The role of the Judiciary in the accountability and governance of the devolved Government structure

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1. Introduction

This paper argues that the devolved system of government is crucial to securing the promise of the Constitution of Kenya 2010 and that the Judiciary should take a pro-active role in facilitating and protecting devolved government. The 2010 Constitution introduces a devolved system of government where Kenya shall be governed by two levels of government, the national government and county governments. Devolution is a form of decentralization. It is the process of transferring decision-making and implementation powers, functions and responsibilities as well as the concomitant resources to legally constituted, and popularly elected local governments.¹

Decentralization is not a novel concept in Kenya. Since independence there have been numerous attempts to decentralize and devolve governance. Perhaps the only robust attempt at decentralization was the *majimbo* system entrenched in the Independence Constitution of 1963. This system was soon abolished. The road towards a highly centralized system of government began in 1964. The first core strategy was to concentrate power in the president and centralize authority in Nairobi as I have noted elsewhere,

"Immediately after independence, the Kenya African National Union (KANU) political elite sought to dismantle the Independence Constitution in order to implement the Kenyatta-Mboya-Njonjo-Nyerere theory of singular executive authority (one centre of power)."²

¹ Albert K. Mwenda (eds) (2010) *Devolution in Kenya: Prospects, Challenges and the Future* Institute of Economic Affairs Research Paper Series No. 24, Nairobi.

² Ben Sihanya (2010) "Reconstructing the Kenyan Constitution and State, 1963-2010: lessons from German and American constitutionalism," *Law Society of Kenya Journal* Vol. 6 No. 1, pp. 1-35.

Even the introduction of local governments, the District Focus for Rural Development (DFRD), the provincial administration, among others, did not help decentralize governance and power.³ The central government was the centre of power which was increasingly vested in an imperial and ambivalent presidency; a presidency that became increasingly authoritarian and populist at the same time.

Under the highly centralized system of government, Parliament and even the Judiciary were seriously weakened and played to the tune of the executive. Ghai, Okoth-Ogendo, Githu Muigai, Walter Oyugi Mutatha Kangu, Charles Hornsby (1989), and others note that both under President Jomo Kenyatta and President Daniel Arap Moi, Kenya was increasingly dominated by the institution of the Presidency and the authorities of the other organs of government were seriously weakened.⁴ Thus with the introduction of devolution, and the constitutional empowering of other organs of government, it is expected that such organs of government will play a major role in the governance structure.

The 2010 Constitution constructs a politically, administratively, and juridically empowered and independent judiciary. Its main role is to authoritatively and independently implement and defend the constitution. In this role, the judiciary will be instrumental in *adjudicating* the *constitutionality* and *legality* of the exercise of presidential and public authority in Kenya. The constitutional provisions creating normative benchmarks for the exercise of state power, for example, require interpretation by the courts, as the process of implementing the Constitution unfolds.

This presentation reviews three important aspects. First, the concept of accountability in a devolved system of government. Second, the role the judiciary is expected to play in ensuring accountability in the devolved government structure. Third, the role of the judiciary in the governance of devolved governments.

³ See generally, Joel D. Barkan & Michael Chege (1989) "Decentralising the State: District Focus and the Politics of Reallocation in Kenya," *Journal of Modern African Studies*, Vol. 27, No. 3 Cambridge University Press.

⁴See Charles Hornsby (1989) "The Social Structure of the National Assembly in Kenya, 1963-83," in *The Journal of Modern African Studies*, Vol. 27, No. 2, at p. 275.

2. The concept of accountability

Article 10 of the Constitution of Kenya 2010 outlines national values and principles of governance. Good governance and accountability are included.

Accountability is one of the cornerstones of good governance and requires the due performance of tasks or functions by an individual or agency. Such a mandate and performance are subject to another's oversight, direction or request that the individual or agency provides information or justification for its action.⁵ Thus accountability exists where persons in authority are answerable for their actions and there is transparency in leadership.

Kenyans agitated for a devolved system of government mainly because the highly centralized government failed to ensure accountability and transparency in leadership. Principles of good governance were rarely adhered to. The national government wielded too much power, exercised authoritarian and dictatorial control and further weakened all systems that would provide checks and balances. This created a system where rulers were not answerable to the people who gave them the mandate to lead.

Kenyans expected a devolved system of government to cure the defects of the centralized government. Article 174 of the 2010 Constitution lists the object of the devolved government, including promoting democratic and accountable exercise of power.

It is in this context that the national government is based in Nairobi and 47 county governments are based at the counties which used to be districts under 8 provinces. The key parameters of the national and county government, including areas of concurrent authorities are enumerated in the Fourth Schedule.

How will the Judiciary ensure this objective is achieved?

At

http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf

3. Role of the judiciary in ensuring accountability and good governance of the devolved government

The Judiciary consists of judges and magistrates, and paralegal staff that are largely accountable to the Judicial Service Commission (JSC). Structurally, the Judiciary consists of the Supreme Court, other superior courts, and subordinate or magistrate courts. The Judiciary remains an agency of the national government. It is not devolved, although it is to under go various forms decentralization. The role of the judiciary in ensuring accountability of the devolved government may be understood against the backdrop of the wider role the judiciary is expected to play, including providing informative interpretation of the Constitution as the laws. It is also important to note that the 2010 Constitution empowers and strengthens the Judiciary to enable it perform its functions. The Constitution reinforces judicial independence to guard against the influence and manipulation of other organs of government, especially the executive.

It should further be noted that the Constitution 2010 enacts a compromise on devolution, in terms of decentralized powers. The executive and legislative powers are decentralized. The coordination and management of the Judiciary will remain centralized. [to review]

Further, Judicial restructuring is one of the urgent matters in the implementation process. This restructuring is in line with calls for judicial reforms to curb some of the challenges that have faced the judiciary in Kenya since independence in 1963. These included limited human, financial and physical resources, corruption, inefficiency, delays, political patronage, ethnicity and nepotism, manipulation and interference, and backlog of cases, among others. It is recognized that the radical surgery of the Judiciary in 2004 did not sufficiently address these problems and challenges. These reforms are crucial in building an empowered Judiciary that will perform key functions in the new constitutional dispensation.

The judiciary is expected to play the following core functions to ensure accountability and good governance in the devolved government.

3.1 Review of legislation as well as administrative and executive decisions

The judiciary has the power through judicial review mechanisms to review executive and administrative conduct or actions of the state, state organs, state departments, and state officials. Judicial review commonly refers to the authority of the court both to review the constitutionality or validity of legislative acts and to pass upon the constitutionality or validity of executive and administrative acts, and to disregard, or direct the disregard of such acts as are held to be unconstitutional or as violative of applicable statutes.⁶

The review is to ensure that such conduct, actions or decisions conform to the Constitution and the law. This includes the power to review any decision of any inferior tribunal and administrative or executive agency.

In this regard, if the devolved government adopts an unaccountable system of governance, and makes decisions through such a system, the judiciary is expected to step in and review such decisions. As earlier noted, accountability is a national value and principle of government entrenched in Article 10 and other provisions of the Constitution. Therefore, devolved governments have to ensure they are accountable in governance, failure to which they risk having the courts review their actions and decisions.

3.2 Enforcement of the 2010 Constitution

Enforcement is mainly used with regard to the role of the Executive and administrative agencies. Under the 2010, constitution, it is the duty and obligation of the Judiciary to enforce the

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⁶ Paul Craig (2008) Administrative Law, Sweet & Maxwell, London; Peter Kaluma (2009) Judicial Review: Law Procedure and Practice LawAfrica Publisher, Nairobi; F.P. Feliciano, "The application of law: some recurring aspects of the process of judicial review and decision making" 1992 American Journal of Jurisprudence 17-56, 19. See also Gichira Kibara (2011) "Reforming the Judiciary: Responsiveness and accountability of the Judiciary," A study under the auspices of the Friedrich Ebert Stiftung (FES) and University of Nairobi's Department of Political Science & Public Administration, Occasional Paper Series, Nairobi, presented at the FES and UoN workshop, Nairobi Safari Club, November 2011.

Constitution as law through decisions or orders. This is mainly the case where there has been blatant disregard or neglect in enforcing the Constitution, and especially the Bill of Rights. It is through this role that the Judiciary will act as a restraint against executive and legislative abuse of power, dictatorship, megalomania and intrigue (or *fitina*). This includes the county executives and county assemblies. The Judiciary in this sense has a duty to ensure that devolved governments adopt principles of good governance, are accountable, and respect and follow the letter (or text) and spirit (or intendment) of the 2010 Constitution.

In enforcing the Bill of Rights, the judiciary is expected to protect the liberties, rights and interests of minorities and the marginalized in the county governments. Devolved governments ought to promote the concept of public participation where the public participates in the decision making process of the County.

Further, the judiciary should help ensure that the county government observes the rule of law in the governance process. It is recognized that the rule of law, upheld by an independent and incorruptible Judiciary, is an essential bulwark of democracy.⁷ Under a constitutional government or democracy, principles of accountability and good governance are respected.

3.3 Interpretation of the Constitution

The judiciary has the ultimate power to interpret the Constitution and the law faithfully considering its texts (or letter), structure, and history (or practice). Judicious interpretation, construction or translation of the text, structure, and history in the context of the social, economic, technological, cultural or political questions before it will be important in shaping governance and accountability of devolved governments. Related to this role is the Constitution implementation role. The Judiciary is expected to ensure that the national and county governments implement the Constitution in the manner laid down by the law. The Supreme Court will be instrumental in this regard.

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⁷ John Haberson (2012) "Judiciary on course to true independence," *Nairobi Law Monthly* Vol. 3, issue No. 1, January 2012, pp. 6-7.

Thus the Judiciary is expected, while interpreting the Constitution, to ensure that its supremacy is not compromised and further to declare void any legislation or conduct that is inconsistent with the Constitution.⁸ This cuts across the national and county governments. County governments will thus have to ensure that any laws that they enact conform to the Constitution. They should also seek the guidance of the Judiciary in interpreting provisions of the Constitution, especially the potentially controversial ones.

3.4 Advisory role

The Supreme Court under the Constitution 2010 will also be giving advice to the executive. Article 163 (6) states that the 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 advisory role will be important in two ways. First, to ensure that the governance of county governments is according to the 2010 Constitution. Second, to advice on how to deal with any emerging conflicts between the county government and the central governments.⁹

3.5 Promoting a structural government, the rule of law and constitutionalism

The Judiciary can be instrumental in promoting constitutionalism through Constitution implementation, which overlaps with interpretation. Several questions are important in respect to this. Can the Judiciary move *suo moto* where the other organs of Government have failed or are intransigent or recalcitrant? What is the import of a declaratory order under Article 261(5)-(7)? Can the Judiciary order institutions like Parliament to pass an important implementation Bill if Parliament fails or refuses to do so?¹⁰

Through this role, the Judiciary will keep a watchful eye over the affairs of the County governments to ensure that they conform to the Constitution. Gichira Kibara notes:

⁹ The advisory jurisdiction of the Supreme Court is still unclear. In the US, which the Kenyan Constitution seeks to adopt, courts only adjudicate cases or controversies not speculative matters.

⁸ Articles 2, 159.

¹⁰ The Bills due by 27/2/2012 are adversely running late and some MPs are seeking extension. There is also evidence that some laws passed to implement the Constitution are constitutionally suspect.

"How the Kenyan judiciary balances between judicial activism and maintaining separation of powers by not interfering in the policy domains of the executive and the legislature and making timely and relevant interventions on behalf of the public will to a large extent determine whether it would regain the confidence of the people of Kenya." ¹¹

The ongoing judicial reforms are important to achieve the foregoing. However, questions have been raised about the legality of stand-alone courts by Parliament. George Kegoro notes thus,

"The establishment of stand-alone courts to deal with land disputes on the one hand and issues of labour, on the other, must be regarded as a form of diversification of forums for the resolution of judicial disputes." ¹²

The pluralism in dispute judicial and dispute resolution mechanism could present difficulties service delivery and administration at county level: what is the appropriate form? What of where the judicial and quasi-judicial decisions are contradictory?

4. Conclusion

The Judiciary will thus be instrumental in facilitating accountability and governance in the devolved government. The

¹¹ See Gichira Kibara (2011) "Reforming the Judiciary: Responsiveness and accountability of the Judiciary," A study under the auspices of the Friedrich Ebert Stiftung (FES) and University of Nairobi's Department of Political Science & Public Administration, Occasional Paper Series, Nairobi, presented at the FES and UoN workshop, Nairobi Safari Club, November 2011. Mr Kibara is the Ag. Permanent Secretary, Ministry of Justice National Cohesion and Constitutional Affairs.

¹² George Kegoro (2011) "The New Constitution: Judicial Reforms One Year Later," A study under the auspices of the Friedrich Ebert Stiftung (FES) and University of Nairobi's Department of Political Science & Public Administration, Occasional Paper Series, Nairobi, presented at the FES and UoN workshop, Nairobi Safari Club, November 2011.

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