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11TH PARLIAMENT (FOURTH SESSION)

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23/11/16
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THE JOINT PARLIAMENTARY COMMITTEE ON NATIONAL COHESION AND
EQUAL OPPORTUNITY

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REPORT ON WORKSHOP ON OPERATIONALISATION OF THE
EQUALIZATION FUND WITH VARIOUS GOVERNMENT INSTITUTIONS AND
STAKEHOLDERS AT, WHITESANDS HOTEL, MOMBASA HELD FROM 12TH -
15TH MAY, 2016

Clerk's Chambers,
Parliament Buildings,
Nairobi, Kenya

May, 2016

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ABBREVIATIONS/ ACRONYMS

ASAL:	Arid and Semi-Arid Lands
CDF:	Constituency Development Fund
CRA:	Commission on Revenue Allocation
FY:	Financial Year
IFMIS:	Integrated Financial Management Information System
KNBS:	Kenya National Bureau of Statistics
MP:	Member of Parliament
NCIC:	National Cohesion and Integration Commission
NGO:	Non-Governmental Organization
PFM:	Public Finance Management

PREFACE

On behalf of the members of the Joint Committee on National Cohesion and Equal Opportunity and pursuant to the provisions of Standing Orders of both houses of Parliament, I have the honour to present to the house, this Report on a workshop on operationalization of the equalization fund with various government institutions and other key stakeholders.

COMMITTEE MANDATE

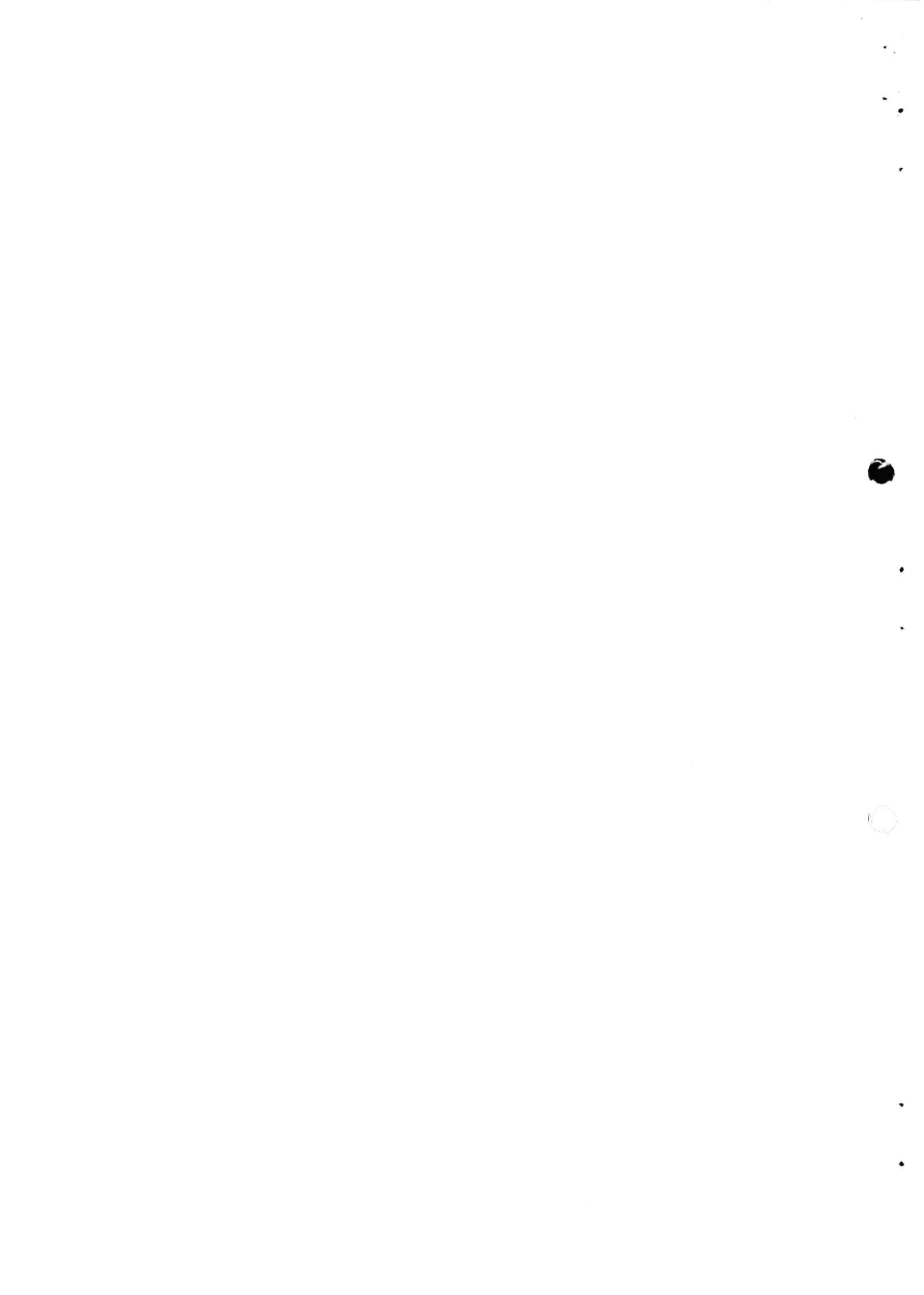
The Joint Committee on National Cohesion and Equal Opportunity is established under the Standing Order No. 217 and 214 of the Senate and the National Assembly respectively, in order to, inter alia: -

- (a) monitor and promote measures relating to policy and program initiatives in pursuit of peace and national cohesion;
- (b) investigate, inquire into and report on all matters relating to inter community cohesion;
- (c) monitor and promote measures designed to enhance the equalization of opportunities and improvement in the quality of life and status of all persons, including persons who are marginalized on the basis of gender, age, disability, health status, ethnic, racial, cultural or religious background or affiliation or any other such ground;
- (d) Investigate, inquire into and report on all matters relating to discrimination and or marginalization of persons referred to under sub-paragraph (c).

COMMITTEE MEMBERSHIP

The Joint Committee comprises of the following Members: -

1. Hon. Johnson Sakaja, MP – Chairman
2. Sen. Hargura Godana, MP– Vice Chairperson
3. Hon. George Omondi Mallan, MP
4. Hon. Mohamed Diriye Abdullahi, MP
5. Hon. Peris Tobiko, MP
6. Hon. Grace Kipchoim, MP
7. Hon. Francis Mwangangi, MP
8. Hon. James Gordon Rege, MP
9. Hon. Moses Injendi, MP
10. Hon. Kimani Ngunjiri, MP
11. Hon. Zipporah Jesang, MP
12. Hon. Mohamed Elmi, MP
13. Hon. Rose Museo Mumo, MP
14. Hon. Elijah Memusi Kanchory, MP
15. Hon. RobaDubu, MP



16. Hon. MaisonLeshoomo, MP
17. Sen. Beatrice Elachi
18. Sen. Mike Mbuvi Sonko
19. Sen. Henry TioleNdiema
20. Sen. Peter Mositet
21. Sen. Isaac Melly
22. Sen. Abdirahaman Hassan
23. Sen: Stephen Sang
24. Sen. Emma G. Mbura
25. Sen. Agnes Zani
26. Sen. Godliver Omondi
27. Sen. Ali Abdi Bulle
28. Sen. Chris Obure
29. Sen. KarueMuriuki
30. Sen. Moses Kajwang'

COMMITTEE OBSERVATIONS

- i. The elected representatives from the identified counties were not consulted in the process of selecting the projects to be funded through the Equalization Fund.
- ii. There was no evidence of public participation in selecting projects.
- iii. The criteria for selecting Counties that benefit from the Equalization Fund relies heavily on the Poverty index.

COMMITTEE RECOMMENDATIONS

- i. Projects identified under the Equalization Fund must not be lumped together with the other government projects. They must be separately identified and appropriated for to ensure accountability and transparency in the use of the funds.
- ii. There is need to separately identify and appropriate for projects under the Equalization Fund.
- iii. The Funds should be allocated with the intention to fund specific projects.
- iv. Public participation is guaranteed by the Constitution. This should be pursued by all the agencies tasked with putting the Equalization Fund to use.
- v. There is need for a combined effort between the Committee and the agencies involved in the implementation of Equalization Fund to visit the fourteen (14) Counties and confirm that the identified projects are those prioritized by the people in these Counties.

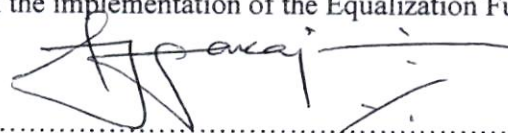
- vi. There should be an extensive National Survey to give a baseline for the accurate identification of the projects that will improve the livelihood of Kenyans. It is not adequate to rely on the 2009 census- a lot has changed since then.
- vii. The criteria for selecting Counties that benefit from the Equalization Fund should include other indices such as the Human Development Index and not rely only on the Poverty index.
- viii. The Committee should hold a meeting with the leadership of the fourteen (14) Counties (Governors, Senators, Members of Parliament and Women Representatives), representatives from the line ministries (Cabinet Secretaries of Treasury, Transport, Energy, Health and Water), and the Budget Committee, to ensure clarity in the operationalization of the Equalization Fund.

ACKNOWLEDGEMENT

The Committee extends its appreciation to the offices of the Speakers and the Clerks of the Parliament for the support accorded to it in the execution of its mandate and the opportunity accorded to its members to undertake various activities culminating in the production of this report.

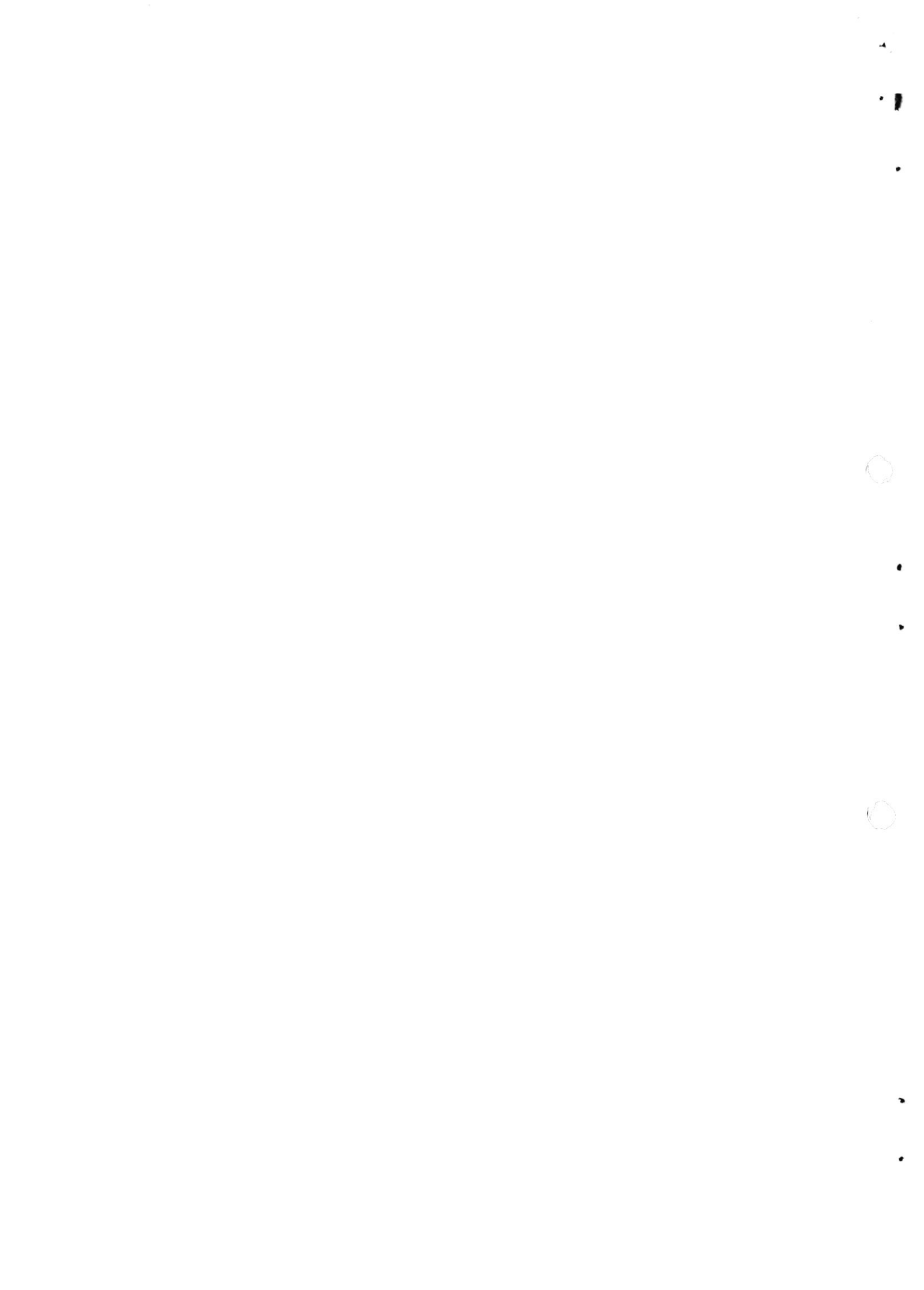
Finally, I wish to express my appreciation to the Honourable Members of the Joint Committee who found time out of their busy schedules to participate in the activities of the Committee and preparation of this report, and the representatives of the various agencies and stakeholders concerned with the implementation of the Equalization Fund.

SIGNED



HON. JOHNSON SAKAJA, (MP)
CHAIRPERSON, JOINT COMMITTEE ON NATIONAL COHESION AND
EQUAL OPPORTUNITY

DATE



BACKGROUND

Article 204 of the Constitution establishes the Equalization Fund: It states that:

- (1) There is established an Equalisation Fund into which shall be paid one half per cent of all the revenue collected by the national government each year calculated on the basis of the most recent audited accounts of revenue received, as approved by the National Assembly.
- (2) The national government shall use the Equalisation Fund only to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.
- (3) The national government may use the Equalisation Fund--
 - (a) only to the extent that the expenditure of those funds has been approved in an Appropriation Bill enacted by Parliament; and
 - (b) either directly, or indirectly through conditional grants to counties in which marginalised communities exist.
- (4) The Commission on Revenue Allocation shall be consulted and its recommendations considered before Parliament passes any Bill appropriating money out of the Equalisation Fund.
- (5) Any unexpended money in the Equalisation Fund at the end of a particular financial year shall remain in that Fund for use in accordance with clauses (2) and (3) during any subsequent financial year.
- (6) This Article lapses twenty years after the effective date, subject to clause (7).
- (7) Parliament may enact legislation suspending the effect of clause (6) for a further fixed period of years, subject to clause (8).
- (8) Legislation under clause (7) shall be supported by more than half of all the members of the National Assembly, and more than half of all the county delegations in the Senate.
- (9) Money shall not be withdrawn from the Equalisation Fund unless the Controller of Budget has approved the withdrawal.

In line with its mandate, the Joint Committee on National Cohesion and Equal Opportunities during one of its meetings resolved to hold a workshop to deliberate on the Operationalization of the Equalization Fund. The objective of the workshop was to inform the Committee on the progress made so far in terms of operationalizing the Equalization

Fund, the causes of the delay so far in rolling out the fund and to encourage synergy and communication between the agencies concerned with implementing the Fund.

HIGHLIGHTS OF THE PUBLIC FINANCE MANAGEMENT (EQUALIZATION FUND) REGULATIONS, 2015

**Presented by Mr. Albert Mwenda for Dr. Kamau Thugge, CBS Principal Secretary /
the National Treasury**

The presenter gave a background of the provisions of the Constitution and the PFM Act, 2012 that give rise to and effect the Equalization Fund. He also highlighted the salient features of the Fund the progress that has been made, successes and challenges encountered in operationalizing the Fund. The presentation was as follows:

Background – Constitutional Provisions

Article 204 of the Constitution establishes the Equalization Fund and....

1. Sets the source of the capital for the Fund at 0.5% of all revenue collected by the National Government each year calculated on the basis of the most recent audited accounts of revenue received, as approved by the National Assembly.
2. Requires National Government to use the Equalization Fund only to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.
3. Requires National Government to use the Equalization Fund only to the extent that:
 - the expenditure of those funds has been approved in an Appropriation Bill enacted by Parliament; and
 - either directly or indirectly through conditional grants to counties in which marginalized communities exist.

The National Government has opted to use the Fund directly through the national government structures in the marginalized counties.

Article 216(4) of the Constitution Requires the CRA to determine, publish and regularly review a policy in which it shall set out the criteria by which to identify the marginalized areas for purposes of Article 204 (2). This policy was approved by Parliament in December, 2014.

Background – PFM Act 2012

Section 18 of the PFM Act assigns the responsibility to administer the Fund to the Cabinet Secretary / National Treasury.

In addition, this Section requires any withdrawal from the Equalization Fund to be authorized by the Controller of Budget

Salient Features of the Equalization Fund Guidelines

1. The Fund Guidelines provide that the Fund shall be managed at the National Government level.
2. Further, the Fund Guidelines have provided a robust management structure for the Fund to ensure the Fund's objectives are achieved through a transparent and accountable mechanism.
3. The management structure includes the Administrator of the Equalisation Fund, Advisory Board and a Secretariat.
4. The Fund Guidelines provide that the Fund may be used directly by the national government where the function(s) fall under the national government
5. Alternatively, the Fund Guidelines provide that the Fund may be used by the national government to finance devolved functions under intergovernmental agreements as envisaged under Article 187 of the Constitution as conditional grants.
6. These Regulations accord the National Executive the latitude to implement the decisions of the legislature while providing for the consultation with Members of Parliament during the identification of projects.
7. The Marginalization policy determined by the Commission on Revenue Allocation in line with Article 216 (4) of the Constitution, identified fourteen counties to benefit from the Fund for the first three years namely: Turkana; Mandera; Wajir; Marsabit; Samburu; West Pokot; Tana River; Narok; Kwale; Garrissa; Kilifi; Taita Taveta; Isiolo; and Lamu.
8. The Regulations provide for:
 - Preparation and submission of work plans;
 - Preparation and submission of quarterly financial statements; and
 - The process of approval of financial statements and work plans for the Fund.
9. Requires any withdrawals from the Fund to be based on Parliamentary approval through an Appropriation Act and be authorized by the Controller of Budget

10. Makes provisions for the Winding up of the Fund and specifically provides that cash balances shall be transferred to the National Exchequer Account whereas assets shall be transferred to the State Department responsible for finance; and
11. Schedule I: Makes elaborate provisions on the conduct of the business and affairs of the Advisory Board including tenure of office, vacation of office, meetings of the Advisory Board, disclosure of conflict of interest and Minutes of the Advisory Board.

Highlight of the Progress Made, Successes and Challenges in the Operationalization of the Fund

- Extensive consultations were done while preparing the Public Finance Management (Equalization Fund) Regulations, 2015 with key stakeholders and their input taken into account before finalization of these Regulations.
- The Equalization Fund Regulations have also been approved by Parliament.
- Funds have been set aside for the Equalization Fund amounting to Kshs.6.4 billion up to the current financial year.
- National Treasury has proposed an allocation of a further Kshs. 6.0 billion to the National Assembly for the financial year 2016/17 to the Fund. This is 0.8% of the last audited revenue raised nationally an amount that is above the required 0.5% and therefore included in this amount are arrears for previous years.
- The arrears of Kshs. 7,680,759,850.00 to cater for the lost period shall be factored in the National Government budget over the medium term.
- The Cabinet Secretary / National Treasury has already appointed an Administrator of the Fund and the necessary structures to operationalize the Fund have been finalized.
- The Administrator has opened an Equalization Fund Account No. 1000183225 at the Central Bank of Kenya and Kshs. 6.4 billion has been deposited in this account.
- Upon the disbursement of a further Ksh. 6.0 billion allocated in the budget for FY 2016/17 it is expected that at the end of FY 2016/17 the account will be funded to the tune of Ksh. 12.4 billion.
- The estimates of revenue to and expenditure from the Fund have been submitted to the National Assembly pursuant to Article 221 of the Constitution after approval by the Cabinet Secretary / National Treasury as required under the Regulations.

- The Fund Advisory Board has commenced meetings to guide the Secretariat during the implementation of the approved budget of the Fund for FY 2016/17.
- The Marginalization Policy took three years before it was approved by Parliament.
- Consultations on and approval of the Equalization Fund Regulations by Parliament took two years.
- This delayed the roll out of the Equalization Fund thus creating a perception that National Government was not keen to operationalize the Fund.
- There were divergent views on modalities for implementation of the Equalization Fund.
- This was particularly with regard to the two options:
 - Utilizing the Fund directly through State Departments of the National Government or CDF structures; or
 - Utilizing the Fund indirectly through conditional grants to marginalized counties.
- Equalization Fund Regulations were finally approved in late 2015.
- The approved Regulations provide for the use of the Fund through the National Government structures.
- Projects for FY 2016/17 have been identified by the relevant National Government Ministries / State Departments/ Agencies through the National Government structures at the county level.
- Due to this delay in the approval of the policy and the Regulation for the Fund, huge arrears had accumulated estimated at Kshs. 7.68 billion.
- The approved marginalization policy was to be effective for three years commencing 2013/14 and therefore it shall lapse in the FY 2016/17.
- The Commission on Revenue Allocation is therefore expected to develop the 2nd generation marginalization policy before the end of FY 2016/17.

Conclusion

- The decision to use the Fund directly through the National Government structures is informed by the National Government's comparative advantage to leverage on the existing capacity.

- This will ensure faster and efficient implementation of projects/programs to ensure maximum impact in order to bring the services of the marginalized counties closer to those enjoyed by other areas

REVENUE ALLOCATION CRITERIA AND THE EQUALISATION FUND

(Policy on which sets out the criteria of identifying the marginalized areas and the formula of allocation of funds)

Presentation by the Ms. Lineth Oyugi Director Research and Policy, Commission on Revenue Allocation

The presenter gave the Constitutional provisions that give the connection between the Commission and the Equalization Fund, the definition of marginalization, the nature and causes of marginalization, and the criteria used to identify the marginalized for purposes of benefitting from the Fund. She concluded by giving the recommendations of commission on the policy governing the use of the Fund, the membership of the Advisory Committee and the allocation criteria. The presentation was as follows:

Introduction

Article 216(4): The Commission shall determine, publish and regularly review a policy in which it sets out the criteria by which to identify the marginalized areas for purposes of Article 204 (February 2013)

Article 204(4): The Commission shall be consulted and its recommendations considered before Parliament passes any Bill appropriating money out of the Equalization Fund

Article 204(2): Fund shall be use to provide basic services including water, roads, health facilities and electricity to marginalized areas to bring quality of those services to the level enjoyed by the rest of the nation as far as possible

MARGINALIZATION

Article 260: Defines Marginalized communities (location, lifestyle, culture, social value, etc.)

Marginalized Group (Article 27)- Race Sex, Pregnancy, marital status, health status, colour, age, disability religion, culture etc



Marginalized Areas:The Commission defined marginalized areas in reference to a geographical location (a county) where significant populations of marginalized communities live

NATURE AND CAUSES OF MARGINALISATION

Historical and Legislative Discrimination

District Ordinance Act of 1902 created closed districts (Turkana, Marsabit, Wajir, Mandera, Garissa, Isiolo and Samburu)-were deemed uneconomical.

Land Policy & Administration:

Dispossession of Land (Land Title Ordinance of 1908; and the Crown Lands Ordinance of 1915-crown land; Creation of the White highlands

Geographical Factors

Vastness and distance from the capital and climatic conditions-exclusion from development

Culture and Lifestyles

Pastoral communities-ASAL 80% of total land area.

Marginal participation in integrated social, economic and political development

Inequitable development policiesSessional Paper No 10 1965- invest in high potential areas and redistribute to low

CRITERIA IDENTIFYING THE MARGINALIZED

Primary criteria: County Development Index

The criteria include:

Health: % of Deliveries by qualified personnel; Level of immunization; Improved sanitation)

Education: (% of population with Secondary education; Adult literacy)

Infrastructure: (Water, Roads and Electricity)

Poverty- Measure of deprivation

Other Criteria:

Study report on Historical and legislative discrimination

CRA county marginalization survey

The Marginalised Counties include: Turkana, Mandera, Wajir, Marsabit, Samburu, West Pokot, Tana River, Narok, Kwale, Garissa, Kilifi, TaitaTaveta, Isiolo and Lamu

Recommendations of the Policy

1. That the Fund be appropriated as conditional grants to marginalized counties
2. That the Fund be appropriated in a single budget line
3. That the Fund be managed by an Advisory Committee (*clear linkages –Fund Management, county and local level structures and the Ministries*)
4. Marginalized communities within non-marginalized counties- *affirmative action*

Recommendations on the Membership of the Advisory Committee

1. Commission on Revenue Allocation
2. The National Treasury
3. The Inter-governmental Relations Department
4. The Controller of Budget
5. The Kenya Institute for public Policy and Analysis
6. The Association of Professional Societies
7. State Departments responsible for Water, Roads, health, Education and Electricity

Allocation Criteria

1. The commission recommended that the fund be shared among the fourteen counties based on:
 - a) 50% based on the County Development Index
 - b) 50% Equally.

MANAGING BUDGETARY ALLOCATION IN LIGHT OF THE EQUALIZATION FUND

Presented by Agnes Odhiambo (Mrs.)Controller of Budget

The presenter briefly gave the Constitutional and PFM Act 2012 requirements that should be met in the implementation of the Equalization Fund. She also highlighted the planning framework and budgetary allocations that should be considered in the use of the Equalization Fund. The presenter concluded by insisting that use of the Fund should be monitored, reported and audited. The presentation was as follows:

Introduction

What is a budget?

- ▶ A budget is a financial plan used to estimate revenues and expenditures for a specific period of time. It is a management and planning tool, not just an accounting document and assists in the allocation of resources.
- ▶ A budget allocation is the amount of funding designated to each expenditure line. It designates the maximum amount of funding to a given item or program, and it is a limit that is not to be exceeded.

Constitutional and PFM Act, 2012 requirements

- ▶ The PFM framework requires effective management of budgets.
- ▶ IFMIS should be used to process and track resource utilisation for effective use of resources (Section 12 of the PFM Act 2012). Effective planning and financial control will help in:
 1. Ensuring efficient and effective use of resources
 2. making sound decisions
 3. demonstrating accountability
 4. taking remedial action where needed

Planning Framework and Developing Budget Allocations

Equalization Fund projects should be determined based on planning frameworks:

- ▶ Existing expenditure commitments.
- ▶ For the allocation of expenditure budgets, the appropriate levels may be informed by historic expenditure patterns and any appropriate benchmarks that have been identified or adopted.

Supplementary Budget Allocations and Carry Forward, and Project Surplus Balances

- ▶ Budgetary allocations might not always be sufficiently estimated. This can happen when adequate funding for predictable or reoccurring expenses are not included in the budget and might require the budget to be modified after adoption to account for the shortfall.
- ▶ Typical corrections will include transferring funds from other allocation categories or from the organization's surplus (savings).
- ▶ Insufficient revenues might require the need to reduce budgetary allocations in order for expenditures not to exceed revenues at the end of the budget year.

Monitoring and Reporting

- ▶ Budgetary allocations should be routinely monitored to ensure the amounts budgeted are sufficient to meet expenditures.
 - ▶ Both the Constitution and the PFM Act 2012 require regular monitoring of expenditure and reporting; not just to verify expenditure against target but also to identify changing patterns or circumstances that need corrective action.
 - ▶ The Government must have procedures in place to monitor progress against budget and objectives at regular intervals.
 - ▶ Calls for strong partnership with other oversight institutions in monitoring and reporting. These include:
 - National Internal Audit Department
 - The Public
-
- ▶ Periodic reports should be prepared in line with the PFM framework.
 - Quarterly reporting
 - Annual reporting, etc.

Auditing

- ▶ The Fund should be audited on annual basis or as the case may be.

NATIONAL COHESION AND THE EQUALIZATION FUND

Presentation by Hon. Francis Ole Kaparo Chairman of the National Cohesion and Integration Commission (NCIC)

The presenter showed that the Counties that had qualified for the Equalization Fund were also those with the lowest social cohesion, lowest development indicators and the highest incidence of poverty in the country. He also highlighted the Government effort in bridging the gap between the marginalized counties and the rest of the nation through Policy and Legal Instruments. The presentation was follows:

Introduction

- The ASALs Counties that are mainly targeted by the **Equalization Fund** have the lowest social cohesion index, the lowest development indicators and the highest

incidence of poverty in the country. Hence perceived or real feeling of marginalization by the locals.

- The NCIC social cohesion index of 2013 ranked counties on matters of peace, prosperity and Equity as follows:

Lowest Social Cohesion: Wajir (22.0%), Garissa (36.5%), Mandera 38.8%), Tana River (43.0%)

Highest Social Cohesion: Kiambu (65.9%), Uasin Gishu (64.5%), Nairobi (63.7%) and Siaya (63.2%)

- Conscious public policy choices by Kenya's past Government may be responsible for this sorry situation. Consider this scenario: Sessional Paper No. 10 of 1965 on African Socialism stated the following: "One of our problems is to decide how much priority we should give in investing in less developed provinces. To make the economy as a whole grow as fast as possible, development money should be invested where it will yield the largest increase in net output. This approach will clearly favor the development of areas having abundant natural resources, good land and rainfall, transport and power facilities, **and people receptive to and active in development.**"
- For many years this policy statement guided distribution of national resources and investment decisions by the Government; hence the wide developmental gap between the region and the rest of Kenya.
- The net effect of this policy is in a nutshell "separate development" that did little to build cohesion between Kenyans in the north and those in the rest of the country. On their part, many in Northern Kenya regarded the rest of the country as distant and different.
- The primary policy challenge is how to close this gap and achieve national cohesion and integration in practical terms.

Government effort in Bridging the Gap-Policy and Legal Instruments

- Since 2003 the Government has demonstrated renewed commitment to the ASALs, for example through the Economic Recovery Strategy launched in 2003, which recognized 'the important contribution the ASALs can make to national development'. The Government of Kenya is committed to putting in place a holistic policy framework that facilitates and fast-tracks sustainable development in the region, reducing levels of inequality with the rest of Kenya and releasing its potential for the benefit of the nation as a whole.

- The Constitution of Kenya 2010 have provided for affirmative action programs for marginalized groups under Article 56.
- Article 204 provides for the Equalization Fund to accelerate infrastructure development in the ASALs. Implementation of the Equalization Fund will strengthen cohesion and integration of ASAL with the rest of the country and address inequality and inequities.

Recommendations

- The Equalization Fund should be directed to purely capital development and not to recurrent expenditure.
- The Government should fast-track the release of the **Equalization Fund** including progressive compensation of the lost five (5) years.
- The social cohesion index should be considered when constituting counties for the equalization fund

THE CONSTITUTION OF KENYA (AMENDMENT) (NO.2) BILL, NATIONAL ASSEMBLY BILLS NO. 26 OF 2013

Presentation by Senator Omar Hassan

The Senator presented the considerations of the Senate Committee on Legal Affairs and Human Rights on the Constitution of Kenya (Amendment) (No.2) Bill, National Assembly Bills No. 26 of 2013. The Bill proposes to amend Article 204 on the Equalization Fund to allow the disbursing of Funds through the Constituencies. The presentation was as follows:

Introduction

The Bill seeks to amend Article 204 of the Constitution to remove the disbursement of the Equalization Fund from the purview of the National government and transfer it to the constituencies where the marginalized areas exist.

1. According to its Memorandum of Objects and Reasons, the Bill is informed by the fact that the Equalization Fund was established to assist marginalized areas to attain the same level of development as the rest of the Country.
2. Chapter sixteen of the Constitution provides for amendment of the Constitution.
3. Article 255(1) of the Constitution as follow-

"A proposed amendment to this Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to any of the following matters—

- (a) the supremacy of this Constitution;*
- (b) the territory of Kenya;*
- (c) the sovereignty of the people;*
- (d) the national values and principles of governance mentioned in Article 10 (2) (a) to (d);*
- (e) the Bill of Rights;*
- (f) the term of office of the President;*
- (g) the independence of the Judiciary and the commissions and independent offices to which Chapter Fifteen applies;*
- (h) the functions of Parliament;*
- (i) the objects, principles and structure of devolved government; or*
- (j) the provisions of this Chapter."*

(2) A proposed amendment shall be approved by a referendum under clause (1) if—

- (a) at least twenty per cent of the registered voters in each of at least half of the counties vote in the referendum; and*
- (b) the amendment is supported by a simple majority of the citizens voting in the referendum.*

(3) An amendment to this Constitution that does not relate to a matter mentioned in clause (1) shall be enacted either—

- (a) by Parliament, in accordance with Article 256; or*
- (b) by the people and Parliament, in accordance with Article 257.*

4. On constitutional amendment by parliamentary initiative, Article 256 of the Constitution states as follows -

256. (1) A Bill to amend this Constitution—

- (a) may be introduced in either House of Parliament;*
- (b) may not address any other matter apart from consequential amendments to legislation arising from the Bill;*

(c) shall not be called for second reading in either House within ninety days after the first reading of the Bill in that House; and

(d) shall have been passed by Parliament when each House of Parliament has passed the Bill, in both its second and third that House.

(2) Parliament shall publicise any Bill to amend this Constitution, and facilitate public discussion about the Bill.

(3) After Parliament passes a Bill to amend this Constitution, the Speakers of the two Houses of Parliament shall jointly submit to the President—

(a) the Bill, for assent and publication; and

(b) a certificate that the Bill has been passed by Parliament in accordance with this Article.

(4) Subject to clause (5), the President shall assent to the Bill and cause it to be published within thirty days after the Bill is enacted by Parliament.

(5) If a Bill to amend this Constitution proposes an amendment relating to a matter mentioned in Article 255 (1)—

(a) the President shall, before assenting to the Bill, request the Independent Electoral and Boundaries Commission to conduct, within ninety days, a national referendum for approval of the Bill; and

(b) within thirty days after the chairperson of the Independent Electoral and Boundaries Commission has certified to the President that the Bill has been approved in accordance with Article 255 (2), the President shall assent to the Bill and cause it to be published.

5. On constitutional amendment by popular initiative, Article 257 of the Constitution states as follows -

(1) An amendment to this Constitution may be proposed by a popular initiative signed by at least one million registered voters.

(2) A popular initiative for an amendment to this Constitution may be in the form of a general suggestion or a formulated draft Bill.

(3) If a popular initiative is in the form of a general suggestion, the promoters of that popular initiative shall formulate it into a draft Bill.

- (4) *The promoters of a popular initiative shall deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters.*
- (5) *If the Independent Electoral and Boundaries Commission is satisfied that the initiative meets the requirements of this Article, the Commission shall submit the draft Bill to each county assembly for consideration within three months after the date it was submitted by the Commission.*
- (6) *If a county assembly approves the draft Bill within three months after the date it was submitted by the commission, the speaker of the county assembly shall deliver a copy of the draft Bill jointly to the Speakers of the two Houses of Parliament, with a certificate that the county assembly has approved it.*
- (7) *If a draft Bill has been approved by a majority of the county assemblies, it shall be introduced in Parliament without delay.*
- (8) *A Bill under this Article is passed by Parliament if supported by a majority of the members of each House.*
- (9) *If Parliament passes the Bill, it shall be submitted to the President for assent in accordance with Articles 256 (4) and (5).*
- (10) *If either House of Parliament fails to pass the Bill, or the Bill relates to a matter mentioned in 255 (1), the proposed amendment shall be submitted to the people in a referendum.*
- (11) *Article 255 (2) applies, with any necessary modifications, to a referendum under clause (10).*

Issues

6. While reporting to the House, the Committee will be required to address the following questions which have been raised by stakeholders –
 - (a) whether or not the Bill is one that requires a referendum; or
 - (b) whether or not the House can amend the Bill as proposed by one of the stakeholders.

Whether or not the Bill is one that requires a referendum

7. Its memorandum to the Committee, The Devolution Forum observes as follows-

Article 255 of the Constitution provides that a process to amend the Constitution shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to matters among others the national values and principles of governance mentioned in Article 10 (2) (a) to (d).

Article 10 (2) (a) to (d) provide that national values and principles include among other principles, sharing and devolution of power, rule of law, participation of the people, protection of marginalized and good governance.

It is evident from the constitution that the intention is to shift power of amending the constitution from Parliament to the people on matters at the heart of the devolved system of government. This amendment bill on the equalization fund touches on key principles of the Kenyan devolved system that the citizens approved as provided in the Constitution of Kenya, 2010. The amendment bill touches on matters of sharing and devolution of power, rule of law, protection of marginalized and good governance. Therefore, the constitutional process of reviewing this amendment ought to be through a referendum and not a parliamentary initiative.

8. To answer the question whether the Bill is one that requires a referendum, the Committee would be required to consider whether the amendment relates to any of the matters outlined in Article 255(1) of the Constitution.
9. In this regard, the stakeholders drew the Committee's attention to the following provisions, which they asked the Committee to consider when determining whether or not the Bill requires a referendum-
 - (a) Article 10(2) of the Constitution which states as follows-
 - (2) *The national values and principles of governance include—*
 - (a) *patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*
 - (b) *human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;*
 - (c) *good governance, integrity, transparency and accountability;*
and
 - (d) *sustainable development.*

(b) Article 174 of the Constitution which states as follows-

174. The objects of the devolution of government are—

- (a) to promote democratic and accountable exercise of power;*
- (b) to foster national unity by recognising diversity;*
- (c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;*
- (d) to recognise the right of communities to manage their own affairs and to further their development;*
- (e) to protect and promote the interests and rights of minorities and marginalised communities;*
- (f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;*
- (g) to ensure equitable sharing of national and local resources throughout Kenya;*
- (h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and*
- (i) to enhance checks and balances and the separation of powers.*

Whether or not the House can amend the Bill as proposed by one of the stakeholders

10. The Parliamentary Initiative Network, in its Memorandum to the Committee, recommends that clauses 2(a) and 2(b) of the Bill be deleted.
11. It will therefore be important for the Committee, in its report, to indicate whether or not these proposals can be adopted and to give reasons for its decision.
12. Chapter Sixteen of the Constitution, provides for the amendment of the Constitution.
13. Article 255(1) specifically states that a proposed amendment to the Constitution “shall be enacted in accordance with Article 256 or 257, and approved in accordance with clause (2) by a referendum, if the amendment relates to any of the following matters....”

14. Any amendment to the Constitution therefore must be in accordance with Articles 255, 256 and 257. It is important to observe that none of these provisions provide for amendment of a Bill to alter the Constitution.
15. In contrast, Part 4 of the Constitution provides for the procedure for enacting legislation and variously recognizes the amendment of a Bill in the relevant House. For instance-
- (a) Article 111(2) states –
 - (2) *The National Assembly may amend or veto a special Bill that has been passed by the Senate only by a resolution supported by at least two-thirds of the members of the Assembly*
 - (b) Article 112(1) states-
 - 112. (1) *If one House passes an ordinary Bill concerning counties, and the second House—*
 - ...
 - (b) *passes the Bill in an amended form, it shall be referred back to the originating House for reconsideration.*
 - (c) Article 115(2) states-
 - (2) *If the President refers a Bill back for reconsideration, Parliament may, following the appropriate procedures under this Part—*
 - (a) *amend the Bill in light of the President’s reservations; or*
 - (b) *pass the Bill a second time without amendment.*
16. The repealed Constitution provided for amendment of the Constitution as follows—
- 47. (1) *Subject to this section, Parliament may alter this Constitution.*
 - (2) *A Bill for an Act of Parliament to alter this Constitution shall not be passed by the National Assembly unless it has been supported on the second and third reading by the votes of not less than sixty five per cent of all the members of the Assembly (excluding the ex-officio members).*
 - (3) *If, on the taking of a vote for the purposes of subsection (2), the Bill is supported by a majority of the members of the Assembly voting but not by the number of votes required by that subsection, and the Bill is not opposed by thirty-five percent of all the Members of the Assembly or more, then, subject to such limitations and conditions*

as may be prescribed by the standing orders of the Assembly, a further vote may be taken.

- (4) *When a Bill for an Act of Parliament to alter this Constitution has been introduced into the National Assembly, no alterations shall be made in it before it is presented to the President for his assent, except alterations which are certified by the Speaker to be necessary because of the time that has elapsed since the Bill was first introduced into the Assembly.*

17. The repealed Constitution was therefore clear that a Bill to amend the Constitution could be amended by the House.
18. Similarly, when confronted with the same challenge, the Speaker of the National Assembly has ruled as follows-

"...while Parliament has been given the power to amend the Constitution, we should be mindful that the Constitution belongs to the people of this Republic and treating the process of its amendment to be akin to an ordinary legislation subverts the collective will of the People. In this regard, it is expected that any person intending to amend the Constitution must be very clear and precise on what he or she is intending to alter, but not to change mind while in the process. It is my strong view that any proposal to amend the Constitution should be preceded by meaningful and adequate consultations before such Bill is published, a principle that is embodied in the Article 256(2) of the Constitution. Bearing in mind that the legislative power is originally derived and consequently vested in the people, we ought to obtain the confidence of our fellow citizens even as we endeavor to amend the Constitution. The process of making or amending the Constitution therefore cannot be without consultations, precision and guarded restraint. ...

I am therefore of the opinion that a plain reading of Article 256 of the Constitution clearly reveals that while the Constitution does not expressly disallow amendments to a Bill proposing to amend any of its Articles, it deliberately discouraged such amendments, unless there is anything extraordinary in the proposed Bill that would require application of the

extraordinary measures. In this regard, I am constrained NOT to allow any amendment to the Bill proposed by the Member for Ugenya or indeed any of the other four Bills proposing to amend the Constitution."

Way forward for the Committee

19. In light of the above it is proposed that the Committee -
- (a) considers whether or not the Bill is one that requires a referendum by considering Article 255(1) and in its report, gives its view as to whether or not the Bill is one that requires a referendum; and
 - (b) in its report to the House, indicates whether or not it is possible to amend the Bill on the floor of the House as suggested by one of the stakeholders.

RECOMMENDATIONS AND OBSERVATIONS BY THE PARTICIPANTS

The participants at the workshop gave the following observations and recommendations regarding the Equalization Fund:

Ministry of Devolution and Planning

- The ministry undertook to ensure that the public participates in all the decisions regarding the Equalization fund
- The Ministry also expressed the need for technical coordination between the national government and county government in the operationalization of the Fund.
- All the funds set up to uplift the livelihood of Kenyans must be coordinated to ensure maximum impact.

National Cohesion and Integration Commission (NCIC)

- The Equalization fund is a small part of the funds that go to the County. The Commission observed that leaders should focus on fostering cohesion and honest implementation of projects to guarantee that the effects of all these funds.

Commission on Revenue Allocation (CRA)

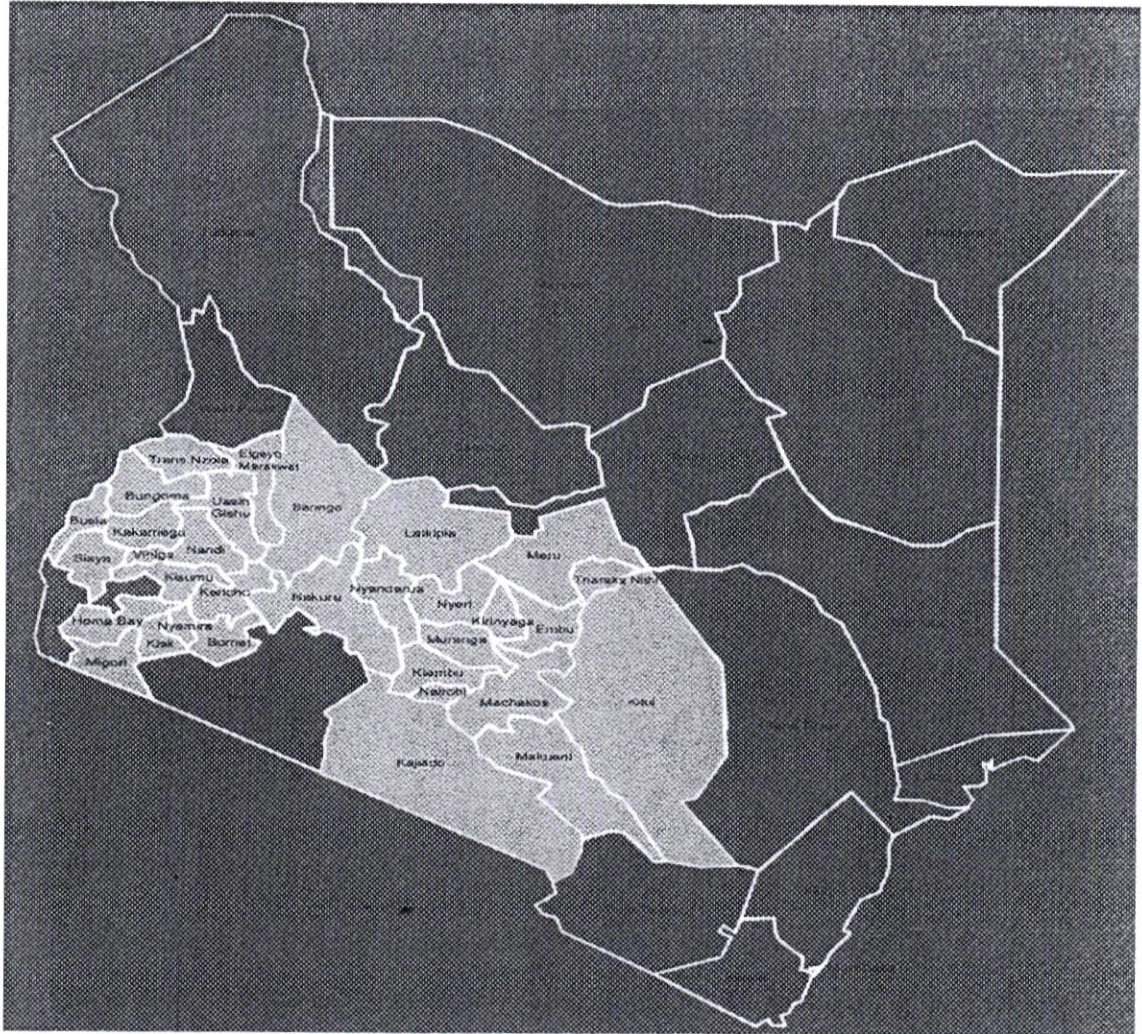
- The commission observed that the percentage set aside for the administration costs of the Board is too much and should be reviewed downwards
- The 0.5% set aside for the Equalization fund needs to be increased to guarantee a tangible impact of the Fund.
- There is need for the County government to be involved in projects under the Fund.

- Greater public participation must be sought at all levels in implementing the Equalization Fund. In this regard the National Treasury should consult the people's representatives to identify the projects that are of urgent need and of most impact in the Counties.
 - The lack of public participation may have resulted in the allocation of six billion shillings (Sh. 6B) of the 12 billion shillings (Sh.12 B) to roads. The National Treasury should consult the people's representatives to identify the projects that will have the greatest impact on the people in the Counties and allocate the funds accordingly.
 - There must be coordination of the projects being undertaken at the Counties- by the Governor, Member of Parliament, County Women Representative, NGOs etc. There must be a 'port of call' to ensure accountability and transparency. There needs to be intergovernmental consultations on the modalities of implementing projects under the Fund.
 - The Kenya National Bureau of Statistics is in the process of completing a survey that will improve the data being used to guide the use of the Equalization Fund.
-

ANNEXES

Annex 1

Map showing the Counties targeted to receive the Equalization Fund



Source: Commission on Revenue Allocation

Annex 2

Table showing the Allocation Index

	COUNTY	CDI	% CDI SHARE*	% EQUAL SHARE**	% COMBINED SHARE***
1	TURKANA	0.27	10.66%	7.14%	8.90%
2	MANDERA	0.31	9.25%	7.14%	8.20%
3	WAJIR	0.33	8.62%	7.14%	7.88%
4	MARSABIT	0.37	7.87%	7.14%	7.51%
5	SAMBURU	0.38	7.61%	7.14%	7.37%
6	WEST POKOT	0.38	7.54%	7.14%	7.34%
7	TANA RIVER	0.39	7.41%	7.14%	7.28%
8	NAROK	0.44	6.57%	7.14%	6.86%
9	KWALE	0.45	6.34%	7.14%	6.74%
10	GARISSA	0.47	6.13%	7.14%	6.64%
11	KILIFI	0.50	5.81%	7.14%	6.47%
12	TAITA TAVETA	0.51	5.59%	7.14%	6.37%
13	ISIOLO	0.52	5.51%	7.14%	6.33%
14	LAMU	0.56	5.10%	7.14%	6.12%
			100.00%	100.00%	100.00%

Source: Commission on Revenue Allocation

Annex 3

Table showing allocations to the fourteen (14) Counties

S/No	Description	Total Amount Kshs.		
Total available amounts, including arrears as at FY 2016/17		12,400,000,000.00		
<i>Less Administration Expenses (10% of Kshs. 598,820,000.00)</i>		598,820,000.00		
Amount Available for sharing among counties		11,801,180,000.00		
S/No	Name of County	% Combined Share (Based on CRA Policy)	Amount to be shared	County Share
1	Garrissa	6.64	11,801,180,000	783,520,000
2	Isiolo	6.33	11,801,180,000	746,940,000
3	Kilifi	6.47	11,801,180,000	763,460,000
4	Kwale	6.74	11,801,180,000	795,320,000
5	Lamu	6.12	11,801,180,000	722,160,000
6	Mandera	8.20	11,801,180,000	967,600,000
7	Marsabit	7.51	11,801,180,000	886,180,000
8	Narok	6.86	11,801,180,000	809,480,000
9	Samburu	7.37	11,801,180,000	869,660,000

10	Tana River	7.28	11,801,180,000	859,040,000
11	Turkana	8.90	11,801,180,000	1,050,200,000
12	TaitaTaveta	6.37	11,801,180,000	751,660,000
13	Wajir	7.88	11,801,180,000	929,840,000
14	West Pokot	7.34	11,801,180,000	866,120,000
	Total shared	100.00		11,801,180,000

Source: National Treasury

Annex 4

Table showing allocations to the fourteen counties for the various projects

S/No	County Name	Water Projects	Health Projects	Energy Projects	Roads Projects	Total Allocations	Ceiling of	Balance of
		Kshs. Million	Kshs. Million	Kshs. Million	Kshs. Million	Kshs. Millions	Kshs. Millions	Kshs. Million
		a	b	c	d	e = (a+b+c+d)	f	g = (f-e)
1	Garissa	291.00	35.00	-	438.00	764.00	783.50	19.50
2	Isiolo	97.00	-	-	426.00	523.00	746.90	223.90
3	Kilifi	85.00	-	-	678.50	763.50	763.50	0
4	Kwale	200.00	-	-	595.30	795.30	795.30	0
5	Lamu	205.00	100.00	-	417.20	722.20	722.20	0
6	Mandera	37.00	-	700.00	230.60	967.60	967.60	0
7	Marsabit	250.00	-	130.00	506.20	886.20	886.20	0
8	Narok	70.00	-	-	739.50	809.50	809.50	0
9	Samburu	350.00	-	-	519.70	869.70	869.70	0
10	Tana River	110.00	100.00	40.00	609.00	859.00	859.00	0
11	Turkana	280.00	-	740.00	30.20	1,050.20	1,050.20	0

12	TaitaTave ta	8.00	-	-	743.70	751.70	751.70	0
13	Wajir	80.00	-	190.00	659.80	929.80	929.80	0
14	West Pokot	744.00	-	-	122.10	866.10	866.10	0
	TOTAL	2,807.00	235.00	1,800.00	6,715.80	11,557.80	11,801.20	243.40

Source: National Treasury

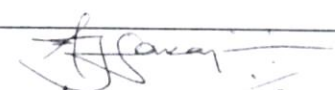




SIGNED

HON. JOHNSON SAKAJA, (MP)
CHAIRPERSON, JOINT COMMITTEE ON NATIONAL COHESION
AND EQUAL OPPORTUNITY

DATE

**KENYA NATIONAL ASSEMBLY
COMMITTEE ON NATIONAL COHESION & EQUAL OPPORTUNITY
ATTENDANCE LIST/ PAYMENT SCHEDULE**

AGENDA: Consideration - And adoption of the Report on Equalization funds
DATE: 7/June/2016.

No.	NAME	SIGNATURE
1.	Hon. Johnson Sakaja, M.P - Chairperson	
2.	Hon. Francis Mwangangi, MP	
3.	Hon. George Omondi Mallan, MP	
4.	Hon. Grace Kipchoim, MP	
5.	Hon. James Gordon Rege, MP	
6.	Hon. Kimani Ngunjiri, MP	
7.	Hon. Maison Leshoomo, MP	
8.	Hon. Mohamed D. Abdullahi, MP	
9.	Hon. Mohamed Elmi, MP	
10.	Hon. Moses Injendi, MP	
11.	Hon. Peris Tobiko, MP.	
12.	Hon. Roba Duba, MP	
13.	Hon. Rose Museo Mumo, MP	
14.	Hon. Zipporah Jesang, MP	
15.	Hon. E. Memusi Kanchory, MP	


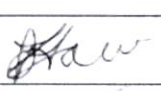
Prepared by
 Mr. Oscar Namulanda
 Ms. Hellen Kina.

Signature
Signature

**SENATE MEMBERS OF THE JOINT COMMITTEE ON NATIONAL COHESION AND
EQUAL OPPORTUNITY**

ATTENDANCE LIST

Date..... 7/6/2016 Venue Committee Room 9 Time 12:30 PM

NAME	SIGNATURE	COMMENT
Sen. Godana Hargura-Vice-Chairperson		
Sen. Ali Bulle		—
Sen. Godliver Omondi		—
Sen. Agnes Zani		
Sen. Muriuki Karue		—
Sen. Christopher Obure		—
Sen. Moses Kajwang		—
Sen. Henry Ndiema		—
Sen. Peter Mositet		—
Sen. Emma Mbura		—
Sen. Mike Mbuvi		—
Sen. Stephen Sang'		—
Sen. Beatrice Elachi		—
Sen. Abdirahman Hassan		—
Sen. Isaac Melly		—

