Statement on the Supreme Court Advisory Opinion on Division of Revenue Bill Stalemate

Introduction

On 15th May 2020, the Supreme Court issued an advisory opinion on the Division of Revenue Bill 2019 stalemate. The Council of Governors (CoG) and the 47 county governments asked for the advisory opinion after Parliament failed to enact the Division of Revenue Bill for the 2019 financial year. Without a Division of Revenue Act, county governments could not prepare and adopt their annual budgets and appropriation laws. Katiba Institute and The Institute for Social Accountability (TISA), who took part in the court action as amicus curiae (friends of the court), welcome the Supreme Court's majority opinion.

Facts

The 47 county governments and CoG sought an advisory opinion following the lengthy disagreement between the National Assembly and Senate over the Division of Revenue Bill 2019. The key point of contention between the two houses of parliament was on how much money should go to the counties. The two houses took hard-line positions; the Senate agreed with the Commission on Revenue Allocation (CRA) recommendation that Kshs. 335.7 billion be given to the counties, while the National Assembly aligned with the National Treasury, which proposed that the counties receive only Kshs. 310 billion. While the Division of Revenue Bill was stuck in the disagreements between the National Assembly and Senate, the National Assembly enacted the Appropriation Act.

In their application to the Supreme Court, the county governments also raised concerns about the National Treasury's inordinate delay in releasing funds to the counties, noting that they often do not receive funds until the end of the fiscal year. The counties argued that the delay violated the Constitution because it prevented them from implementing the programs included in their county budgets.

Issues for determination and advisory opinion

The CoG asked the court to offer an advisory opinion on the following issues:

1. Whether CRA recommendations are binding on both the National Assembly and Senate during deliberations concerning the Division of Revenue Bill.
2. What happens when the National Assembly and the Senate fail to agree on a Division of Revenue Bill, thereby triggering an impasse?
3. Whether there should be timelines by which the National Government release the equitable share of revenue to County Governments.
4. Whether the National Assembly can enact an Appropriation Act before the enactment of a Division of Revenue Act?

Advisory Opinion

1. **The CRA recommendations are not binding on the National Assembly and the Senate.** The two houses of parliament, however, cannot ignore or casually deal with CRA

recommendations; they are not ordinary suggestions or proposals, but recommendations from a Commission established under the Constitution. Although parliament and the CRA may not always agree on the equitable share of revenue due to county governments, both must be guided by the objective criteria under Article 203(1) of the Constitution.

2. **If there is an Impasse over the Division of Revenue Bill, the Supreme Court proposes that:**

   i. **The National Assembly should authorize counties to withdraw money from the Consolidated Fund.** The percentage of the money to be withdrawn shall be 50% of the total equitable share allocated to counties in the Division of Revenue Act of the previous financial year. However, if the amount exceeds the total equitable share proposed in the Division of Revenue Bill, the withdrawal amount should not be less than 15% of all revenue collected by the National Government. The Court urged Parliament to enact a law to give effect to these recommendations.

   ii. **Any person may petition the High Court for a declaration that Parliament has violated Article 258 of the Constitution if it fails to agree on the Division of Revenue Bill during a second mediation.** If the declaration is allowed, the Chief Justice would advise the President to dissolve Parliament, and the President would dissolve Parliament.

3. **Inordinate delay in the transfer of funds to counties by the National Treasury is a violation of the Constitution.** Although the Constitution does set timelines for the transfer of equitable share to counties, the National Treasury should not impulsively decide when to disburse these because the counties operate within rigid budget cycles. The National Treasury must justify and timely explain to counties why the funds have been delayed. The National Treasury violates the Constitution if its delay in releasing funds prevents the counties from implementing county projects as per their budgets.

4. **Parliament cannot enact the Appropriation Act before the Division of Revenue Act has been passed.** Section 39 of the Public Finance Management Act clearly states that the National Assembly cannot enact an Appropriations Act before enacting the Division of Revenue Act. Therefore, the estimates of revenue and expenditure the Cabinet Secretary submits to the National Assembly should be based on the national government share of revenue as provided for in the Division of Revenue Act.

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