



## Augmenting proletariat governance: lenses on chapter eleven of the constitution of Kenya, 2010

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### ABSTRACT

Since independence, the governance of development in Kenya has for the most part been centralised under the armpit of government officials. As such devolution is vaguely understood especially by grassroots leaders and communities. Consequently, central government officials have continued to determine the path of development at the grassroots especially so since they also control financial resources through the district treasury. However, the government has recognised this top-down development archetype as a major bottleneck to welfare and has been implementing policies to bring on board the beneficiaries. One major attempt was the District Focus for Rural Development Strategy of the early 1980s, which made the district the local level planning and development coordination and implementation unit. This policy faced several challenges which necessitated more focussed strategies to move decision-making powers from the *centre* to *margin*. The early years of the 21<sup>st</sup> century marked increased resource devolution and decentralized decision-making to the grassroots including Constituencies Development Fund, recruitment of some cadre of staff, management of health facilities and water resources among others. The Constitution of Kenya endorsed by about 70% of votes cast during the August 4<sup>th</sup> 2010 Referendum and subsequently promulgated by the president on August 27<sup>th</sup> 2010 is yet another devolution stab to enhance development and governance at the grassroots. This paper highlights the devolution proposals and the envisaged benefits to grassroots communities in Chapter Eleven of the Constitution of Kenya.

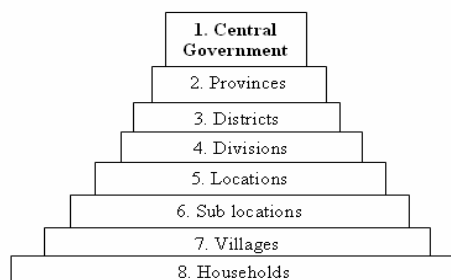
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### Introduction

#### Structure of the Government of the Republic of Kenya

The Government of the Republic of Kenya has an elaborate bureaucratic structure from the national to the village level, with each lower level of the structure being answerable to the one above it on matters of public governance and development. It is headed by an elected president who is the chief executive of the country as both head of state and government. With the promulgation of the new constitution of Kenya on 27<sup>th</sup> August 2010, a country government structure was introduced. It is not yet clear how the structure would look like after the introduction of the county government since parliament is yet to enact the relevant legislation to this effect. The structure of the Government of the Republic of Kenya is as presented in figure 1.

Figure 1: Structure of the Government of the Republic of Kenya



### Key

1. National/Central Government headed by the President and a number of Cabinet Ministers
2. Provinces each headed by a Provincial Commissioner, a central government appointee.
3. Districts that are each headed by a District Commissioner, a central government appointee.
4. Divisions that are each headed by a District Officer, a central government appointee
5. Locations each headed by a Chief, a central government appointee.
6. Sub-locations each headed by an Assistant Chief, a central government appointee.
7. Villages each headed by a Village Head who is not an official government appointee, but appointed by the Chief or Assistant Chief to assist him/her.
8. Households. This is however not a government, but a social structure.

Kenya is divided into 8 provinces each headed by a Provincial Commissioner (PC). The provinces are further divided into smaller administrative units called districts, each of which is under a District Commissioner (DC). It is important to mention that in between the provinces and the central government are administrative structures that are manned by such officers as permanent secretaries, directors and other chief officers working under the Head of Public Service who doubles as the Secretary to the Cabinet. The Cabinet in Kenya is like a

Company Board of Directors as it runs the country under the leadership of the president. It is made up of the President, Vice-President, Prime Minister, other ministers (each in charge of a ministry), the Attorney-General and the Head of Public Service. Following the promulgation of the constitution though and starting in 2012, the Office of the Prime Minister stands scrapped.

Each district is further divided into much smaller administrative units called divisions each headed by a District Officer (DO). Working alongside the district officials are local authorities that have devolved powers to collect revenue and provide certain services within designated areas of their jurisdiction. The local authorities fall under the Ministry of Local Government and include the City Council of Nairobi, municipal, urban, town and county councils, each headed by an executive officer called a Clerk appointed by the central government. In providing services at the local authority level, the clerk is assisted by locally elected leaders called councillors or civic leaders and other staff.

The divisions are divided into much smaller unit called locations each of which is headed by an officer called a Chief. The locations are divided into sub-locations that are placed under the headship of an Assistant Chief. Sub-locations are further divided into villages headed by Village Headmen/women, who are not direct government appointees, but appointed by chiefs and assistants and sometimes by people at the grassroots in line with participatory democracy. The bureaucratic structure from the president of the country down to the village level is called the Provincial Administration. It is noteworthy to mention that a single village is made up of several households and has a population that is fairly small for the Village Headmen/women to virtually know everybody, except perhaps where the population is cosmopolitan as in some urban areas. Households are however not government, but social structures, made up of legally, socially or biologically-related kin. With the investiture of the new constitution though, more structures are set to emerge while others like the provincial administration will be restructured. This however will be achieved after parliament enacts the relevant legislation.

In each of these layers of government bureaucracy, the subordinate level is directly answerable to the next (upper) level structure up to the national or central government. When it comes to implementation of development activities, the district level is the most important and all the structures at this level (from the village to the district) work as a team. Thus, in each of the levels, there are potential government and nongovernmental stakeholders for purposes of devolutionary decision-making. Nonetheless, the district is the most appropriate given that it is the local development coordinating arm of the central government and for which every stakeholder as a requirement should work with. It is also at the district level where most development resources are devolved, shared out among different government departments and therefore controlled to ensure transparency and accountability in their utilization.

#### **Devolution, Grassroots Governance and Service Delivery in Kenya**

Development scholars and those in public administration alike have looked at devolution as a way of moving resources and decision-making responsibilities from the central to the local levels so that grassroots communities can take an active part in making decision regarding local development in line with the idea of participatory democracy (UNDP, 2003; Mwendwa,

2007). Else, it is seen as the increased reliance upon sub-national levels of government, with some degree of political autonomy that are substantially outside direct central government control yet, subject to general policies and laws (Levine & Bland, 2000). Hence, even though powers may be devolved, the decisions made should go along with the relevant legislation and policy provisions of the national government. As such, devolution does not mean independence and to ensure coordinated and balanced national development, there are guidelines in form of policy and legislative direction on the *modus operandi* regarding development decision-making, implementation and administration.

Grassroots governance in Kenya is placed under the ambit of several government arms depending on their duties, the services provided and the powers that are devolved to these levels of state bureaucracy. In many cases, several government arms join together and must therefore be consulted and fully involved in decision making before any development is carried out. Various devolution attempts have been made since independence to decentralize decision-making power to lower levels of the government bureaucracy and this has worked to minimize government red tape regarding access to civic services. Suffice it to mention that more needs to be done not just in devolving power and decision-making, but also sensitising those levels to which the powers and resources are devolved to augment efficiency and effectiveness in civic service delivery.

In particular, the District Focus for Rural Development Strategy of the 1980s (Republic of Kenya, 1982; Chitere, 1994; Makokha, 1985) made the district the local level development coordination and implementation unit. This charged district level government officials with the responsibility of development planning and implementation. However, this strategy faced several management problems including the discredited top-down approach to development mentality (see Makokha, 1985). In addition, resources provided by the government were inadequate including personnel and therefore its goals were never fully realized. As a result, it largely failed to provide the necessary environment for grassroots communities to participate actively in local development. Indeed, previous decentralization attempts in Kenya have yielded little tangible benefits at the lower levels (Oloo, 2006). Nevertheless, from the various attempts important lessons have already been learned, which have informed subsequent devolution and decentralization strategies.

Since then, various other attempts have been made to further devolve decision-making authority and resources to the lower levels and this is demonstrated through stakeholder involvement in formulation of policy documents and development plans. For example, the formulation of the National Poverty Eradication Plan 1999-2015 (Republic of Kenya, 1999) and subsequent Poverty Reduction Strategy Papers have actively tried to involve the intended beneficiaries particularly in data collection and formulation of intervention projects. In addition, the idea and principles behind the Constituencies Development Fund (Republic of Kenya, 2003a), which is already institutionalized by an Act of Parliament has succeeded in devolving substantial resources to the constituency level. Such has seen initiation of projects that otherwise would not have been realized without devolution of such resources.

In addition, both the National Youth Enterprise Development Fund and National Women Enterprise

Development Fund are other devolution attempts. These funds have seen many hitherto unemployed Kenyans accessing resources to engage in income generating activities and hence play a significant role in nation building. Although there are management problems regarding the utilization of the funds including loan default, the significant role played by the funds in alleviating poverty at the grassroots level cannot be gainsaid. It is expected that, when these funds are institutionalized through legislation, they are likely to be more sustainable and therefore more effective in poverty reduction.

When the government declared HIV/AIDS a national disaster in 1999 (Mwenzwa & Amuyunzu-Nyamongo, 2006), several agencies were established to combat the spread of the pandemic and services were devolved to lower levels of the government structure particularly to districts. The devolved HIV/AIDS services and health institutions management at the local level have been able to fight the pandemic and reduce its prevalence rate from about 14% in 2003 to about 5% currently. Similarly, the government recognized that some other social services like water are better devolved to be management at the local level with the government ministry in charge of water playing a policy role. This has seen the formation of quasi-autonomous water companies across the country that have not only improved the quality of water available, but also enhanced its availability to more people.

Moreover, lately there has been the formation of two parastatal bodies namely the Kenya Rural Roads Authority and the Kenya Rural Electrification Authority to provide the respective services at the grassroots level. Some of these services were previously provided by respective local authorities, which proved ineffective as they were not only riddled with corruption, but also incompetence courtesy of political interference among other management and governance issues. In addition, they were manned by largely untrained and scanty personnel who were unlikely to measure up to the efficiency required in the provision of the services. From the foregoing, it is clear that devolution when well managed and monitored can be effective in civic service delivery. Otherwise, it can be an unnecessary burden to the tax payer as it is the case with many local authorities in Kenya.

#### **A Spotlight on Chapter Eleven of the Constitution of Kenya**

The Constitution of Kenya, 2010 was published by the Attorney-General on May 6, 2010 in accordance with Section 34 of the Constitution of Kenya Review Act (No. 9 of 2008) (Republic of Kenya, 2008b). It has eighteen (18) chapters that are divided into two-hundred and sixty-four (264) sections and six (6) schedules. The chapters complement each other in ensuring that Kenya is better governed and that people's voices are audible in development planning and decision-making. In particular, Chapter Eleven (11) on Devolved Government, which is the core of this paper, has seven (7) parts made up of twenty-seven (27) sections (174-200). While the chapter contains the structure of the devolved government in the endorsed constitution, it cannot be read in isolation of others such as Chapter Twelve (12) on Public Finance and the First and Fourth Schedules on Counties and Distribution of Functions between National and County Governments respectively.

The Chapter starts by spelling out the principles and objectives of devolution. In particular, the objective of devolved government would be to promote socio-economic development, make services more proximate to people throughout Kenya and decentralize state organs, their functions and services to the

grassroots. In a way, it aims to promote the interests and rights of minorities and marginalized groups to enable them manage their own affairs. By so doing, the chapter recognises the rights of communities to make decisions regarding their own development as opposed to these decisions being made by central government technocrats (Makokha, 1985; Ikiara, 2000; Chitere, 1994; Mwenzwa, 2007). While the role of these technocrats will not be done away with by the chapter, the role of the local community will be enhanced as the process will not only be more inclusive, but also participatory.

Section 175 of the chapter declares that county governments will be based on democratic principles, the separation of powers and will be provided with adequate resources to make sure they are viable to provide services not only effectively, but also in acceptable standards. Indeed, in section 203(2) of Chapter 12 (Public Finance) it is proposed that not less than 15% of government revenue will be devolved for use by the County Government. This is expected to enhance the provision of quality civic services at the grassroots level including health, security, education and water among others. To ensure gender equity, one of the principles of devolved government is that no gender will make up more than two-thirds of the members of representative bodies in each of the county governments. Moreover, section 197 obligates parliament to ensure community and cultural diversity are reflected in the constitution of County Governments and at the same time enhance the protection of minority groups.

Although substantial power and authority will be devolved to the County Government upon enactment of the Proposed Constitution as has already been highlighted, the National Government has a supervisory role over the former. As such, national legislation in many cases prevails over the county legislation and it is only in special circumstances that the reverse is acceptable as provided in section 191.

#### **Structure and Functions of a County Government**

The chapter provides for a County Assembly and County Executive Committee in each of the proposed forty-seven (47) counties in the First Schedule of the Constitution of Kenya. The County Assembly which will be elected every five years during a general election is constituted by representatives elected through universal suffrage from each Ward. In addition, the Assembly includes members nominated to ensure that no gender takes more than two-thirds of its seats and most important representatives of marginalized members of the local communities. It will be presided over by a Speaker who will be an ex-officio of the County Assembly. The speaker who should not be a member of the County Assembly is elected by the Assembly when it is constituted to preside over its affairs.

The County Assembly is the legislative arm of the County Government and therefore the one in which legislative authority of a given county is vested and exercised. As such, a County Assembly may make laws necessary to occasion effective provision of services and oversee the working of the County Executive Committee and its various organs. In this endeavour, the principle of separation of powers between the legislature and the executive must be respected. Moreover, the County Assembly may approve proposals for the management and exploitation of county resources and the development of its infrastructure and institutions. The resources made reference to however do not include appropriation of land as this is vested with the National Land Commission under Chapter Five (5) on Land and Environment.

On the other hand, the County Executive Committee which is charged with the executive authority of the county consists of a Governor, Deputy Governor and other members appointed by the County Governor, the latter who should not be members of the County Assembly. Like the County Assembly members, the County Governor is elected by universal suffrage together with the Deputy County Governor. As a requirement in section 180 of the promulgated Constitution, there is no separate election for a Deputy County Governor. Rather, the person nominated for the post of County Governor is required to nominate a Running Mate who becomes the Deputy County Governor if the person nominated as County Governor wins in the General Election.

Under the stewardship of the County Governor and the Deputy, the County Executive committee shall be charged with various responsibilities that include implementation of both the national and county legislation within the county. It is also supposed to manage and coordinate the functions of the county government and any other functions that may be devolved to it by legislation. Moreover and where need be section 183(2) mandates the County Executive Committee to prepare legislation proposals for consideration by the legislative arm of the county, the County Assembly.

With regard to term of office, section 180(7) vetos both the County Governor and County Deputy Governor from holding office for more than two terms. If the County Governor is removed from office, the Deputy County Governor assumes office for the rest of the remaining time and should the two be removed, then the Speaker of the County Assembly acts as county Governor. Subsequent to this development, an election should be held to fill those offices within six (6) days of the Speaker assuming the office of the County Governor.

What are the functions of the county government as a whole and how are they different from those of the national government? These questions are answered by making reference to the Fourth Schedule of the Constitution which concerns the functions of both governments. In this schedule functions between the two governments are clearly demarcated, but the national has a supervisory role over the County Government. The National Government has its functions pegged on national issues such foreign affairs, security, development planning, consumer rights, education, promotion of sports, national standards, statistics and population matters, national policies and public investment among other issues that have a national outlook.

On the other hand, the County Government has an important role on issues that do not have a direct collective national implications and outlook but those that can be attended to at the local level with minimal involvement of the National Government. These include agriculture, health services, environmental management, cultural activities, county transport, animal control and welfare, trade development and regulation and county planning and development. Others include pre-primary education, village polytechnics and childcare facilities, implementation of specific national government policies, county public works, disaster management and control of drugs. Most important a county government is charged with mobilization of communities to participate in governance at the local levels.

#### **Implications of the Devolution Provision for Grassroots Governance**

It is already acknowledged that devolution implies decentralization of decision-making from the centre to the grassroots. One of the most important devolution proposals in

the promulgated constitution is a county government. Section 176(2) requires every county to decentralise its functions and provision of its services as much as possible. The implication of this provision is that services will be taken closer to the people and made more responsive to the local needs. It also implies that both the national and county governments will have to recruit more staff in tandem with the devolved services and functions.

Flowing from the foregoing, it is expected that with the enactment of the promulgated Constitution, more job opportunities will be available and hence helping alleviate unemployment especially among the youth. This is expected to pay dividends by way of reduced crime, drug abuse, prostitution and other social evils, better education, health, water, security and extension services, while at the same time opening up the government for more scrutiny by the public. In particular, enhanced security will attract investment in rural areas, alleviate unemployment and create wealth necessary for sustainable national development.

As already mentioned, Chapter Eleven (11) of the promulgated Constitution debars both the County Governor and the Deputy for serving more than two terms in office. What are the implications of this limitation of the terms of office of these officers on grassroots governance? The limitation on the term of both County Governor and Deputy County Governor in essence ensures that political dynasties are not maintained at the grassroots level. Such dynasties may be manipulated for political expediency at the expense of development, civic welfare and national integration.

On the other hand, the problem with the foregoing provision is that the occupants of these positions may only work well during the first term and neglect their work on the subsequent given that they have nothing to lose politically since they are constitutionally debarred from contesting in the subsequent election. It would therefore be important for parliament to legislate on recall in the case of the County Governor and the Deputy to put them on their toes. Such would ensure people play an active part in deciding how they are governed, which is expected to enhance efficiency, transparency and accountability in public service delivery. Nevertheless, it is also expected that should these offices be filled with individuals of the calibre envisaged in Chapter Six (6) of the Constitution of Kenya on Leadership and Integrity, professionalism, efficiency and effectiveness in civic service delivery will be ensured.

Although the County Assembly and the County Executive Committee complement one another in the running of the county government, they are differentiated in their roles in that while the former's role is legislative that of the latter is administrative. Nonetheless, both are elective through universal suffrage and therefore this enhances the role of people in vetting potential leaders and other important matters. Hence, the local citizen is afforded a fair opportunity not only to determine who to govern him, but also by implication how. Since these individuals will be elected from among the local people, the voters will have a reasonable chance to scrutinize their character in order to make informed choices. This is in contradistinction with the previous trend where largely aloof technocrats are imposed on grassroots communities as change agents.

There is substantial power devolved to county government in the promulgated Constitution. While this devolution is important for effectiveness in service delivery, it may end up being an additional burden to the taxpayer without returns commensurate with investment in the form of taxes. It is

instructive to mention that the County Government will be run largely by local politicians who largely prod sectarian interests manifested in form of political infighting at the expense of development. Due to this conflict, societal cohesion may be eroded and development adversely affected. Indeed, one may be compelled to ask: what would set apart a County Government from a Local Authority? Hence, despite the noble intentions of the devolved County Government, there is fear that counties may degenerate and become case studies in ineffectiveness like has been the case with many local authorities in the country.

In the Constitution, the power to manage and appropriate land and the environment is vested in the yet to be instituted National Land Commission. By doing this, the constitution averts a situation where the local County Assembly would do it and by implication forestalling negative civic engagement like land-based ethnic clashes and marooning of certain areas on ethnic or other sectarian grounds. Our thesis here is that if local politicians (County Assembly) are allowed to preside over land, this would be a recipe for societal disintegration courtesy of the *indigenous-foreigners* dichotomy, the genesis of land-based ethnic strife in Kenya.

Section 196 requires a County Assembly to conduct its affairs transparently and for that matter in public to facilitate active civic and media participation in its business. Such is expected to give a voice to the minority and other disadvantaged groups who would otherwise have no avenue to air their concerns. People will then be expected to actively participate in nation building when their views and decision are taken into account in development planning. It is therefore expected that the post-promulgated constitution citizen will not only be more informed, but also involved regarding government organization functions and civic roles.

The implication is that more and better services will be provided and most important these will be brought closer to the consumers. As such, it is also expected that citizens will spend more time in development and nation building, rather than seeking services such as health, water and security. It is hence implied that with more financial resources, drugs, personnel and physical infrastructure will be revitalized, while making their access by the grassroots communities much better.

It has already been mentioned that Chapter Eleven (11) on Devolved Government should be read alongside other chapters such as Chapter 12 on Public Finance. The promulgated Constitution recognizes the need for more funds to manage the County Government and make it more viable in the provision of civic services. Consequently, it proposes to devolve at least 15% of the country annual revenue to the county. This will be in addition to other already devolved funds such as Local Authority Transfer Fund (LATF), Constituencies Development Fund and those earmarked for the fight against HIV/AIDS among others. What are the likely governance implications of this increased fund at the grassroots? Expectedly, more and better services will be provided leading to a more secure, healthier, educated population able to take an active part in nation building. It is therefore expected that with the promulgation of the Constitution, the realization of Kenya's development goals envisaged in the Kenya Vision 2030 will be more real than ever before.

In the constitution of both the County Assembly and County Executive Committee, local people will take an active role particularly in determining who their leaders. As such, the governance of the County Government can be described as local

governance. For this reason, as local leaders govern locally, they are expected to not only understand their people better, but also their needs. On the other hand, the governed are expected to be more responsive to development initiatives as the process of decision-making will be more inclusive and participatory. Hence, ownership of projects among the local community will be enhanced and this will ensure their sustainability.

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