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Protection of county boundaries is yet another avenue through which the Senate could endeavour to secure county interests. Under Article 188(1) of the Constitution, county boundaries may only be altered by a resolution of an independent commission set up by Parliament for that purpose and which resolution must be supported by a two thirds vote from both Houses.

### **3.2.2 Critique on representative role**

Through representation of interests that would otherwise be unrepresented in a majoritarian unicameral House, a second House, such as the Kenya's Senate is a critical tool for curtailing majority tyranny.<sup>170</sup> Through delays of the legislative process and decision making, the Senate can encourage due consideration of policies, resulting in better quality decisions or what Riker terms as delaying action, 'until a true majority is arrived at', which allows for 'adoption of out-of-equilibrium policies'.<sup>171</sup>

A key principle in the Senate's representative role is that it is one based on equality, where each of the 47 counties is represented by one senator regardless of population size or number of constituencies within it. Equality in territorial representation is also practised in countries like the United States, the Federal Republic of Nigeria or even Switzerland.<sup>172</sup>

The Senate acts as a counterbalance in a number of ways. If we look at Nairobi County for instance, which is the most populous county in Kenya at 3 138 369, it has only one senator,

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<sup>167</sup> Art 192(2) & (4) Constitution.

<sup>168</sup> See Art 225 and Part IV PFMA, No 18 of 2012.

<sup>169</sup> Art 225(5)(6)(7) Constitution. See also ss 97-99 PFMA on procedure for stoppage of funds and effectuation of a recovery plan.

<sup>170</sup> Riker, WH (1992) 'The justification of bicameralism' 13(1) *International Political Science Review* 101-116.

<sup>171</sup> Riker (1992): 101.

<sup>172</sup> In the US, each of the fifty states is represented by two directly elected senators regardless of size, while in Nigeria, each of the 36 States is represented by three members to the Senate. In Switzerland, the Council of States comprises two representatives from each of the twenty full cantons, and one representative from each of the six half-cantons.

the same as the five least populous counties - Lamu, Isiolo, Samburu, Tana River and Taita Taveta, whose total population is less than a third of that of Nairobi. Likewise, Samburu, Lamu and Isiolo Counties with two constituencies each enjoy equal representation in the Senate as Nairobi County which boasts 17 National Assembly elective seats.<sup>173</sup> This ensures that the interests of people in densely populated areas do not always override those of people in less populated areas. In this way, the effect of ‘tyranny’ of numbers in the National Assembly is counterbalanced. It has been observed that such balance enhances representation of the smaller ethnic communities in the Senate, giving them a stronger voice, which is an advantage they do not get in the more populous first chamber.<sup>174</sup>

Moreover, the insistence on delegate voting on matters concerning counties further bolsters the equality of votes, ensuring no county gets more say than the other. After elections, the members of the Senate in a county, inclusive of nominated members, constitute a single delegation. The delegate vote is cast on behalf of the county by the elected senator who heads the county delegation.<sup>175</sup> Thus, the 20 nominated Senators (who obviously have their respective counties of origin where they are registered voters) do not have an independent vote over their ‘home counties’ in county matters.<sup>176</sup> This means that the vote becomes not the vote of an individual senator but a county vote. This is vital in maintaining the equality and representation of county interests because if the 20 members were to be allowed to vote independently on county matters, it would disadvantage counties without nominated senators. In such a scenario, the majority Senate decision could mean a veto on the decision of the majority of counties and hence counties’ interests.<sup>177</sup> Ghai and Bosire observe that the insistence on delegation-voting in county matters reflects the close link of the senators with the county and further emphasises, ‘the centrality of the county rather than other affiliations (like political)’.<sup>178</sup> Delegate voting further underscores the role of the Senate as a protector of the counties’ interests, as the county vote essentially becomes a vote on the aggregate county issues.

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<sup>173</sup> Data obtained from The Independent Electoral and Boundaries Commission (IEBC) ‘4<sup>th</sup> March 2013 General Election Data’ report.

<sup>174</sup> Bosire (2013): 358. It has however been argued elsewhere that such equalisation paradoxically ushers in inequality through the backdoor through ‘overrepresentation’ of the minority groups.

<sup>175</sup> Art 123(1) Constitution.

<sup>176</sup> Art 123(3) Constitution.

<sup>177</sup> CoE (2010): 114-5.

<sup>178</sup> Ghai & Bosire ‘Senate: The protector of county governments autonomy, interests’ (2013) *The Star online* S 1 June 2013. See also Bosire (2013): 364.



The influence of party politics on representation vigour in both Houses cannot however be wished away. It is to speak in a vacuum to discuss the parliamentary role outside of the political game play. Thus, as Gallagher, Laver and Mair have observed, when we speak about Parliament, it is ‘not really...about the interaction of a large number of legislators’, but a constellation of ‘a small number of political parties’ in practical terms.<sup>179</sup> In the Kenyan situation, party politics would especially have a significant influence on the representative and supervisory roles whereby a governor and a senator hail from different warring political parties, a situation that fuels competition and conflict between the office holders. As shall be seen in the latter part of the chapter, politics has been blamed as the motive behind the impeachment motions against governors and their deputies.

The institutional design of the Constitution is such that it compromises on the representative role of the Senate and has promoted rivalry between the Senate and governors in two major ways: First, the Senate membership has weak linkages to the county governments which translate into equally weak representation of county governments at the national level. Secondly, the fact that the two Houses of Members of Parliament are directly elected and on the same day as the President means that the two Houses largely mirror each other in terms of political composition, thus diluting the Senate’s counterbalancing force at the national level.<sup>180</sup>

Lijphart long argued that for there to be meaningful representation in bicameral systems, the chambers must be incongruent in their composition that is, they should be differently constituted, and the second chamber should have real power.<sup>181</sup> It has similarly been argued elsewhere that when both houses are elected by similar methods, the upper house mirrors the lower house, thus obscuring the essence of a second house.<sup>182</sup> The fact that the Kenyan Senate is selected in the same manner as the National Assembly and the same day as the rest of the elections means that the Senate elections are also much influenced by the political climate of the day. Therefore, more likely than not, the House’s political genetic make-up is a replica of the first chamber in terms of party representation and hence political control. True enough, a glimpse at the party strengths in the first general elections of March 2013 shows

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<sup>179</sup> Gallagher M, Laver M & Mair P *Representative government in modern Europe* McGraw-Hill (1995): 51.

<sup>180</sup> This is unlike say, Germany or the US systems whereby elections take place at diverse times (Gallagher, Laver & Mair (1995): 140).

<sup>181</sup> Lijphart A *Patterns of Democracy Government Forms and Performance in Thirty-Six Countries* (1999): 39, 205-7.

<sup>182</sup> Gallagher, Laver & Mair (1995): 41.

that ‘Jubilee,’ the ruling party coalition dominates both Houses in similar proportions.<sup>183</sup> This could affect the ‘independence’ with which the Senate can vigorously protect the interests of counties and counteract executive power owing to party allegiance.

The second weakness relates to the mode of selection of the Senate members. A directly elected federal chamber has weak institutional links with the subnational governments.<sup>184</sup> While Kenyan senators have a direct link with the respective counties as they are directly elected by county voters, there is little nexus, if any, with the county governments. Plainly put, a senator is not a delegate and does not represent county governments but counties. Notwithstanding, the Senate is under a constitutional obligation to protect the interests of not only counties but also their governments. This becomes problematic considering the weak linkage to the latter and is determinative of the willingness and vigour with which the Senate promotes and protects the interests of county governments. Therefore, while direct election has afforded the Senate ‘democratic legitimacy’ and the requisite political clout necessary for transacting business at the national level,<sup>185</sup> it has by the same token weakened the links with the governments at the county level whose interests it is also mandated to promote and protect.

During the constitutional review process, a number of Kenyans had expressed concern over the weak linkages of the Senate to the county governments.<sup>186</sup> Indirect election of senators was ‘perceived as a weakness’ as ‘persons of the right calibre were unlikely to emerge’.<sup>187</sup> It was also argued that senators not popularly elected ‘would carry less weight than members of the proposed National Assembly’.<sup>188</sup> This made a case for the present form of popular election of Senate members.

The essence of weak representation of county governments by the Kenyan Senate is perhaps better appreciated by drawing a comparison with the German and South African systems. Germany’s *Bundesrat*, an equivalent of the Kenyan Senate, comprises representatives of the states or *Land* governments in the *Bund* (federal government). These delegates are essentially

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<sup>183</sup> See (IEBC) ‘4<sup>th</sup> March 2013 General Election Data’.

<sup>184</sup> Bosire (2013): 380.

<sup>185</sup> See Lijphart (1999): 206 and Bosire (2013): 363, 379. Bosire is of the view that popular mandate not only grants the Senate political leverage but also ‘the political voice necessary to safeguard county autonomy.’

<sup>186</sup> CKRC (2005): 387.

<sup>187</sup> CoE (2010): 92.

<sup>188</sup> CoE (2010): 92.

members of state governments from *Land* who vote *en bloc* on instructions from the *Land* government.<sup>189</sup> South Africa, which adapted its system from Germany, has a similar system of representation. The National Council of Provinces (NCOP), which represents the nine provinces in South Africa, comprises a single delegation from each province consisting of ten delegates. Each province has one vote which is cast on behalf of the province by the head of the delegation.<sup>190</sup> This form of representation would, *prima facie*, favour strong representation of the subnational level governments, while eliminating the elements of competition and antagonism. It is however to be noted that even the strong representation expected in such a delegate system has in practice been compromised by the influence of party politics, as the case of South Africa's NCOP, or even India's *Rajya Sabha* demonstrates. Thus, as Bosire rightly concludes, 'there is no universally preferred method of structuring the central representation of devolved units' and there is no guarantee that 'a particular design will bear the same fruit if it is transplanted elsewhere'.<sup>191</sup>

The weak linkage of senators to the county governments would partly explain the ease and frequency with which the Senate and heads of county governments appear to be embroiled in tugs of wars. The situation is likely to be even more volatile if the governor and the senator from one county hail from different, rival political parties.

### 3.2.3 The practice

Despite the fact that the Constitution envisions that the Senate would play the role of a zealous protector and promoter of interests of counties and county governments, there are valid concerns that the discharge of its mandate has leaned more towards antagonising the interests of county governments.

Take the case of legislative authority for instance, it is almost as if every Act emanating from Parliament and touching on county affairs signifies an additional petition in Court by governors challenging its constitutionality. Indeed, in less than four months after taking office, the Senate introduced a Bill seeking *inter alia* to stop governors from flying national flags on their vehicles, a move seen to be geared towards 'trimming the county bosses to

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<sup>189</sup> Gallagher, Laver & Mair (1995): 139.

<sup>190</sup> S 65 Constitution of South Africa.

<sup>191</sup> Bosire (2013): 361.

size’<sup>192</sup> This Bill has since been enacted into law as the National Flag, Emblems and Names (Amendment) Act, 2014<sup>193</sup>. The Act raised a red flag for the Council of County Governors (“Council of Governors”) which challenged it in Court.<sup>194</sup> In the meantime, hot on the heels was the Order of Precedence Bill, 2014<sup>195</sup> originating from the National Assembly, dealing with the issue of protocol and forms of address of state officers. Similar to its predecessor, the Bill ranked the governor at a humble position seven in the pecking order, below the Members of Parliament (MPs). The Bill also proposed to deny governors the right to fly the Kenyan flags and sirens on their vehicles in addition to stripping the governor of the title of ‘His Excellency’. A governor is to contend with being referred to as ‘Governor’ with no prefixes or courtesy form of address.<sup>196</sup> This again goes to show the power struggles that continue to pit governors against the Houses of Parliament, singularly and collectively.

Furthermore, the enactment of the impugned County Governments (Amendment) Act, 2014 and the proposed County Industrial Development Bill, 2014, which designates senators as chairpersons of development forums in counties, leans towards undermining county government autonomy. A detailed appraisal of these laws is provided in Chapter Four of the study wherein the role of a senator in county affairs is explored.

With regard to county revenue, governors apparently no longer trust the Senate’s ability or willingness to promote their interests by ensuring that the percentage allocation of national revenue to counties is enhanced. This is despite the fact that the Senate commands representation of the majority members in the CRA, a critical body charged with the allocation of revenue, quite apart from the fact that the Senate also participates in the passing of the DRB. That would explain why governors launched a referendum campaign dubbed ‘Pesa Mashinani,’<sup>197</sup> seeking to collect signatures so as to amend the Constitution through popular initiative. One of the key issues sought is the enhancement of the amount of equitable share to counties from the current base of 15 percent to not less than 45 percent of the most recently audited accounts. At the time of concluding the study, a draft Constitution of Kenya

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<sup>192</sup> Senate Bill No 2 of 2013, dated 25 March 2013.

<sup>193</sup> Act No 10 of 2014.

<sup>194</sup> See Ochieng A ‘Governors challenge law barring them from flying national flag’ *Daily Nation online* 2 July 2014. Council of County Governors is a forum consisting of all the governors of the 47 counties. It is established under section 19 of the Intergovernmental Relations Act No 2 of 2012 (IGRA).

<sup>195</sup> Kenya Gazette Supplement No 32 (National Assembly Bills No 11 of 2014). The Bill dated 20 March 2014 was sponsored by Hon Adan Keynan, a Member of the National Assembly.

<sup>196</sup> See Clauses 5, 6(2) and 7 Order of Precedence Bill, 2014.

<sup>197</sup> Kiswahili phrase meaning ‘money to the grassroots’.

(Amendment) Bill, 2014 was in the offing.<sup>198</sup> The Pesa Mashinani initiative has further exacerbated rifts between senators and governors, rather than unified them.<sup>199</sup>

### 3.3 The Senate's oversight role

#### 3.3.1 Constitutional and legislative framework

In order to holistically appreciate the oversight role of the Senate over county governments, it is worth noting here that the Constitution establishes the Auditor-General (AG) and the Controller of Budget as Independent Offices for purposes of financial management in Kenya.<sup>200</sup> Within six months after the end of each financial year, the Constitution requires the AG to conduct an audit of accounts of both national and county governments and all state organs and other entities funded by public funds.<sup>201</sup> The AG's reports are required to be submitted to Parliament 'or the relevant county assembly', which in turn must consider the report and take appropriate action within three months of receipt of the audit reports.<sup>202</sup>

The Controller of Budget (CoB) is mandated to oversee the implementation of the budgets of both national and county governments and approves withdrawals from public funds. The CoB is required to submit a report every four months to each House of Parliament on the implementation of the budgets of national and county governments. According to the CoE, separation of the two offices was critical to ensuring financial management was carried out in accordance with the law. While the AG would perform 'post-mortems' on financial dealings to check on compliance, the CoB was crucial to monitoring compliance throughout the process.<sup>203</sup>

The PFMA confers on the relevant Senate committee on public finance various general responsibilities.<sup>204</sup> The responsibilities include presenting proposals to the Senate for the basis of allocating revenue among the counties and considering any bill dealing with county financial matters. The Senate Committee is also charged with reviewing the CARB and the

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<sup>198</sup> See Obala, R 'Draft Bill on issues informing Pesa Mashinani campaign finally out' *Standard Digital* 24 October 2014.

<sup>199</sup> See for instance Kimutai G 'Governor Isaac Ruto faces off with Jubilee senators in Bomet' *Standard Digital* 19 October 2014.

<sup>200</sup> Arts 228, 229, 248(3) Constitution.

<sup>201</sup> Arts 226(3), 229(4) (5) Constitution.

<sup>202</sup> Art 229(7) (8) Constitution.

<sup>203</sup> CoE (2010): 101.

<sup>204</sup> See s 8 PFMA.

DRB and examining financial statements and other documents submitted to the Senate under Part IV of the PFMA Act. Under the Senate Standing Orders, 2013 the County Public Accounts and Investments Committee is the sessional committee of the Senate charged with the oversight over national revenue allocated to county governments.<sup>205</sup> The Standing Orders also charge the Committee with examining CoB's reports on the implementation of the budgets of the county governments. The Committee is also tasked with the AG's reports on the annual accounts and generally exercising oversight over county public accounts and investments.<sup>206</sup>

Where does that leave the county assembly's oversight role? Article 185(3) of the Constitution mandates the county legislature to exercise oversight over the CEC 'and any other county organ'. Article 226(2) further stipulates that 'the accounting officer of a county public entity is accountable to the county assembly for its financial management'. It is worth pointing out here that a 'county public entity' is not a synonym for 'county government'. The PFMA defines the term 'county government entity' as, 'any department or agency of a county government, and any authority, body or other entity declared to be a county government entity under section 5(1)'.<sup>207</sup> While the law provides for accounting officers for the county assemblies and county public entities, it is not clear who the accounting officer for the county government/executive is.

The central question with regard to the financial oversight over counties has been whether and to what extent the Senate should probe into the financial affairs of counties; should the Senate for instance be allowed to summon and grill governors?

### **3.3.2 Critique on the oversight provisions**

The constitutional provision relating to the Senate's oversight over county finances presents two major problems. The first is the lack of clarity in law on the jurisdictional divides between county assemblies and the Senate in oversight function over county government finances. Put differently, it is not clear when the oversight role of the county assembly ends and where that of the Senate begins. The Senate's oversight power is said to be strictly

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<sup>205</sup> Order No 212 Senate Standing Orders.

<sup>206</sup> Order No 212(3) Senate Standing Orders.

<sup>207</sup> S 2 PFMA. For designation of accounting officers to county public entities, see section 148 PFMA and s 31(c) CGA empowering a governor to appoint accounting officers to departments and agencies within county governments.



limited to the equitable share and other conditional or unconditional grants emanating from the national government.<sup>208</sup> This essentially means that the Senate's oversight power is considerable, given that the bulk of the revenue for most counties emanates from the national government rather than county revenue. Nevertheless, an examination of the relevant oversight provisions under the Constitution, the CGA and the PFMA reveals that a county assembly has a wide remit to oversee all the financial resources of the county, including revenues allocated by the national government and the revenue generated locally by the respective county.<sup>209</sup>

Another concern, flowing from the first, regards the practicality of the role sharing between the Senate and county assemblies. How is a county assembly, for instance to exercise 'selective oversight' by requiring accounting officers of county public entities to account only for the use of monies not emanating from national government? How identifiable and separable is the national revenue from other revenue sources in county spending in the first place? Evidently, the oversight role over county finances is unclear and this has brought about role confusion and even bred conflicts between the county assembly and the Senate, as will be seen shortly.

The second problem concerns ineffective oversight tools for the Senate. Even though the Senate's County Public Accounts and Investments Committee is charged with the Article 96(3) oversight, there are no tangible mechanisms at the Senate's disposal to ensure compliance. While the Constitution empowers Parliament through its committees to summon any person to appear before it to give evidence or provide information, there is no clear rule as what hard measures are available in case of adverse findings.<sup>210</sup> This effectively consigns the Senate's oversight role to a passive one, what Bosire aptly terms as 'scrutiny' and 'naming and shaming'.<sup>211</sup> In order for the oversight role to have logical meaning, then it would be expected that the Senate would have the ability to penalise whenever the need arises.

It is however arguable that this state of affairs is indicative of the anticipated role sharing between the two assemblies with regard to oversight over county governments - that the law

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<sup>208</sup> Art 96(2) Constitution.

<sup>209</sup> See also *International Legal Consultancy Group v Senate & another* [2014] eKLR para 62.

<sup>210</sup> Art 125 Constitution. Save for the vague provision under Article 125(2) that confers upon the relevant House or its Committee the equivalence of High Court powers in issuance of summonses, to among other things, 'enforce the attendance of witnesses and examine them on oath, affirmation or otherwise'.

<sup>211</sup> Bosire (2013): 377.

must have been intended such that the primary role of oversight over county finances rests with the county assembly and not with the Senate. This could be so given that the county assembly has at its disposal an array of measures including disapproving county plans, policies and budgets, not forgetting the most potent ‘arsenal’-the initiation of impeachment motions against governors.

Article 229 providing that the AG’s reports may be submitted to Parliament ‘or’ the relevant county assembly portends a likely standoff over the oversight role. The use of the disjunctive term ‘or’ is problematic. What criteria is the AG to use in determining whether to lay the report before a county assembly ‘or’ the Senate? Given the joint oversight responsibility, it is submitted here that the reports would be useful to both the county assemblies and the Senate. The Senate would require the reports in exercise of its Article 96 mandate, while the county assemblies also need to be furnished with these reports in order to effectively discharge their role as the primary oversight organs over their county governments and the body with effective oversight tools. In view of this, the conjunctive term ‘and’ would have been more appropriate, although this would be unhelpful in solving the jurisdictional overlap. What for instance happens when the reports are tabled in both Houses - are the ‘appropriate actions’ by the Senate and county assemblies to be taken concurrently or consecutively? What if there is a clash of opinions or ‘appropriate actions’ of the assemblies?

### **3.3.3 The Practice**

Tugs of war between the Senate and the county government punctuated with court cases have characterised Senate’s oversight role over county finances.<sup>212</sup> The Senate has been summoning governors to account for financial management of their counties. Governors are opposed to this move, maintaining they are accountable to the county legislatures. They see the issuance of summonses as a ploy to undermine their stature and through the Chairperson of the Council of Governors have vowed not to honour the summonses, with some opting to send chief finance officers and the CEC in charge of finance.<sup>213</sup> These officers have been turned away, with the Senate Committee insisting on personal appearances of the

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<sup>212</sup> *International Legal Consultancy*. See also Wanambisi L ‘Kenya: Reprieve for Three Governors over Senate Summons’ *Capital FM* 25 August 2014.

<sup>213</sup> Odhiambo M ‘Governors will not appear before Senate, Isaac Ruto says’ *Daily Nation online* 13 August 2014.



governors.<sup>214</sup> Senators assert that as the county chief executives, governors must be made accountable for public moneys and must therefore personally appear before the Senate committee. The chairperson of the Senate's Committee on Devolution is reported to have remarked, rather comically:

'We have told the governors you can go to court, call for a referendum, hide in the forest, you can fly high or even run to your relatives but ultimately you must appear before the Senate to answer questions of accountability.

Am asking my brothers the governors to learn to appear before the Senate so that they can get used and not fear to appear before the big man in heaven when the time comes to account for our lives because there is neither referendum nor courts.'<sup>215</sup>

The governors read mischief in this whole accountability business which they see as a 'veil' to power play, a belittling of their authority and an attempt at derailing devolution.<sup>216</sup> With these accusations and counter accusations, the environment has been charged and 'daggers' drawn out as 'battles' reign supreme. Never mind the all-important common denominator, that the 'warring' parties both represent the interests of one subnational unit; the county.

The Senate's oversight role has not only upset the county executive up, but also the county legislature. Members of the County Assembly (MCAs) have complained that, '[t]he Senate has resorted to interrogating daily activities of county executives, ignoring the role of the assemblies'.<sup>217</sup> The MCAs maintained that it was within their jurisdiction to probe the financial queries raised in the AG's reports touching on the expenditures of county governments. The Chairperson of the Senate's Public Accounts and Investment Committee is reported to have stated that the county legislature lacked the capacity to grill the governors. The irate MCAs threatened to seek advice from the Supreme Court over the situation.<sup>218</sup>

The issuance of summonses by the Senate committee to governors has often been accompanied by the 'freezing' of county funds to compel appearance. This raises pertinent legal questions such as the Senate's authority in the stoppage of funds process, given that such mandate constitutionally vests in the executive under Article 225 of the Constitution. An in-depth discussion on this is however outside the scope of this study; suffice to note that

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<sup>214</sup> See Ayaga W 'Senate Committee declines to hear officials representing Governor Wycliffe Oparanya' *Standard* 1 October 2014.

<sup>215</sup> Kibor F 'Governors should appear before Senate, insist Kithure Kindiki and Kipchumba Murkomen'. 25 October 2014 *Standard Digital* .

<sup>216</sup> Odhiambo M 'Governors will not appear before Senate, Isaac Ruto says' *Daily Nation online* 13 August 2014. See also Netya W 'Senators urged go slow on governors over audit' *Standard Digital* 29 September 2014.

<sup>217</sup> See Obala R 'Senate tussles with county assemblies' *Standard Digital* 22 October 2014.

<sup>218</sup> Obala 'Senate tussles with county assemblies' *Standard Digital* 22 October 2014.

both the Constitution and the PFMA provide for the substantive and procedural requirements to apply in stopping county funds.<sup>219</sup> For instance, stoppage of funds can only be made for ‘serious material breach or persistent material breaches’<sup>220</sup> and no more than 50 percent of the amount may be stopped.<sup>221</sup> The law also provides for certain procedural aspects in the stoppage of funds.<sup>222</sup> It is doubtful whether these requirements have been followed.

The Constitution and the law anticipate that the Senate is to review the drastic intervention by the executive of stopping funds to county governments. Ironically, there appears to be a readiness, whether justified or otherwise on the part of the ‘protector’ to sanction the stoppage of the funds at the ‘slightest provocation’, to the detriment of the county governments whose interests it is charged to promote and protect.

### 3.3.4 Judicial intervention

How have the Kenyan Courts resolved this impasse? In *International Legal Consultancy*, the Court recognised the jurisdictional untidiness occasioned by the power overlap between the two assemblies and recommended amendments to the law in order ‘to guide the Senate and the County Assemblies on how they should co-operate in the oversight of national revenue allocated to the County... while respecting the principle of separation of powers’.<sup>223</sup>

The petitioner in *International Legal Consultancy* had challenged Senate’s decision to summon nine governors and county executive members responsible for finance to appear before it and respond to various financial queries within their counties. The summonses were apparently issued pursuant to Article 125 of the Constitution.<sup>224</sup> The petitioner contended that the Senate’s oversight role over county finances was limited to special circumstances, such as where there was a stoppage of funds by the national government, or suspension of a county government under Article 192, or impeachment proceedings. The petitioner decried that, by

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<sup>219</sup> Art 225 (3) Constitution and s 96 PFMA.

<sup>220</sup> See Art 225(3)(a) and ss 93, 94 PFMA.

<sup>221</sup> Art 225(4) Constitution. See also s 97(5) PFMA.

<sup>222</sup> See Art 225(7) and ss 97-99 PFMA.

<sup>223</sup> See *International Legal Consultancy* para 63.

<sup>224</sup> Article 125 provides as follows;

‘125. (1) Either House of Parliament, and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information.

(2) For the purposes of clause (1), a House of Parliament and any of its committees has the same powers as the High Court—

(a) to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise;

(b) to compel the production of documents; and

(c) to issue a commission or request to examine witnesses abroad.’

issuing the impugned summonses, the Senate had usurped the oversight role accorded to the county assemblies by the Constitution and that this was a further attempt at subjugating the county government.<sup>225</sup>

Six key principles could be distilled from the High Court's decision in the *International Legal Consultancy*. First, that in respect of the values enshrined in the Constitution and the principles and objects of devolution on democratic and accountable exercise of power, persons managing county finances, including a governor must be held to account and could be summoned by the Senate in the exercise of its oversight mandate under Article 96(3) of the Constitution.<sup>226</sup>

Secondly, that the Senate's oversight role is restricted to the national revenue allocated to the counties and as such, 'has no oversight over grants, loans and revenue generated locally by the counties'.<sup>227</sup> Thus, the Senate may not venture into any other aspect of County Government operations and resources as that is the preserve of the County Assembly.

Thirdly, the power to summon must not be done arbitrarily and capriciously. Such summons must be in pursuance of the Senate's constitutional mandate. This was also emphasised in the *JSC case*<sup>228</sup> where the High court observed that, 'the Constitution does not envisage that any one organ of state, in exercising its oversight role over another, should make haphazard or un-coordinated incursions of inquiry into the mandate of another state organ or independent commission or office'.<sup>229</sup>

Fourthly, the power of oversight must be exercised with due regard to the spirit and letter of the Constitution, including respect for the separation of powers and the 'distinctiveness' of county governments. The Senate must thus exercise some degree of deference and 'refrain from acting in a manner that could be construed as micro-managing devolved units at the county level'.<sup>230</sup>

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<sup>225</sup> See generally *International Legal Consultancy* paras 11-23.

<sup>226</sup> See *International Legal Consultancy* paras 57-65.

<sup>227</sup> *International Legal Consultancy* para 62.

<sup>228</sup> *Judicial Service Commission v Speaker of the National Assembly & 8 others* [2014] eKLR ("JSC case").

<sup>229</sup> *JSC case* para 200.

<sup>230</sup> *International Legal Consultancy* paras 67-68.

Fifthly, in the spirit of co-operative governance that requires organs of government to avoid litigating against one another, the issuance of summons by the Senate against county governments must be as a last measure after other 'friendlier' options such as consultations and mediation have been unsuccessfully explored. Put another way, 'the Senate should only issue summons to Governors or other Officers of the County Government as a matter of last resort where it is clear that the County Governors and other County Officials have declined an invitation by the Senate or its Committee(s) to answer to matters of oversight of County Funds'.<sup>231</sup>

Finally, in case of any disputes arising between the county Governments and the Senate, efforts must be made to amicably settle the disputes outside the courts. The Senate and county governments must cooperate and engage on a platform of mutual relations and consultations as opposed to engaging in adversarial relations. Courts should thus only be used 'as a last point of call'.<sup>232</sup>

### 3.3.5 Assessment

Although the Courts have provided important guidelines with regard to the exercise of the Senate's oversight role, critical issues such as the division of powers between the two assemblies require clarification. The fact that the Senate's oversight is only limited to national revenue dispersed to county does not ameliorate the situation and in fact worsens it since, as stated earlier, national revenue accounts for the bulk of the county revenue. This will be the situation for possibly a long time until county governments become more financially independent and increase their revenue generating capacity to levels like say, South Africa whereby most of the revenue for municipalities is self-generated.

It is a canon of constitutional interpretation that a constitution be construed holistically, without any one of the provisions destroying the other but each sustaining each other.<sup>233</sup> As such, the oversight mandate of the Senate cannot be wished away just as that of the county assembly cannot be underplayed. Both are constitutional provisions and must be read on par

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<sup>231</sup> *International Legal Consultancy* para 68.

<sup>232</sup> See *International Legal Consultancy* paras 69-72.

<sup>233</sup> See *Olum v Attorney General of Uganda* (2002) 2 EA 508 and *Tinyefuza v The Attorney General of Uganda* Constitutional Appeal No. 1 of 1997.

with each other and in a manner that resonates with other constitutional principles. No constitutional provision can be said to be unconstitutional.<sup>234</sup>

There are two possible solutions to resolving the confusion regarding the oversight role of the two assemblies. The first option is to adopt a broad interpretation of the term ‘oversight’ not restricted to the finances, as suggested by the petitioner in the *International Legal Consultancy*. This would provide a restrictive application of the Senate’s oversight mandate under Article 96(3) of the Constitution which reads that, ‘[t]he Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments’. Such an interpretation would confine the Senate’s oversight to an aggregate level. For instance, the provision could be read to restrict the Senate’s oversight to assessing revenue allocation under Article 217 as read with the criteria for equitable sharing under Article 203 of the Constitution. In this case, the Senate would be more concerned in say, establishing whether such criteria is effective for purposes of meeting the objects of devolution and indeed protecting the interests of counties generally. In impeachment procedures, the Senate’s oversight role would ensure that the procedure for impeachment is followed by the county assembly, sitting as a review body. Additionally, the Senate’s oversight role could be circumscribed within the national government’s intervention measures over county affairs discussed in 3.2.1.3 above; for example, with regard to stoppage of funds or the suspension of a county government under Articles 225<sup>235</sup> and 192 of the Constitution respectively.

The above avenues have been deliberately set out to demonstrate that the Senate’s oversight role needs to be read outside the narrow confines of audit reports and summoning the governors, which is a role better exercised by the county assemblies. Such an ‘outward’ reading of the Senate’s oversight powers would then resolve conflicts and the question of who is responsible for which monies. Such an interpretation is preferable, as it preserves the Senate’s oversight mandate and is also consistent with the core mandate of the Senate in protecting and promoting county interests. It is also advantageous in that it supports core devolution principles such as the vertical division of powers between the two levels of

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<sup>234</sup> Article 2(3) of the Constitution reads that, ‘[t]he validity or legality of this Constitution is not subject to challenge by or before any court or other State organ’. By extension, a provision in the Constitution cannot be said to be unconstitutional.

<sup>235</sup> Art 225(5)(b), (7) Constitution. See also S 97(4) PFMA.

government and is also in line with the national values and principles, including devolution of power and good governance.

The second and most drastic action is to amend the Constitution and completely divest the Senate of its oversight role over the finances of county governments in whatever form. Practically, however, this is most unlikely since, as mentioned earlier in Chapter Two, such an amendment would require the concurrence of both Houses of Parliament in order pass.<sup>236</sup> Naturally, the Senate would probably not vote, by a two-thirds majority, to divest itself of such power.

Accountability and transparency form part of the national values and principles under Article 10 of the Constitution and resonate throughout the Constitution. Indeed, promoting ‘accountable exercise of power’ and the enhancement of checks and balances are amongst the objects of devolution under Article 174. It is thus in the interests of counties that these principles pervade the county governments. Even so, the process of entrenching these vital principles must be counterbalanced against other, equally fundamental principles of devolution, including the division of powers between the two levels of government. The manner in which the oversight role has been carried out would appear to lean more towards undermining county autonomy. For instance, the insistence on personal appearances of the governors in all cases and the almost instantaneous stoppage of funds would appear to be unreasonable, and points more to a ‘power play’ than to the genuine exercise of the oversight mandate; the ‘let’s-see-who-the-boss-is’. Indiscriminate issuance of summonses to the chief executives, and the stoppage of funds may be counter-productive, as it compromises on development and service delivery, the very essence of a devolved system.

Regarding accounting officers, the High Court in *International Legal Consultancy* the Court suggested the county accounting officers as the appropriate persons.<sup>237</sup> This is still tricky since the Constitution is categorical in stating that accounting officers of county public entities are accountable to the county assembly.<sup>238</sup> It is desirable to have clarity in law on who the accounting officer of a county government is and whether such power is delegable.

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<sup>236</sup> See Arts 255, 256 and 257 Constitution.

<sup>237</sup> *International Legal Consultancy* paras 42-3, 67.

<sup>238</sup> Article 226(2) Constitution.



### 3.4 Impeachment procedure

None of the Senate's roles has evoked more furore than impeachment processes against governors and their deputies. The Senate plays a strategic role, being the second port of call, after a county assembly and on which the fate of an embattled governor ultimately rests.<sup>239</sup>

#### 3.4.1 Constitutional and legislative Framework

The Constitution and the CGA provide a procedure for the removal of a governor.<sup>240</sup> The Senate and county assemblies ("the assemblies") also have in-house rules governing the processes.<sup>241</sup> Notably, the procedure for the removal of governors also applies to deputy governors.<sup>242</sup> A governor may be impeached on the following grounds;

- '(a) gross violation of this Constitution or any other law;
- (b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;
- (c) abuse of office or gross misconduct; or
- (d) physical or mental incapacity to perform the functions of office of county governor.'<sup>243</sup>

The procedure for the removal of a governor is as follows: First, such a motion is initiated by a member of a county assembly by giving notice to the county assembly speaker. The motion must be supported by at least two-thirds of the MCA's. If the motion is supported by the county assembly, the speaker then informs the Speaker of the Senate of that resolution within two days. After receipt of the notice, the Senate Speaker is required to convene a Senate meeting to hear charges against the governor. For this purpose, the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter and report to the Senate on whether the allegations are substantiated. The committee must report back to the House within ten days.

If the special committee reports that the particulars of any allegation against the governor are

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<sup>239</sup> Unless of course the Senate's process is further challenged in Court.

<sup>240</sup> Art 181 Constitution and s 33 CGA.

<sup>241</sup> Order No 68 of the Senate Standing Orders provides for impeachment procedure.

<sup>242</sup> See *Hon. Dorothy N. Machungu v Speaker, County Assembly of Embu & others* Kerugoya HC Constitutional Petition No 5 of 2014 and *Bernard Muia Tom Kiala v Speaker of the County Assembly of Machakos & 4 others* [2014] eKLR. The County Governments (Amendment) Bill (No. 4) 2014 also seeks to amend section 11 of the CGA to expressly state that the procedure for removal of governors shall also apply to the deputy governors.

<sup>243</sup> Article 181(1) Constitution.

unsubstantiated, no further proceedings are to be taken in respect of that allegation but if it finds otherwise, the Senate proceeds to vote on the impeachment charges after according the governor an opportunity to be heard. If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor ceases to hold office. However, if a vote in the Senate fails to result in the removal of the governor, the Senate Speaker is required to notify the county assembly speaker.

According to the CGA, the removal of a governor on the same charges cannot be re-introduced to the Senate within three months from the date of such vote. It is worth noting that since the impeachment process is a matter concerning the counties, Senators vote as county delegations.

### **3.4.2 Critique on impeachment provisions**

The constitutional and statutory provisions on impeachment of governors present two main difficulties. First, giving the Senate, a body at the national level, a role over the impeachment process of governors who are heads of the counties effectively creates hierarchical power relations. Secondly, the fact that the procedural aspects of the impeachment process are governed by legislation and the rules of the assemblies as opposed to the Constitution is problematic, given that the environment under which the processes take place are politically charged. It is then no wonder that rules of assemblies have been disregarded in the impeachment processes. This shall become clearer when an examination of the practice is made in the succeeding segment.

### **3.4.3 The practice**

At the time of concluding this research, the Senate had presided over four impeachment processes and one more awaited the Senate's determination; this is not a number to raise eyebrows before one considers the fact that these happened within a span of less than two years since county governments took office. Two of these proceedings involved the Governors of Embu and Kericho, while the third one related to the Deputy Governor of Machakos County. There was also one for Deputy Governor of Embu County which was



carried out concomitantly with that of the governor.<sup>244</sup> The impeachment process for the Makueni Governor awaited the Senate's impeachment following the issuance of temporary court orders halting the process. A few critical issues have emerged with regard to the manner of removal of county leaders from office at both the county level and the Senate.

Members of the County Assembly (MCAs) have been accused of driving a political agenda through threats of impeachment motions against the county executives.<sup>245</sup> There have been claims that the MCAs' clamor for allowances, personal assistants and overseas trips has fuelled some of the impeachment motions when these demands are not met by the chief executives.<sup>246</sup> Impeachment motions have therefore been used as bargaining tools to blackmail governors and other CEC members. There have even been claims that some MCA's have demanded bribes in order to 'save a governor's skin'.<sup>247</sup>

Figure 3.4 below shows, rather satirically, Kenyan MCAs donned in sports and casual attire at the 2014 World Cup stadium in Brazil, ostensibly to learn about devolution. There are allegations that unmet demands such as allowances and overseas trips have upset MCAs, leading to stand offs in approvals of county plans/budgets and triggering impeachment motions. In the Makueni county for instance, the embattled Governor accused MCAs of 'frustrating his government by failing to pass the budget' for the 2014/2015 fiscal year, amongst other allegations.<sup>248</sup>

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<sup>244</sup> The Embu county governor attracted two processes of removal ('Wambora I' and 'Wambora II'); a second motion of removal having been passed within a month after the first attempt was nullified by the High Court (See *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others* [2014] eKLR).

<sup>245</sup> See Etale P, 'Grey areas in law make MCAs the worst enemies of devolution' *The People* 22 May 2014. See also Editorial team, 'Probe claims of MCAs hounding governors for self-gain' *The People* 19 May 2014.

<sup>246</sup> See for instance Otieno A 'Governor finally wins MCAs' hearts with a trip to Coast' 21 June 2014 and Lumiti D 'MCAs pass bill to award themselves more perks' *Mediamax network* 19 May 2014.

<sup>247</sup> See for instance 'Report of the Special Committee on the proposed removal from office of Prof Paul Kiprono Chepkwony, the Governor of Kericho County' dated 3 June 2014 ("Kericho Governor Senate Select Committee report") para 41. The Governor alleged that an MCA had approached him to solicit bribes on behalf of the other MCAs in order to 'save the Governor' from the impending impeachment proceedings.

<sup>248</sup> Nzia D & Nzioka O 'Makueni County residents launch plan to send leaders home' *Standard Digital* 4 October 2014.

Figure 3.4 MCAs' demands for perks and overseas trips



Source: GADO cartoons.

Such stand offs have in some cases escalated to the point of paralysing county government, as was the case with Makueni county. Exasperated by the irreconcilable differences between the MCAs and the county executive which had led to a stalemate in service delivery, the Governor and a section of county residents favoured a campaign dubbed 'Operation Okoa Makueni' (Operation save Makueni) aimed at collecting signatures in order to petition the President to dissolve the county and have fresh elections conducted.<sup>249</sup>

Vendettas and malice have also been cited as being behind some of the impeachment proceedings. Thus, it has been reported that MCAs are using impeachment motions to settle scores and 'teach the Governors a lesson'. In the first impeachment motion against the Governor of Embu County,<sup>250</sup> (*Wambora I*), it was alleged that the Governor had been uncooperative regarding recruitment and payment schemes of salaries payable to persons employed in the County Assembly Service Board. Apparently, the Governor had acted upon the advice of the Salaries and Remuneration Commission and the CoB, whose unfavourable

<sup>249</sup> See Nzia D & Nzioka O 'Makueni County residents launch plan to send leaders home' *Standard Digital* Saturday 4 October 2014 and Mkawale, S 'Council of Governors issue ultimatum on Makueni County wrangles' *Standard Digital* Tuesday 30 September 2014.

<sup>250</sup> *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others* [2014] eKLR.

response stirred up sour relations.<sup>251</sup> Consequently, the High Court found that the impeachment of the Governor ‘was a deliberate scheme hatched to settle scores and was actuated with malice, bad faith, ill spite, witch-hunting and revenge’.<sup>252</sup>

Similarly, in the impeachment of the Kericho Governor, it was alleged that the filing of a constitutional petition in court<sup>253</sup> by the county executive seeking interpretation of the division of roles between the county assembly and the executive had bred bad blood. In the petition, the county executive had complained that the county assembly was overstepping its mandate in its oversight function in disregard of the principle of separation of powers. Reportedly, on the day of court attendance, some MCAs led demonstrations against the Governor and a motion of impeachment was filed the same day and posted on the website.<sup>254</sup>

Moreover, there have been allegations that MCAs are being used to perpetuate certain political agendas. MCAs have kept governors ‘on their toes’ with threats of impeachment motions, leaving the county executive with the option of either walking on egg shells around the affairs of a devolved unit which they head, or risk impeachment. This is an impossible environment for service and development delivery to take place. The cartoon below (figure 3.5) by *Gado* illustrates Makueni County MCAS (as rats) devouring on the cat (the Governor) right down to the bone. This is telling of what has become of impeachment motions.

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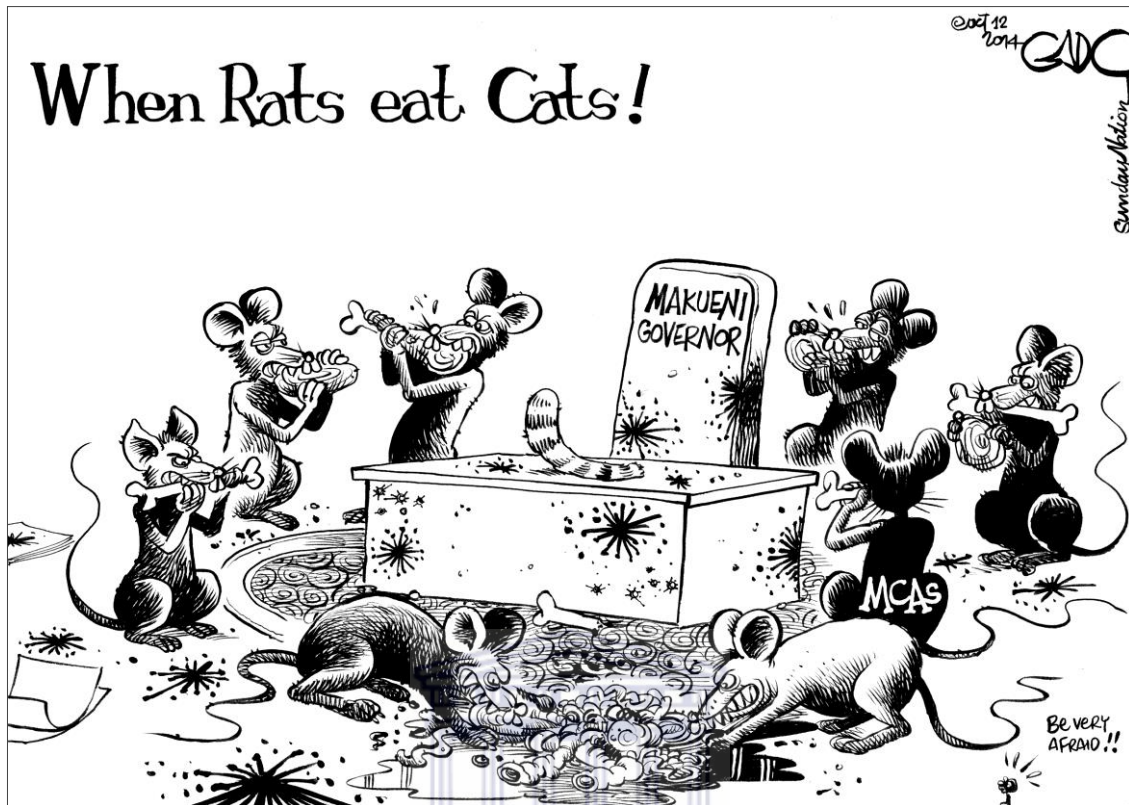
<sup>251</sup> See *Wambora I* paras 34, 35.

<sup>252</sup> *Wambora I* para 36.

<sup>253</sup> Kericho High Court, Constitutional petition No 4 of 2014.

<sup>254</sup> See Kericho Governor Senate Select Committee report paras 30-7, 47.

Figure 3.5: Devouring the executives: When rats eat cats



Source: GADO cartoons.

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Unsurprisingly, complaints of ‘rushed’ and ‘stage-managed’ processes and flouting of Assembly Rules have been reported. For instance, in moving the motion for the removal of deputy-governor for Machakos, the deputy Governor of Machakos is said to have complained that ‘the impeachment process before the County Assembly of Machakos was so systematically rushed and stage-managed and that the same did not amount to a fair hearing.’<sup>255</sup>

With this state of affairs, the Senate could be the body expected to ‘save the situation’, being the second port of call and review body in impeachment motions. This has however not always been the case, as the Senate is not blameless in its conduct of impeachment processes. Similar to the county assemblies, the House has been accused of being driven by a political agenda in their procedure of impeachment processes. Embattled governors have attributed

<sup>255</sup> See Senate Hansard of 15 August 2014: 7.

their fate to politics by the national legislators.<sup>256</sup> The Senate has even threatened to disobey temporary court orders halting the impeachment and oversight processes.<sup>257</sup> In fact, in *Wambora I*, both the county assembly and the Senate had proceeded with impeachment processes against the Embu governor, despite a court order temporarily barring the process. It is actually the disobedience of the court orders that led to the nullification of the process as the High Court firmly stated that, ‘anything done in disobedience of court orders is null and void *ab initio* and is a nullity in law’.<sup>258</sup> The Senate’s eagerness to discharge these two roles seemingly ‘at all costs’ again points more towards power play than the genuine exercise of a constitutional mandate.

Moreover, there are attempts to expand avenues for the removal of governors to include parliamentary petition. If the County Governments (Amendment) Bill, 2014<sup>259</sup> originating from the National Assembly is passed into law, members of the public will be able to petition either House of Parliament for removal of governors regardless of their home county. The primary purpose of the Bill according to its memorandum of objects is to, ‘provide for the involvement of either House of Parliament in the removal of a governor from office’. Although the memorandum of objects to the Bill states that the aim of the legislative proposal is to ‘protect the gubernatorial office holders from politically instigated unanimous removal from office’ and ensure that ‘the removal of gubernatorial office holders is free from political motivations and abuse informed by personal interest,’ it is unclear how the law would achieve that purpose.<sup>260</sup> It is submitted that if such a proposal passes into law, it leaves the county executives in an undesirably more vulnerable position, and this is not in the interests of county governments.

In a desperate attempt to secure their increasingly precarious positions, the ‘besieged’ governors have called for a more stringent process in their removal, similar to the recall

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<sup>256</sup> See for instance Mutua P ‘There is a plot to dislodge us, Ukambani governors say’ *Standard Digital* 20 October 2014. See also Wanyoro C, ‘Embattled leader blames his woes on decision to ditch APK’ *Daily Nation* 13 May 2014.

<sup>257</sup> See Obala R ‘Kenya Senate to discuss Kibwana impeachment despite court order’ *Standard Digital* 13 October 2014. See also Burrows O ‘LSK warns lawyer Senators over disobeying courts’ *Capital News* 16 October 2014.

<sup>258</sup> *Wambora I* paras 282, 296 and 314.

<sup>259</sup> Bill dated 12 August 2014 originating from National Assembly.

<sup>260</sup> Perhaps the only gain for the Bill is that a governor who survives removal under the proposed provisions is assured of an undisturbed term as no petition can be reintroduced during the remainder of the term.



procedure for MPs and MCAs.<sup>261</sup> In their Pesa Mashinani campaign, the governors want a constitutional amendment to the effect that they or their deputies cannot be impeached ‘unless grounds of impeachment are confirmed by the High Court’.<sup>262</sup>

#### 3.4.4 Judicial intervention

The High Court has a supervisory role over the removal of a governor from office with the aim of ‘[ensuring] that the procedure and threshold provided for in the *Constitution* and the *County Governments Act* are followed’.<sup>263</sup> In resolving cases over impeachment processes that have been presented before it, the court has elucidated on both the substantive and procedural aspects of the impeachment processes. For the removal of a governor from office to be valid, ‘the process used must strictly adhere to both the substantive and the procedural law contained in both Article 181 of the Constitution and Section 33 of the Act respectively’.<sup>264</sup>

The High Court in *Wambora I* clarified that the Senate was not intended to be merely a rubber stamping authority to impeachment motions. The court has ruled that the impeachment process is ‘sequential and hierarchical in nature’<sup>265</sup> and that the impeachment process is meant to be a ‘self-correcting’ mechanism’ such that any errors in the county assembly are detected and corrected at the Senate level. Thus, ‘where the Senate finds that the resolution is not properly before it then it is not obliged to admit’.<sup>266</sup> This way, the Senate exercises review power over the county assembly impeachment process.

What is the threshold for the removal of a governor? The courts have unequivocally stated that it is not every violation of the Constitution or written law that can lead to the removal of a governor. It has to amount to ‘gross’. What amounts to a gross violation is to be determined by the facts in each specific case.<sup>267</sup> The Courts have also set down the criteria for assessing

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<sup>261</sup> See Part IV of Elections Act 2011 and ss 27 and 28 of CGA on procedures for recall of MPs and MCAs respectively.

<sup>262</sup> See Obala R ‘Draft Bill on issues informing Pesa Mashinani campaign finally out’ *Standard Digital* 24 October 2014.

<sup>263</sup> *Wambora Appeal case* para 34.

<sup>264</sup> *Wambora I* para 233.

<sup>265</sup> *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others* [2014] eKLR para 46. (“*Wambora Appeal case*”) para 31.

<sup>266</sup> See *Wambora I* paras 236 & 237.

<sup>267</sup> Paras 252-253. See also *Wambora Appeal case* para 46.

whether a matter qualifies to be termed ‘gross’ so as to justify unseating of a governor. The allegations against the governor must:

- ‘(a) Be serious, substantial and weighty.
- (b) There must be a nexus between the Governor and the alleged gross violations of the Constitution or any other written law.
- (c) The charges framed against the Governor and the particulars thereof must disclose a gross violation of the Constitution or any other written law.
- (d) The charges as framed must state with a degree of precision the Article (s) or even sub-Article(s) of the Constitution or the provisions of any other written law that have been alleged to be grossly violated’.<sup>268</sup>

The Appellate Court in *Wambora* observed that the removal of a Governor ‘is a constitutional and political process...a *sui generis* process that is quasi-judicial in nature’ and that, the rules of natural justice and fair administrative action must be observed.’<sup>269</sup> The courts have also emphasised that it is individual responsibility as opposed to collective responsibility that forms grounds for impeachment. As such, the act or omission complained of ‘must have been done or undertaken with the knowledge, consent or connivance of the person charged’.<sup>270</sup> The Courts have also set the standard of proof required for the removal of a governor, to be above a balance of probability but below beyond reasonable doubt.<sup>271</sup>

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### 3.4.5 Assessment

What emerges from case law and the previous impeachment processes is that there is no one size fits all mathematical formula for the threshold for the removal of a governor and it is more a subjective test based on the particular set of facts and circumstances of each case. It is paramount that impeachment processes, being such that they portend drastic repercussions not just for the individual involved, but also for the electorate, the bodies charged with its use must exercise great circumspection in mounting motions of impeachment. As such, impeachment should be sparingly resorted to and only used in circumscribed circumstances.<sup>272</sup> The grounds stipulated to warrant such a process should strictly and faithfully guide the process to prevent the mechanism being abused for collateral purposes.

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<sup>268</sup> High court decision in *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others* 2014] eKLR para 253. See also *Wambora Appeal case* para 45.

<sup>269</sup> *Wambora Appeal case* paras 31,33.

<sup>270</sup> See *Wambora Appeal case* paras 40, 41.

<sup>271</sup> *Wambora Appeal case* Para 42.

<sup>272</sup> See *Hon. Muyiwa Inakoju & Others v Hon Abraham Adeolu Adeleke S.C. 272/2006* as cited in *Wambora I* para 254.

Not any and every wrong befits an impeachment motion As was stated in *Muyia Inakoju & Others*:

‘Section 188 is not a weapon available to the Legislature to police a Governor or Deputy Governor in every wrong doing. A Governor or Deputy Governor, as a human being, cannot always be right and he cannot claim to be right always. That explains why section 188 talks about gross misconduct.’<sup>273</sup>

With the Senate wielding the ultimate power over the security of the governors through the impeachment motions, it is hard to speak of balanced power relations. Unsurprisingly, therefore, the role has provided fertile ground for power strife between senators and governors. That impeachment processes have been marred by politics and selfish interests is a reality and unless this mechanism is reined on, it is likely to be more a liability to devolution than serve the well-intended purpose of bolstering good governance. With the MCAs brandishing impeachment motions as weapons for self-gain, and, given the immense power over budget and development plans at the county level, the situation is dire as far as the stability of county governments is concerned. County executives cannot freely and optimally discharge their mandate with a ‘guillotine’ in the form of impeachment motions constantly hanging over their head. Development and service delivery risk being compromised as misappropriation of funds at the county level go unabated if the same is sanctioned by the MCAs charged with an oversight role.

Given that the impeachment process is an escalated mechanism between the two assemblies, the Senate, exercising quasi-judicial powers, would ensure that county assemblies abide by the due process and the rules. The previous impeachment proceedings however point more to deference of the county processes at the expense of review.<sup>274</sup> In the absence of such critical review, the High Courts’ supervisory powers remain vital in impeachment processes in order to safeguard devolution by ensuring that the threshold and due process of the law are followed.

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<sup>273</sup> Nigerian Supreme Court in *Hon. Muiywa Inakoju & Others* (above).

<sup>274</sup> The Senate has held that ‘a legislature makes its own rules of procedure and can choose to override the same rules of procedure if the circumstances warrant the same, only a legislator can judge the conformity of its actions with its own rules of procedure’ (See remarks by Chairman of the Select Committee in moving the motion for removal of deputy-governor for Machakos .Senate Hansard of 15 August 2014: 7). See also Kericho Governor Senate Select Committee report paras 56, 57.



The mayhem surrounding impeachment processes strongly suggests that the current state of affairs, whereby the procedural aspects of the impeachment process are purely governed by legislation and erratic rules of the assemblies, is precarious and requires reinforcement. Grounding the process in the Constitution is not only a recognition of the stature that the governors wield in the devolved system as heads of county governments but will ensure certainty and uniformity in application of the procedures, while sealing loopholes for its abuse. A more stringent and elaborate process in which more time is given for substantive consideration and investigation of the claims is equally desirable.

### **3.5 Conclusion**

The oversight and impeachment roles have undoubtedly been the main centres of conflicts between governors and the Senate. The constitutional and statutory framework governing these roles is not watertight and has caused uncertainties and role confusion as is the case with the oversight role between the Senate and county assemblies. The oversight and impeachment procedures have introduced power relations between county governments and the Senate creating fertile ground for power struggles, hence the ensuing conflicts. However, as the practice reveals, structural weaknesses are not the only source of combative relations between governors and the Senate. Exogenous factors, including power play, politics and greed appear to have taken over and diluted the essence of the well-intended powers of oversight and impeachment, as mechanisms meant to entrench accountability and good governance at the county level. These factors have also compromised on the representative role of the Senate. The next chapter looks into the relations between the senator as an individual representative of the counties and the county governments.

## **CHAPTER FOUR**

### **Structuring Senator and County Government Relations**

#### **4.1 Introduction**

A major source of conflicts between governors and the Senate members has been the extent of the latter's involvement in county affairs. While the previous chapter provided a detailed analysis on the role of the Senate as an organ, this chapter is dedicated to examining how relations between the senator as an elected representative and the county governments may be structured in light of the Senate's role. It especially examines the extent to which a senator may constitutionally participate in the affairs of the county and county government and how the representative role may be bolstered.

The chapter argues that, in order to effectively promote the interests of counties and county governments, an implicit duty rests on senators to meaningfully engage with their respective county governments. It is also argued that the move to have senators as heads of development forums at the county level whose mandate is to approve, co-ordinate, supervise or otherwise implement county projects, infringes on the separation and division of powers and is thus unconstitutional.

#### **4.2 Representation of interests**

In a representative capacity, a senator has the duty to promote and protect the interests of his/her county and its county government. As seen in the previous chapter, the senator represents the county and, later sitting as the Senate, is under an obligation to protect two interests; those of the county and county government. The question is how can a senator best fulfil the representative role?

Notably, although the Constitution states that the Senate represents counties, and is to protect the interests of counties and their governments ('the what'), there is no provision for a mechanism through which senators can engage with the counties and their governments in order to effectively articulate their interests ('the how'). This poses a threat to the quality of representation, especially given the already weak linkage to the devolved units, discussed in previous chapter. The question of linkage with devolved units formed the subject of debate during the constitutional review process. To mitigate the problem of linkage between the

second chamber and the devolved units, the CoE had recommended that senators be given ‘rights of audience in their respective county assemblies without a right to vote’ and be required to furnish annual reports before the respective county assembly as a way of injecting a ‘reciprocal relationship of accountability’.<sup>275</sup> This proposal, however, never saw the light of day.

Despite the weak linkage between senators and the county governments, nothing in the Constitution stops Senators and county governments from ‘building bridges’ by establishing visible mechanisms of forging mutual working relations.<sup>276</sup> Ghai and Bosire observe that ‘consultations with the county government would be desirable if not essential’.<sup>277</sup> Meaningful representation demands that a senator should have a way to ascertain the needs of those whom he or she represents in order to articulate or consider them in voting on matters concerning counties and county governments. For instance, a senator could meaningfully engage with the counties and county governments before initiating legislation on county matters, or before seeking to amend the laws touching on counties in order to gather views. The same case applies to other roles at the national level, including those relating to revenue sharing<sup>278</sup> and oversight of the national executive.

Kirui and Murkomen suggest the establishment of a legislative mechanism through which senators are made accountable to the counties in the performance of their duties. The authors proposed that ‘senators should also hold consultative meetings with county residents through county hearings on issues that must be addressed in the Senate’.<sup>279</sup> As part of the accountability mechanism, they also recommend that senators, ‘be made to address special sessions of county assemblies three times in a year and account to the county through the assembly, on what they have been doing in the Senate on behalf of their counties’.<sup>280</sup> This appears to resonate with the CoE’s earlier recommendation mentioned above.

It is however submitted here that requiring the Senate to account to the county assembly is not a viable option and the Constitution does not even anticipate such an accountability mechanism. It is sufficient that the Senate members remain ultimately accountable to the

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<sup>275</sup> CoE (2010): 92.

<sup>276</sup> Bosire (2013): 380.

<sup>277</sup> Ghai & Bosire (2013) *The Star online* 1 June 2013.

<sup>278</sup> Article 217 of the Constitution already requires the Senate to consult governors and organisations of county governments in determining the criteria for the horizontal division of revenue among counties.

<sup>279</sup> Kirui & Murkomen (2011): 16.

<sup>280</sup> Kirui & Murkomen (2011): 16.

electorate who may unseat them at the end of the electoral term for unsatisfactory performance or recall them from office earlier as provided by law, whichever comes first.

Apart from the problem of weak linkages between the senators and the county governments and the absence of a representation mechanism, the representative role has been compromised in other ways. First, the fact that there is only one senate representative per county adds a twist to the relationship between senators and governors. Each is a directly elected representative of the county. This injects an element of rivalry as the 'who is the bigger boss' syndrome takes centre stage. The Kenyan model in that sense creates fertile ground for competitive rather than co-operative relations. This becomes more acute if the governor and senator hail from differing political affiliations. A contrast would be made with say, the Federal Republic of Nigeria whereby the three senators in a State each represents a specific senatorial district, thus effectively dissolving an aspect of 'territorialism' and the ensuing rivalry.

The second difficulty lies in the apparent conflict of interest in designating the Senate as the promoter and protector of county interests and their governments and at the same time requiring it to oversee financial management of county governments. It is in the interests of counties that county funds be expended prudently and that services be delivered effectively. Oversight, therefore, if appropriately conducted would be a way of securing county interests. However, the fact that the Senate, a body within the national government may summon governors to explain or justify their financial management creates a hierarchical structure between the two offices, introducing power relation issues which have partly led to the conflicts witnessed.

#### **4.3 Senator as executive?**

Laws have been enacted and others proposed which in effect make senators chairs of development forums at the county level; a situation that has met with resistance from governors. The latest arose from the County Governments (Amendment) Act, 2014, which established County Development Boards (CDBs) in every county, which are to be chaired by the elected senator.<sup>281</sup> The governor is to be the Vice-chairman of the Board.<sup>282</sup> A senator is to

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<sup>281</sup> S 91A (1)(a) CGA.

<sup>282</sup> S 91A (1)(d) CGA. In fact, the initial proposal was to have the county governors sit as secretaries in the CBD which the senate chaired. (See County Governments (Amendment) Bill, 2013 (Senate Bills No. 4).

convene all CDB meetings that are to be held at the County level. The Board's membership also extends to elected MPs within a county, leaders of the majority and minority parties in the county assembly, chairperson of the county assembly committee responsible for the budget, the county commissioner and the county secretary.<sup>283</sup> The Act states that the main purpose of the CDBs is to provide a forum for consultation and coordination between the national government and the county governments on matters of development and projects.<sup>284</sup> CBDs are to consider and give input on county development plans and county budgets before they are tabled in the county assembly for consideration.

The assent by the President of this law predictably faced stiff opposition from governors who dashed to the High Court to have the Act rendered unconstitutional.<sup>285</sup> In the first CDB meeting convened by senators under the Act, the governors vowed to abstain from it, while others declined to provide meeting venues. Senators vowed to go ahead with the meeting anyway, before the High Court's orders temporarily barred the impugned meeting from taking place. Senators defended the move to involve them in county forums claiming that its move is to streamline development and service delivery in the counties. Furthermore, that, as senators, they are best placed to chair the county boards, as they are the 'umbilical cord linking National and County Governments' and that the Senate is a more neutral organ since it does not run any funds.<sup>286</sup> Governors are however particularly opposed to the idea of the senators chairing CBDs meant to deliberate county affairs;<sup>287</sup> they are wary that this could be yet another move to undermine their authority as the heads of county governments.

Apart from the CBDs, a senator is also part of the County Projects Committee (CPC) in each county in terms of Part VII of the Constituencies Development Fund Act, 2013<sup>288</sup>. A CPC comprises, among others, a senator, 'the Members of Parliament from the County,'<sup>289</sup> a county women representative and a national government official at the county.<sup>290</sup> The CPC is

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<sup>283</sup> See s 91A(1) CGA.

<sup>284</sup> S 91A(2)(a) CGA.

<sup>285</sup> *Council of Governors v The Senate and Another*, Constitutional Petition No 413 of 2014.

<sup>286</sup> See Murkomen K 'Why there is nothing wrong with senators chairing county boards' Friday *Daily Nation online* 8 August 2014. See also Wachira M 'Law puts senators in charge of county cash' *Daily Nation online* 31 July 2014.

<sup>287</sup> See Odunga D 'New Bill gives senators more power over counties' *Daily Nation* 5 July 2014.

<sup>288</sup> Constituencies Development Fund Act (CDF Act) No 30 of 2013 as amended by CDF (Amendment) Act, No 36 of 2013.

<sup>289</sup> The Act here uses the term 'Members of Parliament' ostensibly in reference to the National Assembly Members.

<sup>290</sup> S 37(1) CDF Act, 2013.

charged with implementing projects financed through the CDF,<sup>291</sup> and may even make official or impromptu visits to projects if it finds it appropriate to do so.<sup>292</sup> Glaringly and rather ironically, the composition largely excludes the executives of the counties. While county departmental heads under whose docket the various projects fall may attend CPC meetings as ex-officio members, they can only do so upon invitation by the CPC.<sup>293</sup>

The Senator could chair yet another forum at the county level if the County Industrial Development Bill, 2014 proposing to introduce County Industrial Development Funds for the counties, goes through.<sup>294</sup> If passed into law, the elected senator would chair the County Industrial Development Committee (CIDC) comprising, among others, nominated senators, all elected members of the National Assembly in the county and the governor or the deputy governor. The national government official responsible for the coordination of national government programmes in the county would also form part of this committee.<sup>295</sup> The memorandum of objects and reasons, states that the aim of the Bill is to create a system through which the counties would be ‘encouraged and assisted to establish industries focusing, primarily on the produce of each county’. A rather far-reaching proposal in the Bill was the introduction of vetting for all projects, whether public or private, by the CIDC<sup>296</sup> and provision for prior approval of the projects within the county by the CIDC.<sup>297</sup>

The advent of the involvement of legislators in decentralised funds and development projects at the local level did not begin with the devolved system under the Constitution. There had been earlier forms of fiscal decentralisation efforts and schemes as mentioned in chapter two of the study. The Constituencies Development Fund Act, 2003 set up constituency funds to be primarily run by MPs.<sup>298</sup> It would appear it is from this concept that the impugned Senate forums have been transplanted. Although a number of mostly developing countries have embraced the equivalent of Constituency Development Funds (CDFs),<sup>299</sup> these have been met

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<sup>291</sup> Ss 31, 36 CDF Act, 2013.

<sup>292</sup> S 36(2) CDF Act, 2013.

<sup>293</sup> S 37(2) CDF Act, 2013.

<sup>294</sup> County Industrial Development Bill, 2014. Notice also the overlapping mandates and multiple memberships to the development committees and forums.

<sup>295</sup> Clause 10(1) CID Bill.

<sup>296</sup> Clauses 21, 34 CID Bill.

<sup>297</sup> See clause 36(2) CID Bill.

<sup>298</sup> Act No 10 of 2003. The Act has since been repealed and replaced by the 2013 CDF Act.

<sup>299</sup> These include India, Bhutan, Sudan, Pakistan, Philippines, Malaysia, Malawi, Tanzania, Ghana, Jamaica, Solomon Island, Nepal, Papua New Guinea, Uganda and Zambia (see also Tshangana, AH ‘Constituency Development Funds’ (2010) *Scoping Paper* International Budget Partnership (IBP):1).



with sharp criticisms in those countries.<sup>300</sup> For Kenya, the effect of the parallel development mechanisms in the wake of a devolved system of governance becomes even more grievous for reasons explained below.

#### 4.4 Assessment

The involvement of senators in forums at the county level squarely sets the senator and the county executives on a collision path. More importantly, the arrangement offends the Constitution in two major ways. First, it infringes on the principle of separation of powers between the executive and legislative powers.<sup>301</sup> The principle of separation of powers is a foundational principle of the Constitution and one of the objects of devolution.<sup>302</sup> As can be deciphered above, these development forums are not the ordinary meet-and-greet meetings, they are charged with the implementation and co-ordination of projects. In the case of CDF, there is specific fund allocation to be run, while the development forums are to be administered from the county's share of revenue. The national legislator thus becomes an executor of policy at the county level.

Secondly, such an arrangement offends the vertical division of powers between the national and county governments. The senator, as a national organ within the national government, effectively becomes part of the county government as s/he actively engages in policy direction and project co-ordination and implementation. As seen earlier in Chapter Two on the functional division of powers in the devolved structures, matters of county planning is the preserve of the county executive, led by the governor. Similarly, oversight over the county development plans and budgets is vested on the county assembly. Thus, the involvement of senators in the county development and committees offends not only the separation of powers between the legislative and executive roles, but also the division of functions in the devolved structures, the core essence of devolution. Indeed, one of the demands for co-operative governance under Article 189 of the Constitution is that government at either level must

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<sup>300</sup> See for instance IPU report: 67-9, Chua Y & Cruz B 'Pork is a political, not a developmental tool' (2004) Philippine Centre for Investigative Journalism and Zyl AV 'What is wrong with the Constituency Development Funds?' (2010) *IBP Budget Review*. See also Ongoya ZE & Lumallas E (2005) 'A critical appraisal of the Constituency Development Fund Act' (2005) and Shiundu A 'Scrap CDF, urges Senator Otieno Kajwang' *Daily Nation online* 22 May 2013.

<sup>301</sup> See also Bosire C 'The 'war' between Senators and Governors: What does the law say?' *The Star online* 22 February 2014.

<sup>302</sup> See Art 174(i) Constitution.

‘perform its functions and exercise its powers in a manner that respects the functional and institutional integrity of government at the other level’.<sup>303</sup>

Furthermore, the enhancement of checks and balances, one of the objects of devolution<sup>304</sup> is seriously put in jeopardy, as the senator charged with overseeing how the county spends money, is involved in giving inputs, and co-ordinating and overseeing how actual development takes place. This scenario creates a conflict of interest and could lead to the buck passing between the county executives and legislators when finally problems arise in connection with the use of the devolved funds - an interesting drama could even unfold where ‘the hunter becomes the hunted.’ The argument that, allowing senators to chair the CBDs would enable them ‘to get useful information that they can use to facilitate their county oversight role’<sup>305</sup> tends to overlook the inherent conflict of interest in such a proposition. It also insinuates that senators can be some sort of spies or undercover investigators, stealthily gathering information adverse to the county governments in those county forums, and then later conveniently extricating themselves to play the role of an independent overseer as a collective body in the Senate.

While the development funds and development forums, *prima facie*, are well-meaning, their design and manner of implementation is wanting. As Ongoya and Lumallas point out in their critique of the then CDF Act, 2003, ‘[t]he problem with these developments is rarely found in the theoretical ideals, the challenge is usually with design and architecture’<sup>306</sup>.

Senators have important roles to perform at the national level, not just over county matters, but also in oversight and legislative functions in national matters. They cannot effectively be legislators and at the same time implementers of policy decisions at the county and constituency levels. This is likely to compromise the core business of representing county interests. Besides, if there are gaps in, for example, planning, or a county is unable to perform its functions, there are constitutional mechanisms available for the national government to correct them. Senators have at their disposal tools of reining in the county governments to the allowable constitutional limits. For instance, sitting in the Senate, a senator can influence the

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<sup>303</sup> Art 189(1)(a) Constitution.

<sup>304</sup> Art 174(i) Constitution.

<sup>305</sup> Murkomen K ‘Why there is nothing wrong with senators chairing county boards’ Friday *Daily Nation online* 8 August 2014.

<sup>306</sup> Ongoya & Lumallas (2005) para 3.0.



enactment or amendment to legislation that assists and strengthens the county governments to better perform their roles.<sup>307</sup> The Senate also wields the oversight mandate over how counties spend money allocated to them from the national government. Moreover, if matters were to get out of hand, the senators later convening in the Senate ultimately play a vital role in the impeachment processes of the governor. Furthermore, the national government can also intervene in the event a county government is unable to perform its functions or does not comply with a system of financial management as set under the Constitution.<sup>308</sup> Stoppage of funds is yet another option available to the national government in certain circumstances.<sup>309</sup> There is thus no rationale in ‘short-circuiting’ the mechanisms already set out in the law. It is premature and runs against the grain of constitutional and devolution principles.

All types of elections in Kenya are conducted on the same day.<sup>310</sup> The candidates and their respective political parties (including independent candidates) make up their mind which level of government they wish to serve; whether at the national or county level. The aspirants and their parties also make a conscious decision as to whether they wish to be legislators - in this case senators - or executives, as in the county governors. The terms of reference for each are distinct, just as is the pay check.<sup>311</sup> Once elections are over and the newly elected representatives are sworn into office, there can be no apparent change or mix of roles until the end of the electoral cycle when parties can change candidature. One cannot have one title and be allowed to perform what is essentially the portfolio of another’s title. Each must stick to their constitutional mandate. Senators constitute an organ of the national government and have no executive role to play in the counties and should thus steer away from forums whose functions entail the co-ordination of, project approvals or actual implementation of county projects. Enhancing checks and balances and the separation of powers is one of the core objects of devolution and one that demands respect.<sup>312</sup>

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<sup>307</sup> Art 190(1) Constitution.

<sup>308</sup> Art 190(3) Constitution.

<sup>309</sup> See Art 225 Constitution and Part IV PFMA.

<sup>310</sup> Arts 101(1), 136(2)(a), 177(1)(a) and 180(1) Constitution.

<sup>311</sup> For salary scales, see <http://www.src.co.ke/services/salaries-remuneration> (accessed 28 October 2014).

<sup>312</sup> Art 174 (i) Constitution of Kenya.

#### **4.5 Conclusion**

It is possible to foster harmonious and fruitful relations between the senator and county governments within the constitutionally allowable limits. In order to effectively discharge the representative role as a Senate, it is crucial that the individual senators find means of engaging with the county governments and counties in order to ascertain their interests. Without such a mechanism for collecting views, the representative role loses its practical meaning. Such means of engagement should however respect the principles of devolution and co-operative government, including the functional division of powers between the two levels of government. A senator has important roles to perform with respect to county governments - executive functions is however not one of them. Membership of senators to forums meant to deliberate, co-ordinate or implements the developmental agenda in counties, crosses the legislative and executive bounds and undermines the institutional autonomy of county governments. Such involvement also undesirably sets the stage for conflicts between senators and governors, which may otherwise be easily avoided.



## CHAPTER FIVE

### Conclusion and Recommendations

#### 5.1 Introduction

The 2010 Constitution of Kenya bestowed governance of the country to two levels of government; the county government and the national government. Article 186, as read with the Fourth Schedule to the Constitution, provides for the functional competencies of each of the levels.<sup>313</sup> None of the two levels is an agent of the other, and each exercises delegated authority derived directly from the people of Kenya. Furthermore, both levels of government derive their existence from the Constitution. Neither of the two levels is subordinate to the other. Nevertheless, though distinct, the two levels are interdependent and are required to conduct their mutual relations in consultation and co-operation with each other.

The study was necessitated by the emerging relational conflicts between the Senate/senators-representatives of the subnational governments and governors - the heads of county governments in Kenya's multi-level governance. The Senate and governors belong to different levels of government. The rivalry between the two is peculiar, especially given that both the Senate and governors represent the interests of one subnational unit. These conflicts have escalated to the point that they threaten to shake the devolution structure to its core. The study thus sought to explore the constitutional architecture as well as the legal framework governing the powers of the Senate and county governments in Kenya. The research also set out to establish the practice surrounding the relations between governors and the Senate. Lastly, the study looked at ways of avoiding the conflicts. The key findings and lessons from the research study are summarised in the various subheadings below.

#### Constitutional status

The study established that the Senate is a legislative body within the national government and is one of the two Houses forming the bicameral legislature in Kenya. The Senate represents the counties. Members of the Senate are popularly elected by the registered voters of the 47 counties in a general election that is conducted the same day as that for the Governor and the President. The introduction of the 20 nominated senators comprising women representatives, the youth and persons with disabilities is meant to cater for special interests. The composition

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<sup>313</sup> Arts 6(2), 189 Constitution.

of the Senate, and the equality of voting in the House, is vital to ensuring that there is equality in representation even for the least populous counties. It further underscores the core role of the Senate as the protector and promoter of county interests.

The governors, on the other hand, are the heads of the executive arm of the county government and, together with the deputy governor and CEC members, form the executive authority of the county governments. Just like the senators, the 47 governors are popularly elected by county voters during a general election. A discussion of the status of the county assembly, the legislative arm of the county governments, was necessary because the oversight role of the Senate has impacts the county assembly and vice versa. The county assembly, it was established, is designated not just as the legislative arm of the county governments, but also as an oversight body over the county executive.

### **Role sharing**

The respective functions of the Senate and governors are laid out under the Constitution and law. The Senate is designated as the ‘promoter’ and ‘protector’ of the interests of the counties and county governments. Notably, the Constitution puts a lot of faith in the Senate, banking on the institution to play the role of a zealous protector of interests of both counties and their governments. It is for this reason that it exonerates the House from much of the national business so that it can amply attend to this core mandate. Besides the representative role, the study established that the Senate exercises supervisory authority by way of impeachment processes and oversight over county finances. This, the study noted, has brought about its own dynamics - It has effectively skewed power relations between the Senate and county governments. This power relations syndrome has tended to have a spill-over effect in relations between senators and governors, where the senator is accorded a ‘higher status’, being designated as chair of development forums. This scenario invites rivalry and power struggles between the two entities.

Governors, on the other hand, are designated as the chief executives of the respective county governments and it is on them that the executive authority of county governments ultimately rests. As such, the study concludes that there is no role confusion on the respective roles of the Senate and governors. Even so, the study uncovered inherent weaknesses in the design of the role of the Senate vis-à-vis the county governments as encapsulated below.

### **The Senate's representative role**

There are various avenues through which the Senate can serve to promote and protect the interests of county governments. Through legislation, the Senate can actively initiate, consider and approve Bills affecting counties. In its reactive role, the Senate has a duty to stop laws that are 'anti-county' interests from passing, or allowing for more considered and better versions of laws through delays. In revenue matters, the Senate occupies a vantage point in the vertical and horizontal sharing of national revenue. Through its participation in the revenue processes, the Senate can ensure the protection of county governments' interests. Additionally, the Senate may counteract executive decisions that are adverse to the interests of county governments through its oversight role at the national level. By exercising review power over national government intervention and participation in constitutional amendment processes, the Senate is able to act as a bulwark against unwarranted intrusion in the county government structures and their affairs.

The study established that the Senate's representative role has been weakened, owing to some aspects in the design of the Constitution. Three challenges were identified with regard to this role. First, it was discovered that the mode of selection of the Kenyan senators effectively compromises on the representative role of the county governments. While according the Senate political muscle at the national level, popular election of senators by the county electorate, portends weak links to the county governments. It was argued that such a situation also attracted competitive, as opposed to co-operative, relations and may partly be to blame for the antagonistic relations between county governments and senators. The situation is likely to be even more precarious if the governor and senator hail from different 'warring' parties, which further weakens the strength of representation due to the influence of party politics. A caveat was however raised in that the delegate system as is the case with the South African or German systems may not always yield stronger representation of the subnational governments in practice, due to the influence of party politics.

The second problem lies with the fact that both the senator and the governor derive their mandate from one territorial unit - the county. This created an ideal environment for rivalry between the two elected representatives. In addition, it was noted that the fact that all the elections in Kenya are conducted on the same day meant that the election of senators was very much influenced by the political mood of the day. This meant that the political genetic

makeup mirrored that of the National Assembly. This could also weaken the counteracting force of the Senate on county affairs at the national level.

The third structural weakness appertaining to the representational role was the absence of a representational mechanism between senators and county governments. A representation mechanism is especially important, given the already weak bondage of senators to the county governments.

The study established that, as a result of the foregoing weaknesses and fuelled by exogenous factors such as politics, the representational role has been severely compromised.

Despite these difficulties, the representative role could still be strengthened. For instance, the study noted that although the Constitution does not expressly demand that senators consult the county governments, there is nothing in the Constitution stopping the senators and county governments from setting up a liaison so as to give meaning to the representational role. Indeed, it was argued, an implicit duty lies on the part of the senators to ascertain the interests of the county governments in order to be able to articulate them at the national level. Without such systems in place, the role would become more a theoretical than a practical one.

Thus, in order to mitigate the effect of the weak linkage of the senators to the county governments, the study proposes the following measure: that, as a matter of practice, the senators, with their respective county governments, come up with mutually agreeable mechanisms of engagement with the aim of eliciting the concerns and needs of county governments. These mechanisms can be informal and develop as a matter of practice and need not be legislated upon. What is paramount is that such engagement mechanisms be effective for the purpose and also abide by the devolution principles, including respect for the autonomy of county governments and the division of powers between the levels of government.

### **Oversight over county finances**

Despite its perceived gains and noble intentions, the study established that the oversight role has been very contentious and a major source of conflict in practice. The key issue here is to what extent the Senate can lawfully exercise its financial oversight mandate over county finances in light of the county assembly's role.

The study established that the design of the oversight mandate is partly to blame for the conflicts pitting the parties against each other for the following three reasons. First, the Constitution gives the power of financial oversight to two bodies in different spheres of government. Vesting the Senate, an organ in the national government, the oversight mandate, effectively introduces hierarchical power relations between the Senate and the governors, hence the rivalry. Unsurprisingly, therefore, the supervisory role accorded the Senate over county governments is being mirrored in protocol and the senator's engagement with the counties, with the senator being accorded a 'higher' status to that of the governor. Secondly, there is ambiguity in law as to the extent to which the Senate exercises its oversight mandate. This is made worse by the fact that the Senate, unlike county assemblies, lacks effective tools of oversight. Thirdly is the question of power overlap between the Senate and the county assemblies in terms of oversight over counties. The Constitution and the law are unclear as to what extent the Senate's oversight role is to be exercised in view of the county assembly's powers. It is not surprising, therefore, that the Senate and county assemblies, for instance, have already begun bickering over who has the mandate to probe the reports of the Auditor General that relate to county governments.

The Kenyan courts have set forth useful principles to govern the exercise of the oversight role by the Senate.<sup>314</sup> To ensure that the oversight role has meaning, and in order to avoid conflicts, it is proposed that, first the oversight mandate of the Senate be broadly interpreted. In other words, the oversight mandate under Article 96(3) of the Constitution should not only be seen or read in the restricted sense of summoning governors to account before the Senate Committee and interrogating the minutiae of the reports touching on county government affairs. Thus, and without destroying its constitutionally vested oversight power, the Senate's oversight is confined to an aggregate level, leaving the details of individual county government finances to the county assemblies on whom the primary duty rests. That way, the oversight role would reinforce the representative role of the Senate rather than, 'taking away from it, by the other hand'.

The second option is to amend the Constitution and completely divest the Senate of the oversight mandate, leaving everything to the county governments. Such an option however,

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<sup>314</sup> Refer to *International Legal Consultancy & JSC case* above.



the study noted, is most unlikely, given that it would require the approval of a two thirds majority from the Senate in order to pass.

### **Impeachment procedures**

The impeachment procedure has, and understandably so, been an overly emotive subject that has stirred up sour relations between senators and governors on the one part and governors and MCAs on the other; understandably emotive, as the process could have deep repercussions - it means someone losing their job and the initial will of the electorate being put to the test. The study revealed that similar to the oversight role, impeachment procedures are susceptible to manipulation to advance selfish political interests. Indeed, the manner and circumstances surrounding most impeachment processes so far point more towards politically instigated impeachment processes, clothed in legal attire as genuine exercise of a constitutional mandate. It was noted that impeachment is a double-edged sword, which could be inappropriately used to intimidate county executives and kill devolution, rather than a tool to genuinely weed out non-performing executives.

It was noted that the process has been grossly abused by the MCAs for selfish gain and to settle scores, a situation that has led to stand offs in some county governments, thus compromising on the functioning of county governments as mandated under the Constitution. This state of affairs has left the executives vulnerable and open to blackmail and this has the effect of compromising the independence of the executives. In such an environment, the executives may not make 'bold' decisions for fear of either having their work frustrated by failure by MCAs to approve the executive plans or the ultimate fate - being impeached at whim. This state of affairs effectively curtails development and service delivery which are at the heart of devolution. It was further discovered that, in most instances, the rules of the respective assemblies have not been adhered to, thus denying the executives due process. The Senate occupies a vantage point as the second port of call and in exercise of its oversight and review powers to ensure that the procedures are well complied with. However, the study discovered that the Senate has often deferred to the county assembly processes, hence is unhelpful in reining on this process, especially considering that the Senate is not itself impervious to partisan interests.

An analysis of the practice surrounding impeachment processes thus revealed that the influence of politics and selfish interests cannot be wished away. In view of this reality, it is



unsafe to leave such a sensitive process entirely at the mercy of such a politically charged climate. It obviously becomes even more difficult, if not impossible, to legislate or otherwise guard against the effects of politics and maliciously instigated processes. In light of this, it is suggested that a more stringent process of impeaching governors and their deputies, which is not confined to the two assemblies be introduced. In order to restore ‘sanity’ in the impeachment processes and especially in light of politics, it behoves having a neutral arbiter in order to inject fairness and dilute the effect of politics and other selfish interests. The importance of the Courts’ supervisory jurisdiction in impeachment processes cannot, therefore, be gainsaid. The Kenyan courts have laid important principles to govern impeachment procedures.<sup>315</sup> Involving a neutral party such as the courts in the process would ensure that the sanctity of the process is not sacrificed to party politics and selfish interests. Even then, it is advisable that the process providing for court intervention should cap the level at which an appeal can be made against the decision of the first instance. This is to guard against the effects of protracted court processes that ultimately are counterproductive to performance and county interests. It will also ensure that the process is not used to unduly prolong or merely ‘procrastinate’ the ultimate fate of deserving, non-performing executives.

In view of the vulnerability of the impeachment processes, the current state of affairs, whereby the procedural aspects are governed by erratic rules of the respective assemblies, is detrimental. Therefore, the study roots for a constitutionally entrenched process in order to ensure predictability and uniform application, while sealing loopholes for possible abuse.

### **Involvement of senators in development forums**

What is the acceptable level of involvement of senators in county affairs? How can the relationship between the senators and county governments be strengthened? Chapter Four of the study probed these questions and came up with the following findings.

While the idea behind the developmental efforts is *prima facie* noble, the study established that development forums in which senators are involved and even designated to convene and chair meetings is inappropriate in the current constitutional dispensation for various reasons. First, such an arrangement infringes on the vertical division of powers between the national

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<sup>315</sup> High Court’s decision in *Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 others* 2014] eKLR. Principles later upheld in *Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others* [2014] eKLR.

and county governments and undermines the autonomy of county governments as a distinct level of government. Secondly, such forums offend the separation of powers by conflating the legislative and executive functions.<sup>316</sup> Senators as legislators and initiators of policy ought not be involved in execution. Other problems brought about by such arrangements include a compromise on accountability mechanisms. Such a state of affairs also dangerously courts conflict of interest with the senator as implementer of county projects and subsequently the Senate as overseer of how a county government expends national allocations on county projects. Moreover, such forums duplicate existing structures and unduly add to administration costs. In their current form and design, such funds and development forums are, therefore, an affront to key national values and principles under Article 10 of the Constitution, including good governance, accountability and the prudent utilisation of public resources. The study inevitably concludes that county development Boards chaired by the senator in their current form are unconstitutional.

It is proposed that the existing parallel forums be scrapped. Any development initiatives must, as a rule of thumb, both in their design and implementation, be wholly weaved into the constitutionally recognised governance structures and not run parallel them.



## **5.2 Conclusion**

While tensions are not unheard of in multi-level systems of governance, if uncontrolled, they are likely to spill over and threaten the devolved structure, as the Kenyan experience shows. Some measurable progress has been made in the implementation of Kenya's devolved system. However, the spirited rivalries being witnessed are a sure way of regressing on the gains made so far and a sure recipe to kill devolution.

Undoubtedly, as the study has established, some aspects of the constitutional design are to blame for this wave of conflict and role confusion. Notwithstanding, most, if not all of the emerging conflicts witnessed between the county executives and the Senate after the 4 March 2013 General Elections in Kenya could easily be avoided. It is possible for the two levels of government and institutions within them to work harmoniously with the Constitution as it is and avoid conflicts. Even where conflicts emerge, the nature of the co-operative relationship

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<sup>316</sup> Bosire C 'The 'war' between Senators and Governors: What does the law say?' *The Star online* 22 February 2014.

between the levels of government demands that these must be resolved amicably. Importantly, this also requires a change of mind-set from the old centralist ways of doing things to the new system of governance, whereby power is shared out among the two levels of government and the organs within them. Otherwise, it will be akin to putting new wine into old wineskins which cannot hold.<sup>317</sup>

The Kenyan Constitution came about as a result of many sacrifices and '[if] properly implemented carries great promise for the people of Kenya, and it offers the country a chance to transform society for all citizens.'<sup>318</sup> The counties are the major manifestation of the country's devolved governance and it is imperative therefore, that they deliver on the devolution promise. This requires co-operative as opposed to competitive interactions within and across the two levels of government. At the end of the day, development is local and every citizen belongs to a particular county. Thus, there is ultimately one client to serve, the Kenyan citizen, whose primary or sole concern is that quality services are efficiently delivered to them and that their livelihood is improved through development. Success of the county governments will ultimately reflect on the Government of the Republic as a whole and vice versa, with the biggest winner or loser, as the case may be, being the *mwananchi*.<sup>319</sup> Rivalry stunts are therefore unentertaining theatrics to the ordinary person, are misplaced and an unnecessary derailment to the devolution process.

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<sup>317</sup> Expression borrowed from the Christian Bible, New Testament.

<sup>318</sup> *International Legal Consultancy* para 8 (as per Mumbi J).

<sup>319</sup> A Kiswahili word meaning citizen or ordinary citizen.

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