

Thomas Tödtling  
Conrad Bosire  
Ursula Eysin

# Devolution in Kenya

Driving forces and future scenarios





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# CONTENTS

About the authors .....	v
List of acronyms .....	vii
Acknowledgements and contributing experts .....	ix
1. Introduction .....	1
2. The scenario process: Methodological approach .....	3
3. History and implementation of devolved governance .....	11
4. Future driving forces for devolution in Kenya .....	33
5. Four future scenarios for devolution in Kenya .....	85
6. Conclusion .....	107
7. Policy recommendations .....	109
Bibliography .....	111

Chart 1: Impact-uncertainty map .....	7
Chart 2: Scenario cross: Devolution in Kenya 2028 .....	9
Chart 3: Actors in intergovernmental relations.....	48
Chart 4: Factors for economic development in the counties.....	51
Chart 5: Overview of county government devolved functions.....	54
Chart 6: Types of decentralized governance .....	65
Chart 7: Interconnected driving forces .....	83
 Graph1: Percentage of county budgets spent on development.....	 36
Graph 2: Perception of the country's corruption level from 2012-2016 .....	 38
Graph 3: Percentage of targeted local revenue actually generated (annual target FY 2016/2017) .....	 79
 Map 1: Impact-uncertainty map.....	 33
Map 2: County elections 2017 .....	73

## ABOUT THE AUTHORS

**Dr. Conrad Bosire** — Conrad M Bosire is a lawyer by profession and has extensive training and experience in law, governance, democracy and human rights. He holds a doctoral degree in law from the University of the Western Cape in South Africa. Conrad's doctoral research analysed (using Kenya's new devolved system of government as a case study) how subnational governments can, through constitutional design, pursue development, peace and limited and democratic central government. Conrad also holds a Post-graduate Diploma in Federalism and Devolution from the Institute of Federalism at the University of Fribourg, Switzerland.

**Ursula Eysin** — Ursula Eysin is founder and CEO of Red Swan, a boutique consultancy specialised in scenario processes based in Vienna and an evaluator for technology transfer and new business models with the European Commission. She is an expert in the strategic future process 'scenario planning', the creation of new business models and strategic communication. Mrs Eysin studied Sinology, Political Sciences, Business Administration and Public Relations. She used to work as a production manager and commentator in theatre, opera and film before she became a technology consultant and communication professional. Her broad knowledge and experiences in many areas including technology, security, politics, the media and the cultural business enable her to develop insightful future scenarios with the potential to cause real changes in perspectives.

**Thomas Tödtling** — Thomas Tödtling is Director of the Program on Devolution of Konrad Adenauer Foundation (KAS) in Kenya. Before he joined Konrad Adenauer Foundation Mr Tödtling worked as Adviser to a Member of the European Parliament as well as Senior Consultant with a consultancy for Strategic Communication and Public Affairs in Vienna and Brussels. Mr Tödtling studied Political Science as well as Mass Media and Communication Science in Vienna and Bordeaux. He has expertise in the areas of governance, international relations, European affairs, public affairs and environmental policy.





## LIST OF ACRONYMS

ASALs	Arid and semi-arid land
CASB	County Assembly Service Board
CEC	County Executive Committee
CIC	Commission for the Implementation of the Constitution
CIDPs	County Integrated Development Plans
CoB	Controller of Budget
CoG	Council of Governors
Constitution	Constitution of Kenya
CPSB	County Public Service Board
CRA	Commission on Revenue Allocation
CSOs	Civil society organisations
EACC	Ethics and Anti-Corruption Commission
HR	Human Resource
ICT	Information Communication Technology
IGRA	Intergovernmental Relations Act
IGRTC	Intergovernmental Relations Technical Committee
KADU	Kenya African Democratic Union
KNBS	Kenya National Bureau of Statistics
MCA	Member of County Assembly
NASA	National Super Alliance
NCCAP	National Climate Change Action Plan
NCPD	National Council for Population and Development
PWDs	Persons with Disability
TA	Transition Authority
TDGA	Transition to Devolved Government Act



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# **1.**

## **INTRODUCTION**

Devolution constitutes one of the most important and decisive factors for the future development of Kenya. It aims to increase citizen participation, foster inclusiveness, improve service delivery and strengthen democracy. This is an ambitious concept and therefore accords Kenya an opportunity to become a role model on the continent. During the eight years after the introduction of the devolved governance system there have been achievements but also shortcomings. Consequently, it is necessary to have a closer look at its status quo, its current challenges and its potential future beyond daily political discussions, which too often do not deal with the essential issues of devolution.

For this purpose Konrad Adenauer Foundation conducted a future scenario process with experts from different areas. As predicting the exact future of such a complex process is impossible, the methodology of scenario planning allows one to develop different views of the potential future, to get an idea of how it might look and which developments lead to the various scenarios. In addition to discussions with experts in interviews and workshops, the authors did an in-depth analysis of the driving forces they identified for the future development of devolution and predetermined trends that will influence all scenarios.

This publication analyses the history and implementation of devolution to date, identifies future driving forces and describes four potential scenarios for the future development of devolution in Kenya until 2028. It is a contribution to the political and academic debate on the devolved governance system in Kenya and should serve as useful input for the work of political decision-makers, civil society organisations (CSOs), scholars, and international organisations as well as journalists.

The four scenarios for devolution in Kenya are: the roaring lion, the white elephant, the abandoned buffalo, and the dying rhino.

## **The roaring lion**

In this scenario devolution is as strong and admired as a roaring lion in the jungle. Other countries in Africa praise the ‘Kenyan way’ as a potential role model. The enlightened and visionary elites in Kenya are strong supporters of devolution and highlight its benefits in the light of an accelerated socio-economic growth in the counties. The country and the counties thrive. People credit their increased living standard and bountiful possibilities directly to devolution and highly appreciate it.

## **The white elephant**

Devolution is perceived as a white elephant project. Citizens see the system devouring a lot of money while their needs remain unmet. The elites use devolution as a welcome instrument, which serves their advantages while the people do not see benefits. The money does not reach the counties and their citizens. As the socio-economic development in the counties declines, people become more and more discontent with the system and blame it for their decreasing living standards. The discussion about devolution in the country is split: the elites praise it while the people criticize it and call for a change.

## **The abandoned buffalo**

In its beginnings, devolution in Kenya used to be as strong as a buffalo. Its contribution to the decrease of tribal tensions was honoured and appreciated. But now devolution is abandoned by the leadership as well as by the people because the country, the counties and the citizens do not see its long-term benefits. They are thriving socio-economically, but the increased living standards and economic growth are not credited to devolution. Kenya, its counties, its businesses and its people think that they are flourishing despite devolution, not because of it. That means the very system of devolution gets questioned, becomes obsolete and runs the risk of abolishment – not immediately, but in the long run.

## **The dying rhino**

While the path of ‘the abandoned buffalo’ leads to a slow, subtle death of devolution, which may take years or even decades, in ‘the dying rhino’ scenario the danger of extinction of devolution is much more acute. Devolution is blamed for the socio-economic decline all across Kenya and as the situation becomes unbearable for the population, new solutions have to be found quickly. The call for a strong man or woman who changes the system back to a centralised one becomes louder and louder.

## 2. THE SCENARIO PROCESS: METHODOLOGICAL APPROACH

*'The best way to predict the future is to create it.'*<sup>1</sup>

Organisations and decision-makers are very often afraid of what they might learn about the future in a scenario process and thus refuse it entirely, as if the costs of not thinking about the future's critical uncertainties in an open and flexible way were smaller, and burying their heads in the sand could stop undergoing developments. As Gary Hamel stated, 'the problem with the future is that it is different. If you are unable to think differently, the future will always arrive as a surprise.'<sup>2</sup>

In Kenya the situation is very different. Experts were very open to the discussion of potential future scenarios, their driving forces and critical uncertainties. The scenario process in Kenya in March 2018 showed that the experts involved strongly believe in their own ability to create a positive future for themselves and their country. This fact provided a very good basis for a highly interesting, creative and open-minded process.

### 2.1 Scenario processes, their history and impact

The scenario process, also called scenario planning, was first applied by the US Air Force for strategic planning in the 1940s.<sup>3</sup> The military organisation tried to imagine what opposing forces might do and developed alternative strategies accordingly. In the 1970s, the oil company Royal Dutch-Shell adapted scenario

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<sup>1</sup> Dennis Gabor-<<https://quoteinvestigator.com/2012/09/27/invent-the-future/>> on 18 December 2018.

<sup>2</sup> Wade W, *Scenario Planning: A Field Guide to the Future*, John Wiley & Sons, New Jersey, 2012, 9.

<sup>3</sup> US Air Force Strategic Master Plan 2015: [https://www.af.mil/Portals/1/documents/Force%20Management/Strategic\\_Master\\_Plan.pdf](https://www.af.mil/Portals/1/documents/Force%20Management/Strategic_Master_Plan.pdf) on 16 December 2018.

planning for business purposes and with great success.<sup>4</sup> Shell had already been prepared for an oil-shock scenario when others did not even dare to think about it. As a result, Shell was able to skyrocket from a rather weak market position to the top two of the world's leading oil companies.<sup>5</sup> Since then scenario planning has been and continues to be used globally by Shell and others like the World Energy Council, the Government of Singapore, South Africa, public entities, non-governmental organisations and companies of all sizes for strategic planning and decision-making.

It is important to note that the scenario process is not about predicting the future or getting the future right:

Scenarios are not predictions. It is simply not possible to predict the future with certainty. [...] Rather, scenarios are vehicles for helping people learn. Unlike traditional [...] forecasting or market research, they present alternative images of the future; they do not merely extrapolate the trends of the present.<sup>6</sup>

Scenarios are different views of the potential future, and they open up new ways to tap into the endless sea of possibilities the future can hold if one does not bury their head in the sand and start creating the future instead of just reacting to it. 'Building scenarios is like making a journey of exploration. It can change how we see and understand the world.'<sup>7</sup> The presumption is not that the future can be predicted, but that it can be co-created if one identifies the various potential paths into the future and understands how to build and influence them. Questions that are discussed in such a process include: What drives the future of the topic? What is uncertain? How can the desired end-state be reached? How can one contribute to these developments? That makes the scenario process an excellent way to think about driving forces and the future's critical uncertainties. Also, the collaborative conversations among participants, which are typical for the process; lead to a real change in perspectives.

<sup>4</sup> Shell scenarios, modelling and decision making: [https://www.shell.com/investors/news-and-media-releases/investor-presentations/2017-investor-presentations/shell-scenarios-modelling-and-decision-making-webcast/\\_jcr\\_content/par/textimage\\_158f.stream/1504857536756/7f287fc47cb72372f3d3704eeb24b482681f749d6a668e6723549da2daca7359/scenarios-modelling-and-decision-making-webcast-london-8-september-2017.pdf](https://www.shell.com/investors/news-and-media-releases/investor-presentations/2017-investor-presentations/shell-scenarios-modelling-and-decision-making-webcast/_jcr_content/par/textimage_158f.stream/1504857536756/7f287fc47cb72372f3d3704eeb24b482681f749d6a668e6723549da2daca7359/scenarios-modelling-and-decision-making-webcast-london-8-september-2017.pdf) on 16 December 2018.

<sup>5</sup> 'The World's Largest Oil and Gas Companies 2018: Royal Dutch Shell Surpasses Exxon as Top Dog', *Forbes*, 6 June 2018.

<sup>6</sup> Schwartz P, *The Art of the Long View: Planning for the Future in an Uncertain World*, Currency Doubleday, New York, 1991, 6.

<sup>7</sup> Shell, *Scenarios: An Explorer's Guide*, 2008 [https://www.shell.com/energy-and-innovation/the-energy-future/scenarios/new-lenses-on-the-future/earlier-scenarios/\\_jcr\\_content/par/expandablelist/expandablesection\\_842430368.stream/1447230877395/5ab112e96191fa79e1d30c31dc6e5cd2ce19ed518a4c1445ab32aa4c4b5c7ec5/shell-scenarios-explorersguide.pdf](https://www.shell.com/energy-and-innovation/the-energy-future/scenarios/new-lenses-on-the-future/earlier-scenarios/_jcr_content/par/expandablelist/expandablesection_842430368.stream/1447230877395/5ab112e96191fa79e1d30c31dc6e5cd2ce19ed518a4c1445ab32aa4c4b5c7ec5/shell-scenarios-explorersguide.pdf) on 28 June 2018.



Below is a short overview of the beneficial impacts a scenario process usually has<sup>8</sup>:

- Enabling the exchange of a wide variety of ideas in a collaborative, conversation-based process.
- Gaining new and widening perspectives: ‘Scenarios address blind spots by challenging assumptions, expanding vision and combining information from many different disciplines.’<sup>9</sup>
- Challenging existing beliefs and thinking patterns.
- Cutting through complexity and aiming at the heart of decision-making by focusing on the drivers and uncertainties of the topic.
- Rehearsing the future in order to be prepared instead of being paralysed by the fear of a worst-case scenario.
- Taking better, conscious decisions in full awareness of the drivers behind it.
- Training the mind to think about different versions of the future at the same time and thus see the future’s many possibilities, and imagine ways to exploit this infinite sea of chances and opportunities.<sup>10</sup>

## 2.2 A seven step approach

The scenario process itself is a flexible methodology, which is always tailored to the specific challenge to be tackled and the decisions to be made. In the case of devolution in Kenya, a seven steps approach was chosen for the scenarios, which will be explained in more detail in the following part. The seven steps encompass: framing the challenge; identifying driving forces; defining the future’s critical uncertainties; building the scenario cross; fleshing the scenarios out and creating story lines; identifying signposts; and developing policy recommendations.

### 2.2.1 Framing the challenge

First, the challenge to be tackled had to be defined. In this case, the scenario process was centred around the question: ‘What are possible future scenarios for

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<sup>8</sup> Similar points are also described in Schwartz, *The art of the long view*.

<sup>9</sup> Schwartz, *The art of the long view*, 6.

<sup>10</sup> Schwartz, *The art of the long view*, 6.

the further development of devolution in Kenya until 2028?’ The reason for looking ten years ahead is the fact that a shorter horizon of, for example, one, two, or even three years into the future brings the problem that the mind is captured too much by current reality. Looking further ahead gives the mind the freedom to think the unthinkable and get creative. It opens the door for imagination, for thinking out of the box and it diminishes the resistance to the idea that it is possible to create a new, very different future.

### *2.2.2 Identifying driving forces*

Step two in the process was to gather and discuss driving forces, which are defined as factors with the potential to cause significant change now and in the future. To do so, written interviews with 13 experts involved in the topic were conducted. The experts were asked three open questions:

- If you could look into the future of devolution in Kenya, what would you like to know?
- If the future unfolded according to your wishes, realistically but optimistically, what would it look like?
- If the future unfolded in the wrong direction, what would you worry about?

The interview input was then clustered in main topics and transferred into a list of first suggestions for driving forces, which were presented in a 2,5 days scenario workshop held in Nairobi; and served as the basis for further discussion and suggestions. The goal of this task was to develop a view of the main forces that will drive devolution in Kenya between 2018 and 2028. The main topics were defined as: economic empowerment of the counties; benefits for the people and impact on the lives of ordinary Kenyans (especially for marginalized groups and peripheral regions); creation of adequate and sustainable political systems, structures and processes; spirit and expectations of the citizens as well as international actors towards devolution; technological drivers; environmental drivers; and potential risks for the failing of devolution.

### *2.2.3 Defining the future’s critical uncertainties*

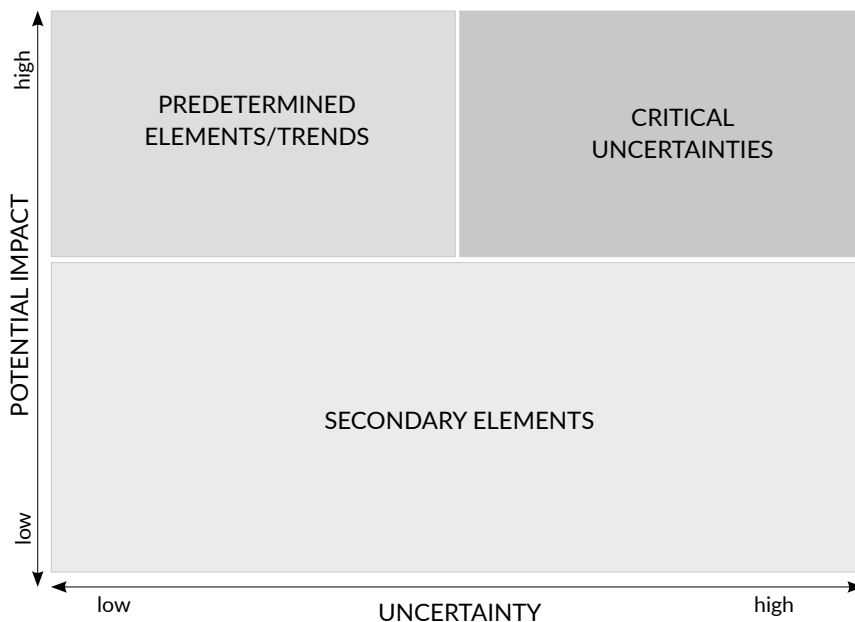
The scenario process is an excellent way to look at uncertainties. To define critical uncertainties of the future a so-called impact-uncertainty analysis of the

previously discussed driving forces was undertaken in a group discussion. In this task, the driving forces were ranked on the impact-uncertainty-matrix.

During the workshop for this publication, the question guiding the discussion was: ‘How important are the driving forces and how uncertain is their development?’ At the end of the discussion, all the driving forces were plotted on a matrix, as shown in Chart 1, to visualise their relevance for the scenarios and to identify specific trends (upper left corner) and, more importantly for the scenario, critical uncertainties (upper right corner).

The critical part for the further scenario development is to be found in the upper right corner: the critical uncertainties. In contrast to certain trends and predetermined elements, which cannot be changed, critical uncertainties may still be influenced and altered. Factors which are uncertain provide the basis for the creation of a different future. That is why they are in the focus of the scenario building process.

Chart 1: Impact-uncertainty map



### 2.2.4 *Building the scenario cross*

At the next stage, a closer look was taken at the impact-certainty-matrix plotted before to make sure the factors were placed in the right spots. After that, the next task was the selection of the two most significant and important critical uncertainties and the discussion of their alternative developments to form the ‘scenario cross’, a matrix, which defines four different scenarios in four different quadrants. The two selected uncertainties forming the two major dimensions of the scenarios for devolution in Kenya until 2028 were firstly, the socio-economic development of the counties which could accelerate or decline; and secondly the attitude of leaders and influencers – also to be called ‘the elite’ – toward devolution, which could be supportive or non-supportive.

Of course, it is always a challenge to choose only two out of so many critical uncertainties to form the scenario cross. However, in this case, it was an apparent decision since the identified uncertainties can very well be structured under these two main topics according to linkages of cause and effect. The chosen dimensions are highly crucial for the further development of devolution in Kenya, very different from each other and can be expressed in a logical “either/or” dimension.<sup>11</sup>

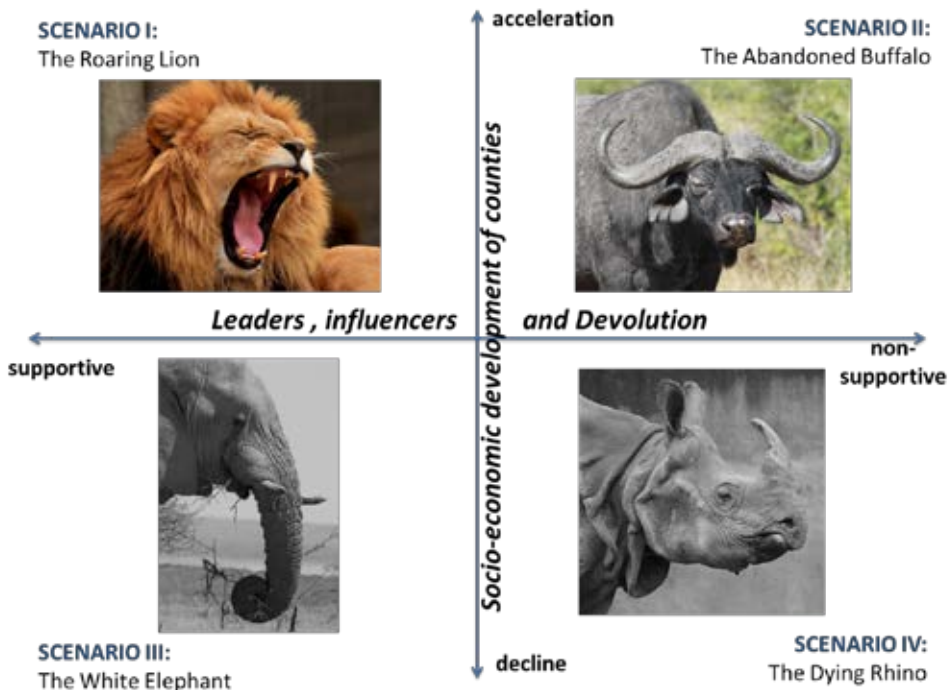
### 2.2.5 *Fleshing the scenarios out and creating storylines*

After the skeleton of the scenarios had been defined, the creative part of fleshing the scenarios out and thinking of storylines began. For this purpose, the experts imagined they had travelled forward in time and were looking back from the year 2028. In the process of describing the future end state of the different scenarios, painting a detailed picture of what the scenarios look and feel like, and describing the developments taking place over the next 10 years leading to the specific outcomes, very beautiful and graphic names for the scenarios were developed as shown in Chart 2: ‘the roaring lion’, ‘the abandoned buffalo’, ‘the white elephant’ and ‘the dying rhino’.

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<sup>11</sup> Wade W, *Scenario planning: A field guide to the future*, John Wiley & Sons, New Jersey, 2012, 40.

Chart 2: Scenario Cross Devolution in Kenya 2028



### 2.2.6 Identifying signposts

‘Watching for signals means that rather than being forced to react to unexpected events after they have happened, decision-makers can begin to anticipate the development of situations.’<sup>12</sup> After fleshing the scenarios out, the process continued with the discussion of signposts or signals for the specific scenarios. The question to be discussed was: What could tell that this specific scenario is emerging? As scenarios are not trying to predict one future but rather intend to prepare for and to react to everything the future might bring in a flexible way, it is key to monitoring further developments. Signposts give hints about which scenario-dynamic is on the verge of unfolding. That makes it easier to react quickly. The discussion of the signposts in this case also gave another possibility to detail the ‘look and feel’ of the different scenarios.

<sup>12</sup> ‘Scenarios: an Explorer’s Guide’ *Shell*, 2008: [https://www.shell.com/energy-and-innovation/the-energy-future/scenarios/new-lenses-on-the-future/earlier-scenarios/\\_jcr\\_content/par/expandablelist/expandablesection\\_842430368.stream/1447230877395/5ab112e96191fa79e1d30c31dc6e5cd2ce19ed518a4c1445ab32aa4c4b5c7ec5/shell-scenarios-explorersguide.pdf](https://www.shell.com/energy-and-innovation/the-energy-future/scenarios/new-lenses-on-the-future/earlier-scenarios/_jcr_content/par/expandablelist/expandablesection_842430368.stream/1447230877395/5ab112e96191fa79e1d30c31dc6e5cd2ce19ed518a4c1445ab32aa4c4b5c7ec5/shell-scenarios-explorersguide.pdf) on 28 June 2018.

### 2.2.7 *Developing policy recommendations*

Scenarios provide a good basis for thinking about implications, possible responses to the scenarios and strategic options. Policy recommendations and possible action points were discussed in the workshop group. As scenarios are not meant to be predictions of the future, but rather help to appreciate the different drivers and uncertainties of the future as chances to create a better future, the process was not aimed at developing a fixed strategy and roadmap to follow, but rather at giving some suggestions to inspire further consultations and discussions.

## 2.3 Using the scenarios

An important purpose of building and using scenarios is to raise the awareness of decision-makers for the future's critical uncertainties and for the different ways the future may unfold. Decision-makers can use scenarios to structure their discussions about the future. The stories provide them with the possibility to deal with uncertainty in a flexible way and not be overwhelmed or paralysed by any development. This is intended to prepare them to respond faster and more effectively to changes in their environment. At the same time, scenarios make it easy to keep various possibilities in mind without losing the focus on the most important driving forces and critical uncertainties. In South Africa, scenarios were used to establish an open dialogue between opponents and to develop a common vision of the future. The scenarios were presented to and discussed with decision-makers all across the country. The Government of Singapore started using scenarios in 1991 and has since established a Centre for Strategic Futures.<sup>13</sup> Politicians are using scenarios as an inspiration and a guideline for the Government and public services. By using scenarios, the island country was able to turn uncertainty and vulnerability to external circumstances into a competitive advantage.

Equally, the developed devolution scenarios can serve as an input for decision-makers at all levels in Kenya and also help to promote the model of devolution as a role model to other African nations.

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<sup>13</sup> See Singapore Government, Centre for Strategic Futures, Prime Minister's Office: <https://www.csf.gov.sg/about-us> on 16 December 2018.

### 3.

## HISTORY AND IMPLEMENTATION OF DEVOLVED GOVERNANCE

### 3.1 Introduction

The devolved system of government seeks to fundamentally transform the country's institutional, political and governance structures, by dispersing resources, powers, and governance structures from the centre to the forty-seven county governments.<sup>1</sup> After decades of centralised governance (dating back to the colonial era), Kenyans resolved to transition to a system where powers and governance are shared between the centre and the devolved units.

Before getting into the details of implementation of devolved government, it is important to understand the nature and general structure of the devolved system of government. Kenya joined other states that are increasingly transferring powers, resources and functions to the sub-national levels of government through varied structures.<sup>2</sup> While most or all countries have had one form of decentralised governance or another, the trend now is to adopt a devolved system as part of the constitutional architecture.<sup>3</sup> Kenya's preferred term to describe its multilevel governance arrangements is 'devolution'; other countries on the continent such as Nigeria and Ethiopia fully identify themselves as federal.<sup>4</sup>

While Kenya does not refer to itself as federal or unitary, a scan of the features of devolved government reveals that the devolved system is indeed at the core of Kenya's new constitutional dispensation. The Constitution of Kenya (Constitution)

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<sup>1</sup> Article 174, *Constitution of Kenya* (2010).

<sup>2</sup> Countries with relatively established multilevel systems of governance include: Nigeria (federal), Ethiopia (federal), South Africa, and Zimbabwe.

<sup>3</sup> Wanyande P, Structure of government and the scope and method of division of power, *Constitution of Kenya Review Commission*, 2001.

<sup>4</sup> Rojas JA, 'A comparative perspective of three African federal systems: the cases of Nigeria, Ethiopia and the Union of Comoros' 5<sup>th</sup> European Conference of African Studies 2013.

provides that state sovereignty is divided vertically (between the national and county levels),<sup>5</sup> and that legislative and executive structures at each of the two levels exercise these powers on behalf of Kenyans.<sup>6</sup> The State's internal territory is divided into the forty-seven county boundaries, which are recognized in the founding provisions that establish Kenya as a republican State. County powers and functions are recognised and entrenched in the Constitution and cannot be easily amended.<sup>7</sup> The Constitution establishes the two levels of Government as 'constitutional equals' and recognises that there are instances where county laws may trump national legislation.<sup>8</sup> It is, thus, clear that the National Government is a core constitutional feature and a major plank in the constitutional architecture.

During the constitutional review process, public views were clear; Kenyans wanted anything but a centralised system of government.<sup>9</sup> This strong and collective resolve to establish a devolved system was informed by the years of suffering that Kenyans experienced under a centralised system of government. Lack of accountability, inefficiencies, inequitable development and distribution of services were but a few of the concerns that were commonly associated with the centralised system of government.<sup>10</sup> Therefore, while Kenyans differed on the form that devolved governments would take, they were clear that powers and resources had to be dispersed from the centre.

The Constitution captures 'devolution and sharing of power' as one of the national values and principles of governance. Article 174 of the Constitution lists nine objectives of devolving power which include: addressing inequities in access to development and local services, participation in governance and accountability in the exercise of power, and enhancing national unity and inclusiveness, among other objectives. The objectives of devolved government provide the primary and fundamental purpose of the devolved system of government. Effective implementation of the devolved system of government required extensive changes in the country's national and sub-national systems of governance.

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<sup>5</sup> Article 1 (4), *Constitution of Kenya* (2010).

<sup>6</sup> Article 1 (2), *Constitution of Kenya* (2010).

<sup>7</sup> Article 255 (1) (i), *Constitution of Kenya* (2010).

<sup>8</sup> Schedule 4, *Constitution of Kenya* (2010).

<sup>9</sup> Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, 2005.

<sup>10</sup> Constitution of Kenya Review Commission, *The Final Report of the Constitution of Kenya Review Commission*, 2005.



In general, transition to county governance and implementation of devolution required the building of new institutions, abandonment or restructuring of some of the old institutions, and shifting of roles, responsibilities, and accompanying resources between the two levels of Government. Furthermore, implementation of devolution required not only a change in structures and systems but also a change in governance culture by adopting the governance culture that is compatible with the Constitution. To achieve this, the Constitution provided for a three-year transition period (after the March 2013 general election) to put in place the appropriate legal, policy, and institutional measures to facilitate the implementation of devolved governance.

This chapter analyses the implementation of devolved government in Kenya and specifically examines the transition process, and the institutional structures put in place to realise devolution objectives, and their impact.

## **3.2 The general structure and features of devolved government**

County institutions are established to mirror those at the national level. First, county power is divided into legislative and executive, vested in the county assembly and the county executive respectively.

### **3.2.1 The county executive**

All the forty-seven counties have governors elected by a simple majority vote<sup>11</sup> and they head the county executive committee (CEC). The CEC is composed of persons nominated by the governor and approved by the county assembly. The role of the county executive is to: implement legislation (county, and national, where necessary), manage and coordinate functions of the county administration and departments,<sup>12</sup> and perform other functions vested in it by law. The county executive may also propose legislation for debate and adoption by the county assembly.<sup>13</sup>

The county executive is thus vested with authority to exercise executive functions at the county level. Counties have specific responsibilities under the Constitution. The Fourth Schedule to the Constitution contains a list of fourteen functions that are allocated to the counties. The functions allocated to the counties

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<sup>11</sup> Article 180, *Constitution of Kenya* (2010).

<sup>12</sup> Article 183, *Constitution of Kenya* (2010).

<sup>13</sup> Article 185, *Constitution of Kenya* (2010).

straddle all the major sectors of public service delivery and some are concurrent (shared with National Government). The county executive is responsible for coordinating the performance of these functions and ensuring that counties pursue the objectives of devolved governance. Accordingly, specific responsibilities of counties include, preparing budgets and development plans of counties, putting in place structures and systems to ensure delivery of services and utilizing available resources according to county plans.

The Constitution separates the governor from the county public service, again mirroring the national level's public service body.<sup>14</sup> Enabling legislation (the County Government Act)<sup>15</sup> establishes a County Public Service Board (CPSB) for each county that is responsible for establishing and abolishing offices within the county executive, the county assembly has a parallel body.

### 3.2.2 *The county assembly*

The Constitution establishes county assemblies as the legislative arm of the county governments.<sup>16</sup> County assemblies are composed of elected representatives chosen from single-member wards at the county level and nominated members.<sup>17</sup> There are different categories of nominated members: first, the Constitution requires all county assemblies to have no less than one-third of each gender and the number nominated to these seats depends on the gender composition of the ward representatives.<sup>18</sup> Secondly, the Constitution provides for special representative seats for groups, for example, marginalised groups such as Persons with Disability (PWDs), youth, and the representatives of marginalised communities.<sup>19</sup> The Constitution also provides for the election of a speaker (from outside the county assembly) who is an *ex-officio* member.<sup>20</sup>

As part of the legislative arm of Government, the main role of the county assembly is to debate and pass county laws. The Constitution provides that counties can exercise their legislative power on all matters that are listed as county matters under the Fourth Schedule, and this particular power is the preserve of the county

<sup>14</sup> Article 235, *Constitution of Kenya* (2010).

<sup>15</sup> Part VII, *County Governments Act* (No 17 of 2012) eKLR.

<sup>16</sup> Article 185, *Constitution of Kenya* (2010).

<sup>17</sup> Article 177 (1) (a), *Constitution of Kenya* (2010).

<sup>18</sup> Article 177 (1) (b), *Constitution of Kenya* (2010).

<sup>19</sup> Article 177 (1) (c), *Constitution of Kenya* (2010).

<sup>20</sup> Article 177 (1) (d), *Constitution of Kenya* (2010).

assembly.<sup>21</sup> As the alternate arm of Government, the county assembly is also given a power of oversight over the county executive. The Executive is required, under the Constitution, to submit its budget and plans to the county assembly for scrutiny, debate, and approval.<sup>22</sup> More importantly, all the major appointments by the governor, such as county executive members and other senior staff of the county executive, are subject to approval of the assemblies.<sup>23</sup> The county assembly is also required to approve specific decisions of the county executive, such as county borrowing.<sup>24</sup> A national legislation, the County Government Act, also establishes a County Assembly Service Board (CASB) that is charged with establishing and abolishing offices within county legislature.<sup>25</sup>

### 3.2.3 National institutions concerned with devolved government

#### Parliament

Parliament exercises national legislative power that is collectively vested in the two chambers (the Senate and the National Assembly).<sup>26</sup> Of these two chambers, the Senate is the most important chamber in relation to devolution implementation. Indeed, the Senate is the main institution that connects the counties to the national level.<sup>27</sup> The Senate is carved out of the National Legislature to specifically represent counties and to safeguard the collective interests of counties.<sup>28</sup> However, the senators are neither delegates nor direct representatives of the county governments. 47 directly elected senators (from the county constituent units) represent the counties. There are 16 nominated women senators, and 4 senators representing the youth and PWDs (a man and woman each) bringing the total number of senators to 67, excluding the speaker who is an *ex-officio* member of the chamber.<sup>29</sup>

As part of the Legislature, Senate represents counties mainly through legislation; Senate's law-making powers are limited to laws affecting counties.<sup>30</sup>

<sup>21</sup> Article 185 (1), *Constitution of Kenya* (2010).

<sup>22</sup> Article 185 (1), *Constitution of Kenya* (2010).

<sup>23</sup> Article 179 (b), *Constitution of Kenya* (2010).

<sup>24</sup> Article 185 (4), *Constitution of Kenya* (2010).

<sup>25</sup> Part VII, *County Governments Act* (No 17 of 2012) eKLR.

<sup>26</sup> Article 94 (1), *Constitution of Kenya* (2010).

<sup>27</sup> Article 96, (1) *Constitution of Kenya* (2010).

<sup>28</sup> Article 96, (1) *Constitution of Kenya* (2010).

<sup>29</sup> Article 98 (1), *Constitution of Kenya* (2010).

<sup>30</sup> Article 110-112, *Constitution of Kenya* (2010).

Senate has a special legislative veto power<sup>31</sup> over specific special laws that affect counties and an ordinary veto over other general laws affecting counties.<sup>32</sup> Senate has no role to play in laws that concern National Government exclusively. Senate has special decision-making procedures that reflect its primary role as a representative of county interests.<sup>33</sup>

Senate has special review powers over the Executive and other arms of Government that facilitate it in protecting county interests. First, Senate has a special power to set, every five years, the basis/criteria for the division of county share (equitable share) among the 47 counties.<sup>34</sup> The resolution of the Senate on county-sharing binds institutions such as the Commission on Revenue Allocation (CRA) that are charged with the mandate of making recommendations on the sharing of revenue among the counties. Furthermore, Senate has the power to terminate, at any time, an intervention by the National Government in a county<sup>35</sup> or the suspension of a county government.<sup>36</sup> These special powers, together with other general powers (such as oversight), enable Senate to hold the other national arms of Government and national institutions accountable over matters touching on county affairs.

While the National Assembly's role is not so specific to counties as that of Senate, it still has a general legislative and oversight role that covers county issues. The National Assembly participates in the debate and adoption of all laws and is therefore crucial to the implementation of national legal and policy frameworks related to devolved government. Furthermore, all Money Bills (including those concerning counties) are exclusively originated in the National Assembly.<sup>37</sup> The National Assembly is, therefore, a critical institution in devolved governance.

## National Executive

While the Constitution separates the executive arms of Government at the national and county levels, it envisages close institutional interaction between the institutions. Indeed, Article 6(2) of the Constitution provides that the two levels are 'distinct and inter-dependent and shall conduct their mutual relations on the basis

<sup>31</sup> Article 111, *Constitution of Kenya* (2010).

<sup>32</sup> Article 112, *Constitution of Kenya* (2010).

<sup>33</sup> On matters affecting counties, the senators are required to cast votes as county delegates. The elected senator from a county casts a county vote on behalf of nominated colleagues from the same county. On other matters not affecting counties, senators are required to cast individual votes.

<sup>34</sup> Article 217 (1), *Constitution of Kenya* (2010).

<sup>35</sup> Article 190 (5) (d), *Constitution of Kenya* (2010).

<sup>36</sup> Article 190 (4), *Constitution of Kenya* (2010).

<sup>37</sup> Article 109 (5), *Constitution of Kenya* (2010).

of consultation and cooperation'. There are many national and county functions (especially in the service-based sectors) where functions overlap between the two levels and this requires joint planning and execution. In order to coordinate devolution affairs, the National Government has established the Ministry of Devolution and Planning with a Directorate of Devolution. The Directorate of Devolution is headed by a Principal Secretary and is in charge of the overall coordination of county affairs within the National Government.

There are sectoral ministries (Agriculture, Education, Finance and Health, etc) that have policy-making and regulatory powers as well as some shared roles with the counties across the sectors. The National Treasury, which is in charge of overall financial and economic policies, plays a major role with regard to financial affairs of counties. The policy directions and operations management at the National Treasury directly determine the public finance management at the county level.

At the county level, there are deconcentrated National Government agencies entrusted with the coordination and performance of National Government functions. These include institutions such as the Provincial Administration, Police Service and other national agencies. The constitutional spirit of coordination and consultation is required between the National Government institutions based at the county level and the respective county institutions.<sup>38</sup> The Constitution provides for the restructuring of National Government institutions (specifically the Provincial Administration) to accord with devolved governance.

### Judiciary

The Judiciary is the only institution, of the three arms of Government, which is not part of the devolved structure. However, the Constitution provides specific and general powers to the Judiciary that are relevant to the implementation of devolved government. First, the Judiciary is entrusted with the responsibility of safeguarding the Constitution. Accordingly, it has a supervisory role over implementation by ensuring that all implementation processes accord with the spirit and letter of the Constitution. Conflicts regarding devolution of power are filed in court frequently and courts have made pronouncements that have significantly impacted on the implementation process. More specifically, the Constitution vests the Supreme Court with the power to give an advisory opinion with respect to any matter concerning county governments.<sup>39</sup>

<sup>38</sup> Article 189 (2), *Constitution of Kenya* (2010).

<sup>39</sup> Article 163 (6), *Constitution of Kenya* (2010).

The Judiciary, therefore, is an arm that serves the two levels of Government and is a critical institution in the implementation process. The Judiciary has also been expanding its coverage to the counties in order to enhance access to justice. While the Judiciary is not structurally part of the devolved government structure, its role is critical to the implementation process.

### Independent institutions and offices

The Constitution establishes various institutions and offices that operate outside the three levels of Government. During the constitutional review process, the public called for the formation of these institutions to ‘safeguard sovereignty’.<sup>40</sup> Public mistrust of politicians led to calls for the formation of these institutions, which are increasingly coming to be known as the ‘fourth arm’ of government.<sup>41</sup> Some of these institutions have a direct impact on the effectiveness of the implementation of devolved government.

The Constitution established the Commission for the Implementation of the Constitution (CIC) to oversee its implementation.<sup>42</sup> The Constitution also provided (implicitly) for the establishment of the Transition Authority (TA).<sup>43</sup> The two bodies had the critical mandate and role of managing and monitoring the transition to county governance. The roles that were assigned to the TA were meant to facilitate a smooth transition with minimal disruption in service delivery.<sup>44</sup>

There are other independent institutions and offices that have a permanent role to play in the implementation of devolution. These include the Controller of Budget (CoB) who is charged with the approval and monitoring of all Government expenditure, the CRA that is charged with developing recommendations for the sharing of revenue between the national and county governments, and among the 47 counties. The Office of the Auditor General is charged with auditing the accounts of national and county government entities. Other independent institutions and offices have roles that impact on county government operations.

<sup>40</sup> Constitution of Kenya Review Commission, *The final report of the constitution of Kenya Review Commission*, 2005.

<sup>41</sup> Chapter 15, *Constitution of Kenya* (2010).

<sup>42</sup> *Commission for the Implementation of the Constitution Act* (No 9 of 2010) eKLR.

<sup>43</sup> Section 15, Fourth Schedule, *Constitution of Kenya* (2010).

<sup>44</sup> The CIC wound up its operations at the end of 2015 as per the constitutional timeline (5 years) while the TA’s mandate was set to last until March 2016.

### 3.3 The historical, institutional, and political context of implementation of devolved governance

The centralised system of government, which the devolved system of government seeks to undo, was entrenched during Kenya's colonial rule. From the onset, the colonial Government established a strongly centralised and hierarchical system in Kenya's territory.<sup>45</sup> While the Kenya colony Governor exercised control over all administrative and political institutions, he was ultimately accountable to the colonial office in London.<sup>46</sup> This remained the system until independence when there was an attempt to discard the centralised system and replace it with a semi-federal system of governance, locally known as *majimbo*.<sup>47</sup>

The *majimbo* system (which loosely translates into 'regions') was an attempt to balance the interests of smaller and larger ethnic communities. Feeling threatened by the political power and control that the political elite from the two largest communities (Luo and Kikuyu) were consolidating, the smaller communities agitated for a regional system of government (*jimbos*) to protect their minority interests.<sup>48</sup> However, the larger communities were opposed to the proposed system, on the grounds that the centralised system was important for the much needed unity and development.<sup>49</sup> The compromise was a constitution that provided for a regional system of government under semi-federal arrangements.

The system, however, did not last long. The Kenya African National Union (KANU), the party of the larger ethnic communities, won the independence election. Throughout the independence negotiations, the party had fought the introduction of regionalised governments.<sup>50</sup> The exit of the colonial Government at the end of independence negotiations left the opposition party, Kenya African Democratic Union (KADU), the party of the ethnic minorities, in a weak and vulnerable situation. The regional system was quickly dismantled through carefully

<sup>45</sup> Oyugi W, 'Governance in Kenya during pre-colonial and colonial period,' in Hofmeister W and Scholz I (eds), *Traditional and contemporary forms of local government in Africa*, Konrad Adenauer Foundation, Johannesburg, 89-102.

<sup>46</sup> Oyugi W, 'Governance in Kenya during pre-colonial and colonial period,' 89-102.

<sup>47</sup> Ghai YP and McAuslan PWB, *Public law and political change in Kenya*, Oxford University Press, Oxford, 1970.

<sup>48</sup> Ghai and McAuslan explain that *Majimbo* is a Swahili word which means an "administrative unit" or "region", and is generally used to refer to those provisions of the Constitution which established the [independence] regional structure.

<sup>49</sup> Ogot B and Ochieng W, *Decolonization and independence in Kenya*, Ohio University Press, London, 1995, 71.

<sup>50</sup> Ghai and McAuslan, *Public law and political change in Kenya*, 196-201.

crafted constitutional amendments that recentralized powers.<sup>51</sup> Thus, while the country crossed into independence with a system of government where powers were dispersed to the regions, this was rapidly undone and the country went back to the colonial arrangement where powers and resources resided in the centre.<sup>52</sup>

Under the centralised system of government, local authorities were the only level of government that was left after the decimation of regions, and played a minimal, and almost insignificant, role in the previous dispensation. Previously (during the colonial and independence periods), local authorities performed vital functions. However, these authorities were stripped of the resources and functions they were delivering. As a result, the local authority's share of overall Government expenditure declined consistently over the post-independence decades.<sup>53</sup> Indeed, some of the current incapacities in the counties can be partially traced to the deliberate policy of denying the sub-national level resources, and vital functions over the decades. Accordingly, counties have had to build institutions and processes from scratch with very little to depend on from the former local authorities.

Furthermore, the mere adoption of the devolved system of government in 2010 did not mean that values, attitudes and mind-sets of implementers (especially public officers with decision-making powers) adjusted accordingly. National Government bureaucrats are still beholden to the former system where decision-making defined governance processes. Part of the challenges facing implementation is the resistance by national political and institutional actors to give space to county governance. Decision-makers at the centre may perceive the transfer of resources and powers from the centre (a constitutional requirement) as a loss of power and control over resources. Implementation has seen some shades of resistance in the transfer and management of resources and functions, and this can be attributed partly to the desire by some persons not to let go of control over resources and functions that have been devolved to counties.

While the Constitution is only required to provide the general framework of devolved government and leave the details to enabling legislation and policy, a number of challenges can be attributed to the text of the Constitution itself.

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<sup>51</sup> Muigai G, *The structure and values of the independence Constitution*, in Report of the Constitution of Kenya Review Commission, 10 April 2003, 308.

<sup>52</sup> Muigai G, *The structure and values of the independence Constitution*, 308.

<sup>53</sup> Local authority expenditure accounted for a general average of 25 per cent of the overall government expenditure in the first decade of independence but this figure fell sharply in the subsequent years to a meagre 8 - 10 percent between 1975 and 1990, see Republic of Kenya 'Report of the Commission of Inquiry on Local Authorities in Kenya: A strategy for local government reform in Kenya' (1995) 71.



Ambiguities in some of the constitutional provisions have led to varying and mostly conflicting interpretations of the text and what it means. Furthermore, the Constitution is silent in some aspects of implementation, which leads to serious difficulties especially where there are varying and competing interests among a wide spectrum of players. In other cases, the demands of the Constitution are too complex and require much more time and capacity to be achieved. Areas of specific concern include the division of powers, resources, and specific responsibilities between the two levels of Government. The scheme of division of powers and functions between the national and county governments, provided for under the Fourth Schedule, is wide, vague, and general in nature. The delineation of functions does not emerge clearly and this leads to conflicts and lack of clarity in the boundaries of functional division.

Secondly, while devolution is based on the constitutional principle of cooperation and consultation, which in turn is based on ‘equality of levels’ of Government, the institutional, political, and governance culture in the country is that of centralised decision-making. It will take time for such arrangements to be activated and made effective, as this will require a gradual culture change in institutions of governance. Accordingly, the implementation of devolved government; and even the Constitution generally, is neither a linear nor predictable process. A lot of factors will influence, in negative and positive ways, the intended objectives of devolved government.

However, the uniqueness of the current Constitution, unlike the previous constitutional order, is that the fundamental purposes and objectives of devolved government are explicitly recognised and provided for in the Constitution. The Constitution provides basic safeguards to the implementation process (such as the timelines for passing legislation and institutions to oversee implementation).<sup>54</sup> The courts, too, have a role to ensure that implementation processes accord with the spirit and text of the Constitution. Effective implementation, therefore, depends on how implementation processes navigate through the factors discussed above and ensure gradual movement towards achievement of the objectives of the devolved system of government.

### 3.3.1 *Transition to county governance*

The transition through devolution that is envisaged in the Constitution requires laws and policies, resources (human and financial), restructuring of institutions,

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<sup>54</sup> Fifth Schedule, *Constitution of Kenya* (2010).

etc. The three-year transition period provided for in the Constitution enabled a number of measures to be put in place in preparation for county governments. Shortly after the promulgation of the Constitution in 2010, the then Ministry of Local Government put in place a taskforce to recommend ways of implementing the devolved system of government. The taskforce developed a comprehensive report on various aspects of implementation and transitioning to county governance, as well as draft legislation to implement devolved government. The laws developed by the taskforce formed the basis of parliamentary legislation.<sup>55</sup>

In order to ensure effective transition, Parliament passed the Transition to Devolved Government Act (TDGA) that established the TA. The TA was given key functions that were meant to put the country onto the path to devolved government. The TA's functions included: clarify and unbundle national and county government functions as provided in the Constitution, facilitate the transfer of functions, assist in the division of assets and liabilities between the two levels of Government, and assist in the costing of the national and county functions for purposes of budgeting. The TA was also meant to assess capacity needs at the national and county levels and take measures necessary to ensure counties have adequate capacity.<sup>56</sup> The TA was required to report regularly (on a quarterly basis) on its progress to the President, Parliament, the CIC, and the CRA.<sup>57</sup> While the TA made some progress in the execution of its mandate, a number of challenges beset the transition process.

It was expected that the TA, in collaboration with relevant sectoral ministries and institutions, would complete the unbundling and clarification of functions ahead of the entry of county governments. However, even as the TA's mandate expired in March 2016 (at the end of the three-year transition period) many of the roles have not been completed. In its June 2015 report, a few months before the end of the transition period (March 2016), the TA noted that it was yet to complete the unbundling of concurrent powers and functions. The unbundling, costing and transfer of functions was expected to inform important processes such as county and national budgeting processes. However, the first budgets (2012/13) were prepared by the National Treasury without these essential guiding frameworks in place.<sup>58</sup>

The Constitution and the TDGA envisaged a gradual and phased transfer of functions, based on the assessment of readiness of counties to assume functions allocated under the Constitution. However, once county governments came into

<sup>55</sup> Republic of Kenya, *Interim Report of the Task Force on Devolved Government*, 2011.

<sup>56</sup> Section 7, *Transition to Devolved Government Act* (No 1 of 2012) eKLR.

<sup>57</sup> Section 25, *Transition to Devolved Government Act* (No 1 of 2012) eKLR.

<sup>58</sup> Republic of Kenya (Ministry of Finance), *Medium Term Budgetary Policy Statement*, 2012, 28-29.

office, they asked for a ‘big bang’ transfer of functions that the Summit (composed of the President and the County Governors) reportedly endorsed. The TA was, thus, not able to transfer functions on a county-by-county basis pegged on the county’s readiness as prescribed by law.<sup>59</sup> The TA issued four gazette notices<sup>60</sup> identifying functions transferred to counties symmetrically to all counties with little or no regard to the individual capacities of counties to take up the functions. The fourth gazette notice for transfer of functions that the TA prepared was halted by the office of the Attorney General on grounds that some of the functions that the TA proposed to transfer (in the infrastructure and roads sector) belonged to the National Government.<sup>61</sup>

In the absence of a comprehensive framework for the division of functions between the two levels of Government, many court cases have been filed. The cases filed include: division of health functions,<sup>62</sup> betting and control, education functions, roads functions,<sup>63</sup> among others. The Intergovernmental Relations Technical Committee (IGRTC), established under the Intergovernmental Relations Act (IGRA)<sup>64</sup>, has taken over the mandate of the incomplete transition and is tasked with completing this process.

### 3.3.2 Enabling legal and policy frameworks

Laws reify (or make concrete) constitutional provisions by providing details and filling gaps. Some of the constitutional ambiguities and gaps can be filled through implementing legislation and policies. Legal and policy frameworks are therefore important as they lay a basis for the performance of devolved functions. Recognising this, the drafters of the Constitution provided strict timelines within which laws related to devolution were to be passed.<sup>65</sup> Along with the timelines, the drafters also provided for transitional provisions that required pre-2010 legislations to be interpreted (with alterations, adaptations and qualifications) to ensure conformity with the Constitution.<sup>66</sup>

<sup>59</sup> Transition Authority, *The Status of Transition to Devolved Government*, 2014, 33.

<sup>60</sup> Gazette Notice of 7 February 2014.

<sup>61</sup> Transition Authority, *The Status of Transition to Devolved Government*, 2014, 10.

<sup>62</sup> *Okiya Omtata Okiiti and another v Attorney General and 6 others* (2014) eKLR; *Republic v Transition Authority and another ex parte Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU) and 2 others* (2013) eKLR.

<sup>63</sup> *The Council of County Governors v The Attorney General and 3 others* (2015) eKLR.

<sup>64</sup> No 2 of 2012.

<sup>65</sup> Fifth Schedule, *Constitution of Kenya* (2010).

<sup>66</sup> Section 7 - Sixth Schedule, *Constitution of Kenya* (2010).

Policies provide guidance in administrative procedures, and provide further details that cannot be covered in ordinary legislation. Policies are thus important guides to day-to-day activities that are carried out by officers at the national and county levels. The Constitution vests certain policy-making powers in the National Government.<sup>67</sup> Ideally, most of the policy frameworks should have been completed before or soon after county governments came into place in order to ensure orderly performance of county government functions. However, the adoption and development of national law and policy is uncertain and fraught with confusion.

With regard to legislation, the Constitution specified that the now repealed Local Government Act would continue in force until the County Government Act came into force.<sup>68</sup> Furthermore, some transitional or temporary laws were passed to avoid a ‘legal lacuna’ during the period of debate and enactment of permanent legislation.<sup>69</sup> The Constitution required Parliament to pass laws on various issues of devolved government (Chapter 11) within one and three years.<sup>70</sup> All the laws required by the Constitution under chapter 11 were passed within the specified timelines.<sup>71</sup> Other laws related to devolution but outside the chapter on devolution, e.g. public finance management of counties, were also passed within the required timelines. A few of the laws had not been passed by the fifth year (August 2015) and Parliament voted to extend the passing of the laws to 2016.<sup>72</sup>

The implementation process has clearly demonstrated the need for further laws than those that were provided for in the Fifth Schedule. For instance, counties for a long time performed functions in sectors such as health, transport and infrastructure, and water and sanitation without substantive national or county legislation. These functions were transferred to the counties in August 2013 while the relevant national legal frameworks had not been completed.<sup>73</sup>

A policy framework that sets out sector strategies and approaches should ideally precede the development of national legislation. There is no clear evidence

<sup>67</sup> Part 1 - Fourth Schedule, *Constitution of Kenya*. The National Government has policy-making powers in sectors such as: agriculture, economic and financial management, energy, health etc.

<sup>68</sup> Section 18 - Sixth Schedule, *Constitution of Kenya* (2010).

<sup>69</sup> These include the *County Government Public Finance Management Transition Act* (No 8 of 2013).

<sup>70</sup> Fifth Schedule, *Constitution of Kenya* (2010).

<sup>71</sup> Among the laws that were expressly required under the Fifth Schedule included: the *Urban Areas and Cities Act* (No 13 of 2011), the *County Government Act* (No 17 of 2012), and the *Intergovernmental Relations Act* (No 2 of 2012).

<sup>72</sup> ‘MPs extend key Bills deadline by a year, elections remain in August’ *Business Daily*, 25 August 2015 <https://www.businessdailyafrica.com/news/MPs-extend-Bills-deadline-by-a-year-elections-remain-August-539546-2846278-xh4csx/index.html> on 2 April 2018.

<sup>73</sup> Some of the laws that had not been passed include the Water Bill 2015, the Roads Act and others.

whether the national laws for the various sectors were developed or are being developed on the basis of an existing policy framework. National policy-making is largely vested in the National Government but effectiveness in implementation requires involvement of both levels of Government. However, there are concerns that most of the national draft policy documents in most sectors were developed by the ministries concerned at the national level without effective consultation and the involvement of counties.<sup>74</sup>

While Parliament managed to pass all laws that were prescribed in the Fifth Schedule to the Constitution, the finalisation of other laws that are critical to implementation took longer than necessary. For instance, Parliament took over five years to enact sectoral legislation for sectors such as water and health.<sup>75</sup> Factors such as the lack of a clear and comprehensive framework for division of functions may have contributed to the slackened development of enabling legislation. Furthermore, counties have concerns regarding many of the enabling laws and some of them have been challenged in court, a factor that further threatens smooth implementation.

Furthermore, the courts have declared parts of laws (and in some cases entire laws) passed by Parliament unconstitutional. Many of the laws have been declared unconstitutional mainly on grounds that they infringe on county government powers and functions. These include the Constituency Development Funds Act,<sup>76</sup> parts of the County Government Act,<sup>77</sup> and amendments to the County Government Act.<sup>78</sup> While the complexity of the constitutional framework may have led to the passing of unconstitutional legislations by Parliament, some of the laws that were declared unconstitutional by courts are a result of political resistance to devolution by national politicians.

The Constitution envisages consultation and cooperation between different institutions in order to ensure a cohesive pursuit of devolution objectives. The law and policy-making processes are obvious processes that should engender cooperation and consultation. However, there has been little or no consultation, even where the Constitution explicitly requires cooperation. For instance, the Constitution requires

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<sup>74</sup> See generally, Council of Governors, *Sectoral Policy and Legislative Analysis*, 2015.

<sup>75</sup> The Water and Health Acts were not law at the beginning of 2015, the fourth year of county government operations.

<sup>76</sup> *The Institute for Social Accountability (TISA) and another v The National Assembly and 3 others* (2015) eKLR.

<sup>77</sup> *Stephen Nendela v The County Assembly of Bugoma and 2 others* (2014) eKLR.

<sup>78</sup> *Council of Governors and 3 others v The Senate and 2 others* (2015) eKLR.

both chambers of Parliament to agree on whether a law affects counties or not (this will determine whether such a law is sent to Senate or not), but, in practice, the National Assembly has in many instances sought to exclude the Senate from law-making without consultation between the speakers of the chambers. Even some of the laws that emanate from the Senate (an institution whose core role is to represent and safeguard county interests) have been declared unconstitutional for infringing on county powers and functions.<sup>79</sup>

### 3.3.3 Institutional restructuring (national and county)

Apart from the legal and policy frameworks, a major part of the implementation is the alignment of institutional and structural arrangements at the national and county levels in accordance with the Constitution. Implementation of devolution entails the restructuring of existing institutions, building of new institutions (especially at the county level) and abandoning some of the old institutions (such as the former local authorities). This should be followed by the alignment of resources (human and financial) as envisaged in the Constitution in order to facilitate performance of functions at the two levels of Government.

Election of county governors and county assembly representatives has happened twice, in 2013 and 2017. Counties have also put in place county-level institutions to assist in the performance of county functions. These include the CPSBs and the county assembly public service boards as well as the levels of service delivery below county levels (sub-county, ward, and village levels).<sup>80</sup> Most counties have put these institutions in place. All counties have established their respective county assembly service boards.<sup>81</sup> Most of the CPSBs carried out human resource assessment needs and issued plans on how counties were to fill the human resource requirements. Counties have also established sub-county levels for service delivery; all counties have established the sub-county level and a few counties have established village levels for service delivery.<sup>82</sup> However, there are a number of challenges.

The delays in the national transition process also affected the effectiveness of county institutions. The exit report of the CIC, for instance, noted that there

<sup>79</sup> In the case of *Council of Governors and 3 others v The Senate and 2 others* (2015) eKLR, the Court found that the amendment to the *County Government Act* which emanated from the Senate infringed on county powers and functions.

<sup>80</sup> Section 48, *County Government Act* (No 17 of 2012) eKLR.

<sup>81</sup> Commission for the Implementation of the Constitution (CIC), *Sustaining the Momentum: Assessment of Implementation of the Transferred Functions to the County Governments*, Nairobi, 2015, 61.

<sup>82</sup> CIC, *End Term Report*, 2015, 93.

was no audit of human resources by the time counties came into place. This brought confusion to the newly established CPSBs as they had no idea of the existing capacities at the national level that were to be transferred to the respective counties.<sup>83</sup> Furthermore, while the levels below counties have been established, they are generally non-performing.<sup>84</sup> The CIC, for instance, noted that ‘a total of 554 village and “zone” levels have been established in 6 counties, with none being functional’.<sup>85</sup> The main challenges facing the lower units of counties are mainly lack of technical capacity and resources for service delivery.

### 3.3.4 *Service delivery and implementation of county functions*

The legal, policy, and institutional frameworks discussed above are all geared towards ensuring the effective performance of county functions. The performance of county functions is, thus, the end product that citizens at the county level are supposed to receive from the governance process. However, the effectiveness of service delivery at the county level, like any other implementation process, is dependent on the preparedness of the counties and the general transition to county governance. Inevitably, service delivery became a casualty of the poorly-managed transition process.

First, the lack of clarity on the nature and extent of county functions (a factor that remained unresolved at the end of the transition period) led to poor planning and execution of county functions. Even at the end of the transition period (March 2016), there was no clarity on what each level of Government is responsible for in critical sectors of service delivery such as roads and infrastructure, electricity and energy reticulation and regulation, cultural activities, and public entertainment and amenities.<sup>86</sup> In this confusion, counties planned and executed their functions without any guiding policy. The result was that some counties ended up planning and funding functions that belong to the National Government.<sup>87</sup>

Despite the general confusion in the transition laws and policies, county governments made a generally impressive performance in the delivery of county services. Assessments done by various institutions on county government services reveal remarkable progress made across the 47 counties in the provision of some of

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<sup>83</sup> CIC, *Sustaining the Momentum*, 2015, 61.

<sup>84</sup> CIC, *End Term Report*, 93.

<sup>85</sup> CIC, *Sustaining the Momentum*, 89.

<sup>86</sup> CIC, *End Term Report*, 102.

<sup>87</sup> Machakos County, for instance, budgeted for police cars, yet the security function belongs to the National Government.

the services.<sup>88</sup> It will take a few more years to have a realistic and comprehensive picture of whether counties have actually improved access to services at the county level and spurred local development as expected of them in the Constitution. However, there is anecdotal evidence to support the assertion that counties have commenced projects and services that will in the long run enhance access to development and vital services across the country.

In the agricultural sector, many counties had procured agricultural machinery and inputs for various agricultural services; the machinery is to be made available to farmers at a subsidised cost.<sup>89</sup> Counties have also enhanced agricultural extension services.<sup>90</sup> In the health sector, counties across the country have built new health institutions and improved and rehabilitated the existing ones in order to enhance the delivery of health services.<sup>91</sup> In the transport and infrastructure sector, all counties have procured machinery for construction and maintenance of roads and almost all counties reported to have undertaken major road projects within their counties.<sup>92</sup>

Counties have a very limited role in education, mainly focusing on early childhood education and tertiary institutions of learning (village polytechnics and vocational training institutions).<sup>93</sup> The CIC reports that the educational function is ‘one of the most successfully implemented’ in most of the counties.<sup>94</sup> Counties have built new facilities for early childhood education and vocational training, hired teachers, bought learning materials, and introduced supporting programmes (such as school-feeding programmes) so that early childhood education is maintained. In the water and infrastructure sector, the counties have rehabilitated existing water supply infrastructure, connected additional households to water supply, and constructed more boreholes, wells, and watering points for livestock in order to enhance access to water.<sup>95</sup>

Service delivery at the county level requires that county laws and policies provide the appropriate institutional, legal and policy frameworks for service

<sup>88</sup> United Nations Development Programme, *The Integrated UNDP Support Programme to the Devolution Process in Kenya*, 2015.

<sup>89</sup> CIC, *Sustaining the momentum*, 23.

<sup>90</sup> United Nations Development Programme, *The Integrated UNDP Support Programme to the Devolution Process in Kenya*, 2015.

<sup>91</sup> CIC, *Sustaining the Momentum*, 27-29.

<sup>92</sup> CIC, *Sustaining the Momentum*, 34-35.

<sup>93</sup> United Nations Development Programme, *The Integrated UNDP Support Programme to the Devolution Process in Kenya*, 2015

<sup>94</sup> CIC, *Sustaining the Momentum*, 42.

<sup>95</sup> CIC, *Sustaining the Momentum*, 46-48.



provision. However, as is the case with national frameworks for service delivery, the legislative and policy processes at the county level have not matched up to the services offered. Very few counties have concluded laws and policies to support their service delivery efforts and this is due to a complex set of factors. First, the lack of national laws and policies has delayed the finalisation of the equivalent laws and policies at the county level. National legal and policy frameworks define the operational environment for counties, without which counties have no clear direction in the development of laws and policies.

Secondly, counties are also faced with technical and resource capacity constraints to ensure the development of required laws and policies. For instance, very few counties have developed county health legislation while a large majority of counties are in the process of developing the laws.<sup>96</sup> This is the same in almost all sectors of county service delivery where most of the county laws are, for reasons stated above, among others, still in draft form. It is important to note that while counties have engaged in the actual delivery of services, the lack of proper laws and frameworks (at the national and county levels) hinders effectiveness since counties have no clear basis for planning and implementing.

### 3.3.5 Management of county public finances

The Constitution devolves resources to counties to facilitate the performance of functions allocated to counties under the Fourth Schedule. This is achieved by giving counties some revenue-raising powers as well guaranteeing a minimum share of resources (15%) that should be allocated to counties from the share of revenue collected nationally.<sup>97</sup> Among the transition measures that the TA was able to achieve was to facilitate (in cooperation with the National Treasury), the establishment of county treasuries across the 47 county governments.<sup>98</sup> Counties were, therefore, somewhat prepared to raise or receive and manage funds from the start. While the Constitution only guarantees a minimum county share, counties have been receiving transfers that are well beyond the minimum. Indeed, one of the principles of public finance management is that counties should be adequately resourced to enable the performance of their functions.<sup>99</sup>

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<sup>96</sup> CIC, *Sustaining the Momentum*, 27.

<sup>97</sup> Article 203 (2), *Constitution of Kenya* (2010).

<sup>98</sup> Transition Authority, *The Status of Transition to Devolved Government* (2014), 12.

<sup>99</sup> Article 175, *Constitution of Kenya* (2010).

The Constitution provides a set of principles to guide the management and utilisation of all public finances. The principles include: fair and equitable distribution, transparency and accountability, and public participation in the use of public finances. The Constitution also calls for fiscal discipline and prudence by the county government and all other public institutions.<sup>100</sup> Counties are, therefore, required to adhere to these principles in the management and use of resources.

However, reports on the implementation of county finances reveal issues that go against the very principles that counties are required to adhere to.<sup>101</sup> There are numerous reports of imprudent use of funds allocated to counties.<sup>102</sup> These range from overpriced goods and services that are procured by county governments to expensive foreign trips that consume funds that could have been redirected to service provision. The recurrent expenditure of counties has been reported as high with a large amount of funds going to salaries, partly due to the bungled transition of human resources.<sup>103</sup>

Secondly, while counties routinely exhaust the moneys set aside for recurrent expenditure, there are emerging reports that they are not able to utilise their development funds owing to capacity constraints.<sup>104</sup> Annual reports of county expenditure revealed huge balances of unspent development funds. This is especially the case for counties in areas that were previously marginalised (such as Lamu and Turkana counties) where the counties are yet to put in place institutional capacities that can ensure uptake of funds meant for development and service delivery.<sup>105</sup>

Thirdly, despite the requirement for counties to enhance and maximise their local revenue potential,<sup>106</sup> most counties have not put in place measures to achieve it. The total amount of revenue collected by the former local authorities has risen only marginally under the current county governments. This has led to more and more reliance on National Government transfers to counties in order to perform

<sup>100</sup> Article 201, *Constitution of Kenya* (2010).

<sup>101</sup> 'Auditor General report reveals misuse of county funds', *Citizen News*, <https://citizentv.co.ke/news/auditor-general-report-reveals-massive-misuse-of-county-funds-75779/> on 16 December 2018.

<sup>102</sup> Samuel Kisika, 'Auditor indicts county bosses for suspect use of taxpayers' money' the Star News, 9 November 2017.

<sup>103</sup> Mutua J, 'Emerging issues in county public finance management' in Bosire C and Wanjigu G, (eds), *Animating devolution in Kenya: The role of the judiciary, commentary and analysis of Kenya's emerging devolution jurisprudence under the new constitution*, International Development Law Organization (IDLO), Rome, 2015, 132-133.

<sup>104</sup> Mutua J, 'Emerging issues in county public finance management', 140-141.

<sup>105</sup> Mutua J, 'Emerging issues in county public finance management', 140-141.

<sup>106</sup> Article 203 (1) *Constitution of Kenya*, (2010).

county functions. While counties have a relatively limited source of local revenue, it is important for counties to ensure that at least a part of the total revenue needs is met at the county level. This will not only enhance local accountability but will also ensure that counties are not wholly dependent on transfers from National Government.

Lastly, there are emerging challenges on oversight and accountability in the use of funds transferred to counties. This has led to confusion and conflict between and within national and county institutions with regard to accountability in the use of public funds. While the county assemblies have constitutional powers to exercise oversight on how funds are managed and utilised by county executives,<sup>107</sup> the Constitution also vaguely vests the Senate with powers to exercise ‘oversight over national revenue allocated to the county governments’.<sup>108</sup> The National Government (through the National Treasury) also has certain constitutional powers to regulate the financial and fiscal affairs of county governments. To this, add the roles of the offices of the Auditor General, the CoB, and the CRA.

The multiplicity of institutions with related roles has led to conflicts between the Senate and governors, and even between the two chambers (Senate and the National Assembly). The county assemblies lack effective capacity to monitor the use of funds by county executives. The Senate, on the other hand, has sought to step in and fill the accountability gap left by county assemblies. However, the county governors, who see this as interference and read political malice on the side of senators, have stiffly resisted the Senate’s direct involvement in oversight at the county level.<sup>109</sup> Reports by institutions such as the Auditor General and the CoB paint a picture of waste of resources at the county level through corruption and general imprudence.<sup>110</sup> There is need for proper checks and balances as well as accountability systems in the use of county finances. This will ensure that funds are managed and utilised in the manner prescribed by the Constitution.

## Conclusion

The structure of devolved government provided for in the Constitution versus the actual implementation taking place shows that it will take many more years to get the politics, institutional dynamics and technical issues right. There is nothing

<sup>107</sup> Article 185 (3) *Constitution of Kenya* (2010).

<sup>108</sup> Article 96(3), *Constitution of Kenya* (2010).

<sup>109</sup> *Council of Governors and 6 others v Senate* (2015) eKLR.

<sup>110</sup> ‘Audit reveals theft and plunder of public funds in the counties’ *Daily Nation*, 18 July 2015.

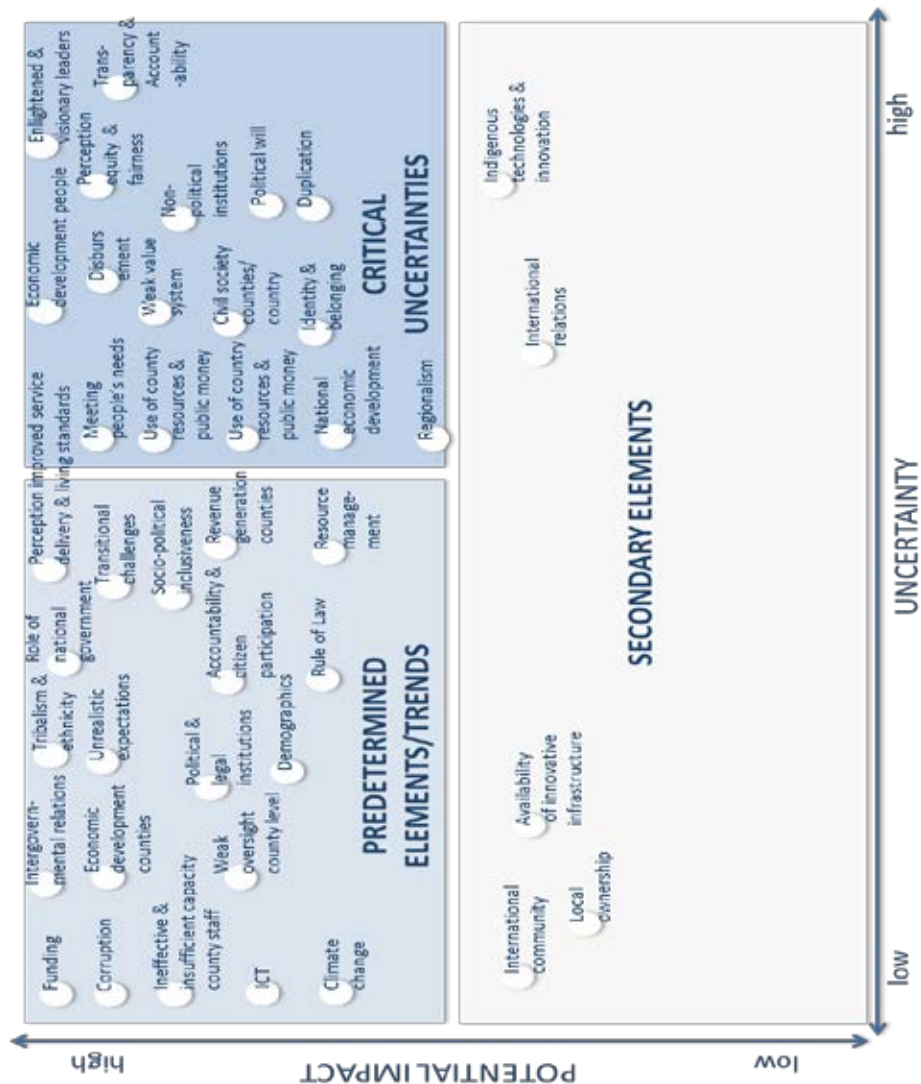
wrong with that since the transition required is fundamental and it can only take time. The objectives and principles of devolved government require certain changes that are of a social, political, and economic nature. The objectives also require extensive institutional changes, most of which have been described above.

It is important that all processes and efforts put in place to facilitate implementation are led by the content of Article 174 of the Constitution that lays out the objectives of the devolved system of government. However, this has to be preceded by a change of mind-set and attitudes that will create a favourable environment for the effective implementation and pursuit of devolved governance.

4.

## FUTURE DRIVING FORCES FOR DEVOLUTION IN KENYA

Map 1: Impact-uncertainty map



This chapter discusses the driving forces which underlie devolution in Kenya. Some of them constitute predetermined trends which are the same for all four scenarios. However, their characteristics and concrete manifestation in the individual scenarios may vary to a certain extent. The critical uncertainties are those driving forces which are completely uncertain. Beside the different level of uncertainty all driving forces are also characterised by a different level of impact on devolution in Kenya. The graph above shows the identified driving forces and their respective uncertainty and impact.

#### 4.1. Funding

A serious decentralisation of power to lower levels of government always requires sufficient funding. There are several comparative examples where the national government transferred responsibilities but never ensured that regional and local authorities possess proper financial resources guaranteeing that they could perform. Such an approach leads to decentralisation, which is dead at its introduction. This rule applies to the Kenyan case as well since the success of the devolution process greatly depends on adequate funding. Counties will only meet the high expectations concerning service delivery if there are enough resources; otherwise citizens will not support devolution anymore. It is not surprising that this predetermined trend is considered to have a big impact.

Generally, counties in Kenya rely on two kinds of funding: on their share of the national revenue as well as grants and on their own generated revenues.<sup>1</sup> First, counties receive at least 15% of the revenue raised nationally.<sup>2</sup> The calculation basis is the most recent audited accounts of revenue received and approved by the National Assembly. Data of fiscal years since 2013/14 shows that this share has been significantly higher; has been between 30% and 33%. Although, it is often wrongly referred to as financial support from the National Government it is the share for the counties proceeding from nationally collected revenues. Therefore, there is only a centralised collection of county revenues, which are then redistributed. Before the beginning of each fiscal year, the National Assembly and the Senate have to agree on a Revenue Division Bill fixing the exact amount of revenues and grants to be transferred to counties.<sup>3</sup> Besides Parliament, the National Treasury, the CRA and the Council of Governors (CoG) play an essential role in the process. The involvement of the CRA should ensure professional and independent advice, for example, by

<sup>1</sup> Office of the Controller of Budgets, *County Governments Budget Implementation Review Report – FY 2017/2018*, 2.

<sup>2</sup> Article 203 (2), *Constitution of Kenya* (2010).

<sup>3</sup> Article 218, *Constitution of Kenya* (2010).

proposing recommendations for an annual equitable sharing or by presenting its opinion on the Revenue Division Bill before the two chambers of Parliament vote on it. After the approval of the amount of devolved funds, it is necessary to decide on the share for each of the 47 counties. A formula, which is developed every five years, constitutes the basis of this decision. It is informed by factors such as population, poverty, land area, fiscal effort, development and the equal share, which are weighted according to their importance. The biggest emphasis is given to population and poverty while the equal share is the same for every county.<sup>4</sup> The system of the equitable share establishes a particular kind of solidarity between economically stronger and more impoverished regions. Another point concerning equitable share is the issue of the economic performance of Kenya. The volume of collected revenues is closely linked with the economic progress of the country. Bad economic development results in lower revenues, strained budgets and fewer resources for devolution.

Additionally, the National Government can transfer conditional grants, which are dedicated to specific purposes, and the Constitution stipulates that 0.5% of the nationally collected revenue feed into an Equalisation Fund. The purpose of this Fund is to provide financial support for marginalised areas of the country for basic services (water, health, infrastructure, etc.).<sup>5</sup>

Secondly, counties have limited rights to generate their revenues by imposing property rates (tax on immovable property), entertainment taxes, and charges for services or others taxes approved by Parliament.<sup>6</sup> It is a way of strengthening the independence of counties. However, the most profitable taxes such as income tax or value-added tax are of national competence.

All in all, the funding of counties is structured in a way that does not allow them to sustain themselves and attributes a central role to the National Government. The main reasons are the dependency of counties on the equitable share and their constrained possibilities for collecting revenues. Potential restrictions on the revenue autonomy of counties, the possibility for increased use of conditional grants (where counties have limited say in the amount and purpose) or the transfer of only the minimum of the national revenue (15%) are some examples of how National Government could pressure counties. From a political point of view, funding is certainly the way the National Government can influence the development of devolution most, either in a supportive or undermining manner.

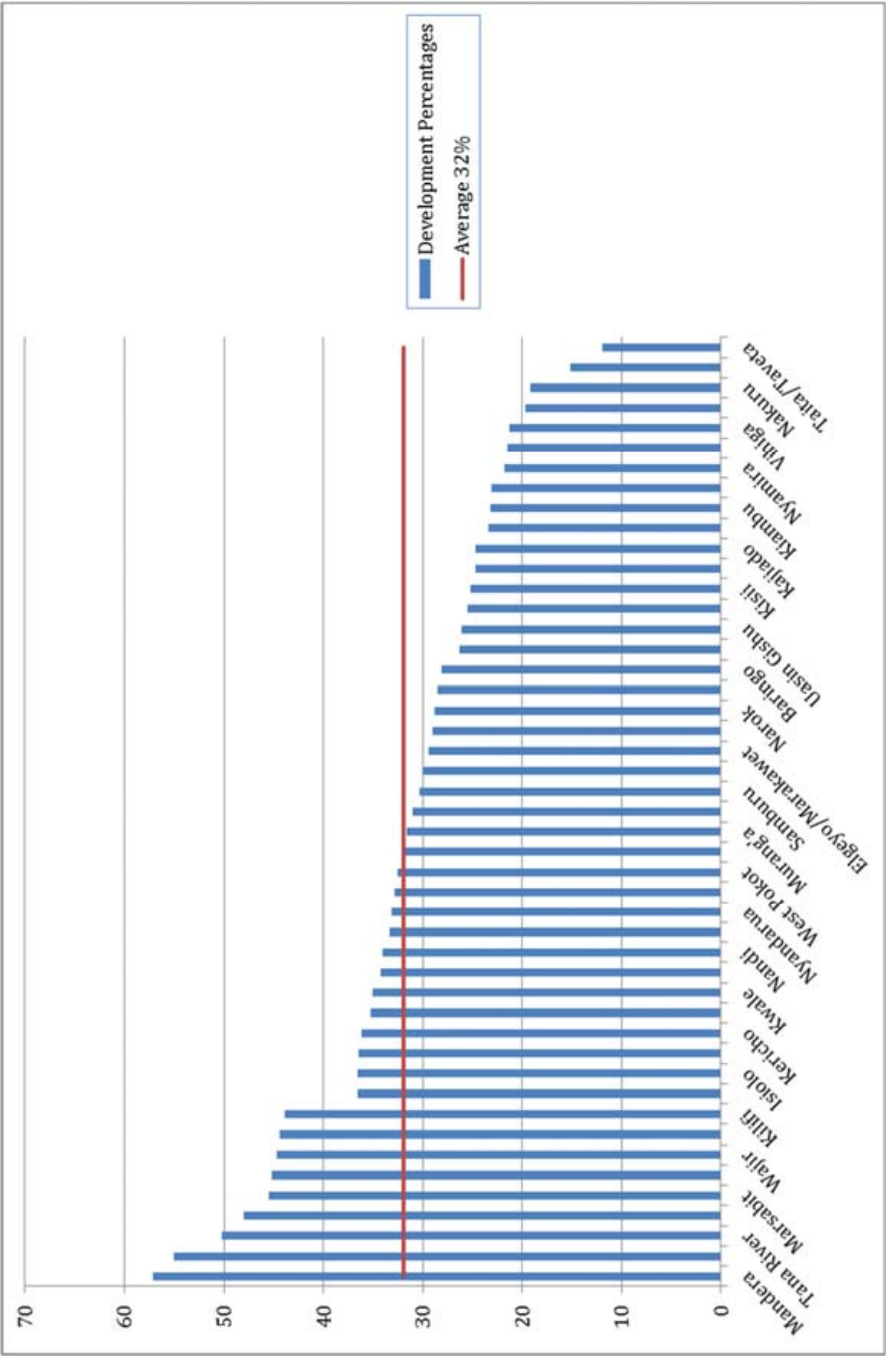
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<sup>4</sup> Article 203, *Constitution of Kenya* (2010).

<sup>5</sup> Article 204, *Constitution of Kenya* (2010).

<sup>6</sup> Article 209(3), *Constitution of Kenya* (2010).

Graph 1: Percentage of county budgets spent on development, Financial Year 2016/17



Source: Controller of the budget



## 4.2 Corruption

Former UN Secretary General Kofi Annan termed corruption ‘an insidious plague that has a wide range of corrosive effects on societies.’<sup>7</sup> According to Transparency International, Kenya is ranked 143 out of 180 countries with a score of 28.<sup>8</sup> Although this score is a slight improvement on previous years, a closer look at the situation in Kenya is not very encouraging because the country has been stagnating at a high level of (perceived) corruption. The Transparency International Index shows an average score of 26.3 between 2012 and 2017 whereby 0 means highly corrupt, and 100 means very clean. However, this trend of an unchanged high level of corruption had already existed from 1996 onwards when Kenya was for the first time part of the survey.<sup>9</sup> A recent report of the Ethics and Anti-Corruption Commission (EACC) indicates that 79.3% of Kenyans perceive the level of corruption in their country is high (only 4,6% regard it as low) while in 2012 it was 68% who shared that view and in 2015, 73.9%.<sup>10</sup> Obviously, Kenyans have felt a massive increase in the level of corruption in the last years.<sup>11</sup>

Corruption is also an issue which touches on devolution. Many citizens regarded the former highly centralised system as corrupt and only beneficial for a small elite at the top. However, the impact of decentralisation in general on the level of corruption in a country is disputed among scholars: Some say decentralisation has had positive effects since new accountability mechanisms are in place and citizens have easier access to decision-makers. As a consequence, it is much more difficult for them to misuse public funds for private benefit.<sup>12</sup> Others doubt such a position and see either no effects or sometimes even a worsening of the situation after the introduction of devolution.<sup>13</sup> The transfers of power and funds to the 47 counties created new opportunities and venues for such practices, because county authorities grant tenders, provide employment, implement development projects or simply

<sup>7</sup> ‘Statement on the adoption by the general Assembly of the United Nations Convention Against Corruption’ *UNDOC*, 31 October 2003 <https://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html> on 1 April 2018.

<sup>8</sup> ‘Corruption Perception Index 2017’ *Transparency International*, [https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2017](https://www.transparency.org/news/feature/corruption_perceptions_index_2017) on 1 April 2018.

<sup>9</sup> ‘Corruption Perceptions Index’ *Transparency International*, <https://www.transparency.org/research/cpi/overview> on 1 April 2018.

<sup>10</sup> Ethics and Anti-Corruption Commission, *National Ethics and Corruption Survey 2016, 2017*, xiii.

<sup>11</sup> Ethics and Anti-Corruption Commission, *National Ethics and Corruption Survey 2016*, 6.

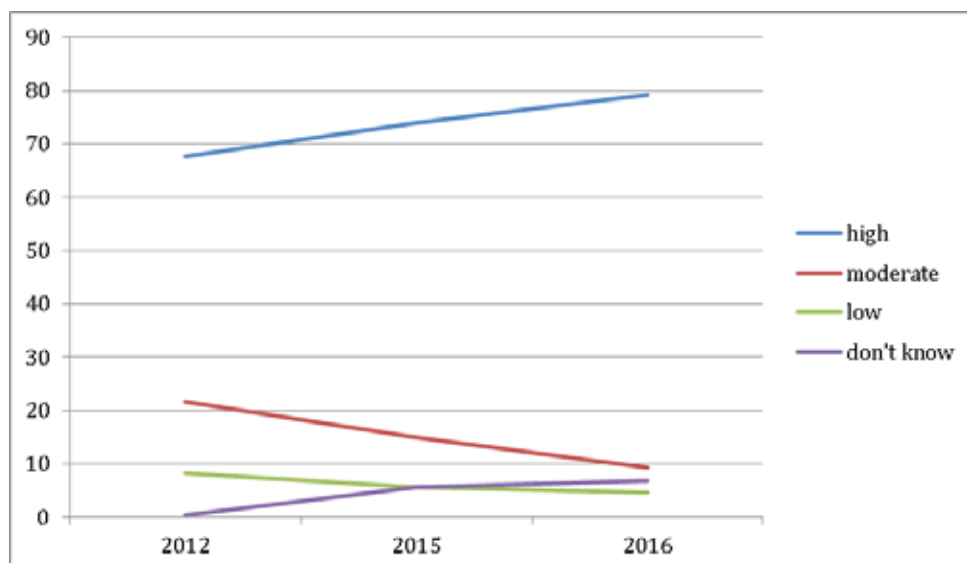
<sup>12</sup> D’Arcy M and Cornell A, ‘Devolution and corruption in Kenya: Everyone’s turn to eat?’ 115 *African Affairs*, 459, 2016, 250.

<sup>13</sup> D’Arcy M and Cornell A, ‘Devolution and corruption in Kenya: Everyone’s turn to eat?’, 250.

offer services in devolved areas. As a result, corruption can appear in different forms in the local sphere, for instance, ghost projects, bribery, ignoring procurement rules and ethnically-motivated recruitment. At the county level citizens name the health sector especially as being prone to corruption (37.5%); followed by county public work and services (22.5%) and the sector of education (15.4%).<sup>14</sup> Additionally, the creation of newly-elected positions, for example, governor and member of county assembly (MCA), opened up a new way for patronage and rent-seeking.

However, it is not only the public sector that is affected, but also the private sector. As one expert summarised it: ‘Corruption is neither a problem of the private nor the public sector in Kenya, but it is a societal problem.’<sup>15</sup>

Graph 2: Perception of the country's corruption level from 2012-2016, Source: EACC



The consequences of corrupt practices on devolution should not be underestimated. Corruption poses a significant threat to devolution because it undermines the benefits and prevents an improvement in the daily life of Kenyan citizens. It endangers democracy and the legitimacy of leaders as well as officials, it causes significant costs and losses for county budgets and, therefore, for the socio-economic development of counties. It also harms service delivery. If citizens

<sup>14</sup> Ethics and Anti-Corruption Commission, *National Ethics and Corruption Survey 2016*, 2017, 16.

<sup>15</sup> As expressed by one of the participants during the workshop.

question the integrity of their county representatives, see no progress in development due to lack of funds and are still confronted with bad public service, it is very likely that they will potentially turn against the idea of devolution. There is hardly doubt that corruption will remain a significant issue in Kenya in the forthcoming years with a very high impact on the future development of devolution.

### 4.3 Ineffective and insufficient capacity of county staff

The issue of capacities of human resources at the county level is central because it directly affects a key deliverable of devolution, which is service delivery to the people. Only well-qualified and a sufficient number of county staff can build the basis for proper service provision. County government public service has, in general, three distinct categories of staff:

- Former local authorities staff: They were automatically integrated into county staff with the onset of devolution. This is one reason why counties face the burden of a bloated wage bill.
- Staff seconded by the National Government: They perform devolved functions such as health and agriculture, which remain seconded to the counties and coordinated by the Public Service Commission.
- Directly employed staff: These include staff employed directly by the county governments to fill in the gaps and provide for the new skills required to actualise county government. They are employees of the county service boards. There is, however, a particular category of staff who are advisors to the governor on specific issues. In most instances, the CPSB or even the county assembly does not supervise this category.

This mixture of staff is a bone of contention 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. The national standardisation of human resources policy could curb uncontrolled personnel spending and reduce capacity gaps across and within counties.

One example of the need for training is the health sector, which is the most devolved function. Many Kenyans are dissatisfied with the discharge of health services by the county governments.<sup>16</sup> Although, the number of health workers increased in the last few years, the qualification level of staff needs improvement;

<sup>16</sup> Twaweza East Africa, *Striking an Unhealthy Note: Citizen's views on Health and Health Services*, Brief No 18, November 2017, 10.

this requires capacity building and general workforce development across all categories. A precondition for effective training and the improvement of staff skills is high-quality curricula. Additionally, the majority of analysed training institutions have gaps with regard to curriculum management, development and review.<sup>17</sup>

One predetermined trend concerns the revenue generation of counties. A vast majority of them fail to achieve their revenue collection goals and have challenges concerning reliable budgets. One major reason for these shortcomings is human capacity constraints. Revenue and expenditure forecasts, for instance, are in many cases unrealistic and are not informed by sufficient information.<sup>18</sup>

The reasons for the existing incapacity of county staff are systematic and manifold: First, as mentioned above, there is no harmonised structure for the local administrations due to the mix of former local authorities, seconded staff and county-employed staff. The absence of National Government direction regarding standards and norms causes problems concerning recruitment and qualification. Secondly, due to ageing county workers, the devolved units are inadequate because of the lack of skills of their employees. Thirdly, the working relations between the independent boards and the county executive are characterised by hostility. Lastly, counties fail to put in place Human Resource (HR) management and lack appropriate HR departments and strategies.

The reform of (county) public administrations is a challenging and lengthy process since such systems are interlinked with (personal) interests, and it is impossible to change an entire personnel structure and the skills required and the qualification level within a short time. Skilled and sufficient county staff is the basis for proper service delivery as well as data-informed and fact-based policy decisions.

#### 4.4 Information Communication Technology

Information Communication Technology (ICT) as a pre-determined trend has the potential needed to bring about transformation in achieving the promise of devolution in the country. While figures indicating the percentage of the ICT sector as a contribution to the GDP have fluctuated between 6% and 9%, the sector has become a crucial enabler of socio-economic development mainly through reduced

<sup>17</sup> Shikuku P et al., *Strengthening the curriculum management commitments in medical training institutions in Kenya*, 2017, 1-2.

<sup>18</sup> KIPRA, *Towards Strengthening Public Financial Management in County Governments in Kenya*, 2018, 2-3.

transaction costs. The Economic Survey 2017 details that the value of output and intermediate consumption for the ICT sector has been on an upward trend since 2012.<sup>19</sup> Generally, the country has established itself as a regional hub of the ICT sector with robust internet coverage, excellent mobile phone penetration and a leader in mobile money services penetration. This stable growth in the ICT sector has made it pivotal in improving other sectors of the economy like finance, education, and health. While it has enormous opportunity for creating jobs, developing skills and start-ups, the ICT sector has an even more significant stake in accelerating progress towards attainment of the goals of devolution.

#### 4.4.1 *Economic development*

The case for the positive influence of ICT in contributing to the economic development and growth of the counties can be directly drawn from the national experience where the sector has contributed a substantial amount of the GDP for several years. First, county governments have the upper hand in solving challenges like unemployment rates among the youth. Youth comprise the most significant percentage of the population across counties, and yet has the highest unemployment rates. ICT can offer opportunities to create employment in particular for youth since they are the most technologically educated group. ICT empowerment among the counties can be focused on the youth to target and promote entrepreneurship and start-ups at the county level. Additionally, ICT contributes to improving the competitiveness of services and products offered.

#### 4.4.2 *Enhanced service delivery*

One of the primary objectives of devolution envisioned in the Constitution was to provide proximate and easily accessible services throughout the country. In order to provide interlinked and easily accessible services to the people, there is need to synchronise data and operations, which is possible through the collaboration of technologies and services. Devolution in this context means continuous collaboration in the public sector to bring transformation to service delivery. The innovative use and integration of ICT within county governments has made it possible to tailor services and so meet people's needs in an efficient manner. Through the use of ICT technologies and services that can process information and transact independently, county governments have made it possible for citizens to acquire services like the

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<sup>19</sup> Kenya National Bureau of Statistics, *Economic Survey 2017*, 237.

application of business permits, trade licences, rates payments and electronic filing of taxes. In the future, this trend of county governments utilising and harnessing the potential of ICTs to deliver services is likely to continue.

#### 4.4.3 *Transparency and public participation*

The growing reliance on networking in the private sector across the world is quickly forcing governments to adapt their internal functions to these developments. Reducing it to the focus on devolution, county governments have also been forced to encourage the application of ICT to give the public more information as well as to be more accountable. The increased use of ICT tools means more accountability and transparency since citizens have better access to information. County governments have in the first stage of devolution embraced ICTs to provide information to the general public. They have done so by disseminating information on their websites and other media platforms (social media and traditional media) about county laws, policies, plans and budgets among other relevant documents. On their websites, counties have stretched technological flexibility to engage in direct communication in the form of blogs and social media pages or indirect communication where county constituents can request and receive information on county projects, laws and plans. All these ICT interactions in their own right have enhanced public participation and information, transparency, democracy and good governance. However, there is still more to be done.

While Kenya set out to be a paperless economy in 2009 when the Communication (Amendment) Act<sup>20</sup> was signed into law, the process has been slow, and full realisation of this vision is yet to be achieved. However, the county governments' entry into the governance picture can help achieve it through slowly transitioning into e-government. Procurement of county tenders and licensing can be adopted into online IT-enabled services for accessibility and easy storage. By adopting e-government strategies in budgeting and planning, county governments are best placed to facilitate the participation of citizens in decision-making processes including the formulation of policies. Moreover, the application of ICT services, especially in the area of public procurement, can be a useful instrument to combat corruption, since processes become more transparent. Finally, it reduces bureaucracy and stimulates local businesses.

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<sup>20</sup> Act No 1 of 2009.

#### 4.4.4 Improved county capacities

When county governments place greater emphasis on the utilisation of knowledge bases available through ICT, their capacities can be enhanced decision-making, skills development, and capacity building especially. One way is designing and utilising distance learning and online training programmes for county staff so that they can enhance their skills continually and so keep up with the ever-increasing demands placed on them by the public. Furthermore, technologies enable the 47 counties to set up cost-efficient innovation and experience-sharing platforms helping peer-to-peer learning. Of critical importance is that ICT has automated revenue collection for counties thus optimising the process of revenue management to the benefit of counties. Through the adoption of technologies in collecting and accounting for revenue, counties have managed to seal loopholes through which revenues were lost, which led to counties falling way behind their revenue targets. Citing the case of Nakuru County, the ICT department, in conjunction with that of Finance and Economic Planning, automated revenue collection through electronic platforms to accept all forms of electronic payments such as smart cards and mobile money. As a result, revenue collection in Nakuru County increased from KHS 900 million to more than KHS 2.3 billion.<sup>21</sup> Clearly, the utilisation of innovative ICT services will be crucial to the sustainability of resource generation for county governments, especially in revenue management. Further, some county governments have put in place ICT-enabled technologies for their health workers to access vast knowledge bases about diseases and healthcare, data storage facilities and automated diagnosis tools. In the agricultural sector, others have utilised ICT to provide farmers with text subscription services, which give tips to farmers; while others have collaborated with the National Government to provide animal insurance against drought and aid for pastoralists. It all depends on county governments' priorities and the needs of the local communities for them to employ ICT towards improving their capacities.

The potential for ICT to be a decisive push factor for devolution is enormous on both economic and social fronts. However, the potential of ICT in the devolution space has not yet been fully exploited because barriers like the digital divide and inadequate network infrastructure still exist, especially in the arid northern counties. The utilisation of ICT infrastructure and services like fibre optics will enable institutions across counties to share data and create management systems and so improve efficiency. Presently, all the 47 counties have ICT roadmaps which are

<sup>21</sup> See *Council of Governors and 6 others v Senate* (2015) eKLR.

linked to the National ICT Master Plan and their County Integrated Development Plans (CIDPs). This growing awareness of the potential of ICT in spurring economic growth and innovation in poverty-reduction strategies compelled the CoG to recommend an increase in county ICT budgets for these purposes since most counties still allocate less than 1% of their budgets to ICT<sup>22</sup>. However, as time progresses, the lessons individual counties learn will increase opportunities for integrating ICT into devolution.

## 4.5 Climate change

About 80% of Kenya is classified as arid and semi-arid land (ASALs), which means that the country is prone to climate change.<sup>23</sup> Of the 47 counties, 23 counties are ASAL counties with nine regarded as arid and 14 as semi-arid.<sup>24</sup> In addition, Kenya is mainly dependent on its natural resource base regarding agriculture and tourism with more than a fourth of the country's GDP reliant on agriculture, which is always the first to be hit by the ravages of climate change. For instance, in 2016, the agricultural, forestry and fishing sectors had reduced growth of 1.5% primarily attributed to unfavourable weather conditions when the country experienced a near failure of short rains.<sup>25</sup>

The majority of Kenyans who directly or indirectly earn their living from agriculture, especially in the rural areas, rely on small-scale, rain-fed farming systems, which are very susceptible to unpredictable weather patterns like inadequate rainfall or flooding. As a result of migrating to more favourable areas, there is often competition for natural resources resulting in conflicts and tensions with the nearby communities, for example in the case of nomadic pastoralists in northern Kenya.<sup>26</sup> In cases where the migration is irregular and unplanned, it has led to uneven distribution of population. Moreover, with the ever-changing dynamics of climate change around the East African region and especially in Kenya, one might surmise that there will be a surge in the number of internal migrants. The poorest of the population in ASAL counties and low-lying lands like coastal counties could

<sup>22</sup> Council of Governors., *The Third Annual Devolution Conference 2016 Report*, 2016, 46.

<sup>23</sup> UNDP, 'Adaptation to Climate Change in Arid and Semi-Arid Lands', [http://www.ke.undp.org/content/kenya/en/home/operations/projects/environment\\_and\\_energy/Adaptation\\_to\\_Climate\\_Change.html](http://www.ke.undp.org/content/kenya/en/home/operations/projects/environment_and_energy/Adaptation_to_Climate_Change.html) on 27 March 2018.

<sup>24</sup> PRISE, *Kenya: Country Assessment Situation Working Paper*, 2016, 11.

<sup>25</sup> Kenya National Bureau of Statistics, *Economic Survey 2017*, 2017.

<sup>26</sup> Schilling J et al., 'On raids and relations: Climate change and pastoral conflict in Northern Kenya' in Bronhorst S and Bob U (eds), *Climate change and conflict: Where to for conflict sensitive climate adaptation in Africa?*, Berlin Wissenschaftsverlag, Berlin, 2014, 241-268.



be forced to move due to the slow onset of climate change impacts like decreasing crop productivity and water shortages. Consequently, there will be more pressure on service delivery in the counties with favourable climatic conditions like Nairobi County and the peripheral counties and also in the counties around the Lake Victoria Basin. A report released by the World Bank confirms the likelihood of an increase of internal climate migration around East Africa and generally around the world.<sup>27</sup> The stagnation of agricultural and livestock productivity due to a loss of ecosystems in the counties together with continuous population growth will increase vulnerability to drought and dry spells. This further complicates poverty alleviation in the ASALs because the provision of food and health services is affected, significantly reducing household incomes.

For some years now, climate change in Kenya has had a negative impact on tourism, which is a key driver of the country's economy. The National Climate Change Action Plan (2010) acknowledges that the 'tourism sector is highly sensitive to climate change.' Since Kenya's tourism industry is mainly dependent on wildlife, the adverse effects of climate change disrupt their habitats and other crucial tourist attractions. Typical examples are the reduction of snow-caps on Mount Kenya, coral bleaching in the Indian Ocean and reduced wildebeest migration in and out of Masai Mara Game Reserve.<sup>28</sup> All this in turn translates to low-incomes for the counties as a result of reduced tourism activities. Counties like Narok and Taita Taveta will be most hard hit. Besides, climate change has the undeniable effect of gradually diminishing rangelands for both the people and wildlife of these counties, which in turn augments human-wildlife conflict.<sup>29</sup>

Concerning the industrial-economic vulnerability of counties as a result of climate change, industries and sectors that are most dependent upon climate-sensitive inputs have experienced and are likely to continue experiencing changes in the reliability, availability and costs of significant inputs like timber or charcoal.<sup>30</sup> If regulatory and institutional frameworks dealing with climate change mitigation policies are actually implemented; like carbon tax and emission targets, they could potentially raise the cost of doing business for some of the industrial

<sup>27</sup> World Bank Group, *Groundswell: Preparing for Internal Climate Migration*, 2018, 79.

<sup>28</sup> Nyamwange M, 'Impact of climate change and tourism in Kenya', 4 *Journal of Geography and Earth* 2, 2016, 6-8.

<sup>29</sup> Kiti L et al., 'Root causes of human-wildlife conflicts and alternative dispute resolution methods: The case of Arbukosokoke forest' 1 *International Academic Journal of Arts and Humanities* 2, 2017.

<sup>30</sup> In February 2018, the Government of Kenya ordered a moratorium on timber harvesting in response to the increased water shortages and dwindling forest cover in the country. As a result the charcoal sector which pumps KES 135 billion annually into the Kenyan economy was crippled.

manufacturing corporations which will lead to relocation from Nairobi and other county headquarters to far-flung areas or even outside the country.

Through heavy precipitation, events like floods and landslides, climate change has had far-reaching economic and social implications. Most fatal is the destruction of personal property, telecommunications and transport infrastructure, which sets back the counties with losses of millions of shillings, thus slowing their rate of growth. Kenya's National Climate Change Action Plan 2013-2017 (NCCAP) reported that some estimates place the cost that Kenya incurs on droughts and flooding at about 2.4% of GDP per year.<sup>31</sup> Inevitably, this means that more money will be spent on reducing the negative side-effects of climate change.

Climate change is increasingly becoming an economic and social factor with its challenges to devolution. Given that the ASAL counties are home to 36% of the Kenyan population, it would be impossible to ignore the development of general well-being in these areas.<sup>32</sup> Climate change affects the equality standards between counties and inevitably the allocation of the Equalisation Fund at the national level to assist the marginalised groups. Going into the second phase of devolution (2017 - 2022) and further, county governments are expected to take up their roles as responding agents to the effects of climate change. This is because, as the Fourth Schedule of the Constitution dictates, county governments should execute and implement specific National Government policies on natural resources and environmental conservation. The National Government has fulfilled its obligations partly by enacting the Climate Change Act of 2016, and establishing the Climate Change Council and Directorate and the National Climate Change Policy. However, more ought to be done to strengthen county governments' human and technical capacities and intervention mechanisms. In the future, it will be central for the county governments to check the effects of climate change by creating sustainable visions for their communities with reference to climate change, developing, implementing, and formulating relevant strategies, policies, and actions.

#### 4.6 Intergovernmental and inter-institutional relations

The Constitution introduced a system of two levels of government and provides a clear framework for the management of intergovernmental relations

<sup>31</sup> Ministry of Environment and Natural Resources GOK, *National Climate Change Action Plan (2013-2017)*, 2013, 8.

<sup>32</sup> Government of Kenya, *Vision 2030 Development Strategy for Northern Kenya and other Arid Lands*, 2011, 9.

including conflict resolution. As stipulated in Article 6(2): ‘The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation’.<sup>33</sup> This means that Kenya has a system of cooperative devolved governance, which is similar to South Africa. To get a better understanding of this predetermined trend it is important to discuss in detail the components of distinctness and interdependence.

‘Distinct’ expresses the autonomy that every level of Government possesses. Therefore, the counties have their own areas of autonomy with their own political structures and institutions elected by the people. Furthermore, distinctness guarantees that in those areas where county governments have the final say they are equal to the National Government and not its agents. Such a restriction to interference in county affairs represents a strong sign of autonomy. Although the two levels of Government are distinct, they are also interdependent at the same time since several functions are concurrent and some of them are shared where the National Government formulates the policies, and the counties implement them. Additionally, governments from both levels are supposed to accept certain obligations, for instance the obligation to consult, to cooperate or to support and assist.<sup>34</sup>

An important forum with regard to intergovernmental relations is the National and County Government Co-ordinating Summit comprising the President as chair and all 47 governors.<sup>35</sup> The Summit meets twice a year and should foster coordination, cooperation and consultation, among other functions. The Intergovernmental Relations Technical Committee provides the organisational and support structure. In addition, there is the Intergovernmental Budget and Economic Council chaired by the Deputy President and comprising certain members of the National Government and members of the CECs.<sup>36</sup>

However, a closer look at devolution shows the gap between constitutional theory and political reality. Notwithstanding that the Constitution clearly determines a cooperative approach, the relationship of the two levels of Government has been difficult from the outset and is often characterised by competition, blame-shifting and dispute, resulting in duplication of tasks and political stalemate. One reason is that with their direct election, governors became confident actors who have their

<sup>33</sup> *Constitution of Kenya* (2010).

<sup>34</sup> Kangu JM, *Constitutional law of Kenya on devolution*, Strathmore University Press, Nairobi, 2015, 311-319.

<sup>35</sup> <http://www.igrtc.go.ke/> on 10 December 2018.

<sup>36</sup> <http://www.igrtc.go.ke/> on 10 December 2018.

own agenda and are well aware of their political weight. Fighting the national level helps them to sharpen their profile, and mobilise supporters. The CoG, established by the IGRA, is a strong advocate of county interests and does not shy away from public confrontation with the National Government. In this sense, the CoG can be regarded as the real protector of the counties instead of the Senate.

Secondly, in certain areas counties and the National Government have conflicting interests. It is natural that these two spheres do not always share the same view and this creates tensions. The issue of devolved funds and disbursement of funds, especially the annual Revenue Division Bill, is a regular bone of contention between the different actors. The decisive question is how they deal with these issues.

Thirdly, experience shows that the National Government and its institutions are reluctant to accept the full transfer of devolved functions to the county level according to the Fourth Schedule of the Constitution.<sup>37</sup> This not only undermines devolution but also leads to tensions and to duplication as well as inefficient use of public funds.

Chart 3: Actors in intergovernmental relations



Besides intergovernmental relations, inter-institutional relations at the national level also have an impact on devolution. The Constitution makes the Senate and its 67 members<sup>38</sup> the primary defenders and advocates of county interests by considering, debating and approving bills that affect counties. One of

<sup>37</sup> Intergovernmental Relations Technical Committee (IGRTC), *Emerging Issues on Transfer of Functions to National and County Governments*, 2017, 42.

<sup>38</sup> Every county elects one senator (47). The constitution also reserves 16 seats for women nominated by the parties according to their results, two seats for youth and two seats for persons with disabilities.

the most important responsibilities of the Senate is the determination of the funds shared between National Government and counties as well as the oversight of the shared revenues.<sup>39</sup> For matters that affect the counties the total possible votes are 47 meaning that only county senators have a vote (not the special interest senators); on other matters (which do not affect counties) every senator has a vote (total possible vote 67).<sup>40</sup> The relation between the Senate and the National Assembly has proven conflictual when it comes to certain bills. However, the tensions do not only arise due to diverging positions on specific matters but also from a struggle for influence. Initially planned as a strong upper house comparable to the Senate in the United States, the Senate's power was limited during the drafting process. As a consequence, both chambers find themselves in political power struggles in which one accuses the other of either overstepping its competences or not acknowledging its role in the legislative process.<sup>41</sup> One example is the periodic dispute on devolved funds regulated in the Division of Revenue Bill.

There is a broad spectrum of actors and institutions dealing with devolution and county affairs. Although interrelated and supposedly cooperative, the relationship between them is not free of friction since resources, influence, and interests are at stake. The development of these relations is a predetermined trend and decisive for the future of devolution because it is within this framework that decisions with high impact are made (funds, policies, etc.).

#### 4.7 Economic development of counties

Kenya is a strong economy in Sub-Sahara Africa with an annual Gross Domestic Product (GDP) of USD 70.5 billion (2016) and an average economic growth of 5.5% between the years 2011 and 2016. However, due to the political situation before and after the elections in 2017 economic growth is expected to drop to under 5%. In 2016 the GDP per capita reached USD 1,455 making Kenya a lower middle-income country according to the World Bank.<sup>42</sup>

The new mapping of the country with its 47 counties created new economic units and spaces, which differ with regard to their economic strength. Generally speaking, counties in central Kenya (Kajiado, Kiambu, Nairobi, Nyeri), some parts

<sup>39</sup> Mbondenyi M and Ambani J, *The new constitutional law of Kenya: Principles, government and human rights*, LawAfrica, Nairobi, 2013, 114-115.

<sup>40</sup> Kangu J M, *Constitutional law of Kenya on devolution*, 355.

<sup>41</sup> *Speaker of the Senate & another v Attorney-General & 4 others* (2013) eKLR.

<sup>42</sup> 'Kenya' *World Bank*, <https://data.worldbank.org/country/kenya> on 5 May 2018.

of Rift Valley (Nakuru) and the coast (Kwale, Kilifi) have a higher GDP or GDP per capita than counties in North Eastern or Northern Rift Valley.<sup>43</sup> Most of the western counties and those around Lake Victoria also have a weak economic performance except Kisumu.<sup>44</sup> The gap between the different areas is partly a heritage of the old centralised system, which favoured only specific regions while others remained excluded and marginalised. Therefore, industrial and manufacturing activities, which contribute to around one quarter of GDP, for example, have been concentrated in urban areas (e.g. Kisumu, Mombasa, Nairobi, Nakuru) whereas rural counties are limited to agriculture without the capacities of value addition processes.

Kenya is rich in agricultural and natural resources, which play a significant role in the economic development of counties. Tea, coffee, meat, fruits, wood, minerals, fish, water, oil, as well as the natural treasures which attract a significant number of tourists every year, offer opportunities for building local economies. However, many of them lack the ability of value addition and, consequently, do not utilise the full potential of their natural resources. County governments have realised this shortcoming and have started to build up processes to move up the value chain. Manufactured products deliver a higher return for counties and strengthen their economic basis.

Trade, exchange and cooperation between counties represents a promising way to expand the markets for local products and pursue common strategies for investment and development. Steps to create regional, trans-county economic blocs have been taken in recent times. Examples are the Lake Region Economic Bloc (Bomet, Bungoma, Busia, Homa Bay, Kakamega, Kericho, Kisii, Kisumu, Migori, Nandi, Nyamira, Siaya, Trans Nzoia, Vihiga), the South Eastern Economic Bloc (Machakos, Makueni, Kitui) and the Mount Kenya and Aberdare Economic Bloc (Embu, Kiambu, Kirinyaga, Laikipia, Meru, Murang'a, Nyandarua, Nyeri, Tharaka-Nithi). Although such initiatives are still at an early stage, they could gain more momentum and push economic cooperation without creating new and costly political structures. Besides approaches to foster cooperation at a regional level, counties and local businesses have started to look beyond the country's borders to identify markets for their products at a global scale. Entering foreign markets is not easy, but it shows that local businesses in the counties - with the help of constantly developing online opportunities - are not limited and solely bound to the

<sup>43</sup> Bundervoet T, Maiyo L and Sanghi A, *Bright lights, big cities: Measuring national and subnational economic growth in Africa from outer space, with an application to Kenya and Rwanda*, The World Bank, Policy Research Working Paper, 2015, 18-22.

<sup>44</sup> Bundervoet T, Maiyo L and Sanghi A, *Bright lights, big cities*, 18-21.

national market with their products or services. In particular for young Kenyans in the counties, this will produce new opportunities if there are the right conditions.

Chart 4: Factors for economic development in the counties



Nevertheless, using the potential and achieving positive economic development in the counties requires from them and from the National Government the implementation of policies, programmes and regulations to provide a supportive environment. Areas that play a prominent role are, for example:

- Education

Kenya has an adult literacy rate of 79% and a youth literacy rate of 87%.<sup>45</sup> There has been a significant improvement with regard to education in general, for example, nearly 58% of Kenyans above 24 have completed primary education in comparison to 44.2% in 2005. However, only 14.4% of adults who are older than 25 years have completed secondary education. In other countries with similar poverty rates much higher rates can be found.<sup>46</sup> A solid education of the youth up to secondary level is essential. At the same time, there is a need for universities and an effective system of vocational training ensuring skilled and qualified employees and workers who possess the necessary know-how to transform potential into development.

<sup>45</sup> 'Kenya' *UNESCO*, <https://en.unesco.org/countries/kenya> on 6 May 2018.

<sup>46</sup> Bundervoet T, Maiyo L and Sanghi A, *Bright lights, big cities*, 25.

- Entrepreneurship

In addition to big companies and firms, micro, small and medium-sized businesses have a lot of potential for citizens in the counties, in particular the young population. In the best case, they create jobs for others and contribute to better economic development. Education, awareness building for the idea of entrepreneurship and training on entrepreneurship skills (business plan, funding, management, etc.) and sources for funding new businesses are critical issues in this respect.

- Infrastructure

Devolution helped to lay the ground for new and improved infrastructure in the counties, which constitutes a vital component of the local economies. Nevertheless, infrastructure should be looked at from a broader perspective not exclusively roads, machines or buildings but also digital infrastructure, financial infrastructure (for funding of new businesses) or education and training.

- Rule of law and corruption

The high level of corruption and theft of public money in Kenya represents a significant impediment for national and local economic development since it does not only hinder progress but even worsens economic conditions. If politics does not take determined steps to change the status quo, economic empowerment of the counties will fail radically, and together with it, the socio-economic situation of the people will degenerate. At the same time, businesses need planning security especially concerning legal questions. Consequently, the rule of law and the application of existing laws are a considerable factor.

Positive economic development at the local level has multiple, positive effects in other areas. By creating more and better employment, it prevents the migration of rural population to the urban centres and improves the situation for social inclusiveness in the country in general. Furthermore, county authorities will benefit from positive economic performance because it reduces the financial burden on their budget for social welfare, reduces unemployment rates, and increases revenue generation.

Nevertheless, the economic development of counties is not detached from the national economy. Despite stable growth rates in the last few years, there are several external risks for the Kenyan economy. Like many other African countries, Kenya has a big public debt, which could become a severe issue in the forthcoming



years. The massive borrowing of money has caused a significant increase in public debt. Other risks are the development of interest rates in the United States and the policy of the Federal Reserve, the global changes in commodity prices, the security situation in the country, and climate-related threats (drought, floods, water scarcity).

#### 4.8 Perceptions of improved service delivery and better living standards

Besides other objectives, the improvement of service delivery and a better life for Kenyans are among the priorities of the Constitution. The way to realise this objective is the devolved governance system. The reason why service delivery to the people plays such an essential role is a heritage of the centralised state which benefited a few selected regions but left other areas marginalised, leading to socio-economic and ethnic exclusion. Countering this long-lasting trend was necessary. Devolution should improve services by bringing them closer to the people and satisfying their specific needs.

The Fourth Schedule of the Constitution specifies the functions for which the counties bear responsibility, for instance agriculture, county health services, some water and sanitation services, cultural activities, county transport, pre-primary education and planning and development. While agriculture and health services are devolved to a large extent, some areas belong to the concurrent functions that are shared between the two levels of Government.<sup>47</sup> Therefore, the Fourth Schedule identifies the relevant areas if one wants to measure service delivery in the counties. Most of them cover the essential needs making a significant difference in the daily life of Kenyans, like access to water, education, healthcare, food, shelter or infrastructure. In 2017 more than two-thirds of Kenyans agreed that there was more development in their areas because of devolution than when there was no devolution.

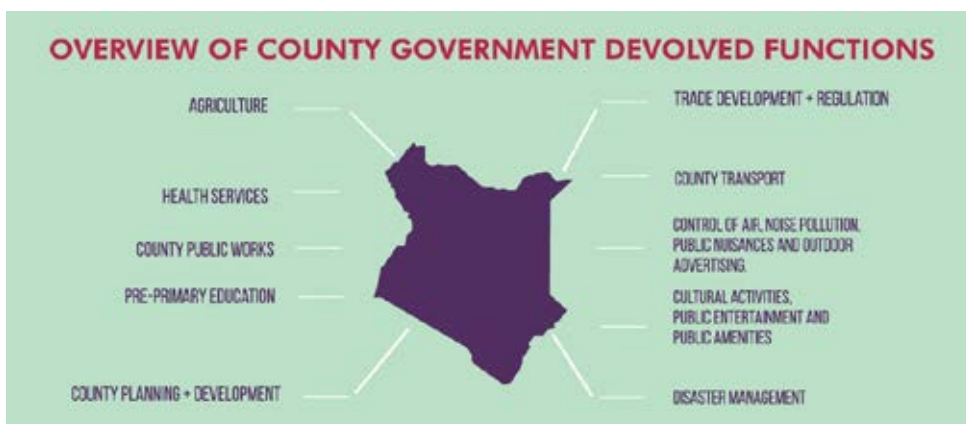
Nevertheless, there is constant discontent with regard to health care. For example, in 2017 nearly all important indicators (cleanliness, availability of staff, waiting times) were rated worse than in 2016.<sup>48</sup> Consequently, citizens are divided on the question of whether county governments should be in charge of health or

<sup>47</sup> Kangu JM, *Constitutional law of Kenya on devolution*, 192.

<sup>48</sup> Twaweza East Africa, *Striking an Unhealthy Note: Citizen's views on Health and Health Services*, Brief No 18, November 2017, 4.

whether it should be re-centralised: 44% in 2018<sup>49</sup> and 46% in 2017<sup>50</sup> approve such a re-transfer of responsibility. Concerning water services, nearly six out of ten Kenyans are not satisfied or not satisfied at all with their county government.<sup>51</sup> Although service delivery is available it is often the quality that is criticised.

Chart 5: Overview of County Government Devolved Functions



Service delivery and, as a consequence, the (perceived) improvement of citizens' lives is undoubtedly the most inter-related of the predetermined trends, in particular concerning funding and staff capacities. They build the basis for counties to deliver adequate and high-quality services.

The importance and impact of a (perceived) improvement in service delivery and living standards for devolution and its widespread support cannot be underestimated because progress in devolved functions is one of the principal benchmarking tools for Kenyans. In the end, it is the simple question 'Did my life improve with devolution?' that citizens will ask themselves when they have to decide whether they support the devolved governance system or not.

<sup>49</sup> 'Survey shows majority of Kenyans support devolution' *Daily Nation*, 6 April 2018 <https://www.nation.co.ke/news/Majority-of-Kenyans-support-devolution/1056-4375484-gob9rs/index.html> on 14 April 2018.

<sup>50</sup> Twaweza East Africa, *Is Government Closer to People? Kenyan Views on Devolution*, Brief No 17, September 2017, 10.

<sup>51</sup> Twaweza East Africa, *Half Empty or Half Full? Water Sanitation and Hygiene in Kenya*, Brief No 13, March 2017, 9.

## 4.9 Weak oversight at county level

The Constitution gives counties political autonomy in a number of devolved functions. This political autonomy is reflected in their institutional setup, which provides a county executive with a directly elected governor and a county assembly as the legislative branch. Consequently, there are strong institutional systems concerning political oversight as well as checks and balances. In particular the county assemblies have the primary responsibility to exercise oversight over the county executive; however, many of them have not exercised this power in as strong a way as they could and have shown a lack of oversight especially in relation to the implementation of laws. The reasons are varied, such as the limited capacities and skills among MCAs or assembly staff. Furthermore, MCAs often focus on other issues such as the implementation of projects; since they want to deliver election promises or consolidate their supporter bases among voters. If they use or threaten to use their oversight powers, e.g. the possibility of impeaching the governor, they often use it as a leverage to force the governor to release financial resources for their projects. Such political trades-offs have nothing to do with oversight in its core sense.

Weak oversight at county level represents one predetermined trend with a middle-ranking potential impact but a low uncertainty. One reason is the fact that during the last elections county assemblies witnessed a massive turnover of members. Around 80% of MCAs in office between 2013 and 2017 were not re-elected in 2017.<sup>52</sup> Consequently, a lot of expertise and knowledge was lost, and it took the new members time to find their role. Moreover, there can be justified doubt that the new MCAs will change their behaviour significantly since they also have to keep their election promises. The framework and the logic in which they operate remains the same.

Besides State institutions, it is CSOs and local media which play a crucial oversight role at the county level. Both are often not able to exercise their mandate as watchdogs of political and public actors. Local CSOs, for example, lack the necessary resources, coordination, staff, funding, infrastructure, and efficient management. Better coordination and consultation, by creating local platforms like Citizen Oversight Forums, would foster synergies and amplify peoples' voices at county levels. A high number of CSOs rely on funding by foreign development partners and are not self-sustaining. Local journalism faces similar challenges since

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<sup>52</sup> 'Close to 80% of Kakamega MCAs are sent packing' *Star*, 10 August 2017.

many of its representatives lack adequate and comprehensive education in their field. Furthermore, the entanglement of political leaders in the ownership of national and local media prevents critical and investigative journalism. An unbundling seems to be necessary to avoid self-censorship or pressure on journalists.

Improved ICT and ICT-based applications can boost oversight on the part of citizens, CSOs and media at the county level. Even though ICT and ICT-based platforms can make a useful and remarkable contribution towards a better scrutiny of public action, they are only technological infrastructure. Infrastructure alone does not have any effect because someone has to produce the content. Social media, for instance, do not substitute for professional journalism since they serve as pure distribution platforms and sometimes the information circulated does not undergo proper screening, resulting in false news or propaganda (e.g. hate speech) in some cases.

#### 4.10 Tribalism and ethnicity

Kenya is a country with diverse ethnic groups and languages. The three largest ethnic groups are the Kikuyu with 22% of the total population followed by the Luhya with 14%, Luo with 13% and Kalenjin with 12%. Other ethnic groups are the Kamba (11%), Kisii (6%), and Meru (6%).<sup>53</sup>

However, this diversity has been overshadowed by ethnic tensions and tribalism. It is impossible to understand Kenyan politics without considering tribalism because this strong affiliation to the respective ethnic group made its way into the DNA of the political system. Parties and movements are not organised along ideological worldviews or political programmes but rather along ethnic lines and primarily serve as mobilisation platforms for the leader of one ethnic community.<sup>54</sup> As a consequence, certain tribes and regions feel unfairly treated concerning socio-economic development as well as political participation. The most obvious and tragic manifestation of these circumstances was the post-election violence in 2007 and 2008 which left more than 1200 people killed and more than 600 000 internally displaced. These events have shaped Kenyan society long after. As a consequence, the political elite initiated the promulgation of a new constitution that was approved by more than two-thirds of the citizens in 2010. It was a total break with the constitutional past and introduced a devolved governance system.

<sup>53</sup> 'The World Factbook' *Central Intelligence Agency*, <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html> on 5 April 2018.

<sup>54</sup> See, generally, Katiba Institute, *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives*, 2013.

Together with the devolved system, 47 counties were established instead of the former provinces. A closer look reveals that a vast majority of the county boundaries coincide with ethnic boundaries and, as a consequence, the Kenyan counties have one dominant ethnicity from which many also derive their name. On the one hand, this ensures that many communities have a ‘home county’, which may help combat ethnic marginalisation since the counties receive funds to foster local development.<sup>55</sup> On the other hand, such ethnic-oriented demarcation bears the risk of excluding minorities within the counties as well as creating an ethnic-based ‘county nationalism’. One indicator is the representation of different ethnicities in the county administrations. Several reports indicated the continued trend whereby a high number of counties (more than 60%) recruited most of their staff from the numerically dominant group although they are supposed by law to fill 30% of new positions with candidates from the non-dominant communities.

Despite the dark phase of 2007/08, tribalism still constitutes one of the most powerful and stable features of Kenya in general and its politics in particular. Hence, tribalism is a predetermined trend with an enormous impact on devolution. However, one of the most decisive questions in the forthcoming years will be how the youth will deal with this topic. 64% of young Kenyans either agree or strongly agree with the statement that their principal source of identity is their ethnic group.<sup>56</sup> This is particularly strong in Eastern Upper sub-region and Nyanza South.<sup>57</sup> This is a strong indicator that ethnicity still plays a crucial role but there are other factors to which young Kenyans refer with regard to identity: 89% regard their country as a principal source of identity, 87% their family and 69% their religion.<sup>58</sup>

Consequently, ethnicity is one powerful factor among several. Some argue that for the younger generation the ethnic belonging is becoming less relevant.<sup>59</sup> Such a development could be a real game changer for Kenya and for devolution.

#### 4.11 Unrealistic expectations

Kenya had a highly centralised political and administrative system, which left many regions marginalised since there was no political need or incentive to bring development or public services to those areas. As a result, many Kenyans

<sup>55</sup> Bosire C, *County Governance and pluralism in Kenya*, 2017, 6-8.

<sup>56</sup> British Council, *Next Generation Kenya: Listening to the Voices of Young People*, 2018, 21.

<sup>57</sup> British Council, *Next Generation Kenya: Listening to the Voices of Young People*, 2018, 21.

<sup>58</sup> British Council, *Next Generation Kenya: Listening to the Voices of Young People*, 2018, 21.

<sup>59</sup> Kenya Human Rights Commission (KHRC), *Ethnicity and Politicisation in Kenya*, 2018, 9.

had no access to proper services and experienced social, economic as well as political exclusion. Therefore, the shift from this centralised system to a devolved governance system created huge expectations among citizens because they saw not only the end of centralised decision-making but rather the end of exclusion and marginalisation.

According to a survey, in 2012 44% expected that ‘citizens will get better public services’ and 40% were convinced that the new system would provide better opportunities for citizens to participate.<sup>60</sup> Four years after the promulgation of the new Constitution and one year after the first county elections, two-thirds of the Kenyan population described themselves as supportive of devolution.<sup>61</sup> Surveys clearly show that this support has grown impressively in the last couple of years: In 2016 more than 79% of Kenyans altogether supported devolution and its county government system whereas only 20% stated that they do not support it.<sup>62</sup> A report by Twaweza East Africa in 2017 came to the same conclusion: 88% of Kenyans said that they either actively support or somewhat support devolution (11% did not support it). The backing of devolution is continuously strong in all demographic groups (female/male, rural/urban, different ages etc.).<sup>63</sup> A recent survey constitutes an unprecedented peak in widespread support for devolution. 84% are in favour of the devolved governance system and the counties. The same trend is evident in all regions and among supporters from different political camps.<sup>64</sup>

Kenyans usually refer to the objects and principles of devolution stated in the Constitution as ‘the promise of devolution’.<sup>65</sup> The use of the term ‘promise’ best illustrates and summarises the enormous expectations of people towards the new system.

However, many citizens had and still have unrealistic expectations concerning devolution. Such a fundamental transformation of a state structure takes time and also requires patience from citizens. A change overnight is not possible. During his speech on the occasion of the promulgation of the Constitution, former President Mwai Kibaki already prepared the citizens for a long walk ahead:

<sup>60</sup> Kenya School of Government, *Building Public Participation in Kenya's Devolved Government*, Working Paper 1, 2015, 5.

<sup>61</sup> ‘More than two-thirds of Kenyans support devolution-survey’ *Daily Nation*, 2014 <https://www.nation.co.ke/news/politics/1064-2449752-yvnei/index.html>

<sup>62</sup> Ipsos, *1st Quarter Survey*, SPEC Barometer, 2016, 25.

<sup>63</sup> Twaweza East Africa, *Is Government Closer to People? Kenyan Views on Devolution*, Brief No 17, September 2017, 2.

<sup>64</sup> ‘84% of Kenyans support devolution – Ipsos’ *The Star*, 2018 [https://www.the-star.co.ke/news/2018/04/06/84-of-kenyans-support-devolution-ipsos\\_c1741537](https://www.the-star.co.ke/news/2018/04/06/84-of-kenyans-support-devolution-ipsos_c1741537) on 6 April 2018.

<sup>65</sup> See Article 174 and 175, *Constitution of Kenya* (2010).

This Constitution will fundamentally transform our nation politically, economically and socially... Some of the changes will be immediate and we must be ready to support them. Other changes will take time. We must remain resilient and focused as we work towards their fulfillment.<sup>66</sup>

This also applies to devolution. County governments neither have the financial nor the personal resources to fulfil the exaggerated hopes.

There is little doubt that unrealistic expectations are likely to remain a certainty in the forthcoming years, with a high impact on devolution. The relevant question will be how those expectations will develop. Hence, on the one hand, such high hopes can lead to high popular support and have a positive effect on the development of devolution. On the other hand, unrealistic expectations can be a potential starting-point for disappointed hopes, which can quickly turn into a negative attitude towards devolution. Since this particular trend has a very high impact, it is necessary for leaders to manage expectations, to deliver results and closely monitor in which direction this factor will develop.

#### 4.12 Political and legal institutions

Another predetermined factor concerning devolution is the political and legal institutions in Kenya. In this context, it is necessary not only to refer to formal institutions (e.g. National Assembly, Senate, National Executive, Judiciary) but to work with a broader definition that also encompasses informal institutions such as social norms, the Constitution, separation of powers, political culture or traditional practices. In particular, in Kenya, these factors are essential for a comprehensive view because formal (institutional) arrangements exist; however, it is often the (informal) social norms and practices which influence politics.<sup>67</sup> However, it is not exclusively political and legal institutions that influence the development of a state and play an important role with regard to stability, economic prosperity and democracy. Another factor is the question of to what degree are they inclusive or extractive and to what extent do they provide an open, innovative and free environment, or if, instead, they primarily limit, restrict and control.<sup>68</sup>

<sup>66</sup> 'Speech of President Mwai Kibaki on 27<sup>th</sup> August 2010' *Daily Nation*, 2010 <https://www.nation.co.ke/blob/view/-/998162/data/189174/-/1m232f/-/kibaki+speech.pdf?format=xhtml> on 2 April 2018.

<sup>67</sup> Kerrets-Makau M, *The Senate of Kenya and its operation within the contemporary political economy*, Working Paper, West Minister Foundation, 2016, 17-22.

<sup>68</sup> Acemoglu D and Robinson J, *Why nations fail: The origins of power, prosperity and poverty*, Profile Books Limited, London, 2013, 73-83.

Historically, Kenya had a highly centralised and Executive-focused political system with a minor role played by the legislative and legal branch. The introduction of the multi-party system in the 1990s, as well as the promulgation of the new Constitution, boosted a shift towards a formal setup providing a more prominent role for Parliament through the National Assembly and the Senate. Additionally, Kenyans witnessed a strengthening of the Judiciary that has been characterised so far by remarkable independence in comparison to other African countries.<sup>69</sup>

The development of formal institutions at the national and the county level concerning stability, legitimacy and proper functioning can create a stable environment with positive social, economic and political effects. Concerning devolution, this means, for example, an influential Senate, which protects the interests of the counties, an independent judiciary which ensures compliance with the constitutional provisions dealing with devolution and responsible county authorities catering for effective service delivery.

Besides the formal institutions, a comprehensive picture integrates the informal institutions or silent features as well. For a long time, several patterns and norms have influenced Kenyan politics and its culture. Notwithstanding the formal transformation of its governance system they remained stable and unchanged and consequently influence devolution:

- Economic and political interests: One of these informal institutions is the connection between political office and personal economic advantages. Many decision-makers regard the gain of a public position as a way to improve their economic situation. This often leads to corruption and misuse of public funds, for example, via procurement at the county level.
- Ethnicity and tribalism: Kenyan politics is organised along tribal lines. Generally, political parties and movements do not have a programme based on ideology but rather they serve as a platform for politicians to mobilise their ethnic community. This feature has characterised the development of Kenya since its independence in 1963 and escalated in the post-election violence of 2007/2008. Although political leaders tried to overcome this ethnic divide through the new Constitution and a devolved State structure, the issue of ethnicity still plays a vital role as an informal institution.

<sup>69</sup> See [https://tcdata360.worldbank.org/indicators/h5ebaeb47?country=KEN&indicator=670&countries=CMR,MRT,LSO,CIV,GHA,ZMB,SEN,TZA,STP,TCD,ZWE,BEN,SSD,COM,SDN,MLI,UGA,RWA,BFA,SLE,ETH,MOZ,GNB,TGO,ERI&viz=line\\_chart&years=2007,2017&compareBy=region](https://tcdata360.worldbank.org/indicators/h5ebaeb47?country=KEN&indicator=670&countries=CMR,MRT,LSO,CIV,GHA,ZMB,SEN,TZA,STP,TCD,ZWE,BEN,SSD,COM,SDN,MLI,UGA,RWA,BFA,SLE,ETH,MOZ,GNB,TGO,ERI&viz=line_chart&years=2007,2017&compareBy=region) on 12 December 2018.



- Focus on leader and supporters' expectations: At the national as well as the county level many Kenyans still focus on 'the' leader or 'the' one powerful man. This part of the political culture is best illustrated by the enormous attention that media and the public attached to the presidential election and the presidency in general. At the county level it is the governor who fulfils this role, and in the wards it is the MCA. Moreover, citizens expect benefits from their leader in exchange for their support. The focus often lies more on the individual and personal benefits than on the greater good or collective progress. This fosters dependencies and weakens cohesion.
- Family business: Since independence the country was primarily run by a few families constituting the political and economic elite, like the Moi's, the Kenyatta's or the Odinga's or other less prominent families who find themselves in leading positions in parliament or counties. These dynasties build informal institutions on their own which are not reflected in any official document.
- Deeply rooted, formal and informal institutions shape devolution and development; many having existed for a long time (with no change likely within subsequent years). In a nutshell, political and legal institutions matter for the future of devolution.

#### 4.13 Demographics

Analyses of recent population reports and policy documents by the World Bank, National Council for Population and Development (NCPD), Kenya National Bureau of Statistics (KNBS) and other sources show that Kenya, like other African countries, has witnessed a massive population growth over the last decades. According to the World Bank, the Kenyan population exceeded 48 million in 2016.<sup>70</sup> In 2010 the proportion of children aged zero to fourteen years constituted 43% while the youth aged 15 - 34 years constituted 35%. The working age population aged 15 - 64 years made up 53% and the elderly aged 65 and above years constituted almost 4%.<sup>71</sup> The resulting youth bulge will remain a phenomenon of the Kenyan population in the foreseeable future. The national total dependency ratio is 0.873.

<sup>70</sup> 'Kenya' *World Bank*, <https://data.worldbank.org/country/kenya> on 11 May 2018.

<sup>71</sup> National Council for Population and Development, *Population & Food Security in Kenya*, Policy Brief No.58 of 2017, 2017, 2.

The rural areas have a higher dependency ratio (1.008) than urban areas (0.63). 32 have dependency ratios above the national average.<sup>72</sup>

The picture painted by demographical changes in Kenya is quite rigid given the rapidly growing population, an incessant youth bulge in the face of high unemployment rates and high dependency ratios. If unchecked, the cumulative outcome is a diminishing quality of life as a result of complicating both the national and county governments' ability to fulfil the needs of citizens. Such high densities have increased pressure on land and other natural resources. The consequences have been evident in the extensive loss of forest cover, land degradation, dwindling water resources and environmental pollution. It is well-known that increasing population densities often drive up the demand for food, which typically results in increased and intense use of arable land and water. When the problem cannot be solved, it ends up as a food crisis, which quickly culminates in drought aggravated by harsh climatic conditions, as was the case for the droughts between 2008 and 2011.

High dependency ratios within counties with respect to the young and elderly dependents has increased pressure on the incomes generated by households, leading to reduced savings and fewer resources for investments. These households are forced to dig deeper into their pockets to feed and maintain the significant number of dependents.<sup>73</sup> Consequently, it becomes difficult to raise the living standards because a large chunk of their income is spent on basic needs. For the counties, especially those with low-income inequalities and high poverty rates like the ASALs counties, this slows economic growth and increases structural poverty.

A further observation is the on-going trend of young people moving to the urban centres in search of employment and education opportunities. Popular targets for relocation are big cities such as Nairobi or Mombasa as well as Nakuru. For example, 41% of young Kenyans who intended to move locally named Nairobi, 17% Mombasa and 7% Nakuru.<sup>74</sup> These complex urbanisation dynamics means that the basic social services and infrastructures in these areas are further stretched, and service delivery becomes a challenge for county governments. Coupled with lack of employment, this overcrowding often leads to the springing-up of informal settlements in the form of slums, characterised by a lack of basic needs and infrastructure.

<sup>72</sup> KNBS and SID, *Exploring Kenya's Inequality: Pulling Apart or Pooling Together*, 2013, 9.

<sup>73</sup> KNBS and SID, *Exploring Kenya's Inequality: Pulling Apart or Pooling Together*, 2013, 9.

<sup>74</sup> British Council, *Next Generation Kenya: Listening to the Voices of Young People*, 2018, 22.

Another important implication of demographic change in Kenya – more so regarding the effect for counties – is on the budgetary implications for both levels of Government. As the population of counties increases, it translates to an additional need for State and county expenditure. This, in turn, means that counties require more resources to cater for their citizens' needs on a broader scale including infrastructural projects and higher costs to implement national policies. This continual rise of the national budget calls for more government involvement and coordination in the provision of social amenities such as education, health, recreational facilities, social security etc since most social services are capital intensive and require assets for long-term operations. For the county governments, this implies that they will be required to invest more in the social sectors. County governments through their CIDP ought to take into consideration demographic change and delivery of social services since finding measures to balance provision and extension of these services vis-a-vis economic investments could determine how well a county performs on all fronts of development.

With a median age of 19 years, Kenya is a very youthful country.<sup>75</sup> Therefore, the resulting massive youth bulge may result in a disaster or a blessing in the form of a demographic dividend. The national youth bulge is also relevant to the counties, which are challenged in developing and implementing strategies to use the potential of their young population. On the flip side, those counties that miss out on gainfully employing and providing avenues for satisfactory incomes for their youth will turn this youth bulge into a demographic curse because frustrated youth are likely to become potential sources of social and political instability.<sup>76</sup> There is a growing concern today all over the world that an expanding youthful population can pose serious challenges for a country by exacerbating social unrest, especially if unemployment rates are quite high and the youthful population is not engaged in productive labour. A report released by the NCIC in March 2018 highlighted that close to 33% of the members of organised criminal gangs in Kenya is made up of youth aged 18 to 35 while children aged 12 to 17 comprise 20%. This has resulted in trouble spot counties such as Kisumu, Mombasa, and Nairobi, which pose security challenges that can have adverse effects concerning investment and job creation.

Evidence of the continuing linkage between demographic changes and devolution is very apparent, especially in the field of social welfare and economic development. The variance of population within counties calls for varying

<sup>75</sup> Awiti A and Scott B, *The Kenya Youth Service Report*, 2016, 1.

<sup>76</sup> National Council for Population and Development, *Youth Bulge in Kenya: A Blessing or a Curse*, Policy Brief No. 56 of 2017, 2011, 1.

considerations and complex responses. This is because changes in the size and composition of households relate directly to the movement into and out of poverty. Different stages of the lifecycle require different needs, for example, the young need intensive investments in health and education while the prime-age adults require the supply of labour and savings; and the aged require health care and retirement income. All of this demographic change influences a county government's financial situation and its ability to spur economic growth by affecting its potential revenue base as well as its necessary expenditure. For some counties, large populations may mean more taxes, thus sharing costs in supplying crucial social services, while to some it might mean more expenditure concerning the extension of social services to larger groups of people. At the moment the counties' abilities to collect revenues are limited. For some county governments, declining population may translate into economically sustainable adjustments regarding their capacities to provide services as well as investment projects.

#### 4.14 Role of National Government

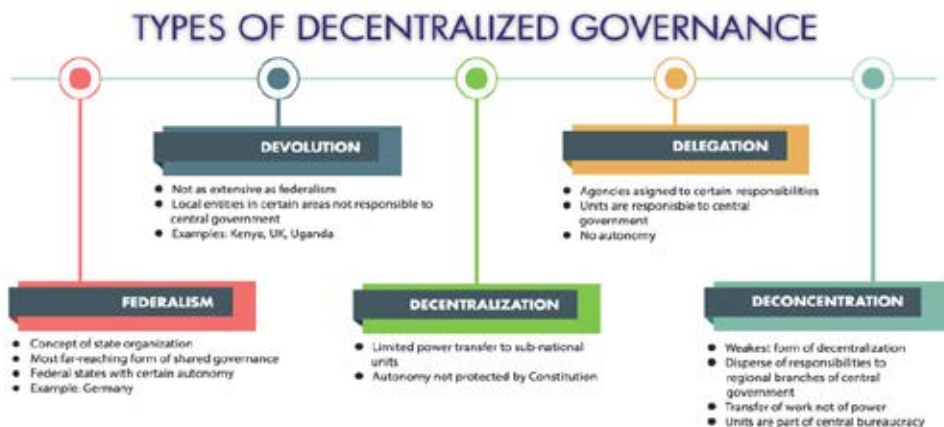
Although the role and influence of the national level varies significantly in the different concepts of multi-level governance, it has its part in all of them. In general one can distinguish between the following categories:

- **Federalism:** A federal system is a concept of state organisation mostly enshrined in the Constitution and represents the most far-reaching form of shared governance in a state. Several individual states possess a certain degree of (political, fiscal, administrative) autonomy but are part of a unified federal state. Some of them may have their own Constitution. Power is distributed between two or more levels of government with some policies exclusively in the power of the individual states. An example is the Federal Republic of Germany.
- **Devolution:** This form of multi-level governance is not as extensive as federalism. The concrete meaning varies from country to country since devolution has different characteristics in the United Kingdom, in Uganda or in Kenya.<sup>77</sup> One notable feature is that local entities can make decisions independent from and not responsible to the national government within their legally defined territory. Specific functions are entirely shifted to lower levels.

<sup>77</sup> Kangu, *Constitutional law of Kenya on devolution*, 9-10.

- **Decentralisation:** This governance system is characterised by the transfer of powers to sub-national units, which enjoy a limited degree of autonomy. These units are not as autonomous as in devolution and are not protected by the Constitution.<sup>78</sup>
- **Delegation:** In such a decentralised system local governments or agencies are assigned specific responsibilities or functions, which they carry out on behalf of the central level. These organisations are not part of the central bureaucracy. However, they are responsible to the central government and consequently have no autonomy.
- **Deconcentration:** This is the weakest form of decentralisation since the central government only disperses responsibility for a policy to its regional branch offices. It is not a transfer of power but a transfer of workload to lower level units, which are embedded in the hierarchy of central government bureaucracy. There is a complete absence of autonomy.<sup>79</sup>

Chart 6: Types of decentralised governance



Kenya falls into the category of devolution. Although the Constitution devolves specific functions to the county level, others remain with the National Government, such as foreign policy, immigration, monetary policy and national defence.<sup>80</sup> The legal framework creates an interdependence between the two levels

<sup>78</sup> Kangu, *Constitutional law of Kenya on devolution*, 12.

<sup>79</sup> Ryan R and Woods R, 'Decentralisation and subsidiarity: Concepts and frameworks for emerging economies', 15 *Forum of Federations* (2015), 3.

<sup>80</sup> For a detailed listing see Fourth Schedule of the Constitution of Kenya (2010).

of Government.<sup>81</sup> One of the most prominent manifestations is the equitable sharing of national revenues between national and county governments. The National Treasury implements the disbursement of a particular share of revenues to the counties as well as other additional (conditional or unconditional) allocations.<sup>82</sup> Moreover, other policy areas belong to the National Government and influence, directly and indirectly, the devolved governance system, like security, and education policy.

Besides the legally defined role of the National Government, one has also to consider its political role. Whether a central or national government is supportive or not concerning devolution cannot be captured from the legal perspective. Consequently, on the one hand, a national executive can be a massive obstacle for devolution, for example, by fulfilling only the minimum legal requirements. On the other hand, it can be a promoter by going beyond the (legally defined) minimum and support the county level in various aspects and to a far more considerable extent than it has to. The political attitude towards devolution and the self-perception of the National Executive's role within the intergovernmental setup is influential.

The National Government possesses a number of ways to create leverage against the county governments. These include; delayed disbursement of funds, proposing bills which counter the further development of devolution, like cutting counties' autonomy or interfering in already devolved functions.<sup>83</sup> In recent years, the delayed disbursement of devolved funds has been on top of the counties' complaints' list because it significantly affects their business concerning the implementation of development projects and service delivery.

Actions of the National Government often have an indirect impact on counties since the national framework in which devolution is embedded is profoundly influenced by its decisions. One example is the economic development of Kenya and the policies related to it. These can provide either a favourable environment and boost the Kenyan economy or they can fail to address the challenges and so contribute to an economic downturn. Both scenarios would significantly impact local economic development in the 47 counties.

The role of the National Government and its representatives constitute another predetermined trend because it is quite certain that it will be influential in matters of devolution. The question remains whether it will be supportive.

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<sup>81</sup> The intergovernmental relations are an independent trend and are discussed separately.

<sup>82</sup> Article 202, *Constitution of Kenya*.

<sup>83</sup> One example is a proposed Bill by Treasury in 2018 to cut county autonomy with regard to raising revenues and taxes.

### 4.15 Accountability and citizen participation in county governance

Citizen or public participation and accountability are two essential components of good, responsible, democratic and effective governance, which go hand in hand with each other. Traditionally citizens participate through elections. However, to limit participation to voting ignores other important venues of engagement, in particular at the local and regional level.

Public participation and accountability are vital governance requirements and are embedded in the Constitution and several laws concerning devolution. Most importantly, Articles 1(1) and (2) of the Constitution emphasise that all sovereign power belongs to the people of Kenya and Articles 10(2)(a) and (c) espouse participation of the people and accountability as national values and principles of governance. Besides these general provisions, there are more specific points referring to the counties and devolution. For example, Article 174(c) lists the right to self-governance, the participation of the people in the exercise of the power of the State as well as the right of communities to manage their affairs. Moreover, the Fourth Schedule designates county governments to coordinate and ensure the participation of communities in governance. Additionally, some devolution-related laws and acts provide for the same including the Public Finance Management Act,<sup>84</sup> the County Governments Act,<sup>85</sup> Urban Areas Act,<sup>86</sup> and the Public Procurement and Disposal Act.<sup>87</sup>

Despite the laws, acts of citizen participation and accountability at county level require institutionalised structures and procedures as well as education and information for the citizens.<sup>88</sup> Firstly, many Kenyans are not aware of their constitutional rights or possibilities to engage in the county decision-making process, which prevents them from deciding on the future of their county. Training and empowerment of citizens on their rights and the use of information are essential particularly for issues addressing development planning. CSOs can contribute here and work as partners with the local governments. Many counties have established departments or directorates for public participation in charge of civic education. However, the performance of counties varies significantly, and, in many of them, public participation has remained a hollow phrase without real results and backing

<sup>84</sup> No 18 of 2012.

<sup>85</sup> No 17 of 2012.

<sup>86</sup> No 13 of 2011.

<sup>87</sup> No 33 of 2015.

<sup>88</sup> Omolo A, *Policy proposals on citizen participation in devolved government in Kenya*, The Institute for Social Accountability (TISA).

from county leaders. Such counties ignore the fact that decisions with popular engagement and support are mostly more effective and sustainable. With special regard to local development, the citizens can help to make tailored decisions, which take care of their needs. Two positive examples are Baringo and Makueni.<sup>89</sup> In this context, county administrations need to implement their county public participation laws with the help of concrete policies and guidelines. Otherwise, there will be no substantial achievements in this area.

Secondly, access to information builds the basis for participation and accountability at the county level. Consequently, information has to be published in due time and in a way that makes it easy to understand, and accessible. Smart mobile devices, vernacular radio stations, local print media, social media or blogs offer plenty of opportunities for the counties to inform their citizens.

As mentioned above, there are many different ways for citizens to engage directly in county affairs in which planning, budgeting, monitoring and evaluating constitute the most central areas. Two concrete examples are:

- The CIDP is the principal document for development for every county. On the one hand, it indicates the priority areas and projects for every five years. On the other hand, it is also a benchmarking document to check what has been achieved after five years. Therefore, citizen engagement in the drafting, budgeting and monitoring of its implementation is of utmost importance.
- The application of social audit instruments is another way to engage citizens and to guarantee accountability. The community scorecard, for example, is a tool that is not expensive, ensures citizen participation and helps counties to identify shortcomings in service delivery. It can be used in all areas relevant to county governments such as health, water, and sanitation, agriculture or education.

Public participation and accountability also need actors such as vibrant CSOs, local media and monitoring bodies. In general, Kenya does not lack those actors, but devolution brought a new governance structure, and, at the same time, it created with the counties new arenas and spaces where those actors are supposed to be active. The process of devolving strong and independent non-state actors to the county level and establishing vibrant advocates of accountability is still an ongoing process:

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<sup>89</sup> Intergovernmental Relations Technical Committee (IGTRC), *The Status of Public Participation in National and County Governments*, 45.



- CSOs: Counties often lack robust, professional and coordinated CSOs, which have sufficient capacity and resources for fulfilling their mandate. Better cooperation and coordination, for example, by establishing local CSO platforms or networks works towards synergy (sharing of offices, shared pool of staff, etc) and increased lobbying power in approaching county decision-makers (development of coordinated activities and streamlining of positions, one voice one agenda, etc).
- Local media: Like civil society, media at the county level meet several obstacles. Many of them unless they are part of a big national media group – have weak financial basis and lack qualified staff. Consequently, there is a tendency towards shallow and trivial reporting without critical or investigative content. Moreover, political players own many local media outlets, so critical journalism becomes difficult. According to the World Press Freedom Index, Kenya is ranked 96 out of 180 countries.<sup>90</sup>
- Monitoring bodies: The EACC, the CoB, the Commission on Administrative Justice and the Auditor General investigate and check county authorities. These institutions provide evidence-based monitoring. By publishing their critical findings, they are the primary source for media, civil society, prosecution authorities or citizens. Besides the need of increasing their presence in the counties these institutions need sufficient capacities and powers to ensure a stable system, which contributes to the accountability of counties and their representatives.
- Concerns are also starting to emerge that although public participation has drastically improved in county level during the first phase of devolution, the quality has not been of a high standard. CSOs have primarily driven public participation and accountability. Surveys have found out that while there has been a rise in citizen participation at the county level, there exists a significant disconnect between the leaders and citizens with regards to the decisions taken on their behalf. Therefore, a large number of citizens do not trust the process of governance at county level due to the feeling that their opinions are not taken into account.<sup>91</sup>

The trust in county institutions, as well as their representatives and their responsiveness to input from citizens, is essential for the positive development

<sup>90</sup> World Press Freedom Index, *Reporter Ohne Grenzen*, <https://rsf.org/en/ranking> on 7 May 2018.

<sup>91</sup> Twaweza East Africa, *Is Government Closer to People? Kenyan Views on Devolution*, Brief No 17, September 2017, 4-12.

of devolution. Citizen participation and accountability constitute the determining factors in this context. Counties are well advised to embrace these concepts and take measures to ensure their proper implementation. Non-state actors can and should be valuable partners in that process.

#### 4.16 Rule of law

Contrary to international relations where it is often political power that determines the relations between states; the national governance systems are based on constitutions (except some few cases), laws and regulations. These define the overall framework in which politics has to act. This supremacy of the law over politics constitutes one of the main features of a modern state and is a principal component of the rule of law. The United Nations defines the rule of law ‘...as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws’.<sup>92</sup> It also identifies supremacy of law, separation of powers, accountability, equality before the law, participation in decision-making, legal certainty and legal transparency as its key pillars.<sup>93</sup> The rule of law protects citizens and institutions from despotism and arbitrariness.

Legal certainty, for example, often proves to be challenging between National Government and county governments since the transition of devolved functions is not smooth. It is normal that reconfiguration of a governance system leads to tensions and power struggles and requires some time until the different institutions are working well together. However, several National Government bodies show reluctance to completely hand over their responsibilities to the counties as stipulated by law. This causes legal insecurity and results in a considerable number of court battles although many issues are of a political nature and therefore require a political instead of a legal solution. For instance, even after the evolution and operationalisation of the Fourth Schedule that empowers county governments to take control of county health facilities, the Ministry of Health has been accused of attempting to influence primary health care services. While a case may be argued for incomplete capacities of county governments, still it does not warrant that the health ministry can procure primary health care facilities for the counties and subsequently deduct the accrued costs from county allocations.

<sup>92</sup> United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General*, 2004.

<sup>93</sup> United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General*.

A prominent source of legal and, as a consequence, financial insecurity is the continued delay of the disbursement of devolved funds in recent years. The tabling of legislation that goes against the spirit of devolution is one of the impediments to the fulfilment of the mandate of county governments. Examples are laws in the area of water, health or transport, which interfere with the tenure of county administrators. It is not only the national level, however, which has its issues with the rule of law concerning devolution but also the county governments. Many of them have been unable to enact and implement the necessary laws, policies or guidelines. Some of the reasons are, the lack of capacity to draft and enact laws and the lack of political will in particular concerning public participation. Venues or structures for public participation are often without political backing, infrastructure, funding or capacity and consequently are incapable of fulfilling their purpose. For instance, many County Budget and Economic Forums do not have the necessary means to play a substantial role in the planning of development projects and are degraded to a yes-man gathering for the governor. Another issue is the failure to comply with the County Government Act that prohibits employment of over 70% of dominant ethnic groups. A vast majority of the local entities fail to honour this provision according to a 2016 audit of the National Cohesion and Integration Commission.<sup>94</sup>

Counties will have to pay more attention to legal transparency and the access to information. Gazetting laws and regulations is only the minimum when it comes to this point. Many counties in Kenya are rural, and their people invariably have no television or regular supply of newspapers. Sufficient networks for obtaining information via mobile devices or the intensive use of (local) radio stations, which is by far the most important source of information for Kenyans, are ways to ensure proper access to information. Moreover, the usage of vernacular media channels has potential to enhance transparency and foster the rule of law.

Accountability of counties and their representatives constitutes an essential element of the rule of law in the devolved governance system. This is not limited to political but also to political accountability, which demands strong institutions with the powers to execute their mandates.

Finally, the Judiciary and its role in the system of checks-and-balances has to be mentioned. The judicial system represents devolution's best chance of ensuring that the rule of law is respected because the Constitution emphasises that in the exercise of its authority, it should not be subject to any person or authority although

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<sup>94</sup> National Cohesion and Integration Commission, *Ethnic and Diversity Audit of the County Public Service*, 2016, 15.

it draws its power from the people.<sup>95</sup> Equipped with independence, the Judiciary can act as an antidote to potential abuses of power and threats to the devolution process by the Executive, Parliament and both levels of Government. For devolution to work, heavy-handedness in exercising power at all levels and arms of Government must be restricted and subsequently subordinated to established laws. The failure or success of the rule of law in Kenya will also have an impact on devolution and its development.

#### 4.17 Transitional challenges

Every five years Kenyans elect a new county assembly and a new governor and, therefore, can either confirm the current office-bearers or choose new representatives. In general, the fight for gubernatorial posts or MCA seats is highly competitive. This leads to great political dynamics in the counties. For example, the elections in 2017 witnessed a political earthquake with 25 new governors whereas only 22 county leaders were re-elected and around 80% of MCAs were voted out.<sup>96</sup>

The Constitution provides a clear legal framework for the transition from out-going and in-coming county governments, and states that the last constituted executive committee of the county remains in office until a new one is constituted after the election. Some counties formed transition committees after the last elections in 2017 to ensure a smooth handover. However, the shift of power at the head of counties also results in a restructuring of county departments because new governors restructure their administration in a way that fits their political agenda better.

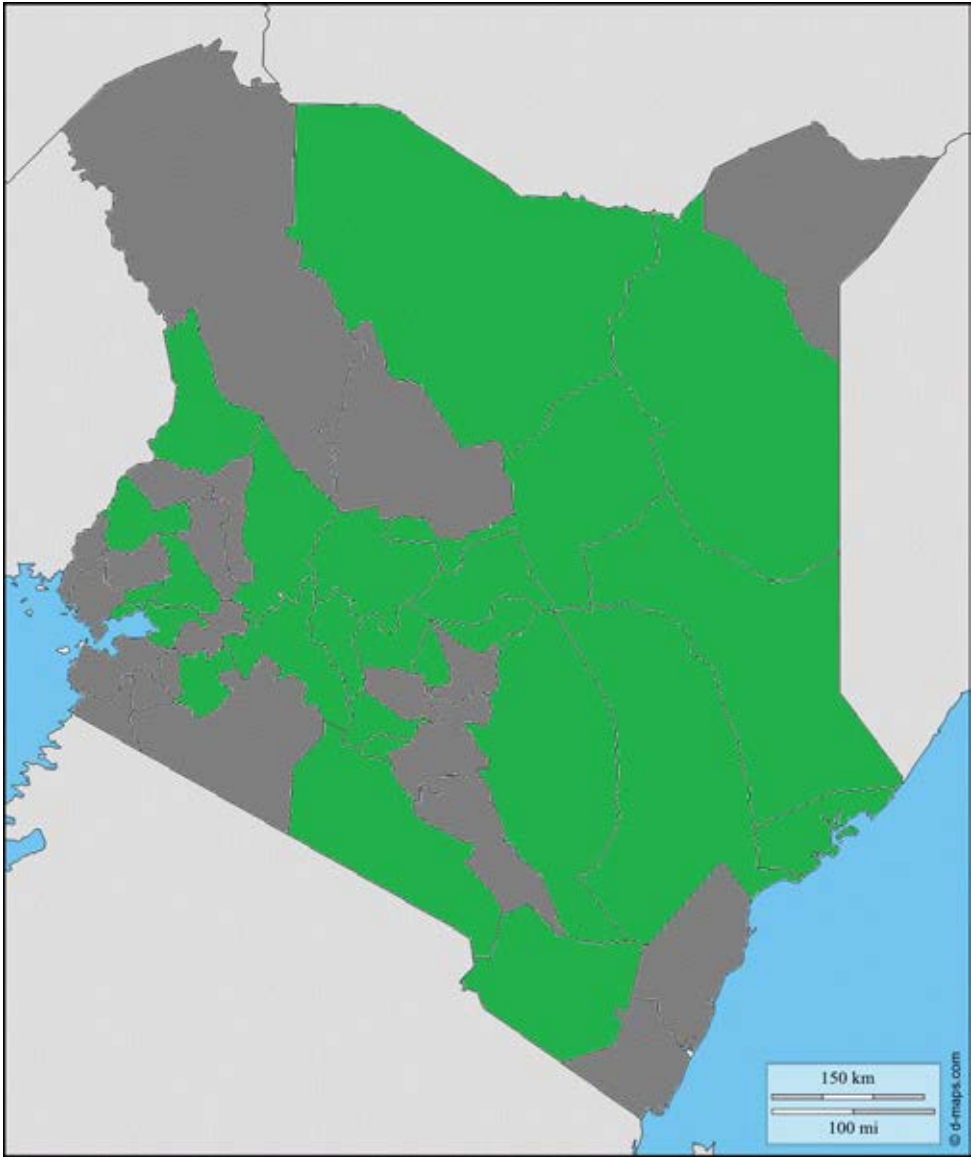
Sometimes such decisions are paired with a reshuffle of staff. Therefore, there is often an absence of continuity and a loss of expertise in the county offices. This makes the handover and first months of the new county government rather cumbersome and shaky. Although such a transition usually only takes place every five years it can consume time and energy and the impact can be felt for quite a time. A separate regulation with regard to the handover of the governor's office has been subject to political debate since 2016.<sup>97</sup>

<sup>95</sup> Articles 159 (1) and 160 (1), *Constitution of Kenya* (2010).

<sup>96</sup> In some counties the turnover of MCAs was above 90% like in Kiambu, Makunei, Machakos, Wajir or Nyeri.

<sup>97</sup> See discussion on the Assumption of the Office of Governor Bill 2016.

Map 2: County elections 2017



- Counties with new governors
- Counties where governors were confirmed

Source (map): d-maps.com [http://d-maps.com/carte.php?num\\_car=236&lang=en](http://d-maps.com/carte.php?num_car=236&lang=en)

#### 4.18 Socio-political inclusiveness

The country's long history of socio-political exclusion of communities has its roots in the pre-independence era and was entrenched in the period that followed independence. At that time, few ethnic communities dominated the country's economic resources and political structures. The implementation of the Sessional Paper No 10 of 1965 along with the pooling of national resources for the exploitation of strategic regions only entrenched the divisions and distorted the development graph of the country. With time, the subsequent centralisation led to occasional conflicts, inter-ethnic animosity and ethnic-based exclusion.<sup>98</sup> Fast forward to the new devolution dispensation: socio-political exclusion still persists though it is argued that county governments and the Constitution have the power to bring about new changes.

On the understanding that among the objectives of devolution was the promotion of the interests and rights of minorities as well as the fostering of national unity by recognising diversity, it is imperative that the county governments build inclusive societies and improve the welfare of all peoples within their territorial spheres. Central to aiding county governments to achieve these objectives is the elimination of all forms of discrimination, and celebrating diversity by ensuring inclusion of all communities in distributing county resources, projects and opportunities.

A general outlook of the disparities and inequalities in the 47 counties indicates that a big responsibility lies on the county governments to redress them. Exclusion and discrimination in any form is a threat not only to national unity but also to community relations at the county level. When the GDP of Kenya was rebased in 2014, it elevated the country to the lower middle-income bracket. While this raised expectations from the citizens, the prosperity achieved was not all uniform since poverty still stood at about 40% of the population at the time.<sup>99</sup> The country's economic model has not been particularly inclusive, and as a result, poverty remains high.<sup>100</sup> This is a crucial point also highlighted by the 2014 - 2018 Kenya Country Strategy Paper by the African Development Bank that notes that the country's economic growth has not been sufficiently inclusive owing to persistently

<sup>98</sup> Bosire C, *County governance and pluralism in Kenya*, 2017, 1.

<sup>99</sup> World Bank, *Kenya Country Economic Memorandum: From Economic Growth to Jobs and Shared Prosperity*, 2016, 31.

<sup>100</sup> World Bank, *Kenya Country Economic Memorandum: From Economic Growth to Jobs and Shared Prosperity*, 2016, 31.

high levels of poverty and regional disparities, limited access to essential services, inequality and unemployment.<sup>101</sup>

For example, Kenya suffers from high youth unemployment where new labour market entrants face an unemployment rate of around 26.2% in 2017.<sup>102</sup> According to the most recent Basic Report on Well-being in Kenya, the national proportion of the population living below the overall poverty line was 36.1% in 2015/2016 meaning that 16.1 million Kenyans lived in overall poverty. Regarding counties, the report shows considerable differences in overall poverty. Nairobi, for example, has the lowest overall poverty with 16.7% while Turkana County has the highest with 79.4%.<sup>103</sup> Poverty is particularly severe in the ASAL counties and the north-eastern part of the country, where a large percentage of the population is classified as poor. Another indicator is the Gini Coefficient, which gives an impression of the wealth distribution in a country. In Kenya (2013) it was nationally estimated at 0.445. Among the counties the spectrum ranges from Tana River with 0.617 to Turkana with 0.283.<sup>104</sup> Inequalities and exclusion among counties vary by extremes primarily due to different lifestyles and access to services. For instance, the low socio-economic attainments of the ASAL counties of Garissa, Madera, Marsabit, Samburu, Tana River, and Turkana directly impact their access to education including Net Enrolment Rates at ECDE, primary and secondary level as well as performance in national exams, dropout rates and allocation of resources like teaching staff.<sup>105</sup>

It is quite clear that county governments are significant platforms for communities to access and benefit from public service delivery. County governments also offer employment opportunities. While the law provides for ethnic inclusion and freedom from discrimination on any grounds, there are impediments such as stereotyping, misinterpretation of the laws and lack of independence and institutional checks. Further, the Constitution through Article 232(1)(i) stipulates the affording of adequate and equal opportunities for appointment, training and advancement of all men and women, ethnic groups and people with disabilities. However, it is not uncommon to find that members of the public still think that county governments are

<sup>101</sup> African Development Bank Group, *Kenya Country Strategy Paper 2014-2018*, 2014, 8.

<sup>102</sup> 'Unemployment, youth total (% of total labor force ages 15-24) (modelled ILO estimate)' *World Bank*, <https://data.worldbank.org/indicator/SL.UEM.1524.ZS?locations=KE> on 6 of May 2018.

<sup>103</sup> KNBS, *Basic Report on Well-being in Kenya: Based on the 2015/16 Kenya Integrated Household Budget Survey*, 2018, 49.

<sup>104</sup> KNBS and SID, *Exploring Kenya's Inequality: Pulling Apart or Pooling Together*, 2013, 43-44.

<sup>105</sup> National Gender and Equality Commission, *Status of Equality and Inclusion in Kenya*, 2016, 75-119.

avenues for larger indigenous local communities to enrich themselves at the expense of other small indigenous communities or those residing outside. The emphasis of county policies that uphold discrimination against specific communities within the counties aggravates the disenfranchisement and heightens social tensions. Going by the findings of the NCIC study report on inclusiveness and diversity of CPSB, out of the 47 counties, 32 had contravened the provisions of Section 65 of the County Governments Act in the appointment of members of the boards according to diversity.<sup>106</sup> Empirical evidence suggests that employment in the county government offices like CPSBs is not only inequitable but also skewed towards the dominant groups. As a result, some communities are highly underrepresented, yet others are almost entirely excluded from accessing opportunities such as Government tenders and the provision of essential social services.

Devolution is about offering opportunities to implement inclusive growth and development across all fronts. Through the process of resource and revenue allocation spearheaded by the CRA, the subsequent distribution of resources to excluded regions provides hope for a more balanced socio-economic development. The need to provide equitable and accessible services to the people at the county level as well as eliminate the inequalities in different parts of the country informed the devolution agenda. And so for this to be achieved, specific structural policies must be successfully implemented. Both social and political inclusiveness across counties can be attained through strengthening institutions and promoting good governance, which leads to reduced poverty and growth. Inclusivity is pegged upon the advancement of social integration through fundamental values like social justice, equity and human rights. If socio-political inclusiveness is lacking in a county, it becomes hard for that particular county to achieve substantial development regarding economic growth and human capital.

A second component of this predetermined trend is political inclusiveness. During the last two general elections the voter turnout was high with 85.91% (2013)<sup>107</sup> and 80% (2017), except during the new round of presidential elections in October 2017 where only 34% participated since the political opposition (National Super Alliance - NASA) called for a boycott.<sup>108</sup> However, voter turnout figures are only one indicator of political inclusion. It is equally important to have a reliable

<sup>106</sup> National Cohesion and Integration Commission, *Ethnic and Diversity Audit of the County Public Service*, 2016, 15.

<sup>107</sup> 'General Election Results (2013)' *IEBC*, <https://www.iebc.or.ke/election/?election-results> on 7 May 2018.

<sup>108</sup> 'Kenya election: Turnout under 34% amid opposition boycott' *BBC*, 27 October 2017. <https://www.bbc.com/news/world-africa-41773919> on 7 March 2018.



and transparent election process, which also covers the phases after voters have cast their votes because election results that are not accepted by the vast share of the electorate can foster a strong feeling of political exclusion.

Political inclusiveness goes beyond elections and encompasses public participation in Government decisions and the representation of social groups like women, youth or ethnic communities in the political system. The barriers to citizen political participation after elections are well considered in the Constitution as well as in several laws. In particular, at county level, a lack of concrete policies, guidelines and regulations has become an obstacle for the full implementation of engagement mechanisms and weakens the responsiveness of local political systems. Decisions on planning and budgeting of local development projects require the input of the population to prevent white elephant projects which do not meet the needs of the citizens and disappoint their expectations in local politics as well as in devolution. As mentioned above, the failure of counties to foster ethnic diversity within their public administrations also hinders political inclusiveness since such positions are connected with influence and resources. Such a development fosters tribalism and the exclusion of ethnic minorities in county decision-making. Moreover, women and the youth are underrepresented at both levels of Government (gubernatorial positions, National Assembly, National Government, etc.) although they make up a significant share of the total population in the country and in the counties.

Socio-political inclusiveness has a notable impact on devolution though its certainty is not as assured as it should be. Both county and national authorities can contribute so that the level of uncertainty decreases over the years and with it the possible collapse of devolution.

#### 4.19 Revenue generation in the counties

The decision to devolve specific policy areas to the county level in Kenya was accompanied by the establishment of provisions granting the counties the right to generate their revenues, though to a limited extent, and to allow an influx of resources besides the equitable share. Generally, such rights strengthen the political autonomy of local authorities.

The Constitution stipulates in Article 209 that a ‘county may impose (a) property rates; (b) entertainment taxes; and (c) any other tax that it is authorised to impose by an Act of Parliament’.<sup>109</sup> For counties with major urban areas, property rates are a

<sup>109</sup> *Constitution of Kenya* (2010).

major source of own-raised revenue, which tax the value of immovable property.<sup>110</sup> Other taxes like income tax or value-added tax are a national responsibility.

Although counties have the formal right to generate revenues, and have managed to increase their collections by automation and other mechanisms, they still meet massive practical challenges concerning implementation. This fact is reflected by the gap between local revenue targets and the actual collected revenue. A vast number of counties have failed to achieve their targets in the last few years. In the Fiscal Year 2016/17, more than half of the counties (26 out of 47) failed to collect more than 60% of their annual revenue targets. On average, counties were only able to generate 56.4% of the defined target.<sup>111</sup> This was less than in the preceding fiscal year and the figures for the first quarter of the fiscal year 2017/18 seem to continue this negative trend.<sup>112</sup> The main obstacles for this situation are the lack of effective mechanisms and qualified staff, the absence of updated valuation rolls and inadequate revenue laws.

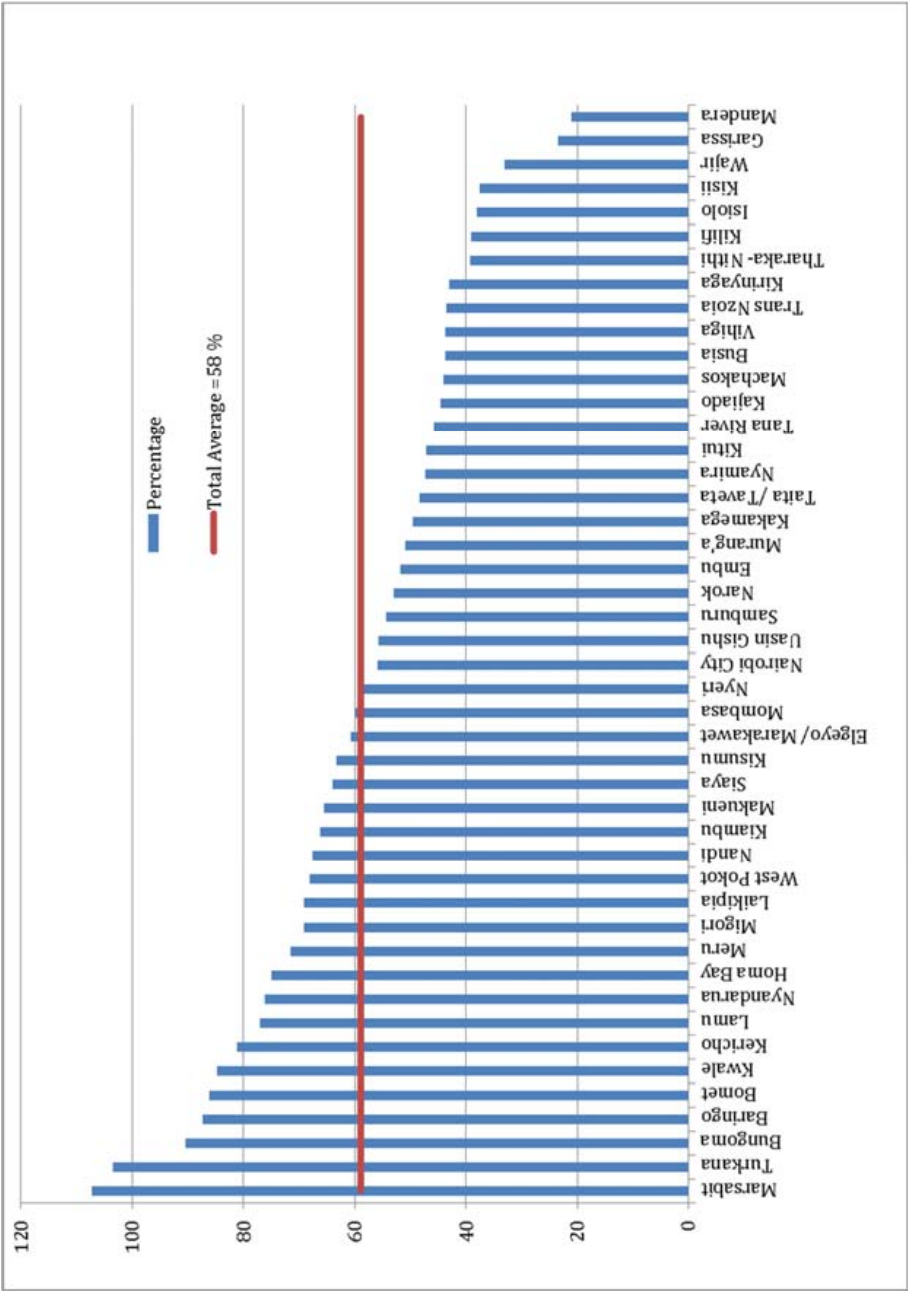
Moreover, counties often have a weak economic base, which constitutes a further impediment to the increase of revenue. Some of them have recently taken steps to improve their value and income creation or to enact tailored policies to suit their specific needs and economic specifications. However, much more has to be done to ensure that counties close the gap between potential and actual revenue generation since it impacts service delivery, local development and the purpose of devolution in general. Even if counties manage to utilise the full potential of locally-raised revenues in the future, they will remain a small part of the county budgets with respect to the equitable share from nationally collected revenues. However, it is imperative that counties strengthen their revenue base and show the ability to cover substantial parts of their expenditures as a sign of a well-functioning and robust devolved governance system.

<sup>110</sup> Kangu, *Constitutional law of Kenya on devolution*, 243.

<sup>111</sup> Controller of the Budget, *Annual County Government Budget Implementation Review Report for FY 2016/2017*, 2017, 3-4.

<sup>112</sup> Controller of the Budget, *County Governments Budget Implementation Review Report First Quarter 2017/18*, 2017, 2.

Graph 3: Percentage of targeted local revenue actually generated (annual target FY 2016/2017), Source: Controller of the Budget



#### 4.20 Natural resource management

One of the most pertinent issues that has been an agenda item in debates concerning devolution is natural resource management and sharing. The economy of Kenya is to a large extent anchored on tourism and agriculture-related industries. It is dependent upon natural resources. Therefore, the efficient utilisation and management of the counties' natural resources will determine how well the country and the counties perform economically and how they improve the quality of life of their citizens. This gives rise to an awareness of the economic implications of natural resources and the will to understand that their mismanagement could adversely lead to their depleting and eventual eroding of natural ecosystems upon which many livelihoods in the counties are pegged. This will, in turn, exacerbate poverty and increase the vulnerability of local communities as a result of over-exploitation. However, if counties find a proper way to manage them this means a great opportunity for their development.

Given the importance of natural resource management, one might argue that it has quite a significant role to play in the success (or failure) of devolution. Article 69(1) of the Constitution requires the State to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources. To ensure collaboration and synergies of the two levels of Government, the responsibility of implementing specific National Government policies on environment and natural resource conservation is left to the county governments. Previously an exclusive right of the National Government and its various agencies, the local communities through their county governments have now been empowered to manage natural resources. County governments must leverage on the existing legal instruments to support sustainable management of resources and enforce national policies and laws in the water, forestry, wildlife and mining sectors. It is upon them to utilise the necessary policy direction put forward by the National Government to help local people exploit and utilise these resourceful sectors sustainably.

With the negative impacts of climate change being felt in the country, the management of the ever-growing scarcity of natural resources presents a new challenge to the county governments. A considerable percentage of the wages of most Kenyans comes from natural resource-related sectors, such as mining (gemstones, minerals, stone carving and sand harvesting), marine and water (fishing), land utilisation (farming) or wildlife (tourism-related activities). Consequently, the utilisation of natural resources employs a substantial number of Kenyans. Therefore, it is necessary to protect these natural resources and manage them efficiently. County

governments ought to take up the responsibility of strengthening institutions that deal with natural resource sustainability at the county level, i.e. both national agencies and CSOs to support their exploitation. To fulfil these responsibilities, county governments have to ensure long-term planning, for example with tailored natural resource management plans and policies. However, these county plans need to be harmonised with national laws. Besides the plans, county governments should partner with the National Government and civil societies when approaching local communities concerning the implementation of those plans.

Revenue deficits have obliged county governments to look for ways to generate revenues from the resources found in their counties. County governments have already learnt that opportunities abound in building upon their revenue bases by means of taxation of employers in the different sectors of natural resources. This presents an opportunity for filling in the gaps for funding and for using the full potential of their right to collect certain revenues. However, the utilisation of natural resources has sparked off conflict between the National Government and county governments owing to disagreements in the sharing of the benefits accruing. Counties endowed with vast resources that generate significant amounts of revenue for the National Government have in the past been caught in the crossfire with State parastatals and the Executive over the utilisation of these resources. While the National Government argues that natural resources are to be shared nationally, county governments argue that since the resources are found within their jurisdiction, they have a greater mandate in determining how the local communities should be empowered. Citing examples, counties like Mombasa have sought full autonomy of the Mombasa port while Muranga County has sought to gain an advantage of its substantial water resources that serve the capital, Nairobi. Others have tried to lobby for more significant autonomy in the taxation of their wildlife parks and game reserves. However, the conflict between the National Government and county governments over natural resources was brought to the national limelight when, in 2016, President Uhuru Kenyatta refused to append his signature to the Petroleum (Exploration, Development and Production) Bill which allocated local communities an oil share benefit of 10%. The Executive wanted it to be capped at 5%. The issue of allocation of benefits to local communities and the subsequent sharing between the National Government and county governments will continue to be a thorn in the flesh if proper guidelines are not put in place and stable precedents are not set.

Besides legislation and political support, county governments can set aside limited funds for natural resource management and conservation efforts. By working together with local CSOs involved in natural resources management,

which educate local communities on their responsibilities and rights in managing natural resources, county governments can harness the synergy and employ it to the better development of counties. With the involvement of National Government, county governments even accord financial support to these organisations that further enhance the sustainable utilisation of natural resources at the county level.

The successful decentralisation of the management of natural resources and environmental conservation requires both levels of Government to cooperate and coordinate. Both levels should take a collective stand involving all stakeholders on how best to utilise, conserve and manage natural resources to promote sustainable development as well as alleviate poverty.<sup>113</sup> Additionally, the partnership with civil society has much potential concerning awareness building, training and education as well as public participation and accountability. A sustainable and effective method for natural resource management requires the integration of all these areas. The question of who owns the right to use natural resources often leads to conflict. Closer cooperation with CSOs and capacity building of specialised county staff can help to set up conflict management mechanisms.

Since many natural resources are shared by more than one county and their utilisation will become more important in the forthcoming years, policy-makers have to pay attention to the issue of trans-county resource management. The utilisation, protection, governance and share of benefits of such transboundary resources can become a source of conflict or of cooperation between devolved units. This is particularly so where the resource is essential for service delivery to the population or economic value creation (e.g. water, oil, fruits, minerals, land). On the international level, there are examples, for instance, of the governance of transboundary rivers, which can be adapted at the regional level.<sup>114</sup>

Given that the Constitution has put in place progressive policy provisions, laws and institutions like the Environment and Land Court, National Environment Management Authority and National Land Commission, among others, it is now upon the implementers of devolution at the county level to leverage these frameworks to manage natural resources appropriately. The county governments with the task of implementing policies on natural resources and environmental conservation have a challenge in improving public involvement in the decision-making process as well as informing the local communities about their roles in the

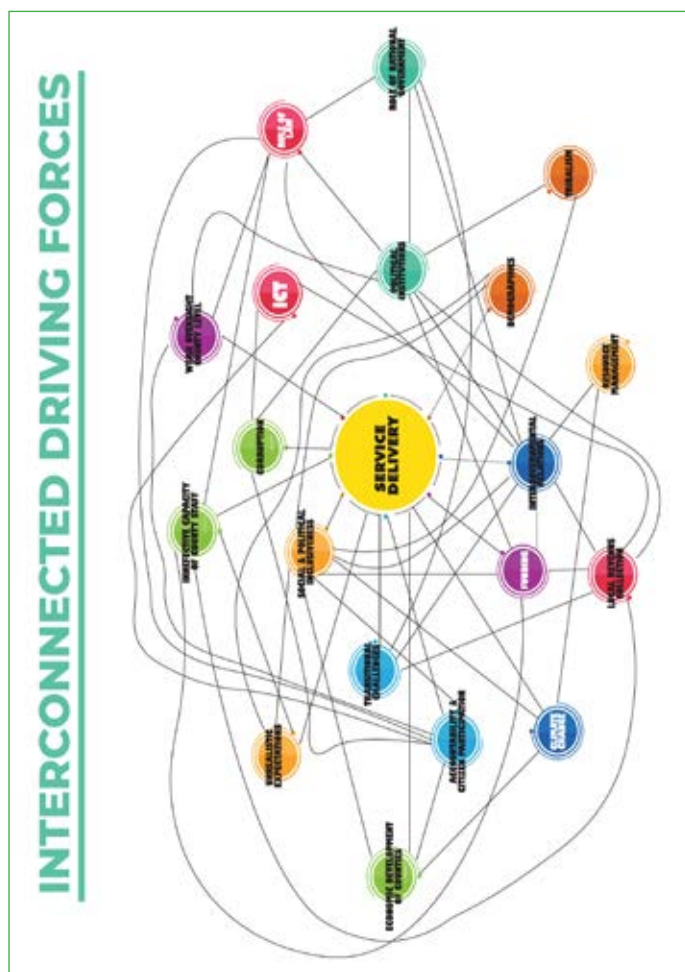
<sup>113</sup> Muigua K, 'Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya' Ph.D. Dissertation, Chartered Institute of Arbitrators, 2017, 46.

<sup>114</sup> Tödtling T, *Water governance: From a global and regional perspective*, Dr. Kovac, Hamburg, 2013.

sustainable use of these resources. By encouraging public dialogue over the use of natural resources, these public discourses might even present a better way of managing conflicts that arise from the utilisation of natural resources.<sup>115</sup>

Natural resources and their management constitute a predetermined trend for counties and the development of devolution and deserve the attention of policy-makers and civil society. Proper management can open up significant opportunities, for example, for the economic and social development of counties. However, poorly managed natural resources will not only take away opportunities from counties but can cause additional costs and problems (insufficient water supply, air pollution, conflict between communities, etc.).

Chart 7: Interconnected Driving Forces



<sup>115</sup> Muigwa K, 'Reflections on Managing Natural Resources and Equitable Benefit Sharing in Kenya', 14.





## 5. FOUR FUTURE SCENARIOS FOR DEVOLUTION IN KENYA

The four scenarios for devolution in Kenya are: the roaring lion, the white elephant, the abandoned buffalo, and the dying rhino.





## 5.1 SCENARIO I: THE ROARING LION



*'Let me play the lion too: I will roar that I will do any man's heart good to hear me. I will roar that I will make the duke say "Let him roar again, let him roar again."'*<sup>116</sup>

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<sup>116</sup> Shakespeare W, 'A midsummer night's dream' -<<http://shakespeare.mit.edu/midsummer/full.html>> on 18 December 2018.

A lion is strong and admired. Thus in this scenario, leaders are supportive of devolution and there is accelerated socio-economic development in the counties. Devolution is strong. Other countries in Africa and beyond admire it as a successful approach and see the 'Kenyan way' as a potential role model.

### *Leadership*

Kenya and its counties have enlightened and visionary political leaders who are credible and act responsibly. It is not only their formal education but also their character and enlightened value system, which ensures remarkable leadership. They embrace a robust value system and can bring change to the counties and the nation as a whole. Integrity, accountability, transparency and responsibility are the key words describing Kenya's local and national leaders. The leadership in the counties and the national level is diverse and multi-ethnic, and people identify with them. A vast majority of them have learnt from the past mistakes and failures of other political generations but also from their own. Political leaders at the national and county levels are responsive and open to ideas and they can be effectively held accountable if they do not meet their goals and promises. Consensus and respect characterise the interaction between leaders. Their motivation is not to serve their own interests but the common good and the good of the country. Of course, there are still leaders, for example, in the National Assembly, the County Assemblies or the county governments who advocate the 'old style' of politics but they are a minority, and their influence is negligible since they are holdovers of a different time. It is normal that the decision-makers in the counties have to go through constant benchmarking. The sharing of best practices is easy due to improved ICT (e.g. learning platforms, e-procurement, social media, etc.). Civil society is not an enemy but a valued partner in dealing with issues at all levels. County leaders are open to input from non-state actors and several of them have been in this sector before they decided to work in politics.

### *Civil society*

Civil society is strong. Over the past decade, these organisations have grown stronger, in particular at the county level. Most of them are well established with sufficient resources, qualified staff and a proper infrastructure. This is the result of efforts that have been taken by CSOs in most of the counties to build up networks, to improve coordination, to use synergies and to advance in their skills and professionalism. Consequently, they follow the motto 'one voice, one agenda'

when it comes to important decisions in the counties. The time of dividing or even ignoring them is over. Kenya possesses a variety of civil society actors: think tanks, sectorial and specialised CSOs (e.g. governance, gender, water, infrastructure, health), faith-based organisations, local and national groups. However, civil society plays a supportive and complementary role, is not dominating or dictating. It is the citizens themselves who take their role upon themselves and guarantee that besides the representative political institutions there is also oversight as well as checks-and-balances from their side.

### *Intergovernmental relations*

Intergovernmental relations are working well in most cases and are free of serious (political and legal) controversies between national and county governments over competencies. Both levels of Government mutually coordinate and consult avoiding duplication and waste of public money. Naturally, there are sometimes debates between the levels of Government on specific details concerning competencies but, in general, the overall framework of functions is accepted, precise and operational. Instead of permanent legal battles, political questions are solved within the political system.

The Senate is empowered and strong. By using its core powers, it protects the interests of the counties. Moreover, the commissions and offices working in the context of devolution are independent and ensure fact-based decision-making (e.g. the CRA) as well as an efficient oversight (CoB). The Constitution as the core document of Kenya is respected and filled with life. Citizens live in constitutionalism and the spirit of the Constitution.

### *Disbursement*

There is still a kind of equitable share meaning that the National Government transfers funds and revenues to the counties, which it collects for them. The disbursements to counties are smooth and based on modern technologies. Instead of the minimum of 15%, counties receive an average of between 40% and 45% per fiscal year as equitable share, and they do not suffer from underfunding. At the same time, counties have set up efficient and effective mechanisms for revenue collection. Due to favourable economic development, county governments benefit from increased revenues. As a result, most of them use the full potential of local revenue generation making it an indispensable source of funding for proper service delivery.

### *Public service and management of counties*

After a long process county governments manage to put in place an efficient, effective human resource management. There is no mixture of staff anymore since many of the officials of the older generation retire, which opens a window of opportunity to reshape the public service and the personnel structure in the 47 counties. Furthermore, the development of national standards and policies for CPSPs with uniform procedures helps to increase the quality of county personnel. Well-established structures of institutions provide capacity-building for county officials. The ethnic diversity of the counties is also reflected in their staff. Since county staff are better qualified, service delivery works better. Generally, counties perform very well concerning health, education, water and sanitation, infrastructure, and food security. The authorities deal with county resources and public money in a responsible and accountable manner, and there is an efficient and speedy implementation of policies. In general, transparency and accountability are core values of public service at all levels. Moreover, participation and engagement of citizens are welcomed and appreciated.

### *Economy and business*

Counties witness an economic boom. They use their strengths and natural resources sustainably. By creating a favourable environment for businesses county governments have strengthened the private sector and managed to promote the creation of Kenyan companies, and also attracted international investors. It is particularly small and medium-enterprises, which create employment in the 47 counties, for example, by value addition processes, use of natural resources and creating new businesses based on indigenous technologies (innovation with Kenyan roots from Kenya to the world). Start-ups are not limited to Nairobi alone but grow in other urban centres like Eldoret, Kisumu, Mombasa, and Nakuru. During the last couple of years, foreign direct investments reached a historic peak, but there is still untouched potential. Most of the counties have formed economic blocs leveraging synergies, boosting inter-county trade and fostering cooperation concerning development and funding. Most of the blocs have a county-funded development bank for investments in the region. This regional integration improves the economic viability of the counties and is possible without the need of additional government levels. The international community supported the formation of those blocs. Local business groups and other lobby organisations have emerged as strong players that participate in the decision-making process together with civil society.

Citizens participate in crowd funding to realise small-scale projects, which cover specific needs.

### *Identity*

Kenyans accept and appreciate the diversity of their country and their counties. Citizens primarily see the advantages and benefits of diversity instead of the dividing components. They are proud to be Kenyans.

### *Equity and fairness*

Citizens perceive that overall their country offers fairness and equity to all Kenyans. Significant reasons for this perception are the positive socio-economic development in the counties and the fact that the country has overcome most of its ethnic divisions as well as marginalisation.

### *Media*

The media in Kenya is free, responsible, professional and independent. At the local level, new media have developed and journalists have a high level of qualification and education. There is a variety of media such as radio stations, newspapers, and TV, but also bloggers and other web-based media channels. Local media are well established and mostly disentangled from political ownership. Although politicians still own media houses consumers regard them as public relations channels and do not grant them high credibility. The local media play their watchdog role and are the fourth estate in the counties. Investigative and critical reporting is possible and an effective oversight tool.

### *Africa*

Kenya and its devolution are a role model for the African continent and even beyond. The devolved governance structure and the autonomy of local entities as well as the related positive socio-economic development of the counties and therefore the country draw the attention of other countries. ‘The Kenyan way’ is known as a promising approach to settle ethnic tensions, to propel local development, foster democracy, and improve the lives of citizens.





## 5.2 SCENARIO II: THE ABANDONED BUFFALO



*'The extinction of the buffalo has been a veritable tragedy of the animal world.'*<sup>117</sup>

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<sup>117</sup> Roosevelt T, *Hunting trips of a ranchman*, New York and London: G.P. Putnam's Sons, New York, 1886.

Older buffalo bulls leave their herd at a certain point of time. Although they continue to live, they are abandoned from their group. In this scenario, devolution is like an abandoned, old buffalo. Leaders are not supportive; however, the people experience accelerated socio-economic development in the counties.

### *Leadership*

Leaders do not support devolution at the national level. In the best case, they are neutral and indifferent, but they do not fight for it and have no interest in developing it further. In the worst case, some of them actively undermine it on purpose. Even the political leadership of the counties does not care about devolution. Most of them have no vision for the future and are not willing to engage in substantial political fights for it. They are reluctant to run for offices like governor or MCA again and try to get into national politics. Many politicians across party lines advocate for a re-centralisation of functions and additional government layers above the counties. Indirectly, office-holders weaken the idea of devolution due to massive corruption and their unethical behaviour. Participation and engagement by citizens or the civil society are not wanted and are even suppressed since they are perceived as disturbing factors. As a consequence the responsiveness of the political systems is low at both national and county levels. County leaders focus their agendas and efforts on economic planning and policies because of the positive economic development. There is no broad political agenda, and other issues like governance, marginalised groups, citizens' engagement and participation or the fundamental issues of society are absent from political discourse. Counties have a technical and not a political leadership. A new type of leader is not coming from politics, but leaders from the business side are emerging in Kenyan politics.

### *Civil society*

Civil society plays a minor role and is quite passive concerning devolution. Local non-state organisations are weak. Their work is uncoordinated and pushes in different directions. Fragmentation has increased over the years and some non-state actors are supporting political leaders in their demand for re-centralisation. Most of the CSOs lack funding and capacity to raise funds since there is no interest from citizens, county governments or international donors in devolution. Citizens are empowered to push their interests at the county level mostly on their own or via business groups.

### *Intergovernmental relations*

Generally, a structured, regular and effective way of coordination and consultation between the national and the county governments does not exist. In specific areas where local leaders are coming under pressure from their voters because they are not able to deliver their promises, national and local elites clash with each other. As a consequence, intergovernmental relations are confrontational and tense in specific areas, and mostly concerning the disbursement of devolved funds. However, the motivation of county leaders is not their commitment to a devolved governance system but to their own political survival. Blame-shifting, court battles between the levels of Government characterise their interaction. Devolution is not questioned at a technical level immediately, but among political actors there is an implicit consensus that devolution does not work and has failed. They agree tacitly that a new, more centralised governance system is necessary and that supporting devolution is not the way to go. Kenya has a ‘mechanical devolution’. The institutions that were defenders of devolution, for example the Senate or the CoG, are dormant and passive.

### *Disbursement*

Funding of counties is a massive problem. The National Government does not question the equitable share per se but only transfers the required minimum of 15%, which is not enough. An exception is only a few selected local entities close to the leadership of the National Government. The bodies in charge of the disbursement of funds bypass constitutional rules and provisions. As a result, a vast majority of the counties are underfunded and cannot fulfil their functions sufficiently. Instead of coordination and consultation concerning funds there exist parallel lines of funding besides the equitable share, leading to enormous duplication and waste of public money. Despite an accelerated socio-economic development in the counties, they do not benefit from increased revenues since the collection of local revenues is not working owing to the fact that counties lack mechanisms and qualified staff.

### *Public service and management of counties*

Devolution is abandoned and slowly eroding and its public service with it. The combination of non-supportive leaders, as well as the lack of widespread support and the massive lack of funding, leads to a degradation of county services. An insufficient number of qualified staff and missing resources for development projects contribute to the slow but steady demise of the devolved governance

system. County administrations are ineffective and corrupt. Step by step the private sector starts to take over the delivery of services like health care or education.

### *Economy and business*

Economic development in the counties is positive and local businesses prosper. In the last couple of years stable and profitable small and medium businesses have been created in most counties. They provide comprehensive employment in particular for the younger generation of Kenyans. Consequently, the social situation of the population improved remarkably, creating a stable middle class in the counties, and poverty levels are going down. Some of them attract international investors and witness an increase of FDIs. It is the private sector that drives devolution economically. Everyone in politics claims the credit for the socio-economic achievements and argues that it was their achievement and not a result of devolution.

### *Identity/citizens*

Citizens are not very involved in politics, unless they want to push for reforms to ensure socio-economic development. They are not interested in devolution because for them it does not make any difference to their lives. The improved standard of living is attributed to other factors like local businesses that were established and thrived despite devolution, not because of it. However, citizens are indifferent towards devolution. In their perception, it does not harm them, but neither does it do anything for them. Kenyans do not identify with their county and have other sources of identity and belonging, such as the nation. Public debates hardly touch on fundamental questions, such that devolution and the trust of people in democratic governance is reduced.

### *Equity and fairness*

In comparison to several years ago, people in Kenya are better off. Therefore, the level of perceived equity and fairness is quite high among the citizens resulting in stability. Ethical tensions or social conflicts are not entirely solved, but the accelerated socio-economic development has helped to reduce them significantly. A majority have the impression that everyone gets a fair chance in Kenya.

### *Media*

Similar to civil society, local media have a purely economic purpose. The

reporting is limited to trivial issues, and the local media are mostly branches of the national media houses, which have a strong influence on reporting. Independent and locally established media hardly exist. Generally, the diversity of media has decreased in recent years and press freedom too has reduced. The big media houses and their journalists are not in favour of devolution. This view is strongly reflected in the adverse reporting of devolution-related issues like corruption. They echo the discourse of non-supportive leaders. Devolution is the scapegoat for adverse developments. Political influence is high and media are often a platform for political public relations. At the same time, alternative channels at the local level are modest. Qualifications among journalists are low.



### 5.3 SCENARIO III: THE WHITE ELEPHANT



*'His services are like so many white elephants, of which nobody can make use, and yet that drain one's gratitude, if indeed one does not feel bankrupt.'*<sup>118</sup>

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<sup>118</sup> Jewsbury GE, *Selections from the letters of Geraldine Endors Jewsbury to Jane Welsh Carlyle: ed. by Mrs. Alexander Ireland... prefaced by a monograph on Miss Jewsbury, by the editor*, Longmans Green and Co, New York, 1892, 414.

Under this scenario, leaders are supportive but socio-economic development in the counties declines. Citizens see investments but they do not meet their needs. White elephant projects become one major characteristic of an elitist devolution in Kenya.

### *Leadership*

At the national and the county levels, leaders are strong supporters of devolution. No one is questioning the devolved governance system in any way and in public debates leaders from politics, business or religion praise it. There exists an elite-wide consensus that devolution is working for them. The motivation by the elite to keep up devolution does not come from its success in bring about an improved life in Kenya but their personal benefits in financial and social respects. The country has a weak value system on the point of its leadership. Political positions at the county level are highly contested and even intra-party competition for posts is high because they promise economic advantages. However, this view does not fit in with the view of the population since the socio-economic development in the counties has been worsening in recent years. Owing to this gap and estrangement between the (political) elite and the citizens a new generation of (populist) politicians at county and national level emerges who make themselves the advocates of the people. Consequently, established power patterns are under pressure.

### *Civil society*

Civil society is detached from citizens. Many actors are still in favour of devolution because they receive much funding from government and international donors who follow the narrative of the elite. Instead of civil society, it is the new political movements, which are the voice of the people. At the local level, civil society's work is ineffective although resources are available.

### *Intergovernmental relations*

The relation between the two levels of Government is good since both have an interest in keeping the system alive. Enough funds are transferred to the counties and consequently they invest in projects but without meeting the needs of the people. White elephant projects become the standard, causing long-term burdens for county budgets. The dependency of counties on the equitable share increases because local revenue collection is poor.



### *Disbursement*

Funding for the counties is available and the disbursement of the devolved funds works smoothly. The amount of revenues that is transferred from the national level is high. However, the counties are not able to generate their own revenue. As a consequence the dependency on national transfers increases.

### *Public service and management of counties*

The public services in the counties are bloated and expensive. Hence, disbursement of funds is working and there are resources to train county staff and improve their qualifications. The oversight and control of public money is incompetent, which fosters corruption among county bureaucrats and leaders as well as the implementation of white elephant projects. County officials benefit from the survival of the devolved governance system and support its preservation.

### *Economy and business*

The economy in the counties is down and the social situation is getting worse. The business environment is poor and there is hardly employment for the growing rural population resulting in massive urban migration. Although counties invest, the investments lack a long-term strategy and do not integrate the real needs. Bureaucratic obstacles are enormous and the bloated county administrations tend to over-regulate. Investments in the counties are low and FDIs are absent.

### *Identity/citizens*

Widespread support for devolution has vanished and a vast majority of citizens are turning against the current governance system because they see no benefit in it. Citizens do not participate in formal processes such as elections but become more active outside the formal structures. They show their dissatisfaction with the socio-economic situation and the lack of responsiveness of their representatives with protests. The country witnesses increased social and political unrest and the rise of new movements catches the climate among the population. Some citizens have turned away from politics and refuse to engage due to their disappointment; others become more active and sometimes more extreme. Many see the old patterns of tribalism and ethnicity as the only remaining source of identity.

### *Equity and fairness*

An overwhelming part of the Kenyan population shares the perception that inequity dominates in the country and that fairness does not exist. The declining socio-economic development in the counties contributes to the feeling that weaker regions are marginalised (again). Facing difficult economic times many return to their tribal patterns, which are supposed to provide protection. Hence other communities are regarded as competitors for the scant resources ethnic tensions become stronger. The trust in established leaders is lost because their agendas do not fit the people's needs in the areas of health, education, water and sanitation, infrastructure and food security. Criminality in the counties reaches new peaks.

### *Media*

Established local media at the county level are weak and are mostly public relations vehicles and agents of the elite's by drawing a picture of successful devolution. Most of them depend on the national media houses and their reporting is biased. The media does not cover negative news on devolution, like corruption or waste of public money due to white elephant projects. Similar to the political sphere where the gap between established politics and citizens opens the way for new movements, alternative media channels appear at the county as well as the national level. They enjoy far more credibility from the people because the alternative media point the finger at the poor socio-economic conditions and at devolution as a mere elitist scheme. They are often targets of suppression and intimidation when they become too powerful.

## 5.4 SCENARIO IV: THE DYING RHINO



*'The scary thing is that in my lifetime, 95 per cent of the world's rhinos have been killed.'*<sup>119</sup>

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<sup>119</sup> Moreton C, 'Mark Carwardine: "Douglas Adams and Stephen Fry were unbelievably similar"' The Telegraph, 4 March 2012 -<<https://www.telegraph.co.uk/news/earth/wildlife/9120742/Mark-Carwardine-Douglas-Adams-and-Stephen-Fry-were-unbelievably-similar.html>> on 18 December 2018.

The fourth scenario envisions un-supportive leaders and declining socio-economic development in the counties. Rhinos are big, strong and popular animals.

However, they are also an endangered species. In this scenario, devolution is a dying rhino whose extinction is near. It is only a matter of time for Kenya to lose something that was once big, strong and popular.

### *Leadership*

County leaders are actively advocating for the re-centralisation of functions and some are leaving the sinking ship by resigning from office. The National Government takes over responsibilities since several counties are utterly incapable of delivering their duties to the citizens. At the core is a retransfer of county responsibilities to higher levels. This move enjoys strong popular support from Kenyans and therefore a majority seems to be guaranteed.

### *Civil society*

Civil society is silent and dormant. Most of those who speak join the call for constitutional reform of the governance system and more centralisation. Local CSOs, which have dealt with issues in connection with devolution (civic education, governance, oversight, etc.), turn to other areas. As CSOs pull out from civic education, many Kenyans remain uninformed of their rights as citizens and are not empowered. Simultaneously with the debate on the re-centralisation of functions the civil society is also moving towards the centre. There are strong national and highly centralised players but very weak local actors at the county level.

### *Intergovernmental relations*

Both Government levels make each other responsible for the situation and blame-shifting characterises intergovernmental relations. However, it is the national leadership that apparently has the upper hand supported by the majority of people who have lost their confidence in devolution. Senate is a puppet and only follows the dictates of the National Assembly. Although some senators continue to fight for devolution they are a minority. Most of their colleagues have accepted that their chamber will not survive the constitutional reform.

### *Disbursement*

Besides the socio-economic decline, the counties do not receive sufficient funds from the National Government, which only transfers the minimum of 15%. Disbursements are delayed for months so that the county governments cannot plan securely. The combination of insufficient funds and the lack of local revenue generation push many counties to the edge and some are collapsing or are embroiled in litigation.

### *Public service and management of counties*

Counties have very few resources left and those resources are widely misused. County bureaucrats and policy-makers try to get as much as possible from the moribund devolved governance system because this source will dry up soon. The lack of financial resources brings the county services in the areas of health, water and sanitation as well as education to its knees. Most of the county budgets go into salaries, and there is no investment in infrastructure projects. Due to the absence of a strong civil society and media, public oversight of county government conduct is non-existent.

### *Economy and business*

The socio-economic situation in the counties is pitiful. Except for some urban centres, most of the counties have no economic basis because it is hardly possible for the private sector to do business. National and international investors as well as companies exit the counties. People in the counties find no employment and are forced to migrate to the cities. The vicious cycle affects the national economy to a greater extent than expected. Public debts go up and the influence of external donors (China, World Bank, private banks, etc.) increases.

### *Identity*

Many Kenyans seek their salvation in old patterns of ethnicity and tribalism. At the same time, the nation is a more important source of identity and belonging.

### *Equity and fairness*

Social unrest and crime are on the rise representing a challenge for the security forces, which often react with violence. The economic and social downturn influences the perception of equity and fairness negatively. Many young and highly educated Kenyans leave their country in the hope of finding a better life abroad.

### *Media*

Apart from some small and specialised local media, there is no significant diversity of radios, newspapers or TV stations at the county level. The national media houses employ correspondents who contribute from their regions. Formal education of journalists is low and their reporting is limited to scandals around devolution-related issues. Nevertheless, the stories are not the result of quality investigative journalism but of rumours and a general climate against devolution.

## **6. CONCLUSION**

The development of the four scenarios for devolution in 2028 clearly shows the enormous complexity of the governance process since there are many predetermined trends as well as critical uncertainties which are often interconnected and which have a huge impact. Such a complexity does not only represent a challenge for policy-makers but for all stakeholders involved in devolution.

However, by identifying these driving forces as well as potential scenarios this publication not only makes the decisive issues visible but also provides strategic options for future policy action since the different scenarios require different approaches from decision-makers, civil society, scholars and international partners. The direction the devolved governance system will take is not cast in stone and, therefore, it is up to all actors to define what kind devolution they want and how to achieve it. For this purpose a close monitoring and constant adaption of policies are required.

During the future scenario process it became evident that the dimensions of support/non-support of leaders as well as the accelerating/declining socio-economic development of the counties are of utmost importance for the development of devolution in the forthcoming years.

Furthermore, the roaring lion, the abandoned buffalo, the white elephant and the dying rhino scenarios stand in sharp contrast to each other. Consequently, the future of devolution is not sure at all and can vary from an outstanding success story to a massive failure with all its implications.





## **7. POLICY RECOMMENDATIONS**

Given the discussions in the earlier sections of this contribution, policy-makers should consider incorporating a number of recommendations. These include:

1. Implementing a revised and effective management set-up of the Equalisation Fund together with the county governments.
2. Establishing a Minority Fairness Fund specifically dedicated to minorities and communities at county level and funded out of the Equalisation Fund.
3. Developing county frameworks for identification and prioritisation of the needs of minorities and marginalised groups.
4. Encouraging consultations regarding additional funds to counties from the National Government.
5. Implementing the relevant recommendations of the CRA.
6. Establishing minimum standards for counties with regard to service delivery in areas such as health, food security, water and sanitation, and housing and infrastructure.
7. Providing adequate resources for implementing devolution down to the lowest level.
8. Developing policies and regulations on intergovernmental relations with emphasis on arbitration processes between and among governments.
9. Activating civil society participation platforms according to Section 91 and 96 of the County Government Act.
10. Developing mechanisms for evaluating and strengthening the current participatory decision-making processes at national and county levels.

11. Establishing appropriate structures and platforms (county government and local civil society) for coordinating capacity-building activities for the citizens.
12. Institutionalising social accountability and the respective tools at the county level.
13. Advocacy by CSOs at the county level for the implementation and activation of localised public participation models.
14. Assessing and revising existing county laws with regard to county-specific needs - by the Kenya Law Reform Commission in collaboration with the counties.
15. Enacting sectoral policies, laws and regulations on health, roads, energy, and agriculture.
16. Evaluating institutions involved in devolution after the first phase of the devolved governance system. The results could serve as a basis for legislative or constitutional reforms.
17. Establishment of a national policy on CPSBs with uniform procedures, independence and comprehensive regulatory frameworks.
18. Strengthening the role of academia in county decision-making processes.
19. Fostering the exchange between county administrations and the private sector on best practices with regard to performance-based management.
20. Developing and implementing appropriate strategies for natural resources management and value-addition in the counties.
21. Opening entrepreneurial development and incubation centres at county level to foster young entrepreneurship, local economic development and employment.
22. Establishment of an office of the Auditor General as well as of the Ombudsman in every county.
23. Strengthening the internal capacities of counties to detect and prevent corruption and abuse of office including public complaints handling mechanisms by the county and national governments.

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This publication analyses the history and implementation of devolution to date, identifies future driving forces, and describes four potential scenarios for the future development of devolution in Kenya until 2028. It is a contribution to the political and academic debate on the devolved governance system in Kenya and should serve as useful input for the work of political decision-makers, civil society organisations (CSOs), scholars, and international organisations as well as journalists. The four scenarios for devolution in Kenya are: the roaring lion, the white elephant, the abandoned buffalo, and the dying rhino.

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