

KO/PIN/L.2016/016

10th March, 2016.

**Mr. Jeremiah .M. Nyegenye,
Clerk of the Senate,
P.O Box 41842 - 00100,
Parliament Buildings,
Nairobi, KENYA.**

Dear Mr. Nyengeny,

REF: MEMORANDUM TO THE SENATE STANDING COMMITTEE ON LEGAL AFFAIRS & HUMAN RIGHTS ON THE CONSTITUTION OF KENYA (AMENDMENT) (NO.2) BILL 2013.

Warm greetings from the PIN Secretariat.

In the matter of consideration of the **Constitution of Kenya (Amendment) (No.2) Bill, 2013**, PIN made oral submissions of its proposals on the bill to the Legal Affairs and Human Rights committee on Wednesday 9th March 2016. Further to your call for memorandum as contained in the media, we hereby attach our memorandum addressing specific provisions of the bill, for further consideration by committee.

Sincerely,



**Kwame Owino,
CHAIRMAN, PIN STEERING COMMITTEE.**

cc. – Clerk, Legal Affairs & Human Rights

Introduction

The Equalization fund is established under Article 204 of the Constitution as an affirmative action fund targeted at marginalized counties. On 29th August 2015, the National Assembly passed the Constitution of Kenya (Amendment) (No.2) Bill, 2013, to Amend Article 204(2) and 3(b) of the Constitution of Kenya (2010). The Amendment Bill contends to take away the disbursement of the Equalization Fund from the purview of the national government and transfer it to the constituencies in which the marginalized areas exist. In effect, this move was meant to direct the Equalization funds to the constituency under the management of Members of Parliament.

From the foregoing:-

- i. The Bill does not tell Kenyans how the fund will be managed. It does not outline the structures that are there in the constituencies to govern the administration and or disbursement of the fund.
- ii. The Marginalization policy by Commission on Revenue Allocation (CRA) is based on counties and not constituencies and the policy is effective for three years before it's reviewed. The County Development Index (CDI) formula provided by CRA is based on the 14 counties shared in CRA marginalization policy.
- iii. Could the intention of the drafter be that the fund will be governed in the same manner the CDF is governed? If the intention is to give MPs these powers, then the bill must be reviewed against the recent court ruling on the management of CDF.
- iv. The Bill ignores the role of the Commission on Revenue Allocation (CRA) as outlined in Article 216(4) of the Constitution.
- v. The Bill contradicts guidelines adopted by Parliament, to guide on the Administration of the Equalization Fund.

PIN proposes the following specific amendments to the Bill:

Clause	Comment/Rationale	Recommendation
Clause 2(a)	<ul style="list-style-type: none"> • It deletes the 'National government' and consequently, leaves the usage of the fund to the discretion of Parliament from the National Government. 	This clause should be deleted and retain the Article as in the Constitution (2010).
Clause 2(b)	<ul style="list-style-type: none"> • The Bill deletes Article 204(3)(b) of the Constitution that provides for funds to be channeled to the counties and replaces it with a new Clause 2(b) that provides for funds to be remitted to the Constituencies. • The introduction of the language SHALL in clause (2) (b) changes the discretionary powers (MAY) in Article 204(3) of the CoK, by the national government in terms the usage and disbursement of the fund. This binds the national government to send money to the 	This clause should be deleted.

	<p>Constituencies rather than at their discretion to the counties.</p> <ul style="list-style-type: none"> • Further, this amendment proposes to transfer management of funds from the counties as it is in Article 204(3)(b) but fails to amend Article 216(5) which mandates the CRA to submit their recommendations on marginalization policy to County executive and county assemblies. 	
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Further, under the Memorandum of objects and reasons:-

- i. National government creates policy for the country. Further, they are meant to collect and disburse funds to ministries, department, agencies and county governments. As such, they should not be left out in the management and disbursement of funds, as this bill seeks to do, by transferring this mandate to the MPs at the Constituency.
- ii. The Constituencies are not considered as implementing units for government policy. Only the national government and county governments implement policies through the agencies.
- iii. No assessment has been done to confirm that Constituencies are better placed in comparison with other structures, in the implementation of policies and programmes.

Conclusion

We therefore call on the Senate to reject in totality the bill as passed by the National Assembly, and safeguard the letter and spirit of the Constitution by affirming the Equalization Fund be disbursed by the national government to the county governments to uplift the standards of marginalized areas.

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