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15th June 2015

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NAIROBI

Your

**RE: AN ADVISORY OPINION ON THE FRAMEWORK FOR CO-OPERATION
BETWEEN THE SENATE AND THE GOVERNORS**

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of democratic values and principles. Further, Article 59(2)(h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, while Section 2(1) empowers the

Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

In recent times, there has been a dispute between the Senate and the Council of Governors in relation to operations and nature of working relationship. In particular, the dispute relates to the establishment and composition of the County Development Boards and oversight by the Senate over County Governments. The dispute, which has been raging on for some time now, has led to a standoff which is likely to undermine devolution and good public administration. Pursuant to Articles 59(2)(h-k) and 252 of the Constitution and Section 8(f) of the Commission on Administrative Justice Act, the Commission commenced mediation process whereby the following issues for mediation identified:

- i) The respective roles and mandates of the Senate and individual Senators as leaders of their Counties, and those of Governors;
- ii) Proposals on a model for structured and meaningful involvement of Senators in County matters, without interference with the Executive functions of the County Government (the Governor);
- iii) Proposals on a model for structured involvement of Governors before passage of legislation affecting Counties, without interference with the legislative role of the Senate; and
- iv) Proposals on when and how the Senate should be involved in reports and recommendations by oversight bodies on finance.

The mediation process, however, could not be concluded within a reasonable period hence the Advisory Opinion by the Commission in line with Article 59(2) (h, i & j) of the Constitution as read with Section 8(h) of the Act, which we hope will address the issues and smoothen public administration in this respect.

A. PURPOSE OF DEVOLUTION

The primary purpose of devolution in the Constitution of Kenya is the promotion of good governance through decentralization of power, resources and representation. This is specifically provided for under Article 174 of the Constitution which outlines the objects of devolution being, *inter alia*:

- i) To promote democratic and accountable exercise of power;
- ii) To give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- iii) To recognize the right of communities to manage their own affairs and to further their development;
- iv) To promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- v) To facilitate the decentralization of State Organs, their functions and services, from the capital of Kenya; and
- vi) To enhance checks and balances and the separation of powers.

B. CONSTITUTIONAL PLACEMENT OF THE SENATE AND THE GOVERNORS IN DEVOLUTION

The Senate and Governors (County Executives) play distinct, but interrelated roles in the devolved system of government in Kenya. Both are the heart of devolution in the country. In relation to the Senate, its role in devolution is mainly provided for under Article 96 of the Constitution thus:-

- i) Representation and protection of the interests of the counties
- ii) Enactment of laws concerning counties
- iii) Determination of allocation of national revenue among counties in accordance with Article 217 of the Constitution [division of revenue]
- iv) Exercise of oversight over national revenue allocated to the counties
- v) Participation in the review of boundaries of counties in line with Article 188 of the Constitution

- vi) Participation in the process of suspension of county governments or termination of such suspension in accordance with Article 192 of the Constitution or determination of suspension of transfer of funds to county governments in line with Article 225(5)(b) of the Constitution.

Further functions of the Senate are:

- i) Participation in the impeachment of a Governor in line with Section 33 of the County Governments Act
- ii) Participation in the transfer of functions by determining an appeal by county governments against a decision by the Transition Authority rejecting the transfer of functions in accordance with Section 23 of the Transition to Devolved Government Act
- iii) Receipt and consideration of the Annual Reports of the Summit and Council of Governors in line with Sections 10(1) and 22(1) of the Intergovernmental Relations Act.
- iv) Consideration of the Annual Reports of Constitutional Commissions and Independent Offices or upon a Special Report submitted pursuant to request by the Senate on a particular issue in accordance with Article 254(1) and (2) of the Constitution.

In the performance of its functions, the Senate or any of its Committees has powers of the High Court to summon any person to appear before it for the purpose of giving evidence or providing information (Art. 125). It can also compel the production of documents and enforce the attendance of witnesses and examine them on oath, affirmation or otherwise among others.

In relation to the Governors, they are the chief executive officers of their counties, leading the counties' executives and administrations. Specifically, the Governors are responsible for:

- i) Implementation of county legislation
- ii) Implementation of any national legislation that requires implementation by county governments

- iii) Management of all county administrative affairs, including development of county policies and delivery of services to the people.

C. RATIONALE FOR CO-OPERATION

Although the Senate and the County Executives are two distinct State Organs, they are required under the Constitution and legislation of devolution to work closely with each other. In particular, Articles 6(2) and 189 of the Constitution call for co-operation and consultation between the national and county governments. In the context of Senate and County Executives, the need for co-operation and consultation becomes imperative for the following reasons:

- i) The Senate is mandated to represent and protect the interest of counties and their governments. Primarily, it has a special role in the enactment of legislation concerning counties and the allocation of revenue to the counties. This role inevitably requires the Senate and individual Senators to bring county concerns to the national level of government.
- ii) At the hearts of the roles of the County Governments (Governors) is the obligation to deliver services to their respective counties. This can be done only if the county receives adequate funds from the distribution of national revenue; if the laws the county must implement are reasonable; and if there is proper co-ordination and co-operation between the county and the national government. The Senate and individual Senators have a role in each of these areas.
- iii) An efficient and effective Governor and county government require to constantly be aware of national plans and policies. The Senators can be a valuable source of this information. In addition, the Senators may be crucial in facilitating county governments to negotiate with the national government for special assistance.
- iv) The Governors need to participate in the legislation and other activities of the Senate, as may be appropriate, to ensure that such laws and policies are reasonable and give effect to the principles and objects of devolution.

Although the co-operation and consultation is critical, it should be done in accordance with the principle of separation of powers, paying due regard to the constitutional caveat of respect for the functional and institutional integrity of each other. This requires a framework for meaningful engagement which respects the functions of each State Organ. This would not only enhance effectiveness, but also ensure accountability in the performance of duties.

D. FRAMEWORK FOR CO-OPERATION BETWEEN THE SENATE AND THE GOVERNORS

We have examined the proposals by Senate and Council of Governors, and the Office of the Controller of Budget and Office of the Auditor General (in respect of financial oversight by the Senate) on the various areas of co-operation between the two State Organs and advice as follows:

a) Participation of Senators in County Matters

While appreciating the efforts for ensuring the involvement of elected representatives in county matters, we note that such efforts have been ineffective. In this regard, we recommend that a consultative forum should be established at the county level to enable the Senators to effectively undertake their duty of representing the counties at the national level. This is especially important considering that the representation role of Senators is akin to that of an ambassador or intermediary insofar as ensuring that the voice of the counties are heard and represented at the national level. This platform should purely be advisory and consultative, and expressly state the roles of every member. The forum could take the form of the County Development Board established under the County Governments (Amendment) Act, No. 13 of 2014, but after proper consultation on the functions, membership and roles of every member of the Board. For instance, the Governors may be assigned the Chairmanship while the Senators are made Patrons of the Forums.

b) Participation of County Governments in Legislative Enactment

We noted the efforts of the Senate to involve county governments in matters that affect them. We also noted the concern by the Council of Governors that the involvement has not been sufficient and effective. Just like the preceding part above, it is important to ensure that the participation by county governments in legislative enactment respects the legislative function of the Senate. Accordingly, we advice as follows:

- (i) The Consultative Forum at the county level could be used as one of the ways of ensuring participation by county governments in matters under consideration by the Senate.
- (ii) There should be invitation to the county government through the Council of Governors, County Speakers Forum, County Secretaries and Clerks of Assemblies, to participate in matters relating to county governments under consideration by the Senate. Such invitation could be made from the conceptualization stage of Bills or other matters that originate from the Senate, and in relation to matters that originate from elsewhere like the National Assembly, they could take the form of targeted public participation by way of oral or written memorandum as may be appropriate. Where appropriate, meetings could be held between the Senate and the Council of Governors for further deliberations.
- (iii) The leadership of the Senate (Speaker and Clerk of the Senate) and that of the Council of Governors (Chairman and Chief Executive Officer) should hold regular consultative meetings to discuss issues of mutual interest to them.

c) Involvement of the Senate in Reports of Office of the Controller of Budget and Office of the Auditor General

The oversight role of the Senate flows from Article 96(3) of the Constitution which mandates it to exercise oversight over national revenue allocated to county governments. It should be noted that County Assemblies also have concurrent oversight mandate under Article 185(3) of the Constitution. The County Assemblies, therefore, have the primary responsibility with the Senate having a secondary or 'backstop'

responsibility. This approach is important in that it enables the County Assemblies to perform their oversight roles effectively without being overshadowed by the Senate. Having considered the proposals from the Senate, Council of Governors, Office of the Controller of Budget and the Office of the Auditor General, we advise as follows:

- (i) Within one month of receipt by the Senate and relevant County Assembly of a report of an oversight body:
 - a) The relevant County Assembly shall, through the appropriate Committee and in Plenary, consider the report and make recommendations thereon.
 - b) The Senate shall, through the appropriate Committee and in Plenary, consider the report with a view to identifying the emerging issues.
- (ii) The County Assembly shall, where it adopts the report of the oversight body, submit a copy of the report to the Senate
- (iii) The Senate shall consider the report of the County Assembly within 60 days of receipt thereof provided that such action shall only be taken after receipt of the monitoring report of the Action Implementation Plan from the oversight bodies.
- (iv) While identifying the emerging issues in terms of paragraph (1)(b), the Senate shall not commence an inquiry on the issues until the County Assembly has considered the report in terms of paragraph (1)(a) unless:-
 - a) the relevant County Assembly has failed to consider the report within the stipulated timeline;
 - b) it is evident that the consideration of the report has been marred by complicity or collusion between the County Assembly and the County Executive;
 - c) the action taken by the County Assembly is otherwise unsatisfactory;

- d) the emerging issues bring to the fore systemic or wanton levels of maladministration or misappropriation of funds;
 - e) the emerging issues are of public or national interest;
 - f) the Senate resolves to consider the report of the oversight body; or
 - g) issues referred to the Senate by the oversight bodies in the report of the status of implementation of the reports.
- (v) After the consideration of the report of an oversight body by the relevant County Assembly, the County Assembly or the oversight body may refer the report or aspects thereof to the Senate for consideration.
- (vi) In considering the report of a County Assembly or an oversight body, the Senate shall write to the Governor and invite the Governor to either appear in person or nominate such officer, not being below the level of County Executive Committee Member, to appear before the Senate to respond to the issues raised.
- (vii) The officer nominated under the foregoing paragraph may be accompanied by any other relevant officers.
- (viii) The Senate may require the personal attendance of the Governor where it is evident that the matters in question are of such a nature as to require the personal response of the Governor

In conclusion, we wish to reiterate the need for co-operation and consultation between the Senate and the County Governments in the execution of their respective mandates. To this end, we urge both State Organs to work closely with each other and seek to resolve their differences through mediation instead of the formal judicial process which ought to be the ultimate choice. It is our hope that this Advisory will go a long way in guiding the Senate and Council of Governors in taking appropriate action to addressing their differences, and may include effecting appropriate amendments of relevant legislation.

DATED this 15th day of **June 2015**

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