Fiscal relations in Kenya’s devolved system of governance

Obuya Bagaka

Intergovernmental fiscal relations often refer to the interactions between two or more levels of government over the assignment of taxing and spending powers. These interactions occur between, or among, actors representing agencies of different units or arms of government, and can oscillate from conflict to collaboration and even co-operation. This article examines the strategies employed by different actors, representing different levels of government, to control the allocation and spending decisions of devolved funds in Kenya. Based on content analysis of various pieces of government legislation, reports, face-to-face interviews, advisory opinions and newspaper excerpts, the findings indicate that conflictual fiscal relations in Kenya’s devolved system are often caused by competition over the control of devolved resources for reasons of projecting and protecting power among elected officials.

Context of intergovernmental relations in Kenya

The structure of fiscal relations is not only shaped by constitutional and legal designs as defined by temporal factors in a given county, but also by the individual interests of different actors representing different levels of government. When looked at from a rational choice perspective, it is the collectivity of these individual interests, especially for power and resources, that define the relations between the levels of government – and Kenya is no exception.

The foundation for intergovernmental fiscal relations in Kenya is clearly spelled out in the Constitution of Kenya 2010 (the constitution) and the Public Finance Management Act 2012 (which lays out the financial management framework for the National and County Treasuries). The constitution delegates sovereign power to the national government and all 47 county governments and places responsibility for exercise of this power on state organs of both levels of government (GoK, 2010: Article 1 (3)). In respect of intergovernmental relations, the constitution recognises the national and county governments as ‘distinct and inter-dependent’ and states that they ‘shall conduct their mutual relations on the basis of consultation and co-operation’ (GoK, 2010: Article 6 (1–2)). Further, the constitution requires ‘government at either level to respect the functional and institutional integrity of government
The County Government of Samburu is among the 47 counties established in the new constitutional dispensation.

The swearing in ceremony of the elected members on 22 March 2013 was presided by Justice Hatari of Milimani law court, the Senior Magistrate of Navaisha and Interim Clerk of the County Assembly, Mr Patrick Leshore.

The Hon. Speaker, Steve Lelegwe and Deputy Speaker was elected on a majority vote, sworn in and presided over by the same. On 27 July 2013, 11 more nominated members were sworn in by the Hon. Speaker.

There are a total of 26 members, including nine women, and the Speaker. The House has the Majority Leader, Minority Leader, Majority Whip, Minority Whip and the Speaker’s panel. The County Assembly has also restructured itself to have 10 sectorial committees and 10 house committees.

The Office of the Clerk has six other departments each headed by a Principal Officer. The Assembly has a total of 30 staff members.

Numerous restructuring were put in place by Samburu County Assembly Board (CASB), formation of sector and house committees, the Speaker’s panel, and the tender committee.

Like most county assemblies, we are striving to capacity build both the members of the County Assembly and staff through seminars and workshops, site visits and simulations.

May I sincerely thank the Centre for Parliamentary Studies and Training (CPST), State University of New York (SUNY) and other partners who have assisted us. I believe we shall set the pace for the other assemblies.”

**House Business**

**Approved Bills**
- Appropriation Act 2013
- Supplementary Appropriation Act 2013
- Finance Act 2013
- Appropriation (Amendment) Act 2013

**Pending Bills**
- Samburu County Agricultural Machinery Bill 2014
- Samburu County Flag and Other Symbols Bill 2014
- Rating Bill 2014
- Licensing Bill 2014
- Revenue Administration Bill
- Samburu County Bursary Bill

**Subsidiary Legislation**
- Public Finance Management - Samburu County Assembly Car Loan Scheme Fund, Regulation 2014
- Public Finance Management - Samburu County Assembly Mortgage Scheme Fund, Regulation 2014

http://samburucountyassembly.or.ke
at the other level and respect the constitutional status and institutions of government at the other level’ (GoK, 2010: Article 189 (1a)). These constitutional provisions not only grant enormous political power to county governments but also buffer them from attempts of power usurpation by the national government.

As can be seen in Figure 1, the provision for respect of functional and institutional integrity is at the centre of conflict and competition for control over spending decisions among actors from different levels of government. Other than the constitutional bodies (Salaries and Remuneration Commission, Commission for Revenue Allocation and the Controller of Budget) all the other actors in Figure 1 have, in the past, engaged in a conflict where they accuse one another of misusing public resources or attempting to usurp another actor’s powers. These actors have also accused one another of fiscal indiscipline. Fiscal indiscipline in an intergovernmental setting usually occurs when spending under a devolved system exceeds revenue raising responsibilities, thus putting a strain on local budgets.

Financially, the constitution allocates a block grant of no less than 15 per cent of the total annual national revenue to be shared equitably among the 47 county governments (GoK, 2010: Article 203 (2–3)). Going by Fiscal Year 2013/14, which recorded an adopted budget of KSh 1.45 trillion, counties received a total of KSh 224 billion (US$2.48 billion; CoB, 2014) – considerably less than 15 per cent. While this percentage is on average higher than in most African countries, this allocation is often contested by actors of the national and county governments, with the former putting it at more than 43 per cent of the constitutional limit and the latter putting it at less than 15 per cent.¹

Unfunded mandates

Fiscal relations between the two levels of government have recently been shaped by unfunded mandates from the national government to county governments. Unfunded mandates in this case arise out of functions that have been devolved to county governments but whose funds still remain with the national government. Figure 2 presents a summary of unfunded mandates in Kenya two years after devolution.

Whereas the constitution safeguards counties against unfunded mandates (GoK, 2010: Article 187 (2a)), the continued retention by the national government of more than KSh 102.6 billion (US$1.14 billion) meant for functions that have already been devolved has created mistrust between the Council of Governors and leaders of the national government. Independent actors in Kenya’s fiscal environment, such as the Commission for Revenue Allocation (CRA), have supported the call to have ‘money held by the central government in various sectors, such as health, agriculture, roads and transport, be devolved to counties’ (CRA, no date). In a country like Kenya, capital projects in roads, health, electricity, agriculture and water endear elected officials to voters; as such, being in charge of these projects enables different actors from different levels of government to protect, project and entrench their powers with the electorate. This is commonly referred to as ‘pork barrel’ in other settings.

The other constitutionally provided fund that is a source of conflict and competition between the national and county governments in Kenya is the national Equalisation Fund, which constitutes one half of all the total annual revenues based on the last audited accounts. The constitution allocates financial responsibility on the distribution and use of this fund to the national government to provide earmarked services such as water, roads, health facilities and electricity to marginalised areas. The criterion for identifying marginalised areas by the national government has been perceived by governors as arbitrary and opaque in the last two years and has prompted the Council of Governors to call for a constitutional amendment to make the equalisation fund a county government fund administered by the CRA (a constitutionally independent body) on the basis of a ‘scientific framework’ (GoK, 2010: Article 204 (1–2)).

An important point to note in the tussle over who should be in charge of the equalisation fund is that the very functions for which the fund was created are the same ones devolved to county governments.
governments under the Fourth Schedule of the Constitution of Kenya 2010. Conflicts over what should constitute 15 per cent of the block grant and who should be in charge of the equalisation fund occur not just over money or offices, but also over legitimacy so as to gain political support and diminish the support of opponents. This is evidenced by the many cases filed in the Kenya courts over the supremacy of one actor versus another over financial matters.2

Institutional actors

The president

At the apex of fiscal relations in Kenya’s devolved system is the president, who chairs an intergovernmental forum that brings together him or her with all 47 governors. It is in this forum that decisions about unfunded mandates and the transfer of functions and related resources are discussed and resolved (GoK, 2011). The president also assents into law bills from the national parliament, some of which have been the source of conflict between the actors of the two levels of government. As such the president has been perceived as siding with the MPs and senators against governors.

The governor

At the centre of fiscal relations in Kenya’s devolved system is a governor who is in charge of the county’s share of the 15 per cent block grant transferred from the national government as well as other resources raised internally by the counties.

Under the Intergovernmental Relations Act 2011 the forum that brings together all 47 county governors is known as the Council of Governors (CoG). Within the CoG the county governors elect a chairperson from amongst themselves (GoK, 2011). The governors are the chief executive officers of county governments and therefore control both the county bureaucracy and internally generated resources and transfers from the national government. Much like the president, the governors assent county bills – including the budget – into law. In fiscal relations, the powers of governors lie in the CoG as a collective body and not in the single action of an individual governor. Equally, governors’ close proximity to the electorate, as well as their power over county resources, connects them to their constituency on a somewhat deeper level than other locally elected officials.

Members of parliament

Members of parliament (MPs) represent the electorate in the national assembly. Their role is to provide corporate oversight over the executive and enact legislation at the national level. MPs also have powers over the budget, including passing the Revenue Allocation Bill that determines the amount of revenue transferred to and shared by the counties. Under fiscal relations, MPs have the power to adjust and approve ministerial allocations of the national government that often include categorical grants given to the counties for services such as health care, roads and water. The genesis of unfunded mandates therefore originates from parliamentary budgetary decisions. MPs also serve as patrons of the Constituency Development Fund1. The CDF constitutes 2.5 per cent of the total government’s ordinary revenues disbursed annually to 290 constituencies (GOK, 2013: Section 4 (1a)). In fiscal year 2013/14 the total allocation for the CDF was KSh 137.67 billion (US$1.53 billion). On average each constituency got KSh 71,289,310 (US$792,000). MPs have used the CDF to fund capital projects in sectors including health, roads, water, schools, bursaries and agriculture at the constituency level (sub-county level). It is worthy to note that these are the same functions devolved to the county government and also the subject of unfunded mandates agitated for by the governors for funding.

The senator

In terms of intergovernmental fiscal relations, senators are instrumental in approving the amount of funding to be shared between the national and county governments factoring in the recommendations of the Commission on Revenue Allocation (GoK, 2010: Article 217 (1–4)). They also have legislative powers on county matters and exercise an oversight role in functional transfers and the associated mandates. Senators have no role in influencing resource allocations within either level of government. However, in the past senators were able introduce an amendment to the County Government Act 2012 that established the County Development Board, chaired by senators (GoK, 2014). In principle this gave them an influencing role at the county level (although county development boards failed to take off across the country).4

Members of the county assembly

In terms of prestige and affluence of power, members of the county assembly (MCAs) have relatively little but when it comes to

Figure 2: Unfunded mandates from national government

<table>
<thead>
<tr>
<th>Function</th>
<th>Amount in KSh (billions)</th>
<th>Equivalent in USD (US$1=KSh 90)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Health</td>
<td>17.83</td>
<td>198,144,444</td>
</tr>
<tr>
<td>Water</td>
<td>24.43</td>
<td>271,388,889</td>
</tr>
<tr>
<td>Housing and urban development</td>
<td>8.03</td>
<td>89,266,667</td>
</tr>
<tr>
<td>Land (management)</td>
<td>19.09</td>
<td>212,144,444</td>
</tr>
<tr>
<td>Transport and infrastructure</td>
<td>19.08</td>
<td>211,977,778</td>
</tr>
<tr>
<td>Livestock services and management</td>
<td>4.88</td>
<td>54,177,778</td>
</tr>
<tr>
<td>Other allied programmes</td>
<td>9.32</td>
<td>103,611,111</td>
</tr>
<tr>
<td>Total</td>
<td>102.66</td>
<td>1,140,711,111</td>
</tr>
</tbody>
</table>

power to influence, they have the most due to their close proximity to the electorate at the ward level – the lowest electoral unit in Kenya. MCAs exercise legislative, oversight, and representation roles at the county level – roles similar to those of parliament at the national level. They also vet and approve nominees for appointment to county public service and approve county development planning. MCAs are the least paid of all government actors discussed here and various reports from independent commissions have cited rampant misuse of public resources by county assemblies, thus triggering calls to tame them by a number of bodies including the Commission on Revenue Allocation (CRA), Controller of Budget (CoB), and Salaries and Remuneration Commission (SRC). The greatest arsenal in the possession of MCAs in fiscal relations is what is commonly referred to in Kenya as ‘tyranny of numbers’ – a term which simply refers to having more manpower than your opponents. 5

Independent commissions

Independent actors have a minimal role in influencing spending decisions at the county level. An exception is the CRA’s role in recommending to the Senate the share of resources divided between the national and the county governments, and among the counties. For the most part, the independence and neutrality of reports from these commissions attract the attention of various actors, including MPs, senators, governors and MCAs, to demand accountability on how devolved resources are utilised. In line with the famous dictum ‘where you stand depends on where you sit’, reports by various independent commissions are read and interpreted differently by various actors. For instance, when governors are asked to account for how resources have been spent, the question ‘to whom are governors accountable?’ is seldom asked. Both senators and MCAs answer this question with ‘to us’, although it is argued in this article that the constitution bestows this role to the latter.

Intergovernmental fiscal relations in Kenya, therefore, are shaped and influenced largely by the above five different actors who, as we have seen, enjoy different types of resources and powers as summarised in Figure 3. The nature of interactions among these actors is often conflictual but also co-operative when need arises. Although the relationship between governors and MCAs in most counties is antagonistic, the combined onslaught and encroachment on the executive and legislative turf of the county governments, by both senators and MPs over spending decisions of devolved resources, has compelled the two to co-operate to ensure that adequate resources are allocated to counties for devolved functions.

**Figure 3: Actors’ powers to influence fiscal relations in Kenya**

<table>
<thead>
<tr>
<th>Actor</th>
<th>Electoral unit</th>
<th>Power</th>
<th>Employer</th>
</tr>
</thead>
<tbody>
<tr>
<td>President</td>
<td>Directly elected nationally</td>
<td>• Assents national bills into law&lt;br&gt;• Legislative veto powers&lt;br&gt;• Overall in charge of national bureaucracy and resources&lt;br&gt;• Overall in charge of budget formulation and execution in the national government</td>
<td>National government</td>
</tr>
<tr>
<td>Governor</td>
<td>Directly elected countywide</td>
<td>• Assents county bills into law&lt;br&gt;• Legislative veto powers&lt;br&gt;• Overall in charge of county resources and bureaucracy&lt;br&gt;• Overall in charge of county budget formulation and execution</td>
<td>County government</td>
</tr>
<tr>
<td>Member of parliament</td>
<td>Constituency (parliamentary jurisdiction)</td>
<td>• Legislative power at national level&lt;br&gt;• Access to Constituency Development Fund (CDF)&lt;br&gt;• Veto powers over budget allocations of national government ministries and agencies</td>
<td>National government</td>
</tr>
<tr>
<td>Senator</td>
<td>Directly elected countywide</td>
<td>• Legislative powers at county level&lt;br&gt;• Control of matters between counties and national government&lt;br&gt;• No powers over budget allocations at either level of government</td>
<td>National government</td>
</tr>
<tr>
<td>Member of county assembly</td>
<td>Ward – lowest electoral unit</td>
<td>• Legislative powers at county level&lt;br&gt;• Access to the ward development fund (WDF) in some counties&lt;br&gt;• Access to county government&lt;br&gt;• ‘Tyranny of numbers’ and proximity to voters&lt;br&gt;• Powers to impeach governors and key officials in county government&lt;br&gt;• Veto powers over county government budget allocations</td>
<td>County government</td>
</tr>
<tr>
<td>Independent bodies</td>
<td>Independent constitutional bodies – serve both national and county governments</td>
<td>• Constitutional immunity&lt;br&gt;• Perceived neutrality based on expertise&lt;br&gt;• Access to information&lt;br&gt;• Access to national stage through quarterly and annual reports</td>
<td>National government but independently managed</td>
</tr>
</tbody>
</table>

Source: Adapted from GoK, 2010 and various sections of different legislation
Governors have also agreed to work with MCAs to set ‘budget ceilings of county assemblies in consultation with the county executive and not parliament’ (CoG, 2014). The political calculus of this co-operation between the governors and MCAs must not be lost in this fight over resource control. Both have close proximity to the voters, given that they are county-based – unlike MPs and senators, who are based in Nairobi and are perceived as agents of the national government. While governors have unrivalled access and control over the county-share of devolved resources, MCAs enjoy the tyranny of numbers. To enhance the political clout of MCAs, governors have proposed that MCAs should ‘enjoy the same privileges as those of MPs in a proportionate manner’ (Ndonga, 2014). The intention of governors in this case is not only to dilute the prestige enjoyed by MPs but also to gain support from MCAs in their quest for more resources from the national government.

The combined onslaught by governors and MCAs on either a senator or an MP has serious political repercussions on the former at the local level. In cases where this has happened, like in the county of Nakuru, both the senator and MPs have either denied fighting the governor and the MCAs, or have openly apologised and pledged to ‘abandon confrontational politics’. While these fiscal turf wars may appear to be political wars among different actors over devolved resources at the local level, in a broader perspective they influence and shape the fiscal relations between the two levels of government.

**Conclusion**

The confrontational fiscal relations in Kenya’s devolved system, between the national and county governments and the attendant actors, is not a unique feature under the fiscal decentralisation process, especially given the ‘big bang’ manner in which Kenya undertook devolution. At the outset, the emerging picture of fiscal relations in Kenya is that, while constitutional and legal designs of a fiscal structure matter, so do the political and power interests of individual actors involved. Consequently, the resulting fiscal relations between or among different levels of government are shaped and influenced by these actors’ interests.

As the discussion over unfunded mandates reveals, the pressure to provide ‘pork’ comes from both the individual actors and the two levels of government. The reluctance of the national government to fully transfer functions, and fund those functions already transferred constitutionally under schedule four of the constitution, which are equally partially funded by the MPs, evokes the ‘norm of reciprocity’ (Rubin, 2006). This means that the president is reluctant to limit the MPs’ avenue to provide ‘pork’ lest the national government’s own revenues be cut. Resolving the problem related to unfunded mandates at county level will therefore take some time.

Going forward, there is hope that different actors from the two levels of government will co-operate to enhance fiscal relations for better service delivery to the citizens. Already there are signs of co-operation between governors and MCAs in confronting issues of common interest and this too is the case between the senators and MPs. Anecdotal evidence also suggests that, in some counties, governors, senators and MPs have come together to forge a common development agenda on local development. It is hoped that the current confrontational fiscal relations will soon transform into co-operative fiscal relations.

**Endnotes**

1. The main reason for this dispute is that the last audited accounts are five years old and thus the annual allocations are not based on the previous year’s approved budget, as the county actors would wish.

2. The Council of Governors has filed a case in court to challenge the senatorial powers that require governors to appear before the Senate.

3. MPs have used the CDF to fund capital projects in health, roads, water, schools, bursaries and agriculture at the sub-county level. Although the CDF is recognised in law as part of devolved funds to the county governments, MPs have had a tight grip on its use since it was established in 2003 – ten years before the county governments were established. Full devolution of the mentioned functions and the attendant funding will therefore be somewhat of an advantage to governors at the expense of MPs.

4. The enactment of this amendment into law was viewed by some governors as an attempt by parliament to settle personal scores and by others as part of the scheme by the House of Parliament to pass some bills that revert back already devolved functions such as water, health and roads.

5. In total there are 1,450 elected MCAs in Kenya and about 480 nominated MCAs, compared to 290 elected MPs, 47 elected senators and 47 elected governors.

**References**


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