



**The Speaker,
Kenya National Assembly,
P.O Box 41842 - 00100, Nairobi – Kenya,
Parliament Buildings**

Tuesday, 15th October 2013

Ref: Memorandum to the National Assembly on the Statute Law (Miscellaneous Amendments) Bill 2013

We, the undersigned, as citizen of Kenya and representatives of the Parliamentary Initiatives Network (PIN) draw the attention of the House to the following proposed amendments to the County Governments Act 2013, Transition to Devolved Government Act 2012 and Public Finance Management 2013 through the The Statute Law (Miscellaneous Amendments) Bill 2013, which may have a deleterious effect on the County Governments in Kenya.

The Bill is an omnibus amendment Bill seeking to amend several pieces of legislation as enacted by Parliament. It has been developed and published by the Attorney General of the Republic. This memorandum will only restrict itself to provisions of the Bill that seek to amend the Transition to Devolved Government Act, Public Finance Management Act and the County Government Act.

i) Proposed amendments to the Transition to Devolved Government Act

a) Section 23 (5A) on capacity strengthening when a function is transferred

This Clause requires the national government to strengthen the capacity of a county government to perform a transferred function under section 24 of the Act.

The bill seeks to regularise the block transfer of functions whilst clarifying the mandate of national government to provide capacity to the county. This is a positive provision as it seeks to enhance the capacity of county governments to perform transferred functions. It further places responsibility on the national government and the Authority to enhance county government capacity.

b) Amendment to Section 24 (1) to provide for application of national laws in the absence of county legislation

The Clause seeks to permit the application of national legislation in counties in the absence of county legislation.

This proposal is untenable. National legislation on its own right is applicable in counties by dint of Articles 94 and 191 of the constitution. National legislation cannot however replace the legislative authority of counties as set out in Article 185 of the Constitution. This provision vests county legislative authority on the county assembly. The Constitution in the transitional provisions could have made that provision but since it did not, an Act of Parliament cannot so legislate. Needless to say the supremacy of the Constitution in Article 2 cannot be overemphasized and any law that is unconstitutional is null and void.

c) Amendment to section 24 (1) paragraph (h) to allow for the application of national development plan in respect to a county to apply with necessary modification

This Clause aims at filling a void created by the absence of a county development plan. It gives the national government development plan to be applied in the absence of a county plan.

The proposal though sound goes against the spirit and objectives of devolution as captured in Article 174 of the Constitution. Amongst the objectives of devolution set out in the Article 174 are to give powers of self-governance to the people and enhance the participation of the people in the exercise of powers of the State and in making decisions affecting them; to recognize the right of communities to manage their own affairs and to further their development. A national development plan may not be responsive to the interests and needs of the local people as envisaged in the Constitution.

The proposed amendment is therefore foul of these objectives of devolution and should not be adopted. National government can implement its development plan using its own resources without substituting its plan with county resources.

d) Amendment to Section 37 (1) to dissolve the Transition Authority

The Clause seeks the dissolution of the Transitional Authority and in its mandate be executed by the Intergovernmental Relations Committee established by the Intergovernmental Relations Act.

This fact may be informed by the Transitional Authority's poor performance in managing the transition so far. However, the Intergovernmental Relations Act 2012 does not deal with numerous transition issues which are addressed comprehensively in the Transition to Devolved Government Act such as civic education, human resource and assets audits and transfers. It also does not address capacity building, audit of liabilities and other **critical transition activities which may fall through the cracks and bog down county governments through the transfer of inefficiencies and unaudited liabilities.** Whereas we do not oppose the dissolution of the Transitional Authority, we urge the house to ensure that pending transition activities are effectively reassigned.

Section 12 (b) of the Intergovernmental Relations Act gives the Technical Committee the function to take over the residual functions of the transition entity established under the law relating to transition to devolved government after dissolution of such entity.

The proposed amendment in the Bill has sought to fast track the dissolution of the Transitional Authority though the IRA had envisaged that at some point it would be dissolved and its functions performed by the Intergovernmental Relations Technical Committee.

The proposed amendment makes reference to the Intergovernmental Relations Committee established by the Intergovernmental Relations Act while the IRA has established the Intergovernmental Relations Technical Committee. The two entities are different in law. The proposed amendment makes reference to an entity not established in the IRA.

Amend this provision by including the term "Technical" in the Committee as used in the IRA.

ii) Proposed Amendment to the County Government Act

a) Amendment to Section 54 to entrench professional bodies in the county intergovernmental development consultative forum

The County Government Act makes extensive provision for public engagement:

Part VI provides for the establishment of decentralised units of county governments, the lowest unit of which will be the village.

Part VIII provides the foundation for public participation and County governments are expected to establish appropriate mechanisms.

Part IX also requires the county governments to establish an effective communication and access to information framework.

Part X compels the county government to undertake continuous and systemic empowerment of citizens through civic education.

Part XI provides for public participation in the county planning process

Part XII provides for public engagement in service delivery.

The bill seeks to amend section 54 of the County Government Act 2012 to entrench professional bodies in the county intergovernmental development consultative forum. **This move is counterproductive to wider public engagement and is likely to open the up county development to commercial interest of the private sector actors and professional bodies.**

Counties should be supported to operationalise the extensive public engagement provision of the Constitution for public engagement for all stakeholders through guidelines on the same. We urge the house to withdraw this amendment.

b) Other proposed amendments

Proposed Amendment	Proposal	Rationale
Section 21 (4) delete the word "Commission" and substitute therefor the word "Council"	Delete this amendment	There is no such term "Commission" used in the section referred to
Section 4(2) insert the word Committee	Sound provision	Meant to ensure proper citation of body
Section 5(2) delete the word "establishment and staffing"	Sound provision	Grammar use
Section 26 (2) Delete the word "fifteen" and substitute the word "ten"	This amendment has been overtaken by events a first review had taken place	It is of no legal effect
Section 32 (1) insert the word "first "	Sound provision	Ensures precision
Section 38 insert the word "first"	Sound provision	Ensures precision
Section 45 (4) insert the word "the"	Sound provision	Grammar use
Section 46 (2) insert the word "departments"	Sound provision	precision
Section 59 (2) delete expression "(1)(a) and substitute "(1)(b)"	Sound provision	Certainty
Section 81(3) delete the word "the" and substitute with "this"	Sound provision	grammar
Section 88(3) delete expression "section 88" and substitute with "this section"	Sound provision	grammar
Section 121 (2) delete expressions "(a)" and "(e)" and substitute therefor expression "(b)" and "(f)"	Sound provision	Precision. Remedy wrong citation
Add a new section 139 to	Amend to make the	People participation is key in

provide for application of existing laws to facilitate tax and rate collection	application of the existing laws mandatory. The term used is "may". Use the term "SHALL". The amendment should also include a time frame within which counties must develop their own revenue legislation failure to which they shall not be able to collect revenue	county administration and it is important that laws levying tax and rates are developed by their representatives in the new dispensation with only limited referral to the old legal order for transitional purposes.
First Schedule delete the expression "31", "33" and "39" and substitute the expressions "30" "32" and "38".	Sound provision	Precision

iii. Proposed Amendments to the Public Finance Management Act

a) Amendment to Section 5(1) for the National Assembly to have a say in the establishment by county governments of county corporations and authorities

The National Assembly seeks to have a say in the establishment by county governments of county corporations and authorities. This provision is unconstitutional because Article 6(2) provides that county and national government are distinct. The National Assembly therefore has no basis for assuming the oversight functions constitutionally assigned to the county assembly under article 185(3).

We urge the National Assembly to support county government accountability through exhaustive regulations and reporting requirements. We urge the house to withdraw this amendment.