

**THE COMMISSION ON
ADMINISTRATIVE JUSTICE**



"Hata mnyonge ana haki"

**AN ADVISORY OPINION ON THE RELATIONSHIP BETWEEN THE NATIONAL
GOVERNMENT, COUNTY GOVERNMENTS AND COUNTY COMMISSIONERS.**

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59 (4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249 of the Constitution, the Commission alongside others has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of democratic values and principles. Further, Article 59 (h) and (i) of the Constitution, which is replicated by Section 8(a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

In recent times, there has been controversy on the nature of the relationship between devolved governments and the National Government. This has led to conflicting claims and power struggles witnessed between the County Commissioners and County Governors. Governors have made various demands including recognition to fly the national flag, to enjoy diplomatic passports, to be addressed as 'His Excellency the Governor' among others. The Governors have stated that they are being undermined by the National Government in what they term as an intention by the National Government to defeat 'real' devolution of power as provided for by both the letter and spirit of the Constitution. How should the County Governors be addressed? What is the status and role of County Commissioners? This uncertainty and state of

affairs has occasioned our invocation of the advisory jurisdiction as hereunder.

(a). Whether Kenya is a Unitary State

Kenya is one indivisible state with 48 governments. Although the territory of Kenya is divided into 47 Counties, it remains one indivisible sovereign nation, in the words of the preamble to the Constitution. The powers and roles of the National Government and those of the County Governments are well defined in the Constitution. It should be noted that a function or power that is not assigned by the Constitution or by national legislation to a County Government is a function or power of the National Government. The County Governments exercise their roles as donated by the Constitution. The two are **distinct but interdependent and shall conduct their affairs on the basis of consultation and co-operation (A. 6(2))**. However, the distribution of powers and functions between the two levels of government as stipulated in the 4th Schedule of the Constitution should be respected. During the review process, some agitated for federalism, while others strongly pushed for a minimum “financially devolution”. In the end, our devolved system is less than a federal structure, but neither is it a token financial devolution to be controlled from the centre. There is no autonomous “peoples government” of county X, yet the National Government cannot also purport to control Governors and County Governments as if they were departments of the executive.

(b). Transfer of Duties & Funds

The Constitution, in the transitional clauses (**6th Schedule, A. 15**) contemplates a phased transfer of functions to county governments by the National Government over a period of not more than three (3) years. It further contemplates an established criterion that must be met before particular functions are devolved to County Governments in a bid to ensure that County Governments are not given functions which they cannot perform. The body charged with this role is the Transition Authority (TA) established by the Transition to Devolved Government Act (**No 1 of 2012**). The Act specifies the procedure and criteria to be met before certain functions are transferred to the County Governments. It is important that the Transition Authority transfers as many functions as practicable, and as soon as possible, for purposes of fast-tracking the

operations of the county governments. We urge the Transition Authority (TA) not to take a conservative approach that would slow implementation of devolution, and to adopt a facilitative approach. Unless there are serious grounds showing that a county will not be capable of performing a particular function, the assumption should be in favour of transfer. The transfer of functions should be followed by the transfer of funds without which county governments will not have the capacity to perform the new functions.

(c). Allocation of Offices and Assets

While it is true that all assets belonging to the erstwhile Ministry of Local Government in all counties before the coming into force of the devolved governments remains the property of the national government, there should be a clear and formal process for allocating offices and transfer of assets to the County Governments by dint of **section 35** of the Transition to Devolved Government Act. This is important as there can be a temptation by the national government to use the issues of assets to stifle intimidate the county governments, thus interfering with their authority. Specifically, it is advisable that all offices and assets held by the Ministry of Local governments through various city, municipal and county councils should be formally and immediately transferred to the county governments.

(d). Status and Role of County Commissioners

The Constitution requires that the national government restructures the system of government commonly known as Provincial Administration (PA) to accord with, and respect, the system of devolved government. The current indications are that Provincial Administration has been retained with only minimal changes. It has been re-designed to parallel the new county structure. Thus, County Commissioners and other officers down to the village have been re-designated. Whereas posting of national government officials at any level, however described, only for purposes of, and restricted to the functions prescribed in part 1 of Schedule Six, would not by itself be objectionable, the present formulation and status of Provincial Administration must raise anxiety. It is a fact that the national government remains in charge of the country's Security, Military, the

Courts and National Economic Policy among other major functions. However, the following should be emphasized:-

- (i) The retention of the wording '**Commissioners**' carries with it the old order of domination and superintendence. Perhaps a less imposing terminology would be adopted. There is further need to train the designated national government officials to respect the functional autonomy of county governments. This should be done by independent Constitutional experts/ offices.
- (ii) The continued retention of Provincial Commissioners (PCs) and Regional Commissioners (RCs) is inappropriate as there are no provinces or regions in the new structure. Kenya is divided into 47 counties and the retention of PCs and Regional Commissioners does not accord with the new system.
- (iii) In any event, the process of appointment of the County Commissioners was not transparent nor representative by gender and region as already observed in **High Court petition No.208 of 2012** and **HC Misc. No. 207 of 2012**. Thus, irrespective of whether the offices are retained or titles changed, it is necessary to restart the process in order to have a transparent, representative and responsive process. This should be done through the Public Service Commission. Holding onto a process that has been impugned by the High Court portends disrespect to the Constitution.
- (iv) The county budget should be a preserve of the county assembly, and the national government through the Transitional Authority should have a limited advisory role in the process.

(e).Security issues between National & County Governments

It ought to be emphasized that the National Security is a function of the national government. The National Police Service is headed by the Inspector General (IG) who exercises independent command. Thus, the county representative of the Inspector General should continuously brief both the governor, and the national government representative at the county, on security matters. It should be made clear that county governments have a leeway to establish their policing services but restricted to the functions allocated to them (see Article 247 of the Constitution and Schedule 4).

(f). Staffing of the County Governments and Continued Secondment of Staff by the National Government

Article **235** of the Constitution empowers county governments to recruit and exercise disciplinary control over their own staff. The national government through the Transition Authority has so far seconded various officers to assist in establishment of the county structures. More recently, the Transitional Authority advertised 47 positions for lawyers to be seconded to each county to help in advising and the drafting of county legislation. It is our view that while secondment may have been necessary earlier, once elections are held, county governments can only be supported to recruit their own staff. All further secondments, unless specifically requested, should cease.

(g). Salutation and Flag

Our attention is drawn to a dispute over salutation, with governors demanding to be addressed as 'Excellencies.' Further, they have demanded to fly the national flag.

First, the tone and tempo of the Constitution is to reduce overly formal salutations that detract from the sovereignty of the people and diminish servant leadership. Further, while hoping this will diminish, there may still remain salutations in respect of the President which accrue, not only because he is head of government, but also because he is head of state. In the body of Nations, only one state called Kenya exists. Such is the reason why even the Prime Minister settled for the 'Right Honourable yet he was co-head of government. Thus, and as happens in other jurisdictions with comparable presidential systems with devolved structures, it should suffice to refer to "X the Honourable Governor of Y County".

On the National flag, the National Flag, Emblems and Names Act (Cap 99) would have to be amended, by participation of both the National Assembly and the Senate, as a Bill concerning county governments (A.109). That notwithstanding, it may well serve the governors better if each were to fly the unique flag of their respective counties to emphasize the point of being head of one of the 48 governments, than struggle to fly

the flag representative of the 48th government, from whom they so crave separateness.

(h) Resolution of Disputes

Being alive to the fact that disputes would arise between the national government and county governments, the constitution states that in any dispute between the two levels of government, reasonable efforts shall be made to settle the dispute by negotiation, mediation and arbitration. In terms of legislation, the Intergovernmental Relations Act establishes a framework for consultation and co-operation between the national and county governments and amongst county governments. It establishes mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6 and 189 of the Constitution.

The Act creates a summit bringing together the President and the 47 governors, and mandates it to resolve disputes by way of alternative dispute resolution with judicial proceedings as the last option. The Act also creates a County Government Council with various functions among which include resolution of disputes between counties. The entire dispute resolution mechanism created by legislation will require strengthening. The summit has forty seven (47) Governors and is chaired by the President. Either the Chair will dictate, or the Governors will gang up against the chair and have their way on account of numbers. On the other hand, the Council comprises purely of persons with an interest on the outcome, (Governors) against the most basic principle of adjudication.

It is to be noted, however, that pending rationalization of these laws, the governments can invoke any of the following

- (i) Refer the dispute for resolution by the Commission on Administrative Justice (see section 8(f) and (g) of CAJ Act and Article 59(2)(i) of the Constitution;
- (ii) Constitute an independent mediation / Arbitration for panel as contemplated by Section 31 of the Intergovernmental Relations Act;
- (iii) Appoint a mutually acceptable "Intermediary" as contemplated by Section 33 of the Intergovernmental Relations Act;

- (iv) Subject to persuading the Court that the issue is not yet “contentious”, refer the matter to the Supreme Court for its **Advisory Opinion** under Article 163(6); or
- (v) Finally, and if all or any of the foregoing fail, refer the matter to the High Court for determination of the issues in contention.

It is our hope and belief that to the extent that Kenyans overwhelmingly voted in favour of the Constitution of Kenya 2010, they endorsed the idea of devolution as contained therein. We must all make it work, without overly romanticizing the concept, and without structurally suffocating it either. Let us respect the sovereignty of the people and make this Constitution work.

Dated this **10TH DAY of APRIL 2013**

CMMR. OTIENDE AMOLLO, EBS
CHAIRPERSON OF THE COMMISSION ON ADMINISTRATIVE JUSTICE