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GOVERNANCE AND DEVOLUTION: KENYAN EXPERIENCE SINCE THE 1990s

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ABSTRACT

Governance theory emerged following the dismal economic growth experienced in the third world countries after the adoption of the neoliberal reforms in the 1980s-90s. The theory emphasized good governance as a prerequisite for sustainable development. This study seeks to investigate the extent to which Kenya's devolution since the 1990s has conflated with or diverted from good governance. It argues that the outcome of decentralization efforts that Kenya has attempted so far has fallen short of good governance. The reason lies in the constitution and prevailing unconstitutional culture, political culture, and increasing dominance of foreign capital. For good governance, a necessity of sustainable development, to take root, the foregoing factors must be **considered.** This study can be valuable in any comparative analysis of governance, continent or region wide, which seeks to establish distinct, general experiences on governance from which policies for sustainable development can be created for Africa.

Keywords: Governance, Devolution, Decentralization, Sustainable Development, Democracy, Foreign Capital.

This paper seeks to analyze the relationship between governance theory of development and devolution process in Kenya since the 1990s. How Kenya has performed on devolution, why, and the extent to which that experience has related to governance theory is our question. Governance theory **emphasized** that bad governance caused poor economic growth in the third world. To develop, the third world needed to adopt good governance—an effective, democratic way of ruling. Devolution, the practice of diffusing power structures to local levels with the objective to include people into policy process, provided a core instrument for good governance. Any comparative analysis, seeking to establish distinct, general experiences on devolution from which possible remedies for **sustainable** development can be created for Africa can benefit from this study. Impacts of World Bank policies on African states and their populations' responses also unravel herein.

Based on information drawn on Kenya government documents, Kenyan newspapers, World Bank development reports, this study argues that in Kenya, relations between devolution and good governance has so far been dismal. Arbitrary leadership, centralism, tribalism, political patronage, corruption—values that negate good governance—have thrived despite devolution. The situation has resulted from local and foreign factors: lack of political will among Kenyan political leadership, presidential system that arrogates power to the presidency, unconstitutional culture, foreign capital, and political culture. While governance theory failed to consider foreign capital a major cause of poor economic growth in the third world, this study considers foreign capital a major factor underlying bad governance and poor economic growth in Kenya, in particular, and Africa, in general.

Governance in Kenya has recently drawn a few valuable research. Relationship between Kenya's devolution, democratic practice, **and neoliberal** policies has dominated the research.[1] A part of the research has appreciated the value of **decentralization** in the enhancement of good governance.[2] The research has, however, tended to be hypothetical, because implementation of governance had been piecemeal before, just occurred in most countries, especially in Africa, the first decade of the new millennium when the research was conducted. The other part of the research has concerned itself with neoliberalism and governance.[3] Going beyond their significant contribution, this paper critiques Kenya's devolution vis-à-vis governance theory. It highlights political, economic, cultural inconsistencies, thriving despite the devolution process that raises questions on Kenya government's commitment to good governance **and sustainable development**.

But why is governance theory important, for if anything, good governance, the main thrust of the theory, based on historical experience, hardly stands as the only viable pathway to **sustainable** development? I argue in response that the central component of governance theory that calls for effectiveness of the state, accountability and democracy as fundamental mechanisms for development ought to be taken seriously in Africa. For while authoritarianism, a system of governance, a converse of democracy, succeeded in fostering economic growth in Asian countries, 1970s-80s, poverty festered in Africa in the context of authoritarian regimes. Something else should thus be tried in Africa. Due to its diverse political cultures, economies typified by ethnicity, political patronage, weak private sector, oligarchic political elite, dominance of foreign

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[1] Godwin, R. Murunga and Shadrack W. Nasongo (eds). 2009. *Kenya: The Struggle for Democracy*. London: Zed Books; Thomas, N. Kibua and Germano, Mwabo. 2013. *Decentralisation and Devolution in Kenya*. Nairobi: University of Nairobi Press.

[2] Thomas, N. Kibua and Germano, Mwabo 2013, 113.

[3] Godwin, Murunga 2009, 265.

capital, a population entirely sidelined from the center of decision making, Africa requires mechanisms for effective, democratic system of governance for sustainable development.

But before addressing the gist of this study, a brief historical background suffices here to help us understand the rise of governance theory in the 1990s. Following dismal results **realized** from **modernization** and neoliberal approaches to development applied before the 1990s, governance theory emerged **in the 1990s** to offer development strategies to the third world countries. **Modernization theorists** had viewed the state in the colonial and postcolonial period as a significant instrument for development through which western values could be transmitted to replace static "traditional" values that in the theorists' **view** had hindered development in places like Africa.[4] The state, from this perspective, deeply entrenched itself in the society with the objective to initiate **sustainable** development during the period.

In Kenya, President Jomo Kenyatta and his cabinet having inherited the state from colonialists, imputed development role entirely upon the state to confront the challenges looming after independence. Major challenges included the gap between the rich and the poor, poverty, and ethnic fragmentation. In the 1960s-70s, the Kenya government adopted socialism, **emphasizing** the significance of the state in equitable distribution of wealth, **centralized** planning, poverty eradication, national integration, regulation and diminution of the private sector.[5] A social welfarist state, strongly intervening in education, health, agriculture, market to equitably distribute wealth, grew in Kenya and other African countries. State institutions consequently unraveled in the postcolonial period as major employers **with the objective to modernize**. Improvement of income per capita, provision of social welfare services, implementation of public projects and controlling the economy constituted major development policy **objectives**.

The state involvement in the economy stagnated tax base significantly in Kenya in the 1980s. For the state could not tax itself like it would private businesses; that limited tax revenue, as expenditures skyrocketed. The government thus operated on budget deficit most of which got funded through bilateral, multilateral aid, grants, external and domestic borrowing from the World Bank, IMF and local banks.[6] Kenya government deficit/surplus (excluding grants) stood at 9.5% of GDP in the 1980s, decreasing to 5% of GDP in 2003.[7] The GDP itself experienced a serious decline: average GDP annual percentage growth declined from 4.7% to 1.8%, 1975-1995, which might explain the fall in the government deficit, 2003.[8] The decline in GDP meant reduced local investment, limited tax base, low tax revenue, and stagnant salaries. But due to the expanded bureaucracy, recurrent expenditure increased from 16.8% to 31.4% of total expenditure and lending minus repayments, 1980-1995, 90% increase within only five years.[9]

[4] Waltz, W. Rostow. 1960. *The Stages of Economic Growth: A Non-Communist Manifesto*. London: Cambridge University Press; M. J., Levy. 1966. *Modernization and the Structure of Societies*. Princeton: Princeton University Press.
[5] Kenya Republic. 1965. *Sessional Paper No. 10 on African Socialism and its Application to Planning in Kenya*. Nairobi: Government Printer; Tom, Mboya. 1986. *Freedom and After*. Nairobi: Kenway Publications, 169.
[6] THE WORLD BANK. 2005. *African Development Indicators 2005 from the World Bank Africa Database*. Washington DC: The World Bank, 283.
[7] THE WORLD BANK 2005, 185.
[8] Ibid, 32.
[9] Ibid, 196.

As the government channeled most of its monies to meet the increasing recurrent expenditure in a budget deficit scenario, dependency on foreign aid placed the government in the hands of donors**.** Net aid from donors, real, to Kenya reached the high of US $ 644 million (constant 2002 prices) in 1980 and decreased, because of SAPs, to US $ 515 million in 2000 (World Bank Africa data base 2005). The dependency is also depicted in the increase in total external debt. From US $ 3, 387 million, the debt increased to US $ 7, 309 million, 1980-1995. Annual average of the total external debt rose from US $ 2, 646 million to 6, 191 million, 1975-1995.[10] The government's attention as a result largely shifted to meeting external conditions that came with the loans and the funding, scarcely responding to pressing local needs. To make it worse, most of the funding ended up meeting costs for recurrent expenditure and social welfare services, activities from which the government entirely never got any financial returns. And because all these policies were determined by the government from the top, the masses hardly contributed to their making and implementation, rendering policies during the period unrepresentative of local interests.

A legal system without law enforcement capability, widespread political patronage and a bureaucracy suffering low wages unabatedly aggravated corruption and tribalism at different levels of the government. Corruption and tribalism adversely affected Kenya's economic growth, as unqualified people got employed by the government and as the government lost colossal sums of money to corruption. Money which would have been invested in worthwhile projects got lost in multi-billion scams, as the Goldenberg and Anglo Leasing. In the Goldenberg scam, the government lost over Kshs54 billion (US $ 540 million) in compensation paid to Goldenberg International for non-existent gold and diamond exports. In the Anglo Leasing scam, the government is estimated to have lost over Kshs7 billion (US $ 70million), 2003-2005.[11]

Based on the available development indicators some of which have been shown above, Kenya, as many other African countries, generally had failed to register significant economic growth by the 1980s. Government intervention in the economy in order to **modernize** had dismally worked. Fiscal deficit, government indebtedness and expenditure rose, GDP, tax base declined; revenue stagnated, as inflation and interest rates increased. The bureaucracy had become extensively unwieldy, corruption pervasive, infrastructures dilapidated. Kenya's growth is reported to have dropped from 5.2% early 1970s to 4.1% in the 1980s to 2.5% in the early 1990s.[12]

In the context of the poor economic performance in Kenya, generally in Africa and the third world, the World Bank and IMF came up with the neoliberal approach to help spur **sustainable** development in those countries in the 1990s. Encapsulated in the structural adjustment programs (SAPS), neoliberalism offered a market diagnosis after identifying relations between state and market as the central cause of the poor economic growth experienced so far in the third world countries. Neoliberalism appealed for public sector reforms to free market from state control.[13] The reforms included withdrawal of the state from the market, **privatization** of parastatals and discontinuation of social welfare services. Downsizing the state itself through

[10] THE WORLD BANK 2005, 172.
[11] Paul, Ogemba. Thursday, March 5, 2015. "Ex-ministers, top officials charged over Anglo Leasing." *Daily Nation*, 1-2.
[12] Geoffrey, R. Njeru and John M. Njoka. 2007. "Political Ideology in Kenya," in Peter Wanyande, Mary Omosa, and Chweya Ludeki. *Governance and Transition Politics in Kenya*. Nairobi: University of Nairobi Press.
[13] THE WORLD BANK 1994. *A World Bank Policy Research Report: Adjustment in Africa, Reforms, Results and the Road Ahead*. New York: Oxford University Press.

retrenchment, besides **privatization**, in order to reduce recurrent expenditure, corruption, political patronage also formed one of the major objectives. Underlying the policies also lay the motive to expand tax bases, improve government revenue and expand private sectors.

Kenya's implementation of the neoliberal reforms, beginning in the 1990s, hardly led to the anticipated economic growth. Rate of unemployment highly increased, because of the retrenchment and **privatization** policies that lowered per capita income and tax revenue. In 1999 Kenya unemployment rate stood at 22.4%. It decreased to 12.70% in 2006, and then rose sharply to 40% in 2011.[14] As many people got laid off, the gap between the rich and the poor, a major problem in the postcolonial period, widened instead of decreasing. Many local companies could not survive the reforms that had opened up the market, ushering in stiff competition from multinational corporations. Resulting unemployment, low domestic capital, diminishing tax revenue caused significant damage to the economy. They constricted the market, lowered investment, and increased government dependence on foreign assistance. Kenya's GDP annual percentage growth declined from 5.6% in 1980 to 1.8% in 2003, despite the SAPs (World Bank 2005). Total external debt, 1980-2003, increased from US $ 3,387 million to US $ 6,755 million. Government expenditure, wages, salaries, also increased despite the retrenchment and **privatization** policies the Kenya government had adopted. From 16.8% of total expenditure and lending minus repayments in 1980, the expenditure climbed to 32% in 2003.[15]

The dismal economic performance in Kenya and other third world countries despite the neoliberal reforms caused the World Bank to introduce governance approach to fix the unending problem of underdevelopment. Focus shifted from markets to states, for **liberalized** markets had failed to spur development. The state squarely received the blame for the apparently failing economic reforms. According to the World Bank, had the state been different, the reforms would have succeeded in the long run. Persistent indicators of negative economic growth, as corruption, high inflation, low tax revenue, wide gap between the rich and the poor, political patronage, heightened poverty continued in Kenya amidst the SAPs because of an ineffective state. Although the state shrunk to disparate extents in most countries in accordance with the reforms, **sustainable** development hardly occurred.

Questions got raised as to why. The World Bank argued that the problem lay with governance, which has been defined as "the way public officials and public institutions acquire and exercise authority to provide public goods and services, including basic services, infrastructure, and a sound investment climate."[16] It means that bad governance as evident in the entrenched centralism, arbitrariness, corruption, lawlessness, disempowered population still prevailed despite the reduced size of the state as well as its withdrawal from the market. The foregoing instances of bad governance explain why positive outcomes of market improvement policies failed to percolate to the grassroots levels. Thus, for **sustainable** development to occur, good governance had to be adopted.

[14] Http://www.tradingeconomics.com/kenya/unemployment-rate
[15] THE WORLD BANK 2005.
[16] THE WORLD BANK 2007. *World Development indicators*. The World Bank, 259.

The World Bank Development Report 1997 **emphasized** state capability and effectiveness as conditions for good governance, necessary for **economic growth**. "Capability, as applied to states, is the ability to undertake and promote collective actions efficiently—such as law and order, public health, and basic infrastructure; effectiveness is a result of using that capability to meet society's demand for those goods," stated the report.[17] In line with the foregoing definition, capability of a state denotes quality of institutions based on merit, specificity of functions, incentives, rule of law, information, infrastructure, equipments, and adequate resources. State effectiveness hinges on checks and balances, transparency, accountability, corruption free governance, participation. The motive behind the latter is to incorporate the private sector, individuals, communities, civil society into decision making, implementation process. For until the emergence of governance paradigm, decision making, policy implementation largely lay with the state exclusive of the people. The process occurred largely in a top-down way. Development policies to a large extent thus projected interests from the top, explaining why most policies failed to succeed locally. To change the prevailing political scenario, governance approach thus clamored for diffused power structure, effective checks and balances, accountability, transparency, rule of law, corruption free governance, devolved government that could incorporate local communities into governance.

To achieve good governance, the World Bank **emphasized** devolution, bringing government closer to the people through **decentralization**. "In principle, bringing policymaking and implementation closer to the communities they serve, and involving citizens in shaping policies," reported the World Bank, "lead to greater accountability and improved local checks and balances."[18] It is hardly just about availing government structures and functions to the local communities. It is also about transference of power and resources to the communities, sharing of power between the national government and local people. The motive is to infuse local people's voices and participation into decision making.[19] Properly implemented, devolution can itself avail diverse centers of checks and balances vis-à-vis the **centralized** executive power. It can also foster flow of the right information from the bottom to the top, from the top to the bottom and horizontally, necessary for policy making and implementation. The enhanced contacts between the center and the grassroots can also conflate policies with local people's interests for sustainability. They can also avail a perspective that can help in equitable distribution of resources between the center and regions and across regions.

Given the structural, political nature of the governance associated reforms, a whole new constitutional framework democratic in nature befitted implementation of the reforms. Kenya's constitution 1969-2010 supported a unitary state with a **centralized** government in total control of local authorities. Political power resided in the presidency. Existing mechanisms for checks and balances were thus entirely muzzled by President Kenyatta who had personalized power after disbanding the opposition in 1969. President Daniel Arap Moi continued with the same practice in his *Fuata Nyayo* (follow the footsteps) policy in succession of Jomo Kenyatta. In consequence, arbitrary rule, political patronage, tribalism, corruption became widespread as mechanisms used by the executive for political survival. The new governance required a new structural,

[17] THE WORLD BANK 1997. *World Development Report 1997: The State in a Changing World*. New York: Oxford University Press, 3.
[18] THE WORLD BANK 1997, 128.
[19] THE WORLD BANK 2007, 110.

ideological framework, possible only with a complete overhaul of the constitution. Replacement of the constitution would thus mark the first fundamental step in the implementation of the governance reforms.

Struggle for constitutional reforms in Kenya began in the 1990s with the clamor for multi-party democracy that paid off in the repeal of section 2A of Kenya's constitution in December 1991 that made Kenya a multiparty state. Towards the end of the 1990s, overhaul of the existing constitution to allow democracy dominated Kenyan politics. In response, President Moi formed the Commission for Constitutional Reform of Kenya (CCRK) to lead in the constitution review process. Meeting at the Bomas of Kenya, the CCRK under Prof. Yash Pal Ghai and delegates from different parties, pressure groups, regions, districts all over Kenya through daily discussions produced the Bomas Draft. The draft proposed a complete overhaul of the political framework with checks and balances: a parliamentary system with an executive prime minister elected by parliament, a ceremonial president elected through popular votes and a devolved government.

The constitutional process had initially incorporated the people through the national constitutional conference that had collated delegates from different parts of Kenya. As a product of daily discussions among the delegates, the Bomas draft came out almost representative of people's varied interests. But scared of losing their grip on the political system, the dominant powers that be led by President Mwai Kibaki completely disarrayed the process and seized control. One of the delegates and chairman of the sub-committee on devolution of power, Dr. Crispin Mbai of the University of Nairobi, Kenya, got assassinated on Sunday 14 September 2003 in his house off Ngong Road in Nairobi. Many believed his death occurred because of the role he played in the constitutional conference. As one of the chairmen of the devolution committee, his demise hardly augured well for the future of devolution in Kenya. In fact, it **symbolized** the death of the Bomas draft, including the devolution system it had proposed.

The pro-Kibaki government shelved the Bomas draft, scuttled and seized the constitutional review process, coming up with the Wako Draft that proposed a presidential system plus a devolved government. Because of the presidential system it proposed, the draft failed the 2005 national referendum by 58% majority votes; the constitutional review process stalled momentarily until after 2007 post-election violence. Under the coalition government led by President Kibaki, Prime Minister Raila Odinga, Vice President Kalonzo Musyoka, Deputy Prime Minister Musalia Mudavadi, the parliament constituted a parliamentary committee of experts on constitutional reforms that took over the constitutional process on the assumption parliament represented the people. The parliamentarians and the committee came up with the **harmonized** draft that was hurried through parliament without extensive consultations with the public—only 30 days was it allowed for public scrutiny—then sent to the referendum.

Despite proposing a presidential system as the postcolonial constitution and 2005 Wako draft that failed the referendum, the **harmonized** draft passed the 2010 referendum. Why? President Kibaki, PM Raila, VP Kalonzo, DPM Mudavadi joined ranks in support of the draft for their political interests. Their communities—the Luo, Kikuyu, Kamba, Luyia—supported the leaders and majority voted for the constitution. They were among the 67% that voted for the constitution. Yet it had proposed a presidential system, as the Wako draft that got rejected. When William Ruto opposed the **harmonized** draft, over 99% of the Kalenjiins voted against it, meaning they voted according to their ethnic leader's position. From the evidence, one certainly learns that the public never really scrutinized the draft. They never really got involved in discussion like they did during the Bomas draft. Things which would have been cleaned out of the draft remained intact and were voted in. Voters basically voted according to their ethnic leaders' position vis-à-vis the constitution, hardly according to the content of the constitution. The approval of the constitution occurred therefore because of tribalism, which makes the constitution a tribalism masterpiece. When President Kibaki, Raila, Kalonzo, Mudavadi, accepted, Kikuyus, Luos, Luyia, Kambas, voted yes. Ruto refused, Kalenjiins voted against.

One can thus argue rightly that the undemocratic propensities that governance paradigm sought to eradicate, unfortunately informed the making of the constitution that would serve as a blue print for the implementation of the devolution process in Kenya. One of the propensities is tribalism, another, arbitrary, exclusive leadership that alienates people from political process. Although the constitution provided the general structural, functional framework for devolution, the existing undemocratic components would certainly haunt the process. They have frustrated the devolution so far. Granted, on the one hand, the constitution has provided a framework that has allowed a form of devolution—a form because what we have seen so far in Kenya has been less than devolution. On the other, it has inherently maintained political values that have continuously held back the devolution. With regard to the general structural outlook, a fused system of the old and new political trends has been created, significantly raising questions about the national government's commitment to the devolution process **and sustainable development**.

The 2010 constitution created national government and 47 counties, with different functions as specified in the Fourth Schedule (Part 2) in the constitution of Kenya.[20] Although the government restructuring has been claimed to be devolution, the government has turned out less devolved than **decentralized** in practice. What has happened is that functions and structures have been **decentralized**, not political power that goes with them, a result of the continuing presidential system working within a unitary political concept, arrogating power to the presidency. In this context, the county governments have limited autonomy and are controlled by the national government. The foregoing scenario is evident in Article 192 of the Kenya constitution that gives the President the power to suspend a county governor under particular circumstances.[21] The county government comprises the Governor who is elected by the people, executive committee appointed by the governor, and a county assembly directly elected by the people. Functions of the county executive committee include: implementing county legislation, implementing national legislation, managing and coordinating the functions of the county administration and its departments. County assemblies represent county sub-units known as wards. They legislate and exercise oversight over the executive committee. They also receive and approve plans and policies for development.[22]

The counties' structures need further **decentralization** at the county, village levels and full autonomy from the Presidency and the national government. To involve the people, the structures must reach the bottom, the grassroots. Currently, the last link at the village level close to the people is the ward representative, who works with the sub-county officials, and is a member of the county assembly (MCA). To represent the people effectively, the ward representative needs strong, active

[20] The Constitution of Kenya, 186.
[21] The Constitution of Kenya, 124.
[22] Socio-Economic Atlas of Kenya, 2014. *Depicting the National Population Census by County and Sub-location*, 12.

village structures, as development, welfare, gender, youth committees and non-governmental **organizations** in close contact with the people. The structures should spring up from the people themselves in order to represent their voices and participation, and the ward representatives should closely work with them through constant consultations. But, so far, the opposite has been happening. Most policies are made at the county halls without grassroots consultations, so the people get surprised all the time with projects, as murram roads, health and education being implemented in their villages without getting involved. Centralism which typified the previous **centralized** system has been wholly transferred to the county governments.

Also, the previous provincial administrative system has been left intact in the current government. Its continuation contravenes the constitution that has proposed only the national and county governments. A county commissioner who acts as the former District Commissioner is nominated by the president as the head of security, who also works with the county leaders as the central government's representative. A system that is colonial in origin established as part of the indirect rule system for control and exploitation has continued today and has been incorporated into the county government. The commissioners work with district officers, chiefs, assistant chiefs, who since the colonial period have been acting as the eye of the government in the villages. They are appointed by the government, hence accountable to the national government, not the people, the opposite of what devolution was meant to achieve. They represent the top down administrative structure that governance approach sought to eradicate. Their continued existence is a representation of control and tyranny, a hindrance to, and negation of, democracy. The president is still seeking to **control** the people. Thus, the officials are powerful vestiges of centralism in the current county government, leading to questions about the seriousness of the national government to issues of good governance.

At the county-national level, despite the **decentralization**, evidence so far shows lack of autonomy of the county government. President Kenyatta and his national cabinet have in many aspects interfered with county affairs, as fiscal and health policies, yet both health and fiscal matters have been **decentralized** to the counties. To avoid macroeconomic instability and a scenario of an enfeebled national government in the face of autonomous county governments, a strong pattern of fiscal restraint and enforceable rules governing intergovernmental relations is necessary.[23] The case of Kenya has, however, shown very direct national governmental control of county governments which are theoretically painted as autonomous. County finances directly come from the national government, meaning county fiscal budgets are to a large extent projection of the national government interests. For instance, in **2014**, the county governments received Kshs242.5 billion from the national government "to ensure effective delivery of public goods and services in a sustainable manner."[24] In 2015 budget estimates, county governments were to receive Kshs320 billion from the national goverment.[25] The fact that the national government funds county fiscal budgets means that counties are not independent entities. They are totally dependent on the national government, hence far from being autonomous.

[23] THE WORLD BANK 1997, 128.
[24] Kenya National Bureau of Statistics, *Economic Survey 2015*, Nairobi: Herufi House
[25] Devolution@2 staying on track. Tuesday, April 21, 2015. "State of Devolution," *The Standard*, 1.

To exercise this control further, the national government through the treasury has established the Integrated Financial Management Information System (IFMIS) to limit county government's access to the devolved funds.[26] They cannot access the funds unless they go through the Treasury; that means they are under direct close treasury control. Daily Nation Newspaper, Monday, June 29, 2015 reported a serious tussle between the Council of Governors (COG) chairman Peter Munya and Treasury Permanent Secretary Kamau Thugge over delay in financing the functions of county governments. Peter Munya is reported to have "accused the Treasury of using the Integrated Financial Management Information System (IFMIS) to limit county government's access to the devolved funds."[27] In response, Kamau Thugge "absolved the ministry from blame, saying county governments had enough funds in their accounts at the Central Bank of Kenya (CBK) to pay salaries of staff, including health workers."[28] Amidst this struggle, the COG "accused the national government of sabotaging activities in the counties by failing to transfer county functions, delays in funds remittance among other tactics."[29] From this case, one sees a national government that is intentionally bent on controlling the counties' activities, development and recurrent. The counties obviously appear as extension of the national government. Seeking counties' autonomy, the COG has consequently threatened pulling out of the IFMIS for total control of county funds.[30]

The control over counties' activities extends beyond their relations to the national government to that between the national government and foreign capital. Evidence exists first in the recent leasing of multi-billion medical machines to the county governments. The national government procured the machines from US multinationals, General Electric Africa and Philips, with the objective to lease them to county governments for 7 years at a total cost of Kshs38 billion. Equipping 94 county hospitals with the medical machines was aimed at offering relief to thousands cancer patients suffering long queues at the radio therapy department, Kenyatta National Hospital, Nairobi. The radiology machines included: "a CR system, digital general X-Ray unit, mammography unit, mobile X-Ray unit, a C-Arm, an OPG unit (used to view the mouth, teeth and bones of the upper jaw) and an ultra sound unit."[31] But, all the machines were for diagnosis, not treatment, meaning that patients would be diagnosed then as in the past referred to Kenyatta National Hospital for treatment. "Tender did not include radio therapy equipment; only screening and diagnostic equipment as advertised," Mr. Isaiah Okoth, Head of Healthcare at General Electric, is quoted to have said.[32]

The county governments immediately rose up in resistance when President Uhuru Kenyatta asked them to rent the machines for the counties. They argued that the national government got into the procurement without their input, that the procurement was shrouded in secrecy, that the counties will have to pay renting and maintenance costs, hire and train specialists to run the machines. Yet the counties had not budgeted for these things. They were abrupt impositions from the national government. Many argued that the project would turn into another Goldenberg or Anglo Leasing scam in which the government lost

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[26] Ngare, Kariuki, Kennedy Kimanthi, Derick Luvega and Patrick, Langat. Monday, June 29, 2015. "Blame games rage over county funds." *Daily Nation*, *52.*
[27] Ibid
[28] Ibid
[29] Eric Lungai. Tuesday, June 30, 2015. "COG: State using deceitful means to kill devolution." *The Standard*, 15.
[30] Ibid
[31] Jacqueline Kubania. Friday, March 20, 2015. "Shs38b machines 'Only for Screening.'" *Daily Nation*, 5
[32] Ibid

billions of shillings, because already complaints had emerged about inflation of the equipments' costs. The governors were getting forced to rent equipments they hardly wanted and budgeted for and without involvement of the people. "We are being forced to take equipment on conditions that we can't understand. An item that costs Sh4 million is going for Sh400 million," Busia Governor Sospeter Ojaamong' is quoted to have complained.[33]

At the background of this struggle lay huge health problems that needed to be addressed promptly. Patients sharing beds in Kenyan wards is a very common thing. In fact, it is the norm, as in Kenyatta National Hospital, or Pumwani Maternity hospital where new mothers share beds in the pediatric wards.[34] In Kisumu district and referral hospitals, patients share beds, hardly strange, amidst lack of basic equipments, as syringes, wool, bandages, gloves, surgical tools. There is also limited medicine. Wards are dilapidated too. Yet someone felt right that counties should rent, not even buy, the modern equipments that can only diagnose, not treat cancer, that no one knows how to use at that high price amidst myriad basic health problems that should be addressed first. It thus means that still the people are totally excluded from policy making and implementation, even the county governments themselves. The national government decides and orders compliance from the county governments in the interest of foreign companies, not in the interest of the people. Arbitrary rule is thus still in place despite devolution, which contradicts principles of good governance **and sustainable development.** But governance theory failed to consider how foreign capital has fed arbitrary rule and contributed to the resulting poor economic growth in Kenya, in particular, and Africa, in general.

Another example of foreign capital influence over the national government by extension county governments occurred after the July 24, 2015 United States President Barrack Obama's visit to Kenya. One week after the visit, August 2, 2015, Kenya National Treasury Cabinet Secretary Henry Rotich and US Secretary of Commerce Penny Pritzker signed a Ksh1.2 trillion (US $12 billion) deal for " a new economic development partnership." The deal offers financial support to "investments in the Lamu Port, an oil pipeline, power plants, urban commuter rail and highways, and various projects in the health and tourism sectors."[35] While the deal appeared beneficial to Kenyans in terms of infrastructural development that stretch to the counties, a closer scrutiny reveals great loss for Kenyans and colossal gain to the US. In the first place, the deal is not a loan or aid to Kenya government. It is a US investment in Kenya. The US Federal government has given the money to American multinational companies' investment in industrial, health, conservation, and infrastructural sectors strategic to American interests in the region. The Lamu Port South Sudan, Ethiopia Transport Corridor (Lapsset) project will enhance US trade, security interests, oil pipeline will foster US interests in oil exploitation, highways will enhance US trade, revenue interests, wildlife conservation, holidaying interests. It is outsourcing, but the exchange is highly unequal in view of Kenyan interests. Ending up in the hands of US multinational companies, as General Electric, the bulk of the money is bent to circulate back to the US. Minimally will it circulate in Kenya through employment of unskilled, low skilled workers and through expatriates buying Kenya's commodities. But their salaries will not be taxed. Kenya government will gain minimally from value added

[33] Dennis Odunga. April 12, 2015. "Leasing fees for County medical equipment inflated, leaders say." *Sunday Nation,* 35.
[34] Eunice Kilonzo. Thursday, June 18, 2015. "New mothers share beds at KNH." *Daily Nation*, 9.
[35] Andrew Teyie. August 02, 2015. "Sh1.2 trillion deal struck but not all Will Go write rosy chapter in club history?" *Sunday Nation*, 4.

tax (VAT) charged on commodities, income tax drawn from the Kenyan low skilled, unskilled workers employed by the MNCs, not from the multinational companies because of tax waivers. Theirs is tax free investment. The Kenya Secretary for Commerce and Tourism Phyllis Kandie made this clear:

> The Government of Kenya expresses its support for the US governmental resources that the United States government intends to make available, consistent with US laws and regulations, to facilitate potential US private sector participation in strategic infrastructure priority projects in Kenya and is committed to ensuring that such resources will be free from taxation within Kenya.[36]

One might argue that Kenyans are going to benefit from the projects' utility, but at a price. They will pay directly and through taxation for using the infrastructures. The money will go directly to the US companies untaxed by virtue of the fact that the US financed and built the infrastructures, so has ownership rights. Whenever a Kenyan will pay for commuter train services, the money will directly go untaxed to the General Electric—the to be supplier of commuter trains. Based entirely on foreign technology, the deal has increasingly deepened Kenya's dependency on foreign capital, an impediment to local technological development. It would have been **sustainable** development to Kenyans were they to build the commuter trains, highways, oil pipelines, health equipments, and the port, themselves. Significant to this paper is the fact the deal has been signed without involving the people. Its objective is hardly to build or enhance local capacity and initiative, but to advance foreign capitalists' interests. Good governance has thus been sacrificed on the altar of foreign capital.

Corruption and political patronage have also continued in Kenya despite devolution. Governance had **emphasized** transparency, accountability, rule of law, meritocracy, checks and balances as fundamental mechanisms for alleviating corruption and political patronage in the underdeveloped world. Corruption has instead grown prevalent both in the national and county governments. The people involved have rarely been prosecuted, showing the extent to which the rule of law has not been applied. Court cases on corruption have been dragging long without prosecution. In case of prosecution, judges have been lenient with the culprits. Because of corruption, money that would have been used for **sustainable** development has ended up diverted to private hands, foreign countries, or unrelated expenditure.

Many county governors, members of county assembly (MCAs), and county staff have been mentioned in big corruption scandals. On June 19, 2015, a quarterly report by the national controller of budget put 11 counties on the spot over irregular expenditure. They had diverted funds for development to pay sitting allowances to MCAs which exceeded the limit set by the Salaries and Remuneration Commission.[37] Turkana county assembly, for instance, is mentioned to have spent Kshs45 million on sitting allowance, four times higher than its budget of Kshs10 million.[38] The third quarter report for the financial year 2014/2015 also indicated that county governments spent Kshs5.71 billion on domestic and foreign trips.[39] Isiolo MCAs have

[36] Ibid
[37] Isaac Ongiri. Friday, June 19, 2015. "Report cites 11 counties for paying hefty perks to MCAs." *Daily Nation*, 19.
[38] Ibid
[39] Ibid

been implicated in corruption and accused of making unnecessary foreign trips instead of playing their oversight role over the governor.[40]

After conducting investigations, Ethics and Anti-Corruption Commission (EACC), on Sunday April 12, 2015, implicated Governors Evans Kidero (Nairobi), Isaac Ruto (Bomet), Peter Munya (Meru), Ali Hassan Joho (Mombasa), Cyprian Awiti (Homa Bay) in corruption.[41] Amidst the corruption reports, Orange Democratic Movement (ODM) leader Raila Odinga expressed his concern: “Governors are complaining that MCAs are meeting to earn allowances, going to India for bench marking and other useless trips instead of spending the money on actual development.”[42] The Nation Newspaper further reported, “last year, eight countries including The Netherlands, India, and Israel wrote to the ministry of Foreign Affairs to complain about the high number of ward representatives visiting.”[43] The extent of corruption among county officials so far reported clearly shows the weakness of Kenya’s judiciary in failing to investigate and punish the culprits involved. Thus, the rule of law is still not upheld; checks and balances proposed in governance are yet to be established.

Political patronage, a central practice in the earlier system of governance has also continued to characterize the current county governments. It has prevalently expressed itself in employment where nepotism and tribalism have been strong determinants of one’s employment. It has been common to find that most county employees would come from the governor’s clan, ward, or constituency and from the county’s dominant community. This has occurred because in making the counties the national government hived off particular ethnic or sub-ethnic groups, placed each under particular counties. In some cases, the government grouped a few ethnic groups within the same county. For instance, Luo were put in Kisumu, Homabay, Migori, Siaya counties, Luyia in Kakamega, Kitale, Bungoma, Vihiga counties, Kalenjin in Nandi, Kericho, Baringo counties. But within each of these counties, existing boundaries sometimes do enclose families, villages, or communities, the bulk of which live in neighboring counties. Ethnic, sub-ethnic groups formerly constituted districts. In such cases where particular communities dominate a county, members of other communities that are within the county exist as minorities.

Because of ethnic distribution within counties, county leaders favor members of dominant communities in employment and development for political interests. To governors and MCAs, the idea is political survival in maintaining loyalty among the county staff and fostering development in particular areas of the county for political support. County governments, for instance, have been reported to have refused employing medical doctors in their counties, because of their ethnic origins.[44] Some have been employed with less salary. The Kenya Medical Practitioners, Pharmacists and Dentists Union is reported to have “raised the alarm that some counties had rejected doctors because they come from ‘wrong tribes’ while those hired were given a lower salary.”[45] These cases are going on yet in county hospitals there is incredible short fall of medical doctors. Patients die before getting attended to as others wait in long queues in referral, district hospitals to see the few doctors available. One can thus surmise that instead of enhancing unity amidst diversity, devolution in Kenya has increased tribalism,

[40] Harry Misiko. Thursday, June 18, 2015. “Vihiga, Siaya, Nandi have the most popular MCAs.” *Daily Nation*, 2.
[41] Walter Menya. Sunday, April 12, 2015. “Graft: Two ministers, governors to be charged,” ***Sunday*** *Nation*, 9.
[42] Linet Wafula and Patrick Langat. Friday, March 20, 2015. “Stop graft, Raila tells Cord governors.” *Daily Nation*, 28.
[43] Ibid
[44] Jeremiah Kiplang’at. June 21, 2015. “Tribalism: Doctors sue counties.” *Sunday Nation*, 8.
[45] Ibid

rendering county administration ineffective in delivering public goods and services because of lack of meritocracy and rule of law.

Election is another factor that has continued to undermine good governance despite devolution in Kenya, yet it has been conventionally considered an evidence of democratic practice. The fact that people elect their leaders has been assumed to be a sign of democracy. The World Bank more than anyone else has made this assumption: "In a democratic society elections are the primary manifestation of citizen voice. The number of democratically elected governments has increased sharply in recent decades, giving many citizens new opportunities to voice their opinions through the ballot."[46] Kenyan elections experience so far has, however, been replete with massive irregularities. The 2007 post-election violence where so many people lost their lives and the 2013 election court case between Uhuru Kenyatta of Jubilee Alliance and Raila Odinga of Coalition for Reforms and Democracy (CORD) over the election results provide strong evidence for the prevalence of irregularities in Kenyan elections. Many cases of ballot boxes filled with ballot papers found thrown away from polling stations were reported in the past elections. Cases where people voted at polling stations they were not registered, where number of voters exceeded number of voters on voters' registration lists at different polling stations in Jubilee dominated areas were reported. Investigations on many polling stations revealed that number of actual voters exceeded by far number of registered voters on registration lists. When all the irregularities are added up and considered, one can argue that in Kenyan elections majority of those who end up becoming leaders, as MCAs, MPS, Governors, Senators, and Presidents are those who get rejected in the polls but end up winning because of irregularities. They rig their way in, for the end justifies the means. Election is thus a sham hiding untold undemocratic mechanisms for power acquisition. Those who lose elections usually end up as leaders as those who win end up on the streets of politics. With ethnic and foreign support, the former end up surviving politically in leadership, the latter lose for good. The experience is thus no less than a mockery of democracy, a hindrance to good governance **and sustainable development.**

The above cases have shown that the devolution process in Kenya so far fall short of good governance, **a prerequisite for sustainable development**. But why has it been a challenge to have good governance in Kenya? This research has established that the constitution, foreign capital, lack of political will, and political cultures have been responsible. The continuation of the presidential system after the adoption of the 2010 constitution still arrogates most powers to the presidency. He appoints the top government officials, the cabinet and the judiciary of course with the approval of parliament. But in Kenyan experience, the political party which the winning presidential candidate belongs to has tended always to have the majority in parliament which favors the president when it comes to approval of his appointments and bills. The situation explains why Kenyan parliament has in most cases been acting in the interest of the president. Party politics which have allowed the entrenchment of political patronage in parliament have been the cause.

The judiciary more than parliament has in all cases been subject to the presidency, significantly compromising democracy and the rule of law in Kenya. In fact, the existing loopholes in the constitution in an unconstitutional context allowed President Kibaki to order the continuation of the provincial administration that turned out to be unconstitutional and a real

[46] THE WORLD BANK 1997, 111.

setback for the devolution. Despite the contravention of the constitution, the judiciary supported the president. Political patronage, corruption, enfeebled checks and balances have thus thrived, undercutting good governance. For change, a parliamentary system would have been better, only if either the opposition party/ies or the incumbent party wins majority in parliament and the other wins popular votes for the president. If either the incumbent political party or opposition political party wins both parliament and presidency the situation will still be the same.

Entrenchment of foreign capital in Kenya has been another significant setback for the devolution process, good governance, **and sustainable development**. Foreign capital has undermined democracy, rendered devolution unnecessary. It has enhanced arbitrary governance, excluding the people from the decision making process. Controlling a large percent of the Kenya's economy through multinational corporations, foreign capital has always influenced the presidency and national government. Important resources as oil and minerals which would have gone into developing counties have unfortunately fallen into the hands of foreign companies, as the Canadian African Oil Corporation and London-based Tullow Oil Company. A big chunk of the resources end up developing foreign countries as Kenya get only what the foreign companies deem fit. The recent successful leasing of the medical equipments from General Electric and Philips to the counties despite the counties' opposition is an evidence of powerful influence foreign capital has over the president, national and county governments. Experience has shown that in most cases, Kenya government has been acting at the bidding of foreign capital, rarely in the interest of the people.

Political will among existing leadership is another factor that has shaped the devolution process in Kenya. Transfer of power to or sharing of power with the **decentralized** structures happen in a political framework that holds the constitution supreme. The will to share power unravels only in a context of *de facto* constitutional sovereignty, which has hardly **materialized** in Africa. For most countries hold the presidency supreme, or presidents consider themselves above the law despite *de jure* emphasis on the people's sovereignty in constitutions. “All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this constitution,” states Kenya's constitution.[47] But perception of the political leadership as sovereign has continued to allow the leadership to establish networks of political patronage with the citizenry, thriving in the context of **tribalism**. A consequence of colonial indirect rule, tribalism has continued despite devolution in most African countries. Its continuation has significantly undermined the rule of law, meritocracy, competitive politics, checks and

[47] The Constitution of Kenya, chapter one, 5

balances, and equitable, **sustainable** development. Although Kenya government has attempted to **decentralize** in the name of devolution, the continuation of tribalism, corruption, and arbitrary rule, or centralism, lawlessness, dominance of foreign capital has significantly undermined **sustainable development**. The attempt to devolve Kenya government through **decentralization** has thus fallen short of good governance.

For good governance to **materialize**, constitutional culture must take root, a culture where people obey the constitution. Amending the constitution with the objective to clip the powers of the presidency is also necessary. One way to do that is to empower parliament relative to the presidency. Instead of the presidency doing appointments, parliament should take that role in order to make institutions as the judiciary independent. For the president would not be able to influence the many public officials, from judiciary, parastatal heads, police force heads, commissioners, to secretaries. Cases of tribalism, corruption, election irregularities, increasingly undermining governance and **sustainable** development, will be prosecuted according to the law in the case of judiciary. The rule of law consequently prevails. **Sensitized** on the significance of the constitution, the people are expected to constantly make reference to the constitution in their social, political relations. The resulting constitutional culture can enable the people to confront arbitrary practices, corruption, tribalism, and empower themselves to seize their sovereignty from the presidency. But the foregoing mentioned possibilities can hardly **materialize** in the context of increasing dominance of foreign capital as it is today. Foreign capital invariably negates democracy, for wherever foreign capital dominates, policies get formulated at the top in the interest of the capitalists, not the people.

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