Devolution in Kenya
A Commentary

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Editors:
PLO Lumumba
Morris K Mbondenyi
Tom Kabau

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Foreword

The adoption of the 2010 Constitution by Kenyans resulted in a multifaceted governance structure, and a complex system of intergovernmental relationships, under a devolved government. It marked the ultimate realisation of the aspiration of the Kenyan people for the devolution of governance powers and functions under a new social contract. This publication is a timely, valuable and highly commendable assemblage of well researched essays on Kenya's system of devolved governance.

The previous centralised form of governance, under the repealed Constitution, was linked to countless challenges that had historically confronted the Kenyan State, namely, inequitable distribution of development benefits, marginalisation of some sections of the society, minimal citizen participation in the management of the affairs of the State, and unaccountability in the utilisation of public resources, amongst others. In a sense, the incorporation of devolved governance in the new constitutional dispensation reflected the aspiration of the Kenyan people for equitable development, popular participation in governance and greater accountability in the utilisation of State resources. By adopting the devolved system of government, the Kenyan people were driven by the firm believe that such a bottom-up approach to the management of State affairs would enhance the realisation of their political, economic and social aspirations.

The merits, opportunities and pitfalls of Kenya's system of devolution are comprehensively scrutinised and evaluated from diverse perspectives in the various compelling treatises that constitute this publication. The book commences by expounding on the theoretical and conceptual nature of decentralisation of governance power and functions in Kenya through devolution, and then proceeds to analyse the practical implication of devolved governance in significant thematic areas of political, economic and social processes within the State. The introductory essays expound on the political and social foundations of devolved governance, and thus reveal the manner in which the experiences and aspirations of the Kenyan people shaped the State's unique concept of devolution. Since both the national and county governments are autonomous, yet interdependent, the book proceeds to examine and evaluate the opportunities and challenges presented by the Kenyan constitutional and statutory regime for intergovernmental

relationships, including the obligation to cooperate and consult, and the appropriate approaches to dispute resolution. The volume also provides vital insights on sectoral aspects and implications of the legal, policy and institutional framework for intergovernmental relations, particularly in the economically significant agricultural sector.

The prospects and challenges of the realisation of distributive justice in Kenya's development process, through the devolved system of governance, are also extensively evaluated from both conceptual and practical perspectives. In addition, the capacity of the devolved governance system to engender qualitative popular participation, and thus improve democratic governance and accountability in the utilisation of State resources, is meticulously and intensely interrogated. Where necessary, the essays make references to vital lessons that may be obtained from the conceptual and practical aspects of decentralisation of power and functions from comparable jurisdictions, particularly South Africa. The examination of the emerging jurisprudence from the Kenyan courts on issues incidental to devolved governance is helpful in determining, appreciating and critiquing the role and effectiveness of the Kenyan Judiciary, the ultimate guardian of the people's sovereignty and constitutional supremacy, in facilitating the full realisation of the diverse objectives of devolved governance. Further, references to judicial precedents from comparable jurisdictions provides vital insights, which are essential in filling constitutional, statutory and jurisprudential lacunas, with regard to the way the national and county governments should conduct intergovernmental relationships, and the approach that the courts should adopt in resolving arising disputes.

Governance has an implication on all sectors of the Kenyan social processes, and affects all Kenyans irrespective of their profession or position. This well-written and highly informative volume will, therefore, be a useful reference material to professionals, students and even laymen interested in understanding how the devolved government operates, and in particular the opportunities and challenges that are incumbent upon the Kenyan mode of governance through devolved power and functions.

Prof. Githu Muigai (EGH, SC)
Attorney General of the Republic of Kenya
March 2016

Contributors

Caroline Kago is currently a Doctor of Philosophy (PhD) Candidate at the University of the Witwatersrand Law School. She holds a Master of Laws (LLM) degree from the University of the Western Cape, South Africa, and a Bachelor of Laws (LLB) degree from the University of Nairobi. She also holds a Post-Graduate Diploma in Law from the Kenya School of Law and is an Advocate of the High Court of Kenya. Ms. Kago has extensive work experience in lecturing, researching and consulting in the field of law. She has worked as a Lecturer and Chairperson of the Private Law Department at the Kenyatta University Law School, Visiting Fellow at Consulting House and an Associate at Mamicha and Company Advocates. She has participated in numerous trainings, seminars and workshops across the world. She has also published peer-reviewed articles in journals.

Faith Nekesa Simiyu is the Chairperson of the Private Law Department at the School of Law, Jomo Kenyatta University of Agriculture and Technology. She is an Advocate of the High Court of Kenya and a Partner at Simiyu, Opondo, Kiranga and Company Advocates, with experience in legal auditing and litigation, and extensive expertise on policy, legislative and sectoral strategies for devolved governance. She serves as the Nairobi County Devolution and Legislative Representative, on behalf of the Law Society of Kenya (LSK), where she facilitates and assists the Nairobi County Assembly in the interpretation of various laws relating to devolution. She is also a member of the Young Lawyers Committee of the LSK, where she engages in the agitation for resolution of issues affecting young lawyers. In addition, she serves in the Editorial Board of the *Jomo Kenyatta University Law Journal*. Ms. Simiyu obtained her Master of Laws (LLM) in Commercial Law from Erasmus University Rotterdam in the Netherlands. She concurrently studied and successfully obtained the Bachelor of Laws (LLB) and Bachelor of Education (BEd (Arts)) degrees from the University of Nairobi and Kenyatta University respectively. She also possesses a Postgraduate Diploma in Law from the Kenya School of Law. Further, she is a certified graduate teacher and trainer in legislative and policy issues. Ms. Simiyu is actively engaged in various seminars, consultancies and research work, and has produced high level reports, publications and presentations on the same, both locally and internationally. Amongst her teaching engagements are Agricultural Law, Bankruptcy Law

and Company Law. Her specialised field of interest and training is biased towards the water, energy, technology, commercial and agriculture sectors, in select thematic areas that include sustainable development and devolution. As part of her extra-curricular activities, she is an ardent lover of photography and swimming, and is also a volunteer at the Nairobi Chapel as a mentor of underprivileged high school students on the Jubilee Scholarship Fund.

James Mamboleo is an Advocate of the High Court of Kenya. He is a Senior Partner at Nyamweya Mamboleo Advocates, a Consultant with the International Economic Law Centre and the Acting Dean at the Africa Nazarene University Law School. He holds a Master of Laws (LLM) degree in International and Commercial Law (World Trade Specialist) from the University of Buckingham (UK) and a Bachelor of Laws (LLB) degree from the University of Nairobi. Mr. Mamboleo has a robust mixed practice and academic background. He has previously taught law at the Catholic University of Eastern Africa (CUEA), headed legal and policy reforms at the Agriculture Sector Coordination Unit (ASCU) and held the positions of Legal Officer and Head of Credit Administration in Equity Bank and First Community Bank respectively. He has represented, advised and consulted for both private and public institutions on a wide range of legal issues. His research and practice focuses on themes that relate to the convergence of law and economics in development.

John Mutakha Kangu is a Senior Lecturer at the Moi University School of Law, where has previously served as Dean. He has a Doctor of Laws (LLD) degree from the University of the Western Cape, a Master of Laws (LLM) from the University of South Africa (UNISA) and a Bachelor of Laws (LLB) from the University of Nairobi. He has extensive work experience as a lecturer, consultant and researcher. Among other positions, he has worked as the Chairperson of the Task Force on Devolution and was a Commissioner in the Constitution of Kenya Review Commission. Dr. Mutakha has numerous publications in the form of books, book chapters and journal articles.

Morris Kiwinda Mbondenyi is an Associate Professor of Law and the Deputy Director of the Kenya School of Law. He was previously the Founding Dean of the Africa Nazarene University Law School. He completed his Doctor of Laws (LLD) and Master of Laws (LLM) studies at the University of South Africa (UNISA), and his Bachelor of Laws (LLB) degree at Moi University, Kenya. He has a Postgraduate Diploma in Law

from the Kenya School of Law and is an Advocate of the High Court of Kenya. Prof. Mbondenyi has several years of experience in legal research, lecturing, advising and consulting. He has consulted with, researched and worked for a number of organisations in Africa. In addition, he has numerous academic publications (books, book chapters and journal articles) and has presented papers in both local and international conferences and seminars. He has also acted as a peer-reviewer for numerous law journals and is one of the Founding Editors-in-Chief of the *Africa Nazarene University Law Journal* (*ANULJ*). Prof. Mbondenyi is a member of several professional organisations. In addition, he is involved in community development, particularly, in charity work and pro bono legal and human rights advisory services. In 2011, he was recognised by the Kenyan *Business Daily* Newspaper as one of the country's 'Top 40 under 40 Men' for his outstanding achievements at a youthful age; in 2012, his biography was listed in Marquis Who is Who in the World; and in 2013, he received the Distinguished Research and Innovation Award of the Africa Nazarene University.

PLO Lumumba is currently the Director and Chief Executive Officer of the Kenya School of Law. He is an Associate Professor of Public Law and has previously served as the Dean of Kabarak University Law School. He has lectured law at the University of Nairobi, the United States International University (Africa) and the Widener University, United States of America (USA). He is an Advocate of the High Courts of Kenya and Tanzania. He is a holder of Bachelor of Laws (LLB) and Master of Laws (LLM) degrees from the University of Nairobi and a Doctor of Laws (LLD) degree from the University of Ghent, Belgium. He is a Certified Public Secretary ((CPS) (K)) and a Member of the Kenya Institute of Management (MKIM). Prof. Lumumba has been trained on Human Rights at the Institute of Advanced Legal Studies of the University of London in England, and at the Raoul Wallenberg Institute of the University of Lund in Sweden, and on International Humanitarian Law in Geneva, Switzerland. In addition, he has authored, co-authored and edited several books. He has also published numerous articles in refereed journals, in addition to several book chapters. He is a former Secretary of the Constitution of Kenya Review Commission, and a former Director of the defunct Kenya Anti-Corruption Commission (KACC). Prof. Lumumba is also a Founding Trustee of the African Institute for Leaders and Leadership (AILL) and founding Chairman of the Association of the Citizens against Corruption (ACAC). He was recognised by the Kenya-USA Association for

the Martin Luther King Jnr Leadership Award in 1996, and was the recipient of the 2008 Martin Luther King Africa Salute to Greatness Award by the Martin Luther King Jnr Africa Foundation. He has also been included in the Marquis Who's Who in the World, and was the Distinguished Mwalimu Nyerere Lecturer for 2014 at the University of Dar-es-Salaam.

Tom Kabau is a Senior Lecturer and Chair of the Law, Science and Technology Department at the School of Law, Jomo Kenyatta University of Agriculture and Technology. He has previously served as a Chair of Department at the Africa Nazarene University Law School. His academic credentials include a Doctor of Philosophy (PhD) degree in Public International Law from the University of Hong Kong, and Master of Laws (LLM) and Bachelor of Laws (LLB) degrees from the University of Nairobi. He has previously been a Research Fellow at Utrecht University and was a Transnational Law Summer Institute Fellow at King's College London. In addition, he has a Postgraduate Diploma in Law from the Kenya School of Law and is an Advocate of the High Court of Kenya. Dr. Kabau has various publications in the form of books, book chapters and articles in peer-reviewed journals. He has also served as a peer-reviewer of articles submitted to journals and was one of the founding Editors-in-Chief of the *Africa Nazarene University Law Journal*. Dr. Kabau has also presented papers on diverse legal issues in international and local conferences. He has previously provided research and consultancy services to various organisations. He is also a member of various professional bodies. His research interests are in Public International Law, Human Rights Law, Law and Development, Property Law and Intellectual Property Law.

Walter Khobe Ochieng is an Assistant Lecturer at Moi University, School of Law. Khobe's research interests are in the areas of Transformative Constitutionalism, International and Comparative Human Rights Law, Third World Approaches to International Law, African Legal Thought, the Application of Contemporary Philosophy to the Theory of Law, and Literature as a Form of Legal Philosophy. Khobe holds a Master of Laws (LLM) degree in Human Rights and Democratisation in Africa from the University of Pretoria, a Bachelor of Laws (LLB) (Hons) degree from Moi University, and a Postgraduate Diploma in Legal Practice from the Kenya School of Law. He is an Advocate of the High Court of Kenya.

Chapter One

Devolution in Kenya: An Introductory Synopsis

PLO Lumumba, Morris Kiwinda Mbondenyi and Tom Kabau

1 Background

Devolution, in the Kenyan context, involves the 'dispersion of power and responsibilities' from the central government to largely locally managed units in the form of county governments.[1] Preceding its inclusion in the recently promulgated Constitution and up till now, devolution has been, and continues to be, advanced as the ultimate means of realising equitable distribution of resources, managing the country's ethnic diversity, amongst other equitable national goals.[2] Devolution, therefore, has been identified as the suitable mechanism for addressing a myriad of problems in Kenya. For instance, PLO Lumumba observed that '[t]he argument over the years has been that the [national] cake has been inequitably and disproportionately enjoyed by the community' from which the President originates.[3] He noted that such concerns 'legitimised the clamour for devolution', thus contributing to a concept of governance through the counties. [4]

Highlighting concerns for equity and distributive justice in the inception of devolved government, Yash Ghai instructively pointed out that '[t]here was a widespread perception, which statistics support, that the centralised state' had, in the post-independence period,

1 Francis Njihia Kaburu, 'Fiscal Decentralisation in Kenya and South Africa: A Comparative Analysis' (2013) 1(1) *Africa Nazarene University Law Journal* 76, 77.

2 For the 2010 Constitution, see, Constitution of Kenya (promulgated 27 August 2010) <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010#part_I> accessed 14 March 2015.

3 PLO Lumumba, 'The Leadership Kenyans Deserve' in Okoth Okombo and others (eds), *Challenging the Rulers: A Leadership Model for Good Governance* (East African Educational Publishers 2011) 38, 40. The author is a former Secretary and Chief Executive of the Constitution of Kenya Review Commission (CKRC), a body that was instrumental in the drafting of the new Constitution.

4 *Ibid*.

'singularly failed to promote economic and political development, and that only a few areas and a small elite, had benefited from the policies of the government.'[5] In particular, according to Jill Cottrel-Ghai and other authors, devolution was viewed as a mechanism for bringing greater benefits to minorities and the marginalised sections of the Kenyan society.[6] They specifically highlighted Article 174 of the Constitution, which lists the objectives of devolution as being the granting of the 'powers of self-governance to the people', and the recognition of 'the right of communities to manage their own affairs and to further their development', as very instrumental in the protection of the marginalised and minorities. [7]

With regard to the probable mitigation of the often tragic ethnic politics that is a serious threat to national unity, Yash Ghai argued that with devolution, State powers will be dispersed throughout Kenya.[8] He opined that subsequently, '[n]ot all political competition will be focused on one office, which is inherently unhealthy. There will still be sites of power for parties or communities which are excluded from the presidency.'[9] With respect to the structures for intergovernmental relations and co-operation, Ghai observed that the necessity for national and county leaders to negotiate and reach compromises on certain issues, in addition to the entrenchment of mechanisms for cooperation and negotiations in the constitutional framework for devolution, will enhance opportunities of public participation and institutionalise a balanced exercise of public power.[10]

Generally, the debate on devolution has over the years caused major rifts and divisions among both scholars and policy makers

5 Yash Ghai, 'Devolution: Restructuring the Kenyan State' (2008) 2(2) *Journal of Eastern African Studies* 211, 214. The author is a former Chair of the Constitution of Kenya Review Commission.

6 Jill Cottrel-Ghai and others, 'Taking Diversity Seriously: Minorities and Political Participation in Kenya' (Minority Rights Group International, January 2013) 7 <http://www.ecoi.net/file_upload/1226_1362406320_mrg-brief-kenya-jan13-final.pdf> accessed 5 May 2015.

7 *Ibid*.

8 Ghai (n 5).

9 *Ibid*.

10 *Ibid*.

in Kenya. The divisiveness has included the lack of agreement on what form such devolution should take. For instance, even during negotiations for constitutional change in the post-2002 National Rainbow Coalition (NARC) government era, which resulted in what was referred to as the Bomas Draft Constitution, there were two factions that were extremely divided on the nature and extent of devolution.[11] The first faction, identifiable with the then President Mwai Kibaki and his supporters, was opposed to extreme decentralisation as it would diminish the power of the central government and was feared as likely to balkanise the State along regional ethnic identities and interests.[12] The second group, which was identifiable with Raila Odinga, an eminent Kenyan politician who served in the NARC government and was later a Prime Minister, strongly endorsed extensive devolution of governmental power from the centre.[13]

At long last, so it seems, a design, enunciated under Chapter Eleven of the Constitution of Kenya 2010, was agreed upon.[14] The establishment of a devolved system of governance was one of the significant factors that contributed to Kenyans approving the 2010 Constitution during its adoption referendum. In a research carried out by Eric Kramon and Daniel Posner shortly after the referendum, almost 20% of Kenyans stated that, more than any other single factor, their reason for voting for the adoption of the Constitution was due to its inception of a devolved system of governance.[15]

Mutakha Kangu rightly opined that the transition to the new constitutional framework is a difficult, problematic and ambitious

11 Eric Kramon and Daniel N Posner, 'Kenya's New Constitution' (2011) 22(2) *Journal of Democracy* 89, 91.

12 *Ibid*.

13 *Ibid*.

14 Chapter Eleven defines and clarifies the objectives, principles, structures and responsibilities of the devolved government. See, Constitution of Kenya (promulgated 27 August 2010) <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010#part_I> accessed 14 March 2015.

15 Other reasons cited by Kenyans as the single most important factors for voting in support of the adoption of the new Constitution included desire for change, the notion that the Constitution would eradicate corruption, establishment of mechanisms for addressing land problems, provisions aimed at eliminating ethnicity, tackling of political impunity and the hope that the Constitution would improve the protection of human rights. Eric Kramon and Daniel N Posner (n 11).

state of affairs, significantly due to the fact that it also involves a paradigm shift from a centralised system of governance to a devolved one.[16] This is due to the fact that devolution involves not just the constitution of the 'newly created County Governments and [the] transfer [of] powers and functions from the National Government to them'.[17] It requires the additional task of deconstructing the previous 'centralised system with its legal order and some of its institutions, and the construction of the devolved system … with a new legal order and … institutions.'[18]

Devolution is, however, not simply a panacea for all the ills afflicting the Kenyan society, which include inequitable distribution of resources, ethnicised politics, marginalisation of some sections of society, institutionalised corruption and exclusive exercise of public power, among others. PLO Lumumba cautioned that if such a system is not implemented through sound concepts and practices, 'it may herald the "devolution" of poor leadership and bad governance to the detriment of the people as Nigerians witnessed early on in most of their 36 states.'[19] In addition, as Morris Mbondenyi and Osogo Ambani pointed out, if improperly structured, devolved governments may become retrogressive avenues for divisions on the basis of ethnicity or religion.[20] Further, Mbondenyi and Ambani caution that differences between the national and county governments may arise 'on the interpretation of laws, the extent of functions and powers or the use of natural resources', which, if not well resolved, can obstruct political, social and economic progress.[21] The efficacy of a devolved system of government therefore does not lie in the beauty and intricacy with which it is tailored, but more

16 J Mutakha Kangu, 'Transition to Devolved Government in Kenya' (2014) 2(2) *Africa Nazarene University Law Journal* 32, 32-33. The author is a former Chairman of the Task Force on Devolved Government, and was a Commissioner of the Constitution of Kenya Review Commission, which played a significant role in the drafting of the 2010 Constitution.

17 *Ibid*.

18 *Ibid*.

19 PLO Lumumba (n 3).

20 M Kiwinda Mbondenyi and J Osogo Ambani, *The New Constitutional Law of Kenya: Principles, Government and Human Rights* (Claripress Ltd 2012) 102.

21 *Ibid*.

with the resolute and dedicated practice of democratic constitutional principles, particularly, constitutionalism and the rule of law.

On the basis of the above background, this book has the objective of exploring and interrogating the entire architecture of devolution in Kenya. In this regard, it examines the legal, political, social, economic and historical basis, as well as the potential perils and possibilities for success of the devolved system of government introduced by the 2010 Constitution. In that context, the book highlights the basic framework and operation of devolved government in Kenya, with specific emphasis on the formal division of powers between the two levels of government, the key means of interaction or relationship between the two levels of government, and sectoral distribution of competencies and functions that have an implication on fiscal devolution. Where relevant, comparisons are made between Kenya's devolved system of government and what obtains in other comparable jurisdictions.

In sum, the book essentially opens and advances scholarly debates on devolution in Kenya as envisaged under the new constitutional dispensation, on the one hand, and on the other, the practice of devolution in other comparable jurisdictions. Thus, the book ably interrogates, with a view to making viable proposals, how Kenya's devolved system of government can be made more workable and, therefore, a success.

2 Structure of the Book

The book contains seven chapters. In Chapter One, PLO Lumumba, Morris Kiwinda Mbondenyi and Tom Kabau give the general introduction and synopsis of the book. The chapter provides the general background and structure of the book. In Chapter Two, Morris Kiwinda Mbondenyi and PLO Lumumba analyse the conceptual and historical overview of Kenya's devolved system of government. The chapter critically examines the conceptual and historical designs, potential perils and possibilities for success of the country's devolved system of government through the prism of the 2010 Constitution. Given that an analysis of this new system of governance cannot bypass the historiography of Kenya's post-independence discourse, a targeted discourse of this historical

narrative is provided in the chapter. In general, the chapter acknowledges that, if properly implemented, the devolved system of government will be the ultimate means of realising equitable distribution of resources and the effective management of the country's ethnic diversity, something which was not easily tenable under the former system of centralised governance.

In Chapter Three, John Mutakha Kangu examines the multi-level system of government under the devolved governance structures of the 2010 Constitution, whose functionality is anchored on intergovernmental interdependence and cooperation. He argues that the new system's devolution of political power, responsibilities and resources, regarded as the Constitution's major transformative aspect, is founded upon a combination of self-rule and shared-rule among two levels of government, the national and the county. As he instructively observes, Article 6(2) of the Constitution, which provides for the distinction and interdependence of the national and county governments, combines aspects of autonomy with those of joint and collaborative action between the two levels of government. According to the author, such a governance system necessitates a framework for intergovernmental relations and resolution of disputes among and within the different levels of government.

In Chapter Four, Faith Simiyu focuses on sectoral devolution while examining intergovernmental relations between national and county governments. She observes that one of the key constitutional requirements is that both governments, which are functionally distinct and interdependent, are to conduct their intergovernmental relations on the basis of consultation and cooperation. Strikingly, however, Kenya's Constitution largely lacks specific provisions to reinforce a robust regime for intergovernmental relations. According to the author, the Intergovernmental Relations Act of 2012, enacted to give effect to the constitutional provisions, provides a weak framework for consultation and cooperation.[22] It simply regurgitates the descriptive constitutional provisions on intergovernmental

22 See, Intergovernmental Relations Act, No 2 of 2012 <kenyalaw.org/kl/fileadmin/pdfdownloads/LawsonDevolution/IntergovernmentalRelationsActNo2of2012.doc> accessed 14 April 2015.

relations and fails to advance better provisions on coordination and management of intergovernmental relations.

Specifically, the author opines that the Intergovernmental Relations Act fails to guide the management of intergovernmental relations at the sectoral level. The arising travesty is an encroachment on, and inconsistency with, the functional distinctiveness of the county government, especially in situations where national state corporations discharge devolved functions. The chapter recommends sectoral mechanisms for enhancing intergovernmental relations. Vital lessons for reform are obtained from a comparative analysis of the 2005 Intergovernmental Relations Framework Act of South Africa, which provides a somewhat clear intergovernmental relations forum unique to the sectoral assignment of each government level, with definitive roles given to state corporations as the intergovernmental technical support team.[23]

Tom Kabau and James Mamboleo, in Chapter Five, examine the prospects of achieving distributive justice in Kenya's development process under the new devolved system of governance. As the authors point out, concern for distributive justice in the allocation of economic and social benefits was one of the core factors that contributed to the establishment of the devolved system of government under the 2010 Constitution, Kenya's new social contract. In discussing the Kenyan case, the chapter makes special reference to the human rights-based concepts of the right to development, as enshrined in various international legal instruments. The concept of the right to development has the objective of institutionalising distributive justice in economic and social processes at both the international and state levels.

The authors essentially postulate the thesis that the new devolved system of governance provides a progressive mechanism for the promotion and realisation of distributive justice in Kenya through an enhanced human rights-based approach to development. Accordingly, the structures of devolution provide Kenya with improved governance structures that enhance opportunities of promoting and fulfilling obligations arising from the right to

23 *Ibid*.

development. The authors acknowledge that the clamour for the new social contract, for which devolution is one of the defining features, was due to the fact that the previous centralised system of governance did not favour institutionalisation of distributive justice in the State's economic and social processes. On that basis, the authors proceed to evaluate systems through which the devolved government establishes prospects of achieving distributive justice in Kenya's development process.

In Chapter Six, Walter Ochieng focuses on the prospects and challenges of democratic governance and public participation under the devolved governance system. According to the author, the 2010 Constitution of Kenya gives prominence to citizen participation in all governance processes. Participation, as postulated by the author, does not imply the mere involvement of Kenyans in the process of selecting their representatives, but requires qualitative engagement of the citizens during decision making. To the author, devolution should facilitate governance at this optimal level by ensuring that decision-making is brought closer to the citizens. As a system of governance, it should ensure that the citizenry have a say in their affairs.

The author is of the view that the devolved system of government has been adopted in Kenya in order to provide the modalities and spaces for the realisation of public participation and democratic governance aspiration. On that basis, the chapter interrogates whether the legal and institutional framework for public participation in governance within the county governments are adequate to guarantee the attainment of qualitative citizen participation. The chapter then proceeds to address the issue of designing deliberative and efficient structures that can enhance public participation in decision-making within county governments and, therefore, enhance democratic governance in Kenya. The author undertakes an informative comparative analysis of the legal, policy and institutional framework for public participation in devolved government in Kenya and South Africa.

Caroline Kago, in Chapter Seven, evaluates the quality and effectiveness of public participation both in the making and implementation of the 2010 Constitution. She argues that the mere

fact that the 2010 Constitution was drafted and adopted through a very participatory process does not guarantee qualitative citizen participation in its implementation. It is on that basis that she evaluates the effectiveness of public participation in the implementation of the 2010 Constitution under the devolved system of government. She is particularly concerned with the question of whether there are adequate and appropriate public participation avenues for Kenyan citizens at the level of county governments. The author therefore concisely interrogates the legal, policy and institutional framework for public participation at the county level.

While discussing the significance of public participation in the implementation of the 2010 Constitution, the chapter discusses some of the case law on the issue in order to clarify the manner in which courts have interpreted the nature and scope of the right of Kenyans to participate in their governance. In addition, it examines the legal, policy and institutional frameworks for public participation at the provincial and local governments in South Africa, including the practice of the decentralised governments after the 1996 Constitution, in order to formulate informed proposals for improving the participation of the citizenry under the Kenyan system.

Chapter Two

A Conceptual and Historical Overview of Kenya's Devolved System of Government

Morris Kiwinda Mbondenyi and PLO Lumumba

1 Introduction

The debate on a devolved system of government has been the single most highly contested and divisive question in Kenya's history, notwithstanding the general consensus that devolution can be one of the most appropriate means of realising equitable distribution of resources in a country that is ethnically divided. The divisiveness has largely been propagated by the lack of agreement on the most suitable form of devolution for the country. At long last, so it seems, a design, enunciated under Chapter Eleven of the Constitution of Kenya 2010, has been agreed upon.

This chapter examines this design, its potential perils and possibilities for success. Given that such an examination cannot bypass the historiography of Kenya's post-independence discourse, a targeted discussion of this historical narrative is provided in this chapter. In general, the chapter finds that the efficacy of a devolved system of government does not lie in the beauty and intricacy with which it is tailored but more with the resolute and dedicated practice of constitutional principles such as constitutionalism.

2 Devolved System of Government: A Review of Concepts

Devolved systems of government are established in pursuance of the concept of decentralisation. In the most general of terms, decentralisation refers to the transfer of authority from a central government to a sub-national entity.[1] Beyond this general definition,

1 Boko Sylvain, *Decentralization and Reform in Africa* (Kluwer Academic Publishers 2002) and DA Rondinelli (ed), *Decentralisation and Development: Polity Implementation*

the process of decentralisation is complex, taking different forms in different contexts and according to the desires and plans of those in charge of its design and implementation. There are various ways in which a government may decentralise power to the sub-national level. These are deconcentration, delegation and devolution.

2.1 Deconcentration

Deconcentration is the delegation of certain decision-making powers to lower, provincial or local levels of the central government.[2] It has a peculiar characteristic in that it takes the form of both centralisation and decentralisation. In this case, decision-making authority is shifted from one locality (the capital) and one individual (the President) to lower levels of government.[3] However, although financial and management responsibility may be shifted to the local units, there remains the hierarchical dependence of the local authority to the central government for appointments, assignments and salaries.[4] Deconcentration is the weakest form of decentralisation used mostly in unitary states. This is the typical system of government that Kenya operated under since 1979.

The presumption under a deconcentrated arrangement is that the central government's local representatives are closer to the local populations and can better respond to the local interests than decision-makers in the capital city. However, since it does not involve any real transfer of authority to local governments that are wholly elected or accountable to the local populations, deconcentration is a limited form of decentralisation as it largely depends on the political will of those in the central government.

2.2 Delegation

In the case of delegation**,** the responsibility for decision-making is transferred to the semi-autonomous organisations or units that are

in Developing Countries (Sage 1983) 19.

2 Boko (n 1).

3 *Ibid*.

4 R Crook and J Manor, *Democracy and Decentralisation in South-East Asia and West Africa: Participation, Accountability, and Performance* (Cambridge University Press 1998) 11- 12. See also Boko (n 1); Cheema and Rondinelli (n 1).

not wholly under the control of government.[5] Such organisations may enjoy ample discretion in decision-making and may not be subject to the same constraints as regular service personnel.[6] Delegation remains a limited form of decentralisation with the difference between it and full political decentralisation being that the lower level organisations to which power is transferred remain ultimately accountable to the central government. Delegation is a more extensive form of decentralisation than deconcentration and it is one way to balance local and national government interests. In some cases it may involve a principal-agent type of a relationship in which the central government is the principal and local organisations are the agents.[7] In that case an issue that arises concerns finding ways to provide incentives that will induce the local, self-interested agent to behave in ways that are as close as possible to the central government's wishes.

2.3 Devolution

Devolution is a form of decentralisation in which the authority for decision-making is transferred to quasi-autonomous units of local government.[8] In other words, devolution is a political concept that denotes the transfer of political, administrative and legal authority, power and responsibility from the centre to lower level units of government created by the national constitution. In a devolved political system, the lower level units of government, to which power, authority and responsibility have been transferred (devolved), are more or less autonomous from each other.[9] This means that any one level of government is not under any obligation to refer to or seek authority from the centre in order to make and/or implement decisions that fall within their exclusive jurisdiction. In such a

5 W Oyugi, 'Decentralisation for Good Governance and Development' (2000) 21 *Regional Development Dialogue* 3.

6 *Ibid*.

7 Oyugi (n 5).

8 JC Ribot, 'African Decentralisation: Local Actors, Powers and Accountability, Democracy, Governance and Human Rights' (2002) *United Nations Research Institute for Social Development, Democracy, Governance and Human Rights Programme Paper No 8*, 7.

9 *Ibid*.

system, local governments have legally recognised geographical boundaries within which they exercise their authority and perform public functions.

2.3.1 The Content of Devolution

Decentralisation may be political, administrative, fiscal or economic. Given that this chapter deals with devolved government as the form of decentralisation under the Constitution of Kenya 2010, we discuss these three methods of decentralisation under the banner of devolution.

Administrative devolution refers to the transfer of responsibility for the planning, financing and management of selected public functions from the central government to lower tier units of the government.[10] These might be field units of government, semi-autonomous public authorities or corporations or regional authorities. Political devolution consists of the creation of sub-national levels of government that are endowed with autonomous decision-making power.[11] Generally, political devolution is more likely to be successful when conducted within the framework of a multiparty, participatory, grassroots-based system. The sub-national entities (state, provincial, district governments, municipalities or counties as the case may be) to which power is devolved in the course of political devolution must be legitimately elected local governments which have legal authority conferred to them by the people who elected them and enjoy financial autonomy. The Constitution of Kenya 2010, is the most explicit of the examples so far given, devoting an entire chapter comprising of 27 articles to 'Devolved Government'. Article 200 of the Constitution provides for the enactment of legislation to specify the details of the process of devolution. The Constitution also provides a fairly comprehensive outline of the structures and functions of the devolved units, thus reducing the possibility of political manipulation through various interpretations of the Constitution.

10 See Cheema and Rondinelli (n 1).

11 *Ibid*.

Fiscal devolution refers to the definition and alignment of monetary functions among the different levels of government.[12] The responsibilities of which level of governments sets and collects taxes, or which tier undertakes what expenditures, ought to be clearly spelt out. Fiscal devolution, if not clearly structured, may altogether derail an otherwise plausible devolution programme. Therefore, a fiscal devolution programme must in a straightforward way delineate whether and on what basis local governments can self-finance or recover costs through user charges. It must clearly specify what types and what levels of intergovernmental transfers are undertaken; whether municipalities or counties, as the case may be, can expand local revenues through property taxes, sales taxes or indirect taxes; whether there is to be any type of co-financing arrangements between the central government and local government; and whether municipalities have the authority to borrow and mobilise funds from local, national or international sources.

Economic or market devolution consists of privatisation and deregulation.[13] This form of devolution shifts the responsibility for provision of goods and delivery of services from the central government to the private sector. When a government undertakes economic or market devolution reforms, it allows functions that had previously been the primary responsibility of the state to be carried out by private corporations, community groups, cooperatives and non-governmental organisations.[14] Generally, economic devolution takes place within the framework of an economic liberalisation programme. It can only succeed if the legal constraints on private sector participation in service provision and delivery are removed, thereby allowing competition to take hold between the different private providers.

More often than not, these different styles of devolution are carried out simultaneously making it a fairly complex process. In the end, a well-designed programme of devolution must contain all four

12 P Smoke, 'Fiscal Decentralisation in Developing Countries: A Review of Current Concepts and Practice' (February 2001) *United Nations Research Institute for Social Development, Democracy, Governance and Human Rights Programme Paper No 2*, 9.

13 *Ibid*.

14 *Ibid*.

approaches to devolution. Political devolution without administrative devolution is possible but probably ineffective. By the same token, the devolution of administrative and political decision-making powers to the lower tiers of government without proper financial authority is most likely short-lived. Finally, economic devolution is important because the private sector is often more creative than government entities in devising efficient ways of producing and providing a given good or service, making government provision of such a good or service an inefficient use of societal resources.

3 Historical Antecedents of the Devolved System of Government in Kenya

Kenya's journey towards the present-day devolved system of government can be traced to a decentralised arrangement in the form of deconcentration or the designation of certain decision-making powers to lower, provincial or local levels of the Central Government. Kenya has operated under this deconcentrated system through a local government system (provided for under the repealed Local Government Act (LGA), Chapter 265 of the Laws of Kenya) which had a majority of the structures of a devolved system save for the lack of autonomy of the local levels and their immense subordination to the central government. This local government system had its roots in the colonial period with the passing into law of the Village Headmen Ordinance in 1902 giving Provincial Commissioners (PCs) powers to appoint locals to be official headmen of a village or group of villages.[15] The headmen were charged with the maintenance of law and order, collection of taxes and arbitration of minor cases in the villages. In 1903, the colonial government introduced the Township Ordinance for the areas of Nairobi and Mombasa (which were the exclusive preserve of the white settlers) to be run by a District Commissioner (DC).[16] In 1912 the Local Authority Ordinance was passed setting up a native authority system which failed to be implemented because the colonial government

15 Njogu Gathata, 'Local Government System in Kenya Cap 265, Laws of Kenya: A Presentation to the North South Cooperation Between Municipal Council of Nyahururu and the Municipalities of Hatulla and Janakal of Finland on the 23rd August to 7th September 2009' (Unpublished).

16 *Ibid*.

and the settler community could not agree on the actual mechanics, functions and compositions of the authority system.[17] In 1924, the Local Native Councils were established under the Native Authority Ordinance. Their main objectives were to encourage and develop a sense of responsibility and duty towards the upcoming state amongst the chief elders and the native population. The Local Native Council was composed of the DC, Assistant DC, Headmen and other locals appointed by the PC.[18] In 1926, a Local Government Commission was established to make recommendations on the structure and functions of a local government system in Kenya. Some of its recommendations were:

a) A policy of separate development based on the segregation of the different races;
b) The establishment of District Councils in the settled area comprising of elected officials;
c) The exclusion of Townships from the District Councils which were to have their own advisory committees.[19]

In 1928, the Local Government District Councils Ordinance was passed establishing District Councils in settled areas. The Municipal Councils Ordinance was also passed elevating Nairobi and Mombasa to the status of Municipalities. In 1930, the Revised Township Ordinance was passed creating two grades of Townships A and B. The DC was mandated to run the grade B Townships exclusively and grade A Townships with the help of an advisory committee. In 1937, a new Native Authority Ordinance was passed providing that Councillors to the Local Native Councils had to be elected by the people. In 1946, Locational Councils were created within the Local Native Councils to provide lower level self-rule for the locals.[20] In 1950, the Local Government African District Ordinance was passed elevating the Local Native Councils to African District Councils giving the African District Councils a number of powers

17 *Ibid*.
18 *Ibid*.
19 *Ibid*.
20 *Ibid*.

like that to enter into contracts on their own behalf.[21] In 1952, the County Councils Ordinance created the District Councils, County Councils, Urban District Councils and Rural District Councils.[22] In 1963, Local Government Regulations were passed establishing a new system of African District Councils. Thereafter in 1968, the Transfer of Functions Local Government Act was passed, stripping the Local Authorities of key responsibilities and transferring them to the Central Government. Some of the powers withdrawn from the local authorities were those of public health, education and road services. The only authorities that maintained a measure of power in these areas were the Municipalities and County Councils. In 1977, the Central Government officially became the major provider of these responsibilities with the enactment of the Local Government Act. Additionally, local authorities lost their financial stability with the abolishment of the Graduated Personal Tax (GPT).[23]

With the enactment of the Local Government Act, various categories of local authorities were established. These categories comprised of Municipal Councils, County Councils and Town Councils. Municipal Councils were urban local authorities which were larger than County Councils and Town Councils. County Councils covered the rural country-sides and were formed along district administrative boundaries. They provided services to rural area residents and had a structure similar to that of the Municipal Councils except that they were presided over by Chairmen instead of Mayors.[24] Town Councils were towns whose physical and population structure were a notch lower than those of Municipal Councils. They were towns waiting to be elevated to Municipal status upon attaining improved attributes.[25]

Local authorities were structured along civic and administrative functions. The civic functions were vested in elected and nominated councillors. Administrative functions were vested in the Town Clerks in the case of Municipal Councils and Town Councils and County

21 *Ibid.*
22 *Ibid.*
23 *Ibid.*
24 *Ibid.*
25 *Ibid.*

Clerks in the County Councils.[26] Other key administrative officers included the Treasurers, Engineers and Public Health Officers. Each local authority had the clerks department, treasurers department, work departments and the environment department. In smaller local authorities, the environment and work department were fused into one. Municipal Councils were headed by Mayors while County and Town Councils were headed by Council Chairmen.

The authorities functioned under a committee and full council system.[27] Under this system, each local authority had a committee comprising members of the council supervised by the various relevant departmental heads. Matters pertaining to each of these departments were brought before the committee through notices of motion where they were deliberated upon and resolutions made.[28] The manner and conduct of the debate was provided for by the LGA. Resolutions made at the committee level had to be tabled before a full council meeting which was the highest organ in the council under the chairmanship of the Mayor or Council Chairman and comprised of the elected and nominated councillors. Once such a resolution was adopted at the full council meeting, it became policy. This policy then had to be approved by the Minister for Local Government, in the essence the Central Government.

Local authorities could also enact by-laws which were prohibitions on the conduct of persons within the various authorities that may disrupt public order and smooth running of socio-economic activities therein.[29] These laws covered areas of general nuisance, health, environment and conduct of business. The supervisory and regulatory role of the council was performed through the application of these laws.

As typical in a deconcentrated system of government, the Minister for Local Government, in this case representative of the Central Government, had immense powers rendering the system far from any resemblance of a devolved arrangement. The Minister

26 R Southall and G Wood, 'Local Government and the Return to Multi-Partyism in Kenya' (1996) 95 *African Affairs* 501.

27 Local Government Act, Chapter 265 of the Laws of Kenya.

28 *Ibid*.

29 *Ibid*.

under the LGA had the powers in effect to approve or disapprove all matters resolved by the local authorities. With the enactment of the Constitution of Kenya 2010 which provides for a more comprehensive system of devolved government under Chapter 11, the LGA was repealed and new legislation on the new system put in place.

4 An Overview of Kenya's Devolved System of Government under the 2010 Constitution

With the enactment of the Constitution of Kenya 2010, central to the organisation of government is the principle of devolved government. Under this principle, Kenya operates under two constitutionally autonomous levels of government: the National Government and the County Government. This division plays an important role in the determination and implementation of public policy and the management of public finances. This segment discusses the constitutional framework and operation of devolved government in Kenya with specific emphasis on the different levels of government, the formal division of powers, the operation of fiscal devolution and the key means of interaction or relationship between the different governments. It is important to note that our discussion shall be limited to the constitutional framework governing devolution in Kenya and shall not analyse the many pieces of legislation enacted to supplement it. Detailed discussions on existing legislation on devolution are conducted elsewhere in this book by several other authors. The purpose of this chapter is essentially to provide the conceptual and historical overview of Kenya's devolved system of government.

4.1 National Government

While there isn't a specific section defining the National Government as it exists, for example, in the Canadian Constitution,[30] a concerted reading of Article 1(3) of the 2010 Constitution outlines the National Government as comprising of the Executive, Legislature

30 Government of Canada, 'Constitution Acts 1867 to 1982' (17 November 2007) <http://laws.justice.gc.ca/en/const/index.html> accessed 25 July 2013.

and Judiciary. It is noteworthy that save for the Judiciary, certain Executive and Legislative functions are shared between the National Government and the County Governments.

4.2 County Government

The County Government comprises of the County Assembly and the County Executive Committee.[31] The County Assembly is comprised of elected members representing the various Wards within the county and has legislative authority conferred upon it by Article 185(1) of the Constitution. The County Assembly has the power to make any laws necessary for or incidental to, the effective performance of the functions and exercise of the powers of the County Government as stipulated in the Fourth Schedule to the Constitution.[32] Additionally, a County Assembly, while respecting the principle of the separation of powers, may exercise oversight over the County Executive Committee and any other county executive organs.[33] It may also receive and approve plans and policies for the management and exploitation of the county's resources and the development and management of its infrastructure and institutions.[34] The County Executive Committee is headed by a Governor, deputised by a Deputy Governor (who are both directly elected by the electorate) and other members appointed by him with the approval of the County Assembly, from among persons who are not members of the Assembly.[35] The Committee is mandated to:

a) Implement county legislation;
b) Implement, within the county, national legislation to the extent that the legislation so requires;
c) Manage and coordinate the functions of the county administration and its departments;
d) Perform any other functions conferred on it by the

31 Constitution of Kenya 2010, Article 176 (1).

32 Fourth Schedule to the Constitution of Kenya 2010.

33 Constitution of Kenya 2010.

34 *Ibid*.

35 *Ibid*.

Constitution or national legislation.[36]

The County Executive Committee may also prepare proposed legislation for consideration by the County Assembly and provide the Assembly with full and regular reports on matters relating to the county.[37]

4.3 Distribution of Functions between the National Government and the County Governments

The Fourth Schedule to the Constitution grants various powers to the National and County Governments. The National Government has control over foreign affairs, foreign policy and international trade, the use of international waters and water resources, immigration and citizenship, the relationship between religion and state, language policy and the promotion of official and local languages, national defence and the use of the national defence services, courts, intellectual property rights, labour standards, consumer protection, including standards for social security and professional pension plans, education policy, standards, curricula, examinations and the granting of university charters.[38] Other powers of the National Government include agricultural policy, universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions.

The County Governments share Executive and Legislative functions (the exact degree of both functions to be determined by implementing legislation) with the National Government in areas of agriculture, health services, education, transport and communications, veterinary policy, housing and public works just to mention a few.[39] In these areas of shared jurisdiction decisions on the structure and management will have to be based on the principle of shared governance earlier discussed. These areas can be referred to as those in which concurrent powers are vested both

36 *Ibid.*

37 *Ibid.*

38 Fourth Schedule to the Constitution of Kenya 2010.

39 *Ibid.*

levels of government. The nature of these powers will presumably be detailed in implementing legislation which is to follow as provided for in the Fifth Schedule.

International constitutional practice has shown that distribution of functions in a devolved system of government, Kenya included, is not cast in stone and may be changed either through constitutional amendments or judicial interpretation of these functions.[40] On changes through constitutional amendments, Chapter Sixteen of the Constitution provides for the procedure to be followed to effect such a change. Given that an amendment relating to the distribution of functions between the two levels of government touches on the structure of the devolved system of government as envisaged under Article 255(1)(i), such procedure must involve the introduction of a Bill in either Houses of Parliament and its passing in both Houses. After Presidential Assent, the Bill must be put before a national referendum in which a simple majority is required to make the Bill law.[41] As for changes through judicial interpretation, the Courts under Chapter Ten are given a constitutional role to make decisions on issues touching on the Constitution including its interpretation. As is the case in the Commonwealth, these judicial decisions can in turn, have transformational impacts on the nature and operation of Kenya's devolved system of government.

4.4 Fiscal Devolution in the Kenyan System

Fiscal devolution refers to the complex interrelationship between the National Government and the County Governments in the area of finance.[42] Four elements are central to this financial interrelationship, namely, national-county taxation powers, revenue allocation, financial equalisation and county revenue funds.

40 J Mutakha Kangu, 'Constitutionalism: A Comparative Analysis of Kenya and South Africa' (2008) 2(1) *Moi University Law Journal* 105.

41 Constitution of Kenya 2010.

42 J Mutakha Kangu (n 40).

4.4.1 National and County Taxation Powers

Both the National and County Governments have the constitutional power to impose certain direct forms of taxation. Under Article 209 of the Constitution, only the National Government may impose income tax, value-added tax, customs duties and other duties on import and export goods and excise tax. County Governments on the other hand may impose property rates, entertainment taxes and any other tax that it is authorised by law. From the foregoing provisions, it is apparent that the responsibility for revenue generation is unequally distributed between the national and county spheres of government. The National Government's taxation power is much more far-reaching while the County Government has limited taxation and borrowing powers. Under Article 212, a County Government has the power to borrow funds from whatever source so long as the sum to be borrowed can be guaranteed by the National Government in addition to being approved by its local Assembly.

4.4.2 Revenue Allocation: Commission on Revenue Allocation

Part 4 of Chapter Twelve of the Constitution provides for the equitable sharing of revenue raised by the National Government. Article 215 establishes a Commission on Revenue Allocation for this purpose.[43] The Commission consists of a chairperson, nominated by the President and approved by the National Assembly; two persons nominated by the political parties represented in the National Assembly according to their proportion of members in the Assembly; five persons nominated by the political parties represented in the Senate according to their proportion of members in the Senate and the Principal Secretary in the Ministry of Finance.[44] Article 216 which provides for the functions of the Commission stipulates that its principal function is to make recommendations concerning the basis for the equitable sharing of revenue raised by the National Government between the National and County Governments; and among the County Governments. The Commission is also mandated to make recommendations on other matters concerning the

43 Constitution of Kenya 2010.

44 *Ibid*.

financing of, and financial management by, County Governments, as required by the Constitution and national legislation.[45]

The basis for allocating a share of the national revenue to the counties is determined by the Senate once every five years by resolution.[46] In determining the basis of revenue sharing, the Senate is required to take into account the criteria under Article 203(1) (which provides a detailed list of criteria for determining the 'equitable shares').The Senate is also required to request and consider recommendations from the Commission on Revenue Allocation, consult the County Governors, the Cabinet Secretary responsible for finance and any organisation of County Governments; and invite members of the public, including professional bodies, to make submissions to it on the matter.

4.4.3 Financial Equalisation

The purpose of the introduction of the concept of financial equalisation in the Constitution is in line with a commitment to fairness and equity, which are central to the overall objective of devolved government under Article 174.[47] In an ethnically diverse country like Kenya, financial equalisation is meant to ensure that across the country, people have access to reasonably comparable public services at reasonably comparable levels. Kenya is not the only country that provides for a mechanism for redistributing national revenues and addressing disparities among Counties or Provinces in other jurisdictions. In fact, many countries that are federations or practice some form of devolved government involving a central government and several regional governments have similar equalisation systems. Examples are Germany, Switzerland, Australia, India, Pakistan, and South Africa.The United Kingdom, for example, has an equalisation approach that takes into account the special fiscal needs of Scotland, Wales, and Northern Ireland.[48] The following

45 *Ibid*.

46 *Ibid*.

47 *Ibid*.

48 See, 'Achieving a National Purpose: Putting Equalisation Back on Track, Expert Panel on Equalisation and Territorial Formulae' <http://publications.gc.ca/site/archivee-archived.html?url=http://publications.gc.ca/collections/Collection/F2-

can be deduced as the basics behind the incorporation of financial equalisation as provided for in the Kenyan Constitution:

a) In accordance with Article 204(1), the equalisation programme is funded entirely by the national government using taxes paid by Kenyans across the country and not from one or more regions;
b) The objective of the programme is to address the economic marginalisation of to be defined areas of the country. Article 204(2) provides that the Equalisation Fund established thereunder shall only be used to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation. In the essence, those areas or groups that have less ability to pay for public services are entitled to equalisation payments;
c) According to Article 204(2), read together with 204(3)(b), the equalisation payments an area or group receives from the National Government may be conditional; that is, they may have strings attached. In such instance the areas or groups have to account to the National Government on how these funds are put to use;
d) Equalisation is only designed to raise the areas or groups up to a common standard. Areas that enjoy provision of basic services above the common standard do not see any reductions as a result of equalisation;
e) Equalisation is designed to fill the gap between an area's own capacity to provide basic services to its inhabitants and a common standard across the country. It is not designed as a permanent entitlement. As an area's or group's wealth increases, the principle dictates that it should receive less money in equalisation payments and none whatsoever if its capacity to provide attains the common standard.[49]

176-2006-1E.pdf> accessed 25 July 2013.

49 Marshall Jim, 'Seven Issues in Equalization: A Discussion' (Saskatchewan Institute of Public Policy, 2005) <http://www.eqtff-pfft.ca/submissions/SevenIssuesinEqualization.pdf> accessed 25 July 2013.

4.4.4 County Revenue Funds

Article 207(1) establishes a Revenue Fund for each County Government, into which all moneys raised by or on behalf of the County Government are paid into with the exception of money reasonably excluded by an Act of Parliament. These moneys can only be withdrawn from the Revenue Fund only as a charge against the Fund that is provided for by an Act of Parliament or by legislation of the county or as authorised by an appropriation by legislation of the county.[50] Furthermore, money shall not be withdrawn from the Fund unless the Controller of Budget has approved the withdrawal. An Act of Parliament may make further provision for the withdrawal of funds from a County Revenue Fund and provide for the establishment of other funds by counties and the management of those funds.

5. The Implications and Prospects of Kenya's Devolved System of Government

5.1 Devolved System of Government as a Basis of Rapid Development

Devolved government has been introduced into Kenya's constitutional landscape with numerous promises chief amongst them is the equal distribution of national resources and the reduction of poverty.[51] In 2001, recognizing the need to assist impoverished nations more aggressively, United Nations (UN) member states adopted the Millennium Development Goals (MDGs). The MDGs are eight international development goals that all 192 UN member states and at least 23 international organisations had agreed to achieve by the year 2015. They included eradicating extreme poverty, reducing child mortality rates, fighting disease epidemics such as AIDS, and developing a global partnership for development.

Whereas Kenya has some of the continent's wealthiest individuals, it is home to one of the world's largest slums. The Kenya

50 Constitution of Kenya 2010.

51 HWO Okoth-Ogendo, 'The Politics of Constitutional Change in Kenya since Independence, 1963-1969' (1972) 71 *African Affairs* 9.

Household Budget Survey (KHBS) suggests that in 2005/6 almost half of the population (47 percent) lived in poverty, of which 85 percent were in rural areas.[52] The eradication of poverty, and of related conditions such as inequity and unequal access to basic social needs, is an essential part of Kenya's development agenda, following the government's recognition that long-term political and social stability will otherwise be unattainable. Some elements require action by the National Government, while others put the onus on County Governments. Within the framework of fiscal devolution, County Governments are set to play an important role in the rapid growth and development of Kenya, going by the objectives of devolution as set out in the Constitution.

5.2 Devolved Government and Poverty Eradication

Poverty, which has been defined as the inability to attain a minimal standard of living, has been measured in terms of basic consumption needs or the income required to meet these needs. An important rationale for devolved government is that County Governments are closer to the people and therefore better equipped to obtain information on local preferences and needs at lower cost and are more likely to conceive and implement pro-poor policies.[53] Fiscal devolution is meant to boost public-sector efficiency in service delivery, so that the scarce public resources are expended on health, education and other social services. It can generate gains in financing, efficiency and quality by devolving resources and decision-making powers to subnational governments for the delivery of services. Fiscal devolution also enhances the accountability and transparency of public institutions in policy-making by bringing expenditure assignments closer to revenue sources and hence to the citizenry. The quality of service provision can also be enhanced since County Governments are more sensitive to variations in local requirements and open to feedback from the users of services.

52 Poverty Reduction and Economic Management Unit Africa Region, 'Kenya Poverty and Inequality Assessment - Volume I: Synthesis Report' (June 2008) <http://siteresources.worldbank.org/INTAFRREGTOPGENDER/Resources/PAKENYA.pdf> accessed 8 November 2015.

53 Etienne Yemek, 'Understanding Fiscal Decentralisation in South Africa' <http://www.idasa.org.za> accessed 25 July 2013.

Therefore, fiscal devolution can be applied in poverty alleviation strategies in a number of ways. Firstly, in order to provide opportunities to the poor. Secondly, in order to empower the poor to take advantage of such opportunities. Thirdly, in order to protect the poor against their own vulnerability.[54] All these steps involve the implementation of pro-poor interventions within the framework of cooperation between the two levels of government. However, the flipside of this argument is that if not properly implemented, devolved government can be a way for the National Government to avoid carrying out its responsibilities.

5.3 Devolved Governance as a Catalyst for Good Governance

Governance refers to the complex mechanisms and processes used in implementing policy and institutionalising rules and norms within any organisation, institution or society.[55] It involves a combined effort and participation of all stakeholders including state institutions and civil society. Existing literature views good governance as a government's responsiveness to the needs and wishes of citizens, for example, bringing the responsibility for providing public services closer to citizens.[56] Former UN Secretary General, Kofi Anan, referred to good governance as a *sine qua non* for economic and social development.[57] Further, it is perhaps the single most important factor in eradicating poverty and promoting development. Good governance entails the existence of efficient and accountable institutions. According to this view, governance has to do with the manner in which responsibilities are devolved to government bodies.[58] At all levels, governments must take responsibility and be accountable. In the context of Kenya's devolved system of government, this means that the National Government must enable the County Governments to fulfil these obligations.

54 *Ibid*.
55 *Ibid*.
56 *Ibid*.
57 *Ibid*.
58 *Ibid*.

The principles of good governance require government institutions to be efficient, effective and consistent. This approach is closely connected to the concepts of transparency, integrity and policy coherence. Good governance mechanisms and rules aim at promoting development, protecting human rights, guiding the respect for the rule of law and accommodating all stakeholders including people to participate in decision-making processes that affect their lives. In theory, the reduction of poverty is more likely to be assured when the people for whom pro-poor interventions are meant are allowed, through empowerment, to effectively participate in these interventions.[59]

Therefore, devolved government is assumed to facilitate redistribution and poverty alleviation since it brings greater local level control over resources and their utilisation. However, good governance requires institutional capacity and mechanisms to ensure accountability through the capacity to monitor and enforce rules and to regulate societal activities in the public interest. Such requirements involve assigning responsibilities to other state institutions in controlling and verifying that government decisions are formulated and implemented in line with its legal commitments. These institutions will have to include an integrated public sector and relevant administrative legislation, efficient parliamentary oversight, an independent judiciary system and an adequate and independent auditing body.

Under a devolved fiscal system, good governance ought to ensure that public resources are effectively and efficiently managed. Additionally, it must ensure effective and sustainable resource mobilisation and its efficient use. In this regard, government and public institutions must ensure greater transparency, predictability, and accountability in the decision-making process. They must provide reliable, relevant and timely information about their activities.

59 *Ibid.*

5.4 Devolved Government and the Promises of Enhanced Citizen Participation

One of the banners under which the devolved government was campaigned for, was that it would bring governance closer to the citizenry. The first way in which a devolved system of government does this is by the election of local governments by the citizenry. However, fiscal devolution may pose a particular challenge for citizen participation in local governance in view of its technical complexity and critical significance for the delivery of public services.[60] Participation in this area of devolved governance is likely to be restricted to select groups and individuals with the technical know-how and would therefore tend to exclude the vast majority of ordinary citizens who pay taxes and consume services provided by local governments. Therefore, fiscal devolution ought to be perceived in its broadest sense as a process which is expected to enhance the opportunities for citizen participation as plainly bringing the decision-making processes closer to the people. In so doing, it is then an important step towards creating an environment with opportunities for regular interactions between citizens and county levels of government. Robinson has suggested that despite its complexity, citizens and civil society can participate in fiscal devolution through:

a) The rules and formulae governing the allocation of grants and revenue-raising powers to local governments;
b) The decision-making processes concerning the sources and level of locally generated revenues;
c) The allocation, utilisation and monitoring of earmarked financial transfers;
d) Decisions on the allocation of untied funds and locally generated resources;
e) Resources allocated for supporting participatory processes in local governance activities, *i.e.* capacity-building for civil society and local government actors in participatory techniques.[61]

60 Boko (n 1).

61 *Ibid*.

5.5 Devolved Government and the Realisation of Affirmative Action

Affirmative action is a deliberate policy or programme that seeks to remedy past discrimination by increasing the chances of the affected to participate in what they were previously denied. The object of affirmative action, otherwise known as positive discrimination, is to enhance the participation of marginalised groups in decision making and implementation and make a difference in the political climate and culture.[62] The protection of rights for minorities and marginalised groups is classically provided for under the Bill of Rights. However, the Bill of Rights by itself is inadequate because experience has shown that its efficiency depends on access to courts, and the capacity of the judiciary to provide redress.[63] Many questions relating to the Bill of Rights border on politics, and therefore, their justiciability is more often than not impugned. The reasonable implication of this reality is that the Bill of Rights requires to be complemented by other devices, such as is done by the concept of affirmative action.

The system of devolved government created under Chapter Eleven of the Constitution, acknowledges and employs the principle of affirmative action. The Chapter makes references to considerations based on gender, minorities and marginalised communities in its provisions. It may be strongly argued from the foregoing that women and ethnic minorities are implicitly considered as special groups in need of constitutional protection and affirmative action.[64] Indeed a central theme of devolution is the protection of minorities and marginalised groups. Some of the provisions that seek to foster and promote affirmative action include Article 175(c) which requires that no more than two-thirds of the members of representative bodies in each county government shall be of the same gender. This is bolstered by Article 177(1)(c) through which the membership of the devolved units (county assemblies) must comprise of the

62 *Ibid.*
63 *Ibid.*
64 *Ibid.*

number of members of marginalised groups, including persons with disabilities and the youth.

6 Conclusion

This chapter has provided an overview of both the concept and historical parameters of Kenya's devolved system of government. As already noted, the concept of devolution has generated heated debates in Kenya for many decades. The main source of the contestation was in regard to the form such a devolved system of government should take. In the midst of such contestation, there has been a general agreement that devolution, if properly implemented, will be the ultimate means of realising equitable distribution of resources and managing the country's ethnic diversity. With the numerous legislation enacted to complement the constitutional framework, it is expected that Kenya's devolved system of government will open up the country to many opportunities – social, economic and political.

Chapter Three

Cooperative Government and Intergovernmental Relations in the Kenyan Devolved System of Government

John Mutakha Kangu

1 Introduction

The 2010 Constitution of Kenya has introduced a multi-level system of government, which essentially establishes a cooperative system of devolved government.[1] The system's devolution of political power, responsibilities and resources, regarded as the 2010 Constitution's major transformative aspect, is founded upon a combination of self-rule and shared-rule among two levels of government - the national and the county. Such a system necessitates a framework for intergovernmental relations and resolution of disputes among and within the different levels of government. This chapter adopts a constitutional perspective and examines the constitutional provisions dealing with cooperative government, intergovernmental relations, and dispute and conflict resolution. In addition to this introduction, the chapter is structured into three sections. The first part discusses the concept and meaning of cooperative government and its two components, namely, distinct and inter-dependent governments. The second section expounds on cooperative intergovernmental relations and the obligations it imposes. In the third part, intergovernmental disputes, and the framework for their resolution, are examined.

Since the Kenyan devolution system borrowed heavily from the South African Constitution, instructive lessons are drawn from the jurisprudence of South African courts in the interpretation of equivalent provisions. The significance of this chapter is that it

1 See, Constitution of Kenya (promulgated 27 August 2010) <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010#part_I> accessed 14 March 2015.

addresses practical challenges, as in the subsequent period after the inauguration of county governments in 2013, intergovernmental relations have been more adversarial than cooperative. This raises the question whether the concept of cooperative government and intergovernmental relations is fully, or at all, understood.

2 Cooperative Government

Article 6(2) of the Constitution provides that '[t]he 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.' This provision forms the foundation of Kenya's cooperative form of devolved government, which combines a certain measure of autonomy on the part of each of the two levels of government, but with a measure of joint and collaborative action and decision-making by the two levels. This provision indicates that Kenya, like South Africa, has made a deliberate choice to settle for a system of cooperative as opposed to competitive devolved government. A cooperative system of multi-level government is founded upon a certain measure of shared responsibilities or concurrent competences.[2] This choice heralds a cooperative approach to the management of intergovernmental relations and dispute resolution. In *Certification of the Constitution of the Republic of South Africa, 1996* (*First Certification* judgment), the South African Constitutional Court commented on a similar choice by South Africa thus:

> The Constitutional system chosen by the [Constitutional Assembly] is one of cooperative government in which powers in a number of important functional areas are allocated concurrently to the national and provincial levels of government. This choice, instead of one of 'competitive federalism' which some political parties may have favoured, was a choice which the [Constitutional Assembly] was entitled to make in terms of the [Constitutional Principles].[3]

2 Iain Currie and Johan de Waal, *The New Constitutional and Administrative Law Volume 1 Constitutional Law* (Juta Law 2001) 119.

3 *In Re: Certification of the Constitution of the Republic of South Africa, 1996* (*First Certification* judgment) 1996 (10) BCLR 1253 (CC) para 287.

The choice could, if well managed and operated, avoid disputes arising. Disputes among governments or organs of state have the potential of interrupting the smooth functioning of the political and government system, thus making a system that can avoid them a worthy venture.[4] For a fuller understanding of cooperative government, intergovernmental relations and dispute resolution, four important terminologies, which are utilised in this chapter, require interpretation, and they are: 'distinct', 'interdependent', 'consultation' and 'cooperation'.

2.1 Distinct Governments

'Distinct' or 'distinctiveness' refers to the autonomy of the levels of government, which connotes two things. First, distinctness connotes a certain measure of autonomy for each of the orders of government as entities, and in their powers and functions.[5] In the Kenyan case, this autonomy is made even stronger in the sense that the nature of the powers and functions are cast by Article 1 of the Constitution, as being an exercise of the sovereign power of the people, which is shared among the two levels of government.[6] Both levels of government and the 47 counties are creatures not of one level of government by the other, but of the Constitution as the expression of the will of the sovereign people. None is a mere agent of the other, or can be abolished by the other.[7] Each level of government elects its own political structures and institutions which it controls. In this sense, each level of government is distinct from the other. Understood against the historical background of the previous local government that was completely subservient to the central government, the Constitution has made a fundamental paradigmatic shift by adopting orders of government that are distinct. South Africa, from which Kenya borrowed this system, talks of spheres of government that

4 *Minister of Police and others v Premier of the Western Cape and others* 2013 (12) BCLR 1365 (CC) para 19.

5 Nico Steytler and Jaap de Visser, *Local Government Law of South Africa* (Lexis Nexis 2011) Chapter 16 at p 3.

6 Articles 1(3) and (4) of the Constitution of Kenya (n 1).

7 Task Force on Devolved Government, *Final Report on Devolved Government in Kenya: Developmental Devolved Government for Effective and Sustainable Counties* (2011) 22.

are distinctive, interrelated and interdependent, terms to which the courts and scholars have already given legal meaning.[8]

Secondly, distinctness, as an expression of autonomy, connotes exclusion of hierarchy in the relations between the governments.[9] It is an extension of the autonomy concept, which ensures that in their relations, none of the governments is treated as a mere agent of the other, but as an equal partner. The county governments are autonomous and not mere agents of the national government.[10] When explaining the status of local government as a distinct sphere of government, Steytler and De Visser associate this terminology with autonomy and elevate local government to the status of 'equal partners'.[11] Woolman and Roux also recognise the notion

8 In the South African case of *Premier of Western Cape v President of the Republic of South Africa* 1999 (4) BCLR 382 (CC) at para 50, the Constitutional Court observed that '[d]istinctiveness lies in the provision made for elected governments at national, provincial and local levels'. See also Norman Levy and Chris Tapscott, 'Intergovernmental Relations in South Africa: The Challenges of Cooperative Government' in Norman Levy and Chris Tapscott (eds), *Intergovernmental Relations in South Africa: The Challenges of Cooperative Government* (Idasa 2001) 11, where they observe that the spheres of government are '*distinctive* from the perspective of their legislative and executive autonomy'.

9 Nico Steytler and Jaap de Visser, 'Local Government' in S Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2011) chapter 22 at p 15, where they observe that '[t]he result was that "[t]he Constitution has moved away from a hierarchical division of government power in favour of a new vision, in which local government is interdependent, and (subject to permissible constitutional constraints) inviolable and has latitude to define and express its unique character."'

10 In the South African case of *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Authority Metropolitan Council and others* 1998 (12) BCLR 1458 para 126, which was decided in the context of the Interim Constitution, Justice Kriegler made it very clear that 'for the first time … provision was made for autonomous local government with its own constitutionally guaranteed and independent existence, powers and functions.' The Court described this new status of local government in a historical context thus:

> The constitutional status of a local government is thus materially different to what it was when Parliament was supreme, when not only the powers but the very existence of local government dependent entirely on superior legislatures. The institution of elected local government could then have been terminated at any time and its functions entrusted to administrators appointed by the central or provincial governments. That is no longer the position. Local governments have a place in the constitutional order, have to be established by the competent authority, and are entitled to certain powers, including the power to make by-laws and impose rates.

Ibid para 38.

11 Steytler and De Visser (n 9) chapter 22 at pp 126-127. See also Steytler and De Visser (n 5) chapter 16 at p 3.

of autonomy and exclusion of hierarchy with the assertion that the 'use of "spheres" reflects a linguistic turn away from a hierarchical relationship between national, provincial and local government'.[12] Stauffer and Topperwien note that the system of a combination of self-rule with shared-rule does not rely on hierarchy between the different orders of government, but assures limited power of all the levels of government.[13]

Although, as has been noted, county government is not the equivalent of local government, this meaning of distinctness applies to such a government, which is described in the Constitution as a distinct level of government. The two levels of government are autonomous but, as in the case of South Africa, the autonomy of the county governments is relative as the national government is granted limited powers of supervision and intervention in county affairs. Steytler and De Visser describe this relative autonomy as a relationship that 'simultaneously exhibits elements of autonomy and hierarchy'.[14] However, since the supervision and intervention powers are constitutionally circumscribed and constrained, they do not subordinate the county government to national government, and must be exercised within the framework of cooperative government. It is notable that although the Parliamentary Select Committee (PSC) had proposed several changes to the Draft Constitution, which would have lowered the status of the county governments by subordinating them to the national government, the Committee of Experts (CoE) rejected these proposals and insisted on counties that are not subordinate to the national government. Furthermore, 'enhancing "checks and balances and the separation of powers" as one of the objects of devolution', which the PSC had suggested to be deleted, was retained in the Constitution.[15]

12 Stuart Woolman and Theunis Roux, 'Co-operative Government and Intergovernmental Relations' in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2 edn, Juta 2011) chapter 14 at p 7.

13 T Stauffer and N Topperwien, 'Balancing Self-Rule and Shared Rule' in LRB Fleiner and T Feiner (eds), *Federalism and Multiethnic States: The Case of Switzerland* (2 edn, Institute of Federalism Frobourg Switzerland 2000) 52.

14 Steytler and De Visser (n 9) chapter 22 pp 126-127.

15 Committee of Experts on Constitutional Review, *Final Report of the Committee of Experts on Constitutional Review* (2010) 125.

In sum, therefore, the two levels of government are distinct and have autonomy from each other in the sense that there is no subordination of one order of government to the other as they are co-ordinate to each other. The governments are created and protected, their functions assigned, and their financial resources are allocated, by the Constitution.[16] Accordingly, they can only be abolished or adjusted through constitutional amendments involving both levels. Hogg argues that if any of them were to be able to solely amend the Constitution, then the system would cease being co-ordinate and become subordinate. The level of government with power to unilaterally amend the Constitution would be a superior government with power to even abolish the other levels of government.[17] The autonomy encompasses at least four distinct aspects; namely, political, functional, financial and administrative autonomy.

2.2 Inter-Dependency

The two levels of government are also interdependent, which connotes dependency, interconnectivity and the need to work together in concert in the discharge of the constitutional mandate of governance. Though each has been assigned its own functions, the governments are dependent on each other and none can operate in isolation. Therefore, though the governments are distinct, they are also interdependent in the sense that they are interconnected in their functions and powers. As the Supreme Court, *In Re the Matter of the Interim Independent Electoral Commission* observed, '[t]here is, therefore, in reality, a close connectivity between the functioning of national and county government'.[18] In addition, Deputy Chief Justice Kalpana Rawal in *Speaker of the Senate and another v Attorney General and others* asserted 'that the *core value of devolution* is hinged upon the twin principles of *co-operation and interdependence*.The beads

16 Ronald L Watts, 'The Federal Idea and its Contemporary Relevance' in Ronald L Watts (ed), *The Federal Idea: Essays in Honour of Ronald L Watts* (Institute of Intergovernmental Relations, Queen's University 2011) 15.

17 Peter W Hogg, *Constitutional Law of Canada* (Carswell Thomson Professional Publishing 1992) 115.

18 *In Re the Matter of the Interim Independent Electoral Commission* [2011] eKLR para 40.

in a chain may have different appearances; however, when joined by a thread, they all become part of one ring; one cannot stand without the other.'[19]

The governments are interdependent because, as it has been discussed, the Kenyan devolution combines self-rule at the local level with shared-rule at the national level. This interdependence emanates from the fact that the two orders of government are meant to serve the people as a whole, although located in different parts of the country.[20] The interdependence is evident in the assignment of functions. First, the assignment under Article 186 of the Constitution recognises the concept of both exclusive and concurrent functions. Secondly, other functions are assigned on the basis of the national government formulating policy and setting standards while the county governments implement the policies and standards.[21] Thirdly, because of the economies of scale, shared services, and the spill over effect of both services and taxes, the counties may be interdependent among themselves. Because of concurrency, the functions cannot be discharged in isolation. The national and county governments are interdependent on each other, while at the same time the various counties are interdependent among themselves.

For this reason, the Supreme Court noted that 'it is clear to us that an *interdependence* of national and county governments is provided for' because of the concurrence of functions and operations, 'as is clear from the terms of the Fourth Schedule which makes a *distribution of functions between the national and county governments*'.[22] Once again, the notion of interdependence draws from the South African system where the courts have given similar meaning to the terminology.[23]

19 *Speaker of the Senate and another v Attorney General and others* [2013] eKLR para 228 (italics in the original).

20 Task Force on Devolved Government (n 7) 23.

21 See generally the Fourth Schedule of the Constitution of Kenya (n 1).

22 *In Re the Matter of the Interim Independent Electoral Commission* (n 18) para 39 (italics in the original).

23 In *Independent Electoral Commission v Langeberg Municipality* (2001) 9 BCLR 883 (referred to as *Langeberg Municipality*) paras 39-40, Justice Yacoob of the Constitutional Court stated that:

> All the spheres are interdependent and interrelated in the sense that the functional

According to Steytler and De Visser, the governments are not meant to work and function in isolation and competition. Instead, interdependence works hand in hand with distinctness and imposes an obligation upon the levels of government to work together in cooperation.[24] As was stated above, Kenya has settled for a 'cooperative' and not a 'competitive' devolved system of government. This choice and the cooperative government obligations contribute to certain restraints and limitations upon the exercise of the distinct powers of the levels of government.[25]

In *International Legal Consultancy Group v The Senate and another*, the High Court of Kenya observed that when the Senate exercises its oversight powers over county finances 'in reference to members of County Government, there must be a measure of restraint by the Senate'.[26] Woolman and Roux emphasise this in the South African context, noting that '[w]hile the different spheres of government have distinct responsibilities, they must work together in order for the South African government as a whole to fulfil its constitutional mandate'.[27] The national and county governments must have a common loyalty to the country, its people and the Constitution, and must all seek to secure the welfare of the Kenyan people.[28] The Task Force on Devolved Government reported that '[t]he thrust of this principle is that governments must function as a cohesive whole

> areas allocated to each sphere cannot be seen in isolation of each other. They are all interrelated. None of these spheres of government nor any of the governments within each sphere have any independence from each other. Their interrelatedness and interdependence is such that they must ensure that, while they do not tread on each other's toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a whole. Sections 40 and 41 are designed in an effort to achieve this.
>
> See also, *Government of the Republic of South Africa and others v Irene Grootboom and others* 2000(11) BCLR 1360 paras 39-40, where Justice Yacoob observed that a 'co-ordinated State housing program must be a comprehensive one determined by all three spheres of government in consultation with each other. But the national sphere of government must ensure responsibility for ensuring that laws, policies, programs and strategies are adequate to meet the State's s 26 obligations'.

24 Steytler and De Visser (n 5) chapter 16 p 3.

25 *Ibid*.

26 *International Legal Consultancy Group v The Senate and another* (judgment) [2014] eKLR para 67.

27 Woolman and Roux (n 12) chapter 14 p 9.

28 Steytler and De Visser (n 5) chapter 16 p 3.

in order to achieve the desired outcomes including the effective delivery of services and national integration'.[29] Interdependence is, indeed, the foundation of cooperative government. As Steytler and De Visser have noted, 'interdependence' is used 'to connote the cooperative relationship that must be pursued when the other two characteristics are being played out'.[30]

3 Cooperative Intergovernmental Relationships

As a consequence of the distinctness and the interdependence of the two orders of government, the Kenyan multi-level system of government requires a normative framework for the conduct of intergovernmental relations, including dispute resolution. Article 6(2) of the Constitution prescribes that the two levels of government 'shall conduct their mutual relations on the basis of consultation and cooperation'. This provision establishes a framework for relations founded upon consultation and cooperation both vertically between the national and county levels of government, and horizontally among the counties. Article 189 of the Constitution then lays down detailed rules of operation to govern and give effect to the cooperative government and cooperative intergovernmental relations. Intergovernmental relations are defined as the processes of interactions between different governments, and between organs of state from different governments, in the course of the discharge of their functions.[31] Steytler and De Visser recognise that the interactions may be both the hierarchical supervisory relations and the more equal cooperative relations.[32]

Cooperative government aims at ensuring a well-coordinated and cohesive system of government that is 'committed to nurturing and protecting the well-being of the individual, the family,

29 Task Force on Devolved Government (n 7) 154.

30 Steytler and De Visser (n 9) chapter 22 pp 126-127.

31 Task Force on Devolved Government (n 7) 157. See also *Langeberg Municipality* (n 23) para 20, where the South African Constitutional Court defined intergovernmental relations thus: '[t]he concept of intergovernmental relations … is inescapably a reference to relations between spheres of government and organs of state within those spheres'.

32 Steytler and De Visser (n 5) chapter 16 p 4.

communities and the nation' as a whole.[33] The system does not, in any way, diminish the autonomy of any of the two levels of government. Instead, it recognises the place of each within the whole and the need for coordination in order to make the whole work effectively.[34] It reinforces the notion of distinctness of each level of government.[35] It aims at avoiding the governments working at 'cross-purposes or in a mutually destructive way' that is duplicative and wasteful in its structures.[36] Effective and cost-effective service delivery at the local level that is well coordinated with national priorities is, therefore, at the core of cooperative government and intergovernmental relations envisaged by the Constitution.[37] In the *International Legal Consultancy Group* case, the Court recommended the enactment of statutory provisions 'to guide the Senate and County Assemblies on how they should co-operate in the oversight of National revenue allocated to the county,' in order 'to avoid duplication of roles and consequent inefficiencies'.[38] Cooperative devolved government, as a deliberate choice against competitive devolved government, aims at avoiding conflicting and adversarial relationships and encourages coordinated harmonious relations. It seeks 'to promote harmonious co-existence'[39] among the governments and their institutions. The system is designed to facilitate political compromises and solutions to conflicts and problems between the two levels of government.[40] The Court in the *International Legal Consultancy Group* case observed that 'pertinent political questions between the two levels of government should be resolved in a manner that does not result in acrimony and hostility'.[41] The Task Force on Devolved Government reported that '[a] cohesive multi-sectoral perspective should be adopted with

33 Paragraph 5 of the Preamble to the Constitution of Kenya (n 1).
34 Woolman and Roux (n 12) chapter 14 p 14.
35 *Ibid* chapter 14 at p 15.
36 Steytler and De Visser (n 5) chapter 16 p 7.
37 Task Force on Devolved Government (n 7) 157.
38 *International Legal Consultancy Group* (n 26) para 63.
39 *Ibid* para 68.
40 Woolman and Roux (n 12) chapter 14 p 8.
41 *International Legal Consultancy Group* (n 26) para 70.

a view to avoiding wasteful competition, ineffective use of human resources and costly duplication'.[42]

In areas of concurrent law-making, cooperation is desirable in order to avoid conflicting legislative provisions, and thus reduce conflict of laws requiring the application of Article 191 of the Constitution. Furthermore, it is necessary, in order to determine which national laws or parts of them should be implemented by county governments, and to ensure that adequate provision is made in the budgets of the different governments for the implementation of those laws.[43]

3.1 Cooperative Government Obligations

As set out by Articles 6(2) and 189 of the Constitution, the concept of cooperative government imposes certain obligations upon the two levels of government.[44] These are the obligation: to respect the institutional and functional integrity of the other level, to consult, to cooperate, to support and assist the other level of government, to avoid judicial settlement of disputes, and to pursue alternative dispute resolution mechanism first before resorting to litigation. The levels of government have an overall obligation to provide a coherent system of government to the people.[45]

Although generally, these principles of cooperative government will, of themselves, rarely be dispositive of a matter in court, they serve as interpretative tools that can be used to give effect to other provisions of the Constitution. They can, however, be dispositive

42 Task Force on Devolved Government (n 7) 157.

43 *Premier of the Western Cape* (n 8) para 55.

44 Woolman and Roux (n 12) chapter 14 p 8, in footnote 2 where they refer to *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (cc); 2000 (1) BCLR 1 (cc) para 40. In this case, the Court said that Chapter 3 of the Constitution 'introduces a new philosophy to the Constitution, namely that of co-operative government and its attendant obligations. In terms of that philosophy, all spheres of government are obliged in terms of … s 40(2) to observe and adhere to the principles of co-operative government set out in chap 3 of the Constitution.' See also Currie and De Waal (n 2) 123.

45 In *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* (n 44) para 40 the South African Constitutional Court held that Chapter 3 of the Constitution introduced a new concept of cooperative government, in which all spheres of government have an obligation to cooperate.

when raised as preliminary issues regarding whether or not the matter is ripe for determination by the courts.[46] Their open-ended nature and flexibility avail courts a significant amount of latitude in deciding whether an intrinsically political matter is sufficiently ripe for judicial intervention.[47] Thus, each of these obligations is examined in the subsequent parts of this chapter to establish the extent to which it is justiciable and dispositive of a matter.

3.1.1 Respect for Functional and Institutional Integrity

The first obligation of the governments is mutual respect for not only the functional and institutional integrity, but also the constitutional status and institutions of each other. Article 189(1) (a) requires the governments to perform their functions, and exercise powers, in a manner that respects the functional and institutional integrity of each other, and the constitutional status and institutions of each other. This obligation seeks to protect and respect two things - the integrity and constitutional status of the government and institutions of each of the two levels of government; and the integrity of the functions and powers of each of the two levels of government.

3.1.1.1 The governments and their institutions

Respect for the integrity and constitutional status of the government and institutions of each level of government emphasises the relative autonomy and distinctive nature of each level of government. The levels of government are separate and have limited powers and functions which are protected from interference.[48] The Committee of Experts reported that although memoranda from many expert groups expressed concern about lack of capacity at the devolved level, and urged the Committee to subject 'the performance of the devolved governments' to monitoring and supervision by

46 Woolman and Roux (n 12) chapter 14 p 9.

47 *Ibid*.

48 See also Stauffer and Topperwien (n 13) 51-52, where they observe that '[t]here is no centralized ultimate power but both the encompassing entity and the sub-entities have the right to decide within their sphere of powers attributed in the constitution without the interference of the other. Both the encompassing entity and the sub-entity have their own legitimacy and own powers.'

the national government, and to allow national government to intervene where a devolved government failed to deliver an essential service or to oversee the utilisation of the funds transferred from national government, it held a different view and sought to protect the autonomy of the county governments from interference by the national government.[49] While appreciating the raised concerns, the Committee clarified that:

> Whereas it may have been useful to empower the national government to take measures to ensure the success of devolution, care had to be taken not to open wide the opportunities for interference in the affairs of the counties. It was in this context that an additional provision was made requiring the national government to ensure that county governments were given adequate support and resources and a power of intervention that would [be] used only to maintain the integrity of the system of devolution and the provision of essential services.[50]

This aspect of the obligation underscores a major shift from the horse and rider relationship that existed between the central government and the local authorities under the replaced Constitution, to a non-hierarchical mutual relationship between national and county governments based on partnership. The institutions of the county government include the county governor, the county executive, and the county assembly which must be treated with respect. Thus, although the national government has limited supervision and intervention powers, it cannot exercise them in a manner that disrespects and undermines the integrity and constitutional status of the county governments and their institutions. Though the national government has powers to legislate for the Republic, it cannot do so in a manner that denigrates and demeans the integrity and constitutional status of the county governments and their institutions. This places limitations on the manner in which the governments, through the performance of their functions and exercise of their powers, conduct themselves towards each other. If they go beyond these limits, their actions and conduct can be declared unconstitutional. If such action or conduct is constituted by legislation, the legislation would be declared unconstitutional and

49 Committee of Experts on Constitutional Review (n 15) 92.

50 *Ibid* 93.

invalid. It is argued that it was in pursuit of respect for the institutions of the other level of government that the Court in *International Legal Consultancy Group* urged for restraint whenever the Senate issues summons against members of the county government in exercise of its oversight powers.[51]

3.1.1.2 The functions and powers of the governments

The obligation to respect the integrity of the functions and powers of each level of government embodies a number of basic principles. First, one level of government or one organ of the State may not use its powers in such a way as to undermine the effective functioning of another level or organ of State.[52] This obligation concerns itself with the manner in which power is exercised, not whether or not a power exists.[53] This limits the manner in which each of the levels of government performs its constitutionally assigned distinctive functions and exercises its powers. This is done by focusing on and restricting the manner in which the powers are exercised.[54]

As Steytler and De Visser have noted, 'co-operative government thus serves as a constraining principle on all the three spheres of government when they exercise their distinctive powers and functions'.[55] The principle proceeds on the basis that the government is operating within its constitutional functional areas and powers, but doing so in a manner that is unacceptable as it undermines the effective functioning of the other. From this perspective, the Court in the *International Legal Consultancy Group* case, while commenting on the exercise of the Senate's oversight powers, observed that it 'should endeavour to improve accountability at the county level and not cripple the County Governments.'[56] This principle becomes relevant once it is established that the government has acted in its areas of competence. Only then, does the question as to whether the government is performing its functions and exercising its

51 *International Legal Consultancy Group* (n 26) para 67.
52 Woolman and Roux (n 12) chapter 14 p 8.
53 *Premier of the Western Cape* (n 8) para 57.
54 Currie and De Waal (n 2) 123.
55 Steytler and De Visser (n 9) chapter 22 p 127.
56 *International Legal Consultancy Group* (n 26) para 68.

powers in a 'manner that respects the functional and institutional integrity of government at the other level' arise.[57] If the government has acted outside its area of competence, the dispute must be dealt with on the basis that the government acted both unlawfully and unconstitutionally.[58] The purpose of this obligation is to prevent one level of government from using its powers in a manner that undermines the other level of government, and prevents it from functioning effectively.[59]

Secondly, this is a no-encroachment obligation requiring the governments not to encroach on the domain of the other.[60] It emphasises non-interference in the functions and powers of each other in the course of their operations. This second principle recognises that the manner of performance and exercise of functions and powers may ultimately spill-over and encroach upon the functions and powers of the other government. It thus seeks to confine the levels of government within their enumerated functional areas and powers, and guards against abuse of power. Thus, one level of government must not assume any power or function of the other.[61] The national government, for instance, cannot through the exercise of its legislative powers take over the functions of county governments.[62] For example, the County Government (Amendment) Act (CGAA), which establishes County Development Boards chaired by the respective county Senators,[63]

57 Woolman and Roux (n 12) chapter 14 p 16.

58 Ibid.

59 *Premier of the Western Cape* (n 8) para 58.

60 In the *Certification of the Constitution of the Republic of South Africa, 1996* (n 3) para 289 the South African Constitutional Court made it clear that '[t]hese principles, which are appropriate to cooperative government, include an express provision that all spheres of government must exercise their powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of the government in another sphere'.

61 *Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* (n 44) para 41.

62 *Premier of the Western Cape* (n 8) para 60, where the South African Constitutional Court stated that '[t]his power given to the national legislature is one which needs to be exercised carefully in the context of section 41(1)(g) to ensure that in exercising its powers, the national legislature does not encroach on the ability of the provinces to carry out the functions entrusted to them by the Constitution'.

63 Section 91A(1)(a) of County Government (Amendment) Act No 13 of 2014 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2014/

confers on the Boards powers that are unconstitutional as they encroach on those of the county governments. Although the Boards are disguised as intergovernmental relations forums, their powers go beyond cooperative consultation.[64] The Boards encroach on the county government development functions and powers as they must 'consider and give input on any county development plans before they are tabled in the county assembly for consideration'.[65] They also encroach on the county budgetary powers and functions since the Boards must 'consider and give input on county annual budgets before they are tabled in the county assembly for consideration'.[66] They must also 'consider and advise on any issues of concern that may arise within the county.'[67] By requiring the operational expenses of the Boards to be provided for in the annual estimates of the respective county governments, the Act creates unfunded mandates for county governments.[68]

The provisions encroach on not only the powers of the county executive to conceive development plans and annual budgets, but also the county assembly's power to approve and legislate the proposed plans and budgets into county laws. To subject the two county government arms to the approval of these Boards is a very serious intrusion into the relative county autonomy. This exercise of power also interferes with the county government effective performance of its functions and exercise of its powers. The legislation undermines the democratic accountability mechanisms. The people elect county governors and their governments with mandate to make development decisions without interference, for which they may hold them accountable at the next elections at the end of the five-year term. They can also recall them mid-stream.

Thirdly, the actual integrity of each sphere of government and organ of state must be understood in light of the powers and purpose

CountyGovernments_Amendment_Act13of2014.pdf> accessed 9 May 2015.

64 *Ibid,* Section 91A(2)(a).

65 *Ibid,* Section 91A(2)(b).

66 *Ibid,* Section 91A(2)(c).

67 *Ibid,* Section 91A(2)(d).

68 *Ibid,* Section 91B(2)(b).

of that entity.[69] In determining whether or not a government has breached this obligation, the overall functional distribution, the purposes meant to be achieved by such distribution, and the relations among the two levels of government, must be examined. This will involve looking at the functions and powers of the levels of government, not in isolation but in relation to each other and the overall objectives of devolution. The essence of this is that the powers and functions of one level of government must be determined by also examining the countervailing powers and functions of the other level.[70] This means that where the national government is granted very broad powers that subsume the narrow and specific powers of the county governments, the national government's broad powers cannot be interpreted broadly as to render the county government's narrow and specific countervailing powers inoperative. A bottom-up approach to interpretation, which requires that the narrow and specific countervailing powers of the county governments be read as limiting the broad powers of national government, must be followed.

In conclusion, although this obligation may not in itself be justiciable, it comes into play in giving meaning to the division of powers and functions among the levels of government, and their exercise and performance. The court can, therefore, rely on this principle when enforcing the division of power and functions, and when seeking to protect the integrity of the devolution system, on the basis of legality and constitutionality. It can use the principle to declare an exercise of power, and any legislation resulting from it, unconstitutional on grounds that it is an exercise of the powers of another government or in a manner that interferes with the powers of another level of government.

69 Woolman and Roux (n 12) chapter 14 p 8.

70 In *Premier of the Western Cape* (n 8) 57, the South African Constitutional Court observed that '[t]he functional and institutional integrity of the different spheres of government must be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government.'

3.1.2 The Obligation to Consult

Cooperative government entails intergovernmental dialogue, which requires that the governments liaise and work with each other when conceiving, developing and implementing legislation and policies. This intergovernmental dialogue imposes on the governments a second obligation of cooperative government, which is to consult each other. As noted, Article 6(2) of the Constitution requires the mutual relations of the governments to be based on 'consultation and cooperation'. Article 189(1)(b) of the Constitution also requires the governments to consult.

3.1.2.1 The meaning of consultation

Consultation is a process of engaging each other, and sharing information and ideas. It entails the duty to make conscious and deliberate efforts to seek out the views of the other party, and to consider them before arriving at a decision. It ensures that the exercise of the autonomous and distinct powers is informed not merely by the narrow interests of the government exercising its powers, but also the wider interests of the other level of government and all other concerned persons.[71] It serves as a means for improving decision-making for the benefit of all concerned.[72] In *The Commission for the Implementation of the Constitution v Attorney General and another,* the High Court of Kenya adopted the legal definition the South African courts have given to the term consultation.[73] The Court cited the words of the South African Court in *Maqoma v Sebe and another* where it generally defined consultation thus:

> It seems that 'consultation' in its normal sense without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party ... in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate. The word 'consultation' in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does

71 Steytler and De Visser (n 5) chapter 16 p 13.

72 *Ibid*.

73 *The Commission for the Implementation of the Constitution v Attorney General and another* [2013] eKLR para 39.

> it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis.[74]

In light of this broad definition, consultation in the context of the Kenyan cooperative government must be understood as encompassing four key elements that constitute the structure of consultation.

3.1.2.1.1 Invitation to present views

There must be an invitation to the other government to present its views on a matter under consideration.[75] In *Robertson and another v City of Cape Town*, the South African High Court described consultation as including 'the communication of a genuine invitation, extended with a receptive mind, to give advice'.[76] The invitation could be passive, extended to the public in general, with a closing date within which the consulted party may choose whether to respond or not. However, it can also be more active, by vigorously soliciting the views of specific parties. This entails an active effort to obtain the views of those supposed to be consulted.[77]

3.1.2.1.2 Afford reasonable opportunity to present views

Although the obligation to consult is fairly broad, and the Constitution does not explicitly set out the form of consultation, the other government must be afforded a reasonable and adequate opportunity to present its considered views.[78] The South African High Court in *Hayes and another v Minister for Housing, Planning*

74 *Maqoma v Sebe and another* [1987] (1) SA 483.

75 Steytler and De Visser (n 5) chapter 16 p 13.

76 *Robertson and another v City of Cape Town* 2004 (9) 950 (C) para 108. See also the South African Intergovernmental Relations Framework Act, which at Section 1(1) defines consultation as 'a process whereby the views of another on a specific matter are solicited, either orally or in writing, and considered.' Intergovernmental Relations Framework Act, No 13 of 2005 <http://www.gov.za/sites/www.gov.za/files/a13-05_1.pdf> accessed 13 April 2015.

77 Steytler and De Visser (n 9) chapter 22 p 135.

78 Steytler and De Visser (n 5) chapter 16 p 13.

and Administration, Western Cape and others explained that 'as long as the lines of communication are open and the *parties are afforded a reasonable opportunity to put their cases or points of view to one another*, the form of such consultation will usually not be of great import'.[79] For example, an invitation to present views the following day on a matter that requires time for consideration, or to an institution that requires time to consult its members, will not afford the invited party a reasonable and adequate opportunity to present its considered views. Some matters may even require research before formulating an informed opinion. An invitation to the county governments to give a collective opinion on a matter must, thus, include adequate time to enable them to come together for discussion before forming the collective opinion. Even an invitation to a single county government may require the exchange of views between the county executive and county assembly before a decision is made.

3.1.2.1.3 Active bi-lateral engagement

In cases of active consultation, there must be active bi-lateral engagement with the other government. This calls for more effort to secure the views and comments of a particular party to whom the invitation must be specifically addressed.[80] While there are cases in which a mere exchange of ideas may suffice, there are others in which an active engagement of the other government with an obligation for feedback from each other is mandatory. Where, for example, the national government intends to enact legislation that may affect the status, institutions or functions of the county governments, it must consult with the county governments by sharing the proposed legislation and giving them an opportunity to express their views about it. This should be in addition to the participation, in enactment of the legislation, by the Senate, which represents the counties. Similarly, when national government seeks to identify other taxes which the county governments may be authorised to impose, it should consult with such governments and seek their views.

79 *Hayes and another v Minister for Housing, Planning and Administration, Western Cape and others* 1999 (4) SA 1229, 1242J-1243A (C) (emphasis added).

80 Steytler and De Visser (n 5) chapter 16 p 14.

In budget matters, the Constitution explicitly requires national legislation to provide for 'the form and manner of consultation between the national government and county governments in the process of preparing plans and budgets'.[81] Implied in this provision is a mandatory active consultation between the national and county governments calling for bilateral engagement. This must be understood in the context of the fact that county governments may prepare the plans and budgets even before the process of the vertical division of revenue is complete. They, therefore, need some information about what to expect from the division of revenue before they can do the plans and budgets. Furthermore, the preparation of the division of revenue must also be informed by the development needs and plans of the county governments. In addition, since county governments may receive additional conditional funding from the national government's share,[82] and the Equalisation Fund,[83] both of which are included in the national government annual appropriations, they must know what to expect to enable them plan their budgets and development programmes.

In matters of this kind, consultation must require bilateral engagement with county governments. In the South African case of *Robertson and another v City of Cape Town* the Court emphasised that consultation was a 'bilateral process' requiring active engagement with the party whose views or advice is sought. In this case the Court held that both the Minister for Local Government and Parliament had failed to 'engage the [Fiscal and Financial Commission] in consultation'.[84] Parliament did not send any formal request to the Financial and Fiscal Commission, which took the position that it would not engage in consultations unless Parliament requested it to do so. In their assessment, Steytler and De Visser correctly regard the decision in this case as supporting the proposition that when there is a duty to consult with a particular body, there must be conscious effort, directed to that party to achieve that end. In addition, they note that although it can be argued that while the

81 Article 220(2)(c) of the Constitution of Kenya (n 1).

82 *Ibid*, Article 202(2).

83 *Ibid*, Article 204(3) (b).

84 *Robertson and another* (n 76) para 109.

decision of the person consulting cannot unreasonably be delayed by dilatory conduct of the person whose views are being sought, 'an engagement to consult' must be more than a mere invitation to submit views.

3.1.2.1.4 The views must be considered in good faith

Consultation implies an obligation to consider the views of the other government in good faith before making a decision.[85] Consultation is not an end in itself. It is meant to ensure that better decisions are arrived at after considering the views of both governments. The other government must thus not be consulted as a mere formality, but with commitment to consider and take into account the views shared, if they add value that improves the decision being made.

3.1.2.2 The consequences of failure to consult

One major consequence of failure to consult is the invalidation of the decision taken even if it is legislation, on grounds that the process for decision making was tainted with unconstitutionality. The principle of constitutional supremacy requires compliance with both the substantive and procedural prescriptions of the Constitution. Thus, where it is proved that the Constitution requires consultation before a decision is made, the absence of such consultation must lead to the invalidation of the resulting decision.[86] In the South African case of *Robertson v City of Cape Town*[87] the applicants challenged the validity of Section 21 of the Structures Amendment Act of 2002, which amended Section 93 of the original Act, in a manner that affected the provisions of the Local Government Transition Act relating to the imposition of property rates.[88] They argued that there

85 Steytler and De Visser (n 9) chapter 22 p 134.

86 Steytler and De Visser (n 5) chapter 16 p 16, where they observe that '[m]aking consultation mandatory means that it is a validity requirement for the legislation'.

87 *Robertson and another* (n 76) para 93.

88 See, Municipal Structures Amendment Act, No 51 of 2002 <http://mfma.treasury.gov.za/MFMA/Legislation/Local%20Government%20-%20Municipal%20Structures%20Act/Municipal%20Structures%20Amendment%20Act%2051%20of%202002.pdf> accessed 14 April 2015. It amended Section 93 of the Municipal Structures Act, No 117 of 1998 <http://mfma.treasury.gov.za/MFMA/Legislation/Local%20Government%20-%20Municipal%20Structures%20Act/Local%20

was no consultation with the Financial and Fiscal Commission, thereby invalidating the enactment. The Cape High Court held that the failure by Parliament to request the Financial and Fiscal Commission to comment on the amendment Bill amounted to a failure to consult. Consequently, the passing of the amendment was inconsistent with the Constitution thus making it invalid.[89]

3.1.3 The Obligation to Cooperate

The third obligation of the governments is to cooperate with each other, which emanates from the provisions of Article 6(2) of the Constitution requiring that the governments 'shall conduct their mutual relations on the basis of consultation and co-operation'. This is elaborated by Article 189(2) of the Constitution, which prescribes that '[g]overnment at each level, and different governments at the county level, shall co-operate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and authorities'. The essence of cooperation is the need to work together, and as already mentioned, this need is necessitated by among other things, concurrency in the functional assignment to the two levels of government. As used together with the term 'mutual', cooperation contemplates more friendly and collegial relations as opposed to 'conflictual or antagonistic' adversarial relations.[90]

The South African Constitutional Court recognised the need to cooperate in the context of the Interim Constitution even before the Final Constitution had made express provision for cooperative government. In *Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995*, the Court observed as follows with regard to a national education policy Bill that called for the executive cooperation between the provinces and the national government: '[w]here two legislatures have concurrent powers to make laws in respect of the same functional areas, the

Government%20-20Municipal%20Structures%20Act,%20No.%20117%20of%20 1998.pdf> accessed 14 April 2015. See also, Local Government Transition Act, No 209 of 1993 <http://www.gov.za/sites/www.gov.za/files/a209-93.pdf> accessed 14 April 2015.

89 Steytler and De Visser (n 5) chapter p 16.

90 *Ibid* chapter 16 p 8.

only reasonable way in which these powers can be implemented is through co-operation.'[91] And in the *First Certification* judgment, the Court held that '[i]ntergovernmental co-operation is implicit in any system where powers have been allocated concurrently to different levels of government and is consistent with the requirement of ... [the Constitutional Principle] XX that national unity be recognised and promoted. The mere fact that the ... [New Text] has made explicit what would otherwise have been implicit cannot in itself be said to constitute a failure to promote or recognize the need for legitimate provincial autonomy.'[92]

The duty to cooperate entails intergovernmental dialogue which requires that the governments liaise and work with each other when conceiving, developing and implementing policies. In this respect, there is a close nexus between the obligation to consult with that of cooperation. This is due to the fact that the duty to cooperate can require the governments to consult each other before taking action in certain matters. Thus, cooperation can be executed through consultation, which is a key mechanism through which cooperation can be secured and evidenced.[93] The governments must put in concerted efforts in working together so as to be able to deliver the required services to the people. In *Government of South Africa v Irene Grootboom and others,* which concerned the implementation of the right to housing, the South African Constitutional Court stated that:

> [A] co-ordinated housing programme must be a comprehensive one determined by all three spheres of government in consultation with each as contemplated by Chapter 3 of the Constitution … Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national government must assume responsibility for ensuring that laws, policies and programmes are adequate to meet the state's section 26 obligation.[94]

91 *Re Dispute Concerning the Constitutionality of Certain Provisions of the National Education Policy Bill 83 of 1995* 1996 (4) BCLR 518 para 34.

92 *Certification of the Constitution of the Republic of South Africa, 1996* (n 3) para 290.

93 *Minister of Police and others* (n 4) para 62.

94 *Government of South Africa* (n 23) para 40.

3.1.4 The Obligation to Assist and Support

The fourth obligation is to assist and support each other. Articles 189(1) (b) and (c) of the Constitution require the national and county governments to assist, support each other, and where appropriate, implement the legislation of each other. A distinction must be drawn between support in the context of cooperative government, and support in the perspective of supervision and intervention. While supervision and intervention support is hierarchical, flowing from the national to the county government, cooperative government support is not hierarchical. It can flow from any government to the other, both vertically and horizontally. This provision may be constitutional anchorage for a claim for support from one county to a neighbouring county, and even from a county to the national government.[95] Cooperative assistance and support must be done within the context of mutual respect for the functional and institutional integrity of each other and, therefore, requires the cooperation and consent of the governments involved. The active participation of both governments is required, with the recipient having the discretion whether or not to accept the assistance or support. This serves to enhance the objective of devolution of enabling communities to manage their own affairs.

This must be contrasted with the support envisaged by Article 190(1) of the Constitution, and the 'capacity building and technical assistance to the counties' required as a function of the national government.[96] The assistance and support in these cases are hierarchical obligations imposed on the national government to assist and support the county governments. They are supervisory in nature and embody a monitoring aspect, with the county governments having very constrained say in whether or not there should be intervention.[97]

95 Steytler and De Visser (n 9) chapter 22 p 133.

96 Item 33, Part 1 of the Fourth Schedule of the Constitution of Kenya (n 1).

97 Steytler and De Visser (n 9) chapter 22 p 133.

3.2 Application of Cooperative Government and Intergovernmental Relations

The application of cooperative government and intergovernmental relations has three major dimensions, namely, vertical, horizontal and fiscal aspects.

3.2.1 Vertical Intergovernmental Relations

In establishing a cooperative devolved system of government, Article 6(2) of the Constitution refers to the 'governments at the national and county levels'. And in establishing the cooperative intergovernmental relations, Article 189(1) of the Constitution refers to '[g]overnment at either level'. This means that the principles and obligations of cooperative government and intergovernmental relations apply, first, vertically between national and county governments. This emerges from the explicit provisions of Article 6(2) of the Constitution, which refers to 'governments at the national and county levels', and Article 189(1), which refers to 'government at either level'. Thus, vertical cooperative intergovernmental relations relate to interactions between the national government on the one hand, and the 47 counties or any one of them on the other hand. These interactions are done through the branches of these governments, especially the executive arm, and the organs of State within these governments. Cooperative intergovernmental relations are envisaged, between the executive arms at both levels, to enable them coordinate their policies and programmes.

Pursuant to these constitutional provisions, the Intergovernmental Relations Act was enacted to provide some of the institutions through which such relations could be conducted.[98] Section 7 of this Act establishes a National and County Government Coordinating Summit, whose members are the President, or in his absence, the Deputy President and the governors of the 47 counties. Section 13 of the Act also provides for the establishment of sectoral working groups and committees, which bring together officials of ministries

98 Intergovernmental Relations Act, No 2 of 2012 <kenyalaw.org/kl/fileadmin/pdfdownloads/LawsonDevolution/IntergovernmentalRelationsActNo2of2012.doc> accessed 14 April 2015.

at the national and county levels of government. It is submitted that the agreements entered into pursuant to these cooperative government provisions are legally binding and enforceable.

3.2.2 Horizontal Intergovernmental Relations

At the horizontal level, the constitutional provisions envisage cooperation and intergovernmental relations among two or more of the 47 counties. The terminology 'governments' or 'government' refers to the government at the national level, and also the governments of the various counties at the county level. While Article 189(1)(a) of the Constitution explicitly talks of 'in the case of county government, within the county level', Article 189(2) expressly talks of 'different governments at the county level'. The principles and obligations of cooperative government, accordingly, apply to relations not only between the national and the county governments, but also between one county and another county or other counties. The Constitution even envisages that two or more counties 'may set up joint committees and joint authorities' for purposes of discharging some of their functions that may relate to shared services. The Constitution envisages that county governments can form an 'organisation of county governments' through which they can be consulted by the Senate when it is determining the five-year formula for sharing revenue among the counties.[99] Such an organisation can only be formed and operate within the context of cooperative government and intergovernmental relations.

As in the case of the vertical intergovernmental relations, the horizontal relations also mainly involve the executive arms of the county governments. The governors and the members of the executive committees may form working relationships through which they may coordinate policies, share information and strategies, share services and infrastructure, and 'set up joint committees and joint authorities' for purposes of performing some of their functions.[100] It is in this spirit of cooperative government and intergovernmental relations that the Intergovernmental Relations Act has provided

99 Article 217(2)(c) of the Constitution of Kenya (n 1).

100 *Ibid*, Article 189(2).

for the establishment of the Council of County Governors.[101] The Council serves as a forum for consultation among the county governments, sharing information with a view to learning from each other, considering matters of common interest, resolution of disputes between counties, facilitation of capacity building, monitoring of implementation of inter-county agreements on inter-county projects, and consideration of reports of other intergovernmental forums such as the vertical ones.[102]

Although the Intergovernmental Relations Act does not make any express provision for horizontal cooperation and intergovernmental relations between the legislative arms of the county governments, the constitutional provisions do not preclude cooperation between the county assembly speakers of different counties. Neither do they preclude cooperation among the members of the county assemblies of different counties. And third, they apply among organs of state and other entities within each of the levels of government.

3.2.3 Fiscal Intergovernmental Relations

In many multi-level systems of government, control over and distribution of financial resources and the amounts allocated to different orders of government are normally contentious issues in the intergovernmental relations. Indeed, in Kenya, the idea of devolved government largely revolves around, and was informed, by concerns about the perception of inequitable distribution of resources and development opportunities.[103] This arose out of a system that was largely centrally controlled, and was based more on political patronage rather than objective criteria.[104] As a result, the Constitution adopts a financial system that seeks to subject these matters to intergovernmental processes that create checks and balances, and are based on objective criteria. Deputy Chief Justice

101 Section 19, Intergovernmental Relations Act (n 98).

102 *Ibid,* Section 20(1).

103 *Speaker of the Senate and another* (n 19) paras 169-196.

104 J Mutakha Kangu, 'Regional Inequalities in Kenya in the Context of Decentralization and Devolution: Dynamics and Policy Options' in *Report of the National Conference on Equity and Growth: Towards a Policy Agenda for Kenya* (Society for International Development 2006) 115, 137.

Kalpana Rawal, in the *Speaker of the Senate* case, captures this spirit of checks and balances, and accountability, as follows:

> It is well to remember that the revenue collected is from and for the people, for whose benefit the three arms of the government have been entrusted with power and authority, under the Constitution. Further, the wisdom of our Constitution is its *categorical rejection of exclusionary claims to powers of governance*: its letter and spirit is suffused with the call for *accountability, co-operation, responsiveness and openness*.[105]

Chief Justice Mutunga concluded his advisory opinion by also underscoring the spirit of checks and balances, and cooperative approaches to sharing of resources. He asserted that:

> Both Houses of Parliament represent the same *people*, and the resources at the core of this dispute, are *owned by the people of Kenya*. In the equitable distribution of resources *owned* by the people of Kenya, *the principles of checks and balances, mediation, dialogue, collaboration, consultation, and interdependence are not necessarily conflictual*, granted that they are all invoked in the interests of *the people* of Kenya.[106]

Pursuant to the provisions of Article 220(2)(c) of the Constitution requiring national legislation to provide for 'the form and manner of consultation between the national government and county governments in the process of preparing plans and budgets', the Public Finance Management Act (PFMA) has provided for the establishment of an Intergovernmental Budget and Economic Council. The Council comprises the Deputy President, a representative of the Parliamentary Service Commission, a representative of the Judicial Service Commission, the Chairman of the Commission on Revenue Allocation (CRA), the Chairperson of the Council of County Governors, every County Executive Committee member for finance, and the Cabinet Secretary responsible for intergovernmental relations.[107] The Council provides

105 *Speaker of the Senate and another* (n 19) para 229 (italics in the original).

106 *Ibid,* para 197 (italics in the original).

107 Section 187(1) of the Public Finance Management Act, No 18 of 2012 <kenyalaw.org/kl/fileadmin/pdfdownloads/LawsonDevolution/PublicFinanceManagementNo18of2012.doc> accessed 14 April 2015.

a forum for intergovernmental relations and consultation on various matters relating to finances.[108]

4 Intergovernmental Disputes and their Resolution

Although cooperative government and consultation were designed as mechanisms of avoiding intergovernmental disputes, the nature of multi-level governance is such that there are occasions when avoidance fails, and disputes over functions, powers and resources arise.[109] In such event, the Constitution provides for how the disputes must be resolved, in an amicable manner before resorting to adversarial litigation. Articles 189(3) and (4) of the Constitution impose a fifth obligation which relates to settlement of intergovernmental disputes. The obligation seeks to secure avoidance of litigation as it encourages alternative dispute resolution mechanisms as the preferred approach as part of the duty to cooperate.[110] Article 189(3) of the Constitution provides that '[i]n any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation'.

The discussed constitutional provisions establish two twin obligations, namely, to make every reasonable effort to settle disputes through other means, and to avoid adversarial litigation. The twin obligations give rise to six important issues that fall for interpretation and which are examined separately in the subsequent parts of this chapter. These issues are, first, an examination of what constitutes an intergovernmental dispute. Second, an evaluation of the parties to an intergovernmental dispute is carried out. Third, the nature and extent of the obligation to avoid adversarial litigation is discussed. Fourth, an analysis is done on the nature and extent of the obligation to settle disputes by other means. Fifth, applicable non-

108 *Ibid,* Section 187(2).

109 Nico Steytler, 'The Settlement of Intergovernmental Disputes' in Norman Levy and Chris Tapscott (eds), *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (Idasa 2001) 176.

110 *Ibid* 177.

judicial alternative dispute resolution mechanisms are discussed. Finally, the role of the courts is examined.

4.1 What Constitutes an Intergovernmental Dispute?

For the obligation to avoid adversarial litigation to apply there must be an intergovernmental dispute. Two terms require examination, namely, 'dispute' and 'intergovernmental'. A dispute is defined as a specific disagreement over a matter of fact, law or policy in which one party makes a claim or assertion, while the other party refutes or counter-claims, resulting into a specific impasse over which the parties cannot agree, as opposed to a broad and general disagreement about a problem.[111] In a situation where the parties are engaged in negotiations, it is sometimes very difficult to determine when an impasse has been reached and a dispute arisen. While one party may claim that it is still negotiating, the other may view that as merely delaying tactics.[112] Since one aspect of the obligation is to avoid litigation in the courts, the dispute must be one that has legal aspects that can be resolved through court processes. This means that differences between levels of government that are merely political, with nothing legal that can be dealt with in the courts, are not disputes for purposes of these provisions.[113] The phrase 'intergovernmental', on the other hand, refers to the parties to the disputes. Only disputes that involve certain parties are intergovernmental, which then necessitates the examination of who are the parties to an intergovernmental dispute.

4.1.1 The Parties to an Intergovernmental Dispute

Article 189(3) of the Constitution refers to 'any dispute between governments', which implies the two levels of government, and their State organs and entities. Given that alternative dispute resolution mechanisms are justified because of the need to enter into political compromises and settlement, the parties to an intergovernmental dispute must be entities that have the power and are capable of

111 Steytler and De Visser (n 5) chapter 16 p 32.

112 Steytler (n 109) 183.

113 Steytler and De Visser (n 5) chapter 16 p 32.

entering into political compromises. In *Langeberg Municipality*, the South African Constitutional Court defined parties to an intergovernmental dispute as 'spheres of government and organs of state within those spheres'.[114]

There are, however, some organs of State that are not bound by the obligation to avoid adversarial litigation. These include the Chapter Fifteen commissions and independent offices, which are excluded because they cannot enter into political compromises,[115] for a number of reasons. First, they are organs of State that fall outside the levels of government, and do not form part of them.[116] Secondly, they are organs of State that are independent of the levels of government,[117] and are not controlled, coordinated and administered by the levels of government.[118] In addition, not every dispute involving the levels of government or organs of State within them qualifies as an intergovernmental dispute.

4.1.2 Dispute Must Involve Exercise of State Authority

The purpose of the constitutional provisions on cooperative government and intergovernmental relations is to regulate relations of governments when they perform and exercise their constitutional governance functions and powers. This excludes relations created by private law from the category of intergovernmental disputes.[119]

114 *Langeberg Municipality* (n 23) para 20.

115 Steytler and De Visser (n 5) chapter 16 p 31.

116 *Langeberg Municipality* (n 23) paras 21 and 22, where the Court underscored this aspect of the dispute noting that 'an intergovernmental dispute is therefore a dispute between parties that are part of the government in the sense of being either a sphere of government or an organ of state within a sphere of government', and then found that the Independent Electoral Commission was not part of the national sphere of government and noted that '[t]he question then is whether it is part of government in that, as an organ of state, it falls within a sphere of government contemplated by chapter 3 of the Constitution'.

117 *Ibid,* para 27, where the Court observed that: '[f]urthermore, independence cannot exist in the air, and it is clear that the chapter intends to make a distinction between the state and government, and the independence of the commission is intended to refer to independence from the government, whether local, provincial or national.'

118 *Ibid* para 27, where the Court expressed the view that the IEC could 'not be said to be a department or administration within the national sphere of government in respect of which the national executive has a duty of co-ordination'.

119 Steytler (n 109) 181.

Intergovernmental disputes can only arise when the governments act in the public law domain, in exercise of their public power and state governance authority. When interpreting provisions of a similar nature in the South African Constitution, Steytler convincingly argues that:

> It is therefore suggested that only where an organ of state acts in its capacity as an organ of state, that is, exercises public power (or state authority), is the relationship so created subject to public law in general and the constitutional law in particular.[120]

The two levels of government can act both in public and private law. They can, for example, enter into contracts in the private law area, either with private citizens or another government. Where they act in this context and a dispute arises, it does not qualify as an intergovernmental dispute. The dispute does not involve the exercise of public power, nor can it be resolved through political compromise and settlement. Where, for example, two county governments or a county government and the national government enter into a contract of sale of property, the act is not done as an exercise of state authority or public power. While the broad authority of governments includes the power to enter into contracts of sale, 'the enforcement of such [contracts] is the subject of private law and is not subject' to the principles and obligations of cooperative government and intergovernmental relations.[121] The purpose of cooperative government and intergovernmental relations is to ensure the cooperation of governments when they govern, or exercise public power in the pursuit of their public functions, and not when they trade with each other.[122]

4.2 The Obligation to Avoid Adversarial Litigation

The Constitution imposes an obligation on governments involved in a dispute to avoid adversarial litigation in preference to alternative dispute resolution mechanisms as a first option. They must 'make

120 *Ibid* 182.

121 *Ibid*.

122 *Ibid*.

every reasonable effort' to settle the disputes by other means and procedures.[123]

4.2.1 The Nature of the Obligation

Article 189(3) of the Constitution requires the governments to 'make every reasonable effort to settle the dispute' by other means other than judicial intervention. The provision is borrowed from the South African Constitution, which requires all the three spheres of government to 'make every reasonable effort' to settle disputes by means other than adversarial litigation.[124] However, unlike the Kenyan provision, the South African clause goes further than this and requires the governments to exhaust all other remedies before approaching the courts to resolve the dispute.[125] In the circumstances, the manner in which the South African courts and scholars have interpreted the provision, with the exception of the bit on exhausting other remedies, should provide instructive lessons for Kenya when determining the nature and extent of the obligation created.

The obligation entails an effort on the part of the governments to try and resolve disputes amicably at the political level. Indeed, as the Constitutional Court asserted in *National Gambling Board v Premier of Kwa Zulu Natal and others*, the governments are required to 'comply with their obligation to try and resolve their disputes amicably', before approaching any court for adversarial litigation.[126] In the assessment of the Court, this obligation forms 'an important aspect of cooperative government'.[127] In *International Legal Consultancy Group*, the Kenyan High Court observed that 'before resulting to summons, the Senate should have sought consultations

123 Article 189(3) of the Constitution of Kenya (n 1).

124 Section 41(3) of the Constitution of the Republic of South Africa of 1996 <http://www.gov.za/documents/constitution-republic-south-africa-1996> accessed 12 April 2015.

125 *Ibid*.

126 *National Gambling Board v Premier of Kwa Zulu Natal and others* 2002 (2) BCLR 156 para 41.

127 *Ibid,* para 33.

or mediation with the respective County Governors with regard to the concerns raised by the Controller of Budget's report'.[128]

The use of the phrase 'every reasonable effort' implies an onerous obligation on the part of the governments, which must make these efforts in good faith and with a commitment to resolving the dispute.[129] Going through motions of alternative dispute resolution, without any commitment and desire to reach a compromise, would not suffice as 'every reasonable effort', and a court to which the dispute is brought may refer it back to the governments to make every reasonable effort.[130] The governments are duty-bound to make a meaningful effort to comply with the requirements of cooperative government. This entails much more than an effort to settle a pending court case. The governments must not pay lip service to this obligation, as they are required to re-evaluate their positions fundamentally.[131]

The reasonableness of the effort must be determined taking into account both the disputed issues and the mechanisms of alternative dispute settlement that have been used. As discussed later, different mechanisms are more suitable for different types of disputes, and a choice of a more suitable system contributes to the reasonableness of the effort. Moreover, a choice of mechanisms that are illegal would be manifestly unreasonable.[132] By requiring the governments to seek alternative dispute resolution mechanisms, the Constitution does not allow them to contract themselves out of the basic principle of constitutional supremacy. Alternative methods agreed to by the governments that are unconstitutional will not be valid. Indeed, any third party who is not bound by the cooperative government obligations can challenge any unconstitutional or illegal attempt to reach a political compromise or settlement.[133]

The governments are not ends in themselves but instruments in the service of the interests of the Kenyan people, and that is why

128 *International Legal Consultancy Group* (n 26) para 68.
129 Steytler (n 109) 198.
130 *Ibid* 199.
131 *Minister of Police and others* (n 4) para 59.
132 Steytler (n 109) 199.
133 *Ibid*.

they exercise the sovereign power of the people. Their pursuit of cooperative government and intergovernmental relations, as well as settlement of disputes by other means, must be done constitutionally and in the interest of the people. Thus, although private citizens are not parties to intergovernmental disputes and are not bound by the cooperative government obligations, they have stakes in the manner in which political compromises are arrived at. They have an interest in ensuring that the governments operate constitutionally and can, therefore, challenge any political compromise that is unconstitutional.

4.2.2 *The Purpose and Rationale of the Obligation*

Three major reasons why governments must avoid adversarial litigation when dealing with intergovernmental disputes are identified. First, a major aim is to encourage a culture of solving society's problems by building political compromises at the political level, not only among the two levels of government but also among the counties in different regions of the country. In the *First Certification* judgment, the South African Constitutional Court explained the reason for this requirement by observing that '[i]ts implications are that disputes should where possible be resolved at a political level rather than through adversarial litigation'.[134] Steytler explains the basis of this objective noting that:

> Whereas adversarial litigation is rule-based, politics deals with interests and the accommodation of diverse interests - the very purpose of co-operative government. Political settlement through compromise and accommodation, which lies at the heart of non-judicial dispute resolution, reflects the letter and spirit of co-operative government.[135]

This requirement compels governments at the two levels to work out differences and disputes among them in the political arena, which affirms the process of cooperative devolved government.[136] This should contribute to the much needed national integration and cohesion. While writing about South Africa, Klug expresses

134 *Certification of the Constitution of the Republic of South Africa, 1996* (n 3) para 291.

135 Steytler (n 109) 177.

136 *Ibid*.

the view that by discouraging adversarial litigation in preference to alternative dispute resolution, the Constitution forces the spheres of government out of an adversarial way of doing things into a cooperative approach to governance matters.[137]

Secondly, the nature of some intergovernmental disputes is such that they are suited for resolution politically through non-judicial mechanisms, since they involve 'policy choices and administrative judgments'.[138] For instance, disputes relating to the duty to support and assist, as well as supervision and intervention powers, are well suited for politically negotiated or mediated settlement. The question of whether the national government is fulfilling its obligation to assist and support county governments is a dispute involving mainly political value judgments.[139] Furthermore, given the open textured nature of the constitutional provisions on a number of issues, non-judicial mechanisms will easily render more pragmatic solutions to disputes than legal answers will. For example, disputes regarding the performance and exercise of concurrent functions and powers could easily be resolved through political compromises, without having to resort to litigation in terms of Article 191 of the Constitution. Likewise, issues relating to funding of additionally assigned and transferred functions will find easier answers in politically negotiated compromises than in judicial intervention. A good example is the constitutional provision that national government may require county government to implement, within the county, national legislation or parts of it.[140]

In addition, while adversarial adjudication often focuses on past acts and facts, and finds in favour of one of the parties to the dispute, alternative dispute resolution mechanisms focus on and address

137 H Klug, 'South Africa: From Constitutional Promise to Social Transformation' in J Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2006) 276, where he observes that:

> Co-operative governance in this sense integrates the different geographic regions and discourages them from seeking early intervention by the courts, instead they are forced into an ongoing interaction designed to produce interregional compromises through political negotiation—as has in practice been the German experience.

138 Steytler (n 109) 177.

139 *Ibid* 178.

140 Article 183(1) (b) of the Constitution of Kenya (n 1).

present and future interests of both parties.[141] It, therefore, addresses how they relate to each other and how their relationships could be structured in future,[142] a matter that is critical for governments in cooperative intergovernmental relations. Thus, the governments are obliged to respect and arrange their activities in a manner that advances intergovernmental relations and bolsters cooperative governance.[143] In the context of cooperative government, avoiding confrontational adversarial litigation may not only prevent damaging relationships, but may in fact enhance the relationships as the alternative dispute resolution mechanisms serve to educate the parties. The parties come to understand fully and better the interests and concerns of each other.[144] Moreover, as is discussed later, alternative dispute resolution mechanisms are procedurally informal and flexible, as there are few fixed procedural rules that must be followed.

Thirdly, alternative dispute resolution mechanisms are more cost-effective and efficient methods of resolving disputes. Litigation is often very costly and time-consuming as decisions can be delayed for long, subjecting the implementation of policies and decisions to unnecessary delays.[145] This will make it difficult for both national and county governments to move with speed and provide the urgently needed development and services.[146] According to the South African case of *Premier of the Western Cape Province v George Municipality*, provisions of this kind seek to avoid unnecessary use of public funds on litigation.[147] Steytler and De Visser observed the following with regard to the *Premier of the Western Cape Province* case:

> There are good reasons, the Court said, for the duty on organs of

141 Steytler (n 109) 188.

142 *Ibid*.

143 *Minister of Police and others* (n 4) para 64.

144 Steytler (n 109) 188.

145 *Ibid* 189.

146 *Minister of Police and others* (n 4) para 64, where the Court noted that, 'often litigation of that order stands in the way or delays sorely needed services to the populace and other activities of government'.

147 *Premier of the Western Cape Province v George Municipality*, Unreported Decision of Cape High Court, Case No 8030/2003, cited in Steytler and De Visser (n 5) chapter 16 p 30.

> state to avoid legal proceedings against one another. Organs of state are public authorities and should act in the public interest. Public funds will be used in litigation, therefore, before decisions are taken to litigate, great circumspection and care are required, particularly where such litigation will entail the use of public funds by another organ of government.[148]

The public purse from which all derive their funding must, therefore, be protected from unnecessary expense arising out of litigation in matters that could easily be settled through other less expensive means.[149]

4.2.3 Enforcement of the Obligation

The obligation is binding on the governments, and the courts must be astute to hold the governments to account for the steps they have actually taken to honour their cooperative governance obligations well before resorting to litigation. The obligation to avoid litigation can be enforced by the courts through three major ways. First, where a court is not satisfied that a level of government, which has gone to court to seek the court's intervention in a dispute, has made every reasonable effort to settle the dispute by other means and procedures prescribed by legislation, it may refer the dispute back to the governments in dispute.[150] By such referral so that the governments explore other means and procedures, the court would be encouraging cooperative government.

Secondly, the court may simply decline jurisdiction to hear a case taken to it without compliance with the obligation on grounds that it is not yet ripe for litigation. It has discretion to refuse to hear a dispute if it is not satisfied that the parties have made every reasonable effort to settle the dispute.[151] In *Uthukela District Municipality and others v President of the Republic of South Africa and others,* the South African Constitutional Court asserted that the 'courts must ensure

148 Steytler and De Visser (n 5) chapter 16 p 30.

149 *Minister of Police and others* (n 4) para 64.

150 Steytler (n 109) 203.

151 *Minister of Police and others* (n 4) para 58.

that the duty is duly performed'.[152] The Court, therefore, declined jurisdiction. Likewise, in *National Gambling Board,* the Court declined to grant the parties direct access noting that '[t]he parties' failure to comply with the obligations of chapter 3 is sufficient ground for refusing direct access'.[153]

However, as already noted, the Kenyan constitutional provisions, unlike the South African, do not require that the governments must exhaust other remedies before approaching a court. Indeed, as discussed later in this chapter, the South African courts have interpreted the words 'make every reasonable effort' in Section 41(3) of the State's Constitution as incorporating discretion on the part of the court to hear a matter even where other means and procedures have not been exhausted. Courts are not automatically precluded from hearing a dispute.[154] Accordingly, the Kenyan courts should not be quick to decline jurisdiction or refer a matter back to the governments merely because the parties have not complied with this obligation.

As discussed later in this chapter, the Kenyan Judiciary has an important role to play in the intergovernmental relations and must not, therefore, abdicate responsibility under the guise of enforcing the obligation to avoid litigation. Exceptional circumstances may exist to justify resort to court without first using other means or exhausting them. If a party to a dispute becomes intransigent, pays lip service to the efforts to settle the matter by other means, or deliberately creates a dispute by acting in a manner it knows is wrong, or on the basis of ulterior motives, the court must be free to adjudicate in the matter without insisting on every reasonable effort first being made. It is for this reason that the Supreme Court in *Speaker of the Senate* decried the refusal by the Speaker of the National Assembly to resort to mediation in resolving the disagreement with the Senate. The Court asserted that '[s]uch course of action is precisely what Archibald Cox had in mind: "*If one arm of government cannot or will not solve an insistent*

152 *Uthukela District Municipality and others v President of the Republic of South Africa and others* 2002 (11) BCLR 1220 (CC) para 13.

153 *National Gambling Board* (n 126) para 37.

154 *Minister of Police and others* (n 4) para 58.

problem, the pressure falls upon another". The pressure now falls on the Supreme Court.'[155]

As the guardian of the Constitution, the courts must devise and formulate other remedies that can be used to give effect to the constitutional provisions. For example, in cases of intransigence which can be attributed to a state officer that is obviously abusing his office, an order of costs against the officer and not the government or institution would be an appropriate mechanism to enforce cooperative government obligations.

4.3 The Non-Judicial Alternative Dispute Resolution Mechanisms

The obligation that seeks to avoid litigation requires the governments to seek to settle disputes through alternative dispute resolution mechanisms, 'including by means of procedures provided under national legislation'.[156] Three broad approaches to resolution of disputes can be identified. The first approach comprises processes that involve private decision-making by the parties themselves, and these include processes such as negotiation, mediation and conciliation.[157] The second approach comprises processes that involve private decision-making by an independent third party, and these include arbitration and a commission of inquiry or a fact finding mechanism.[158] The third approach involves public adjudication by the formal courts or independent tribunals.[159] While the third approach involves adversarial litigation, the first two constitute alternative dispute resolution mechanisms. The main difference between the two is that while in non-judicial alternative dispute resolution mechanisms the parties control the process, in judicial adjudicative processes, the parties have no control. In negotiations, for example, the parties control both the process and the outcome,

155 *Speaker of the Senate and another* (n 19) para 146 (italics in the original).

156 Article 189(3) of the Constitution of Kenya (n 1).

157 Steytler (n 109) 186.

158 *Ibid*.

159 Article 1(3) (c) of the Constitution of Kenya (n 1).

while in arbitration, they have limited control involving the appointment of the arbitrator.[160]

Article 189(4) of the Constitution requires national legislation to be enacted to 'provide for procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.' This provision has clearly settled for the first and second approaches involving the parties themselves and independent third parties. The use of the term 'including', however, means that the legislation is not limited to providing for negotiation, mediation and arbitration, but could identify other like methods and provide for them. For example, the legislation may provide for appointment of an independent commission of inquiry by the governments in dispute, to establish the facts in dispute and make formal recommendations.[161] The governments may or may not accept and implement the recommendations, but the legislation could provide that the recommendations are binding on the parties. The legislation could also provide for conciliation, which is a variant of mediation, in which the mediator plays a more interventionist role by investigating the dispute independently and making formal recommendations regarding the terms of settlement of the dispute.[162]

When determining which mechanisms to provide for, the legislators must appreciate the fact that the nature of the dispute determines the choice of the dispute settlement mechanism. According to Steytler:

> A commission of inquiry is preferable where there is a dispute of fact. Conciliation is concerned with the future rather than with the unraveling of the past and is therefore appropriate for accommodating differences in policy. Arbitration and adjudication are again more suitable for disputes involving legal questions.[163]

There are, however, disputes which may involve a combination of questions of fact, policy and the law, and which will require a

160 Steytler (n 109) 186.

161 *Ibid* 187.

162 *Ibid*.

163 *Ibid* 188.

combination of mechanisms or one mechanism serving more functions. For example, negotiation could be combined with mediation, which is then followed by arbitration.[164]

4.3.1 Negotiation

As already noted, negotiation is one of the processes of private decision making by the parties themselves in which the parties control the process and the outcome. It involves bargaining by and between the parties to a dispute who seek to resolve the conflict between them through the exchange of resources or structuring of relationships.[165] The process does not follow formal structured procedures as the parties who are in control can follow any method that is likely to yield results. While in many, the parties to the dispute negotiate alone, there are instances in which the negotiating parties are supported by specialists and experts who participate as partisan advisers and resource persons to the parties in dispute.[166] The negotiation which the Constitution envisages and requires national legislation to provide for must be understood in these broad manner so that governments can hire advisers to support them during negotiation.

4.3.2 Mediation

Mediation is a process that seeks to facilitate negotiation by the parties in dispute, by assisting them to negotiate. It introduces into the process of negotiation, the services of an outsider called a mediator who facilitates the negotiations. The mediator must be an acceptable, impartial and neutral third party, whose main roles are to ease the tensions among the parties, create conducive atmosphere for negotiation, and help the parties reach an agreement.[167] Since the mediator is not an independent authority whose decisions are binding on the negotiating parties, he can only make proposals for a possible solution, which the parties who still control the process may

164 *Ibid*.
165 *Ibid* 186.
166 *Ibid*.
167 *Ibid* 187.

or may not accept. The mediator improves the negotiation process by introducing a measure of formality and structure. He brings the parties together in structured meetings which he chairs.[168]

4.3.3 Arbitration

Arbitration involves the parties in dispute agreeing to appoint a third party known as an arbitrator and giving him the authority to make a decision on their behalf. The arbitrator must be an impartial and neutral third party who makes a decision on the basis of the evidence and submissions adduced by the parties in dispute.[169] The proceedings must follow procedures determined by the parties. As contrasted with a mediator whose decision is not binding on the parties, an arbitrator's decision is usually binding.[170]

4.4 The Role of the Judiciary in Intergovernmental Relations

Although the Constitution provides for and emphasises the need to settle intergovernmental disputes by alternative dispute resolution mechanisms, it does not oust the jurisdiction of the courts from intergovernmental relations and disputes.[171] The courts, and especially the Supreme Court, are the guardians of the Constitution and must have final say in any dispute between the governments established under the Constitution. First, given that some of the disputes among the governments may be in respect of the different interpretations of constitutional provisions they may have, Article 163(6) of the Constitution expressly provides that '[t]he Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government'. This provision must have been informed by the recognition of the fact that questions of interpretation are best suited for judicial intervention than alternative dispute resolution.

168 *Ibid.*
169 *Ibid* 188.
170 *Ibid.*
171 *Ibid* 178.

A matter concerning a county government may involve the question of its constitutional status as a government, the functions and powers of the county government or even the resources that county governments are entitled to. In effect, these are matters of intergovernmental relations. It may even involve the composition of the two Houses of Parliament as was the case in *The Matter of the Principle of Gender Representation in the National Assembly and the Senate,* in which the Supreme Court was called upon to give an advisory opinion about whether the not more than two thirds gender representation rule in either of the Houses was to be implemented immediately or progressively.[172] The Court found that '[t]he gender composition of both the National Assembly and the Senate, if it could touch on the constitutionality of these organs is an issue bearing impact on county government' and is, therefore, a matter concerning counties.[173] Given the novel and far-reaching nature of the innovations of Kenya's devolved system, the Supreme Court emphasised the important role of the Judiciary in the intergovernmental relations by giving its advice on matters relating to the new system. It stated that:

> The Court recognizes, however, that its Advisory Opinion is an important avenue for settling matters of great public importance which may not be suitable for conventional mechanisms of justiciability. Such novel situations have clear evidence under the new Constitution, which has come with far-reaching innovations, such as those reflected in the institutions of county government. The realization of such a devolved governance scheme raises a variety of structural, management and operational challenges unbeknown to traditional dispute settlement. This is the typical situation in which the Supreme Court's Advisory—Opinion jurisdiction will be most propitious; and where such is the case, an obligation rests on the Court to render an opinion in accordance with the Constitution.[174]

Secondly, given the sovereignty of the people and the supreme nature of the Constitution, its Article 165(3)(d) grants the High Court 'jurisdiction to hear any matter respecting the interpretation

172 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* [2012] eKLR.

173 *Ibid,* para 20.

174 *Ibid,* para 19.

of [the] Constitution' and determine 'the question whether any law is inconsistent with or in contravention' of the Constitution.[175] It can also determine whether anything said to be done under the authority of the Constitution, or any other law, is inconsistent with or in contravention of the Constitution.[176] Most importantly, it can determine 'any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government'.[177] Likewise, the High Court has jurisdiction to determine 'a question relating to conflict of laws under Article 191' of the Constitution.[178] Under Article 191 of the Constitution, national legislation can only prevail over county legislation in certain specified circumstances, otherwise county legislation prevails.

The decisions of the High Court in these cases can be appealed against in the Court of Appeal and subsequently to the Supreme Court. In both cases, the superior courts' jurisdiction gives them an important role in the intergovernmental relations and balance of power between the two levels of government. In the exercise of this jurisdiction, the Judiciary will have an opportunity to police and enforce the devolution bargain and balance of power between the two levels of government. The Supreme Court in *Speaker of the Senate* has endorsed this view by noting that:

> Courts must patrol Kenya's constitutional boundaries with vigor, and affirm new institutions, as they exercise their constitutional mandates, being conscious that their very infancy exposes them not only to the vagaries and fragilities inherent in all transitions, but also to the proclivities of the old order.[179]

Thirdly, even where the Constitution makes provision for specific alternative dispute resolution mechanisms, the Judiciary as the final arbiter of the Constitution, retains supervisory powers which it can use to review the non-judicial processes.[180] For example, in cases

175 Article 165(3)(d)(i) of the Constitution of Kenya (n 1).

176 *Ibid,* Article 165(3)(d)(ii).

177 *Ibid,* Article 165(3)(d)(iii).

178 *Ibid,* Article 165(3)(d)(iv).

179 *Speaker of the Senate and Another* (n 19) para 161.

180 Steytler (n 109) 178-79.

of intervention in terms of Article 190 of the Constitution, and suspension of county government in terms of Article 192, non-judicial mechanisms are envisaged. The Senate is even empowered to terminate the intervention or suspension. It is submitted that a county government dissatisfied with the manner in which the non-judicial mechanisms have been used can approach the Courts for review. Likewise, a county dissatisfied with the manner in which the non-judicial mechanisms have been used in stoppage of transfer of funds under Article 225 of the Constitution can also seek judicial intervention.

Fourthly, Article 189(3) of the Constitution only requires the governments to 'make every reasonable effort' to settle the disputes by alternative methods to be provided for by national legislation, without completely precluding adversarial litigation. Contrasted with the South African Constitution, which expressly requires that all other remedies must be exhausted before turning to adversarial litigation in court,[181] the Kenyan Constitution does not have such a requirement. But even in South Africa where there is such requirement, the courts have interpreted the words 'make every reasonable effort to settle the dispute' by other means as embodying discretion on the part of the court to determine whether or not to hear a matter even where such other means have not been used or exhausted. In *City of Cape Town v Premier of the Western Cape*, the High Court of South Africa observed that:

> To disregard the provisions of section 40(4) of the Constitution, which vests in a court a discretion to hear a matter, even if not satisfied that the parties have made every reasonable effort to settle the dispute, would run counter to the provisions of section 34 of the Constitution, which guarantees the right of the individual to have any dispute resolved by the application of law, decided in a fair public hearing before a court.[182]

As such, the Kenyan courts have a role to play in the intergovernmental relations and dispute resolution. As in the South African approach, the jurisdiction of the courts is not ousted. The Constitutional Court in the *First Certification* judgment noted that the constitutional provisions

181 Section 41(3) of the Constitution of the Republic of South Africa (n 124).

182 *City of Cape Town v Premier of the Western Cape,* 2008 (6) SA 345 (c) para 17.

requiring use of alternative dispute resolution bind all departments of State and administration in the national, provincial and local spheres of government, with the implication that disputes should, where possible, be resolved at a political level rather than through adversarial litigation. It, however, emphasised that this requirement 'is consistent with the system of co-operative government which has been established and does not oust the jurisdiction of the courts or deprive any organ of government of the powers vested in it under the [New Constitution] …'[183]

5 Conclusion

What emerges from this chapter is that there is sufficient provision in the Constitution on how intergovernmental relations, and dispute resolution among the levels of government established under the Kenyan devolved system, should be managed. The constitutional choice of a cooperative as opposed to a competitive devolved system of government was a deliberate one aimed at providing intergovernmental relations that avoids disputes arising. The successful management and resolution of intergovernmental disputes must be founded upon a clear understanding of the cooperative system of government and the manner in which it operates.

The chapter has also indicated that even when disputes cannot be avoided, and therefore arise, the Constitution provides for resolution of such disputes through mechanisms and procedures that avoid litigation in the first instance. The governments must make every effort to resolve the disputes by other means other than judicial intervention. But, as the chapter points out, this does not oust the jurisdiction of the Judiciary, which is assigned a critical role in not only intergovernmental relations but also in the settlement of disputes.

183 *Certification of the Constitution of the Republic of South Africa, 1996* (n 3) para 291 and Currie and De Waal (n 2) 123. See also *Minister of Police and others* (n 4) para 58, where it was observed that '[h]owever, a Court is not thereby precluded from hearing the dispute.'

Chapter Four

Recasting Kenya's Devolved Framework for Intergovernmental Relations: Lessons From South Africa

Faith Simiyu

1 Introduction

The promulgation of the 2010 Constitution of Kenya brought forth a plethora of reforms, key amongst them being a cooperative system of devolved governance. This form of devolution involves the establishment of two levels of government, namely, national and county governments. Article 6(2) of the Constitution anchors the cooperative model of devolved governance in Kenya.[1] It provides that the national and county governments are to conduct their mutual relations on the basis of consultation and cooperation. Thus, in discharging their constitutionally defined roles or functions, both levels of government must observe and be guided by two key principles of intergovernmental relations. These principles are elucidated under Article 6(2) and Article 189(1) of the Constitution, and comprise the principles of distinctiveness and interdependence. Collectively, the stated principles echo the fact that even though both governments are autonomous institutions, they are interrelated and need to work together; especially when discharging their functions in various sectors, including agriculture. In other words, even though each level of government is separate and distinct, they are interrelated. None can work in isolation. Due to this interrelation, the Constitution mandates co-operation and consultation between the two levels of government.[2] It is expected that the constitutionally defined principles of intergovernmental relations would serve to

1 See, Constitution of Kenya (promulgated 27 August 2010) <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010#part_I> accessed 14 March 2015.

2 See, *International Legal Consultancy Group v Senate and Clerk of the Senate,* High Court Constitutional Petition No 8 of 2014.

ensure that the cooperative system of devolved governance works for the benefit of the Kenyan people.

In retrospect, however, as this chapter illustrates, the Constitutional provisions on intergovernmental relations are vague. The Constitution largely lacks specific provisions that would reinforce a robust regime for intergovernmental relations. Accordingly, the national government enacted the Intergovernmental Relations Act of 2012 (hereafter Intergovernmental Act of 2012) as the legislative approach for the advancement of the constitutional provisions on intergovernmental relations in Kenya.[3] The Intergovernmental Act of 2012 establishes Intergovernmental Structures that act as intergovernmental relations forums pursuant to Articles 6(2) and 189 of the Constitution. However, the Intergovernmental Act of 2012 simply reiterated the descriptive constitutional provisions on vertical and horizontal mechanisms for intergovernmental relations. It fails to advance further and better provisions on the coordination and management of intergovernmental relations. In particular, the Intergovernmental Act of 2012 does not guide the management of inter-governmental relations at a sectoral level. As a result, several challenges have underscored the implementation of intergovernmental relations in the various sectors, including agriculture.

Two key challenges are particularly evident in Kenya's agriculture sector, where, in the absence of sector-specific mechanisms for intergovernmental relations, the national government enacted the Agriculture, Fisheries and Food Authority Act of 2013 (AFFA Act).[4] The AFFA Act creates a national state corporation known as the Agriculture, Fisheries and Food Authority (hereafter AFFA Authority).[5] The AFFA Authority seems to advance sectoral mechanisms for intergovernmental relations between the national and county governments. However, as shall be discussed, the AFFA

3 Intergovernmental Relations Act, No 2 of 2012 <kenyalaw.org/kl/fileadmin/pdfdownloads/LawsonDevolution/IntergovernmentalRelationsActNo2of2012.doc> accessed 14 April 2015.

4 Agriculture, Fisheries and Food Authority Act, No 13 of 2013 <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=NO.%2013%20OF%202013> accessed 16 April 2015.

5 *Ibid,* Part II.

Authority not only encroaches on the functional distinctiveness of the counties but is also aloof of the intergovernmental structures established under the Intergovernmental Act of 2012. Therefore, amongst the key questions posed in this chapter are the following: what are the roles of national state corporations in the context of the intergovernmental structures (established under the Intergovernmental Act of 2012) as far as the management and coordination of intergovernmental relations between the counties and the National Government of Kenya is concerned? Can national state corporations purport to act as sectoral intergovernmental forums even though they overstep the functional and institutional prestige, integrity and autonomy of one level of government?

Accordingly, taking Kenya's agriculture sector as an illustrative case, the chapter investigates how the absence of sector-specific intergovernmental relations framework has led to the national state corporations attempting to play the role of sectoral intergovernmental forums. The chapter begins by examining Kenya's devolved framework with specific emphasis on the meaning, models of and interplay between devolution and intergovernmental relations. It then highlights the various approaches to intergovernmental relations with specific emphasis on the constitutional and legal approach. Following this, the chapter critically examines the constitutional and legislative approaches to intergovernmental relations in Kenya and then details the realities characterising the implementation of the same as exemplified by the agriculture sector. In so doing, the chapter elucidates on the sectoral challenges of implementation and recommends a need for sectoral mechanisms for intergovernmental relations in Kenya.

The recommendations of the chapter are derived from South Africa's intergovernmental relations framework entailed in the State's Constitution and the Intergovernmental Relations Framework Act of 2005 (hereafter 'Intergovernmental Act of 2005').[6] The chapter, therefore, compares and contrasts the Kenya's

6 See, Constitution of the Republic of South Africa of 1996 <http://www.gov.za/documents/constitution-republic-south-africa-1996> accessed 12 April 2015; Intergovernmental Relations Framework Act, No 13 of 2005 <http://www.gov.za/sites/www.gov.za/files/a13-05_1.pdf> accessed 13 April 2015.

intergovernmental relations with its South African counterpart. As will be evident, South Africa provides a somewhat clear inter-governmental relations forum peculiar to its cooperative devolved system and the functional assignment of each government level. The functional assignments arguably introduce sectoral mechanisms for cooperation and coordination of intergovernmental relations. Further, as recommended, South Africa defines the role of national state corporations as the inter-governmental technical support team and, in case they discharge the constitutionally defined functions of any level of government, they must sign implementation protocols. Therefore, as suggested in this chapter, Kenya may draw lessons from South Africa when recasting its devolved framework for the management and coordination of intergovernmental relations.

2 Contextualising Devolution

2.1 Meaning and Models of Devolution

Devolution is a complex undertaking which derives different meanings in varying contexts. Devolution refers to the *transfer of power or functions* from one level of government (usually the central or national government) to a lower level of government such as the local government.[7] In some instances, devolution is considered a form of *decentralisation* in which the authority for decision-making, functions and powers are transferred from the central government to quasi-autonomous units or levels of the local governments.[8] For example, the United States of America (USA) has a decentralised system of government at the federal, state and county or local levels. Similarly, South Africa has three levels of a decentralised government at the national or central, provincial and local government levels comprising of municipalities and districts. Germany has a federal, lander and local government levels, whilst in Kenya, two levels exist at the national and county levels of governance.

7 YP Ghai and JC Ghai, *Kenya's Constitution: An Instrument for Change* (Katiba Institute 2011) 139.

8 Steve Odero, 'Devolved Government' in PLO Lumumba, MK Mbondenyi and SO Odero (eds), *The Constitution of Kenya: Contemporary Readings* (LawAfrica 2011).

2.1.1 Models of Devolution

There is no uniform model of devolution the world-over. Indeed, different variants of devolution exist and each country adopts a variant peculiar to its need. However, the realization of devolution is premised on the legislative framework created to facilitate its design and implementation. Thus, in order to derive the methods, design and processes of devolution in any country, one must examine the Constitution, ordinary law or administrative arrangements of the country in question.[9] In turn, this affects the intergovernmental relations of a particular jurisdiction.

Arguably, there are four parameters within which devolution models emerge. They include, first, administrative devolution, which essentially involves the transfer of responsibility for planning, financing and management of selected public functions from the central government to lower units of the government. Second, there is political devolution, which involves the creation of sub-national levels of government that are endowed with autonomous decision making power within the framework of legitimately elected local governments that have legal authority conferred upon them by the people during the electoral process. Third, there is fiscal devolution, which is the alignment of monetary functions among different levels of government whereby the different levels of government set and collects taxes. Fourth, there is economic or market devolution, which occurs through privatisation and deregulation, thereby shifting the responsibility for the provision of goods and delivery of services from the central government to the private sector.[10]

2.1.2 The Kenyan Model of Devolved Governance

The 2010 Constitution of Kenya introduces a 'cooperative form of devolved governance' which is underpinned by the principle of distinctiveness and interdependence of government relations.[11] Prior to the enactment of the new Constitution in 2010, Kenya operated

9 YP Ghai and JC Ghai (n 7).

10 Steve Odero (n 8).

11 Task Force on Devolved Government of Kenya, *A Report on the Implementation of Devolved Government in Kenya* (TFDG 2011) para 3.4.

under a constitutional dispensation that advanced a unitary form of government. In the unitary form of governance, the supreme authority was vested in the central or national government. In turn, the central government delegated its decision-making powers to the local government comprising of six sub-national entities at the provisional, district, divisional, locational and sub-locational levels. As far as the then inter-governmental relations were concerned, the local government was accountable to the central government and could only exercise its powers within the limits delegated by the central government. In addition, legislative power was vested entirely in the unicameral Parliament which could delegate its powers to various state institutions and non-state actors in the implementation of the law. [12]

However, with the passing of the 2010 Constitution, Kenya was transformed from a unitary state into a quasi-federal state comprising of a cooperative form of devolved government. In this regard, instead of governance being characterised by *delegation* of power, which essentially involved accountability being centralised (with state and non-state institutions being an extension of the central government), and lack of autonomy by sub-national entities, Kenya began to be guided by principles of *cooperative devolved governance,* in which sub-national entities at the counties enjoy autonomy.

Accordingly, the Constitution of 2010 captured the parameters within which the cooperative form of devolution was to occur. The administrative parameter of the cooperative devolved model is encapsulated in the Fourth Schedule of the Constitution, which not only distributes but also transfers functions between the national and county governments. On the other hand, the political parameter has been realised in Chapter Eleven, which establishes the objects and principles of devolved government, including in electoral matters related to counties. On a different note, the fiscal parameter is conceptualised in Chapter Twelve, which enumerates matters of public finance between the national and county governments. In addition, the economic parameter is imbued in administrative

12 *Ibid*.

arrangements and legislation governing the private sector, such as the Privatisation Act of 2005.[13]

In realising the preceding parameters of the cooperative model of devolution, Articles 6(2) and 189(1) of the 2010 Constitution provide an intergovernmental relations framework underpinned by the principles of distinctiveness and interdependence of the national and county governments. Thus, for example, when discharging their devolved administrative functions, listed in the Fourth Schedule of the Constitution, each level of government is required to take cognisant of the said principles. A key parameter of administrative devolution, which is the focus of this chapter, is that of agriculture, especially its interplay with the intergovernmental relations envisaged by the Constitution. But first the chapter examines the concept of intergovernmental relations in the context of devolution.

3 Intergovernmental Relations and Devolved Governance

3.1 Conceptualising Intergovernmental Relations

The concept 'intergovernmental relations' is commonly used to refer to the relations between and within levels of government in the attainment of common goals through cooperation, and the interactions between the different levels of government within the state.[14] In this regard, intergovernmental relations comprise the legal and institutional mechanisms by which bilateral and multilateral interactions within and between the various levels of government occur, in furtherance of governmental policies and functions.[15]

In other instances, intergovernmental relations are deemed to constitute a set of policies and institutional mechanisms by which the interplay between the different levels of government, serving in a common geographical area, is managed. Accordingly, intergovernmental relations are cross-cutting in nature, encompassing

13 Privatisation Act, Chapter 485C of the Laws of Kenya.

14 BR Opeskin, 'Mechanisms for Intergovernmental Relations in the Forum of Federations' in L Ademolekun (ed), *Public Administration in Africa (*Spectrum Books 2002).

15 *Ibid*.

all the manifestations of and relations between the various units of government.[16] As such, intergovernmental relations are realised through intergovernmental structures designed to accommodate, facilitate and create boundaries for government functions.

3.2 Intergovernmental Structures

Intergovernmental structures usually comprise the heads of the various levels of governments and are established as intergovernmental forums for the management and coordination of matters of national and sub-national interest. The matters of interest are usually peculiar to the functional assignment of each level of government. As such, intergovernmental structures seek to answer external questions on the conduct of intergovernmental relations that include but are not limited to: which level of government has overall responsibility for a specified function? How are the functions between the various levels of government to be shared? If the functions are shared between the levels of government, how are they to be divided amongst the various levels of government? As pointed out in this chapter, both the Kenyan and the South African Intergovernmental Acts create intergovernmental structures that act as forums for intergovernmental relations at the various levels of government. In turn, the intergovernmental structures are to act in tandem with the various approaches to intergovernmental relations adopted in a country.

3.3 Approaches to Intergovernmental Relations

There are several approaches to intergovernmental relations. The key approaches are the constitutional approach, the legal approach, the democratic approach, the financial approach and the normative - operational approach.[17] A detailed elucidation of the stated approaches is beyond the scope of this chapter. The chapter instead focuses on the constitutional and legal approaches as they comprise

16 *Ibid*.

17 PS Lawson, 'Nigeria's Constitutions and Intergovernmental Relations (IGR): Need for Improvement' (2011) 4(3) *Ozean Journal of Social Sciences* 199, 201.

the foundational framework for intergovernmental relations in Kenya.

The origins of the constitutional and legal approaches may be traced to the federalist movement of the United States in the 18th and 19th century where the hierarchy of government was accepted as a constitutional fact.[18] Advocates of the constitutional and legal approaches assert that the constitution is the basic foundation for determining intergovernmental relations. In this regard, the constitutional and legal approaches argue that since the supremacy of the constitution dictates and limits the action of government, it inevitably means that the relations between governments must exist exclusively within the limits of the constitution.[19] For instance, Articles 6(2) and 189 of the Kenyan Constitution dictate that the State is to comprise the national and county governments. Hence, in limiting the actions and relations of the two levels of government, the principles of distinctiveness and interdependence of both governments are introduced by both Articles of the Constitution. These principles in part call for adherence and respect of the functional autonomy, integrity and prestige of each level of government. Thus, no level can purport to encroach on the functions of the other, or infringe on the autonomy of the other.

Notably, however, constitutions may provide vague provisions on intergovernmental relations. Hence, the legislative approach may be called upon to provide specific provisions. Indeed, as already noted, the Kenyan Constitution largely lacks specifics on the conduct of intergovernmental relations pursuant to Articles 6(2) and 189 of the Constitution. Therefore, as discussed below, the Intergovernmental Relations Act of 2012 has been enacted as the legislative framework that extends the constitutional provisions on intergovernmental relations. In particular, the Intergovernmental Relations Act of 2012 establishes a framework for vertical consultation and cooperation between the national and county governments on the one hand, and horizontal mechanism for consultation and cooperation amongst the counties, pursuant to Articles 6 and 189 of the Constitution. In

18 BR Opeskin (n 14).

19 NL Roux and others, *Critical Issues in Public Management and Administration in South Africa* (Kasigo Tertiary 1997).

this regard, the Constitution and the Intergovernmental Relations Act of 2012 signify the constitutional and legal approaches to intergovernmental relations in Kenya and will, therefore, be the reference legal instruments in this chapter.

3.4 Approaches to Intergovernmental Relations in Kenya

Intergovernmental relations are applicable irrespective of the system of government embraced by a state, and encompass all the complex and interdependent relations amongst the various spheres of government.[20] In Kenya, intergovernmental relations consist of a complex network of the day-to-day interrelationships between and within the cooperative form of devolved government. The interrelationships network ranges from political, fiscal, administrative and economic arrangements by which the national government shares resources with the county government.

3.5 Constitutional Approach to Intergovernmental Relations in Kenya

The Constitution provides several principles that underpin the foundation for intergovernmental relations in Kenya. Articles 6(2) and 189(1) of the Constitution create a cooperative form of devolved governance in Kenya as underpinned by two key principles – distinctiveness and interdependence. Article 6(2) provides that 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.' Article 189 of the Constitution proceeds to provide that:

> (1) Government at either level shall—
>
> (a) perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level;

20 W Mitullah, 'Intergovernmental Relations Act 2012: Reflection and Proposals on Principles, Opportunities and Gaps' (2012) *Friedrich Ebert Stiftung Kenya Occasional Paper No 6*.

(b) assist, support and consult and, as appropriate, implement the legislation of the other level of government; and

(c) liaise with government at the other level for the purpose of exchanging information, coordinating policies and administration and enhancing capacity;

(2) Government at each level, and different governments at the county level, shall cooperate in the performance of functions and exercise of powers and, for that purpose, may set up joint committees and joint authorities …;

(4) National legislation shall provide procedures for settling intergovernmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

Articles 6(2) and 189(1) of the Constitution are important in two aspects. Firstly, they introduce a 'cooperative system of devolved government'. Secondly, the Articles introduce two guiding principles for the cooperative system of devolved governance, namely; the principle of distinctiveness and the principle of inter-dependence. These principles are to guide intergovernmental relations in Kenya as explained below.

3.6 The Principle of Distinctiveness in Intergovernmental Relations

The principle of distinctiveness provides that each level of government is autonomous from the other. The autonomy encompasses certain distinct features such as political, functional, financial and administrative autonomy. This means that no level of government is sub-ordinate to the other, or an agent of the other, and must each respect the functional and institutional integrity of the other. Essentially, this also connotes a measure of equality and autonomy among the two levels of government so that each level has the flexibility to make their own decisions pursuant to their constitutionally defined functional assignment. The decisions can include the laws and administrative arrangements on the discharge of government functions as specified by the Constitution.

Article 189(1)(a) of the Kenyan Constitution echoes the principle of distinctiveness, by providing that the 'Government at

either level shall perform its functions and exercise its power in a manner that respects the functional and institutional integrity of government at the other level'. By referring to the notion of respect for 'the functional and institutional integrity of government', it can be construed that Article 189(1)(a) of the Constitution requires recognition of the principle of distinctiveness of government. In essence, the recognition means that neither government should encroach on the constitutionally assigned functional area of the other, nor purport to undermine the institutional autonomy of the other government.

3.7 The Principle of Interdependence in Intergovernmental Relations

The principle of interdependence recognises that whereas the various levels of government are autonomous, they cannot operate in isolation. Both levels must realise that some of their functions are concurrent in nature, and therefore require consultation and cooperation. Important aspects of cooperation and consultation are captured in Articles 189(1)(b) and 189(1)(c) of the Constitution, envisaged to involve assistance, support, consultation and liaisons between the various government levels for purposes of 'exchanging information, coordinating policies and administration and enhancing capacity.' Article 189(1)(a) again captures the principle of interdependence in so far as cooperation and consultation are concerned. The Article specifically provides that the 'government at either level shall perform its functions and exercise its power in a manner that … respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level'.

The notion of government that 'respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level', introduces two mechanisms of intergovernmental consultation and cooperation, namely; vertical mechanisms between the national and county

governments, and horizontal mechanisms between the county governments.[21]

In accordance with Article 189(2) of the Constitution, both levels of government may set up joint committees and authorities. Arguably, joint authorities or institutions have been established through intergovernmental structures under the Intergovernmental Act of 2012, as a forum for operationalizing intergovernmental relations envisaged by the Constitution. The Intergovernmental Act also forms the legislative approach to intergovernmental relations in Kenya.

3.8 Legislative Approach to Intergovernmental Relations in Kenya

As pointed out, the Intergovernmental Act of 2012 forms the legislative approach to intergovernmental relations in Kenya. It extends the constitutional provisions on devolution. It seeks to, *inter alia,* establish a framework for consultation and cooperation between the national and county governments pursuant to the principles of distinctiveness and interdependence of government; articulated under Articles 6 and 189 of the Constitution. Further, it creates intergovernmental structures for the concretisation of intergovernmental relations in Kenya. Specifically, Sections 3(a), (b) and (c) of the Act objectify the creation of inter institutional structures and mechanisms of vertical and horizontal consultation and cooperation between and amongst the national and county governments. In particular, the stated Sections provide as follows:

> 3. The objects and purposes of this Act are to—
>
> (a) Provide a framework for consultation and co-operation between the national and county governments;
>
> (b) Provide a framework for consultation and co-operation amongst county governments;
>
> (c) Establish institutional structures and mechanisms for intergovernmental relations.

21 Steve Odero (n 8).

In furtherance to the stated objectives, governments at the national and county levels are to be guided by the constitutional principles of distinctiveness and interdependence of their relations.[22] Part II of the Intergovernmental Act of 2012 establishes intergovernmental relations structures (hereafter 'intergovernmental structures') that will facilitate vertical and horizontal mechanisms of cooperation and consultation between national and county governments on the one hand, and horizontal cooperation and consultation amongst county governments, on the other hand.[23] These structures are: (i) the National and County Government Coordinating Summit; (ii) the Council of County Governors; (iii) the Intergovernmental Relations Technical Committee and; (iv) the Intergovernmental Relations Secretariat.

3.9 National and County Government Coordinating Summit

The National and County Government Coordinating Summit (hereafter 'Summit') is the apex body for intergovernmental relations in Kenya and comprises of the President, Deputy President and the Governors of all the forty seven counties of Kenya. A key function of the Summit is to act as a vertical forum for consultation and cooperation between the national and county governments.[24] This is because the Summit is composed of elected representatives from the national and county governments, who are to consult and cooperate with each other for purposes of exchanging information, coordinating policy and other administrative arrangements. Furthermore, the Summit is mandated to evaluate the performance of the national and county governments in order to recommend appropriate action.[25] Moreover, the Summit coordinates and harmonises the development of county and national government policies.

22 Sections 4(c) and (e) of the Intergovernmental Relations Act (n 3).

23 *Ibid,* Section 5(b).

24 *Ibid,* Section 8 (a).

25 *Ibid,* Section 8 (f).

3.9.1 Council of County Governors

The Council of County Governors (hereafter 'Council') comprises of governors that represent all the forty seven counties in Kenya. The Council has functions that relate to county matters. The functions of the Council can arguably be equated to a forum for horizontal mechanisms for consultation and cooperation amongst county governments. For instance, amongst the functions of the Council is to exchange information on the performance of counties and consider matters of common interest to county governments.[26]

3.9.2 Intergovernmental Relations Technical Committee

The Intergovernmental Relations Technical Committee (hereafter 'Technical Committee') comprises of a chairperson, a maximum of eight persons competitively recruited and the Principal Secretary of State responsible for devolution.[27]A notable feature of the composition of the Technical Committee is the explicit exclusion of elected representatives from the national and county governments.[28] This necessarily implies a gap in the consultative forum for the articulation of national or county issues. On the contrary, the fact that the Technical Committee is merely responsible for administrative, management, facilitation and implementation of the decisions emanating from the Summit and Council implies some form of consultation and cooperation between the two levels of governments. Therefore, the implied lacuna may be mitigated.

Besides that, the Technical Committee, through the Principal Secretary, may convene a consultative forum on sectoral issues that are of a common interest to both the national and county governments.[29] Thus, the Technical Committee is empowered to establish sectoral working groups for the better carrying out of its functions.[30] This conceivably introduces an aspect of sectoral mechanism for consultation and cooperation. However, since the

26 *Ibid,* Section 13.
27 *Ibid,* Section 11.
28 *Ibid,* Section 11(6).
29 *Ibid*, Section 15(5).
30 *Ibid,* Section 13(1).

Technical Committee is merely a facilitator of the Summit and Council decision, its ability to anchor sectoral mechanisms for consultation and cooperation between the national and county government remains limited, as shall be exemplified from the agricultural sector.

3.9.3 Intergovernmental Relations Secretariat

The Intergovernmental Relations Secretariat (hereafter 'Intergovernmental Secretariat') is headed by the Secretariat and consists of a Secretary appointed by the Technical Committee. The main responsibilities of the Intergovernmental Secretariat are to implement the decisions of the Summit, Council and Technical Committee. The Secretariat merely plays an administrative role.[31]

3.10 Summary of Approaches to Intergovernmental Relations in Kenya

The constitutional and legal approaches form the foundation of intergovernmental relations in Kenya. As discussed, both approaches echo of horizontal and vertical mechanisms for consultation and cooperation. The said mechanisms are realised through intergovernmental structures established under the Intergovernmental Act of 2012 and are premised on two guiding principles of intergovernmental relations, namely, the principle of distinctiveness and interdependence. Thus, governments at the national and county levels are expected to adhere to the stated principles and recognise the intergovernmental structures created to facilitate intergovernmental relations between and within their levels.

The table below summarises the composition and functions of the intergovernmental structures established under the Intergovernmental Act of 2012. The table is then followed by a critical analysis of the implementation of the constitutional and legal approaches in the agricultural sector.

31 *Ibid,* Section 15(5).

Table 1: Composition and role of intergovernmental structures established under the Intergovernmental Relations Act of 2012

Intergovernmental Structure	Composition	Selected Functions	Meetings, Reports and Referrals
The National and County Government Coordinating Summit	The apex body for intergovernmental relations comprising of the President, Deputy President and the Governors of the forty seven counties	The functions of the Summit, *inter alia,* include the provision for a forum for: • Consultation and cooperation between the national and the county governments;[32] • Evaluating the performance of the national and county governments and recommending appropriate action; [33] • Considering issues relating to intergovernmental relations referred to the Summit by a member of the public and recommending measures to be undertaken by the respective county government; • Coordinating and harmonising the development of county and national government policies; • Facilitating and coordinating the transfer of functions, power or competencies from and to either level of government[34]	The National and County Coordinating Summit is to meet twice in a year and make reports at the end of each financial year to be submitted to the National Assembly, Senate and county assemblies. [35]

32 *Ibid*, Section 8(a).

33 *Ibid*, Section 8 (f).

34 *Ibid*, Section 8(k).

35 *Ibid*, Sections 9 and 10.

The Council of County Governors	Consists of the Governors representing the forty seven counties of Kenya.[36]	The main functions of the Council are largely tailored towards county matters that include being a forum for: • Consultation amongst county governments; • Sharing of information on the performance of the counties for purposes of obtaining the best practices; • Consideration of matters of common interest to county governments; • Capacity building for governors; • Dispute resolution between counties.[37]	The Council is mandated to meet twice in a year. Further, the Council may establish other intergovernmental forums including inter-city and municipality forums and sectoral working groups for the better carrying out of its functions.[38]
The Intergovernmental Relations Technical Committee	Comprises a chairperson, a maximum of eight members competitively recruited and the Principal Secretary of the State department responsible for devolution.[39]	• The Technical Committee is responsible for the day to day administration of the Summit and the Council of Governors in terms of facilitation and implementation of their decisions;[40] • The Technical Committee may establish sectoral working groups for the better carrying out of its functions;[41] • The Cabinet Secretary is not precluded from convening a consultative meeting for or on sectoral issues of common interest to the national and county governments[42]	The Technical Committee is accountable to and must submit reports to the Summit and Council.

36 *Ibid*, Section 19.
37 *Ibid*.
38 *Ibid*, Section 20.
39 *Ibid*, Section 11.
40 *Ibid*, Section 12.
41 *Ibid*, Section 13(1).
42 *Ibid*, Section 13(2).

The Intergovernmental Relations Secretariat	The Intergovernmental Relations Secretariat is headed by the Secretariat of the Technical Committee and consists of a secretary appointed by the Technical Committee.[44]	The secretary is mainly responsible for the implementation of the decisions of the Summit, the Council and Technical Committee and any other duties assigned by the stated structures.[43]	Not defined

Source: Author, 2014

43 *Ibid*, Section 15.
44 *Ibid*, Section 15(5).

4 Intergovernmental Relations in the Kenyan Agricultural Sector

The agricultural sector is the backbone of the Kenyan economy. It directly contributes to 26% of Kenya's gross domestic product (GDP).[45] Agriculture also accounts for 65% of Kenya's total exports, and provides more than 60% of informal employment in rural areas. In light of this, any legislation that affects agriculture is of great importance to the people of Kenya.[46] The Constitution and Intergovernmental Act of 2012 arguably affect the agriculture sector. They form the constitutional and legislative approaches to intergovernmental relations and prescribe how the national and county governments should proceed in coordinating and managing relations amongst themselves, especially when discharging the administrative parameter of devolved agriculture. Hence, the constitutional and legislative approaches to intergovernmental relations in Kenya must be examined in terms of their implementation in matters affecting agriculture. As a prerequisite to enumerating the implementation of the stated approaches in the agriculture sector, it is imperative to take cognisance of the legal framework of the agricultural sector generally, and in the context of Kenya's cooperative form of devolved governance in particular.

4.1 The Legal Framework for Agriculture in Kenya

Prior to the enactment of the new Constitution in 2010, Kenya's agricultural sector was managed by over 131 pieces of legislation. Historically, legislations enacted in the agricultural sector were sector specific and created specialised authorities for sub-sectoral management of the sector. Accordingly, legislations on agriculture were spread over the more than ten sub-sectors that include crops, horticulture, livestock, fisheries, aquaculture, research, extension, marketing, veterinary, wildlife, forestry, and water sectors. From the early 1990's, however, it became apparent that legislations in the agricultural sector were either causing contradictions or were

45 Government of Kenya, *Agricultural Sector Development Strategy* (2009-2020)
46. *Moses Munyendo and 908 others v The Attorney General and Minister for Agriculture*, High Court Constitutional Petition No 16 of 2013.

obsolete.[47] Hence, subsequent agricultural policies agitated for a review of the legal and institutional framework for agriculture, in order to consolidate and harmonise existing legislation.[48] It was only until the enactment of the new Constitution in 2010 that the agitation for consolidation and harmonisation of agriculture legislations gained momentum.

The new Constitution introduced a leaner government through a reduction of the number of ministries from 44 to between 14 and 22. As a consequence, the agriculture sector required to be consolidated, and thus four pieces of legislation were enacted in 2013. These are the Agriculture, Fisheries and Food Authority Act of 2013, the Crops Act of 2013,[49] the Kenya Agricultural and Livestock Research Act of 2013[50] and the Pyrethrum Act of 2013.[51] The extent to which the stated Acts have harmonised the agriculture sector is debatable and beyond the scope of this chapter. The chapter instead focuses on the AFFA Act, which seeks to, *inter alia,* consolidate the laws on the regulation and promotion of agriculture generally and enable the national and county governments discharge their devolved agricultural functions, as discussed in the section that follows.

4.2 Agriculture in the Context of Devolution in Kenya

As already discussed, the Fourth Schedule of the Constitution provides the administrative parameters of devolution in the distribution of functions between the national and county governments in various sectors, including agriculture. The devolved administrative functions for agriculture are buttressed in Parts 1 and 2 of the Fourth Schedule

47 Rogo Muriu and Hillary Biwott, 'Agriculture Sector Functional Analysis: A Policy, Regulatory and Legislative Perspective' (International Institute for Legislative Affairs 2013) <http://internationalbudget.org/wp-content/uploads/Whos-in-Charge-Agriculture.pdf> accessed 17 April 2015.

48 Government of Kenya, 'Agricultural Sector Development Strategy' (2009-2020) <http://www.disasterriskreduction.net/fileadmin/user_upload/drought/docs/Agricultural%20Sector%20Development%20Strategy.pdf> accessed 12 May 2015.

49 See, Crops Act, No 16 of 2013 <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=NO.% 2016%20OF%202013> accessed 16 April 2015.

50 See, Kenya Agricultural and Livestock Research Act, No 17 of 2013 <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=NO.%2017%20OF%202013> accessed 16 April 2015.

51 See, Pyrethrum Act, No 22 of 2013 <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=NO.%2022%20OF%202013> accessed 16 April 2015.

of the Constitution. On the one hand, Section 29 of Part 1 of the Fourth Schedule provides the agricultural functions of the national government as exclusively relating to 'agriculture policy'. On the other hand, Section 1 of Part 2 provides the agricultural functions of the county government in the agriculture sector as relating to 'agriculture'.

Interestingly, the Constitution does not define the term 'agriculture'. In fact, the term 'agriculture' is only mentioned twice in the Fourth Schedule of the Constitution. The Constitution in Section 1 of Part 2 of the Fourth Schedule merely provides a list of the probable sub-sectors within which counties may discharge agricultural functions. The sub-sectors include crop and animal husbandry, livestock sale yards, county abattoirs, plant and animal disease control and fisheries. Accordingly, it can be implied that the national government is to act as the 'regulator' of agriculture through policy formulation whilst the counties are to 'implement' national policies on agriculture. In addition, counties are to act as 'facilitators' and 'providers' of agricultural services in the various sub-sectors.

In discharging their devolved agricultural functions, the national and county governments must recognise the principle of distinctiveness that calls for respect of the institutional autonomy of the other, and the principle of interdependence, which requires consultation and cooperation. Notably, however, the Fourth Schedule of the Constitution fails to define the exact degree of consultation and cooperation between the national and county governments on matters agriculture. The Constitution only echoes the already discussed principles underpinning intergovernmental relations and assumes that the governments at each level will implement the same, especially when discharging their devolved agricultural functions. Thus, based on Article 190(1) and (4) of the Constitution, the national government enacted the AFFA Act as the framework within which the national and county governments may assume their agricultural functions.

The AFFA Act seeks to, *inter alia*, make provisions for the respective roles of the national and county governments in

furtherance to their devolved agricultural functions. In particular, the AFFA Act seeks:

> [T]o provide for the consolidation of the laws on the regulation and promotion of agriculture generally, to provide for the establishment of the Agriculture, Fisheries and Food Authority, to make provision for the respective roles of the national and county governments in agriculture excluding livestock and related matters in furtherance of the relevant provisions of the Fourth Schedule to the Constitution and for connected purposes.[52]

The extent to which the national and county governments have implemented their constitutionally prescribed and devolved agricultural functions, in tandem with the constitutional and legislative approaches to intergovernmental relations, is debatable, and is discussed in the section that follows.

4.3 Implementing Intergovernmental Relations in Kenya's Agricultural Sector

As already discussed, the constitutional and legislative approaches to intergovernmental relations are encapsulated in the 2010 Constitution and the Intergovernmental Act of 2012. The Constitution elucidates two underlying principles for intergovernmental relations in Kenya. These are the principle of distinctiveness, which requires a recognition and respect of the institutional and functional autonomy or integrity of the various levels of government, and the principle of interdependence, which requires the recognition that even though the various levels of government are autonomous, they must consult and cooperate with each other. The Intergovernmental Act of 2012 extends the two Constitutional principles and establishes intergovernmental structures that comprise the Summit, Council of Governors and the Technical Committee.

In the context of the devolved agricultural functions between the national and county governments, difficulties arise in realising and pinpointing how, and to what extent, the constitutional and legislative approaches to intergovernmental relations have been implemented. This is largely in part due to a glaring absence of the

52 Preamble to the Agriculture, Fisheries and Food Authority Act (n 4).

sector specific mechanism for intergovernmental relations, which has resulted in the national government enacting the AFFA Act.

The AFFA Act seemingly introduces a sectoral forum for intergovernmental relations through a national state corporation known as the Agriculture, Fisheries and Food Authority. Section 4 of the AFFA Act defines the functions of the AFFA Authority as follows:

> The Authority shall, in consultation with the county governments, perform the following functions—
>
> (a) Administer the Crops Act, and the Fisheries Act in accordance with the provisions of these Acts;
>
> (b) Promote best practices in, and regulate, the production, processing, marketing, grading, storage, collection, transportation and warehousing of agricultural and aquatic products excluding livestock products as may be provided for under the Crops Act, and the Fisheries Act;
>
> (c) Collect and collate data, maintain a database on agricultural and aquatic products excluding livestock products, documents and monitor agriculture through registration of players as provided for in the Crops Act and the Fisheries Act;
>
> (d) Be responsible for determining the research priorities in agriculture and aquaculture and to advise generally on research thereof;
>
> (e) Advise the national government and the county governments on agricultural and aquatic levies for purposes of planning, enhancing harmony and equity in the sector;
>
> (f) Carry out such other functions as may be assigned to it by this Act, the Crops Act, the Fisheries Act and any written law while respecting the roles of the two levels of government.

The immediate provision arguably supplements and introduces a sectoral framework for intergovernmental relations. This is because the AFFA Authority is mandated to act in 'consultation' with the county governments on matters pertaining to the agricultural sector. Indeed, as an organ of the national government, the AFFA Authority will act on behalf of the national government in spearheading 'consultation' with the county government.

Besides that, the AFFA Authority will spearhead the realisation of the principle of distinctiveness that underscores intergovernmental relations. Specifically, under Section 4(f) of the Act, the AFFA Authority must carry its agricultural functions in a manner that 'respects the roles of the two levels of government.' It can, therefore, be construed that the national government, through the AFFA Authority, will discharge its devolved agricultural functions in a manner that respects the functional and institutional autonomy or integrity of counties.

It can also be deduced that as a national state organ, the AFFA Authority will be supplementing the intergovernmental framework envisaged by the Constitution and Intergovernmental Act of 2012. As a sectoral forum, the AFFA Authority seems to take cognisance of the principle of distinctiveness that requires the respect of the function and institutional integrity of each level of government. In turn, it can be inferred that the constitutional and legislative approaches to intergovernmental relations in Kenya have to a certain extent been implemented in the agricultural sector. The implementation is through the introduction of a sectoral forum in the form of national state corporation, namely, the AFFA Authority. However, key challenges have arisen, as discussed below.

4.4 Key Challenges to Implementing Intergovernmental Relations in Kenya's Agricultural Sector

A critical scrutiny of the substantive provisions entailed in the AFFA Act reveals impediments in the implementation of the constitutional and legislative approaches to intergovernmental relations. These impediments are in the form of two key sectoral challenges for intergovernmental relations in Kenya, namely; constitutional challenges related to the functional and institutional distinctiveness of counties, and legislative challenges for intergovernmental structures established under the Intergovernmental Act of 2012.

4.4.1 Constitutional Challenges Relating to Functional and Institutional Distinctiveness of Counties

As already discussed, in the context of the agriculture sector, the AFFA Authority has been set up to arguably facilitate the implementation of sector specific intergovernmental relations framework in tandem with the Constitution. On further scrutiny of the functions of the AFFA Authority, however, it becomes apparent that the AFFA Authority will be discharging its functions in a manner that encroaches on, remains aloof from and undermines the distinctiveness of counties. This is because the AFFA Authority is mandated to perform the devolved agricultural functions that have been constitutionally prescribed to the counties.

To begin with, under Section 4 (b), (c) and (d) of the AFFA Act, the AFFA Authority is mandated to:

> (b) Promote best practices in, and regulate, the production, processing, marketing, grading, storage, collection, transportation and warehousing of agricultural and aquatic products excluding livestock products as may be provided for under the Crops Act, and the Fisheries Act;
>
> (c) Collect and collate data, maintain a database on agricultural and aquatic products excluding livestock products, documents and monitor agriculture through registration of players as provided for in the Crops Act and the Fisheries Act;
>
> (d) Be responsible for determining the research priorities in agriculture and aquaculture and to advise generally on research thereof…

The aspect of promoting best practices in agriculture, and monitoring, collecting and collating agricultural data, in addition to being responsible for research priorities for agriculture, creates confusion and conflict in relation to devolved agricultural functions at the county level. It is neither apparent nor implied what would be the role of counties as facilitators and providers of agricultural services, a role that has been constitutionally prescribed to counties. Indeed, as already noted, the devolved agricultural function of the national government is exclusively related to agricultural policy formulation, whilst the roles of counties relate to 'agriculture', which include the

implementation of national agricultural policies, and the facilitation and provision of agricultural services.

The provisions of Section 4(b), (c) and (d) of the AFFA Act imply that the AFFA Authority will overstep the functional and institutional integrity of counties. This connotes, therefore, that the constitutional and legislative principle of distinctiveness, which underpins Kenya's intergovernmental relations and calls for equality and autonomy amongst the two levels of government, will be obsolete. Suffice to say, the AFFA Authority, as a creature of the national government, has been given mandates that undermine the principle of distinctiveness of intergovernmental relations. To argue that the AFFA Authority is to discharge its functions in a manner that respects the two roles of government, as Section 4(f) of the AFFA Act postulates, is abhorrent. Ironically, Sections 29(1) and (2) of the AFFA Act provide that:

> (1) Each county government shall within its area of jurisdiction be responsible, for agricultural matters in accordance with Part 2 of the Fourth Schedule to the Constitution.
>
> (2) The national government shall, in accordance with Part 1 of section 29 of the Fourth Schedule to the Constitution, be responsible for agricultural policy and for assisting the county governments on agricultural matters.

To argue that each government is to discharge its constitutionally prescribed role, as Sections 29(1) and (2) of the Act postulate, is misplaced. The AFFA Authority has been created to take away devolved agriculture functions from the counties. Certainly, the constitutionally prescribed roles of counties in the agriculture sector remain watered down, despite the provisions of Section 29(1) of the AFFA Act. The questions that, therefore, linger are: what is the role of the county government as facilitator of agricultural activities in the sector? Conversely, can national state corporations (as creatures or organs of the national government) purport to overstep the principle of distinctiveness in the context of intergovernmental relations? It should be noted that Section 29(3) similarly undermines the role of county governments. It specifically provides that:

> Each county government shall, for purposes of ensuring uniformity

> and national standards in the agricultural sector, through its legislation and administrative action, implement and act in accordance with the national policy guidelines issued by the Cabinet Secretary on the advice of the authority under this Act.

Section 29(3) provides that the AFFA Authority will advise on national agricultural policies. The aspect of advising in turn means that the counties must follow the national policy guidelines issued by the AFFA Authority. In turn, the question that comes up is whether the vertical mechanisms for intergovernmental relations (as envisaged under the Constitution and Intergovernmental Act of 2012) were to consist of indirect consultation between the national and county governments through national state organs, or were to occur directly between the national and county governments. To the extent that this question remains unanswered, it is certainly deducible that in the absence of sector-specific mechanisms for intergovernmental relations, national state corporations will attempt to play that role. However, such a role evidently poses constitutional challenges relating to the principle of distinctiveness in intergovernmental relations.

Undoubtedly, given the foregoing challenges, it is deducible that the AFFA Authority encroaches on and remains aloof from the functional and institutional integrity of the counties. To this extent, it is deducible that the functions of the AFFA Authority are unconstitutional.

4.4.2 Legislative Challenges Relating to Intergovernmental Structures

The AFFA Authority also poses challenges for intergovernmental structures established under the Intergovernmental Act of 2012. The intergovernmental structures are to act as the forum for vertical and horizontal consultation and cooperation between the national and county governments. However, despite the creation of the stated structures, Section 4(e) of the AFFA Act designates the AFFA Authority functions that seemingly mimic and probably replace the role of the intergovernmental structures established under the Intergovernmental Act of 2012. Specifically, Section 4(e) provides that the 'Authority shall, in consultation with the county

governments … advise the national government and the county governments on agricultural and aquatic levies for purposes of planning, enhancing harmony and equity in the sector'.

This foregoing provision suggests that the AFFA Authority is to act as a sectoral consultative forum for 'advise' and for 'consultation' by the national and county governments on agricultural matters. The aspect of providing 'advise' and 'consultation' suggests that the AFFA Authority is the consultative forum for national and county policies on agriculture. Therefore, the striking question that remains is: what is the role of the intergovernmental structures established in the Intergovernmental Relations Act of 2012 in the context of the AFFA Authority? The AFFA Act does not seem to in any way recognise the intergovernmental structures established under Section 3 of the Intergovernmental Act of 2012. By extension, these may well mean that in the context of the agriculture sector, the institutions established under the Intergovernmental Act of 2012 will remain archaic, obsolete, nugatory and ceremonial.

It is not surprising then that the composition of the AFFA Authority fails to take cognisance of the need for representatives from the counties. The AFFA Authority largely comprises of representatives from the finance, agriculture, lands and cooperative ministries, and farmers elected from the major crop sub-sectors in Kenya. This suggests that counties will not be able to articulate matters peculiar to their interests in agriculture. Definitely, given the foregoing, it is also deducible that the intergovernmental relations framework envisaged under the Constitution and the Intergovernmental Act of 2012 remain mere aspirations of government due to the want of actual implementation sectoral mechanisms for intergovernmental relations, as illustrated by Kenya's agricultural sector.

5 Improving Intergovernmental Relations in Kenya: Lessons From South Africa

South Africa's intergovernmental relations framework, which is almost similar to that of Kenya, somewhat provides a sectoral mechanism for intergovernmental relations. South Africa adopts a constitutional and legal approach to intergovernmental relations.

The Constitutional approach is aptly captured in Chapter 3 of the South African Constitution, which establishes a cooperative system of government underpinned by the principles of distinctiveness and interdependence of government relations.The legislative approach to intergovernmental relations is encapsulated in the Intergovernmental Relations Act of 2005, which establishes Intergovernmental Structures. Both the Constitution and the Intergovernmental Act of 2005 provide derivative lessons on sectoral mechanism for intergovernmental relations that may be adopted by Kenya.

5.1 Constitutional Approach to Intergovernmental Relations in South Africa

The South African Constitution, just like Kenya's, establishes a 'co-operative' system of devolved governance comprising of a national, provincial and local spheres or levels of government which are distinct, interdependent and interrelated.[53] The three levels of government have original powers emanating from the Constitution so that, just as is the case of Kenya, none is subordinate to the other. In this regard, for example, the municipalities have the right to manage their own affairs within the framework of national and provincial legislation. The national and provincial governments cannot purport to impede or undermine their functional and institutional distinctiveness.[54]

Section 41 of the South African Constitution echoes the underlying principles of inter-governmental relations (similar to Kenya) that relate to distinctiveness and interdependence. Section 41(1), *inter alia,* provides that:

> All spheres of government and all organs of state within each sphere must …
>
> e. respect the constitutional status, institutions, powers and functions of government in the other spheres;
>
> f. not assume any power or function except those conferred on them in terms of the Constitution;
>
> g. exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or

53 Section 40(1) of the Constitution of the Republic of South Africa of 1996 (n 6).

54 *Ibid,* Sections 151(3) and 4.

institutional integrity of government in another sphere; and

h. co-operate with one another in mutual trust and good faith by
   i. fostering friendly relations;
   ii. assisting and supporting one another;
   iii. informing one another of, and consulting one another on, matters of common interest;
   iv. co-ordinating their actions and legislation with one another;
   v. adhering to agreed procedures; and
   vi. avoiding legal proceedings against one another.

In order to realise the foregoing principles, Section 40(2) of the Constitution goes ahead to provide that there must be legislation that provides for the structures and institutions to promote and facilitate intergovernmental relations. In this regard, the South African Parliament enacted the Intergovernmental Act of 2005 to provide the legislative approach to intergovernmental relations set out in the Constitution.[55]

5.2 Legislative Approach to Intergovernmental Relations in South Africa

The Intergovernmental Act of 2005 forms the legislative approach to intergovernmental relations in South Africa. The objectives of the Act are to provide a framework within which the national, provincial and local governments, and all state organs, can coordinate the implementation of policy and legislation in a manner that is consistent with the principles of cooperative government set out in the South African Constitution. [56]

To realise its objectives, Chapter 2 of the Intergovernmental Act of 2005, just like its Kenyan counterpart, establishes 'intergovernmental structures' that act as forums for intergovernmental consultation. The intergovernmental structures comprise of: President's Co-ordinating Council, national intergovernmental forums, provincial intergovernmental forums, interprovincial relations forums,

55 Section 4 of the Intergovernmental Relations Framework Act (n 6).

56 *Ibid*.

municipal/district intergovernmental forums, intermunicipality forums and the intergovernmental technical support structures.

A detailed examination of the composition and functions of the stated intergovernmental structures is not feasible in the context of this chapter. Nonetheless, a notable feature of the composition of the stated inter-governmental structures is the fact that each comprises elected representatives from the various levels of government and the cabinet ministers responsible for the functional area for which the structure is established. As such, the stated intergovernmental structures are mandated to raise matters of national interest that are peculiar to the functional area of the government level in question. In this chapter, the functional area of each level of government is viewed as referring to sectoral mechanisms for intergovernmental relations. For instance, a national intergovernmental forum may comprise the Cabinet member responsible for the functional area for which the forum is established, the Deputy Minister appointed in the functional area, members of the Executive Councils responsible for a similar functional area in their respective provinces and Municipal Councillors representing the local government in the functional area for which the forum is established, or the functional area assigned by the Constitution.[57]

Table two below surmises the composition and role of the intergovernmental structures. The table is then followed by comparisons between the Kenyan and South African framework for intergovernmental relations, with emphasis on the sectoral mechanism for intergovernmental relations imbued in the functional area of each level of government in South Africa. The comparisons are followed by recommendations for improving Kenya's intergovernmental relations framework.

57 *Ibid,* Section 9.

***Table 2: Composition and role of intergovernmental structures established under the* South African Intergovernmental Relations Act of 2005**

Intergovernmental Structure	Composition	Selected Functions	Reports and Referrals
President's Co-ordinating Summit	• President; • Deputy President; • Minister; • Cabinet members responsible for finance and public service; • Premiers of the nine provinces and municipal councillor representing local government	• Consultative forum for the President; • Raising matters of national interest with the provincial and local governments; • Consults the provincial and local governments on the implementation of national policies; • Coordination and alignment of priorities, objectives and strategies across the three levels of government; • Discuss performance in the provision of services in order to detect failures and initiate preventive or corrective action when necessary	Considers reports from other intergovernmental forums

National intergovernmental forums	• Cabinet member responsible for the functional area for which the forum is established; • Deputy Minister appointed in the functional area; • Members of the Executive Councils of provinces responsible for a similar functional area in their respective provinces; • Municipal councillor representing local government in the functional area for which the forum is established or in the functional area assigned by the Constitution; • Relevant Cabinet member	Consultative forum for the Cabinet member responsible for the functional areas of the forum to: • Raise matters of national interest within the functional area of the provincial and local government and hear their views; • Consult the provincial and local government on the development and implementation of national policy and legislation affecting their functional area; • Consult the provincial and local government on the coordination and alignment within their functional areas that affect the interest of other governments	Reports back to the President's Co-ordinating Council on matters arising

Provincial intergovernmental forums	• The Premier of the province; • The member of the Executive Council of the province who is responsible for local government; • Any other members of the Executive Council designated by the Premier; • The mayors of district and metropolitan municipalities in the province; • The administrator of any of those municipalities if the municipality is the subject	Premier's intergovernmental forum is a consultative forum for the Premier of a province and local governments in the province to : • Discuss and consult on matters of mutual interest, including the implementation in the province of national policy and legislation affecting local government interests; • Draft national policy and legislation relating to matters affecting local government interests in the province and the implementation of national policy and legislation; • Facilitate coherent planning in the province as a whole, including the coordination and alignment of the strategic and performance plans and priorities, objectives and strategies of the provincial government and local governments	A Premier's intergovernmental forum must report at least annually to the President's Coordinating Council on progress with the implementation of national policy and legislation within the province, and may report to the Council on matters of national interest that have arisen in the forum

Interprovincial relations forum	• The composition, role and functioning of an established interprovincial forum is determined by agreement between the participating provinces.	The Premiers of two or more provinces may establish an interprovincial forum to promote and facilitate intergovernmental relations between those provinces. An interprovincial forum is a consultative forum for the participating provinces to discuss and consult on matters of mutual interest, including: information sharing, best practices and capacity building; cooperating on provincial developmental challenges affecting more than one province; and any other matter of strategic importance which affects the interests of the participating provinces	Not defined

Municipal/district intergovernmental forums	A municipal/district intergovernmental forum consists of- • The mayor of the district municipality; • The mayors of the local municipalities in the district or, if a local municipality does not have a mayor, a councillor designated by the municipality; • The administrator of any of those municipalities if the municipality is the subject	The role of a district intergovernmental forum is to serve as a consultative forum for the district municipality and the local municipalities in the district to discuss and consult each other on matters of mutual interest including but not limited to draft national and provincial policy and legislation relating to matters affecting local government interests in the district, and the implementation of national and provincial policy and legislation with respect to such matters in the district	The forum must meet at least once per year with service providers and other role players concerned with development in the district to coordinate effective provision of services and planning in the district

Intermunicipality forums	The composition, role and functioning of an intermunicipality forum is determined by agreement between the participating municipalities	Two or more municipalities may establish an intermunicipality forum to promote and facilitate intergovernmental relations between them. The role of an intermunicipality forum is to serve as a consultative forum for the participating municipalities to discuss and consult each other on matters of mutual interest, including but not limited to information sharing, best practice and capacity building and **co**-operating on municipal developmental challenges affecting more than one municipality	Not defined
Intergovernmental technical support structures	An intergovernmental forum may establish an intergovernmental technical support structure if there is a need for formal technical support to the forum, and must consist of officials representing the governments or organs of state participating in the intergovernmental forum which establishes the technical support structure. It may also include any other persons who may assist in supporting the intergovernmental forum.	Not outlined in the Act	Not defined

Source: Author, 2014

5.3 Comparative Analysis of the Kenyan and South African Intergovernmental Relations

The Kenyan and South African intergovernmental relations framework envisage a cooperative form of devolved governance underpinned by the principles of distinctiveness and interdependence of government relations. Both countries adopt a constitutional and legal approach to intergovernmental relations. However, whereas the Kenyan Constitution introduces an intergovernmental relations framework consisting of two tiers of government at the national and counties levels, the South African Constitution introduces a three-tier government comprising the national, provincial and local government.

The Intergovernmental Relations Acts of both countries similarly provide the legislative approach to intergovernmental relations. The Intergovernmental Relations Acts of both countries introduce intergovernmental structures as forums for consultation and cooperation between the various levels of government. By contrast, however, it can be observed that the Kenyan Intergovernmental Relations Act of 2012 largely focuses on vertical and horizontal mechanisms for cooperation and consultation between the national and county governments. In Kenya, the vertical mechanisms for consultation and cooperation are realised through the National and County Government Summit whilst the horizontal mechanisms are realised through the Council of Governors. In retrospect, the South African Intergovernmental Relations Act of 2005 introduces not only vertical and horizontal mechanisms for consultation and cooperation but also sectoral mechanisms peculiar to the constitutionally defined functional areas of each level of government. For instance, the vertical mechanisms for consultation and cooperation in South Africa are realised through the President's Coordinating Summit which, *inter alia,* raises matters of national interest with the provincial and national government; aligns priorities, objectives and strategies with the three levels of government; and consults the provincial and local government on the implementation of national policies.[58]

58 *Ibid,* Section 6.

In addition, the vertical and sectoral mechanisms are realised through national intergovernmental forums and provincial intergovernmental forums which, amongst other things, raise matters of national interest within the functional areas of the provincial and local governments. They are also a consultative forum for the alignment of the functional areas that affect the provincial and local governments and either implement or draft national policy and legislation affecting their functional area.[59] Further, the horizontal mechanisms for consultation and cooperation are realised through the interprovincial, interdistrict and the intermunicipality forums. In most cases, the interprovincial, interdistrict and intermunicipality forums serve as consultative forums for discussing matters of mutual interest, including but not limited to information sharing, best practices, capacity building, drafting policy and legislations, and any other matter of strategic importance that affects the interest of the government level in question.[60]

On a different note, it can be observed that both the Kenyan and the South African Intergovernmental Acts establish intergovernmental technical support structures as the administrative arms that assist the various intergovernmental forums achieve their goals. By contrast, however, whereas the Kenyan intergovernmental technical structure is responsible for the day-to-day administration of the Summit and the Council of Governors in terms of facilitation and implementation of their decisions,[61] and may establish sectoral working groups for the better carrying out of its functions,[62] the South African Intergovernmental Technical Support Structures is established only when there is a need for formal technical support to the forum.[63] Besides that, whereas the Kenyan intergovernmental technical support structures excludes officials or elected representatives of the various government levels, the South African structure must consist of officials representing the governments or organs of state participating in the intergovernmental forum.[64] This implies an attempt at ensuring cogent consultation and cooperation

59 *Ibid,* Sections 6 and 16.

60 *Ibid,* Sections 22, 24 and 28.

61 *Ibid,* Section 12.

62 *Ibid,* Section 13(1).

63 *Ibid*, Section 30.

64 *Ibid*.

between the various levels of government within the South African framework.

Interestingly, unlike in Kenya (as exemplified by the AFFA Authority), a national state organ may not purport to be an intergovernmental forum and can only participate in an intergovernmental structure only if specifically referred to in the Intergovernmental Act of 2005, or on invitation to participate.[65] Besides that, where the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service depends on the participation of state organs in the different levels of government, the state organ must enter into an 'implementation protocol' to coordinate their actions. This means that a national state organ cannot purport to overstep on the functional and institutional integrity of any level of government.

In addition, Section 154(2) of the South African Constitution provides that any policy of the national or provincial government, which affects the status, institutions, powers or functions of local government, must be published for public comment before it is introduced in Parliament or a Provincial Legislature. This is so as to afford an opportunity to the local government, municipalities and other interested persons to make representations with regard to the draft legislation. This means that none of the other levels of government introduce legislation that takes away the powers and functions of the local government, unlike in Kenya, as exemplified by the AFFA Act.

From the foregoing discussion, it is evident that both the Kenyan and South African Intergovernmental Framework converge at the point of establishing intergovernmental structures as forum for consultation and cooperation between and amongst the various levels of government. However, the mechanisms of consultation and cooperation have slight variations that ultimately render the South African intergovernmental relations framework somewhat superior than its Kenyan counterpart. Table three below surmises the similarities and differences between the Kenyan and South African approaches to intergovernmental relations. The table is followed by the conclusion of the chapter, which includes brief recommendations on improving the Kenya's intergovernmental relations framework.

65 *Ibid,* Section 3.

Table 3: The similarities and differences between Kenyan and South African approaches to intergovernmental relations

Country	**Approach to Intergovernmental Relations**	**Government Level**	**Presence of Intergovernmental Structures**	**Intergovernmental Relations Structures**	
				Type of Intergovernmental Structures	**Selected Functions of the Intergovernmental Structures**
Kenya	Constitutional approach	National Government	X	X	X
		County Government	X	X	X
	Legislative approach	National Government	✓	National and County Government Coordinating Summit	Vertical and horizontal mechanisms for cooperation and consultation between the national and county governments. The vertical mechanisms for consultation and cooperation are realised through the National and County Government Summit while the horizontal mechanisms are realised through the Council of Governors
		County Government	✓	Council of County Governors	

South Africa	Constitutional approach	National Government	X	X	X
		Provincial Government	X	X	X
		Local Government comprising municipalities and districts	X	X	X
	Legislative approach	National Government	✓	President's Coordinating Summit and National Intergovernmental Forums	Introduces vertical, horizontal and sectoral mechanisms for consultation and cooperation peculiar to the constitutionally defined functional areas of each level of government. In particular, the sectoral mechanisms are realised through national intergovernmental forums and provincial intergovernmental forums, which amongst other things, raise matters of national interest within the functional areas of the provincial and local government. The horizontal mechanisms for consultation and cooperation are realised through the interprovincial, interdistrict and the intermunicipality forums that act as consultative forums for each participating level of government
		Provincial Government	✓	Provincial intergovernmental forums and interprovincial relations forums	
		Local Government comprising municipalities and districts	✓	Municipal/District intergovernmental forums and intermunicipality forums	

Source: Author, 2014

Key

✓ Implies a presence of the specified attribute of the intergovernmental structures;
X Implies an absence of the specified attribute of the intergovernmental structures

6 Conclusion

The foregoing discussion has revealed that Kenya's devolved framework for intergovernmental relations comprises of the constitutional and legal approaches to intergovernmental relations, atypical to its South African counterpart. In both countries, the stated approaches largely comprise horizontal and vertical mechanisms for consultation and cooperation. The stated mechanisms are realised through intergovernmental structures established under the respective Intergovernmental Relations Acts. Further, two guiding principles of intergovernmental relations - the principles of distinctiveness and interdependence - underlie the conduct of intergovernmental relations in both countries. Thus, governments at the national and county levels are expected to adhere to the stated principles, in addition to recognising the intergovernmental structures created to facilitate intergovernmental relations between and within their levels.

Strikingly, however, South Africa introduces a sectoral mechanism for consultation and cooperation peculiar to the functional assignment of each level of government. The sectoral mechanism is curiously absent in Kenya. Although it can be said that the technical committee, as a branch of the intergovernmental structures envisaged under the Intergovernmental Act of 2012, is empowered to establish sectoral working groups for the better carrying out of its functions, the sectoral working groups do not have any decision-making powers. They are merely the facilitators of the Summit and Council decisions[66] and, therefore, lack the necessary power to create a sustainable sectoral forum for intergovernmental relations in Kenya.

66 Section 12(a) of the Intergovernmental Relations Act (n 3).

Accordingly, as exemplified in the agriculture sector, there is a glaring absence of sector-specific intergovernmental forums to cater for devolved agriculture. Thus, to mitigate the said absence, the national government enacted the AFFA Act. In particular, the AFFA Act has created a national state corporation, the AFFA Authority, which removes devolved functions and reveals challenges to Kenya's intergovernmental relations framework. As highlighted, two key challenges have emerged. These are constitutional challenges to the functional and institutional distinctiveness of counties, and legislative challenges for intergovernmental structures established under the Intergovernmental Act of 2012. These challenges need to be resolved if Kenya's cooperative form of devolved governance is to succeed. In other words, Kenya's intergovernmental relations framework must be recast.

Ultimately, in stipulating recommendations for recasting Kenya's intergovernmental relations framework, emphasis is given on the need for sectoral mechanisms for intergovernmental relations. The recommendations relate three main areas of reforms. First, there is need for clarity on the status and role of national state corporations in the context of intergovernmental relations forum. Second, is the need to ensure the recognition and respect of the principle of distinctiveness in sectoral devolution, which may be institutionalised and safeguarded through the integration of sectoral intergovernmental forums to the functional assignments of each level of government, in a manner similar to South Africa. Third, there is a need to ensure that any national legislation or policy that affects, or has the potential to affect, the discharge of functions of the county governments, be published so as to afford an opportunity to counties to make presentations with regard to the draft legislation. This will curb the introduction of national legislation or policy that takes away the devolved powers and functions of the county government.

In sum, while recasting intergovernmental relations in Kenya's devolved system of governance, there must be a tacit, if not explicit, recognition that the cooperative form of devolved government cannot be achieved without developing appropriate intergovernmental structures at national and lower levels that deal with sectoral issues.

Chapter Five

Distributive Justice in Kenya's Development Process: Prospects under a Devolved System of Governance

Tom Kabau and James Mamboleo

1 Introduction

The inception of a devolved system of governance in Kenya was one of the core attributes of the 2010 Constitution.[1] Devolution is a form of decentralisation that involves the apportionment of political, administrative and fiscal powers from the central government to lower levels of governance.[2] Concern for distributive justice was one of the core factors that contributed to the establishment of the devolved system of governance under Kenya's new social contract.[3] According to the Commission on Revenue Allocation (CRA), marginalisation under the previous centralised system of governance in Kenya resulted from, among other factors; inappropriate legislation, non-recognition of minority groups, inequitable government policies and lack of public participation in governance.[4]

1 See, Constitution of Kenya (promulgated 27 August 2010) <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010> accessed 11 November 2014.

2 Albert Mwenda, 'Introduction' in Albert Mwenda (ed), *Devolution in Kenya: Prospects, Challenges and the Future* (Institute of Economic Affairs, Nairobi 2010) 8, 9. See also, Francis Njihia Kaburu, 'Fiscal Decentralisation in Kenya and South Africa: A Comparative Analysis' (2013) 1(1) *Africa Nazarene University Law Journal* 76, 77.

3 Distributive justice concerns itself with the nature of a socially just allocation of goods in a society. See, for instance, Julian Lamont and Christi Favor, 'Distributive Justice' *Stanford Encyclopaedia of Philosophy Archive* (Fall 2014 edn) <http://plato.stanford.edu/archives/fall2014/entries/justice-distributive/> accessed 25 February 2015. In the case of Kenya, PLO Lumumba points out that under the previous constitutional dispensation of centralised government, there were complaints that national resources had 'been inequitably and disproportionately' allocated to the community from which the President originated. PLO Lumumba, 'The Leadership Kenyans Deserve' in Okoth Okombo and others (eds), *Challenging the Rulers: A Leadership Model for Good Governance* (East African Educational Publishers 2011) 38, 40.

4 Commission on Revenue Allocation, 'Policy on the Criteria for Identifying Marginalised Areas and Sharing of the Equalisation Fund: Financial Years 2011 to 2014'

In 2013, the CRA concluded a Report which revealed that although the highest prevalence of marginalisation was in arid and semi-arid areas, there were pockets of marginalisation in all the 47 counties.[5] In particular, Marsabit, Lamu, Turkana, Wajir, Mandera, Isiolo, Garissa, Samburu, Tana River and West Pokot were identified as the most marginalised counties in Kenya.[6] Such marginalisation, or in some cases, perceived exclusion, has been cited as being a major catalyst of various societal ills, including debilitating poverty,[7] and spates of violence and widespread insecurity in certain parts of the country.[8] Therefore, a pursuit of distributive justice in Kenya not only helps cure the historical marginalisation siege mentality, but also infuses, practically and optimally, into the realisation of the country development objectives.[9]

This chapter discusses the prospects of achieving distributive justice in Kenya's economic and social processes under a devolved system of governance. Special reference is made to the human rights-based concepts of the right to development as affirmed in various international legal instruments, which, as will be demonstrated, have

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(2013) paragraph 3.1.2 <http://www.crakenya.org/wp-content/uploads/2013/10/CRA-Policy-on-marginalisation-driteria.pdf> accessed 21 October 2014.

5 Commission on Revenue Allocation, 'Survey Report on Marginalised Areas/Counties in Kenya' (CRA Working Paper No 2012/03, 2013) 18-20 <http://www.crakenya.org/wp-content/uploads/2013/10/SURVEY-REPORT-ON-MARGINALISED-AREASCOUNTIES-IN-KENYA.pdf> accessed 9 March 2015.

6 *Ibid*.

7 See, Kenya Institute for Public Policy Research and Analysis, 'Kenya Economic Report 2013' (Nairobi, 2013) 158 <http://www.kippra.org/downloads/Kenya Economic Report 2013.pdf> accessed 25 March 2015. The Report projects absolute poverty in Kenya to stand at 49.50 per cent, 49.05 per cent and 48.79 per cent in 2013, 2014 and 2015 respectively, *ibid*.

8 With regard to the 2007/2008 post-election violence, see, Commission of Inquiry into Post-Election Violence in Kenya, 'Report of the Commission of Inquiry into Post-Election Violence' (2008) 31-33 <http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf > accessed 25 February 2015.

9 For the country's economic and social development objectives, which include transforming Kenya into a globally competitive and prosperous State in which all its citizens enjoy a high quality of life by the year 2030, see, Government of the Republic of Kenya, 'Kenya Vision 2030' (2007) <http://www.usaid.gov/sites/default/files/documents/1860/3%29%20Vision%202030%20Abridged%20version.pdf> accessed 25 February 2015.

the objective of institutionalising distributive justice in economic and social processes both internationally and nationally.[10]

The chapter essentially postulates the view that the new devolved system of governance provides a progressive mechanism for the promotion and realisation of distributive justice in Kenya through an enhanced human rights-based approach to development. The devolution mechanism provides Kenya with enhanced governance structures to promote and fulfil obligations relating to the right to development. The chapter, therefore, identifies the relevant human rights-based concepts that can be relied upon by various state and non-state actors in order to enhance distributive justice in the realisation of the right to development through a devolved form of governance in Kenya. The concepts postulated under the right to development are relevant to Kenya as they are essentially a coherent and comprehensive conception of a human rights-based approach for purposes of achieving and promoting distributive justice within a state. The core concepts that are specifically examined in this chapter include: legitimation of claims and interests of Kenyans to development; institutionalisation of popular participation in governance; and equitable development policies that empower the marginalised regions and communities.

John Rawls' eminent theory of justice, which supports a concept of distributive fairness, is referred to while critiquing provisions under both international and domestic legal norms.[11] Notwithstanding the legal, policy and institutional progress achieved through the devolution framework, this chapter acknowledges that effective achievement of distributive justice in Kenya may be hindered by sustained 'conflict of interest', regardless of the emergence of a new social contract under the 2010 Constitution. Apt examples of the unrelenting 'conflict of interest' include refusal to implement obligations relating to equitable distribution of resources, inefficiency, and widespread

10 With regard to the affirmation of the right to development in international legal instruments, see, for instance: Article 22 of the African Charter on Human and Peoples' Rights (adopted 27 June 1981, entry into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev. 5; United Nations General Assembly, 'Declaration on the Right to Development' UN Doc A/RES/41/128 (4 December 1986).

11 For an overview of Rawls' theory of justice, see, John Rawls, *A Theory of Justice* (Harvard University Press 1971).

corruption in county governments. Factors that can contribute to effective implementation of constitutional and statutory provisions on equitable distribution of resources, improvement of efficiency and the elimination of corruption under the devolved system of governance, in order to facilitate full realisation of distributive justice under the new social contract, are briefly discussed.

After this introduction, the chapter briefly examines the meaning of the concept of the right to development and highlights significant factors that contributed to its evolution in its second section. The third part of the chapter examines the legal and policy value of the right to development at the state level, especially its human rights-based concepts that are oriented towards institutionalisation of distributive justice. The fourth section evaluates prospects of achieving distributive justice in Kenya under a devolved system of governance, which is driven by the obligation to promote and realise the right to development. Continuing challenges in the achievement of distributive justice in Kenya, despite the devolved government under the new social contract, are then highlighted in the fifth section.

2 The Meaning of the Concept of 'Right to Development' and its Evolution

The right to development is a comprehensive and coherent concept of advocating for the fulfilment, protection and promotion of economic, social, cultural, and political rights both at the international and state levels. Article I of the 1986 Declaration on the Right to Development provides as follows:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be realized.[12]

Flávia Piovesan buttresses the above definition by observing that it 'is the right of individuals and peoples to an enabling environment for development that is equitable, sustainable, participatory and in

12 United Nations General Assembly (n 10).

accordance with the full range of human rights and fundamental freedoms.'[13] Piovesan further notes that the realisation of the right requires the elimination of 'structural and unfair obstacles to development domestically as well as globally.'[14]

The concept of the right to development began to emerge in the late 1960s and early 1970s from the ideas of African scholars and practitioners, such as Kéba M'Baye, a Senegalese, and Mohammed Bedajoui, an Algerian.[15] Writing in the late 1970s, Mohammed Bedajoui opined that:

> The underdeveloped countries, too long excluded from international relations by an inegalitarian and inequitable system, do not hanker after its converse, which would favour them and make the privileged of the past and the present the outcasts of the future. That would be neither just nor possible, neither desirable nor realistic. The right to development is something which brings life to countries hitherto excluded from that development.[16]

Bedajoui was concerned that the international system was based on a structure of 'unequal economic relations' in which a few dominant states subjugated the rest.[17] He would, years later, emphasise that the right to development was essentially an entitlement to '*an equitable share in the economic and social well-being of the world*.'[18] As Anthony Anghie observes, the international right to development originated from the efforts of the Third World to explicitly link

13 Flávia Piovesan, 'Active, Free and Meaningful Participation in Development' in *Realizing the Right to Development* (Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development, United Nations 2013) 103, 103.

14 *Ibid*.

15 Obiora Chinedu Okafor, 'A Regional Perspective: Article 22 of the African Charter on Human and Peoples' Rights' in *Realizing the Right to Development* (Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development, United Nations 2013) 373, 373-374. See also, Peter Uvin, 'From the Right to Development to the Rights-Based Approach: How 'Human Rights' Entered Development' (2007) 17 (4/5) *Development in Practice* 597, 598.

16 Mohammed Bedajoui, *Towards a New International Economic Order* (Holmes and Meier Publishers 1979) 72.

17 *Ibid*.

18 Mohammed Bedjaoui, 'The Right to Development' in M Bedjaoui (ed), *International Law: Achievements and Prospects* (1991) 1182, Reprinted in Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context* (3rd edn Oxford University Press 2007) 1447 (italics in the original).

international human rights law with development, through the use of the language of 'rights', in order to advance their most imperative necessities in international relations.[19] The articulation of the right to development also emerged out of the concerns that economic, social and cultural rights had been neglected by the United Nations (UN) human rights agencies.[20]

The right to development was initially concerned with equality and equity in international economic and social relations, with the objective of eradicating the marginalisation and exclusion of developing countries in international economic policies. The concept emerged during 'a period of radical debate about the New International Economic Order (NIEO)', when Third World states began to utilise their numerical strength in the UN in order to 'negotiate reforms in the global political economy of trade, finance, investment, aid, and information flows.'[21] The concept was helpful in generating the requisite legal and ethical force to the demands for the international redistribution of resources by the Third World.[22] Further, it was a useful instrument in countering the developed world's insistence on the need to focus only on political and civil human rights in international relations issues.[23]

Contributing to norms generation at the international level, the 1981 African Charter on Human and Peoples' Rights emphasised, in its Preamble, the need to give special focus to 'the right to development', while affirming that it was practically impossible to separate civil and political rights from economic, social and cultural ones.[24] Further, Article 22(2) of the African Charter was explicit that states have an obligation, 'individually or collectively, to ensure the exercise of the right to development.'[25] At the global level, the

19 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2004) 257.

20 Phillip Alston, 'Revitalising United Nations Work on Human Rights and Development' (1991) 18 *Melbourne University Law Review* 216, 233.

21 Peter Uvin (n 15) 598.

22 *Ibid.*

23 *Ibid.*

24 African Charter on Human and Peoples' Rights (n 10).

25 *Ibid*.

1986 United Nations Declaration on the Right to Development is one of the most comprehensive enunciation of the duties of states in relation to the realisation of the right both domestically and internationally.[26] The adoption of the Declaration represented a landmark achievement of Third World states for reforms within the United Nations that would contribute to a New International Economic Order that was just, especially to poor countries.[27] The 1993 Vienna Declaration and Programme of Action reaffirmed that the right to development is 'a universal and inalienable right and an integral part of fundamental human rights.'[28]

3 The Legal and Policy Value of the Right to Development at the State Level

Although the original evolution of the right to development was due to concerns with inequality and exclusion in international relations, the concept has subsequently evolved to incorporate significant state and non-state obligations at the domestic level, some of which will be discussed in this chapter. The right to development is a proper legal norm, especially within the African region. It is enshrined in the Preamble and Article 22(2) of the African Charter, which obligates states to facilitate the realisation of the right to development.[29] The African Charter 'is the only legally binding international instrument that contains an explicit affirmation of the right to development.'[30] The subsequent resolutions on the right, adopted under the auspices of the United Nations General Assembly, such as the 1986 Declaration[31] and the 1993 Vienna Declaration,[32] provide valuable 'soft law' in the form of interpretative guidelines on the nature and

26 See, United Nations General Assembly (n 10).

27 Andrea Cornwall and Celestine Nyamu-Musembi, 'Putting the 'Rights-Based Approach' to Development into Perspective' (2004) 25(8) *Third World Quarterly* 1415, 1422.

28 Vienna Declaration and Programme of Action (Adopted by the World Conference on Human Rights in Vienna) UN Doc A/CONF.157/23 (25 June 1993).

29 African Charter on Human and Peoples' Rights (n 10).

30 Anthony Wambugu Munene, 'Locating the Right to Development in Kenya' (2013) 1(1) *Africa Nazarene University Law Journal* 56, 62.

31 United Nations General Assembly (n 10).

32 Vienna Declaration and Programme of Action (n 28).

extent of state obligations.[33] As Philip Alston instructively points out, the General Assembly has legal competence to proclaim human rights.[34] For instance, Alston cites Article 13 of the UN Charter as a direct basis for the General Assembly's legal mandate.[35] Article 13 states that the General Assembly may make recommendations for the purpose of codification of international law, to promote the progressive development of legal norms, and in order to facilitate the realisation of human rights.[36] Alston acknowledges that the General Assembly has severally affirmed the right to development.[37]

The right to development is essentially a third generation right, as it is essentially in the form of solidarity or collective right.[38] Rights often categorised as the first generation ones are concerned with civil and political claims, and largely protect individuals from state abuse.[39] Second generation rights comprise economic, social and cultural rights, and are generally claims that prevent exploitation

33 The phrase 'soft law' implies various 'non-legally binding instruments' adopted by states and intergovernmental organisations in the course of international relations. Alan Boyle, 'Soft Law in International Law Making' in Malcolm D Evans (ed), *International Law* (3rd edn Oxford University Press 2012) 122, 122. Though they are not legally binding, they have significant normative value, for they may be indicative of state practice and *opinio juris*, which are the necessary elements in the formation of international customary law, *ibid*. Ian Brownlie particularly observes that although a resolution of an organ of an international organisation, such as the UN General Assembly, is not by itself binding, it may prescribe principles that clarify and develop international customary law, and may actually be taken as evidence of emerging state practice. Ian Brownlie, *Principles of Public International Law* (7th edn Oxford University Press 2008) 691-692. Further, soft law instruments such as UN General Assembly resolutions may be used as interpretative guides or even may assist in filling legal lacunas. Dinah Shelton, 'International Law and 'Relative Normativity'' in Malcolm D Evans (ed), *International Law* (3rd edn Oxford University Press 2012) 141, 141.

34 Philip Alston, 'Conjuring up New Human Rights: A Proposal for Quality Control' (1984) 78(3) *American Journal of International Law* 607, 609.

35 *Ibid*.

36 United Nations Charter (adopted 24 October 1945) 1 UNTS XVI.

37 Philip Alston (n 34) 612.

38 Stephen Marks, 'The Human Right to Development: Between Rhetoric and Reality' (2004) 17 *Harvard Human Rights Journal* 137, 138. Other examples of third generation rights include the right to a clean environment, the right to communication and the right to ownership of the common heritage of mankind. NJ Udombana, 'The Third World and the Right to Development: Agenda for the Next Millennium' (2000) 22 *Human Rights Quarterly* 753, 761-762.

39 Stephen Marks (n 38) 138.

and oppression.[40] Third generation rights often contravene the traditional limits of human rights, and are aimed at reinforcing existing claims and rendering them more pertinent to governments and individuals.[41]

A fundamental legal and policy value of the concept of the right to development is that it is essentially a coherent conception of a human rights-based approach for purposes of achieving and promoting distributive justice within a state. The section that follows examines some of the legal values of the right to development.

3.1 A Coherent Conception of Human Rights-Based Approach for Distributive Justice

The right to development is based on comprehensive and coherent human rights based standards which are helpful in the theoretical articulation and practical application of distributive justice measures within a state. In particular, the Preamble of the 1986 Declaration comprehensively defines development as:

> [A] comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom…[42]

By emphasising participation and fair allocation of resources, the above definition of development is human rights inspired, and is oriented towards distributive justice.[43] In particular, Flávia Piovesan opines that the 1986 Declaration's postulation of a human rights-based approach to development was amongst its most extraordinary contribution.[44] It established a concept of development that integrated

40 *Ibid*.

41 NJ Udombana (n 38) 762.

42 United Nations General Assembly (n 10).

43 In particular, the right to development has been categorised as an 'umbrella right' based on its comprehensive focus on two core issues, namely, popular participation and fair distribution of developmental benefits. See, Irene I Hadiprayitno, 'Poverty' in *Realizing the Right to Development* (Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development, United Nations 2013) 137, 137.

44 Flávia Piovesan (n 13) 103.

the various norms, principles and values of the international human rights system.[45] The human rights-based approach of the right to development concept, whose elements will be examined in this section of the chapter, is arched towards distributive justice.

As Andrea Cornwall and Celestine Nyamu-Musembi have pointed out, different agencies may have varying interpretations, methodologies and practices associated with the concept of a human rights-based approach to development.[46] This chapter largely focuses on three aspects of the human rights-based approach, namely, the concept of claims, emphasis on popular participation, and equitable processes that focus on empowering the marginalised.

The distributive justice advanced under the right to development is consistent with the renowned concept of justice postulated by John Rawls. Since it was postulated, Rawls' theory of justice has elicited immense interest and influence.[47] Rawls' theory establishes novel ways of conceptualising the social contract.[48] The social contract between the state and the citizens implies that there exists an obligation on those in charge of government to fulfil some human rights.[49] Revisiting the ideas of the social contract theory, Rawls' concept of justice is about the establishment of more equitable and inclusive governance structures.[50]

According to Rawls, besides *equal* civil and political rights such as the right to life and liberty, people should also have the right to achieve progress with regard to their economic and social status.[51]

45 *Ibid*.

46 Andrea Cornwall and Celestine Nyamu-Musembi (n 27) 1425.

47 Allan Bloom, 'Justice: John Rawls vs the Tradition of Political Philosophy' (1975) 69(2) *American Political Science Review* 648, 648. John Rawls' theory of justice has been the most widely discussed concept of distributive justice within the previous four decades since its postulation. Julian Lamont and Christi Favor (n 3).

48 Allan Bloom (n 47) 650.

49 Raymond C Offenheiser and Susan H Holcombe, 'Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam America Perspective' (2003) 32 *Nonprofit and Voluntary Sector Quarterly* 268, 277.

50 He points out that the principles postulated in his theory are concerned with the basic structuring of the society, especially the manner in which rights and duties are to be granted, and the nature of the system that regulates the distribution of economic and social advantage. John Rawls (n 11) 61.

51 Raymond C Offenheiser and Susan H Holcombe (n 49) 277.

Offenheiser and Holcombe offer the view that on the basis of Rawls' theory, society should not accept inequalities, whether they originate from fortune, nature or birth.[52] Describing his theory as concerned with distributive justice in governance, Rawls observes that:

> [T]he primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation. By major institutions I understand the political constitution and the principal economic and social arrangements … Taken together as one scheme, the major institutions define men's rights and duties and influence their life prospects, what they can expect to be and how well they can hope to do. The basic structure is the primary subject of justice because its effects are so profound and present from the start.[53]

John Rawls' theory of justice comprises of two principles. The first principle is that 'each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.'[54] The first principle is applicable to political and civil rights, such as right to vote, and freedom of assembly and speech, for which no person should have an advantage over others in a just society.[55] The more technical second principle is based on the idea that '[s]ocial and economic *inequalities* are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.'[56] The first part of the second principle essentially implies that inequality in the allocation of economic and social benefits should assist the most disadvantaged. In addition, in the second part, the principle implies there is no need for such inequality in the allocation of economic and social benefits if members of society are of the same status.

52 *Ibid*.

53 John Rawls (n 11) 7.

54 *Ibid* 60.

55 *Ibid* 61.

56 John Rawls (n 11) 83 (emphasis added).

The first part of the second principle, often referred to as the *difference* principle,[57] is the focus of this chapter as it is the most relevant and often most controversial. Rawls' theory hypothesises that such an approach to state governance 'will increase the total wealth of the economy and, under the [d]ifference [p]rinciple, the wealth of the least advantaged.'[58] Under the difference principle, opportunities of the least advantaged are improved by those that are more advantaged. [59] Rawls justifies the difference principle on the basis that no person deserves 'a more favorable starting place in society',[60] especially in the context of social institutions such as a state. Rawls further vindicates the difference principle as follows:

> This is the principle that undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for…Thus the principle holds that in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favorable social positions. The idea is to redress the bias of contingencies in the direction of equality.[61]

Rawls' theory is a well thought and compelling justification for the special focus on equity, inclusive participation, and economic and social empowerment of the marginalised in societal institutions, as enshrined in the human rights-based concepts of the right to development.

3.1.1 The Concept of Claims

Conceptualising the citizens of a state as legitimate claimants of certain entitlements, for which the state bears primary duty to fulfil, is one of the core benefits of the right to development through its rights-based approach. Article 2(3) of the 1986 Declaration is clear that states have the 'right and the duty' to establish appropriate national development policies that are based on popular participation

57 *Ibid* 76.

58 Julian Lamont and Christi Favor (n 3).

59 John Rawls (n 11) 95.

60 *Ibid* 102.

61 *Ibid* 100-101.

and have the objective of ensuring fair distribution of the resulting benefits.[62] In addition, Article 3(1) of the Declaration affirms the 'primary responsibility' of states in the realisation of the right to development both domestically and internationally.[63] This implies that while states bear the primary responsibility, other non-state actors such as intergovernmental organisations (IGOs) and non-governmental organisations (NGOs) may accrue secondary or subsidiary responsibility. The usefulness of a rights-based approach is that it legitimises claims in the development process.[64] It assumes a 'root cause approach', and it is exemplified by a shift from the notion of charity to one of duties, and therefore increases attention on accountability.[65] Therefore, the human rights-based approach legitimises claims that individuals have with regard to the conduct of the state (as the primary duty bearer) and other agencies (on the basis of subsidiary or secondary responsibilities) in order to secure their economic and social capability and liberty.[66]

The rights-based approach in the development process is helpful in defining and shifting the terms of the debate. [67] In such context, development is reframed 'as an entitlement, secured largely through a political and legal contract with the state and other key actors.'[68] The previous development principles were premised on the American and Western Europe concept of the 'welfare state.'[69] Under such an approach, poverty was viewed as originating from the lack 'of some particular set of public goods or body of technical knowledge.'[70] It was, therefore, assumed that if the absent public goods or the lacking technical knowledge were provided, either by

62 United Nations General Assembly (n 10).

63 *Ibid*.

64 Peter Uvin (n 15) 602.

65 *Ibid* 603.

66 Arjun K Sengupta, 'Conceptualizing the Right to Development for the Twenty-First Century' *Realizing the Right to Development* (Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development, United Nations 2013) 67, 70.

67 Paul Gready, 'Rights-Based Approaches to Development: What is the Value-Added?' (2008) 18(6) *Development in Practice* 735, 737.

68 *Ibid*.

69 Raymond C Offenheiser and Susan H Holcombe (n 49) 270.

70 *Ibid*.

a state or non-state actor, then development would occur and there would be a reduction in poverty.[71]

However, from a rights-based perspective, poverty is deemed as social exclusion in which the poor are actors who have the potential to define their destiny.[72] Such an approach, therefore, focuses on addressing systemic impediments that limit the capacity of people to access economic and social opportunities and generally improve their livelihoods.[73] Consequently, such an approach, from its outset, focuses 'on structural barriers that impede communities from exercising rights, building capabilities, and having the capacity to choose.'[74] Development is, therefore, conceptualised as amounting to empowering underprivileged communities overcome economic and social impediments as opposed to being viewed as a 'never-ending pursuit of grants for social goods.'[75]

In order to legitimise its concept of claims, the human rights-based approach emphasises existing rights and obligations as enshrined in international instruments such as treaties.[76] In particular, the Preamble of the 1986 Declaration reaffirms the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and other relevant covenants and instruments.[77] The approach, therefore, utilises a variety of concepts related to human rights protection, interpreted in their broadest sense and viewed as the appropriate platform for development policy.[78]

71 *Ibid*.

72 *Ibid* 271.

73 *Ibid*.

74 *Ibid*.

75 *Ibid*.

76 Brigitte I Hamm, 'A Human Rights Approach to Development' (2001) 23(4) *Human Rights Quarterly* 1005, 1011.

77 United Nations General Assembly (n 10). See: Universal Declaration of Human Rights, UNGA Res 217A (III) (10 December 1948); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976) 993 UNTS 3; International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171.

78 Francisco Sagasti, 'A Human Rights Approach to Democratic Governance and Development' in *Realizing the Right to Development* (Essays in Commemoration of

At the state level, a human-rights based approach emphasises three levels of obligation, namely, to respect, protect and fulfil the right in issue.[79] In that sense, a rights-based approach requires 'the development of adequate laws, policies, institutions, administrative procedures and practices, as well as on the mechanisms of redress and accountability that can deliver on entitlements, respond to denial and violations, and ensure accountability.'[80] In particular, Articles 1 and 22 of the African Charter require African states to adopt legislative and other measures in order to facilitate the realisation of the right to development.[81] Obiora Okafor points out that African states are, therefore, required to adopt 'laws that support the creation of an environment in which people can develop their full potential and lead productive, creative lives in accordance with their needs and interests.'[82] Further, a human rights-based approach to development, though with a special focus on social and economic entitlements, still affirms the 'interrelation and interdependence' of all human rights.[83] Article 6(2) of the 1986 Declaration provides that '[a]ll human rights and fundamental freedoms are indivisible and interdependent' and should, therefore, be granted equal attention.[84] The Preamble of the African Charter emphasises the need to grant the right to development special attention, while affirming that economic, social and cultural rights cannot be separated from political and civil rights in their conceptualisation and implementation.[85] That implies that the legal, policy and institutional framework established by states for the promotion and realisation of economic and social rights should also safeguard political and civil rights.

Some criticisms have been articulated in relation with the language of rights, especially the bold pronouncement of a right to

25 Years of the United Nations Declaration on the Right to Development, United Nations 2013) 125, 125.

79 Arjun K Sengupta (n 66) 70.

80 Francisco Sagasti (n 78) 125.

81 African Charter on Human and Peoples' Rights (n 10).

82 Obiora Chinedu Okafor (n 15) 381.

83 Brigitte I Hamm (n 76) 1006.

84 United Nations General Assembly (n 10).

85 African Charter on Human and Peoples' Rights (n 10).

development. Phillip Alston concisely highlights the three common criticisms against the right to development, namely, that it 'cannot be defined in precise terms, that its realization cannot accurately be measured and that there is no direct correlation between rights and duties and those who hold them.'[86] First, with regard to the definition, although the meaning of the right to development may be articulated differently by various agencies, there are core elements that can be identified from relevant international instruments such as the 1986 Declaration.[87] This chapter has focused on three core aspects of the right, namely, the concept of claims, legitimation of popular participation, and emphasis on equitable economic and social progress by special focus on the marginalised.

Second, there may be challenges in evaluating, accurately, the level of realisation of the right to development. However, it is possible to generally determine whether the government has adopted a progressive approach to the realisation of the right to development, through its laws, policies and practice. Whether a state is committed to respect, protect and fulfil the right to development can be discerned. It should be acknowledged that, as Amartya Sen asserts, the right to development implies both 'perfect' and 'imperfect' obligations.[88] Imperfect duties 'are less precisely characterized.'[89] Whether it is in relation to perfect or imperfect duties, the human rights approach to development induces the obligation to afford 'reasonable consideration to the reasons for action and their practical implications, taking into account the relevant parameters of the individual case.'[90] In addition, as Sen states, the acceptance of imperfect duties by states (for instance, by African states ratifying or acceding to the African Charter that formally recognises the right to development) implies acknowledgement of obligations that are

86 Phillip Alston (n 20) 226. See also, Peter Uvin (n 15) 598.

87 United Nations General Assembly (n 10).

88 Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32(4) *Philosophy and Public Affairs* 315, 319.

89 *Ibid*. Imperfect obligations include: those that do not imply a corresponding right to compel performance; those whose violation would not render life intolerable; and those that have no legal sanctions for their violation, among other parameters. George Rainbolt, 'Perfect and Imperfect Obligations' (2000) 98 *Philosophical Studies* 233, 233.

90 Amartya Sen (n 88) 319.

'beyond volunteered charity or elective virtues.'[91] Further, the fact that an accepted right, which is still unrealised, but which 'can be promoted through institutional or political change, does not, by itself, convert that claim into a *non*-right.'[92]

The third criticism relates to the alleged lack of a direct correlation between rights and duties, including allegations of lack of proper identification of those entitled to the resultant claims, or those that bear the responsibility for their enforcement or realisation.[93] However, international legal instruments have identified states as the primary duty bearers.[94] Further, as Phillip Alston opines, the assertion that there must be a direct correlation between rights and duties is both inconsistent with the general approach of the United Nations to human rights issues, and many contemporary strands of legal theory.[95]

3.1.2 Popular Participation

The Preamble of the 1986 Declaration requires that individuals be the main participants and beneficiaries of the development policies and processes.[96] Further, Article 2(3) of the Declaration stipulates that development policies should be premised on 'active, free and meaningful participation' of the entire population.[97] Therefore, an integral aspect of the rights-based approach to the right to development is qualitative participation of the individuals and communities that are deemed as the beneficiaries of the process. By establishing a criterion of 'active, free and meaningful participation', the Declaration implies that the participation must include a 'bottom up' approach that involves qualitative consultation with the local population. It also implies participation in all processes of

91 *Ibid*.

92 *Ibid* 320.

93 Phillip Alston (n 20) 226. See also, Peter Uvin (n 15) 598.

94 See, for instance, Article 3(1) of the 1986 Declaration. United Nations General Assembly (n 10).

95 Phillip Alston (n 20) 226.

96 United Nations General Assembly (n 10).

97 *Ibid*.

development, including in the design, implementation, monitoring and evaluation of development projects.[98]

The requirement that participation be 'meaningful' is an assertion of popular sovereignty in the development process, in which people have the capacity 'to voice their opinions in institutions that enable the exercise of power, recognizing the citizenry as the origin of and the justification for public authority.'[99] In particular, Article 7(2) of the Declaration is clear that states should promote 'popular participation' in the development process.[100] Therefore, participation should be democratic, permitting various forums, and should have special considerations for the capacity of the vulnerable, marginalised and deprived groups to articulate their views and concerns.[101]

Both elements of top-down and bottom-up approaches to participation are anticipated. It has been observed that:

> In some circumstances, structures of participation may require top-down initiatives in which the State invites participatory actions during the formulation and execution of development policies. However, such initiatives may not be sufficient to empower the poor … By contrast, it is through bottom-up actions, in which rights holders take the initiative themselves, that the loss of voice and power imbalances can be remedied.[102]

3.1.3 Equity and Focus on the Marginalised

The right to development, through its human rights-based approach to economic and social empowerment, advocates and legitimises equitable distribution of resources and special focus on the marginalised. The Preamble of the 1986 Declaration affirms that 'equality of opportunity for development' is an entitlement

98 Flávia Piovesan (n 13) 104-105.

99 *Ibid* 105-106.

100 United Nations General Assembly (n 10).

101 Flávia Piovesan (n 13) 105. The participation model postulated under the human rights-based approach promotes a shift 'towards a more genuinely inclusive and democratic process of popular involvement in decision-making over the resources and institutions that affect people's lives.' Andrea Cornwall and Celestine Nyamu-Musembi (n 27) 1424.

102 Irene I Hadiprayitno (n 43) 143-144.

of individuals within a state.[103] In addition, Article 2(3) of the Declaration requires that there be a 'fair distribution' of the benefits arising from the development process.[104] Further, Article 8(1) of the Declaration requires states to undertake appropriate economic and social reforms in order to eliminate all forms of social injustices. The duty to ensure 'fair distribution' of economic and social benefits, and to eliminate all forms of injustices, as enshrined in the Declaration, are exceedingly consistent with John Rawls' theory of justice. To Rawls, justice implies fairness.[105] In addition, as John Rawls points out, his theory is concerned with 'social justice', in the context of 'the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.'[106]

Rawls' theory provides valuable justifications for the promotion of distributive justice through special and favourable treatment of the marginalised, and it essentially epitomises a human rights approach to development. As Sengupta instructively argues, the human rights approach to development is concerned with the protection of 'the worst off, the poorest and the most vulnerable' and acknowledges that it amounts to 'the application of the Rawlsian Difference Principle which requires maximizing the advantages of the worst off'. [107] According to Sengupta, such an approach can be viewed 'as the minimal principle of equity'.[108]

4 Achieving Distributive Justice through Devolution in Kenya: A Human Rights-Based Approach to Development

The 2010 Constitution is a new social contract between the citizens of Kenya and the State. One of the core pillars of the new social contract is the devolved system of Government. Devolution

103 United Nations General Assembly (n 10). The obligation for states to ensure equality of opportunity for all individuals with regard to access to basic resources is reaffirmed in Article 8(1) of the Declaration.

104 *Ibid*.

105 John Rawls (n 11) 3.

106 *Ibid* 7.

107 Arjun K Sengupta (n 66) 85.

108 *Ibid*.

essentially involves the decentralisation of political, administrative and financial powers to lower levels of governance from the central government.[109] The Kenyan system of devolution is, however, not a 'federal' system of governance.[110] Article 6(2) of the Constitution defines the conceptual nature of devolution in Kenya, and provides that 'governments at the national and county levels are distinct and inter-dependent'. For purposes of facilitating devolution, Article 6 and the First Schedule of the Constitution divide the State into 47 Counties. The Fourth Schedule to the Constitution provides for the distribution of functions between the national and county governments. More particularly, Part 2 of the Fourth Schedule outlines the functions assigned to county governments.

The Kenyan Constitution defines the primary economic and social arrangement within the State and, in the context of Rawls' theory of justice, defines the rights and duties of Kenyans, and influences their economic, social, and cultural prospects in life.[111] As already stated, this chapter postulates the thesis that the devolved system of governance is a progressive mechanism that enhances the achievement of distributive justice in Kenya, particularly since it incorporates significant human rights-based concepts in the legal, policy and institutional structures of the development process.

Kenya's economic and social progress agenda should be consistent with the right to development as articulated in international legal instruments. This is rendered even more obligatory by Articles 2(5) and 2(6) of the Constitution, which permit the direct application of the 'general rules of international law' and treaties ratified by Kenya within the domestic legal system, without the necessity of municipal legislation.[112] On that basis, the right to development, as articulated in

109 Albert Mwenda (n 2) 9.

110 For instance, even at the time of drafting the Constitution, Yash Ghai, a former Chair of the Constitution of Kenya Review Commission, had clarified that the focus was on 'devolution and not federalism' particularly under the 'Bomas Draft' of the Constitution. Yash Ghai, 'Devolution: Restructuring the Kenyan State' (2008) 2(2) *Journal of Eastern African Studies* 211, 212. The Bomas Draft was one of the earlier drafts of the 2010 Constitution, but was subjected to further debates and amendments. The 2010 Constitution does not utilise the phrase 'federalism' while the term 'devolution' is commonly used, such as in Article 6. See, Constitution of Kenya (n 1).

111 John Rawls (n 11) 7.

112 The phrase, 'general rules of international law', as used in Article 2(5) of the

Article 22 of the African Charter and the 1986 Declaration, among other international instruments, has legal value within Kenya.[113]

Kenyans were concerned that the previous centralised system did not favour institutionalisation of distributive justice in the State's economic and social processes. In 2008, Yash Ghai, a former Chair of the Constitution of Kenya Review Commission (CKRC), explained the main motivation for the restructuring of the Kenyan state from a centralised system of governance to a devolved one as follows:

> The motivation was not for the well off or well endowed areas to keep their wealth for themselves; instead a primary concern was the equitable distribution of revenue and promotion of development throughout the country. There was a widespread perception, which statistics support, that the centralised state has, for the last 50 years, singularly failed to promote economic and political development, and that only a few areas and a small elite, had benefited from the policies of the government.[114]

The transformative nature of the new social contract in governance has been affirmed by the courts. In *Joseph Kimani Gathungu v Attorney General and 5 others*, Justice JB Ojwang instructively emphasised that the 2010 Constitution has a compelling 'social orientation', and that its core concepts of 'rights,' 'empowerment' and 'welfare' provide significant values that should be incorporated in governance.[115] This chapter is based on the view that the paradigm shift in governance, from a centralised system to a devolved one, had the ramification of,

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Constitution, is uncertain and problematic. As Michael Wabwile observes, the phrase is ambiguous in relation to 'the theory and practice of international law.' See, Michael Wabwile, 'The Emerging Juridical Status of International Law in Kenya' (2013) 13(1) *Oxford University Commonwealth Law Journal* 167, 173. In the 2013 case of *Kituo Cha Sheria v Attorney General*, the Court interpreted the phrase as implying customary international law, and attributed the ambiguity to a constitutional drafting oversight. *Kituo Cha Sheria and 8 others v Attorney General* [2013] eKLR, paragraph 71. The Court particularly observed that an examination of various earlier drafts of the 2010 Constitution indicated that Article 2(5) of the Constitution had the objective of incorporating customary international law as part of Kenyan law. *Ibid*. There have been no similar challenges in the interpretation of Article 2(6) of the Constitution, which permits the direct application of treaties ratified by Kenya. See, Constitution of Kenya (n 1).

113 Anthony Wambugu Munene (n 30) 69. See: African Charter on Human and Peoples' Rights (n 10); United Nations General Assembly (n 10).

114 Yash Ghai (n 110) 214.

115 *Joseph Kimani Gathungu v Attorney General and 5 others* [2010] eKLR 17.

inter alia, enhancing, promoting and institutionalising the human rights-based notion of the 'right to development' for dignified economic and social progression of Kenyans. In a sense, the inception of a devolved system of governance was implementation of the obligation, under Article 7(1) of the 1986 Declaration that appropriate economic and social reforms be carried out by states for purposes of eliminating various forms of social injustices.[116]

4.1 Development as a Legitimate Claim

Among the principles and values of governance enshrined in Article 10(2)(b) of the Constitution is human rights protection and promotion. That includes social, cultural and economic rights, and in particular, the right to development. The devolved government enhances the capacity of Kenyans to articulate their claims at the grassroots level, as the county governments are also obligated to protect and promote human rights. In particular, some of the objectives of devolution, as stated in Article 174 of the Constitution, legitimise claims of citizens against both the national and county governments in relation to the realisation of the right to development. The objectives of devolution include:

i. The promotion of democratic and accountable exercise of power. This implies inclusiveness and accountability in economic and social policies and processes;
ii. Granting the people the powers of self-governance. It implies that the people have a right to participate in the formulation and implementation of the Governments' development policies both at the national and county levels. This concept of popular sovereignty implies that both the national and county governments have an obligation to take into account the opinions of the governed;
iii. Promoting economic and social development, including recognising and affirming the right of communities to advance their development.

In addition, Article 66(2) of the Constitution obligates Parliament to enact legislation to ensure 'that investments in property benefit local

116 United Nations General Assembly (n 10).

communities and their economies.' The constitutional obligation affirms the requirement under Article 2(1) of the 1986 Declaration that people be active participants and beneficiaries of the right to development. In that context, Kenyans are entitled to participate in and benefit from investment and development processes even at county and sub-county levels.

By virtue of Section 88 of the County Governments Act (CGA) of 2012, citizens have a right to petition and challenge the conduct of a county government in the performance of its responsibilities.[117] In addition, on the basis of Section 90 of the Act, a county government may conduct a local referendum on matters concerning county laws and petitions, and planning and investment decisions. Further, Section 91 requires that a county government establishes effective mechanisms and platforms for citizen participation, such as county budget preparation and validation forums.

Section 115(2) of the CGA requires county assemblies to enact legislation and regulations that facilitate the effective citizen participation requirement in development planning and performance management within the county, and in so doing, they should adhere to minimum national requirements. Other relevant issues that legitimise claims and entitlements by Kenyans are further discussed in the sections that follow, which focus on public participation and equitable distribution of developmental resources and benefits.

4.2 Public Participation in the Development Process

Yash Ghai points out that during the drafting of the 2010 Constitution, Kenyans expressed widespread sentiments of alienation by the central government wherever CKRC visited in the process of soliciting the views of citizens.[118] Some Kenyans expressed the view that their problems were due to 'government policies over which they had no control.'[119] In particular, they complained that government 'decisions did not reflect the reality under which they lived, [including] the

117 County Governments Act, No 17 of 2012 <kenyalaw.org/kl/fileadmin/pdfdownloads/LawsonDevolution/CountyGovernment17of2012.doc> accessed 30 October 2014.

118 Yash Ghai (n 110) 215.The author is a former Chair of the CKRC.

119 *Ibid*.

constraints and privations … which they suffered'.[120] Kenyans also alleged that Government decisions were formulated in faraway places without consultations.[121] While advocating for devolution as a mechanism of institutionalising effective public participation in Kenya, Yash Ghai points out that:

> One advantage of autonomous or devolved systems is that they enjoy a fair measure of legitimacy, or acceptance among the community. A system of devolution not only provides greater opportunities for the people to participate in public affairs, but also compels leaders at the regional and national level to negotiate and reach compromises…The enhanced possibilities of public participation and the negotiations and co-operation between different levels of government can provide a kind of equilibrium or balance in the exercise of public power.[122]

The structures of devolved governance have created greater opportunities for Kenyans to participate in the design and implementation of development policies, especially at the local levels. It has institutionalised a bottom-up approach to governance. As an analysis of the 2010 Constitution and relevant statutes indicates, the new social contract under the devolved system of governance deems popular participation as a right of Kenyans, a legal entitlement that both the national and county governments have duties to respect, protect and fulfil.

Article 10(2)(a) of the Constitution states that the values and principles of governance include participation of the people. Counties are an important vehicle in the development process, as they are likely to be more informed about local people's concerns and aspirations than the national government. Article 185 of the Constitution outlines the legislative authority of county assemblies, which includes receiving and approving policies and plans for the exploitation and management of county resources, and for the development of infrastructure and institutions.

The objectives of the devolved government outlined in Article 174 of the Constitution, include: the promotion of accountable and democratic exercise of power; the enhancement of self-governance

120 *Ibid*.

121 *Ibid*.

122 *Ibid* 222.

of the people especially their participation; and recognition of 'the right of communities to manage their own affairs and to further their development'. Based on the stated objectives, the devolved system of government has the effect of institutionalising concepts of popular sovereignty in governance, especially in the development process. In addition, Article 196(1) of the Constitution requires county assemblies to hold their sittings in public, and to generally conduct their business in an open manner. Further, the Article obligates county assemblies to facilitate public participation in their legislative and other businesses.

In order to raise additional revenue to cater for local developmental needs, county governments are granted taxation powers in Article 209 of the Constitution. On the basis of the Article, county governments may impose taxes on property and entertainment, charges for services that it may provide, and may levy other taxes that legislation by the National Parliament may permit.

There are also statutory provisions that institutionalise the concept of governance through popular participation, especially at the county government level. Under Section 30(3)(g) of the County Governments Act, a county governor is required, in the performance of his duties, to 'promote and facilitate citizen participation in the development of policies and plans, and delivery of services in the county.'[123] Section 87 of the CGA outlines the principles of citizen participation in the counties, and the core concepts include:

(i) Timely access to information by the public;

(ii) Reasonable access, by the public, to the process of formulating and implementing policies, regulation and laws;

(iii) Protection and advancement of rights and interest of minorities and marginalised communities and groups;

(iv) Promotion of public-private partnerships;

(v) Recognition and enhancement of the participation of non-state actors.[124]

123 County Governments Act (n 117).

124 *Ibid*.

County residents have a right to petition and challenge the conduct of a county government in the performance of its responsibilities, on the basis of Section 88 of the CGA.[125] Section 90 of the Act grants a county government the mandate to conduct a local referendum on issues pertaining to county laws and petitions, and planning and investment decisions.[126] A county government is also obligated to establish appropriate mechanisms and platforms for citizen participation, such as notice boards, information communication technology-based platforms, town hall meetings and budget preparation and validation forums by Section 91 of the CGA Act. [127] The county governor is also required, by Section 92(2) of the Act, to submit an annual report on citizen participation to the county assembly. [128]

Under Sections 105(1)(d) and 106(4) of the CGA, the county planning unit has the duty of ensuring qualitative involvement of the public in the planning process.[129] Section 115(2) of the Act obligates county assemblies to adopt legislation and regulations that expedite effective citizen participation in development issues within the county, and they should adhere to minimum national standards.[130] Further, Section 119 of the CGA requires that the county executive committee establish citizens' service centres at the county, sub-county, ward and other relevant decentralised levels for purposes of providing timely and efficient services to the public.[131]

Another significant legislation is the Public Finance Management Act (PFMA), which, in Section 125(2), obligates the county executive committee member responsible for financial matters to ensure that there is effective public participation in the budgeting process.[132] Under Section 128(2) of the PFMA, the county executive

125 *Ibid.*

126 *Ibid.*

127 *Ibid.*

128 *Ibid.*

129 *Ibid.*

130 *Ibid.*

131 *Ibid.*

132 Public Finance Management Act, No 18 of 2012 <kenyalaw.org/kl/fileadmin/pdfdownloads/LawsonDevolution/PublicFinanceManagementNo18of2012.doc> accessed 10 November 2014.

committee member responsible for finance is required to issue a circular by 30 August of each year which outlines the guidelines to be adhered to by the various county government institutions in the budgeting process.[133] Section 128(3)(d) of the Act specifically requires that the circular outlines 'the procedures to be followed by members of the public who wish to participate in the budget process'.[134]

Section 131(2) of the PFMA requires that before the county assembly debates the revenue and expenditure estimates for purposes of the approval of the budget, 'the relevant committee of the county assembly' should have reviewed the estimates and made appropriate recommendations to the assembly, after taking into account the opinions of members of the public.[135] Section 139(1) of the PFMA obligates county assemblies to enact regulations concerning 'the administration, control and management of grants,' for instance, from development partners.[136] Under Section 139(2)(c), such regulations should establish mechanisms to enable the intended beneficiaries participate 'in the design and management of the projects or public services financed by the grant'.[137]

Section 207 of the PFMA permits the enactment of regulations to enhance participatory regulation of the county government finances, which may include procedures for participation, mechanisms for lodging complaints, public hearing processes, methods of public notification, and distinct mechanism to encourage the involvement of people with special needs such as the illiterate, those with disabilities, disadvantaged groups and women.[138]

The Intergovernmental Relations Act (IRA) of 2012 is also a significant legislation in engendering popular participation both in the national and county governments.[139] Section 29 of IRA requires

133 *Ibid*.

134 *Ibid*.

135 *Ibid*.

136 *Ibid*.

137 *Ibid*.

138 *Ibid*.

139 Intergovernmental Relations Act, No 2 of 2012 <kenyalaw.org/kl/fileadmin/pdfdownloads/LawsonDevolution/IntergovernmentalRelationsActNo2of2012.

the enactment of regulations to govern public participation in the determination of the criteria for transferring powers, functions or competencies between national and county governments.

4.3 Equitable Distribution of Development Benefits

The previous centralised system of government had contributed to the concentration of economic activity in and around Nairobi.[140] Further, there was extreme marginalisation of some regions such as the former North Eastern Province, in terms of economic policies and distribution of development. [141] As Yash Ghai observes, in the absence of regional institutions, on the basis of which regions could articulate their economic and social needs, the government and the political elite had 'little reason to distribute resources away from their charmed circle.' [142]

The new social contract under the 2010 Constitution is geared towards distributive justice through equitable distribution of development benefits, including through legalisation and legitimation of more favourable economic and social policies for traditionally marginalised regions. Article 66(2) of the Constitution requires Parliament to enact laws that ensure that local communities and their economies benefit from investments in property that is within their regions. According to Article 10(2)(b) of the Constitution, the principles and values of governance include the protection of the marginalised and inclusiveness. Article 174 of the Constitution affirms that equitable sharing of resources, and the protection of the rights and interests of marginalised communities, are some of the core objectives of devolution.

Article 201 of the Constitution focuses on the principles of public finance management and specifically requires that nationally raised revenue be allocated equitably between the national and county governments.[143] In Addition, the Article requires that State

doc> accessed 10 November 2014.

140 Yash Ghai (n 110) 218.

141 *Ibid* 218-219.

142 *Ibid*.

143 Equitable sharing of revenue between national and county governments is also reaffirmed by Article 202 of the Constitution. See, Constitution of Kenya (n 1).

'expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas'. The criteria for determining the equitable share of revenue is provided for in Article 203 of the Constitution. It includes consideration of economic disparities among counties and the necessity of affirmative action in favour of disadvantaged areas and groups.

Article 204(1) of the Constitution establishes the Equalisation Fund that shall be calculated on the basis of the most recent audited State revenue that has been approved by the National Assembly. Under Article 204(2) of the Constitution, the national government shall utilise the Equalisation Fund only for purposes of providing basic services such as water and health facilities 'to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation,' as may be practically possible.

The county administrative units have been one of the most important mechanisms for determining and distributing the Equalisation Fund. According to the Commission on Revenue Allocation, a three-pronged approach is utilised in developing the criteria for identification of marginalised areas for the purposes of distribution of the Equalisation Fund, namely, the County Development Index (CDI), CRA's insights on marginalisation based on county surveys, and an analysis of historical and legislated injustices.[144] According to the CRA, its county surveys insights contribute to the public participation aspect of the criteria.[145] The 14 Counties identified as marginalised by the CRA in 2013 were Turkana, Narok, Mandera, Kwale, Wajir, Garissa, Marsabit, Kilifi, Samburu, Taita Taveta, West Pokot, Isiolo, Tana River and Lamu.[146]

Even for regions that do not qualify for the distinct Equalisation Fund, poverty level is generally a significant consideration in the first tier criteria for allocation of collected revenue by the national government to the counties. For instance, in the 2013-2014

144 Commission on Revenue Allocation (n 4) paragraph 5.1.2.

145 *Ibid.*

146 *Ibid,* paragraph 5.6.3

financial year, the poverty parameter had a weight of 20% in the determination of the financial allocation to a county government on the basis of the approved formula as contained in the County Allocation of Revenue Act (CARA) of 2013.[147] The objective of CARA was to provide the legal and policy framework for equitable share of revenue from the national government to various counties in the 2013-2014 financial year. [148]

5 Continuing Challenges in the Achievement of Distributive Justice in Kenya

Despite the inception of a devolved government under the 2010 Constitution establishing a significant mechanism for the institutionalisation of distributive justice in the realisation of the right to development in Kenya, some challenges continue to confront the State. Some of these challenges shall be discussed in the sections that follow.

5.1 Reluctance by National and County Governments to Promote and Fulfil the Right to Development

5.1.1 Refusal to Fulfil Some of the Rights of Marginalised Indigenous Communities

First, Kenya has already been faulted for acting in a manner inconsistent with the right to development under Article 22 of the African Charter by the African Commission on Human and Peoples' Rights in the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, often referred to as the *Endorois* case.[149] Although the African Commission issued its findings shortly before the adoption of the new Constitution in August 2010, the recommendations of

147 See, First Schedule, County Allocation of Revenue Act, No 34 of 2013 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/CountyAllocationofRevenueActNo34of2013.pdf> accessed 10 November 2014.

148 *Ibid*.

149 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* [2010] African Commission on Human and Peoples' Rights 276/2003 paragraph 298.

the Commission are yet to be effectively implemented by both the national and county governments, more than four years later. This is despite the new Constitution establishing the devolved government as a mechanism for equity and special focus on the marginalised in development policies, in addition to its legitimation of public participation in economic and social activities. As has been stated by the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, the Endorois community qualifies to be categorised as 'indigenous peoples'.[150] The concept of indigenous peoples is not based merely on the notion of 'first inhabitants', but rather, is premised on a human rights perspective such as shared experiences of marginalisation and dispossession, amongst others.[151] Therefore, as has been pointed out, the contemporary use of the phrase 'indigenous' is not merely on the basis of aboriginality, but has the objective of highlighting and bringing to an end certain forms of discrimination that certain communities experience.[152]

The Lake Bogoria Game Reserve, previously referred to as Lake Hannington Game Reserve, was established by the Kenyan Government in 1973 in the territory of the Endorois community.[153] The State evicted the Endorois community without adequate compensation, and it has not benefitted from the revenue earned by the Reserve in the subsequent years.[154] The community was also subsequently denied unrestricted access to Lake Bogoria and the

150 United Nations General Assembly, 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, on His Mission to Kenya' (26 February 2007) UN Doc A/HRC/4/32/Add.3 paragraph 10.

151 *Ibid,* paragraph 9.

152 George Mukundi Wachira, 'Vindicating Indigenous Peoples' Land Rights in Kenya' (LLD thesis, University of Pretoria 2008) 15.

153 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council* (n 149) paragraph 177. See also, Korir Sing'Oei Abraham, 'Kenya at 50: Unrealized Rights of Minorities and Indigenous Peoples' *Minority Rights Group International* (2012) 9 <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/MRG_Annex1_Kenya_HRC105.pdf> accessed 3 December 2013.

154 Minority Rights Group International, 'Trouble in Paradise' (2007) <http://www.minorityrights.org/6779/trouble-in-paradise/the-facts.html> accessed 26 January 2014.

surrounding land, which violated its land rights, in addition to seriously curtailing its economic, cultural and spiritual attachment to the land.[155] The Endorois community instituted its claim for the restitution of its land and compensation for material and spiritual losses at the African Commission in 2003 through the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG).[156] In its 2010 decision, the African Commission stated that the Kenyan Government 'bears the burden for creating conditions favourable to a people's development' and that the State had violated its obligations under Article 22 of the African Charter (which affirms the right to development) with regard to the Endorois community.[157] The *Endorois* case is immensely significant since, as Obiora Okafor points out, it is perhaps the most authoritative decision by the African Commission on the right to development under Article 22 of the African Charter.[158]

The continued reluctance of both the national and county governments to effectively implement the post-2010 social contract is also evidenced by the *Ogiek* case at the African Court of Human and Peoples' Rights.[159] The case was filed by the African Commission at the African Court in July 2012 due to an eviction notice that had been issued to the Ogiek community in October 2009 requiring that they vacate the Mau Forest as it was categorised as a water catchment area and government (now public) land.[160] The Africa Court issued provisional measures on 15 March 2003 stopping the evictions until the case is determined in full.[161] The case concerning the Ogiek is similar to that of the Endorois, and as the UN Special Rapporteur states, they also qualify to be categorised as indigenous peoples[162]

155 *Ibid*.

156 Korir Sing'Oei Abraham (n 153) 9.

157 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council* (n 149) paragraph 298.

158 Obiora Chinedu Okafor (n 15) 376.

159 *African Commission on Human and Peoples' Rights v Republic of Kenya,* African Commission on Human and Peoples' Rights (Application Number 006/2012) [2013] (Provisional Measures).

160 *Ibid,* paragraphs 1-3.

161 *Ibid*, paragraph 23.

162 United Nations General Assembly (n 150) paragraph 10.

requiring special protection due to historical marginalisation and exclusion. On the basis of the foregoing discussion, it can be argued that both the national and county governments are yet to show full commitment to the fulfilment and promotion of obligations relating to the equitable distribution of benefits of development, including the duty of a special focus on the marginalised and the vulnerable. Such practice is fundamentally inconsistent with the human rights-based concept of the right to development.

5.1.2 Inadequate Development Expenditure and Functional Disagreements between the National and County Governments

County governments, individually or through the Council of Governors,[163] have continuously accused the national government of frustrating their quest to roll out development to their subjects. The first major contention by county governments has been that the national government is allocating inadequate resources to counties.[164] Article 203(2) of the 2010 Constitution provides that at least fifteen per cent of national revenue shall be allocated to counties. According to a budget bulletin released by the accountancy firm, Price Waterhouse Coopers (PwC), Kenya Shillings 226.7 billion was allocated to counties in the 2014-2015 budget.[165] This constituted 12.8% of the 2014-2015 budget, and 33% of the last (2011-2012) audited revenue.[166] PwC concluded that the allocation was inadequate for the devolved function.[167]

163 The Council of Governors is established under Section 19 of the Intergovernmental Relations Act of 2012 to provide a non-partisan mechanism for consultation amongst county governments. Intergovernmental Relations Act (n 139).

164 See, for instance, Council of Governors, 'Remarks by HE Hon Isaac Ruto, EGH, Chairman Council of Governors at the Consultative Meeting of County Governments' Leadership Forum' (Nairobi, 18 August 2014) <http://cog.go.ke/index.php?option=com_content&view=article&Itemid=203&id=37:trans-nzoia> accessed 22 April 2015.

165 Price Waterhouse Coopers, 'Understanding Kenya's 2014/2015 National Budget: Budget Bulletin' (13 June 2014) 6 <kenyaflowercouncil.org/pdf/PWC_2014 Budget_Bulletin.pdf> accessed 5 March 2015.

166 *Ibid*.

167 *Ibid*.

The bulk of the funds allocated to county governments have been utilised in recurrent expenditure, as opposed to development. A 2014 World Bank report states that the 'approved budget allocation [by county governments] on recurrent [expenditure] and development was [averagely] 62 percent and 38 percent respectively in 2013/14, and by the end of the fiscal year, only 22 percent of actual spending took place on development areas.'[168] The Report also notes that '[o]nly 10 counties reached the 30 percent development spending threshold.'[169] The World Bank Report demonstrates that county governments are grossly not development oriented in their management of financial resources, which seriously undermines their quest for higher allocations from the national government. In particular, despite the financial allocations, the Report observes that county governments will largely still be 'dependent on the national government to mobilize development activities.'[170] Such factors have impeded progress towards the realisation of the right to development under a devolved system of governance.

County governments have also accused the national government of refusing to cede certain county functions.[171] Part 2 of the Fourth Schedule to the 2010 Constitution assigns certain functions to county governments. Friction between national government agencies and county governments on matters of health, roads and infrastructure, museums, Early Childhood Education (ECD), to name but a few, have slowed down implementation of development projects. The stalemate that ensues from such disagreements hampers optimal realisation of the right to development and distributive justice across the various counties.

168 World Bank Group, 'Decision Time: Spend More or Spend Smart?' (Kenya Public Expenditure Review, Volume I, December 2014) 32 <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/02/02/000470435_20150202142310/Rendered/PDF/940210WP0v10Bo0ort0Vol01201400FINAL.pdf> accessed 22 April 2015.

169 *Ibid*.

170 *Ibid*.

171 See, Council of Governors (n 164).

5.2 Corruption and Technical Capacity Challenges

Another key challenge that is an impediment to the achievement of meaningful development and distributive justice under the new social contract of devolved governance is that of corruption and inefficiency at the level of county governments. The Ethics and Anti-Corruption Commission (EACC) has already raised concerns on the increasing corruption in the county governments, and stated that severe measures are required to curtail the vice.[172]

Despite the already discussed avenues of popular participation, apathy by the members of the public has limited their participation in county governance matters, thereby reducing oversight. [173] The thriving of corruption has also been facilitated by the fact that most counties inherited weak structures of the previous local authorities and municipalities.[174] However, most counties have also not focussed on strengthening governance structures, improving efficiency and eliminating all forms of corruption. Nairobi County makes for good illustration of how corruption is obstructing development through devolution. In a December 2013 Report of the Auditor-General, it was noted that some of the revenue collected at the County was not banked intact as required by Section 9 of the County Governments Public Finance Management Transition Act of 2013.[175] In addition, most of the unbanked revenue was irregularly paid to County employees or utilised in questionable expenditure. [176]

172 Ethics and Anti-Corruption Commission, 'EACC in the Press: Lack of Checks Blamed for Graft in Counties' <http://www.eacc.go.ke/media.ASP?ID=563> accessed 8 November 2014, quoting *Daily Nation* (9 March 2014).

173 Ethics and Anti-Corruption Commission, 'EACC in the Press: Matemu Tells Counties to Fight Graft' <http://www.eacc.go.ke/media.ASP?ID=532> accessed 8 November 2014.

174 *Ibid*.

175 Kenya National Audit Office, 'Special Audit Report of the Auditor-General on the Financial Operations of Nairobi City County' (December 2013) 16 <http://www.kenao.go.ke/index.php/reports/cat_view/2-reports/11-county-governments/12-county-reports> accessed 8 November 2014. Section 9 is on the functions and responsibilities of Transition County Treasuries. See, County Governments Public Finance Management Transition Act, No 8 of 2013 <http://www.worldbank.org/content/dam/Worldbank/document/Africa/Kenya/Kenay%20Devolution/County%20Governments%20PFM%20Transition%20Act%20%282013%29.pdf> accessed 8 November 2014.

176 Kenya National Audit Office (n 175) 16.

The Report also established that 'major expenditures immediately after and during transition to County government were mainly on direct procurement of refurbishments, furniture, advertisements, motor vehicles and other recurring items and none on development items.' [177] Such conduct is indicative of greed and abuse of office within the Nairobi County Government rather than the pursuit of development and service delivery. Further, with regard to the purchase of medical supplies within the Nairobi County, investigations at the Central Medical Stores and various County health centres indicated that 'records were either doctored and drugs diverted to private clinics or [that] not all the drugs procured were received.'[178] The Report of the Auditor-General also pointed out that the deployment of qualified procurement personnel at the Central Medical Stores was vigorously resisted, thus rendering effective verification of medical supplies through audit almost impossible.[179] The spirited resistance against the deployment of qualified procurement personnel was certainly for purposes of facilitating the continuation of corruption and related activities.

A physical verification of some allegedly recently repaired roads in Nairobi County indicated that they had reverted to their original poor state, which demonstrated shoddy supervision of the works, or none at all.[180] There were no reasonable justifications provided as to why payments were made before thorough inspection and commissioning of the allegedly repaired roads was done.[181] With regard to land, though some of the corrupt activities could be attributed to the previous Nairobi City Council, the predecessor to the County Government, the audit revealed that several County properties had either been illegally or irregularly allocated or disposed to individuals, or encroached on.[182]

Even before the devolved system of governance was formally adopted after the 4 March 2013 general elections, there had been

177 *Ibid* 21.
178 *Ibid* 23.
179 *Ibid*.
180 *Ibid* 25.
181 *Ibid*.
182 *Ibid* 29-31.

concerns that if proper accountability and deterrence mechanisms were not established and implemented, devolution would contribute to increased corruption and inefficiency. It was opined that with devolution, it would 'become much more difficult for central government to implement its traditional supervisory role over local government effectively … due to increased political, administrative and financial autonomy of county governments.'[183] There was the risk that devolution would essentially decentralise corruption, 'partly due to the weakening of the traditional supervisory role' of the national government.[184]

Widespread corruption and inefficiency is likely to be a serious obstacle to the realisation of the right to development and the achievement of distributive justice. In 2008, Yash Ghai cautiously observed that:

> For the critics of devolution, the counterpart of a strong and effective central government is an inefficient, corrupt and incompetent government at local levels, with little capacity or resources to carry out their responsibilities. This criticism of devolved governments needs to be taken seriously. We cannot assume that governments at local levels will not reproduce the selfishness, corruption and inefficiency that characterise the national government in Kenya. Local governments will probably be under less media scrutiny, and corruption at that level may receive less attention.[185]

Corruption has also been cited as a major nucleus around which debilitating wars between Governors and Members of County Assemblies (MCAs) have coalesced.[186] There have also been many stand-offs between Senators and Governors, and between Members of Parliament and Governors.[187] The Council of Governors has

183 Christopher Finch, Geoff Handley and Jonathan Rose, 'Decentralisation: More Accountability, Less Corruption?' *East African* (17 March 2012) <http://www.theeastafrican.co.ke/news/Decentralisation++more+accountability++less+corruption/-/2558/1368160/-/16oi2iz/-/index.html> accessed 8 November 2014.

184 *Ibid*.

185 Yash Ghai (n 110) 222.

186 See, Nation Correspondent, 'MCAs Deploy Tricks in Push for Perks and Contracts' *Daily Nation* (Nairobi, 15 May 2014) <http://nation.co.ke/counties/Members-of-County-Assemblies-Governors-Impeachment/-/1107872/-/16wliiz/-/index.html> accessed 25 February 2015.

187 See, for instance, Samuel Karanja, 'Governors Blame Crisis on Clans' *Daily Nation*

recommended the dissolution of Makueni County Government following disagreements between the Governor and MCAs.[188] Threats of impeachment of Governors by respective County Assemblies are rampant across the country.[189] The effect of the internecine wars between county executives and county assemblies is continuous disruption of service delivery and implementation of the counties' development agenda. This has contributed to slow realisation of distributive justice and the fulfilment of citizens' right to development in the affected counties.

The PwC 2014/2015 Kenya national budget analysis has also indicated that lack of capacity and ability of county governments to absorb funds allocated for development has also been due to inadequate capacity and human resources skill mix in order to deliver the required quality of services to citizens.[190]

5.3 Legislative Challenges

County governments face challenges in passing appropriate and high quality legislation to enable them to deliver on their mandates.[191] Many county assemblies comprise members who are ill-equipped to effectively participate in law making. In other cases, county assemblies have passed laws that fly in the face of the Rawlsian

(Nairobi, 15 February 2015) <http://nation.co.ke/news/politics/Governors-blame-crisis-on-clans/-/10642612300/-/w9mr67z/-/index.html> accessed 25 February 2015.

188 Presidential Strategic Communications Unit, 'Governors Back Dissolution of Makueni County Government' *Standard Digital* (Nairobi, 9 December 2014) <http://standardmedia.co.ke/article/2000144082/governors-back-dissolution-of-makueni-county-government> accessed 25 February 2015.

189 See, for instance: Eric Wainaina, 'Kabogo's Woes Deepen as Kiambu MCAs Plot his Ouster' *Daily Nation* (Nairobi, 26 November 2014) accessed 22 April 2015: *Standard Digital*,'MCAs Vow to Impeach Isaac Ruto as Rift Leaders Call for Unity' (Nairobi, 30 March 2015) <http://www.standardmedia.co.ke/thecounties/article/2000156558/mcas-vow-to-impeach-isaac-ruto-as-rift-leaders-call-for-unity> accessed 22 April 2015.

190 Price Waterhouse Coopers (n 165) 7.

191 See, for instance, Nation Team, 'Alarm over Quality of Laws Crafted by County Assemblies' *Daily Nation* (Nairobi, 17 January 2015) <http://mobile.nation.co.ke/news/Alarm-over-quality-of-laws-crafted-by-county-assemblies/-/1950946/2593070/-/format/xhtml/-/ddyi3s/-/index.html> accessed 22 April 2015.

difference principle of spreading advantages to the worst off. There are examples of county finance legislations which have had the effect of punishing the poor by imposing unreasonable levies and charges which make the cost of living or doing business by the underprivileged unachievable.[192]

5.4 Distributive Justice Baseline and Recommended Remedial Measures

In order to explain the continued dilemmas of effectively implementing distributive justice in the development projects and revenue allocation under the devolved system of governance, and the emerging predicaments of corruption and inefficiency at the county governments' level, it may be necessary to revert to John Rawls' theory of justice. In his theory, Rawls postulates a hypothetical 'original position' in which the social contract that will lead to effective justice (in the form of fairness) is established, under a 'veil of ignorance.'[193] Rawls explains that the original position is not an actual period of time, but 'a purely hypothetical situation characterized so as to lead to a certain conception of justice.'[194] It is a situation in which every participant operates under a 'veil of ignorance' for 'no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities'.[195] It therefore 'ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances.'[196] The veil of ignorance in the original position, therefore, effectively eliminates any form of 'conflict of interest' in the formulation of the social contract.

The already mentioned post-2010 Constitution practices of development policies that are inconsistent with the rights

192 See, for instance, Eric Wainaina, 'New Burial Fees Proposed for Kiambu County Cemeteries' *Daily Nation* (Nairobi, 30 October 2014) <http://www.nation.co.ke/counties/Kiambu/New-burial-fees-Kiambu/-/1183274/2504750/-/fcd8gfz/-/ndex.gtml> accessed 25 March 2015.

193 John Rawls (n 11) 12.

194 *Ibid*.

195 *Ibid*.

196 *Ibid*.

and interests of marginalised and vulnerable communities, and widespread corruption and inefficiency under county governments, are serious impediments to the achievement of distributive justice. Some of them, such as endemic corruption, continued disregard for marginalised indigenous communities, and unhelpful functional differences between the national and county governments, also indicate that Kenyans were never at the proper 'original position' and under a 'veil of ignorance' (as postulated by Rawls) while drafting the new social contract, the 2010 Constitution. They demonstrate that some 'conflict of interest' was still in existence during the drafting of the Constitution, and it has continued to crystallise in the subsequent period hindering full, unbiased and effective implementation of the progressive provisions of the Constitution with regard to distributive justice under a devolved form of governance. The conflict of interest has continued to tilt the policies and concerns of officials, both in the national and county governments, from collective and equitable development and prosperity of society to individual enrichment.

The question that follows, therefore, is how the situation can be remedied. The solution certainly requires multiple measures. For instance, civic education at the grassroots by various participants, including civil society organisations, is likely to make the public utilise the various public participation opportunities that are recognised under the Constitution, and in both national and county legislations. In addition, civic education may eradicate the current apathy to governance matters by members of the public. That way, demands for accountability, transparency and inclusion may emerge from the lowest levels of governance, making it easier to eradicate corruption and institutionalise efficiency. If it occurs, Yash Ghai's vision that a devolved system of governance would render county governments' corruption more visible to the people and, therefore, could be addressed more effectively through local accountability and control mechanisms, may come true.[197] In addition to civic education and demands for accountability by the people at the local levels, stiff anti-corruption legislation and deterrent measures should be developed in a timely manner to address emerging challenges especially at the county levels. Activities such as the launch of a

197 Yash Ghai (n 110) 222.

countrywide advisory programme by the EACC, in order to address the increasing incidences of corruption at the county levels, should be intensified.[198]

In addition to the foregoing measures, the Judiciary has a fundamental responsibility of putting to an end the continued 'conflict of interest' that is being manifested by officials of both the national and county governments in the form of widespread corruption, inefficiency and exclusion of the public. The Judiciary should be decisive and uncompromising in interpreting the Constitution, domestic legislation and international instruments in a manner that will promote the realisation of distributive justice in Kenya's development agenda. In the instances that economic and social matters are litigated in the courts, the Judiciary should affirm the legitimate entitlement of Kenyans to equitable development, including their right to free, full and meaningful participation in the development process. The courts should ensure that devolution remains a mechanism of facilitating distributive justice in Kenya by tirelessly affirming and enforcing the human rights-based concepts of the right to development as enshrined in international instruments and as reflected in the 2010 Constitution and domestic legislation.

6 Conclusion

The objective of this chapter was to examine prospects of achieving distributive justice in Kenya's development process under a devolved system of governance. The legal, policy and institutional framework of economic and social progress in Kenya should be consistent with the human rights-based approaches of the right to development as stipulated in international legal instruments. The relevant constitutional and statutory provisions on devolution were, therefore, analysed in accordance with the internationally acclaimed right to development. The article established that the devolved system of governance is a progressive mechanism that facilitates the achievement of distributive justice in Kenya, especially since it integrates significant human rights-based concepts in

198 Ethics and Anti-Corruption Commission, 'EACC in the Press: Corruption May Increase, Says EACC' *Star* (28 January 2014) <http://www.eacc.go.ke/media.ASP?ID=547> accessed 8 November 2014.

Kenya's development process. In particular, the constitutional and statutory framework effectively incorporates the core elements of distributive justice as postulated under the right to development, namely, affirmation of development as a legitimate claim, emphasise on public participation, and requirements of equity and special focus on the marginalised in the development process. The incorporation of the distributive justice concepts in international and domestic legislation were justified on the basis of John Rawls' theory of justice.

The chapter has also acknowledged that effective achievement of distributive justice in Kenya may be hindered by continued 'conflict of interest', despite the various constitutional, legal and institutional reforms that established the devolved system of governance. The continued 'conflict of interest', which has been manifested in recent cases of failure to implement obligations relating to equitable distribution of resources, and prevalent corruption and inefficiency by the county governments, have been highlighted. Factors that may be helpful in addressing the emerging challenges, in order to facilitate the full realisation of distributive justice under the new social contract, have been suggested. They include civic education at local levels by various participants including civil society organisations, and more stiff anti-corruption legislation and related deterrence measures. The Judiciary has specifically been identified as the most important institution capable of bringing to an end the continued 'conflict of interest' that has obscured effective implementation of obligations under the Constitution, statutes and international legal norms. It has, therefore, been suggested that the Kenyan Judiciary should be firm, uncompromising and proactive in asserting the distributive justice obligations as enshrined in the Constitution, statutes and international instruments.

Chapter Six

Devolution of Government as a Means of Engendering Public Participation in Governance

Walter Ochieng

1 Introduction

Public participation espouses the concept of active citizenship, which entails equal participation in public affairs in the pursuit of the common good. The 2010 Constitution of Kenya gives prominence to citizen participation in all governance processes. However, conceptualisation and implementation of public participation in governance does not occur in the abstract, but within a concrete legal and institutional context. Therefore, a devolved system of government has been adopted in Kenya in order to provide the modalities and spaces for the realisation of this aspiration. This chapter argues that the legal and institutional framework for public participation in governance in Kenya, under the county government system, is not adequate to guarantee the attainment of active citizenship. This is because the legislative and executive structures lack the requisite avenues, capacity and resources to meaningfully engage with societal actors. The chapter also evaluates how an efficient deliberative structure that would enhance public participation in decision-making may be designed and implemented.

Participative democratic theory finds its origin in the idea that the full inclusion of the polity is a positive attribute of democratic governance. According to Tocqueville, citizen participation in the practices of governance is the political essence of citizenship.[1] Citizenship, for him, means to govern oneself with others without being dominated by the decisions, laws, procedures and policies that others have made. This implies that open dialogue with the public is the only means for the elected leadership to truly understand

1 Alexis de Tocqueville, *Democracy in America* (Joseph Epstein tr, Bentam Classic 2000).

the needs of the citizenry; thereby opening up the decision-making process to include the voices of the public to fully incorporate their ideas.[2]

Participation entails not just the involvement of the citizenry in the process of selecting representatives, but also requires their engagement during decision making.[3] It is arguable that it is at the local level where participation has the potential for its greatest effect.[4] Devolution facilitates governance at this optimal level by ensuring that decision making is brought closer to citizens.[5] As a system of governance, it ensures that the citizenry have a say in their affairs.[6] Devolution is, therefore, a system of governance that promotes a more democratic and participatory society.

Before the adoption of the 2010 Constitution, Kenya's post-independence governance framework had been characterised by a highly centralised governance system traceable to the colonial era.[7] With the centralisation of both political and economic power, the government abandoned its role as an instrument in the service of the welfare of the people and became the property of a few.[8] Allocation of resources and decision on development projects was done based on political patronage, which excluded citizens from having an input into governance processes, leading to a feeling of marginalisation.[9]

2 Dewey John, 'From the Public and its Problems' in Phillip Green (ed), *Key Concepts in Critical Theory: Democracy* (Humanities Press 1993) 120.

3 John Stuart Mill, 'From Considerations on Representative Government' in Phillip Green (ed), *Key Concepts in Critical Theory: Democracy* (Humanities Press 1993) 32.

4 Carole Pateman, *Participation and Democratic Theory (*Cambridge University Press 1970) 23.

5 J Fox and A Josefina, *Decentralization and Rural Development in Mexico: Community Participation in Oaxaca's Municipal Funds Program* (United Nations Development Programme 1996) 1.

6 For a discussion on the relationship between devolution and democracy, see, Celina Souza 'Redemocratisation and Decentralization in Brazil: The Strength of Member States' (1996) 27 *Development and Change* 529-555.

7 Government of Kenya, *Report of the Taskforce on Devolved Government* (Government Printer 2012) 10.

8 Mutakha Kangu, 'The Strengthening of the Unitary State' (2003) 5(1) *Report of the Constitution of Kenya Review Commission* 303.

9 World Bank, 'Navigating the Storm, Delivering the Promise: With a Special Focus on Kenya's Momentous Devolution' (2011) 5 *Kenya Economic Update* vii.

In excluding local people from the making of decisions that affected their lives, centralisation failed to facilitate local solutions to local problems. The need to overhaul the governance framework to place the public at the centre of the management of the affairs, particularly in matters of local development, thus became a major objective of the struggle for constitutional reforms in Kenya.[10] The adoption of a devolved system of government in the 2010 Constitution of Kenya is a culmination of efforts to correct the ills associated with the centralised system of governance obtaining under the former legal order.

The 2010 Constitution gives prominence to citizen participation in all governance processes. It provides, to the people of Kenya, sovereign power which can be exercised either directly or through representatives who must be democratically elected.[11] Citizen participation is recognised in Article 10 of the Constitution as a national value and a key principle of governance. The State is enjoined to 'encourage public participation in the management, protection and conservation of the environment.'[12] Moreover, Parliament is required to 'facilitate public participation in the legislative and other business of parliament and its committees.'[13] Crucially, the Constitution adopts a devolved system of government whose objective is to 'enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them.'[14] This is buttressed by the requirement that residents must be involved in governance of urban areas.[15] Lastly, the Constitution requires the participation of citizens in law making and other functions of the county assembly and its committees.[16]

10 Wato Salad, 'Devolution Promises to Reduce Marginalisation in Kenya' in Kenya National Commission on Human Rights (2012) 11 *Nguzo za Haki: The Devolution Issue* (Kenya Human Rights Commission 2012) 27.

11 Articles 1(1) and (4) of the Constitution of Kenya (promulgated 27 August 2010) <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010#part_I> accessed 14 March 2015.

12 *Ibid,* Article 69(d).

13 *Ibid,* Article 118(1)(b).

14 *Ibid,* Article 174.

15 *Ibid,* Article 184.

16 *Ibid*, Article 196.

The central role the devolved system of government is envisaged to play in ensuring participatory governance is founded on the thought that devolution provides an institutional framework within which sub-national units of government as well as the population therein can meaningfully engage in decision making on matters affecting them directly.[17] This argument is driven by the logic that the process of discerning and responding to local needs and aspirations is likely to be performed optimally by local institutions given their proximity to the requisite information. In addition, such local institutions can be held accountable by the local populations more easily than remote institutions in centralised governance systems.

It should be noted that despite the emphasis on participatory governance, institutionalization of participatory practice is not automatic. Its success depends upon its administrative framework. Where the design and implementation is properly conceived, then this enhances the potential of a devolved system of government delivering on the promise of enhancing democracy and participatory governance.[18] However, devolution without adequate mechanisms to guarantee citizen participation is not sufficient to ensure adherence to the spirit of public participation in government. Thus citizen participation can be facilitated or hindered by a number of factors that is the concern of this study.

In the sections that follow, the chapter elaborates on the linkage between the right to participate in government and devolution. It then proceeds to interrogate the legal framework for the devolved system of government in Kenya. This is followed by a critique of the mechanisms for public participation in governance in counties while drawing lessons from the South African regime on public participation in governance. Finally, the adequacy or otherwise of the public participation framework in Kenya, under the devolved system of governance, is highlighted.

17 John-Mary Kauzya, 'Local Governance Capacity Building for Full Range Participation: Concepts, Frameworks and Experiences in African Countries' (Background Papers, 4th Global Forum on Re-Inventing Government, United Nations, 2002) 363.

18 Richard Crook, 'Decentralisation and Good Governance in Federalism' *Federalism in a Changing World-Learning from Each Other* (Conference Reader for International Conference on Federalism, St Gallen 2002).

2 The Linkage Between the Right to Participate in Government and Devolution

The right to participate in government is a facet of good governance as it ensures effective, transparent and accountable discharge of public responsibility.[19] This betokens creation of institutions that are efficient and accountable – whether political, judicial, administrative or economic – in order to promote, among other things, human rights, the rule of law and democracy. Ultimately, the right ensures that people are free to participate in, and be heard on, decisions that affect their lives.[20]

The right to participate in government is guaranteed in Article 13 of the African Charter on Human and Peoples' Rights (African Charter).[21] The provision guarantees the right to every citizen to freely participate in government, either directly or through freely chosen representatives.[22] It also confers on every citizen the right of equal access to the public service and public property of his country.[23] The right is also expressly guaranteed under Article 21 of the Universal Declaration of Human Rights (UDHR),[24] and Article 25 of the International Covenant on Civil and Political Rights (the ICCPR).[25] The ICCPR guarantees not only the right but also the opportunity to take part in the conduct of public affairs. This has been viewed as imposing an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to participate in public affairs.[26]

19 Kempe R Hope, 'The UNECA and Good Governance in Africa' (Paper presented at the Harvard International Development Conference, Boston, 4-5 April 2003) 2.

20 *Ibid*.

21 African Charter on Human and Peoples' Rights (adopted 27 June 1981, entry into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev 5.

22 *Ibid,* Article 13(1).

23 *Ibid,* Articles 13(2) and (3).

24 Universal Declaration on Human Rights, UNGA Res 217A (III) (10 December 1948).

25 International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171.

26 Human Rights Committee, 'General Comment 25 (57)' UN Doc CCPR/C/21/Rev.1/Add.7 (1996).

The nature and typical functions of sub-national governments at the local level makes such a system of governance the most appropriate for the enjoyment and the exercise of the right to participate in government.[27] Devolution as a means for the realisation of the right to participate in governance has legal sanctification through its entrenchment in the African Charter on Democracy, Elections and Governance (ACDEG). The overarching objective of ACDEG is the promotion of good governance through principles that include a representative system ensured through regular, free and fair elections, and citizen participation in governance and development.[28] Article 34 of ACDEG requires member states to 'decentralize power to democratically elected local authorities as provided in national laws.' Furthermore, Article 36 of the Charter calls on state parties to 'integrate traditional leadership systems into formal democratic processes at the local level.' These two clauses anchor sub-national democracy within the African human rights system.[29]

At the sub-regional level, the Economic Community of West African States (ECOWAS) Protocol on Good Governance and Democracy provides that state parties shall ensure '[p]opular participation in decision making, strict adherence to democratic principles and decentralisation of power at all levels of governance'.[30] However, the East African Community legal instruments do not address the issue of the use of local democracy to realise the right to participate in governance. With regard to other non-African regional human rights systems, recognition of thi link is

27 Conrad Bosire, 'Local Government and Human Rights: Building Institutional Links for the Effective Protection and Realisation of Human Rights in Africa' (2011) 11 *African Human Rights Law Journal* 147, 151.

28 Article 2 of the African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entry into force 15 February 2012) <http://www.au.int/en/sites/default/files/AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf> accessed 10 April 2015.

29 Kangu Mutakha and Conrad Bosire, 'AU Charter on Democracy, Elections and Governance: Through a Local Government Lens' 14 (4) *Local Government Bulletin* 5.

30 Article 1(d) of the Economic Community of West African States Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (2008), *Reproduced* in Solomon Ebobrah and Armand Tanoh, *Compedium of African Sub-Regional Human Rights Documents* (Pretoria University Law Press 2008) 220.

evident in the Preamble to the European Charter of Local Self-Government,[31] which recognises 'that the right of citizens to participate in the conduct of public affairs can be exercised most directly at the local level.'[32]

Starting from the premise that devolution empowers the citizenry to participate in a country's social, economic and political processes, it can be argued that such a system of government provides equal opportunities to all citizens by creating conditions that encourage their input in the country's governance. Moreover, it is also arguable that it empowers citizens to hold public officials accountable for their conduct, omissions and decisions. In sum, the system broadens a country's democratic space and enhances citizens' political participation.[33]

3 Legal Framework for Devolved Government in Kenya

The Constitution espouses the concept of a Republic founded upon the idea of all sovereign power belonging to the people of Kenya and establishes two levels of government, namely, the national and county governments.[34] The Constitution provides for the devolution of legislative and executive powers whereas the judicial powers are not devolved. It further creates 47 counties with delineated functions and responsibilities.[35]

3.1 Structures and Institutions of Devolved Governance

The structures and institutions of devolved governance provide for the arrangement, composition and configuration of the county

31 Council of Europe, 'European Charter of Self-Local Government' European Treaty Series 122.

32 Paras 4 and 5 of the Preamble to the Charter, *ibid*.

33 Morris K Mbondenyi, 'Enhancing the Right to Political Participation through a Devolved System of Government: The Case of Kenya's New Constitutional Dispensation' in Rose Kimotho (ed), *Nguzo za Haki: The Devolution Issue* (Kenya Human Rights Commission 2012) 15.

34 Article 1(4) of the Constitution of Kenya (n 11).

35 *Ibid,* Article 6(1) and the First Schedule.

governments. This entails the framework and the working of the supporting institutions that enable the county governments to deliver on their mandate. County governance is vested in the county assembly and the county executive.[36] The former has a legislative role while the latter carries out the executive functions of the county.

3.1.1 County Assemblies

The county assembly is established under Article 176(1) of the Constitution. Membership of the county assembly comprises of the following: elected representatives to represent each ward within the county, special seat representatives of such a number to ensure that no more than two-thirds of membership of the assembly are of the same gender, representatives of marginalised groups (which includes representatives of persons living with disabilities and the youth) and a speaker who is an *ex officio* member.[37]

The county assembly serves a representative function in the governance process. This function involves being the channel through which public input is infused into law making and oversight over the county executive. It achieves this by reviewing the county executive committee's development-planning proposals and supervising the committee's implementation of priorities.[38] To discharge this representative role, the capacity of county assemblies to obtain quality public input and effectively incorporate it in their legislative and oversight processes is crucial.

In discharging its legislative function, the county assembly enacts laws, and directs and limits the power of the Governor and the county executive as it discharges its oversight obligations.[39] County legislation deals with matters that are within the jurisdiction of the county. These include: receiving and approving plans and policies for exploitation and management of the county's resources and the development of its infrastructure and institutions; evaluation and approval of budgets and development projects; supervision of other

36 *Ibid,* Article 176(1).
37 *Ibid,* Article 177(1).
38 *Ibid,* Article 185.
39 *Ibid.*

units within the county; monitoring the execution of projects and assessing and evaluating their impact; and approval of investment decisions and loans.[40] In effect, a county assembly has the duty of controlling and directing the economic activities within the county and ensure equitable and acceptable development and use of resources.

Both the national and the county governments can legislate in a matter that falls within the sphere of concurrent national and county legislative competence.[41] The doctrine of pre-emption does not apply as legislation enacted by both spheres of government is valid on an issue so long as there is no inconsistency in both laws. The predominance of national legislation becomes clear, however, as soon as a conflict ensues between national and county legislation. The Constitution regulates circumstances in which there is a conflict between national and county legislation. It outlines the conditions which national legislation must meet in order to prevail over county legislation, thus creating the impression that counties are granted more autonomy.[42] The diluted nature of this county autonomy becomes apparent, however, when one looks at the broad circumstances under which national legislation can prevail over county legislation in areas of concurrent competencies. National legislation, according to Article 191(2) and (3) of the Constitution, can prevail over county legislation 'if the national legislation applies uniformly throughout Kenya and is aimed at preventing unreasonable action by a county that is prejudicial to the economic, health or security interest of Kenya or another county; or impedes the implementation of national economic policy.' Moreover, in extreme circumstances, the national government can exercise powers of intervention as permitted by Article 192 of the Constitution. The intervention is envisaged where a county fails to discharge either its executive or legislative obligation under the Constitution or any other legislation.

The above constitutional provisions contribute to the view that the counties enjoy limited legislative autonomy. First, they are

40 *Ibid,* Article 186 and Fourth Schedule.

41 *Ibid,* Article 186(2).

42 *Ibid,* Article 191.

provided with a limited area of exclusive legislative competence. The minimal emphasis on county autonomy is also apparent from the fact that the national government enjoys overriding power over almost all legislative areas of county government. Considering the scheme of distribution of power as currently adopted, however, it would only be fair to conclude that counties enjoy a circumscribed legislative autonomy.

It is therefore crucial that in discharging their legislative function, the county assemblies should take into account public participation. The South African Constitutional Court has opined that public participation in the legislative process is at the heart of participatory democracy. In the *New Clicks* case, the Court opined that '[t]he Constitution calls for open and transparent government and requires public participation in the making of laws by parliament and deliberative legislative assemblies.'[43] The Court reiterated this argument in the *Doctors for Life* case and pointed out that bodies charged with legislative functions have the twin obligations of providing for meaningful opportunities for participation in the law making process and adopting measures to enable the public to take advantage of the opportunities provided.[44] This duty to facilitate public participation imposes an obligation on the county assemblies to adopt any mechanism to provide access to the county assemblies, provide an opportunity to the public to submit representations and submissions, providing a forum for public hearings for oral submissions and summoning people to testify before the county assembly and its committees.[45]

The potential relevance of county assemblies in facilitating public participation in governance is gleaned from the powers and competences that the Constitution accords to these bodies. It has been submitted that the counties enjoy a very limited legislative autonomy. Despite this reality, the county assemblies play a crucial role in governance at the sub-national level thus a need to ensure

43 *Minister of Health and another v New Clicks South Africa (Pty) Ltd and others* (2006) 1 BCLR 1 (CC) 344 - 347.

44 *Doctors for Life International v The Speaker of the National Assembly and others* (2006) 12 BCLR 1399 (CC) 24.

45 *Matatiele Municipality and others v President of the Republic of South Africa and others 2006 (5) BCLR 622 (CC).*

that its representative capacity is optimal. The capacity of the county assembly, in the context of legal and political framework, should be strong to guarantee effective representation, and should provide the human and financial resources necessary to support the representative function. This is the motivation for the constitutional requirement that in the performance of their duties, county assemblies should conduct their business transparently, including by facilitating public and media participation in their proceedings and publishing legal materials in the Kenya Gazette.[46] However, the absence of procedural mechanisms through which public input and comments on legislation can be undertaken is a glaring inadequacy of the system. Moreover there is no mechanism for the dissemination of information about legislative initiatives to citizens. It is imperative that members of the public are provided with sufficient information on how their views can be channelled to the assembly, and how to lobby for their interests and monitor the work of the county assemblies. The current framework, therefore, fails to ensure that members of the public are adequately assisted to participate in the functioning of the county assemblies.

3.1.2 County Executive Committees

The Constitution has created an autonomous county executive, controlled by locally elected representatives. Executive authority is vertically divided between the central and the county governments, ensuring political and governance autonomy for county governments in defined geographical areas. The executive authority of the county is vested in the county executive committee, which is composed of the county governor, the deputy county governor, and members appointed by the county governor with the approval of the county assembly, but who cannot be members of the county assembly.[47] The members of the executive committee are accountable to the county governor for the performance of their functions and exercise of their powers.

46 Articles 196 and 199 of the Constitution of Kenya (n 11).

47 *Ibid*, Article 179.

Under its constitutional mandate, the county executive committee acts as advisor to the legislative assembly, implements county and national legislation, originates legislation and manages the affairs of the county.[48] By virtue of the County Governments Act of 2012, the roles of the county executive committee include the implementation of both national and county legislation, and the management and coordination of the functions vested upon it by the Constitution or national legislation.[49] In discharging these functions, the county executive committee proposes legislation for consideration by the county assembly and provides the county assembly with full and regular reports on matters relating to the county.

The structure is geared towards the creation of an autonomous county executive, controlled by locally elected representatives. It has the objective of effectuating the division of executive authority between the national and the county governments, thus ensuring political autonomy in the operations of county governments. The county executive committee is vested with the function of policy making and political representation. Such twin roles implicate the need for democratic decision making. The wishes of the people should be determined and incorporated in the preparation and implementation of policies and plans for the county.

3.2 Functions and Resources of County Governments

Division of powers between the national and the devolved government is an important area where the State provides practical expressions to the concept of self-rule. The centrality of distribution of powers is patently unquestionable. However, as Watts observes:

> [W]here particular distribution of powers has failed to reflect accurately the aspirations for unity and regional autonomy in a given society, there have been pressures for a shift in the balance of powers, or, in more extreme cases, even for abandoning the federal system. [50]

48 *Ibid,* Article 183.

49 Sections 36 and 37 of the County Governments Act, No 17 of 2012 <kenyalaw.org/kl/fileadmin/pdfdownloads/LawsonDevolution/CountyGovernment17of2012.doc> accessed 14 March 2015.

50 Ronald Watts, *Comparing Federal Systems in the 1990s* (McGill-Queen's University

Based on this understanding, the Constitution has assigned the county and national governments distinctive powers and functions in order to delineate the remit of competence of each level of government. The county government's functions and powers are targeted at those sectors that implicate participation of the public in service delivery. These areas require the input of the public to identify the needs and priorities of those targeted to benefit from the services.

The functions of the county governments are designated as either exclusive or concurrent functions.51 Key sectors where the county governments are envisioned to play a crucial role include agriculture, health, planning and development, pollution control, public works, roads, transport, public entertainment, soil and water conservation, forestry, trade development and regulation, tourism, animal welfare and cultural activities.[52]

In theory, sub-national levels of government should have constitutionally guaranteed fiscal autonomy to possess the financial capacity to discharge their expenditure responsibilities. A disparity between the responsibilities of sub-national governments and their revenue-raising authority, it is argued, limits the powers of constituent governments. The common feature of financial arrangements of many devolved governments is the dominance of the national government.[53] The national government takes the lion's share of revenue collected while most sub-national governments have limited revenue generating responsibilities. Even when sub-national governments are entrusted with taxing powers, they do not have powers over most of the taxes that generate high revenue. Those revenue sources are left to the national government. The

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Press 1996) 103.

51 Exclusive functions are those fully assigned to the county government, shared or concurrent functions are those that are performed by both levels of government, while residual functions are those carried out by either government because it is not clear which of the two should carry them. However, it is noteworthy that most residual functions are taken up by the national government.

52 Fourth Schedule of the Constitution of Kenya (n 11).

53 Francois Rocher and others, 'Recognition Claims, Partisan Politics and Institutional Constraints: Belgium, Spain and Canada in a Comparative Perspective' in James Tully and Gagnon Alain (eds), *Multinational Democracies* (Cambridge University Press 2001) 81.

sub-national units, in the circumstances, rely on intergovernmental transfers.

The counties enjoy a very limited taxation power. Local taxes are stipulated as sources of finance for devolved governments. According to Article 209(3) of the Constitution, a county government 'may impose property rates, entertainment taxes and any other tax that it is authorised to impose by an Act of Parliament.' This provision denies county governments access to broad-based taxes like income tax and sales taxes that are strong sources of revenue. The Public Finance Management Act of 2012 is to provide 'for the effective management of public finances by the national government and the county government.'[54] The legislation, however, fails to grant the county government any other taxation power beyond that contemplated in the Constitution.

This leaves the national government with extensive powers of taxation, making it the fiscally dominant sphere of government. The tax regime accords the national government extensive taxation powers while the county governments have little own source of revenue. However, given the disparity in resource endowment between counties, provisions for equity in the disbursal of national revenue to counties have been made. Application of principles of equity implies that the various county governments will not receive equal amounts of allocations under the inter-governmental fiscal transfer system, but factors such as levels of development of each county, poverty indices, population size and geographic size are to be taken into account when determining allocations. The Commission on Revenue Allocation is charged with the responsibility of ensuring equitable and fair allocation of resources between the national and county levels of government and the sharing of resources among the counties.[55] The high dependence of the counties on inter-governmental transfers is further reinforced by the fact that the counties have little control over the use of the transfers.

54 Short Title, Public Finance Management Act, No 18 of 2012 <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20412C> accessed 10 April 2015.

55 Articles 202, 204 and 215 of the Constitution of Kenya (n 11).

The degree of autonomy by the sub-national units is affected not only by the extent to which they rely on transfers, but also by the level of expenditure autonomy they enjoy, which is determined by whether the transfers are conditional of unconditional in character. The Constitution envisages that the Cabinet Secretary responsible for finance may stop the transfer of at most fifty per cent funds to a county government on account of serious breach or persistent material breaches of any measure imposed by legislation to ensure expenditure control and transparency in the government.[56]

The inter-governmental competence between the national and county government shows that most of the functions fall within the jurisdiction of the national government. Failure to devolve key functions like education, social welfare, children and gender programmes, and security means that even if public participation is facilitated at the county level, there will be no public input in decision making in the sectors falling within the competence of the national government. This is bound to frustrate the public as the top-down approach to decision making associated with the national decision making will be perpetuated.[57] In fact, this is arguably one of the glaring inadequacies of Kenya's devolved system. The same problem has arisen in South Africa where it has been noted that the limited competence of the local governments has led to disillusion as the public often directs complaints on service delivery to the municipalities whilst the issues fall within the powers and functions of either the provincial or the national government.[58]

The inter-governmental competence, roles, functions and fiscal framework must be understood by the public in order for the citizenry to distinguish which government, between the national and the county one, has been mandated to deal with a particular sector. It is only where members of the public appreciate which level of government is charged with a responsibility that they can hold the authorities accountable and participate in the appropriate

56 *Ibid,* Article 225.

57 See generally, Robert Dahl and Edward Tuft, *Size and Democracy* (Stanford University Press 1973). They argue that meaningful participation cannot take place within a national polity.

58 Thabile Sokupa, 'Let Us Have Better Co-ordination of Inter-Governmental Relations' (2009) 15(3) *Transformer* 7.

forum that implicates their concerns. These concerns gain traction considering that the issue has arisen with respect to South Africa, where it has been observed that uncertainty over functional competence between the national, provincial and local governments has caused confusion to the public with regard to which level of government they should address their concerns to.[59]

3.3 Legislated Decentralisation of the County Government to Lower Levels

In order to bring governance closer to the people,[60] and therefore enhance public participation in the governance process, the Constitution mandates Parliament to decentralise the county government to lower levels.[61]In addition, Parliament has been explicitly mandated to enact legislation to provide for governance of urban areas and cities.[62] Pursuant to this authority, Parliament has enacted the County Governments Act of 2012 and Urban Areas and Cities Act of 2011 to create levels of government below the county level.[63] The legislated decentralisation of the county governments is arguably in the nature of de-concentration due to its attempts to merely shift operations from the county level to sub-units closer to the people.[64] The legislations conceptualise two categories of lower levels of government, namely, urban and cities, and rural areas.[65]

3.3.1 Urban Areas and Cities

The county government is charged with the responsibility of managing cities and municipalities within its jurisdiction. The

59 Bonginkosi Masiwa, 'Provisional Comments Emerging from the Local Governance Review Process' (2008) 14(1) *Local Government Transformer* 9.

60 Government of Kenya (n 7) 34.

61 Article 176 (2) of the Constitution of Kenya (n 11).

62 *Ibid,* Article 184.

63 See, County Governments Act (n 49); Urban Areas and Cities Act, No 13 of 2011 <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%20275> accessed 10 April 2015.

64 B Sihanya, 'The Presidency and Public Authority in Kenya's New Constitutional Order' (2011) *Society for International Development Constitutional Working Paper No 2*, 13.

65 Section 48(1) of the County Governments Act (n 49).

administration of such cities and municipalities is vested on either a board of the city or the municipality, a manager and other staff or officers appointed by the county service board.[66] The board of the city is comprised of 'not more than eleven members, six of whom shall be appointed through a competitive process by the county executive committee, with the approval of the county assembly.'[67] The county executive committee, with the approval of the county assembly, appoints at least five other members of the board from persons who represent various stakeholders in that particular urban area or city.[68] The same criteria apply to appointments in the boards of municipalities, except that the board comprises nine members, of whom four are appointed and five elected in the prescribed manner.[69]

The city or municipal managers are charged with the role of implementation of the decisions and functions of the board.[70] The role of a municipal manager in relation to the executive committee is somewhat ambiguous. However, as noted earlier, the manager is a public officer and chief executive officer of a city or municipality and is the head of administration of the board subject to the policy directions of the board.

The municipal managers and administrators are to be competitively recruited and appointed. A board may establish departments and specialised service delivery agencies as it may consider necessary within a city or municipality. The agencies may provide services such as water, public transport, environmental management and emergency services. The boards have administrative, management and oversight responsibilities in service provision.[71] Towns are to be unincorporated entities and should 'operate under the direct supervision of the county executive committee.'[72]

66 Section 12(1) of the Urban Areas and Cities Act (n 63).

67 *Ibid,* Section 13(1).

68 *Ibid,* Section 13(2).

69 *Ibid,* Section 14.

70 *Ibid,* Section 28.

71 *Ibid,* Section 21.

72 *Ibid,* Section 31.

The vesting of administration of cities and urban areas in city or municipal boards made up of appointed officials rather than elected representatives is antithetical to the entrenchment of participatory and accountable governance.[73] Direct elections promote self-governance as the citizens are granted a voice on who is to exercise power and administrative functions on their behalf. By divesting the public the role of direct democratic participation, the structure impinges on public participation.[74]

3.3.2 Rural Areas

Further decentralisation has been provided at three levels below the county in rural areas. The first level is the sub-county, while the second and third levels are wards and villages respectively.[75] It is envisaged that sub-counties will play a vital role in the integration of big counties, and that they will be best positioned to ensure that services and resources are distributed equitably between all villages.

Governance at the sub-county level consists of a sub-county administration that is managed by the office of the sub-county administrator.[76] The sub-county administrator is responsible for the coordination, management and supervision of the general administrative functions in the sub-county unit. This grants the sub-county administrator jurisdiction over planning, service delivery and citizen participation in development.[77]

The sub-county is further divided into ward units. At the ward level, the administration authority is vested in a ward administrator appointed by the county executive committee. The ward administrator has jurisdiction over the 'coordination, management and supervision of the administrative functions of the ward unit.'[78]

The ward units are further divided into villages. At the village level, there is provided for a county appointed village administrator

73 *Ibid,* Section 12.

74 Amukowa Anangwe, 'Bill on Devolution Has Many Flaws' *Star* (1 March 2012) 12.

75 Sections 48(1) (b), (c) and (d) of the County Governments Act (n 49).

76 *Ibid,* Section 50(1).

77 *Ibid,* Section 50(3).

78 *Ibid,* Section 51.

to 'coordinate, manage and supervise the general administrative functions in the village unit.'[79] A village council is also established, comprising the village administrator and not more than five elders, taking into account gender balance.[80] The village council is tasked with ensuring and coordinating the participation of the village unit in governance, and assisting the village unit in developing administrative capacity for the effective exercise of its functions and its participation in governance at the local level, among other responsibilities.[81]

A glaring failure of the decentralised regime is its failure to provide for public participation spaces at the sub-county, ward and village levels. The legislative framework only decentralises the executive arm of the county administration by creating the offices of administrators at the sub-county and ward levels. However, the creation of administrative structures without concomitant provision for representative structures like sub-county councils and ward councils deprives the public of deliberative avenues to enable their participation in the governance process and to exercise oversight roles in order to ensure accountability at these levels of government. The end result is the absence of local participation and accountability at these two levels.[82] The unchecked authority grants the sub-county and ward administrators immense sway in decision making and implementation.

It is also noteworthy that the sub-county, ward and village administrators are appointed by the county executive committee and are not directly elected. Appointment of these administrators deprives the public of the benefit of democratic accountability that is associated with direct elections.[83] Direct election of local government officials has been credited for greater accountability and arousing of public interest in local governments. Failure to

79 *Ibid,* Section 52.

80 *Ibid,* Section 53(1).

81 *Ibid,* Section 53(2).

82 Anangwe (n 74*)* 12.

83 Aodh Quinlivan, 'Reconsidering Directly Elected Mayors in Ireland: Experiences from the United Kingdom and America' (2008) 34(5) *Local Government Studies* 609-623, 612.

have directly accountable administrators is likely to lead to public participation apathy.[84] The model of appointed administrators deprives the governance framework public consent and, therefore, legitimacy.[85] Predictably, this has emerged as one of the major criticisms of the structure of the county governments.[86]

In providing for multiple layers of elected county representation, such as county assemblies and county executive committees, devolution enhances the scope of democracy, self-governance and self-management.[87] Furthermore, these multiple sites of representation also potentially provide alternative checks and balances against bad governance. In so doing, the role of citizen participation in policy formulation, the legislative process and decision making within the county governments is of paramount importance if the interest of the public is to be factored in these governance processes. However, the county government structure fails to adequately entrench direct public representation at the decentralised unit levels, namely the cities, urban areas, sub-county, ward and village levels. The failure to make use of these structures to entrench representation and participation militates against the objective of enhancing participatory governance.

4 Public Participation Spaces, Processes and Structures

A participatory environment can only be realised by creating an enabling environment for an autonomous and vibrant public to emerge and meaningfully engage with the county governments.[88] The legislative framework has provided regulated and institutionalised spaces for public participation within the county governments. These spaces will be interrogated in this section.

84 *Ibid*.

85 Colin Copus, *Leading the Localities – Executive Mayors in English Local Governance* (Manchester University Press 2006) 11.

86 Anangwe (n 74*)* 12.

87 Otieno Nyanjom, 'Devolution in Kenya's New Constitution' (2011) *Society for International Development, Constitution Working Paper No 4,* 31.

88 Good Governance Learning Network, 'Review of the White Paper on Local Government: A Civil Society Perspective' (2007) 9(5) *Local Government Bulletin* 13.

4.1 Citizen Awareness

A knowledgeable citizenry with access to a wide range of information enables participation in public life. For participation to be successful, the public must be aware of their role in governance and have access to adequate information. This implicates the need for public awareness of rights and responsibilities and adequate knowledge of the means or avenues through which they can exercise them.[89] It extends to the need for knowledge amongst the public of the spaces or opportunities for engagement with the government. It is also important that the framework for provision of information serves an educative purpose by enabling the public to learn about democratic processes.[90] As Heyden *et al* have pointed out, 'information can be transferred in large amounts without any understanding or knowledge being generated.'[91] This indicates the need for the information to be in a form, and be provided in a manner, that the public can understand and use it effectively.

It is on the basis of this understanding that county assemblies are obliged to conduct their affairs in an open manner, hold sittings of their committees in public, and facilitate public participation and involvement of citizens.[92] In addition, there is the recognition of the right to access information held by governmental authorities.[93] Furthermore, the State has an obligation to publish and publicise any important information affecting the nation.[94] The County Governments Act provides legislative basis for access to information held by county governments.[95] Lastly, the county governments are obligated to 'establish mechanisms to facilitate public communication

89 Annette Omollo, 'Devolution in Kenya: A Critical Review of Past and Present Frameworks' in Albert K Mwenda (ed), *Devolution in Kenya: Prospects, Challenges and the Future* (Institute of Economic Affairs 2010) 24.

90 Rhys Andrews and others, 'Supporting Effective Citizenship in Local Government: Engaging, Educating and Empowering Local Citizens' (2008) 34(4) *Local Government Studies* 499.

91 Carol Heyden and others, 'Information Poverty in the Knowledge Society: Better Government for Older People' (2001) *Research Paper* 6, 2.

92 Articles 196(1)(a) and (b) of the Constitution of Kenya (n 11).

93 *Ibid,* Article 35(1).

94 *Ibid,* Article 35(3).

95 Section 96 of the County Governments Act (n 49).

and access to information in the form of the media with the widest form of outreach in the county.'[96]

4.1.1 South African Experience on Citizen Awareness

In contrast to the Kenyan legal and policy regime, South Africa's Municipal Systems Act (Systems Act) has adopted a creative use of the office of the municipal manager as a conduit for information regarding public participation to the local community.[97] One of the critical responsibilities imposed on the municipal manager is the publication of various notices to inform the public of proposed policy formulation or decision making and inviting their participation in such processes. The municipal manager must issue notices informing the public of pending council meetings[98] and invite public participation in the discussion of the municipality's annual report.[99] In order to enable informed participation, the municipal manager must also supply copies of the annual report to the public, interested organisation and the media.[100]

Regarding legislation, the municipal manager must publish proposed by-laws for public comment.[101] Upon adoption, the by-laws must be published in the Provincial Gazette and in a local newspaper to enable public access.[102] The municipality must keep and maintain a compilation of its by-laws.[103] In addition, all notices that are published in the Provincial Gazette must be displayed at the municipal offices.[104] The municipal manager is also expected to notify the public of the adoption of integrated development plan, and avail copies of the plan and provide its summaries.[105] The

96 *Ibid,* Section 95.

97 Section 18 of the Municipal Systems Act No 32 of 2000 <http://www.energy.gov.za/files/policies/act municipalsystem_32of2000.pdf> accessed 10 April 2015.

98 *Ibid,* Section 19.

99 *Ibid,* Section 46(3)(a).

100 *Ibid,* Section 46(4)(a).

101 *Ibid,* Section 12.

102 *Ibid,* Section 13.

103 *Ibid,* Section 15.

104 *Ibid,* Section 21(3).

105 *Ibid,* Section 25(4).

municipal manager must also report to the public on the performance management system,[106] which includes provision of information on key performance indicators and performance targets.[107] Lastly, the municipal manager is obligated to communicate to the public any parts of the code of conduct for staff members that affect the local community.[108]

The South African Government has also recognised the role public funded information centres can play in providing the public with information by setting up Thusong Service Centres and Youth Advisory Centres.[109] The Thusong Service Centres link the public to the government by availing information on government programmes and activities. Similarly, the Youth Advisory Centres provide information targeting the youth.[110] These innovative initiatives are vehicles through which the South African Government has been able to provide information on governance activities to the public, especially those in the rural areas.

The Kenyan devolution regulatory framework fails to ensure that the public has notice of meetings as detailed in South Africa's regime. There is need to ensure that where notice is prescribed, it must accord the public sufficient period to analyse the policy proposals of the county government to ensure effective participation in deliberations. Moreover, access to information and its costs are not regulated in order not to hinder the obtaining of requisite information. There is also the need to ensure commitment of duty bearers to make the access to information system work by inculcating a culture of proactive release of information. This will contribute to the entrenchment of a culture of sharing information amongst public officials which may promote the release of adequate information to the public.

Without the right to access information, State authorities or agents can selectively release information to further vested interests.

106 *Ibid,* Section 41(e)(ii).

107 *Ibid,* Section 44.

108 *Ibid,* Section 70(2)(b).

109 Nangamso Magadla, 'Making Information Centres Work for the Poor' (2008) 14(3) *Transformer* 9.

110 *Ibid*.

To guard against this, there is need for a legislative framework that compels the devolved governments to adopt a policy of maximum openness. This is borne by the reality that poor information management and failure to disclose information regarding local governance matters alienates the public from local development and provides opportunities for corruption.[111]

4.2 Capacity Building

Supporting public participation initiatives with capacity building activities leads to better local decision making.[112] This is in recognition of the fact that members of the public require knowledge and skills on execution of their responsibilities. The implication of this is the need to develop the knowledge, skills and operational capacity of individuals and groups on how to achieve their objectives and purposes.[113]

The motivation for capacity building is to create a public that is willing, able and equipped to get involvement in public life.[114] It is, therefore, incumbent upon the government to go beyond simply providing people with opportunity to participate which cannot lead to realisation of this ideal. Instead the government must disseminate the necessary information to citizens and help them acquire the skills and confidence that they need in order to become more active in the governance process. It is essential, therefore, for civic education to enable citizens to become more active in public affairs.[115]

The County Governments Act imposes an obligation on each county to establish a civic education unit and implement an

111 Institute for Social Accountability, *Policy and Legislative Proposals Aimed at Sound Planning, Accountability and Citizen Participation in County Governments* (TISA 2010) 27.

112 David Clapham and others, 'User Participation in Planning for Housing: Is Small Really Beautiful?' in Gerry Stoker (ed), *The New Politics of British Local Governance* (Macmillan 2000) 215-233.

113 Mathew Okello, *Participatory Urban Planning Toolkit Based on the Kitale Experience: A Guide to Community Based Action Planning for Effective Infrastructure and Services Delivery* (LASDAP 2008) 23.

114 Adrian Oldfield, *Citizenship and Community: Civic Republicanism and the Modern World* (Routledge 1990) 62.

115 Amy Gutmann, *Democratic Education* (Princeton University Press 1999) 8.

appropriate civic education programme.[116] However, the Act fails to impose an obligation on the county governments to explore other avenues for capacity building in the inculcation of skills, to the public, for better engagement with the government. In fact, it is stark that the whole regime of the regulatory framework does not make mention of the need to engage in capacity building. This is unlike the legal regime in South Africa, which has recognised the need to build not only the capacity of the public but also the administrators to optimize the potential of public input into the governance process.

4.2.1 South African Experience on Capacity Building

South Africa's Municipal Systems Act, for example, recognises and accords the public a prominent role in the governance of local authorities. The statute obligates the municipality to develop 'a culture of municipal governance that complements formal representative government with a system of participatory governance.'[117] In pursuit of the objective of entrenching participatory governance, the statute imposes a duty on the municipality to create conditions for it. This obligates the municipality to build the capacity of the public to enable members of the community to participate in municipal affairs. In order to realise this, the municipality is enjoined to use its resources and budget for public participation annually. It is also the duty of the municipality to build the capacity of its councillors and staff to foster public participation.[118]

The municipality has an obligation to put in place mechanisms and processes to enable public participation.[119] The role of the municipal manager in facilitating the realisation of this goal is crucial. This is because it is this office that has been vested with the responsibility of implementing processes and overseeing mechanisms for public participation. The municipal manager is further obligated to structure the municipal administration in a manner that enables the public to participate in the affairs of the municipality. An

116 Sections 99, 100 and 101 of the County Governments Act (n 49).

117 Section 16 of the Municipal Systems Act (n 97).

118 *Ibid,* Section 16(6)(ii).

119 *Ibid,* Section 17(2).

example of how the municipal administration has been structured to facilitate public participation is providing that persons who cannot write and put their comments in writing are assisted to do so.[120]

In 2003, the South African Government created a programme of community development workers in an effort to deepen democracy at the local level by giving citizens direct access to Government.[121] The community development workers are deployed to municipalities to enable them function to bridge the gap between the Government and the public.[122] The programme aims at bringing public services closer to the people and to ensure that information on services and development opportunities are accessible so that they may be more effectively used. The programme underscores South Africa's recognition of the importance of experiential learning, rather than formal class-based training, in acquisition of skills and knowledge of the services offered by municipalities and political processes.[123]

South Africa's initiatives to support public participation with civic education have been credited for the increase in participation at the local level.[124] Kenya should impose an obligation on the county governments to adopt a range of training courses to target the public and enhance their ability to participate in the availed forums. The county administration and other staff should also be trained in order to ensure that they not only facilitate but also respond to public input.

4.3 Integrated Development Planning

Integrated development planning is 'a process through which devolved governments can establish a development plan for short,

120 *Ibid,* Section 21(4).

121 Reuben Baatjies, 'Community Development Workers: At the Heart of Participatory Democracy and Developmental Local Government' (2007) 9(2) *Local Government Bulletin* 10.

122 *Ibid*.

123 John Annette, 'Education for Citizenship, Civic Participation and Experiential Learning and Service Learning in the Community' in Denis Lawton and others (eds), *Education for Citizenship* (Continuum 2000) 77-92.

124 Steven Finkel, 'Civic Education and the Mobilization of Political Participation in Developing Democracies' (2002) 64(4) *Journal of Politics* 994-1020.

medium and long-term.'[125] Planning enables the realisation of such goals as social inclusion, economic regeneration, environmental conservation and efficient delivery of services given that it avails the requisite holistic framework that involves all stakeholders. This is achieved due to the fact that integrated planning infuses stakeholder commitment, ownership, pooling of resources and coordination in undertakings.[126]

A key principle underpinning the planning process is public involvement.[127] This is motivated by the reality that planning is no longer to be regarded as a purely technical or scientific exercise but as a process that rests to an extent on value judgments about desirable features, including the opinions of the communities that are affected by such decisions.[128] It is, therefore, imperative that the devolved governments encourage public engagement in matters that affect their community.[129]

The county governments in Kenya have an obligation to work towards the attainment of developmental objectives arising from the welfare demands of citizens as envisaged in the Constitution. These include the socio economic rights demands entrenched in the Constitution, including provision of housing, health and education services, and water and sanitation services, as their provision is within the competence of this level of government.[130] Effective realisation of these constitutional aspirations implicates the need for planning. This argument is buttressed by the fact that to meet these challenges, the counties have the onerous task to develop visions for their areas. To do this, public participation in integrated development planning framework is a necessity.

125 Purshottama Reddy, 'Democratic Decentralization and Local Democracy in South Africa Re-examined: Quo Vadis?' (2010) 29 (3) *Politeia* 66-67, 71.

126 Stephen Owen and others, 'Bridging the Gap: An Attempt to Reconcile Strategic Planning and Very Local Community-Based Planning in Rural England' (2007) 33(1) *Local Government Studies* 51.

127 Janice Morphet, *RTPI: Scoping Paper on Integrated Planning* (Royal Town Planning Institute 2004) 8.

128 Nigel Taylor, *Urban Planning Theory Since 1945*(Sage Publications 1998) 32.

129 Kenneth Hogg, 'Making a Difference: Effective Implementation of Cross-Cutting Policy' (Scottish Executive Policy Unit, 2000) <http://www.scotland.gov.uk/library3/governemnt/effect.pdf> accessed 3 June 2014.

130 Article 35 of the Constitution of Kenya (n 11).

The County Governments Act provides for public participation in the planning processes.[131] The legislation also provides that the development of county integrated development plans, and their amendment, should also involve public participation.[132] Despite the elaborate planning framework, poor resourcing and enforcement of the rules is likely to pose a huge challenge. A detailed framework for information gathering should be given legislative grounding. Legislation should provide for prioritisation of resources on the basis of evidence-based facts. Evidence based plans should use community based monitoring systems. This must also recognise the critical role of civil society engagement in information sharing, and monitoring and evaluation.

4.3.1 South African Experience on Integrated Development Planning

South Africa's Municipal Structures Act identifies the two primary actors in the integrated development planning management as comprising the executive mayor and the executive committee, and imposes a legal duty to 'manage the integrated development planning processes'.[133] The preparation of the integrated development plan incorporates public participation.[134] This is done by the establishment of a mechanism for public participation which incorporates public comments. Facilitation of public participation is an aspect of integrated development planning for which the municipal manager is responsible.[135]

With respect to South Africa, a number of shortcomings have been identified in the integrated development planning process and Kenya can learn vital lessons from these criticisms. The process has been criticised for inadequate public understanding of the core economic and social strategies that underpin such plans. In addition, it has been argued that the process frequently fails to capture the

131 Section 115 of the County Governments Act (n 49).

132 *Ibid*, Sections 108 and 112.

133 Section 30 of the Municipal Structures Act, No 117 of 1998 <http://mfma.treasury.gov.za/Legislation/lgmsta/Pages/default.aspx> accessed 10 April 2015.

134 *Ibid,* Section 28.

135 *Ibid,* Section 55(1)(n).

strategic choices that must be made in allocating state resources, given that the members of the public are often unaware of the practical implications of such plans and their role in maintaining and expanding existing infrastructure, services and development undertakings.[136] The same challenges have not been addressed in the Kenyan framework and, therefore, they may similarly hinder public participation in planning.

There is need for the adoption of a simplified integrated development process that is understandable and available to the public. Lastly, sectoral and geographical desegregation of the planning process should be entrenched in order to ensure that input is tied to actual progress within the different sectors as well as practical delivery on the ground.

4.4 County Government Budgeting

There is need to link planning and budgeting. The legislative framework should make the integrated planning the basis for identifying programmes, projects and initiatives aimed at improving the welfare of citizens. All appropriations and expenditures should be founded on plans. The Kenyan legislative framework for county budgeting is inadequate for public participation. The Public Finance Management Act provides for the creation of a County Budget and Economic Forum composed of members of the county executive committee and a number of representatives of various interest groups for consultations on the county budget, economy and financial management.[137] The County Governments Act envisages that county governments will facilitate the establishment of budget preparation and validation fora to entrench civic participation in budgeting.[138]

136 Good Governance Learning Network (n 88) 13.

137 Section 137 of the Public Finance Management Act (n 54).

138 Section 91(c) of the County Governments Act (n 49).

4.4.1 South African Experience on Budgeting

In South Africa, the management of municipal finances and budgeting is regulated by the Municipal Finance Management Act (MFMA). The MFMA provides that the process should be open and transparent.[139] It has been noted that the practice has rarely adhered to these standards. Moreover, it has been noted that there is the need to educate councillors and the public on issues relating to budgeting in order to enable them engage more critically in the processes. This has led to calls for strengthening of municipality's relationship with the public.[140]

The need for public participation in the municipal budgeting process in South Africa informs the MFMA provision that a draft budget be tabled by the end of March of each year, so that there is enough time for public input before the budget is finally adopted towards the end of June of a given year.[141] This seeks to protect the integrity of democratic and participatory municipal budgeting.[142] Kenya lacks such a requirement that would give the public adequate time to interrogate the county government budget.

Moreover, there is need for budget literacy capacity building, which is a key ingredient of effective citizen participation. There is need for a requirement for disaggregation of budgetary information to enable the citizenry to appreciate how it will affect them. Access to budget information and citizen involvement in all stages of budget preparation process is only useful where budget information is appropriately disaggregated to ensure maximum transparency with regard to cost per sector, sub-county, ward and village. Only then can citizens appreciate their direct involvement in a process that makes meaning for them.

139 Section 42 of the Municipal Finance Management Act, No 56 of 2003 <http://mfma.treasury.gov.za/MFMA/Legislation/Local%20Government%20-%20Municipal%20Finance%20Management%20Act/Municipal%20Finance%20Management%20Act%20%28No.%2056%20of%202003%29.pdf> accessed 10 April 2015.

140 Good Governance Learning Network (n 88) 13.

141 Section 42(5) of the Municipal Finance Management Act (n 139).

142 Johann Mettler, 'Bulk Electricity Prices, Exemptions and the Demise of Local Democracy?' (2008) 10(3) *Local Government Bulletin* 5.

4.5 Monitoring and Evaluation of Service Delivery

Public participation implies the need for accountability mechanisms to counter the risk of corruption and the risk of local patronage. There is need for an effective legislative framework that compels duty bearers to account to the public. This implies the need to put in place external monitoring mechanisms within the counties as part of the public participation framework.

The monitoring and evaluation of the public participation system should include indicators for measuring development outcomes, service delivery performance and accountability. The monitoring and evaluation system should provide a forum for dissemination of information, where the public can deliberate the way forward. This allows the public to investigate poor areas of performance based on its strategic plans. However, the Kenyan regulatory regime fails to provide for public participation in monitoring and evaluation of county service delivery.[143]

4.5.1 South African Experience on Performance Management

In contrast, the South African regime vests the municipal executive mayor and the executive committee with the duty of developing a performance management system.[144] This includes developing a criterion for evaluation, including devising key performance indicators.[145] A statutory requirement for involving the public in establishment, implementation and review of municipal performance management system has been entrenched.[146] Further, regular reporting of performance to the municipal council, provincial government, and importantly, the public, is provided for.[147] The executive mayor and the executive committee must also ensure that public views are taken into account.[148] The regime also requires the municipal manager to ensure that the municipal administration is

143 Part XII of the County Governments Act (n 49).

144 Section 39(b) of the Municipal Systems Act (n 97).

145 Sections 44(3)(a) and 56(3)(a) of the Municipal Structures Act (n 133).

146 Section 16(1)(a) of the Municipal Systems Act (n 97).

147 Section 41(1)(e) of the Municipal Structures Act (n 133)..

148 *Ibid,* Sections 44 and 56.

open to, and facilitates, the input of the public in municipal affairs. In furtherance of this objective, the municipal manager is under a statutory obligation to devise a mechanism to assess the satisfaction of the community with municipal services.[149]

The South African regulatory framework provides for an annual monitoring, measurement and review of municipal performance.[150] The reports of performance management assessments are submitted to the municipal council by the executive mayor and the executive committee.[151] To further develop the monitoring framework, the Municipal Finance Management Act provides that performance agreements must be communicated to the public.[152] Since performance agreements improve the municipality's capacity to monitor implementation of the integrated development plans, and to act on any implementation, this ensures public participation in service delivery.[153]

The crucial role that the municipal manager plays in municipal administration necessitates the need for public accountability.[154] It is on this basis that accountability to the public has been recognised as one of the tenets upon which the performance of the municipal administration is to be anchored.[155] This entitles the public to expect transparency, and be responsive to issues raised.[156] There is also a need to provide for sector specific public participation in service delivery monitoring and evaluation. This is evident in the South African system where sectoral structures are linked to the ward committees, such as school governing bodies and community policing forums.[157]

149 Section 55(1)(o) of the Municipal Systems Act (n 97).

150 *Ibid,* Section 41(1)(e).

151 *Ibid*.

152 Section 57 of the Municipal Finance Management Act (n 139).

153 Jaap de Visser, 'Common Sense Rather Mere Compliance: Service Delivery and Budget Implementation Plan' (2007) 9(2) *Local Government Bulletin* 11.

154 Section 51 of the Municipal Systems Act (n 97).

155 *Ibid,* Section 2(b).

156 Section 58 of the Municipal Systems Act, as an example, requires the municipality to publish the salary scales and benefits of the municipal manager, *ibid*.

157 Musa Sebugwawo, 'Advancing Participatory Democracy and Development in South Africa: Towards a New Strategy of Governance' (2012) 18(2) *Transformer* 5.

4.6 Citizen Forums

The establishment of citizen forums is geared at providing a check and balance to decision making by ensuring that county affairs are conducted openly and are subject to effective scrutiny. The forums are established to allow citizens to voice their concerns, allowing representatives to get insights to the public demands, preferences and needs. In addition, they allow representatives to explain and justify their decisions and choices to the public.[158]

The County Governments Act imposes an obligation on the county governments to 'facilitate the establishment of structures for citizen participation.'[159] The structures envisaged for establishment include town hall meetings, and devising of other citizen forums at county and decentralised units.[160] However, the legal and policy regime is insufficient to guarantee effectiveness of participation given the challenges that similar initiatives have faced in other countries such as South Africa. The experience of ward committees in South Africa is a pointer to the challenges that the citizen forums can reasonably be expected to face.

4.6.1 South African Experience with Ward Committees

In the context of South Africa, ward committees were introduced in municipalities to link and inform municipalities about the needs, aspirations, potentials and problems of the public.[161] The ward committees have attracted fierce criticism. This arises from disillusionment and feeling that participation in ward committees does very little to express the voices of the public.[162] This demonstrates that adoption of public participation as a policy, or the establishment of ward committees, is not proof of fulfilment of the constitutional obligation to facilitate public participation. For the counties to fulfil their constitutional obligation, they must ensure that the citizen

158 Hanna Pitkin, *The Concept of Representation* (University of California Press 1967) 43.

159 Section 91 of the County Governments Act (n 49).

160 *Ibid*.

161 Gugu Mgwebi, 'Contemplating Ward Committees – Civil Society Alliances: Opportunities and Challenges' (2010) 16(6) *Transformer* 15.

162 Annette May and Jaap de Visser, 'Community Participation and Ward Committees' (2008)10 *Local Government Bulletin* 13.

forums are accessible and effective in facilitating real and meaningful participation by the public in county affairs.

Some observers have argued that the ward committees are not functioning as intended, and that instead of enhancing the environment of participatory governance, these structures have actually undermined it by displacing many other channels for public participation.[163] For others, the committees only serve a ceremonial role as they do not influence decisions in the wards.[164] It is further posited that ward committees are partisan structures and serve the interest of political parties' agendas. Furthermore, questions have been asked as to whether the representation is inclusive and meaningful. In order to avoid walking the same road, the nomination, election and functioning of citizen forums in Kenya should be shielded from political parties' influence.

The limited mandate of the citizen forums in Kenya should also be put in the public domain. This is to avoid the potential conflation of the role of members to involve responsibility for service delivery as if they were an extension of the county government. If this is not clarified, it can create expectations that lead to disappointment by the public that threatens the credibility of the citizen forums. It behoves the county government to create public awareness on recognition and understanding of the limited powers that will be vested in the members of the citizen forum within the county governments.

In order to ensure that resolutions of citizen forums are integrated into county decisions and taken into account, it is imperative that their interface with county administration is clearly defined. Failure to do this creates opportunities for the county governments to ignore the citizen forums input and relegate the forum to ceremonial roles. South Africa has legislated a requirement that municipalities delegate certain powers and duties to ward committees.[165] However, the practice has seen municipalities give

163 Smith Terence, 'Are Ward Committees Working? Insights from Six Case Studies' (2008) 10(1) *Local Government Bulletin* 14.

164 Bonginkosi Masiwa, 'Ward Committees: Not Yet Out of the Woods' (2008) 14(4) *Local Government Transformer* 8.

165 See generally Municipal Structures Act (n 133).

ward committees little or no space as envisaged by the legislation, thus excluding them from decision making and hampering their effectiveness.[166]

In Kenya, the direct influence of citizen forums on county government decision-making has not been guaranteed, thus raising the prospect of the forums turning to talking shops whose input can be ignored by the county governments at will. This creates a need for creation of structured mechanisms that would guarantee that input from the citizen forums feed into the formal county government deliberation processes. This could be addressed by the creation of institutional mechanism for citizen forum reports to be presented to county assembly and executive meetings.

In South Africa, a number of municipalities have carved out a role for the speaker of municipalities to enable public participation in the affairs of the local government.[167] The speaker has, therefore, been vested with the role of facilitating, overseeing and supervising the election of ward committees. The speaker is also charged with the responsibility of deploying proportional representative councillors to ward committees, and monitoring and reporting on the performance of ward committees to the municipal council. As an intermediary between the municipal council and ward committees, the speaker is vested with the power to make recommendations to the municipal council on dissolution, capacity building interventions and administrative arrangements necessary to enable efficient functioning of ward committees.[168] Kenya should borrow a leaf from the South African innovation and carve a role for the county assembly speaker in ensuring that the views of citizen forums are presented before the county assembly.

166 Mgwebi (n 161).

167 Reuben Baatjies and Jaap de Visser, 'Facilitating Public Participation: A Niche Role for the Speaker' (2003) 9(5) *Local Government Bulletin* 3.

168 *Ibid*.

5 Conclusion

The chapter has demonstrated that few formal and statutory spaces designed for public engagement in the governance process have been provided in the Kenyan legal and policy regime for county governance. This is clearly a demonstration of the inadequacy of the public participation framework under the devolved system of governance. Moreover, the few spaces and opportunities provided for participation do not guarantee success as the capacity of the public to engage in an informed manner in the processes has not been ensured. Failure to provide the public with an enabling environment for participation is a glaring lacuna in the devolution scheme. It should also be pointed out that even where informed participation is achieved, there are no inbuilt mechanisms within the system to ensure that the public input is taken into account in decision making and implementation. The county assemblies should, therefore, enact laws to cure these defects pursuant to their legislative mandate under the Constitution.

Chapter Seven

Implementation of the Constitution of Kenya by County Governments: The Significance of Public Participation

Caroline Kago

1 Introduction

Participation by the citizens of a state in the making of a constitution is paramount as it creates ownership. Such participation provides legitimacy for the constitution, besides generating its social acceptance and enhancing commitment to abide by it. The 2010 Constitution of Kenya was developed by a very participatory process.[1] However, a participatory constitution making process does not guarantee its successful implementation by the state, through the institutions created by the constitution, if the citizens are not provided appropriate opportunity for public involvement. In this regard, there should be adequate public participation avenues in constitution implementation activities of the state.[2] This is clearly provided for in the 2010 Constitution of Kenya, for instance, by Article 118, which requires Parliament to 'facilitate public participation and involvement' in its 'legislative and other businesses' and even in the activities of the Parliamentary committees.

Public participation in the implementation of the Constitution of Kenya should be effected both at the national and county

1 The first part of this chapter briefly discusses Kenya's participatory Constitution making process, which was achieved through the establishment of the Constitution of Kenya Review Commission, the National Constitution Conference, and the Committee of Experts. The holding of a national referendum was also a mechanism of involving the public. An earlier version of this chapter formed the basis of a paper presented at the Conference on Constitutional Making in Africa on 6 September 2013, held at the University of the Western Cape, South Africa.

2 Such activities include drafting of legislations and policies for different sectors that ensure implementation of the constitution, vetting of public officers, among others.

levels.[3] Since devolution is a new phenomenon in Kenya,[4] this chapter examines opportunities for public participation through the county governments system, and evaluates how adequate citizens' participation can be realised. A comparative study of the practice in South Africa is undertaken in order to evaluate any vital lessons that may be replicated in Kenya in order to enhance and institutionalise effective public participation in the devolved system of governance.

2 The Struggle for A Participatory Constitution Making Process In Kenya

Public participation is the process by which people who are going to be affected by a decision are involved or consulted in the decision making and implementation process.[5] The members of any

3 The 2010 Constitution of Kenya provides for a devolved system of government, hence moving Kenya from a centralised system of government that it operated since its independence. In addition, the Constitution provides for public participation at county level. This is provided for in the 4th Schedule, Part 2 of the Constitution, which provides that 'county governments are supposed to ensure and coordinate the participation of communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at local level.' See, Constitution of Kenya (promulgated 27 August 2010) <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010#part_I> accessed 14 March 2015. Further, Section 87 of the County Governments Act, Act No 17 of 2012, lays down the principles of citizen participation in county governments. See, County Governments Act, No 17 of 2012 <kenyalaw.org/kl/fileadmin/pdfdownloads/LawsonDevolution/CountyGovernment17of2012.doc> accessed 14 March 2015.

4 As earlier stated, Kenya operated a centralised system of government since its independence in 1963. Decentralisation was introduced by the current Constitution after years of agitation by the people of Kenya for *majimbo* (decentralisation).

5 International human rights law recognises the right to political participation. This is provided for in Article 21 of the Universal Declaration of Human Rights, which states that:

> (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
>
> (2) The will of the people shall be the basis of the authority of the government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Universal Declaration of Human Rights, UNGA Res 217A (III) (10 December 1948). In addition Article 25 of the International Covenant on Civil and Political Rights states that:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen

community are usually interested in making their community better and, therefore, would ordinarily have greater commitment to the development activities in their locality. This is because they would like the development activities to be sustainable and improve the economic and social conditions of the community and the residents. In this regard, they are the ones who are greatly affected by decisions made concerning their communities.[6] During the consultation and involvement of the public, learning occurs and, therefore, the community is able to check its leaders. This, therefore, improves governance and enhances development and service delivery.

Public participation in the making or repealing of a constitution does not only mean voting at a referendum, but also requires the involvement of the public in coming up with the provisions of the draft constitution or proposed amendments.[7] Public participation is significant as it gives legitimacy to the constitution, generates its social acceptance and enhances commitment to abide to it. This is because the civic dignity of those who participated in the constitution making is enhanced as they feel that their voices were heard and taken account of. As a result, transparency and accountability in governance is enhanced.

Kenyans have struggled to ensure that the Constitution making process is participatory. Kenya, formerly a British colony,

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representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors…'

International Covenant on Civil and Political Rights (adopted 16 December 1966, entry into force 23 March 1976) 999 UNTS 171. With regards to regional instruments, the African Charter on Human and Peoples' Rights, in Article 13(1), provides that '[e]very citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.' African Charter on Human and Peoples' Rights (adopted 27 June 1981, entry into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev. 5.

6 For example, better infrastructure implies greater opportunities for the citizens such as in business activities. This translates to improved income levels and thus better living standards.

7 For the people to be able to effectively contribute to the process of making of the constitution, civic education, media campaigns, public consultation (both on how the process should be undertaken and on the substance of the constitution) and national dialogue should be part of the process. See B Michele and others, *Constitution-Making and Reform: Options for the Process* (Interpeace 2011) 9.

was granted full independence on 12 December 1963. Just prior to independence, Kenya's political leaders went to London in the United Kingdom to negotiate the Independence Constitution with the British Colonial Office. The negotiations occurred in 1960 and 1962 during the Lancaster House Constitutional Conferences that were held in London, and were later conducted in Nairobi in 1963. Like most independence constitutions in Africa, the Constitution making process was not participatory, hence there was no social acceptance of the legal instrument and, therefore, no commitment to abide to it.

The Independence Constitution became effective in 1963 following Kenya's attainment of full independence. Some features of the Independence Constitution were that it provided for a multi-party system of government,[8] a Westminster-style parliamentary Government with a Prime Minister as its Head and the Queen of the United Kingdom (UK) as the Head of State, a *majimbo*[9] system of governance, a bicameral legislature,[10] a Supreme Court,[11] Kadhi Court and various Commissions.[12] The Independence Constitution greatly limited governmental power, thus checking abuse of

8 The executive authority of the Government of Kenya was vested in Her Majesty the Queen of the United Kingdom, and exercised on her behalf by the Governor-General, either directly or by officers subordinate to him. The Prime Minister was appointed by the Governor-General from among members of the Kenyan House of Representatives who commanded the support of the majority of the members of the House.

9 A Kiswahili phrase for decentralisation. It was used in reference to the distribution of power between the Central Government and the seven regions listed in Article 91 of the Independence Constitution of Kenya. This provided for equal sharing of power and a channel for all tribes (especially the minorities) to participate in the governance processes. See PLO Lumumba, MK Mbondenyi and SO Odero (eds), *The Constitution of Kenya: Contemporary Readings* (LawAfrica 2011) 22-24. See also, Constitution of Kenya of 1963 <http://mlgi.org.za/resources/local-government-database/by-country/kenya/constitution/1963%20Independence%20constitution.pdf> accessed 14 March 2015.

10 The Parliament consisted of Her Majesty the Queen of the UK and the National Assembly. The National Assembly comprised of two Houses, namely, the House of Representatives and the Senate. The Senate represented the 40 districts and the Nairobi area, while the House of Representatives represented the constituencies. See Chapter IV of the Constitution of Kenya of 1963 (n 9).

11 The Supreme Court had unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law.

12 Such as the Judicial Service Commission and the Public Service Commission.

executive authority and promoting constitutionalism, accountability and respect for the rule of law.

In 1964 Kenya delinked itself from the British Crown and became an African Republic.[13] This was effected through the first constitutional amendment which abolished the office of the Prime Minister and created that of the President.[14] The President became the Head of State and the Head of Government. Numerous other amendments to the Independence Constitution were subsequently effected by Parliament, which greatly impacted on democracy and adherence to the rule of law. In *Njoya and 6 others v Attorney General and 3 others,* the High Court noted that:

> Since independence in 1963, there have been thirty-eight (38) amendments to the Constitution. The most significant ones involved a change from Dominion to Republic status, abolition of regionalism, change from parliamentary to a presidential system of executive governance, abolition of a bicameral legislature, alteration of the entrenched majorities required for constitutional amendments, abolition of the security of tenure for judges and other constitutional office holders (now restored), and the making of the Country into a one party state (now reversed). And in 1969 by Act No 5 Parliament consolidated all the previous amendments, introduced new ones and reproduced the Constitution in a revised form. The effect of all those amendments were to substantially alter the Constitution. Some of them could not be described as anything other than an alteration of the basic structure or features of the Constitution. And they all passed without challenge in the courts.[15]

The political incumbency made amendments to the Constitution without public consultations. Hence, Constitutional amendments that were effected had the objective of enabling the Government of the time serve the interests of the political elite. In this regard,

13 This was effected through the Kenya Amendment Act No 28 of 1964. It declared Kenya a sovereign Republic as from 12 December 1964. See JB Ojwang, 'Constitutional Reform in Kenya' (2001) <http://www.commonlii.org/ke/other/KECKRC/2001/9.html> accessed 15 May 2013; PLO Lumumba, M Mbondenyi and S Odero (n 9) 24.

14 By virtue of Section 8 of the Amendment Act, the first Prime Minister became the first President of Kenya.

15 *Njoya and 6 others v Attorney General and 3 others* [2008] 2 KLR (EP) 696-697.

the Constitution became a hodgepodge of political convenience.[16] Because of the above stated facts, there was arbitrariness, no respect for the rule of law, limited separation of powers, lack of political accountability, gross administrative improprieties and political manipulation.

Following the constitutional amendments that removed the security of tenure for the Attorney General, judges and the Auditor General, as well as those that weakened the separation of power, demands for a systematic review of the Constitution began to be made in the late 1980s and early 1990s to the Kenya African National Union (KANU) Review Committee.[17] In addition, the movement for restoration of multi-party politics started in early 1990s and was led by the Citizens' Coalition for Constitutional Change and religious bodies.[18] Other organisations such as the Law Society of Kenya, International Commission of Jurists (Kenya Chapter), Kenya Human Rights Commission, the Episcopal Conference of Catholic Bishops as well as the National Council of Churches of Kenya, joined the movement.

There was thereafter a demand for comprehensive reforms to the Constitution. A proposed Constitution titled 'Proposal for a Model Constitution' was prepared by the Law Society of Kenya, International Commission of Jurists (Kenya Chapter) and the Kenya Human Rights Commission.[19] Since there was a popular demand to make comprehensive reforms to the Constitution, in 1995 the Government announced that it would invite foreign experts to assist in drafting a Constitution for consideration by the National Assembly. This never came to pass. As a result, political parties formed a movement referred to as the Inter-Parties Parliamentary Group

16 In fact, it was very easy to amend the Constitution as the thresholds for approving constitutional amendments were reduced by virtue of the Constitution of Kenya (Amendment) Act No 14 of 1965. In addition, the constitutional amendment procedural requirement of publication of a bill for fourteen days was violated in 1974 in order to adopt a presidential directive requiring parliamentary proceedings to be in Kiswahili. All stages were debated in one sitting in order to effect the constitutional amendment.

17 See, for instance, Constitution of Kenya (Amendment) Act No 14 of 1986. See also PLO Lumumba, M Mbondenyi and S Odero (n 9) 37.

18 PLO Lumumba, M Mbondenyi and S Odero (n 9) 37.

19 *Ibid*.

(IPPG). IPPG agreed on a number of reforms that would ensure free and fair elections in the 1997 general elections. Comprehensive review would then follow after the general elections. The Constitution of Kenya Review Act of 1997 was enacted as the legal instrument to assist in addressing the post-election constitutional review plans of the IPPG. Many interested parties were, however, not happy with the Act, as significant entities like civil society organisations and opposition parties were left out of the constitutional review process. Consequently, negotiations commenced in Nairobi between June and October 1998 to identify an acceptable framework for the constitutional review process. A consensus was reached leading to the amendment of the Constitution of Kenya Review Act in 1998.

One of the amendments was the establishment of a Review Commission consisting of 25 members who were to be nominated by the stakeholders. After the amendment to the Act, differences emerged between the Government on the one side, and the opposition and civil society organisations on the other.[20] As a result, the two groups proceeded separately with the review process. The opposition political parties, religious bodies and civil society organisations established the Ufungamano Initiative which pushed for a participatory Constitution making process. Consequently, it appointed the People's Commission of Kenya, which was mandated to collect the views of the public on constitutional related issues.

On the other hand, the Government and its partners established the Parliamentary Select Committee which pushed for a parliamentary led process. The work of the parliamentary group led to the review of the Constitution of Kenya Review Act in 2000. Thereafter, the Constitution of Kenya Review Commission (CKRC) was established in November 2000 consisting of fifteen commissioners.

The civil society led group and the parliamentary group eventually agreed to merge in 2001 in order to promote national unity. The merger necessitated the amendment of the Review Act to incorporate the terms of the merger. The Act was thus reviewed

20 G Kibara, 'The State of Constitutionalism in Kenya, 2003' in B Tusasirwe (ed), *Constitutionalism in East Africa: Progress, Challenges and Prospects in 2003* (Fountain Publishers 2005) 74.

once again in May 2001. The CKRC carried out a participatory Constitution making process by going round the country to collect views from Kenyans. They thereafter came up with a Draft Constitution which was released on 19 September 2002.[21] The next process, according to the Constitution of Kenya Review Act, was to be the National Constitutional Conference (NCC) at the Bomas of Kenya on 28 October 2002 to debate the Draft Constitution. The delegates of the conference were drawn from all sectors, including civil society organisations, Members of Parliament, religious institutions, and district representatives, among others. The Bomas Conference did not take place as the then President Moi decided to dissolve Parliament. Elections were held in December 2002. President Mwai Kibaki won the presidency under the National Rainbow Coalition (NARC) party.[22]

The NCC reconvened at Bomas of Kenya in Nairobi in April 2003 to work on the Draft Constitution. However, there were political differences within the NARC coalition parties, and as a result, the Bomas process collapsed.[23] In 2004, the Constitution of Kenya (Amendment) Act was enacted. It provided for a mandatory national referendum and also gave powers to Parliament to effect changes to the Bomas Draft.[24] Parliament thus came up with 'Proposed New Constitution of Kenya (2005)'.[25] It was subjected to a national referendum on 21 November 2005, but was rejected by 58% of Kenyans.[26] The NARC Government never revisited the issue of constitutional review.

In December 2007, Kenya held general elections whose results were greatly disputed leading to post-election violence that saw many Kenyans killed and others displaced. The violence mutated

21 It was dubbed the Ghai Draft (after the Chair of the CKRC, Yash Ghai) or the CKRC Draft.

22 NARC was a coalition of several political parties that agreed to support Mwai Kibaki for the presidency.

23 S Othman and J Warioba (eds), *Moving the Kenya Constitution Review Process Forward: A Report of a Fact-Finding Mission to Kenya* (Fountain Publishers 2007) 8.

24 *Ibid*.

25 Popularly referred to as the Wako Draft, after the then Attorney General of Kenya, Amos Wako.

26 S Othman and J Warioba (n 23) 8.

into a political crisis that paralysed core State institutions and threatened to balkanise the country along two dominant ethnic and political camps, which were the Orange Democratic Movement (ODM) and the Party of National Unity (PNU). An international mediation effort to defuse the crisis was mounted by the African Union under the stewardship of President John Kufuor of Ghana. From this intervention, a Panel of Eminent African Personalities, consisting of former United Nations (UN) Secretary-General Kofi Annan (Chairman), former President of Tanzania Benjamin Mkapa, and former South African First Lady Graça Machel, was established to assist Kenyans in finding a peaceful solution to the political crisis. Under the auspices of the Panel, the Party of National Union (PNU) and Orange Democratic Movement (ODM) started negotiations on 29 January 2008, through the Kenya National Dialogue and Reconciliation Committee (KNDR).

The result of the mediation process was a negotiation agenda and a timetable for addressing issues identified to have caused the political crisis.[27] The agenda identified four broad issues whose resolution was necessary to solve the political crisis. The first item in Agenda 4 was constitutional, legal and institutional reforms. This led to the enactment of the Constitution of Kenya Review Act (2008) and the Constitution of Kenya (Amendment) Act (2008). The latter Act incorporated the political agreements reached by the KNDR. The Constitution of Kenya Review Act (2008) established the Committee of Experts (COE) whose mandate was to identify the contentious and non-contentious issues in the Bomas and Wako Drafts of the Constitution, carry out consultations to resolve the contentious issues and thereafter come up with a harmonised Draft Constitution for presentation to the National Assembly. The Harmonised Draft Constitution was subjected to a national referendum on 4 August 2010. It was endorsed by a majority of Kenyans and hence promulgated into law on 27 August 2010.

27 See A Meroka, J Ndegwa and D Kenduiwa, *Agenda 4: 10th Parliament's Legislative Response* (Plato Institute 2009) 1.

3 Public Participation in Implementation of the Constitution

3.1 Importance of Public Participation in the Implementation of the Constitution

A participatory constitution making process does not, however, guarantee successful implementation of the constitution by the state through the institutions created by the constitution if the citizens are not given an opportunity for public involvement. In this regard, there should be public participation in constitution implementation activities of the state.[28] This is clearly provided for in the Constitution of Kenya. For instance, Article 118 of the Constitution stipulates that 'Parliament shall facilitate public participation and involvement in [its] … legislative and other businesses … and [in] its committees.' In addition, the Constitution of Kenya provides for a devolved system of Government, hence moving Kenya from a centralised system of governance that it operated since its independence. Devolution provides powers of self-governance to the people and thus enhances public participation.[29] With a devolved system of Government, public participation in the implementation of the Constitution of Kenya should be effected at both the national and county levels.

At the national level, several court cases that have been decided have included the issue of public participation in the implementation of the Constitution. One such case is the *Republic v Interim Independent Electoral and Boundaries Commission and another* ex parte *Eliot Lidubwi Kihusa and 5 others*.[30] In the case, the Court held that the Interim Independent Electoral and Boundaries Commission (IIEBC) was duty bound to ensure public participation in the process of delimitation of electoral boundaries. In addition, the Court held that the nature and extent of that participation was for the IIEBC to determine, provided it was meaningful and gave effect to the

28 Such activities include drafting of legislation and policies for different sectors that ensure implementation of the constitution and vetting of public officers, among others.

29 See Article 174(c) of the Constitution of Kenya (n 3).

30 *Republic v Interim Independent Electoral and Boundaries Commission and another* ex parte *Eliot Lidubwi Kihusa and 5 others* [2012] eKLR.

purpose of the Constitution, that is, had the effect of promoting accountability, transparency and good governance.

In *Centre for Rights Education and Awareness (CREW) and others v The Attorney General* consolidated with *Patrick Njuguna and another v The Attorney General and another,*[31] the Court noted that:

> The inclusion of the national values and principles at Article 10 of the Constitution is a reflection of the concerns of Kenyans with the opaque and unaccountable manner in which many acts by the state which had an impact on the public were done. Public appointments were made in a manner that totally lacked transparency, and the criteria and basis of appointments were known only to the appointing authority.[32]

It was held that with regards to public appointments, it is critical to have public participation and consultation. Consequently, an opportunity should be given to all who may be interested in the position to apply, and anyone who may have a view on the suitability of the appointee, particularly with regard to integrity and competence, should be heard if they so wish.

In *Ledama Olekina v Attorney General and another*[33] the Petitioner felt aggrieved that he was not given an opportunity to participate in the drafting of the Ethics and Anti-Corruption Commission Bill of 2011 due to Parliament reducing the period of publication of

31 In *Centre for Rights Education and Awareness (CREW) v The Attorney General* the petitioners were seeking various declarations and orders, the gist of which were to declare the act of the then President Mwai Kibaki (of appointing 47 County Commissioners by way of Gazette Notice No 6604 issued on 11 and 23 May 2012) unconstitutional, null and void. See, *Centre for Rights Education and Awareness (CREW) and others v The Attorney General,* High Court Petition No 208 of 2012. In *Patrick Njuguna and another v The Attorney General and another* the applicants were seeking orders of *certiorari*, *mandamus* and prohibition in respect of the same appointments by the then President Mwai Kibaki. See, *Patrick Njuguna and another v The Attorney General and another,* Judicial Review Misc Application No 207 of 2012. The two cases were consolidated into one on 28 May 2012.

32 Article 10 of the Constitution of Kenya lays down the national values and principles of governance that bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. Public participation is one of the values and principles of governance in accordance with Article 10(2)(a) of the Constitution. See, Constitution of Kenya (n 3).

33 *Ledama Olekina v Attorney General and another* [2011] eKLR.

the Bill from fourteen days to four.[34] After parliamentary debate of the Ethics and Anti-Corruption Commission Bill of 2011, Section 34(1) of the original Bill was amended. The effect of the amendment was that five Kenya Anti-Corruption Commission (KACC) officers were forced to leave statutory employment. The argument of the petitioner was that members of the public were denied an opportunity to participate in the making of the legislation as after the stated amendment, Parliament reduced the period of publication to four days. The Court held that the issues raised by the petitioner were of monumental, national and public interest, and hence stayed the effect of the impugned amendment pending the hearing of the case *inter partes.*

Since the constitutional right of access to information[35] is an important component of public participation, it is meaningful to look at the case of *Famy Care Limited v Public Procurement Administrative Board and 5 others,* which clarified the class of persons who can enjoy the right.[36] The Court emphasised that the right of access to information is limited to natural persons and hence cannot be enjoyed by juridical persons.

3.2 Public Participation at the County Level

The Constitution of Kenya recognises the need for public participation at the county level in its Fourth Schedule (Part 2) (14).[37] Consequently, the County Governments Act of 2012 has

34 Before the promulgation of the Constitution of Kenya on 27 August 2010, Kenya had an Anti-Corruption and Economic Crimes Act of 2003. Upon the promulgation of the Constitution of Kenya 2010, it became necessary to replace the stated Act hence the subsequent Ethics and Anti-Corruption Commission Bill which was published on 19 August 2011. The Bill was eventually adopted as the Ethics and Anti-Corruption Commission Act, No 22 of 2011 <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/EthicsandAntiCorruptionAct_No22of2011.pdf> accessed 9 April 2015.

35 See, Article 35 of the Constitution of Kenya (n 3).

36 *Famy Care Limited v Public Procurement Administrative Board and 5 others,* Petition No 43 of 2012.

37 It provides that county governments are supposed to ensure and coordinate 'the participation of communities … in governance at the local level', and should, therefore, 'develop the administrative capacity' for such effective participation. Fourth Schedule (Part 2) (14) of the Constitution of Kenya (n 3).

numerous provisions on public participation.[38] Section 87 of the Act lays down the principles of citizen participation in county governments, which are:

(a) Timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;

(b) Reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;

(c) Protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;

(d) Legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities;

(e) Reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;

(f) Promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and

(g) Recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.

Moreover, Section 88 of the County Governments Act gives citizens the right to petition the county government (in writing) on any matter under the responsibility of the county government. Upon receipt of the petition, the county government authorities, agencies and agents have a duty to respond expeditiously to the petitions and challenges from citizens. The county government may conduct a local referendum on the petitions.[39] This provision is important as the

38 See, County Governments Act (n 3).

39 *Ibid,* Section 90(a) and (b).

petitions will act as a check and balance of the county government affairs, consequently increasing accountability in governance.

Under the County Governments Act, county governments are also expected to facilitate the establishment of structures for citizen participation.[40] Some of the structures include establishment of citizen fora and town hall meetings; creating notice boards to be used for making important public announcements such as procurement awards and job opportunities; convening budget preparation and validation fora; and developing information communication technology platforms.[41] These structures are intended to ensure that citizens are well informed of the affairs of the county government. An informed citizenry is an important aspect of ensuring effective citizen participation.

In addition, the County Governments Act recognises that for public participation to be effective there should be sufficient civic education on issues of devolution and governance, and even on the significance of public participation.[42] This ensures that citizens are enlightened and empowered hence able to actively and effectively participate in governance affairs of the county. In addition, citizens should be able to access information easily from the county government. This guarantees an informed citizenry hence increasing the ability of citizens to effectively contribute to the affairs and decisions of the county government.[43]

Further, monitoring and evaluation of public participation in county governments is important in order to ensure that it is prioritised. The County Governments Act has a provision on monitoring and evaluation, albeit inadequate.[44] However, having provisions for public participation in legislation does not guarantee

40 *Ibid,* Section 91.

41 *Ibid*. Sections 91(a), (b), (c), (d), (e) and (f).

42 Civic education can be effected through the media (such as televisions and community radios), information communication technology and public meetings. See Sections 94 and 95, *ibid*.

43 The County Governments Act in Section 96 acknowledges this by requiring county governments to ensure that every citizen accesses any information held by county government upon request, *ibid*.

44 Section 92(2) of the County Governments Act requires the governor of a county to submit an annual report to the county assembly on citizen participation, *ibid*.

that people will be able to exercise the right. There should be proper mechanisms that ensure that the citizens are able to participate effectively. Hence, it is important to look at the practice in South Africa, which can be a useful guide to the county governments in Kenya in developing an effective public participation mechanism.

3.3 Public Participation: The South African Experience

The current Constitution of South Africa was developed through a very participatory process. In further recognition of the importance of public participation in South Africa, the Constitution has several provisions that directly deal with the concept of public participation.[45]

South Africa is divided into provinces which are similar to the counties in Kenya. It is the responsibility of each provincial legislature to ensure that all necessary steps are taken to guarantee that public opinion is taken into account in decision making.[46] At the municipal level, the Local Government: Municipal Structures Act[47] and the Local Government: Municipal Systems Act[48] require municipalities to involve the public in the affairs of local government such as the making of by-laws.[49]

There have been judicial interpretations of the constitutional provisions on public involvement discussed above. In the landmark

45 See, for instance, Sections 17, 59(1), 70(b), 72(1) (a), 115(a), 118(1) of the Constitution of the Republic of South Africa, 1996 <http://www.gov.za/documents/constitution-republic-south-africa-1996> accessed 9 April 2015.

46 Legislative authority in South Africa is divided between the National Parliament (which has two Houses: the National Assembly and the National Council of Provinces), the nine provincial legislatures (there are nine provinces in South Africa and the legislative authority of the provinces is vested in the provincial legislature of each province) and municipal councils. All the provincial legislatures, the National Assembly and the National Council of Provinces are required by the Constitution to facilitate public participation. This is found in Sections 59(1)(a), 72(1)(a) and 118(1) (a) of the Constitution of South Africa, 1996. Under Section 152(1)(e) of the Constitution, municipalities are also required to encourage the involvement of communities and community organisations in the matters of local government, *ibid*.

47 Local Government: Municipal Structures Act, No 117 of 1998 <http://mfma.treasury.gov.za/Legislation/lgmsta/Pages/default.aspx> accessed 9 April 2015.

48 Local Government: Municipal Systems Act, No 32 of 2000 <http://mfma.treasury.gov.za/Legislation/lgmsya/Pages/default.aspx> accessed 9 April 2015.

49 Centre for Public Participation, 'A Report on Participation and Local Governance' (2007) <http://www.cpp.org.za/docs/reports/2007/lg-report0507.pdf> accessed 15 August 2013.

case of *Doctors for Life International v Speaker of the National Assembly* the Constitutional Court held that Sections 59(1)(a), 72(1)(a) and 118(1)(a) of the Constitution, requiring the national and provincial legislatures to facilitate public involvement in legislative and other processes of Government, actually provide a right and impose a duty to ensure public participation in the law-making process.[50] Hence, if a legislative authority fails to comply with the duty to ensure effective public participation in passing legislation, then that legislation is constitutionally invalid and may be struck down.[51]In addition, the Court held that the legislative authorities have a wide discretion over the appropriate means for facilitating public involvement in the legislative process, allowing substantial room for flexibility and innovation.

From the literature available on public participation in South Africa provinces, it is clear that some provinces have been able to greatly involve the public in their affairs while others are still struggling. The Centre for Public Participation (CPP), which is situated in South Africa, has carried out various studies on public participation.[52] Some of the reports of the said studies have significant lessons which Kenya can benefit from, and therefore, the observations made by the CPP in its 2006 Report are outlined

50 *Doctors for Life International v Speaker of the National Assembly and others* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).

51 See, *Matatiele Municipality and others v President of the Republic of South Africa and others* [2006] ZACC 12;2007 (1) BCLR 47 (CC); 20017 (6) SA 477 (CC) (*Matatiele II*); *Merafong Demarcation Forum and others v President of the Republic of South Africa and others* [2008] ZACC 10; 2008 BCLR 969 (CC); 2008 (5) SA 171 (CC); *Poverty Alleviation Network and others v President of the Republic of South Africa and others* [2010] ZACC 5; 2010 (6) BCLR 520 (CC) where the Court decided that the legislations in question were not constitutional on grounds of failure to facilitate public involvement. See, University of Oxford, 'A Comparative Survey of Procedures for Public Participation in the Law-Making Process' (Report for the National Campaign for People's Right to Information, 2011) <http://denning.law.ox.ac.uk/news/events_files/A_Comparative_Survey_of_Public_Participation_in_the_Legislative_Process.pdf> accessed 15 May 2013.

52 The CPP is an independent, non-partisan organisation empowering civil society organisations to engage actively through accessible and accountable structures and processes of governance. The CPP's programme purpose is to strengthen public participation in governance and advance the achievement of civil, political and socio-economic rights and poverty alleviation. See Centre for Public Participation <www.cpp.org.za> accessed 15 August 2013.

hereunder.[53] The Report was the outcome of a study by the CPP on the provincial legislatures' experiences, structures, systems and practices with regards to public participation, and it made the following observations:[54]

i. The custodian of public participation in legislatures was the speaker or deputy speaker;

ii. Some legislatures had a dedicated public participation unit while in others the communication unit facilitated public participation processes such as public outreach in the form of public education workshops and promotional material;

iii. In some legislatures, portfolio committees were responsible for all public participation activities relating to their specific portfolios;

iv. The Gauteng legislature had a standing committee on public participation that served to encourage members to play a key role in the formulation of public participation programmes and interaction with the citizenry;

v. The most common form of public participation was the holding of public hearings where comments were invited from interest groups, stakeholders and individuals;

vi. Legislatures gave the public between five days' and three weeks' notices of public hearings by placing advertisements in newspapers, public places and the radio in order to enable them prepare their submissions;

vii. Members of the public who were unable to attend the public hearings could send their submissions;

viii. The venues for public hearings were generally accessible to the public. In some cases, transport was provided;

ix. When considering new legislation, some legislatures (such as Free State, Northern Cape and Gauteng) conducted pre-

53 See, Centre for Public Participation, 'Developing a Public Participation Strategy for South Africa's Legislatures' (2006) <http://www.sals.gov.za/research/public_participation.pdf> accessed 15 August 2013.

54 *Ibid*.

hearing work where Bills were simplified and explained to members of the public;

x. Many legislatures had experienced a poor turnout at public hearings as well as submissions by the public that were not relevant to the subject matter at hand;

xi. Most legislatures facilitated their committees to visit community sites in order to gather information, deepen committees' understanding of community issues and establish linkages between committees and communities;

xii. Educational workshops, community radio stations, community print and electronic productions, stakeholder databases, church groups, traditional leadership structures, schools, community structures and theatres were some of the methods some legislatures used to reach particular communities;

xiii. The Western Cape legislature used its website as a means of information dissemination while the Northern Cape legislature utilised Government Communication and Information System, municipalities and schools as avenues for information dissemination and encouraging public participation;

xiv. Most legislatures produced pamphlets and other materials and educational tools to supplement outreach programmes;

xv. The public could submit petitions to legislatures. A dedicated petition standing committee was established to receive and deliberate petitions and make decisions on forwarding issues raised to relevant stakeholders within government;

xvi. Legislatures had constituency offices that were used to facilitate public participation by informing the constituencies about the work of the legislature and popularising the petitions process;

xvii. The Western Cape legislature had a budget figure for public participation;

xviii. The legislatures recognised the need for a more creative and expansive use of technology to improve public participation;

xix. Some legislatures did not monitor and evaluate public participation programmes. The CPP Report noted that it was important for monitoring and evaluation to be done and the outcome of evaluation incorporated into programme planning. This would be possible if the unit tasked with the responsibility of facilitating public participation submitted reports that were evaluated for issues such as the impact of public participation initiatives;

xx. There was active participation by organised interest groups most of which had access to resources. In that regard, it was recommended that public participation mechanisms should consider facilitating participation by the poor and marginalised;

xxi. There should be sufficient staff employed to address issues of public participation;

xxii. There was need to develop a sector-wide strategy to act as a guide and benchmark for legislatures;

xxiii. There should be appropriate internal structures, resources and effective programmes of public participation;

xxiv. There should be appropriate budget allocation for public participation.

Another significant study carried out by CPP looked at the design of public participation in South Africa and compared it with other jurisdictions.[55] In addition, it looked at how KwaZulu-Natal municipalities have implemented public participation.[56] The Report of the study outlined the following findings:

i. Political commitment for public participation was present in all the three municipalities studied. The leaders appreciated

55 Centre for Public Participation, 'Public Participation and Local Governance' (Research Report Prepared in Association with Human Sciences Research Council and the University of KwaZulu-Natal, 2007).

56 *Ibid*.

the importance of public participation for accountability and transparency in local governance. However, the necessary resources to make participation work were not available;

ii. Public participation mechanisms in the three municipalities were generally poorly developed.[57] It was observed that this was because of failure to allocate resources for public participation (especially money for staff and training), failure to institutionalise public participation effectively in the municipalities and between districts and local levels, and a weak civil society;

iii. The public hearings were irregular, members of the public usually got very little opportunity for meaningful input, and there was poor minutes taking, in addition to lack of continuity and follow-up of issues;

iv. There was lack of training for officials, councillors and the community on public participation.

The Report recommended that there should be an annual public participation plan that assigns responsibilities and sets time-frames for all the activities requiring public participation.[58] In addition, sufficient resources should be allocated for public participation.[59] The resources should cater for recruitment and salaries of administrative staff of the public participation units, and funding for training leaders and the community, in order for them to engage meaningfully in public participation.[60]

With regards to the public hearings, it was noted that attendance was not an issue but more required to be done to secure meaningful participation and follow-up.[61] On the budget process, it was recommended that best guidelines should be developed to

57 Public participation mechanisms studied included public consultation processes (the budget, performance management system and public hearings), structures like ward committees and organisational issues such as the establishment of public participation units and the role of community development workers (CDW), *ibid*.

58 *Ibid*.

59 *Ibid*.

60 *Ibid*.

61 *Ibid*.

ensure the effective inclusion of civil society in the annual review process.[62] The development of a Citizen's Charter, which would explain how to make use of public participation, and which would include contact information, was recommended.[63] In addition, it was recommended that advisory committees comprising of expert stakeholders be formed.[64] Such committees would advise on key issues such as performance management system, service delivery contracting, among others.[65] Further, it was suggested that there be partnership with civil society organisations in such issues like training, monitoring and evaluation.[66]

4 Conclusion

From the South African experience, which has been discussed above, it is evident that lack of training (education on public participation), inadequate access to information, and lack of resources and infrastructure to support public participation activities can greatly hinder public participation.

In view of the above findings, county governments in Kenya should, as a starting point, develop a public participation strategy that will ensure that the right to public participation is fully realised. This includes formulating a road map for achieving public participation in the counties as well as designing effective public participation mechanisms. The public participation mechanisms may include processes, techniques, instruments and tools that enable the effective involvement of the public in any particular situation. Since public participation can take different forms in different contexts, different mechanisms should be developed to maximize effectiveness. Such mechanisms may include citizens' advisory committees, citizens' jury, petitions committee, complaints and suggestion schemes, public hearings and consensus forums, among others. County governments may engage experts to develop the recommended

62 *Ibid*.
63 *Ibid*.
64 *Ibid*.
65 *Ibid*.
66 *Ibid*.

public participation strategy, who should work closely with the citizens as this will bring about community and local ownership.

For effective citizen participation to take place, the public should have adequate knowledge of different governance issues to enable them make meaningful input into decisions of county governments. Adequate knowledge on issues such as the constitutional, legal and policy framework on public participation and devolution, especially on the role of counties, the budget process, the procurement process and the right to information, among others, is necessary. It is important that the civil society, the private sector and experts are involved in the training of the public. In addition, information on pending legislation and opportunities for public participation should be effectively communicated through the media and other communication avenues such as community traditional leaders, churches, schools, community radios, pamphlets, among others.

Section 88 of the County Governments Act gives citizens the right to petition the county government (in writing) on any matter under its responsibility.[67] Upon receipt of the petition, the county government authorities, agencies and agents have a duty to respond expeditiously to the petition and challenge from citizens. The county government may conduct a local referendum on such petitions.[68] A petitions committee should, therefore, be formed within the county government whose task would be to receive, deliberate on and make decisions on the petitions that may be raised by the public.

The counties should also establish dedicated offices to coordinate their public participation functions and public education programmes, which may be modelled to operate in a manner similar to the public participation units of provincial governments in South Africa. The established public participation units of county governments should have several departments to cater for different public participation activities. Some of the departments can be as follows: a civic education department to cater for training, education and access to information as well as encourage meaningful participation; a communications department to take care of all

67 County Governments Act (n 3).

68 *Ibid*, Sections 90(a) and (b).

communication issues such as correspondence with the media, and coordinate public hearings, road shows, workshops and conferences, in addition to keeping proper records and minutes of meetings; an information technology department to ensure that the benefits of information technology are maximized by the public;[69] and an evaluation department to monitor and assess the effectiveness of public participation in the county.

Sufficient resources should be set aside for public participation. The funds should be used for coming up with the initial public participation infrastructure,[70] civic education, public hearings, staff remuneration, among others. With regard to public hearings, they should be held at venues that are easily accessible by the general public in order to guarantee attendance. In some instances, transport should be provided to those who wish to attend. In addition, experts, professionals, the private sector and academic groups in the community should be consulted as they are a reservoir of knowledge and experience and can hence give meaningful input in various county governance processes. The county government should analyse and consider all relevant matters presented to enable it respond to comments raised by the public in a conclusive, decisive and timely manner. This will make the community feel that they have a voice in the governance of the county.

Finally, monitoring and evaluation of public participation is imperative. Currently, the only provision on monitoring and evaluation of public participation in counties is found in Section 92(2) of the County Governments Act, which mandates the governor of a county to submit an annual report on citizen participation to the county assembly.[71] The civil society should also be involved in

69 The department can develop and manage the public participation website of the county as well as develop and manage the public participation Twitter and Facebook accounts. In addition, it can take advantage of the number of mobile services available such as toll free numbers. In Canada, there is a dedicated Government website that is used to provide a single-point access to online consultations with the public. See, University of Oxford (n 51). For the Canadian Government website, see Government of Canada, 'Consulting with Canadians' <http://www.canada.ca/consultingcanadians/> accessed 9 April 2015.

70 For instance, developing a public participation strategy, establishment of a public participation unit and recruitment of staff, among others.

71 County Governments Act (n 3).

monitoring and evaluating public participation in the counties in which they are situated.

However, it should still be acknowledged that while public participation is desirable, it can slow down, and sometimes stall, decision making at the county government level, as different public interest groups may disagree on the option to pursue in a given situation. Moreover, meaningful public participation does not mean that the public's submissions must be reflected in the final decision, as some of them could be in direct conflict with progressive policies of the county government.

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