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Posts without 'Functions': A review of Article 180(5) of the Constitution of Kenya 2010 on the Position of Deputy Governors

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Article 180(5) of the Constitution of Kenya 2010 provides that each candidate for election as a county governor shall nominate a person who qualifies for election as a county governor as a candidate for deputy governor. But almost twelve years after the implementation of the Constitution of Kenya 2010, questions have arisen not only on the importance of these positions but also on whether there is a need to amend the Constitution to provide for clear and substantive functions of deputy governors or even scrap off these positions altogether. To address this dilemma, this paper will begin by exploring the constitutional duties of the deputy governors. The paper will then conduct a comparative analysis of the Kenyan county governance structure and South African provincial governance structures before then critically analysing the five functions enlisted in section 32 of the County Government Act 2012. In moving from a theoretical analysis to a practical analysis of the situation, the paper will finalise by looking into case studies involving the resignation of the former Deputy Governor of Nairobi County, Paulcarp Igate, and the 'absence in office' of the West Pokot's Deputy Governor, Nicholas Owon Atudonyang. In summary, the paper finds that constitutionally, the critical mandates of the deputy governor include deputising the Governor, filling the vacancy in cases of vacancy in the Governor's office, and promoting inclusivity in the county. However, there are still numerous gaps in the Constitution, such as the failure to fill the vacancy in the deputy governor's office and the lack of procedure for removing the deputy governor's office. Having been enacted after the adoption of the Constitution of Kenya 2010, it was legitimately expected that the enactment of the County Government Act 2012 will at least address these gaps. Unfortunately, a critical analysis of section 32 of the County Government Act shows that all the enlisted functions in the aforementioned provision are merely

a repetition of what is provided by the Constitution, or whatever has been enlisted as functions are fundamentally inconsequential for lack of clarity and substance.

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INTRODUCTION

Pursuant to Article 180(5) of the Constitution of Kenya 2010, "Each candidate for election as a county governor shall nominate a person who is equal for nomination for election as a county governor as a candidate for deputy governor."¹ It is the spirit of the Constitution that just like the president and the deputy president, the Governor and the deputy governor should be elected together on the same political ticket or elected together as independent candidates (hereby referred to as 'joint candidature'). This argument is underscored by Article 180(6) of the Constitution, which obligates the Independent Electoral and Boundaries Commission (IEBC) not to conduct a separate election for the deputy governor, but instead to declare the candidate nominated by the individual elected as the county governor to have been elected as the deputy governor.² But almost twelve years after the implementation of the Constitution of Kenya 2010, scholars, political analysts, governance experts, and students of the Constitution like myself are asking, "Was it really necessary to have the positions of deputy governors?" If the

answer is in the affirmative, the next question will be, "Is it still necessary to have these positions?"

To conceptualise and provide answers to the above-asked question, one needs to adopt a four-pronged typology which shall involve the following; First, one needs to exhaustively analyse all the constitutional and statutory duties of deputy governors in addition to looking into all the benefits that this position has brought. Secondly, considering that the Kenyan 2010 Constitution heavily borrowed from the South African Constitution, it is necessary to conduct a comparative analysis of Kenya's County governance structure and South Africa's Provincial governance structure to establish the relevance of the deputies' position. Thirdly, one needs to critically analyse why both the Constitution and the County Governments Act 2012 did not intend to promote these positions' relevance. Finally, to support the above position, the paper will also analyse two case studies; the resignation of the former Deputy Governor of Nairobi County, Paulcarp Igathe, and the 'absence in office' of the West Pokot's Deputy Governor, Nicholas Owon Atudonyang.

¹ The Constitution of Kenya 2010, Article 180(5).

² The Constitution of Kenya 2010, Article 180(6).

Constitutional Duties of Deputy Governors

There are four primary duties or what can be considered to be important in the existence of the position of deputy governor. Firstly, deputy governors have the constitutional duty of deputising the Governor. In his or her capacity as a member of the County Executive Committee (CEC),³ Article 179(4) provides that the deputy governor shall be the deputy chief executive of the county, deputising the county governor, who is the chief executive of the county.⁴ Secondly, in case of vacancy in the office of the Governor⁵ or the county governor is removed from office⁶, the deputy governor is constitutionally entitled to occupy the office. Pursuant to Article 182(2) of the Constitution, in cases of vacancy in the office of the county governor, either as a result of the events in Article 181 or Article 182 of the Constitution, the county deputy governor shall assume office as the county governor for the remainder of the term of the county governor.⁷

Article 182 of the Constitution is specifically relevant for the following two reasons; firstly, it ensures a smooth transition of power and functions in the county without delay or other underlined factors. The complexity of power and functions transition in cases of vacancy in the office of the Governor in cases where a county does not have a deputy governor or the deputy governor is incapable of executing the functions of the Governor are well seen in Articles 182(4) and (5) of the Constitution of Kenya 2010. In *Re Speaker, County Assembly of Embu*, SC. Reference No. 1 of 2015; [2018], at paragraph 61, the Supreme Court of Kenya (SOK) held that:

“Where a vacancy occurs in both the offices of County Governor and Deputy County Governor at the same time, the office of the Deputy County Governor shall remain vacant until the

*election of a new Governor. The new Governor shall nominate a person to fill the vacancy within fourteen days after assuming office”.*⁸

Pursuant to these articles, if there’s a vacancy in the office of the county governor and that of the deputy governor or the deputy governor is unable to act, it falls upon the speaker of the county assembly to act as the county governor.⁹ In such circumstances, Article 182(5) of the Constitution provides that an election shall be held within sixty days of the speaker acting as the county governor.¹⁰ Such, in my opinion, is a long, complex process that is always avoided when a county has an able deputy governor. Secondly, besides the smooth transition of power and functions in cases of vacancy in the county governor’s office, it saves the Kenyan taxpayers money that IEBC would ordinarily have used to conduct another by-election in cases of vacancy in the office of the Governor.

On the other hand, it may be argued that such constitutional provisions may be against the core principles of democracy, which demands that the electorates should always be given the opportunity to choose the leaders of their choice to lead in cases of vacancy.¹¹ But this argument can be countenanced by the fact that, similar to the case of the president and the deputy president in Article 146 of the Constitution, the electorates are presumed to be making their choices when electing their governors and deputy governors when well ‘aware’ that the deputy governor is technically a ‘governor in waiting’ in cases of vacancy in the office of the county governor. This argument is well buttressed by Article 180(5) of the Constitution, which demands, “Each candidate for election as county governor shall nominate a person who is qualified for nomination for election as county governor as a candidate for deputy governor”,¹² thus requiring a

³ The Constitution of Kenya 2010, Article 179(2).

⁴ The Constitution of Kenya 2010, Article 179(4).

⁵ The Constitution of Kenya 2010, Article 182

⁶ The Constitution of Kenya 2010, Article 181

⁷ The Constitution of Kenya 2010, article 182.

⁸ *Re Speaker, County Assembly of Embu*, SC. Reference No. 1 of 2015; [2018],

⁹ The Constitution of Kenya 2010, Article 182(4)

¹⁰ The Constitution of Kenya 2010, Article 182(5)

¹¹ Bassiouni et al., “Democracy: Its Principles and Achievement” (1998) at <http://archive.ipu.org/pdf/publications/democracy_pr_e.pdf> accessed by 10 August, 2022.

¹² The Constitution of Kenya 2010, Article 180(5).

deputy governor to have similar qualifications with that of a governor.

Thirdly, unlike the cases of vacancy in the office of the county governor, there are cases when the Governor is temporarily incapacitated to operate the county because of scenarios such as serious illness, in which case the deputy governor may act as the county governor. For example, Article 179(5) of the Constitution provides that in cases where the county governor is absent, the deputy governor shall act as the county governor.¹³ Contrary to the cases resulting in the vacancy in the office of county governor as provided in Articles 181 & 182 or, Article 179(2), where the deputy governor deputises the Governor in cases where the Governor is in office, the case at hand applies strictly to scenarios where the Governor is ‘absent’ from office such as when he is arrested or imprisoned for a period that is less than 6 months. In those cases, it is prudent to have a deputy governor, someone who has the same qualifications as a governor, to ensure the continued running of the county.

Lastly, the deputy governor’s office has been used as a political card to promote the inclusivity of ethnic communities during elections. Those vying for the positions of county governors from different counties have always picked their deputy governors from outside their ethnic divides. For example, in Busia, the two-term outgoing county governor, His Excellency Sospeter Ojaamong, whose ethnic background is Teso, has always picked his two different deputies from other ethnic groups in Busia County.¹⁴ When the Constitution is interpreted purposively as well as advocated by scholars like Mutakha Kangu, such decisions advance the objects and principles of devolved government provided in Article 174 of the Constitution, including; fostering national unity by recognising the diversity and the protection and promotion of the rights and interests of minorities and marginalised communities.¹⁵

¹³ The Constitution of Kenya, Article 179(5).

¹⁴ Shaban Makoha, “Calls for rotational county boss grows as polls near” (2021) at <<https://nation.africa/kenya/counties/busia/calls-for-rotational-county-boss-grows-as-polls-near-3661246>> accessed by August 5, 2022.

¹⁵ The Constitution of Kenya 2010, article 174.

¹⁶ Constitution of the Republic of South Africa 1996, chapter 6.

While this may be something to celebrate, it has a negative side; it is becoming a recipe for systematic discrimination against the more marginalised minority communities in the county. Due to the nature of Kenyan ethnicised politics, the position of the deputy governor is mostly ‘given’ to those communities with substantive political backing. Unfortunately, most of our counties have more than two ethnic communities, especially in those metropolitan counties such as Kakamega and Eldoret. The effect of this is that the more marginalised minority communities are unlikely to be given a chance to be elected as the county governor because of their little political backing.

Comparative analysis of the Kenyan and the South African Constitution

Unlike the Kenyan two-tier structure of governance (national and county government), South Africa has a three-tier structure of governance; the national, provincial¹⁶, and local government.¹⁷ Of the three levels of government, Kenya’s counties can be equated to South Africa’s provinces, whose executive authority is vested in the Premier of that province, who’s like the county governor in Kenya.¹⁸ This similarity is further buttressed by section 104 of the Constitution of the Republic of South Africa 1996, which provides for the legislative authority of provinces which is vested in its provincial legislature, whose authority includes passing legislation within the functional area listed in schedule 4 and 5 of the Constitution¹⁹, which is equally similar to Kenya’s county assembly.

Just like county governors in Kenya, the Premiers carry out their executive authority in coordination with the members of the Executive Council. Their duties include implementing provincial legislation in their provinces and implementing all the national legislative enactments within the functional areas listed in schedule 4 or 5.²⁰ In Kenya, Article 180(5) of the Constitution of Kenya 2010 states, “Each

¹⁷ Constitution of the Republic of South Africa 1996, chapter 7.

¹⁸ Constitution of the Republic of South Africa 1996, section 125.

¹⁹ Constitution of the Republic of South Africa 1996, section 104.

²⁰ Constitution of the Republic of South Africa 1996, section 125(a) & (b).

candidate for election as a county governor shall nominate a person who qualifies for election as a county governor as a candidate for deputy governor.”²¹ Unlike Kenya, section 128 of the Constitution of South Africa provides that; “*At its first sitting after its election, and whenever necessary to fill a vacancy, a provincial legislature must elect a woman or a man among its members to be the Premier of the province.*”²² It is clear that there are no positions for ‘Deputy Premiers.’ When the Premier is absent or incapable of carrying out the duties of the office of Premier, or if there is a vacancy in the office of Premier, section 131 of the Constitution provides that a member of the Executive Council designated by the Premier, or a member of the Executive Council appointed by the other members of the Council or the speaker shall assume office as the Acting Premier.²³ This, therefore, raises legitimate questions on why the drafters of the Constitution of Kenya 2010 found it wise to have the position of the deputy governor, and yet South Africa does not have such a positions. If indeed it was necessary, if not wise, to have the positions of deputy governors enshrined in the Constitution, why are there not clear, precise, and substantive functions, duties, and powers accompanying these positions?

Failure by the Constitution and the County Governments Act 2012 to Provide Precisely and Substantive Functions of the Deputy Governors

The drafters of the Constitution of Kenya 2010 substantively failed to address fundamental issues concerning the county deputy governors’ position for the following three reasons. Firstly, unlike the county governor, whose procedure for removal from office has been provided in Article 181 of the Constitution, the Constitution does not provide for the procedure of the removal of a deputy county governor from office. Secondly, whereas Article 182 of the Constitution outlines the procedure for replacing the county governor in cases of vacancy in the office, the Constitution went silent on addressing what happens in vacancies in the office

of the deputy governors. This problem has been evident in Kenya, especially after the resignation of the deputy governor of Nairobi County, Polycarp Igathe. The then Governor failed to appoint a deputy governor. He even left office after his impeachment without appointing a deputy governor, citing a lack of constitutional and statutory provisions. Finally, a critical analysis of the constitutional provisions on the deputy governor’s role indicates that the deputy’s primary role during the county governor’s tenure is to deputise him or her. Unfortunately, similarly to what is happening with the president and his deputy president, deputising the county governor means that the mandates assigned to the deputy governor are purely based on the goodwill of the Governor. This problem has resulted in situations where some deputy governors have been completely left without any key duties to execute.

The Constitution having fundamentally failed to provide precise and substantive functions and powers for deputy governors, it is expected, or at least it was expected, that the enactment of the County Government Act 2012, whose section 32 outlines the duties of the deputy county governors, would then be precise, and useful in addressing the gaps brought by the Constitution. Unfortunately, as will be discussed below, the County Government Act provided a list of functions of the deputy governors,²⁴ whereby the enlisted functions seem to be baseless and inconsequential. Each of these functions will be addressed below.

Firstly, pursuant to section 32(1) of the County Government Act 2012, the deputy governor shall take and subscribe to the oath or affirmation as set out in the Schedule of the County Government Act before assuming office.²⁵ Taking the oath of office is a prerequisite legal condition for every public servant occupying an office. Then how does a deputy governor take and subscribe to the oath or affirmation enlisted as a function of deputy governor? Secondly, according to section 32(2), the deputy governor shall deputise the Governor in executing the Governor’s functions.²⁶ As argued

²¹ The Constitution of Kenya 2010, Article 180(5).

²² Constitution of the Republic of South Africa 1996, section 128(1).

²³ Constitution of the Republic of South Africa, section 131.

²⁴ County Government Act, s 32.

²⁵ County Government Act 2012, s 32(1).

²⁶ County Government Act 2012, s 32(2).

above, deputization of the county governor by the deputy governor can be considered one of the deputy governor's greatest functions of the deputy governor, especially in cases whereby the county governor is incapable or incapacitated from carrying out his functions. But this has proven to be problematic because the functions assigned to deputy governor in the context of 'deputization' are purely dependent on the goodwill of the Governor, a situation which has seen several deputy governors functionless.

Thirdly, section 32(3) of the County Government Act provides that the Governor may assign the deputy governor any other responsibility or portfolio as a county executive committee member.²⁷ Assigning the deputy governor other responsibilities is not so different from the deputy governor 'deputising' the Governor. Consequently, I think this was unnecessary repetition of the same thing. Having said that, it is worth appreciating the innovativeness of our legislators by providing that the Governor may assign the deputy governor a portfolio as a member of the county executive committee.²⁸ Whereas the wording of the Act—'may'—is problematic because it does not obligate the Governor to do so; thus, he may or may not assign the deputy governor a portfolio in the county executive committee, the reality on the ground has seen several deputy governors appointed in various positions in the county executive committee. Whereas this is something worth celebrating, someone can equally legitimately question why we need deputy governors to perform functions that can already be performed by county cabinet secretaries. Are those deputy governors assigned portfolios in the county executive committee paid salaries for performing those dual functions?

Another function of the deputy governor pursuant to section 32(4) of the County Government Act is that "When acting in office as contemplated in Article 179(5) of the Constitution, the deputy governor shall not exercise any powers of the governor, to nominate, appoint or dismiss, that are assigned to the governor under the Constitution or other written

law."²⁹ Whether this is a function in the real sense or a mere regulation on how an acting deputy governor is obligated to carry out his or her mandate is a question that can only be answered through the application of the methods of statutory interpretation. But in my opinion, section 32(4) of the County Government Act 2012 is more of a regulatory provision and less of a statutory provision outlining the functions of the deputy governor. Finally, section 32(5) provides that the Governor shall not delegate to the deputy governor any of the functions referred to in subsection (4).³⁰ Even a first-year law student will openly tell you there is no technical or substantive difference between the provision of sections 32(4) & (5) of the County Government Act, 2012. In summary, just like Chapter 11 of the Constitution of Kenya 2010, section 32 of the County Government Act 2012 has nothing meaningful in addressing the constitutional gap concerning the functions, powers, and privileges of the 47 deputy county governors. The following two case studies can well demonstrate the lack of relevance of these positions.

Case Studies

Resignation of the Former Deputy Governor of Nairobi County, Polycarp Igathe and the 'Absence in Office' of West Pokot's Deputy Governor, Nicholas Owon Atudonyang.

Posting on his official Twitter account on 31st January 2018, the then-Nairobi deputy governor wrote,

"Dear Nairobians, it is with a heavy heart that I resign my seat as elected Deputy Governor of Nairobi City County, effective 1 pm on 31st January 2018...I regret I have failed to earn the trust of the Governor to enable me to drive the Admin & Management of the county. Without fear, favour, or ill will, I step down to avoid abusing or betraying my oath of office to Kenyans, Nairobians, and my family. Thank you for the encouraging support given to me so far," Polycarp Igathe.³¹

²⁷ County Government Act 2012, s 32(3).

²⁸ County Government Act 2012, s 32(3).

²⁹ County Government Act 2012, s 32(4).

³⁰ County Government Act 2012, s 32(5).

³¹ Wanjohi Giate, 'Polycarp Igathe resigns as Nairobi Deputy Governor' (2018) << <https://www.businessdailyafrica.com/>

Following the resignation of Polycarp Igate, Nairobi County continued operating without a deputy governor during the entire tenure of the then Governor Mike Sonko before he was eventually impeached. According to Edwin Mutai, the then Nairobi Governor Sonko had alleged that he would only appoint a deputy governor once parliament enacts a law spelling out the procedure of filling the vacancy of a deputy governor.³² Whereas the question of whether Nairobi County operated less effectively after the resignation of Igate as compared to when he was still in office is debatable, the fact remains that Nairobi County continued operating.

The situation is almost similar to that of West-Pokot County. According to the petition concerning the absence of the deputy governor of West Pokot County filed and received by the Senate on 14th May 2019, a section of that petition reads, ‘...that since the Deputy Governor of West Pokot County, Dr. Nicholas Owon Atudonyang was sworn-in, he left the Country for the USA in the pretext of sourcing for health equipment and has never returned back to serve the people of West Pokot County’.³³ Arguably, since the Deputy Governor of West-Pokot County consistently absconded his constitutional duties to attend to his personal issues in the United States at the expense of his national duties, the residents of West-Pokot County and Kenyans at large have not gotten the value for money paid to Dr. Nicholas Owon since September 2017. But according to the Deputy-Governor, “At no time was I asked by the Governor to perform, and I did not accomplish. I did everything I was asked to do”.³⁴ In defending his actions of being absent from the office, the Deputy governor argues that he helped his West Pokot County by reducing the county’s cost of operation. “I am the DG who has done more than others. My office running cost is

very low, and as a result, we hired more staff with my salary. The county has hired up to 30 people”.³⁵ With that, it is obvious that the 47 counties can effectively operate without the existence of the positions of deputy governors.

CONCLUSION

Even though the drafters of the Constitution of Kenya 2010 may have a noble and transformative rationale behind the creation of the positions of deputy governors, the actual existence of these positions has proven no value. Whereas the greatest problem arising is the Constitution of Kenya 2010 and the County Government Act’s 2012 lack of provision for precise, substantive, and useful functions and power of deputy governors, other factors, such as lack of procedure for the replacement in cases of vacancy in the office of the deputy governor cannot equally go unmentioned. Therefore, it is incumbent upon the incoming legislators (government) to address these legal gaps or give the Kenyans an opportunity to scrap these positions.

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³⁴ Winferoy Owino, ‘Why I did not resign, Texas-based West Pokot Deputy-Governor Owon Atudonyang explains’ (2022) << <https://www.standardmedia.co.ke/politics/article/2001440904/why-i-did-not-resign-absentee-west-pokot-deputy-governor-explains>>> accessed 25 June, 2022.

³⁵ Ibid

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