

THE

DEVOLUTION

FORUM



**Report on The Devolution Forum Conference held on
26th March 2014 at Safari Park Hotel, Nairobi**



Acknowledgement

The Devolution Forum Conference was supported by UNDP Amkeni Wakenya as part of the efforts to ensure the establishment of people centered devolved government.

Abbreviations

CG	County Government
CIC	Commission for the Implementation of the Constitution
CLARION	Center for Law and Research International
CRA	Commission of Revenue Authority
CREAW	Centre for Rights Education and Awareness
CRECO	Constitution & Reform Education Consortium
GIS	Geographical Information Systems
IBP	International Budget Partnership
ICJ	International Council of Jurists
IEA	International Economic Affairs
IGR	Inter Governmental Relations
KSG	Kenya School of Government
LSK	Law Society of Kenya
MCA	Members of County Assembly
NG	National Government
PFM	Public Finance Management Act
PPP	Public Private Partnerships
SID	Society for International Development
TA	Transition Authority
TDF	The Devolution Forum
TISA	The Institute for Social Accountability
UNDP	United Nations Development Programme
TI-KENYA	Transparency International in Kenya
KHRC	Kenya Human Rights Commission

Table of contents

1	Executive Summary	5
1.1	Background and problem statement;	6
1.2	Objectives of conference;.....	7
1.3	Methodology???......	7
1.4	Conference Participation.....	7
2	Preliminaries.....	8
2.1	Opening Remarks	8
2.2	Opening Remarks from UNDP	10
3	Conference Presentations and feedback	11
3.1	Critical Review of the Division of Revenue Process- Jason Lakin, (IBP).....	12
3.2	Critical Review of the Salaries Review Process – Kwame Owino(IEA).....	12
3.3	Revenue sources for County Governments - Fatma Ahmed.....	13
4	Towards successful intergovernmental relations under devolved government in Kenya.....	15
4.1	Making Devolution Work: Successful Intergovernmental Relations.....	15
4.2	Intergovernmental Relations: Perspective from Senate - Senator Kipchumba Murkomen .	15
4.3	Intergovernmental Relations: Perspective from LSK – Rene Omondi.....	16
4.4	Intergovernmental Relations: Perspective from School of Government Dr. Kemoli Sagala	17
5	Participation by the Public---The Reason for Devolution.....	18
5.1	Public Participation: Saphia Abdi – Transition Authority (TA).....	18
5.2	Public Participation : Irungu Houghton –Society for International Development (SID).....	18
5.3	Public Participation: Catherine Mumma - Commission for the Implementation of the Constitution (CIC)	19
6	Conference Plenary:	21
6.1	Discussion from the First Session	21
6.2	Discussion on the Second session	21
6.3	Discussion on the Third session.....	21
7	Conference Closure:	22

7.1	Way Forward	22
7.2	Closing Remarks.....	24

1 Executive Summary

It was not by chance that the first words in the Constitution are “We, the people of Kenya.....” and that Article 1 declares that “sovereignty of the republic belongs to the people of Kenya.....”. Devolution in its philosophy, design and architecture is one of the pillars of realising the aspirations of these two statements. That devolution is a reality in Kenya today cannot be gainsaid. This foremost constitutional provision has positioned itself at the core of national life today affecting not just the citizenry, but elevating itself into a national discourse, that even its opponent cannot wish it away. The onset of devolution in Kenya was marked by the promulgation of the current constitution on the 4th August 2010. Through a popular referendum, Kenyans adopted the new Constitution marking the end of centralised government. The purpose of devolution is to allow citizens greater control over resources affecting their priorities through active participation in planning, budgeting and resource allocation among others as outlined in Cap 11 of the constitution. The transition from central to devolved government however is only one year old characterised with more challenges than success stories. Some of these challenges include poor functional assignment process; lack of clarity of roles/intergovernmental relation wrangles; lack of comprehensive capacity building; lack of and even uncoordinated public participation; and poor oversight by certain institutions.

Since the promulgation of the constitution (2010) in Kenya, there is a rhetoric in the background that there are efforts to derail devolution. In addition, the Civil Society has increasingly, found itself overwhelmed by the multiplicity of its challenges and the overbearing weaknesses of its capacity-human, financial and organisational in the midst of a determined national state that seeks to subdue its leadership. It is clear that since the implementation of the devolved government system, there has not been a united and convicted voice from CSOs, a critical gap that The Devolution Forum (TDF) seeks to address.

On Wednesday 26th March 2014, the Civil Society took a huge step towards addressing this gap when it launched the wider Civil Society in Kenya. The launch, funded by UNDP and supported by TISA and other CSOs comes at a time where there is an assault on the devolved government system in Kenya. The Devolution Forum (TDF), Civil Society Organisations reflected on the devolution promise one year later following the formation of county governments as well as the challenges in three key areas-revenue sharing, intergovernmental relations and public participation. The conference was organized by a team of 20 Civil Society Organisations and brought together over 200 participants from CSOs at national and county level.

The Devolution Forum is a multi-sectoral alliance convened by civil society, to bring together like-minded networks, organisations and individuals united for the promotion and protection of Devolution and its implementation as enshrined in the Constitution of Kenya 2010.

I. Introduction:

1.1 Background and problem statement;

Devolution is just over a year old and the teething problems of its implementation are threatening to reverse the gains made to get to this point. There have been multiple challenges from intergovernmental relations, fiscal sustainability of a devolved government, public participation and the role of CSOs in safeguarding the constitution. Arms of government have been more interested in power plays than in working together for the good of the citizens. The perception from the public is that the devolved government structure is fiscally unsustainable contributing to waning public support for the entire process. Public participation which is the heart of the constitution is poorly understood by the citizens hence accountability is not as strong as expected. The biggest gap has however been as a result of the failure by CSOs to find a common stand and hold the government accountable as well as educate the citizens on how to engage the government. Efforts to address these issues from the CSOs have been disjointed at best exposing the need for a joint structure to engage the government on its promise to implement the devolution process as engendered in the constitution. The Devolution Forum (TDF) is a response to this gap as a mechanism to safeguard the constitution by empowering the citizens and holding government accountable.

Kenya's Civil Society (CS) as identified from early 1990s until the setting in of the new constitutional dispensation credited for its relentless pursuit of the constitutional project until its realisation and bearing the heavy costs along the way including loss of life, maiming, prison and detention terms and bearing the brunt of state violence. They deserve therefore to be referred to as the defenders of human rights and governance that seek to ensure that the state and its apparatus is held accountable for its actions and promises to the citizens.

However, the Civil Society has and is changing rapidly in terms of its character, structure, organisation, focus and leadership. Increasingly, it finds itself overwhelmed by the multiplicity of its challenges and the overbearing weaknesses of its capacity-human, financial and organisational in the midst of a determined national state that seeks to subdue its leadership. It is clear that since the implementation of the devolved government system, there has not been a united and convicted voice from CSOs, a critical gap that The Devolution Forum (TDF) seeks to address.

On Wednesday 26th March 2014, the Civil Society took a huge step towards addressing this gap when it launched the wider Civil Society in Kenya. The launch, funded by UNDP and supported by TISA and other CSOs comes at a time where there is an assault on the devolved government system in Kenya. Media reports have painted a picture of uncoordinated, unaccountable and questionable integrity devolved County Governments (CG) mostly accurate. This coupled with lack of active CSO involvement to ensure devolution is effective in achieving its mandate was the basis for uniting efforts under TDF. The one day deliberations were well organised with a turnout of over 200 CSO participants at both county and national level comprising of youth, women and marginalised populations represented.

1.2 Objectives of conference;

- To come up with a common position and recommendations on the devolution process
- To champion for the protection of devolution process

1.3 Methodology

The conference report was developed from the presentations of the workshop and references to secondary data on the three areas that were discussed namely key areas-revenue sharing, intergovernmental relations and public participation.

1.4 Conference Participation

The devolution forum brought together members of the Civil Society from various parts of the country. The institutions that were brought together represented both national and sub-national institutions that have a human rights approach towards development. These institutions included international Donor organisations, state actors, local NGOs and CSOs, members of the media fraternity among others with similar interest. The sectors were broad with policy think tanks, budgeting experts, constitutional law experts, the Senate, various Intergovernmental Institutions among those represented.

2 Preliminaries

A warm welcome from the conveners was marked with gratitude to all participants for attending on short notice and UNDP for financing the forum and making it a reality. A vote of thanks was also extended to the CSO partner members of the devolution forum for their contributions and teamwork in making the event a reality.. In a clear and passionate context of devolution in Kenya, its challenges and the need for a stronger CSO role, Wanjiru Gikonyo of TISA laid down the foundation of the deliberations to be held.

The participants of this one day forum comprised of representatives of institutions working directly or closely with devolution structures. Wanjiru Gikonyo outlined the aim of the "forum as an effort "to put together a memorandum to present to hold the leaders accountable". This will therefore lead to the formation of a multi sectoral alliance convened by the civil society to bring like minded individuals together to ensure the implementation of devolution as enshrined in the constitution.

"The last 50 years were dominated by big national governments; The next 50 years will be for devolved governments"

As Kenya celebrates one year of devolved government, the public image and support for devolution has not been positive. This has led to the perception that devolution is not working or is not the right model for this country among the public. It is clear we have a well written constitutional document however the CSOs have failed to actively claim the rights that they hold. Wanjiru Gikonyo outlined a clear case of how devolution under deliberate and sustained assault.

"Sole purpose of TDF: Promote and protect devolution as it is enshrined in the constitution"
Wanjiru Gikonyo - TISA

2.1 Opening Remarks

Presenter 1: Wanjiru Gikonyo- Deliberate Assault on Devolution

Wanjiru Gikonyo provided the tempo for the Forum by outlining the genesis of the assault on devolution. The Forum noted that the constitution of Kenya is the blue print for Kenya's peaceful revolution through devolution. Devolution has been under attack by the previous and current government and unfortunately, the Civil Society community has not successfully challenged these assaults. The forum observed the various challenges and assaults that have so far been directed to devolution.

Right from the beginning, the assault commenced with the previous government dilution of the accountability of state officers. The success of devolution is intimately linked to the extent to which state officers at the national and county levels may be held to a higher level of leadership accountability as enshrined in Chapter VI of the Constitution. Chapter VI has been the target by all arms of government-Legislature, Judiciary and Executive to reduce its portent and weaken its effect.

This is evidenced by the sustained push for an amendment by MPs to remove themselves from the provisions and thus escape from accountability and responsibilities placed on them by chapter. There are efforts to protect the country and citizenry from the MPs including those by the CIC which went to court to block the MPs from the intended amendment.

Secondly, MPs are provided with budgetary apportionment and supervisory powers expected to be applied for the benefit of the citizens. This calls for a higher threshold of responsibility placing the public good to supersede personal gain, a test which both houses of parliament have failed. Instead these powers are exercised to secure personal benefits, demonstrate muscular authority over other state organs and as a big stick to those state officers and offices which dare to question legislative authority! It is worth remembering that the first devolution project after independence due to strangulation of the revenue lifeline.

Thirdly, public participation underpins the success of the Constitution as the space and means of Kenyans realising their role as sovereign as in Articles 1 and entrenched in Articles 10 as a national value in additions to other provisions in the Constitution including under Articles 35, 174, 196, 201. Devolution is not just at the County government level but at grassroots level requiring the need to set up county budget forums and village councils. These grassroots investments are established with the premise that civic education on the planning and budgeting process has been afforded to the citizens and they have the capacity to actively be involved in meaningful input to allow for development needs to be adequately prioritised and included in the County budgets. It is clear that even though some counties are beginning to undertake civic education most have yet to meet this requirement of devolving to the lowest level. The CSOs therefore need to give their support for adequate level of devolution to be achieved.

Fourthly, the transition from Centralised government to Devolved government was entrusted to the Transition Authority. The process for this transition has encountered massive challenges leading to power struggles and perceived ineffective County Government discharge of responsibilities mandated to the CG in Schedule 4 and Art 174. For instance, Art 174, 5, 201,202 – Division of revenue, equalisation of funds. Division of revenue was done without costing data available to make rational decisions. This transition process is now viewed as a personality contest with poor intergovernmental relations that have exacerbated the process in which issues are identified, prioritised and priced.

Further transition of personnel from National to County Government has also not been managed adequately with County Government inheriting staff they do not need or who do not exist or hiring staff that the National level already has. In addition the audit of assets and their transfer to relevant governments to manage has been slow with information already collected still not available to the public.

It was also pointed out that intergovernmental relations are a critical part of the devolution government with clarity of roles between the national government and county government causing significant issues for devolution and as a result, we are witnessing political guess work on how to allocate budgets to deliver services.

Therefore enactment of laws in contravention with the Constitution has also been a significant challenge to the devolution process. For instance, parliament has published a bill in which they want

to manage it from the CDF structure (sub county level) which is unconstitutional and contravenes the principles of separation of powers. Conditional grants are useful for county government management therefore; usurping this from County by parliament is a step in the wrong direction for devolution.

Finally, there is no overarching policy overseeing the process of devolution. Policy manages administrative aspects of the constitution.

“Article 3, we (CSOs) have been entrusted with protection of the constitution. We shall not rest until we have achieved equity and equality for all Kenyans...”

2.2 Opening Remarks from UNDP

When opening the UNDP's Sandra Diesel noted that the most important question in understanding the success of devolution will be how the devolution has impacted on the people of Kenya by assessing health, agriculture and other basic services conducted at county level. Whilst the roll out of devolution has been marked by challenges there is need to assess and evaluate the early progress and develop a devolution balance sheet to provide a way forward. It is important that the principles of devolved government guide the deliberations of the constitution.

She reiterated the commitment of UNDP in assisting the national devolution project both at the national and county levels through various state and non state actors, through enhancing participation by the people of Kenya.

“As non state actors we must be firmly grounded on modern day human rights and governance”

Sandra commended TDF for the development of the devolution forum as a united front and emphasised that the forum should also be active in devolved levels and not just at the national level.

3 Conference Presentations and feedback

The ability of Counties to deliver services will depend on the extent to which finances are well targeted at service delivery needs. Whereas the Public Finance Management Act, 2012 (PFM) provides a sound framework for the management of county resources, there have emerged numerous challenges in its implementation. Experts, Kwame Owino of the Institute for Economic Affairs, Jason Lakin from- International Budget Partnership, Commissioner Amina Ahmed, Vice Chair of the- Commission of Revenue Authority provide well thought out analytical diagnosis of various aspects of the issues on county financing, moderated by Commissioner Kamotho Waiganjo from the Commission for the Implementation of the Constitution.

“There has been more discussion about budget, accountability in one year than there has been in 50 years.... as frame discourse on devolution, let us build on what we have achieved in one year....no need to join the sceptics”

3.1 Critical Review of the Division of Revenue Process- Jason Lakin, (IBP)

Jason Lakin posited that Devolution is all about revenue sharing for without securing adequate resources how can government function. He a number of principles around the sharing of revenue:

- ✓ *Vertical sharing and horizontal sharing is about ensuring national and county governments get appropriate revenue proportions and ensuring counties have sufficient funds to meet the need for public services respectively*
- ✓ *It is also about priority setting: ensuring that Kenyans as a whole decide how much they want to dedicate to security, education, health and so on*
- ✓ *The revenue sharing process is not just technical, it is a political and deliberative process and therefore cannot be evaluated only technically*
- ✓ *Understanding the Division of Revenue informs how counties budget and how citizens participate in county decision-making*
- ✓ *Revenue sharing is about what is fair, ensuring that there are adequate funds for service delivery at both levels of government and across counties*

The process so far has caused the shifting of allocation of resources from central government to across the counties with positive results, a reason for celebrating the devolution project at its first anniversary. The new system is more open and identifies recipients based on objectivity, budgetary debates are about financing devolved government functions and not mere projects and marginalised counties are now allocated and receiving more.

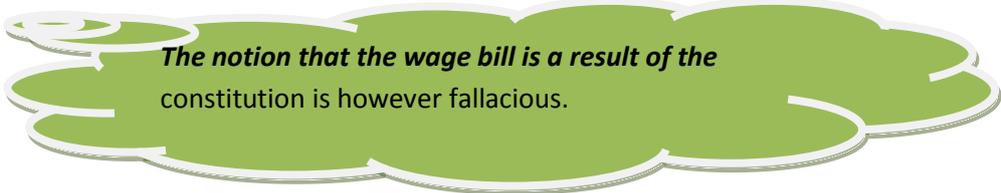
Nevertheless, revenue sharing faces challenges of clarity on functions and their assignment, confusion of roles between County Government and National Government, floating role of the Transition Authority, lack of transparency in provision of data on finances and functions and CRA failure to provide clear justification of critical allocations of budgets. However, two stand alone challenges have stood out in the first year, poor media analysis and reporting and the power struggles between senate, National assembly and other intergovernmental agencies that are all trying to assert their power struggles in revenue sharing. The failure by media coverage on the budgetary issues has been a major barrier to making devolution a national agenda. This result from capacity issues in appreciating budgetary process, analyse it and provide an informed platform to critique both vertical and horizontal aspects of revenue sharing. Without the deliberate and active support of the fourth estate on clear and accurate discourse on the devolution process, devolution will remain an abstract reality to the public leading to decline in support for devolution.

3.2 Critical Review of the Salaries Review Process – Kwame Owino(IEA)

Kwame Owino delved into the contemporary debate of the public wage bill, noting that public wage bill, its size, ratio and growth affect the availability of resources available for service delivery to the people of Kenya. Figures from the government indicate that wages for government and parastratals account for more than Kshs 500 billion (an average of 1.5 billion every day). This is by far the highest wage bill as a ratio of all public expenditure in the East African region. The basic principle in budgets is if the rate at which salaries increases is higher than the rate at which taxes are growing; there will be a divergence in the two leading to a gap which is likely to be filled by debt, which is unsustainable.

The notion that the wage bill is a result of the constitution is however fallacious. It is important to understand the history of the wage bill which has been rising over a long period of time. The Constitution did however foresee the challenge of this divergence and mitigated this through the development of the Salaries Review Commission (SRC). SRC has been given powers to review and recommend and covers all state officers national and county. At the inception of implementing any budget, the constitution requires the decision be **fiscally sustainable**, which is currently the case. Whatever public servants think they are worth; their compensation must be fiscally sustainable to the nation. This is a factor that has eluded decisions on public sector wage bill that is threatening the future of the country.

The second and third requirements recommend that the government attracts and retain the skills required to execute their functions and recognises productivity and performance. What has been witnessed is an increasing wage bill, increased cases of mismatched skills for functions required and a declining productivity, all in contravention of these requirements.



Finally, it must be done within a framework of fairness and transparency. The closed door meetings discussing MPs wages without disclosure on what was discussed is one of the reasons the process of salary review is not perceived as fair and transparent

Whereas the constitution laid out the relevant principles, the process on how to go about it was not defined. As a result, two years ago there was a review of salaries in the public sector finding disparities, weak structures, problems with allowances which have at times exceeded salaries and the most publicised reform, MPs were to pay taxes. The point on MPs tax opened up a long standing conflict that led the SRC to compromise on its stand on MPs pay by using allowances to make up for the lost revenue in tax. This was later picked up by other offices in the national and county governments and has exacerbated the already rising wage bill. The challenges of wage bills are however complex and have their roots in legacy issues, inefficiency and cultural issues. There is a threat to devolution if public sector wage bill continues to grow. For every 100 shillings 70 shillings goes to paying wages. This is unsustainable and if it continues, there is no alternative but to get into wider debt. Public debt is expanding **partly** due to wage bill.

3.3 Revenue sources for County Governments - Fatma Ahmed

Commissioner Fatma Ahmed brought the Forum to reality check by providing the anatomy of revenue growth of counties noting that counties have access to various sources of revenues such as property rates, entertainment taxes, service charges for CG, borrowing, single business permits and vehicle parking fees among others

County Governments were lauded that have gone as far as hiring ICT firms to digitise revenue collection, or set up a local revenue authority. According to the CRA one of the reasons why counties failed to meet revenue was setting unrealistic targets. For instance some of the targets were set as high as a 4000% increase which was unrealistic. Despite the availability of these other sources of revenue, serious challenges prevent counties from maximising this such as

- *Inadequacy of laws and legislation*
- *Poor automation*
- *Finance constraint is procurement*
- *Embezzlement, fraud and corruption*
- *Low level of stakeholder involvement*
- *Political Interference*

“Devolution, has just started, it is marking one year. Let us give each other the chance to implement the devolution.” Amina Ahmed – (CRA)

The presentation by Amina found that the following issues must be addressed to ensure County Governments can collect revenue adequately and these are that Staff capacity must be built, automation and digitisation of revenue process, effective internal audit functions and the establishment of effective Private Partnerships (PPPs) . Without these interventions, County Governemnts will continue to struggle to raise revenues for their populaitons.

4 Towards successful intergovernmental relations under devolved government in Kenya

4.1 Making Devolution Work: Successful Intergovernmental Relations

Article 6(2) provides for consultation and coordination between national and county governments. The Intergovernmental Relations Act 2012 provides for two critical intergovernmental relations institutions, the Summit and Council. The Public Finance Management Act, 2012 also establishes the Intergovernmental Budget and Economic Council. Other key intergovernmental bodies include the chapter 15 commissions and the Senate. The panel comprising Senator Kipchumba Murkomen, Rene Omondi of the Law Society of Kenya, Kemoli Sagala of Kenya School of Government and moderated by Wanjiru Gikonyo from The Institute for Social Accountability (TISA) examined the state of intergovernmental relations, underlying challenges and made proposals on how to improve intergovernmental relations.

4.2 Intergovernmental Relations: Perspective from Senate - Senator Kipchumba Murkomen

Senator Kipchumba Murkomen led the panel by declaring that “Despite the media portrayal of devolution as fragile and impractical, it is protected by the constitution and is here to stay”. Inter Governmental Relations (IGR) is guided by Article 189 where consultation and cooperation form the basis of a working model between national and county level government. The national assembly has the power to enact laws on IGR. IGR institutions include the council of governors, the summit and a dispute resolution body. The Council of Governors is forum where discussions on issues affecting them can be shared. The summit provides a forum for the executive arms of national and county governments to discuss and share information. In the event of a dispute, the constitution provides for a Dispute Resolution Body under. Focus should therefore turn to improving the implementation of the devolved government. Senate is mandated to oversee County government as outline in Art 96 9(4). Though CSOs is heard in ensuring that funds go to County Government, disproportionately few voices are present in holding county level state officers accountable, risking having the corruption that was in Central Government taking root in the new county institutions.

Consultation and Cooperation has been changed to Competition and antagonism

With the understanding that IGR is a new phenomenon in the country, its definition, structure, institutions, processes and results need to be given time to nurture, consolidate and take root. Challenges facing IGR include:

Unhealthy competition between arms of government is the single most threat to effective IGRs. The power struggle needs to change to a healthy competition that brings out the spirit of the constitution.

- *Some of the key challenges with effecting IGRs are the lack of clear roles for some state officers such as the Deputy Governor making it difficult for these state officers to execute their mandate.*

- *In addition to the council of governors and the summit, the role of institutions such as CIC, CRA among others is critical in the execution of IGR functions and the support should extend to both national and county governments.*

4.3 Intergovernmental Relations: Perspective from LSK – Rene Omondi

The Vice Chair LSK Society, Rene Omondi made upfront position that obedience to the rule of law is key to any successful IGR. The successful devolution process must work on the basis that each arm of government must respect each other. She stated that in the implementation of devolution and the subsequent infighting of arms of government that has arisen. Omondi further said that despite adopting a new constitution and transferring power to the people on paper, the actual transfer is yet to occur. The process has been slowed down by infighting by institutions trying to prove superiority. In the backdrop of the difficult inter-governmental relations, the mandate and role of lawyers therefore is to achieve the following aspects;

- To move the High Court through the terrains and the borders of the constitution
- To move the court to issue orders, direction and judgment on constitutional matters
- Bear the duty of ensuring that the court orders are respected as a cardinal tenet of the rule of law

In response to this, the arms of government are expected to respect the rule of law in facilitating the resolution of IGR issues. The disobedience of court orders issued against other arms of national government is a recipe for chaos. The act of disobedience is paramount to impunity and cannot engender the spirit of devolution. LSK therefore supports a stronger regulatory approach towards management of conflict between arms of government through strict application and compliance to the law as defined by the constitution and related enactments. ***“It is the LSK position that the independence of the judiciary can never be compromised and that court decisions must be obeyed unreservedly”***. This approach must be the basis of upholding constitutional integrity and effectiveness of devolved government.

“The lawyers have the task of moving the High Court to patrol the borders of the constitution”

4.4 Intergovernmental Relations: Perspective from School of Government – Dr. Kemoli Sagala

Dr. Kemoli Sagala looked at IGR as a culmination of the society, its values, attitudes and behaviour. Intergovernmental relations need to be looked at in the context of the society attitude towards rule of law. This attitude emanates from conduct and behaviour of ordinary citizens, public servants and state officers. IGR are activities or interactions occurring between governmental units of all types and levels and it is a public good transaction that takes place among people. Due to its relational nature, it relies heavily on human behaviour which therefore means adherence to laws is one component but it cannot be described without taking behavioural and qualitative aspects into consideration. For instance, political factors are powerful influencers of IGR and can influence how individuals respond to the rule of law. The conflict in the new constitution is defined by several variables. First, the system is new which translates to change, that always brings conflict. Secondly, there is poor understanding on the roles, functions, powers and reporting components of the devolved government. Thirdly, the system is experiencing supremacy powers between arms of government influenced by lack of a clear understanding of roles. There is also a lack of civic duty and awareness among the state officers and citizens. Finally, there is over reliance on courts to resolve our differences. IGR in the devolution system is largely regulatory where what Kenyans need is cooperative consultation. This is further exacerbated by lack of political will to resolve the underlying causes. To address challenges in the Intergovernmental Relations, Kemoli proposed the following:

- It is imperative to coordinate and harmonise policies to manage process and procedure. The process of implementation or many devolution aspects remain unclear leading to confusion and infighting among key intergovernmental stakeholders.
- In the event of conflict between national and county governance on regulation, the national government should use contractual grants to gain buy in consensus from county government
- Massive Civic Education drive is necessary to ensure that all stakeholders including citizens understand what different arms of government are mandated to do.
- All commissions require IGR specialists to manage stakeholder relations
- Reformers should not try to do to everything at once, gradual change will lead to a more sustained output in the long term

5 Participation by the Public---The Reason for Devolution

Public participation is a key pillar of the Constitution of Kenya. Evidence demonstrates public participation is most effective when it is institutionalised in government processes. Through various constitutional and statutory provisions county governments are required to establish effective public participation frameworks. Public participation under devolved system of government is a fundamental part in implementation of devolution. There are generally three types of participation which are participation, non participation and cynical participation. There are various factors that make participation possible and these are guided by the provision in Article 1(1) of the constitution where all power is vested in the people. Citizens must be empowered to participate in devolved government and this power could be strategic (National and County Government) or operational (County Government).

The key aspects to assess include ensuring that the councils at local level are established according to the provisions of the constitution. It is also important to assess whether citizens can interrogate a budget, CIDPS among others. Public participation is integral to the constitution and therefore laws guiding its implementation are all over..

Saphia Abdi from Transition Authority, Irungu Houghton of Society for International Development and Commissioner Catherine Mumma of the Commission for the Implementation of the Constitution (CIC) lived to the discourse with Wambua Kituku of United Nations Development Programme moderating the session.

5.1 Public Participation: Saphia Abdi – Transition Authority (TA)

Saphia Abdi gave fact that key established principles of public participation were to ensure the that the citizens have timely access to information, reasonable access to process of policy making, protection and promotion of interest and rights of minorities, marginalized groups and communities and their access to information and the promotion of Public Private Partnerships. Modes of public participation include information communication technology based platforms; town hall meetings; budget preparation and validation forums- e.g. County budget and economic forum; notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest; development project sites. The mode depends on the characteristics of the population at County level. Literacy is not a requirement for participation and therefore cannot be used to justify lack of participation.

5.2 Public Participation : Irungu Houghton –Society for International Development (SID)

Irungu Houghton noted that there exist evidence that the devolved system is not engaging the participation model and this can be both beneficial and destructive. There are direct benefits to public government officials who do not undertake PP (Control budget, no accountability) yet at the same time there are disadvantages such as Capacity of citizens to disrupt top down control county models as has been seen in demonstrations against increased tax without participation. Similarly citizens also benefit from not engaging in the public participation model and this includes the right to complain and not take responsibility and the comfort of blaming others for our weaknesses.

Behavioural Change is therefore a key step in assessing why leaders and citizens alike are not shifting to align to the regulatory process.

In the first anniversary of devolution public participation has taken the form tokenism, primarily being done to comply with the law but not as a genuine engagement of the public in decision making. There are a few counties that have made efforts to institutionalise public participation in the public communication office, ad hoc citizen forums, town hall meetings organized to discuss budget, policies, and legislations. However public participation as defined in the constitution constitutes a higher level of engagement. Challenges that have faced public participation include:

- *Lack of National Framework in the implementation of PP limits its effective implementation*
- *PP is perceived as an expensive venture*
- *PP is not usually budgeted for within county budgets*
- *The national executive have not developed regulations to operationalise various devolution laws- few drafts in place*

To ensure that change is witnessed, the CSO gap will have to be bridged and county level forums must be formed and engage County governments otherwise there will be, no accountability and no pressure to achieve this, there is need to change the public participation platforms as they do not use mechanisms that are appealing to ordinary people.

The translation of information should also focus on aspects that the majority of the public can engage with such as service availability, emergency services, children performance among others. There is also need to put the private sector on the spot as they also provide a significant portion of basic services such as 20% of all health services. Some of the Mechanisms than can be used for public participation include:

- County budget and economic forum
- Performance management structures
- State of the county report
- Public service charters

The future of engagement of PP and CSOs in the accountability of devolved government however is likely to be adversely affected by proposed provision of the Public Benefits Act specifically provisions to limit external funding for organisations registered under this act to 15%. Despite overcoming these proposed changes in the same Act last year, the threat remains active and requires the commitment of the CSO bodies to find long term solutions to the role and sustainability of CSOs.

5.3 Public Participation: Catherine Mumma - Commission for the Implementation of the Constitution (CIC)

Commissioner Catherine Mumma returned the Forum to the fundamentals in the constitution- literally every chapter of the constitution alludes to the principle and practice of public participation and each implementer is required to do this. Frameworks are required for individuals, groups, experts, corporate and other interests. Cap 11 of constitution places emphasis on public participation and inclusion, in decision making and in design. There are many provisions that support the principle

of participation, to uphold and defend the constitution. In everything all leaders do article 10 must be included.

ARTICLE 10 does it require a law or a culture? Catherine Mumma

She isolated access to information in a form that is understood to the grassroots level stakeholders and that encourages participation as one of the greatest challenges in realising the value of public participation. Such mechanisms should also enable those who cannot see, cannot hear is able to participate in that forum. In addition, for access to information to be meaningfully it must give the user adequate time to look at that information. However it should also be meaningful public participation without wasting money.

“Devolution has not failed Kenya, We have failed Devolution” Irungu Houghton

6 Conference Plenary:

6.1 Discussion from the First Session

The Forum held vibrant discussions with key issues emerging in the dialogue. Firstly, the debate that has been framed in the media focussing mainly on wastage, corruption and ineffectiveness of finances at county level has left most of the public uninformed on the real issues. Even knowledgeable members of the civil society, professionals, political leaders and academia depicted a state of not being well informed on the application of devolution.

Secondly, lack of rationalisation of budgets and enactment of laws contrary to the constitution affecting budgetary process such as the review on affirmative action, efforts to retain CDF under the National Assembly and Senate among others. Duplication of efforts by County government for budgeting for items that are in the mandate of National Government needed focus on. Finally, the Forum confessed a weakness in role of CSOs, with little coordinated evidence by CSOs to interrogate and hold County Governments accountable. CSOs role in making the public aware on their role within budgeting to ensure their needs are prioritised during budgeting is also wanting. There is a key gap in advocacy for public awareness on financial matters regarding devolution in Kenya.

6.2 Discussion on the Second session

The Forum reflected on the panel discourse bringing to light the fact that there is little consensus on issues raised amongst participant. However, the Forum was unanimous on upholding the principles as in the constitution that required consultation, respect and harmony between levels of governments and amongst institutions. However, the Forum was clear that even the state officers in the judiciary have a duty to make such orders that are pragmatic, enforceable and inspire confidence in the rule of law. The Forum also identified poor transitional plan has been a major contributory factor to weakening IGR. In this case the national government bears the brunt having failed on midwife implementation whilst the county governments too eager to gobble what they could not swallow.

6.3 Discussion on the Third session

The Forum discussions on this panel found that public participation is a great entry point for CSOs in organising community action, mobilising public energy and channelling public interest to state organs. The CSOs are required to champion a clear framework for public participation without unduly being antagonistic towards county officers. CSOs need to learn its unique advantage in managing public engagements and share this with public officers. Public officers need to be seen from the perspective of learners shifting orientation from a top-down to a bottom up dispensation. Article 3 gives CSOs the mandate to drive public participation. This is a call to action for CSOs.

7 Conference Closure:

7.1 Way Forward

At the conclusion of deliberations of the forum the following resolutions were adopted.

I. On the Devolution

- a. We have established **The Devolution Forum** to defend, support and promote the promise of devolution, its goals and promise of better services. We shall establish this forum at the county and lower levels. We shall create strong partnerships with the National Institutions on promoting effective devolution;
- b. We recognize the inspiration of the devolution promise as the primary and foremost gain of the new constitutional dispensation.
- c. We celebrate the first anniversary of devolution as evidence that when power, authority, resources and accountability are devolved, a greater number of c Kenya access these assets and the national discourse is permanently shifted from the center to where people are.
- d. We acknowledge expected teething challenges as evidenced by unclear structures, processes and relationships; deliberate abuse of offices and calculated countermending of the devolution process.

II. On Public Participation

- a. Public participation is the **primary and direct way** in which Kenyans influence and realise the benefits of the constitution and fruits of devolution. Public participation is not a choice of any state organ or public officer to be allowed or withdrawn. It is demand by, directive of and obligation conferred by the constitution to all public officers.
- b. **Public participation** and civic education must be invested in significantly and resources allocated for this functions.
- c. Civil society shall champion for a **comprehensive and pragmatic devolution**. Public participation Framework-policy and strategy must be rolled out urgently informed by considerations of cost of facilitating PP, the settings of such PP mechanisms and platforms.
- e. Public participation ought to be **mainstreamed in all Laws and governance** processes.
- f. **Civic education**, public communication and information are key to effective public participation.
- g. The **media** is a critical driver of public participation and must enhance its capacity in understanding, analysis and synthesis of issues to empower the citizenry.

III. On Revenue Sharing

- a. Priority must be given to finalize the **definition, scope and allocation of functions** at the national and county government levels
- b. **Efficient collection and accountability, collectable revenue** collected, other revenue stream be introduced and new strategies for revenue enhancement are needed to plug the resource needs for counties
- c. County governments need to be encouraged and supported in the use of **information technology** in the collection, management and accounting for revenue.
- d. **Salaries and wages** affect the resources available to deliver services and increase productivity. Informed and transparent national discourse on this is required.

IV. Intergovernmental Relations

- a. IGR is a prerequisite to national stability, harmony and economic growth. Successful IGR is a testimony of a mature political leadership, a secure public service and well oiled government machinery.
- b. **Intergovernmental relations** should be conducted through consultation and cooperation in order to promote economy, ethics, effectiveness and efficiency.
- c. The **culture** and **structure** of the institutions of intergovernmental relations mainly the Summit, Council of Governors and National Institutions need to be reviewed and strengthened.
- d. The role of the **judiciary** as an independent institution in governance and devolution must be respected in order to give life to the cardinal principle of rule of law in our nation. Court orders must be respected.
- e. A shift is needed from regulatory to **consultative and cooperative** IGR; this will require that IGR specialists and experts be involved in the IGR processes

V. On the Role of Civil Society

- a. CSO acknowledges its lag that has confused its constituency and the public and given rise to doubt on its commitment to public good, vigilance in public interest and firmness and resolute in public action.
- b. Progressively CSOs shall **strengthen the Voice of the people** collaboration with governments to achieve the promise of devolution/
- c. Civil Society has an obligation of promoting public participation and **raising the demand** by the citizens to participate in priority setting in order to access better services
- d. CSOs shall call for **Empowerment** that is driven by the narrative of services-Performance Management structures, allocation to civic education and capacity building, state of the county reports, public service charters, where to complain, how to complain;
- e. CSOs shall demand that public participation is **budgeted** for at the county and National Levels
- f. CSOs shall **resist** attempts by the national government to stifle the civic space and structure of CSOs to fully promote democratic governance and the rights of Kenyans
- g. The Devolution Forum and its members shall take steps to roll back the emerging trend of county and national government authorities to **criminalize the right of the people** to assemble, associate and express themselves
- h. Civil Society shall rely on **evidence based advocacy** and reliable facts and information to promote support and defend devolution. CSOs shall move against propaganda that is being bundled around aimed at vilifying devolution as a burden instead of a mechanism for development.

The discussion on the twenty point way forward was focussed on the need to prioritise the CSO agenda to support the devolved government system. The perceived negative attitude among the citizens on devolution is a threat to the gains on what Kenya aims to achieve. Civic education and awareness is critical to safeguarding the constitution and the devolution process.

Marginalised populations such as persons with disabilities must be integrated both by government and CSO participation in devolution. This should include material for all categories of physical impairment for instance IEC materials should be developed in braille for the blind, sign language interpreters should be available at the grassroots level to ensure participation of all groups in devolution.

CSOs were also advised to engage their counties in the County Fiscal Strategy Paper which most counties have already developed. IBP assists TISA to analyse budgets and the forum will work on solutions to help CSOs analyse the budgets. CSOs were also urged to attend budget hearings that will be held in May to understand the issues and contribute to them objectively. CSOs should however engage the county governments in a non antagonistic way to form partnerships and strong relationships with them to facilitate productive outputs.

Closing Remarks

In the conclusion of the meeting, it was agreed that CSOs need to become proactive in protecting devolution in a participatory and non-antagonistic way. CSOs should therefore participate and contribute to devolution in all forums available including the governors meeting. Wanjiru Gikonyo clarified to the participants that the structure of the devolution forum is still under development and urged members to provide their contact details so as to keep members up to date with the developments of the forum. The conference was concluded with a vote of thanks from Rosemary Ogolla of CRECO with mention to UNDP for funding the conference, TISA and the core team of CSOs for organizing the conference, the facilitators, moderators and the participants.