

DEVOLUTION WORKING GROUP (DWG)

Advisory Note on Devolution Process in Kenya: N0. 2/2012

In the first Advisory Note issued during the month of May this year, the Devolution Working Group highlighted devolution as one of the unique and untried features of the Constitution of Kenya 2010. This is because the type and form of devolution prescribed by the Constitution completely overhauls the structure of the Kenyan State and its governance systems. This reality makes implementation of devolution a challenge in many respects. It is towards pro-actively addressing these challenges and successful realization of the devolved system that the DWG contributes by way of advisories. In the initial Advisory the DWG appreciated that whereas some progress had indeed been made in the implementation of the Constitution generally, there were genuine concerns specific to transition to devolved governments whose cumulative effects undermine not only implementation of the entire Constitution but also have the potential of occasioning capital flight and impeding attainment of the objectives of Kenya Vision 2030.

DWG appreciates that much progress has been registered in a number of areas, as highlighted in the first advisory note. These include:

- The adoption and official publication of the Sessional Paper on Devolved Government in Kenya 2012;
- Enactment of facilitative legislations namely, the County Governments Act, 2012, the Transition to Devolved Government Act, 2012, the Intergovernmental Relations Act, 2012, the Urban Areas and Cities Act, 2011 and the Public Finance Management Act, 2012, among others;
- Establishment and resourcing of the Transitional Authority to commence its work as stipulated by the Transition to Devolved Government Act, 2012; and
- The design and rolling out of the Kenya National Integrated Civic Education Programme (**K-NICE**) which focuses on Constitution Education generally, and the Transitional Authority's determination to deliver on Transition Education on the Devolved System (**TEDS**) specifically.

It is also noted by the DWG that some of the critical issues raised remain un-addressed. There are also new challenges that have since emerged. Critical concerns in this advisory include among others the spiraling insecurity concerns across the country, increasing pressure to the political economy through industrial action by segments of Kenyan workers for better pay and work conditions; existing bulk of legislations critical to the implementation of the constitution, which remain to be enacted; diluted legislations like the Urban Areas and Cities Act, 2011. The Transitional Authority remains underfunded, ineffective and yet to be seen doing work; lack of civic awareness on devolved governance and general civic education on the constitutional provisions on devolution; and dizzying preoccupation by political parties with ascension to power through ethnic based alliances.

It is in view of the above that the DWG makes the following recommendations:

- The Government needs to act decisively, but within the confines of the law to reign in on the insecurity in the country. This should include independent investigations by relevant agencies like the Transitional Authority, the Kenya National Commission on Human Rights (KNCHR) and Civil Society Organizations to establish the causality of the phenomenon of destabilization. Where there is incapacity on the part of the government to undertake such exercise, help should be sought from regional and international sources;
- The enactment of critical pieces of legislation to facilitate availing of resources to county governments as requested by the Commission on Revenue Allocation should be expedited. In this regard, the National Assembly should demonstrate the highest sense of patriotism by extending time to enact the requisite legislation;
- The hand of the Transitional Authority needs to be sufficiently strengthened through adequate financial resources to enable it discharge of its mandate on timely basis. In particular, the working relationship between the Authority and the Inter-Ministerial Committee on Devolution should be streamlined and any injurious duplicitous seams removed;
- The Transitional Authority should with a sense of urgency roll out awareness creation on the transition process and its role in it. In this endeavour, the Authority should have structured and principled collaborative arrangements with the Civil Society, including faith based organizations;
- Considering that devolution is one of the key determining areas with regards to the forthcoming General Elections, the DWG calls upon all candidates and political parties to take a clear position on devolved governance. In particular, the coalitions and alliances being formed must tell Kenyans upfront what policy options they have for the devolved system of government;
- The transition from the current central government to the envisaged national government under the Constitution together with the transfer of functions to the counties should be anchored in appropriate legislation. The Transitional Authority should be placed at the centre of restructuring of the government system for the establishment of the national and county governments. This is particularly the case with restructuring of the system of administration previously known as the Provincial Administration. In undertaking this exercise, there must be adequate public consultations to comply with the principle of constitutionalism. The proposed National Government Coordination Bill, 2012 therefore needs to be publicised for purposes of assuring sufficient and adequate consultations; and
- Although the Public Finance Management Act has been enacted, there are still certain gaps which, if left without clarification in the initial stages, may lead to confusion. Key among these is the role of the Senate as the guardian of County Governments.

DEVOLUTION WORKING GROUP

The Devolution Working Group (**DWG**) is made up of like-minded Kenyans with long and demonstrable history in the reform movement, especially on comprehensive people-centred constitutional reforms, devolved governance and the **Nationhood Project**. Collectively, members of DWG have expertise in democratic governance including constitutionalism, devolution, gender, disability, judicial and electoral systems and wholesome development. The group is motivated by the self-evident collective interests of the peoples of Kenya as espoused in the constitution they adopted and enacted on August 4th 2010 and are bonded by a shared aspiration for realization of a governance system fully informed by the Constitution of Kenya 2010 as adopted and related Bills and Acts of Parliament; that is to say constitutionalism and the rule of law.

The legitimacy and mandate of the group is anchored on the **Preamble, Articles 1, 2 (1), 3 (1) and (2) and 10** of the Constitution of Kenya; which respectively constitute a social contract between and amongst the diversity of the peoples of Kenya; provide for sovereignty of the people and national values and principles of governance - all which entrench citizen participation as sacrosanct, inalienable and indivisible right.

Members of the DWG come together as independent additional voice to provide professional, technical and institutional advice for effective and efficient implementation of the gains of constitutional reforms, with particular emphasis on devolution. DWG members are:

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