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# ASSESSING KENYA'S COOPERATIVE MODEL OF DEVOLUTION: A SITUATION-SPECIFIC ANALYSIS

*James Thuo Gathii\* and Harrison Mbori Otieno\*\**

## ABSTRACT

Kenya's form of quasi-federalism termed devolution was introduced under the *Constitution of Kenya* (2010) ('*2010 Constitution*'). This governance system establishes 47 county governments which are constitutionally independent sub-national units with direct election of county level leaders. Given the complexity of devolution's relationship to national politics, as well as the broad variation in how devolution has unfolded in the 47 counties since 2013, this article argues in favour of a situation-specific assessment of devolution in Kenya. This analysis departs from the emerging scholarly consensus of devolution in Kenya represented in two predominant approaches. One approach contends that devolution in Kenya has simply devolved corruption and patronage from the national to the county level. Another approach argues that devolution has so far been relatively successful because it has introduced a new political system at the county level that has a robust system of checks and balances but that has empowered a new dynamic in Kenya's politics at the sub-national level. This article argues the first approach paints the emerging devolution experience with a broad brush that is not reflected in every county or even on every issue. This article has more in common with the second view. However, we argue for a more situation-specific, case by case analysis of devolution to show variations in how devolution has or has not facilitated the delivery of services and opportunities that were prior to 2013 likely to be unavailable particularly in the most economically disadvantaged counties.

## I INTRODUCTION

The *2010 Constitution* inaugurated a weak form of federalism in which 47 new county governments have functions and powers separate from the national government. The counties are constitutionally independent subnational units with direct election of county level leaders. Unlike in the pre-devolution era, when county-level elites owed their loyalty to national-level elites on whom they relied for patronage and access to the resources of the state, in the era of devolution county-level leaders must be responsive to county-level pressures. This is in part because the *2010 Constitution* guarantees that at

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least 15% of national revenue every year must be allocated to the counties.<sup>1</sup> This guaranteed monetary allocation, together with the creation of executive and legislative elections at the county level, provide a level of insulation from national level politics. In addition, the fact that county assemblies have the power to impeach county Governors,<sup>2</sup> and competitive county level elections, puts pressure on county leaders to be responsive to highly mobilized county electorates. The 2010 Constitution also created a Senate, as part of a bi-cameral parliament, to protect county affairs at the national level.<sup>3</sup> The advocacy of the Senate together with county Governors for increased resources from the national government have played vital roles in defending and expanding the power of county governments.

The advocacy for county authority and resources has in turn become a driving force for accountability at two levels: first, between county Governors and county legislatures; and second, between elected leaders and county electorates. This increased pressure for accountability between the executive and legislative arms in the counties has decreased the likelihood of political deadlock in county governance that characterised the first set of county governments between 2013 and 2017. In the 2017 general elections, voters, apparently disenchanted with the political deadlocks that characterized county legislatures and county executives, voted out two thirds of county legislators, half of Governors and 80% of women representatives elected at the county level to the national assembly.<sup>4</sup> For county level politicians, political deadlocks have therefore also become undesirable since they slow down access to county resources—both for executing the politicians' county functions and powers as well as for rewarding their supporters. Indeed, since county level officials want to protect their access to county resources, they often seek to limit the national government's control over them.<sup>5</sup> This in turn has strengthened the support for devolution.

Given the complexity of devolution's relationship to national politics, as well as the broad variation in how devolution has unfolded in the 47 counties since 2013, this article argues in favour of a situation-specific rather than a broad-ranging assessment of devolution. This analysis departs from the emerging scholarly consensus of devolution in Kenya represented in two predominant approaches. One approach contends that devolution in Kenya has simply devolved corruption and patronage from the national

<sup>1</sup> 2010 Constitution art 203(2).

<sup>2</sup> County Governments Act (Kenya) No 17 of 2012 s 33.

<sup>3</sup> 2010 Constitution art 93(1).

<sup>4</sup> Michael Chege, 'Kenya's Electoral Misfire' (2018) 29 *Journal of Democracy* 158, 170. A combination of factors explain why a large number of women representatives were voted out, including inadequate political support from their political parties, and lack of resources to challenge poorly conducted political party primaries: National Democratic Institute and Federation of Women Lawyers, 'A Gender Analysis of the 2017 Kenya General Elections' (Report, February 2018) <[https://www.ndi.org/sites/default/files/Gender%20Analysis%20of%202017%20General%20Elections%20FINAL%20High%20Res%20for%20Printer%20-%20NEW%20COVER\\_small.pdf](https://www.ndi.org/sites/default/files/Gender%20Analysis%20of%202017%20General%20Elections%20FINAL%20High%20Res%20for%20Printer%20-%20NEW%20COVER_small.pdf)> 6.

<sup>5</sup> See generally Nic Cheeseman, Gabrielle Lynch and Justin Willis, 'Decentralisation in Kenya: The Governance of Governors' (2016) 54 *Journal of Modern African Studies* 1; Alex Dyzenhaus, 'Decentralisation: Accountability in Local Government' in Nic Cheeseman (ed), *Institutions and Democracy in Africa: How the Rules of the Game Shape Political Developments* (Cambridge University Press, 2018) 327.

to the county level.<sup>6</sup> The other approach argues that devolution has so far been relatively successful because it has introduced a new political system at the county level that has a robust system of checks and balances.<sup>7</sup> This article shows that the first approach makes a totalising argument that is not reflected in every county or even on every issue – even in some of the counties with the worst corruption. This article has more in common with the second view. However, we argue for a more situation-specific, case by case analysis of devolution to show variations in how devolution has or has not facilitated the delivery of services and opportunities that were, prior to 2013, likely to be unavailable. A case-by-case analysis does not imply that no general patterns can be drawn from the newly emerging devolution experience. Rather, this approach foregrounds thick description as a starting point and springboard for analysis and for asking further questions. This approach makes it possible to understand devolution in light of the specificities of the particular context. Thus, as noted in Part III below, some regions of the country have, since the establishment of devolution and for the first time, had benefits such as tarmacked roads and hospitals that conduct caesarean operations. Adopting a situation-specific analysis helps to refer to the emerging devolution experience in a way that complements and adds to approaches that look for patterns such as the two approaches described above.

An example of why this more fine-grained assessment of the merits and demerits of devolution in Kenya is warranted can also be gleaned from the 2013 general elections. In those elections, devolved governance played what in retrospect was a one-time role in reducing the high-stakes winner-take-all nature of Kenya's first-past-the-post election system. The 47 counties created a new and important arena of political contestation that de-emphasized the zero-sum competition over the national Presidency that has characterized Kenyan elections since the introduction of multi-party politics in 1991.<sup>8</sup> In the 2013 presidential election cycle, county elections gave Kenya's opposition parties control over more county governorships in the country than the ruling party. That included the very highly visible Nairobi county, the seat of the Kenyan government. The new governing opportunities in the counties gave the opposition the promise that they could translate victories at the county level into future opportunities of winning power at the national level.<sup>9</sup> However, in the August 2017 elections, the incumbent President's party reversed this possibility and won a majority of county Governors' races. More importantly, the August 2017 presidential elections saw a return of a highly polarised election in a two-person horse race that split the country into ethnic voting blocks.<sup>10</sup>

<sup>6</sup> Michelle D'Arcy and Agnes Cornell, 'Devolution and Corruption in Kenya: Everyone's Turn to Eat?' (2016) 115 *African Affairs* 246; Brendon J Cannon and Jacob Haji Ali, 'Devolution in Kenya Four Years On: A Review of Implementation and Effects in Mandera County' (2018) 8 *African Conflict and Peacebuilding Review* 1.

<sup>7</sup> See generally Cheeseman, Lynch and Willis, above n 5, 6.

<sup>8</sup> James Gathi, 'Implementing a New Constitution in a Competitive Authoritarian Context: The Case of Kenya' in Tom Ginsburg and Aziz Haq (eds), *From Parchment to Practice: Implementing New Constitutions* (Cambridge University Press, forthcoming).

<sup>9</sup> Rachel Beatty Riedl and J Tyler Dickovick, 'Party Systems and Decentralization in Africa' (2014) 49 *Studies in Comparative International Development* 321, 327.

<sup>10</sup> Chege, above n 4, 158.

The design of Kenya's devolution was in part intended to accommodate the multi-ethnic nature of Kenya's politics.<sup>11</sup> Devolution ensures more ethnic groups' political inclusion, representation and power sharing in Kenya's 47 counties than is possible within a centralised state.<sup>12</sup> A primary goal of this devolution scheme was to temper competing claims of access to national power and resources based on ethnic loyalties. The political parties formed after the introduction of multi-party politics in 1991 primarily comprised members of the ethnic communities of the respective party leaders. Devolution was regarded as an antidote to ethnic based politics as well as a mechanism of addressing and remedying grievances relating to the uneven allocation of government resources—including land—between various regions and ethnic groups.<sup>13</sup>

Overall, devolution at the county level has enhanced horizontal accountability and, in at least the 2013 elections, reduced the high-stakes winner take all nature of Kenya's Presidential elections. Further, in the pre-2010 period elites at the county level were more likely to be accountable to their patrons at the national level than to their local or county level electorates. The devolution introduced by the 2010 *Constitution* reduced the likelihood of such an outcome.<sup>14</sup> Much less clear is the extent to which devolution in most counties has met other objectives of better local service delivery, fostering national unity, enhancing self-governance and alleviating poverty.

This paper proceeds as follows. Part II outlines Kenya's scheme of devolution. Part III critically assesses Kenya's system of devolution. Part IV concludes the paper.

## II FROM CENTRALISATION TO DEVOLUTION

Although Kenya's independence *Constitution of 1963* inaugurated a system of regionalism, by 1969 this system of diffusion of power had been dismantled and had been replaced with a centralised system of government.<sup>15</sup> To reverse this legacy of a centralised authoritarian state, the 2010 *Constitution* 'devolved' fiscal, political and administrative powers to 47 counties.<sup>16</sup> Devolution sought to counter the centralisation

<sup>11</sup> Yash Ghai, 'Ethnicity, Nationhood and Pluralism: The 2010 Kenya Constitution' in Yash Ghai and Jill Cottrell Ghai (eds), *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives* (Katiba Institute, 2016) 98, 75.

<sup>12</sup> Ben Christopher Nyabira and Zemelak Ayitenew Ayele, 'The State of Political Inclusion of Ethnic Communities Under Kenya's Devolved System' (2016) 20 *Law, Democracy and Development* 131, 131–2.

<sup>13</sup> On this, see Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, *Report of the Presidential Commission of Inquiry into Illegal and/or Irregular Allocation of Public Land* (Republic of Kenya, 2004).

<sup>14</sup> See Rachel Beatty Riedl, *Authoritarian Origins of Democratic Party Systems in Africa* (Cambridge University Press, 2014); Gathii, 'Implementing a New Constitution', above n 8.

<sup>15</sup> See James Gathii, 'Kenya's Legislative Culture and the Evolution of the Kenya Constitution' in Yash Vyas et al (eds), *Law and Development In the Third World* (University of Nairobi, 1994) 74, 82.

<sup>16</sup> Kenya is one of several African countries to experiment with political decentralization in the last two decades. For other African cases, see J Tyler Dickovick and Rachel Beatty Riedl, 'Comparative Assessment of Decentralization in Africa: Final Report and Summary of Findings' (United States Agency for International Development, September 2010) <<https://pdfs.semanticscholar.org/7170/3844afc30d61e792c212fb6b03e8e53014c6.pdf>>. The term devolution, a 'term of art,' was inherited from Great Britain. See Yash Ghai, 'Comparative Theory and Kenya's Devolution' in Conrad M Bosire and Wanjiru Gikonyo

of political and economic power that had disadvantaged and marginalised many regions, communities, and individuals.<sup>17</sup> Allocation of financing was a major tool adopted in this new constitutional framework to address regional imbalances in the allocation of development financing.<sup>18</sup> In addition, Kenyans supported a devolved system of governance to re-channel the distribution of resources in favour of certain ethnic groups and against others, and in so doing to serve as a mechanism to redress poverty and inequality.<sup>19</sup> Kenya is therefore typical of countries that have used decentralisation to promote a measure of local self-rule that gives sub-national governments meaningful authority over local matters.<sup>20</sup> The 2010 Constitution sought to achieve these objectives by promoting the participation of more people in the governance of the country; ensuring a framework of equitable access to national resources; promoting inclusiveness of ethnic and regional diversities with a view to accommodating as many ethnic communities in their own governance; as well as safeguarding community rights.<sup>21</sup> While there have been challenges,<sup>22</sup> the roll out of

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- (eds), *Animating Devolution in Kenya, The Role of the Judiciary: Commentary and Analysis on Kenya's Emerging Devolution Jurisprudence under the New Constitution* (International Development Law Organization, Judicial Training Institute, Katiba Institute, 2015) 13, 18–20.
- 17 According to the Supreme Court in *The Speaker of the Senate v Attorney-General* [2013] eKLR (Supreme Court of Kenya, Advisory Opinion Reference No 2 of 2013) [316]:  
[The] Kenyan people, by the Constitution of Kenya, 2010 chose to de-concentrate State power, rights, duties, competences—shifting substantial aspects to the county government, to be exercised in the county units, for better and more equitable delivery of the goods of the political order.
- 18 Article 174 of the 2010 Constitution identifies the objects of devolved government as follows:  
(a) to promote democratic and accountable exercise of power;  
(b) to foster national unity by recognising diversity;  
(c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;  
(d) to recognise the right of communities to manage their own affairs and to further their development;  
(e) to protect and promote the interests and rights of minorities and marginalised communities;  
(f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;  
(g) to ensure equitable sharing of national and local resources throughout Kenya;  
(h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and  
(i) to enhance checks and balances and the separation of powers.
- 19 Yash Ghai, 'Devolution: Restructuring the Kenyan State' (2008) 2 *Journal of Eastern African Studies* 211, 215.
- 20 See Robert Agranoff, 'Autonomy, Devolution and Intergovernmental Relations' (2004) 14 *Regional and Federal Studies* 26, 26.
- 21 See Committee of Experts on Constitutional Review (Kenya), 'Final Report' (11 October 2010) 66–7 <[https://katibaculturalrights.files.wordpress.com/2016/04/coe\\_final\\_report-2.pdf](https://katibaculturalrights.files.wordpress.com/2016/04/coe_final_report-2.pdf)>.
- 22 For example, in the first year of devolution there was a petition to dissolve one county because the Governor and the county Legislature could not work together. See Edwin Mutai, *Uhuru Names Commission of Inquiry for Makueni County Row* (10 February 2015) *Business Daily* <<http://www.businessdailyafrica.com/Uhuru-names-team-to-hear-Makueni-county-dispute/-/539546/2619508/-/147vk8/-/index.html>>. However, that County was not dissolved and no County has been dissolved to date.

devolution has been largely successful.<sup>23</sup> Devolution is now regarded as an indispensable and irreversible aspect of Kenya's governance system.<sup>24</sup>

The cooperative nature of Kenya's devolution scheme is captured in the 2010 *Constitution's* recognition of 'sharing and devolution of power' as an important national value and principle of governance.<sup>25</sup> Kenya's devolved units (the counties) do not exercise decentralised power delegated to them from the national level because under the 2010 *Constitution* sovereign power is exercised at the county level as well.<sup>26</sup> Rather, they exercise sovereign power delegated directly by the people of Kenya.<sup>27</sup> Kenya's system of devolution is therefore one of shared sovereignty between the central and county governments.<sup>28</sup> Unlike in the United Kingdom where devolution is asymmetrical, in Kenya the devolution system is symmetrical in the sense that all 47 counties are granted similar institutional arrangements and powers.<sup>29</sup>

In this sense, Kenya's devolution follows the South African model, which follows the German model.<sup>30</sup> As borrowed from the South African model, Kenya therefore has 'an integrated, cooperative model of devolution that gives relatively little autonomy to the counties and requires ongoing collaboration among [national and county] governments rather than competition'.<sup>31</sup> Based on art 186 of the 2010 *Constitution*, concurrent powers

<sup>23</sup> Copperfield Lagat and Charles Wokabi, 'World Bank Lauds Kenya for Devolution', *Daily Nation* (online), 3 February 2015

<<http://www.nation.co.ke/lifestyle/smartcompany/World-Bank-lauds-Kenya-for-devolution/-/1226/2611618/-/4knkydz/-/index.html>>.

<sup>24</sup> Kamotho Waiganjo, 'We Risk Paying a Heavy Price if State Stifles Devolution', *Standard Digital* (online), 23 June 2018 <<https://www.standardmedia.co.ke/article/2001285112/we-risk-paying-a-heavy-price-if-state-stifles-devolution>>.

<sup>25</sup> Art 4(2) as read together with art 10(2)(a).

<sup>26</sup> See *ibid* arts 1(1), 1(3)(a)(b), 1(4)(b).

<sup>27</sup> As the High Court observed in *Institute of Social Accountability v National Assembly* [2015] eKLR (High Court of Kenya, Petition No 71 of 2013) [122]:

Article 1(4) of the Constitution recognises two levels of government, the national and county governments. Each of these levels exercises power derived from the Constitution itself. Under Article 1 of the Constitution, the county government does not derive its power from the national government but directly from the People of Kenya and under the Constitution. These two levels of governments are therefore, in theory, equal and none is subordinate to the other.

<sup>28</sup> Article 6(2) of the 2010 *Constitution* describes the government at the two levels as being 'distinct and inter-dependent'. See also Conrad M Bosire, *Devolution for Development, Conflict Resolution, and Limiting Central Power: An Analysis of the Constitution of Kenya 2010* (PhD Thesis, University of the Western Cape, 2013) 304

<[http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/3008/Bosire\\_PHD\\_2013.pdf?sequence=1&isAllowed=y](http://etd.uwc.ac.za/xmlui/bitstream/handle/11394/3008/Bosire_PHD_2013.pdf?sequence=1&isAllowed=y)>.

<sup>29</sup> Thus the Supreme Court of Kenya has noted that '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': *Speaker of the Senate v Attorney-General* [2013] eKLR (Supreme Court of Kenya, Advisory Opinion Reference 2 of 2013) [229] (emphasis in original). For the case of the United Kingdom, see Michael Keating, *The New Regionalism in Western Europe: Territorial Restructuring and Political Change* (Edward Elgar Publishing, 1998).

<sup>30</sup> Christina Murray, *Kenya's 2010 Constitution*, 37 <<http://www.health.uct.ac.za/usr/publicLaw/staff/Kenyas%202010%20Constitution.pdf>>.

<sup>31</sup> *Ibid*.

are powers that are available to both levels of government. Identifying concurrent powers in part 1 (National Government) and part 2 (County Government) in the fourth schedule to the *2010 Constitution* is, however, a difficult task. This is because 'similar subjects in the two lists are not defined in the same terms (eg, transport, water, disaster management, policies, planning and development, and housing)'.<sup>32</sup> A literal reading of these provisions shows that the *2010 Constitution* creates 'exclusive powers of policy-making and policy application for the national and county government[s] respectively within the various shared sectors'.<sup>33</sup>

Take the example of the function and power of health. The National Government has the function of National referral health facilities,<sup>34</sup> while the counties cover:

- (a) county health facilities and pharmacies;
- (b) ambulance services;
- (c) promotion of primary health care;
- (d) licensing and control of undertakings that sell food to the public;
- (e) veterinary services (excluding regulation of the profession);
- (f) cemeteries, funeral parlours and crematoria; and
- (g) refuse removal, refuse dumps and solid waste disposal.<sup>35</sup>

The overlapping nature of these powers and functions is perhaps a feature of Kenya's system of cooperative devolution. Even with cooperative devolution, the constitutional scheme gives the national government the last word. This is reflected in art 191(2) of the *2010 Constitution*, which provides that when national and county law or policy on a concurrent power conflict, the national law or policy prevails.

Ultimately, consistent with the model of weak devolution adopted in the *2010 Constitution*, counties have conferred upon them rather feeble competencies such as those relating to animal control and welfare as well as trade licensing, trade development and regulation which are typical of the powers of local governments.<sup>36</sup> In addition, unlike the national government, county governments have limited power to

<sup>32</sup> Conrad Bosire and Yash Pal Ghai, 'Powers and Functions of County Governments', *The Star* (online), 27 April 2013 <[https://www.the-star.co.ke/news/2013/04/27/powers-and-functions-of-county-governments\\_c766556](https://www.the-star.co.ke/news/2013/04/27/powers-and-functions-of-county-governments_c766556)>.

<sup>33</sup> Ibid. See sch 4 of the *2010 Constitution* dealing with the functions of agriculture and health. The National Government deals with agricultural policy and health policy: *2010 Constitution* sch 4 pt 1 items 28–9. The counties deal with a myriad of functions under the heads '[a]griculture' (crop and animal husbandry; livestock sale yards; county abattoirs; plant and animal disease control; and fisheries) and county 'health services': *2010 Constitution* sch 4 pt 2 items 1–2.

<sup>34</sup> *2010 Constitution* sch 4 pt 1 item 23.

<sup>35</sup> Ibid sch 4 pt 2 item 2. Here any power or function not mentioned (perhaps a national vaccination campaign) is a residual matter and a national responsibility. The question therefore is what is 'concurrent' power in this case? The clash between the function and powers of the National Government and counties was litigated in *Okiya Omtatah Okiiti v Attorney General* [2014] eKLR (High Court of Kenya, Petition No 593 of 2013).

<sup>36</sup> Although this paper argues that Kenya adopts a weak form of devolution, it is nevertheless a strong form of devolution in the African context. On this see, Beatty Riedl and Dickovick, above n 9, 327.



raise revenue. Counties only have the power to levy property taxes,<sup>37</sup> entertainment taxes,<sup>38</sup> user charges for certain services,<sup>39</sup> as well as charges for the licensing powers with regard to activities such as betting, liquor, parking, and trading.<sup>40</sup> Notably of course, sch 4 of the *2010 Constitution* vests more significant functions and powers, such as those over national defence, foreign affairs, security,<sup>41</sup> police services, national economic policy and planning as well as monetary policy, currency and banking, on the national government.

This scheme reflects the cooperative model of devolution which requires the national and county governments to respect each other's 'functional and institutional integrity' as well as to 'assist, support and consult' each other, in addition to 'exchanging information' and 'coordinating policies'.<sup>42</sup> The *2010 Constitution* requires that each level of government 'shall perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level'.<sup>43</sup>

To make up for the likely dominance of national law in the counties, counties are represented in the national Senate by a Senator elected by the voters in each county. The Senate's powers are mainly restricted to matters concerning county government, particularly with regard to county finances and elections.<sup>44</sup> In addition, the establishment of the Senate as the second house of the national Parliament was designed as an additional check on executive power, particularly on matters affecting the counties.<sup>45</sup>

In addition to decentralising political and legislative authority, the *2010 Constitution* guarantees the counties' equitable financial allocations with the national government.<sup>46</sup>

<sup>37</sup> *2010 Constitution* art 209(3)(a).

<sup>38</sup> *Ibid* art 209(3)(b).

<sup>39</sup> *Ibid* art 209(4).

<sup>40</sup> *Ibid* sch 4 pt 2 items 4–5.

<sup>41</sup> On the evolving relationship between counties and the national government on security matters, see Dominic Burbidge, 'Security and Devolution in Kenya: Struggles in Applying Constitutional Provisions to Local Politics' (2018) 3 *Strathmore Law Journal* 131. In early 2018, the national government directed counties to work with county commissioners, who are appointed by the national government as holdovers from the pre-devolution provincial system of administration, on security matters. See Cyprus Ombati, 'Matiangi: I Said This Was a New Way of Operation the Government Had Adopted to Curb Crime', *Standard Digital* (online), 5 February 2018 <<https://www.standardmedia.co.ke/article/2001268491/matiangi-i-said-this-was-a-new-way-of-operation-the-government-had-adopted-to-curb-crime>>.

<sup>42</sup> *2010 Constitution* arts 189(1)(a)–(c).

<sup>43</sup> *Ibid* art 189(1)(a).

<sup>44</sup> *Ibid* art 109(4)–(5).

<sup>45</sup> Committee of Experts on Constitutional Review (Kenya), above n 21, 114. According to a three judge bench of the High Court of Kenya, the constitutional mandate of the Senate:

is that of representation of counties and protection of the interests of counties at the national level; law-making in relation to matters concerning counties at the national level; and allocation of revenue to counties, and oversight over national revenue allocated to counties. Its mandate, like that of the National Assembly, does not extend to matters or functions reserved by the Constitution to counties at the county level.

*Council of Governors v Senate* [2015] eKLR (High Court of Kenya, Petition No 381 of 2014 as consolidated with Petition No 430 of 2014) [90].

<sup>46</sup> *2010 Constitution* art 201(b)(ii).

Any expenditures made by Parliament are required to be expended to promote equitable development.<sup>47</sup> An equalisation fund is established<sup>48</sup> with a mandatory allocation to go towards provisioning of basic services to 'marginalised areas.'<sup>49</sup> There is also a guaranteed fifteen per cent of all national revenues each financial year to be allocated to county governments.<sup>50</sup> There is also a Revenue Fund established specifically for county governments, from which funds cannot be withdrawn except as authorized by Parliament or a County Assembly.<sup>51</sup>

The 2010 Constitution's guarantees of financial security eased the rolling-out of all 47 county governments without exception. Within one year of the creation of this devolved governance system, 'key institutional structures and systems in the County Executives and County Assemblies' were established.<sup>52</sup> This was a remarkable achievement because counties were designed to take-up the functions of overlapping layers of prior administrative structures.<sup>53</sup> The roll-out of the counties and the process of transferring functions to them, and the counties' efforts to build-up their capacity to deliver on these functions, have provided political insulation from easy reversal.<sup>54</sup>

While we provide a brief assessment of the implementation of devolution here, it is a process in its early stages—and thus it is still early to draw any definitive conclusions. The process will be long-term and complex, with a variety of risks, challenges and opportunities.<sup>55</sup> A significant opportunity has been the ability, under the Senate's leadership, for year-on-year increases in 'monies sent by the National Treasury to the counties': Ksh210 billion (USD2.08 billion) in 2013/14 and Ksh226 billion (USD2.26 billion) in 2014/15.<sup>56</sup> Ksh287 billion (USD2.87 billion) 'was allocated to the counties for the 2015/16 financial year after the Senate and National Assembly struck a compromise

<sup>47</sup> Ibid art 201(b)(iii).

<sup>48</sup> Ibid art 204(1).

<sup>49</sup> Ibid art 204(2).

<sup>50</sup> Ibid art 203(2).

<sup>51</sup> Ibid arts 207(1) and 207(2) respectively.

<sup>52</sup> Commission for the Implementation of the Constitution, 'Assessment of the Implementation of the System of Devolved Government: From Steps to Strides' (June 2014) 2 <<http://devolutionhub.or.ke/file/35e0b4f8ec748888848abe6ef5102eb3.pdf>>.

<sup>53</sup> These were the Provincial, District and Local Government Administration that together long-served as a fourth-arm of the Central government.

<sup>54</sup> The World Bank notes that with the architectural infrastructure of devolution already put in place, it would be 'impossible to alter the foundations, at least not without knocking it down and starting again': Fiscal Decentralisation Knowledge Program Team, 'Devolution Without Disruption: Pathways to a Successful New Kenya' (Report, World Bank, November 2012) vi

<[http://www.wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2012/11/15/000333037\\_20121115230524/Rendered/PDF/NonAsciiFileName0.pdf](http://www.wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2012/11/15/000333037_20121115230524/Rendered/PDF/NonAsciiFileName0.pdf)>.

<sup>55</sup> Ibid xxviii. See also James Gathii, 'Assessing Kenya's Constitution Five Years Out' in Tom Ginsburg et al, *Measuring Constitutional Performance* (Cambridge University Press, 2016) from which some of the preceding paragraphs were drawn from.

<sup>56</sup> Ekwee Ethuro, 'Senate: Advancing Devolution Agenda', *Standard Digital* (online), 10 February 2017 <<https://www.standardmedia.co.ke/article/2001228848/senate-advancing-devolution-agenda>>.

on the Division of Revenue Bill, 2015'.<sup>57</sup> The significance of these increases ought to be seen against the national government's decision to reduce budgetary allocations to the Judiciary in the 2018–19 financial year.<sup>58</sup> Although the reduction in the Judiciary's spending is directly attributable to the judicial nullification of the August 2017 elections, the fact that the national government has reduced spending for an arm of the government, while increasing spending for devolution, suggests the staying power of devolution relative to judicial transformation.<sup>59</sup>

As noted above, the counties were established as equal and interdependent organs, rather than as entities subordinate to the national government.<sup>60</sup> National-county relations are conducted through processes of consultation and cooperation. This cooperative model of devolution is set out in more detail in the *Intergovernmental Relations Act* (Kenya) No 2 of 2012 ('IGRA'). The objective of IGRA is to set out a detailed framework together with its institutional structures and mechanisms for consultation and cooperation between national and county governments.<sup>61</sup> This is cooperation and consultation between the national and county governments and among county governments themselves. The Act also provides a mechanism for the resolution of intergovernmental disputes.<sup>62</sup>

The most important institutional mechanism established by IGRA for conducting inter-governmental relations is the National and County Government Co-ordinating Summit.<sup>63</sup> One of several important consultative bodies established by IGRA is the Council of County Governors (CoG).<sup>64</sup> The CoG has, for the most part, been a very effective advocate of the interests of the Counties vis-à-vis the national government. While the first chairperson of the CoG adopted a contentious approach in advocating for the interests of the counties with the national government, subsequent chairs have adopted a more cooperative approach.

With the decision by Kenya's opposition to work with the government in March 2018 after the tumultuous elections of 2017, the CoG has maintained its cooperative approach towards the national government. Their most recent move has been more self-

<sup>57</sup> Ekwee Ethuro, 'Senate: Advancing Devolution Agenda', *Standard Digital* (online), 10 February 2017 <<https://www.standardmedia.co.ke/article/2001228848/senate-advancing-devolution-agenda>>.

<sup>58</sup> This was after the National Assembly allocated a meagre Ksh50 million (USD500 000) for the repair and construction of new courts in the 2018/2019 budget: Lillian Mutavi, 'Drastic Budget Cuts Will Stall 70 Judiciary Projects, Maraga Warns', *The Star* (online), 24 July 2018 <[https://www.the-star.co.ke/news/2018/07/24/drastic-budget-cuts-will-stall-70-judiciary-projects-maraga-warns\\_c1792073](https://www.the-star.co.ke/news/2018/07/24/drastic-budget-cuts-will-stall-70-judiciary-projects-maraga-warns_c1792073)>.

<sup>59</sup> See Gathii, 'Implementing a New Constitution', above n 8.

<sup>60</sup> Article 189(1)(a) of the 2010 Constitution states:

[g]overnment at either level shall- 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

See also arts 6(2), 189(1)(b)–(c). See also art 6(2) noting that devolution is based on the principle of distinctness, interdependence, cooperation and consultation.

<sup>61</sup> IGRA s 3.

<sup>62</sup> Ibid.

<sup>63</sup> Ibid s 7.

<sup>64</sup> Ibid s 19(1).

preservationist, with Governors demanding immunity from civil and criminal proceedings when corruption charges were brought against them.<sup>65</sup> The CoG has aligned itself with the Judiciary in criticizing the national Executive and Parliament for 'using the budget to manipulate the Judiciary'.<sup>66</sup>

### III DEVOLUTION IN KENYA: DECENTRALISING CORRUPTION OR ACCOUNTABILITY?

#### A Two Contending Approaches of Assessing Kenya's Devolution

As noted in the introduction, two contending analyses of Kenya's emerging experience with devolution have emerged. On the one hand, some scholars have argued the decentralisation introduced by the 2010 *Constitution* devolved corruption and patronage from the national to the county level. Michelle D'Arcy and Agnes Cornell, whose work typifies this approach, argue that it is precisely the opportunities for corruption and patronage politics introduced by devolution that most account for support for devolution.<sup>67</sup> These county level officials, it is argued, also have an incentive to defend devolution against subversion by the central state.<sup>68</sup> According to these scholars, devolution is likely to exacerbate cleavages at the county level in ways that are likely to generate conflict. For example, since land governance has been devolved, scholars in this school of thought argue that there is likely to be a continuation of highly politicised and ethnised land conflict.<sup>69</sup> Further, in some sectors like health, scholars have shown how devolution has resulted in re-centralisation of power within devolution. For example, these scholars have shown that power that previously belonged to county level hospitals has been transferred to county departmental health officials.<sup>70</sup> These scholars therefore argue that devolution in Kenya undermines the benefits associated with decentralisation such as reducing corruption, and patron-client networks.<sup>71</sup>

By contrast, a competing group of scholars, such as Nic Cheeseman, Gabrielle Lynch and Justin Willis, have argued that, notwithstanding its limitations, devolution has so far been relatively successful.<sup>72</sup> This is because it has introduced a new and robust political system at the county level that is generating new political struggles with new actors such as county Governors who are acting in concert to protect their newfound positions.<sup>73</sup> Further, because county Governors are accountable at the local level, they are under pressure to defend county interests from the central government. In that sense,

<sup>65</sup> Imende Benjamin, 'We Need Immunity Just Like the President, Say Governors', *The Star* (online), 10 July 2018 <[https://www.the-star.co.ke/news/2018/07/10/we-need-immunity-just-like-the-president-say-governors\\_c1784447](https://www.the-star.co.ke/news/2018/07/10/we-need-immunity-just-like-the-president-say-governors_c1784447)>.

<sup>66</sup> See Imende Benjamin, 'Giving Courts Sh50m for Growth in Bad Faith - CoG', *The Star* (online), 28 July 2018 <[https://www.the-star.co.ke/news/2018/07/28/giving-courts-sh50m-for-growth-in-bad-faith-cog\\_c1793837](https://www.the-star.co.ke/news/2018/07/28/giving-courts-sh50m-for-growth-in-bad-faith-cog_c1793837)>.

<sup>67</sup> D'Arcy and Cornell, above n 6; Cannon and Ali, above n 6.

<sup>68</sup> D'Arcy and Cornell, above n 6, 248.

<sup>69</sup> Catherine Boone, 'Land Conflict and Distributive Politics in Kenya,' (2012) 55 *African Studies Review* 75, 75.

<sup>70</sup> Edwine W Barasa et al, 'Recentralization within Decentralization: County Hospital Autonomy under Devolution in Kenya' (2017) 12(8) *PLOS ONE* 1.

<sup>71</sup> D'Arcy and Cornell, above n 6.

<sup>72</sup> Cheeseman, Lynch and Willis, above n 5.

<sup>73</sup> *Ibid.*

devolution has created a new system of checks and balances to protect county interests at the local level. Among the limitations identified by this group of scholars is that devolution has not dismantled the patron-client networks between the central and the periphery, but rather it has shifted it to the counties.<sup>74</sup> This second group of scholars have also sought to show how devolution has promoted horizontal accountability between officials at the county level which has allowed some accountability to county electorates.<sup>75</sup> Accountability to county electorates has been particularly higher in counties under opposition control, where the incentives to cooperate with the central government must be balanced against electorates that demand resistance from such control.<sup>76</sup>

The analysis in this article is more aligned with this second view; devolution has had its challenges, but it has by and large created autonomous entities that have so far decentralised the competition for political and economic power in the country. Within counties, the alliances built (which are often quite informal) in support of devolution have contributed towards the institutionalisation of devolution as a system of governance.<sup>77</sup> More importantly, this paper argues that while devolution has yet to result in more equitable distribution of national resources, it has been a major factor in cooling off the zero-sum and often ethnic nature of electoral competition for the national presidency – particularly in the 2013 elections, and much less so in the 2017 elections. A major reason why the 2013 elections cooled off the zero-sum nature of electoral competition based on ethnicity is that an alliance was formed between candidates from two major ethnic groups, the Kikuyu and the Kalenjin. These two communities had faced off in prior ethnic skirmishes in national elections.<sup>78</sup> In their election campaign the unlikely alliance of Uhuru Kenyatta (a Kikuyu) and William Ruto (a Kalenjin) whipped up nationalist sentiments as they campaigned for national office on a platform that gained momentum because both had been indicted by the International Criminal Court.<sup>79</sup> Further, a more situation-specific analysis shows that in some counties, devolution has delivered services and opportunities that were prior to 2010 unavailable and would likely be unavailable today without devolution.

## **B Corruption and Accountability**

Devolution's successes must be seen in light of the challenges that have come with it. For example, most county expenditures have been on building huge mansions for Governors, salaries, fuel, and administration costs, rather than on development

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<sup>74</sup> Ibid.

<sup>75</sup> Dyzenhaus, above n 5.

<sup>76</sup> Gathii, 'Implementing a New Constitution', above n 8.

<sup>77</sup> Ibid.

<sup>78</sup> The axis of conflict in the 2008 elections, like in prior national elections since 1991 when multi-party elections were introduced in Kenya, was between the Kalenjin, on the hand, and the Kikuyu, Kisii, Luo, Luhya, on the other. The Kalenjin regarded these groups as outsiders who did not have a right to reside in the Rift Valley which the Kalenjin claim is their home. Since these non-Kalenjin groups traditionally voted for opposition political parties under then President Daniel Arap Moi's reign, the Kalenjin engaged in ethnic cleansing to punish these ethnic groups for supporting opposition political parties.

<sup>79</sup> Susanne D Mueller, 'Kenya and the International Criminal Court (ICC): Politics, the Election and the Law' (2014) 8 *Journal of Eastern African Studies* 25.

projects.<sup>80</sup> Early estimates of their expenditures in the first few years after devolution was launched showed that only 10 of 30 counties in one analysis had met the 30% target budget expenditure on development. Counties had instead engaged in wasteful spending on foreign trips, top of the range vehicles, office furnishings, iPads and allowances.<sup>81</sup>

Furthermore, county Governors and members of the Senate are pitched in perennial battles with the national government for additional allocation of revenues. It was only in the third quarter of 2018 when the national government finally appeared determined to begin prosecuting county Governors for corruption offences.<sup>82</sup> The national government's decision to begin prosecuting county Governors for corruption is perhaps an indication that President Uhuru Kenyatta, who is serving his last constitutionally mandated term, is intent on leaving a positive legacy. In addition, because he is term-limited, he does not need the support of county Governors in the next presidential election, in 2022. The impetus for the re-energized anti-corruption prosecutions first arose from public outrage following the disclosure of mega-corruption scandals in the national government. The vigour of this anti-corruption campaign has now spread from the national government to county officials.

Many of the newly established County Assemblies have often prioritized spending that would benefit themselves. This spending includes increased salaries, allowances and discretionary funds that they were individually in charge of. When Governors stood in their way relations turned chaotic and Members of County Assemblies often used their power to impeach the Governors.<sup>83</sup> In at least one county, the President was petitioned to dissolve a county government on the grounds that it had become ungovernable.<sup>84</sup> There was considerable litigation challenging the impeachment of Governors, particularly in the inaugural 2013–17 period. Governors who have been impeached so far have been protected from ouster by the judiciary.<sup>85</sup> This is because County Assemblies did not always follow the impeachment process laid down in the 2010 *Constitution* and in statute. Another barrier to removal through impeachment is the Senate, which the *County Governments Act* (Kenya) No 17 of 2012 empowers to approve

<sup>80</sup> Mwaniki Wahome, 'How the Governors Spent Your Money', *Daily Nation* (online), 5 February 2015 <<https://www.nation.co.ke/news/politics/How-the-governors-spent-your-money/1064-2614608-mqw20hz/index.html>>.

<sup>81</sup> See World Bank Group, 'Decision Time: Spend More or Spend Smart?' (Public Expenditure Review Volume 1, December 2014) <<http://documents.worldbank.org/curated/en/230971468254049239/pdf/940210WP0v10Bo0ort0Vol01201400FINAL.pdf>>.

<sup>82</sup> Justus Wanga, '30 Sitting, Former Governors to Face Corruption Charges' *Daily Nation* (online), 29 July 2018 <<https://www.nation.co.ke/news/30-sitting-former-governors-to-face-corruption-charges/1056-4686624-jj40ca/index.html>>; Maggie Fick, 'Kenya to Prosecute County Governor, Nine Others in Graft Case' *Reuters* (online), 3 July 2018 <<https://uk.reuters.com/article/uk-kenya-corruption/kenya-to-prosecute-county-governor-nine-others-in-graft-case-idUKKBN1JT0HV?rpc=401&>>.

<sup>83</sup> Commission for the Implementation of the Constitution, above n 52, 103.

<sup>84</sup> Moses Njagih, 'President Uhuru Kenyatta Declines to Disband Makueni County Government', *Standard Digital* (online), 7 September 2015 <<https://www.standardmedia.co.ke/article/2000175491/president-uhuru-kenyatta-declines-to-disband-makueni-county-government>>.

<sup>85</sup> See, eg, *Martin Nyaga Wambora v Speaker of the Senate* [2014] eKLR (Kenyan Court of Appeal, Civil Appeal No 21 of 2014).

impeachment decisions by County Assemblies.<sup>86</sup> The Senate has done so by setting a very high threshold for conduct warranting impeachment under the law.<sup>87</sup> The large number of county Governors who faced impeachment motions in the first few years of devolution has spurred a legal reform initiative to put limits on the ability of County Assemblies to impeach Governors.<sup>88</sup>

The Ethics and Anti-Corruption Commission (EACC) has argued that 40 out of the 47 Governors flaunted the mandatory legal requirements in appointments of their County Executive Committee Members (CECMs).<sup>89</sup> This claim arises from the requirement in s 35 of the *County Governments Act* (Kenya) No 17 of 2012 requiring those appointed to County government employment to be cleared on financial probity, corruption, criminal conduct and tax compliance. This is an important governance and rule of law question that cannot be over-emphasised.

### C Service Provision in the Counties

Rural and poorer counties also face the additional challenge of service providers such as doctors and teachers not working there. Doctors, for example, have had a very contentious relationship with the counties. Before devolution, they worked for the national government. After devolution, many of them became county employees. At the onset of devolution, they went on strike and demanded a national scheme of service under which they would continue getting paid at the national level, a fact that would have re-centralized health as national instead of making it a county function.<sup>90</sup>

Counties have also faced challenges relating to the rigid accounting systems developed under the *Public Finance Management Act* (Kenya) No 18 of 2012 ('PFMA'). This system has adversely affected the county level 5 hospitals. The PFMA requires that each County Treasury ensure that all money raised or received by or on behalf of the county government be paid into the County Revenue Fund, instead of having these hospitals keep the money they have raised and received.<sup>91</sup> These hospitals have thus lost an important source of revenue, and county treasuries have failed to disburse the

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<sup>86</sup> *County Governments Act* (Kenya) No 17 of 2012 ss 33(3)(a)-(b), (4).

<sup>87</sup> Moses Njagih, 'Why Gachagua Survived Impeachment Though He Was Guilty of Charges', *Standard Digital* (online), 15 September 2016 <<https://www.standardmedia.co.ke/article/2000216095/why-gachagua-survived-impeachment-though-he-was-guilty-of-charges>>.

<sup>88</sup> Dennis Odunga, 'Bill Seeks to Raise Bar for Governors' Impeachment' *Daily Nation* (online), 17 May 2014 <<https://mobile.nation.co.ke/news/Bill-seeks-to-raise-bar-for-governors-impeachment/1950946-2318572-format-xhtml-ugbwft/index.html>>.

<sup>89</sup> Jael Keya, 'EACC to Reconstitute 40 County Governments' *Kenyans.co.ke* (online), 21 August 2018 <<https://www.kenyans.co.ke/news/26347-eacc-reconstitute-40-county-governments>>.

<sup>90</sup> David Ndi, 'Why the Doctors Are Fighting Devolution' on *Daily Nation Blog* (13 December 2013) <<http://mobile.nation.co.ke/blogs/Why-the-doctors-are-fighting-devolution/-/1949942/2111146/-/format/xhtml/-/plxa90/-/index.html>>.

<sup>91</sup> PFMA s 109(2)(a).

money back to the hospitals on time.<sup>92</sup> These hospitals thus found themselves suffering crippling cash flow and procurement issues.<sup>93</sup>

Perhaps because of these kinds of challenges, in the recent past the members of the national assembly, the senators, and the devolution ministry have shown concerted intention to strengthen devolution by addressing these challenges. Members of the national government have in recent years attempted, in specific cases successfully, to review 'some devolution laws to improve working relations between county and national governments.'<sup>94</sup> One of the key recommendations of reform initiatives has been to strengthen the role of the Senate.<sup>95</sup> This recommendation includes granting the Senate a role in the process of suspending a county government before it is finalised at the county level.<sup>96</sup> The *2010 Constitution* vests the President with the final power over whether or not a county government can be suspended.<sup>97</sup> This power is, however, checked by the involvement of an independent commission of inquiry and authorisation from the Senate.<sup>98</sup> Another recommendation has been for an increased role of the Senate in legislation.

#### D Gaps in County Governance Law

A significant issue that has arisen is the replacement of a deputy governor who has resigned, been impeached or died. This issue has arisen because there is no statutory or constitutional provision that anticipates this possibility. It became apparent there was a gap in the law after the deputy governor of Nairobi City county Polycarp Igathe resigned soon after being elected in 2017, and after the governor of Nyeri, Wahome Gakuru, died in a road accident in November 2017. The *2010 Constitution* provides that when a Governor dies the position should be filled by his/her Deputy.<sup>99</sup> As noted above, the *2010 Constitution* and statutory law are, however, silent about what happens when the office of the Deputy Governor falls vacant. An Advisory Opinion on this question, requested by the Speaker of Embu County Assembly, from the Supreme Court held that the *2010 Constitution* does not require a fresh election to be conducted when the office of the deputy governor falls vacant. The court held that the Governor should nominate a replacement within 14 days and the Senate should vote on that nomination

<sup>92</sup> Jaindi Kisero, 'To Stop Corruption, Address the Accounting Hitches in Counties' on *Daily Nation Blog* (25 April 2018) <<https://mobile.nation.co.ke/blogs/To-stop-corruption--address-accounting-hitches-in-counties-/1949942-4520858-14w59gr/index.html>>.

<sup>93</sup> Ibid.

<sup>94</sup> Kennedy Kimanthi, 'Devolution Laws under Review, Says CS Eugene Wamalwa', *Daily Nation* (online), 4 June 2018 <<https://www.nation.co.ke/news/politics/Devolution-laws-under-review--says-CS-Eugene-Wamalwa/1064-4593862-15cetyd/index.html>>. See, eg, *Council of Governors v Senate* [2015] eKLR (High Court of Kenya, Petition No 381 of 2014 as consolidated with Petition No 430 of 2014). The High Court held that County Development Boards established under the *County Governments (Amendment) Act* (Kenya) No 13 of 2014 ('CGAA') are unconstitutional.

<sup>95</sup> Kimanthi, above n 94.

<sup>96</sup> Fred Kibor, 'Senate Seeks Powers to Secure Devolution', *Standard Digital* (online), 9 December 2017 <<https://www.standardmedia.co.ke/article/2001262544/senate-seeks-powers-to-secure-devolution>>.

<sup>97</sup> *2010 Constitution* art 192(1).

<sup>98</sup> Ibid art 192(2).

<sup>99</sup> Ibid art 182(2).



within 60 days.<sup>100</sup> The Court used the provisions relating to vacancies in the office of the Deputy President as an analogy in reaching its conclusion. The inspiration for applying this ‘principle of congruence’ arises from the cooperative structure of devolution adopted in Kenya’s 2010 Constitution.

### E Some Devolution Successes

Despite the stated challenges and the need for improvement, devolution has produced significant successes consistent with the goals that justified the adoption of devolution in the 2010 Constitution. Our approach is not to generalise such successes, however, because for every example of what we give as examples of success there are more counter-examples. Our point is that the examples of success we outline are achievements that were not possible in the pre-devolution era, when the national government could not pay attention to local concerns in the same way counties have been able to. Our premise therefore, is that devolution has given counties the autonomy to experiment and implement projects in ways that were not possible without devolution.

Makueni county, under the stewardship of Governor Kivutha Kibwana, is a good example. It has initiated an ambitious experiment in the provision of universal health coverage. ‘Since October 2014, Makueni has been offering its one million residents free healthcare across all public facilities, including county and sub-county hospitals.’<sup>101</sup> However, the residents are required to enrol by paying a subscription fee of Ksh 500 (USD 5) per household annually in order to enjoy the benefits.<sup>102</sup> ‘The program, called MakueniCare, piggybacks on the national government’s free primary healthcare policy and the national coverage provided by the National Health Insurance Fund (NHIF) with the goal of providing seamless cover across all public health services.’<sup>103</sup> This is facilitated by the national government, including the provision of free treatment, in-patient care and ambulatory services, at the thirteen hospitals within the county, paid for by the county government.<sup>104</sup> Moreover, people subscribed to NHIF enjoy ‘free care at referral facilities outside the country.’<sup>105</sup> The program has more than doubled the number of health facilities in less than five years under this innovative approach.<sup>106</sup>

Makueni county has also launched two pioneer factories—one a fruit processing plant and the other a milk processing plant. Farmers in Makueni will deliver over 72

<sup>100</sup> *Re Speaker, County Assembly of Embu* [2018] eKLR (Supreme Court of Kenya, Reference No 1 of 2015).

<sup>101</sup> Patrick Gathara, ‘(D)evolved Healthcare: Makueni’s Trailblazing Experiment in Providing Universal Health Coverage’, *The Elephant* (online), 11 January 2018 <<https://www.theelephant.info/features/2018/01/11/devolved-healthcare-makueni-trailblazing-experiment-in-providing-universal-health-coverage/>>.

<sup>102</sup> Pius Maundu, ‘Kibwana Launches Ambitious Free Healthcare Plan for Makueni Residents’, *Daily Nation* (online), 16 September 2016 <<https://www.nation.co.ke/counties/makueni/Makueni-County-to-offer-free-healthcare-to-residents/1183294-3383768-vwve2o/index.html>>. The system covers parents and all their children below 18 years (up to 24 years in the case of students).

<sup>103</sup> Gathara, above n 101.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.* See also Graham Kajilwa, ‘How Makueni Plans to Sustain Subsidised Healthcare Programme’, *Standard Digital* (online), 5 April 2018 <<https://www.standardmedia.co.ke/article/2001275698/how-makueni-plans-to-sustain-subsidised-healthcare-programme>>.

metric tonnes of raw mango to the factory, and the factory is expected 'to process 2100 metric tonnes of raw mango from across the country, producing 4,000 drums of mango puree'.<sup>107</sup> The county has also commissioned a milk processing plant.<sup>108</sup> The plant has the capacity to process and pack 300 litres of milk per hour, and 6600 litres in a day.<sup>109</sup> So successful have the Makueni projects been that the county is now the first of fifteen counties to receive cash from the Instruments for Devolution Advice and Support (IDEAS) programme of the European Union, which has given a Ksh 110 million grant for the mango puree project.<sup>110</sup>

These successes in Makueni have emerged only in the second phase of devolution, after the 2017 elections. In the first phase, Makueni county had witnessed a tumultuous period. In September 2014, Members of County Assembly (MCAs) in Makueni passed an impeachment motion against Governor Kivutha Kibwana.<sup>111</sup> This set in motion a process that nearly led to the suspension of the county government. Coupled with the unfruitful competition between the national and county governments during the first five years of devolution, this prevented many tangible achievements during this period.<sup>112</sup> The success witnessed in Makueni provides a good example of the uses of a situation specific analysis of the benefits and challenges that are emerging from devolution, and how the principle of subsidiarity is taking root within the Kenyan model of cooperative devolution. In addition, the fact that in Makueni voters voted out all (except one) of the MCAs who had unsuccessfully attempted to impeach the Governor in the 2017 elections<sup>113</sup> shows there is increased county level accountability between county legislators and their electorates.

On a more generic level, some counties have made achievements that had not been possible in the first several decades of Kenya's independence under a unitary

<sup>107</sup> 'Amazing: Devolution Miracles in Makueni; Two Factories Launched by Gov Kivutha Kibwana', *Kenya Today* (online), 12 January 2018 <<https://www.kenya-today.com/business/devolution-miracles-makueni-factories-milk-mango-kivutha-kibwana>>.

<sup>108</sup> Ibid.

<sup>109</sup> Wambui Mbuthia, 'Netizens Crown Kivutha Kibwana 'the Governor of the Year' for Piloting Food Processing and Preservation' *Ureport* 12 January 2018 <<https://www.standardmedia.co.ke/ureport/story/2001265699/netizens-crown-kivutha-kibwana-the-governor-of-the-year-for-piloting-food-processing-and-preservation>>.

<sup>110</sup> Susan Muhindi, 'EU Gives Makueni Sh110m to Build Fruit Processing Plant', *The Star* (online), 17 May 2018 <[https://www.the-star.co.ke/news/2018/05/17/eu-gives-makueni-sh110m-to-build-fruit-processing-plant\\_c1759498](https://www.the-star.co.ke/news/2018/05/17/eu-gives-makueni-sh110m-to-build-fruit-processing-plant_c1759498)>.

<sup>111</sup> Daniel Wesangula, 'Kibwana: Why Makueni is Best Example that Devolution Works', *Standard Digital* (online), 27 January 2018 <<https://www.standardmedia.co.ke/article/2001267429/kibwana-why-makueni-is-best-example-that-devolution-works>>. The MCAs had tried to impeach the Governor and he subsequently moved to dissolve the entire county government. A commission on inquiry looked into the disputes at Makueni and made some recommendations to the President that the Makueni County government be suspended. The President, however, never forwarded the report to the Senate for debate and approval, effectively vetoing the recommendations.

<sup>112</sup> Ibid.

<sup>113</sup> Mutua Kameti, 'Clean Sweep after Only One Out of 30 Makueni MCAs Bounce Back to Assembly', *The Star* (online), 9 August 2017 <[https://www.the-star.co.ke/news/2017/08/09/clean-sweep-after-only-one-out-of-30-makueni-mcas-bounce-back-to\\_c1613599](https://www.the-star.co.ke/news/2017/08/09/clean-sweep-after-only-one-out-of-30-makueni-mcas-bounce-back-to_c1613599)>.

government. The following examples come from the poorest counties in the country. These counties have been marginalised by both colonial and post-independence governments. For example, Lamu county witnessed its first caesarean section operation since independence.<sup>114</sup> 'Mandera county launched its first tarmacked road since independence.'<sup>115</sup> Garissa and West Pokot Counties have been celebrated for increasing the number of deliveries in hospitals. Other counties such as 'Embu, Kakamega, and Mandera counties stand out for improving access to healthcare services by providing free maternal healthcare service kits, incentives to traditional birth attendants and community health workers and using WhatsApp messaging to connect health facilities'.<sup>116</sup> Furthermore, devolution has revamped the area of Early Childhood Education (ECD) through a rapid increase of enrolment in ECD centres.<sup>117</sup> The emphasis on funding ECD has opened up the educational system to more children than in the past.<sup>118</sup>

#### IV CONCLUSION

Devolution is less than 10 years old, and while it is too early to say anything definitive about the success or failure of devolution, it has taken root as a new system of governance in the country. The fact that the national government has retained vestiges of the provincial administration by having the county commissioners in every county indicates the continued discomfort of the national government over giving up its system of centralised governance fully. This in turn has continued to be a point of tension between the new devolved units and the national government.

Since county governments have to be accountable to their electorates, to county officials and to county institutions, this has created very strong incentives for county politicians to maintain their autonomy from the central government to defend their newfound opportunities for control of resources and power. County officials also support devolution because they want to avoid being voted out by an electorate that loses resources that are re-centralised, or do not come to the counties because of a powerful central government relative to the counties. A major risk facing devolution that arose following the 2017 elections has been the inability to dislodge control of the Kenyan state from the Kikuyu and Kalenjin communities which have controlled the Presidency since independence. Following a second electoral loss in the race for presidency since the enactment of the *2010 Constitution*, the opposition began a campaign to divide Kenya up – in effect to allow those communities excluded from the

<sup>114</sup> Silas Apollo, 'How Devolution has Changed Kenya', *Daily Nation* (online), 23 April 2018 <<https://www.nation.co.ke/news/How-devolution-has-changed-Kenya/1056-4494048-117qesa/index.html>>.

<sup>115</sup> John Kipchirchir, 'How Devolution Has Impacted Positively on Kenyans', *Ureport* (online), 20 October 2016 <<https://www.standardmedia.co.ke/ureport/story/2000220434/how-devolution-has-impacted-positively-on-kenyans>>.

<sup>116</sup> Apollo, above n 114.

<sup>117</sup> *Enrolment in ECD Centres Rise After the Sector Was Devolved* (26 January 2017) Kenya News Agency (KNA) <<http://kenyanewsagency.go.ke/en/?p=100833>>. The number of children in ECD Education centres in Kiambu county doubled after the education sector was devolved.

<sup>118</sup> Beatrice Elachi, 'Devolution has made Kenya a better Country' on *Fifth Estate* (16 February 2016) <<https://www.capitalfm.co.ke/eblog/2016/02/16/devolution-has-made-kenya-a-better-country/>>.

Presidency to secede. While calls for secession receded when the government and the opposition decided to work together in March 2018, calls for secession demonstrate the continuation of the grievances that devolution sought to address that remain unaddressed.

This article has argued that, to understand the successes and failures of devolution, a more situation-specific analysis is likely to present some of the important nuances that are emerging in Kenya's relatively new devolution. These nuances are likely to be missed out in analyses designed to look for broader trends and patterns. In the foregoing sense this paper therefore departs from some of the current scholarship on devolution in Kenya. In particular, we distinguish ourselves from scholars who have argued devolution has simply devolved corruption. This paper has more in common with scholars who have noted that while devolution has had some successes, it has relocated patron-client networks from the national level to the county level. From our perspective, devolution is a contested process accompanied by risks and challenges, and some successes as well. In other words, there are examples of significant progress in some counties on issues important to those counties—like the rising availability of hospitals, educational opportunities and roads, which were unavailable or grossly inadequate prior to devolution. Other counties may be characterised more by challenges than successes. Ultimately, there is no single picture that emerges. It is a patchwork of experiments with varying outcomes that will continue into the future.

