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# WHO'S IN CHARGE?

## DEVOLUTION MAY FAIL WITHOUT CLEAR DIVISION OF ROLES

### Introduction

Imagine if, several months after Kenya has devolved major services like water, health and agriculture to counties, the quality of these services suddenly declines rapidly. Neither counties nor national government know what they are supposed to do under the new system, and neither has the money or authority to take up their new roles. Public support for devolution falls, and Kenya's great experiment is deemed a failure.

Could this really happen? If key decisions are not made quickly, rationally and in a manner consistent with the Constitution, there is a real possibility that many core services—services like health, education, agriculture, water and housing—will not be delivered and that ordinary Kenyans will suffer.

On March 27, Kenya's new governors were sworn into office. Along with county assembly members, these officials are charged with ushering in a new era of devolution with its many promises: greater accountability, a more equitable distribution of resources down to the grassroots, and improved service delivery.

But successful devolution does not depend only on county officials. It also depends heavily on national government. This is so first because national government will still raise most of the revenues and transfer them to counties. National agencies like the Commission on Revenue Allocation have an enormous responsibility to ensure that revenues are distributed in an efficient and equitable manner to both levels of government.

At the same time, national government must clarify its new role alongside that of counties. The Transition Authority, working with all of the line ministries, is responsible for making clear, transparent and constitutionally defensible decisions about whether government services should be carried out by the national or county governments. This process, known as "functional assignment," requires national officials to look at the Fourth Schedule of the Constitution and determine whether each activity that they currently undertake should remain a national activity, or must be devolved.

Although the Constitution offers broad guidance on this question, it is clear that there are many gaps in the Fourth Schedule.

For example, the Constitution suggests that county health facilities will be run by counties and national referral hospitals by national government, but it is not clear who should run provincial hospitals. Where this confusion is not sorted out, there are serious risks of services collapsing.

For this reason, the Task Force on Devolved Government and the Transition to Devolved Government Act 2012 both envisioned that, before devolution, an open process of functional assignment would occur that would clarify who was in charge of what, and ensure that each level of government had the funds to carry out their roles.

Unfortunately, the process of functional assignment has delayed. We now have county governments, but we do not have clarity about the division of responsibilities. Counties have been given preliminary functions to carry out from March until June 2013, but no rationale for the transfer of these functions has been given. Neither the Transition Authority nor any of the line ministries has shared a timetable for their process of assigning functions, and the public is in the dark about whether and how these decisions are being made. The Transition Authority has suggested that new functions will be transferred to counties from July 1, 2013, but how can the Authority continue to make these decisions without first determining what is properly a county function? And counties are soon to begin budgeting for the 2013/14 financial year, but do not know what they are budgeting for.

These issues matter because confusion about who is in charge and lack of transparency about finances mean that citizens cannot hold government accountable. Devolution depends on a combination of clear roles and citizen oversight for better services. Without these, services may suffer, funds may not be transferred to the right level of government, county and national government may begin to trade blame for service failures, and a chaotic transition could ultimately undermine public support for devolution.

In order to highlight the continuing lack of clarity across sectors and to focus public discussion on the most important issues that need to be sorted out, a number of civil society organizations came together to look closely at what was happening in five sectors: health, agriculture, education, water and housing. Short papers have been produced analyzing the key issues in each sector by the Institute of Economic Affairs (IEA), the International Institute for Legislative Affairs (IILA), The Institute for Social Accountability (TISA), Article 19, Water and Livelihood Reforms Network, Haki Jamii and the International Budget Partnership (IBP).

In this synthesis paper, we highlight the overall confusion and some of the key issues in each sector. Across the five sectors, we find serious gaps in the information that has been made publicly available about how responsibilities will be shared, and a substantial number of confusing areas that require immediate attention. For example, at this late date, it remains unclear who will:

- Provide immunizations
- Manage agricultural extension workers
- Implement slum upgrading programs
- Manage water services at county level
- Manage construction of Early Childhood Development facilities

How can there be improved service delivery or accountability for these services if we don't even know who is in charge of delivering them?



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We call on the Transition Authority and the line ministries to release information about the ongoing process for resolving the many issues related to functional assignment in each sector, a roadmap with clear timelines for completing this process, and a schedule of concrete opportunities for public participation in discussing how responsibilities should be shared between levels of government.

## WHO'S IN CHARGE OF HEALTH?

The health sector is the largest, most expensive and most ambitious social sector to be devolved under the 2010 Constitution. While national government will continue to manage health policy and national referral hospitals, counties have been given expansive control over lower level health facilities and primary care services. Still, the Constitution remains silent on a number of key responsibilities in the health sector that have yet to be assigned to either level of government.

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.

Similar questions surround immunization and tuberculosis control, which are devolved to counties in the 2012/13 budget, but which the Position Paper considers public goods that should be provided by national government. Since neither immunization nor tuberculosis control is mentioned in the Constitution, there is a need for broader discussion and consensus about who will manage these services under the devolved system.

One major concern that has been raised about the Constituency Development Fund in the past is that government should not separate responsibility for recurrent spending (like salaries) from development spending (like investment in buildings). This can lead to a mismatch where there are health clinics or schools without doctors or teachers. Unfortunately, the 2012/13 Budget Estimates suggest that while the management and financing of District Health Services will be devolved, nearly Ksh 900 million in development spending for district facilities will remain at national level. No explanation for this has been provided, nor any guidance on how, if this split is necessary, proper coordination between the two levels of government will be coordinated.

## WHO'S IN CHARGE OF AGRICULTURE?

Agriculture, like both health and housing, is a sector where quite a number of functions have been devolved by the Constitution. The Fourth Schedule indicates that agricultural and veterinary policy will remain national responsibilities, while agriculture as a whole is to be devolved to counties. Specific reference is made to counties taking control of crop and animal husbandry, livestock sales, abattoirs, disease control for plants and animals, and fisheries.

In light of this, it is noteworthy that a new national Authority was created earlier this year, the Agriculture, Fisheries and Food Authority. This body should largely confine itself to policymaking and provision of technical assistance to counties. However, questions have been raised about whether its powers exceed what was envisioned in the Constitution. Moreover, it is of concern that while most of the functions in agriculture have been devolved, less than 30% of the budget has been devolved.

 The agriculture sector has a very large number of state corporations that manage billions of shillings every year.

At the same time, there are still a number of areas where it is unclear who will be in charge. For example, does crop and animal husbandry (a county responsibility) include research and extension services? Who will manage and extend subsidized inputs to farmers under the devolved system? Marketing of agricultural products to international companies seems like an area where there might need to be both a county and national role; how will this be coordinated? Where resources used in agriculture cross county lines, how will these be managed?

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Quite a number of these were set up to undertake functions that have now been devolved to counties. This implies that these corporations need to be restructured, yet there is no clarity about how, when or if this is to be done. Some of these corporations have anyway been superseded by the Authority Act, and will be converted into departments of the Authority, but not all of them should remain at national level. This needs to be thoroughly discussed and consensus reached.

## WHO'S IN CHARGE OF EDUCATION?

The education sector is among those areas that have been least affected by devolution, with most responsibilities remaining at the national level. This has been controversial, with a number of stakeholders already calling for at least basic education to be transferred to counties. The Basic Education Act 2013 also opens the door to this possibility by suggesting that agreements with individual counties could be reached to transfer financing of primary and secondary school infrastructure to the county level. Given the large share of the total budget that goes to education, this has important implications for the share of resources that is transferred to counties.

The Constitution limits county responsibilities in the education sector to pre-primary education (often referred to as ECDE, or Early Childhood Development Education), village polytechnics, home craft centres and childcare facilities. The core mandate to develop basic, secondary and tertiary education and the syllabus for the same remains a national function. In light of the fairly limited transfer of roles to counties in the sector, the division of functions should be fairly straightforward compared to the other sectors discussed in this brief.

However, as in other sectors, national policy documents introduce confusion rather than clarity into the roles of the two levels of government in education. For example, since counties control ECDE, one might think that they also control the staffing and the curricula for this level of education. Yet, this is not clear. The Constitution gives general curriculum development to the national level, and it is silent on the matter of staffing. Will the Teachers Service Commission, which is charged with staffing other levels of education, also provide teachers for ECDE facilities and set their salaries? How will this be coordinated with the county to avoid situations where counties set up facilities without accessing teachers?

A closely related concern is that the development budget for ECDE facilities has not been devolved to counties. How can counties manage ECDE if they don't control all of the financing? This split between who is in charge of recurrent and development spending is unfortunately a common problem across sectors. In the case of ECDE, there is very little domestic national financing for capital spending. Most of the money comes from donors, which may be one reason it is not devolved. This raises issues of both

coordination and sustainability. At the same time, at least ECDE has a devolved recurrent budget: it is not clear that the other areas of county responsibility have any devolved budget at all, since there is nothing else that is considered devolved in the 2012/13 budget.

The Basic Education Act 2012 introduces a National Education Board and a series of County Education Boards as its agents at devolved level. Surprisingly, however, the County Education Boards are given oversight for pre-primary education and youth polytechnics, which are clearly county roles under the Constitution. This gives the impression that national government is wading into territory that is squarely the responsibility of counties.

Another area of concern is around the mushrooming of non-formal education (NFE) in recent years, and the fact that regulating this sector is not a function described in the Constitution. Although the issue has been a concern at policy level since the 1990s, it is problematic that neither the legal nor the policy framework assigns responsibility for reform of NFE. Is this area likely to fall between the cracks of national and county government? NFE might appear to be a national responsibility, but counties will come under increasing pressure to manage it in the absence of a formal national response. This could create conflict between the two levels of government.

The government now has a draft policy for technical and vocational education institutions (TIVET Act 2013), but this makes no mention of how national institutions in this category will be coordinated with the roles of similar institutions (village polytechnics or homecraft centres) that will be managed by counties. Ideally, there should be one overall approach to vocational training that ensures that each institution plays a complementary role rather than leaving gaps in the available options for training.

## WHO'S IN CHARGE OF WATER?

More than half of the Kenyan population lacks access to reliable sources of clean water. Access in rural areas is far lower than in urban areas, in spite of the existence of funding mechanisms like the Water Services Trust Fund.

Recent decades have seen a number of changes in water management, but relatively little improvement in access. Expectations are high that the country's water problems will be resolved by devolution. Yet if we look at what is happening in the sector, there is considerable confusion about who will be doing what to improve access to water.

The Constitution suggests that counties are in charge of water and sanitation, while national government will maintain control of water and sanitation policy and environmental (including water) protection.

However, the water sector consists of a number of other actors that are neither strictly national nor county in nature, such as the eight regional Water Service Boards, which regulate water provision and provide water infrastructure, and the Water Service Providers, which are public companies under private management that distribute water. In addition, although they were to have been dissolved, District Water Offices have continued to play a role in infrastructure development.

What is to become of Water Service Boards (WSBs) if counties take over the responsibilities to provide water infrastructure?

Recent decades have seen a number of changes in water management, but relatively little improvement in access.



## The National Housing Bill provides almost no role for counties, which is at odds with the Constitution.

One option is for these bodies to disappear and the counties to assume their roles. If instead they continue, how will they be reconfigured to coordinate with multiple counties? It would seem that for bodies like WSBs to persist, counties must agree to delegate certain functions to them and they must be redesigned to incorporate county representation in some way. Moreover, there are questions about how regional resources that cut across county boundaries, such as Mzima Springs and Ndakaine Dam, will be managed.

It is also the case that much of the financing in the water sector passes through Water Service Boards. Without fundamental reform, this will not leave resources for counties to be able to undertake new projects or reforms in the water sector. This is not to suggest that counties should be given total control of water: the 2002 reforms in the sector took water services away from municipalities because it was believed that local government control was inefficient. There is still a need for water providers to operate according to commercial principles that allow for efficient provision and investment in maintenance and expansion. Whatever the exact arrangement, clear assignment of roles is essential.

As of now, the Transition Authority has only transferred control of storm water management to counties. Given citizen expectations for improved water access under devolution, it is vital that TA, in conjunction with the line ministries, provide a timeline for the full transfer of water services to counties, and clarity about the expected role of counties vis-à-vis other players in the sector.

### WHO'S IN CHARGE OF HOUSING?

Lack of adequate and affordable housing is a major challenge in Kenya. The 2010 Constitution defines housing policy as a national function, while housing itself is a county responsibility (within the counties' planning and development role). This would appear to mean that most implementation of housing policy, such as construction, maintenance and upgrading of the housing stock would fall to counties.

However, when one looks at housing policy documents, there is considerable confusion. The National Housing Corporation is a major player in the housing sector, but the main role that it plays in developing affordable housing has been devolved. There has been no public discussion of this so far, even though the NHC has a budget of around Ksh 5 billion every year, far larger than the budget for the Ministry of Housing. The National Housing Bill 2011 seems to indicate that NHC will continue to function as it has been. In general, the Bill provides almost no role for counties, which is at odds with the Constitution and a matter of concern.

Slum upgrading is also an activity that would seem to belong to counties under the new Constitution, yet if one looks at the 2012/13 Budget Estimates, over 90% of capital spending on slum upgrading remains at the national level. Why should this be? What will it mean for counties like Nairobi with large informal settlements? Although counties will manage their own civil servants, the provision of housing for civil servants has not been devolved at all in the budget. This is surprising. Why should national government continue to control this function and how will counties ensure their civil servants receive adequate housing?

One challenge in the housing sector is that it requires coordination with other sectors, such as lands and infrastructure. There is a need to clarify exactly how national or county governments will work with their counterparts at both levels in these other sectors to deliver adequate housing. Little information about this can be gleaned from available policy documents.

## CONCLUSION: TIME TO TAKE CHARGE AND OPEN UP

This Brief has demonstrated that, although the devolution process began in March, the country is far behind schedule in clarifying basic questions about roles and responsibilities under the new system. This is not a problem plaguing only one or two sectors. Across all the sectors we investigated—health, education, water, housing and agriculture—there are still contradictions between various public agencies, legislation and policy proposals about who is in charge of what. These issues must be resolved before further responsibilities are devolved to counties or there will be a high potential for confusion and deterioration in service quality. Kenyans expect devolution to lead to an improvement in services, not a decline. But if there is no clarity about roles and financing, then service decline is far more likely than enhancement.

Devolution will only work if the Kenyan public is informed and active in trying to hold politicians and state officers to account. In order to do so, however, citizens need to know exactly who is doing what, how much money they need, and whether they have it. Otherwise, citizens will not know which level of government to hold to account and for what.

The organizations behind this analysis—Institute of Economic Affairs, International Institute for Legislative Affairs, The Institute for Social Accountability, Article 19, Water and Livelihoods Reform, Haki Jamii and the International Budget Partnership—call on the Transition Authority and all of the national line ministries to open the process of functional assignment to public scrutiny by:

1. Releasing a progress report on the process so far by sector/ministry, including any policy or position papers on functional assignment that have been drafted
2. Releasing a timetable for the remainder of the process including the dates on which additional reports will be released for public scrutiny and comment
3. Setting up a series of genuine consultations by sector to allow the public and county officials to understand what is being discussed and to offer inputs that can alter the planned assignment of roles
4. Ensure that the process is completed within the next 3 months for a smooth and successful devolution of key functions

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