REPUBLIC OF KENYA

PARLIAMENT

THE SENATE

TWELFTH PARLIAMENT

REPORT OF THE STANDING COMMITTEE ON FINANCE AND BUDGET

ON

THE DIVISION OF REVENUE BILL (NATIONAL ASSEMBLY BILLS NO. 3 OF 2020)

PAPERS LAID	
DATE	14.04.2020
TABLED BY	Chairperson
COMMITTEE	Finance and Budget
CLERK AT THE TABLE	Mr. Ruge.

CLERK CHAMBERS
THE SENATE
PARLIAMENT OF KENYA
NAIROBI

APRIL 2020

TABLE OF CONTENTS

PREFACE

Mandate and Functions of the Committee

Article 124 of the Constitution of Kenya, provides for the establishment of Committees by either House of Parliament. Committees are central to the workings, roles and functions of Parliament as set out in Article 94 and more specifically in Article 96 of the Constitution as regards the Senate.

Parliamentary committees consider policy issues, scrutinize the workings and expenditure of the national and county governments and examine proposals for legislation. The end result of any process in Committees is the report, which is tabled in the House for consideration.

The Standing Committee on Finance and Budget is established pursuant to standing order 218(3) of the Senate *Standing Order and is mandated –*

a) To investigate, inquire into and report on all matters relating to coordination, control and monitoring of the county budgets and to examine –

i) the Budget Policy Statement presented to the Senate;

ii) report on the Budget allocated to Constitutional Commissions and independent offices;

iii) the Division of Revenue Bill, County Allocation of Revenue Bill, and cash disbursement schedule for county governments.

iv) to consider all matters related to resolutions and Bills for appropriations, share of national revenue amongst the counties and all matters concerning the National Budget, including public finance and monetary policies and public debt, planning and development policy; and

b) To pursuant to Article 228 (6) of the Constitution, to examine the report of the Controller of Budget on the implementation of the budgets of county governments.

Membership of the Committee

The Committee was constituted by the House on Thursday 14th December, 2017, during the First Session of the Twelfth (12th) Parliament. The Committee as currently constituted, comprises the following Members-

1. Sen. (Eng) Mohamed M. Mahamud, CBS,MP - Chairperson
2. Sen. (Dr) Isaac Mwaura, CBS, MP - Vice Chairperson
3. Sen. Wetang'ula Moses Masika, EGH, MP - Member
4. Sen. Mutula Kilonzo Junior, MP - Member
5. Sen. Aaron Cheruiyot, MP - Member
6. Sen. (Dr.) Ali Abdullahi Ibrahim, CBS, MP - Member
7. Sen. (Dr) Rose Nyamunga, MP - Member
8. Sen. Boniface Mutinda Kabaka, MP - Member
9. Sen. CPA Farhiya Haji, MP - Member

BACKGROUND AND EXECUTIVE SUMMARY

Article 218 of the Constitution provides for introduction of Division of Revenue Bill and the County Allocation of Revenue Bill to Parliament, at least two months before the end of each financial year.

The Budget Policy Statement (BPS), is the precursor to the Division of Revenue Bill, sets the fiscal framework underpinning the sharing of revenue between the two levels of government. The adoption of the BPS Report paved way for the publication and subsequent introduction of the Division of Revenue Bill to the House.

The Division of Revenue Bill, (National Assembly Bills No. 3 of 2020 was published and introduced in the National Assembly. The National Assembly passed the Bill on 17th March, 2020.

Following the passage by the National Assembly, the Division of Revenue Bill (National Assembly Bills No. 3 of 2020), was submitted to the Senate for concurrence.

The Bill was read a First Time in the Senate on Tuesday, 31st March, 2020, and thereafter stood committed to the Standing Committee on Finance and Budget pursuant to standing order 140 (1) of the Senate Standing Orders for consideration and facilitation of public participation.

Pursuant to Article 118 (1) (b) of the Constitution and standing order 140(5) of the Standing Orders of the Senate, the Standing Committee, in its consideration of the Bill, invited key stakeholders, including the National Treasury, Attorney General, Ministry of Devolution, Council of Governors, Commission on Revenue Allocation, County Assembly Forum to submit their views on the Bill to the Committee. The Committee also invited other non–state actors and the general public who similarly participated and submitted their contributions.

The Bill provides for the division of nationally raised revenue between the two levels of government as well as setting out specific resources to be provided to counties as conditional grants and loans, and the Equalization Fund. In addition, the Bill is accompanied by an explanatory memorandum as required in Article 218(2) of the Constitution. The memorandum sets out the explanation of revenue allocation as proposed by the Bill along with the evaluation of the Bill in relation to the criteria mentioned in Article 203(1) of the Constitution. It also provides a summary of any significant deviation from the recommendations from the Commission on Revenue Allocation with an explanation for each such deviation.

The enactment of the Division of Revenue Bill is critical in setting the stage for the preparation of the County Allocation of Revenue Bill. It also informs on the preparation of respective county budget documents in a manner that is timely and enables fiscal clarity and planning.

The Bill proposes follows-

a) Shareable revenue Kshs. estimated at Kshs 1,856.7 billion which is proposed to be shared as below
    i) National Government Kshs. 1,533.41 billion of which Kshs. 13.73 billion is given to counties as Conditional allocations;
    ii) County Equitable Share Kshs 316.5 billion;
    iii) Equalization Fund – Kshs 6.78 billion;
b) Road Maintenance Fuel Levy Fund Kshs. 9.43 billion; and
c) Additional Conditional allocations (loans & grants from Development Partners) Kshs. 30.20 billion

The Bill also has an allocation to Nairobi City County form the County Equitable Share and proposes that this intended allocation be retained in the Consolidated Fund. This is allocation would be used to fund the functions which Nairobi City County transferred to National Government.

Committee's Recommendations

The Committee recommends that the bill be approved with amendments as follows-

Clause 4

(a) deleting subclause (2); and

(b) deleting subclause (3).

Consequently, the Schedule to the bill be amended by deleting the allocation set aside for Nairobi City County.

Acknowledgements

The Committee acknowledges the Commission on Revenue Allocation, Institute of Certified Public Accountants (ICPAK), International Budget Partnership (IBP), Open Governance Institute (OGI), Expertise Global Consulting Ltd and members of the public who made insightful contributions and recommendations to the Bill. Further, the Committee thanks the Offices of the Speaker and Clerk of the Senate for the support extended to the Committee in execution of its mandate.

Appreciations to all Members of the Committee for their patience, sacrifice and commitment to public service, which enabled the Committee complete the assigned task within the stipulated time.

It is now my pleasant duty and privilege, on behalf of the Standing Committee on Finance and Budget, to present to the Senate, this Report of the Committee on the Division of Revenue Bill (National Assembly Bills No. 3 of 2020).

SIGNED:

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SEN. (ENG) MOHAMED M. MAHAMUD, CBS, M.P.

(CHAIRPERSON, STANDING COMMITTEE ON FINANCE AND BUDGET)

Date: 8/07/20

8 |*Report on division of Revenue Bill (National Assembly Bills No. 3 of 2020)*

Adoption of the Report

Pursuant to standing order 213 (2) of the Senate Standing Orders, the Senate Standing Committee on Finance and Budget Committee adopted the report on Division of Revenue Bill, (National Assembly Bills No. 3 of 2020). The Members of the Committee hereby affix their signatures to this Report to affirm the support for the Report

Sen. (Eng) Mohamed M. Mahamud, CBS, MP	-Chairperson
Sen. (Dr) Isaac Mwaura, CBS, MP	-Vice Chairperson
Sen. Wetang'ula Moses Masika, EGH, MP	- Member Wetangula
Sen. Mutula Kilonzo Junior, MP	- Member
Sen. Aaron Cheruiyot, MP	- Member
Sen. (Dr.) Ali Abdullahi Ibrahim, CBS, MP	- Member
Sen. (Dr) Rose Nyamunga, MP	- Member
Sen. CPA Farhiya Haji, MP	- Member
Sen. Boniface Mutinda Kabaka, MP	- Member

CHAPTER ONE

1.0 VERTICAL ALLOCATION OF REVENUE FOR FINANCIAL YEAR 2020/21

HIGHLIGHTS OF THE DIVISION OF REVENUE BILL, 2020

1. Article 218 of the Constitution provides for the submission of the Division of Revenue Bill and the County Allocation of Revenue Bill to Parliament, at least two months before the end of each financial year. The Division of Revenue Bill divides revenue raised by the national government among the two levels of government while the County Allocation of Revenue Bill divides among the counties the revenue allocated to the county governments as equitable share. The Division of Revenue Bill further sets out specific resources to be provided to counties as conditional grants and loans, and the Equalization Fund.
2. In addition, section 191 of the Public Finance Management (PFM) Act, 2012, provides that each year when the Budget Policy Statement (BPS) is introduced, the Cabinet Secretary shall submit to Parliament a Division of Revenue Bill and County Allocation of Revenue Bill prepared by the National Treasury for the financial year to which that Budget relates.
3. The adoption of the BPS Report by both Houses paved way for the publication and subsequent introduction of the Division of Revenue Bill, 2020 in National Assembly.
4. The Division of Revenue Bill (National Assembly Bills No. 3) was published on 9th March, 2020 and passed by the National Assembly on 17th March 2020. The total shareable revenue for the FY 2020/2021 is estimated at Kshs 1,856.7 billion proposed to be allocated as follows
   a) National Government Kshs. 1,533.41 billion
   b) County Equitable Share Kshs 316.5 billion

c) GoK Conditional allocations Kshs. 13.73 billion;

d) Road Maintenance Fuel Levy Fund Kshs. 9.43 billion

e) Additional allocations (loans & grants) Kshs. 30.20 billion.

f) Equalization Fund – Kshs 6.78 billion

1.1 Equitable Share of Revenue

5. Pursuant to Article 202 of the Constitution, the nationally raised revenue is shared equitably among the national and county governments. Article 203 (2) further stipulates that the equitable share of the revenue raised nationally that is allocated to county governments shall be not less than fifteen per cent of all revenue collected by the national government and shall be calculated on the basis of the most recent audited accounts of revenue received, as approved by the National Assembly. The proposed Equitable Share for FY 2020/21 is Ksh. 316.5 billion which is equivalent to 23.3 percent of the last audited accounts **(Ksh 1,357,698 million for FY 2016/17)** as approved by the National Assembly.

6. In calculating the County Governments' equitable revenue share allocation for FY 2020/21, the following factors have been put into consideration;

    (i.) Continued underperformance in ordinary revenue, which forms the base for the annual division of revenue;

    (ii.) The fact that the National Government continues to solely bear shortfalls in revenue in any given FY;

    (iii.) There being a Ksh 161 billion funding gap in the FY 2019/20 budget;

    (iv.) A 10.3% projected contraction in National Government's net spending in FY 2020/21 vis-à-vis FY 2019/20; and

    (v.) The proposal by National Treasury that the entire incremental revenue in FY 2020/21 be earmarked for CFS, specifically debt repayment and pensions.

1.2 GOK Conditional Allocations to County Governments

7. Article 202(2) of the Constitution stipulates that the County Governments may be given additional allocations from the National Governments share of revenue either conditionally or unconditionally. In line with these provisions the Bill, proposes to allocate **Kshs. 23.16 billion** for the following additional conditional allocations to support specific national policy objectives to be implemented by County Governments:

   (i.) Additional Conditional Allocation to facilitate the leasing of medical equipment of **Kshs 6.20 billion**;

   (ii.) Additional Conditional allocation for level-5 hospitals of **Ksh. 4.33 billion**.;

   (iii.) Additional Conditional allocation of **Kshs. 900 million** to compensate county health facilities for user fees foregone.

   (iv.) Additional Conditional Allocation for Rehabilitation of Youth Polytechnics of **Kshs. 2.00 billion**:

   (v.) Additional Conditional allocation to supplement county allocation for the construction of county headquarters of **Kshs. 300 Million** in five counties; and

   (vi.) Additional Conditional Allocation from the Road Maintenance Fuel Levy Fund of **Ksh. 9.43 billion**.

1.3 Additional Conditional Allocations (Loans & Grants)

8. County Governments also receive conditional allocations from development partners which are disbursed through State Departments at the National Government level according to the respective financing agreements and in fulfilment of the set conditions. In the FY 2020/21, the following additional conditional allocations amounting to **Kshs. 30.20 billion** will be transferred to counties in the form of loans and grants;

   (i.) Transforming Health Systems for Universal Care Project conditional allocation of **Kshs. 4.34 billion** (World Bank credit);

(ii.) DANIDA-Universal Healthcare for Devolved System Program of **Kshs. 900 million**;

(iii.) National Agricultural and Rural Inclusive Growth Project; NARIGP of **Kshs. 4.26 billion** (World Bank credit);

(iv.) Kenya Urban Support Program (KUSP) – Urban Development Grant (UDG) additional conditional allocation of **Kshs.6.36 billion;**

(v.) Kenya Devolution Support Program (KDSP) County Capacity Building ("level 1") Grant of **Kshs. 2.15 billion;**

(vi.) EU-Instruments for Devolution Advice and Support (IDEAS) grant of **Kshs. 216 million;**

(vii.) IDA (World Bank) - Kenya Climate Smart Agriculture Project (KCSAP) of **Kshs. 7.12 billion;**

(viii.) IDA – Water and Sanitation Development Project (WSDP) World Bank Credit of **Kshs. 3.4 billion;**

(ix.) Agricultural Sector Development Support Programme (ASDSP) II- **Kshs. 652 million;**

(x.) EU- Water Tower Protection and Climate Change Mitigation and Adaptation Programme (WaTER) - **Kshs. 528 million;**

(xi.) Drought Resilience Programme in Northern Kenya (DRPNK) - **Ksh. 300 million.**

1.0 IMPLICATIONS OF THE NAIROBI CITY COUNTY TRANSFERRED FUNCTIONS

9. In accordance to Article 187(2) of the Constitution and Gazette Notice No. 1609 of 25th February 2020, some functions of the Nairobi City County (NCC) as given in schedule four of the Constitution were transferred to the National Government.

10. The County Governments have a preserve of 14 functions out of which four functions have been transferred, while ten functions have remained with the Nairobi

county government. The details of the functions transferred from Nairobi County to the National Government is shown in table 1

Table 1: Breakdown of Nairobi City County transferred functions

S/No	Transferred functions	Details
1.	County Health Services	i.) County health facilities and pharmacies ii.) Ambulance services iii.) Promotion of primary health care iv.) Licensing and control of undertakings that sell food to the public v.) Veterinary services (excluding regulation of the profession) vi.) Cemeteries, funeral parlours and crematoria vii.) Refuse removal, refuse dumps and solid waste disposal
2.	County Transport Services	i.) County roads ii.) Street lighting iii.) Traffic and parking iv.) Public road transport v.) Ferries and harbours, excluding the regulation of international and national shipping and matters related thereto
3.	County Planning and Development Services	i.) Statistics ii.) Land survey and mapping iii.) Boundaries and fencing iv.) Housing and v.) Electricity and gas reticulation and energy regulation
4.	County Public Works, Utilities	i.) Storm water management systems in built-up areas ii.) Water and sanitation services

	and Ancillary services	

Source: Constitution of Kenya, Gazette Notice No. 1609 of 2020

11. Article 187 (2) (a) of the constitution requires that arrangements are put in place to ensure that the resources necessary to undertake or perform the functions transferred is provided. The Nairobi County has three main sources of revenue which are the equitable share, conditional grants and own source revenue.

12. The BPS 2020 was approved by the Senate on 27th February, 2020. For the FY 2020/21 the House approved a quantum amount of Kshs. 316.50 billion as equitable share going to counties. This is similar to the amount provided as county equitable share for the FY 2019/20. If the formula for sharing resources remains the same, and considering the fiscal effort, the Nairobi City County has a proposed allocation of **Kshs. 15.95 billion** as equitable share for the FY 2020/21.

13. It is important to note that the transferred functions may have budgetary allocation which is higher than what the county is expected to receive from the equitable share. Thus, part of the financing of the transferred function would be through Nairobi City County Own Source Revenue (OSR).

14. Article 207 (1) of the Constitution establishes a revenue fund for each county government into which shall be paid all money raised or received by or on behalf of the County Government. The Nairobi County own source revenue is remitted to the county Revenue fund. It is therefore important to develop a framework that transfers the monies received from Own Source Revenue which is meant to fund the transferred functions to the National Government.

CHAPTER TWO

2.0 SUBMISSIONS FROM STAKEHOLDERS

15. This Chapter presents the deliberations of the Committee with various stakeholders. It highlights the views and recommendations submitted to the Committee.

STAKEHOLDER	OBSERVATIONS AND RECOMMENDATIONS
Joint Submission by the International Budget Partnership-Kenya, The Institute for Social Accountability (TISA) and Institute of Certified Public Accountants of Kenya -ICPAK	**Despite devolution being a key aspect of service delivery in Kenya, the allocations to the county governments have been declining**. This is despite the fact that the growth in national revenue has remained stable o the last six years. FY 2020/21 will see a zero per cent growth in allocations. This does not reflect the increased growth in demand for services at that level of governance, especially with resource demands under the Big Four and emergent risks to the country's economy. They proposed that Parliament arrests this state.
	The realism of the revenue forecast remains a gamble. The organizations noted that revenue forecasts at both national and county level were ambitious and often led to budget deficits. This was exacerbated by the failure by the Tax Authority to meet the set targets over the years. This would need to be further revised due to the effect of COVID-19 to Kenya's econon productivity. This situation is mirrored at the County Government level where Counties collection of own revenue has been uncertain. Available data shows that only 13 out of 47 counties can meet more than 10 per cent of their annual budget from their own sources of revenue. This means that into the foreseeable future, they will be dependent on the national transfers and hence the more reason to safeguard the allocations.

STAKEHOLDER	OBSERVATIONS AND RECOMMENDATIONS
	There is no clear growth factor on the division of revenue allocation basis, and this leaves it to individual actors in the national government to decide how much should be allocated to county governments. The Organizations proposed that the growth factor or the criteria for determining the same be established. As a minimum, allocations to county governments should be informed by the average year on year growth of ordinary national revenue for 3 years.
	The allocation process for functions that were transferred by Nairobi City County to the National Government is opaque and explanations are inadequate. The Division of Revenue makes proposals on how to handle the funding for functions that were transferred to the national government to run them. These proposals do not give a clear and practical direction of how county revenue would be handled where functions will be run by two separate levels of government. Therefore, there are some challenges to the approach and the level of details provided on this issue that the Senate needs to address: **(i) Unconstitutional Retention of Equitable Share Allocation:** The DOR proposes to retain the full equitable share for Nairobi in the consolidated fund which would be in violation of Article 207 of the Constitution of Kenya and Section 109 of the Public Finance Management Act. These PFM related laws create the County Revenue Fund and direct its management and instances when county funds can be exempted from being remitted in the County Revenue Fund. Transfer of functions between two levels of government do not fall under the given exemptions. Nairobi City

STAKEHOLDER	OBSERVATIONS AND RECOMMENDATIONS
	Government thus has full responsibility on any revenue raised on its behalf including transfers under the equitable share. Any transfer of monies from the county should therefore be from the County Revenue Fund. **(ii) Adherence to Funding Follows Function Principle** The county transferred four functions, namely, health, transport, planning and development, public works, utilities and ancillary functions to the national government according to the Deed of Transfer, Gazette dated 25th February 2020. This means the county still has budgetary responsibilities to run ten other functions that remain under its management. Therefore, the proposal to retain all funds in the consolidated account leaves a lot of confusion on how the other services will be funded. **(iii) Spending levels for the transferred functions** The process notwithstanding the amount to be withheld by the national government at KES. 15.9 Billion seems to be on the higher side. Spending levels for the four functions over the last 4 years show that the amounts have been lower. Further, there is a huge variance between approved estimates and actual expenditures in Nairobi County. As such the amounts to be transferred should be based on the actuals and for which the proposed KES. 15.9 billion would be on the higher side. **(iv) Conditional Grants for Transferred Functions** Given the separation of powers principle in devolved governance and assignment of functions under Schedule Four of the Constitution, the organizations proposed that the bill's Section 4 (3) (a) be amended to make the transfer of the monies to the national government as conditional grants

STAKEHOLDER	OBSERVATIONS AND RECOMMENDATIONS
	for the performance of the transferred functions. Amend the section to read as follows: *4(3) "For avoidance of doubt where the transfer of functions is –* *(a) From a county government to the national government, the requisite funds shall be retained in the consolidated fund for appropriation respective County Revenue Fund and transferred to the national government as conditional grants to meet the costs of the transferred functions"* This would be in line with Article 187 (2) of the constitution that leaves the constitutional responsibility for the delivery of the transferred function with the level it is assigned to in the Fourth Schedule of the Constitution. **(v) Amendment to the PFM Act** Given the confusion this has created, the PFM Act section 109 should be amended to make provisions for the resourcing of transferred functions. Specifically, the transfer should be as a conditional grant from the government transferring the function
	The conditional grants have been maintained even though the criteria of how they are set up and the conditions for their use remains unclear: concerns a) There seem to be no clear criteria as to how they are set up. A closer look at them indicates that they are to facilitate functions that are assigned to the counties by the constitution. As such the resources should be part of the unconditional share for the county governments. b) There is no clarity of the conditions of how the resources are to be utilized once they are at the county level or a clear monitoring framework that can

STAKEHOLDER	OBSERVATIONS AND RECOMMENDATIONS
	be followed even by citizens. As a result, it is impossible to establish if the objectives they are supposed to actualize have been accomplished. c) How they grow from one year to another is unclear, and the process of their disbursement to counties is uncertain. Some like compensation for user fees foregone has remained the same for the 6 years, and this does not reflect the demand for primary health care. Generally, the growth and decline in allocations to conditional grants seem as arbitrary as the equitable share. This makes medium-term budgeting at the county level quite difficult due to unpredictability in the allocations at the point when counties are work through their County Fiscal Strategy Papers.
	There is a need for publicly available information on the performance of each conditional grant from the national government's share of revenue to provide oversight on the execution of the grants at the county level. It is noteworthy that the recipients of conditional grants are required to submit reports, and thus the national treasury should ensure that this performance information is included in DORA. Such information would include; the amount of grants previously received, the status of fiscal gap, how they performed in terms of spending and absorption over the years. The reports should also report on attainment of Key Performance Indicators.
	Public debt, pensions and other charges of the consolidated fund services are crowding out the amount available for the division of revenue and hurting counties allocation. Further, while public borrowing has a very direct impact on the size of the sharable revenue, the National Treasury remains the only body that decides on this vital national instrument.

STAKEHOLDER	OBSERVATIONS AND RECOMMENDATIONS
	The recommendation was therefore that counties and the Senate should be involved in the discussion on national borrowing as that has an impact on the revenue that is shared between the two levels of government.
	Pensions and other CFS Services have equally grown, and their administration is of concern. Pension is a non-discretionary obligation which has a bearing on the size of revenue that is eventually shared between the two levels of government. The higher the share of ordinary revenue that is taken up by these national obligations, the lower the sharable revenue and allocations to counties.
	A mechanism for cushioning cities and urban areas still needs to be established. CRA recommended a KES. 5 billion conditional grant for the 5 cities of Nairobi, Mombasa, Kisumu, Nakuru and Eldoret. While this has not been allocated for, Parliament needs to relook the matter. These cities continue to bear the heavy costs of service delivery given their populations and are critical centres for economic growth in the country and their regions.
	Significance of Audited Financial Statements in the division of revenue should be underscored. The DORB 2020 uses the 2016/17 audited accounts as the most recent, yet the Auditor General finalized and submitted to Parliament reports up to FY 2017/18. The use of FY 2017/18 audited accounts will guarantee a higher minimum allocation. ICPAK, TISA and IBP-K proposed an amendment to the Public Finance Management Act to rectify that situation as follows: *The National Assembly shall within three months after receiving an audit report adopt and approve the report; Where the audit report is not adopted and approved by the National Assembly within the three months, it shall be deemed as the most recent audited accounts for purposes of division of revenue.*

STAKEHOLDER	OBSERVATIONS AND RECOMMENDATIONS
	Lack of transparency, accountability and meaningful public engagement has affected the division of the revenue process Although Parliament has embraced public participation in the legislative process and made efforts towards facilitating public participation, public engagement in the division of revenue process is not effective but tokenistic and inconsequential in the ultimate decision-making process. There is a need for clear guidance on how the public should engage during the division of the revenue process in a manner that they can influence decisions made and the kind of information that government institutions should provide to enable the citizens to engage accordingly. In addition, a feedback mechanism is required informing on how submissions and inputs from the public are handled. Further, pursuant to Article 201 and section 35(2) of the Public Finance Management Act the cabinet Secretary should enact regulations to provide for meaningful public participation in the national budget and include sanctions for failure to undertake meaningful public participation in the budget process including division of revenue process.
	Budget Transparency is critical for the objective division of revenue The lack of a clear definition and objective criteria for determining national interest has been exploited by the national government to starve counties of resources. Additionally, the framework for the management of conditional grants continues to be weak and indeed does not meet the constitutional requirements for fiscal prudence and transparency. On performance evaluation, there is a need to ensure that funds are traceable to avoid double funding and blurring of reporting. National departments must

STAKEHOLDER	OBSERVATIONS AND RECOMMENDATIONS
	report to Parliament the outcome of grants allocated for a specific purpose. Inclusion of an implementation work plan and monitoring and evaluation mechanism in the existing framework for the management of conditional grants would go a long way. Finally, further allocations and introduction of conditional grants should be based on past performance data.
	The leasing medical equipment repayments allocation amounting to Kshs. 6,205,000,000/- should be stopped and classified as odious debt on account of queries raised by the Auditor General and Senate Finance Committee. A report by the Institute for Economic Affairs reviewing the office of the Auditor General reports revealed that the lawfulness and accuracy of expenditure amounting to Kshs. 4.57 billion on the leasing of medical equipment project could not be verified due to lack of important supporting documents, such as the contract, the Attorney General's legal opinion on the contract, the procurement and the progress reports were not availed during the audit review process. Additionally, numerous audit queries have been raised regarding the operationalization and implementation of the MES project by county governments. These include ineffective and unlawful utilization of public funds allocated to implementation of the MES project; violation of the financial laws and regulations, including unlawful procurement processes; the total amount of the lease (rental payments deducted at the source) for the respective counties; lack of supporting documents. The numerous audit queries imply that the value for money could not be ascertained regarding the medical equipment delivered but remain idle or those that have been paid for but not delivered

STAKEHOLDER	OBSERVATIONS AND RECOMMENDATIONS
	It was therefore the considered view of the stakeholders that the MES project was solely crafted as a corruption scheme to benefit corrupt individuals on the pretext that it would meet the health care needs of the population, and as such Kenyans ought not to be saddled by its debt. Instead, the people responsible, companies contracted, and government officials involved, ought to be prosecuted for their actions or inaction. It should be classified as odious debt because it was contracted and spent against or not in the interests of the people of Kenya, without their consent, and with full awareness of the government.
Expertise Global Consulting Ltd (EGCL)	**Schedule 4 on Equalization Fund: Ksh.6.7billion provided towards the fund** a) The allocation should be disbursed directly in the form of a conditional grant to the affected counties as guided by the marginalization policy developed by the Commission on Revenue Allocation and as per the High Court judgement of 12th November 2019 on the appropriation of the Fund. b) The allocation should not be appropriated by the national government until the High Court judgement and recommendation on the need to prepare new administration guidelines are adhered to. c) Parliament should urgently institute a special audit through the office of the Auditor General to review the expenditures associated with the Fund.
	Schedule 4 on Nairobi City County Equitable share to cater for transferred function: Ksh.15.9billion provided for exclusion from

STAKEHOLDER	OBSERVATIONS AND RECOMMENDATIONS
	the total counties' equitable share of revenues. Amount to be retained in the consolidated fund to meet part of the cost of the functions transferred to the national government. a) The Nairobi City County Equitable share of allocation should directly be disbursed to the County's Revenue Fund account without any deduction as mandated by the constitution under Article 219. b) Appropriation for the transferred functions to be done through the County's budget and Appropriation Act passed by the County Assembly as mandated by the Constitution and the PFM Act 2012. c) Allocations for the implementation of the transferred functions should directly be disbursed through the County Revenue Fund Account to the Nairobi Metropolitan Services.
	Schedule 4 on the Grant towards Level 5 hospitals: Ksh. 4.3billion provided for support of the level 5 hospitals Expand the allocation to the additional gazetted level 5 hospitals. The Allocation has consistently since 2014/15 targeted 11 facilities without consideration of newly gazetted Level 5 facilities such as the Bungoma Level 5 Hospital.
Commission on Revenue Allocation (CRA)	Given the non- performance of revenues and the likely poor performance of revenues in financial year 2020/21 that may arise from the impact of COVID-19 pandemic on the economy, **the Commission has no objection to the proposal of equitable share allocation to county governments at Ksh. 316.5 billion.** An allocation of Kshs.316.5 billion is equivalent to 23 per cent of the most recent audited approved accounts for financial year 2016/17 and therefore

STAKEHOLDER	OBSERVATIONS AND RECOMMENDATIONS
	meets the provision of Article 203(2) of the Constitution of allocation at least 15 per cent.
	The Commission recommended for a new conditional grant of Ksh. 5.0 billion to finance cities, in line with the provisions of the Urban Areas and Cities Act. The five cities namely: Nairobi, Mombasa, Kisumu, Nakuru and Eldoret are centres of economic growth that provide unique services such as provision of sewerage systems, water reticulation, solid waste disposal, and storm water drainage and management to the residents be given additional resources. The COVID-19 pandemic, though a health crisis, has brough the fore the dire situation of collapsed infrastructure in the urban informal settlements. These include; increased respiratory infections in slums, heaps of garbage, poor sanitation, lack of roads, lack of clean water, and poor drainage, among other challenges. The Senate needs to set up a grant to provide infrastructure in urban informal settlements.
	Transfer of functions of the Nairobi City County to the National Government The National Assembly DORB 2020, allocates the entire of Nairobi county government equitable share of Ksh. 15.95 billion to run the four transferred functions. The Commission noted that a provision in National Assembly DORB 2020, allocating Nairobi County's entire equitable share of Ksh. 15.949 billion to only four transferred functions did not amount to equity in financing of the 14 functions assigned to Nairobi County governments. The Commission recommended that the budget estimate of the transferred functions be financed from both Nairobi's equitable share, 50 percent and 50 per cent from Nairobi's own revenue.

STAKEHOLDER	OBSERVATIONS AND RECOMMENDATIONS
	To enable national government to access revenues from the county revenue fund (CRF), there is need to provide in the DORB under Clause 4, a requirement for the County Executive Committee Member for finance to establish a Fund unto which, 50 per cent of the equitable share shall be deposited to finance the four transferred functions. The Senate approves a cash disbursement schedule for all county governments. The Senate needs to also provide another cash disbursement schedule of 50 per cent of Nairobi county governments' equitable share to be deposited to the special fund to run the transferred functions
	In accordance with the provisions of Article 217, the Senate is to determine the basis for sharing of the county governments' equitable share. Due to the COVID-19 pandemic, the consultations earlier scheduled by the Senate were suspended. The Commission recommends that the Senate considers the third basis for sharing revenue among county governments. This will ensure equity in sharing revenue among counties through the use of the most recent data relating to population, households and poverty.
Open Governance Institute (OGI) Kenya	**The basis for freezing county revenue growth in 2020/21 is contradictory**: a. That, paragraph eight discusses potential revenue underperformance as a basis for denying county governments increase in revenue, however, that is contradicted by paragraph 14 which estimates revenue growth of Ksh. 89.8 billion. b. That, by county governments not, directly or indirectly, receiving a share of loans borrowed by National Government, at least not according to the bill, renders paragraph (7) (e) unreasonable basis for

STAKEHOLDER	OBSERVATIONS AND RECOMMENDATIONS
	denying county governments additional revenue in 2020/21. (it states any increase in revenue in 2020/21 will be applied for the repayment for debt and pensions.) c. That, paragraph nine (9) punishes county governments for not having been affected by shortfalls in national revenue in the past. In light of lack of properly costed county and national functions to determine the actual budgetary requirements for respective functions, and that county governments receives just under a third of the nationally raised revenue is unreasonable factor for denying county government an increase in its revenue.
	The bill must take the following factors into account: a. That, county governments incur incremental cost annually as a result of various factors including inflation rates. b. That, county governments have registered an average of 12% increase in personnel emoluments (PE) since 2016/17. Using expenditure base of 2018/19 of Ksh. 162.77 billion according to Controller of Budget (COB), county governments will require Ksh. 185 billion for 2019/20 for PE costs, and subsequently an increase of Ksh. 22 billion, representing Ksh. 207 billion in 2020/21. c. That, public servants are entitled to 1.5% annual salary increment. Using the estimated cost for personnel emoluments for 2020/21 at Ksh. 207 billion, 47 county governments will require Ksh. 3 billion for salary increments bringing the budget to Ksh. 210.3 billion. d. That, county governments receiving smaller portions of equitable share and low OSR, have in the past had tight budgets, struggled to meet the requirements of Public Finance Management (PFM) Act 2012 on budget ration of 30:70 for development to recurrent budget

STAKEHOLDER	OBSERVATIONS AND RECOMMENDATIONS
	vote shares. Thus, maintaining the revenue share means for the costs outlined in (a), (b) and (c), county governments will be forced to secure such costs from development votes, thus technically violating the PFM provisions.
	The cost of Leasing Medical Equipment must be borne by national government therefore increasing the portion of the sharable revenue available to county governments by Ksh. 6.2 billion.
	To cushion county governments against cost pressure on her recurrent budget votes and subsequently, ensure that county government meet the minimum legal requirements of 30:70 ratio of development to recurrent votes, the portion of the sharable revenue available to counties must, at least increase by 12%, raising the share of sharable revenue available to counties to Ksh. 354.5 billion from current financial year's share of Ksh. 316.5 billion.

CHAPTER THREE

3.0 COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

3.1 OBSERVATIONS

From the submission made by the stakeholders, the Committee made the following observations-

a) Noting the prevailing economic situation arising from the impact of COVID-19 pandemic, the performance of revenues may be poor thus, the 2020/21 equitable share may be expected not to grow from the previous allocation. The proposed equitable share for FY 2020/21 is Kshs. 316.5 Billion.

b) Pursuant to Article 187(2) of the Constitution and Gazette Notice No. 1609 of 25th February 2020, four (4) functions of the Nairobi City County (NCC) as given in schedule four of the Constitution were transferred to the National Government. The functions are namely County Health Services; County Transport Services; County Planning and Development Services; County Public Works, Utilities and Ancillary services, to National Government. The County was left with ten (10) functions to perform.

c) Though the functions were transferred, no arrangements have been put in place to ensure that the resources necessary for the performance of the functions are transferred. However, constitutional responsibility, which includes budgeting, of the performance of the transferred function resides with the Nairobi City County government.

d) The Bill proposes retention of Nairobi City County equitable share allocation Ksh. 15.95 billion in the Consolidated Fund. The retained monies would be used to finance the implementation of programmes under the four (4) transferred functions.

e) Article 207(1) provides for establishment of a Revenue Fund for each county government, into which shall be paid all money raised or received by or on behalf of the county government, except money reasonably excluded by an Act of

Parliament. Further, section 109(2)(a)&(c) of PFM Act, 2012 provides that the County Treasury for each county government shall ensure that all money raised or received by or on behalf of the county government is paid into the County Revenue Fund, except money that is excluded from payment into that Fund because of a provision of the Act or another Act of Parliament, and is payable into another county public fund established for a specific purpose or is reasonably excluded by an Act of Parliament as provided in Article 207 of the Constitution.

f) Article 219 on Transfer of equitable share provides that a county's share of revenue raised by the national government shall be transferred to the county without undue delay and without deduction, except when the transfer has been stopped under Article 225. However, transfer of function(s) from county level to National Government is not one of the exceptions.

g) Allocation of Nairobi City County's entire equitable share of Ksh. 15.949 billion to only four transferred functions does not amount to equity in financing of the 14 functions assigned to the county governments. Secondly, the budget estimate for the functions should be financed from both Nairobi's equitable share and own Source Revenue; may be at ratio of 50:50.

h) Several stakeholders termed the proposal as 'unconstitutional' and they recommended that-

    i) The Nairobi City County Equitable share of allocation should directly be disbursed to the County's Revenue Fund account without any deduction as mandated by the constitution under Article 219.

    ii) Appropriation for the transferred functions to be done through the County's budget and Appropriation Act passed by the County Assembly as mandated by the Constitution and the PFM Act 2012.

    iii) Allocations for the implementation of the transferred functions should directly be disbursed through the County Revenue Fund Account to the Nairobi Metropolitan Services.

i) Article 218(1)(a) and PFM Act section 191(2) provides that Division of Revenue Bill divides the revenue raised by national government between the national and county levels of government. Article 218(1)(b) and PFM Act section 191(3)(a) provides that the County Allocation of Revenue Bill shall specify each county's share of revenue allocated to counties (county level of government) by Division of Revenue Bill. Thus, the basis for allocating the purported Ksh. 15.95 billion in Division of Revenue Bill to Nairobi City County is fault since the County Allocation of Revenue Bill, 2020 is yet to be approved.

In light of the of the foregoing the Committee observes that-

a) Clause 4(2) and (3) of the Bill as read together with the Schedule to the Bill proposes to retain in the Consolidated Fund Nairobi County Government's equitable share of nationally raised revenue. However, Article 202(1) of the Constitution provides that *"revenue raised nationally shall be shared equitably among the national and county governments"*. Further Article 219 of the Constitution provides that *"a county's share of revenue raised by the national government shall be transferred to the county without undue delay and without deduction, except when the transfer has been stopped under Article 225"*. These provisions of the Constitution therefore contemplate that in every financial year nationally raised revenue shall be divided between the national government and the county government and each county shall receive its share of nationally raised revenue without deduction or delay except for stoppage of funds under Article 225. The Constitution therefore does not contemplate the retention of any county government's share of nationally raised revenue by reason of a transfer of functions under Article 187 of the Constitution.
b) The Committee further notes that Article 218 of the Constitution sets out a two-tier system for the division of revenue. In the first instance, the Division of Revenue Bill proposes a vertical division of revenue between the national and county governments. In the second instance, the County Allocation of Revenue proposes

the horizontal division of revenue between the forty-seven counties. Clause 4(2) and (3) of the Bill as read together with the Schedule proposes to retain Ksh.15,951,600,000 in the Consolidated Fund as Nairobi City County share of nationally raised revenue. However, it is through the County Allocation of Revenue Bill that the allocation made to each of the counties is determined. It would therefore be unconstitutional to purport to provide for the retention of Nairobi City County's equitable share before the introduction and consideration of the County Allocation of Revenue Bill.

c) Article 187(2)(b) of the Constitution provides that *"if a function or power is transferred from a government at one level to a government at the other level constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule"*. Constitutional responsibility entails the preparation of budgets and accountability for the expenditure of funds as contemplated under Article 226 of the Constitution. A retention of the equitable share of nationally raised revenue for Nairobi City County at the national government would amount to a usurpation of the constitutional mandate of the county government to prepare its own budget and the power of the county assembly to approve said budget and exercise oversight over expenditure.

d) The Committee is further cognizant of the provisions of the Deed of Transfer of Functions of Nairobi County Government to the National Government and in particular Article 5 on financing the delivery of the transferred functions. In particular, Article 5.2 of the Deed provides that *"the Nairobi City County Government shall ensure that the transferred functions are fully funded from the County Revenue Fund"*. This would therefore imply that appropriation shall be made from the County Revenue Fund to cater for the transferred functions.

3.2 RECOMMENDATIONS

The Committee recommends that the bill be approved with the following amendments-
Clause 4

a) Delete Clause 4(2)
b) Delete Clause 4(3)

Following the proposed amendments, the new schedule referred in Clause 4 will be as follows-

Allocation of Revenue Raised Nationally Among the National and County Governments for the Financial Year 2020/21

Type/level of allocation	**Amount in Ksh.**	**Percentage (%) of 2016/17 audited and approved revenue i.e. Ksh. 1,357,698 Million**
A. Total Sharable Revenue	**1,856,700,000,000**	
B. National Government*	**1,533,411,510,000**	
Of which:		
1. Leasing of Medical Equipment	6,205,000,000	
2. Compensation for user fees forgone	900,000,000	
3. Level 5 hospitals	4,326,000,000	
4. Supplement for construction of county headquarters	300,000,000	
5. Rehabilitation of Youth Polytechnics	2,000,000,000	
C. Equalization Fund	**6,788,490,000**	**0.50%**
D. County equitable share	316,500,000,000	**23.31%**
Memo items		
1. County equitable share	***316,500,000,000***	
2. Additional conditional allocations(National Government share of Revenue) of which;	***13,731,000,000***	
2.1. Leasing of Medical Equipment	6,205,000,000	
2.2 Compensation for user fees forgone	900,000,000	

2.3 Level 5 hospitals	4,326,000,000	
2.4 Supplement for construction of county headquarters	300,000,000	
2.5 Rehabilitation of Youth Polytechnics	2,000,000,000	
3. Allocation from Fuel Levy Fund (15%)	*9,433,265,625*	
4. Conditional allocations (Loans & grants) of which:	***30,204,347,510***	
4.1 IDA-Kenya Devolution Support Program (KDSP) (Level 1)	2,115,000,000	
4.2 IDA-Transforming Health Systems for Universal Care Project	4,345,375,741	
4.3 DANIDA-Universal Healthcare For Devolved System Program	900,000,000	
4.4 IDA-National Agriculture & Rural Inclusive Growth Project (NARIGP)	4,261,646,438	
4.5 EU-Instruments for Devolution Advice and Support (IDEAS)	216,014,391	
4.6 IDA (World Bank) - Kenya Climate Smart Agriculture Project (KCSAP)	7,119,726,782	
4.7 World Bank- Kenya Urban Support Program(KUSP)- UDG	6,366,000,000	
4.8 IDA- Water and Sanitation Development Project (WSDP)	3,400,000,000	
4.9 Sweden Agriculture Sector Development Programme II (ASDP II)	652,584,158	
4.10 EU- Water Tower Protection and Climate Change Mitigation and Adaptation Programme (WaTER)	528,000,000	
4.11 Drought Resilience Programme in Northern Kenya	300,000,000	
Total County Allocations= (1+2+3+4)	**369,868,613,135**	

APPENDIXES

(a) **Minutes of the Committee sittings**

(b) **Submission from Public Institutions and Members of Public**

(c) **Committee Stage Amendments**

MINUTES OF THE 138TH MEETING OF THE SENATE STANDING COMMITTEE ON FINANCE AND BUDGET HELD ON MONDAY, 6TH APRIL, 2020, IN COUNTY HALL, FIRST FLOOR, COMMISSION BOARDROOM, PARLIAMENT BUILDINGS AT 10:00 AM.

PRESENT

1. Sen. (Eng) Mohamed M. Mahamud, CBS, MP - Chairperson
2. Sen. (Dr) Isaac Mwaura, CBS, MP - Vice Chairperson
3. Sen. Moses Wetangula, EGH, MP - Member
4. Sen. Mutula Kilonzo Junior, MP - Member
5. Sen. Aaron Cheruiyot, MP - Member
6. Sen. (Dr) Ali Abdullahi Ibrahim, CBS, MP - Member
7. Sen. (Dr) Rose Nyamunga, MP - Member
8. Sen. CPA Farhiya Haji, MP - Member
9. Sen. Boniface Mutinda Kabaka, MP - Member

SECRETARIAT

1. Mr. Christopher Gitonga - Clerk Assistant
2. Ms. Lucy Radoli - Legal Counsel

MIN. NO. 669/04/2020: PRELIMINARIES

The Chairperson called the meeting to order at 10.10 am and there followed a word of prayer.

MIN.NO. 670/04/2020: ADOPTION OF THE AGENDA

The agenda of the meeting was adopted after it was proposed by Sen. Sen. Mutula Kilonzo Junior, MP and seconded by Sen. Aaron Cheruiyot MP.

MIN.NO. 671/04/2020: CONSIDERATION AND ADOPTION OF THE REPORT ON THE DIVISION OF REVENUE BILL, (NATIONAL ASSEMBLY BILLS NO. 3 OF 2020)

The Committee noted that the Division of revenue Bill (National Assembly Bills. No 3 of 2020) Clause allocates part of equitable share to the Nairobi City County Government. Further, the Bill proposed that the allocation to the same county should be retained in the Consolidated Fund.

The Committee observed that this matter had been raised by several stakeholders who submitted their memorandum on the Bill.

The Committee further observed that-

a) Article 202(1) of the Constitution provides that *"revenue raised nationally shall be shared equitably among the national and county governments"*. Further Article 219 of the Constitution provides that *"a county's share of revenue raised by the national government shall be transferred to the county without undue delay and without deduction, except when the transfer has been stopped under Article 225"*. These provisions of the Constitution therefore contemplate that in every financial year nationally raised revenue shall be divided between the national government and the county government and each county shall receive its share of nationally raised revenue without deduction or delay except for stoppage of funds under Article 225. The Constitution therefore does not contemplate the retention of any county government's share of nationally raised revenue by reason of a transfer of functions under Article 187 of the Constitution.

b) Article 218 of the Constitution sets out a two-tier system for the division of revenue. In the first instance, the Division of Revenue Bill proposes a vertical division of revenue between the national and county governments. In the second instance, the County Allocation of Revenue proposes the horizontal division of revenue between the forty-seven counties. Clause 4(2) and (3) of the Bill as read together with the Schedule proposes to retain Ksh.15,951,600,000 in the Consolidated Fund as Nairobi City County share of nationally raised revenue. However, it is through the County Allocation of Revenue Bill that the allocation made to each of the counties is determined. It would therefore be unconstitutional to purport to provide for the retention of Nairobi City County's equitable share before the introduction and consideration of the County Allocation of Revenue Bill.

c) Article 187(2)(b) of the Constitution provides that *"if a function or power is transferred from a government at one level to a government at the other level constitutional responsibility for the performance of the function or exercise of the power shall remain with the government to which it is assigned by the Fourth Schedule"*. Constitutional responsibility entails the preparation of budgets and accountability for the expenditure of funds as contemplated under Article 226 of the Constitution. A retention of the equitable share of nationally raised revenue for Nairobi City County at the national government would amount to a usurpation of the constitutional mandate of the county government to prepare its own budget and the power of the county assembly to approve said budget and exercise oversight over expenditure.

d) The Committee cognizant of the provisions of the Deed of Transfer of Functions of Nairobi County Government to the National Government and in particular Article 5 on financing the delivery of the transferred functions. In particular, Article 5.2 of the Deed provides that "*the Nairobi City County Government shall ensure that the transferred functions are fully funded from the County Revenue Fund*". This would therefore imply that appropriation shall be made from the County Revenue Fund to cater for the transferred functions.

The Committee resolve that the Bill be approved with amendments as follows-

Clause 4

a) Delete Clause 4(2)
b) Delete Clause 4(3)

Consequently, the Schedule to the Bill be amended to reflect the proposed amendments.

The Committee unanimously adopted its report for tabling on Tuesday, 7th April, 2020.

MIN.NO. 672/04/2020: ANY OTHER BUSINESS AND ADJOURNMENT

a) The Committee observed that there was need to finalise the preparation of the third criteria for sharing revenue among counties since the criteria is required for preparation of County Allocation of revenue Bill, 2020. The Committee resolved to hold a meeting with Commission on Revenue Allocation on Thursday, 9th April, 2020.
b) The Committee noted that some county were requesting for exemptions from the ceiling set for construction of headquarters and county state officers' residences. The Committee directed the secretariat to circulate the documents received from the respective counties for scrutiny and deliberations on the way forward.

There being no other business the meeting was adjourned at 11:35 am.

SIGNATURE...

(CHAIRPERSON: SEN. (ENG) MOHAMED MAALIM MAHAMUD)

DATE......6/04/2020......

SPECIAL ISSUE

THE KENYA GAZETTE

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GAZETTE NOTICE NO. 1609

THE CONSTITUTION OF KENYA

THE INTERGOVERNMENTAL RELATIONS ACT

(*No.* 2 *of* 2012)

TRANSFER OF FUNCTIONS

IT IS notified for the general information of the public that pursuant to Article 187 of the Constitution as read with section 26 of the Intergovernmental Relations Act, 2012, Nairobi City County Government has transferred certain functions to the National Government *vide* the Agreement set out in the Schedule.

SCHEDULE

THE NATIONAL GOVERNMENT

(THROUGH)

THE MINISTRY OF DEVOLUTION AND THE ASALs

AND

THE NAIROBI CITY COUNTY GOVERNMENT

DEED OF TRANSFER OF FUNCTIONS FROM THE NAIROBI CITY COUNTY GOVERNMENT TO THE NATIONAL GOVERNMENT

THIS Deed of Transfer is made on this 25th day of February two thousand and twenty.

BY AND BETWEEN

(*a*) The National Government of the Republic of Kenya, through the Ministry of Devolution and the ASALs ("the National Government") on the first part; and,

(*b*) The Nairobi City County Government, ("the County Government") whose registered office is at City Hall, off City Hall Way, Nairobi on the other part.

(Each a "Party" and together the "Parties")

RECITALS AND DECLARATION OF COMMON INTENT

WHEREAS, the Constitution of Kenya, 2010 established a devolved structure of Governance with a service-centric approach, in which the sovereign power of the people of Kenya is exercised at two levels, being the National Level and the County Level (collectively the "Government of the Republic of Kenya");

WHEREAS, the Principles of Executive Authority set out under Article 129 of the Constitution require that Executive Authority at both levels of Government be exercised in a manner that serves the best interest, well-being and aspirations of the People of Kenya;

WHEREAS, the Principal Object of Devolution is set-out under Article 174 of the Constitution as being: "to promote democratic and accountable exercise of power, to foster national unity by recognizing diversity and to give powers of self-governance to the people and enhance the participation of the people in exercise of the powers of the state and in making decisions affecting them";

WHEREAS, Article 189 of the Constitution, sets out the structure for co-operation between the National and County Governments; with Government at either level being required to perform its functions and exercise its powers in a manner that respects the functional and institutional integrity of the Government at the other level, and respects the constitutional status and institutions of Government at the other level;

WHEREAS, it is the shared aspiration of all Kenyans for their Government to operate in an effective, transparent and accountable manner with respect to the delivery of public goods and services;

WHEREAS, it is the solemn duty of the Government to guarantee reasonable access to all public goods and services in all counties and in every part of the Republic;

WHEREAS, Article 186 of the Constitution, as read with the Fourth Schedule of the Constitution, sets out functions of County Governments to include: County Health Services, Control of Air Pollution, Control of Noise Population, Prevention of Public Nuisance, Regulation of Public Entertainment, County Transport, Trade Development, County Planning and Development, Pre-primary Education, Village Polytechnics, Firefighting Services, and Disaster Management and Control of Drugs;

WHEREAS, Nairobi City is the seat of the Government of Kenya and the Nation's Capital City;

WHEREAS, Nairobi City is also the largest commercial hub in East and Central Africa, and home to over 4 million persons;

WHEREAS, the Nairobi City County Government seeks to foster its effectiveness in the delivery of the public good; and is considering mechanisms of embedding operational enhancements that would make the County Government better able to deliver on its constitutional mandate;

WHEREAS, the Nairobi City County Government is conscious of its internal constraints as to the effective discharge of its functions;

WHEREAS, the Nairobi City County Government recognizes that in light of the scope of the devolved functions, some of the functions currently vested in the Nairobi City County Government would be more effectively performed and exercised by the National Government;

WHEREAS, and to enhance delivery of the public good, the Nairobi City County Government is desirous of transferring to the National Government the functions set out in Article 3 of this Deed of Transfer of Functions;

WHEREAS, the National Government is desirous of accepting the transfer to the National Government of the functions set out in Article 3 of this Deed of Transfer of Functions from the Nairobi City County Government; and it has the requisite capacity and competence to perform the transferred functions:-

NOW THEREFORE, having considered the above, the Parties enter into this Deed of Transfer of Functions and solemnly agree as follows:

ARTICLE 1: DEFINITIONS

1.1 The following expressions (save where the context requires otherwise) bear the following meanings:-

1.1.1 References to an Article are (unless the context otherwise requires) to an Article respectively of this Deed of Transfer of Functions;

1.1.2. Words importing the singular meaning where the context so admits include the plural meaning and vice versa;

1.1.3. The Article and paragraph headings are for reference purposes only and shall not affect the interpretation of this Deed of Transfer of Functions.

ARTICLE 2: PRINCIPAL OBJECTS

The principal objects this Deed of Transfer of Functions are:

2.1 To give full effect of the benefits of the devolved and decentralized governance to the residents of Nairobi City County; and,

2.2 To anchor the framework of the transfer of certain functions from the Nairobi City County Government to the National Government.

ARTICLE 3: THE SCOPE OF THE FUNCTIONS TRANSFERRED TO THE NATIONAL GOVERNMENT

The Nairobi City County Government unequivocally transfers the following functions to the National Government:

3.1 County Health Services;

3.2 County Transport Services;

3.3 County Planning and Development Services; and

3.4 County Public Works, Utilities and Ancillary services.

ARTICLE 4: PERFORMANCE STANDARDS AND REPORTING OBLIGATIONS

In furtherance of the principles of good governance that require accountable and transparent management of public affairs, the performance of the transferred functions shall be undertaken in keeping with the guidelines set out herein after:

4.1 The Parties will harmonize the relevant sector performance contracts and service delivery indicators, as adopted by the respective governments herein and relevant departments;

4.2 There shall be an annual report tabled before Parliament and the Nairobi City County Assembly on the implementation of this Agreement;

4.3 Pursuant to Article 189(2) of the Constitution, the Parties may form joint committees for the better performance of this Agreement; and

4.4 The National Government and Nairobi City County Government may enter into sector specific service-level agreements and/or Memoranda of Understanding to guide and achieve better performance of this agreement.

ARTICLE 5: FINANCING THE DELIVERY OF THE TRANSFERRED FUNCTIONS

The financing of the delivery of the transferred functions shall be undertaken as follows:

5.1 Financing for the functions herein shall be drawn from either or both the Consolidated Fund and the County Revenue Fund;

5.2 The Nairobi City County Government shall ensure that the transferred functions are fully funded from the County Revenue Fund;

5.3 The level of funding for each transferred function shall be determined by the National Government in consultation with the County Government, but in any case the budgetary allocation shall not be less than the amount last appropriated by the County Assembly in the preceding financial year;

5.4 The National Government shall have the responsibility of collecting and remitting all revenue accruing from the transferred functions herein;

5.5 For the purposes of general co-ordination of revenue collection, the Nairobi City County Government appoints Kenya Revenue Authority (KRA) as the principal agent for overall revenue collection;

5.6 The relevant human resources for the implementation of this agreement shall be seconded from the County Government to the National Government; and

5.7 The County Public Service Board shall, in consultation with the Public Service Commission, formulate the necessary instruments to facilitate the secondment and/or deployment of the necessary human resources.

ARTICLE 6: CAPACITY BUILDING FRAMEWORK

6.1 The National Government shall carry out a comprehensive capacity assessment in line with Article 190 of the Constitution, as read with section 121 of the County Governments Act, 2012; and,

6.2 In addition to the capacity building measures identified in the Capacity Assessment Review Report (CARPS), the Parties shall develop a capacity building programme based on 6. 1 above.

ARTICLE 7: EXECUTION OF THE TRANSFERRED FUNCTIONS

7.1 The National Government shall prescribe and establish an institutional framework for the execution of the transferred functions.

ARTICLE 8: REVIEW CYCLE

8.1 The Parties shall review the performance of the transferred functions annually.

ARTICLE 9: DURATION AND TERMINATION

9.1 This Deed of Transfer shall become effective 21 (twenty one) days from the date of execution and shall remain in force for an initial renewable period of 24 months from the date of execution.

9.2 This Deed of Transfer of Functions may only be terminated by the mutual written consent of both Parties expressed in a common document.

ARTICLE 10: GENERAL

10.1 This Deed of Transfer of Functions shall be notified to the Nairobi City County Assembly pursuant to Section 26(6) of the Intergovernmental Relations Act and shall in the meantime be subjected to public participation.

10.2 This Deed of Transfer of Functions, together with any amendments as may be necessitated by public participation, constitute the entire Agreement between the Parties. Both parties acknowledge that they have not entered into this Agreement in reliance wholly or partly on any statement or representation made by the other except as contained or referred to herein.

10.3 No variation or addition to this Agreement and no waiver of any provision shall be valid unless in writing signed by a duly authorized officer of both of the parties. In the event of a variation or addition, all the terms of this Agreement shall apply to such variation or addition except as may otherwise be expressly provided therein.

10.4 No forbearance or indulgence by either Party in enforcing any term or condition of this Agreement shall prejudice or restrict that Party's rights or powers under this Agreement and no waiver of any breach shall operate as a waiver of any subsequent or continuing breach.

10.5 Any written notice to be given under the terms of this Agreement may be delivered by hand delivered to:

10.5.1 In the case of Ministry
Cabinet Secretary
Ministry of Devolution and the ASALS
The National Treasury
Nairobi
(Marked 'URGENT'); and,

10.5.2 In case of the County
County Secretary
Nairobi City County
City Hall
(Marked 'URGENT').

10.6 This Agreement may be amended, supplemented or modified only by a written instrument duly executed by or on behalf of each Party hereto and expressed in a common document.

ARTICLE 11: GOVERNING LAW AND DISPUTE RESOLUTION

11.1 This Deed of Transfer of Functions shall be governed by and construed in accordance with the Laws of Kenya.

11.2 In the event of a dispute between the Parties herein arising from a matter provided for, governed by or arising out of this Agreement, the Parties shall at the first instance endeavour to resolve the dispute amicably through negotiations, but if the dispute is not resolved amicably within 30 days from the date one Party notifies the other of the dispute in writing, the Parties shall refer the dispute to the National and County Governments Co-ordinating Summit.

IN WITNESS whereof this Deed of Transfer has been executed by the duly authorized representatives of the parties the day and year first written above.

Signed By EUGENE WAMALWA
duly authorized: CABINET SECRETARY,
MINISTRY OF DEVOLUTION AND THE ASALS

In the presence of: PAUL KIHARA KARIUKI,
ATTORNEY-GENERAL

SIGNED BY MIKE MBUVI SONKO
duly authorized Signatories for
NAIROBI CITY COUNTY GOVERNMENT

JUSTUS KATHENGE,
AG. COUNTY SECRETARY

In the presence of

SIMON L. MORINTAT

Dated the 25th February, 2020.

EUGENE WAMALWA,
Cabinet Secretary for Devolution and the ASALs.

GAZETTE NOTICE NO. 1610

THE CONSTITUTION OF KENYA

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT

(*No.* 9 *of* 2011)

THE ELECTIONS ACT

(*No.* 24 *of* 2011)

THE ELECTIONS (GENERAL) REGULATIONS, 2012

(*L.N.* 128/2012 and *L.N.* 72/2017)

APPOINTMENT OF COUNTY RETURNING OFFICER FOR CLEARANCE OF THE DEPUTY COUNTY GOVERNOR, KIAMBU COUNTY

PURSUANT to the Supreme Court Advisory Opinion Reference No. 1 of 2015 and in exercise of the powers conferred by Articles 88 (4), 180 (5), (6), section 4 of the Independent Electoral and Boundaries Commission Act, 2011, section 25 of the Elections Act, 2011 and Regulation 4 (1) (*a*) of the Elections (General) Regulations, 2012, the Independent Electoral and Boundaries Commission appoints the person listed in the Schedule to this notice, as the County Returning Officer for Kiambu County for purposes of clearing the Deputy County Governor, Kiambu County.

SCHEDULE

County Code	*County Name*	*Surname*	*Other Names*	*ID. No.*
022	Kiambu	Mutai	Irene	9870206

Dated the 21st February, 2020.

W. W. CHEBUKATI,
Chairperson, Independent Electoral and Boundaries Commission.

GAZETTE NOTICE NO. 1611

THE CONSTITUTION OF KENYA

THE ELECTIONS ACT

(*No.* 24 *of* 2011)

THE ELECTIONS (GENERAL) REGULATIONS, 2012

(*L.N.* 128/2012 and *L.N.* 72/2017)

THE ELECTIONS (PARTY PRIMARIES AND PARTY LISTS) REGULATIONS, 2017

(*L.N.* 69/2017)

ASPIRANTS SCHEDULED TO PARTICIPATE IN THE ORANGE DEMOCRATIC MOVEMENT PARTY PRIMARY FOR MEMBER OF THE COUNTY ASSEMBLY, DABASO WARD, KILIFI NORTH CONSTITUENCY

IN EXERCISE of the powers conferred by Articles 88 (4) (*d*) and (*e*) of the Constitution of Kenya, sections 13 (3), 19, 31 2 (C) and 74 of the Elections Act, 2011 and Regulation 13B of the Elections General Regulations, 2012, Regulations 15, 16, 17 and 18 of the Elections (Party Primaries and Party Lists) Regulations, 2017, the Independent Electoral and Boundaries Commission gives notice to the public that the persons listed in the seventh and eighth columns of the Schedule stand to contest in the Orange Democratic Movement primary for Member of the County Assembly, Dabaso Ward, Kilifi North Constituency.

SCHEDULE

County Code	*County Name*	*Const. Code*	*Const. Name*	*County Assembly Code*	*County Assembly Name*	*Surname*	*Other Names*	*ID/PP No.*	*Gender*	*Year of Birth*	*Type of Disability (if Any)*	*Political Party Name*
003	Kilifi	011	Kilifi North	0054	Dabaso	Hussein	Hamza Hamisi	21591485	Male	1979	Physical Impairment	Orange Democratic Movement
003	Kilifi	011	Kilifi North	0054	Dabaso	Yaa	Dickson Karam	20813411	Male	1978	Non	Orange Democratic Movement
003	Kilifi	011	Kilifi North	0054	Dabaso	Kombe	Emmanuel Changawa	23165888	Male	1984	None	Orange Democratic Movement

Dated the 14th February, 2020.

W. W. CHEBUKATI,
Chairperson, Independent Electoral and Boundaries Commission.

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COMMISSION ON REVENUE ALLOCATION

OUR REF. CRA/P&S/04/VOL.1 (187) **DATE:** 03 April 2020

Mr. J. M. Nyegenye,
Clerk of the Senate,
Clerk's Chambers
Parliament Buildings
NAIROBI

Dear Mr. Nyegenye,

RE: THE COMMISSION CONSIDERATIONS ON THE NATIONAL ASEMBLY No.3 OF 2020 ON DIVISION OF REVENUE BETWEEN NATIONAL AND COUNTY GOVERNMENTS

The Commission on Revenue Allocation is mandated by Article 216 (1)(a) of the Constitution to make a recommendation concerning the basis for the equitable sharing of revenue between the national and county governments.

In this regard, the Commission in accordance with the provisions of Article 205 has considered the provisions of the National Assembly Bill No. 3 of 2020 on the division of revenue between the national and county governments and hereby submit the attached considerations.

Sincerely,

Dr. Jane Kiringai
CHAIRPERSON
Att//01

Attachment/01

Promoting an Equitable Society

MEMORANDA ON THE DIVISION OF REVENUE BILL (NATIONAL ASSEMBLY BILLS NO. 3 OF 2020)

In accordance with the requirements of Article 205 of the Constitution, the Commission on Revenue Allocation has considered the provisions of the Division of Revenue Bill (National Assembly Bills No. 3 of 2020) and recommends as follows:

1. The CRA recommended that based on a revenue projection of Kshs 1,877 billion for financial year 2020/21, county governments be allocated 321.7 billion and National Government Kshs.1,554 billion. The national government has revised the revenue projections downward to Kshs. 1,856.7 billion. This projection is below the 2019/2020 shareable revenue projection of Kshs. 1,877 billion, which has also been revised downwards to Kshs. 1,773 billion.

   Recommendation 1.

   Given the non- performance of revenues and the likely poor performance of revenues in financial year 2020/21 that may arise from the impact of COVID-19 pandemic on the economy, the Commission has no objection to the retention of equitable share allocation to county governments at Ksh. 316.5 billion.

   An allocation of Kshs.316.5 billion is equivalent to 23 per cent of the most recent audited approved accounts for financial year 2016/17 and therefore meets the provision of Article 203(2) of the Constitution of allocation at least 15 per cent.

2. The Commission recommended that National government provides a conditional grant to improve infrastructure in the cities in line with the provisions of the Urban Areas and Cities Act. The five cities namely: Nairobi, Mombasa, Kisumu, Nakuru and Eldoret are centres of economic

growth that provide unique services such as provision of sewerage systems, water reticulation, solid waste disposal, and storm water drainage and management to the residents be given additional resources.

The DORB 2020 provides for a conditional allocation under the World Bank- Kenya Urban Support Programme(KUSP)-UDG grant of Kshs. 6.366 billion. ***This infrastructure grant excludes Nairobi and Mombasa counties***. We commend the use of the UDG grant but encourage the operationalization of the UDF as the avenue to disburse funds as conditional grants as required by the Urban Areas and Cities Act rather than a schedule to the Division on Revenue Bill.

Recommendation 2

The Commission had recommended for a new conditional grant of Ksh. 5.0 billion to finance cities. The COVID-19 pandemic, though a health crisis, brings to the fore the dare situation of collapsed infrastructure in the urban informal settlements. These include; increased respiratory infections in slums, heaps of garbage, poor sanitation, lack of roads, lack of clean water, and poor drainage, among other challenges. The Senate needs to set up a grant to provide infrastructure in urban informal settlements.

3. In accordance to Article 187(2) of the Constitution and Gazette Notice No. 1609 of 25th February 2020, four functions of the Nairobi City County (NCC) as given in schedule four of the Constitution were transferred to the National Government. The functions include;

a) County Health Services
   i. County health facilities and pharmacies
   ii. Ambulance services
   iii. Promotion of primary health care
   iv. Licensing and control of undertakings that sell food to the public
   v. Veterinary services (excluding regulation of the profession)
   vi. Cemeteries, funeral parlours and crematoria
   vii. Refuse removal, refuse dumps and solid waste disposal

b) County Transport Services
   i. County roads
   ii. Street lighting
   iii. Traffic and parking
   iv. Public road transport

v. Ferries and harbours, excluding the regulation of international and national shipping and matters related thereto

c) County Planning and Development
   i. Statistics Services
   ii. Land survey and mapping
   iii. Boundaries and fencing
   iv. Housing and
   v. Electricity and gas reticulation and energy regulation
d) County Public Works, Utilities and Ancillary services;
   i. Storm water management systems in built-up areas
   ii. Water and sanitation services

As provided in, Article 5 (3) of the Transfer Deed, "*the level of funding for each transferred function shall be determined by the National Government in consultation with the County Government, but in any case the budgetary allocation shall not be less than the amount last appropriated by the County Assembly in the preceding financial year*".

The Amount of money appropriated to the transferred function amounts to Ksh.15.95 billion out of an approved budget for 2019/20 of Kshs. 33.3 billion. The budget for the transferred functions is equivalent to 50 per cent of Nairobi county approved budget.

The county finances its functions from both the equitable share, and own sources revenues. Nairobi equitable share for financial year 2020/21 is estimated at Ksh. 15.949 billion.

The National Assembly DORB 2020, allocates the entire of Nairobi county government equitable share of Ksh. 15.95 billion to run the four transferred functions. Nairobi county, like all other county governments was assigned fourteen functions under the Fourth Schedule. All the functions have to be financed, partly from the equitable share and partly from the own source revenues.

The Commissions notes that a provision in National Assembly DORB 2020, allocating Nairobi County's entire equitable share of Ksh. 15.949 billion to only four transferred functions does not amount to equity in financing of the 14 functions assigned to Nairobi County governments.

The Commission also notes that the National Assembly DORB 2020 retains the money in the consolidated Fund without providing for any amendments to the PFM. Article 207 and Section 109 of the PFMA provides that all monies raised or received by or on behalf of a county government is paid into the County Revenue

Fund. However, such monies entitled to a county government may be 'reasonably' excluded from being paid into the CRF by an Act of Parliament.

Article 187(2)(b) retains the constitutional responsibility for the performance of a transferred function or exercise of the power to the level of government assigned that function under the Fourth Schedule. Additionally, under section 25(d) of the Intergovernmental Relations Act, one of the principles of the delegated or transferred function is to ensure that such a transferred or delegated function does not transfer constitutional responsibility assigned to that level of government. This in essence retains the oversight mandate of the performance of the transferred functions to the county assembly which is one arm of a county government.

Therefore, retaining the monies in the consolidated fund as proposed under clause 4 of the DORB will obscure the constitutional responsibility of the county assembly in oversighting the transferred functions and would in our view not be 'reasonable' within the context of the exclusion under Article 207 and section 109 of the PFMA.

Recommendation 3
The Commission recommends that the budget estimate of the transferred functions be financed from both Nairobi's equitable share, 50 percent and 50 per cent from Nairobi's own revenue.

To enable national government to access revenues from the county revenue fund (CRF), there is need to provide in the DORB under Clause 4, a requirement for the County Executive Committee Member for finance to establish a Fund unto which, 50 per cent of the equitable share shall be deposited to finance the four transferred functions.

The Senate approves a cash disbursement schedule for all county governments. The Senate needs to also provide another a cash disbursement schedule of 50 per cent of Nairobi county governments' equitable share to be deposited to the special fund to run the transferred functions

Recommendation 4
The functions Transfer Deed empowers national government to perform the transferred functions. In performance of the transferred functions, national government shall collect AIA in provisions of Health, public works, transport and county Planning. AIA should constitute the other 50 per cent of financing the transferred functions. Under the national government, by an Act of Parliament, the AIA generated by MDAs is retained by the MDAs to perform the functions.

Recommendation 5

In accordance with the provisions of Article 217, the Senate is to determine the basis for sharing of the county governments equitable share. Due to the COVID-19 pandemic, the consultations earlier scheduled by the Senate were suspended. The Commission recommends that the Senate considers the third basis for sharing revenue among county governments. This will ensure equity in sharing revenue among counties through the use of the most recent data relating to population, households and poverty.

MEMORANDUM TO THE NATIONAL ASSEMBLY ON THE DIVISION OF REVENUE (NATIONAL ASSEMBLY BILL NO. 3 OF 2020) FOR 2020/21

Jointly submitted by Institute of Certified Public Accountants of Kenya (ICPAK), The Institute for Social Accountability (TISA) and International Budget Partnership (IBP Kenya)

03 APRIL 2020

The three organizations have reviewed the bill and prepared this memorandum. We take note that this bill differs significantly from the one that the national assembly published for public input on 12th March 2020. This is against the spirit of transparency and public participation process. That said, this comes at a time of tight fiscal stress in the country amidst unknown effects of a possible coronavirus spread. Some of the issues herein were aptly raised in our earlier memorandum on the Budget Policy Statement of 2020. The global economy is also facing dangers from the outbreak of the novel coronavirus that was first reported from Wuhan, China in December 2019. According to the latest situation report by the World Health Organization (WHO), by 3rd April 2020 globally, there were 900,306 confirmed cases, covering over 206 countries with 110 cases confirmed in Kenya.

The spread of the Corona Virus has directly affected international and local trade. Many countries have enforced stringent measures to contain the spread of the virus such as restrictions on travel and total national lockdowns. The ripple effect has been a decline in the performance of key sectors in affected economies such as hospitality, transport, capital markets and trade among others. Free movement of people is one of the key success factors in international trade. This pandemic will impact on the global economy greatly given a shutdown in manufacturing, tourism, hospitality and service industry. In Kenya, the President during his address on 25th March 2020 outlined key economic interventions to cushion Kenyans during the pandemic period. As such Parliament will need to guide the country in enacting policies that will make life manageable for all Kenyans, especially those in low-income status.

In this memorandum, we raise the following key issues:

1. The allocations to counties are declining, and this will affect services. Parliament needs to address this situation so as not to lose the gains already made through devolution of public services.
2. The criteria for setting conditional grants and the conditions for their use need to be clarified
3. Public debt, pensions and other charges of the consolidated fund services are crowding out the amount available for sharing and hurting counties allocation.
4. There is no clarity on funding of functions transferred by Nairobi City County and proposed mechanisms are problematic at best.
5. Unrealistic revenue projection has negatively affected revenue sharing.
6. Lack of transparency, accountability and meaningful public engagement is affecting the division of the revenue process.

Detailed Submissions

1. **Despite devolution being a key aspect of service delivery in Kenya, the allocations to the county governments have been declining.** As Table 3 shows, while the growth in national revenue has remained stable over the last six years, the amounts approved to counties as a proportion of national revenue has been declining. This year will see a zero per cent growth in allocations. This does not reflect the increased growth in demand for services at that level of governance, especially with resource demands under the Big Four and emergent risks to the country's economy. We propose that parliament arrests this state.

2. **The realism of the revenue forecast remains a gamble.** We note that revenue forecasts at both national and county level have been ambitious and often led to budget deficits. We are concerned with the accuracy and the ambitious nature of National Treasury's revenue projections. This is exacerbated by the failure by the Tax Authority to meet the set targets over the years. This will need to be further revised due to the effect of COVID-19 to Kenya's economic productivity. A trend analysis of revenue growth is critical in informing revenue projections for the coming years. Kenya's budget process has inadequately facilitated accurate forecasts for resource collection. The common tendency has, therefore, been to make overly optimistic revenue projections leading to increased uncertainty of resource flows. This is illustrated in both *Table1* and *Table 2* below:

Table 1: Revenue Projections vs Actual Collections 2012-2019

Year	Pay As You Earn (PAYE)	Other Income Tax	VAT	Excise Duty	Import Duty	Other	Total Exchequer Revenue	Ordinary revenue Estimates (Ksh millions)	GDP*
	Kshs Million	Kshs Million	Kshs Million	Kshs Million	Kshs Million	Kshs Million	Kshs Million		Kshs Million
2012/13	211,061	182,981	183,219	88,030	57,897	36,323	759,511		4,536,001
2013/14	252,974	200,710	233,558	104,698	66,596	60,446	918,982	**1,006,404**	5,079,670
2014/15	277,068	229,066	264,872	114,952	73,733	62,283	1,021,974	**1,070,515**	5,849,132
2015/16	312,032	248,988	290,843	142,591	80,966	61,412	1,136,833	**1,184,368**	6,734,060
2016/17	336,596	291,452	336,572	163,236	86,861	58,343	1,273,060	**1,380,199**	7,794,026
2017/18	364,104	278,277	356,777	168,062	93,713	79,314	1,340,248	**1,560,276**	8,468,218
2018/19	392,693	296,042	409,526	195,731	105,209	75,472	1,474,673	**1,688,492**	10,030,206
2019/20								1,776,637	
2020/21								**1,883,694**	

Source: Kenya Revenue Authority Annual report FY 2018/19 & the National Treasury – BPS

An analysis of total revenue collection including Appropriation in Aid (A.i.A) shows shortfalls in each financial year since 2015. See table below

Table 2: Performance of total Revenue including A-i-A

Year	Dec 2015	Sept 2016	Nov 2017	Nov 2018	Dec 2019
Target revenue	Ksh 642.9 billion	Ksh 328.0 billion	Ksh 611.0 billion	Ksh 677.0	Ksh 1,059.3 billion
Actual	Ksh 575.2 billion	Ksh 313.6 billion	Ksh 558.4 billion	Ksh 633.7 billion	Ksh 920.6 billion
Shortfall	Ksh 67.7 billion	Ksh 14.4 billion	Ksh 29.7 billion	Ksh 43.3 billion	Ksh 138.7 billion

Source: National Treasury- Budget Policy Statements 2016-2020

This situation is mirrored at the County Government level where Counties collection of own revenue has been uncertain. Available data shows that only 13 out of 47 counties can meet more than 10 per cent of their annual budget from their own sources of revenue. This means that into the foreseeable future, they will be dependent on the national transfers and hence the more reason to safeguard the allocations. The sources counties have access to seem to limit how much they can realistically collect especially in the current state of a contracting economy

3. **There is no clear growth factor on the division of revenue allocation basis, and this leaves it to individual actors in the national government to decide how much should be allocated to county governments.** As table 3 shows, save for 2015/2016, CRA and the National Treasury have always used different factors to determine how the share of county governments should grow. As Parliament considers this DoR bill, we propose that the growth factor or the criteria for determining the same be established. We propose that as a minimum, allocations to county governments should be informed by the average year on year growth of ordinary national revenue for 3 years.

Table 3: Division of Revenue 2015-2020

	Proposed Growth		Basis for Proposed Revenue Growth							
Year	CRA	National Treasury	CRA	National Treasury	Ordinary Revenue	*Growth in National Ordinary Revenue*	Equitable Share Approved in the DoR (2020/21 is proposed)	Growth in DOR approved Amounts	Sharable Revenue (KES Billion)	Equitable share as a % of Sharable Revenue
2014/15							[illegible]	-	1,031.80	22%
2015/16	10.4%	10.4%	3-Year average growth in ordinary Revenue	3-Year average growth in ordinary Revenue	1,152.97	*13%*	259.77	15%	1,251.67	21%
2016/17	15.0%	7.8%	3-Year average growth in ordinary revenue	Not provided	1,306.57	*13%*	280.30	8%	1,380.20	20%
2017/18	15.0%	6.7%	3-Year average growth in ordinary Revenue	3-Year average month on month inflation	1,365.06	*4%*	302.00	8%	1,549.41	19%
2018/19	8.5%	4.0%	3-Year average inflation	Not Clear	1,496.93	*10%*	314.00	4%	1,681.07	19%
2019/20	6.9%	2.0%	3-Year average inflation	Not Clear	1,843.81	*23%*	316.50	1%	1,877.18	17%
2020/21	5.7%	0.0%	The country's 3-year (2016-2018) average development expenditure	Not Clear	1,856.71	*1%*	316.50	0%	1,857.00	17%

4. **The allocation process for functions that were transferred by Nairobi City County to the National Government is opaque and explanations are inadequate.** The Division of Revenue makes proposals on how to handle the funding for functions that were transferred to the national government to run them. These proposals do not give a clear and practical direction of how county revenue will be handled in these scenarios where functions will be run by two separate levels of government. Therefore, there are some challenges to the approach and the level of details provided on this issue that the Senate needs to address:

   (i) **Unconstitutional Retainment of equitable share:**

   The DOR proposes to retain the full equitable share for Nairobi in the consolidated fund which would be in violation of Article 207 of the Constitution of Kenya and Section 109 of the Public Finance Management Act. These read as follows:

   Article 207(1) of the Constitution: 207. "There shall be established a Revenue Fund for each county government, into which shall be paid all money raised or received by or on behalf of the county government, except money reasonably excluded by an Act of Parliament"

   Section 109 of the Public Finance Management Act provides detail of when revenue can be excluded from going to the County Revenue Fund:

   Section 109 (2) Stipulates that "The County Treasury for each county government shall ensure that all money raised or received by or on behalf of the county government is paid into the County Revenue Fund, except money that—

   a) **is excluded front payment into that Fund because of a provision of this Act or another Act of Parliament, and is payable into another county public fund established for a specific purpose;**
   b) **may, in accordance with other legislation, this Act or County legislation, be retained by the county government entity which received it for the purposes of defraying its expenses; or**
   c) **is reasonably excluded by an Act of Parliament as provided in Article 207 of the Constitution.**

   Further, section 26(2)(e) of the Intergovernmental Relations Act 2012 on Agreements on transfer or delegation of powers, functions or competencies states that, "The agreement for the transfer or delegation shall include the resourcing framework for delivery of the powers, function or competency transferred or delegated"

   This was provided in the transfer deed in the case of transfer of functions from Nairobi City County Government to the National Government vide Gazette Notice No. 1609 dated 25th February 2020. Article 5: of the deed provides that the financing of the delivery of the transferred functions shall be undertaken as follows:

5.1 Financing for the functions herein shall be drawn from either or both the Consolidated Fund and the County Revenue Fund;

5.2 The Nairobi City County Government shall ensure that the transferred functions are fully funded from the County Revenue Fund;

5.3 The level of funding for each transferred function shall be determined by the National Government in consultation with the County Government, but in any case, the budgetary allocation shall not be less than the amount last appropriated by the County Assembly in the preceding financial year;

Therefore, these PFM related laws create the County Revenue Fund and direct its management and instances when county funds can be exempted from being remitted in the County Revenue Fund. Transfer of functions between two levels of government do not fall under the given exemptions. From above analysis, it is therefore evident that Nairobi City Government has full responsibility on any revenue raised on its behalf including transfers under the equitable share. We recommend that any transfer of monies from the county should be from the County Revenue Fund.

(ii) Adherence to Funding Follows Function Principle

The county transferred four functions, namely, health, transport, planning and development, public works, utilities and ancillary functions to the national government according to the deed gazetted on 25th of February 2020. This means the county still has budgetary responsibilities to run other ten functions that remain under its management. Therefore, the proposal to retain all funds in the consolidated account leaves a lot of confusion on how the other services will be funded. The ten functions include: Agriculture; Control of air pollution, noise pollution, other public nuisances and outdoor advertising; Cultural activities, public entertainment and public amenities; Animal control and welfare; Trade development and regulation; Pre-primary education, village polytechnics, homecraft centers and childcare facilities; Implementation of specific national government policies on natural resources and environmental conservation; Firefighting services and disaster management; Control of drugs and pornography; Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

According to the CRA recommendations on shareable revenue the criteria of sharing revenue is based on the support for all devolved functions including: Planning & Development; Agriculture, Livestock and Fisheries; Culture, Public Entertainment & Public Amenities; Youth Affairs and Sports; Trade, Cooperative Development & Regulation; Roads &Transport; Lands, Housing and Public Works; Water, Natural Resources & Environmental Conservation; Pre-Primary Education; Public Administration; New conditional Grant : Financing of cities

(iii) Spending levels for the transferred functions

The process notwithstanding the amount to be withheld by the national government at KES. 15.9 Billion seems to be on the higher side. Spending levels for the four functions over the last 4 years show that the amounts have been lower. Table 4 shows the trends from the three departments that host the four functions. The highest is the 2019/20 total allocation of KES. 14.3 Billion. Worth noting is that there is a huge variance between what approved estimates and actual expenditures in Nairobi County. As such the amounts to be transferred should be based on the actuals and for which the proposed KES. 15.9 billion would be on the higher side.

Table 4: Spending levels for the transferred functions

Department	2014/15		2015/16		2016/17		2017/18		2018/19		2019/20
	Approved Estimates	Actual Estimates	Approved Estimates	Actual Estimates	Approved Estimates	Actual Estimates	Approved Estimates	Actual Estimates	Approved Estimates	Actual Estimates	Approved Estimates
Health	4.92	5.25	6.31	4.90	6.30	4.23	6.95	5.44	6.56	5.57	7.58
Public Works Transport and Infrastructure	5.71	2.34	5.60	3.01	7.91	3.24	4.18	1.86	5.58	4.68	4.78
Environment, Water, energy and Natural resources	1.01	1.17	1.87	1.61	2.83	2.15	2.30	1.63	2.72	2.39	1.98
Total for 3 departments	***11.63***	***8.76***	***13.78***	***9.53***	***17.04***	***9.63***	***13.43***	***8.92***	***14.86***	***12.65***	***14.34***
Total for all (county) departments/total budget	**25.59**	**21.02**	**29.09**	**23.95**	**34.78**	**24.86**	**33.65**	**24.54**	**33.34**	**29.40**	**36.98**

(iv) Conditional Grands for Transferred Functions

Given the separation of powers principle in devolved governance and assignment of functions under Schedule Four of the Constitution, we propose that the bill's Section 4 (3) (a) be amended to make the transfer of the monies to the national government as conditional grants for the performance of the transferred functions. Amend the section to read as follows:

4(3) *'For avoidance of doubt where the transfer of functions is –*

(a) From a county government to the national government, the requisite funds shall be retained in the ~~consolidated fund for appropriation~~ respective County Revenue Fund and transferred to the national government as conditional grants to meet the costs of the transferred functions"

This would be in line with Article 187 (2) of the constitution that leaves the constitutional responsibility for the delivery of the transferred function with the level it is assigned to in the fourth schedule of the constitution.

(v) Amendment to the PFM Act

We propose that given the confusion this has created, the PFM Act section 109 should be amended to make provisions for the resourcing of transferred functions. Specifically, the transfer should be as a conditional grant from the government transferring the function.

5. **The conditional grants have been maintained even though the criteria of how they are set up and the conditions for their use remains unclear.**

There are several concerns with conditional grants from the national government that require addressing:

a) First is that there seem to be no clear criteria as to how they are set up. A closer look at them indicates that they are to facilitate functions that are assigned to the counties by the constitution. As such the resources should be part of the unconditional share for the county governments.
b) Secondly, there is no clarity of the conditions of how the resources are to be utilized once they are at the county level or a clear monitoring framework that can be followed even by citizens. As a result, it is impossible to establish if the objectives they are supposed to actualize have been accomplished.
c) Thirdly, how they grow from one year to another is unclear, and the process of their disbursement to counties is uncertain. Some like compensation for user fees foregone has remained the same for the 6 years, and this does not reflect the demand for primary health care. Generally, the growth and decline in allocations to conditional grants seem as arbitrary as the equitable share. This makes medium-term budgeting at the county level quite difficult due to unpredictability is the allocations at the point when counties are working through their County Fiscal Strategy Papers.

Table 5 shows the allocations over the last 6 years (includes 2020/21 projections)

Table 5: Conditional Grants over period 2015-2020

	Current Conditional Grants (Billions)	2015/16 DORA	2016/17 DORA	2017/18 DORA	2018/19 DORA	2019/20 DORA	2020/21 DORB	% Increase of National Treasury Grants to DORA
1	Level 5 hospitals	3.60	4.00	4.20	4.33	4.24	4.30	2%
2	Free maternal health care	4.30	4.12	-	-			-
3	Compensation for user fees forgone	0.90	0.90	0.90	0.90	0.90	0.90	0%
4	Leasing of medical equipment	4.50	4.50	4.50	9.40	6.20	6.21	0%
5	Road Fuel Levy Fund	3.30	4.31	11.09	8.27	8.98	9.40	5%
7	Development of Youth Polytechnics			2.00	2.00	2.00	2.00	0%
8	Supplement for construction of county headquarters			0.61	0.61	0.49	0.30	-38%
	Total	***16.60***	***17.83***	***23.3***	***25.5***	***22.8***	***23.1***	1%

Source: Division of Revenue Acts and Bills 2015-2020

6. **Conditional Grants for construction of county headquarters need to be clarified**

   We note that DORB 2020 has allocated Kshs. 300 million towards the construction of county government headquarters for five counties. However, there is need for clarity on the criteria used to identify the counties and the amount to be allocated to each. From the bill, it is clear that these are still the 5 counties that received a similar grant in previous years. How far have their construction gone? An annexure of the same will provide the requisite information.

7. **There is a need for publicly available information on the performance of each conditional grant from the national government's share of revenue to provide oversight on the execution of the grants at the county level**

   It is noteworthy that the recipients of conditional grants are required to submit reports, and thus the national treasury should ensure that this performance information is included in DORA. Such information would include; the amount of grants previously received, the status of fiscal gap, how they performed in terms of spending and absorption over the years. The reports should also report on attainment of Key Performance Indicators.

8. **Public debt, pensions and other charges of the consolidated fund services are crowding out the amount available for the division of revenue and hurting counties allocation**

   As table 6 and below shows, servicing of non-discretionary CFS has been growing at a high rate and that is limiting how much is available for allocation to devolved services. We commend Parliament for halting the growth in overall expenditure and implore you to address the public debt servicing and pensions which are the leading CFS items. More importantly, while public borrowing has a very direct impact on the size of the sharable revenue, the National Treasury is the only body deciding on this vital national instrument. We recommend that counties and the Senate should be involved in the discussion on national borrowing as that has an impact on the revenue that is shared between the two levels of government.

Table 6: Servicing of non-discretionary Consolidated Fund Services

Year	Public Debt Service	Ordinary Revenue	Counties' allocation	Growth in Public Debt Service	Growth in Sharable Revenue	Growth in County Allocation
2014/15	250.97	1,031.82	226.66			
2015/16	250.39	1,152.97	259.77	0%	12%	14.6%
2016/17	307.16	1,305.79	280.30	23%	13%	7.9%
2017/18	453.36	1,486.29	302.00	48%	14%	7.7%
2018/19	687.57	1,688.49	314.00	52%	14%	4.0%
Average				30%	13%	9%

Source: Budget Review and Outlook Papers and Division of Revenue Acts (2014-2019)

9. **Pensions and other CFS Services have equally grown, and their administration is of concern**

Pension is a non-discretionary obligation which has a bearing on the size of revenue that is eventually shared between the two levels of government. The higher the share of ordinary revenue that is taken up by these national obligations, the lower the sharable revenue and allocations to counties. An analysis of government expenditure on pensions between 2016-2020 indicates an increasing trajectory over time, as illustrated in table 7.

Table 7: Government Fiscal Framework- Pension and other CFS

Year	2016	2017	2018	2019	2020
Pension and other CFS	43,429 Million	60,169 Million	91.1 Billions	109.5 Billions	118.7 Billions

Source: Budget Policy Statements 2016-2020

10. **A mechanism for cushioning cities and urban areas still needs to be established**

CRA recommended a KES. 5 billion conditional grant for the 5 cities of Nairobi, Mombasa, Kisumu, Nakuru and Eldoret. While this has not to be allocated for, Parliament needs to relook the matter. These cities continue to bear the heavy costs of service delivery given their populations and are critical centres for economic growth in the country and their regions.

11. **Significance of Audited Financial Statements in the division of revenue should be underscored.**

The DORB 2020 uses the 2016/17 Audited accounts as the most recent, yet the Auditor General finalized and submitted to Parliament reports up to FY 2017/18. We note an improvement in the usage of the latest audited accounts. An assessment of this process for the past four is as follows::

Table 8: Audited and Approved Revenue

Year	Source	Latest Audited Account for DORA
2016	Division of Revenue Act 2016	Percentage (%) of 2013/14 Audited and Approved Revenue i.e. KSh.935,653 Millions
2017	Division of Revenue Act 2017	Percentage (%) of 2013/14 Audited and Approved Revenue i.e. KSh.935,653 Millions
2018	Division of Revenue Act 2018	Percentage (%) of 2013/14 Audited and Approved Revenue i.e. KSh.935,653 Millions
2019	Division of Revenue Act 2019	Percentage (%) of 2014/15 Audited and Approved revenue i.e. KSh.1,038,035Millions
2020	Division of Revenue Bill 2020	Percentage (%) of 2016/17 Audited and Approved Revenue i.e. KSh.1,357,698 Millions

Source: Division of Revenue Acts/ Bills

We note improvement and use of 2016/17 Audited and Approved revenue for purposes of revenue share. However, the 2017/18 audited accounts were submitted to the National Assembly for approval and should thus be the basis. National Assembly's continued delay in debating and considering Auditor General Reports impedes credible analysis of equitable revenue. The use of FY 2017/18 audited accounts will guarantee a higher minimum allocation than using FY 2016/17 audited accounts

We propose an amendment to the Public Finance Management Act to rectify this situation. This should be worded as follows: The National Assembly shall within three months after receiving an audit report adopt and approve the report; Where the audit report is not adopted and approved by the National Assembly within the three months, it shall be deemed as the most recent audited accounts for purposes of division of revenue.

12. **Lack of transparency, accountability and meaningful public engagement is affecting the division of the revenue process**

Although Parliament has embraced public participation in the legislative process and made efforts towards facilitating public participation, public engagement in the division of revenue process is not effective but tokenistic and inconsequential in the ultimate decision-making process. Over the years, civil society organizations have raised concerns on the above-mentioned issues which have never been adequately addressed. There is a need for clear guidance on how the public should engage during the division of the revenue process in a manner that they can influence decisions made and the kind of information that government institutions should provide to enable the citizens to engage accordingly. In addition, a feedback mechanism is required informing on how submissions and inputs from the public are handled. Pursuant to Article 201and section 35(2) of the Public Finance Management Act the cabinet Secretary should enact regulations to provide for meaningful public participation in the national budget and include sanctions for failure to undertake meaningful public participation in the budget process including division of revenue process.

13. **Budget Transparency is critical for the objective division of revenue**

The lack of a clear definition and objective criteria for determining national interest has been exploited by the national government to starve counties of resources. Additionally, the framework for the management of conditional grants continues to be weak and indeed does not meet the constitutional requirements for fiscal prudence and transparency. On this, we recommend that the Division of Revenue bill provides information on the status of previous year national priorities, including the status of projects, financial probity and realization of set targets.

The Division of Revenue bill should include performance and accountability information on conditional grants to adhere to constitutional and statutory requirements. For example, categorization of conditional grants in terms of their type, nature, administration and trends in allocations. Prudent utilization of grants and access to information. Include key accountability information on conditional grants. Establish explicit principles which inform conditional grants or transfers which are subject to specific conditions. This may include; targets use, by sector or purpose; requirement for matching (i.e. matching grants) which require recipients to contribute part of costs; requirement to meet specified targets, outputs or results; one off-funding or over a period, maybe open-ended, like the case with LATF but with requirements to achieve specified performance ratios, e.g. debt and revenue.

On performance evaluation, there is a need to ensure that funds are traceable to avoid double funding and blurring of reporting. National departments must report to Parliament the outcome of grants allocated for a specific purpose. Inclusion of an implementation work plan and monitoring and evaluation mechanism in the existing framework for the management of conditional grants would go a long way. Finally, further allocations and introduction of conditional grants should be based on past performance data.

14. **The leasing medical equipment repayments allocation amounting to Kshs. 6,205,000,000/- should be stopped and classified as odious debt on account of queries raised by the Auditor General and Senate Finance Committee.**

The leasing of medical equipment (Managed Equipment Services-MES) project was initiated in 2015 as an alternative health care financing option to scale up health infrastructure for provision of specialized medical care under a seven-year Public Private Partnership project worth KES. 38 billion at County levels. Six different private firms were contracted by the national government to equip two hospitals per county and four national referral hospitals with different sets of medical equipment, ranging from theatre and Intensive Care Unit (ICU) machines to machines for offering renal dialysis and imaging services. Four years into the project 21 additional hospitals were included in the project bringing total project cost to KES. 63 billion. The DOR Bill 2020 allocates Kshs. 6,205,000,000/- for leasing medical equipment despite queries raised by the Office of the Auditor General and ongoing investigations by the Senate Finance and Budget Committee.

A report by the Institute for Economic Affairs[1] reviewing the office of the Auditor General reports reveals unlawful transactions regarding the project. The study reveals that the lawfulness and accuracy of expenditure amounting to Kshs. 4.57 billion on the leasing of medical equipment project could not be verified due to lack of important supporting documents, such as the contract, the Attorney General's legal opinion on the contract, the procurement and the progress reports were not availed during the audit review process. Additionally, numerous audit queries have been raised regarding the operationalization and implementation of the MES project by county governments. These include ineffective and unlawful utilization of public funds allocated to implementation of the MES project; violation of the financial laws and regulations, including unlawful procurement processes; the total amount of the lease (rental payments deducted at the source) for the respective counties; lack of supporting documents. The numerous audit queries imply that the value for money could not be ascertained regarding the medical equipment delivered but remain idle or those that have been paid for but not delivered.[2]

It is our considered view that the MES project was solely crafted as a corruption scheme to benefit corrupt individuals on the pretext that it would meet the health care needs of the population, and as such Kenyan ought not to be saddled by its debt. Instead, the people responsible, companies contracted, and government officials involved, ought to be prosecuted for their actions or inaction. It should be classified as odious debt because it was contracted and spent against or not in the interests of the people of Kenya, without their consent, and with full awareness of the government.

ABOUT THE THREE ORGANIZATIONS:

About ICPAK

The Institute of Certified Public Accountants of Kenya (ICPAK) is a statutory body of accountants established under the Accountants Act of 1978, and as repealed under the Accountants Act Number 15 of 2008, mandated to develop and regulate the Accountancy Profession in Kenya. It is also a member of the International Federation of Accountants (IFAC), the global umbrella body for the accountancy profession. For more details contact ceo@icpak.com or hillary.onami@icpak.com

About International Budget Partnership Kenya (IBPK)

The International Budget Partnership in Kenya collaborates with civil society around the world to use budget analysis and advocacy as a tool to improve effective governance and reduce poverty. The IBPK focuses on government budgets because they are at the core of development. Budgets are the government's most powerful tool to meet the needs of its people, especially those who are poor and marginalized. The main contact at IBPK is Dr. Abraham Rugo Muriu, Email:arugo@internationalbudget.org Phone: 0721431083

About the Institute for Social Accountability (TISA)

TISA is a civil society initiative committed towards the achievement of sound policy and good governance in local development in Kenya, to uplift livelihoods of, especially, the poor and marginalized. TISA has been operational since March 2008 and is a locally registered trust. TISA has engaged with various relevant state and non-state actors in the quest to promote effective local governance in Kenya. The main contact at TISA is Ms. Wanjiru Gikonyo, Email: wanjiru.gikonyo@tisa.or.ke Phone:....

April 3, 2020

Clerk of the Senate/ Secretary,

Parliamentary Service Commission,

P.O. Box 41842-00100, Nairobi,

Dear Clerk,

RE: Submission: The Division of Revenue Bill (National Assembly Bills No. 3 of 2020)

In response to invitation for submissions to the subject, Open Governance Institute (OGI) Kenya wishes to present the following comments and input on the bill. We have the following comments and reflections on the bill.

1. **The basis for freezing county revenue growth in 2020/21 is contradictory:**
   a. That, paragraph eight (8) discusses potential revenue underperformance as a basis for denying county governments increase in revenue, however, that is contradicted by paragraph 14 which estimates revenue growth of Ksh. 89.8 billion.
   b. That, by county governments not, directly or indirectly, receiving a share of loans borrowed by National Government, at least not according to the bill, renders paragraph (7) (e) unreasonable basis for denying county governments additional revenue in 2020/21. According to this paragraph, any increase in revenue in 2020/21 will be applied for the repayment for debt and pensions.
   c. That, paragraph nine (9) punishes county governments for not having been affected by shortfalls in national revenue in the past. In light of lack of properly costed county and national functions to determine the actual budgetary requirements for respective functions, and that county governments receives just a under third of the nationally raised revenue is unreasonable factor for denying county government an increase in its revenue.

2. **The bill must take the following factors into account:**
   a. That, county governments incur incremental cost annually as a result of various factors including inflation rates. Over the last five years, the inflation rate as averaged 6.5% and expected to stand at 5.02% in 2021. That, means budgets for county governments for the coming year must, at least, provide for that inflation.
   b. That, county governments have registered an average of 12% increase in personnel emoluments (PE) since 2016/17. Using expenditure base of 2018/19 of Ksh. 162.77 billion according to Controller of Budget (COB), county governments will require Ksh. 185 billion for 2019/20 for PE costs, and subsequently an increase of Ksh. 22 billion, representing Ksh. 207 billion in 2020/21.
   c. That, public servants are entitled to 1.5% annual salary increment. Using the estimated cost for personnel emoluments for 2020/21 at Ksh. 207 billion, 47 county governments will require Ksh. 3 billion for salary increments bringing the budget to Ksh. 210.3 billion.

d. That, county governments receiving smaller portions of equitable share and low OSR, have in the past had tight budgets, struggled to meet the requirements of Public Finance Management (PFM) Act 2012 on budget ration of 30:70 for development to recurrent budget vote shares. Thus, maintaining the revenue share means for the costs outlined in (a), (b) and (c), county governments will be forced to secure such costs from development votes, thus technically violating the PFM provisions.

3. **On the basis of the above factors, we recommend the following:**
   a. That, Senate having extensively discussed and questioned the decision that led to Leasing of Medical Equipment agreement that has since bind county governments, albeit the devolved units having not been consulted on the same, and Senate being the guardian to the devolved system of government, the institution of the Senate has an opportunity to offer leadership. The cost of Leasing Medical Equipment must be borne by national government therefore increasing the portion of the sharable revenue available to county governments by Ksh. 6.2 billion.
   b. That, to cushion county governments against cost pressure on her recurrent budget votes and subsequently, ensure that county government meet the minimum legal requirements of 30:70 ratio of development and recurrent votes, the portion of the sharable revenue available to counties must, at least increase by 12%, raising the share of sharable revenue available to counties to Ksh. 354.5 billion from current financial year's share of Ksh. 316.5 billion.

Open Governance Institute (OGI) Kenya will be available to discuss and clarify any of these recommendations. Please contact our Executive Director via skype @kironotc or phone +254723 757 574 or email kipronotc@gmail.com

Sincerely

Timothy Kiprono

Executive Director

Open Governance Institute

EXPERTISE
GLOBAL CONSULTING

LEGISLATIVE MEMORANDUM ON THE DIVISION OF REVENUE BILL 2020 TO THE SENATE

FROM
EXPERTISE GLOBAL CONSULTING LTD
31ST MARCH 2020

MEMORANDUM ON THE DIVISION OF REVENUE 2020

While **RECOGNIZING** the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law and in further **CONSIDERATION** of Article 6 (2) that governments at the national and county levels are distinct; **EXPERTISE GLOBAL CONSULTING LTD (EGCL)** hereby submits its memorandum to the National Assembly Budget and Appropriation Committee on the above mentioned Bill.

Clause	Provision	EGCL proposal	Rationale/Justification
Schedule 4 on Equalization Fund	Ksh.6.7billion provided towards the fund.	1. The allocation should be disbursed directly in the form of a conditional grant to the affected counties as guided by the marginalization policy developed by the Commission on Revenue Allocation. This is as per the High Court judgement issued on 12th November 2019 on the appropriation of the Fund. 2. The allocation should not be appropriated by the national government until the High Court judgement and recommendation on the need to prepare new administration guidelines are adhered to. The High	Since the onset of devolution from 2014/15 FY to 2019/20FY the Equalization Fund has been approved for an allocation cumulative of Ksh.33.5billion. This allocation has directly been appropriated by the National Government through the National Treasury. Considering the instrument of administration which was the administration guidelines have been declared unconstitutional by the High Court in November 2019, it is important to undertake a special audit on the projects implemented using the Ksh 33.5 billion before the Fund is disbursed to the Counties as directed by the Court. xx

		Court declared the current guidelines on administration of the Fund unconstitutional. 3. Parliament should urgently institute a special audit through the office of the Auditor General to review the expenditures associated with the Fund.	
Schedule 4 on Nairobi City County Equitable share to cater for transferred functions	Ksh.15.9billion provided for exclusion from the total counties' equitable share of revenues. Amount to be retained in the consolidated fund to meet part of the cost of the functions transferred to the national government.	1. The Nairobi City County Equitable share of allocation should directly be disbursed to the County's Revenue Fund account without any deduction as mandated by the constitution. 2. Appropriation for the transferred functions to be done through the County's budget and Appropriation Act passed by the County Assembly as mandated by the Constitution and the PFM Act 2012. 3. Allocations for the implementation of the transferred functions should directly be disbursed through the County Revenue Fund Account to the Nairobi Metropolitan Services.	1. The Constitution under Article 224 emphasizes that it is on the basis of the Division of Revenue Bill passed by Parliament under Article 218 that each county government shall prepare and adopt its own annual budget and appropriation Bill. If the National Government retains the County's equitable share of revenue then the County cannot budget and approve its appropriation Bill on the 10 remaining functions. Without fiscal autonomy then there is no well functioning County. 2. Additionally Article 219 of the Constitution emphasizes that a county's share of revenue raised by the national government shall be transferred to the county without undue delay and without deduction, except when the transfer has been **stopped under**

			Article 225. It is very clear that the County's funds were not stopped rather functions were constitutionally transferred from one level of government to the other as guided under Article 187 of the Constitution. 3. Thirdly Article 207 of the Constitution requires that all monies raised by or on behalf of a county government shall be deposited within an established Revenue Fund Account hence the case in point in this context. There is no justification whatsoever for the retention of Nairobi City's equitable allocation at the national level.
Schedule 4 on the Grant towards Level 5 hospitals	Ksh. 4.3billion provided for support of the level 5 hospitals	Expand the allocation to the additional gazetted level 5 hospitals.	The Allocation has consistently since 2014/15 has targeted 11 facilities without consideration of newly gazetted Level 5 facilities such as the Bungoma Level 5 Hospital. There is need for new consideration into the funding