

A Critique of the Interim Report Task Force on the Devolved Government (TFDG)

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during a retreat on 4th, 5th, 6th May 20100

Summary of Observations:

1. The Report provides detailed principles and standards under each chapter which will provide a good basis for subsequent policy. These principles and standards are in conformity with the Constitution of Kenya 2010;
2. The thematic areas are exhaustive and structured in a functionally competent and useful way for purpose of informing policy and legislation;
3. Given the time constraints the TFDG has made adequate attempts to obtain citizen input into the process of developing the report.

The abovementioned notwithstanding the report has numerous gaps and weaknesses which if not addressed will undermine its suitability to inform future policy and legislation.

1. The report appears not to have taken cognizance of the numerous reports that have been generated by state and non-state actors' specialist in this area, that would have informed Kenya's experiences with decentralized funds in Kenya, and the lessons learnt from the same.
2. Unfortunately, the report shies away from taking any potentially controversial positions, and in so doing, fails to tackle the very issues that are likely to derail the devolution agenda.
3. Some of the chapters are very poorly organized and difficult to read due to their lack of structure.
4. The report contradicts itself in some sections and it is evident that the authors of respective chapters did not get a chance to harmonize their positions prior to publication of the report. We are especially concerned that the section on public finance which has implications on the size and functioning of the devolved structures, comes much later and appears unlinked to the earlier sections of the report. For example, what are the likely cost implications of the further levels of devolution (municipal councils etc.)- and how do they compare with the potential resource pools for counties i.e. How will they be funded and with what implications for the larger county government?

A broad critique of the proposals:

1. **Legislative muddle:** The report proposes a multiplicity of laws to be passed which are likely to fragment implementation, introduce contradictions within various legislation and make it difficult for county administration to understand the legal provisions for the county. The report fails to take cognizance of legislative provisions in Part IV of Schedule 6 of the Constitution and how its proposals would fit into each, particularly those which are already under development such as the electoral laws, vetting of public officers and public finance legislation. The report recommends a devolution law, but fails to make recommendations on its contents. The report mentions 700 laws to be drafted/revised to operationalise the Counties without substantiating this seemingly alarmist

proposal. The report makes specific recommendations for some legislation not provided for in the constitution, such as the functional assignment policy and the County development planning and facilitation bill.

Recommendation: We recommend that the final report give a schedule of proposed legislation including that already covered under the constitution, recommend the contents of such legislation, and legislation likely to be affected by the new legislation and needed timeframes for each. **The task force while recommending such legislation must indicate the constitutional basis for recommending such legislation.**

2. **Which body will manage the transition?:** Whereas the report mentions the need for an independent body to coordinate the transition process it fails to make a clear recommendation on this. It appears that the transition process will be managed by respective ministries under coordination of the cabinet. This subjects the county reform process to vested interests of incumbent government bodies and introduces a conflict of interests that the report shies away from resolving.

Recommendation: The report should make a clear recommendation the body to oversee the transition, its mandate, independence, transparency, competency needs, reporting and responsibility for key tasks and milestones and accountability measures to ensure successful implementation of the counties. **The task of transition we propose must be situated within the CIC, CRA, KLRC and Attorney General's office as they are the bodies recognised under the constitution.**

3. **The Ethnic Question:** The report has failed to adequately identify and propose ways of safeguarding and upholding 'diversity' as defined by 'ethnic belongings' in how these counties will be governed. This refers to the need for leaders to both uphold and ensure ethnic diversity and gender parity in the administrative structures of devolved governments under Chapter 11.

Recommendation: The report needs to make clear recommendations on how the ethnic diversity and gender standards will be operationalised.

4. **Citizen engagement at risk:** The chapter on citizen participation fails to provide standards for citizen engagement, it also fails to address the challenges with citizen engagement under the present local governance framework and lessons learned. Our paper provides a detailed critique of this chapter and makes several detailed recommendations on the same.

Recommendation: Enhance the chapter on citizen participation to provide standards for engagement and to provide a detailed citizen engagement framework, and to be enshrined through the devolution law.

5. **The report fails to propose clear planning and monitoring and evaluation frameworks.** Whereas the report provides for a very compelling integrated planning model, it fails to provide a framework and also fails to address the role of citizen in the integrated planning framework. It also fails to provide a link between monitoring and planning. Unlike the chapter on Finance which provides a preliminary framework for financial management, the report does not give a planning framework nor does it provide for a clear framework for monitoring and evaluating success at county levels.

Recommendation: The report should provide both a planning and monitoring and evaluation framework, making clear which institution is responsible for planning at various levels, information generated, involvement of citizens, and how to insulate planning from

political manipulation. The report should also provide for a clear monitoring and evaluation framework and provide links into the planning process.

6. **We reject the proposal to create third level of political governance (Municipals):** The report proposes elective Municipals at sub-county level, with political and fiscal powers. In so doing the report introduces potential conflict and competition between two centres of power with the risk of undermining local service delivery. Kenya's practical experience has demonstrated that electoral representation does not afford citizens better participation due to the dominant regressive and selfish political culture. We propose the report focus on strengthening county government institutions and fostering citizen participation in the administrative structure.

Recommendations: We propose that **the taskforce recommends that a generic uniform administrative governance model be formulated and which can be subsequently adopted for all sub-counties urban and rural subject to the existing conditions within each sub-county.** We recommend that political decentralisation should only be up to the level of county government level. At the sub-county level focus should be more on administrative decentralisation (which should include strong components of citizen participation and integrated planning), thereby putting in place an administrative structure that will promote effective use of resources and improve service delivery to the lowest geographical unit in the counties.

7. **Sub County Administrative Units should not be politically assigned**

We object to the proposal that 290 constituencies serve as the sub county units. This proposal is made without justification given that those units were made without guiding criteria for their creation. This will undermine the interest of national MP's in sub county oversight and will push them towards sub-county oversight which is already the role of the sub-county assembly member. It will likely to be too costly to effectively capacitate 290 sub-counties. Lastly, without clear functional assignment, costing and determination of planning and citizen structures this decision cannot be justified.

Recommendation: The level of sub-county units should be based on service delivery informed by functional assignment, cost effectiveness, Sub-county administrative framework and personnel demands. The TFDG should first develop a costed county blueprint and then determine the number of sub counties needed.

8. **Rural areas should not be left out:** Whereas the constitution expressly provides for legislation to classify cities and urban areas, this does not mean that rural areas not be addressed in the same legislation.

Recommendation: The report needs to make clear how less productive and rural areas will stimulated towards growth given their vital importance in food security, conservation of water towers, tourism areas, forests, and the need for appropriate technology to reclaim areas of marginal productivity.

9. **Need to Restructure CDF:** The report fails to address the shortcomings presently plaguing the Constituency Development Fund namely the unconstitutional role of the Member of Parliament and the absence of accountability checks and low technical and administrative capacity resulting in financial mismanagement, low completion rates and unsustainable projects. Thus CDF fails to mean constitutional standards on funds management.

Recommendation: We recommend that 2.5% of ordinary be transferred to county governments and directly disbursed to the ward level through a conditional grant to the county government, administered through the county offices at the ward level. This money should be used for ward level projects only, selected by local communities through the citizen/planning framework and for a specific category of projects. No parallel management structure should be created; it should be managed through the county planning, implementation and monitoring process. The CDF law should be repealed, and staff of its institutions integrated into the county framework.

10. Provincial Administration Needs To Go: The report proposes to retain a restructured provincial administration and seeks to give this publically disparaged institution a new lease of life contrary to the principles it espouses of harmonising development and maintaining the distinctness of government at the two levels. In so doing the report allows ambiguity and potential impunity through the discretionary exercise of executive power through proposed revised administration. **This is an obvious and dangerous attempt by central government to maintain control over county governments.**

- We object to the proposal that chiefs and sub-chiefs retain their positions 'to support county governments'. We object to the use of the term chief which has colonial roots.
- We object to continued involvement by the provincial administration in county service delivery which is already assigned to county government.
- We object to the proposal that Provincial administrative be the link between county governments and county governments.
- We note that the proposed functions (Pg110-111) for the restructured provincial administration will cause an overlap with county administration and other institutions such as EACC which should deal with ethics and integrity **and reject those in totality.**

Recommendations: staff of provincial administration be placed into the wider pool of personnel to be assigned county responsibilities, **through a competitive process based on competence and subject to the constitutional provisions on ethics and integrity,** under formal county departments such as the policy force, judiciary, etc. National government cooperation and coordination be through clear functional and oversight functions on sectorally basis. A well qualified, competitively recruited officer could be assigned the role of cooperation but with a clear mandate that respects the principles of distinctiveness, subsidiary and oversight between levels of government; and then this officer/department should not sit below the county government.

11. Inadequate treatment of county public service puts county service delivery and accountability at risk: The report is not clear on the structure/size/form of the county public service. It does not clarify the role, powers and independence of the county public service, does not clarify the relationship between the county public service and the board and governor/CEC/assembly.

Recommendation: The report needs specific recommendations on the county public service institutions, their role, mandate and independence. Counties need a strong independent public service able to enforce accountability, performance, and integrity provisions of the constitution towards the realisation of the aspiration of Kenyans for effective service delivery.

12. Report needs to strengthen accountability and anti-corruption provisions: The report does not deal with issues of administrative discipline and does not provide tools for enforcement of integrity and ethics

provisions. It also does not provide for monitoring of county public service performance. The report does not provide for the vetting of all public officers that will be redeployed under the new national and county institutions. The report does not make specific recommendations on how to combat corruption at county level. There is thus a risk of devolving corruption through the transfer of perpetrators of corruption.

Recommendations: The report needs to provide for administrative discipline and monitoring of public service performance. The report needs to provide for vetting of all public officers prior to redeployment. The report needs to be explicit regarding the institutions and measures needed to curb corruption at county level and make corresponding recommendations for relevant legislation.

13. **Functional Assignment should not be politicized:** The report indicates that functional assignment is currently going on under the *Framework policy paper on functional and competency assignment*. However, this vital process is proceeding without transparency and threatens to be used to perpetuate present service delivery institutions and will undermine the implementation of the constitution.

Recommendations: preparation of policy should be open to public scrutiny and be captured as part of a comprehensive transition timetable.

14. **Cost government vs service delivery** The constitution attempts to redress historical bloat and the issue of financial mismanagement in Kenya by providing for prudent resource management under the new dispensation. However, this report and subsequent policy needs to put a ceiling on the administrative cost of government compared to the cost of service delivery at both national and county level. Great care is needed in the Kenyan context not to introduce cost-push inflation into the economy due to over inflated salaries such as those of the current members of parliament.

Recommendation: There is needed a rationalization and standardization of salaries of Ministers, Governors and CEC members so that only those willing to serve their county apply for these positions. A policy curbing all per diems and strictly regulating travel and entertainment allowances should be provided for in this report. The issue of overstaffing must be sincerely addressed to avoid retaining unsuitably qualified staff in mismatched positions, creating inherent human resource inefficiencies.

15. **INTERGOVERNMENTAL RELATIONS BETWEEN COUNTY & NATIONAL GOVERNMENTS:** The concept of inter-governmental relations between the two levels of government enshrined in the Constitution owes its existence on Article 6(2) of the Constitution. Though distinct, county governments will not be absolutely autonomous but will aim to work with the national governments thereby embracing the principle of inter-dependence. The Task Force on Devolution Report however failed to critically scrutinize the provisions of the Constitution that specifically touch on the matter. Nor were the recommendations clear on the manner in which such relations will exist and the institutions to be established in the realization of the same while still considering the constitutional provisions.

Chapter Six: Leadership and Integrity- The provisions contained herein are to apply to both State officers at the county and national levels. Article 260 defines a State office to include members of the county assembly, governor or deputy governor and other members of the executive committee of a county government.

Chapter Eight: Legislature -Article 109(4) provides that a Bill concerning county governments may originate either in the National Assembly or the Senate. Article 109(5) further goes on to stipulate that a Bill

may be introduced by any member or committee of the relevant House of Parliament, but a money Bill may be introduced only in the National Assembly.

Chapter Ten: Judiciary -Article 165 (3)(d)(iii) & (iv): the High Court will have jurisdiction over questions relating to the constitutional interpretation of any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government. The same court shall also have jurisdiction to determine a matter relating to conflict of laws.

Chapter Eleven: Devolved Government -Article 183 (1) (b) contemplates that one of the functions of the county executive committee is to implement within the county, national legislation to the extent that the legislation so requires. Article 187(1) provides for the transferability of functions between the two levels of government. Articles 189-191 discuss the relationship between the two units of government.

Chapter twelve: Public Finance The constitution has provided for the equitable sharing of revenue raised nationally between the two levels of government and further, county governments may be given additional allocations, either conditionally or unconditionally. Article 209 (5) allows for the national mobility of goods, services, capital or labour. The taxation powers and other revenue-raising powers of a county shall not prejudice national economic policies. Article 212 allows for the county government to borrow only if the national government guarantees the loan. The independent offices of the Controller of Budget and Auditor-General (Articles 228 and 229 respectively) shall have functions which extend to both the national and county governments.

Recommendations:

i. There should be clear mechanisms that oversee and implement these relations;

ii. 8.4 of the TDG- Mechanisms of consultation and cooperation between the county governments other state organs and officers namely senate, senators, members of the National Assembly. We recommend that the list of state organs include the president and cabinet of the national government.

iii. 8.5.3 The recommendation that an intergovernmental /co-operative national government ministry and corresponding county departments/ ministries to co-ordinate matters of intergovernmental co-operation is not necessary as an intergovernmental institution created through the envisaged intergovernmental relations legislation is adequate to deal with matters of intergovernmental co-operation.

16. **TFDG Report should provide the Blue Print for Devolution in Kenya.** The Constitution provides that the organic devolution law be enacted by December 2011. The final TFDG report should be comprehensive enough and obtain widespread consensus without compromising principles of effectiveness, to guide subsequent legislation. Without a blueprint subsequent legislation will be discordant and counties dysfunctional and the existing mess in local governance will be transferred to the county level to the detriment of service delivery.

Recommendation: There is a need for the TFDG to build consensus on the final report, without compromising key principles, from key stakeholders this is especially important for parliament to adopt the report to prevent partisan political interests from undermining the subsequent legislation.