

**INTERNATIONAL CENTER FOR POLICY AND CONFLICT  
POLICY BRIEF ON TRANSPARENT ACCOUNTABLE DEVOLVED  
GOVERNANCE INITIATIVE  
ICPC PROJECT UNDER DEMOCRATIC GOVERNANCE FOR  
DEVELOPMENT PROGRAMME 2013**

**March 2014**

**March 2014**

## Contents

About ICPC .....	3
Executive Summary .....	4
1. Introduction .....	6
2. Approaches and Results.....	7
3. Observations and Conclusions .....	9
4. Policy Recommendations.....	11
References .....	12

## **About ICPC**

International Center for Policy and Conflict (ICPC) is a non-profit, Independent, human rights public policy research, advocacy and education institute. It was established in Kenya in 2001 but got official recognition as a trust in 2005 under the Trustee (Perpetual Succession) Act Chapter 164. ICPC espouse a free society with dignity, equality and justice for all. Our mission is to create, promote and engage platforms that transform societies.

The Center is an affiliate of Africa Open Democracy Foundation (AODF) and partner of Africa Rights and Democracy Institute (ARDI). Our three over-arching strategic goals are; Larger Human Rights and Freedoms, Democratic development and Human Security.

The organization's strategic focus and concentration is to; a) Promote, contribute and strengthen respect for human rights and consolidating democratic governance, b) Research, engage and advocate public policy solutions for development of more equal democratic, inclusive and secure societies, c) Mechanisms for access to justice and security, d) Education and information sharing and e) A secure, accountable, visible and resourced institute.

The Center comprises of the five (5) members of the board, Management Committee and full-time programmatic and administrative paid staffs. In addition, it utilizes a network of Associates and Consulting Experts and works in concert with other local, regional, and international organizations. It also offers internships and fellowships. The Board members are responsible for the strategic policy direction of the Center. The management committee guarantees a sound internal management structures and policies that contribute to the optimal functioning of the organization. The Executive Director is the head of the secretariat, responsible for its management and implementation of policy directions, coordination of programmes and ensuring accountability in utilization of its resources.

## Executive Summary

This Policy Brief Note outlines International Center for Policy and Conflict's (ICPC) experience in the implementation of the devolved governance in Kenya as enshrined in the Constitution of Kenya 2010 and after the March 2013 General Elections.

The guiding principle for this briefing note is the Harare Declaration: ***Affirmed the 'Individual' inalienable right to participate by means of free and democratic political processes in framing the society in which she or he lives and pledges to work further on 'democracy, democratic processes and institutions, which reflect national circumstances, rule of law, independence of judiciary. A Just and accountable government.***

One of the critical features of the Constitution of Kenya 2010 is the creation of a devolved cooperative system of governance dismantling the oppressive skewed centralized government the country has had since 1964. The goal of this system of governance is to establish a developmental state with enhanced public welfare.

Devolved governance system of government is obliged to: offer democratic leadership and governance; be responsive and accountable to communities; deliver high quality and effective financial management practice and quality services; provide skilled human resource capital to ensure professional administrations, and positive relations between labour, management and people; and fulfill legal requirements to ensure the active participation of communities in local government processes.

ICPC's approach to its work is both institutional, direct interventions and collaborative initiatives. This way, the Center is about to maximize on the resources and tap knowledge and competencies from a wide range of sources. In the months of April and May 2013, ICPC hosted a collaborative series of consultative and capacity building forums on devolved system of government in the randomly selected Counties of Nyeri, Kirinyaga, Embu, Meru, Murang'a, Kwale and Kilifi. This project brought together County Assembly representatives, journalists and civil society organizations based at these counties.

This is part of ICPC's **Transparent Accountable Devolved Governance Initiative** project of the Democratic Governance for Development Programme. Through these activities, ICPC was able to experience firsthand, the various challenges that different actors are facing in the implementation of the devolved governance devolution.

Glaring inadequacies noted and identified included capacity gaps on procedures, facilities, human resources and *modus operandi* of the devolved units; limited public participation of citizens due to lack of clear channels for public participation and lack of general capacity for effective participation. Other challenges are inequalities in representation as there is no gender balance or representation of minorities and vulnerable groups at the counties; weak oversight mechanisms; and a serious information gap.

As a matter of priority, several interventions are recommended including: establishment of watertight financial and administrative policies and law in counties; conduct broad, coordinated and intensive civic and human rights education on devolved governance system; promulgation of regulations to stem indiscriminate hiring and firing personnel in the Counties; tighten and implement a transparent and accountable County supply chain management system; ensure the policy and financial programmes implementation of the national and county governments are synchronized and coherent in county; and Integrated Development Plans; avoid "one size fits all" approach by differentiating responsibilities and priorities of the integrated development plans; and improve intergovernmental relations.

This brief note, in a summative manner, examines these challenges and gives recommendations.

## 1. Introduction

The Constitution of Kenya in Article 10 lays out the national values and principles of governance which include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.<sup>[1]</sup> This is where the public draws their right to participate in all governance issues whether at the national or county level.

It ushered in constitutional recognition for local government by recognizing its autonomy and guaranteeing it revenue generating powers, as well as a right to a share of nationally generated revenue. The Constitution posited devolved system of government as a critical development vehicle by listing the constitutional objects and developmental duties of the county government. This centered on deepening democracy, sustainable service delivery, social and economic development, environmental protection, community participation, poverty alleviation and intergovernmental cooperation.

There are five statutes that put in place measures and frameworks for implementation of devolution. These are *the County Governments Act, 2012*, *The Urban Areas and Cities Act, 2011*, *The Inter-Governmental Relations Act, 2011*, *The Public Financial Management Act, 2012*, and *The Transition to Devolved Governments Act, 2012*.

However, the Country through the relevant Ministry is yet to develop a comprehensive coherent policy paper in consultation with the relevant institutions to translate constitutional objects and duties enshrined Constitution into practical harmonized and rationalized institutional architecture and guideline of the operations.<sup>[2]</sup> The policy paper is a prerequisite tool in outlining the pathways towards maximizing inclusive economic growth and social development, integrating and coordinating democratic rule of law and public participation, and learning processes.

Listening carefully to Members of County Assembly and civil society in the forums, they shared a position that the County government is the closest to the citizens with ability to obtain and understand people's wishes and aspirations. Further, they seemed to agree that the devolved government stood in the best place to identify and unlock local potential, and mobilize

resources in the County. However they expressed concerns and fears that for this to happen, it will depend on the capacity and design of the County government and whether it has the right responsiveness as well as the prerequisite human, financial and physical infrastructure to deliver.<sup>[3]</sup> Political will at the national government should fully support establishment and maturity of the County Governments coming up across the board.

Other crucial benefits of effective devolved system of the government articulated by participants included the potential it holds in rooting democracy because of the many sites of engagement paying pivotal role for the development of new leadership and the consolidation of constitutional democracy; responsibility to Counties create room for local creativity and avoids the phenomenon where the entire country needs to experience the same experiment before it can be evaluated; and County governments will be key players in multi-sectoral coordination as they are the witnesses of the actual delivery by all development actors on the ground.

The common concern emerging in these forums was that weak authority and defective institutional and operational rules will make it difficult to for the County Government to reach decisions, and thereby lead to policy failure and weakened county governance. Also, lack of clear clarity of the intergovernmental framework would keep creating tensions and confusions due to either duplication or implementation differences.

## **2. Approaches and Results**

ICPC runs the **Democratic Governance for Development Programme**. This programme is aimed at deepening and consolidating democratic governance and accountability in order to achieve the human development priorities and democratic practice culture. The programme addresses weak governance institutions and undemocratic governance practices; flawed and discriminatory electoral governance systems and practice; and civic engagement in policy-making and legal processes.

**Transparent Accountable Devolved Governance Initiative** is a project of the Democratic Governance for Development Programme. The project is conceptualized to engage and

promote policy dialogue and applied research on effective democratic local governance. The initiative acts as a forum to deliberate on emerging policy issues, systematic learning and experiences exchanges from on-going devolution policy, fiscal and legislative engagements. It also endeavors to catalyze a coalition of devolution governance practitioners, citizen participation and democratic accountability.

The project is built around three core areas of capacity needs of the devolved governance; sustained democratic accountability; and creating space for citizen participation and social inclusion with the expectations being; exchange of knowledge and experience to strengthen local actions and inform policy processes.

ICPC undertook pilot trainings and policy dialogues focusing on devolved system of governance in the months of April and May 2013. This was informed by the knowledge gap identified through ICPC monitoring of and engagement in the electoral processes leading to the March 2013 elections. The capacity building and dialogues centered on:

- i. The Constitution and Principles of devolved governances
- ii. Devolved governance legal and institutional framework
- iii. Devolved governance in the context of historical injustices
- iv. The role of the media in devolved governance
- v. Civic engagement and participation in devolved governance
- vi. Civil society engaging devolved governance

The Counties piloted included Nairobi, Nyeri, Kirinyaga, Embu, Meru, Murang'a, Kwale and Kilifi. Also, through ICPC collaborating partners, detailed information from counties of Vihiga, Kakamega and Nakuru was obtained. The selection of the Counties was done randomly but also as a result of request for capacity development from the various grassroots partners. The target groups for this pilot project were the media, civil society and Members of County Assembly. In total 70 County Assembly Representatives, 1 Deputy Governor, 2 speakers, 25 civil society organizations and 51 journalists were involved in the pilot project.

### 3. Observations and Conclusions

- i. Public expectations are soaring high on the devolved governance. However, devolution as a concept and system of the governance system is far from being understood. The problem is worsened by systemic factors, deficient of democratic structure, rules, policies and institutions and lack of clarity of the intergovernmental framework and connection between the County and national government functions on the ground.<sup>[4]</sup> For instance, at the national level, the role of the Senate and National Assembly in division of revenue for counties ended up in the Supreme Court. Both Houses held contrary opinion on the procedure of enacting the Division of Revenue Bill, 2013. The Supreme Court in its Advisory Opinion reaffirmed that both Houses had constitutional mandate as far as it relates to Division of Revenue for Counties.<sup>[5]</sup>
- ii. There is a serious disconnection and disagreements on the policy and legislative roles of county and national governments.<sup>[6]</sup> Many Members of County Assembly expressed serious concerns of fear to failure. Information made available to them was minimal, inadequate and skewed therefore hindering their effective participation and implementation of their mandate at the County government.<sup>[7]</sup> This is further exacerbated by the multiplicity of institutions and sharing of political authority across a number of administrative levels creating institutional complexities that lead to democratic deficits.
- iii. The County governments lack developed and transparent systems and procedures for project planning, procurement, budgeting, monitoring and evaluation. There is also existence of inadequate human resources and limited budgets to enable implementation of core functions and delivery of services.<sup>[8]</sup>
- iv. The relationship between Governors and Members of County Assembly (CARs) as well as other elected officials to national institutions like Senate and National Assembly clearly show a strained or tense relationship and engagement. Some of the Counties are conducting themselves as if they were independent units yet they are expected to work hand in hand with the national government. Further, it emerged that there are fears of the Governor manipulating Members of County Assembly to ratify their actions because

majority (MCA) lack basic knowledge of such processes as procurement, legislative and budget oversight.<sup>[9]</sup>

- v. Weaknesses in the civilian participation systems. Because of inadequate information on devolved governance operations and laws governing it, the workshops revealed very little transparency, citizen participation and accountability control systems.<sup>[10]</sup>
- vi. The capacity deficit among government, communities and CSOs. Despite the existence of legal mechanisms, most members of the County Assembly do not have basic skills to understand the laws that create their assemblies and how to apply them; there are no supportive facilities, infrastructure and skilled human capital to enable County Assembly Representative carry out their duties and responsibilities effectively.<sup>[11]</sup> One of the County Assembly Members told ICPC that they do not even understand what Standing Orders in the Assembly are. In one of the County Assemblies, there was a proposal by the Speaker to allow illiterate members to use vernacular languages to debate in the sessions but this move was seen to pose a threat to national cohesion.<sup>[12]</sup> The Constitution recognizes two languages English and Swahili as the official languages in Kenya. A glance at the training sessions of County Assemblies illustrates a disheartening state of affairs. In some occasions; the facilitators are forced to have translators to enhance their sessions. An audit of the Assemblies credentials would reveal a milestone in developing an effective national policy towards enhancing the effective of county Assemblies.
- vii. Foreign trips syndrome. A common phenomenon in County governments is the purported benchmarking visits in foreign countries to learn ideals of devolution. This practice is not only wasteful but ill-advised as well. Some of the countries that have been visited have been categorized as failed federals or decentralized cases as may be the case.
- viii. Prudent financial practices have not taken ground. Almost all the counties have audit queries raised by the Auditor General.

## 4. Policy Recommendations

- i. Sustain political will to create a favorable enabling environment for devolved system of government: This would include providing proper interface between County and national governments and harmonizing the administrative functions and institutions. The imperative of greater decentralization to county governments must be recognized. The basic guiding principle of subsidiarity must be promoted as a vehicle to strengthen democracy and service provision, and ensure an “enabling environment” for county authorities to take on their responsibilities. Otherwise, the country is at risk.<sup>[13]</sup> For instance, it can be argued that the transition process was not well thought out.<sup>[14]</sup>
- ii. It is imperative to develop democratic local governance system. This requires technical support for County governments and community efforts to create a County government that operates in a more responsive, accountable, participatory, and increasingly effective or more democratic manner.
- iii. Building County institutions and representatives’ capacity: Strengthening the capacities and accountability in devolved governments is critical to reinforcing people’s confidence in County public institutions; improving their ability to deliver public services and their financial standing; and providing skilled human resource and prerequisite institutional infrastructure/facilities.
- iv. The distribution of resources and responsibilities between national and county governments needs to be clarified and balanced to allow local authorities to assume the tasks they are allocated and to be accountable to the people who elected them.
- v. Strengthening gender equity in County governance must be encouraged through improving the participation of women in County governments’ affairs.
- vi. Civil society and media will play an important role in facilitating public participation and accountability of devolved system of government. Also, deploying monitoring and dialogue tools for the county governments to realize their mandate and developing more effective, democratic and pro-poor gender sensitive policies and laws.

- vii. Establish an effective monitoring and learning mechanism on the devolved system of the governance

## References

[1] See article 2 (a) of the Constitution of Kenya 2010.

[2] Some counties prefer to have a national policy or legislation in common areas like public participation framework. In the case of Meru County Assembly, the speaker is of the opinion that such would be more efficiency instead of each county hiring experts on need basis to develop such policies or legislation. Furthermore, there is a simmering crisis on the country's wagebill and drastic measures like reduction of counties from 47 to 10 have been mooted by way of constitutional amendment, see, Jacob, Ngetich, 'Leaders warn against MPs' costly bid to assault the constitution' Standard Newspaper, dated 23<sup>rd</sup> March, 2014.

[3] In a paid advert in Standard Newspaper dated 23<sup>rd</sup> March, 2014, the National Treasury, outlines, "The Release of the 6<sup>th</sup> Tranche of the Equitable Share of Revenue to County Governments pursuant to County Allocation of Revenue, Act, 2014" From the advert, it is illustration of disparity amongst the Counties with balance ranging from 3% to 79 %.

[4] The Council of Governors has consistently accused national institutions of interference with County affairs and has gone ahead to seek Advisory Opinion from the Supreme Court (find details) and has threatened to seek intervention from the courts if the initiative to amend County Government Act, 2011, to establish County Development Board that would chaired by the Senator with the Governor as the Secretary materializes (find citation).

[5] Speaker of the Senate & Another v. Hon. Attorney General & Another & 3 Others [2013] eKLR

[6] In an ongoing case involving theousted Embu Governor (Martin Wambora), amongst other issues challenges the criteria and threshold of impeachment of a Governor. The oversight role of both County Assemblies and the Senate are subject of consideration and when powers of impeachment can be invoked.

[7] In the case of Meru, the development of County Integrated Development Plan 2013-2018, was undertaken without effective involvement of the Assembly and as such illustrates lack of coordination that would consequently impede effective policy and legislation making.

[8] Cite, the advert on County employees and their qualification (Ministry of Devolution)

[9] One of the County Assembly Representative told ICPC at one of the trainings that they vied for the position since it did not require high education qualifications. They were also afraid of being used by the governors to pass everything the governor proposes without raising any questions on the matters. Interestingly a number of County Assemblies have enacted Ward Development Fund Legislation or have intent to do so (Meru, Laikipia, Nairobi, Kakamega, Machakos etc) and the Controller of Budget has raised a red flag, that no money would be released to such initiatives if the MCAs have a role in the management of the Fund.

[10] There is limited if any civilian participation at the various committee sessions at the Counties. Of great concern is that most County Assemblies have not publicized their Calendars notwithstanding the legal requirement in their respective Standing Orders. It also remains a real challenge for effective participation, considering the flawed legislative procedure adopted by the Assemblies. In some instances some assemblies fix issues in the Order Paper just to ensure a sitting takes place to fetch the sitting allowance without necessarily having any tangible outcome of such sessions.

[11] One of the County Assembly representatives informed ICPC that “the Constitution was passed and it was not read”. In the trainings only 3 out of the 55 county assembly representatives trained had copies of the Constitution most of them complained that the bundle of Statutes and Laws they are required to understand are too many and bulky.

[12] See Bryan Tumwa, No Vernacular, Mr. Speaker Sir, April 3<sup>rd</sup> 2013.

< [http://www.standardmedia.co.ke/?articleID=2000080701&story\\_title=no-vernacular-mr-speaker-sir](http://www.standardmedia.co.ke/?articleID=2000080701&story_title=no-vernacular-mr-speaker-sir)>.

[13] The enmasse resignation of Doctors based in certain Counties like Embu leaves a lot to be desired and an illustration of a still initiative undertaken by the institutions charged with overseeing transition. (Cite the T.OR of Macharia Taskforce)

[14] Cite Council of Governors contention against TA