REPUBLIC OF KENYA

Paper Laid
By Hon. Mutava Musyimi, MP
Chair, Mediation Committee on the Division of Revenue (No.2) Bill 2017 on Thursday, June 15, 2017 (Am)

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PARLIAMENT OF KENYA

ELEVENTH PARLIAMENT – FIFTH SESSION (2017)

THE REPORT OF

THE MEDIATION COMMITTEE ON THE DIVISION OF REVENUE BILL, 2017

PURSUANT TO ARTICLE 113 OF THE CONSTITUTION

JOINT CLERKS CHAMBERS,
PARLIAMENT BUILDINGS,
NAIROBI.
JUNE 2017

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1.0 INTRODUCTION

1.1 Establishment of the Committee

The Mediation Committee on the Division of Revenue (No. 2) Bill, (National Assembly Bills No. 22 of 2017) was constituted by the Speaker of the Senate pursuant to Standing Order 154 (2) and the Speaker of the National Assembly pursuant to Standing Order 149(2) of the National Assembly and Articles 112 and 113 of the Constitution on 13th and 14th June, 2017 respectively comprising of the following members:-

1.	Hon. Mutava Musyimi, MP	- Chairperson
2.	Sen. (Dr.) Agnes Zani	-Vice Chairperson
3.	Sen. Mutula Kilonzo Junior	-Member
4.	Sen. Billow Kerrow	-Member
5.	Hon. Mary Emaase, MP	-Member
6.	Hon. Christopher Omulele, MP	-Member
7.	Hon. Richard Onyonka, MP.	-Member
8.	Sen. Beatrice Elachi	-Member

1.2 Mandate of the Mediation Committee

The Mediation Committee derives its mandate from the provisions of Articles 112 and 113 of the Constitution, Standing Order 149 of the National Assembly and Standing Order 154 of the Senate which outlines the functions of the Committee as follows:-

i. *To consider Bills where the Houses do not agree on all or any of the amendments made by either Houses;*

ii. *To consider Bills where either House rejects a Motion that a Bill which originated in the other House be read a Second or Third time; and,*

iii. *To attempt to develop a version of the Bill that both Houses will pass.*

The Committee was established to develop an agreed version of the Division of Revenue Bill, 2017 and in particular clause on equitable share for the counties. The version would then be presented to both Houses for approval as provided for under National Assembly Standing Order No. 149 (6) and Senate Standing Order No. 154 (6).

The specific substance of discussion by the mediation Committee was the county equitable share which the Senate had proposed an amount of Ksh. **314.7 billion** and the National Assembly an amount of **Ksh. 291.1 billion**.

1.3 Committee Meetings and Methodology

The Committee held a total of two (2) sittings to deliberate on the Division of Revenue (No. 2) Bill (National Assembly Bills No. 22 of 2017) in accordance with the Constitution and relevant provisions of the Standing Orders of the Senate and the National Assembly.

During the first sitting, the Committee appointed Hon. Mutava Musyimi, MP and Sen. Agnes Zani, MP as the Chairperson and the Vice-Chairperson respectively pursuant to Standing Order 154 (4) of the Senate and Standing Order 149(4) of the National Assembly.

At this meeting the Committee made reference to the report of the pioneering Mediation Committees that recommended that in future, the Chair of the mediation Committee should be elected from amongst members of the House that originated the Bill.

The Committee commenced its work by developing a statement of issues of concern raised that necessitated the rejection of Bill by the Senate. The statements comprised of the amendments made by the Senate to the Division of Revenue Bill, 2017.

Appended to this report is a version of the Bill developed by the Committee for consideration by both Houses.

1.4 Acknowledgements

The Chairperson, on behalf of the Committee, wishes to sincerely thank the offices of the Speakers and the Clerks of both Houses of Parliament for the support extended to it in the execution of its mandate. The Committee also thanks the Cabinet Secretary National Treasury for having found time to appear before the Committee at a very short notice. The Committee also appreciates the patience and the input of the Council of Governors and the Commission on Revenue Allocation on the Division of Revenue (No. 2) Bill (National Assembly Bills No. 22 of 2017)

The Chairperson in particular extends his appreciation to all the Members of the Committee for their patience, sacrifice, endurance and commitment to their assignment under tight schedules which enabled the Committee to complete the task within the stipulated period of time.

Finally, it is now my pleasant duty and privilege, on behalf of the Mediation Committee on the Division of Revenue (No. 2) Bill (National Assembly Bills No. 22 of 2017), to present and commend this report including and agreed version of the Bill to the Houses for approval pursuant to Article 113(2) of the Constitution and Standing Order 155(3) of the Senate and Standing Order 150(3) of the National Assembly.

SIGNED ....

HON. MUTAVA MUSYIMI, MP

CHAIRPERSON (THE MEDIATION COMMITTEE)

DATE: 15th June 2017

2.0 BACKGROUND

1. The bill was preceded by the Division of Revenue Bill (National Assembly Bills No. 2 of 2017) which was passed by the National Assembly on 9th February 2017. The bill was referred to the Senate by the National Assembly on 15th February 2017. The Senate considered and passed the bill with amendments on 1st March, 2017. The National Assembly rejected the amendments proposed by the Senate and the bill was referred to a mediation committee pursuant to Article 112(2)(b) of the Constitution.

2. The Mediation Committee failed to agree on a version of the bill within 30 days as required by Article 113(4) of the Constitution. The bill was therefore defeated.

3. The National Assembly published the Division of Revenue (No. 2) Bill (National Assembly Bills No. 22 of 2017) and passed it (with amendments) on 30th May 2017. The bill was referred to the Senate by the National Assembly on 9th June 2017 and read a first time on the same day. The Senate on 13th June, 2017 considered the report of the Standing Committee on Finance, Commerce and Budget and resolved to reject the Division of Revenue (No. 2) Bill (National Assembly Bills No. 22 of 2017). Pursuant to Article 112 (1) (a) a Mediation Committee was established.

3.0 CONSIDERATION OF THE DIVISION OF REVENUE (No. 2) BILL

4. The Committee was established to develop an agreed version of the Division of Revenue Bill, 2017 and in particular clause on equitable share for the counties.

5. The specific substance of discussion by the mediation Committee was the county equitable share which the Senate had proposed an amount of Ksh. **314.7 billion** and the National Assembly an amount of **Ksh. 291.1 billion**. The initial proposal by the National Treasury was an allocation of Ksh. 299.1 billion. The Treasury proposal was an increase of Ksh 19.1 billion from the allocation for the Financial Year 2016/2017. The increment was only to cater for adjustments to inflation.

6. The Committee was informed that the 314.7 Billion was a product of several negotiations and compromises by stakeholders. The allocation took into consideration the adjustments for inflation from the allocation provided in FY 2016/2017 and the need for additional resources for counties to undertake additional responsibilities allocated to them after round of salary negotiations for medical personnel and additional salary increments for public servants. In addition, the resolution took into consideration the projected increase in the sharable revenue so as to ensure equitable sharing of National Revenue pursuant to Article 202(1) of the Constitution.

7. The Committee was informed that the Ksh 291.1 billion was decided upon taking into consideration the limited financing since the national government fiscal framework had limited opportunity for adjustment and the government has already exhausted its limit for any additional austerity measures.

8. The Committee was informed that the Commission on Revenue Allocation has reviewed the Division of Revenue (No. 2) Bill 2017 and had made a recommendation of allocating **Ksh. 309.8 billion.** This allocation took into consideration the allocation for FY 2016/2017 as the baseline and provided for an adjustment for inflation. The proposal also provided for allocation to fund the provision for negotiated salary adjustments for medical officers.

9. The Committee was informed that the Conditional Allocations had taken into consideration additional collections from Fuel Levy Fund and new loans negotiated by the National Treasury with external donors to fund county related functions. The additional collection in fuel levy fund was due to adjustments in the levy in July 2016 from Ksh 12 to Ksh 18. The increase allocation from loans was occasioned by the negotiation of new loans and grants from external donors including the Kenya Devolution Support Programme from the World Bank.

4.0 THE COMMITTEE'S OBSERVATIONS AND RECOMMENDATIONS

10. The Mediation Committee observed that the approval of the Division of Revenue Bill was crucial for county budget process. The county government will not have a basis for preparation of the budgets for FY 2017/2018 if the Division of Revenue (No. 2) Bill, 2017 and the County Allocation of Revenue Bill, 2017 are not finalized before the July 2017.

11. The Committee also noted the need to adequately fund counties against the limited resources available for the two levels of government. The Committee agreed that there is need for both levels of government to live within the current resources by effecting austerity measures on non-core expenditures. The county government should also improve on their own-source revenue collection so as to avail additional funds.

12. The Mediation Committee therefore recommends that:

i.) The county equitable share be allocated **Kshs 302,000,000,000** for financial year 2017/2018.

ii.) The two Houses of Parliament to approve this report and mediated version of the bill as provided in Appendix 1.

This report was unanimously adopted by the following members:-

No.	NAME	SIGNATURE
1.	Hon. Mutava Musyimi, M.P. - **Chairperson**	
2.	Senator Agnes Zani, M.P. - **Vice-Chairperson**	
3.	Senator. Billow Kerrow, M.P.	
4.	Senator Beatrice Elachi, M.P.	
5.	Hon. Mary Emaase, M.P.	
6.	Hon. Richard Onyonka, M.P.	
7.	Hon. Christopher Omulele, M.P.	
8.	Senator Mutula Kilonzo Junior, M.P.	

MINUTES OF THE 1ST SITTING OF THE MEDIATION COMMITTEE ON THE DIVISION OF REVENUE BILL, 2017(NATIONAL ASSEMBLY BILLS NO. 22 OF 2017) HELD AT COUNTY HALL, GROUND FLOOR BOARDROOM ON WEDNESDAY, 14TH JUNE, 2017 AT 4.00 P.M.

PRESENT

1. Hon. Mutava Musyimi, MP - Chairperson
2. Sen. (Dr.) Agnes Zani - Vice Chairperson
3. Sen. Billow Kerrow - Member
4. Sen. Beatrice Elachi - Member
5. Hon. Richard Onyonka, MP. - Member

ABSENT WITH APOLOGY

1. Sen. Mutula Kilonzo Junior - Member
2. Hon. Christopher Omulele, MP - Member
3. Hon. Mary Emaase, MP - Member

IN ATTENDANCE

A. NATIONAL TREASURY

1. Mr Henry Rotich - Cabinet Secretary,
2. Mr. Albert Mwenda - Director IGFRD
3. Mr. Fred Owegi - Financial Adviser

B. SECRETARIAT

1. Mr. Mohammed Ali - Senior Deputy Clerk, Senate
2. Mr. Njenga Njuguna - Director, Committees' Senate
3. Mr. Boniface Lenairoshi - Principal Clerk Assistant
4. Mr. Martin Masinde - Deputy Director, Budget office (PBO)
5. Mr. Joseph Ndirangu - PBO
6. Mr. BenajminNg'imor - PBO
7. Mr. Christopher Gitonga - Clerk Assistant
8. Ms. Lucy Radoli - Legal Counsel
9. Mr. Robert Rop - Audio Recording

MIN NO. 001/2017: PRELIMINARIES

Mr. Mohammed Ali called the meeting to order at 4:25 pm. This was followed by a word of prayer. He welcomed the members and informed them that the mediation Committee was established to consider the Division of Revenue (No. 2) Bill (National Assembly Bills No. 22 of 2017).

MIN NO.002/2017: ADOPTION OF THE AGENDA

The agenda was adopted having been proposed by Sen. (Dr.) Agnes Zani and seconded by Sen. Beatrice Elachi.

MIN NO. 003/2017: APPOINTMENT OF THE CHAIRPERSONAND VICE CHAIRPERSON

The Committee was informed that there was a set precedent in which the Chairperson of the mediation committee is appointed from the House which originated the Bill. The other House produces the Vice Chairperson.

The Committee made an unanimous decision and appointed Hon. Mutava Musyimi, M.P and Sen. (Dr.) Agnes Zani, M.P. as the Chairperson and the Vice Chairperson respectively.

MIN NO. 004/2017: MEDIATION ON THE DIVISION OF REVENUE BILL, (NATIONAL ASSEMBLY BILL 22 OF 2017)

The Chairman began by appreciating the members for the appointment as the chair of the Committee. He also informed the members that the bill had been re-published since the earlier mediation failed to produce an agreed version of the Bill. The Chairman informed the Committee that due to the time constraints he opted to invite the Cabinet Secretary National Treasury to attend the meeting and help in the mediation process. The chair thereafter briefed the members on the mandate of the mediation committee and welcomed the Cabinet Secretary to make his remarks.

The Cabinet Secretary informed the Committee that-

a) Initially the government had committed and negotiated with IMF on the budget deficit 6.4%. However, this had was re-negotiated to 5.9% due to increased debt levels which were too high,

b) Debt borrowing was not feasible and thus, there was need to restructure expenditure,

c) National treasury was obligated to ensure there was fiscal responsibility especially in the updated fiscal framework,

d) There was need for counties to improve on expenditure prudence,

e) After re-consideration, Treasury had changed their proposal on county equitable share from Ksh. 299 billion to Ksh. 291 billion. However, there were additional resources from increased fuel levy fund and donations from development partners, and

f) The National Treasury was willing to consider an additional Kshs. 4 billion and have the county equitable share at Kshs. 295 billion.

Deliberations ensued and members made the following remarks-

That;-

a) The substance of discussion was county equitable share which was a figure between Ksh. 299 billion and Ksh. 314 billion.

b) The memorandum from the Commission of Revenue Allocation had indicated that at the very minimum the county governments be allocated Ksh. 309 billion factoring in inflation and the negotiated medical doctors salaries,

c) The Council of Governors had indicated a probable figure of Ksh. 311 billion factoring in inflation, negotiated salaries for doctors and nurses allowances,

d) Members emphasized that the difference between the initial treasury figure and Senate/ CRA was Ksh 15 billion. Thus, there was need to reach at agreeable figure,

e) The members requested for a 5 minutes break to consult with their respective members

f) After the break, the Senate delegation reported that their proposal would be county equitable share of not less than Ksh.303 billion,

g) The National Assembly delegation also indicated that they had consulted and agreed on Ksh. 295 billion as proposed by National Treasury.

After further deliberations, the committee was of the proposal of county equitable share of either Ksh.301 billion or Ksh.302 billion.

Members requested for another meeting the following day to deliberate further and agree on a certain figure.

MIN NO.005/2017: DATE OF NEXT MEETING AND ADJOURNMENT

There being no other business, the chair adjourned the meeting at 6.05pm. The date of the next meeting was set for Thursday, 15th June at 9 am at the same venue.

SIGNED ____________________

(CHAIRPERSON)

DATE 15. 6. 17

MINUTES OF THE 2ND SITTING OF THE MEDIATION COMMITTEE ON THE DIVISION OF REVENUE BILL, 2017(NATIONAL ASSEMBLY BILLS NO. 22 OF 2017) HELD AT COUNTY HALL, GROUND FLOOR BOARDROOM ON THURSDAY, 15TH JUNE, 2017 AT 9.00 A.M.

PRESENT

1. Hon. Mutava Musyimi, MP - Chairperson
2. Sen. (Dr.) Agnes Zani, MP - Vice Chairperson
3. Sen. Billow Kerrow, MP - Member
4. Sen. Beatrice Elachi, MP - Member
5. Hon. Richard Onyonka, MP. - Member

ABSENT WITH APOLOGY

1. Sen. Mutula Kilonzo Junior, MP - Member
2. Hon. Christopher Omulele, MP - Member
3. Hon. Mary Emaase, MP - Member

IN ATTENDANCE SECRETARIAT

1. Mr. Njenga Njuguna - Director, Committees' Senate
2. Mr. Boniface Lenairoshi - Principal Clerk Assistant
3. Mr. Joseph Ndirangu - Budget Office
4. Mr. BenajminNg'imor - Budget Office
5. Mr. Christopher Gitonga - Clerk Assistant
6. Ms. Lucy Radoli - Legal Counsel
7. Mr. Robert Rop - Audio Recording

MIN NO. 006/2017: PRELIMINARIES

The Chairperson called the meeting to order at 9:30am. After a word of prayer, the chair welcomed the members to the meeting.

MIN NO.007/2017: ADOPTION OF THE AGENDA

The agenda was adopted having been proposed by Hon. Richard Onyonka, MP. and seconded by Sen. Beatrice Elachi, MP

MIN NO. 008/2017: CONFIRMATION OF MINUTES OF THE PREVIOUS MEETING

The minutes of the 1st sitting held on Wednesday, 14th June, 2017 at 4:00 pm at County Hall, Ground Floor Boardroom were confirmed as true record of the proceedings of the Committee having been proposed by Sen. Billow Kerrow, MP and seconded by Hon. Richard Onyonka, MP.

MIN NO. 009/2017: **MEDIATION ON THE DIVISION OF REVENUE BILL, (NATIONAL ASSEMBLY BILL 22 OF 2017)**

The Committee unanimously resolved that the equitable share for counties be Ksh. 302 billion.

The Chairperson thanked the members for their commitment.

MIN NO.010/2017: **DATE OF NEXT MEETING AND ADJOURNMENT**

There being no other business, the chair adjourned the meeting at 10.05 am.

SIGNED ____________________

(CHAIRPERSON)

DATE 15.6.17

REPUBLIC OF KENYA

NATIONAL ASSEMBLY

Division of Revenue Bill, 2017

A Legislative Proposal for submission to Parliament

THE DIVISON OF REVENUE BILL, 2017

ARRANGEMENT OF CLAUSES

Clause

THE DIVISION OF REVENUE BILL, 2017

A Bill for

AN ACT of Parliament to provide for the equitable division of revenue raised nationally between the national and county governments in 2017/18 financial year, and for connected purposes

ENACTED by Parliament of Kenya, as follows—

1. This Act may be cited as the Division of Revenue Act, 2017. Short title.

2. In this Act, unless the context otherwise requires— Interpretation.

"Cabinet Secretary" means the Cabinet Secretary for the time being responsible for matters relating to finance;

"revenue" has the meaning assigned to it under section 2 of the Commission on Revenue Allocation Act, 2011; No. 16 of 2011.

3. The object and purpose of this Act is to provide for the equitable division of revenue raised nationally between the national and county levels of government for the financial year 2017/18 in accordance with Article 203 (2) of the Constitution. Object and purpose of the Act.

4. Revenue raised by the national government in respect of the financial year 2017/18 shall be divided among the national and county governments as set out in the Schedule to this Act. Allocations to national and county governments.

5. (1) If the actual revenue raised nationally in the financial year falls short of the expected revenue set out in the Schedule, the shortfall shall be borne by the national government, to the extent of the threshold prescribed in Regulations by the Cabinet Secretary. Variation in revenue.

(2) If the actual revenue raised nationally in the financial year exceeds the projected revenues set out in the Schedule, the excess revenue shall accrue to the national government, and may be used to reduce borrowing or pay debts.

SCHEDULE (s.4)

ALLOCATION OF REVENUE RAISED NATIONALLY BETWEEN THE NATIONAL AND COUNTY GOVERNMENTS FOR THE FINANCIAL YEAR 2017/18

Type/Level of allocation	Amount in KSh.	Percentage (%) of 2013/14 audited and approved Revenue i.e. KSh. 935,653 Million
A. Total Shareable Revenue (B+C+D)	**1,560,275,840,000**	
B. National Government*	**1,238,343,840,000**	
C. Equalization Fund	**7,727,000,000**	
D. County Government (1+2)	**314,205,000,000**	**33.58%**
1. County Equitable Share	302,000,000,000	32.28%
2. Conditional Allocations	12,205,000,000	
2.1 Leasing of Medical Equipment	*4,500,000,000*	
2.2 Compensation for User Forgone	*900,000,000*	
2.3 Level 5 hospitals	*4,200,000,000*	
2.4 Construction of County Headquarters	*605,000,000*	
2.5 Rehabilitation of Youth Polytechnics	*2,000,000,000*	
E. Additional County Conditional Allocations (not part of sharable revenue)	**31,476,018,499**	
3. Allocation from fuel levy (15%)	11,068,192,369	
4. Conditional Allocations (loans & grants)	20,407,826,130	
F. Total County Allocations (D+E)	**345,681,018,499**	**36.95%**

Source: National Treasury/ ***House Resolution on Budget & Appropriation Committee Report of the Budget Policy Statement 2017***

**The National Government Share includes KSh. 3,400 million which is a special grant to the National Health Insurance Fund (NHIF) for free maternal health care, to be disbursed as re-imbursements.*

MEMORANDUM OF OBJECTS AND REASON

The principal object of this Bill is to provide for the equitable division of revenue raised nationally among the national and county levels of government as required by Article 218 of the Constitution in order to facilitate the proper functioning of county governments and to ensure continuity of county services.

Clauses 1 and 2 of the Bill provide for the short title of the Bill and the interpretation of terms used in the Bill.

Clause 3 of the Bill contains the provisions on the objects and purpose of the Bill.

Clause 4 of the Bill prescribes the allocations for the national government and the county governments from the revenue raised nationally for the financial year 2017/18.

Clause 5 of the Bill deals with mechanisms for adjusting for variations in revenues emanating from revenue performance during the financial year in which this Bill relates to.

This Bill is a Bill concerning county governments for the purpose of Article 110 of the Constitution.

Dated the ......15th June......, 2017

Mutava Musyimi, CBS, M.P.
Chairperson, Budget and Appropriations Committee

APPENDIX

EXPLANATORY MEMORANDUM TO THE DIVISION OF REVENUE BILL, 2017

Background

1. This memorandum has been prepared as an attachment to the Division of Revenue Bill (DoRB), 2017 in fulfilment of the requirements of Article 218(2) of the Constitution and Section 191 of the Public Finance Management Act, 2012.

2. Article 218(2) of the Constitution requires that the Bill be submitted to Parliament every year together with a memorandum explaining:

(a) the proposed revenue allocation set out in the Bill;

(b) the extent to which the Bill has taken into account the provisions of Article 203 (1) of the Constitution; and

(c) any significant deviations from the recommendations of the Commission on Revenue Allocation (CRA).

3. In addition to the above requirements, Section 191 of the Public Finance Management Act, 2012 requires that the Bill be submitted to Parliament together with the Medium Term Budget Policy Statement accompanied by a memorandum which explains;

(a) the extent, if any, of deviation from the recommendations of the Intergovernmental Budget and Economic Council; and

(b) any assumptions and formulae used in arriving at the respective allocations proposed in the Bill.

Explanation of the Allocations to the National and County Governments as Proposed in the Bill

4. The DoRB, 2017 proposes to allocate to County Governments Ksh.345.7 billion in the financial year 2017/18, which relative to the 2016/17 allocation, reflects an increase of Ksh. 43.5 billion. This allocation comprises of an equitable share of Ksh. 302.0 billion and additional conditional allocations from the share of national government revenue amounting to Ksh. 43.7 billion.

County Governments' Equitable Share

5. The County Governments' equitable share of revenue raised nationally for the financial year 2017/18 is arrived at by growing the County Governments' equitable share

for 2016/17 of Ksh. 280.3 billion to Ksh 302.0 billion. This yields an adjustment factor of 21.7 billion. The equitable share of revenue, thus determined, is an unconditional allocation to the County Governments and therefore County Governments are expected to plan, budget, spend, account and report on the funds allocated independently. This allocation to County Governments takes into account all the functions gazetted for transfer to County Governments by the end of transition period in March 2016 except for the unresolved transfer of 32,000 km of class D roads.

6. After making the above adjustment, County Governments' equitable share of revenue in the financial year 2017/18 is estimated to be Ksh. 302.0 billion. This allocation which represents a 32.28 per cent of the latest audited revenues for FY 2013/14 (i.e. Ksh. 935.7 billion) is above the constitutional minimum of 15 percent.

Conditional Allocations to County Governments

7. Article 202(2) of the Constitution provides for additional allocation to County Governments from the National Government's share of revenue, either conditionally or unconditionally. Pursuant to this Article, the National Government proposes to allocate the following additional conditional allocations to support specific national policy objectives to be implemented by County Governments:

- **Conditional Grant to facilitate the leasing of medical equipment of Ksh 4.5 billion.** This grant is in its third year of implementation and is intended to facilitate the leasing of modern specialised medical equipment in at least two health facilities in each County Government over the medium term. This will facilitate easy access to specialised health care services and significantly reduce the distance that Kenyans travel in search of such services today. This grant will be managed by the National Government on behalf of the County Governments, in accordance with intergovernmental agreements entered into.
- **Conditional grant for level-5 hospitals of Ksh. 4.2 billion.** Level-5 hospitals have continued to play a significant role in providing specialised health care services to Kenyans. These hospitals provide specialised health care services to citizens residing outside their host County, usually for complicated cases referred from lower level health facilities. In order to compensate them for the costs incurred in rendering services to neighbouring Counties, the national government proposes to further allocate Ksh. 4.2 billion in financial year 2017/18 up from 4.0 billion allocated in FY 2016/2017. This grant will be transferred from the National Government exchequer account at the Central Bank of Kenya to County Governments as a conditional grant through the respective County Revenue Fund Accounts.

- **Conditional Grant of Ksh. 900 million to compensate county health facilities for forgone user fees.** It is the intention of government to sustain the Government policy of not charging user fees in public health facilities. In this regard, and in furtherance of this policy, the National Government has allocated Ksh. 900 million in the financial year 2017/18 to compensate county governments for revenue forgone by not charging user fees in the county health facilities. This grant will be transferred from the exchequer by the National Treasury to County Governments on a reimbursement basis through the respective County Revenue Fund Accounts, upon receipt of written confirmation by the Accounting Officer responsible for Health confirming that the County Government waived user fee charges in their health facilities in accordance with agreed specifications.
- **Conditional Grant to supplement county allocation for the construction of county headquarters of Ksh. 605 Million in five counties.** This conditional grant in its second year of allocation and is intended to further supplement financing for construction of headquarters by five County Governments that did not inherit adequate office space. The five counties are Isiolo; Lamu; Nyandarua; Tana River and Tharaka Nithi. The grant is part of a three year plan, beginning financial year 2016/17, to supplement contribution of the five counties towards construction of their county headquarters. The allocation will be shared equally, with each county getting an allocation of Ksh. 121 million in FY 2017/18. This allocation is part of the National Government contribution which translates to 70 percent of the budget. County Governments will contribute the balance, that is, 30 percent. The National Government's contribution will be spread over three financial years. In FY 2016/17, the DORB 2016 allocated a total of Ksh. 605 million for the construction of county headquarters (i.e. Ksh. 121 million to each of the five counties). In FY 2017/18, the DORB 2017 is allocating an additional Ksh. 605 million (i.e. Kshs 121 million per county).
- **Conditional Grand for rehabilitation of village polytechnics of Ksh. 2.0 billion.** This conditional grant is for county government to build, equip and renovate village polytechnics. The village polytechnics will go a long way to serve as centres of excellence to empower youth with the requisite skills to generate employment. The village polytechnics are essential in developing skills of youth who do not transit to institutions of higher learning. Whereas this is a devolved function and counties should finance it unconditionally using their own resources, in the past, counties have been hesitant to finance it.

Additional County Conditional Allocations (not part of sharable revenue)

- **Conditional Grant from the Road Maintenance Fuel Levy Fund of Ksh. 11.1 billion.** This conditional grant which is in its third year of allocation has been increased from an allocation Ksh. 4.3 billion in the 2016/17 FY to Ksh.11.1 billion in FY 2017/2018. This translates to 158 percent increase arising from the increase in Fuel Levy. This grant is meant to further enhance County Governments' capacity to repair and maintain county roads and is equivalent to 15 percent of the Road Maintenance Fuel Levy Fund.
- **Conditional Grant from proceeds of a loan from the World Bank amounting to Ksh 873.4 million.** This Results Based Financing grant from World Bank to 21 counties is in its final year and is for the Kenya Health Sector Support Project. These funds are intended to support the delivery of health services in county health facilities with a view to increase access to health care services by Kenyans and in particular the poor.
- **KDSP County Capacity Building ("level 1") Grant amounting to Ksh 1.5 billion.** This is a conditional grant financed by a World Bank credit to support county capacity building under the Kenya Devolution Support Program (KDSP) amounting to Ksh. 1.5 billion. This grant is intended to support capacity building initiatives in the counties in the following areas:
    - Strengthening public financial management (PFM) systems;
    - Strengthening County Human resource management;
    - Improving county planning and Monitoring & Evaluation systems; and,
    - Civic Education and Public Participation.
    - Strengthening Intergovernmental relations.
- **KDSP Performance ("level 2") Grant amounting to Ksh. 4 billion.** This is a conditional grant financed by a World Bank credit which is intended to incentivise county governments that achieve good results in the following key areas:
    - Strengthening public financial management (PFM) systems;
    - Strengthening County Human resource management;
    - Improving county planning and Monitoring & Evaluation systems; and,
    - Civic Education and Public Participation.
    - Strengthening Intergovernmental relations.

  Performance of counties in the above areas is to be assessed by an independent firm to be recruited through a competitive process. County governments will be at liberty to allocate KDSP performance grants to a wide list of priority programs.

- **Conditional allocation financed by other loans and grants received from development partners and the Government counterpart funding derived from the National Government's share all totalling Ksh11.7 billion.** These conditional allocations have increased from a total of Ksh. 2.1 billion in the FY 2016/17 to the current Ksh. 11.7 billion. These funds, however, will not be transferred to County Governments in the financial year 2017/18 but will instead be managed by the National Government because they tied to financing agreements which were entered into prior to the establishment of the county governments. Such funds are tied to on-going contracts with suppliers while the related financing agreements also specify the funds flow modalities which may not be consistent with what is contemplated under the intergovernmental arrangement.
  It is therefore expected that the loans and grants under the existing financing agreement will be included in the budget of the National Government. These funds will be managed by the National Government but with involvement of County Governments in the Project Steering Committees and Project Implementation Units for each programme/project. In addition, reporting arrangements as well as the conditions attached to the implementation of the programme/project will be clearly spelt out in Project Implementation Frameworks to be agreed with County Governments prior to the release of the funds and implementation of the projects.

Evaluation of the Bill against Article 203 (1) of the Constitution

8. Article 218(2) of the Constitution requires division of revenue between the two levels of government and across County Governments to take into account the criteria set out in Article 203(1) of the Constitution. The criteria include factors such as: national interest, public debt and other national obligations, needs of the disadvantaged groups and areas etc.

9. Table 1 provides an assessment of the extent to which the requirements of Article 203 (1) have been incorporated in estimating the division of revenue between the national and county levels of Government in the financial year 2016/17.

Table 1: Evaluation of the Bill against Article 203 (1) of the Constitution

	ITEM DESCRIPTION	2016/17	2017/18
		Ksh. Millions	Ksh. Millions
A	**Ordinary Revenue (excluding AIA)**	**1,380,199**	**1,549,412**
B	**National Interest [Article 203 (1)(a)]**	**79,685**	**81,902**
	1. Enhancement of Security Operations (police vehicles, helicopters, defence etc.)	18,900	20,556
	2. National Irrigation & Fertilizer Clearance	8,700	8,880
	3. Youth Empowerment	18,544	18,544
	4. National Social safety net - (for older persons, OVC, Child Welfare, Presidential Bursary, severe disability)	16,924	17,305
	5.Primary school digital literacy program	13,408	13,408
	6. School Examination fees subsidy(KSCE & KCPE)	3,209	3,209
C	**Public Debt (Article 203 [1][b])**	**446,408**	**618,569**
D	**Other National Obligations (Article 203 [1][b])**	**371,743**	**414,188**
	1. Pensions, constitutional salaries & other	60,169	76,552
	2. Constitutional Commissions (Art. 248(2)) - i.e. CRA, SRC, NLC, NPSC, IEBC, TSC	208,763	225,294
	3. Independent Offices(Art. 248(3)) - i.e. AG & CoB	4,723	6,086
	4. Parliament	31,480	36,000
	5. Other Constitutional Institutions- State Law office and DPP	6,359	6,824
	6. Other Statutory Bodies (e.g. EACC,RPP,WPA,CAJ, IPOA, NGEC)	4,855	6,013
	7. Judiciary	17,759	17,907
	8. Other Statutory Allocations(earmarked funds e.g. National Government Constituency Development Fund, Affirmative Action)	37,635	39,512
E	**Emergencies [Article 203 (1)(k)]**	**7,245**	**6,200**
	1.Contingencies	5,000	5,000
	2.Strategic Grain Reserve	2,245	1,200
F	**Equalization Fund [Article 203 (1) (g) and (h)]**	**6,000**	7,727
G	**Balance to be shared between the National and County Government**	**469,118**	**420,826**
H	County Government Allocation from Revenue Raised Nationally	294,021	314,205
I	Balance Available for National Government Needs	175,097	106,521

Source: National Treasury/ House Resolution on Budget & Appropriations Committee Report of the Budget Policy Statement 2017.

10. **National Interests**: These are expenditures which relate to projects and programmes that:

- are critical to the achievement of country's economic development objectives;
- potentially will have significant impact on social well-being of citizens;
- are anchored in the Vision 2030 and the Medium Term Plan II (2013 – 2017); and
- have significant resource investment requirements;
- have been specified in the 2017 Budget Policy Statement.

These national interests include: activities aimed at enhancing security operations; national irrigation and fertilizer subsidy initiatives; Youth Empowerment; provision of national social safety net for vulnerable groups and primary school digital literacy program, and school examination fees subsidy. Revenue allocation for these programs is expected to increase slightly from Ksh. 79.7 billion in 2016/17 to Ksh. 81.9 billion in 2017/18.

11. **Public Debt**: The Bill has fully provided for all public debt related costs. These comprise of the annual debt redemption cost as well as the interest payment for both domestic and external debt. In 2017/18, the revenue allocation for payment of public debt related costs is expected to increase to Ksh. 618.6 billion up from Ksh. 446.4 billion in 2016/17 financial year.

12. **Other National Obligations**: As provided for under Article 203(1) (b) of the Constitution, the Bill has also taken into account the cost of other national obligations, such as, mandatory pension contributions and/or payments, financing for constitutional offices, including Parliament as well as expenses relating to other statutory bodies and funds. These are estimated to cost Ksh. 414.2 billion in 2017/18 up from Ksh. 371.7 billion in 2016/17.

13. **Fiscal Capacity and Efficiency of County Governments**: Fiscal capacity for county governments, that is, the potential revenues that can be generated from the tax bases assigned to the counties when a standard average level of effort is applied to those tax bases, has not been assessed fully. However during the FY 2017/18 there are plans to carry out studies to establish the fiscal efforts of each of the respective counties.

14. **County governments' ability to perform the functions assigned to them and meet other developmental needs of the county governments**: As explained above, the baseline for the equitable share allocation for the financial year 2017/18 was derived from the Division of Revenue Act, 2016.

15. It should be noted that allocations for devolved functions transferred from the national government were based on the historical cost of those functions as determined through a consultative process that involved the line ministries and other independent

commissions and offices. Further it should be noted that the transition period to devolved system of government came to an end in March, 2016. However should any residual function/s and attendant resources be identified, they shall be included in subsequent DoRB.

The proposed vertical division of revenue proposed in the Division of Revenue Bill, 2017 therefore takes into account the cost of county governments' developmental needs and it is expected that county governments will have the ability to perform the functions assigned and transferred to them as contemplated under Article 203(1) (f).

16. **Economic Disparities within and among counties and the need to remedy them**: Allocation of the sharable revenue (i.e. equitable share of Ksh. 302.0 billion) among counties is based on the second generation formula approved by Parliament in June, 2016 pursuant to provisions of Article 217 and Section 16 of the Sixth Schedule of the Constitution. The formula takes into account disparities among counties and aims at equitable distribution of resources by introducing a new parameter, Development factor (1%), expected to bridge the development disparities gaps amongst counties. The formula takes into account population (45%), land area (8%), poverty (18%), a basic equal share (26%), fiscal responsibility (2%) and Development factor (1 %). The equitable share of revenue for county governments in 2017/18 reflects an increase of 6.72 percent compared to the allocation in 2016/17. This means that there is more money in 2017/18 to help remedy economic disparities within and among counties. It should also be noted that Ksh. 7.7 billion has also been set aside for the Equalization Fund in 2017/18 which translates to 0.8 per cent of last audited revenue accounts of governments and is way above the constitutional provision of 0.5 percent. This Fund will be used to finance development programmes that aim to reduce regional disparities among counties.

17. **Need for Economic Optimization of Each County**: Allocation of resources to county governments was guided by the costing of the functions assigned to the county governments. The equitable share of revenue allocated to county governments was increased by 7.74 per cent from Ksh. 280.3 billion in 2015/16 to Ksh. 302.0 billion in 2017/18. This is an unconditional allocation which means that the county governments can plan, budget and spend the funds independently. With the additional resources, therefore, county governments can allocate more resources to their priority projects and thus optimize their potential for economic development.

18. **Stable and Predictable Allocations of County Governments' Vertical Share of Revenue**: The county governments' equitable share of revenue raised nationally has been protected from cuts that may be necessitated by shortfall in revenue raised nationally.

According to the DoRB 2017, any shortfall in revenue raised nationally is to be borne by the National Government.

19. **Need for Flexibility in Responding to Emergencies and Other Temporary Needs**: Included in the equitable share of revenue for the national government is an allocation of Ksh. 5 billion for the Capital of the Contingencies Fund. This Fund will be used to meet the demands arising from urgent and unforeseen needs in all Counties that suffer from calamities in the manner contemplated under Section 21 of the Public Finance Management Act, 2012. In addition, the Public Finance Management Act, 2012 and the PFM (County governments) Regulations, 2015 requires each county government to set up a County Emergency Fund. County governments are expected to set aside at least 2 % part of their allocation for this purpose.

20. It should be noted that after taking into account all the other factors contemplated under Article 203(1) of the Constitution, including the needs of county governments, only Ksh. 106.6 billion is left to finance other National Government needs, such as, defence, roads, energy etc.

Response to the Recommendations of the Commission on Revenue Allocation

21. The Division of Revenue Bill, 2017 proposes to allocate county governments an equitable share of Ksh. 302.0 billion from the shareable revenue raised nationally. The CRA, on the other hand, recommends County Governments' equitable share of revenue of Ksh. 331.6 billion as an unconditional allocation to be shared among county governments on the basis of the formula for sharing revenue approved by Parliament under Article 217 of the Constitution. The difference in the Commission on Revenue Allocation (CRA) recommendation and the DORB 2017 proposal emanates from the different approaches used to compute the County Governments' equitable share of revenue. These include:

- County equitable revenue share adjustment of Ksh. 8.43 billion for additional county roads: Following the reclassification of roads by the State Department of Infrastructure and subsequent transfer of additional county roads by the defunct Transition Authority (TA) vide Gazette Supplement No.4 of 22nd April, 2016, the CRA proposed to gross up the county equitable share of revenue for 2017/18 by an allocation of Ksh. 8.43 billion for construction and rehabilitation of county roads.

It should be noted that the defunct Transitional Authority Gazetted 90,000 Kilometres of roads of class E, F, G and non-classified roads which were transferred to county governments in the financial year 2013/ 14. The attendant resources (Ksh. 27.4 billion) were subsequently transferred to county governments through the Division of Revenue Act, 2013.

The DoRB 2017 also recognises that the taskforce established by the Cabinet Secretary/National Treasury to assess if there were duplication of function in the national and county governments, also recommended that Kshs. 8.43 billion held by Kenya Rural Roads Authority and the Kenya Urban Roads Authority be transferred to county governments to follow the transfer of class D roads amounting to 32,000 km.

First, it should be noted that the report of the taskforce have not be considered and adopted by the SUMMIT and therefore it would be pre-mature to reflect such recommendations in DoRB 2017. In light of the foregoing, it is not possible to include in the DoRB 2017 the recommendation of the CRA and the taskforce.

- County equitable revenue share adjustment of Ksh. 319 million from Kenya Libraries Services to cater for salaries and operations of devolved libraries: The CRA has proposed a further adjustment of the equitable revenue share to include an allocation of Ksh.319 million to salaries and operations of devolved libraries in FY 2017/18. The DORB 2017 view is that, that this amounts can only be transferred to counties upon the formal adoption of the report of the taskforce by the SUMMIT.

22. Table 2 below analyses the differences between the CRA recommendations and the National Assembly proposal on the division of revenue between the national and county governments in 2017/18.

Table 2: Comparison of Recommendations of the Commission on Revenue Allocation and the National Assembly on the equitable share of revenue proposed for FY 2017/18 (Figures in Ksh. Millions)

Expenditure Item	**CRA (A)**	**National Assembly (B)**	**Difference C = (A-B)**
Equitable Revenue Share in FY 2016/17	280,300	280,300	-
Add			
Adjustment for revenue growth in FY 2016/17	42,550	21,700	20,850
Adjustment for County Roads	8,430	-	8,430
Adjustment for salaries & operations of devolved libraries	319	-	319
TOTAL EQUITABLE SHARE OF REVENUE	**331,599**	**302,000**	**29,599**

Source: National Treasury/Commission on Revenue Allocation/House Resolutions on Budget Policy Statement, 2017

23. **On the existing additional conditional grants**: CRA proposes a total allocation to existing additional conditional grants of Ksh. 27.1 billion against an allocation by the DORB 2017 of Ksh. 43.6 billion. The differences in allocations of these existing additional conditional allocations to counties is as a result of ;-

- CRA use of a growth factor of 5 percent inflation rate to increase all the existing conditional grants. The existing conditional allocations include allocations for; Level-5 hospitals, Free Maternal Health Care, Compensation for User fee forgone, leasing of medical equipment ,county roads funding from Roads Maintenance Fuel Levy, special purpose grant for Emergency Medical services and Supplement for construction of five county headquarters. It should be noted that allocations for the various conditional additional allocations are determined through the national MTEF budget process based on the weight attached to the national government policy objectives that the allocations are intended to support.
- CRA has proposed an allocation of 25 percent to counties from the Roads Maintenance Levy Fund (RMLF) translating to Ksh. 13.3 billion, whereas the DORB 2017 has maintained 15 % allocation from RMLF which translates to Ksh. 11.06 billion which is an increase of Ksh. 3.6 billion from the previous financial year. CRA justification for this increase is to provide funds for maintenance of the 32,000 Km of roads transferred to counties from RMLF. The taskforce appointed by the Cabinet Secretary/National Treasury had also recommended that 25 percent of the annual collections in the RMLF be transferred to counties. As explained above the report of the taskforce has not been adopted formally and therefore it would be pre-mature to incorporate the recommendations in the DoRB 2017. Besides, the Ministry of Transport and Infrastructure (MoTI) has argued that resource requirement for the maintenance of roads assigned to national government is much higher than for the roads assigned to county governments. The MoTI has therefore argued that there is need to have further consultations on the recommendations by the taskforce.
- DORB 2017 has provided for Ksh. 605 million to supplement county financing for the construction of county headquarters in five counties. The CRA has treated this allocation as a new grant and has proposed an allocation of Ksh. 1 billion in the financial year 2017/18. However, this is an existing grant which is phased out for three financial years beginning 2016/17.

This grant is intended to supplement financing for construction of headquarters by five County Governments that did not inherit adequate office space. The five counties are Isiolo; Lamu; Nyandarua; Tana River and Tharaka Nithi. Following consultations with these counties, it was agreed that construction of county headquarters be funded at the cost of Ksh. 518 million (Ksh. 315.5 million for the County Executive offices and Ksh. 202.5 million for the County Assembly offices). The National Government will contribute 70 percent of the budget while County Governments will contribute 30 percent. The National Government's contribution will be spread over three financial years. In FY 2016/17, the DORB 2016 allocated a total of Ksh. 605 million for the construction of county headquarters (i.e. Ksh. 122 million to each of the five counties). In FY 2017/18, the DORB 2017 is allocating Ksh. 605 million (i.e. Kshs 121 million per county).

- The CRA has also provided for Ksh. 200 million special purpose conditional grant for Medical purposes. This grant was intended to upgrade the two level 4 hopsitals in Lamu and Tana River counties to be able to adequately deal with health care demands arising from security operations. This grant was intended to be one-off allocation in the financial year 2016/17.
- **Conditional additional allocation for the Rehabilitation of Village Polytechnics of Ksh. 1.5 billion**: - the CRA has further proposed an additional conditional allocation of Ksh. 1.5 billion from the national government share of revenue to county governments so as to build, equip and renovate village polytechnics. The CRA further argue that these village polytechnics will go a long way to serve as centres of excellence to empower youth with the requisite skills to generate employment. Since the Village Polytechnics are essential in developing skills of Youth who don't transit to institutions of higher learning, the DORB 2017 has allocated Ksh 2 billion towards this function.

24. Further the Commission on Revenue Allocation has in the financial 2017/18 proposed new conditional allocations amounting to Ksh. 5.4 billion that the DoRB 2017 has not included in the Division of Revenue Bill. These have further contributed to the variance between the DORB 2017 and the CRA proposals on division of revenue for FY 2017/18. These include;

- **Allocation to cater for establishment of two Regional Cancer treatment centres at Ksh. 5.0 billion**: - CRA has proposed an additional conditional allocation of Ksh. 5.0 billion for establishment of two Regional Cancer Centres, at a cost of Ksh. 2.5 billion each. These centres are intended to complement the

Governments program of leasing medical equipment for counties with cancer diagnostics equipment. In addition, these cancer diagnostic equipment are intended to ease pressure at Kenyatta National Hospital and Nyeri Level 5 hospital for surgical, chemotherapy and Radiotherapy services.

DORB 2017 appreciates this proposal which plan if implemented would boost chances of the country plan to achieve universal healthcare access. Such a program, however, requires careful planning to ensure that adequate human and financial resources can be availed to guarantee the sustainability and viability of such a program. There is no evidence of any consultation with the Ministry of Health which provides policy leadership on such matters.

- **Additional conditional allocations for Library services of Ksh. 400 million** - the proposed new conditional additional allocation by CRA of Ksh. 400 million is meant for building and equipping 20 counties with libraries at a cost of ksh. 20 million each. This is to achieve equity given that it's only in these 20 counties that there are no Libraries whereas other counties have more than one.

  Proposal for conditional grants such as this should be prepared in accordance with the framework for intergovernmental fiscal transfers as agreed. Ultimately these should be anchored in the national policy. Only then can such be considered for inclusion in the DoRB 2017.

25. In conclusion, allocation to each level of government has been informed by the costing of functions assigned to each level of government. The proposals contained in the Bill are also intended to ensure that neither a huge financing gap is created nor functions at either level of government left unfunded or underfunded. The proposed transfer of additional resources as recommended by the taskforce on assessment of duplication of functions should be implemented only after formal adoption of the report of the taskforce.

26. It should, however, be noted that the DORB 2017 proposed equitable share allocated to county governments at 32.28 per cent of the most recent audited revenue, as approved by the National Assembly, is way above the minimum threshold required under Article 203(2) of the Constitution.