



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

Tuesday, 15th October 2013

Ref: Memorandum to the Senate on The County Governments (Amendment) Bill, 2013 and 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** through the County Governments (Amendment) Bill, 2013 and the **Transition to Devolved Government Act 2012** through the The Statute Law (Miscellaneous Amendments) Bill 2013 which is both undesirable and unconstitutional and if passed will have a detrimental effect on the of County Governments in Kenya.

i. Proposed amendments to the County Governments Act

a) Section 111A on establishing County Development Boards

This Bill has been tabled before the Senate and it seeks to amend the County Governments Act, 2012 by introducing a new Section 111A which aims at establishing County Development Boards in all the 47 counties. The Bill sets out the composition of the Board to include inter alia, Senators from the County, Members of Parliament, identified representatives from the County Executive and the County Assembly. The Bill also curiously sets out the functions of the Board which includes inter alia, to provide a forum at the county level for consultation between the national government and the county government; coordinate and harmonize county development plans and projects; consider and adopt county integrated development plans before they are tabled in the county assembly for

approval; consider and adopt county plans for cities and urban areas before they are tabled in the county assembly for approval; consider and adopt the county annual budget before it is tabled in the county assembly for approval and perform any other functions related to the mandate of the Board.

The Law

In determining the legality and veracity of this Bill we must consider it in light of the provisions of the Constitution and other relevant Acts of Parliament.

i) Establishment of the Board

This Bill seeks to establish a County Development Board comprising all the legislative representatives of the county, the speaker, majority, minority leaders of the assembly, county assembly members for finance and planning, budget with the governor, deputy governor and chair of the CPSB as the only members of the Executive. It attempts to establish a body that will superintend over the county executive in a manner not contemplated in the constitution. The National and County legislature would seize the constitutional mandate of the county governments contrary to the doctrine of separation of powers and the principle of distinctness enshrined in article 6(2) and mechanism for cooperation between national and county governments Article 189.

Article 1 (3) of the Constitution provide that sovereign power under the Constitution is delegated to the stated State Organs which include the national executive and the executive structures in the county governments and they are expected to exercise their functions in accordance with the Constitution. Article 183 (1) of the Constitution sets out the functions of the County Executive Committees which include inter alia, to manage and coordinate the functions of the county administration and its departments.

Recommendation

The upshot of the above cited provisions of the Constitution negates the spirit of the Constitution and offends the structure of devolution as set out in the Constitution. The Constitution only recognize the County Executive and the County Assembly as the principal structures of devolved governments. Establishing another structure not specified in the Constitution through an Act of Parliament will therefore be unconstitutional. If such a structure were to be established by law, that law must be the Constitution. In the absence

of a constitutional amendment, the only other way to establish such a structure as proposed in the Bill is through an informal or ad hoc process where county leaders can meet to deliberate on county issues and development.

ii) Functions of the Board

The Bill attempts to assign specified functions to the Board which includes functions relating to the approval of county development plans and county budgets. It provides that such can only be presented to the County Assembly upon approval of the Board. In other words, the Governors will be required to develop the plans or budget and present it to the Board for approval before the Assemblies can debate and approve. Hypothetically does it therefore mean that if the Board does not approve a county development plan or budget then the same cannot be presented before the Assembly? Such an eventuality offends the structures of devolution as already pointed out but further also violates certain provisions of the County Government Act and the Public Finance Management Act.

The Public Finance Management Act, Section 104, sets out the preparation of county annual budgets as one of the functions of the County Treasuries. Article 185 of the Constitution vests oversight of the County Executive on the County Assembly and the Bill cannot therefore take away this function from the Assembly and vest it on the Board.

Further Section 125 of the Public Finance Management Act sets out the procedure for the development and approval of county budgets. It does not envisage a role for the Board whatsoever. The Bill in its present form does not seek to amend the Section 125 of the PFM Act. The upshot is that there will be two pieces of legislation regulating the same matter from Parliament.

Section 126 of the Public Finance Management Act vests Counties with the responsibility of developing county development plans and laying the same before the Assembly for approval. The Bill does not seek to amend this particular section in any way. If the Bill were to pass we will end up having two conflicting provisions of Acts on Parliament on the same subject matter.

Conclusion

The proposed County Governments Amendment Bill should be reworked to realign it with the cited constitutional and other statutory provisions as discussed above. Passing the Bill in its current form may violate the principles and structures of devolution as set out in the Constitution and provisions of other Acts of Parliament

ii. Proposed amendments to the Transition to Devolved Government Act

a) 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.