

OPINION PIECE

THE ROLE OF THE PRESIDENCY IN THE CONSOLIDATION OF DEVOLUTION BEYOND 2022

As Kenya heads to general elections in the next few weeks, which will lead to regime change at the national level including the election of the fifth President of Kenya and the second President under the devolved system, there is need to prioritize consolidation of devolution among the agenda of the incoming new government. In doing this it is imperative to recognize that whenever a country seeks to implement fundamental and transformative change in its governance system, regimes matter and play a critical role in the success of such transformation. In the Kenyan case, devolution which we have been implementing for the past twelve years since the adoption of the 2010 constitution, and nine years since the first elections under the devolved system in 2013 has been regarded as the most transformative aspect of the 2010 constitution. Therefore, as the election date draws near, we as a country need to pause and reflect on the role of the Presidency as a constitutional institution that has critical intergovernmental responsibilities that can be used to consolidate devolution beyond 2022. We need to ask questions such as whether the outgoing regime realized this critical role and used it as envisaged by the constitution, and what the new regime may need to do to fully realize this role and contribute to the consolidation of devolution beyond 2022.

In the past nine years the implementation of devolution has suffered from a tendency to understand devolution from the narrow perspective that equates it to counties and county governments, with the consequent loss of sight of the fundamental role and responsibility of the national government in devolution. As we prepare for the new regime there is need to start understanding the scope of devolution as a concept that encompasses both the national and county governments in order to identify and underscore the critical role of the national government, especially the presidency, in the consolidation of devolution. The Presidency is a constitutional institution that has critical intergovernmental responsibilities which it can use to provide the direction devolution takes and to consolidate devolution beyond 2022. The presidency has constitutional powers that can be used to put devolution at the centre of the entire government system in line with the national values and principles of governance set out in Article 10 of the constitution which include sharing and devolution of power.

First, the Presidency through the President has constitutional functions and powers to structure and organize the national cabinet into different ministries and departments of government; and assign them their respective functions. Secondly, the Presidency through the President has constitutional powers to determine the processes of operation of the National Cabinet. Since Cabinet plays a critical role in the approval of draft policies and legislation before they go to Parliament for consideration, there is need for the President to use these powers to organize cabinet and determine cabinet operations in a way that can make cabinet become the first point of audit of draft policies and legislations for conformity with the constitution and the devolved system before they are approved and passed to Parliament for consideration. This must be understood against the background of evident clawback on devolution and the functions of county governments through national policies and legislation. The President can use these powers to redefine the Ministry of Devolution as the Ministry of Devolution and Constitutional Affairs or the

Ministry of Devolution and Constitution Implementation Affairs and put the ministry at the centre of coordination of both horizontal and vertical intergovernmental relations among the forty-seven counties, and between the national and county governments. Furthermore, the President can use these powers to assign the functions of the defunct Commission on the Implementation of the Constitution (CIC) to the Ministry of Devolution to fill the institutional vacuum left by CIC. Notably, the CIC had constitutional responsibilities to oversee the implementation of the constitution including auditing of draft policies and legislation to ensure their conformity with the constitution and the devolved system; and when its term expired before the completion of the transition process, an institutional vacuum in the transition process was created.

Thirdly, the Presidency through the President has constitutional legislative powers to assent to bills passed by Parliament which he can use to audit Bills passed by Parliament to ensure their conformity with the constitution and the devolved system. This will reduce the number of laws declared unconstitutional by the courts. Fourthly, since 2013, there have been persistent conflicts between the Senate and the National Assembly over the proper procedures for determination of whether Bills concern counties or not, which have led to very expensive litigation before the courts with very many laws being declared unconstitutional for having been enacted without the involvement of the Senate. Yet the Presidency through the President, coming from the majority party or coalition of parties in Parliament can use this position to secure the agreement of the Speakers of the two Houses of Parliament and the Majority Leaders in the two Houses of Parliament to amend the Standing Orders of the two Houses of Parliament to resolve these persistent conflicts.

Fifth, the Presidency through the President is a member and Chair of the Summit which he can use to work with County Governors to find joint solutions to many policy and legislative problems that devolution faces. Sixth, the Presidency through the Deputy President is a member and Chair of the Intergovernmental Budget and Economic Council (IBEC) which he can use to build consensus on financial issues including equitable sharing of revenue raised nationally.

To accomplish all these the Presidency through the President can and indeed, should use these powers to establish an office of Presidential Adviser on Devolution and Constitutional Affairs to—(i) become the President's anchorage with all the institutions and structures dealing with devolution matters such as Parliament (the National Assembly and the Senate), the Summit, the entire National Cabinet, the Ministry of Devolution, The National Treasury, the Council of Governors, the Intergovernmental Budget and Economic Council, and the Intergovernmental Relations Technical Committee; (ii) provide to the Presidency the necessary evidence-based advice on devolution and constitutional matters; (iii) and enable the President to make evidence-based decisions on devolution and constitutional matters. This should not be a one-man advisory office but a unit with several expert researchers who should continuously undertake research and advise the President on devolution and constitutional matters to enable the president to provide the proper direction devolution should take. This will enable the President to steer the completion of the transition process and consolidated devolution for the benefit of the entire country.