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## DEVOLUTION POLICY- REVIEW

For further information, please contact us at

P.O Box 48353 -00100 Nairobi

Tel: +254 20 4443676

[www.tisa.or.ke](http://www.tisa.or.ke)

### **ABOUT TISA**

The Institute for Social Accountability (TISA) is a civil society organization committed towards the achievement of sound policy and good governance in local development, to uplift livelihoods of, especially, the poor and marginalized in Kenya. TISA has been operational since March 2008, and is a locally registered Trust that has engaged with various relevant state and non-state actors in the quest to promote effective local governance in Kenya.

### **THE DEVOLUTION POLICY**

TISA envisions that a devolution policy ought to address certain cross cutting issues that emerge in the implementation of devolution as opposed to anticipate in details of other policy interventions that are required for implementation of devolution. To this end, TISA envisions a devolution policy that has the following aspects:

#### **The Goal**

The primary goal of the devolution policy ought to be, fostering the progressive transfer of powers, responsibilities and resources from the central government to devolved governments.

#### **The Objectives and Guiding Principles**

The objectives of the policy ought to be in tandem with the objectives of devolution as provided for in the Constitution of Kenya Article 10, Article 174-176 and section 3 of the County Government Act, section 3 of the Intergovernmental Relations Act and the Transitional to Devolved Government Act and the Urban Areas and Cities Act.

#### **Issues the devolution policy should address**

Among other things, the devolution policy should address the following:-

- 1. Transfer of functions and resources in devolution**

The Policy document should speak to the emerging debate on the issues of transfer of functions and resources in order to realize the full benefits of devolution.

#### **a. Functions**

The devolution of functions with the guidance of the broad constitutional provisions becomes problematic when certain sectors are looked at in depth. In the health sector devolved to county governments for instance, the Provincial hospitals are the largest single budget line within the sector that must be managed by either national or county government. Government documents provide contradictory information on this issue: the 2012/13 Budget Estimates show provincial hospitals as devolved, while the government's "Position Paper on the Implementation of the Constitution in the Health Sector" shows that they will be retained at national level. This suggests that there is no consensus on who will maintain control of, and who will finance these units as the country devolves.

Therefore, a comprehensive devolution policy should address the issues of function assignment. Among the actors relevant in this particular process is the Transition Authority. According to the World Bank, **International best practice shows that successful devolution requires a framework outlining a well-defined and consultative process for formulating and defining functions.** This applies, for example, on how to unbundle functions, how to create new policies around staffing, financing and capacity building, and how best to pace implementation, among other issues. Other sectors of concern are agriculture, health, water, housing and education.

The transfer of functions is preceded with the capacity of the devolved government have to be considered. It is TISA's opinion that this policy documents develops an assessment criteria to gauge the competency of functions. A capacity building policy in addition to what is mentioned can then also provide for the implementation among other things.

In addition to the above, the Article 187 provides that both the national and county government have the option to negotiate for the transfer of functions. A devolution policy should then provide an elaborate process of such negotiation the role of different stakeholders including the communities in this process as well as guard against permanent re-centralization of functions.

#### **b. Expenditure**

The policy should address modalities for agreement between the two levels of government, especially in matters that result to the responsibility of one level of government over capital development and the other level of government being responsible over re-current expenditure. The governments should be guided on addressing such situation where one level of government creates a liability in order to minimize misuse/underutilization of resources

#### **c. Economies of Scale**

The policy should guide on matters of procurement that involve significant economies of scale. This is because large scales purchases are significantly cheaper than small-scale purchases. The policy should then advice on instances where counties hold a certain function, but the national government is charged with the responsibility of making relevant

purchases for all counties in order to benefit from the economies of scale. A good example could be procurement of drugs within the health sector

## **2. Land Issues**

In light of the on-going conflicts over institutions on land administration, the focus of land administration should be less about the institutions and more about the process of administration. The policy should provide for the transfer of functions from the boards appointed to by the centralized government to the boards under the National Lands Commission.

## **3. Urban areas and cities management**

The devolution policy should also provide a framework for the operationalization of the urban areas and cities framework. There is need to provide clear procedures for the delegation of functions to the city and municipal boards from the county government.

## **4. Rationalization of Parastatals**

There is no clear framework for transferring or management and ownership of sector based companies previously under then central government line ministries such as agriculture, but which have been assigned counties. Tension over control of such firms is predominant with production activities being disrupted.

## **5. Bilateral agreements between county governments and foreign companies**

The autonomy of county governments provides a chance for county governments to enter into bilateral agreements with private entities in bids to attract investments to their respective counties. Thus the policy documents should provide for the procedure counties should undertake while entering into such agreements including but not limited to public participation, scope of tax relief counties should ideally offer among other things.

## **6. Gender Representation**

The devolution policy should provide a mechanism for the realization of the two-thirds gender rule as envisioned in the Constitution of Kenya.

## **7. Use of conditional and unconditional funds**

Section 24(11) of The Public Finance Management Act, 2012 provides that 'regulations shall provide for the establishment, management, operation or winding up of national public funds'. This has not been done. There is also no express requirement for reporting on funds by national government. The Auditor General Report of 2012/13 reports on over 35 funds under various ministries some of which should have transferred their functions to the county governments. The status of these funds is not clear.

This policy should guide intergovernmental fiscal relations, transparency and accountability. It would ensure the use of funds does not undermine the autonomy of county governments, as is presently the case in the BPS.