution, a total of 708, 650, and 727 women were nominated in the 47 county assemblies in 2013, 2017, and 2022 respectively.[628]

[624] Article 177 (b) Constitution of Kenya 2010.

[625] Article 27(8) Constitution of Kenya 2010.

[626] Article 28 (7) Constitution of Kenya 2010.

[627] Shilla Sintoyia Memusi and Diana Højlund Madsen, 'Gender gains overshadowed by constitutional violation: An analysis of the situation for women in politics after the 2022 elections in Kenya' The Nordic Africa Institute (Policy Notes 2022:7).

[628] *ibid.*

The table below shows the total number of men and women elected as MCAs in the last three general elections.

Table 1: Elected Members of County Assembly by Gender

ELECTION YEAR	FEMALE MCAS	MALE MCAS	TOTAL ELECTED MCAS	NO. OF SPECIAL SEATS
2013	83	1367	1450	708
2017	96	1354	1450	650
2022	115	1335	1450	727

Source: NDI, UN Women[629]

A study conducted in five counties revealed that it was only rare occasions that women occupied offices of speaker and Deputy Speaker, and sometimes chaired the committees of county assemblies.[630] This observation suggests that though county assemblies are compliant with the constitutionally set gender quotas, there are other systemic factors that hinder the full and effective participation of women in political and governance structures. The same factors have contributed to the lack of compliance with the constitutional gender quota in the National Assembly and the Senate, despite clear timelines and requirements to ensure compliance.[631]

County Executive

In the 2013 general election, no woman was elected as county governor in the entire country. This changed slightly in the 2017 general election, with the election of three women as county governors.[632] Seven women were elected as county governors in the 2022 general election.[633] In the second term of county governments (2017-2022), a female county governor passed away,[634] however, the number of women governors was still at three at the end of the term as the Nairobi Governor who was impeached during the second term was replaced by a female Governor.[635]

Nine women were elected as deputy governors during the 2013 general election and this dropped by two to seven female deputy governors in 2017.[636] During the second term of county governments (2017-2022), the number of deputy governors increased to ten,

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[629] https://africa.unwomen.org/en/digital-library/publications/2022/12/in-brief-womens-performance-in-the-kenya-elections#view

[630] Lucianna Thuo and John Ambani, 'Devolution and the promise of democracy and inclusion: An evaluation of the first decade of county governments (2013-2022)' in Osogo Ambani & Caroline Kioko (eds) *Decentralisation and inclusion in Kenya: from pre-colonial times to the first decade of devolution* (Kabarak University Press) 2022: 243-244.

[631] https://www.ngeckenya.org/news/8267/ngec-urges-political-parties-to-comply-with-two-thirds-gender-principle

[632] Joyce Laboso in Bomet County, Anne Waiguru in Kirinyaga County, and Charity Ngilu in Kitui County.

[633] Anne Waiguru in Kirinyaga County, Kawira Mwangaza in Meru County, Susan Kihika in Nakuru County, Wavinya Ndeti in Machakos Count, Cecily Mbarire in Embu County, Gladys Wanga in Homa Bay County, and Fatuma Achani in Kwale County.

[634] Governor Joyce Laboso (Bomet).

[635] Mike Sonko (Nairobi) impeached and replaced by Anne Kananu.

[636] Lucianna Thuo and John Ambani, 'Devolution and the promise of democracy and inclusion: An evaluation of the first decade of county governments (2013-2022)' in Osogo Ambani & Caroline Kioko (eds) *Decentralisation and inclusion in Kenya: from pre-colonial times to the first decade of devolution* (Kabarak University Press) 2022: 243-244.

following the death and impeachment of governors that in turn led to succession in the office of deputy governors by females.[637]

County governments are required to ensure that the County Executive Committee (CEC), which is composed of the governor, deputy governor, and members of the executive committee, also complies with the requirement that no more than two thirds of the members are of the same gender. The County Assembly is further required to ensure that the nominees for appointment to the CECM meet this gender threshold.[638] In 2013, it was reported that out of the 448 CECMs that were appointed in the 47 county governments, 33 percent were female.[639] However, only 16 out of the 47 county governments met the minimum constitutional criteria with at least two-thirds of CECMs being female.[640]

A study conducted in 2022 of five counties[641] found that although counties barely met the minimum constitutional threshold in CEC gender composition (with most failing to meet the criteria) those appointed "were entrusted with both the ministries that are thought to be important and those considered inferior."[642] While it appears that county governments only delivered the bare minimum in terms of gender composition in the county executive (because the law requires it), the law has set in motion the basis for inclusion of women in governance.

13.3 Gender and delivery of county government services

Gender and health services

There are indicators of improved health for women and girls seeking health services at the county level, mainly as a result of increased and sustained funding (approximated at 30 percent) to the health sector by county governments.[643] These resources have been invested in the expansion of coverage of health facilities, the hiring of medical personnel including community health volunteers and workers, medical insurance for poor and vulnerable families, and acquisition of drugs and equipment for better health care.[644]

The national government has also partnered with county health facilities in special programmes, such as the *Linda Mama* programme, that provides free maternal healthcare in public and private health facilities in the country.[645] The programme has led to an

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637 *Ibid.*
638 Section 35(2)(a) County Governments Act.
639 Commission for the Implementation of the Constitution (CIC) 'Assessment of the Implementation of the System of De volved Government: from steps to strides' (June 2014), p.26.
640 FIDA and NDI, 'A gender audit of Kenya's 2013 general election process'57-58, quoted in Lucianna Thuo and John Ambani, 'Devolution and the promise of democracy and inclusion: An evaluation of the first decade of county governments (2013-2022)' in Osogo Ambani & Caroline Kioko (eds) *Decentralisation and inclusion in Kenya: from pre-colonial times to the first decade of devolution* (Kabarak University Press) 2022, p. 256.
641 Garissa, Kakamega, Mombasa, Nakuru, and Narok.
642 Lucianna Thuo and John Ambani, 'Devolution and the promise of democracy and inclusion: An evaluation of the first decade of county governments (2013-2022)' in Osogo Ambani & Caroline Kioko (eds) *Decentralisation and inclusion in Kenya: from pre-colonial times to the first decade of devolution* (Kabarak University Press) 2022: 234-235.
643 Council of Governors, 'The impact of devolution on women and girls in Kenya' (2022) p. 15.
644 See Chapter six for detailed discussion.
645 https://www.health.go.ke/linda-mama-programme-positioning-kenya-on-the-pathway-to-uhc-health-ps/

increase in the number of women seeking maternal services, particularly neonatal care.[646] The Kenya Demographic Health Survey (KDHS) indicates that there are significant and positive changes between 2003 and 2014, including a decline in infant mortality, increase in the number of mothers seeking antenatal and postnatal care, and a rise in the number of immunized children.[647]

Access to general health services, and specialized healthcare services for women are critical to the realization of the right to health. County government investments have focused on both general and specialized health services to ensure that health services are delivered in a manner that considers gender equality. Kirinyaga County, for instance, has set up rescue desks in all public health facilities or the specialized assistance of Sexual and Gender Based Violence (SGBV) survivors.[648] Homa Bay County, on the other hand, has set up GBV centres to assist survivors and offer requisite health care.[649]

Gender dimensions in water and sanitation and water services

While water and sanitation services are critical to essential human rights for everyone, the lack or inadequate provision of water impacts disproportionately on women than men, especially in Kenyan households. It is estimated that 80 percent of households without water in their premises in Kenya rely on women and girls to fetch the precious commodity.[650] Indeed, in rural areas, and even most urban areas in the country, it is women and girls that undertake daily chores of fetching water for domestic use.

The investments in water and sanitation services by county governments have addressed issues of accessibility, reliability, quality and availability of water services. These investments range from piped water in urban areas, to provision of protected water sources in rural areas.[651] In areas, such as Kizingitini Village in Lamu County (discussed in Chapter Six), women and girls now fetch water for use from water taps, just outside their houses.[652] Bringing water closer to homesteads reduces the risk of violence that women and girls are likely to meet outside their homes. The coverage of water and sanitation services is generally low, mainly due to the resource constraints yet filling this gap will address the plight of women and girls who bear the greater burden from the lack of water for domestic use.

Education and gender

There has been a tremendous increase in enrollments into ECDE facilities in the country since the entry of county governments. This is attributed to the opening of new ECDE

[646] *bid.*

[647] Council of Governors, 'The impact of devolution on women and girls in Kenya' (2022) p. 16.

[648] Nzei Mwende, 'Kirinyaga County supports gender-based violence survivors by setting rescue desks in all public health facilities' (Council of Governors, Maarifa Centre) 8 February 2023.

[649] Nzei Mwende, Dr Kevin Osuri and Dr Gordon Okomo 'Homa Bay County mitigates gender-based violence through sensitization and GBV Centres' (Council of Governors, Maarifa Centre) 10 February 2023.

[650] Council of Governors, 'The impact of devolution on women and girls in Kenya' (2022) p. 7.

[651] See Chapter six for a detailed discussion.

[652] Observations during field visit to Kizingitini Village, Lamu County.

facilities and hiring of more teachers/caregivers by county governments.[653] While there have been discrepancies in the past between the admission of boys and girls, these disparities have been diminishing over the years as a result of affirmative action measures targeting the girl child. In 2021, the numbers of girls and boys enrolled into ECDE facilities across the country were **1,422,247** and **1,423,018** respectively.[654]

However, there are still subsisting inequalities between counties in relation to access to ECDE facilities. The parity may be in terms of physical accessibility, the teacher to student ratio, access to books and study materials, or other dimensions. In many cases, disparities in access affect girls more disproportionately. The incremental provision of ECDE facilities will, in the long term address the prevailing gendered disparities in access to education. Bomet County Government has commenced the supply of sanitary towels to KCPE female candidates from vulnerable households to enable them stay in school when they experience their menstrual cycles.[655]

Gender in county planning and development

There is a need for clear plans, strategies, and arrangements on how to achieve gender equality and equity in county governance. While constitutional and legal thresholds are a good beginning point, it is clear that without further and clear measures to ensure the full realization gender sensitive governance, counties may not achieve the desired constitutional obligations regarding gender.

The study by the Council of Governors identified a number of critical gaps in gender governance in county governance processes. These include: a lack of gender action plans, limited expertise and skills in gender mainstreaming, inadequate resources to facilitate gender inclusiveness in governance processes, non-implementation of national gender policies, and a lack of frameworks and means of evaluating and monitoring gender inclusion, among other gaps.[656]

Gender sensitive county facilities

County governments have embraced the need to ensure that facilities cater for the special needs of all genders, especially women. In Tharaka Nithi, for instance, the construction of creche within Chuka Market, (a facility, within a building, that provides supervised care and early education for infants and young children, typically between the ages of three months to three years old) has enabled women traders to carry out their work while attending to the children within the market. This has had immense benefits; children

[653] See Chapter eight for a detailed discussion.

[654] Council of Governors, 'The impact of devolution on women and girls in Kenya' (2022) p. 15.

[655] https://maarifa.cog.go.ke/county-initiatives/bomet-county-supplies-free-sanitary-pads-female-kcpe-candidates-keep-them-school

[656] Council of Governors, 'The impact of devolution on women and girls in Kenya' (2022) p. 16-20.

are able to receive nutritional needs while mothers are able to attend to their businesses without worry. The county government intends to replicate this approach to all its public markets.[657]

Figure 43: A creche in Chuka open air main Market, in Tharaka Nithi County

13.4 Conclusion

The Constitution of Kenya sought to ensure gender inclusion in governance and service delivery. In doing so, the Constitution sought to deal with a cultural problem where women were at the periphery of decision-making. Conscious of the slow transition and even possible resistance by patriarchal societal and governance structures, the Constitution placed affirmative measures and gender quotas to ensure that women have their place in governance. As a result, all appointive and elective positions (including in county governance) are required to comply with constitutional criteria regarding gender composition. These measures provided for in the Constitution have seen the enhanced participation of women in county leadership structures. County assemblies, for instance, are fully compliant of the constitutional requirements. Some of the progress seen in gender responsiveness, as highlighted in the preceding sections, can in part be attributed to the visible participation and contribution of women in the county. While the ideal has not been achieved, the experiences highlighted above are in important starting point.

[657] https://maarifa.cog.go.ke/county-initiatives/gender-mainstreaming-trade-impacts-chuka-market-creche-traders-and-children

CHAPTER FOURTEEN

KENYA AND THE FUTURE OF DEVOLUTION

The preceding chapters of this book have provided the journey that Kenya' has traveled in its local and subnational governance structures, from the early days of formal governance, through the colonial period, to the independence era, the post-colonial period, and up to the adoption of the current Constitution in 2010. The book has provided a background to the return of the devolved system of government through a popular constitution-making process. The constitution-making process in Kenya and devolution demands were born of popular and widespread disenchantment with the centralised government systems and decades of inefficiency and declining services.

However, while the political choice of devolution is clear, implementing and realizing the popular vision is uncertain. The political and institutional culture of centralisation quickly emerged as a major and systemic challenge to the implementation of devolution. Thus, while devolution is radical in its transformative objective and purpose, the transition process has almost been upended by resistance to devolving controls (resources and powers) at the centre.

Despite the above prevailing context, and as the book has demonstrated in the successive chapters (chapters 7 to 13), there has been remarkable progress across the counties in providing services and development. County governments have collectively and individually asserted their space in governance and have implemented systems to facilitate the delivery of services and the performance of their functions.

Enhancing service delivery and development

Realizing the county governments' potential to deliver services and development will depend on whether the identified challenges related to the implementation of devolution are fully addressed. These include addressing the challenges of the delayed transition process, as highlighted in chapter five.

County governments must also build their capacity and institutions to provide services to all people within their defined geography. The performance of functions has also shown that it is critical that counties not only participate in setting national standards for service delivery, but that compliance and enforcement means are available to guarantee implementation. This calls for intergovernmental consensus with regard to standards of service delivery, setting of targets, and evaluation of progress on a sector basis and other levels.

Furthermore, the Constitution and all applicable laws provide clear objectives and purposes that the devolved system of government is meant to serve. These should be injected into and reflected within the county service delivery and development plans. This is the only way there can be an informed and conscious pursuit of the county governments' aims, objectives, and purposes. The courts have demonstrated an eagerness to defend the principle of devolution of power, and county governments have sought and got reliefs that enable them to perform their functions as provided for in the Constitution.

Securing resources for service delivery and development

Counties can effectively continue to serve people if the devolved governance structures are supported and matched with timely, predictable, and optimal resources. This means the presence of functional frameworks that govern and manage financial and technical resources for county governments. However, it would be in vain, as experience has demonstrated, if the adherence to the Constitution provisions on funding, especially by the national government, takes a back seat.

County governments have a constitutional duty to optimize the management of their resources. An optimal collection and utilization of local resources by counties can, as pointed under Chapter Six, provide an important cushion in the face of challenges faced through the national funding mechanism and process. This also involves the development of requisite capacity and commitment to the Constitution and relevant laws.

Devolution and national unity

The devolution project aims to build the nation and enhance national unity. This is evident in the objectives of devolved government in the Constitution and the general constitutional spirit regarding the devolved system of government. Therefore, even as county governments scale up the provision of services, their delivery must unite Kenyans. A practical example is the cross-county scope of some services, such as healthcare services, as demonstrated under Chapter Seven of the Constitution.

The channels of intergovernmental relations between the national and county governments and between county governments should facilitate discussions and consensus on pursuing national unity through the devolved system of government.

Towards future of county governance and devolution

Devolution of power and shared governance at the national and county level remains the centerpiece of the Constitution of Kenya 2010. While the expected constitutional outcomes have yet to be fully met, the last ten years of implementation (2013-2023) demonstrate significant advancement towards the realization of the goals of devolution. Kenyans have experienced the fruits of devolution and have seen the transformation that can be achieved when resources and powers are moved from the centre to the local or community level. There is renewed optimism among members of the public on the ability of county governments to respond to their collective needs. This translates to a duty on the part of the National and county governments to consciously pursue the objectives of devolved government and ensure that the sovereign will of the people, as expressed in the Constitution, is translated into reality for their meaningful transformation.

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