

THE JUDICIARY



**THE OFFICE OF
THE FORMER CHIEF JUSTICE**

REMARKS BY HON. (RTD) CHIEF JUSTICE

DAVID K. MARAGA, FCIArb, EGH,

FORMER CHIEF JUSTICE OF THE

REPUBLIC OF KENYA

DURING A FAREWELL LUNCHEON

HOSTED BY

THE COUNCIL OF GOVERNORS

ON 13TH JANUARY 2021

AT THE

MOVENPICK HOTEL, NAIROBI

**The Hon. Acting Chief Justice, Lady Justice
Philomena Mwilu,**

**The Chair of the Council of Governors, Hon. Dr.
Wycliff Oparanya,**

Your Excellencies the Governors present,

**Hon. Eugene Wamalwa, CS Devolution and Arid and
Semi-Arid Lands,**

Your Excellency, Amb. Ole Thonke,

Mr. Kennedy Ogeto, the Solicitor-General,

**Dr. Jane Kiringai, Chair of the Commission on
Revenue Allocation,**

**Rt. Rev. Archbishop Eliud Wabukala, the Chair of
the Ethics and Anti-Corruption Commission,**

Commissioner General of Prisons,

The President, Law Society of Kenya,

Distinguished Guests,

Ladies and Gentlemen;

Good afternoon!

I am sincerely grateful for this luncheon which has offered me the opportunity to say *kwaheri* to you. We have worked together for many years, first while I served as a Judge of the High Court and the Court of Appeal and later as the Chief Justice of the Republic of Kenya. It is therefore only fitting that we get together one final time and exchange views as I start my life in retirement. Thank you very much Council of Governors for making

this possible by organizing this event, and to everyone who has made time to be here. I am truly grateful.

As I was reflecting on this session, my thoughts went to the challenges of inequitable distribution of resources and development in Kenya, the historical factors that contributed to it and the role that devolution must play to correct this anomaly.

Consider, for example, the fact that the colonial and settler philosophy of development was that of exclusion on the basis of race and resources. When you weigh this against the fact that as much as much as **89 per cent** out of the 581,309 square kilometres that make Kenya's territory is considered to Arid and

Semi-Arid Lands (ASAL) it means that huge parts of Kenya were routinely neglected in the allocation of resources. The areas that were set aside for European settlement were not only resource-endowed but also

better developed and favoured with access to better services, to the exclusion of those areas with little or no settler presence.

Right from the onset of self-rule in Kenya, this was a matter of great concern. It is what led to the adoption of a semi-federal system of government, commonly known as the *majimbo* system of government following negotiations between the two main political parties, KANU and KADU. Unfortunately, soon after

independence, the Executive reverted to skewed, discriminative and exclusionary developmental agenda premised on *Sessional Paper No 10 of 1965 on African Socialism and its Application to Planning in Kenya*. This created widespread disenchantment among the Kenyan people.¹

¹ CKRC Final Report, 2005 p.237.

Since not everyone can fit in the **11 per cent** part of the country that is agriculturally rich, there has been persistent clamour for more equitable distribution of resources across the country. Many Kenyans, for example, while presenting their views to the Constitution of Kenya Review Commission (CKRC), recounted their frustrations, saying that they felt they were “*subjects ... [and] not citizens*” of their own country. To accommodate everyone, they demanded that the country embraces devolution, which, as is clear from its objects in Article 174 of the Constitution, would recognize and protect, *inter alia*, the rights of minorities and marginalized communities; promote social and economic development; and, most importantly, ensure equitable sharing of the national and local resources.

As is clear from the CKRC’s final report, there was universal endorsement of devolution during the

constitutional review process. While Kenyans held differing views on what devolution structure the country should adopt, they were united in moving away from a centralized system of government. As the CKRC team noted, Kenyans wanted to participate in governance and management of their affairs and to hold leaders to account. They also wanted an improvement in the provision of services and to have powers and resources decentralized from the capital.²

In response to these wishes, the drafters of the Constitution sought to provide for devolution as the centerpiece in the Constitution. The founding provisions of the Constitution make clear the significance and the centrality of the devolved system of government to our constitutional system of government.

² As above.

Slightly over a decade ago, Kenyans overwhelmingly voted for the current Constitution, which introduced fundamental changes to the state and governance structures in this country. Therefore, after decades of centralized government, Kenyans adopted a political and governance system whose thrust was to disperse political power and resources from the centre to county governments. It is no wonder therefore that the principle of devolution is a central plank in our constitutional architecture and elevates it to an important aspect of Kenya's constitutionalism.

Given the history of skewed development, Kenyans did not trust the Executive or Parliament to equitably distribute the national resources. They therefore demanded the establishment of the Commission on Revenue Allocation.³ These and other demands were

³ See Final Report of the Committee of Experts on Constitutional Reform (2010), P.72

incorporated in the 2010 Constitution. What then is the central thrust of Devolution.

In my humble view, a careful reading of the CKRC report, Article 174 of the Constitution, the two advisory opinions given by the Supreme Court at the request of the Senate and the Council of Governors and a lot of literature, and lastly the acrimonious Senate debate on the division of revenue between the two levels of Government, the fulcrum of devolution is the equitable distribution of the national cake. The question we should now ask ourselves is whether devolution has

worked well for Kenyans. Has the 2010 Constitution enabled the people to realize their dreams of equitable share of the national cake?

Your Excellencies, any honest lawyer will tell you that any Constitution is as good as its implementation. Unless it achieves some

measure of constitutionalism, in abstract, a constitution is a dead document. A constitution which provides for respect for human rights but has no effective mechanism for implementation and enforcement of those rights is a hollow constitution with no constitutionalism.

Constitutionalism entails limited government and the commitment to be governed by limitations enshrined in each democratic constitution; constitutionalism entails implementation that succeeds in reflecting the desires and aspirations of the people; constitutionalism entails a vibrant implementation that positively “*affects and ... improves the reality of people’s [lives]*.”⁴

⁴ Y Ghai, “Kenyan Constitution: History in the Making: The Challenges of Implementation.” Pambazuka News (2010). Available at www.pambazuka.org/en/category/features/66501 (accessed on...

What does the term constitutionalism mean to our devolved system of Government? It does not mean that the contest over resources ended with the promulgation of the Constitution. The struggle continues at various levels. At the national level, the tug of war is on the division of revenue between the two levels of Government. At the County level, the issue is fair distribution of the particular county's share of revenue among all the areas of the county.

At the national level, although the Legislature and the Judiciary play critical roles, the primary responsibility of implementing the Constitution rests with the Executive arm of government. It is mainly the Executive that has to formulate and execute appropriate implementing policies.

At the County level, your Excellencies are the heads of the County Executives. It is therefore your responsibility to formulate appropriate implementing policies to equitably share the county resources to all parts of the county.

Ladies and Gentlemen,

Speaking to this kind of audience, it will be remis of me, as the retired Chief Justice, to fail to speak on the Judiciary's role on devolution.

As a matter of fact, from the cases that have been brought to our courts in the last 10 years of the implementation of our Constitution have proved that the Judiciary and the court system are indispensable if devolution is to be implemented as envisaged in the Constitution. Indeed, courts have played a critical role in interpreting essential aspects of devolved government, whose collective impact has been to enhance the place and role of devolution and county governance in our constitutional system. The first

advisory opinion that the Supreme Court rendered was on the role of the Senate in debating and passing the Division of Revenue Bill which allocates money between the two levels of government. In that decision, the Supreme Court affirmed the role of the Senate (as a representative of counties) in determining the division of resources between the two levels of government.

More recently, in May 2020, the Supreme Court pronounced itself on matters of revenue division and even developed the law to allow counties to access funds where there is an inordinate delay in the national budgeting process that affects county operations.⁵ Other aspects of devolved governance that the courts have pronounced themselves on include asserting the legislative powers of counties, protecting the functional

⁵ Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae) [2020] eKLR

areas of county governments, and intergovernmental relations, among other areas. The courts remain committed to their constitutional role

in ensuring the proper interpretation of the Constitution and laws in all disputes that are brought to the courts for adjudication.

While the Constitution does not devolve judicial power and authority to counties, Article 174 (h) requires **“the decentralization of state organs, their functions and services**

from the capital of Kenya.” In pursuit of this requirement, the Judiciary made it a policy objective to establish at least one High Court station in each of the 47 counties, and a Magistrate’s Court in each the 290 sub-counties.

County governments have been true partners

in this quest. They have assisted the Judiciary in identifying the location of new courts. In other cases, they have set aside or even purchased land where courts will be constructed and in other cases actually built courts or offered premises for use as court houses. The Judiciary faced, and continues to face, huge resource constraints and this kind of collaboration has assisted the Judiciary in advancing access to justice and ensuring physical reach of courts in areas that are underserved.

The Judiciary has also availed Magistrates to what is known as “county courts” in order to assist counties in the enforcement of county

legislation. Where the Judiciary received requests to deploy judicial officers, the Judiciary has readily done so and I hope that this mutually beneficial relationship will continue.

I know that there are gaps in our legal framework and issues such as the concern that most of you have raised with me that counties should retain revenue raised from the enforcement of county laws. As the county governments incur most of the running costs for these courts, there is, in my opinion, a justifiable ground or basis for this concern. As such, this is an area that requires dialogue between the National Treasury for the adoption of a legal and policy framework to enable counties to retain the revenue collected in this process.

While that is being addressed, there is a more important issue that your Excellences should constantly keep at the back of your minds: Corruption.

Sad, and I would say embarrassing as it is, it is an acknowledged fact that the country loses one third of the national budget to corruption. The looting of public resources is alarming. To be fair, I should add that all of

us Kenyans are to blame for this. Right from the village kiosks, all of us keep cutting corners to steal from each other. As a result, after paying salaries and defraying other aspects of recurrent expenditure, there is little left for development. What that boils down to is the stagnation of the growth of the national economy. What does this portend?

In my concurring opinion in the Supreme Court Advisory opinion of May 2020, I warned that;

“Unless decisive action is taken to address the historical injustices engendered by the skewed development founded on Sessional Paper No. 10 of 1965 and subsequent policies; unless decisive action is taken to address the income and resource allocation inequalities in this country; unless decisive action is taken to address the soaring unemployment; and unless decisive action is taken to address the looting of public

resources through corruption; only the naïve will fail to see that we are sitting on a powder keg the detonation of which will render the 2007/08 post-election skirmishes child play.”

What is the relevance of this to this forum?

As I have stated, your Excellencies are the heads of the County Executives charged with the responsibility of formulating policies on the proper and equitable utilization of the County resources. As such, as County leaders, you are, in my view under obligation to have, as your top priority, the anti-corruption crusade. You are, in my view under obligation to ensure the frugal utilization of the resources placed in your hands.

While we have seen excellent examples of progress in some counties, it is also true and unfortunate that we have heard of reports of misuse of funds that are availed to counties. Reports of pilferage and theft of public

resources meant to provide services and development are most disheartening. The funds that are availed for service provision are meant to improve the lives and livelihoods of those that you govern. We have a direct responsibility as leaders to ensure that these resources are put to good use. I implore you to remain faithful to your oath of office and to always put the interests of the people you lead ahead.

Some of you are in the second and final terms of leadership of your counties. From the press reports, an average of Ksh. 8 billion is

allocated to each county annually. There is of course the issue of how much is actually released to you and in time. But at the end of the day what will your score card look like? What will your people say you did for them from the resources placed in your hands? Let this be your greatest concern.

As I conclude, let me once again thank you for the cooperation and support that you extended to me during my tenure as Chief Justice and request that you continue with even greater cooperation for better service delivery to the Kenyan people.

Once again, I thank you most sincerely for the luncheon which gives me the opportunity to say kwaheri.

God bless you all. God bless Kenya.

**HON. JUSTICE DAVID K. MARAGA, FCI Arb,
EGH.
(RTD) CHIEF JUSTICE**