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Kenya Devolution Programme

Effective, Open and Accountable County Governance

Focus Areas:

1. Intergovernmental relations that supports devolution
2. Effective county planning, public finance management and staff performance
3. County government and citizens' engagement to improve service delivery and livelihoods

Introduction

The Act Change Transform led Consortium is currently implementing the Kenya Devolution Programme (KDP), a four year (2021 – 2025) national programme funded by the Foreign, Commonwealth and Development Office (FCDO). The programme aims to address some of the specific challenges facing devolution in selected counties in Kenya. The KDP has seeks to make a contribution in five Output Areas. These areas:

1. *Intergovernmental relations that supports devolution*
2. *Effective county planning, public finance management and staff performance*
3. *County government and citizens' engagement to improve service delivery and livelihoods*
4. *Evidence generation, digital technology and learning as enablers of public service delivery and reform*
5. *UK Government Portfolio in Kenya is better aligned with county government priorities*

Successful delivery of the KDP requires a deep understanding of the intervention context including the power dynamics. To enhance understanding of the implementation context, the Consortium committed to generate political economy analysis briefs on a monthly basis. The monthly briefs are to provide clear and succinct synthesis of key issues in the KDP implementation context with a focus on the five Output Areas. The bulk of the data that informs the brief report emanates from a close monitoring of the media in Kenya. Each *Monthly Briefing Note* should be no more than two pages. This *Monthly Briefing Note* provides a snapshot of main issues during the month of January 2022 in Kenya's political economy that may impact on the implementation of the Kenya Devolution Programme.

Political Economy Analysis: May 2022

Highlight of Key Issues

This section provides an overview of key happenings in the country and their implications for the implementation of the KDP and in particular the five Output Areas.



1.1. Intergovernmental relations that supports devolution

The Constitution envisions a situation where the two levels of government and Constitutional agencies work seamlessly through consultation, cooperation and coordination. Over the years, both levels of government have come to the realization that they cannot work alone, given the often-overlapping functions that may require the cooperation with other county governments or the national government. In some instances, failure by the two levels of government to consult and cooperate has resulted to costly court disputes. The Intergovernmental Relations Technical Committee has tried to fill this void by championing alternative dispute resolution mechanisms among government entities (e.g. county vs. county; or county vs. national government). A case in point is the on-going dispute before IGRTC between the Nairobi City County Government and the Ministry of Defense over the routing of the Kayole – Mihang'o ring road.

During the month under review, the national cabinet gave approval of the Laikipia county infrastructure bond ending a period of push and pull between the county government and the national government.[1] Seeking approval from the national government is on the basis of a legal provision that requires engagement of the county governments with external donors to be sanctioned by the national government. While such an approach is meant to enhance coherence in the country's foreign relations, delays in ratifying county level engagement with external donors stifles the timely implementation of such development intervention.

A second issue on intergovernmental relations identified for the month of May 2022 relates to the politics of health care in the counties. Three issues stand out: debate on the audit report of the Kenya mobile clinics project; Beyond Zero mobile clinics; and the plight of cancer patients in the counties. These three issues featured prominently in the media during the month under review. Collectively, the three health issues point to a discussion around the unfinished business of fully transferring health functions to the counties. The Fourth Schedule apportions health policy, and the national referral health facilities as a function of the national government. However, in spite of the devolution of health function, the national government continues to play a key role in the delivery of health services in the country.

A case in point is the active involvement of the Ministry of Health in the Kenya mobile clinics project. Through this project the national government oversaw the procurement of mobile clinics worth around Kshs. 1 billion in 2015.[2] These were touted as a game changer in bettering the health of communities in far flung counties. In particular, the mobile clinics were meant to offer maternal and child health services, emergency, outpatient, post-rape care, HIV care, TB care, family planning, immunization, growth monitoring and laboratory services. However, media reports show that these clinics have remained unused for over six years since they were imported and delivered to the counties. In Kisumu, Nairobi, Murang'a, Uasin Gishu, Elgeyo Marakwet, Kericho, Nakuru, Nandi, Mombasa, Makueni, Siaya, Garissa, Tana River, Bungoma, Marsabit and Isiolo, those clinics are not operational.[3]

Efforts by the Public Accounts Committee to investigate the project did not provide answers as to the operational status of these clinics, thereby reinforcing the mystery surrounding the procurement and delivery of those clinics to the counties. The cost involved in the importation and delivery of the mobile clinics is high, raising questions on value for money. For instance, media reports show that each of the containers was imported at a cost of Kshs. 1.4 million and later resold at a rate of Kshs. 10 million per mobile clinic.[4] All this work was coordinated by the Ministry of Health. The involvement of the national government in procuring certain health supplies for the county governments undermines the full devolution of health services. However, given the vast amount of resources involved in some of the health-related programmes, the Ministry of Health has found it difficult to let go some of the functions.

A related issue to the Kenya mobile clinics project is the state of the Beyond Zero campaign clinics across the 47 counties. Between 2014 and end of 2016, all the 47 counties had received a mobile clinic through this initiative. Like in the Kenya mobile clinics project, part of the goal was to improve maternal and child health given the high the high level of maternal mortality in the country (i.e. 335 deaths per 100,000 live births). As was the case with the Kenya mobile clinics project, the Beyond Zero clinics are grounded in virtually all the counties. Media accounts show that in Murang'a, Siaya, Kisumu, Homa Bay, Mandera, Lamu, Turkana, Narok, Bungoma, Kitui, Nyandarua, Nyeri, Meru, Kisii, Tharaka Niithi, and Nakuru, among other counties, these clinics are grounded. Reasons that account for their dysfunctional nature include inadequate personnel, allowances, drugs, lack of insurance, lack of fuel for the trucks, and overall operational costs. The mobile clinics need drivers, nurses, clinical officers, clerks, lab technicians among other cadres of health staff.[5] This failure, again points to poor conceptualization of a health project between the two levels of government and a well-thought-out plan on how to run and sustain such a programme.

[1] Daily Nation, May 12, 2022
[2] Daily Nation, May 29, 2022
[3] Daily Nation, May 29, 2022
[4] Daily Nation, May 29, 2022
[5] Daily Nation, May 10, 2022

The media debate on the plight of cancer patients in the counties also illustrates the inefficiencies in the countries health care system, lack of a coherent policy direction on how to address the rising burden of non-communicable diseases in the country. On their own, counties are constrained in making investments aiming at addressing the rising cancer cases in the country, but jointly working closely with the national government can undertake investments that can lead to increased early diagnosis of such cases and rolling out affordable curative plans for the people. Across the country, cancer patients have to travel long distances to the few referral hospitals for treatment, with the country having less than 12 tertiary or comprehensive cancer centers (with only four being public), and nearly all of them in Nairobi.[6] This means patients outside Nairobi County have fewer options for cancer treatment. The gaps in cancer care in the country are compounded with the high cost of care, and a general lack of medical cover for a big portion of the citizens. The non-prioritization of long-term investments in the country's health care by both the national and county governments compounds the challenges.

Thirdly, the row pitying the Cabinet Secretary for Energy and the Council of Governors in regard to the appointment of six directors at the Rural Electrification and Energy Corporation (REREC, yet again point to the tensions between the national and county governments in the execution of some of the concurrent functions. To the Council of Governors, the nomination of six directors to REREC was in contravention of the Energy Act of 2019, that made a provision for the nominations to REREC to include four nominees from the Council of Governors.[7] The national government is in charge of the overall energy policy including electricity and gas reticulation and energy regulation; while county governments have a mandate on electricity and gas reticulation and energy regulation. Resolution of the conflict between the Cabinet Secretary for Energy and the Council of Governors was through an advisory by the Attorney General who supported the position taken the Council of Governors. REREC is a critical agency in connecting more rural households to the national grid, hence the widened mandate through the 2019 amendments to the Energy Act to facilitate close working relationship with the county governments in the rural energy sector.

Fourth, is the continued delay in the release of equitable share revenue to the counties. Since the advent of the devolved system of governance, the release of the equitable share to the county governments has been occasioned with unexplained delays. This is in spite of the legal provision that the national government releases the funds to the devolved units every 15th day of every month. The national government has been in breach of this law every financial year. For instance as of May 2022, the Council of Governors noted that the national government owed counties around Kshs. 64 billion, of which Kshs. 32.6 billion was for April allocation to 46 counties and another Kshs. 31.4 billion for all counties for the month of May 2022.[8] Such delays in remitting the equitable share revenue (CoK Article 202-204) undermines the implementation of county development programmes and functions such as health, roads and water among others.

Other notable occurrences during the month of May, 2022 include the establishment of Kshs. 3 billion industrial park projects by nine counties in the Lake Region Economic Bloc. The industrial park targets livestock, poultry, and fisheries processing zone, cold storage facilities, solid waste management and a training center.[9] Funded by the United Nations Industrial Development Organization (UNIDO), the project targets Nyamira, Kericho, Nandi, Bomet, Kisumu, Siaya, Migori, Kisii and Homa Bay. The project is being undertaken in a context where the policy and legal environment governing the operations of regional economic blocs remains unclear. For instance, the Public Finance Management Act does not envision a situation where counties transfer financial resources to undertake development projects outside their areas of jurisdiction, yet, projects of such a nature, revolve around such an expectation. This legal and policy lacuna was amplified during one of the mini-workshops on Kenya's devolution:

> *"One of the shortcomings in intergovernmental relations is cross-county collaboration, and how to provide a legislative framework for such collaborations and in particular the regional economic blocs. One of the biggest challenges is how to move public money from one county to another so as to fund a joint project. Currently, there is no policy framework for this to happen."* [Participant, Kenya Devolution workshop, May 2022].

Finally, the declaration of a curfew in Marsabit county following a period of community violence in the devolved unit is also note worth. Although such violent confrontations have been reported during the period around the previous general election, the intensity and scale of violence in 2022 is higher and more devastating in terms loss of lives, displacement of people, loss of property and a general disruption of livelihoods. The conflict situation has been worsened by the prevailing drought situation in that part of the country. Besides, Marsabit county, Isiolo, Baringo, Mandera, Samburu, Wajir, Turkana, Garissa, Kitui, Kwale, Lamu, Laikipia, Kilifi, West Pokot and parts of Nyeri are all gripped in a worsening food situation given the failure of the March/April rainy season.[10]

In a related issue, *a Marsabit chief and his driver were on Wednesday (4th May 2022) arraigned over the murder of six people in the county. The six killed include Loglogo senior chief Kennedy Kongoman, an assistant chief and four others while on their pursuit of stolen animal a week before. Shurr area chief Isaacko Warguto Bewa and his driver Boru Abudo Guyo appeared before magistrate SK Arome but did not take plea as police asked for 21 days to complete investigations. Businesswoman Morme Abdi, a miraa trader in Marsabit, said the curfew will affect her sales and asked government to apply directives only in areas experiencing tribal conflict instead of issuing blanket curfew* (STAR, 05 May 2022).

1.2. Effective county planning, public finance management and staff performance

During the month under review, there was sustained spotlight on corruption and wastage of public funds by both the devolved units, the national government or its entities. On corruption related charges, the case against the former Governor of Kiambu, Ferdinand Waititu stands out. The Ethics and Anti-Corruption Commission points out that the former Governor in unclear circumstances accumulated around Kshs. 2

6 Daily Nation, May 7, 2022
7 Daily Nation, May 9, 2022
8 Daily Nation, May 26, 2022
9 The Standard, May 11, 2022
10 Daily Nation, May 2, 2022

billion between 2015 – 2017 (parts as Member of Parliament) and 2017 – 2020 (as Governor). The anti-graft body case is that the former Governor may have colluded with officials of the county government of Kiambu to embezzle public funds through fictitious and fraudulent procurement contracts.[11]

This case of so suspected embezzlement of public funds is not unique to Kiambu county alone, but a replica of many other devolved units across the country. It is against this backdrop that the ruling by the High Court during the month under review that Governors can face criminal and civil charges while in office could further strengthen accountability in the use of public funds in the devolved units.[12] In the case, the Council of Governors had sought to shield Governors from prosecution should they break the law. Before this ruling, Governors charged with crimes had unfettered to their offices and some of the cases took much longer to conclude. Six Governors has so far been barred from accessing their offices after they were charged with criminal offences related to corruption and other economic offences. Given the centrality of the Governors in the management of public funds and assets in the devolved units, the High Court ruling would strengthen efforts aimed at public finance management at the county level.

Corruption and lack of accountability is not limited to the devolved units. During the month under review, the Auditor General unearthed a discrepancy at the Ministry of Education where 438 pupils could not be accounted for, yet resources had been channeled to them. The Auditor General could not unearth the true number of funded learners as the auditors were denied access to enrollment data. Such a stance speaks to the power that corruption wields in the running of public functions across the country.

The proposed Statute Law (Miscellaneous Amendments) Bill 2022, also connects with the enormity of the challenge of enhancing integrity in the management of public finances and assets. The Bill seeks to amend around 56 pieces of legislation (e.g. the Leadership and Integrity Act of 2012) to give Ethics and Anti-Corruption Commission the sole mandate of undertaking integrity tests on those seeking employment in the public sector.[13] The Bill targets those that may have looted or convened to loot public funds. Currently, integrity tests are only limited to those seeking employment as state and public officers. The Bill also seeks to include those intending to be appointed to a public office among those required to submit a self-declaration form that contains moral and ethical questions, personal identification details, birth information, marital status, level of education and employment data to EACC. It remains unclear with additional legislation will in any way turn the tide against lack of integrity in the management of public resources in the absence of change of attitude by the people. How to generate a shift in mindset and have a population that values integrity is a core challenge not only for devolution in Kenya, but society in general.

> ***How would describe the policy and legal context that governs public finance management in the counties, are there any challenges, if yes, how can they be addressed?***
> *"PFM act is very clear in terms of how you are supposed to manage finances. The only challenge is that most of the people do not want to follow the laws that are laid down. In our country we have the best laws, the best policy documents, best strategic plans but we don't implement. The documents we have in place, like the PFM Act is very clear. If it was followed to the latter, I think there would be no challenge. The policies made are adequate. If implemented, I think we would be moving in the right direction."* Key Informant Interview May 2022.
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> *"The Public Procurement and Disposal Act is very clear on how you are supposed to procure services. The finances used there must be economic, efficient and effective. If there was honesty in the procurement of public goods, we would have money to do other things. We are saying that you get the lowest bidder. If you get the lowest bidder and assuming there is no collusion in the procurement, then that could mean you will get the lowest price. The laws of Kenya are very clear. If we had people of integrity sitting there, they would do the right thing."* Key Informant Interview, May 2022.

On county planning two observations stand out for the month of May 2022. One of these is the ninth edition of the Africities summit, held in Kisumu city. The forum was important for urban areas in the context of devolution in Kenya because it brought to the attention the need for new action plans to hasten urban renewal in Africa. In Kenya, urban areas remain critical sites for economic development, and accounts for close to 55 percent of the country's gross domestic product, with a projection that in future, 80 percent of economic growth will be in urban areas.[14] Given this reality, the challenge is for policy makers to re-engineer the urban spaces so as to make them more socially inclusive, generate sustainable jobs for the rising urban population, enhance trade, commerce and innovation in these centers. However, it is still unclear on the extent to which the planning processes in the country integrate this thinking (the contribution of urban areas) to ensure they generate prosperity for all, by ensuring that urbanization works for the people and not against the people.

The second issue related to planning is the paradox of rising fertility rates in northern Kenyan amidst overall declining fertility in the country. Data shows that counties in northern Kenya have some of the highest child birth rates with 8 children per woman as compared to other parts of the country. For instance in Mandera county its 8 births per woman, Marsabit (7 births per woman), Wajir (6.7 births per woman), Turkana (6.4 births per woman), Tana River (5.2 births per woman), Samburu (4.9 births per woman) and Garissa (4.4. births per woman).[15] These regions also record some of the lowest contraceptive prevalence rates in the country, coupled with low levels of education of women. Left unchecked, population increment in already impoverished regions of the country may undermine the overall welfare of the nation while at the same time putting more strain on available resources so as to provide essential social infrastructure to support the rising population.
On staff performance, three issues are noteworthy. These are the staff audits in Lamu county, implementation of schemes of service for early childhood education tutors across the country, and finally, the release of a number of quality assurance standards by the Kenya Bureau of

[11] Daily Nation, May 28, 2022
[12] Sunday Nation, May 8, 2022
[13] Daily Nation, May 31, 2022
[14] Daily Nation, May 16, 2022

Standards. First, in Lamu county, the county-wide staff audit ordered by the County Public Service Board, unearthed 112 ghost workers in the country's payroll pointing to critical lapses in the management of county human resources.[16] As a consequence, the audit rooted for creation of a county human resource information system as well as the development of a staffing plan to guide promotions, recruitment, skill upgrades, redesignations, redeployments and training. Management of county temporary staff is also an issue. The audit called for the county to develop a framework to guide the employment and management of temporary staff by the county. Such staff include casuals, contractors, interns, and volunteers.

For early childhood education tutors, it is note worth that different counties have differentiated remuneration for the tutors. In some counties, ECDE tutors earn Kshs. 10,000 per month irrespective of their level of education, while in other counties, they earn upwards of Kshs. 40,000 per month for those with a degree.[17] The issue of irregular and low pay for ECDE tutors is widespread in a number of counties. Perhaps as a cure to this anomaly, the Senate through a report on the status of implementation of ECDE in the country called for implementation of schemes of service for ECDE teachers as one way of harmonizing the pay across the counties and enhancing regularity of the pay.
The publication of a number of quality standards by the Kenya Bureau of Standards, offers an improved operating environment for persons living with disabilities. Data from the Kenya National Bureau of Statistics shows that around 10 percent of Kenya's population has some form of disability. This segment of the population is also more likely to experience adverse socio-economic outcomes such as lower education standards, poor health outcomes, lower levels of employment and higher poverty rates.
To enhance the experience of persons living with disabilities, the Kenya Bureau of Standards has approved a number of standards that will enable PLWDAs go about their duties and activities without the daily inconveniences that encumber them. This is especially in a context where persons living with disabilities face challenges in accessibility to workplaces, business and public spaces, as well as access to education, health and sanitation facilities, transport and new technologies. The standards are[18]:

- KS ISO 17069: 2014: Accessible design – application of braille on signage, equipment and appliances
- KS ISO 19029: 2016 : Accessible design – auditory guiding signals in public facilities
- KS ISO 17049:2013: Accessible design – consideration and assistive products for accessible meetings
- KS iso 19028:2016: Information contents, figuration and display methods of tactile guide maps

KS ISO 16201:2006: Technical aids for persons with disability – environmental control systems for daily living.

1.3. County government and citizens' engagement to improve service delivery and livelihoods

The County Budget Transparency Survey 2021[19] released in the month of May by the International Budget Partnerships further highlights progress made, but also challenges that remain in publicization by county governments of key budget documents. Such documents include the County Integrated Development Plans, Annual Development Plans, County Fiscal Strategy Paper, County Budget Review Outlook Paper, Budget estimates, Budget circular, budget and project implementation reports, Bills and Acts. Although the survey shows progress (e.g. improvement in overall county transparency score from 33 to 35 points out of a possible 100), the low score shows that citizens have limited access to information on their county budgets, thus hampering their participation in the development and monitoring of service delivery through public budgets. Even as counties strive to share information with the public, there are concerns as to whether the citizens make use of this information to meaningfully engage with their county governments. Having informed dialogue between the county public officers and the citizens that they represent would not only enhance accountability in service delivery but also improve on the quality of the services offered. An empowered citizenry is on the basis of having public documents and information presented in a format and language that is understandable to the citizens. At present, this is a major gap in public participation discourses in the country.

Key highlights from the Kenya Budget Transparency Survey 2021

i. Counties are becoming more transparent, but the pace is too slow

- Counties are increasingly making more budget documents and information available to the public.
- The findings show that it's just around one-third of the information that should be publicly available that is availed, which is still very low.

ii. Counties are not consistent in making budget information publicly available.

- There are inconsistencies on how counties publish budget documents and maintain what they are already publishing.
- The survey shows that the number of counties publishing all the budget documents evaluated increased to three: Elgeyo Marakwet, Nyeri and Turkana, compared to only two in the year 2020.

[16] Daily Nation, May 26, 2022
[17] Daily Nation, May 25, 2022
[18] Daily Nation, May 10, 2022
[19] https://internationalbudget.org/publications/the-kenya-county-budget-transparency-survey-2021/ , accessed on June 13, 2022

iii.	**Budget documents provide incomplete coverage of required budget information**
-	Only 9 out of 47 counties provided more than half of the information required for comprehensiveness
-	Public participation information remains the least published
iv.	**Counties are becoming more responsive in a quest to improve their level of budget transparency**
-	Survey shows that 25 counties had published at least one document

Source: Kenya Budget Transparency Survey 2021, p. 12.

Conclusion

The issues identified in this brief provides useful pointers to development partners as they implement the Kenya Devolution Programme. For instance, horizontal and vertical relations between the various levels of government continue to improve, but there are emerging challenges which require to be addressed. To enhance coordination, stakeholders have developed sector working groups, even though in some sectors, these groups are more active than others (e.g. health sector more active). Having functional sector workings groups can go a long way in improving cooperation, consultation and coordination in the delivery of key functions and services. It is note worth that there is consideration for the formation of finance sector working group[20] as one way of handling conflicts arising in the management of public finances.
Strengthening of regional economic blocs is paramount for addressing inter county relations as well as cross cutting issues like conflict currently being experienced in Marsabit County and whose impacts extends to other counties.

Finally, the Council of Governors needs to continue advancing the devolution agenda especially in areas of finance (equitable share revenue) release by the treasury. This is more urgent as the government financial year comes to a close. If this matter is not addressed in earnest, counties will have to bear with escalating pending bills in the next financial year (2022/2023).

[20] Participant, political economy analysis workshop, May 13, 2022