



Mr Jeremia Nyegenye,
The Clerk Senate,
Parliament Buildings,
Nairobi

Attn: Hon Amos Wako
Chairperson
Legal Affairs and Human Rights Committee Senate,

Memorandum on the Constitution of Kenya (Amendment) (NO.2) Bill, 2013
Tuesday, October 6, 2015

About The Devolution Forum

The Devolution Forum (TDF) is a multi-sectoral alliance of like-minded networks, organisations 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

The proposed amendment is unconstitutional because it offends the principle of separation of powers between the executive and legislature, offends the functional distinctness of the county governments by seeking to establish the constituency as an administrative unit. It is also not clear what if any public participation has taken place on the proposed amendment. It is noteworthy that the High Court issued a ruling on these very principles vis a vis the Constituency Development Fund Act 2013, and gave the National Assembly 12 months to comply with the ruling.

109..... 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**.

127. 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.

131. 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 and 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.¹

¹ Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR <<http://kenyalaw.org/caselaw/cases/view/91815/>> at 15 August 2015

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.

2. 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.

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