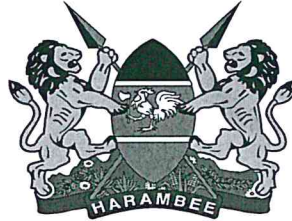


REPUBLIC OF KENYA



PARLIAMENT

THE SENATE

TWELFTH PARLIAMENT

REPORT OF THE STANDING COMMITTEE ON FINANCE AND  
BUDGET

ON

THE EQUALIZATION FUND BILL (NATIONAL ASSEMBLY BILLS NO.  
43 OF 2019)

CLERK CHAMBERS  
THE SENATE  
PARLIAMENT OF KENYA  
NAIROBI

PAPERS LAID	
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COMMITTEE	FINANCE
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## PREFACE

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### Mandate and Functions of the Committee

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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 Standing Committee on Finance and Budget was constituted by the House on Thursday 14<sup>th</sup> December, 2017 during the First Session of the Twelfth Parliament. The Committee was later reconstituted on Wednesday, 24<sup>th</sup> June, 2020, during the Fourth Session of the Twelfth (12<sup>th</sup>) Parliament. The Committee as currently constituted, comprises the following Members-

1. Sen. Charles Kibiru, M.P. - Chairperson
2. Sen. (Dr.) Ochillo Ayacko, MP - Vice Chairperson
3. Sen. Wetang'ula Moses Masika, EGH, MP - Member
4. Sen. Kimani Wamatangi, MP - Member
5. Sen. Mutula Kilonzo Junior, MP - Member
6. Sen. Aaron Cheruiyot, MP - Member
7. Sen. (Dr.) Rose Nyamunga, MP - Member
8. Sen. CPA Farhiya Haji, MP - Member
9. Sen. Milicent Omanga, MP - Member

## **BACKGROUND AND EXECUTIVE SUMMARY**

The Equalization Fund Bill, (National Assembly Bills No. 43 of 2019) intends to give further effect to the provisions of Article 204(1) of the Constitution which provides that- *“there is established an Equalization 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”*.

The Equalization Fund is a special fund established under the Constitution with the intent of addressing historical marginalization in the country, accelerate development in marginalized areas and ensure as far as possible those areas are at par with the rest of the country. It was therefore intended to address the fair distribution of resources in order to bridge the gap of poverty in Kenya.

The Bill proposes to establish a Board to administer the Fund. It further proposes the establishment of Local Equalization Fund Committees in each ward in marginalised area as determined by the Commission on Revenue Allocation. The Committees are tasked with identifying projects for funding in consultation with local communities but the final decision on projects to be implemented would be made by the Board.

### **Committee’s Recommendations**

The Committee recommends that the Bill be approved with amendments (Annex 1).

## Acknowledgements

The Committee acknowledges the National Treasury, The Office of the Controller of Budget, the Council of Governors, International Budget Partnership Kenya and the Institute of Public Finance 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 Equalization Fund Bill (National Assembly Bills No. 43 of 2019).

**SIGNATURE:** \_\_\_\_\_



**SEN. CHARLES KIBIRU, MP.**

**(CHAIRPERSON, STANDING COMMITTEE ON FINANCE AND BUDGET)**

**DATE:** \_\_\_\_\_ **2<sup>nd</sup> September, 2020** \_\_\_\_\_

## CHAPTER ONE

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### HIGHLIGHTS OF THE EQUALIZATION FUND BILL, 2019

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1. The Equalization Fund Bill was read a First Time in the Senate on 2<sup>nd</sup> June, 2020. The Bill was thereafter committed to the Standing Committee on Finance and Budget for consideration and subsequently tabling of a report.
2. The main object of the Bill is to operationalize Article 204 of the Constitution which establishes the Equalization Fund into which shall be paid one half 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.

#### **Purpose of the Equalization Fund**

3. Article 204 (2) of the Constitution provides that the national government shall 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.
4. Further, Article 204 (3) states that fund may be used only to the extent that the expenditure has been approved in an Appropriation Bill enacted by parliament, either directly or indirectly through conditional grants to counties in which marginalized communities exist.

#### **Salient provisions of the Bill**

5. The Equalization Fund Bill,2019 provides that the fund shall comprise of one half of all revenue collected by the national government each year calculated on the basis of the most recent audited accounts of revenue received. Other sources of the fund

include income generated from proceeds of the fund and the cumulative amount of national revenue from previous years not spent. Additionally, all receipts, savings and accruals to the Fund and the balance of the fund at the end of each financial year shall be retained in the account of the Fund.

6. Part III of the bill proposes to establish the Equalization Fund Board which shall be a corporate body with perpetual succession which shall comprise of:-
  - a. A chairperson appointed by the President with the approval of the National Assembly;
  - b. The Principal Secretaries in the Ministries responsible for matters relating to water, roads, health, National Treasury, arid and semi-arid lands or persons designated in writing by the PS.
  - c. Four persons appointed by the Cabinet Secretary for the time being responsible for the National Treasury to represent marginalized communities;
  - d. The Chief Executive Officer who shall be an ex-officio member and secretary to the Board.
7. The Board shall be responsible for managing the fund; considering and approving project proposals in accordance with the Act; disbursing fund for approved projects; monitoring and evaluating the usage of monies disbursed from the fund and receiving and addressing complaints and disputes relating to the fund.
8. Clause 15 of the bill allows the Board to co-opt such experts as may be necessary to assist in the discharge of its functions.
9. **Part IV** of the Bill proposes establishment of Local Equalization Fund Committees in every Constituency in a marginalized area to assist the Board in the identification and administration of projects funded by the Fund in consultation with the marginalized communities. The Committee shall comprise of seven persons whom shall include national government official responsible for co-ordination of national government functions, two men and two women nominated in accordance to the provisions of the act, a person with disability nominated by a registered group, two



persons nominated by the relevant constituency office, an officer of the Board seconded to the Committee by the Board and one member co-opted by the Board in accordance with Regulations made by the Board. The Committees are mandated to employ such staff as may be required in the exercise of their mandate.

10. The local Committee shall identify the projects to be undertaken in its constituency and submit it to the Board in the prescribed format for consideration and approval.
11. A project management committee appointed in accordance to the provisions of the Act with the assistance of the relevant government department shall implement projects under the Act.
12. To enhance good governance in the management of the fund, part IX of the act, on offences and Penalties, a person who misappropriates any funds or assets from the fund or assists or causes any person to misappropriate or apply the funds otherwise than in the manner provided in the act commits an offence and shall upon conviction be liable to imprisonment for a term not exceeding ten years or a fine not exceeding four million shillings or both.
13. The Bill proposes to repeal Section 18 of the Public Finance Management Act, 2012 on the Guidelines on the administration of the Equalization Fund.

## CHAPTER TWO

### 2.0 SUBMISSIONS FROM STAKEHOLDERS

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

#### 2.1 SUBMISSION BY THE NATIONAL TREASURY

15. The National Treasury submitted its memorandum to the Committee on the Equalization Fund Bill (National Assembly Bills No.43 of 2019) through a letter dated 21<sup>st</sup> July 2020. In their submission, they stated the following-

16. **The Constitution in relation to Object and Purpose of the Bill:** - the main object and purpose of the proposed bill is to operationalize Article 204 of the Constitution; *to establish structures of directly administering the Equalization Fund and for connected purposes.*

Article 204(3)(b) provides that the *National government may use the Equalization Fund either directly or indirectly through conditional grants to counties in which marginalized communities exist.*

In view of this provision, the National Treasury opines that the Constitution has assigned the national government through existing structures the executive, powers to apply the Equalization Fund as contemplated in Article 204(3) (b) to provide basic services to marginalized areas.

17. Further, the Equalization Fund is one of the five (5) Funds established under the Constitution of Kenya, 2010. The other funds are the Judiciary Fund (Art.173), Consolidated Fund (Art.206), Revenue Funds for County Governments (Art.207) and Contingencies Funds (Art.208). They observed that Articles 204, 206 and 207 do not envisage the enactment of legislation to provide regulation and operation of the Equalization Fund, Consolidated Fund and Revenue Funds for the County Governments respectively. This would be in contrast with Articles 173 and 208,

which expressly require enactment of such legislation to provide for regulation and operations of the Judiciary Fund and Contingencies Fund, respectively.

18. Additionally, Section 18 of the PFMA 2012 gives powers to the National Treasury to administer the Equalization Fund. Consequently, this would require regulations or guidelines to put structures on the management/administration of the fund. It was against this backdrop that the National Treasury developed the Guidelines on the Administration of the Equalization Fund which were approved and published by Parliament in Gazette Notice No.1711 of 13<sup>th</sup> March, 2015 to provide for regulation and operation of the Equalization Fund.
19. However, the High Court on 5<sup>th</sup> November, 2019 quashed the Guidelines on the Administration of the Equalization Fund and directed that the Cabinet Secretary to the National Treasury should prepare an appropriate policy and/or instruments on the administration of equalization Fund that would be compliant with the recommendations of CRA as approved by Parliament, and the objectives of Equalisation Fund and devolution, as set out in the Constitution and enunciated in the Judgment.
20. In compliance with the ruling, the National Treasury constituted a multi-agency committee to develop the statutory instrument which, according to them was at advanced stages of completion. They submitted that the instrument would be shared with the committee in due course.
21. **On the proposal to Repeal Section 18 of the PFM Act, 2012** as contained under clause 40 and 41 of the bill which provides that the National Treasury to administer Equalization Fund, the National Treasury observed that it is only Section 18(1) that expressly provides that the National Treasury administers the Equalization Fund in accordance with Article 204 of the Constitution. The other sub sections have provided for matters beyond the day to day administration of the Fund such as maintaining of the fund account at the Central Bank of Kenya, transfer into and out of the Equalization Fund and safeguards to the fund account not to be overdrawn.

22. The matters relate to PFM and could only be legislated in the PFMA 2012 and not another legislation on the administration of the Equalization Fund. Such instrument should make reference to this section in the PFMA 2012. Furthermore, this Section and specifically, sub-section 4 and 5 provide for the requirement of the approval by the Controller of Budget on the withdrawal of funds from the Equalization Fund which is a Constitutional provision amplified by this section.
23. Chapter 12 of the Constitution requires that PFM matters be legislated in an Act of Parliament which is the PFM Act, 2012. Based on that, it was not in order to repeal Section 18 which goes beyond the day to day administration of the fund to provide safeguards as envisaged under Chapter 12 of the Constitution.
24. **Public Finance Management Act (PFMA), 2012 to prevail in certain matters- -** Section 24 gives powers to the Cabinet Secretary, National Treasury to among other things establish Public Funds. Section 6(f) provides that the PFMA, 2012 shall prevail in the event of another Act that is contrary to its provisions on matters among them- the establishment and management of public funds. In view of the provisions, the National Treasury opined that the Equalization Fund should be operationalized under Section 12 (2) (k) of the PFMA, 2012 which *empowers the Cabinet Secretary for finance to issue guidelines to national government entities with respect to financial matters and monitoring their implementation and compliance.*
25. In conclusion, the National Treasury submitted that the Equalization Fund had already been operationalized under Section 28 of the PFM Act, 2012 and Guidelines on administration of the fund should therefore be issued under Section 12(2)(k) of the PFM Act, 2012, and not through another act of parliament. Further, there was a legal opinion from the Hon. Attorney General that all public funds should be anchored under the PFM Act, 2012 and not any other legislation.

**2.2 SUBMISSION BY THE OFFICE OF THE CONTROLLER OF BUDGET**

26. The Office of the Controller of Budget submitted views on the Bill as contained in the table below-

SECTION	PROPOSED RECOMMENDATION	COMMENTS
7 <i>“Membership of the Board”</i>	Membership of the Board should be expanded to include representatives appointed by the County governments to represent the marginalized area	The amendment will provide an opportunity for the National and County governments to build synergy while working together in enabling the marginalized areas to achieve the intended purpose of the fund
10 and 11 <b>Functions of the Board vis a vis Powers of the Board</b>	The Chief Executive Officer as the secretary of the Board should be made the Administrator of the Fund	There is need for the Bill to appoint/designate an Administrator of the Fund who will undertake the roles of an Administrator of the Fund as provided for under the PFMA
	The Bill should separate the functions and powers of the Board and those of the Administrator of the Fund.	There is a need to align this provision to the general provisions under the PFMA on the functions of an Administrator of the Fund by

			separating the functions of the Board and those of the Administrator of the Fund
<b>20</b>	<b>Establishment of the Local Fund Equalization Committee for every constituency.</b>	The Bill should use and borrow from the already established administrative structures under the County Government Act instead of establishing a parallel Committee at the Constituency level.	This will ensure prudence in the use of public resources by using the already established administrative structure under the County Government Act. The structure's lowest unit is at the Ward level therefore there will be no need to establish a parallel structure at the Constituency level.  It will also ensure concerted efforts of both the National and County Government in the identification of projects for funding
<b>24</b>	<b>Submission of project proposals</b>	We recommend that the Bill makes provision of how the process will be aligned to the annual budget process.	The Bill provides that the Local Committee submit proposed projects within one month of the enactment of the Equalization Bill by the National Assembly.  It fails to provide for how the projects will be included in the Appropriation Act.

			As budgets are programme-based, budgets the identified projects need to be provided for within the Appropriation Act.
26	<b>Report to the National Assembly</b>	The Bill should be amended to allow copies of the reports to be submitted to the office of the Controller of Budget	The Controller of Budget grants approval for withdrawal from the Equalization Fund. Besides, the CoB is mandated to oversee budget implementation thus, pragmatically, the office should be supplied with copies of the reports.
31	<b>Annual estimates. The Bill has set aside 5% of the total allocation of the Fund to cater for administrative costs of the Board</b>	The per centum should be realigned with set under the PFMA Regulations.	The PFM Act provides for a standard 3% of the approved budget as an administrative cost. Thus, for uniformity with all other funds, there is a need to realign the percentage of the administrative costs to 3% of the approved budget.

## 2.3 SUBMISSION BY THE COUNCIL OF GOVERNORS

The Council of Governors submitted a memorandum on the Bill. The memorandum was as-

27. The COG opined that the Bill did not conform to the devolved structure of governance for lack of involvement of the County Governments in the implementation of the projects under the fund whereas the fund is meant for the benefit of marginalized counties. Further, the guidelines upon which the Bill was premised were declared null and void by the Court on 5<sup>th</sup> November 2019 in Constitutional Petition Number 272 of 2016 between the Council of Governors V. Attorney General & 2 others, Commission of Revenue Allocation, the Senate & 15 others enjoined as interested parties.

28. After the delivery of the judgment, the council wrote to the National Assembly on the 12<sup>th</sup> May, 2020 advising that the bill negates the interpretation of the High Court in its proposed mode of administration of the fund and the manner of implementation of the projects, as it does not assign any role to the county governments as the court advised. On that basis, the Council requested the national Assembly to withdraw the bill to allow room for the gazettment of a bill that conforms to the orders issued by the court, but the latter passed the bill notwithstanding the council's request.

29. Further, the council submitted the following specific comments on the bill:

Clause	Proposed Amendment	Justification
<b>Clause 3 Purpose and object of the Act</b>	The purpose and object of the Act is to - <i>a) Provide a framework for the indirect administration of the Equalization Fund as conditional grants as to counties defined as</i>	In line with the CRA recommendation the fund needs to be administered indirectly as conditional grants to marginalized counties. This position was echoed by the Court in Petition 272 of 2016



	<i>marginalized by Commission on Revenue Allocation</i>	between COG vs National Treasury and others.
	<p>Include the following purpose and object immediately after (c) to read as follows:</p> <p><i>(d) to establish structures for identification, selection and implementation of the Fund projects</i></p>	
<b>Clause 4 Application</b>	<p>Amend to read as follows</p> <p><i>Pursuant to Article 204(3) (b) of the Constitution, this Act shall apply to the indirect use of Equalization Fund 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 enjoyed by the rest of the nation, so far as possible</i></p>	The application ought to be aligned with the purpose and object of the Act provided for in Clause 3 above.
<b>Clause 7 Establishment of the Board</b>	<p>Include the following provision immediately after (g) to read as follows:</p> <p><i>(h) three persons nominated by the Council of Governors drawn from marginalized communities.</i></p>	The composition of the Board failed to take cognizance of representation of County Governments whose citizenry are beneficiaries of the projects from the fund. It was therefore

	<i>(i) two persons nominated to represent the marginalized communities.</i>	imperative to include representatives from the affected
	<i>(j) one person nominated by the pastoralists Parliamentary Group</i>	counties.
<b>Clause 10 Functions of the Board</b>	Amend (c) to read <i>Approving disbursements of funds from the Equalization Fund to the marginalized counties</i>  Include the following function immediately after (e) to read as follows: <i>(f) review the quarterly and financial and non-financial statements submitted to it by the Fund administrator.</i>	

**Further proposals by COG: Inclusion of the following structure in the bill**

30. The COG further submitted that the following structures be included in the bill for proper administration of the fund.

**1. Administration of the Fund**

**1.1 First level: National Level**

Fund administrator as designated by the CS National Treasury in line with regulation 20 (1)(i) of the Public Finance Management (National Government) Regulations which vests this role to the office of the Accountant-General.

**1.1.1 Secretariat**

The inter-governmental Relations Technical Department to provide secretariat services to the Fund Administrator. This will involve undertaking the following functions:

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**1.1.2 The fund Administrator shall:**

- a) Ensure that the earnings of, or accruals to the Equalizations Fund are retained in the Fund
- b) Appropriate Equalization Fund in line with the framework developed by the Commission for Revenue Allocation in the policy identifying marginalized areas
- c) In consultation with other stakeholders develop conditions for disbursements of Equalizations Funds to beneficiary counties
- d) In consultation with other stakeholders develop schedule to the County Allocation of Revenue Act of appropriated funds to beneficiary counties
- e) Issue guidelines in line with the policy on marginalized areas on project identification
- f) Receive approved funding proposals from Inter- Governmental Sub County Technical Committee
- g) Ensure that the money held in the fund, including any earnings or accruals referred to in (a), is spent only for the purposes for which the fund is established.
- h) Prepare financial statements for the fund for each financial year in a form prescribed by the Accounting Standards Board in line with section 84 of the PFM Act.
- i) Prepare quarterly and financial and non-financial statements for the fund in a form prescribed by Accounting Standards Board (section 85 of the PFM Act).
- j) Verify and evaluate project implementation.
- k) Manage, control and administer assets of the fund in such manner and for such purposes as best to promote the purpose for which it is established
- l) Determine the provisions to be made for the capital and recurrent expenditures under the fund.
- m) Receive any grants, gifts, donations or endowments and make legitimate disbursements therefrom.

## **1.2 Second Level: County Level**

### **1.2.1 County Executive Committee Member for Finance**

- a) The County Executive Committee Member for Finance shall consolidate all projects approved by the Sub County Technical committee (SCTC) and submit to the Fund Administrator for funding
- b) The County Executive Committee Member for Finance shall prepare financial statements for the fund for each financial year in a form prescribed by the Accounting Standards Board in line with section 84 of the PFM Act and submit to the Fund Administrator
- c) The County Executive Committee Member for Finance shall prepare quarterly financial statements for the fund in a form prescribed by the Accounting Standards Board (section 85 PFM Act) and submit to the Fund Administrator
- d) The County Executive Committee Member for Finance shall establish two committees, the Sub County Technical Committee (“SCTC”) at the Sub County level and the Project Identification and Implementation Committee (PIC) at the ward level which shall have representation from all the wards in the county.
- e) Prepare quarterly reports on funds received and implementation status of all projects financed by equalization Fund with a copy to the Fund Administrator and Commission on Revenue Allocation
- f) Prepare annual report on implementation all projects financed by the Equalization Fund with a copy to the Fund Administrator, Commission on Revenue Allocation and Parliament

#### **1.2.2 The SCTC shall:**

SCTC shall be chaired by the sub county administrator and shall undertake the following functions

- a) Receive project/funding proposals from respective project Identification and Implementation Committees

- b) Evaluate and approve all developments from the Project Identification and Implementations Committees
- c) Access the feasibility and cost all the project proposals received from the Project Identification and Implementations Committees
- d) Submit the project proposals and funding received from the Project Identification and Implementations Committees to the County Executive Committee Member.
- e) Monitor all projects being undertaken and ensure they meet the objectives they originally meant to achieve;

### **Composition**

1. Sub- county administrator
2. A maximum of four (4) technical officers from ministries relevant to funding priorities
3. The chairs of Project Identification and Implementations Committees within the sub county

### **1.2.3 The PIC shall**

Be chaired by the assistant Sub County Administrator,

### **Functions**

- a) Undertake public participation, in beneficiary areas
- b) Identify and prioritize project in beneficiary areas in line with guidelines issued by the Fund Administrator
- c) Prepare and submit project/funding proposals to SCTC
- d) Provide oversight on project implementation

### **Composition**

- a) Assistant Sub County Administrator
- b) The villager administrators of areas defined by the Commission on Revenue Allocation as marginalized
- c) A representative of the women, youth, minorities and PWDs

## 2. Mode of disbursement as Conditional grant

Single line item in the Division of Revenue Act then as conditional grant annexed in a schedule to the County Allocation of Revenue Act

## 3. Period/term of office

The Fund Administrator, and the Chairs of SCTC and PIC shall be equivalent to the duration of the policy.

### 2.4 SUBMISSION BY THE INTERNATIONAL BUDGET PARTNERSHIP-KENYA

31. The International Budget Partnership – Kenya Chapter (IBP-K) submitted a memorandum on the Bill. In the memorandum, the following concerns and recommendations were raised-

Clause/ Issue of concern	Recommendation	Justification
<b>Clause 7</b> The Equalization Board does not have any representation from the counties where the funds will be spent.	Include representation from the Council of Governors, whose section MUST be from one of the counties identified in the Marginalized policy, prepared by the Commission on Revenue Allocation	The projects that are to be funded through the Equalization Fund should be generated by the communities in the marginalized areas. Therefore, the board should have representation from the counties to ensure there are clear processes on how communities will be included in the process.
<b>Clause 20</b> In subclause (2), Men, Women and by extension Youth, are accorded two opportunities each.	Amend subclause (2) (d) to follow similar structure and provision as (2) (b, c). Amend subclause three to have eight members. Amend the	By doing so, a fair playing ground and enabling environment is created for fair decision making outcomes on the basis of representation.

<p>However, Persons with Disability has one slot. That marginalizes this segment on matters that are to put on vote or any consideration where numbers are needed</p>	<p>clause 20 by deleting subclause 22 to ease the burden of unnecessary costs on the fund through wage bill.</p>	<p>Advice or provide for the collaboration between the committee and existing structures county governments receiving benefitting from the fund.</p>
<p><b>Clause 23</b> The identification of projects seems to be unclear and heavily dependent on the Local Committee. Despite receiving presentations from the marginalized communities, there doesn't seem to be a lot more involvement in the projects.</p>	<p>There should be a clear mechanism for the local committee to receive submission from the marginalized communities, preferably a public meeting and or written submission. Selection should be on the basis on consensus. Proper records on the process of identification should be kept and made public.  Merging of clause 23 and 27 to avoid duplication of roles</p>	<p>Lack of clarity on the mechanism identifying projects creates room for community 'gate keepers' to the advance their selfish interests in the name of marginalized community</p>
<p><b>Clause 25</b> Neither the Local Committee nor the Board is provided with the main criteria for selection of project for funding</p>	<p>There should be a statement to ensure that projects selected by the board adhere to and promote equitable development - which is the main objective of the fund.</p>	<p>Need to include a section that guarantees that the projects selected will improve the five indicators expounded in the 2019 marginalization policy and only the target locations. These are:</p>

		<ul style="list-style-type: none"> <li>• Access to safe drink water,</li> <li>• Use of improved sanitation</li> <li>• Use of electricity;</li> <li>• Net primary school attendance rate and</li> <li>• Secondary school attendance rate</li> </ul> <p>Therefore, the template to be prepared should provide a section on justification for selection of projects with data from credit institutions, incidences and observations of the community related to the five indicators</p>
<p><b>Clause 26</b></p> <p>This clause compels the Equalization Fund Board to submit a quarterly report only to the National Assembly</p>	<p>The Equalization Fund Board should publish and publicize the implementation report on a quarterly basis</p>	<p>This is not only a requirement of PFM Act but also a measure to strengthen public oversight of the fund. In addition, citizen knowledge of the progress of projects will prevent duplication of the County Budget.</p>
<p><b>Clause 27</b></p> <p>A project management committee is introduced at this point. It is highly likely that they are not involved in</p>	<p>The project management team should be engaged at an earlier stage so that they are involved in the process of identification of projects.</p>	<p>The success of projects is higher when implemented by those who were involved in its identification and design. In the case where a team is put in place after identification, the</p>



<p>identification of the projects. This can affect delivery of the chosen projects.</p> <p>The bill is short of details on selection criteria of the PMC and their roles and responsibilities. Other issues that are not clear are:</p> <ul style="list-style-type: none"> <li>• Will the PMC manage the funds at the project level?</li> <li>• Is the government department mentioned a county or a national one?</li> <li>• Who is the accounting officer in this case?</li> </ul>	<p>The money should have been disbursed to the county government as a conditional grant with a schedule of projects to be implemented.</p>	<p>may miss the spirit of the project which may jeopardize the delivery of the project</p>
<p><b>Clause 39</b></p> <p>The Cabinet Secretary has the power to make regulations to enable the carrying out of provisions of the Act</p>	<p>There is need to have a timeframe within which the Cabinet Secretary must make the regulations</p>	<p>If there is no timeframe for the regulations to be put in place, there is a risk of them being over delayed as has been the case with other laws like the PFM Act which had its regulations developed three years after it came into force.</p>
<p><b>Schedule 2</b></p>	<p>Any officer of the Board should not be allowed to</p>	<p>Allowing an officer who has interest in a particular contract to be part</p>

<p>Schedule 2 (1) (2) (3) Seems to allow and permit conflict of interest. An officer of the Board should not be permitted to have any dealings with the Board where they stand a chance to benefit financially or otherwise</p>	<p>engage in any dealings with the board at all.</p>	<p>the proceedings is a violation Article 75 of the Constitution Kenya.</p>
<p><b>PART V: Identification and consideration of projects</b></p> <p>There is no linkage with the County Government budget process for complementarity.</p> <p>This clause is open and left discretionary to the fund board. The board may or may not approve a project from the committee.</p>	<p>The process of project identification needs to be intertwined with the public participation under the County Budget Process.</p> <p>For efficiency and complementarity, the process of identifying projects should be undertaken simultaneously with the County Budget process.</p> <p>To tighten this, the bill should provide the basis and criteria by which projects are identified/selected, approved or rejected.</p>	<p>Without a proper and structured means for project selection, the board will have the discretion to reject projects as they wish.</p>

## 2.5 SUBMISSION BY THE INSTITUTE OF PUBLIC FINANCE KENYA (IPF-K)

32. The Institute of Public Finance Kenya (IPF-K) submitted their memorandum on the Bill. In their submission, they observed and recommended as follows:
33. **Most recent audited accounts of revenue approved by the National Assembly are too old:** The bill states that the fund shall comprise one half percent of all revenue collected by the national government based on the most recent audited accounts. However, according to Commission on Revenue Allocation, the most recent audited accounts currently in use for revenue sharing are for FY 2014/15, yet the government has wound up on the implementation of the FY 2019/20. Analysis indicates that Kenya's revenue has been increasing over the years. Therefore, using audited accounts for the FY 2014/15 to determine allocations for FY2020/21 failed to capture the true position of the public revenues. They therefore recommended that the Commission on Revenue Allocation in collaboration with the National Treasury should consider using the actual revenues collected in the previous financial year to estimate the amount for the fund instead of the audited accounts as proposed in the Bill.
34. **Lack of disclosure on when the Cabinet Secretary may make regulations for operationalization of the fund:** Part X of the Bill provides that the Cabinet Secretary may make regulations for the better carrying into effect the provisions of this Act. These regulations would prescribe the way the selection and the qualification of members of the local committee. However, the timeframe within which the regulations may be made was not provided hence undermining the principle of transparency in application of public finance. The IPF-K recommended that the bill should provide the timeframe within which the regulations would be in place to promote transparency. This would also help in the operationalisation of the Board and smooth running of the Fund.

**35. Identification of Projects:** Part V of the Bill provides that the local Committee shall identify the projects to be undertaken in its ward based on presentations from marginalized communities within the ward. The way the presentations should be submitted are not laid down in the bill. They therefore proposed that the Senate to ensure that the local committee observe the principles of public participation as laid down in the constitution of Kenya 2010 and the Public Finance Act, 2012. Further, the Senate should ensure that there is a monitoring and evaluation framework in place. This would ensure that there was proper prioritization of projects identified and there would be value for money.

## CHAPTER THREE

### 3.0 COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

#### 3.1 OBSERVATIONS

The Committee, having considered the bill and the submissions from various stakeholders, made the following observations-

- a) The Bill intends to operationalize Article 204 of the Constitution by providing a framework for the administration and management of the equalization fund;
- b) The Bill proposes an establishment of a Board. However, the composition of the Board as proposed will be dominated by Principal Secretaries of various ministries.
- c) The Bill does not provide a criteria which may guide in the selection of the projects. The criteria would enable the Board in determining the final decision concerning a project that has been selected by the Local Committee;
- d) The proposal to establish local committees with mandate of project identification, and project implementation Committees would lead to increased administrative costs.
- e) The Bill proposes that the projects should be identified after appropriation of funds. This would be against the spirit of programme based budgeting and may lead to inappropriate expenditures. The functions of the board, as proposed in the Bill, seems to be intertwined with the roles of the fund administrator.
- f) The Bill does not recognise the office of the Controller of Budget as one of the recipients of the report on expenditure of funds. This would hinder this office from adequately reporting to Parliament as required by Article 228(6) of the Constitution.
- g) The Bill proposes deletion of section 18 of the Public Finance Act, 2012, yet there are some provisions in this section which are not provided in the Bill.

### 3.2 RECOMMENDATIONS

1. Clause 3 and 4 should be amended by deleting the word 'direct'. This is because the Article 204(3)(b) provides that fund may be expended either directly or indirectly.
2. In order to ensure the Board is inclusive and not dominated by Principal Secretaries from various ministries, clause 10 should be amended such that the board consists of-
  - a) the Principal Secretary responsible for matters relating to finance who shall be the chairperson;
  - b) the Principal Secretary responsible for matters relating to devolution or a representative designated in writing;
  - c) two persons nominated by the Council of Governors;
  - d) the chairperson of the Commission on Revenue Allocation or a representative designated in writing;
  - e) two persons not being public officers and of the opposite gender, appointed by the Cabinet Secretary;
  - f) one person who is a member of Institute of Certified Public Accountants of Kenya but not being public officer; and
  - g) the Administrator of the Fund who shall be the secretary to the Board and an ex-officio member of the Board.

The persons nominated under (c), (e) and (f) shall be appointed by the Cabinet Secretary, National Treasury by notice in the *Gazette*.

3. Clause 10 be amended to distinguish the functions of the Board and roles of the administrator of the fund. Thus, the clause be amended to provide the function of the Board as follows-
  - (a) advise and make recommendations to the Cabinet Secretary on the distribution of resources for the provision of basic services to marginalised areas under Article 204 of the Constitution in line with the recommendations of the Commission on Revenue Allocation;

- (b) consider and approve projects proposed by the county executive committee member;
  - (c) oversee, in consultation with the County Governments, the implementation of the projects to ensure compliance with the Constitution;
  - (d) monitor and evaluate the projects implemented by County Governments to determine their impact on the delivery of basic services contemplated under Article 204 of the Constitution;
  - (e) put in place measures for transparency and accountability in the implementation of projects by County Governments;
  - (f) establish a framework for collaboration between the National Government and County Governments in the implementation of projects;
  - (g) review the consolidated quarterly reports prepared by the officer administering the Fund on the implementation of the projects and make appropriate recommendations to the Cabinet Secretary;
  - (h) review the annual estimates of expenditure of the Fund for approval by the Cabinet Secretary;
  - (i) undertake project public participation in line with Article 201 of the Constitution; and
  - (j) carry out such other functions that may be necessary for the achievement of the objects and purposes of this Act or that may be conferred by any other law.
4. Introduce a new clause which provides the functions of the administrator of the fund as follows-
- (a) open a separate account at the Central Bank of Kenya into which all monies raised shall be paid into;
  - (b) operate and maintain the bank account in (a) above, in a manner as prescribed by the National Treasury from time to time;
  - (c) consult with Cabinet Secretary and the Board on matters relating to the administration of the Fund;

- (d) disburse monies related to approved projects from the Fund;
  - (e) keep proper books of account in relation to the operation of the fund;
  - (f) prepare a quarterly report on the receipts and withdrawals out of the fund and transmit the same to the cabinet secretary; and
  - (g) prepare and submit to the Auditor-General a statement of accounts within three months of the end of each financial year;
5. To ensure the administrative costs are minimal, there is need to use already established administrative structures in identification and implementation of the projects. Thus,
- a) Clause 20, 21 and 22 should be deleted.
  - b) Amend clause 23 as follows-
    - (a) The county executive committee member shall be responsible for identifying projects to be financed by the Fund.
    - (b) In determining and identifying projects or programmes for the provision of basic services and financing under the Fund, the county executive committee member in each of the County Governments in which are found marginalized areas identified by the Commission on Revenue Allocation shall take into account—
      - i. the recommendations of the Commission on Revenue Allocation and the Board;
      - ii. the projects or programmes required to be implemented on a priority basis in line with the recommendations made under paragraph (a);
      - iii. existing or ongoing projects or programmes whose implementation would meet the objectives for the delivery of the identified basic services under Article 204;
      - iv. the cost of implementation relative to projects or programmes whose implementation would meet the objectives;
      - v. the submissions received pursuant to public participation undertaken under this Act; and



- vi. the annual development plan prepared by the County Government under the Public Finance Management Act.

6. To streamline the process of identification of projects, submissions of selected projects to the Board and implementation of the projects, the following new clauses should be introduced-

**a) 23A.** The county executive committee member shall, upon the identification of projects and programmes, prepare a workplan setting out —

- (a) a schedule together with the feasibility and cost assessment of projects and programmes for implementation under the Fund;
- (b) a technical assessment of the viability of the projects and programmes;
- (c) a report on the public participation undertaken during the process of identification of programmes;
- (d) an assessment of the manner in which the programmes or projects would be expected to address the shortcomings identified by the Commission on Revenue Allocation in the provision of the identified basic needs;
- (e) an assessment of how the programmes and projects identified impact on the County Integrated Development Plan; and
- (f) the approximate cost of the works to be undertaken in relation to a project or programme identified in the workplan

**(b) 23B.** (1) The county executive committee member shall submit a workplan prepared under section 23A to the respective county assembly for approval within seven days.

(2) Where the county assembly fails to approve or reject the workplan submitted under paragraph (1) within fourteen days, the workplan shall be deemed to be approved.

**(c) 23C.** (1) The county executive committee shall, upon approval submit the workplan to the Board.

(2) Upon receipt of the workplan, the Board shall –

(a) appraise the workplan to ensure compliance with the Constitution and recommendations made by the Commission on Revenue Allocation; and

(b) identify and approve the programmes or projects that require to be implemented on a priority basis; and

(3) Where, the Board finds that the workplan does not sufficiently address the needs identified by the Commission on Revenue Allocation or meet the criteria set out under the Regulations, the Board shall inform the county executive committee member in writing setting out the specific information that is required.

7. Consequently, clause 24 and 25 should be deleted.

8. To promote transparency and accountability on implementation of the fund, quarterly reports should be submitted to relevant institutions. Thus, **clause 26** should be amended as follows-

**26.** The Board shall submit, on a quarterly basis, a report to Parliament detailing—

(a) a summary of the project and programmes approved for financing in the preceding year indicating the funding status of such projects, if any;

(b) a summary of the status of disbursements of funds to the various projects and implementation progress;

(c) a summary of the status of disbursements from the Fund to the respective county governments involved in implementation of any projects financed from the Fund; and

(d) any restriction imposed on a county government involved in the implementation of the projects or programmes by the county government

9. Following the proposal above on implementation of the projects, **clause 27** should be deleted.

10. To align the allowed administrative expenses of the Board with the provisions in Public Finance Management Act, clause 31(5) should be amended by replacing 'five per centum' with '3 per centum'.

11. Noting that Commission on Revenue Allocation had released two policies on marginalization, the Bill should be specific on which financial years each policy would apply. Thus, an introduction of a **new clause 43** that-

'The Board shall ensure that any amount earmarked for expenditure on projects identified pursuant to the first and second policy prepared by the Commission on Revenue Allocation shall be finance the projects or programmes as identified.

12. Clause 40 should be amended such that it amends section 18 of the Public Finance Management Act, 2012 on subsections which have been provided for in the bill.

## APPENDIXES

- (a) **Committee Stage Amendments**
- (b) **Minutes of the Committee sittings**
- (c) **Submission from Public Institutions and Members of Public**

