



**Strathmore University**

**Law School**

**CHALLENGE OF REVENUE ALLOCATION FACING DEVOLUTION IN KENYA**

**BY**

**WANGOME LEVI MUCHAI**

**072267**

**DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE BACHELOR  
OF LAWS DEGREE**

**STRATHMORE UNIVERSITY**

**STRATHMORE LAW SCHOOL**

**January 2016**

## Table of Contents

Acknowledgements.....	iii
Dissertation Declaration Form.....	iv
Abstract.....	v
List of Abbreviations .....	vi
Chapter 1: Introduction.....	1
1.1. Background .....	1
1.1 Hypothesis.....	2
1.2 Research questions.....	2
1.3 Research objectives.....	2
1.4 Significance of study.....	3
1.5 Literature Review.....	3
1.5.1 Understanding Devolution.....	3
1.6 Proposed Structure .....	6
1.7 Limitations .....	7
Chapter 2: Theoretical Framework and Research Methodology .....	8
2.1 Theoretical Framework .....	8
2.1.1 Distributive Justice Theory .....	8
2.1.2 Social Justice Theory .....	9
2.2 Research Methodology .....	11
Chapter 3: Devolution in Kenya .....	12
3.1 History of Devolution of Power .....	12
3.1.1 The Majimbo System.....	12
3.1.2 The Local Government System .....	13
3.2 Forerunners to Fiscal Decentralization under the Devolution System .....	15
3.3 What is the Legal Framework in Kenya on County Allocation of Funds?.....	17
3.3.1 The Constitution of Kenya, 2010.....	17
3.3.2 Public Finance Management Act, 2012.....	18

3.3.3	Equalisation Fund .....	19
3.4	Institutional Framework .....	20
3.4.1	Commission on Revenue Allocation (CRA) .....	20
3.4.2	The Senate .....	21
3.4.3	Office of the Controller of Budget (COB).....	21
3.4.4	Office of the Auditor-General .....	21
3.5	Challenges facing County Revenue Allocation in Kenya.....	22
3.5.1	Legal Framework.....	22
3.5.2	Supremacy Battles .....	23
3.5.3	Weak Financial Management .....	24
Chapter 4: A comparative analysis of Decentralization in Kenya vis a vis Nigeria and South Africa .....		26
4.1	Federalism in Nigeria.....	26
4.2	Three-Tier System in South Africa .....	28
4.2.1	Introduction.....	28
4.2.2	Fiscal Decentralization in South Africa.....	29
4.3	Lessons learnt from the Nigerian and South African contexts .....	30
4.3.1	Strengthening of Constitutional Institutions .....	30
4.3.2	Accountability.....	30
4.3.3	Inclusion of the Principle of Derivation in the Revenue Allocation formula....	31
4.3.4	Proper development of the Fiscal Decentralization system.....	31
Chapter 5: Recommendations and Conclusion.....		32
5.1	Recommendations .....	33
5.1.1	Legislative re-alignment .....	33
5.1.2	Formula.....	33
5.1.3	Equalisation Fund .....	34
5.1.4	Accountability.....	34
5.2	Conclusion .....	35
List of References .....		36

## **Acknowledgements**

I give most gratitude to God Almighty for giving life, soundness of mind and body and the strength to carry out this work and seeing me through to completion. May His name be praised!

To my supervisor, Ms. Emmy Rono, thank you for the diligence you have shown, unwavering support and guidance you have given me during the whole dissertation process. Without your amazing input, the completion of this paper would have been impossible.

To my former supervisor, Dr. Conrad Bosire, for the assistance and guidance given during the time he was my supervisor, I am truly grateful.

To my parents; Mr. Paul Wangome and Mrs. Jemimah Wangome, and my siblings; Ian Kanyi and Calvin Wambugu, thank you for being inspirational pillars ready to support in all ways possible and showing me that indeed anything I put my mind to, I can achieve.

Special thanks to my friends and the Strathmore Law School faculty staff members for the great support and valuable lessons and skills that you have taught me and helped me attain.

To my SLS classmates, thank you for enduring and walking this journey with me and making it amazing and bearable.

May God bless you all and continue to expand your territories.



## **Abstract**

The Constitution of Kenya 2010, under chapter 11, introduced the concept of the county government system of devolution to Kenya. This brought about a sense of hope to the *mwanaanchi* as it signified the return of the government into the hands of the people and away from the grasp of the few high and mighty. It also sought to enforce equitable sharing of resources all over the country through county governments.

This paper set out to research further into the legal and institutional framework around fiscal decentralization as enshrined in the constitution and find whether the legislation to cater for it, was able to meet the objectives set under chapter 11.

In carrying out the research, journal articles by various authors, statutes and internet sources gave the much needed guidance and material to complete this paper.

The study takes a look at Kenya's history with regards to decentralized government, highlights the main laws in relation to fiscal decentralization, critiques the legal framework and draws lessons from South Africa and Nigeria in equitable distribution of national resources in devolved governance.

The research ultimately gives various recommendations, especially with regards to legislative reform, that would ensure the growth and success of devolution in Kenya.

## **List of Abbreviations**

AIDSAcquired Immune Deficiency Syndrome

CDFConstituency Development Fund

COBController of Budget

CORDCoalition for Reforms and Democracy

CRACommission on Revenue Allocation

DFRDDistrict Focus for Rural Development

EACCEthics and Anti-Corruption Commission

FFCFinancial and Fiscal Commission

GDPGross Domestic Product

GPTGovernment Poll Tax

HIVHuman Immunodeficiency Virus

IGFRIntergovernmental Fiscal Relations

KANUKenya African National Union

KLGRP Kenya Local Government Reform Programme

LALocal Authority

LASDAPLocal Authority Service Delivery Action Plan

LATFLocal Authority Transfer Fund

PEFPoverty Eradication Fund

PFMPublic Finance Management

RMAFC Revenue Mobilization Allocation and Fiscal Commission

RMLF Road Maintenance Levy Fund

SEBF Secondary Education Bursary Fund

WEF Women Enterprise Fund

YEDF Youth Enterprise Development Fund

### **1.1 Hypothesis**

The research is of the view that revenue allocation to the county governments as mandated by legislation, through the Commission on Revenue Allocation (CRA), is not sufficient to meet the objectives of devolution as set by the Constitution in article 174. The basis for this hypothesis is the fact that the Kenyan threshold of ‘not less than 15%’ as stipulated by the constitution, is below the international standards used in other jurisdiction.

In the Philippines, for example, the unconditional grant share for lower levels of government is 40 per cent of revenues, plus a share in taxes while in South Africa, it is about 36 per cent of revenues through its equitable sharing formula in 2012. Based on Commission on Revenue Allocation recommendations, Kenya’s guaranteed share is too low for the functions they are to perform.<sup>2</sup> This therefore undermines the independence of the county governments.

This stipulation has resulted in the call for a referendum by the governors in their ‘*Pesamashinani*’ call and the ‘*Okoa Kenya*’ referendum by the Coalition for Reforms and Democracy (CORD).

### **1.2 Research questions**

The research paper will centre on the following questions:

- i. What is the legal framework that has been set for revenue allocation?
- ii. Is the legal framework effective?

### **1.3 Research objectives**

The objectives of my research are therefore:

- To analyze the legal framework set for county revenue allocation.
- To look at the effectiveness of this framework.
- To find legal solutions that can be applied to make it as effective as possible.

---

<sup>2</sup>Ondigi Calvin Nyambane, *Challenges facing devolution in Kenya: A comparative study*, 2014, 11.

#### **1.4 Significance of study**

The significance of this study is to have a deeper insight on the problems of revenue allocation that face devolution in Kenya at this teething stage of development and what future problems we can expect and how we can solve them through change of policy and law. The research once concluded, should give ideas and solutions in reforming the law to suit our situation therefore making sure that devolution suits our demographic.

#### **1.5 Literature Review**

##### **1.5.1 Understanding Devolution**

Decentralization is the transfer of authority and responsibility for public functions from the central government to the subordinate or quasi-independent government organizations and/or the private sector<sup>3</sup>. The article by Annette Omolo<sup>4</sup> tries to decipher the meaning of devolution. The paper by Annette is however written before the election of the first devolved government thus, this study shall try to add to the knowledge disseminated by Annette from the experience accrued to date.

Mwangi Kimenyi<sup>5</sup> examines the current allocation of resources to Kenya's county governments and invites both the national and county governments to explore possible alternatives in his paper. He however looks at solutions mostly from an economics point of view whereas this research is going to find solutions which are more legal by going deeper into Kenya's legal framework.

Due to the fact that devolution is still quite new in Kenya, not much has been written especially with regard to the challenges faced in relation to revenue allocation. This is why the research shall rely mostly on statute and literature on how other countries have implemented equitable resource allocation.

---

<sup>3</sup>[www.ciesin.org/decentralization/English/General/Different\\_forms.html](http://www.ciesin.org/decentralization/English/General/Different_forms.html) on 2 March 2015

<sup>4</sup> Annette Omolo, 'Devolution in Kenya: A critical view of past and present frameworks', Institute of Economic Affairs, 2010, 15-47.

<sup>5</sup> Mwangi S. Kimenyi, *Devolution and resource sharing in Kenya*, [www.brookings.edu/research/opinions/2013/10/22-devolution-resource-sharing-kenya-kimenyi](http://www.brookings.edu/research/opinions/2013/10/22-devolution-resource-sharing-kenya-kimenyi) on 6 March 2015.

Lamidi and Fagbohun<sup>6</sup> describe revenue allocation in Nigeria as being very volatile and a great issue of contention. This paper examines the revenue allocation system in Nigeria vis-à-vis the functional and institutional relevance of local government in national development.

The paper strongly advocates for a direct revenue allocation to Nigerian local governments; it also identifies roles/functions capable of playing by local governments in national development; and showcases the operational and tactical roles of local government in enhancing national development.

According to Ikeji<sup>7</sup>, the question of an acceptable formula for revenue sharing among the component tiers of the Nigerian nation is one of the most protracted and controversial debates in the political and macroeconomic management of the economy. This debate has its foundations in the history and evolution of the Nigerian federation.

Ikeji<sup>8</sup> further looks at the challenges facing fiscal decentralization in Nigeria and analyzes the development of revenue allocation policy however, he does not come out with clear and concise solutions through which parity may be reached. This is however written from the point of view of the Nigerian system of government.

The paper by Adeleke Salami<sup>9</sup> will also be very important in the research when trying to understand fiscal decentralization in Nigeria from an economic standpoint as he gives the challenges and policy options that can be taken.

Yemek<sup>10</sup> further examines the social policies which have been implemented in South Africa and how they have affected fiscal decentralization. He finally takes a look at some of the challenges that still face South Africa when it comes to fiscal decentralization. The research shall look into how applicable some of these policies are in Kenya.

---

<sup>6</sup>Lamidi, OyedeleKazeem and Fagbohun, Francis Oluyemi, 'Advocating for direct revenue allocation to Nigerian Local Governments: A catalyst for national development', *Journal of Public Administration and Policy Research*(2013), 133.

<sup>7</sup>Ikeji, Chibueze C, 'Politics of revenue allocation in Nigeria: A reconsideration of some contending issues', *Sacha Journal of Policy and Strategic Studies*, Volume 1 Number 1 (2011), 121-136.

<sup>8</sup>Chibueze, 'Politics of revenue allocation in Nigeria'.

<sup>9</sup>Adeleke Salami, 'Taxation, Revenue allocation and fiscal federalism in Nigeria : Issues , challenges and policy option', *Economic Annals*, Volume LVI, No. 189, 2011.

<sup>10</sup> Etienne Yemek, 'Understanding fiscal decentralisation in South Africa', Institute for Democracy in Africa - Budget Information Service – Africa Budget Project, 2005.

Nyambane<sup>11</sup> takes an in-depth look at the problems facing the devolution process in Kenya so far and compares it with devolution in South Africa and concludes by giving some possible solutions.

He categorizes revenue allocation and expenditure as one of the main problems that has plagued devolution in Kenya.

Nyambane<sup>12</sup> does a comparative study on South Africa and the challenges that have faced devolution. Nyambane however does not give much recommendation on how the law can be implemented or amended to suit the current situation and eradicate the problems that devolution is facing. I intend to further his recommendations by giving them a legal footing.

Wallace Kantai<sup>13</sup> examines the reasons why countries such as South Africa and Nigeria resorted to devolution and tries to go through the frameworks set up, the challenges and the lessons which Kenya may learn from these countries.

After examining the different aspects and characteristics that make up devolution in these countries, the author of this article comes to a conclusion that indeed decentralization of power and resources to the grass root levels of a country is indeed very important but it should be done on a case by case basis therefore, in the case of Kenya we do have a lot to learn from the likes of Nigeria and South Africa but only what is relevant in our case should be replicated here.

This is very relevant to my research as it gives a sense of some of the problems that other countries face in striving to decentralize resources. It must however be noted that the article written by Mr. Kantai<sup>14</sup> is only applicable to an extent as it was written before the election of the first county governments on 4<sup>th</sup> March 2013. The research that shall be undertaken, shall seek to give solutions to the problem of revenue allocation that is being faced after almost two years since the election of the first county governments.

---

<sup>11</sup>Nyambane, 'Challenges facing devolution in Kenya'.

<sup>12</sup>Nyambane, 'Challenges facing devolution in Kenya'.

<sup>13</sup> Wallace Kantai, 'Lessons for devolution: A country comparative Study, Devolution in Kenya: Prospects, challenges and future', *Institute of Economic Affairs*, 2010, 48-73.

<sup>14</sup>Kantai, 'Lessons for devolution: A country Comparative study, Devolution in Kenya: Prospects, challenges and future', 48-73.

## **1.6 Proposed Structure**

### Chapter 1: Introduction

This chapter shall give a definition of the concept of decentralization and devolution as explained by various scholars and researchers. It shall also give a brief overview of the objective of the research.

### Chapter 2: Theoretical Framework

The chapter shall look into different theories that which are in line with the topic and its objectives.

### Chapter 3: Revenue Allocation in Kenya

The research under this chapter shall have a look at the proposed structure under the 2010 Constitution.

Statutes that have been enacted as a result of the introduction of devolution shall also be reviewed under this chapter.

A general outline of the challenges facing devolution shall also be reviewed, with an in-depth look at the challenge of revenue allocation.

It shall also give a brief history of the process of decentralization through history i.e. majimboism, local authority administration and the like.

### Chapter 4: A Comparative Analysis of Decentralization in Kenya vis a vis other Jurisdictions

In this chapter, there shall be a review of decentralization in other jurisdictions relatable to Kenya, specifically on how they have practiced fiscal decentralization in their jurisdictions and the legal framework that has been put in place.

The research shall try and derive some solutions from these countries and look at how they can be implemented in the Kenyan system of devolution.

### Chapter 5: Conclusion and Recommendations

This Chapter shall be used to sign off on the topic by giving recommendations that should be taken up in policy development and drafting of laws, in order to ensure equitable distribution and allocation of resources.

### **1.7 Limitations**

The main limitation that may be faced in undertaking this study is the fact that the devolved system of government in Kenya is a fairly new concept, with the county governments being just over 2 years old. This therefore limits the practical experience that can be analyzed and there is also limited number of local publications on this topic.

## Chapter 2: Theoretical Framework and Research Methodology

### 2.1 Theoretical Framework

In getting to its findings, this paper identified some key theoretical concepts which are in line with the research objectives and would act as guiding principles in the course which the paper would take.

#### 2.1.1 Distributive Justice Theory

Distributive justice is concerned with the fair allocation of resources among diverse members of a community. Fair allocation typically takes into account the total amount of goods to be distributed, the distributing procedure, and the pattern of distribution that results.<sup>15</sup>

Among the main objects of devolution enumerated in Article 174 of the Constitution of Kenya 2010, sub-article (g) states that devolution is to ensure equitable sharing of national and local resources throughout Kenya.<sup>16</sup> In it being inculcated into the constitution, devolution was seen to be a means to bringing equality and equity amongst the people in various parts of Kenya. One of the main inequalities of the past was the fact that most of the national resources were only distributed among a selected few.

In trying to implement this theory, the three most common criteria that are looked at are equity, equality and need.<sup>17</sup>

If equality is regarded as the ultimate criterion determining who gets what, goods will be distributed equally among all persons; in other words each person will get the same amount<sup>18</sup>. In the Kenyan context, this would go against the principle of fairness due to the

---

<sup>15</sup> 'Michelle Maiese : Distributive justice' *Beyond Intractability*, June 2013.  
<http://www.beyondintractability.org/essay/distributive-justice> on 28 October 2015.

<sup>16</sup> Article 174, *Constitution of Kenya* (2010)

<sup>17</sup> Robert T. Buttram, Robert Folger, and B.H. Sheppard, "Equity, equality and need: Three faces of social justice," in *conflict, cooperation, and justice: Essays inspired by the work of Morton Deutsch*, Jossey-Bass Inc. Publishers, 1995, 261.

<sup>18</sup> 'Michelle Maiese : Distributive justice' *Beyond Intractability*, June 2013  
<http://www.beyondintractability.org/essay/distributive-justice> on 28 October 2015.

fact that needs vary from one county to another, thus a simple sum of equal division cannot be employed.

Another possibility is to proceed according to a principle of equity, and distribute benefits in proportion to the individuals' contribution. Thus, those who make a greater productive contribution to their group deserve to receive more benefits. This sort of distribution is typically associated with an economic system where there is equal opportunity to compete.<sup>19</sup> Devolution was however created to heal the lack of equal opportunities hence; use of equity would not be the best way to implement distributive justice.

Distributive justice theory also gives the option of implementation by looking at the needs of the people. Those who need more of a benefit or resource will receive more. This would seem like the closest way in which the distributive theory may be achieved in the context of devolution in Kenya, having looked at the history and circumstances surrounding the creation of a devolved government.

The theory of distributive justice is therefore sufficient and necessary in meeting the objectives of this paper. The paper seeks to look at various ways in which the legal framework and policies guiding allocation of county resources, specifically allocation of revenue, can be improved upon and developed in order for the theory of distributive justice to be concretised and made a reality, in the devolution system of Kenya.

### **2.1.2 Social Justice Theory**

To John Rawls, social justice is about assuring the protection of equal access to liberties, rights, and opportunities, as well as taking care of the least advantaged members of society. Thus, whether something is just or unjust depends on whether it promotes or hinders equality of access to civil liberties, human rights, opportunities for healthy and fulfilling lives, as well as whether it allocates a fair share of benefits to the least advantaged members of society.<sup>20</sup>

To Miller, social justice deals with the distribution of good (advantages) and bad (disadvantages) in society, and more specifically with how these things should be distributed

---

<sup>19</sup> 'Michelle Maiese : Distributive justice' *Beyond Intractability*, June 2013  
<http://www.beyondintractability.org/essay/distributive-justice> on 28 October 2015.

<sup>20</sup> 'Matthew Robinson, PhD: What is social justice?' <http://gjs.appstate.edu/social-justice-and-human-rights/what-social-justice> on 4 November 2015.

within society. Further, social justice is concerned with the ways that resources are allocated to people by social institutions. Some of the advantages relevant for social justice include money, property, jobs, education, medical care, child care, care for the elderly, honors and prizes, personal security, housing, transportation, and opportunities for leisure.

Some of the disadvantages include military service, dangerous work, and other hardships. Miller's theory applies to both public goods as well as private commodities.<sup>21</sup>

The theory, as posited by Rawls and Miller, involves the distribution of public goods and disadvantages in a manner that is just and one that takes into account the different levels and factors affecting society. For the objectives under article 174 of the constitution to be met, the theory of social justice must indeed be at the center and therefore, devolution must strive to attain social justice. The main way in which this social justice may be achieved is through the just allocation and division of resources. Just in this sense does not mean equal, it means that all the factors; such as need, population size, historical injustices, and local resources available, among others; should be looked at in determining how the national funds and resources shall be allocated to the different counties.

Whether something is just or unjust thus depends on whether advantages and disadvantages are distributed appropriately in society. Miller explains that when "we attack some policy or some state of affairs as socially unjust, we are claiming that a person, or more usually a category of persons, enjoys fewer advantages than that person or group of persons ought to enjoy (or bears more of the burdens than they ought to bear), given how other members of the society in question are fairing."<sup>22</sup>

This paper seeks to look at the social inequalities brought about by the laws governing devolution, precisely county allocation of funds and further seeks to bring about suggestions on how the legal framework may be amended or improved upon to ensure that social justice is met through devolution as intended.

---

<sup>21</sup> Matthew Robinson, PhD: What is social justice?' <http://gjs.appstate.edu/social-justice-and-human-rights/what-social-justice> on 4 November 2015.

<sup>22</sup> Matthew Robinson, PhD: What is social justice?' <http://gjs.appstate.edu/social-justice-and-human-rights/what-social-justice> on 4 November 2015.

## **2.2 Research Methodology**

Research has been carried out through the collection of qualitative data. Both primary and secondary sources have been collected and analyzed in coming up with the final findings of this paper.

The major primary source that has been analyzed is the Constitution of Kenya, 2010, under which devolved government was created in chapter eleven. This paper has also relied heavily on chapter twelve of the Constitution which deals with public finance. In line with primary sources of data, the paper has also taken a look at acts of parliament and subsidiary legislation which mandate and govern county allocation of revenue and the institutions which have this duty.

Secondary data has also been very useful in the research carried out to bring fruition to this paper. These data is largely drawn from books, and journal articles and internet sources. It has been especially helpful in coming up with a comparative study between Kenya and other countries that have a similar system of government. The heavy reliance on what others have written is very necessary in this context, considering that it has been only 2 years since the first 47 devolved governments in Kenya were formed.

## Chapter 3: Devolution in Kenya

### 3.1 History of Devolution of Power

#### 3.1.1 The Majimbo System

The majimbo system was a highly centralized bureaucracy which was inherited by Kenya at the moment of her independence for British colonial rule. The administration was established to facilitate direct rule alongside the civil service. It was sustained highly through the imposition of the provincial administration.<sup>23</sup>

The provincial administration in pre-independence Kenya was tasked with three main functions namely the control, coordination and mobilization of the public for development. In the exercise of the three functions, it acted in the executive capacity as the agent of the Colonial Governor.<sup>24</sup>

In post-independence Kenya, the KANU government undertook to continue with the use of majimbo as the mode of grassroot administration. The nature of the majimboism or regionalism was a political system which power was devolved to semi-autonomous regional units. These regional governments were entrenched in the 1963 constitution, which elaborately defined the regional structure.<sup>25</sup>

The independence constitution provided three structures. The first was the devolution of certain tax and financial powers to seven regional authorities. The second vested the control of Trust Lands in the county (former African District) councils. Thirdly, it set a bicameral legislature with a House of Representatives and a Senate. The Senate was to represent district interests.<sup>26</sup>

Majimbo system as a means of bringing financial parity between the regions, however failed due certain reasons.

---

<sup>23</sup> Annette Omolo, 'Devolution in Kenya: A critical review of past and present frameworks, Devolution in Kenya: Prospects, challenges and future,' *Institute of Economic Affairs*, 2010, 27.

<sup>24</sup> Annette Omolo, 'Devolution in Kenya: A critical review of past and present frameworks', 27.

<sup>25</sup> Annette Omolo, 'Devolution in Kenya: A critical review of past and present frameworks', 27.

<sup>26</sup> Annette Omolo, 'Devolution in Kenya: A critical review of past and present frameworks', 27.

One of the main reasons for its failure was the fact that the independence government delayed the implementation of the financial provisions laid out in the constitution at the time.

It retained control of regional finances beyond the date of June 1964. This date had originally been set as the period when the regions would assume full responsibility of their finances.<sup>27</sup>

### **3.1.2 The Local Government System**

The promulgation of the Constitution of Kenya 2010, among other things, ushered in the beginning of a new devolved system of government and the end of the local government system. The local government system was the country's most substantive experience with devolution before the realization of the current devolved government in 2013.<sup>28</sup>

The local government system evolved considerably through several distinct phases after the colonial era. The first is the post-colonial period under the Majimbo constitution, immediately followed by the post-independence period under the Republican constitution. The last phase is under the Kenya Local Government Reform Programme (KLGRP) that ushered in the Local Authority Transfer Fund (LATF) and the Local Authority Service Delivery Action Plan (LASDAP).<sup>29</sup>

During the colonial period, local authorities (LA) carried out responsibilities for the central government in the field including provision of primary education, healthcare, roads, maintenance of markets and construction of slaughter houses.<sup>30</sup>

The LAs at independence were meant to fall within the majimbo system of government and therefore, they were meant to enjoy more autonomy from the central government. However, this did not come into fruition due to the failure of majimboism.

Under the Republican Constitution of 1964, the LAs further lost their autonomy as the regional powers were transferred to the minister of local government thus, putting the LA power under the auspices of the central government. In 1969 the government further diminished the power and functions of the local governments by transferring some key functions, such as provision of primary education, roads and healthcare; from the local

---

<sup>27</sup> Annette Omolo, 'Devolution in Kenya: A critical review of past and present frameworks', 27.

<sup>28</sup> Annette Omolo, 'Devolution in Kenya: A critical review of past and present frameworks', 27.

<sup>29</sup> Annette Omolo, 'Devolution in Kenya: A critical review of past and present frameworks', 27.

<sup>30</sup> Annette Omolo, 'Devolution in Kenya: A critical review of past and present frameworks', 27.

governments to the central government through ministries. Minor services such as maintenance of markets, slaughter houses and feeder roads were left to the LAs.<sup>31</sup>

The central government also undermined the financial base of the local governments in 1974 by abolishing Government Poll Tax (GPT) and other sources of local government revenue. It introduced a service charge in 1988 to benefit the LAs but this did not serve its intended purpose, as the central government was the collecting agent hence, in most instances it did not get to the local governments. This resulted in the poor management and service delivery by the local authorities.<sup>32</sup>

The Local Government Act Cap 265 which was enacted in 1977 and revised in 1998 and 2010, clarified the structures, functions and powers of the councils. It established county councils, municipal councils, town and urban councils. It gave the minister of local government power to declare LAs but did not provide any given procedure that he had to follow.

The local authorities recorded persistent poor performance in their functions and this prompted the government to form a commission of inquiry, known as the Omamo Commission. The commission found that the shortcomings of the LAs were due to a number of reasons which included the lack of self-determination and the lack of financial support and autonomy.<sup>33</sup>

These shortcomings led to the introduction of the KLGRP in the early 1990s. Its objectives were to improve the local public sector, improve local public expenditure management and strengthen local level accountability mechanisms.<sup>34</sup> It is under the KLGRP that the LATF was established under the LATF Act and the associated LASDAP. The fund constituted 5% of all revenue collected under the Income Tax Act.<sup>35</sup> These in time helped the local authorities to improve service delivery and repayment of debts however not to a sufficient level.

---

<sup>31</sup> Annette Omolo, 'Devolution in Kenya: A critical review of past and present frameworks', 27.

<sup>32</sup> Annette Omolo, 'Devolution in Kenya: A critical review of past and present frameworks', 27.

<sup>33</sup> Annette Omolo, 'Devolution in Kenya: A critical review of past and present frameworks', 32.

<sup>34</sup> Annette Omolo, 'Devolution in Kenya: A critical review of past and present frameworks', 32.

<sup>35</sup> Annette Omolo, 'Devolution in Kenya: A critical review of past and present frameworks', 32.

This led to the drafters of the 2010 constitution to the current devolution system we now have, as there was need to improve service delivery to the grass root level.

### **3.2 Forerunners to Fiscal Decentralization under the Devolution System**

The means in which resources and revenue are disbursed to those at the grass root level, has always been viewed as a crucial step in bringing equity to a state. This is one of the reasons why the drafters of the 2010 Constitution of Kenya, decided to decentralize power through the creation of devolved governments. This is seen in article 174 of the Constitution of Kenya 2010, sub-article (g), which states that devolution is to ensure equitable sharing of national and local resources throughout Kenya.<sup>36</sup>

In Kenya's history, various methods have been tried and tested in order to bring some form of equity in how resources are allocated. Snapshots of the efforts that have been made through history, have been enumerated on earlier in the chapter and specificity on decentralization of revenue and resources will be the focus of this part of the paper.

Kenya has followed a strongly centralized development planning strategy since Independence in 1963. In 1983 a new approach called District Focus for Rural Development (DFRD) was introduced.<sup>37</sup> Backed by the Office of the President, this new approach was introduced as a major initiative in the process of decentralizing planning and implementation of development in every district in Kenya.<sup>38</sup>

As a result of the District Focus Policy, ministerial budgets were disaggregated on a district by district basis. Ministries were obliged to base their programmes on district's own plans and priorities; and guarantees were given as to the funding of district-specific budget ceilings.<sup>39</sup>

DFRD aimed at decentralizing finances at the district level so as to ensure that there was a trickle-down effect.

---

<sup>36</sup> Article 174, *Constitution of Kenya* (2010)

<sup>37</sup> <http://www.tandfonline.com/doi/abs/10.1080/02255189.1987.9670192> on 30 November 2015

<sup>38</sup> [https://openaccess.leidenuniv.nl/bitstream/handle/1887/9018/ASC\\_1268319\\_040.pdf?sequence=1](https://openaccess.leidenuniv.nl/bitstream/handle/1887/9018/ASC_1268319_040.pdf?sequence=1) on 30 November 2015

<sup>39</sup> [https://openaccess.leidenuniv.nl/bitstream/handle/1887/9018/ASC\\_1268319\\_040.pdf?sequence=1](https://openaccess.leidenuniv.nl/bitstream/handle/1887/9018/ASC_1268319_040.pdf?sequence=1) on 30 November 2015

The period between 1999 and 2007 saw the introduction of several geographically earmarked funds in an attempt to address spatial inequality. The most notable were the Local Authority Transfer Fund, (LATF)-created through the LATF Act No 8 of 1998, the Road Maintenance Levy Fund, (RMLF) created through the Road Maintenance Levy Fund Act of 1993, the Rural Electrification Fund or Rural Electrification Programme Fund created through the Energy Act of 2006 and the Constituency Development Fund (CDF), created through the CDF Act of 2003. Other notable decentralisation programs include the Constituency Bursary Fund or Secondary Education Bursary Fund (SEBF), Constituency HIV/AIDS Fund, Youth Enterprise Development Fund (YEDF), Women Enterprise Fund, (WEF), National Development Fund for Persons with Disability and the Poverty Eradication Fund (PEF). Though ingenious, these most of these programs suffered the same fate – a lack of funding and excessive bureaucratic capture by the central government.<sup>40</sup>

CDF is seen to be Kenya's greatest success story to date on how fiscal decentralization should be undertaken and how far reaching it is. The Constituencies Development Fund (CDF) Act was passed into law in 2003 by National Assembly. In principle this Act compels the Minister for Finance to allocate not less than 2.5 percent of all collected government ordinary revenue every financial year for development programmes in the constituencies.<sup>41</sup>

Studies have found that the CDF decentralization has, to a large extent, lived up to its promise to deliver services to the local people, with increased efficiency and responsiveness compared with other development initiatives, particularly the former centralized system. Consequently, it has made a big impact on constituency development work despite the challenges of sustainability, political patronage, financial inadequacy, and lack of capacity building.<sup>42</sup>

---

<sup>40</sup> Angela Ambetsa, 'County governments' sources of revenue: A legal perspective on how the county governments are funded' Unpublished LLM Thesis, University of Nairobi, November 2014, 31.

<sup>41</sup> *Kenyan's Verdict: A Citizens Report Card on the Constituencies Development Fund (CDF)*

<sup>42</sup> <http://kimmagedsc.ie/dissertation/decentralization-kenya/>

### 3.3 What is the Legal Framework in Kenya on County Allocation of Funds?

#### 3.3.1 The Constitution of Kenya, 2010

The constitution of Kenya is considered to be the *grundnorm*; where all laws of the land are rooted. In creating a decentralized form of government, the drafters of the 2010 constitution, saw it fit to define and engrave the roles and powers of the devolved governments in a whole chapter; chapter 11 of the constitution. The basis for other pieces of legislation to be established, so as to give the devolved governments sufficient powers and application, was set in this chapter of the constitution.

Article 174(g)<sup>43</sup> declares that the devolved governments, among other objectives, shall ensure equitable sharing of national and local resources. These resources include revenue that has been given by the national government.

In order for the county governments to function, certain principles have to be met and one of them is the fact that they should have reliable sources of revenue, as enumerated by article 175(c).<sup>44</sup>

The constitution of Kenya takes a step further in ensuring that the allocation of public funds is done in an upright and equitable manner, by including chapter 12<sup>45</sup>, which is on public finance. The chapter sets out various principles in relation to public finance, with the most relevant to this topic being sub-article(b)(ii) which states that, the public finance system shall ensure that the revenue raised nationally shall be shared equitably among national and county governments. The same principle is echoed in article 202.<sup>46</sup>

Article 203<sup>47</sup> delves further into what equitable sharing is and gives the criteria which should be followed in order for this principle to be upheld. Sub-article (2) of the same article also

---

<sup>43</sup> Article 174(g), *Constitution of Kenya* (2010)

<sup>44</sup> Article 175(c), *Constitution of Kenya* (2010)

<sup>45</sup> Chapter 12, *Constitution of Kenya* (2010)

<sup>46</sup> Article 202, *Constitution of Kenya* (2010)

<sup>47</sup> Article 203, *Constitution of Kenya* (2010)

states that the equitable share that is to be allocated to county governments shall not be less than fifteen percent of all revenue collected by the national government.<sup>48</sup>

Article 218 gives the means in which the allocation of revenue to the county governments shall be carried out. Sub-article (1) states, “*at least two months before the end of each financial year, there shall be introduced in Parliament— (a) a Division of Revenue Bill, which shall divide revenue raised by the national government among the national and county levels of government in accordance with this Constitution; and (b) a County Allocation of Revenue Bill, which shall divide among the counties the revenue allocated to the county level of government on the basis determined in accordance with the resolution in force under Article 217*”.<sup>49</sup>

### **3.3.2 Public Finance Management Act, 2012**

The PFM Act is a key piece of legislation when it comes to allocation and management of county revenue. The main object of this Act is to ensure proper and accountable management of public funds, both at the county and national level. It also intends to bring a sense of accountability on public officers.<sup>50</sup>

The Act gives some of the responsibilities of the national treasury, which include within the framework of this Act and taking into consideration the recommendations of the CRA and to prepare the annual Division of Revenue Bill and the County Allocation of Revenue Bill; strengthen financial and fiscal relations between the national government and county governments and encourage support for county governments in terms of Article 190(1) of the Constitution in performing their functions; and assist county governments to develop their capacity for efficient, effective and transparent financial management.<sup>51</sup> The PFM Act further puts the administration of the equalisation fund in the hands of the national government.<sup>52</sup> More on the equalisation fund shall be looked at in the subsequent chapter.

The Act further stipulates that once the Division of Revenue and County Allocation Revenue Bills have been presented to parliament, it shall consider them in not more than 30 days with

---

<sup>48</sup> Article 203(2), *Constitution of Kenya* (2010)

<sup>49</sup> Article 218, *Constitution of Kenya* (2010)

<sup>50</sup> Section 3, *Public Finance Management Act* (2012)

<sup>51</sup> Section 12, *Public Finance Management Act* (2012)

<sup>52</sup> Section 18, *Public Finance Management Act* (2012)

a view of approving them, with or without amendments.<sup>53</sup> Each year when the Budget Policy Statement is introduced, the Cabinet Secretary shall submit to Parliament a Division of Revenue Bill and County Allocation of Revenue Bill prepared by the National Treasury as provided in this Act for the financial year to which that Budget relates.<sup>54</sup>

The relationship between the national government and county governments with regards to revenue sharing is also spelt out in this piece of legislation. The process of revenue sharing shall be in accordance with the Constitution.<sup>55</sup>

Finally, so as to ensure equity and to determine the share to be allocated to each county, the Act states that the CRA shall submit, at least six months to the beginning of the financial year, to the Senate, the National Assembly, the County Assembly, the National Executive and the County Executives, recommendations for the following financial year.<sup>56</sup> This ensures constant revision of the allocation formula so as to create an equitable system.

### **3.3.3 Equalisation Fund**

The allocation of funds may however not be enough to safeguard each and every need of the county governments hence under article 204, the constitution creates the equalisation fund. *The national government shall use the equalisation fund only to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those areas to the level enjoyed generally by the rest of the nation, so far as possible.*<sup>57</sup>

Administration of the fund is placed in the hands of the national government as stated in section 18 of the Public Finance Management Act, 2012. This means that the national government, through treasury, has the power to allocate the funds to the county governments which are classified as marginalized, once criteria has been met.

The fund shall be paid one half percent of all national revenue collected.<sup>58</sup> The Commission for Revenue Allocation (CRA), in 2013, gave the first list of marginalised areas. The areas

---

<sup>53</sup> Section 42, *Public Finance Management Act* (2012)

<sup>54</sup> Section 191, *Public Finance Management Act* (2012)

<sup>55</sup> Section 189, *Public Finance Management Act* (2012)

<sup>56</sup> Section 190, *Public Finance Management Act* (2012)

<sup>57</sup> Article 204, *Constitution of Kenya* (2010)

<sup>58</sup> Article 204, *Constitution of Kenya* (2010)

that benefit from the equalisation fund are; Turkana, Mandera, , Wajir, Marsabit, Samburu, West Pokot, Tana River, Narok, Kwale , Garissa, Kilifi, TaitaTaveta, Isiolo, and Lamu.<sup>59</sup>

However, there have been various delays which have resulted in the non-utilization of the equalisation fund to date. There have also been supremacy battles between county governments and the national assembly on who should control the fund, despite the constitution giving clear mandate to the national government.<sup>60</sup> This has led to a back and forth, meaning that the fund is not being utilized at the moment.

### **3.4 Institutional Framework**

The laws of Kenya create various offices to deal with fiscal decentralization and to ensure that allocation of funds by the national governments is done appropriately.

#### **3.4.1 Commission on Revenue Allocation (CRA)**

The CRA is established under article 215 of the Kenyan constitution.

*The principal function of the Commission on Revenue Allocation is to make recommendations concerning the basis for the equitable sharing of revenue raised by the national government— between the national and county governments; and among the county governments.*<sup>61</sup>

*The Commission shall also make recommendations on other matters concerning the financing of, and financial management by, county governments, as required by this Constitution and national legislation.*<sup>62</sup>

In fulfilling its mandate, the CRA shall forward recommendations every five years to the senate, for the determination of the basis of sharing of the national revenue among the counties.<sup>63</sup> These recommendations are what form the basis for the formula that is to be used for the allocation and disbursement of public funds.

---

<sup>59</sup><http://www.crakenya.org/news/cra-chairman-launches-marginalisation-policy/> on 5 December 2015

<sup>60</sup><http://allafrica.com/stories/201403060615.html> on 5 December 2015

<sup>61</sup> Article 216, *Constitution of Kenya* (2010)

<sup>62</sup> Article 216, *Constitution of Kenya* (2010)

<sup>63</sup> Article 217, *Constitution of Kenya* (2010)

### **3.4.2 The Senate**

As alluded to through this chapter, the senate represents the counties, and serves to protect the interests of the counties and their governments.<sup>64</sup> In its role as the representative branch of county governments, the senate debates on matters pertaining to the counties, which include matters regarding allocation of funds to the counties.

The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.

The senate is therefore a major constitutional stakeholder when it comes to matters of county revenue and allocation of this revenue.

### **3.4.3 Office of the Controller of Budget (COB)**

This office is created by article 228 of the constitution of Kenya. The role of the COB is to oversee the implementation of budgets of national and county governments by authorizing withdrawals from public funds under articles 204 (equalisation fund), 206 (consolidated fund) and 207 (county revenue).<sup>65</sup>

The office of the COB is very crucial in county allocation of funds as it approves access by the county governments to the funds allocated to them and also tables regular reports on how the funds have been implemented.

### **3.4.4 Office of the Auditor-General**

The role of this office is to audit and report on among others; the accounts of national and county governments and the accounts of all funds and authorities of national and county governments; within six months after the end of the financial year.

This office is therefore very vital as it ensures that that county government revenue is used appropriately during the financial year.

---

<sup>64</sup> Article 96(1), *Constitution of Kenya* (2010)

<sup>65</sup> Article 228(4), *Constitution of Kenya* (2010)

### **3.5 Challenges facing County Revenue Allocation in Kenya**

Various challenges seem to have dogged fiscal devolution since the formation of the first county governments in 2013. These challenges are bound to rear their heads due to the fact that the 47 counties are in no way similar, as they have different population sizes, geographical placements, poverty levels, local resources among other factors; yet they are subject to the same national legal framework.

#### **3.5.1 Legal Framework**

Devolution in Kenya, as seen earlier, is a construct of the 2010 constitution. The constitution gives certain mandate to devolved governments, including the fact that it is the objective of the county governments to ensure equitable distribution of resources.

The country has however seen a number of calls for amendments to be done on the constitution pertaining to certain issues. The issue most relevant to this paper is that of minimum percentage to be allocated to the counties.

Article 203(2) states that for every financial year, the equitable share of the revenue raised nationally that is allocated to county governments shall be not less than fifteen per cent of all revenue collected by the national government. This has been one of the biggest points of contention between county governments and legislatures.

The county governors are of the view that the allocation as per the constitution is below international standards. This has led to the launch of the '*Pesamashinani*' campaign by the governors, which seeks to increase the allocation from a minimum of 15% to 45%.<sup>66</sup> The governors have gotten support by yet another drive for a referendum by the CORD coalition, (*Okoa Kenya*), which seeks to increase the minimum allocation three-fold.

The clamor for an increment in the amount that is to be allocated stems from the argument that the allocation is too low as compared to the functions the county governments are expected to carry out. It is also seen to be below the international standards. In the Philippines, for example, the unconditional grant share for lower levels of government is 40

---

<sup>66</sup><http://www.standardmedia.co.ke/article/2000139239/draft-bill-on-issues-informing-pesa-mashinani-campaign-finally-out> on 5 December 2015

per cent of revenues, plus a share in taxes while in South Africa, it is about 36 per cent of revenues through its equitable sharing formula in 2012.<sup>67</sup>

The legal framework therefore seems to be a major impediment when it comes to revenue allocation especially considering that the amount to be allocated has its basis in the constitution and can only be amended through a referendum.

### **3.5.2 Supremacy Battles**

Financial control in Kenya has always been a major point of disagreement between the various branches of government. The decentralization of government finance has also brought about issues of management of funds with the national government, county governments and parliament being at loggerheads on who should control the funds.

The main example is with regards to the equalisation fund which was created under article 204<sup>68</sup> of the constitution. The purpose of this fund is to give basic services to the marginalized areas so as to promote a sense of equity. There however has been much contention as to who should have control over this fund.

The main stalemate has been between the national government, national assembly and the county governments. The constitution under article 204(3)<sup>69</sup> states that;

*The national government may use the Equalisation Fund—*

*(a) only to the extent that the expenditure of those funds has been approved in an Appropriation Bill enacted by Parliament; and*

*(b) either directly, or indirectly through conditional grants to counties in which marginalised communities exist.*

The constitution therefore puts the equalisation fund under the control of the national government, giving it power to disburse the funds for the various projects. Sub-article 3(b) however allows county governments in those marginalised areas, to receive finances from the fund as conditional grants. The constitution seems to give the national government control

---

<sup>67</sup> Calvin Nyambane, 'Challenges facing devolution in Kenya: A comparative study', 2014, 11

<sup>68</sup> Article 204, *Constitution of Kenya* (2010)

<sup>69</sup> Article 204(3), *Constitution of Kenya* (2010)

over disbursement, power of approval to the national assembly and control over use of the funds to the county governments.

The national government, national assembly and the county governments want more control over the funds especially with regards to how the funds are to be used. In October 2015, Samburu West MP LatiLelelitmarshalled 246 MPs to have his bill passed through the third reading, in readiness for presentation to the president. The bill that was passed sought to amend the constitution, specifically article 204, with the intent to remove the fund from the national government's control to the constituencies.<sup>70</sup> This would basically make the funds from the equalisation fund similar to CDF allocations, while in essence they were meant to be different.

Such supremacy battles have led to the delayed disbursement of the equalisation fund. The money has never been disbursed since 2012 due to the inability of the national assembly and Treasury to agree on the model for the fund in line with the Public Finance Management Act.<sup>71</sup>

### **3.5.3 Weak Financial Management**

The auditor-general's report of 2015 noted various cases of fraudulent behavior and corruption in the way in which government funds are managed at the county level. The reports released from 29 counties noted the misappropriation of county revenue.<sup>72</sup>

The county executives allegedly detain millions of shillings of collected revenue and only declare a portion of it for approval by the Controller of Budget (CoB). It is a requirement that counties do not access banked revenues until they get approval to spend it from the CoB's office.<sup>73</sup>

---

<sup>70</sup><http://www.businessdailyafrica.com/MPs-back-Bill-to-take-over-Sh6bn-Equalisation-Fund/-/539546/2900084/-/7muv5xz/-/index.html> on 6 December 2015

<sup>71</sup><http://www.businessdailyafrica.com/MPs-back-Bill-to-take-over-Sh6bn-Equalisation-Fund/-/539546/2900084/-/7muv5xz/-/index.html> on 6 December 2015

<sup>72</sup><http://www.nation.co.ke/news/politics/How-officials-are-swindling-counties-of-billions/-/1064/2799198/-/jm3wuv/-/index.html> on 6 December 2015

<sup>73</sup><http://www.nation.co.ke/news/politics/How-officials-are-swindling-counties-of-billions/-/1064/2799198/-/jm3wuv/-/index.html> on 6 December 2015

Nairobi collected Sh1.6 billion from parking fees alone between July 2013 and June 2014, but the audit reveals some 72 million of the amount cannot be accounted for.<sup>74</sup>

Things were not different in Mombasa where Sh496 million was not banked after the county received Sh1.7 billion in tax collections from local sources.<sup>75</sup>

Misappropriation of funds is definitely a big headache to the development of counties and the realization of the objectives of devolution.

---

<sup>74</sup><http://www.nation.co.ke/news/politics/How-officials-are-swindling-counties-of-billions/-/1064/2799198/-/jm3wuv/-/index.html> on 6 December 2015

<sup>75</sup><http://www.nation.co.ke/news/politics/How-officials-are-swindling-counties-of-billions/-/1064/2799198/-/jm3wuv/-/index.html> on 6 December 2015

## **Chapter 4: A comparative analysis of Decentralization in Kenya vis a vis Nigeria and South Africa**

### **4.1 Federalism in Nigeria**

Nigeria has a population of more than 155 million people. It has one federal government, 36 state governments and 774 local governments. Each tier has its own constitutional responsibilities. The history of revenue sharing can be traced back to 1951 with the institution of commissions to help allocate revenue in an equitable manner. However, since then, no acceptable formula that is equitable and efficient has been arrived at to date. The process of finding an acceptable formula has often been hindered by political and ethnic considerations that have stalled the process.<sup>76</sup>

The issue of revenue allocation remains very volatile and constitutes a major source of political and governmental tension in Nigeria.<sup>77</sup> The need for a suitable formula for revenue allocation in Nigeria is necessary, especially due to the large amounts of revenue received from the oil and gas industry in the country.

Nigeria has a revenue distribution system in which the national government shares revenues with state and local governments.<sup>78</sup>

Historically, the 1946 Richard constitution laid the foundation for quasi-federalism in Nigeria through regionalism and the first revenue commission was appointed to recommend appropriate revenue for the country.<sup>79</sup> The first commission was the Sydney Phillipson's Commission of 1946. It was subsequently followed by Hicks Phillipson's Commission, 1951, Chicks Commission, 1953, Raisman's Commission, 1958, Binns, Commission, 1964, Dina Report, 1968, Aboyade Report, 1977, Pius Okigbo Report, 1980 and finally the

---

<sup>76</sup> Angela Ambetsa, 'County governments' sources of revenue, 95-96.

<sup>77</sup> Lamidi, OyedeleKazeem and Fagbohun, Francis Oluyemi, 'Advocating for direct revenue allocation to Nigerian local governments: A catalyst for national development', 134.

<sup>78</sup> Lamidi, OyedeleKazeem and Fagbohun, Francis Oluyemi, 'Advocating for direct revenue allocation to Nigerian local governments: A catalyst for national development', 134.

<sup>79</sup> Lamidi, OyedeleKazeem and Fagbohun, Francis Oluyemi, 'Advocating for direct revenue allocation to Nigerian local governments: A catalyst for national development', 134.

Revenue Mobilization Allocation and Fiscal Commission (RMAFC), 1989.<sup>80</sup> Each of these commissions tried to incorporate different principles that were to be considered in the division and allocation funds so as to come up with the most equitable allocation formula.

In Nigeria, the Revenue Mobilization Allocation and Fiscal Commission (RMAFC) is in charge of revenue allocation and is mandated by the Nigerian constitution. Part I, Paragraph 32 of the Third Schedule of the 1999 Constitution of the Federal Republic of Nigeria<sup>81</sup>, states that the Commission is to “review, from time to time, the revenue allocation formulae and principles in operation to ensure conformity with changing realities.”<sup>82</sup> This mandate is similar to that given to the CRA by article 216 of the Constitution of Kenya.<sup>83</sup>

The factors used in coming up with the current formula by the RMAFC were; equality of states, population, landmass and terrain, internally generated revenue and social development factor.<sup>84</sup> The principle of derivation is also applied when coming up with the formula; where the regions which produce natural resources, such as oil and gas, shall be subject to get an allocation from the Federal Account on the basis of this principal, which shall not be less than thirteen percent.<sup>85</sup> The 1999 constitution also established a Federation Account in which all revenue collected by the federal government was to be put.<sup>86</sup>

The current formula allocates 52.68% to the federal government, 26.72% to the state governments and 20.60% to the local governments. This formula was invoked through an executive order by President Olusegun Obasanjo in March 2003 in revision of a formula proposed by the RMAFC in 2001.<sup>87</sup>

---

<sup>80</sup>Lamidi, OyedeleKazeem and Fagbohun, Francis Oluyemi, ‘Advocating for direct revenue allocation to Nigerian local governments: A catalyst for national development’, 135.

<sup>81</sup> Part I, Paragraph 32, Third Schedule, Constitution of the Federal Republic of Nigeria, (1999)

<sup>82</sup>Lamidi, OyedeleKazeem and Fagbohun, Francis Oluyemi, ‘Advocating for direct revenue allocation to Nigerian local governments: A catalyst for national development’, 135.

<sup>83</sup>Article 216, *Constitution of Kenya* (2010)

<sup>84</sup>Lamidi, OyedeleKazeem and Fagbohun, Francis Oluyemi, ‘Advocating for direct revenue allocation to Nigerian local governments: A catalyst for national development’, 135.

<sup>85</sup>Lamidi, OyedeleKazeem and Fagbohun, Francis Oluyemi, ‘Advocating for direct revenue allocation to Nigerian Local Governments: A catalyst for national development’, 135.

<sup>86</sup> Angela Ambetsa, ‘County governments’ sources of revenue, 99.

<sup>87</sup> Angela Ambetsa, ‘County governments’ sources of revenue, 99.

## 4.2 Three-Tier System in South Africa

### 4.2.1 Introduction

South Africa was under the apartheid regime for years until its end on April 27, 1994.<sup>88</sup> The apartheid policy left behind large socioeconomic backlog and underservicing across social groups and regions. One of the critical challenges that the national government faces, therefore, is how best to redistribute national revenues with a view to equity and poverty alleviation. The South African intergovernmental fiscal system is designed to address this concern through the assignment functions allocated to each sphere of government.<sup>89</sup>

The Constitution adopted in 1996 established three separate, interdependent and interrelated spheres of governments: a national government, nine provincial governments and 284 local governments.<sup>90</sup> Each sphere is assigned its own powers, functions and responsibilities.

As is in Kenya, the national government is responsible for managing the country's affairs, and shares responsibility for the provision of basic social services with the subnational governments. The national government's power to intervene in the decisions of provincial or local governments is defined and limited by the Constitution.<sup>91</sup>

Provincial and local government functions consist of exclusive competences and concurrent competences, the latter being responsibilities shared by more than one sphere of government.

The provinces are thus mandated to deliver most basic services, including education, health and welfare. Local governments have the major responsibility for certain local services and infrastructure such as water, sanitation, and electricity.<sup>92</sup>

---

<sup>88</sup> <http://www-cs-students.stanford.edu/~cale/cs201/apartheid.hist.html> on 29 December 2015

<sup>89</sup> Etienne Yemek, 'Understanding fiscal decentralisation in South Africa', 2-3

<sup>90</sup> The Constitution of the Republic of South Africa (1996)

<sup>91</sup> Etienne Yemek, 'Understanding fiscal decentralisation in South Africa', 4.

<sup>92</sup> Etienne Yemek, 'Understanding fiscal decentralisation in South Africa', 10.

#### 4.2.2 Fiscal Decentralization in South Africa

Fiscal decentralization is carried out between the three systems of government in South Africa in a system known as the intergovernmental fiscal relations (IGFR). The IGFR system determines the way in which taxes are allocated and shared among the various levels of government, and how funds are transferred from one level to another. This is mandated by the Constitution of South Africa and is done through the devolution of revenue and expenditure assignments to subnational governments.

In addition, the Constitution provides that a non-partisan Financial and Fiscal Commission (FFC) should advise parliament and sub-national governments on a variety of issues in intergovernmental fiscal relations. These include taxing powers, the allocation of revenue between tiers of government the grants system and borrowing powers.<sup>93</sup> The FFC is similar to the CRA in Kenya.

The South African system is also similar to that in Kenya in that, every year there is a Division of Revenue Act (Division of Revenue Bill in Kenya) which allocates revenue to the three forms of government in South Africa.

In South Africa, however, many devolved government entities remain poorly funded. They have been unable to raise sufficient revenue from local taxes and service charges. The South African National Treasury estimates that 42% of local government revenues are generated locally with the remaining 58% of their income coming from national revenue, grants and donations.<sup>94</sup>

The equitable transfer to the provincial governments in South Africa takes into consideration the following parameters: (i) Population of the province (weighted at 14%); (ii) Education share based on the size of the school age population and the average number of learners enrolled in public schools over the previous three years ( weighted at 51%); (iii) Health share based on the proportion of the province's population without access to medical aid ( weighted at 26%); (iv) An institutional component divided equally among the provinces

---

<sup>93</sup> Wallace Kantai, *Lessons for devolution: A country comparative Study, Devolution in Kenya: Prospects, challenges and future*, 67.

<sup>94</sup> Calvin Nyambane, *Challenges facing devolution in Kenya: A comparative study*, 2014, 16.

(weighted at 5%); (v) a poverty component based on the poverty incidence ( weighted at 3%) and (iv) and output component based on province level GDP ( weighted at 1%). An interesting comparison can be made with Kenya's approved CRA formula that applies the following parameters: Population 45%, Poverty Index 20%, Land Area 8%, Basic Equal Share 25%, and Fiscal Responsibility 2%. South Africa gives the most weight to the education parameter and health, which are not factored in Kenya's formula. Population comes in third as compared to Kenya where it is given the most weight.<sup>95</sup>

### **4.3 Lessons learnt from the Nigerian and South African contexts**

#### **4.3.1 Strengthening of Constitutional Institutions**

As seen from the case studies of both the South African system and the Nigerian system, the Financial and Fiscal Commission (FFC) and the Revenue Mobilization Allocation and Fiscal Commission (RMAFC), they both hold great power in the allocation of revenue in their respective countries. The law in South Africa and Nigeria has developed to support these commissions and promote their independence. In the Kenyan context, the CRA cites lack of full support, resistance and irresponsiveness as one of its major challenges.<sup>96</sup> This is however expected due to the fact that the Kenyan constitution is only a few years old hence, some resistance to the change. Proper civic education on the roles of the CRA may be the solution to this problem of resistance as people only fear what they do not know.

Kenyan legislation should strive to uphold the independence of the CRA, as given by the constitution, and the decisions should be backed by both the national and county governments, to ensure that they are implemented for the benefit of the *wananchi*.

#### **4.3.2 Accountability**

Some of the major challenges faced by Nigeria and South Africa are rooted in the lack of proper accountability in the both the national and local governments. In Nigeria, the development of the fiscal decentralization system has led to massive development of the local governments and state governments however, one of the most regressive factors

---

<sup>95</sup> Angela Ambetsa, 'County governments' sources of revenue, 91.

<sup>96</sup> <http://www.crakenya.org/information/faqs/> accessed on 20.12.15

that scholars have widely reported on is corruption.<sup>97</sup> With low levels of accountability, money that is meant to be of benefit to the people is lost in an unscrupulous manner.

Kenya could derive lessons on the importance of accountability from these countries so as not to make the same mistakes which shall negatively impact its economic development and take it away from realizing the objectives of devolution. This can be done by creating systems and procedures on reporting of how funds are used and prosecution of those who are found to be guilty of corruption and similar economic crimes.

#### **4.3.3 Inclusion of the Principle of Derivation in the Revenue Allocation formula**

The revenue allocation formula in Nigeria brought in a new dimension by including the principle of derivation as a consideration for how the funds are to be allocated. The principle of derivation was necessary to Nigeria due to the large oil and gas industry in the country.

Despite its pitfalls, the principle may be one to consider in Kenya, with the discovery of oil and gas in Turkana county and other minerals such as titanium in Kwale county, as it gives a high benefit to the counties which are the source of the minerals and natural resources.

#### **4.3.4 Proper development of the Fiscal Decentralization system**

One point to note from both South Africa and Nigeria is that decentralization of government is not a perfect system rather it is an imperfect system which is ever changing. However, despite its imperfection, it has very many advantages and if developed in a proper manner to meet the needs of the specific nation, it may lead to large scale political and economic development.

The Nigerian and South African systems are still not perfect but they have come a long way in making the systems better, therefore the Kenyan system will also be plagued with problems but if rightly dealt with will lead to the country's growth.

---

<sup>97</sup>AbachiTerhemem Philip PhD, SalamatuIsah PhD, 'An analysis of the effect of fiscal decentralisation on economic growth in Nigeria', *International Journal of Humanities and Social Science*, 2 (2012), 147.

## **Chapter 5: Recommendations and Conclusion**

The 2010 Constitution was as a result of Kenyans wanting a paradigm shift in how the country was being governed as we needed a new formula that would put the ownership of government back to where it rightfully belongs, in the hands of the people. This led to the inclusion of Chapter 11 which devolved government further, thus giving the *mwana* a say in the day to day activities of government through better representation and most importantly, it was the hope of the people that we would get a more equitable share of what the country has to offer, in terms of fiscal decentralization.

It has been just over 5 years since the promulgation of the new constitution and almost three years since the establishment of the first devolved units of government. The hope that Kenyans had with the devolved form of government has not been fully met yet however, major improvements have been seen in our different counties with increase in hospitals, schools, better roads and other county government related services. However, there is still so much more to be done and much more that needs to be achieved in the coming years.

The devolved governments have been marred with issues of corruption, mismanagement, misappropriation of funds and other negative factors which we had thought to be fables of the past, having ushered in a new era through the 2010 constitution.

The research carried out, whose results are jotted down in this paper, show fiscal decentralization, which is one of the most important aspects of devolution, is still at the infant stage and therefore will only develop out of its imperfections with years of development of laws and policy and also with a change of mindsets in the people. The inclusion of devolution was definitely not a magic wand which would change everything in an instant. The development of devolution demands patience and the right minds to take it to a new level. This paper further came up with some recommendations that would ease the pain and irritation of the teething process of devolution and aid in faster growth, more so with regards to fiscal decentralization of government revenue.

## **5.1 Recommendations**

### **5.1.1 Legislative re-alignment**

With the promulgation of the 2010 constitution, various laws were needed to support the new structures and offices that had been established. Some of the legislation, however, due to the fact that the constitution is still quite new, was drafted in a hurried manner to meet deadlines and without much experience or expertise. In a bid to improve fiscal decentralization and devolution as a whole, the continuous review and change of laws to suit the current situations and conditions should be encouraged.

There has been clamour by the opposition, through the *Okoa Kenya* campaign, and the *PesaMashinani* by council of governors, to have the constitution amended in order to increase the minimum allocation from 15% to 45%. From the research carried out in this paper, their calls for an amendment are justified as indeed, the 15% minimum is quite low as compared to other countries with a similar form of government.

The CRA should therefore sit down with the different stakeholders and look for ways in which the current legislation may be amended to suit the Kenyan demographic and meet the objectives of devolution set out in the constitution.

### **5.1.2 Formula**

The Kenyan constitution under article 216<sup>98</sup> gives the Commission on Revenue Allocation the mandate to review the revenue allocation formula and make recommendations. The CRA thus far has done a good job in revising the formula, with the just released recommendation on the second generation formula intending to increase county allocation by Kshs. 101.1 billion, thus increasing the total from Kshs. 276.4 billion in the 2015/2016 financial year, to Kshs. 377.5 billion in the 2016/2017 financial year.<sup>99</sup> However, the CRA should also do more research so as to include other possible principles, such as the principle of derivation as used in Nigeria, to the allocation formula.

---

<sup>98</sup> Article 216, *Constitution of Kenya* (2010)

<sup>99</sup> <https://citizentv.co.ke/news/body-proposes-increase-of-county-funds-by-sh100-billion-110328/>, on 6 January 2015

### **5.1.3 Equalisation Fund**

Article 204<sup>100</sup> of the constitution creates the equalisation fund, which is to be used by the national government to provide basic services including water, roads, health facilities and electricity to marginalized areas. The essence of this fund is to help bring equity to what are regarded as marginalized areas, so as to enable for the fast growth and development of such areas.

The CRA has so far been able to publish a list of the 14 counties which are going to benefit from this fund but the process of getting the funds to the people, has been stalled by supremacy battles on who shall control the fund, between the county government and the national assembly despite the law placing control in the national government.

The battles around the equalisation fund should be quickly resolved so that the people of Kenya may start benefitting from this fund as it will bring the much needed equity. The law should be followed and as the law places control in the national government, it should be followed.

### **5.1.4 Accountability**

The use of public funds disbursed to the county governments has come into question time and again since the establishment of the first county governments. Cases of corruption, misappropriation and mismanagement of funds have been rampant at county level. Bungoma county government, for example, was accused of procuring 100 wheelbarrows at a cost of about Kshs. 1 million each, which to many is quite absurd. This is just one example of how funds are being mismanaged and being embezzled by the county governments and with no repercussions on the perpetrators of these crimes.

More stringent measures should be placed to enhance reporting by county governments and ensure that funds are used in the intended manner. Sanctions should also be enacted in the law to ensure that the county governments which are found to misappropriate funds are punished for these actions.

---

<sup>100</sup>Article 204, *Constitution of Kenya* (2010)

Furthermore, government agencies such as the Ethics and Anti-Corruption Commission (EACC), who are given the mandate to investigate corruption charges, should do their job and ensure that such crimes do not go unpunished. For devolution to succeed, all parts of the system should carry out their functions diligently.

## **5.2 Conclusion**

All in all, the idea of fiscal decentralization is one that is to the benefit of the Kenyan people and despite the small and slow strides, there is hope that they shall gradually transform into a sprint. We, the Kenyan people, have to be patient with the process and endeavor to help in the improvement of what is naturally an imperfect system. Kenyans should be fully involved in the business of both the county and national governments and ensure that the best decisions are made for the current and for the future generations.

This research has brought to light various issues and recommendations and from the findings, it is safe to say that indeed the hypothesis is true and therefore, the allocation of funds to counties is still not enough.

Fiscal decentralization and devolution as a whole is indeed a step in the right direction on the road to a greater and more developed Kenya.

## List of References

### Books

Robert T. Buttram, Robert Folger, and B.H. Sheppard, "Equity, equality and need: Three faces of social justice," in *conflict, cooperation, and justice: Essays inspired by the work of Morton Deutsch*, Jossey-Bass Inc. Publishers, 1995.

### Journal Articles

AbachiTerhemem Philip PhD, SalamatuIsah PhD, 'An analysis of the effect of fiscal decentralisation on economic growth in Nigeria', *International Journal of Humanities and Social Science*, 2 (2012).

Adeleke Salami, 'Taxation, Revenue allocation and fiscal federalism in Nigeria: Issues, challenges and policy option', *Economic Annals, Volume LVI, No. 189* (2011).

Annette Omolo, Devolution in Kenya: A critical view of past and present frameworks, *Institute of Economic Affairs* (2010).

Etienne Yemek, 'Understanding fiscal decentralisation in South Africa', *IDASA – Budget Information Service – Africa Budget Project* (2005).

Ikeji, Chibueze C, 'Politics of revenue allocation in Nigeria: A reconsideration of some contending issues', *Sacha Journal of Policy and Strategic Studies Volume 1 Number 1* (2011).

KiraguWachira, 'Fiscal decentralisation: Fostering or retarding national development in Kenya?', *Institute of Economic Affairs* (2010).

Lamidi, OyedeleKazeem and Fagbohun, Francis Oluyemi, 'Advocating for direct revenue allocation to Nigerian Local Governments: A catalyst for national development', *Journal of Public Administration and Policy Research*(2013).

Wallace Kantai, 'Lessons for devolution: A country comparative Study, Devolution in Kenya: Prospects, challenges and future', *Institute of Economic Affairs* (2010).

Ondigi Calvin Nyambane, 'Challenges facing devolution in Kenya: A comparative study' (2014).

Kenya Human Rights Commission and Social and Public Accountability Network, 'Harmonization of decentralized development in Kenya: Towards alignment, citizen engagement and enhanced accountability' (2010).

### **Dissertation**

Angela Ambetsa, 'County governments' sources of revenue: A legal perspective on how the county governments are funded' Unpublished LLM Thesis, University of Nairobi, November 2014.

### **Internet Sources**

Mwangi S. Kimenyi, *Devolution and resource sharing in Kenya*, [www.brookings.edu/research/opinions/2013/10/22-devolution-resource-sharing-kenya-kimenyi](http://www.brookings.edu/research/opinions/2013/10/22-devolution-resource-sharing-kenya-kimenyi)

[www.ciesin.org/decentralization/English/General/Different\\_forms.html](http://www.ciesin.org/decentralization/English/General/Different_forms.html)

'Michelle Maiese : Distributive justice' *Beyond Intractability*, June 2013.  
<http://www.beyondintractability.org/essay/distributive-justice>

'Matthew Robinson, PhD: What is social justice?' <http://gjs.appstate.edu/social-justice-and-human-rights/what-social-justice>

<http://www.tandfonline.com/doi/abs/10.1080/02255189.1987.9670192>

[https://openaccess.leidenuniv.nl/bitstream/handle/1887/9018/ASC\\_1268319\\_040.pdf?sequence=1](https://openaccess.leidenuniv.nl/bitstream/handle/1887/9018/ASC_1268319_040.pdf?sequence=1)

<http://kimmagedsc.ie/dissertation/decentralization-kenya/>

<http://www.crakenya.org/news/cra-chairman-launches-marginalisation-policy/>

<http://allafrica.com/stories/201403060615.html>

<http://www.crakenya.org/information/faqs/>

## **Newspaper Articles**

<http://www.standardmedia.co.ke/article/2000139239/draft-bill-on-issues-informing-pesa-mashinani-campaign-finally-out>

<http://www.businessdailyafrica.com/MPs-back-Bill-to-take-over-Sh6bn-Equalisation-Fund/-/539546/2900084/-/7muv5xz/-/index.html>

<http://www.nation.co.ke/news/politics/How-officials-are-swindling-counties-of-billions/-/1064/2799198/-/jm3wuv/-/index.html>

## **Legislation, Acts of Parliament**

### **Kenya**

*Constitution of Kenya* (2010)

*Public Finance Management Act* (No.18 of 2012)

### **Nigeria**

*Constitution of the Federal Republic of Nigeria* (1999)

### **South Africa**

*Constitution of the Republic of South Africa* (1996)