Decentralization in Kenya

Background Note

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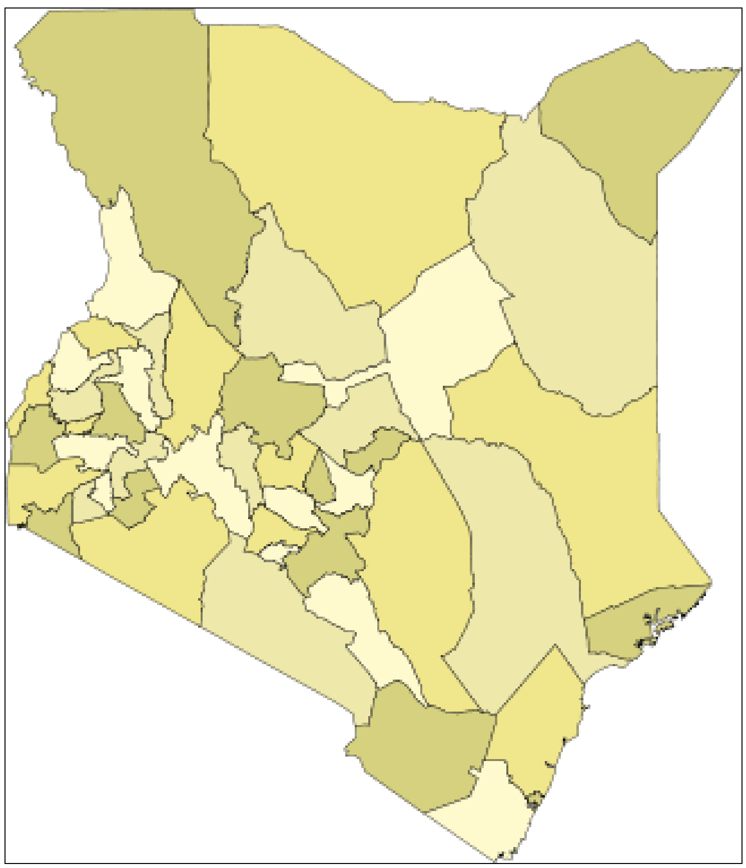
Main author: David Ndii



Introduction

Kenya has a new constitution and as a result the country is embarking on fundamental devolution of power. The new Constitution divides the country into 47 counties, to which both political power and government functions will be devolved. This is the most far reaching institutional and public finance reform undertaken Kenya to date.

Kenya's devolution is to a very large extent a response to distributional grievances, which in turn have contributed to the political strife. Thus it is absolutely critical that devolution delivers on the promise of a more equitable distribution of public resources in the first instance, as well as development outcomes.

The purpose of this paper is to highlight the key issues for a high-level mission on decentralization to consider, specifically:

1 **The implication for central institutions,** including identification and coordination of roles for institutions critical to fiscal decentralization.
2 **Functional assignments**, including administrative decentralization
3 **Fiscal decentralization**, especially transfers (including status of CDF and LATF under new fiscal framework)
4 **The dynamics at the local level,** including:
    a) Role of Provincial administration under new Constitution
    b) Status and mandates of metros/towns under new Constitution
    c) Local government mandates and capacity levels
5 **Data and information systems**

It provides background, context and analysis of the key strategic and implementation issues that are evident. This overview section highlights the critical issues in fiscal decentralization and a discussion of the current state of fiscal decentralization in Kenya. The second section discusses the implications on the structure and functions of government. The third is on public financial management, and the fourth and final section is on implementation issues.

Current State of Decentralization in Kenya

Local Government

Kenya has already a significantly decentralized public sector. There is a well established local government system going back to colonial times. The local government system has three elements, namely Municipalities (Cities and larger towns), Town Councils (small towns) and County Councils (rural authorities). There are presently 172 local authorities.

A baseline survey of decentralization in Africa published in 2002, ranked Kenya's local government third out (out of 30 countries in the sample) after South Africa and Uganda[1] It was ranked high on political decentralization, and moderately on administrative and fiscal decentralization, but in the top quartile on all five dimensions used in the survey (see Table 1)

Table 1 - Kenya's Decentralization in African Context

Dimension/ Criteria	**Ranking/Peers***
<u>Political</u> Elective sub-national government Regular free and fair elections	**HIGH :**South Africa, Uganda, Namibia, ***Kenya*** , Ghana, Senegal, Ethiopia, Cote D'Ivoire
Administrative Legal framework Clarity of division of roles/functions Power to hire and fire staff	**MODERATE:** Nigeria, Rwanda, Tanzania, Zimbabwe, ***Kenya,*** Ghana, Ethiopia, Madagascar, Botswana, Eritrea
Fiscal Dependable finances Share of national public expenditure	**MODERATE :**Madagascar, ***Kenya***, Rwanda, Ghana,Senegal,Burundi,Congo Rep., Congo DRC
Downward Accountability Elections Citizen Participation	**HIGH (1-4):** South Africa, Uganda***, Kenya* (3),** Namibia
Upward Accountability Audit Service delivery standards Monitoring and Evaluation	**MODERATE (6-12**):Namibia, ***Kenya*** **(7)**, Ethiopia, Eritrea
** countries were ranked on a scale of 0-4 where <2 is low, 2-3 moderate and 3-4 is high.* *Source: Ndegwa, op cit*	

Local government provides an incomplete view of decentralization of decentralization in Kenya. There are two other decentralization structures, namely District Focus and Devolved Funds.

[1] Ndegwa, Stephen (2002), "Decentralization in Africa: A Stocktaking Survey", Africa Region Working Paper Series No. 40.

District Focus

In 1983, the government embarked on an ambitious deconcentration initiative, the District Focus for Rural Development. The stated purpose of District Focus was to change from top-down, sector based to integrated, participatory, bottom-up development planning. The centerpiece of the system is delegation of development planning and coordination to the District Development Committee (DDC), a consultative forum that brings together the civil servants at the district level, elected representatives and community leaders. The DDC is responsible for producing and coordinating implementation of the District Development Plan. A planning unit, headed by an economist (District Development Officer) is the technical arm of the DDC.

By and large, this initiative is considered a failure. Its failure has been attributed to "(i) its lack of basis in an Act of Parliament; (ii) its reliance on an institutional framework that did not facilitate meaningful local decision making and mobilization of resources; (iii) lack of adequate capacity in participatory planning among civil servants; (iv) financial allocations by ministries headquarters which, though insufficient, justified continued control of their field units; (v) dominance of the strategy by civil servants, especially staff of the provincial administration; and lack of people's awareness of and participation in planning and implementation of the strategy"[2]

Its failure notwithstanding, the district based structures and processes are still in place; the DDC still meets, and district development plans are produced with regularity. However, the proliferation of districts has led to resources, particularly human resources, being spread very thinly. For instance, many of the new districts do not have planning officers, or even some critical sector functions, notably engineers.

Devolved Funds

Devolved Funds are ring fenced monies for which decision making has been delegated to local entities, committees of one type or another, that have community participation or control. There are at present seven operational funds, all created since 1993 (including the LATF discussed above). An eighth one, the Health Sector Services Fund (HSSF) has been established but is not yet operational (see table 2).

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[2] Chitere, P.O and O.N. Ireri "District Focus for Rural Development in Kenya: Its Limitations as a Decentralisation and Participatory Planning Strategy and Prospects for the Future" Institute of Policy Analysis and Research Discussion Paper No. , 2004

Table 2 - Devolved Funds in Kenya

	Legal Framework*	Financing	Decentralized to	Accountability
Bursary Fund (1993)	No	Budget	Constituency Committees,	Upward (Central Govt.)
Rural Electrification Fund (1998)	No	Electricity Levy + Budget		
Road Fund (1993)	Yes	Fuel Levy	Constituency CDF Committee (Community Leaders, appointed by MP)	Upward (Central Government)
LATF (1999)	Yes	5% of Income Tax	Local Authorities	Upward (Central Government and downward (electorate)
HIV/AIDS (1999)	No	Budget/Donors	HIV/AIDs committee (Govt +Community Leaders, appointed by Govt.	Upward (Central Govt)
Free Primary Education (2003)	No	Budget/Donors	Schools (School Committees/PTAs, appointed by Govt)	Central Govt.
CDF (2004)	Yes	2.5% of Tax	CDF Committee	Upward (Parliament) Downward (electorate)
Health Sector Services Fund (HSSF)	No	Budget	District Health Management Committee (Govt.+ comm.. leaders, appointed by Govt)	Upward (Ministry of Health).)

** i.e. whether the fund is established by a law*
Source: Authors compilation

These funds now constitute very significant fiscal decentralization. In the last financial year (FY 2009/10), Ksh. 38 billion was budgeted to go through the CDF system alone, 30 percent more than local authorities' expenditure for the previous year (Ksh. 29 billion). The LATF and CDF are the only truly devolved funds i.e. the only funds that entail transfer of political authority. All the other funds are deconcentrated. The CDF is distributed according to a formula that is allocated as: 75 percent divided equally between the 210 constituencies, and the remaining 25 percent weighted by each constituency's contribution to national poverty. This skews the distribution in favor of sparsely populated constituencies.

Government Structure and Functions

County Governments

The Constitution creates two levels of political authority: national and county. The two are to be "distinct and interdependent", engaging on the basis of consultation and cooperation. This means that county governments are not subordinate to the national government; they are equal partners before the Constitution.

It is worth noting that, as characteristic of devolution in Africa, the impetus is political as opposed to economic or development objectives. Of the 9 stated objectives of devolution (Article 174 (a)-(i)), only two (f) promote social and economic development and service delivery and (g) equitable resource distribution, are economic. The other seven revolve around strengthening democracy, including reducing and checking the power of the national government.

The structure of the county governments mirrors the new structure of national government, that is, autonomous executive and legislative arms. The executive will consist of a Governor, elected directly by voters in the county, a Deputy Governor, who will have been the Governor's running mate, and no more than 10 county executive members, appointed by the Governor. Members of the county legislature will be elected by voters at ward level (the ward is the electoral unit for local authorities). This means that the size of legislatures will vary depending on the number of wards in a county (See Table 3). The county boundaries themselves are not new. They correspond to the 47 administrative districts that existed in 1992 (see Annex 2), last time that the creation of new districts was legally gazetted as required by law—all districts created subsequently have not been gazetted.

Table 3 – Structure of Government in Old and New Constitution

<table>
<tr><th colspan="5">Structure of Government in Old and New Constitution</th></tr>
<tr><th colspan="3">Old Constitution</th><th colspan="2">New Constitution</th></tr>
<tr><td>Executive</td><td colspan="2">Legislature</td><td>Executive</td><td>Legislature</td></tr>
<tr><td colspan="2">President, Ministers, Ass. Ministers</td><td>National Assembly</td><td>President, Cabinet Secretaries</td><td>National Assembly and Senate</td></tr>
<tr><td>Provincial Administration headed by Provincial Commissioner (PC). Key function is coordination</td><td colspan="2"></td><td colspan="2"></td></tr>
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Old (Pre 1992) districts (46 + Nairobi)		*Old county councils*	County Executive headed by Governor	County. Elects Governor, Senate and Women MPs	County Assembly
District Development Committee (DDC)				Constituency. Elects National Assembly	County Council
District Administration headed by District Commissioner. Decentralizatio n unit	Constituency. Elects Parliament	County Council.			
Division Administration headed by District Officer (DO)					
Location admin headed by Chief					
Sub-Location admin headed by Asst. Chief,		Ward. Elects County Council		Ward. Elects County Assembly and County Council	

Source

Devolved Functions

The Constitution grants the national government exclusive mandate for security, foreign affairs and water. All other functions are affected by devolution to a greater or lesser degree (see Table 4). The Constitution grants the mandate for environment to the national government, but requires the county governments to implement environmental policy —and is the only function that the national government has authority over the county governments. For all other devolved functions, the national government retains the mandate for policy, regulation and some national infrastructure and strategic facilities, and the county governments are responsible for service delivery in their jurisdictions.

Table 4 - National and County Government Functions

Function	**National**	**County**
Security	Exclusive	
Foreign Affairs	Excusive	
Environment	Policy, protection	Implementation of national government policies
Economic Management/Planning	National policy, planning, monetary policy, financial regulation	County planning, statistics
Commerce	Regulation, incl. labour standards, consumer protection,	Trade development and regulation, incl. business

	intellectual property rights	licenses, markets, fair trade practices, cooperatives,
Land	Policy, county planning coordination	Land survey and mapping
Water and Sanitation	International waters, water resources management	Service delivery
Infrastructure/energy	Policy, national infrastructure, national standards	County roads, transport, energy infrastructure/regulation
Transport/communi-cations	National policy, telecommunications, railway, civil aviation, broadcasting	County public transport
Education	Policy, tertiary, secondary and primary education	Vocational, pre-school education
Health	Policy, national referral hospitals, regulation of professions	County medical services, public health, primary health promotion
Agriculture & Livestock	Policy	Agricultural and veterinary services, plant and animal disease control
Tourism	Policy and development	Local tourism
Housing	Housing policy	Housing provision
Culture and Sports	National museums and monuments, sports promotion, sports education	County cultural, recreational and sports amenities
Source: Constitution of Kenya (2010)		

Health

The counties will take over public health facilities, with the exception of national referral hospitals, as well as primary responsibility for public health and promotion of primary health care. Currently, there are two national referral hospitals, Kenyatta National Hospital and Moi Teaching and Referral Hospital in Eldoret.

There are two immediate implications on the central government. First, the centralized procurement of medical supplies through the Kenya Medical Supplies Agency (KEMSA) becomes untenable. Since the county funds will be transferred as a block to the county Governments, KEMSA will have to contract with the County Governments. However, reforms are underway to move from a supply to a demand driven system. Devolution now makes this imperative. This applies also to the recently established Health Services Support Fund (HSSF), whose purpose is to disburse O& M funds directly to health facilities (as opposed to the current system where the funds go through the ministry). Again, the fiscal ‘Chinese Wall’ between national and county governments means that there is no scope for the HSSF, a national government institution, to finance county

government institutions – unless of course the national government chooses to make these additional grants from its own share of revenue and/or external loans/grants.
The second issue is ownership of provincial hospitals. In theory provincial hospitals are supposed to be referral hospitals for entire provinces. In practice, the referral system does not work, and the provincial hospitals are really district hospitals located in provincial headquarters. [3] In fact, the districts that host provincial hospitals do not have separate district hospitals. However, the fact that they are designated as provincial hospitals is bound to raise the issue as to where they will belong. While most of them could be downgraded to county hospitals without much objection, there are two major ones—Coast General and Nyanza General—where it may be more appropriate to upgrade to national referral hospitals. This may necessitate (a) compensation of the host counties with replacement county hospitals and (b) establishment of national referral hospitals to serve areas that would be far from the existing ones (upper Eastern, North Western, and North Eastern).

Agriculture and Animal Health

The services provided at the county level are primarily extension services. It follows that the trend has been to have closer integration of research and extension. The devolution of extension of services will require a review of this strategy. Rather than change the Ministry of Agriculture will have to develop very strong working relations with the county governments.

The devolution of plant and animal disease control is problematic as it risks creating an important gap in disease surveillance and control (e.g. quarantines that require national enforcement). The appropriate division of responsibilities would be along the lines of the environment function i.e. to grant the national government mandate for policy and regulation, and the county governments the obligation to enforce.

Cooperatives

The cooperatives sector in Kenya is peculiar. It is the only function that is fully devolved without providing for national policy or regulatory function. This suggests that under the new Constitution, the ministry of cooperatives becomes redundant. This is likely to be problematic because there are many national cooperatives, in particular financial cooperatives (SACCOS) but also agricultural ones such as the Kenya Cooperative Creameries (KCC).

[3] Making the referral system work has been a recurring theme in health reform for many years. Because hospitals cannot turn away patients, patients go to referral hospitals, (which are in large towns end up serving the urban residents), or they go straight to facilities higher up the system if they feel that their ailment is serious.

Secondly, cooperatives are presently registered under national legislation. This might imply cooperatives having to register afresh under county legislation (the Constitution does have an "interstate commerce" clause that could be used to override this).

Water and Sanitation

The Constitution retains the existing structure of water services. The national government retains the mandate for resource management (Water Service Boards), while the county governments are assigned local reticulation and service delivery, which are presently services provided by water and sanitation companies owned by the local authorities.

Housing

Housing provision in Kenya is primarily an urban issue. It is therefore best suited for the urban governments. The Constitution anticipates the strengthening of urban governments. It affects the mandate of the National Housing Corporation (NHC) as well as the role of the national government's involvement in housing provision, slum upgrading for instance. However, how the NHC's mandate will pan out will depend on the legal relationship that will be created by the anticipated urban governance legislation between the county governments and urban governments. The relationship should not be problematic if the urban authorities are subsidiary to county governments. If however, they remain under the national government as is presently under the Local Government Act, it will be problematic—as the housing provision function will fall under county governments will have a function for which they will not have a constituency

Education

The national government retains primary, secondary and tertiary education, while the county governments will be responsible for pre-primary and vocational education. Although not devolved, the demise of the province tier affects the secondary school structure, as it has three tiers, national, provincial and district schools. The abolition of the province immediately raises the question of what happens to provincial schools. There are two readily apparent options. One is to elevate them to national schools. The other is to downgrade them to county schools. Elevation to national school is likely to meet resistance from the province i.e. catchments that have more orbetter provincial schools. Downgrading them to county schools will generate the opposite reaction from the counties within the province that will be locked out of good schools that they presently have access to.   That said, public schools in Kenya enjoy a high degree of administrative autonomy, which already makes education on of the most decentralized public services in Kenya.

Aligning Government with Devolution

Central Government

The Constitution requires the national government to restructure the provincial administration "to accord with and respect" the devolution, within five years of the Constitution coming into force (August 2015) i.e. within three years after the election of the first county governments. While the provincial administration is the most directly affected, virtually all ministries organizational structures have the same structure.

The provincial administration has six tiers, with the Province at the top, and a sub-location at the bottom. One, the sub-province is a very recent addition that is yet to take root—most Kenyans are not aware of its existence. The County comes between the sub-province and the district.

Readily apparent is that the two levels above the county, the Province and the Sub-province are out of place in the new Constitution. Indeed, shortly after the approval of the Constitution, the government announced that it has embarked on this process, suggesting that this may be completed sooner than the deadline. Early indications (from media reports) point to the government retaining the structure as it is save for these two levels, which are to be "downgraded" to county commissioners. This will entail creation of an additional 21 positions.

The two lowest tiers, namely the location and sub-location are unlikely to be significantly affected. The districts and divisions are likely to be the most problematic. The proliferation of districts is driven in part, by pressure to bring administrative services closer to the people. Although the Constitution does not explicitly make districts unconstitutional, the government will have to review whether maintaining district and divisional headquarters within counties are necessary. One option that could meet the service decentralization objectives while reducing the layers would be to decentralize the essential administrative services even further down to the location.

Local Government

The Constitution requires legislation on governance of urban areas and cities to be enacted within one year (see Annex 1). The time frame indicates that the Constitution envisages a new urban governance system to be in place in time for the 2012 elections. Although the Constitution gives no direction, it is reasonable to presume that the intention is to align the 2012 elections with devolution.

One of the critical issues that this legislation will have to resolve is overlapping mandates of county and local governments- the Constitution assigns to the county governments' functions and revenue sources that presently belong to local authorities. Nairobi is the most extreme case, the jurisdiction and mandate of the County Government are identical to those of the City Council of Nairobi.

Although the Constitution does not explicitly provide for changes affecting the county councils (i.e. the rural LAs), this is with a proviso "subject to any legislation that may be made" This is inevitable in the light of the overlapping mandates. The fact that members of county legislatures will be elected ward level as are county council members means will elect two representatives to different assemblies that will have overlapping functions. Given that the county is Constitutional, and the county councils are established by ordinary legislation, the most probable direction of the change is in favor of the counties.

This then begs the question, if the functions and revenue belong to the county governments what then will be the role of county councils. There are two readily apparent options:

One is to abolish them. This is an attractive option from an economic and financial standpoint as their institutional infrastructure, staff and assets could be inherited by the county governments thus saving on the costs of the county governments starting new establishments. Politically, it is probably likely to be the most difficult –few institutions are willingly abolished.

Secondly, the county councils could become second tier county governments, and become the vehicles for county governments to implement their Constitutional mandate that every county government "decentralize its functions and provisions of its services to the extent that it efficient and practicable to do so" (Article 176(2)) The county governments would have to decide whether to delegate both revenue and service delivery functions that the county councils perform already, or whether it would make more sense to centralize revenue collection. The merits of either could vary from county to county depending on the character of intra-county disparities.

This option could also be attractive to the national government. If the county councils were subsumed by county governments, it could make a case for abolishing the LATF thus clawing back some of the fiscal space it is losing in the Constitution.

Since quite evidently, devolution will affect all LAs, not just urban ones, it makes sense to expand the scope of the envisaged legislation to cover all local governments. A readily apparent way to go about this is to overhaul the existing Local Government Act.

Public Financial Management

Intergovernmental Transfers

The county governments will have limited revenue raising powers—taxation will remain by and large centralized and uniform throughout the country, under the control of the national governments. However, the Constitution provides for counties to introduce taxes, but only through national legislation, that is, it has to be approved at the national level. It also includes an "interstate commerce" clause i.e. precludes taxes that might constitute trade barriers within the country. The counties are granted the revenue base that currently belongs to local authorities—this raises problems to be discussed shortly.

The largest source of counties revenue is a share of national revenue.The Constitution entitles the counties to a minimum of 15 percent of national revenue which is unconditional. The division of national revenue between the national and county governments will be framed by legislation. The Constitution creates an independent body, the Commission of Revenue Allocation to advice the legislature on the allocation. This gives the counties a high degree of financial independence. It does however provide for additional grants by the national government, which may be conditional or unconditional.

Policy and Planning

National Government

One of the principle functions of the budget is as a policy instrument. Over the last decade, the government has made a lot of progress in linking budget to policy through the Medium Term Expenditure Framework (MTEF) process. The MTEF is based on sectoral allocations. The assignment of some functions to county governments will severe this direct link between national policy and budget for the devolved functions i.e. the national government may adopt a policy to increase investment in health but it will not be able to directly increase public resources going into health services.

The impact of severing this linkage may not be as detrimental as it may first appear. For one, the counties could make better resource allocations than the national government. Resource allocation priorities of the counties are likely to be by and large aligned to the national government's priorities, particularly with regards to poverty reducing expenditures. Moreover, there is more scope for public participation which experience shows leads to better informed resource allocations and stronger ownership.

Nonetheless, the national government has to devise methods of influencing the county governments' resource allocation decisions. The Constitution itself affords it two instruments. First, it provides for national legislation that will govern planning and budget consultations between the national and county governments. Second, it provides for the national government to make conditional grants to the county governments.

Another important implication on policy and planning is the national government's budget flexibility. The mandatory county share of national revenue, the Equalization Fund (0.5 percent) and the Judiciary Fund add to an already large portfolio of earmarked tax revenues (CDF, LATF, Road Fund etc).

County Governments

County Governments are likely to be starting out with considerable fiscal space. The Constitution does not give any allowance to reduce the 15 percent mandatory share, which means that this will have to be transferred from year one. This is a very significant amount relative to the current outlays for the devolved functions. Health and agriculture are the "big budget" items that are devolved. The other financially significant portfolio is roads, for which there is already significant devolved financing from the Road Fund as well as CDF and LATF. The total outlays for the two for the last three fiscal years amount to 70 percent of 15 percent share of tax revenues (see Table 5).

Table 5 - National Health and Education Relative to County Share of Revenue

	2007/8	2008/9	2009/10	Total
Tax Revenue	408,445	459,368	532,540	1,400,353
15 %t of Revenue	61,267	68,905	79,881	210,053
Health Expenditure	27,479	32,221	47,906	107,607
Agriculture Expenditure	16,793	11,862	11,145	39,800
As % of 15 % of Revenue				
Health	45	47	60	51
Agriculture	27	17	14	19
Both Agric & Health	72	64	74	70
Source: Economic Survey				

This does not leave much scope to devolve functions gradually. Even though the Constitution anticipates the gradual devolution in tandem with county's capacities, the fiscal imperative is to devolve enough functions to absorb the county share of revenue; otherwise the national government will find itself with the functions and not the money.[4] One way that the country could work around this is to have counties temporary delegate upwards to the national government. Although it does not explicitly anticipate it, the

[4] The reason for this is that the 15 percent was a late inclusion, introduced by the Parliamentary Committee in the in final review of the COEs draft.

Constitution does provide for transfer of functions between national and a county government by mutual agreement (Article 187 (1)). Such an arrangement would entail all the functions being legally transferred, and then county governments "outsourcing" some of them back to the national government and taking them over gradually as they develop the capacity.

Devolved Funds

There will be need to review the role of the devolved funds *vis –a- vis* the assignment of functions between national and county governments. The implications are dependent on the nature of the fund.. The Bursary Fund may not be much affected—since it is a direct transfer to households, and therefore it is outside the scope of the functional division. Free Primary Education (i.e. direct transfers to schools) is also not affected, since primary education is assigned to the national government. The mandates of the funds spans both national and county government functions.

Budget Process

The Constitution sets up a totally new budget process. It begins with tabling before Parliament of a Division of Revenue Bill, proposing how revenue is to be allocated between the national and county governments (vertical allocation, and a County Allocation of Revenue Bill, proposing distribution of county share of national revenue between counties). Once these bills are passed, the national government and each county will proceed to prepare their budgets for approval by the national and county assemblies respectively. As noted already, within the national government, it also implicitly prescribes another horizontal allocation between the three arms, by providing for the Judiciary to submit its budget proposals separately to the National Assembly (Parliament already prepares its own budget.

The approval process of the national government's budget is not affected. In terms of content however, it does complicate matters with regard to the Finance Bill. If the Cabinet Secretary was to table revenue enhancing measures in the national government's budget, the county governments could accuse him or her of being disingenuous i.e. understating revenue prior to division.

Budget Execution

With regard to budget execution, disbursement is the area likely to be most challenging. The Constitution obliges Treasury to disburse money to the counties "promptly". This is a potential source of conflict between the Treasury and the county governments, as exchequer releases is presently one of the most problematic (and opaque) areas of public finance management in Kenya.[5] It would be advisable that a clear and transparent policy be developed on disbursement to counties, as well as the Judiciary Fund well in advance of implementation.

Financial control

The Constitution introduces an innovation in the area of financial control, namely the Controller of the Budget. Although, as noted earlier, this function is not new, an effective Controller can have a huge impact on financial accountability. Conversely an ineffective one can become a major bottleneck since the Constitution requires the controller's approval of every withdrawal from all the public funds. A well resourced, proactive, effective Controller of the Budget could be the most valuable investment that the country makes for a long time.

The Constitution does not specify or give guidance on the content of the Controller's reports to Parliament nor provide for statute to do so. The recently enacted Fiscal Management Act (2009) places similar obligation on Treasury, and specifies the content and format of the reports. This could be the appropriate legislation to amend to specify the content and format of the reports. At any rate, it seems necessary to harmonize the two so that they not duplicate each other. It may be worth considering removing this compliance burden from the Treasury, since the Controller's reports will be independent.

The Constitution requires financial control covering both national and county governments to be enacted within 18 months of its coming into force. A key institutional design issue that will arise for the counties is whether to centralize or decentralize internal financial control. Financial control is presently decentralized through delegated authority known as authority to incur expenditure (AIE). The AIE holder is a person to whom the power to incur expenditure is delegated by the Accounting Officer (Permanent Secretary), who is in turn accountable to Parliament for a Vote. Local Authorities on the other hand have only one accounting officer, the Town/County Clerk. A central government model would mean each of the counties departments (ministries) would have accounting officer accountable to the county assembly, while in the local government model, one person, most likely the chief administrator of the county would be accountable to the county.

[5] The standard response from Treasury to delayed releases is that funds will be released when money becomes available—there seems to be no policy, e.g. how releases are prioritized if there is a cash-flow constraint, certainly not one that is in the public domain.

Implementation Issues

Legislation

Schedule 5 sets out the legislative agenda for implementing the new Constitution (see Annex 1). On the public finance, the Schedule lists 6 items as follows;

- Revenue Funds for county governments (Article 207) within 18 months
- Contingencies Fund (Article 208) within one year
- Loan guarantees by national government (Article 213) within one year
- Financial control (Article 225) within 2 years
- Accounts and audit of public entities (Article 226) within 4 years
- Procurement of public goods and services (Article 227) within 4 years

This list is incomplete. A critical piece of legislation missing is the legal framework for the structure of county government's plans and budgets, as well as the modes of consultation on the same between the national and county governments. The Equalization Fund may also require a legal framework even though the Constitution does not prescribe one—perhaps because the Fund was a last minute inclusion by the Parliamentary Select Committee.

It is safer to assume however, that the devolution will affect all the current financial management laws in one way or other, in which case it is worth considering rather than a piecemeal approach, drafting different pieces of legislation and amendments to existing ones as necessity becomes evident. It is also worth considering whether it would be more efficient to enact an organic budget law i.e. an omnibus law covering all aspects of public financial management based on the new Constitution. In fact, the organization of the public finance chapter in the Constitution lends itself to such a law.[6]

Institutions

Controller of Budget

Setting up the Controller of the Budget is relatively easy institution to establish since it is an existing function. Indeed the Constitution mandates the Auditor General to execute its mandate in the interim. The Controller is required to report to Parliament three times a year, and this is effective on adoption, a first report on budget implementation as early as February 2011. While start up might be relatively easy, the Controller's office will need to build capacity very rapidly—it will need to have the capability to a presence in all the 47 counties by the time the county governments are established with the capability to supervise their financial management and fulfill the reporting requirements to the Senate.

[6] Treasury had embarked on developing an organic budget law a few years ago. However, coming hot on the heels of Parliament's initiative (the Fiscal Management Act), it was opposed by Parliament which read mischief (i.e. a tactic to persuade it to withdraw the fiscal management bill following which the government would withdraw its bill, as had happened with other private members bill that the government was opposed to).

The Revenue Allocation and Salaries Commissions

The mandate of the Commission for Revenue Allocation is a totally new. Since it is unlikely that the initial county share of revenue will exceed the 15 percent, the Commission's most immediate task is to establish criteria for distribution between counties. This is critical because the distribution will be for an initial three year cycle (5 year cycles after the first two).

The Salaries and Renumeration Commission is mandated to set the terms of state officers. This includes the members of the other commissions to be established as well as the Controller of the Budget. This would seem to imply that it should precede the other commissions, since it is now un constitutional for anybody else to determine their terms of service.

County Governments

The inaugural county governments will be elected in August 2012. This will be two months into the 2012/13 annual budget. Realistically, the implementation of the financial provision for the counties will have to be in the following year's budget i.e. FY 2013/14. This gives a window of almost a year when county governments are elected but without a budget, to establish some institutional structures and build some capacity for the counties. The Commission for Revenue Allocation will need to have done all the background work to inform the decisions on functions to be transferred and the distribution of revenue.

Planning and Financial management are the most critical new capabilities that the county governments will require. The service delivery of the critical services to be devolved functions will be simply a transfer of ownership of functions that are already on the ground. The Constitution gives the national government the responsibility of building county government's capacity- in effect, this responsibility falls on Treasury and the Ministry of Planning.

Information and Data Requirements

The key information and information and data needs are revenue division, distribution between counties, and county governments' planning and budgeting.

Because, as observed earlier, the 15 percent minimum requirement is very significant relative to devolved functions, the criteria specified in the Constitution are not likely to come into effect early on.

The information and data requirements of distribution between counties will be considerable—this is the heart of devolution, and is likely to be a highly political and public affair, hence it is very important that is objectively informed.

County governments are fortunate they will be starting out with considerable planning and budgeting capability in the districts, a legacy of the District Focus. Many CDF committees have developed strategic plans, most of them participatory. Local authorities are required by the LATF law to engage in public budgeting process (LASDAP). These will provide considerable information for the county governments. That said, all this information data needs to be compiled and synthesized, and made available in a format that will facilitate decision making.

In terms of socioeconomic data there also exists a wealth of household level data that can provide county level socioeconomic indicators. These include:

- Population and Housing Census 2009 The census which has just been released provides comprehensive demographic and socioeconomic data. The published reports include analysis by County

- National demographic and health survey 2008/9. This survey provides detailed information on health status and fertility behavior. DHS surveys are one of the more regularly conducted surveys (1989, 1993, 1998, 2003, 2009), which should provide a good time series on health, as well as other socio-economic indicators.

- Integrated Household Budget Survey (2005/6). This Survey is the source of the socioeconomic welfare statistics currently being used in the country. The survey data was used to generate constituency level poverty profiles that provide insights into intra-county disparities.

The available data are likely to be more than sufficient for resource allocation purposes (i.e. expenditure).

The Constitution also requires the fiscal capacity of the counties to be one of the criteria for determining revenue allocation, and also to ensure that counties have the incentive to maximize revenue collection. This requires the Commission on Revenue Allocation will need to economic data that can be used to assess the counties fiscal capacity. There are presently no reliable data of this nature.

Annex 1: Timeline for fiscal decentralization

Milestone	Deadline
Establishment of Commission for the Implementation of the Constitution established	90 days (Nov 25, 2010)
Establishment of Commission for Revenue Allocation	90 days (Nov 25, 2020)
Legislation on the governance of urban areas and cities enacted by Parliament	1 year (August 2011)
Legislation on loan guarantees by national government enacted by Parliament	1 year (August 2011)
Legislation on the Provisions for Devolution enacted by Parliament	18 months (February 2012)
Legislation on revenue funds for county governments enacted by Parliament	18 months (February 2012)
Legislation on financial control, including functions of Treasury, enacted by Parliament	2 years (August 2011)
Elections, including of county governments and assemblies	August 2012
Installation of county governments, beginning of devolution	2013
Legislation on accounts and auditing enacted by Parliament	4 years (August 2014)
Legislation on norms and standards for the staffing of county governments enacted by Parliament	5 years (August 2015)

Annex 2: Schedule of Counties and Population

County	Pop	County	Pop
Nairobi	3,138,369	Nandi	752,965
Kakamega	1,660,934	Bomet	724,186
Bungoma	1,630,934	Nyeri	693,558
Kiambu	1,623,282	Kajiado	687,312
Nakuru	1,603,325	Wajir	661,941
Meru	1,356,301	Kwale	649,931
Kisii	1,152,282	Garissa	623,060
Kilifi	1,109,735	Nyamira	598,252
Machakos	1,098,584	Nyandarwa	596,268
Migori	1,028,579	Baringo	555,561
Mandera	1,025,756	Vihiga	554,622
Kitui	1,012,709	Kirinyaga	528,054
Kisumu	968,909	Embu	516,212
Homa Bay	963,794	West Pokot	512,690
Muranga	942,581	Busia	488,075
Mombasa	939,370	Laikipia	399,227
Uasin Gishu	894,179	Elgeyo Marakwet	369,998
Makueni	884,527	Tharaka Nithi	365,330
Turkana	855,399	Marsabit	291,166
Narok	850,920	Taita Taveta	284,657
Siaya	842,304	Tana River	240,075
Trans-Nzoia	818,757	Samburu	223,947
Kericho	758,339	Isiolo	143,294
		Lamu	101,539