Partnership for Transformational Devolution

Policy Brief

to the 5th Annual Devolution Conference: *The Devolution Experience: Sustainable, Productive, Effective and Efficient Governments for Service Delivery*

1. INTRODUCTION

This brief has been prepared by partnership for Transformational Devolution[1] (PTD) project being implemented in ten counties in Kenya[2]. It is based on partners' experiences from three regions and feedback from the project beneficiaries. The primary objective of the brief is to contribute to the policy debate towards sustainable, productive, effective and efficient governments for service delivery in Counties. The brief highlights four key historical yet current policy areas that need to be explored and identifies a number of critical questions that need to inform policy debates around the areas. While it may not be comprehensive, the PTD partners hope that the brief shall make an important contribution that shall go a long way in firming devolution in Kenya on its pathway to success.

1.1 Background

Devolution of government and governance is an international phenomenon that was embraced in Kenya through the Constitution of Kenya 2010. Broadly, devolution is a process which meets multiple objectives of increasing the efficiency and quality of public services through a better fit and greater responsiveness to citizen preferences of public goods; improving legitimacy, transparency and accountability of political institutions and; fostering the growth of local and regional economies through competition, experimentation and innovation in public sector. It is a pivotal means of promoting and advancing the National Values and Principles of Governance stipulated in Article 10 of the Constitution which includes democracy, participation, accountability, equity, inclusion and non-discrimination among others.

Article 174 of the CoK 2010 outlines the objectives of devolution that espouse four critical goals: Accountable Governance, citizen participation, equality and quality service delivery.

Devolution in Kenya is therefore largely viewed by the citizenry as the panacea of most historical ills in governance and service delivery. There is hope that the success of devolution

[1] Facebook@kas.kenya.ptd.
[2] Coast: (Tana River, Kilifi, and Mombasa), Lower Eastern (Makueni, Machakos and Kitui) and Rift Valley (Nakuru, Baringo, Elgeyo Marakwet and West Pokot)

signals an era of improved delivery of services. These expectations are unprecedentedly high and euphoric presaging the devolution promise.

2. POLICY CONCERNS

As the Country embarks on the second phase of implementation of devolution, it is imperative to take stock of the implications of various policy decisions made during phase one. While on one hand, some policy decisions have reinforced and hastened the pace of devolution, others have been viewed as an impediment.

The Key Policy areas around which concerns have evolved include:

- **Transition into County Governments** – There appears to be general consensus that transition particularly with regards to transfer of functions was rushed without consideration of such issues as capacity and readiness of counties to take up the functions. It may therefore be instructive that the Council of Governors undertakes an assessment of the extent to which the capacity and "preparedness" of counties has improved after phase one of devolution to inform capacity development priorities for phase 2.

  Support from national government has been debatable with one hand alleging full support while other sentiments hold that there is coercion and sabotage from national government hence interfering with county assignments and mandate especially in the health sector. These transitional challenges have affected quality of service adversely**.**

- **Public Expenditure Management –** The ability of counties to meet their financial obligations and achieving their local revenue targets has been a matter of concern. The balance between development expenditure and re-current expenditures has not been realized in most cases. A significant portion of county government revenues comes from national government. However, there is little correlation between a county Government's public goods and services for which they are responsible and the amount of money spent on the recurrent expenditure.

- **Intergovernmental communication, coordination and cooperation between County Governments and national government remain deficient and underdeveloped** – Was provincial administration really reviewed to accord with and respect the devolved system of Government? Is the relationship between national government and county governments really based on the principles of cooperation and mutual respect? Has there been duplication and or encroachment into exclusive spaces? What with the National Government-Constituencies Development Fund?

- **Corruption, wastage of resources and abuse of power –** There have been concerns that rather than deliver "accountable governance" devolution appears to be having a reverse effect. Civilian oversight has been constricted by difficulties in accessing information and stifling of public participation. Corruption threatens to become the "new norm" with some unsettling level of acceptance. There needs to be a shift from calling it 'corruption' to 'theft' which it basically is.

All in all, many Kenyans hold the view that devolution is on the right track in achieving its objectives. However, they are also cautious that for full realization of the benefits, we must keep our eyes on the pin-hole lest we plummet.

Reflection Questions Moving Forward

The following are key policy questions to inform policy reflections towards ensuring that the Country continues to be on a firm pathway to successful implementation of devolution through sustainable, productive, effective and efficient governments.

a) ***Do the institutional structures and policies developed hitherto constitute an enabling framework for devolution? Are the structures and policies reinforced by necessary laws, regulations and guidelines for effective and efficient implementation?***

b) ***Are there proper and functioning coordination, cooperation and synergies between and among the two levels of government?***

c) ***Is there provision of an adequate and sustainable financial base, control and accountability systems coupled with accessibility of information to support productivity, efficiency and sustainability by county governments?***

d) ***Is there a one homogenous and coherent civil service? How has the country met the pressing needs for staffing, training and career development in the face of devolution? Do counties have in place a coherent performance management framework in place?***

e) ***How has the country handled the aspects of diversity, ethnicity, and affirmative action, while at the same time safeguarding performance and professionalism including ethical values?***

f) ***Do the structures and strategies in place encourage, support and enlist active participation from the local community and civil society?***

g) ***What measures are in place to prevent and deal with corruption at county level? Are counties facilitating civilian oversight or are they stifling it?***

h) ***What is the role of County Citizen Oversight Forums, media and other non-state actors?***

i) ***Are there interactive rosters and networks among counties for peer to peer learning, sharing information, ideas and expertise?***

j) ***Do counties have comprehensive MERL frameworks?***

3. THE CURRENT SITUATION

3.1 The Legislative Framework and Process in support of Sustainability and efficiency in devolution

Devolution has proved to be a complex undertaking that cannot be completed within a short time and by one-off legislative acts. Rather, it requires continuous attention and regular fine tuning. Most of the legislative framework for devolution was put in place by the Commission for the Implementation of the Constitution (CIC) before the onset of devolution in 2013.

However, there is need to domesticate most of the legislation into policies, regulations and guidelines specific to each county for effective implementation. This process of domestication has been hampered by supremacy wars that characterized the first phase of devolution (2013-2017). At the county level, the executive and county assemblies were in constant show of might. While at the national level, the National Assembly and the Senate would not agree on pertinent matters affecting devolution such as the quantum of equitable share.

The Senate, as the protector of counties and by extension devolution, struggled to live to its mandate. Many are the occasions where issues before the committees were often driven by politics rather than by public interest. The work of the Senate has further been undermined by the National Assembly especially on the aspect of Division of Revenue Bill that has always ended up in a mediation committee of both houses.

There has been little or insignificant coordination on drafting national laws or standards applicable to county governments especially on service delivery, and trans-boundary resources management.

On the aspect of separation of powers, there is evidence of influence of either the legislative or executive arm. Some bills were passed, not because of their validity and interrogation but because of undue pressure. Mandatory legislation such as Appropriation Bill and Finance Bill has been a boon and a negotiating tool for legislature to push personal gain, for example, implementation of Ward Development Funds.

During the period there was weak legislative drafting and advisory services, further weakening the oversight role of the legislative arm. This is particularly the case in counties where most MCAs have limited technical capacity to formulate laws*

Across the 10 PTD Counties there have been attempts to develop legislations of domesticating national legislations critical to realization of the objectives of devolution. For instance, Nakuru, Elgeyo Marakwet, Baringo, Mombasa and Machakos, have in place public participation laws*. However, only Makueni County has developed guidelines and set up relevant structures for its implementation. Baringo County is following suit. Having passed the law and established a civic education and public participation Unit, the County recently set up committees to the locational level to animate public participation.

3.2 **Public Financial Management in Support of Productivity, Sustainability and Efficiency of Government**

During the first phase, county governments received equitable share and conditional grants earmarked mostly for health and infrastructure sectors without fail though inconsistently and not according to the Disbursement Schedules approved by the Senate. The counties also generated their own revenues which increased over time as they leveraged in automation and other efficiency mechanisms even though most counties hardly achieved their local revenue targets in any financial year.

During the period there was overall improved adherence to the PFMA in terms of planning, approvals, implementation and reporting. Most county assemblies approved budgets within the stipulated timelines. Even then, there were challenges with regard to how meaningfully citizens were involved in the budget process. Access to budget information was a major impediment at the beginning although there has been steady improvement over time. Baringo County is perhaps the most improved in this regard.[3]

The establishment of institutions in financial management such as Internal Audit Committees and County Budget and Economic Forums (CBEF) was a mixed bag. For instance some counties had functional Internal Audit mechanisms and County Budget and Economic Forums while for others they were yet to establish. A key feature across the 10 PTD counties safe for Elgeyo Marakwet County however was that the CBEFs were not adequately facilitated to execute their mandate. Expenditure control during the period increased even though instances of over expenditure on items such as domestic travel were identified in some counties under discussion. The absorption rate of development funds increased tremendously from an average of 45% to unprecedented rates, with Machakos County recording the highest rate of 99.1%

Most of the Development funds were utilized in construction of health facilities, ECDE classrooms, roads, water pans, bridges, county and sub counties offices and sports facilities. Other notable development expenditures included establishment of resource centers targeting the youth, supply and installation of hospital equipment mostly funded by national government; street lighting and acquisitions of heavy machinery as seen in West Pokot and Baringo.

The investments in the above projects portend a future of improved economic growth and increased quality of service delivery at the counties.

What is evident is that these thrusts have increased operational cost that need to be included in the budget. Many facilities constructed are yet to be operationalized as the recurrent costs associated thereto were never envisioned. An example of such mismatch is in the health sector where facilities were constructed and equipped with state of the art machinery with no requisite personnel and consumables to run them. A case in point is Kilifi and Tana River counties. Similarly, most counties took up the lighting of streets with the more expensive thermal power and did not factor in the electricity bills. In Kitui County, the new government has switched off the street lights terming them very expensive. In Nakuru County, most street lights are not functional due to lack of maintenance. In education sector, several ECD centres have been constructed but not supplied with teachers, learning materials and furniture. Some do not even have latrines making them unusable.

A notable positive trend is that counties have innovatively sought to address their unique needs by using locally available resources and opportunities. For instance, Machakos County has acquired strategic stocks to improve on agricultural and livestock productivity, while Makueni County has banned sand harvesting. On its part, Kitui recently banned charcoal making.

[3] http://www.internationalbudget.org/budget-work-by-country/ibps-work-in-countries/kenya/understanding-county-budgets/tracking-county-budget-information-kenya/

Table 1.1[4] below shows the percentage% of Development Expenditure versus total expenditure for the counties.

County		2015/16			2016/17		
		Recurrent (Billion)	Development (Billion)	Total (Billion)	Recurrent (Billion)	Developmen t (Billion)	Total (Billions)
Baringo	Budget (Released)	3.54	1.27	5.90 (5.14)	3.90	2.61	6.51 (5.39)
	Actual	3.42	2.36	4.69	3.75	1.46	5.21
	Performance (%)	96.5%	53.9%	79.5%	96.2%	56%	80.0%
Nakuru	Budget	8.60	5.38	13.68 (10.28)	9.25	5.84	15.09 (11.27)
	Actual	8.15	2.23	10.38	8.61	2.05	10.66
	Performance (%)	94.8%	41.4%	75.9%	93.1%	35.1%	70.6%
Elgeyo Marakwet	Budget (Released)	2.42	1.43	3.85 (3.24)	2.89	1.85	4.74 (4.05)
	Actual	2.27	0.65	2.93	2.8	1.17	3.97
	Performance (%)	93.8%	45.5%	76.1	97%	63.2%	83.8%
West Pokot	Budget	2.82	2.01	4.83 (4.57)	3.41	1.83	5.25 (4.96)
	Actual	2.76	1.6	4.36	3.24	1.57	4.80
	Performance (%)	97.8%	79.6%	90.2%	95%	85.8%	91.4%
Makueni	Budget	4.70	4.75	9.45 (5.80)	5.15	5.5	10.65 (9.39)
	Actual	4.0	1.5	4.15	4.88	4.04	8.92
	Performance (%)	85.1%	31.6%	43.9%	94.8%	73.5%	83.8%
Machakos	Budget	6.02	5.70	11.72 (8.50)	7.51	3.37	10.88 (9.68)
	Actual	5.79	2.54	8.33	5.81	3.34	9.14
	Performance (%)	96.2%	44.6%	71.1%	77.4%	99%	84%
Kitui	Budget	4.69	5.42	10.11 (8.12)	5.75	5.22	10.97 (9.26)
	Actual	4.10	3.77	7.87	4.63	3.69	8.31
	Performance (%)	87.4%	69.60%	77.8%	80.5	70.7%	75.8
Tana River	Budget	1.77	2.80	4.57 (4.21)	2.23	2.36	4.59 (4.5)
	Actual	1.61	2.25	3.86	1.77	1.78	3.55
	Performance (%)	91.3%	80.4%	84.5%	79.4%	75.4%	77.3%
Kilifi	Budget	5.57	5.95	11.52 (9.52)	6.5	6.83	13.33 (9.23)
	Actual	4.74	3.73	8.47	5.71	4.47	10.18
	Performance (%)	85.1%	62.7%	73.5%	87.8%	65.4%	76.4%
Mombasa	Budget	6.62	3.36	9.98 (8.36)	7.66	3.99	11.65 (8.78)
	Actual	5.77	2.77	8.54	6.39	2.74	9.13
	Performance (%)	87.2%	82.4%	85.6%	83.4%	68.7%	78.4%

Source: Summary of the County Budget Implementation Review Reports 2016/17, *Office of the Controller of the Budget – Annual County Government Budget Implementation Review Reports FY 2016/17*

Many of the counties have initiated agro-processing units for value and income creation, a notable example being the fruit processing plant in Makueni County. The County also introduced Universal Health care, set up a milk and mango juice processing plants .Nakuru County recently launched the pyrethrum restoration program to revamp the one-time economic giant.

Mombasa has also embarked on verification of the assets and liabilities of the county to regularize the assets register and take full control of assets and liabilities that were inherited from the defunct local authorities. The same happened in Nakuru, Baringo and west Pokot Counties.

[4] Controller of Budget: Annual County Governments Budget Implementation Review Reoport for FY 2016/2017

Revenue mobilization and administration for the respective counties is hindered by inadequate revenue laws. This has led to a lot of discordance from the public and business community. Instances of double taxation are rampant and transfer of taxes and unfavorable economic conditions a surefire. However, over time, the revenue laws have been enacted to uphold fidelity to legislation and policy framework and are tailor made to suit the specific needs of every county and its economic strengths. For instance, while Machakos and Kitui Counties collect revenues from sand harvesting, there is total embargo of sand harvesting in Makueni County. The table below shows the revenue collected against target revenue

Table 1.2[5] Realization of revenue targets 2016/2017 FY.

TABLE 1.2	COUNTY	FY 2016/17 REVENUE TARGET	FY 2016/17 ACTUAL OWN REVENUE	% OF ACTUAL REVENUE/ ANNUAL TARGET
1	Mombasa	5,289,743,050	3,166,240,961	59.6
2	Kilifi	1,585’881,577	620,093,575	39.1
3	Kitui	668,610,000	315,347,364	47.2
4	Tana River	60,000,000	27,417,024	45.7
5	Machakos	2,861,623,481	1,259,304,944	44
6	Makueni	330,000,000	216,257,976	65.5
7	Baringo	330,000,000	288,518,677	87.4
8	Nakuru	2,597,264,658	1,548,294,999	59.6
9	Elgeyo Marakwet	160,021,113	97,323,973	60.8
10	West Pokot	122,245,626	83,218,907	68.1

Source: Summary of the County Budget Implementation Review Reports 2016/17, *Office of the Controller of the Budget – Annual County Government Budget Implementation Review Reports FY 2016/17*

Because county governments are required to have a balanced budget, not meeting the revenue target is a huge public finance management threat that results into a deficit budget and pending bills thereby negatively affecting service delivery.

At the same time, absence of Valuation Rolls for almost all counties or use of outdated ones has been a great obstacle to county revenue raising efforts. There is need for national and county legislation to regulate and standardize the processes.

[5] Ibid

3.3 **Human Resource Management and Sustainability, Effectiveness Efficiency and Productivity**

Harmonization and rationalization in the public service has been ongoing for a long time. However, solid benefits are yet to be realized. County government public service have three distinct categories of staff, namely; former local authorities staff who automatically reverted into county staff with the onset of devolution; those performing functions that were devolved such as health and agriculture sector that remain seconded to the counties and coordinated by the Public Service Commission and lastly, those employed directly by the county government to fill in the gaps and provide for the new skills required to actualize county government and are employees of the county service boards. There is however a special category of staff; a host of advisors to the governor on a host of issues, that draw allowances without clear terms of references. In most instances, this category is not supervised by the county public service board or even the county assembly.

This mixture of staff portends a boiling pot and if not effectively handled may compromise service delivery at the county level. Balancing central and local autonomy of the staffing issue has proved tricky as witnessed by the health workers bedlams characterized by incessant labour disputes.

Rules governing management of public service such as creation of offices and schemes of service and training strive to fit into the dysfunctional setup discussed above and the result is nothing short of chaos. Rearing its head too is the aspect of balancing diversity; ethnicity and affirmative action at the same time safeguarding performance and professionalism including ethical values.

National standardization of human resources policy will curb against uncontrolled personnel spending and reduce capacity gaps across and within counties. County governments should not be viewed as being in the “business of paying salaries”. Data available indicates the fact that the wage bill has been maintained below the 50% mark against total expenditure of the county ***in 2016/2017 financial year*** as illustrated in table 1.3.

Counties such as Mombasa and Nakuru started with a huge wage bill due to inheriting many and large local authority institutions. However, they have managed to maintain the wage bill below 50% of the equitable share.

Table 1.3.[6] Wage Bill as a percentage of Total Resource Envelope per Count

NO.	COUNTY	% OF WAGE BILL/ TOTAL EXPENDITURE
1	Mombasa	41.3
2	Kilifi	27.8
3	Kitui	33.9
4	Tana River	35
5	Machakos	45.1
6	Makueni	30.4
7	Baringo	45.7
8	Nakuru	48.4
9	Elgeyo Marakwet	51.7
10	West Pokot	34.6

Source: Summary of the County Budget Implementation Review Reports 2016/17, *Office of the Controller of the Budget – Annual County Government Budget Implementation Review Reports FY 2016/17*

3.4 **Mobilizing Civic Participation**

With the advent of devolution a debate about the meaning and extent of public participation in government decision making has taken centre stage. The judicial voice has been added, with instances where decisions made by governments have been reserved because of inadequate public participation. This has led to vibrancy in mobilization for civic participation country wide.

Civil society collaboration with counties in the realm of public participation has steadily improved in all 10 PTD counties over the years. With support from the project, Citizen Oversight Forums (COFs) have been set up in all 10 Counties. In Nakuru and Baringo Counties, County CSO Forums have become strong stakeholders that inform government priorities while they also hold government to account through periodic civic engagement forums. For effective County Citizen Oversight Forums, citizens need to be trained, supported and empowered on how to access and use information especially in addressing issues such as development planning for their community. Further, there is need to build capacity for problem solving and ownership of projects and initiatives within the county. Civic education is therefore a very important enabler for public participation that counties save for Makueni and Baringo County are yet to invest in.

Accessibility of information is very critical for successful civic mobilization. It then follows that a truly independent media will boost and support a strong and well informed citizenry.

Capacity development of all stakeholders in civic mobilization, for example the assembly, executive, non-state actors and the citizenry is crucial. Citizen participation can be enhanced

[6] Controller of Budget: Annual County Government Budget Implementation Review Report for FY 2016/2017

through civic education and well-structured framework reinforced by the distinctiveness of each county.

Social audit and accountability ventures have taken root in the 10 counties. Training of stakeholders for both public and civic citizens has been done. This gives rise to the Community Score Card conducted by the local citizens with the participation of the public officers offering services. A design and implementation of Community Score Card for health facilities has been done in all 10 counties with remarkable success. Extension of the process beyond the health sector is long-awaited. This initiative by the local citizenry and the service providers is a success story that needs to be replicated in other counties. Further training to empower and ensure sustainability of the Community Score Card and social audit are extremely important and can be replicated in other counties.

Enactment of Public Participation Act is very critical in the development of civil mobilization and development as it sets the parameters and framework within which to operate. In some counties where the legislation has been pushed by the assembly, the executive has been hesitant with the governor not assenting as was the case in Machakos County. Nevertheless it is evident that a legal framework without resultant policies and regulations is not sufficient and has been without effect and sums up to only ticking the box.

Devolution has generally faced the challenge of access to information and a structured framework for public participation. For remedy, County Citizen Oversight Forums came in handy. These forums help to network within all non-state actors in the county in support of mobilization of citizens for public participation. They also empower the citizenry and service providers on identified areas.

Some county governments under consideration have the Governors Round Table where civil society, the public and county administration meet on a regular basis. The environment has led to improved public participation in the respective counties. Notable examples of success include the counties of Nakuru, Makueni and Baringo. Further, progressive counties have gone ahead and established a Public Participation Unit in the county government as liaison between the government and non-state actors.

Public participation is an important constitutional and democratic governance principle. Therefore, effective public deliberation requires the participation of responsible, well-informed and proactive citizens. Passive citizens are a barrier to a strong local democracy and reinforcement of civil society. A vibrant civil society supported by international organizations, intergovernmental and non-governmental partners hence plays a significant role in devolution. There is need to establish a fund for public participation for effectual realization.

3.5 **Networks for Peer to Peer Learning and Innovation**

The implementation of devolution has led to accumulation of a wealth of experience both positive and negative on methodologies of addressing service delivery concerns. There is need for local peer to peer learning going forward. A great deal could be gained by tapping into the rich pool of expertise and experience available in the counties. Such experiences and expertise, including information on good practices, is a valuable tool in development. There is need to formalize the process.

The sharing of best practices can be accomplished and enhanced by maximum use of technology, including creating opportunities for distance learning. These initiatives would foster the establishment and maintenance of credible information networks and clearing houses facilities. Non state actors and state actors have a role to play for full realization for the devolution promise.

Inter-governmental institutions such as CoG, CAF, IGTCS and Technical committees of various sectors such as IBEC and non- state actors must come together and dialogue on matter of networks and peer to peer learning.

An integrated approach to peer learning need to be adopted where by all stakeholders are involved especially state (technocrats and legislators) and non-state actors.

4. POLICY RECOMMENDATIONS

It is crucial to consolidate and secure the huge gains and outcomes of the 1stdevolution phase. However for full realization of the devolution agenda, the following recommendations need to be considered:

1. There is need to strengthen the role and capacities of legislative bodies involved in devolution at all levels.

2. There is need for urgent enactment of sectoral policies, laws and regulations on health, roads, energy and agriculture.

3. There is urgent need for policy and regulations on intergovernmental relations with emphasis on arbitration processes between and among the governments.

4. There is need for connected and value based capacity building and innovation in dealing with local challenges, including capacity building in legal drafting and C.S.O's and other bodies involved in devolution.

5. There is need for a national policy on county public service boards with uniform procedure, independence and a comprehensive regulatory framework by the national government as a standard to guide the county boards.

6. There is urgent need to establish information networks to document the rich pool of experience and expertise on devolution by the State Department for Devolution with support from county governments.

7. There is need to implement, facilitate and strengthen systems that support and create an environment where the role of civil society in decision making and public participation is safeguarded by the Council of Governors and State Department for Devolution.

8. There is need for counties to prioritize provision of effective civic engagement as a prerequisite to quality public participation.

9. There is need for counties to strengthen internal capacity to detect and prevent corruption and abuse of office including public complaints handling mechanisms by the county and national governments.

10. There is the need to strengthen monitoring and evaluation through social audits systems and active engagement with non-state actors.

5. CONCLUSION

Devolution remains the most important gateway to Kenya's prosperous future. The PTD partners hold the view that devolution works and that it is working in Kenya. It should be viewed as work in progress and therefore investment made towards improving its implementation on a continuous basis.

POLICY BRIEF PREPARED BY THE PTD TEAM WITH INPUT FROM THE FOLLOWING CSOs:

1. KONRAD-ADENAUER-STIFTUNG
2. CENTRE FOR ENHANCING DEMOCRACY AND GOOD GOVERNANCE
3. KCCB – CATHOLIC JUSTICE AND PEACE COMMISSION
4. MOBILIZATION AGENCY FOR PARALEGAL COMMUNITIES IN AFRICA
5. WESTMINSTER FOUNDATION FOR DEMOCRACY
6. CORDAID
7. MID RIFT HUMAN RIGHTS NETWORK
8. CSO NETWORK
9. TWAWEZA EAST AFRICA
10. CENTRE FOR MINORITY RIGHTS DEVELOPMENT