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The Values of Money

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A significant change in the distribution and use of resources was among the most ardently desired objectives of Kenya's 2010 constitutional reform. For this reason, Chapter 12 of the constitution lays out both detailed principles and elaborate procedures for making decisions about public finances. What do these principles and procedures indicate about the intended aims of Kenya's public finance system? In my view, the core values are reducible to two: public engagement throughout the process and equity in distribution of resources. These core values are supported by some additional principles, however, which can be discerned from procedural choices. These principles include: choices should be deliberative and not left to any one institution; democratic choice should be partially constrained by detailed technical guidance; decisions should be frequently reviewed and revised.

Participation

The first principle in Article 201 is "openness and accountability, including public participation in financial matters." This builds on the broad values underlying the constitutional order as a whole as defined in Article 10, which refers to "democracy and participation of the people" as national values. While public participation in finance is not defined, the constitution requires public consultation at specific moments. Among these is the

moment when the decision about how to allocate funds among the counties (“the formula”) is made (Article 217), and in the annual decision by the parliamentary budget committee about how to respond to the executive’s proposed budget (Article 221).

It is noteworthy that these clauses direct Parliament to consult with the public. In the Public Finance Management Act 2012, there are further requirements for executive consultation, including a requirement to consult the public in drafting the national Budget Policy Statement and the requirement for each county to create a special body, the County Budget and Economic Forum, to consult the public on county budgets. Taken together, the constitution and PFM Act envision considerable consultation throughout the year between executives, legislatures and the public. This consultation naturally rests on a general environment of transparency, captured by the “openness” in Article 201, and “transparency and accountability” in Article 10, but also specific references to transparency and efficiency in the keeping of financial records, the procurement of goods and services, and the audit of government accounts (Articles 226 and 227). Article 10 also mentions integrity in connection with transparency and accountability, and it can be inferred that the accounting officers appointed under Article 226 must be, like all government officers, transparent, accountable and persons of integrity.

Equity

Article 201 is also explicit about the equity principle, which is expressed in various clauses referring to sharing of revenues, development, and the “burdens and benefits” of the raising and spending of public funds. The equity principle is expanded upon in Article 203 which refers to the factors that should determine

the county shares of national revenue. The constitution mentions developmental needs, fiscal capacity, and incentives for counties to optimize their own revenue collection (what is usually called “fiscal effort”). “Economic disparities” and “affirmative action in respect of disadvantaged areas and groups,” are also mentioned. The Equalisation Fund is designed to channel a small fixed share of annual revenues to marginalized areas in order “to bring the quality of those services [roads, water, electricity and health] in those areas to the level generally enjoyed by the rest of the nation, so far as possible.” Equity must also be considered between current and future generations, meaning that we must consider the benefits and costs to different generations of choices we make today, such as contracting new debt.

Deliberation and separation of powers

So much for the two major values of participation and equity. I turn now to the supporting principles embedded in procedure. The first is deliberation and separation of powers. If we look at the annual division of revenue, we can see clearly how this first supporting principle operates. First, the timeframe for the decision is extended, with recommendations tabled by January 1 and a decision reached only by March 15. These two and a half months are meant to be filled with active deliberation on the published recommendations of the Commission on Revenue Allocation (CRA), a response to those recommendations from the National Treasury, and then deliberations in Parliament. While there has been debate about the proper role of the Senate in these discussions, a Supreme Court advisory opinion clarified that both houses of Parliament should be involved, meaning that there are four major actors that contribute to this decision: CRA, Treasury, National Assembly and Senate.

How is democratic choice partially constrained by technocratic guidance? As noted, the constitution provides a very clear delineation of equity principles in Article 203, which must be taken into account by these actors in determining how to share resources. The constitution is also very clear on the services covered by the Equalisation Fund. The decision to give an autonomous, quasi-technical body, the Commission on Revenue Allocation, the agenda-setting power in these discussions was also intended to moderate the power of elected officials in the process (as well as of the unelected officials at the National Treasury). Similarly, consider the Salaries and Remuneration Commission, which controls the salaries of state officers and sets the agenda for the determination of public sector wages as a whole. Again, a central public finance question was not entrusted wholly to democratically elected actors.

Finally, the requirement for an annual division of revenue and a revision of the criteria for revenue sharing among the counties every five years indicates a desire to avoid making permanent decisions and to ensure continuous debate on these matters. This reflects a desire to avoid locking in poor or potentially unfair choices that might lead to perceptions of permanent minorities or irremediable inequities.

How are we doing?

So how well have we done so far in implementing these principles? Let's start with participation. There is no question that the budget formulation and approval process starts earlier, lasts longer and is more open to public scrutiny. This is true in spite of numerous delays and failures, such as the fact that the Division of Revenue and County Allocation of Revenue Bills have not been released or passed on time since 2013, and that

the approved national budget is not consistently available to the public within 21 days as required by law. The public is woefully uninformed about the basis for the division of revenue, and there is minimal, and equally uninformed, discussion of this issue in the media. This has helped to fuel calls for a referendum to increase funding for counties based on a flawed understanding of the cost of government.

The average citizen's engagement with the decision about the CRA formula has been even more abysmal. At Senate hearings on the formula revisions in February 2015, only three members of the public were present, and it was later clear that the Senate Finance Committee did not intend to change its recommendations to reflect public comments. Participation in National Assembly budget hearings is somewhat higher, but still limited. At the county level, deadlines for tabling and publication of key budget documents have been routinely missed, and budget documents are not consistently made available to the public in any form.

Both levels of government have pursued modest efforts at public participation in the budget process through public hearings. However, these efforts are plagued by lack of sufficient notice, inadequate information and poorly structured meetings in which citizens are given little time to deliberate. Few counties have fully operationalized their County Budget and Economic Forums.

At the budget implementation stage, the Controller of Budget has raised the profile of spending issues, and, along with a perhaps surprising fixation on this issue among Senators, this has put management of resources at county level squarely on the public agenda, leading to intense discussion about what county governments are doing with public money. Much of this discus-

sion is media-fuelled and is outside of the formal procedures for dealing with such matters, such as oversight by county assemblies. It constitutes a diffuse and weak form of participation, and is often poorly informed by media (which is, for example, unable to distinguish between the Controller of Budget and the Auditor General), but it is nevertheless a kind of participation that has increased substantially since 2013. There has also been an apparent surge in citizen protest over county finance acts (which set taxes and rates), another form of informal participation. The lack of other structures for engaging with decision-making has tended to make street protests the most attractive option for voicing concerns, though there has also been resort to the courts, as in Kiambu (where the court held that the county Finance Act was invalid because of lack of participation).

On the matter of equity, the record is also mixed. The first formula achieved considerable redistribution with a strong focus on fiscal need. Historically marginalized counties, particularly those in northern Kenya, were given a massive increase in funding, in some cases more than double what they were estimated to have received before 2013. This achievement came at a cost, however, as a number of counties did not receive enough from the formula to actually maintain their service levels of 2012/13. The proposal by the National Treasury to “hold harmless” counties to ensure that no one actually saw a decline in service levels was rejected as regressive and anti-devolution, but a core principle of fairness is that we should, where possible, avoid making people worse off to make others better off. Holding harmless does mean less redistribution in the short-term, but to keep this in perspective, it would have cost about Ksh 20 billion to achieve in year FY 2013/14, and counties like Turkana and Mandera would still have received more than double what they

were receiving before. CRA stood firmly against “holding harmless”, but conversations I organized in 2014 around revenue sharing indicated that when the issues were properly explained, many Kenyans actually supported this approach.

The first formula also fell short of other principles of equity, such as those associated with fiscal capacity and fiscal effort. Fairness demands that those who can do more for themselves be given less (fiscal capacity) and those who make more of an effort on their own behalf be rewarded rather than punished (fiscal effort). CRA’s proposed revisions to the formula refine the definition of fiscal need, but do not address these other principles. These principles are in Article 203 but not in the proposed formula.

The failure to approve regulations and disburse the Equalisation Fund is also a blot on the equity record of the first years of devolution. Though a fairly small fund, the figures are not trivial for areas of the country that are most marginalized. Concerns have also been raised about the decision by CRA to consider the unit of “marginalized areas” to be counties, ignoring the possibility of using this fund to target sub-counties or wards. Indeed, available data suggests vast inequalities at ward level that are more severe in many cases than inequalities across counties, themselves substantial. There is thus far no mechanism for dealing with inequality within counties and the preliminary record of MCAs in this regard is severely deficient: many have opted to share resources equally across wards in spite of massive inequities in their counties.

There has also been inadequate debate about the equity implications of national government moves to contract more debt. A cardinal principle of fairness is that debts contracted today that will be paid in the future must benefit the future generations

that will pay off the debt. The requirement in the PFM Act that debt be for capital investment helps to ensure this, and the current administration's focus on large-scale infrastructure is consistent with this. However, this does not tell us how much debt is reasonable to leave for our children. That depends on analysis that has been thoroughly debated in public about the expected economic benefits of large-scale infrastructure. It remains unclear whether the burden of repaying the debt associated with the Standard Gauge Railway and other projects will indeed be balanced by the economic growth and enhanced revenue these projects generate.

In terms of the values of deliberation, checks and balances, technical guidance and frequent review, there is no question that in all these ways we are better off than we were before, when these decisions were made in the dark and there was no way to know what basis was used. Today, we do have debate about these issues in parliament, we have transparent disagreements between CRA and Treasury, all stakeholders refer to the technical principles in the constitution when arguing their cases, and we are reviewing the first formula on schedule (though approval of revisions looks to be delayed). There are also frequent revisions to the national budget that suggest the increasing ability of parliament to check executive preferences.

Nonetheless, the quality of deliberation is fairly low, and technical guidance, while often invoked, is not necessarily an effective constraint on action. Various other unresolved matters suggest that we are not where the constitution wanted us to be. State corporations control a third of the total national ministerial expenditure, and though a number of them (such as the Kenya Rural Roads Authority, or the Water Service Boards) perform devolved functions, there has been no reform of these agen-

cies as yet. Parliament is reluctant to part with CDF although it has been held unconstitutional by the High Court. There has been precious little reform of the Kenya National Bureau of Statistics to provide us with the information we need to make choices about how to share resources in a devolved system. But the weakest link is public engagement: until the public wakes up to its role in resource sharing, we can be sure that change will be slow and halting.

Things to think about

- Think about how you manage your personal or household money: do you have principles about how you decide what to do with the money in terms of using it wisely, and fairly if it is for other people as well as yourself? Do you think these principles are similar to those that the national and county governments ought to use in managing public money?
- If you were introduced today to your county executive member responsible for finance, what would you say about the way county money is being spent?
- Have you read your county's budget or any document the county has put out about the budget?
- Why not join together with other people to discuss the budget and make suggestions? It may be hard for one person, but together you might be able to make a useful contribution.
- Have you ever thought of yourself as a taxpayer (you certainly are, even if you do not have to pay income tax for some reason)? Does that perspective give you a different way of looking at the way government spends money?