

# ADVISORY TO THE DRAFT DEVOLUTION POLICY

*"The draft Devolution policy is not well grounded on human rights concern which is a necessary ingredient in ensuring human rights based approach to sustainable development and is the other foundation of devolved system of governance"*



## **Introduction**

The proposed devolution policy is meant to operationalize the implementation of devolution by giving life the legislations<sup>1</sup> that seek to anchor a devolved system of governance in Kenya. The policy then should give meaning to the principles and objects of devolution as well as the transformative aspects of the constitution on the broadened bill of rights participation, equality and inclusivity.

The draft Devolution policy is not well grounded on human rights concern which is a necessary ingredient in ensuring human rights based approach to sustainable development and is the other foundation of devolved system of governance.

## **OUTLINE OF THE DRAFT POLICY**

### **PART ONE: BACKGROUND TO THE DEVOLUTION POLICY**

#### **1.0: Introduction**

In the background , the draft policy should highlight the following issues: give an appreciation of constitutional and legal frameworks on devolution in general; highlight the key policy areas that the devolved governance should deal with; identify gaps to be filled, institution and processes to be covered to enhance service delivery; focus on guiding principles that inform the understanding of the policy; recognize the two-tier system of government; and limit the scope of the policy and give overall guiding principles.

The draft policy should also outline public consultations and generally the processes that the document has undergone in line with the procedures outlined in the constitution.

Pursuant to Article 6 (3) which states that “a national organ shall ensure reasonable access to its services in all parts of the republic , so far as it is appropriate to do so having regard to the nature of the service.”

#### **1.1: Devolution and other Forms of Decentralization**

Instead of the policy outlining form of decentralization, it should have: defined devolution as envisioned in the constitution; discussed the main features of devolved governance; give a critical analysis of how devolution is understood and general debate around devolution.

#### **1.2: Situation Analysis**

##### **1.2.1: Legal and institutional Framework**

Article 6 (3) of the constitution requires the national government to state the extent to which it has been able to transfer services to the counties. This draft policy needs to capture this to show progress in transfer of functions to the 47 counties. The division of revenue Act No.31 has been overlooked in the draft policy and other sectoral laws amended or enacted with a bearing on devolution e.g. Land laws, on security – National Police Service Act, Environmental Management Act which is under review.

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<sup>1</sup> The legislations that seek to entrench devolution are Public Finance Management Act, 2012,; County Government Act,2012; Transition to Devolved Government Act, Urban Areas and Cities Act, Intergovernmental Relations Act

### 1.2.2: Strengths, Weaknesses, Opportunities, and Threats (SWOT) Analysis

Generally the policy should have a comprehensive analysis and context of the SWOT. The issues identified in the SWOT analysis are not exhaustive and some are in conflict. There is need to subject the SWOT analysis in the context of Political, Environmental, Social, Technological, Environmental and Legal<sup>2</sup> issues.

- *One of the greatest **weaknesses** of devolution is the fact that this system of governance is new both to the rights holders (citizens) and duty bearers (public and state officers)*  
The realization of constitutional gains such as participation, equality and devolution are new concepts to both the supply and demand sides of the development equation. Capacity gaps on both the supply and demand sides need to be recognized and addressed to enable both sides meet their obligation to provide services and demand for services respectively<sup>3</sup>.
- **Threats** – There is unhealthy competition between county governments internally and external and national government between arms of government
- *The other **threat** to devolution is the resistance to change by those who have benefitted from the centralized system of governance*  
The resistance to relinquish governance authority to County Governments, particularly by organs that benefited from the opacity of a centralized system of government and often citing capacity gaps in County governments do not auger well to the implementation process<sup>4</sup>.
- **On opportunities** – The analysis portrays staff from the defunct local authorities as qualified, yet the county government perception is that these staff is lazy and unqualified.  
Most county government have been working together by pooling resources together and forming county economic blocs.
- Public participation has been covered as strength and also as a weakness in the SWOT matrix

## PART TWO: POLICY FRAMEWORK

### 2.0: Introduction

The draft policy has failed to recognize other existing policy frameworks and to give a niche to the proposed policy by outlining the policy gaps that it seeks to address.

### 2.3: Guiding Principles

The principles are borrowed from chapter 11 on devolution, but leaves out principles on chapters on leadership and integrity, values and principles on public service, public finance, land and other sectoral policies that are central to devolution.

### 2.4: Values of Devolution

The values have not been contextualized and systematically linked with the values of devolution. It has failed to link development with human rights while Article 10<sup>5</sup> of the constitution recognize

<sup>2</sup> PESTEL (Political, Environmental, Social, Technological, Environmental and Legal)

<sup>3</sup> KHRC's concept paper on County Model Framework

<sup>4</sup> KHRC's concept paper on County Model Framework

development and human rights as some of the foundation upon which national values and principles of governance are anchored. Under the UN declaration, the UN guiding principle of 1987 states that “ development is a comprehensive , economic , social , cultural and political process which end at constant improvement of the wellbeing of the entities, population and of all individuals on the basis of their active, free and meaningful participation in the distribution of benefits resulting thereof”

**D - Development** should embrace a human rights based approach and sustainable development. The Human Rights Based Approach (HRBA) is a development programming approach underpinned by human rights principles and standards. This approach takes the individual to the *‘driver’s seat’*, with human rights as the *‘engine’* of the development process<sup>6</sup>. Therefore in recognizing development as a value, this must go together with human rights based approach.

### **2.5: Conceptual Framework**

The conceptual framework needs to give a background of the eleven pillars, use simple language as policy implementers may not comprehend the levels of variables and expand the outcome beyond development and democracy to either objects of devolution or national values and principles of governance as outlined in Article 10.

Under interventions on the framework, the state should support, engagement and respect for human rights based approach as other objects of devolution.

### **2.6 Devolution Policy Formulation Process**

This process of policy formulation should come at the background and introductory part to show the processes that the draft policy has undergone.

## **PART THREE: PILLARS OF THE DEVOLUTION POLICY**

### **3.0: Introduction**

Generally, under all the eleven pillars that underpin this draft policy, the proposed policy measures are vague and has failed to capture and address emerging issues such as: turf wars between and within deferent levels of government; recognition of existing institutions, ongoing processes, legal and policy measures that contribute to devolution; key policy areas that underpin the policy and the roles of institutions that have mandate in enforcing the policy.

### **3.5: Public Finance Management**

#### **3.5.1: Public Finance**

##### **Policy measure;**

- *Develop and implement a policy on business and human rights for national and transnational co-operations.*

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<sup>5</sup> Government of Kenya (2010), The Constitution of Kenya.

<sup>6</sup> KHRC’s Devolution manual ( March 2015) “ A human Rights based tool for governance”

The draft policy has failed to recognize that human rights violations do occur and with the discovery of oil, gas and other extractives, activities of transnational co-operations will definitely increase in the country and so are the cases of violations at the counties where TNCs are situated.

The United Nations has developed guiding principle on business and human rights to ensure that business observe human rights in the process of doing their business. This principle provides for a mechanism for addressing grievances in the event that violations of rights occur.

- *Develop and implement guidelines on county budget and economic forum and support counties to establish such forums*

The devolution policy also failed to recognize the fact that majority of counties have not set up the budget and economic forum pursuant to article 137<sup>7</sup> of the Public Finance Management Act 2012. The policy should clarify the institution(s) that have a mandate to ensure that county governments comply with this constitutional provision.

- *Consultatively develop a framework for establishing the real cost of running the 47 counties to ensure they deliver on their mandate under 4th schedule of the constitution.*

The policy on devolution should ensure a clear formula of establishing the resource requirements of the 47 counties based on the unbundling of functions as stipulated in schedule 4 of the constitution. There is a raging debate that national government has failed to fully devolve certain county functions such as agriculture, roads and electrification as envisaged by the constitution. The law is categorical that by December 2015, all county functions should be fully devolved by the Transition Authority whose mandate is ending early next year (2016).

### **3.5.3: Public Procurement**

#### **Policy measure;**

- *Review procurement laws and policies to make them simple to understand and easy to adhere to by procuring entities*

On public procurement Article 227 (2)(b) of the constitution through an Act of parliament will provide for “ the protection or advancement of persons or categories of persons or group previously disadvantaged by unfair competition or discrimination”. Article 121 of the public Finance Management Act, 2012 cites Article 227 of the constitution and Public procurement and Disposal Act, 2005. While the corruption prevention guidelines of March 2009 and the public procurement and disposal regulations, 2006 are efforts to stream line procurement, the frameworks are too laborious and difficult to implement by marginalized and disadvantaged groups as envisioned in Article 227 of the constitution. The policy should recommend review of the laws and also come up with simple and clear guides to enable the disadvantaged to participate.

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<sup>7</sup> Government of Kenya, Public Finance Management Act 2012

- *Develop and implement a policy to regulate how resources that cut a cross counties will be utilized and shared. (the policy should compel relevant government institutions such as inter-governmental relation to take action).*

As much as Article 118<sup>8</sup> (1) on the County Government Act, 2012 recognizes shared services and proceed to state that “a county government may enter into an agreement with the national government, another county government or an agency of the national government.....” Article 118 (2), states that “each county shall have a county shared services platform aligned to national policies, standards and norms”. However, the policy has failed to outline how this will be achieved due to lack of a standard to guide sharing of services among counties and national government.

### **3.5.4: Development Planning**

#### **Policy measure;**

- *Integrate elements of human rights, conflict resolution, gender and environment for sustainable development in all plans and policies*

Article 105<sup>9</sup> of the County Government Act,2012 envision *integration* in planning, however the law is not clear on how these elements are integrated in planning and hence need to operationalize their inclusion.

### **3.8: Civic Education**

The devolution policy should have a policy measure to;

- *Set a percentage of the total annual county budget to be set aside for civic education.*

Articles 98 and 99 of the County Government Act, 2012 speaks to the principles and objects of civic education. Further Article 100 mandates the national government to design and county government to implement civic education. However, from the two years’ experience, counties have either failed to allocate resources for civic education or allocated inadequate resources for the same. It is therefore crucial for the devolution policy to ring fence a certain percentage of the county budget to be allocated to civic education.

### **Conclusion**

As a result of the dynamism, fluid environment and uniqueness of our devolution the policy needs to be futuristic and be reviewed periodically to take into account the changes that the implementation process in undergoing.

There is also a need to for a human rights and governance framework to guide delivery of social justice/ services at the county and national government levels more or less similar to the County Model

Framework developed by Kenya Human Rights Commission. **See link**

**(<http://resource.khrc.or.ke:8181/khrc/handle/123456789/157>)**

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<sup>8</sup> Government of Kenya, County Government Act, 2012

<sup>9</sup> Government of Kenya, County Government Act, 2012

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1. Government of Kenya, the Constitution of Kenya 2010
2. Government of Kenya, the Public Finance Management Act, 2012
3. Government of Kenya, the Devolved Government Act, 2012
4. Kenya Human Rights Commission (March 2015), Devolution Manual “A human Rights based tool for governance”
5. Kenya Human Rights Commission (2013), County Model Framework Concept
6. Government of Kenya, the public procurement and disposal Act no. 3 of 2005.