OPINION ON THE PUBLIC FINANCE MANANGEMENT (AMENDMENT) BILL NATIONAL ASSEMBLY BILL NO. 63 OF 2019

1. INTRODUCTION

The Chairman of the Budget and Appropriations Committee (National Assembly) caused the publication of the PFM (Amendment) Bill 2019. The Bill purports to address the challenge caused by failure to release monies to Counties due to delays in passage of the Division of Revenue Act (DORA). It introduces what it calls "interim measures" for the resolution of this challenge by introducing a new Section 191A in the Public Finance Management Act (PFMA) that will enable county governments to access and utilize 15% of national revenue "in line with Article 203(2) (*wrongly stated as Article 206(2) in the Bill*) of the Constitution".

2. ANALYSIS

(a) The Constitution and the Law on Revenue Division

The Constitution of Kenya addresses the issue of division of revenue in several Articles, the principal ones being Articles 202, 203, 216, 217, 218 and 224.

Article 202 provides that the revenue collected nationally must be equitably divided between the National and County governments.

Article 203(2) provides that the allocation to Counties in any year shall not be less than 15% of the national revenue on the basis of the last audited accounts approved by National Assembly.

Article 218 provides the process by which money is allocated to both levels of government as follows:

"(1) At least two months before the end of each financial year, there shall be introduced in Parliament

- *(a) a Division of Revenue Bill, which shall divide revenue raised by the national government among the national and county levels of government in accordance with this Constitution.*
- *(b) A County Allocation of Revenue Bill which shall divide among the counties the revenue allocated to the County level of government ...."*

Article 216 establishes the Commission on Revenue Allocation whose primary function is to recommend the allocation of revenue between the National and County governments and between County governments.

Article224 sets out the process of appropriation by County governments by providing that:

"On the basis of the Division of Revenue Bill passed by Parliament under Article 218, each county government shall prepare and adopt its own annual budget and appropriation Bill in the form, and according to the procedure, prescribed in an Act of Parliament'.

To ensure early resolution of these matters long before the end of the financial year, the PFMA then provides in Section 191 as follows: -

(1) Each year when the Budget Policy Statement is introduced (by the 15th of February-Section 25 PFMA), the Cabinet Secretary shall submit to Parliament a Division of Revenue Bill and County Allocation of Revenue Bill prepared by the National Treasury as provided in this Act for the financial year to which that Budget relates.
(2) The Division of Revenue Bill shall specify the share of each level of government of the revenue raised nationally for the relevant financial year.
(3) The County Allocation of Revenue Bill shall specify—
(a) each county's share of that revenue under subsection (2); and
(b) any other allocations to the counties, from the national government's share of that revenue, and any conditions on which those allocations shall be made.

(b) The proposed PFMA Amendment) Bill

The Amendment Bill provides the following:

i. It states that it is providing "interim measures" to allow County governments to access their "minimum share of revenue" guaranteed and "granted to them" by Article 203(2) of the Constitution pending the enactment of the Division of Revenue Act (DORA).

ii. It permits Counties to "access" the minimum amount of 15% of the revenue collected by the national government on the basis of the last audited accounts pending the passage of the DORA and the County Allocation of Revenue Act (CARA).

iii. It empowers the Controller of Budget to authorize withdrawal of the minimum amount of 15% from the Consolidated Fund on the basis that "the funds are already charged to the Consolidated Account" by virtue of Article 203(2)

iv. It purports to safeguard the 15% "guaranteed for allocation" from any further disagreement from both houses of parliament and possible defeat of the DORA as provided in Article 113(4).

v. It seeks to "ensure division of the 15% revenue share" in the event DORA is not passed.

vi. It provides the start date of the process of applying the "interim measures" as the 10th day of June by which time if the DORA is not passed, the Senate may, by resolution, divide the 15% of all national revenue according to the most recent formula as set out in the Constitution Article 217 within seven days.

vii. Within seven days after the Senate resolution dividing the monies, the Senate is required to forward a schedule to National Assembly on how the money has been divided between the counties.

viii. Seven days later, National Assembly may approve or not approve this schedule with or without amendments provided that such amendment can only valid if passed by a vote of 2/3rds majority.

ix. It provides that the resolution by Parliament on this allocation is binding and authorizes the Controller of Budget to approve disbursements of the allocation to Counties.

x. Based on the approved schedule by National Assembly, the Bill provides that each county is to prepare an interim budget and an Appropriation Act pending DORA and CARA.

xi. It provides that eventually when DORA is passed, it will take into consideration the amount disbursed to Counties.

xii. Upon passage of DORA and CARA, each county is then required by the Bill to prepare budgets and appropriation acts taking into consideration the amounts allocated in the interim period.

(c) Challenges with the amendment

While appearing to be well intentioned, the Bill fails to recognize that the same Parliament that is expected to pass the amendment Bill has been the cause of the crisis that Bill now seeks to partially resolve. As is clear from the discussion above, the Constitution and the PFMA provide both the Senate and the National Assembly with the tools to allocate monies to both the National and County governments in good time so as to forestall a crisis. If there was good faith in resolving the counties' financial crisis, and if it was felt that the existing legal provisions do not facilitate resolution within the timelines given by the Constitution and the PFMA, the appropriate option would be to amend the PFMA to provide a more effective mode of resolving the challenge. In this way the resolution of the crisis would still accord with the Constitution. It is absurd that instead of proceeding this way, Parliament is seeking to legislate an alternative process unforeseen by the Constitution and that would cause prejudice to County governments.

The Bill presents the following specific challenges

(a) It sets out an unconstitutional process for division of revenue not anticipated by the constitution. Among other things:

   i. It negates the extensive process of division of revenue set out in the constitution by allocating a numerically defined "guaranteed" allocation.

ii. It fails to recognize that the 15% of revenue in Article 203(2) is not a "protected / guaranteed allocation" but is a floor below which the allocation to counties every year cannot fall.

iii. It distributes monies to county governments without any reference to the constitutional criteria contained in Article 203 which is required by the said Article to be reflected in the division of revenue process and in "all national legislation concerning county governments…" In particular it fails to apply the criteria that take into account
   1. The developmental and other needs of Counties
   2. The need to ensure that Counties are able to perform their functions
   3. The need to ensure that Counties receive stable and predictable allocations of revenue

b. It prejudices Counties ability to offer services, at the very minimum at the level they offered services in the preceding year by effectively reducing their allocations which have historically been above the 15% floor. If the intention of the "interim allocations" had been to enable Counties perform their functions, a more realistic basis of these allocations would have been the amount allocated to Counties in the previous financial year as the same is based on Article 203 criteria.

c. While Article 216 states that the principle function of the Commission of Revenue Allocation (CRA) is to recommend the basis of revenue sharing between that National and County governments, and requires that the CRA be engaged in all manners involving the allocation of revenue to Counties, the Bill eliminates the role of the CRA in this division of revenue process.

d. It introduces an open ended unconstitutional process of revenue sharing and since the Bill anticipates no time lines for how long the interim measures will last, this "interim process" can easily morph into the norm and as the preferred means of revenue allocation by the National Assembly and the National government, causing prejudice to County governments.

e. It assumes as *fait accompli* that the national government has a right to appropriate money before the passage of the DORA and presupposes that only Counties have a constitutional challenge of appropriating money before the DORA and CARA are passed. This assumption and its application are against the principles set out in Article 6, 174, 189 and 190.

3. CONCLUSION

One the basic pillars of the Constitution of Kenya 2010 is the system of devolved government. The success of this system is predicated to a large measure by the sufficiency of resources that are allocated to Counties and the timeliness of the transfers of such allocations to County governments. The current scenario, where the delays in passage of the DORA leads to delays in County budgeting and consequently to delays in exchequer releases threatens the devolved system at its core.

This recurrent challenge requires a comprehensive solution that respects and affirms the Constitution in letter and spirit. A resolution of the matter whether interim or permanent must not have the effect of prejudicing the interests of County governments. The proposals contained in the proposed amendments, while purporting to assist Counties, have the potential to irredeemably damage the financial stability of Counties and the capacity of County governments to perform their constitutional mandates.

The PFM (Amendment) Bill 2019 undermines the significance of the division of revenue process consequently undermines devolution. The Bill should be opposed, and, in its place, the National Assembly should be requested to prepare and publish a Bill that facilitates resolution of the recurring stalemate division of revenue while respecting constitutional principles.