



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 272 OF 2016**

COUNCIL OF COUNTY GOVERNORS.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT

THE CABINET SECRETARY FOR FINANCE.....2<sup>ND</sup> RESPONDENT

THE CONTROLLER OF BUDGET.....3<sup>RD</sup> RESPONDENT

-AND-

COMMISSION ON REVENUE ALLOCATION.....1<sup>ST</sup> INTERESTED PARTY

THE SENATE.....2<sup>ND</sup> INTERESTED PARTY

TURKANA COUNTY.....3<sup>RD</sup> INTERESTED PARTY

MANDERA COUNTY.....4<sup>TH</sup> INTERESTED PARTY

WAJIR COUNTY.....5<sup>TH</sup> INTERESTED PARTY

MARSABIT COUNTY.....6<sup>TH</sup> INTERESTED PARTY

SAMBURU COUNTY.....7<sup>TH</sup> INTERESTED PARTY

WEST POKOT COUNTY.....8<sup>TH</sup> INTERESTED PARTY

TANA RIVER COUNTY.....9<sup>TH</sup> INTERESTED PARTY

NAROK COUNTY.....10<sup>TH</sup> INTERESTED PARTY

KWALE COUNTY.....11<sup>TH</sup> INTERESTED PARTY

GARISSA COUNTY.....12<sup>TH</sup> INTERESTED PARTY

KILIFI COUNTY.....13<sup>TH</sup> INTERESTED PARTY

TAITA TAVETA COUNTY.....14<sup>TH</sup> INTERESTED PARTY

ISIOLO COUNTY.....15<sup>TH</sup> INTERESTED PARTY

**JUDGMENT****The Petition**

1. The Council of County Governors, the Petitioner, is a statutory body established under Section 19 of the Intergovernmental Relations Act No. 2 of 2012. It filed a petition dated 29<sup>th</sup> June, 2016 against the Attorney General, the 1<sup>st</sup> Respondent, the principal legal advisor to the national Government in civil proceedings in which it is a party, and whose constitutional mandate is to promote, protect and uphold the rule of law and defend the public interest; The Cabinet Secretary for Finance, the 2<sup>nd</sup> Respondent and The Controller of Budget, an independent constitutional office holder with mandate to oversee implementation of budgets of the national and county governments, the 3<sup>rd</sup> Respondent. The Commission on Revenue Allocation, The Senate and 14 counties that had been identified as marginalized, were joined in this petition as the 1<sup>st</sup> to 16<sup>th</sup> Interested Parties respectively.
2. The Petition is supported by an affidavit sworn on 29<sup>th</sup> June 2016 and a supplementary affidavit sworn on 23<sup>rd</sup> May, 2019 by Jaqueline Omogeni, the petitioner's Chief Executive Officer. It challenges the constitutionality of the Guidelines on the Administration of the Equalisation Fund published in Gazette Notice No. 1711 of 13<sup>th</sup> March, 2015 by the 2<sup>nd</sup> Respondent.
3. The Petitioner avers that the impugned Guidelines on the Administration of the Equalisation Fund, do not take into account the recommendations contained in the Policy Guidelines issued by the 1<sup>st</sup> Interested Party. The petitioner avers that the Policy Guidelines were for consideration by Parliament when appropriating money out of the Equalisation Fund.
4. The brief facts giving rise to this petition are that, on 23<sup>rd</sup> February 2013, the 1<sup>st</sup> Interested Party issued a Policy on the Criteria for Identifying Marginalized Areas and Sharing of the Equalisation Fund for the Financial Years 2011-2014, in accordance with its mandate under Article 216(4) of the Constitution. The Equalisation Fund is established under Article 204(1) of the Constitution with the aim of addressing historical marginalization in the country, accelerate development in the marginalized areas and ensure as far as possible those areas are at par with the rest of the country. It was therefore intended to address the fair distribution of resources in order to bridge the gap of poverty in Kenya.
5. The Petitioner avers that the primary criteria chosen by the 1<sup>st</sup> Interested Party to identify marginalized counties was the County Development Index (hereinafter "CDI") which is constructed from indicators measuring the state of health, education, infrastructure and poverty in a county; the insights on the marginalisation from the Commission's county survey; and, analysis of historical and legislated injustices. Based on the above criteria, the 1<sup>st</sup> Interested Party gazetted fourteen counties, the 3<sup>rd</sup> -16<sup>th</sup> Interested Parties being the beneficiaries of the Equalisation Fund.
6. The Petitioner further avers that the 1<sup>st</sup> Interested Party made recommendations on the appropriation and management of the fund. Regarding appropriation, it was recommended that the fund be appropriated in a single budget line for each financial year; that it be given indirectly as conditional grants to marginalised counties and, that actual expenditure be done when the county governments were in place. It was further recommended that, unspent funds earmarked for a specific project in each year be rolled over to ensure project completion.
7. On the management of the Fund, the 1<sup>st</sup> Interested Party recommended the creation of an Advisory Committee that would develop operational guidelines including its membership. The policy by the 1<sup>st</sup> Interested Party was approved by Parliament in December 2014, and was to be effective for three financial years from the date of approval.
8. The Petitioner states that in May, 2014, the 2<sup>nd</sup> Respondent issued Guidelines on the Administration of the Equalisation Fund (hereinafter "the impugned Guidelines), which, according to the Petitioner, failed to take into account the 1<sup>st</sup> Interested Party's recommendations; that the 2<sup>nd</sup> Respondent transmitted the impugned guidelines to the 2<sup>nd</sup> Interested Party on 28<sup>th</sup> August 2014 in accordance with Section 11 of the Statutory Instruments Act, 2013, and that the Guidelines were then referred to the Senate Sessional Committee on Delegated Legislation for scrutiny.
9. The Petitioner contends that during the sitting held on 2<sup>nd</sup> October, 2014, the Senate Committee scrutinized and generally approved the Guidelines save for paragraph 4.1(g) (Part IV) on the establishment and composition of the Equalisation Fund Board for failure to make provision for counties' representation. The Petitioner further contends that on 13<sup>th</sup> March, 2015, the 2<sup>nd</sup> Respondent published the impugned Guidelines in the *Kenya Gazette, Vol. CXVII-No. 26, as Gazette Notice No.1711*.
10. The Petitioner avers that on 27<sup>th</sup> April, 2015, it submitted its detailed analysis of the impugned Guidelines to the 1<sup>st</sup> Respondent recommending that; the second Respondent subjects the guidelines to further stakeholder engagement; the fund be managed directly by the County Governments through a conditional grant, and, that the 1<sup>st</sup> Interested Party determines the criteria for identifying the Counties to benefit and the amount to be shared. The Petitioner further avers that on 3<sup>rd</sup> July, 2015, it wrote to the 2<sup>nd</sup> Respondent registering its concern that the Equalisation Fund had not been operationalised by the national government, and that the funds that had been allocated to the Fund in 2014/2015 financial year had not been released to the fourteen (14) counties identified as marginalized.
11. The Petitioner contends that in an extra ordinary session of the Intergovernmental Budget and Economic Council (IBEC) held on 11<sup>th</sup> August, 2015, the 2<sup>nd</sup> Respondent informed members that the regulations to operationalize the Equalisation Fund were ready and a Board to manage the the fund would be appointed in the course of the week. The members then passed a resolution that the 2<sup>nd</sup> Respondent would ensure that the Fund is operational before the end of August 2015 and that implementation of projects funded through the Equalisation Fund

would be consultative, where national and county staff would have a say in project identification.

12. In addition, the Petitioner states that; on 9<sup>th</sup> October 2015, it wrote to the 2<sup>nd</sup> Interested Party requesting to make an oral presentation on the administration of the Equalisation Fund; on 11<sup>th</sup> November, 2015, the Petitioner through its Committee on Finance, Commerce and Economic Affairs appeared before the Senate and made oral presentation on the Constitution of Kenya (Amendment No. 2) Bill, 2013 (National Assembly Bill No. 26 of 2013) and the administration of the Equalisation Fund and, on 12<sup>th</sup> November 2015, it submitted to the Senate its official recommendations on the administration of the Equalisation Fund for consideration.

13. According to the Petitioner, on 4<sup>th</sup> March, 2016 the clerk of the Senate invited it to submit its views on the Constitution of Kenya (Amendment No. 2) Bill, 2013 (National Assembly Bill No. 26 of 2013) and the administration of the Equalisation Fund. Subsequently, on 9<sup>th</sup> March, 2016, the Petitioner re-submitted its submissions and recommendations to the Senate.

14. The Petitioner contends that in April 2016, the 2<sup>nd</sup> Respondent issued its budget estimates of revenue and expenditure of the Equalisation Fund for the financial year 2016, and the National Treasury enhanced the revenue allocation to the Equalisation Fund to cater for the previous six (6) years when there was no budgetary allocation as contemplated under the Constitution. That the total allocation to the fund for the financial years **2011/2012 to 2016/2017** was estimated to be Kshs. 20,080,759,850/-. However, that the allocated funds were to be released directly through national government structures to the marginalized counties contrary to the constitutional structures and design in complete disregard of the 1<sup>st</sup> Interested Party's recommendations and, the resolutions passed by the Intergovernmental Budget and Economic Council in August, 2015.

15. The Petitioner contends that the 1<sup>st</sup> Interested Party's first policy was to be applied for three financial years 2014/15, 2015/16 and 2016/17 and the fourteen counties identified as marginalized were allocated Kshs. 12,400,000,000/- for the year ending 30<sup>th</sup> June, 2017 and the sum was deemed appropriated from 1<sup>st</sup> July, 2016 as provided in the Equalisation Fund Appropriation Act, 2017. The fourteen counties were again allocated the sum of Kshs. 11,977,764, 688/- for the year ending 30<sup>th</sup> June, 2018 as provided in the Equalisation Fund Appropriation Act, 2018.

16. It is the Petitioner's further case that, its Chairperson, in a press conference held on 2<sup>nd</sup> July, 2018, confirmed that Kshs. 12,400,000,000/- appropriated under the Equalisation Fund Appropriation Act, 2017 had not been disbursed to the marginalized counties, and that a total sum of Kshs. 24,377,764,688/- appropriated had not been disbursed to the Equalisation Fund Secretariat for the identified projects in the fourteen counties under the first policy.

17. In the Petitioner's view, the delay in the disbursement and utilization of the Equalisation Fund affirms its apprehension that the purpose for which the Equalisation fund was created will be frustrated. The sums appropriated should therefore be disbursed directly to the fourteen (14) marginalized counties as recommended by the 1<sup>st</sup> Interested Party.

18. The Petitioner, therefore, challenges the constitutionality of the impugned Guidelines and seeks the following reliefs:

**a) A Declaration that the Guidelines on the Administration of the Equalisation Fund in the Kenya Gazette Vol. CXVII-No. 26 are unconstitutional, null and void.**

**b) A Declaration that the Equalisation Fund, being for the benefit of marginalized counties can only be disbursed by the national government though the respective and affected county governments.**

**c) An order of Certiorari to issue to remove to this Court and quash the Guidelines on the Administration of the Equalisation Fund published in the Kenya Gazette Vol. CXVII- No. 26.**

**d) An order of Prohibition to prohibit the 3<sup>rd</sup> Respondent from approving any withdrawals from the Equalisation Fund before the 2<sup>nd</sup> Respondent consults the affected county governments.**

**e) An order does issue compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to establish an Advisory Board within the guidelines issued by the Commission of Revenue Allocation in accord with Article 204(4) of the Constitution.**

**f) An order directing the 2<sup>nd</sup> Respondent to release funds earmarked for projects in the counties earmarked to benefit from the Equalisation Fund though the county framework as a conditional grant.**

**g) This Court be pleased to issue any other appropriate order or relief as it may deem fit and just.**

**h) Cost of the Petition.**

### **The Responses**

19. In response to the Petition, the Respondents filed grounds of opposition dated 1<sup>st</sup> August 2016 and a replying affidavit sworn on 29<sup>th</sup> May, 2019 by Dr. Kamau Thugge, the then Principal Secretary at the National Treasury. The 1<sup>st</sup> Interested Party also filed a replying affidavit sworn on 23<sup>rd</sup> November, 2016 by George O. Ooko, its Secretary. The 2<sup>nd</sup> to 16<sup>th</sup> Interested Parties did not file any responses to the Petition, but the 2<sup>nd</sup> and 8<sup>th</sup> Interested Parties submitted orally in Court in support of the Petition.

### ***The Respondents' response***

20. It is the Respondents' case that the Equalisation Fund was established to be used by the National Government to provide basic services including water, roads, health facilities and electricity to marginalized areas, to the extent necessary to bring those areas to the level generally enjoyed by the rest of the country. It is the Respondents' further case, that Article 204(2) and (3) of the Constitution as read with Section 18 of the Public Finance Management Act, 2012 (PFMA) that the fund should be administered and/ or managed by the National Government through the National Treasury. They also contend that by dint of Section 12(2)(k) of the PFMA, the National Treasury is empowered to prescribe or issue guidelines with respect to financial matters and to monitor their implementation and compliance.

21. The Respondents argue that it was on the basis of proper and efficient management of the Equalisation Fund, that the National Treasury prepared Guidelines on the Administration of the Equalisation Fund, and forwarded the same for consideration by the Senate in accordance with the Statutory Instruments Act, No. 23 of 2013 and the applicable Standing Orders. They state that the impugned Guidelines were discussed in Parliament, approved and subsequently published by the Cabinet Secretary, National Treasury through the impugned *Gazette Notice*

22. They also contend that key stakeholders including the Petitioner and the Interested Parties were involved in the preparation and promulgation of the said regulations. As such, they argue that the impugned guidelines have both constitutional and statutory underpinning, thus enjoy the general presumption of constitutionality which the Petitioner has failed to rebut.

23. It is the Respondents' case that for purposes of the Equalisation Fund, the 1<sup>st</sup> Interested Party is constitutionally mandated to determine and publish a policy that sets out the criteria for the identification of marginalized areas; that the 1<sup>st</sup> Interested Party determined and published the Policy which was approved by Parliament in December, 2014. They further, state that the 1<sup>st</sup> Interested Party identified fourteen (14) counties as marginalized areas for purposes of the Fund, and that the Governors and County Commissioners of all the fourteen counties were among the stakeholders invited to the county consultative meetings on projects to be funded using the Fund for the applicable financial years.

24. According to the Respondents, estimates of revenue and expenditure from the Fund were prepared together with a list of projects identified as recommended by the Equalisation Fund Advisory Board, and the same was approved by the Cabinet Secretary, National Treasury.

25. The Respondents hold the view, that funds from the Equalisation Fund may be used only to the extent that the expenditure therefrom has been approved in an Appropriation Bill enacted by Parliament, upon submission of the relevant estimates of revenue and expenditure; that the fund being a National Government Fund, it may be used directly or indirectly through conditional grants to the marginalized counties; that the National Government therefore chose to use the fund directly, and that it has been implementing the same through the line Ministries, Departments and Agencies (MDAs) because the manner of administration of the Fund and the accountability thereto rests with the National Treasury on behalf of the National Government. In any event, they argue, no cogent reasons have been given by the Petitioner to support the assertion that the composition of the Equalisation Fund Advisory Board is legally deficient.

26. The Respondents aver that upon submission of the estimates of revenue and expenditure from the Equalisation Fund by the Cabinet Secretary National Treasury, the National Assembly is required to approve the same through an Equalisation Fund Appropriation Act and from the foregoing, it is evident that the projects were identified through extensive public consultations and areas of project implementation are in full compliance with the provisions of the Constitution, PFMA and the impugned Guidelines.

27. The Respondents contend that the Petitioner has misconstrued and misapplied the provisions of Article 204(4) of the Constitution, given that the 1<sup>st</sup> Interested Party's recommendations are only to be considered by Parliament during the enactment of an Equalisation Fund Appropriation Act, which role is distinct and does not apply to the mode of administration of the Fund under Article 204(2) and (3). They further contend that, the Petitioner cannot seek to prohibit the 3<sup>rd</sup> Respondent from exercising its constitutional mandate, and at the same time require the court to order release of funds to the counties without any legal basis.

28. The Respondents argue that the 1<sup>st</sup> Interested Party has already published the second policy and the criteria for sharing revenue among marginalized areas which have increased from 14 counties to 34 counties, and that any unutilized balances in the Equalisation Fund shall not lapse at the end of the financial year but shall be retained in the Equalisation Fund for the purposes for which the Fund was established. In addition, they argue that tenders have already been lawfully awarded to the various successful bidders and/or contractors for the implementation of the various projects in the concerned counties and the implementation of the said projects had commenced. In their view, it would be unjustified to halt the implementation of the said projects as it is likely to cause unprecedented liability for the National Government. The Respondents, therefore, argue that the Petition lacks merit and should be dismissed with costs.

### ***1<sup>st</sup> Interested Party's Response***

29. On its part, the 1<sup>st</sup> Interested Party avers that it is a constitutional Commission whose principal function is to make recommendations concerning the basis for equitable sharing of revenue raised by the national government between the national and county governments as provided in Article 216(1). The 1<sup>st</sup> Interested Party argues that the Equalisation Fund is established under Article 204(1) and constitutes 0.5% of all revenue collected by the national government each year calculated on the basis of the most recent audited accounts, received and approved by the National Assembly.

30. It is the 1<sup>st</sup> Interested Party's case that its mandate under Article 216(4) is to determine, publish and regularly review policy through which it sets out the criteria for identifying marginalized areas for purposes of Article 204(2). It argues that on the other hand, the National Government's mandate is to ensure that the Equalisation Fund is utilized only to provide basic services specified under Article 204(2). The Fund will be used only to the extent that the expenditure of the funds has been approved in an Appropriation Bill enacted by Parliament

either directly or indirectly through conditional grants to the identified counties as provided under Article 204 (2) and (3).

31. The 1<sup>st</sup> Interested Party contends that pursuant to Article 204 (4) it should be consulted and its recommendations considered before Parliament passes any Bill appropriating money out of the Equalisation Fund; that pursuant to Article 216 (3) (c) of the Constitution, it is enjoined to encourage fiscal responsibility when formulating such recommendations; that is mandated to submit recommendations to the Senate, National Assembly, National Executive and County Executive on the proposal made for equitable distribution of revenue pursuant to Section 10 (1) (c) of the Commission on Revenue Allocation Act as read with Article 216 (5).

32. The 1<sup>st</sup> Interested Party argues that in furtherance of its constitutional mandate, it published the Policy on the Criteria for identifying marginalized areas and sharing of the Equalisation Fund for the Financial Years 2011-2014 and submitted it to the National Assembly, the Executive, County Assemblies and County Governors through its letter dated 22<sup>nd</sup> February, 2013. It states that the Policy sets out the criteria for identifying the marginalized areas and did identify them. It further states that the policy provided a framework that was to guide in the planning, implementation, monitoring and evaluation in the use of the Equalisation Fund, using County Development Index (CDI) as the criteria in determining the state of health, education, education, infrastructure and poverty in the counties.

33. The 1<sup>st</sup> Interested Party argues that it identified fourteen (14) counties as marginalized areas,(3<sup>rd</sup> to 16<sup>th</sup> Interested Parties). It further argues that due to the fact that the amount set aside for the fund at 0.5% would not be adequate to remedy all the shortcomings in access and quality of services in the marginalized areas, the Policy made recommendations to be considered before Parliament passed any Bill appropriating money out of the Equalisation Fund.

34. According to the 1<sup>st</sup> Interested Party, the recommendations were that;

- a) the CDI be used as a primary basis for the identification of marginalized counties in addition to being identified as marginalized by either the analysis of historical injustices or county surveys or all the three approaches;
- b) the fourteen (14) identified counties be considered as marginalized for purposes of the fund;
- c) the Equalisation Fund be appropriated as conditional grants to marginalized counties and that the Fund should be spent when county governments are in place;
- d) the Fund should be appropriated in a single budget line instead of the sectors under the Medium Term Expenditure Framework (MTEF);
- e) the Fund should be managed by an Advisory Committee and that there should be clearly defined linkages between Fund Management, county and local level structures and line ministries; and that
- f) the policy is effective for three (3) years before it was reviewed.

35. The 1<sup>st</sup> Interested Party avers that it also developed Operational Guidelines on fund appropriation and management, aimed at ensuring the Fund achieved its objectives; recommended that the Equalisation fund be spent indirectly as conditional grants to marginalized counties once the counties are in place given that county governments are better placed to channel funds to targeted programmes in the marginalized areas within those counties.

36. Regarding the Fund Management, the 1<sup>st</sup> Interested Party recommended that the Advisory Committee be tasked to develop operational guidelines and a governance and implementation framework which would outline goals for service level improvement so as to bring quality of those services to the levels generally enjoyed by the rest of the country.

37. According to the 1<sup>st</sup> Interested Party, details of the operational guidelines included, project identification in line with Article 204(2); project appraisal and processes; Fund disbursement procedures; project implementation and progress reports and, project monitoring as well as evaluation process and audit. It avers that it recommended the composition of the Advisory Committee to include representatives from; the National Treasury; the Inter-Governmental Relations Department; the Controller of Budget; the Institute of Certified Public Accountants of Kenya (ICPAK) and State Departments responsible for water, roads, health and electricity. Lastly, that the management of the Fund be supported by Inter-Governmental Relations Department.

38. The 1<sup>st</sup> Interested Party asserts that the mandate of the National Government in the appropriation and management of the Equalisation Fund is to the extent only provided for in Article 204(2) and (3). In its view, the Equalisation Fund is part of the constitutional framework aimed at addressing service level gaps in marginalized areas by targeting particular projects that are expected to have transformational impact on these areas.

39. It argues, therefore, that there is need for collaborative interpolation between the two levels of government aimed at ensuring fiscal responsibility and prudent management of public funds. The 1<sup>st</sup> Interested Party's position is that the Equalisation Fund be spent indirectly as conditional grants to marginalized counties and be managed by the Advisory Committee constituted as per its recommendations.

40. It is the 1<sup>st</sup> Interested Party's contention, therefore, that Parliament has been appropriating funds for the purposes of distribution of the Equalisation Fund to the fourteen (14) counties it identified in its Policy for the past three financial years; 2014/15, 2015/16 and 2016/17 without consulting as required by Article 204 (4). It further contends that the impugned Guidelines show that the 2<sup>nd</sup> Respondent did not take into consideration its recommendations made pursuant to its constitutional mandate.

## Analysis and Determination

41. This Petition was canvassed by way of oral and written submissions. Issa and Company Advocates for the Petitioner filed written submissions dated 20<sup>th</sup> June 2017. Mr. Issa and Miss Lipwop appeared for the Petitioner during the hearing.
42. The Respondents relied on two sets of submissions. The first set is dated 9<sup>th</sup> August 2016 and was filed by Mwangi Njoroge, then a Chief State Counsel at the Attorney General's Chambers while the second set dated 29<sup>th</sup> May 2019 was filed by Maurice Ogosso, also a State Counsel at the Attorney General's Chambers. Mr. Ogosso appeared for the respondents during the hearing and highlighted their submissions.
43. V.A Nyamodi & Company Advocates filed written submissions dated 19<sup>th</sup> June 2017 on behalf of the 1<sup>st</sup> Interested Party. Ms. Ndong appeared for the 1<sup>st</sup> Interested Party and highlighted their submissions. Mr. Kuyoni and Mr. Oindo, counsel for the 2<sup>nd</sup> and 8<sup>th</sup> Interested Parties respectively, appeared during the hearing and orally supported the Petition.
44. We have carefully considered the substance of the Petition, the parties' affidavits, rival submissions and authorities relied on. In our view, the following issues arise for determination:

1. **Whether the policy recommendations by the 1<sup>st</sup> Interested Party on Revenue Allocation, utilization and management of the Equalisation Fund are binding on the National Treasury.**
2. **Whether the Policy on the Criteria for Identifying Marginalized Areas and Sharing of the Equalisation Fund for the Financial Years 2011-2014 by the 1<sup>st</sup> Interested Party is still valid and applicable.**
3. **Whether the Guidelines on the Administration of the Equalisation Fund issued by the National Treasury vide Legal Notice No. 1711 of 13<sup>th</sup> March 2015 are unconstitutional.**
4. **Whether the reliefs sought should be granted.**

### ***I. Whether the policy recommendations by the 1<sup>st</sup> Interested Party are binding on the National Treasury***

45. In the Petitioner's view, the intention of the framers of the Constitution including Articles 204(4) and 216 in the Constitution can be gleaned from the Final Report of the Committee of Experts (CoE) on Constitutional Review. It argues that the Report stated that the Articles provided a method of identifying areas to which the Equalisation Fund may be used, and that the 1<sup>st</sup> Interested Party was mandated to identify marginalized areas. Further, that the CoE introduced controls on spending from the Fund and was categorical that whatever approach the money from the fund is allocated, the 1<sup>st</sup> Interested Party had to be consulted before the money is spent and only on proper appropriation by Parliament.

46. Counsel submitted that the CoE further observed that with respect to the 1<sup>st</sup> Interested Party's mandate *vis a vis* the Equalisation Fund, Parliament would make the final decisions in these matters but the Interested Party's technical advice would strengthen debates in Parliament and enable it make informed decisions. That at the same time, the analysis of the needs and recommendations provided by the Interested Party will also empower county governments to engage constructively in the processes that concerned their finances. So that, if Parliament deviated from the recommendations by the 1<sup>st</sup> Interested Party, it would have to explain how revision of the proposals complies with the criteria set out in the Constitution. That the 1<sup>st</sup> Interested Party's recommendations, therefore, enhance accountability in financial management on division of revenue and the use of the Equalisation Fund.

47. Counsel argued that despite the 1<sup>st</sup> Interested Party's recommendations, the 2<sup>nd</sup> Respondent gazetted different policy guidelines on the administration of the Equalisation Fund. It is the Petitioner's contention that the recommendation by the 1<sup>st</sup> Interested Party is binding on the National Treasury and unless exceptional circumstances are given, it was not open to Treasury to come up with different and less effective guidelines. Mr. Issa stressed that the National Treasury has no discretion to disregard the 1<sup>st</sup> Interested Party's recommendations, including the method of disbursing funds to the counties.

48. To buttress his argument, counsel relied on the Court of Appeal decision in **Teachers Service Commission v Kenya Union of Teachers & 3 Others, (2015) eKLR** the Court (per Githinji, JA) interpreted the binding nature of advice required to be given by a Commission as set out in Article 259(11) of the Constitution to mean that the advice is a mandatory condition precedent for a valid exercise of power or function.

49. Reliance was also placed on **Kenya National Union of Nurses v Moi Teaching and Referral Hospital Board & 2 Others (2015) eKLR** where the Court underscored the binding nature of advice and that the Constitution cannot contain mere advice incapable of being enforced and whose violation is without legal consequences. The Applicant further cited the South African case of **The New National Party of South Africa vs The Government of the Republic of South Africa, (1999) CCT9/99** where the court held that Commissions are a product of the new constitutionalism, and that their advent inevitably has important implications for other organs of state who must understand and recognize their respective roles.

50. The Respondents' submissions on this issue were two-fold. First; they faulted the Interested Party's policy, and submitted that Article 216 refers to marginalized areas and not marginalized counties hence there was no legal justification for the 1<sup>st</sup> Interested Party to confine the enumeration of marginalized areas in its policy to the entire county instead of a specific affected area within the county.

51. In their view, county governments need not be in charge of the use of the funds allocated under the Equalisation Fund. Further, that Article 204 gives the national Government a free hand in deciding how it applies the Equalisation Fund, either directly or indirectly, and funds would only go to County Governments if they were conditional grants.

52. Second, regarding the recommendations made by the 1<sup>st</sup> Interested Party, the Respondents submitted that section 10(1) of the Commission on Revenue Allocation Act provides that the 1<sup>st</sup> Interested Party shall in addition to its functions under Article 216 make recommendations for consideration by Parliament before any appropriation bill is passed. Further, that in respect of the Equalisation Fund, Article 205 provides for recommendations by the 1<sup>st</sup> Interested Party for consideration by Parliament before voting on any Bill that contains provisions for dealing with the sharing of revenue. They therefore, argued that the 1<sup>st</sup> Interested Party can only make recommendations as to the sharing of revenue, and that recommendations on the composition of the management Advisory Board are outside the ambit of the recommendations it can make.

53. It is the Respondents' further submission, that under Article 216, the 1<sup>st</sup> Interested Party's basic function is to make recommendations for equitable sharing of revenue between the national and county governments and amongst county governments. According to them, the fact that under Article 216(2) the 1<sup>st</sup> Interested Party may make recommendations on other matters, this can only be interpreted to mean other matters concerning the financing of, and financial management by county governments. In their view, recommendations made under Article 216(3) can only be in relation to the criteria for equitable sharing of funds according to the principles set out in Articles 202 and 203. And that since the Equalisation Fund is specifically created under Article 204(1), it cannot be the subject of the recommendations made under Article 216, as read with Article 202 and 203.

54. They emphasized that under Article 204(3)(b), the National Government is at liberty to choose the method by which it will use the Equalisation Fund in the marginalised areas, and if it has decided it will use the funds directly in those areas, the 1<sup>st</sup> Interested Party is not empowered to make any binding recommendations that would compel the National Government to use the funds directly. They maintained, therefore, that recommendations by the 1<sup>st</sup> Interested Party pursuant to section 10 of the Commission on Revenue Allocation Act cannot override the clear provisions of Article 204(3)(b), and to the extent that they were meant to compel the National Government to apply the Equalisation Fund in a certain manner, are unconstitutional, null and void.

55. According to the Respondents, the 1<sup>st</sup> Interested Party can only make recommendations with regards to funds entrusted by the National Government to the County Governments for indirect use, and only then does Article 216(3) require it to encourage fiscal responsibility. They asserted that the only policy by the 1<sup>st</sup> Interested Party that will bind the national Government is that which defines marginalized areas.

56. Ms. Ndong, appearing for the 1<sup>st</sup> Interested Party, submitted on the role of the 1<sup>st</sup> Interested Party as a Constitutional Commission, and relied on the case of **County Government of Mandera & 2 Others v the Commission of Revenue Allocation & 4 Others, (2017) eKLR** where the court stated that Chapter 12 of the Constitution lays out both detailed principles and elaborate procedures for making decisions about public finances, the core values being public engagement throughout the process and equity in distribution of resources. Counsel further submitted that Article 202 provides for equitable sharing of national revenue and in order to ensure equitable sharing, the Constitution provides for mandatory consultation between Parliament and the Commission for Revenue Allocation established under Article 215(1).

57. It was therefore, submitted that the 1<sup>st</sup> Interested Party is constitutionally mandated to consider any relevant Bill and make recommendations to Parliament as the first step in the consultation process and its functions elaborated in Article 216. She further relied on **Wamatangi Kimani Paul v Commission on Revenue Allocation, (2016) eKLR** where it was held that the 1<sup>st</sup> Interested Party is expected to determine not just the equitable share of revenue for each level of government but also for each county.

58. It was further submitted that the 1<sup>st</sup> Interested Party issued the *Policy on the Criteria for Identifying Marginalized Areas and Sharing of the Equalisation Fund for the Financial Years 2011-2014* in fulfilment of its fundamental role as espoused by Article 204 and read with Article 216(4). Similarly, that the High Court after considering the aforementioned provisions in **Speaker, Nakuru County Assembly & 46 Others v Commission on Revenue Allocation & 3 Others, (2015) eKLR** held that the 1<sup>st</sup> Interested Party is the body charged with the responsibility of making recommendations *inter alia* to the Senate, the National Assembly, the National Executive, County Assemblies and County Executives on the basis upon which revenue would be shared equitably between the National and County Governments.

59. It was counsel's assertion that pursuant to these provisions, the Commission identified fourteen counties fitting the description of marginalized areas and made recommendations in the form of a policy and submitted the same to the National Assembly, Senate, National Executive, County Assemblies and County Governors on 22<sup>nd</sup> February 2013. That in blatant disregard of Article 204(4), Parliament went forth and appropriated funds to the fourteen counties unilaterally without putting into consideration, the 1<sup>st</sup> Interested Party's recommendations. She therefore submitted that the impugned Guidelines are unconstitutional to the extent that they do not take into consideration the Policy guidelines issued by the 1<sup>st</sup> Interested Party.

60. Ms Ndong also submitted that Article 201(1) provides for responsible financial management and clear fiscal reporting as one of the principles of public finance; Article 10(2)(c) provides of good governance, integrity, transparency and accountability as one of the national values and principles of good governance; that Article 216(3) provides that in making recommendations, the Commission shall seek to promote and give effect to the criteria set out in Article 203(1), define and enhance the revenue sources of the National and County governments where appropriate and to encourage fiscal responsibility.

61. Counsel also relied on **Teachers Service Commission vs Kenya Union of Teachers & 3 Others, (supra)** for the submission that fiscal sustainability is a guiding constitutional criteria in the determination of remuneration and benefits in the public service; the case of **Judicial Service Commission v Speaker of the National Assembly & 8 Others, (2014) eKLR** for the proposition that it is a constitutional requirement that those charged with the affairs of state and governance are accountable to the citizenry. Further, that in **Speaker, Nakuru County Assembly & 46 Others v Commission on Revenue Allocation & 3 Others (supra)**, the court stated that fiscal reporting mechanisms are provided at the National level and also at County level, to ensure accountability and transparency in utilization of county

resources.

62. In conclusion, counsel submitted that the 1<sup>st</sup> Interested Party's constitutional mandate is to encourage fiscal responsibility in the formulation of policy geared towards ensuring accountability and transparency in the utilization of public finances.

63. We have considered the detailed arguments made by the parties on this issue. The starting point of our discussion on this issue is the principle of Constitutional supremacy expressly stated in Article 2(1) of the Constitution. This principle dictates that the Constitution is the supreme law and that principles of the Constitution are binding on all persons and state organs. Any law or conduct that is not in accordance with the Constitution for procedural or substantive reasons, will therefore not have the force of law.

64. The role of the Court in upholding constitutional supremacy was stated in **Shaban Mohamud Hassan & 3 Others, [2013] eKLR** thus:

**“We add that the courts in discharging their judicial function must always bear in mind the supremacy of the Constitution and to respect the manner it has distributed functions to various state organs and independent bodies. The function of the High court is to see that lawful authority vested in these organs and bodies is not abused by unfair treatment. They cannot step outside the bounds of authority prescribed to them by the Constitution or statute because the supremacy of the Constitution is protected by the authority of an independent Judiciary, which acts as the interpreter of the constitution and all other legislation. But as Lord Brightman warned in the often cited case of Chief Constable of North Wales Police vs. Evans [1982] 1 WLR 1155 at 1173:**

**‘If the court were to attempt itself the task entrusted to that authority by the law the court would under the guise of preventing the abuse of power be guilty of itself usurping power.’ “**

65. The 1<sup>st</sup> Interested Party is established under Article 215, and its principal functions are to make recommendations and develop policy on the areas and in the manner provided for in Article 216. The Article states:

**“(1) The principal function of the Commission on Revenue Allocation is to make recommendations concerning the basis for the equitable sharing of revenue raised by the national government—**

**(a) between the national and county governments; and**

**(b) among the county governments.**

**(2) The Commission shall also make recommendations on other matters concerning the financing of, and financial management by, county governments, as required by this Constitution and national legislation.**

**(3) In formulating recommendations, the Commission shall seek—**

**(a) to promote and give effect to the criteria mentioned in Article 203 (1);**

**(b) when appropriate, to define and enhance the revenue sources of the national and county governments; and**

**(c) to encourage fiscal responsibility.**

**(4) The Commission shall determine, publish and regularly review a policy in which it sets out the criteria by which to identify the marginalised areas for purposes of Article 204 (2).**

**(5) The Commission shall submit its recommendations to the Senate, the National Assembly, the national executive, county assemblies and county executives.”**

66. In addition, the Commission on Revenue Allocation Act, makes provision for further functions and powers of the 1<sup>st</sup> Interested Party. Section 10 provides that in addition to its principal function under Article 216 (1), the 1<sup>st</sup> Interested Party has power in accordance with Article 216(2) to do the following—

**“(a) make recommendations for consideration by Parliament prior to any Bill appropriating money out of the Equalisation Fund is passed in Parliament;**

**(b) upon request from the Senate, make recommendations on the basis for allocating among the counties the share of national revenue that is annually allocated to the county levels of government;**

**(c) submit recommendations to the Senate, National Assembly, national executive, County Assembly and county executive on the proposals made for equitable distribution of revenue between the national and county governments and amongst the county governments taking into account the criteria set out in Article 203 of the Constitution, including recommendations on the amounts earmarked for specific purposes such as the constituency development fund, among others; and**

**(d) perform such other functions as are provided for.”**

67. The 1<sup>st</sup> Interested Party is therefore clothed with both Constitutional and statutory powers to make recommendation on the areas listed in the foregoing constitutional and statutory provisions. This Petition focuses on the *Policy on the Criteria for Identifying Marginalized Areas and Sharing of the Equalisation Fund for the Financial Years 2011-2014* that was originated by the 1<sup>st</sup> Interested Party. The policy was on the identification of marginalized areas that the 1<sup>st</sup> Interested Party is specifically mandated by Article 216(4) to undertake. There is no dispute, therefore, that indeed the 1<sup>st</sup> Interested Party discharged this obligation.

68. The gravamen of the Petition revolves around the second part of the policy relating to sharing of the Equalisation Fund and the mode of disbursement. The Petitioner’s grievance is that the impugned guidelines did not take into account its recommendation regarding sharing of the equalisation fund. The Petitioner and the 1<sup>st</sup> Interested Party have argued that the 1<sup>st</sup> Interested Party’s recommendation on sharing of the Equalisation Fund are binding on the 2<sup>nd</sup> Respondent and the National Treasury and should not have been ignored.

69. The Respondents on their part have argued that the 1<sup>st</sup> Interested Party has no power to make recommendations specifically on the sharing of the Equalisation Fund. In their view, the national Government has the sole discretion to decide how the fund is to be utilized pursuant to the Constitution and the PFMA. The first question we are therefore required to answer, is whether the 1<sup>st</sup> Interested Party has any powers to make recommendations regarding the sharing of the Equalisation Fund.

70. The Equalisation Fund is a creature of the Constitution. Article 204 provides as follows:

**“(1) There is established an Equalisation Fund into which shall be paid one half per cent of all the revenue collected by the national government each year calculated on the basis of the most recent audited accounts of revenue received, as approved by the National Assembly.**

**(2) The national government shall use the Equalisation Fund only to provide basic services including water, roads, health facilities and electricity to marginalised areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible.**

**(3) The national government may use the Equalisation Fund— (a) only to the extent that the expenditure of those funds has been approved in an Appropriation Bill enacted by Parliament; and (b) either directly or indirectly through conditional grants to counties in which marginalised communities exist.**

**(4) The Commission on Revenue Allocation shall be consulted and its recommendations considered before Parliament passes any Bill appropriating money out of the Equalisation Fund.**

**(5) Any unexpended money in the Equalisation Fund at the end of a particular financial year shall remain in that Fund for use in accordance with clauses (2) and (3) during any subsequent financial year.**

**(6) This Article lapses twenty years after the effective date, subject to clause (7).**

**(7) Parliament may enact legislation suspending the effect of clause (6) for a further fixed period of years, subject to clause (8).**

**(8) Legislation under clause (7) shall be supported by more than half of all the members of the National Assembly, and more than half of all the county delegations in the Senate.**

**(9) Money shall not be withdrawn from the Equalisation Fund unless the Controller of Budget has approved the withdrawal.”**

71. The fact that the 1<sup>st</sup> Interested Party has mandate to make recommendations for consideration before Parliament passes any Bill appropriating money out of the Equalisation Fund as spelt out in Article 204(4) cannot be gain said. In addition, Article 216(2) and section 10 of the Commission on Revenue Allocation Act give the 1<sup>st</sup> Interested Party powers to make recommendations concerning the financing of, and financial management by, county governments. The 1<sup>st</sup> Interested Party’s functions further include recommendations on the amounts earmarked for specific purposes such as the Constituency Development Fund, among others. Use of the words **“includes”** and **“among others”** is a clear indication that the Constitution and statute did not intend to limit the mandate of the 1<sup>st</sup> Interested Party.

72. We therefore find and hold that our reading of Articles 204(4) and 216(2) and (4) together with section 10 of the Commission on the Revenue Allocation Act, is that the 1<sup>st</sup> Interested Party’s mandate is not limited to formulation of policy setting out the criteria for identification of marginalized areas only, as argued by the Respondents.

73. This finding leads us to the second and more critical aspect of this issue, that is: whether the recommendations made by the 1<sup>st</sup> Interested Party on the sharing of the Equalisation Fund, are binding on the National Treasury. In order to answer this question; we turn to the principles that underlie interpretation of the Constitution. As always, the starting point is Article 259(1) which obliges this Court to interpret it in a manner that : (a) promotes its purposes, values and principles; (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance.

74. Article 259 (11) provides as follows:

**“If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise.”**

75. The binding nature of recommendations by constitutional Commissions is thus expressly provided for in Article 259 (11). This view was expressed by Githinji, JA in Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others, [2015] eKLR, thus:

**“[27]... The very composition of SRC indicates that its advice has to be given great weight. The phrase “only on that advice...” used in Article 259(11) shows that the advice is a mandatory condition precedent for a valid exercise of power or function. If the word “advise” in Article 230 (4) (b) is construed to be not binding, the country would be returned to the pre-Constitution 2010 era which would defeat the purposes, values and principles of the Constitution and of the institutionalization of SRC under the Constitution. It is conceivable and indeed inevitable that many employers in public sector would defy SRC’s advice leading to unimaginable financial crisis in the management of national wage bill.**

**[28] Having regard to the mischief that the institutionalisation of SRC under the Constitution was intended to cure the principles of public finance and fiscal responsibility, the budgetary process and the complexity of salaries and benefits determination for public officers, I hold that the advice of SRC under Article 230(4)(b) on remuneration and benefits of all public officers is binding on national and county governments and any power or function exercised without that advice is invalid.” (emphasis)**

76. Similarly, the Supreme Court, while discussing the nature of its advisory opinions which are provided for under Article 163(6) of the Constitution, held in In the Matter of Interim Independence Electoral Commission [2011] eKLR, as follows:

**“[91] Our task now is to decide whether an Advisory Opinion is simply that – advice which does not bind anyone; or whether it is a ‘decision’, within the meaning of Article 163(7), and thus, *binding* on any Court or parties.....**

**[93] In our discussion of the advisory jurisdiction, we have adopted a circumscribed mandate in relation to the exercise of that jurisdiction. From such a reserved position, and in view of the pragmatic and discretionary nature of the mandate as we conceive it, we perceive that the Supreme Court’s decisions in this domain may significantly touch on legal, policy, political, social and economic situations. On this account, it is inappropriate that the Supreme Court’s Advisory Opinion should be sought as *mere advice*. Where a government or State organ makes a request for an Opinion, it is to be supposed that such organ would *abide* by that Opinion; the Opinion is sought to *clarify a doubt*, and to enable it to *act in accordance with the law*. If the applicant were not to be bound in this way, then it would be seeking an Opinion merely in the hope that the Court would endorse its position and, otherwise, the applicant would consider itself free to disregard the Opinion. This is not fair, and cannot be right. While an Advisory Opinion may not be capable of enforcement in the same way as ordinary decisions of the Courts (in the shape of Rulings, Judgments, Decrees or Orders), it must be treated as an authoritative *statement of the law*. The Opinion must guide the conduct of not just the organ(s) that sought it, but all governmental or public action thereafter. To hold otherwise, would be to reduce Article 163(6) of the Constitution to an “idle provision”, of little juridical value. The binding nature of Advisory Opinions is consistent with the values of the Constitution, particularly the rule of law.”**

77. As a matter of precedent, the above decisions are binding on this court. We are accordingly guided by the reasoning in the two decisions which we find helpful in determining the issue before us. At this juncture, we can only emphasise that constitutional provisions must be given due regard and force of law in the interest of the rule of law and good governance. We will later in this judgment address in detail why the framers of the Constitution deemed it necessary to provide that the 1<sup>st</sup> Interested Party shall, among other things, give recommendations on the appropriation of the Equalisation Fund.

78. It is sufficient, in our view, to state that the mandate of the 1<sup>st</sup> Interested Party having been spelt out in the Constitution and statute, both the procedural and substantive aspects of the provisions setting out its mandate to make recommendations must be given effect in order to achieve the purposes and principles of the Constitution.

79. This position was expounded on by Otieno-Odek J.A. in Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others, [supra] as follows:

**“[211] Article 259 (11) raise two interpretation issues: is the request for advice from SRC that is mandatory and binding or is the advice given by SRC that is binding or are both mandatory and binding” Seeking SRC’s advice is a constitutional procedural step; the content of the advice given is substantive as it affects the remuneration rights and entitlements of public officers. Article 230 (4) (b) of the Constitution must be analyzed from both the procedural and substantive aspects. The issue is whether both the procedural and substantive aspects of SRC’s advice are binding.”**

80. After considering various judicial authorities on the issue, the Judge held as follows:

**“[230]. Guided by the Supreme Court decision In the Matter of Advisory Opinion of the Court, Constitutional Application No. 2 of 2011 at paragraph 93 and persuaded conclusions by the learned Justice Lenaola in Kenya National Commission on Human Rights -v- AG & Another, Petition No. 132 of 2013; 2015 eKLR,I hereby come to the conclusion and finding that the advice given by SRC is binding. The advice is binding because to hold otherwise would render the functions of SRC under**

**Article 230 (5) idle; it would render SRC ineffective and irrelevant; it will introduce a discretionary concept of pick and choose in Kenya's governance structure. An interpretation that renders a constitutional Article idle and an Independent Commission ineffective does not pass the threshold of constitutionality. SRC is a constitutional organ and the trial judge erred in interpreting the Constitution in a manner that renders SRC's singular and exclusive mandate in Article 230 (5) (a) idle and ineffective. The trial court misapprehended the doctrine of separation of functions which is keystone in Kenya's governance structure. In holding that SRC has a non-binding advisory role in the determination remuneration and benefits of public officers, the trial court disregarded the central and exclusive juridical competence of SRC in the determination of fiscal sustainability of the total public compensation bill as per Article 230 (5) (a) of the Constitution."**

81. The learned Judge further explained the legal basis of the binding nature of recommendations and advice required by the Constitution:

**"[231] I am fortified in my finding that the advice given by SRC is binding because a constitution does not contain mere advice; it does not contain provisions that would not have a binding force and obligation of law; everything in the constitution must have the force and binding obligation of law; nothing can be put in a constitutional instrument in the form of mere advice with no binding obligation and be placed in company of other binding Articles. A constitution cannot contain mere advice, incapable of being enforced and whose violation is attendant with no legal consequences. Unless expressly stated, the 2010 Constitution does not contain Articles or provisions that are without force of law and whose binding nature is discretionary. Except as otherwise stated in the Constitution, Article 259 (11) removes all discretionary power and by so doing, the Constitution contains binding provisions."**

82. That recommendations made by the 1<sup>st</sup> Interested Party are binding is reinforced by the fact that there is no dispute that the *Policy on the Criteria for Identifying Marginalized Areas and Sharing of the Equalisation Fund for the Financial Years 2011-2014* containing the recommendation was tabled before Parliament by the 1<sup>st</sup> Interested Party as required by Article 216(5) and approved by Parliament. It is also notable that Article 204(3) requires any expenditure from the Equalisation Fund to be in a manner approved by Parliament. This would therefore include the recommendations made by the 1<sup>st</sup> Interested Party on sharing of the Equalisation Fund. Further, section 18 of the PFMA specifically provides that the National Treasury shall administer the Equalisation Fund in accordance with Article 204 of the Constitution.

83. In this respect, the 1<sup>st</sup> interested Party relied on the decision by Lenaola J. (as he then was), in **Speaker, Nakuru County Assembly & 46 others v Commission on Revenue Allocation & 3 Others**, [2015] eKLR where the learned Judge considered the question of whether the recommendations by the 1<sup>st</sup> Interested Party are binding on all the organs to which they are made and held as follows:

**"Reading Articles 216, 217 and 218 of the Constitution as well as Section 10(1) of the Commission on Revenue Allocation Act, Cap.5E, a number of facts can be distilled a viz;**

**(i) The principle function of the 1<sup>st</sup> Respondent is to make recommendations to the Senate, the National Assembly, the National Executive, County Assemblies and County Executives.**

**(ii) By the very nature of recommendations, they are persuasive but not binding on the person or body to which they are directed.**

**(iii) Its principal functions in Article 216(1) and (2) of the constitution are to be supplemented by legislation and hence Section 10(1) of the Commission on Revenue Allocation Act, which has been reproduced elsewhere above.**

**(iv) The impugned Circular if looked at in the context of Article 216(1) (2) and (5) of the Constitution and Section 10(1) aforesaid cannot be said to be unlawful or unconstitutional as argued by the Petitioners because it was made well within the mandate of the 1<sup>st</sup> Respondent."**

84. We have considered the above holding and while the decision is not binding on this Court, we note that it is distinguishable from the circumstances of this petition. The issue in the case before that court was on the constitutionality of a circular issued by the 1<sup>st</sup> Interested Party addressed to all County Governments. The circular recommended a ceiling on allocation for all County Assemblies and all County Executives in the County budgets for the financial year 2014/2015. That decision was, therefore, not on recommendations regarding the sharing of the Equalisation Fund on which constitutional provisions and different legal principles apply. In any event, the Court did make a specific finding that the said circular was lawful and within the 1<sup>st</sup> Interested Party's mandate.

85. It is therefore our finding that taking into account the constitutional requirements regarding appropriation of the Equalisation Fund, and the circumstances of this Petition, the recommendations on the sharing of the Equalisation Fund made by the 1<sup>st</sup> Interested Party in *Policy on the Criteria for Identifying Marginalized Areas and Sharing of the Equalisation Fund for the Financial Years 2011-2014* were binding on the National Treasury and 2<sup>nd</sup> Respondent in any instruments or actions undertaken to operationalise the Equalisation Fund.

86. We have arrived at this holding fully aware that Kenya is a democratic state founded on national values and principles in Article 10, which bind all state and public officers whenever they apply and interpret the constitution, enact, apply or interpret laws or make or implement public policy decisions. The founding values in Article 10(2) include; sharing and devolution of power, participation of the people, inclusivity, equality, protection of the marginalised, integrity, transparency and accountability.

87. Failure by the National Treasury and by extension, the 2<sup>nd</sup> Respondent, to include representatives from the affected counties in the composition of the Equalisation Fund Board as recommended by the 1<sup>st</sup> Interested Party violates the letter and spirit of the Constitution. Article 159 (1) obligates this court while exercising its judicial authority, to protect and promote the purpose and principles of the

Constitution, including devolution and protection of the marginalised. Without this, the essence of the 1<sup>st</sup> Interested Party would be rendered superfluous.

***II. Whether the Policy on the Criteria for Identifying Marginalized Areas and Sharing of the Equalisation Fund for the Financial Years 2011-2014 by the Commission for Revenue Allocation is still valid and applicable.***

88. Mr. Issa's submission regarding this issue was that the second policy formulated by the 1<sup>st</sup> Interested Party relates to the period 2018 to 2021. In counsel's view, the first policy covered the first period after the counties came into existence and that the funds allocated for the identified 14 marginalised areas (Counties) has not been utilized and therefore, the policy is valid.

89. Mr. Issa submitted that the Equalisation Fund has a sunset clause; is not a fund in perpetuity, and its objective was to bring marginalized areas at par with the rest of the country. Counsel maintained that funds having not been disbursed as intended, the policy remains valid and the National Government, should disburse the funds as recommended by the 1<sup>st</sup> Interested Party.

90. Learned counsel further submitted that certain duties and obligations are placed upon the National Treasury by section 18 of the PFMA to ensure that the Equalisation Fund is ring-fenced, thus demonstrating the urgency for disbursement. He also submitted that the second policy by the 1<sup>st</sup> Interested Party cannot affect the binding recommendations of the first policy which was adopted by Parliament, as the Equalisation Fund is created by the Constitution as a revolving fund. Mr. Issa, expressed the view that the 1<sup>st</sup> Interested Party's second policy has not been tabled before Parliament nor approved, and for that reason it has no effect on the issues raised in this Petition, or monies already appropriated by an Act of Parliament in relation to the Equalisation Fund.

91. Mr. Ogosso on his part submitted from the bar that the second policy prepared by the 1<sup>st</sup> Interested Party, will be used to share revenue from the Equalisation Fund for the financial years 2011/2012, 2012/2013, 2013/2014, 2017/2018, 2018/2019, 2019/2020 and 2020/2021. According to Mr. Ogosso, this adequately addresses the Petitioner's and Interested Party's concerns.

92. In our view, this is not a serious legal issue. Article 216(4) provides for regular review of the policy on identification of marginalized areas. It is notable in this respect that the recommendations in dispute are not on the identification of marginalized areas which have since been expanded by the second policy, but on the sharing of revenue from the Equalisation Fund in these marginalized areas, and management of the Fund. In our view, the policy is still valid and applicable.

93. In addition, Article 204(5) as read together with Article 204(3) of the Constitution provide that any funds appropriated but not expended out of the Equalisation Fund for any given financial year, shall remain in the fund for use during any subsequent financial year. Therefore, the unexpended funds for the financial years to which the *Policy on the Criteria for Identification of Marginalized Areas and Sharing of the Equalisation Fund for the Financial Years 2011-2014*, would still be available for use in accordance with whatever recommendations or guidelines that are found to be the ones applicable by this Court.

94. Regarding the years to which the *Policy on the Criteria for Identification of Marginalized Areas and Sharing of the Equalisation Fund for the Financial Years 2011-2014* applies, section 4.3.3 of the said policy states that it is applicable for 3 years. The second policy, when reviewing the implementation of the first policy in paragraph 3.7 at page 15 thereof, states that implementation started in the financial year 2016/2017, and that Kshs 12.4 billion was implemented across different sectoral priorities in accordance with the impugned Guidelines, which was a lump sum allocation for three financial years, namely; 2014/15, 2015/16 and 2016/17.

95. It is our finding that since the recommendations made regarding the appropriation and management of the Equalisation Fund among marginalised areas were not changed or reviewed by the 1<sup>st</sup> Interested Party pursuant to Article 216(4) of the Constitution in the second policy, the period to which the First Policy applies would be immaterial.

96. Put differently, the various statements as to the years of operation of the policy would only be relevant to the issue of its validity or application, if the recommendations made therein were expressly reviewed by the 1<sup>st</sup> Interested Party in the second policy. It is for this reason that the second policy states that it shall also apply to previous years, including years when the first policy was in operation. In our view, the first policy is valid and applicable with respect to the recommendations that have not been reviewed or varied by the 1<sup>st</sup> Interested Party.

***III. Whether the Guidelines on the Administration of the Equalisation Fund issued by the National Treasury are unconstitutional.***

97. We now turn to consider the constitutionality of the impugned Guidelines. Counsel for the Petitioner submitted that the Guidelines issued by the 2<sup>nd</sup> Respondent violate Articles 204(4) and 2016 of the Constitution in so far as they failed to reflect the recommendations by the 1<sup>st</sup> Interested Party. According to the Petitioner, only Parliament had the mandate to review the policy submitted by the 1<sup>st</sup> Interested Party, and that the National Treasury's mandate was to implement the policy as recommended by the 1<sup>st</sup> Interested Party and approved by Parliament.

98. Noting that the impugned Guidelines are anchored in Section 12(2) of the PFMA, the Petitioner further submitted that it is trite law that provisions of the Constitution take precedence over those of statutes, and the National Treasury can only issue guidelines to national government entities and not in matters touching on counties. It is thus the Petitioner's submission that the guidelines issued by the 1<sup>st</sup> Respondent pursuant to powers provided under section 12(2) of the PFMA and in so far as they do not reflect the recommendations by the 1<sup>st</sup> Interested Party as required under Articles 204(4) and 216 are unconstitutional.

99. Further, that the 2<sup>nd</sup> Respondent's failure to consider the legitimate observations made by the Petitioner questioning exclusion of other stakeholders' representation in the Fund Board violated the Constitution.

100. Counsel pointed out that the Senate Sessional Committee on delegated Legislation in its sitting of 2<sup>nd</sup> October, 2014 also observed that paragraph 4.1 of the impugned Guidelines did not make provision for representation of counties in the Fund Board, thus recommended its annulment. That notwithstanding, the 2<sup>nd</sup> Respondent went ahead to earmark roads, water, health and energy infrastructure projects for the marginalized counties and attempted to allocate funds for each county for the financial year 2016/17 through line ministries without consulting the concerned county governments.

101. The Petitioner relied on the case of **John Githinji Wang'ondu & 7 Others v Coffee Board of Kenya, (2012) eKLR** for the proposition that national values and principles of governance contained in Article 10 of the Constitution must be given effect. The Petitioner further cited Article 73 of the Constitution on the principles of leadership and the objects of devolution, to submit that certain functions, including those earmarked for funding by the 2<sup>nd</sup> Respondent were devolved under Part 2 of the Fourth Schedule, and it would be against public interest and contrary to Articles 10, 73 and 174 to identify projects for utilization of the Fund while ignoring the marginalized counties' input.

102. According to the Petitioner, there is a possibility of duplication of projects and wastage of resources and, therefore, the funds should be allocated to the counties as recommended by the 1<sup>st</sup> Interested Party to prioritize their use. In addition, they submitted that the 2<sup>nd</sup> Respondent failed to take into consideration the projects being undertaken by the respective counties and allocation made in the current budget. Reliance was placed on the case of **North Rift Moto Bike Taxi Association vs Uasin Gishu County Government, (2014) eKLR** where legislation was declared invalid due to lack of stakeholder participation.

103. The Petitioner further argued that the manner in which the Board intends to utilize the funds as set out in its Estimates of Revenue and Expenditure for the Equalisation Fund for the financial year 2016/17 violates Article 204 in that out of the Kshs 12,400,000,000/- allocated to the fourteen marginalized counties, Kshs. 598,820,000/= has been allocated for administrative expenses, which other than being excessive, would have been avoided had the money been allocated as a conditional grant. It argued that the 2<sup>nd</sup> Respondent prioritized administrative expenses of the Fund's secretariat over the projects earmarked to benefit from the Fund contrary to Article 204(2) of the Constitution which requires that the Equalisation Fund shall only be used for basic services. In any event, it is further argued, there are already structures in place within the fourteen marginalized counties through which the funds can be transmitted and, therefore the amount allocated for administrative expenses should go to projects.

104. Counsel relied on the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, (2014) eKLR** where the Supreme Court held that the courts must contribute to the safeguarding monetary and other resources. It was therefore, submitted that there is a legitimate interest in the manner in which the Equalisation Fund is disbursed to marginalized counties and if the money is utilized in the manner proposed by the 2<sup>nd</sup> Respondent, a greater injustice would be suffered by the fourteen counties.

105. Mr. Ogosso for the Respondents submitted that the impugned Guidelines issued by the 2<sup>nd</sup> Respondent were enacted pursuant to the provisions of Article 204 of the Constitution as read with Section 12(2)(k) of the PMFA which empowers the National Treasury to prescribe/issue guidelines with respect to financial matters and to monitor their implementation and compliance. He further argued that the said guidelines were discussed in Parliament, approved and consequently published vide Gazette Notice No. 1711.

106. It is counsel's submission that the impugned guidelines have both constitutional and statutory underpinning and enjoy a general presumption of constitutionality. Consequently, it was submitted that it would be an academic exercise for this court to deal with the question as to the legality or otherwise of the said guidelines, when the parent statute empowering the enactment of the same has not been directly challenged.

107. To support this assertion counsel relied on the case of **National Conservative Forum vs Attorney General, (2013) eKLR** where the court held that its jurisdiction to interpret the constitution is not exercised in a vacuum, and that there must be a real controversy or dispute between the parties before court. According to counsel, the Respondents complied with the provisions of the Constitution, the Statutory Instruments Act and all applicable laws in enacting the impugned guidelines. In any event, the 1<sup>st</sup> Interested Party has already published a second policy and criteria for sharing revenue among marginalized areas which have increased from 14 to 34 counties and cover the financial years 2011/12, 2012/13, 2013/14, 2017/18, 2018/19, 2019/20 and 2020/21.

108. Counsel urged the court to be guided by the principle enunciated in the cases of **Ndyanabo v Attorney General, (2001) EA 495** and **Mark Ngaywa v Minister of State for Internal Security and Provincial Administration & Another, Petition No. 4 of 2011**, to the effect that there is a general presumption of constitutional validity of legislation until the contrary is proved and that the burden rests with the party challenging the constitutionality. He also cited **Susan Wambui Kaguru & Others vs Attorney General & Another, (2012) e KLR** and **Murang'a Bar Operators & Another vs Minister of State for Provincial Administration and Internal Security & Others, (2011) eKLR** for the proposition that in determining whether an Act of Parliament is unconstitutional, the court should consider the objects and purpose of the legislation.

109. To that end, Counsel submitted that the Equalisation Fund is a National Government fund and the same may be used either directly or indirectly through conditional grants to marginalized communities and the manner of administration and mode of implementation of the Fund and accountability thereof rests with the National Treasury on behalf of the National Government. As such, it does not make sense for the Petitioner to find the composition of Equalisation Fund Advisory Board to be legally deficient. He therefore submitted that the impugned guidelines have both constitutional and statutory underpinning and annulling them would defeat their purpose and object thereby impeding the effective administration of the Equalisation Fund.

110. Counsel also relied on the Canadian Supreme Court case of **R vs Big M Drug Mart Ltd , (1985) I SCR 295** for the proposition that both the purpose and effect are relevant in determining constitutionality of legislation. He also relied on the case of **Re Kadhis' Court: The Very Right Rev Dr. Jesse Kamau & Others v The Hon. Attorney General & Another, Nairobi HCMCA No. 890 of 2004** on the guiding principles of constitutional interpretation. Lastly, he relied on the US Supreme Court case of **U.S v Butler U.S 1(1936)** in which the court expressed itself that the only power it has is the power of judgment and the court neither approves nor condemns any legislative policy.

Counsel submitted that the impugned guidelines have already come into effect and impugning the same without any cogent reason would negate the principle of constitutionality.

111. On public interest, he submitted that the challenged guidelines have provided the mode of efficient administration and management of the fund to the benefit of the marginalized areas/counties and increased service delivery to the general public and it would not be in the greater public interest for the same to be impugned.

112. On whether there was public participation in formulating the guidelines, counsel submitted that key stakeholders including the Petitioner were involved in the promulgation of the said regulations as well as the Interested Parties, and therefore urged the court to be persuaded by the case of **Law Society of Kenya v Attorney General, Nairobi High Court Petition No. 318 of 2012** where the court observed that in determining whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation.

113. It was also submitted that it is not for the Petitioner or any special interest group to determine the mode or manner of public participation to be adopted and that there is no mandatory requirement for direct public participation to meet the requirements of public participation. He relied on the case of **Nairobi Metropolitan PSV Saccos Union Ltd & 25 Others v County of Nairobi Government and 3 Others, Petition No. 486 of 2013.**

114. Counsel further submitted that courts have had occasion to address the issue of public participation and have clarified that it must not necessarily be undertaken at the pre-legislative stage. He relied on **Kenya Small Scale Farmers Forum & 6 Others vs Republic of Kenya & 2 Others, (2013) eKLR** where it was held that Parliament manifests the diversity of the nation, represents the will of the people and exercises their sovereignty. Also cited was the case of **Commission for the Implementation of the Constitution v Parliament of Kenya and Another, Petition No. 454 of 2012** for the proposition that the National Assembly has a broad measure of discretion on how it achieves the object of public participation but it must ensure that a reasonable level of participation has been afforded to the public.

115. In conclusion, counsel submitted that the Committee on Delegated Legislation received and considered a number of memoranda from various stakeholders and members of the public before approving the impugned Guidelines. He urged the court to uphold that position.

116. We have considered respective arguments on this issue. In determining whether an impugned legislation or action is unconstitutional, the provisions of the Constitution must be interpreted purposively in line with Article 259(1) and other principles of constitutional interpretation. In the case of **Institute of Social Accountability & Another v National Assembly & 4 Others High Court, [2015] eKLR**, the court summed up these principles as follows:

**[57] “[T]his Court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution.**

**In determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see Murang’a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011]eKLR, Samuel G. Momanyi v Attorney General and Another (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect...**

**[59] Fourth, the Constitution should be given a purposive, liberal interpretation...Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3)). We are duly guided by the principles we have outlined and we accept that while interpreting the impugned legislation alongside the Constitution, we must bear in mind our peculiar circumstances. Ours must be a liberal approach that promotes the rule of law and has jurisprudential value that must take into account the spirit of the Constitution.”**

117. Similarly, the Canadian Supreme Court stated in **R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295** that:

**‘Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation’s object and thus the validity.’**

118. The Constitution should also be interpreted in *a holistic manner that entails reading one provision alongside other provisions, and considering the historical perspective, purpose, and intent of the provisions in question.* In **Re the Matter of Kenya National Commission on Human Rights Sup. Ct. Reference No. 1 of 2012, [2014] eKLR**, the Supreme Court considered the meaning of “a holistic interpretation of the Constitution,” and stated:

**“[26] But what is meant by a ‘holistic interpretation of the Constitution’? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”**

119. The Courts have consistently affirmed that a holistic interpretation of the Constitution calls for the investigation of the historical, economic, social, cultural and political background of the provision in question. This view was expressed by the Supreme Court in ***Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others***, [2015] eKLR, that “*the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.*” The Supreme Court in interpreting the Constitution took into consideration the historical, economic, social and political background of the Articles it had been called upon to consider.

120. In the Supreme Court Advisory Opinion No. 2 of 2013 - ***The Speaker of The Senate & Another vs. Honourable Attorney General & Others***, [2013] eKLR, Mutunga, CJ, cited with approval the holding in ***Tinyefuza v Attorney General Const Petition No. 1 of 1996 (1997 UGCC3)*** that:

**“[184] The entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and rule of paramountcy of the written Constitution.”**

121. We also take note of the holding by the Court of Appeal in ***Njoya & 6 Others vs. Attorney General & Another*** [2004] eKLR that:

**“Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that the constitution, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document.”**

122. Applying the above principles in this petition regarding the constitutionality of the impugned Guidelines, the provisions of the Constitution on the use and sharing of the Equalisation Fund must be considered in light of their purpose and effect, and in the context of other applicable provisions of the Constitution. In this regard, the role of equalisation in the transfer of finances is to correct any fiscal imbalances in the country, which may occur either at the vertical level under which different levels of Government ought to be allocated resources in a balanced way, or at the horizontal level where the revenue capacities of different devolved units vary so that they are not able to provide their citizens with services at the same level.

123. This position was explained in the *Report on Devolution of Power: A Special Working Document for the National Constitutional Conference* that was prepared by the Constitution of Kenya Review Commission (CKRC) on 19<sup>th</sup> August 2003, at Page 107 as follows:

**“As already pointed out, equalisation is necessitated by both vertical and horizontal imbalances. At the vertical level, imbalances in the allocation of functions and revenues may create a need for equalisation. The national level of government may have a higher taxing power yet have lesser functions as compared to the sub-national levels of government. At the horizontal level, different sub-national units may have different fiscal capacities for delivering public services to their residents.”**

124. The purpose of equalisation fund is to correct any imbalance in the revenues of sub national levels of government, and its effect is the revenue sharing between national and devolved governments and will have thus definitely have an impact on fiscal devolution. This purpose and effect was acknowledged and explained by the 1<sup>st</sup> Interested Party in paragraphs 4.31 to 4.32 of its *Policy on the Criteria for Identification of Marginalized Areas and Sharing of the Equalisation Fund for the Financial Years 2011-2014* as follows:

**“4.3.1 The overarching objective of this policy is to improve the welfare of communities in marginalized areas. This would bring the quality of basic services such as roads, health care, water, and electricity in marginalized areas to the level generally enjoyed by the rest of Kenya.**

**4.3.2 The provision of these basic infrastructure and services could be addressed through a number of policy instruments such as, an Equalisation Fund, conditional grants equity-promoting legislative and administrative actions. The instrument used in this policy is the Equalisation Fund, which will run for 30 years as stipulated in Article 204(6) of the Constitution.”**

125. In this respect, several provisions of the Constitution also become relevant. Article 1(4) of the Constitution provides that the sovereign power of the people is exercised at the national and county levels, and Article 6(2) divides the territory of Kenya into counties that are specified in the First Schedule and provides for governments at the national and county levels. Article 10 provides that the national values of governance include devolution of power and the protection of the marginalized, while chapter Eleven of the Constitution, (Articles 174 to 200), is dedicated to the principles of, and structure of devolved governments. The objects of devolution of government are stated in Article 174 as follows:

**“(a) to promote democratic and accountable exercise of power;**

**(b) to foster national unity by recognising diversity;**

**(c) 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;**

**(d) to recognise the right of communities to manage their own affairs and to further their development;**

**(e) to protect and promote the interests and rights of minorities and marginalised communities;**

- (f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;**
- (g) to ensure equitable sharing of national and local resources throughout Kenya;**
- (h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and**
- (i) to enhance checks and balances and the separation of powers.”**

126. It is therefore evident that one of the key objectives of devolution is to implement the principle of subsidiarity, which requires the allocation of functions and accompanying resources to the lowest competent authority or unit of governance. The reason behind this is that such units are better placed to identify their needs and priorities in terms of democratic governance and development. Other principles that are crosscutting within these objects are: good governance, public participation, equity, transparency, accountability and sustainable development, which are also founding values in the Constitution.

127. Regarding fiscal devolution, Article 201 is clear on the principles of public finance. It provides that:

- “a) there shall be openness and accountability, including public participation in financial matters;**
- (b) the public finance system shall promote an equitable society, and in particular—**
  - (i) the burden of taxation shall be shared fairly;**
  - (ii) revenue raised nationally shall be shared equitably among national and county governments; and**
  - (iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;**
- (c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;**
- (d) public money shall be used in a prudent and responsible way; and**
- (e) financial management shall be responsible, and fiscal reporting shall be clear.”**

128. Articles 204, 215 and 216 provide that the 1<sup>st</sup> Interested Party, an independent Constitutional Commission, has the mandate to determine the equalisation questions and the revenue sharing between the national and county governments. The purpose of having such an independent body is to shield its decisions from political and other considerations and also ensure it is representative of all sectoral interests. To that extent, therefore, the arguments put forward by the Respondents that the Equalisation Fund is a fund to be managed by the national government not only negates the purpose of equalisation, but also the very essence and objects of devolution. If the Respondents' argument was to carry the day, it would afford the national government an opportunity to deny devolved units the opportunity to decide on the finances they need to perform their functions.

129. In this regard, the Petitioner submitted that the specific recommendations that the Respondent failed to consider and take into account were:

- a) Composition on the advisory board;
- b) Failure to make provisions for representation of counties;
- c) Appropriation of funds as conditional grants to marginalized counties;
- d) Funds be spent when County Governments are in place;
- e) Management of the fund to be supported by the Inter-governmental relations department.

130. The impugned Guidelines in this respect provide for a board known as the Equalisation Fund Board, which shall consist of;

- a) The Principal Secretary for the time being responsible for matters relating to finance who shall be the chairperson;
- b) One Principal Secretary for the time being responsible for matters relating to devolution and planning or his/her representative;
- c) The Principal Secretary for the time being responsible for matters relating to water or his/her representative.
- d) The Principal Secretary for the time being responsible for roads or his/her representative.

- e) The Principal Secretary for the time being responsible for matters relating to health or his/her representative.
- f) The Principal Secretary for the time being responsible for matters relating to energy or his/her representative.
- g) Five other members of either gender appointed by the Cabinet Secretary for outside the public service.

131. Paragraph 4.4 of the impugned Guidelines provides that the functions of the Equalisation Fund Board shall be to advise the Cabinet Secretary at the National Treasury on the proper and effective performance of the Fund, and in particular to propose and advice on equitable distribution of resources from the Fund to the various marginalized areas and make recommendations to the Cabinet Secretary for provision of other basic services not explicitly covered under paragraph 3.2 that could be financed from the Fund. Paragraph 5.1 of the said guidelines provides for preparation of work plans by the State Departments before submission of the funds, which state departments are designated the spending agencies.

132. Under Article 204(3), and contrary to the Respondents' arguments and the provisions in the impugned Guidelines, the unit of expenditure for the Equalisation Fund is the county, as the national government can only use the Fund, either directly to a marginalized area which is located in a county, or indirectly to counties in which marginalised communities exist. There is no provision in the Constitution that the national government should use its departments or line ministries in expending the Fund. The suggestion that the National government uses its departments or line ministries to disburse the funds goes against specific principles on devolution and public finance. It is therefore against the spirit of devolution.

133. It is also notable in this respect, that self-governance and participation of the people and communities in decision on matters affecting them and management of their development is a specific objective of devolution under the Constitution. This is not however reflected in the composition of the Equalisation Advisory Board established in the impugned Guidelines.

134. It must be appreciated that the basic services for which the Equalisation Fund is to be used under Article 204(2) of the Constitution such as water, roads, health facilities and electricity at the local level, are county government functions under Part 2 of the Fourth Schedule to the Constitution. For that reason, they can only be implemented by the County Governments. That being the case, implementation of the projects supported by the Equalisation Fund through line ministries of the National Government as alleged by the Respondents to have happened and, as provided in the impugned Guidelines, has no legal basis as the national Government has no such functions under the Fourth Schedule. It is patently unconstitutional.

135. The role of the national Government in relation to the Equalisation Fund is explained in section 18 of the PFMA as follows:

- “(1) The National Treasury shall administer the Equalisation Fund in accordance with Article 204 of the Constitution.**
- (2) The National Treasury shall keep the Equalisation Fund in a separate account maintained at the Central Bank of Kenya and shall—**
- (a) transfer into that Equalisation Fund all revenues payable into the Fund under Article 204(1) of the Constitution; and**
  - (b) transfer from that Equalisation Fund, without undue delay, all money for purposes specified in Article 204(2) of the Constitution.**
- (3) The National Treasury shall ensure that the Equalisation Fund Account is not overdrawn at any time.**
- (4) Where a withdrawal from the Equalisation Fund is authorised under an Act of Parliament that approves the appropriation of money, the National Treasury shall make a requisition for the withdrawal and submit it to the Controller of Budget for approval.**
- (5) The approval by the Controller of Budget of a withdrawal from the Equalisation Fund, together with written instructions from the National Treasury requesting for the withdrawal, shall be sufficient authority for the Central Bank of Kenya to pay amounts from the Equalisation Fund Account in accordance with the approval and instructions given.**
- (6) Any unutilised balances in the Equalisation Fund shall not lapse at the end of the Financial year, but shall be retained for use for the purposes for which the Equalisation Fund was established.”**

136. It is our view, therefore, and we so hold, that the role of the national Government under Article 204 of the Constitution as read with section 18 of the PFMA is limited to the operational aspects of establishment and maintenance of an account for the Equalisation Fund, including the preparation, allocation and execution of budgetary decisions with regard to that account, using established financial procedures. These provisions do not give the national government any powers in relation to the decisions and manner of expenditure of the monies in that account. Under Articles 204 and 216 these functions are the preserve of the 1<sup>st</sup> Interested Party, to be approved by Parliament.

137. In conclusion, we emphasise the observation made by G.M. Okello, JA in Zachary Olum and Another v Attorney General (Constitutional Petition No 6 of 1999)[2000] UGCC 3(6 June 2000),

**“To determine the constitutionality of a section of a statute or Act of parliament, [the] Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the**

**Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional.”**

138. It is clear to us that the effect of implementing the impugned Guidelines violates the principles of the Constitution and the purpose of the Equalisation Fund. That being our view of the matter in so far as this issue is concerned, we find and hold that the impugned Guidelines are unconstitutional.

#### ***IV. Whether the reliefs sought should be granted***

139. Mr. Issa for the Petitioner urged that the prayers sought in the petition be granted. As regards the prayer that the 3<sup>rd</sup> Respondent be prohibited from approving any withdrawals from the Equalisation Fund before the 2<sup>nd</sup> Respondent consults the affected county governments, counsel explained that the basis was that the said monies are for the benefit of the marginalized counties under Articles 203 and 204 of the Constitution. Further, the prayers that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents establish an Advisory Board and that the 2<sup>nd</sup> Respondent be directed to release the funds earmarked for projects in the counties identified to benefit from the equalizing fund through the county framework as a conditional grant, are based on the binding recommendations made by the 1<sup>st</sup> Interested Party in accordance with Article 204(4) of the Constitution.

140. Counsel for the Respondents relied on the Court of Appeal decision in **Kenya National Examination Council v Republic, Ex parte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996** where the purpose and reach of an order of mandamus was summarized. He also relied on the case of **Republic vs The Commissioner of Lands And Another Ex-parte Kithinji Murugu M’agere, Nairobi High Court Misc. Application No. 395 of 2012** where the circumstances under which an order of mandamus can issue were discussed. In summary, it was held that mandamus is a peremptory order requiring the Respondent to perform a specific public duty. Counsel submitted that the Petitioner misconstrued and misapplied the provisions of Article 204(4) of the Constitution, because the recommendations therein are only to be considered by Parliament during the enactment of an Equalisation Fund Appropriation Act.

141. According to counsel, the nature of the orders sought are such that, if granted, this Court would have effectively assumed and taken over executive functions and that of independent constitutional commissions contrary to the Constitution. Furthermore, that the Petitioner had not demonstrated the nature of the legal duty owed to it by the Respondents herein that had not been performed, to warrant grant of orders of mandamus.

142. Lastly, Mr. Ogosso submitted that the order sought to prohibit authorization by the Controller of Budgets to withdraw Funds from the Equalisation Fund, is akin to asking this Court to act contrary to the Constitution. He also pointed out that the Petitioner is at the same time seeking release of the same funds to county governments which requires the said authorization, thus contradicting itself.

143. This Court is empowered by Article 23(3) of the Constitution to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms. The constitution has given marginalized communities the right to funds from the Equalisation Fund to assist in uplifting infrastructure health services water and roads to catch up with the more developed counties.

144. The definition of "appropriate relief" was given by the South African Constitutional Court in **Minister of Health & Others vs Treatment Action Campaign & Others, (2002) 5 LRC 216** at p. 249. thus:

**“...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal.”**

145. The Petitioner has sought remedies of certiorari, prohibition, mandamus and various declarations. The Court of Appeal in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances under which the orders of certiorari and prohibition can issue as follows:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

146. On the order of mandamus, the Court held as follows:

**“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4<sup>th</sup> Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-**

**“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”**

At paragraph 90 headed “the mandate” it is stated:

**“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”**

**What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed....”**

147. The remedy of a declaration is on the other hand normally granted to authoritatively state the lawfulness of a decision; action or failure to act; the consequences that follow from a quashing order; the existence or extent of a body’s powers and duties; the rights of individuals or the law on a particular issue.

148. Having found that the recommendations made by the 1<sup>st</sup> Interested Party on the sharing of revenue from the Equalisation Fund were binding on the National Treasury, the National Treasury was under a Constitutional and statutory obligation to observe those recommendations in the preparation of any instruments on the administration of the Equalisation Fund.

149. We also note the submissions made by the Petitioner that the 2<sup>nd</sup> Respondent made the impugned Guidelines under section 12 (2) (k) of the PFMA. As correctly submitted by the Petitioner, section 12(2) (k) only empowers the 2<sup>nd</sup> Respondent to issue guidelines to national government entities with respect to financial matters and monitoring their implementation and compliance, but not on matters affecting county governments.

150. That notwithstanding, we have already observed in this judgment that the National Treasury has various responsibilities as regards fiscal devolution and management of devolved funds. In addition, under section 12 (1) (g) of the PFMA, it has the responsibility of developing policy for the establishment, management, operation and winding up of public funds, which would include the Equalisation Fund. The preparation of appropriate instruments for the administration of the Equalisation Fund, is therefore, within the mandate of the National Treasury, subject to the caveat that it must comply with recommendations made by the 1<sup>st</sup> Interested Party and approved by Parliament in order to achieve the objectives of the Equalisation Fund and devolution.

151. We have also found that the impugned Guidelines are unconstitutional for violating Articles 204 and 216 of the Constitution with respect to compliance with the recommendations made by the 1<sup>st</sup> Interested Party thus negate the principles of constitutional supremacy; national values and principles of governance; and the objects of devolution, including the Equalisation Fund and fiscal devolution. The Petitioner is thus entitled to the orders of declarations and certiorari it seeks.

152. As regards the remaining prayers (d), (e) and (f) in the Petition, even though we have found that the 2<sup>nd</sup> Respondent is under a duty to pay heed to recommendations made by the 1<sup>st</sup> Interested Party, we cannot direct him as regards the specific manner he should undertake that duty. That is not the province of the Courts. In this regard, we are alive to the observation by the US Supreme Court in **U.S v Butler**, (supra), that the only power the court has when considering constitutionality of a statute is the power of judgment. It neither approves nor condemns legislative policy.

153. Having found that the impugned Guidelines are unconstitutional and they are liable to be quashed the performance of these duties will be dependent on new policies or instruments that may be developed on the management of the Equalisation Fund.

154. Lastly, no evidence was placed before us on the illegalities committed or threatened by the 3<sup>rd</sup> Respondent, for the prayer of prohibition against the 3<sup>rd</sup> Respondent to issue. In the circumstances, we can therefore only grant an appropriate relief in lieu of these prayers.

### **Disposition**

155. We accordingly allow the petition as follows :

**I. A Declaration be and is hereby issued that the Equalisation Fund, being for the benefit of marginalized counties can only be disbursed by the national government through the respective and affected county governments, and in accordance with the recommendations made by the Commission on Revenue Allocation as approved by Parliament.**

**II. A Declaration be and is hereby issued that the Guidelines on the Administration of the Equalisation Fund published on 13<sup>th</sup> March 2015 in the Kenya Gazette Vol. CXVII-No.26 as Gazette Notice N0 1711 are accordingly unconstitutional, null and void, for violating Articles 1(4), 2(1), 6, 10, 174, 201, 204 and 216 of the Constitution and sections 12 and 18 of the Public**

**Finance Management Act.**

**III. An order of certiorari be and is hereby issued to remove to this Court and quash the Guidelines on the Administration of the Equalisation Fund published on 13<sup>th</sup> March 2015 in the Kenya Gazette Vol. CXVII-No.26 as Gazette Notice No. 1711.**

**IV. The 2<sup>nd</sup> Respondent shall within six (6) months of the date of this Judgment, and in consultation with all relevant stakeholders, prepare an appropriate policy and/or statutory instruments on the administration of the Equalisation Fund that is compliant with the recommendations made by the Commission on Revenue Allocation as approved by Parliament, and the objectives of the Equalisation Fund and devolution, as set out in the Constitution and enunciated in this Judgment.**

**V. Each party shall bear their own costs.**

156. Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF NOVEMBER 2019**

**P. NYAMWEYA**

**E. C. MWITA**

**J. ONYIEGO**

**JUDGE**

**JUDGE**

**JUDGE**