Separation of powers in Kenya’s devolved administrative system: Opportunities and challenges

Margaret Kobia and Obuya Bagaka

Introduction

The last general election of Kenya was held on 4 March 2013. The new government’s main agenda is to implement the Constitution of Kenya 2010, which introduced two levels of government – national and county. The constitution has brought in major administrative reforms in public service and governance. Managing human resource function during the times of transition to a devolved system of government adds both opportunities and challenges to service delivery. The underlying objective of this article is to shed some light on the progress made so far in the implementation of devolution, with specific focus on the executive organs of the three branches of the national government and the administration of the county governments in Kenya, together with the attendant challenges.

Constitutional context

In August 2010, Kenyans promulgated a new constitution which, among other things, devolved political, fiscal and administrative powers from the national government to 47 counties. Unlike other countries where the devolution process of the three powers has been sequentially attained, in Kenya the experience has been a ‘big bang’ where the three types of decentralisation were achieved at once with the ratification of the constitution. While most literature on administrative devolution focuses on the transfer of power and resources vertically, from one level of government to another, this article focuses on the transfer of power horizontally within the three branches of government at the national level and the two branches of government at the county level.

The Constitution of Kenya 2010 divides the territory of Kenya into two governments made up of 47 counties, commonly referred to as the national and county governments. In the spirit of the constitution, the two governments are perceived to be equal and no level of government has supervisory powers over another. In fact, the constitution stipulates that both levels of government are ‘distinct and interdependent and shall conduct their mutual relations on the basis of consultation and co-operation’. Further, the constitution requires ‘each level of government to perform its functions and powers in a manner that respects the functional and institutional integrity of the government at the other level’. Kenya’s historical experiences informed the inclusion of these constitutional clauses specifically to protect counties from having their powers usurped by the national government, as previously happened under the old constitutional order.

Other than the judicial arm of government, both the national and county governments exercise both executive and legislative powers. At the national level the legislature is bicameral, composed of an elected National Assembly and Senate. In contrast, an elected legislature at the county level is unicameral. Both legislatures perform three functions: legislation, oversight and representation.

To promote the system of checks and balances in each arm of the government there exists an executive entity, which is in charge of welfare and human resource management functions. The legislature of the national and county governments has the Parliamentary Service Commission (PSC) and the County Assembly Service Board (CASB), respectively. The executive at the national level has the Public Service Commission of Kenya (PSC), whereas its counterpart at the county level is the County Public Service Board (CPSB). These bodies are charged with the function of creating and abolishing offices, and staffing and disciplinary control of the public service at each level of government. Under the old constitution, key staff of the local governments were also employees of the central government and often advanced its ideals as opposed to local welfare needs.

The judiciary too has the Judicial Service Commission (JSC), which manages the welfare and human resource function of judicial staff. Under the old system, the executive enjoyed monopoly powers over the appointment and promotion of judges and senior staff of the judiciary, thus blurring the separation of powers boundary, whereas the chairperson and majority members of the CASB, PSC and JSC come from within the elected representatives and judicial officers, respectively. The chairperson and members of PSC-K are independently and competitively recruited, appointed by the President subject to approval by the National Assembly. In the PSC and CASB the speakers are the chairpersons, while in the JSC the chief justice is the chairperson. This deliberate effort to have the speakers and
the chief justice serve as chairpersons was meant to limit the influence of the executive and further preserve the principle of separation of powers.

Going by the experience under the old constitution, where the executive muzzled and controlled both the legislature and the judiciary through the budgetary process, the creation of the PSC, CASB and JSC was meant to give both the legislature and the judiciary some control over budget, human resource management and their agenda.4

Earlier successes

The performance of these three executive organs in the three arms of government, one at the national level and two at the county level, has so far been above board. For instance, the PSC, in respect to the constitutional provisions, independently and successfully recruited and recommended to the President the appointment* of 22 principal secretaries out of a compiled list of 66 that were interviewed. This was a great departure from the old dispensation where the President had the exclusive right to appoint whomever he considered suitable to serve as principal secretaries.

The JSC is on record for exercising its disciplinary control powers, leading to the removal from office of the deputy chief justice over allegations of misconduct in public, in line with its constitutional powers.10 An example of operational independence is the recent decision by the JSC to refuse to honour parliamentary summons to appear before the House Committee on Justice and Legal Affairs over the JSC decision to suspend its chief registrar over allegations of abuse of office.11

Following nationwide protests over MPs’ demands for a salary increment, the PSC successfully negotiated conditions and terms of service with the Salaries and Remuneration Commission – a body that is constitutionally mandated to set salaries and benefits for state and public officers. Despite their infancy status, these key executive organs within the three arms of national government have performed fairly well in ensuring that the principle of separation of powers is upheld.

The administrative architecture of the county government

The key principles and objectives of devolution under the 2010 constitution include the promotion and accountable exercise of power; self-governance by the people; equitable share of resources; and the decentralisation of state organs, functions and services from the capital of Kenya, among others.12 Beyond these objects, the constitution specifies that the county government will consist of the county assembly and the county executive. Further, the constitution requires the county government to decentralise its functions and the provision of services to the extent that it is efficient and practicable to do so.13

To put these provisions into practice and create a county administrative structure, parliament passed the Urban Areas and Cities Act 2011, which specifies how cities and urban areas are managed, and the County Governments Act 2012, which outlines the structure of the administrative system in rural areas. At the apex of the county executive arm is the county cabinet known as the County Executive Committee (CEC), made up of no more than ten members. Each member of the CEC is in charge of a county department (ministry). Each county government has a County Public Service Board (CPSB) composed of seven members who are recruited and appointed by the governor subject to county assembly approval.

Like the PSC at the national level, the CPSB is charged with the responsibility of creating and abolishing offices within the county government, staffing and disciplinary control. The CPSB competitively recruits chief officers (equivalent to principal secretaries at the national level) who serve as the authorised officers in each department.14 A salient point to note is the system of checks and balances employed at the national level of vetting appointed officials by the National Assembly, which is also replicated at the county level by the county assembly. The vetting process is meant to ensure that the appointees reflect the diversity of Kenyan communities and the promotion of fairness and merit so that the executive does not use his/her appointing powers to entrench ethnicity and nepotism in the public service, as was the case under the old regime.

The administrative units below the County Executive Committee (CEC)

Below the CEC, the county administrative units are divided into urban areas and cities on the one hand and rural areas on the other hand, with both ends having three-tier administrative units of government as depicted in Figure 1.

In terms of structure, the county administration, especially in rural areas and townships, is highly hierarchical and centralised as depicted by the reporting line from the village administrator to the respective chief officer. The underlying objective of this structure is to promote efficiency in decision-making and, importantly, political accountability. In line with Denhardt and Denhardt (2003) under the old traditional public administration, accountability in the rural areas and cities ensures that administrators adhere to the standards, rules and procedures established by law.15 It is envisaged that key personnel, to ensure compliance with the law, will do checks and balances through hierarchical supervision, performance evaluation systems and oversight. From a decentralisation point of view, the rural and township administrative structure fosters a deconcentrated form of decentralisation.

The administrative structure in cities and municipalities embraces the new public management model. Cities and municipalities will be corporate bodies with both delegated executive and legislative powers. Although cities and
municipalities will have ‘professional’ managers competitively recruited by the CPSB, they will be answerable to a board of 11 and nine, respectively, and will be required to implement the board’s decisions. The system of checks and balances is promoted under this structure through the recruitment process of board members. Whereas the CEC, chaired by the governor, will competitively recruit and appoint board members, the county assembly has powers to vet and approve all appointees before they take office. This means that the powers of a governor to influence recruitment and appointment of board members is curtailed or limited.

Successes and challenges so far

At the county level, most administrative organs such as the CEC, CPSB, CASB, sub-counties, wards and villages have been created. A number of counties have already hired or are in the process of hiring key personnel to staff the county government administrative units. Despite this progress, a few challenges are emerging that are slowing the transition process.

First, the system of checks and balances, especially through the vetting process of governor’s appointees, while promoting democracy has slowed down the policy implementation process. For instance, some counties – like Nakuru, Kiambu, Nairobi and Laikipia – are yet to properly constitute the CEC because their county assemblies refused to approve the governors’ nominees for various reasons, including the ethnic origin of some nominees. The CEC is a key policy making organ in the county government and any delay in approving these nominees adversely affects county policy processes.

![Three-tier administrative units of county governments in Kenya](image-url)

**Figure 1: Three-tier administrative units of county governments in Kenya**

**Urban sub-county units**

**LEVEL 1: City**
- Population at least 500,000
- Governed by a board of 11 part-time members on behalf of county government – not paid but given allowances
- Board a corporate body – appointed by governor subject to CA approval
- Daily operations run by a manager hired by the CPSB – but answerable to the board

**LEVEL 2: Municipality**
- Population at least 250,000
- Governed by a board of nine members – not paid
- Board a corporate body – appointed by governor subject to CA approval – members are part-timers
- Daily operations run by a manager hired by the CPSB – but answerable to the board

**LEVEL 3: Town**
- Population of at least 10,000
- Governed by a committee of nine appointed by governor upon approval by county assembly
- Not a corporate body
- Daily operations run by an administrator hired by the CPSB

**Rural sub-county units**

**LEVEL 1: Sub-county (Constituencies)**
- Run by an administrator competitively recruited by CPSB
- Answerable to relevant county chief officer
- Administrator facilitates citizen participation
- Exercises functions/powers delegated by the CPSB
- Manages, co-ordinates and supervises general administrative functions

**LEVEL 2: Ward**
- Run by an administrator recruited by the CPSB
- Co-ordinates, manages and supervises ward administrative functions
- In charge of service delivery at the ward level
- Answerable to sub-county administrator

**LEVEL 3: Village**
- Run by an administrator recruited by the CPSB
- Co-ordinates, manages and supervises villages administrative functions
- In charge of service delivery at the village level
- Answerable to relevant ward administrator

*Source: Adapted from: the County Governments Act 2012 and the Urban Areas and Cities Act 2011*
The devolution experiment in Kenya has brought with it some renewed energy in the management of public affairs. Powers that were originally centralised in one arm of the government have been dispersed to other levels of government and even within arms of the same government these powers have further been dispersed. This dispersal of powers has greatly enhanced the system of checks and balances, and promises to foster democracy in the management of public affairs. While administrative efficiency may not be achieved as fast as one may wish, the democratic values such as accountability, transparency, representation and diversity, among others, promoted through the new public service are worth the cost. In any case, leading and managing changes in public service should be expected and addressed as the two governments enhance service delivery and improve quality of life for the citizens. If devolution is conceived as a process of public sector reforms, then the tethering hiccups that are being experienced at the moment will define its future trajectory.

Second, as has been pointed out, the CPSB is responsible for county human resource and staffing issues. The coming into effect of the County Governments Act 2012 repealed the former Local Authorities Act. An ensuing headache for the CPSBs is what to do with former employees of local governments, most of who earn higher salaries than their qualifications guarantee. Besides, these employees are currently making demands that the county governments must recognise and honour the Collective Bargain Agreements (CBA) reached under the old regime and this has caused a stand-off in the city counties of Nairobi and Mombasa. The transition clauses did not automatically transfer the staff of the former local authorities to the new county governments, yet these employees assume that under the new dispensation they automatically became employees of the county governments. Both the national and county governments have an interest in the resolution of this matter. Where the latter rejects these employees, the former through the PSC-K is legally obliged to absorb them.

Third, as the national government continues to transfer more functions to county governments, some sectors and their employees are reluctant to be under county government control. The most affected sectors are education and health, notwithstanding the fact that the conditions and terms of service will remain the same. History and a sheer resistance to change have informed the key reasons for this reluctance. For a long time local units of government were run by people considered to be less knowledgeable and semi-literate, so the creation of county governments is seen in that light. Professionals such as doctors and teachers are therefore reluctant to be under the control of such officials.

Last, there appears to be reluctance by select national officials and bureaucracies to give up certain functions to the county governments. Key among these is the management of urban and rural roads and rural electrification projects. Whereas the national officials argue that there is limited capacity to handle these functions at the county level, the county leaders accuse the national officials of crafting a plot to deny them essential resources to develop their counties and further accuse them of greed.17

Conclusion

The devolution experiment in Kenya has brought with it some renewed energy in the management of public affairs. Powers that were originally centralised in one arm of the government have been dispersed to other levels of government and even within arms of the same government these powers have further been dispersed. This dispersal of powers has greatly enhanced the system of checks and balances, and promises to foster democracy in the management of public affairs. While administrative efficiency may not be achieved as fast as one may wish, the democratic values such as accountability, transparency,

References

3 Ibid.
6 See, Section 12 (1 -3[a]), County Government Act, 2012.

PROFESSOR MARGARET KOBIA is the chairperson of the Public Service Commission (PSC). She is an associate professor of management. Professor Kobia holds a PhD in human resource education from the University of Illinois, MEd from Kenyatta University and BEd from the University of Nairobi. She has taught management, entrepreneurship and research methods at university level. Her research interests include public sector reforms and performance management training. Professor Kobia is the editor of the African Journal of Public Administration and Management. Her Head of State commendations and awards include: Order of Grand Warrior (OGW), First Class Order of Chief Burning Spear (CBS) and Commonwealth Gordon Draper Leadership Award 2010. Before joining the Public Service Commission, she was director general of the Kenya School of Government.

DR OBUYA BAGAKA works as a senior principal lecturer at the Kenya School of Government (KSG). Dr Bagaka is the co-ordinator for the Master of Public Administration (MPA) programme at the Kenya School of Government. He obtained his PhD from Northern Illinois University (NIU) in the USA specialising in public administration and public policy. His main areas of interest are in public finance and budgeting, local government, programme evaluation and monitoring, public policy, and qualitative and quantitative research. Dr Bagaka’s publications have appeared in Administrative Theory and Praxis (2009), KESSA Journal (2010) and AAPAM Journal (2012 and 2013). He regularly comments in the Daily Nation on public policy matters. Dr Bagaka is a member of the Commonwealth Association of Public Administration and Management (CAPAM).
10 See, Article 172 (c), Constitution of Kenya, 2010.
14 See, Section 45 (2) and (4), County Governments Act, 2012.
16 See, Section 13 (1), the County Governments Act, 2012.