



Memorandum on the Constitution of Kenya (Amendment) (NO.2) Bill, 2013

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About The Devolution Forum

The Devolution Forum (TDF) is a multi-sectoral alliance of like-minded networks, organizations and individuals united for the promotion and protection of Devolution and its implementation as enshrined in the Constitution of Kenya 2010.

Introduction

The Equalization fund is established under Article 204 of the constitution as an affirmative action fund targeted at marginalized counties. The Commission on Revenue Allocation concluded the policy to guide the fund on February 2013 and this was subsequently adopted by Parliament. The Cabinet Secretary for the National Treasury gazetted guidelines for the administration of the fund on 13th March 2015. On 29th August 2015, the National Assembly passed a bill to Amend Article 204 -2 and 3(b); the effect of which is to direct the funds to the constituency under the management of members of parliament.

We hereby make the following submissions:

1. Proposed amendment is unconstitutional regarding functional assignment

The proposed amendment is unconstitutional as it offends the functional distinctness of the county governments. It is noteworthy that the High Court issued a ruling on these very principles *vis a vis* the Constituency Development Fund Act 2013, stating, that the “national government, while free to infiltrate its policies at the county levels, must do so through the structures recognized under the Constitution and not run parallel them. If it so desires, the national government may channel grants, whether conditional or unconditional to the county governments as additional revenue within the meaning of Article 202 and not any other entity which performs the functions allocated to the county by the Constitution. The

national government cannot purport to channel grants to an entity whose intended projects effectively undermine the role of the government at the county level unless the projects are specifically defined to exclude them from the ambit of Part 2 of the Fourth Schedule.”¹

The functions funded under the equalization fund are to fund basic service delivery, which fall under the County Government including water, roads, health facilities and electricity².

2. Offends the Principle of Subsidiarity

The amendment bill provides that the Equalization fund shall be used by remitting the monies to respective constituencies of the areas under Article 216 (4) to be used by those constituencies for the purpose for which the appropriation was made in accordance with such fund as Parliament may establish.

This effectively recognizes the constituencies as a unit of service delivery. Article 6 (3) of the constitution provides that a national state 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. Article 174(h) identifies one of the objects of devolution as being “to facilitate the decentralisation of state organs, their functions and services, from the capital of Kenya.”

Additionally, Article 176(2) requires every county government to decentralize its functions and the provision of its services to the extent that is efficient and practicable. Pursuant to this provision, the County Government Act has provided for county decentralized structures at the sub-county level, which is the equivalent of the constituency (though national and devolved units do not correspond perfectly) and the ward level going down to the village level.

Article 183(1)(b) identifies one of the functions of a county executive committee as being to “implement, within the county, national legislation to the extent that the legislation so requires”. Article 187 (1) (a) provides that a function or power of government at one level may be transferred to a government at the other level by agreement between the governments if the function or power would be more effectively performed or exercised by the receiving government. This means that national government is empowered to assign some of its executive powers to implement national legislation to the County Executive Committee.

Therefore, implementation of the Equalization fund at the Constituency level goes contrary to key principles of devolution and further the constitutional design to address marginalization in Kenya. According to the Taskforce of devolved government interim report on the implementation of devolved government in Kenya (2011), devolution is cited as a key contributing factor towards addressing issues of marginalization and minority

¹ Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR Para 109

rights, which again gives strengths to the objects of devolution as provided in the Article 174 of the Constitution. Additionally, the report recognizes Counties as facilitators of Minority and Marginalized group's rights.

3. Separation of Powers between the Executive and Parliament

In the CDF case, the court³ recognized that “the principle of separation of powers is at the heart of the structure of our government; each organ is independent of each other but acting as a check and balance to the other and also working in concert to ensure that the machinery of the state works for the good of Kenyans.” Further, the court argued,⁴ “the respective roles of the Houses of Parliament are clearly stated. The oversight role of the National Assembly and the role of the Senate in regulation of county government under the umbrella of legislative authority do not permit the National Assembly and the Senate to get involved in the administration and implementation of development projects in the counties. Members of Parliament cannot legislate on county laws, play oversight role over the county funds in the case of the senators, set policies on the counties, undertake, and implement development projects at the constituency level without impinging on the county government function and the all-important principle of checks and balances.”

It is our contention that the National Assembly seeks to circumvent this ruling through the proposed amendment. It is blatant impunity and must not be entertained in any form of manner.

4. Constitutional amendment bill fails to follow the constitutional process on amending the Constitution

Article 255 of the Constitution provides that a process to amend the Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to matters among others the national values and principles of governance mentioned in Article 10 (2) (a) to (d).

Article 10 (2) (a) to (d) provide that national values and principles include among other principles, sharing and devolution of power, rule of law, participation of the people, protection of marginalized and good governance.

It is evident from the constitution that the intention is to shift power of amending the constitution from Parliament to the people on matters at the heart of the devolved system of government. This amendment bill on the equalization fund touches on key principles of the Kenyan devolved system that the citizens approved as provided in the Constitution of

² Article 204

³ TISA case Para 127

⁴ TISA case Para 131

Kenya, 2010. The amendment bill touches on matters of sharing and devolution of power, rule of law, protection of marginalized and good governance. Therefore, the constitutional process of reviewing this amendment ought to be through a referendum and not a parliamentary initiative.

5. Lack of clarity in proposed expenditure of the Fund- A fund within a fund

The amendment bill provides that the Equalization fund shall be used by remitting the monies to respective constituencies of the areas under Article 216 (4) to be used by those constituencies for the purpose for which the appropriation *was made in accordance with such fund as Parliament may establish*.

The effect of clause 2 (b) means that Parliament may create other funds within the Equalization Fund. Article 204 (2) provides that **National Government may use the Equalization Fund only to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.**

This considered in light of the proposed amendment that the words '*National Government shall use the Equalization Fund only*' will be substituted with the words the '*Equalization Fund shall be used only*', signifying the consistency in specificity of the use of the Equalization Fund.

The amendment further provides that the fund will be for the purpose for which the appropriation was made in accordance with such funds as parliament may establish. Article 201 includes among the principles of public finance the requirement that "**public money shall be used in a prudent and responsible way**". Prudent and responsible use of public money presupposes that there is clarity in the allocation of finances to levels of government and various departments and agencies of governments. Such clarity will ensure clear lines of accountability with the citizens being able to know who has responsibility to account for what. Again, article 201 includes among the principles of public finance the requirements that "**there shall be openness and accountability**", and that "**financial management shall be responsible, and fiscal reporting shall be clear**". Furthermore, the national values and principles of governance set out by Article 10 include the requirement for transparency and accountability.

The amendment by allowing Parliament powers to create constitutional funds without clear and specific objectives (to the extent there is specificity, the objectives of these *funds* are *prima facie* to duplicate the objective of the overall Equalization Fund) undermines constitutional principles of public finance.

4. Further observations

We note that the Marginalization policy was prepared by the Commission on Revenue Allocation and adopted by parliament. We however note that the subsequent guidelines gazetted in March 2015 - Gazette notice 1711 - do not sufficiently adhere to the adopted policy. We particularly note the following:

The guidelines ignore the principles to inform the fund - particularly principles of subsidiarity, transparency and participation - for which it makes no provision. We also note that the proposed management structure of the fund is top-heavy; it also lacks representation of the county government; and fails to respect intergovernmental requirements.

It is our observation that the present equalization fund guidelines embody the type of centrist, top-down thinking, which resulted in the marginalization of sections of our country and urgently need to be revised to conform to the constitution of Kenya.