



## **Fiscal Decentralization in Kenya: A Small Step or Giant Leap?**

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**May 2011**

Post-election violence in 2007 killed over a thousand people in Kenya and left the country volatile. The adoption of a new Constitution in September 2010 resolved some contentious issues, among others, the introduction of a new structure of governing power between the center and subnational regions. The previous Constitution defined Kenya's public sector as quite centralized, with a vertically deconcentrated territorial-administrative system at the provincial and district levels.<sup>1</sup> In contrast, the new Constitution defines the public sector as comprising two levels of government: a national government as well as a level of 47 elected county governments. While the Constitution assigns detailed functional responsibilities to the county level and provides that at least 15 percent of national revenues are to be shared with the county level, the devil of the new intergovernmental structure is in the details.

Steps that will have to be taken in the coming months include the implementation of a new law on local government, the holding of local elections and preparations for 2012 Presidential elections. Each of these steps will influence the extent to which democracy and devolved authority will actually strengthen local democracy in Kenya.

Article 174 of the Constitution provides a list of reasons or objectives why devolution was enshrined in the constitution, including political objectives (promoting democracy and accountability; greater participation and empowerment) as well as social and economic objectives (promoting social and economic development; improving access to public services; ensuring equity). Article 174 further specifically states that additional objectives of devolution are to protect and promote the interests and right of minorities and marginalized communities; to enhance the checks and balances within the public sector; and to further encourage the separation of powers. However, the extent to which the new intergovernmental structure of the public sector was informed by each of these respective objectives is unclear. The drafting of the Constitution involved various compromises, and it is unlikely that the drafters of the document themselves had a consistent view regarding the ultimate scope and nature of the subnational governance system. While some have interpreted the constitutional provisions surrounding devolution to mean the creation of a more robust local (county) government level within the context of a unitary system, others appear to argue that the current Constitution in fact seeks to impose a quasi-federal structure of government.

Given these various perceptions, at this stage, it remains to be seen whether the implementation of the Constitution will bring about a sea change in intergovernmental fiscal relations and public empowerment, or whether the changes in Kenya's intergovernmental structure will in practice be a more incremental movement toward a more decentralized governance structure. Indeed, if political obstacles delay or derail the progress toward greater decentralization, the implementation of the new Constitution could represent little change in terms of decentralized governance in Kenya.

We believe that the degree to which the changes in Kenya's intergovernmental structure will truly prove to be transformative depends on how the constitutional implementation process deals with five key questions:

1. How politically relevant will the new county governments be?
2. How different will new county governments be operationally from the current county and/or municipal councils?
3. How will counties themselves be decentralized? Will there be elected municipal governments within the urbanized areas?
4. To what degree will county governments truly be in charge of their own affairs?
5. How will county governments fare in terms of own source revenues?

### **1. How politically relevant will the new county governments be?**

The Constitution has gone to great length to create a strong level of county governments that could provide a strong, decentralized political counterweight to tendencies at the national level to monopolize political power. Unlike the current local authorities, the new county governments have a constitutional foundation; have an explicit constitutional functional mandate; and the Constitution guarantees a major increase in financial resources by setting aside a minimum level of national financial resources for county governments. Furthermore, the larger size of the 47 county jurisdictions (compared to the

current 175 local authorities) increases their political prominence, as does the fact that county governors will be directly elected.<sup>2</sup> Although the Constitution urges counties to decentralize their own operations and potentially opens the door for municipal governments in urban areas, the Constitution shies away from explicitly creating a second (subcounty) level of local governments which would compete with the county governments for political space and financial resources.

There is no doubt that these factors combine to make county governments more viable political units and that politically more prominent, better resourced county governments are likely to make the county government level a much more potent political force in Kenya's post-constitution public sector when compared to the country's current local government institutions. As such, the creation of the new county governments may offer members of parliament, opposition leaders, and ethnic minorities a viable alternative governance platform away from the central government. Indeed, the vertical power sharing between the national and county levels may empower different ethnic and regional populations across the country to make governance decisions subnationally. This should take some of the pressure off the national political system, which is currently the only major level where political decisions and compromises can effectively be made.

On the other hand, it could be argued—with almost equal strength—that county governments will likely not be all that different from the current local authorities. In this view, the new county level may become little more than the amalgamation of the current local authorities within each county jurisdiction, as the functions assigned to the new county governments include virtually all of the same functions that local authorities currently deliver.

The two main functions that will be devolved to the county level that are not currently delivered by all elected local authorities are local health services and agricultural extension and livestock services.<sup>3</sup> Notably absent from the

functions devolved to the county level are primary and secondary education. It could be questioned whether county governments will be seen as truly politically relevant as long as public education—the most important and visible public service—remains with the national level.

## **2. How different will new county governments operate from the current county and municipal councils?**

Newly elected county governors may argue that they should be allowed to start completely from scratch, with the new county governments constructing new administrative buildings, with the county governors hiring all new staff, and with new operational procedures to be developed. However, in addition to the inefficiency that this would entail, this approach would fail to capture the experience and institutional capacity that has already been developed within Kenya with regard to decentralized local governments since prior to independence and more recently under the Kenya Local Government Reform Programme since 1998.

We would argue that it would be much more pragmatic to form the new county governments by building on the existing local authorities, for instance, by consolidating the current local authorities within each county jurisdiction into a single government unit, together with all their staff, assets and liabilities. As a starting point, this would instantaneously give the new county governor and Assembly an institutional structure which has operational procedures in place and which would be more capable of delivering local services from the first day of their existence. Local operational processes and systems would of course be modified to fit the post-constitutional situation, along with improved administrative and service delivery systems and procedures. In addition, to the extent that the Constitution assigns the new county governments additional functions that are currently within the purview of the national government, these functions (along with the related infrastructure, staff and the necessary financial resources) should be transferred to the

county governments during the initial three-year transitional period.

## **3. How will counties themselves be decentralized? Will there be elected municipal governments in urban areas?**

An important downside of creating larger, more populous and politically more viable local jurisdictions is that it is hard to argue that the new county governments are truly “closer to the people.” In fact, both the current elected local authorities as well as the current deconcentrated district level operate more closely to the grassroots level than the newly defined county governments. The Constitution recognizes this concern by mandating in Article 176(2) that “[e]very county government shall decentralize its functions and the provision of its services to the extent that it is efficient and practicable to do so.”

The Constitution, however, is vague as to the nature of this subcounty decentralization: the document specifically uses the word “decentralize” rather than the more specific terms (either “devolution” or “deconcentration”). No general implementing legislation is specified to guide the administrative structures or governance structures below the county level. As such, it is unclear whether the intended “decentralization” below the county level should follow district boundaries as the primary administrative subdivision of the county, or whether the current local authority jurisdictions would take on a role in subcounty decentralization (either through a deconcentrated or devolved approach). Alternatively, decentralization below the county level could also be pursued by decentralizing responsibilities and resources from the county level directly to front-line service delivery facilities within the county, such as county health centers or agriculture extension offices. In the absence of national legislation or guidance on this issue, different counties may in fact each follow different approaches.

Although elected municipal governments in the country’s main urban areas have been an

integral element of Kenya's public sector since before independence, the new Constitution does not explicitly recognize urban local governments or municipalities. While the Constitution is generally vague as to the nature of decentralization within counties, it does provide some limited direction with regard to the governance of urban areas: Article 184(1) does allow (and in fact, requires) the national government to enact laws to provide for the governance and management of urban areas and cities.

Given the importance of urbanization to economic and social development in Kenya, clarity should be created quickly on whether municipal authorities will continue to exist as autonomous governance units (albeit territorially below and/or constitutionally under the county government), or whether urban areas will be managed through some type of deconcentrated county structure.<sup>4</sup>

In this case, there is a clear tension between the desire to strengthen the county level on one hand (which in fact might result in the centralization of function to the county level), and the desire to follow the subsidiarity principle, which would empower the people by assigning functions and responsibilities to the lowest level in the territorial-administrative structure that would be able to perform these functions in an efficient manner and strengthen urban development and management.

#### **4. To what degree will county governments truly be in charge of their own affairs?**

The next determinant of the extent to which the changes in Kenya's governmental structure will be transformative is the degree to which counties will truly be in charge of the functions assigned to their level. Again, on this point, the Constitution is somewhat vague as to whether counties will be substantially in charge of their own affairs.

On one hand, the Fourth Schedule of the Constitution assigns specific functions to the county governments and the document goes to some length (in Articles 189–191) to protect

counties from arbitrary interference by the national government in their functions. On the other hand, the same articles give the national government broad leeway to introduce national policies and impose norms and standards on the county level. And the central government is allowed to intervene in the affairs of a county if the county government is either “unable to perform its functions” or if it fails to operate a financial management system that complies with national requirements.

The constitutional provisions dealing with the financing of counties are similarly ambiguous with regard to the extent of county-level control over county functions. For instance, while the Constitution stipulates that county governments shall receive no less than 15 percent of all revenues collected by the national government, the document does not explicitly stipulate that these resources are to be provided to the county level in an unconditional manner. According to Article 202(2), in addition to their equitable share, “[c]ounty governments may be given additional allocations from the national government's share of the revenue, either conditionally or unconditionally.” These elements will need further clarification in order to support the decentralization process.

#### **5. How will county governments fare in terms of own source revenues?**

The final element which will help determine whether fiscal decentralization in Kenya will be transformative in nature will be how county governments will fare in terms of own-source revenues. To the extent that county own-source revenues are meager, county governments will virtually be fully dependent on national revenues and any potential (implicit or explicit) strings attached.

In this regard, the Constitution explicitly assigns property rates and entertainment taxes to the county level, in addition to a number of non-tax revenues (fees and charges). While further tax sources may be assigned to the county level by national legislation, all major revenue sources (the value-added tax, income

taxes, and excise taxes) are exclusively assigned to the national level.

The constitutional assignment of taxes and revenue powers leaves county governments with a limited own-source revenue base from which to make autonomous fiscal decisions. The manner in which local taxation is guided by national legislation may further limit local revenue space. While the weak assignment of revenues to the county level is offset to some extent by the block nature of discretionary grants received through the equitable share, transfers are not perfect substitutes for own revenue sources in the design of an intergovernmental fiscal system.

In addition, the consolidation of taxation previously collected by (subcounty) urban and rural local authorities to the higher county level will reduce the correspondence between the burden of local taxes and the benefits from local expenditures. To the extent that urban residents feel that their tax revenues are used by county officials for the benefit of rural county residents, their incentive to pay local taxes may be reduced. In practice, this would further reduce what is already a narrow local revenue base.

## **Concluding Remarks**

At first glance, Kenya's Constitution provides a clear and detailed map of the future shape of Kenya's public sector and intergovernmental relations. In reality, however, many extremely critical decisions surrounding the implementation of the new intergovernmental system have been deferred to be clarified during the implementing stage.

How these issues will be decided will depend largely on the balance of political forces and institutional interests during the preparation and adoption of implementing legislation. During this process, the intent of the constitutional framers to create politically viable county governments will likely be constrained from several sides. From the top, central government ministries, departments, and agencies may have little incentive to support the creation of a

strong county level. From the bottom, the current local authorities are seeing their service delivery responsibilities and taxing powers usurped by the county level, which is further removed from the grassroots level than is currently the case.

In this environment, whether county governments can establish themselves as a credible, viable decentralized governance level will depend to a large extent on the ability of the new county governors and county assemblies to manage their jurisdictions in a responsive, efficient, and accountable manner, and achieve an improvement in local service delivery outcomes.

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The authors benefited greatly from discussions with Charles Cadwell, Justus Nyamunga, Larry Schroeder, Paul Smoke, and Kathy Whimp in the preparation of this Policy Brief.

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<sup>1</sup> Although the previous Constitution did not specifically recognize an elected local government level, the Local Government Act (Cap 265) provided a legal framework for establishing elected local (county, municipal, town and city) councils.

<sup>2</sup> Under the current Local Government Act, the county chairmen and the mayors are indirectly elected by the council. Town and county clerks are central government officials.

<sup>3</sup> Under the current system, local authorities in the major urban areas are responsible for providing education and health services.

<sup>4</sup> In the former case, under the new Constitution, national legislation would have to define the urban governance entities and assign them the functional responsibility to manage urban affairs. However, these functions are constitutionally assigned to the county governments. In addition, the legislative framework would have to comply with the constitutional assignment of revenues to the county level as it provides municipal governments with the (own and shared) revenue sources needed to implement their municipal functions.