




Council of Governors



**REPORT ON
THE AUDIT OF NATIONAL
AND
COUNTY POLICY AND LEGISLATION
ON PUBLIC FINANCE MANAGEMENT**







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Foreword by Chairman, Council of Governors



In the year 2010, Kenya promulgated a new Constitution which introduced a two tier system of governance: the National Government and forty-seven (47) County Governments. The Fourth Schedule of the Constitution assigns thirty-five (35) functions to the National Government under part one (1) and fourteen (14) functions to County Governments under part two (2). Devolved functions primarily focus on service delivery to the citizens. County Governments have been bestowed with both legislative and executive authority to facilitate the performance of their functions and exercise of their powers.

It is however worth noting that despite the strides made in the country with respect to the devolved system of governance, existing and in force are still National laws that were enacted before the promulgation of the Constitution. Some of these laws undermine devolution by dint of the structures they had created and the powers they had conferred on various institutions, thereby impeding devolution's full implementation. On this premise, CoG and KLRC initiated the legal and policy audit aimed at scrutinizing National and County policies and laws with a view to establishing their alignment to the Constitution, specifically the devolved system of governance.

The study reveals that there are a myriad of National laws and policies that are not in tandem with the Constitution. Some of the key recommendations highlighted in the report are that some National laws need to be repealed while others require amendments in order to ensure conformity with the Constitution. For stakeholders to improve the policy and legislative environment that devolution operates in, they should read the report and collaborate in its implementation. This will ensure that both the National and County laws and policies conform to the letter and spirit of the Constitution, eventually leading to improved service delivery to the people of Kenya.

Thank you!

H.E. Hon. FCPA Wycliffe Ambetsa Oparanya, EGH, CGJ

Chairman, Council of Governors

Foreword by the Attorney General



This Report is the product of a study commissioned by the Council of Governors (CoG) and the Kenya Law Reform Commission (KLRC) across seven sectors, the key objectives of which were to audit the county government policies and legislation with the view of analysing their compliance with the Constitution, to audit all the national policy and legislation with a view of ascertaining the extent to which they conform to the devolved system of governance and to identify gaps and challenges and make recommendations for harmonization and alignment.

The sectors prioritized were Agriculture, Health, Natural Resource Management, Land and Physical Planning, Urban Development, Trade and Investment and Public Finance Management.

At this point in time, and while Kenya is still in transition from the old constitutional order to the new constitutional dispensation, it is clear from the Report that there are significant challenges around the extent of compliance with the laid down constitutional, legal and policy frameworks with respect to governance at both levels of government that need to be addressed. The Report provides the general trends that need to be tackled in the quest for compliance with the constitutional framework. Some of the notable findings include ambiguities in legislation, persistence of the old order in terms of laws, policies and practices across all sectors under review, inadequate consultation and cooperation between the two levels of government that can support and facilitate holistic development of laws and policies and a dearth of capacity to facilitate effective development of laws and policies that are clear, coherent, comprehensive and compliant with applicable constitutional provisions.

The Report has been enriched by the generous, earnest and thoughtful insights by sector experts through a peer review process. Further, the involvement of the stakeholders in reviewing the initial reports provided invaluable input in exploring together the serious topics that surround our common governance goal in addition to extensive discussion with the national and county government officials, civil society organizations, and representatives of the community-based organizations and networks that deal with sectoral governance issues.

As stated above, I wish to reiterate that this Report presents a comprehensive audit of the national and county legislation and policy approach and reveals the gaps and challenges that need immediate attention in the process of developing sufficient and responsive laws and policies that will actualize the devolved system of governance and the country's economic blue print, Vision 2030.

I wish to take this opportunity to sincerely thank the members of the team for their meritorious and sincere effort in writing this enlightening Report. My heartfelt gratitude also goes to the stakeholders and sector experts for their tireless efforts and enriching contribution and co-operation which led to the successful completion of the Report.

P. Kihara Kariuki

Attorney-General

Foreword By Chairperson, Kenya Law Reform Commission



Devolution is one of the hallmarks of the Constitution of Kenya, 2010. Devolution has not only improved the economic and social welfare of people in many places, (some of which were traditionally marginalised), but has, to a great extent, increased the democratic space in our country, since the people are now part of the decision-making processes. As a country, we have indeed overcome several challenges and milestones in a bid to make the devolution dream a reality.

The Kenya Law Reform Commission (KLRC) is established by the Kenya Law Reform Commission Act, No. 19 of 2013 and is mandated to keep under review all the law and recommend its reform by undertaking research and comparative studies relating to law reform as well as related legislative impact assessments. The Commission also provides advice, technical assistance and information to the national and county governments with regard to the reform or amendment of any branch of law. The execution of this mandate includes undertaking a detailed audit of all the existing pieces of legislation, policies and administrative procedures and harmonizing them with the Constitution.

The Council of Governors (CoG) conducted a baseline survey which revealed that most of the laws in respect of key devolved functions were largely not compliant with the Constitution of Kenya, and key devolution Articles including Articles 173, 174 and the Fourth Schedule to the Constitution which demarcates the functions to be undertaken by the national and county governments. As a consequence of the survey findings, the Commission in partnership with COG undertook an audit of the national and county policies and law across seven devolved sectors. The purpose of the audit was to analyse national and county policies and legislation to determine their compliance with the Constitution with particular reference to devolution.

The Audit Report is one among the initiatives that we hope will help policymakers and relevant institutions in their efforts to entrench devolution. The Report focuses on seven devolved sectors namely: Health, Public Finance Management, Agriculture, Trade and Investments, Land and Physical Planning, Urban Development and Natural Resource Management as provided in the Fourth Schedule to the Constitution.

The Report documents the findings of the audit process in the identified seven sectors. It provides an analysis of the national and county policies and legislation and

identifies the gaps and challenges with these instruments of governance. It further outlines recommendations for harmonization and alignment which will inform the success of counties in implementing devolution and will ensure the achievement of the collective aspirations of Kenyans, given the critical role of devolution in our current dispensation. The publication of this Report is a culmination of a highly participatory and consultative process in line with the constitutional requirements of public and stakeholder participation and engagement.

Through this Report, the Commission and CoG will spearhead and undertake the proposed policy and legislative reforms in partnership with the relevant sector Ministries, Departments and Agencies (MDAs). The successful implementation of the Report therefore calls for a coherent and cross-sectoral approach and a coordinated response across all levels of government, private sector and other non-state actors. Towards this end, all MDAs at both levels of government are expected to work closely together to make the proposed recommendations a reality. Finally, in publishing this Report, the Commission and CoG reaffirm their unwavering commitment and support to ensure conformity with the Constitution and respect for devolution.

I would like to thank all those who contributed to the development of the Report and subsequent finalization in one way or the other.

Thank you very much.

Mbage Ng'ang'a

Chairman KLRC



Acknowledgements

The development and finalization of this Report benefited from the contribution of various institutions and individuals. Various stakeholders including Ministries, Departments and Agencies (MDAs) at both levels of Government, the Private Sector, Non-State Actors, Parliament and the Office of the Attorney-General were consulted and their views considered. The stakeholders interacted with the Draft Report and gave their practical position on the issues raised. We sincerely thank them all for their invaluable contribution.

The audit process that culminated into development and publication of this Report was made possible through the generous financial support of the United States International Development (USAID) through the Agile and Harmonized Assistance to devolved Institutions (AHADI) and the Danish International Development Agency (DANIDA) through the International Development Law Organization (IDLO), the United Nations Development Programme and the World Bank. We are forever grateful to Ms. Waceke Wachira, USAID-AHADI Chief of Party and Mr. Romualdo Mavedzenge, IDLO Kenya Country Director, and their respective committed teams for their patience especially during those times when processes slowed down.

We acknowledge the excellent work done by the core technical committee comprising Ms. Joan Onyango (KLRC), Ms. Rosemary Njaramba (CoG), Ms. Zipporah Muthama (CoG), Mr. Justice Gatuyu (KLRC), Ms. Mukami Kibaara (CoG) and Ms. Christabel Wekesa (KLRC) which laid the foundation for the development of this Report. The Technical Committee incorporated the Office of the Attorney General & Department of Justice, Senate, IGRTC and Ministry of Devolution and ASALS whose input we sincerely appreciate. It is through their enthusiasm, hard work and commitment that we credit the accomplishment of this mission. We especially thank the staff of KLRC and COG (the joint secretariat of the Technical Committee) for their dedication and tireless efforts in ensuring successful completion of this Report. Special mention must go to the KLRC Chairman, Mr. Mbage Ng'ang'a who at various points was personally involved in the audit process.

We commend Dr. Conrad Bosire and the team of sector consultants namely: Paul Wafula Otsola and Victor Odhiambo for the exhaustive research in the policy and legal

frameworks. They worked tirelessly with the technical committee to constantly revise, edit and improve the contents of this publication. It is through this effort that we have this comprehensive Report.

Finally, we are indebted to the people of Kenya for according us the opportunity to serve and being the reason we continue to evaluate ourselves as a Country.

Thank you!

Ms. Jacqueline Mogeni, MBS

CEO, Council of Governors

Mr. Joash Dache, MBS

CEO/Secretary, KLRC

Council of County Governors

The Council of Governors (CoG) is a non-partisan organisation established under Section 19 of the Intergovernmental Relations Act (IGRA 2012). The Council of Governors comprises of the Governors of the forty-seven Counties. Main functions are the promotion of visionary leadership; sharing of best practices and; offer a collective voice on policy issues; promote inter-county consultations; encourage and initiate information sharing on the performance of county governments with regard to the execution of their functions; collective consultation on matters of interest to county governments.

CoG provides a mechanism for consultation amongst county governments, share information on performance of the counties in execution of their functions, facilitate capacity building for Governors, and consider reports from other intergovernmental forums on national and county interests amongst other functions. The vision of the Council of Governors is to have prosperous and democratic counties delivering services to every Kenyan.

Kenya Law Reform Commission

The Kenya Law Reform Commission (the Commission) is established by the Kenya Law Reform Commission Act, No. 19 of 2013 (the Act). Presidential assent was given on 14 January 2013 and the Act came into force on 25th January 2013. The Commission has a statutory and ongoing role of reviewing all the law of Kenya to ensure that it is modernized, relevant and harmonized with the Constitution of Kenya. Following the promulgation of the Constitution in 2010, the Commission has an additional mandate of preparing new legislation to give effect to the Constitution. The third mandate is found in the County Governments Act, No. 17 of 2012 which requires the Commission to assist the county governments in the development of their laws. This is also a requirement found in the Act.

The Act grants the Commission a body corporate status and the necessary autonomy to enable it discharge its mandate as envisaged under the Act. The Commission is wholly funded by the Government but welcomes support from its partners.

Before the enactment of the Act, the Commission operated as a Department within the Office of the Attorney-General before being moved administratively to the Ministry of Justice, National Cohesion and Constitutional Affairs in 2003.

Table of Contents

FOREWORD BY CHAIRMAN, COUNCIL OF GOVERNORS	iii
FOREWORD BY THE ATTORNEY GENERAL	iv
FOREWORD BY CHAIRPERSON, KENYA LAW REFORM COMMISSION	vi
ACKNOWLEDGEMENTS	viii
LIST OF TABLES	xi
ABBREVIATIONS	xii
1. Introduction	1
2. National Legislation	3
3. Regulations	16
4. County level public finance management	21
5. Main conclusions and recommendations	53

LIST OF TABLES

Table 1: Review of the Public Finance Management Act 2012 in a tabulated matrix	4
Table 2: Review of Public Finance Management Regulations in a tabulated matrix	16
Table 3: Table showing areas that require development of county regulations	26
Table 4 Review of the Ward Fund Act in a tabulated matrix	41

Abbreviations

AHADI	Agile and Harmonized Assistance for Devolved Institutions
CARA	County Allocation of Revenue Act
CoG	Council of Governors
KLRC	Kenya Law Reform Commission
CARA	County Allocation of Revenue Act
WDF	Ward Development Fund
PPA	Physical Planning Act
CIC	Commission for the Implementation of the Constitution
CFSP	County Fiscal Strategy Paper
CS	Cabinet Secretary
IDLO	International Development Law Organization
IGR	Intergovernmental Relations
IGRA	Intergovernmental Relations Act
IGRTC	Intergovernmental Relations Technical Committee
KLRC	Kenya Law Reform Commission
MTP	Medium Term Plan
NACADA	National Authority for the Campaign Against Drug Abuse
PFM	Public Finance Management
PFMA	Public Finance Management Act
RDA	Regional Development Authority
UNDP	United Nations development Programme
MDA	Ministries Departments Agencies

Public Finance Management

1. Introduction

The Constitution of Kenya 2010 introduced far-reaching reforms to Kenya's system of managing public finances. The reforms entailed not only the decentralisation of the management of public finances to the county level but also the substantial shifting of roles within national level institutions. More importantly, there was a holistic policy shift in terms of objectives and goals of public finance management.


In the period before 2010, management and control of finances and decisions of public finance management was centralised and exercised exclusively by the Ministry of Finance. The former 175 local authorities played a dismal role in control and expenditure of public finances. The overall contribution of the former local authorities to overall economic growth was dismal, to say the least. In the first decade of independence, the local authority expenditure accounted for a general average of 25 percent of the overall government expenditure.¹ However, this figure fell sharply in the subsequent years. Between 1975 and 1990, local authority expenditure accounted for a meagre 8-10 percent of the overall government expenditure.² Local government share of the GDP fell from 3.26 percent in 1969/70 to 1.22 percent in 1999/2000.³

The main reason that local authorities declined is that the national government, over the years, ignored their existence and chose to deliver local development through deconcentrated state institutions and central government programmes. As a result, functions performed by the local authorities, such as: education, health, social development

1 Republic of Kenya (1995) 71.

2 Republic of Kenya (1995) 71.

3 Rocaboy Y et al 'Public finances of local government in Kenya' in Dafflon B & Madies T (eds) (2012) *The Political Economy of Decentralization Sub-Saharan Africa: A New Implementation Model in Burkina Faso, Ghana, Kenya, and Senegal* 165.



and other essential services were taken over by central government agencies.⁴ This action denied local governments vital revenues, which were never replaced. Other revenue sources for local governments were abolished leaving them with little and totally undependable local sources of revenue.⁵ Between 1969 and 1989, the local authorities operated without a system of central government transfers and the central government only intervened in case of a crisis.

However a number of fundamental changes were made to address the historical problems that faced the system of management of public finances. First, there are principles of public finance management that guide the planning and application of all public finances. There should be openness and accountability in the handling of all aspects of public finance management. The public finance system should also promote an equitable society through: a fair taxation, equitable sharing of national resources, equitable development including inter-generational equity, prudence in the use of public resources, and responsible financial management and reporting.⁶


County governments have a guaranteed minimum of resources (15 percent) that should be allocated from revenue collected nationally. New institutions were created with roles carved out of the former all-powerful treasury in order to enhance the practical application of some of the principles above. Parliament was vested with budget-making powers, a function that belonged to the treasury. The Commission on Revenue Allocation was established to advise on allocation of funds between the two levels of government, and the Office of the Controller of Budget (CoB) was established to oversee and authorise public expenditure. All these institutions were established under the Constitution and the pre-2010 National Treasury performed these roles.

More importantly, county governments exercise financial control over funds allocated to them. The Public Finance Management Act was enacted to give effect to the finance management architecture in the

4 Vide the Local Government Transfer of Functions Act of 1969.

5 In 1989, the Local Government Service Charge (LASC), a surcharge on some specified incomes, was introduced to “boost the revenue base of local authorities so as to enhance service delivery” see Republic of Kenya (1995) 87.

6 Article 201, Constitution of Kenya 2010.



Constitution. Specifically, the PFM Act was crafted with the intention of modernizing financial management in the public sector, reducing fraud, corruption and waste whilst also providing a legislative framework of fiscal decentralization as contemplated by the Constitution of Kenya. It is equally expected that the PFMA would lead to a more efficient and effective use of public resources while also enhancing the capacity of government to deliver on their services including the realization of the three budget outcomes to wit; – aggregate fiscal discipline, allocative efficiency and operational efficiency.

The role of the public financial-management system is to facilitate the planning and budgeting process of the public sector, the recording of financial information, and the controlling of budget execution. It concerns both the revenue and the expenditure side of the budget. The broad objective of a public financial-management system is to achieve overall financial discipline, allocation of resources to priority areas, and efficient and effective use of public resources for the achievement of results.

2. National Legislation

The audit entailed the review of a number of laws related to the management of public finance management. First is the Public Finance Management Act (PFMA), which contains extensive provisions on the management of public finance at both the national and county levels, and relations between the two levels on matters of public finance. The audit has, thus, touched on the Act and proposed amendments to the Act. The audit also reviewed the Public Audit Act and the Public Procurement and Disposal Act. The audit also reviewed the Public Finance Management Regulations.

Table 1: Review of the Public Finance Management Act 2012 in a tabulated matrix

SECTION OF THE ACT	REQUIREMENTS	COMMENTS
4(2)	The Cabinet Secretary required by way of Regulations to come up with a Criteria for the Declaration of a State Corporation, an authority or any other body, as a national government entity.	<p>The regulations have fallen short of coming up with an objective criterion for the basis of such declaration. The regulations have simply come up with schedules under which entities deemed as national government are listed.</p> <p>Regulation 3 makes it clear in this regard by affirming the extent and reach of the Regulations from the perspective of the National Government.</p>
Section 12 (1)	The National Treasury is meant to prescribe regulations that ensure that operations of the prescribed financial system under this section respect and promote the distinctiveness of the national and county levels of government;	<p>There is also no evidence in the regulations to show how the National Treasury shall “ensure that operations of a system... respect and promote the distinctiveness of the national and county levels of government”</p> <p>Recommendation:</p> <p>The regulations should be revised to provide appropriate and relevant detail of how the National Treasury shall prescribe an efficient financial management system for the national and county governments that</p> <ul style="list-style-type: none"> » ensures transparent financial management; » standard financial reporting respects and » promotes the distinctiveness of the national and county levels of government.

SECTION OF THE ACT	REQUIREMENTS	COMMENTS
Section 21(1)	Advances and criteria for such advances from the Contingencies Fund	No regulations have been developed prescribing the criteria for making advance from the Contingency fund. Section 21(2), (3) and (4) of the PFM Act provide some good criteria which at a minimum could have been expanded on in the regulations.
Section 25(6)	<u>Regulations made under this Act shall prescribe</u> circumstances and the manner in which persons or groups may make written or oral representations about the contents of the statement	<p>The National Treasury should provide an outline of these mechanisms and manner sourced from its own internal budgeting handbook modified to accommodate this Section of the Act and in consultation with County Treasuries, donor organizations and Civil society to derive a workable formula of minimums necessary to effectively comply.</p> <p>These regulations are couched in mandatory terms.</p>
Section 27(2)	Other than the already detailed requirements of the law with respect to the Pre- Election and Post-Elections Economic and Fiscal update, regulations can further specify any other expenses related to the election	<p>No regulation addresses this requirement though it may be incumbent on The National Treasury in consultation with the Independent Electoral and Boundaries Commission to formulate a list of what these ‘other expenses’ are and incorporate them in regulation</p>

SECTION OF THE ACT	REQUIREMENTS	COMMENTS
Section 29(5)	The National Treasury may invest, subject to any <u>regulations</u> that may be prescribed, any money kept in a bank account of the national government	<p><u>No Regulations address this requirement.</u></p> <p><u>Recommendation</u></p> <p>Possible way to address this is in the provisions for cash management under Regulation 81 in which there is established a Cash Management Advisory Committee which shall determine “The amount of cash that shall periodically constitute an idle balance or surplus cash in the Treasury Single Account arrangements... on the advice of the Accountant General or the County equivalent”</p>
<u>Section 31(3)</u>	At the end of every four months, the Cabinet Secretary shall submit a report to Parliament stating the loan balances brought forward, carried down, drawings and amortizations on new loans obtained from outside Kenya or denominated in foreign currency, and such other information <u>as may be prescribed by regulations</u>	<p>The section of the Act already provides a good base to expand on in the regulations, which they do not.</p> <p><u>Suggested Solution</u></p> <p>‘Such other information’ shall include:</p> <ul style="list-style-type: none"> » The total interest expense paid over the period; » The projected interest expense for the following four months; » The project or program for which new loans have been secured; » A summary of total debt exposure vis-à-vis the national debt ceiling.
36(5)	The Cabinet Secretary Shall by regulations prescribes procedures specifying how, when and where members of the public shall participate in the budget process at the national level.	<p><u>Regulation 32 - Part IV</u> – the regulations need to spell out in detail how public participation shall be conducted. In line with this requirement of the law, the regulations fall short in describing a detailed procedure for public participation in the budget process.</p>

SECTION OF THE ACT	REQUIREMENTS	COMMENTS
48(3)	“A public officer or <u>third party</u> authorized to receive control or pay public money and grants shall only act within the authority of the Constitution, an Act of Parliament or County legislation as provided in section 196 of the Act.”	Regulations seem not to have provided for this requirement of the law.
50(4)	The guarantee of debt shall be done in terms of a criteria agreed with the Intergovernmental Budget and Economic Council and prescribed in regulations approved by Parliament.	Regulations do not specify the criteria for guaranteeing of debt
50(6)	A public debt incurred by the national government is a charge on the Consolidated Fund, unless the Cabinet Secretary determines, by <u>regulations</u> approved by Parliament, that all or part of the public debt is a charge on another public fund established by the national government or any of its entities	<p>No regulations address this requirement</p> <p>This appears to be a discretionary feature of debt management subject to the peculiar circumstances of each occurrence; regulations are therefore to be created as the circumstances and conditions demand.</p>
50(7)	The Cabinet Secretary shall ensure that the proceeds of any loan raised under this Act are paid into the Consolidated Fund or into any other public fund established by the national government or any of its entities as Cabinet Secretary may determine in <u>accordance with regulations</u> approved by Parliament.	No Regulation addresses this requirement
50(10)	Expenses incurred in connection with borrowing by the national government is a charge on a such other public fund as the cabinet secretary may determine by regulations	<p>The Regulations do not adequately respond to this requirement;</p> <p>Recommendation:</p> <p>It would be preferable if the regulation spelt out at least what categories of expenses would qualify in the first instance not to be charged to the Consolidate fund.</p>
	53. (11) Subject to any other legislation, secondary trading of national government securities <u>shall be carried out only in such manner as may be prescribed by regulations</u> made for that purpose and for purposes of this subsection “secondary trading” means any activity leading to a change in the ownership of a national government security before its redemption date.	No regulations address this requirement of the law

SECTION OF THE ACT	REQUIREMENTS	COMMENTS
53(14)	If, after six years from the redemption date of a national government security, the proceeds of the security have not been collected by, or paid to, the holder or the holder's personal representatives, the Cabinet Secretary shall return the uncollected amount to the National Exchequer Account to form part of the Consolidated Fund in accordance with regulations.	No Regulation addresses this requirement of the law
56(1)	The national government may enter into derivative transactions, either directly or indirectly through an intermediary, <u>but only within the framework and limits of the Budget Policy Statement and in a manner prescribed by regulations.</u>	No regulation addresses this requirement of the law
56 (3)	The Cabinet Secretary may <u>enter into a derivative transaction on such terms and conditions, within the scope prescribed by the regulations</u> approved by the National Assembly.	No Regulation responds to this requirement of the law
125 (1) (b)	Planning and establishing financial and economic priorities for the county over the medium term;	This section should be amended to require county governments to prepare Medium Term Expenditure Framework (MTEF) Sector Reports as basis of establishing financial and economic priorities over the medium term
126 (2)	Every county government shall prepare a development plan in accordance with Article 220(2) of the Constitution, that includes— (g) a summary budget in the format required by <u>regulations</u> ; and (h) such other matters as may be required by the Constitution or this Act.	The regulations do not prescribe the format in accordance with this section of the Act
128 (3) (h)	New subsection	There is need to introduce a new subsection (h) that will require the county executive committee member for finance to include in the circular mechanisms of consultation with the intergovernmental sector working groups on budgeting requirements that border on Article 187 of the Constitution
129 (4)	Replace “shall” with “may” to allow for exercise of discretion	

SECTION OF THE ACT	REQUIREMENTS	COMMENTS
139 (3)	A third party shall not receive, have custody of, or pay public money otherwise than in accordance with an authorization given in accordance with <u>regulations</u> made under subsection (1).	The regulations do not adequately respond to this requirement of the law
141(8)	Any expenses incurred in connection with borrowing by a county government shall be a charge— (b) on such other county public fund established by the county government or any of its entities as the County Executive Committee member for finance may determine in accordance with <u>regulations</u> approved by the county assembly.	The regulations do not address this requirement of the law
144 (13)	Subject to this Act or any other legislation, secondary trading of county government securities may be carried out only in such manner as may be prescribed by <u>regulations</u> made for the purposes of this subsection and in accordance with the provisions of this Act.	<u>Regulations do not address this requirement of the law</u>
144 (17)	If, after six years from the redemption date of a county government security, the proceeds of the security have not been collected by, or paid to, the holder or the holder's personal representatives, the County Executive Committee member for finance shall return the uncollected amount to the County Exchequer Account to form part of the County Revenue Fund in accordance with <u>regulations</u> .	<u>Regulations do not address this requirement of the law</u>
146 (2)	The Intergovernmental Budget and Economic Council may agree on <u>regulations</u> with guidelines for county government joint infrastructure investments. Responsibilities of an accounting officer of a county assembly in management of public finances.	<u>Regulations 126 does not fully address this requirement of the law</u>

SECTION OF THE ACT	REQUIREMENTS	COMMENTS
207	<p>Regulations may provide for participatory governance for purposes of this Act.</p> <p>(2) Regulations made under this section may provide for the following matters- (a) structures for participation; (b) mechanisms, processes and procedures for participation; (c) receipt, processing and consideration of petitions, and complaints lodged by members of the community; (d) notification and public comment procedures; (e) public meetings and hearings; (f) special needs of people who cannot read or write, people with disabilities, women and other disadvantaged groups; (g) matters with regard to which community participation is encouraged; (h) the rights and duties of members of community; and (i) any other matter that enhances community participation.</p>	<p><u>Regulation 7 (National Government) and Regulation 7 (County Governments) are inadequate.</u></p> <p><u>It would be ideal if the regulations spelt out in detail how the requirements of public participation are to be conducted in accordance with the requirements of the Act.</u></p>

Table 9: Matrix audit of the Public Finance Management (Amendment) Bill 2017

Clause of the Amendment Bill	Requirements	Comments & Recommendations
<p>Clause (2)</p> <p>(Amending section 2 of the PFMA)</p>	<p>Insertion of the Word State Organ into the definition of national government entity.</p>	<p>State Organs are already defined under article 260 of the 2010 Constitution as –</p> <p>“State organ” means a commission, office, agency or other body established under this Constitution.</p> <p>It is therefore very unlikely that the Cabinet Secretary shall have the powers to declare state organs as national government entities for they are already established under the Constitution with set functions and responsibilities.</p> <p><u>Recommendation:</u></p> <p>Delete any reference to state organs as proposed under this section.</p>

Clause of the Amendment Bill	Requirements	Comments & Recommendations
<p>Clause 5(ii)(k) (Amending Section 10 of the PFMA)</p>	<p>There is a proposal to use the County Fiscal Strategy Paper and Controller of Budget Reports as aids in the Revenue Allocation process.</p>	<p>It is necessary to be clear that the criteria for revenue sharing and the considerations thereto have already been prescribed both under the Constitution and the Law.</p> <p>Further, the County Fiscal Strategy Paper (CFSP) together with the reports of the Controller of Budget are not legally defined as documents that inform decisions on Division of Revenue as under the Constitution. Besides, division and allocation of revenue should be made before preparation of CFSP.</p> <p><u>Recommendation:</u></p> <p>Review the clause or delete it altogether.</p>
<p>Clause 8 (a) Amending Section 17 (7) of the PFMA</p>	<p>Revenue Disbursement Schedule</p>	<p>There is need to find ways to ensure that the National Treasury abides by the approved revenue disbursement schedule as provided for under this section of the law.</p> <p>This is due to the fact that counties are heavily reliant or dependent on fiscal transfers from the National Exchequer; for some over 95% of budget is financed by transfers and any delays in the disbursement, as has been witnessed and consistently reported on by the Controller of Budget, considerably undermine service delivery within the counties.</p> <p><u>Recommendation:</u></p> <ul style="list-style-type: none"> » In the event that there is delay in the passage of the County Allocation of Revenue Act (CARA) which may affect and the Disbursement Schedule, then, Counties should be enabled, by law, to access upto 50 per cent of the indicative allocation of revenue in the approved the Budget Policy Statement. (This would require legal affirmation that once BPS is approved, the indicative amount there-in should be the minimum the counties can be get). » The National Treasury be legally compelled to ensure that delays in disbursements, due to the counties, do not become the norm as is currently being experienced.
<p>Clause 8 (b) (Amending Section 17 of the PFMA)</p>	<p>No procurement to be carried 3 months to the General Elections.</p>	<p>Though the proposed amendment may be valid and well-intended, it is necessary to provide for exceptions that may allow for emergency procurement by national or county governments, in case emergencies, notwithstanding the fact that such procurement falls within the 3 months' window period.</p>

Clause of the Amendment Bill	Requirements	Comments & Recommendations
<p>Clause 10 (b)</p> <p>(Amending Section 35 (1)(j) of the PFMA.</p>	<p>Extending the Reporting time by the National Treasury from 3 months to 4 months.</p>	<p>Article 228 (6) of the Constitution provides as follows:</p> <p>“Every four months, the Controller shall submit to each House of Parliament a report on the implementation of the budgets of the national and county governments”.</p> <p>Therefore, extending the duration of time within which the reports of the national government on budgeted revenues and expenditure are submitted, from 3 months to 4 months, shall conflict with the Constitutional role of the Controller of Budget.</p> <p>The office of the Controller of Budget shall not have enough time to consolidate and reports on the budget implementation by the national government, if they are both to report within 4 months.</p> <p><u>Recommendation:</u></p> <p>The section should remain as currently provided for in law. The amendment as proposed shall affect reporting by the Controller of Budget, impractical.</p>
<p>Clause 32 (b)</p> <p>Amending Section 112 of the PFMA.</p>	<p>Definition – threats to human life.</p>	<p>It shall be ideal to have these events as described under this clause to form part of the exceptions that may inform the engagement in procurement within the 3 months’ window frame to the elections.</p> <p>Refer to clause 8 of the Amendment bill.</p>
<p>Clause 34 (a)</p> <p>Amending Section 117 of the PFMA</p>	<p>Revision of the Timeframe for the submission of County Fiscal Strategy Paper</p>	<p>Legally, preparation of County Fiscal Strategy Paper (CFSP) is guided by the approved Budget Policy Statement (section 117). For this reason, there is need for sufficient time to enable counties consider and be effectively be guided by the contents of approved Budget Policy Statement.</p>

Clause of the Amendment Bill	Requirements	Comments & Recommendations
		<p>Unfortunately, the proposed amendment may have the effect of curtailing the counties will not have time internalize the BPS due to insufficiency of time, especially when both documents are submitted only one day apart.</p> <p>It would be much more effective if the date for the submission of the Budget Policy Statement was pushed ahead to give counties more time to craft their fiscal intentions for the forthcoming financial year and align them to BPS, without being constrained for time.</p> <p><u>Recommendation:</u></p> <p>If possible, the date of submission of the Budget Policy statement be moved to January 30th and the same passed not later than 14th February.</p>
<p>Clause 36</p> <p>Amending section 119 of the PFMA.</p>	<p>Banking arrangements.</p>	<p><u>Recommendation:</u></p> <p>The law should allow the counties to open prescribed revenue collection bank accounts, for purposes of dealing with cash collections deposits especially for counties that have remote outposts, where market fees are collected, which would require long journeys to deposit money in Central Bank Branch in the county.</p> <p>The fact of the matter is that the Central Bank of Kenya is not present in all county commercial areas and therefore requiring that counties bank with it without creating room for exceptions may actually become impracticable.</p>
<p>Clause 39</p> <p>Amending section 127(1) of the PFMA.</p>	<p>Changing the date for the submission of Cash-flow Projections from 15th June to 30th April.</p>	<p>Ideally, cash-flow projections should be based on approved budgets, so that they are accurate to guide fund releases and ensure efficient implementation of the Budget. It is therefore unrealistic to demand for cash-flow projections to be prepared on the basis of budgetary estimates.</p> <p><u>Recommendation:</u></p> <p>The intended amendment will create operational problems and ought to be revised to make it more realistic and capable of adequate implementation.</p>

Clause of the Amendment Bill	Requirements	Comments & Recommendations
<p>Clause 42 (b)</p> <p>Amending section 131 of the PFMA.</p>	<p>Reductions or increases in a vote.</p>	<p>The intended amendment conflicts with section 131(3) of the PFMA which provides that;</p> <p>“An amendment to the budget estimates may be made by the county assembly only if it is in accordance with the resolutions adopted regarding the County Fiscal Strategy Paper and if— any increase in expenditure in a proposed appropriation, is balanced by a reduction in expenditure in another proposed appropriation”</p> <p>Therefore, the above section already allows the counties to vary their budgets as per the County Fiscal Strategy Paper whilst ensuring that any increase or decrease is matched by a corresponding increase or decrease.</p> <p>The proposed amendment may not therefore be entirely useful if this section still reads as it reads.</p> <p><u>Recommendation:</u></p> <p>The intended amendment ought to be revised or done away with altogether.</p>
		<p><u>NOTE:</u> It is interesting that there is not a corresponding requirement for the National Government Budgetary Process in making changes after approval of Budget Policy Statement.</p>

Clause of the Amendment Bill	Requirements	Comments & Recommendations
<p>Clause 45</p> <p>Amending section 136 of the PFMA.</p>	<p>Surrender of unspent balances at the end of the Financial Year.</p>	<p>As currently constructed, this intended amendment is unnecessary and may only serve to confuse rather than streamline the process of surrendering unspent monies at the end of the financial year.</p> <ul style="list-style-type: none"> » Why should the audit report be a critical factor in the surrender of unspent monies at the end of a financial year? » Secondly, section 136(2) already requires that all unspent monies be repaid into the exchequer account and a refund statement prepared and forwarded to the Controller of Budget. » Waiting for audit reports shall definitely provide a reason to hold funds longer which ordinarily should be refunded back to the exchequer. <p>Thus, the section does not, in any way, enhance value to the process of surrendering of unspent balances but shall potentially undermine the same.</p> <p><u>Recommendation:</u></p> <p>The section should be done away with.</p> <p>NOTE: For consistency purposes, there is not a corresponding requirement for the national government.</p>
<p>Clause 56</p> <p>Amending Section 171 of the PFMA</p>	<p>Substitution of the word State Organ.</p>	<p>State Organs as Constitutional bodies are already defined in the Constitution and it may therefore be inconsequential to rope them into this section as intended.</p> <p>Additionally, state organs do not operate within the country's space as defined therein.</p> <p><u>Recommendation:</u></p> <p>The reference to state organs should be dropped and a much more apt definition sought for.</p>

Clause of the Amendment Bill	Requirements	Comments & Recommendations
<p>Clause 66</p> <p>Amending section 193 of the PFMA</p>	<p>Accountability by the Public-Sector Accounting Standards Board.</p>	<p>The intended amendment is not clear on the requirement of accountability on the part of the Public-Sector Accounting Standards Board.</p> <p>Does the section require functional accountability or reporting accountability by the board to the Cabinet Secretary?</p> <p><u>Recommendation:</u></p> <p>The intended amendment to be reviewed for purposes of enhanced clarity.</p>

3. Regulations

Table 2: Review of Public Finance Management Regulations in a tabulated matrix

Reference	Observation and recommendation
<p>Regulations 18 (both National and County Government)</p>	<p>They establish a Committee known as Public Finance Management Standing Committee</p> <p>Comment:</p> <p>Clearly this appears to be the creation of institutions/structures not contemplated by the Act.</p> <p>Recommendation:</p> <p>In our view, any creation of institutions such as this should be stated in the Act and not regulations. While its value is evident, as recommended previously, the preferable avenue for this should be by amending the PFM Act.</p>

Reference	Observation and recommendation
<p>Regulation 41</p>	<p>States, “The national government budget estimates and each county government’s budget estimates shall be prepared, accounted for and reported in accordance with the Government of Kenya budget classification and chart of accounts issued by the National Treasury.”</p> <p>Comment:</p> <p>As noted previously in this review, the appearance of a legislative body prescribing rules to a statutory one is problematic. In this instance while eminently understandable and desirable, the basis of budget estimates should be on the basis of the PFM Act and the constitution rather than GoK budget classifications and Chart of Accounts. In other words - statutory basis must be established. In this instance that authority for establishing the format and structure of budget estimates is the Accounting Standards Board – not the National Treasury. See Section 105. (1) of the PFM Act which states that “A County Treasury has such powers as are necessary to enable it to carry out its functions and responsibilities under this Act including- (e) requiring county government entities to comply with all applicable norms or standards regarding accounting practices, budget classification systems and other public financial management systems;” <u>as prescribed by the Accounting Standards Board</u>. The Act also provides further direction about the Chart of Accounts in its preliminaries section (page 30) when it states that: “chart of account” means a structured list of accounts used to classify and record budget revenue and expenditure transactions as well as government assets and liabilities on a <u>standard budget classifications system</u>;</p>
	<p>Recommendation:</p> <p>Thus, on both accounts of budget classification systems and a chart of accounts, the issuing authority is the Accounting Standards Board. This regulation should therefore be rephrased to read as:</p> <p>“The national government budget estimates and each county government’s budget estimates shall be prepared, accounted for and reported in accordance <u>with the standards laid out by the Accounting Standards Board.</u>”</p>

Reference	Observation and recommendation
Regulation 57A (2) and others	<p>States “The Cabinet Secretary shall submit cash release request to the Controller of Budget for authorization for the transfer of cash to the operational bank accounts of the respective entities.”</p> <p>Comment:</p> <p>No provisions are made for the CEMF.</p> <p>Recommendation:</p> <p>This should be redrafted to read:</p> <p>“The Cabinet Secretary <u>or the County Executive Member for Finance as the case may be</u>, shall submit cash release request to the Controller of Budget for authorisation for the transfer of cash to the operational bank accounts of their respective entities.”</p>
Regulation 79 (County Government Regulations)	<p>Comment: Regulation 79(3) States that “Any legislation found to be <u>inconsistent with sub-regulations (3) and (4)</u> is of no force and effect to the extent of the inconsistency.” This is clearly in error as no regulation can overrule the force of existing legislation.</p>
Bank accounts	<p>Further Recommendations:</p> <p>On the broader issue of Bank accounts, we recommend the following principles to address underlying concerns about how these bank accounts shall be operated:</p> <ul style="list-style-type: none"> » Any interest income earned by governments is a revenue source, which must be offset against expenditure in the following years budget estimates. That is, neither the National nor County governments can retain interest income separately from the budget estimates process. Thus, at each budget estimates cycle, interest income shall be counted a revenue source to meet expenditure estimates. » Cost of operating various bank accounts should be offset against the interest earned and not expensed separately as a recurrent expense. Thus, it should <u>not</u> be included in any expenditure estimates in the budget.

Reference	Observation and recommendation
	<p>» The Treasury Single Account concept is not incompatible with a multiplicity of bank accounts. The TSA is a Primary Account and all other bank accounts are its Subsidiary Accounts with each account being the sole responsibility of an Accounting Officer.</p> <p>» The PFM Act - Section 119(2) gives all governments the freedom to bank with a commercial bank. Provided the interest income and banking charges rules mentioned above are followed, the process need not be complicated.</p> <p>Section 119(2) “As soon as practicable, each County Treasury shall establish a Treasury Single Account at the Central Bank of Kenya or a bank approved by the County Treasury through which payments of money to and by the various county government entities are to be made”</p>
Cheques	<p>Cheque signatories shall be designated by the Accounting Officer and any changes in signatories shall be authorized by him.”</p> <p>Recommendation:</p> <p>Rephrase to read:</p> <p>“All cheque signatories <u>provided they are at least two</u>, shall be designated by the Accounting Officer and any changes in signatories shall be authorized by him.”</p>
Use of “Should” instead of “Shall”	<p>Recommendation:</p> <p>Regulations once passed are mandatory, for that reason and to remove further ambiguity, we recommend the substitution of indefinite terms such as ‘should’ for the prescriptive term ‘shall’</p>
Expenditure Estimates	<p>“Expenditure estimates shall be classified according to the approved standard chart of accounts that includes programmes, subprograms and economic classifications.</p> <p>(2) Parliament and County Assemblies shall approve allocations of expenditure by programmes as the main division or category of a budget vote.</p> <p>(3) Approved budget allocations under a program shall be categorized into –</p> <p>(a) recurrent expenditure to include all current expenditure <u>including asset maintenance costs</u>; and</p> <p>(b) development capital expenditure to include all expenditures for acquisition, rehabilitation and improvements of assets and development of resources.</p> <p>(4) The Cabinet Secretary shall approve and issue a standard chart of accounts <u>as developed and certified by the Accounting Standards Board</u>. It shall <u>contain</u> all units of budgetary classifications applicable to both national county and county government entities</p>

Reference	Observation and recommendation
	(5) The order of presentation of budgetary expenditure estimates submitted to Parliament and County Assemblies shall be in accordance with the budget guidelines and shall be consistent with the standard chart of accounts issued by <u>Accounting Standards Board through the relevant treasury.</u>
Regulations 123 (National Government), and Regulation 121 County Governments)	<p>General Comment:</p> <p>Calculating maximum payments to staff all general allowances should be included and not just overtime.</p>
Regulation 124 (National Government) and Regulation 122 (County Governments)	<p>Recommendation:</p> <p>This regulation should be amended to state that “unless the members salary includes an “extraneous allowance”, no offer of compensation or ex-gratia payment in settlement of any claim against the Government may be made without aprior authority of the Treasury, except where powers are available to the accounting officer</p>
Regulation 161 (National Government) and 153 (County Government)	<p>States that “The Head of Internal Audit shall enjoy operational independence through the reporting structure by reporting administratively to the Chief Executive Officer and functionally to the Audit Committee”</p> <p>Recommendation:</p> <p>This is confusing for the Head of Audit and likely to create unnecessary tensions. It would be easier and more natural to grant primary reporting responsibilities to the audit Committee with courtesy copies to the relevant treasury and the CEO.</p>
Regulation 183 2) (National Government) and 174 (3)	<p>Recommendation:</p> <p>These regulations should be amended either as:</p> <p>“A medium-term public debt management strategy shall be formulated annually on a rolling basis by the Cabinet Secretary or County Executive Committee <u>Member for Finance</u> “</p> <p>or...</p> <p>“A medium-term public debt management strategy shall be formulated annually or on a rolling basis by <u>the National Treasury or County Treasury as the case may be.</u>”</p>


Reference	Observation and recommendation
Regulation 113 (National Government) and Regulation 111 County Government)	States that “An Accounting Officer who is desired by his Cabinet Secretary/ CEC Finance to make payment which for any reason believes to be wrong must represent his objection, and the reason to it to such Cabinet Secretary/CEC in writing. Provided the instruction to pay is then repeated, he may obey without further responsibility, the responsibility is then transferred to the Cabinet Secretary/CEC who will be held personally liable
	<p>(2) after making the payment, the Accounting Officer should inform the Treasury of the circumstances and should copy the documentation to the Controller of the Budget and the Auditor-General.”</p> <p>This regulation is null and void as it sanctions an illegality.</p> <p>Recommendation:</p> <p>This should be redrafted to read:</p> <p>“An Accounting Officer who is desired by his Cabinet Secretary to make payment which for any reason believes to be wrong must represent his objection, and the reason to it to such Cabinet Secretary in writing. If the instruction to pay is repeated, the Accounting Officer shall repeat his or her objection and refer the matter to the Audit Committee for adjudication in writing. Upon the advice of the audit committee in writing and the advice of the audit committee approves the Cabinet Secretary’s request the matter shall be executed expeditiously. The Audit committee chairman shall immediately also issue a memorandum to the Auditor-General and the relevant for the record.</p> <p>In the event the Accounting Officer remains unconvinced, his other recourse shall be to make representations to the relevant treasury and the Clerk of the Assembly for the record and request further direction with a copy to the Controller of the Budget and the Auditor-General.”</p>

4. County level public finance management

The County public finance management process is provided for, in great detail, in the Public Finance Management Act (PFMA). As a result, a lot of county processes are carried out within the framework of the PFMA. This section examines the budget process and the Ward Development Fund.

Budget approval process: proposed amendments to the PFMA

With respect to the Budget, it is important that the County Assemblies be limited to approving the level of appropriations within each expenditure area, hence additional spending on one appropriation must be matched with corresponding spending cuts



within the same expenditure area/sector. This is aimed at reducing the size of county assembly amendments to the government's budget.

Section 129 (3) The County Assembly Revenue and Expenditure estimates

The County Assembly Revenue and Expenditure estimates shall be accompanied with measures on cost, cost control and evaluation of results of programmes financed with budgetary resources and a statement of compliance with the ceilings determined by the Commission on Revenue Allocation (CRA).

131 (1) - The county assembly shall consider the county government budget estimates with a view to approving them or rejecting them with proposals for amendments directed at the county treasury, in time for the relevant appropriation law and any other laws required to implement the budget to be passed by the 30 June in each year.

NEW CLAUSES: Section 131 – Further and in consideration of the county assembly Budget Revenue and Expenditure Estimates, the county assembly shall be BOUND by the need;

- » to comply with the strategic priorities and policy guidelines including the budgetary ceilings and expenditure framework set out in the County Fiscal Strategy Paper.
- » to formulate budgets in a realistic and objective manner with due regard to the general economic outlook and revenue prospects, and the objective need to minimize deviations during the course of the year;
- » to maintain the balance between revenue receipts and the revenue expenditure including managing expenditure in a manner consistent with the level of revenue generated

(2) Any deviations from the County Fiscal Strategy Paper shall be documented and reduced into a memorandum shared with the County Treasury.

(3) In the event that the proposals deviate from the County Governments Medium Term Strategy, the county treasury shall have the power to reject the amendment proposals submitted to it for review.

131 (2) – the county assembly shall alongside the county budget estimates; subject its estimates of expenditure to public review and recommendations.

131(3)(a) In consideration of the Estimates, the County Assemblies shall approve the level of appropriations within each expenditure area, and any additional spending on one appropriation must be matched with corresponding spending cuts within the same expenditure area/sector.

Specifically; the county assembly shall observe the following;


- i. Any proposal for a new project, policy or programme initiatives and measures that involve new or increased public expenditure, the county treasury shall be provided with a:
 - a. detailed description of the proposed project or program and of its objectives and likely outcomes and impact
 - b. description of how the proposed initiative or measure complies with the strategic objectives and priorities of the County Government’s Medium-Term Fiscal Strategy and the expenditure ceilings specified therein.

Additionally, the County Assembly should in the event of proposing a new project, policy or program initiative, ensure that it provides the county treasury with;

- i. a detailed description of the proposed project or program and of its objectives and likely outcomes and impact;
- ii. a description of how the proposed initiative or measure complies with the strategic objectives and priorities of the County Government’s Medium-Term Fiscal Strategy and with the annual budget and the expenditure ceilings specified in the County Fiscal Strategy Paper.

NEW CLAUSE in the PFM Act:

Pursuant to the provisions of article 216 (2) of the Constitution, the county assemblies SHALL be bound by the recommendations of the CRA on expenditure ceilings and costs

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- 2) A county assembly not in agreement with the CRA recommendations shall document and explain their disagreement including the necessary variations to be made provided that the county assembly shall still be mandated to carry out its fiscal and budgetary policies in line with best practices for sound and effective financial and asset management.

The following sections of the Public Finance Management Act (2012) require attention in order to enhance fiscal discipline and sound financial management.

Section 25 (2) on the Budgetary Policy Statement

There is need to have the Budget Policy Statement submitted for approval by 1 December to allow for County Treasuries to align their Fiscal Strategy Papers to the national fiscal framework determined in the Budget Policy Statement. The section should also be amended to require the National Treasury to submit to Parliament the Division of Revenue and County Allocation of Revenue Bills at the same time with the Budget Policy Statement and that the three documents shall approved at the same time by Parliament. This will allow the county governments enough time to determine their fiscal frameworks within the nation's fiscal limits and priorities over the medium term. Currently, the BPS is approved by 28 February while the County Governments are required to have prepared and submit the FSP to the County Assemblies by the same date and that the FSPs must be in line with the BPS. The Division of Revenue and County Allocation of Revenue Acts must be in place to allow rational prioritisation of medium term priorities in the FSPs.

Section 26 (1) Budget Review and Outlook Paper

Preparation and submission of the Budget Review and Outlook Paper by the National Treasury to the cabinet for Consideration, by the 30th of every September, each financial year. This paper ought to be published and publicized once it conforms to the process detailed out under section 26 of the PFM Act.

125 (1) (b) Financial and economic priorities

Planning and establishing financial and economic priorities for the county over the medium term; This section should be amended to require county governments to prepare Medium Term Expenditure Framework (MTEF) Sector Reports as basis of establishing financial and economic priorities over the medium term. MTEF Sector Reports detail each sector's performance for the past three years and forecast the priorities for the coming three years. The medium-term priorities are determined from the five-year County Integrated Development Plans (CIDP).

128 (3) (h) intergovernmental sector working groups

There is need to introduce a new subsection (h) that will require the county executive committee member for finance to include in the circular mechanisms of consultation with the intergovernmental sector working groups on budgeting requirements that border on Article 187 of the Constitution. This will ensure that the MTEF processes at the county government level respond to the budgeting needs that require intergovernmental agreements. This will ensure that the intergovernmental sector working groups are established as platforms of initiating implementation of intergovernmental agreements envisaged in Article 187 of the Constitution and the Intergovernmental Relations Act.

Section 129 (3) County Assembly Revenue and Expenditure estimates

County Assembly Revenue and Expenditure estimates shall be accompanied with measures on cost, cost control and evaluation of results of programmes financed with budgetary resources and a statement of compliance with the ceilings determined by the Commission on Revenue Allocation (CRA).

Under section 129 (4), replace “shall” with “may” to allow for exercise of discretion. This then means that the County Executive Committee member for finance has discretion to give comments or not.

Section 205 regulations under the PFMA

Powers of the Cabinet Secretary to make regulations for purposes of consistency and also the proper exercise of the responsibility to make

regulations under the law, the PFMA should be amended to allow for regulations under the Act to be fully made by the Cabinet Secretary in consultation with all sector players. As it stands now, the Act also allows the County Assemblies to make regulations which responsibility they have not been able to fully undertake. This matter is also a law reform issue that ought to be subjected to further consultations amongst sector players.

A listing of the areas that the counties are called upon to make regulations include;

Table 3: Table showing areas that require development of county regulations

Public Finance Management Act (2012)	Section: County Assembly Power to make Regulations	Issue Addressed by the call for Regulations
	107(2)	Expenditure on Wages and Benefits.
	112	Payments out of the County Emergency Fund
	116	Establishment, Operation and Winding up of County funds.
	120	Cash Management at County Level
	127(2)	Regulations to provide for the content of the Annual Cash Flow Projections.
	154(3)	Regulations to provide for Reallocation of funds within sub-votes or programs.
	182(2)	County Regulations to provide for the establishment or dissolution of county operations.

Revision of county budget calendar in transition Years: (FY 2018-2019 for illustration purposes)


The latest budget calendar for fiscal year 2017-2018 was revised in view of the 2017 elections, with the final deadline for approval of the budget revised from end of June 2017 to end of March 2017.⁷

Following the same principles, adjustments should be made to the budget calendar for fiscal year 2018-2019, particularly for County Governments. The County Executive Committee member for finance is mandated (PFM Act, 2012, section 128 (2)) to issue a circular with guidelines and a budget calendar no later than August 30th and the first deadline in the county budget calendar is the submission by the Executive to the Assembly of the Annual Development Plan (ADP) “no later than September 1st”.

This deadline should be modified during transition years for two reasons. First, the County Assembly will have just been sworn in and it is unlikely that the County Executive Committee will have been constituted by end of August, certainly unable to make informed decisions. Secondly, the annual development plan to be tabled in this budget process will determine expenditures for the fiscal year 2018-2019, hence it should be based on the new County Integrated Development Plan (CIDP) 2018-2022, which is yet to be developed and approved by Counties.

It is therefore appropriate to recommend that the “no later than September 1st” deadline for the submission of the ADP is revised for transition years. Counties should be advised to prepare and table the ADP jointly with the CIDP, as the first annual development spending to be derived from the five-year integrated plan. This would ensure a more effective, efficient and informed unfolding of the planning and budgeting process of Counties after elections, assumptions of office, and inductions.

⁷ During the presentation of the revised budget calendar, Treasury Cabinet Secretary Henry Rotich on July 26, 2016, said that the objective of the calendar revision “is to ensure that the budget for the 2017/18 is appropriated in good time for smooth operation of the budget before and after the 2017 general election”.



MODP is proposing December 31st as the deadline for the submission of draft CIDPs to the County Assembly, it is recommended that the deadline for the ADP in the revised budget circulars should therefore also be December 31st, or other earlier deadline a county might establish for the submission and approval of the CIDP.

The County Budget Review and Outlook Paper October deadline, October 21st, could remain unchanged – as the document will provide useful information for the planning and budgeting process – and similarly the February 28 deadline for the County Fiscal Strategy Paper (CFSP) and following steps of the budget calendar. Please note the mid-term planning process will provide critical information for preparation of the, ADP, CFSP ceilings, and budget estimates, as all these documents will be based on the sector programs formulated in the CIDP. This will ensure the proper link between planning and budgeting as mandated by law.

Since this problem could occur, especially during the General Election years, it may be necessary to provide for legal flexibility to avoid amending the any time the Budget Process is interrupted.

Clarity of Fund Transfers to County Assembly and Executive

When county funds are deposited or transferred into County Revenue Fund (CRF) which is managed by the County Executive Member for Finance (CEC Finance). There has been some incidents when County Assemblies have had difficulties accessing funds to deliver on their mandates, a situation which has been blamed on the CEC Finance, delaying release of funds. This has created misunderstandings that starve the County Assemblies of funds and thus affecting service delivery.

To solve this problem, it is proposed that as CoB releases the funds from CRF, there should be clear indication as to the amount for both the Assembly and Executive. This will ensure there is no room for possible conflicts or hoarding of finances by the Executive at the expense of the County Assembly.


Operational concerns in the county budgetary process

Supplementary budgets

Generally, a supplementary budget is an application to the National Assembly and County Assemblies for additional expenditure of public funds that was not appropriated and is mainly exercised in line with Article 223 and 224 of the Constitution and Sections 44 and 135 of the Public Finance Management Act. Under section 44 (3) of the PFMA, the supplementary budget should include a statement showing how the additional expenditure relates to the fiscal responsibility principles and financial objectives.

It is critical that there is a clear distinction between a supplementary budget as under Sections 44 and 135 of the PFMA and Budgetary Reallocations as envisaged under Sections 43 and 154 of the PFMA. It is increasingly becoming apparent that the national and county governments under the need for passing supplementary budgets, is undertaking more of budgetary reallocations as opposed to actual supplementary appropriations as envisaged under Articles 223 and 224 of the Constitution. With reference to Articles 223 and 224 of the Constitution, supplementary appropriations mainly relate to **additional expenditures** that are approved by Parliament, ex post facto. It does not deal with revisions or variations to the budget at the program, vote or sub-vote level which otherwise is the domain of the budgetary reallocations.

It therefore behoves the National Treasury and other industry players to be able to appreciate the legal and constitutional distinction that exists between supplementary appropriation and budgetary reallocation. Article 223 (5) also makes it clear that in any particular financial year, the national government may not spend more than ten per cent of the sum appropriated by Parliament for that financial year unless, in special circumstances, Parliament has approved a higher percentage. This further reinforces the argument that in so far as supplementary appropriation is concerned, it deals with expenditures and not variations or modifications to the budget for purposes of additional spending. That actually remains the domain of Budgetary reallocations.



As an attempt to merge current practice and the law, the PFMA (National) Regulations (2015) proceed to birth and define

- a. “Revised estimates” as the reference to the supplementary budget estimates and approved budget reallocations prepared and submitted under section 43 of the PFMA
- b. supplementary budget estimates” means additional request of funds by the national government to Parliament;


Taking the above two into consideration, and as a way of dispelling any confusion that may arise with regards to the above two whilst also conforming with the dictates of the Constitution, it is critical that the PFMA is reviewed for purposes of specifically providing for the current practice of supplementary budget making. Seemingly, the involved institutions are conjoining supplementary appropriation and budgetary reallocation and globally referring to the two as supplementary budget making. This approach as it stands, is alien to the law.

Secondly, quite a number of concerns have been witnessed with regards to the manner in which the current practice of supplementary appropriation is conducted. As pointed out by the International Budget Partnership (IBP) Kenya:

“The budget documents that contain these changes mostly fail to justify the reasons behind them. This undermines the supplementary budget’s transparency and the quality of public deliberation around the changes. In addition, we note that the supplementary budget has not been widely available to the public, which of course further erodes the quality of debate over its contents. Finally, we find that in many cases where budgets have been revised downward, there is no corresponding decrease in the programmatic targets.

This suggests that government expects the same work to be done for much less money. Either the original estimates were inflated, which raises additional concerns about the probity of the budget process, or these targets are not realistic”⁸

8 What Does the 2015/2016 Supplementary Budget Say About Kenya’s Priorities? (April, 2016) – International Budget Partnership (IBP).




Basically, the concern has been that whereas supplementary budgeting may actually be unavoidable, it should never be used to meet short term needs which would otherwise have been planned and budgeted for. Unfortunately, both at the national and county level, we are witnessing increased levels of deviation from laid down fiscal responsibility principles and financial objectives to the extent that some government agencies habitually demand for or receive more funds in the course of the financial year through supplementary budgets. Allowing such practices creates room for lethargy among government institutions based on the fact that they formulate their institutional plans in lackadaisical fashion whilst well aware that they can always go back to parliament and get supplementary resources approved. It is unfortunate that a substantial amount of these monies is reportedly misused and thus undermining of service delivery to the people of Kenya.

Thirdly, as observed by a financial commentator, it is evidently clear the Government has adopted the habit of moving money from development to recurrent spending in total violation of the PFMA, which provides that funds appropriated for capital expenditure cannot be reallocated except for defraying other capital expenditure with the net effect of weakening the country's fiscal position.

Proposed Criteria for Approving Supplementary Budget Proposals

As a core principle, supplementary budgets should only apply to expenditures that were unforeseeable, unavoidable and incapable of being absorbed. Consequently, and in addition to the criteria already provided for under the PFMA regulations, we are proposing the following issues as points for evaluation of or consideration of proposals submitted for supplementary budgeting.


1. Is the 'expense' simply a transfer of funding? If the action required is simply a shifting of funds from one ministry to another with a movement of personnel or function, this should be approved as it does not represent any new spending.
2. Can the expense be delayed until the next Budget? Preferably, all spending decisions would be made through the budget process, so if a proposal can be held over until then, it should

- 
- not be considered for supplementary appropriation.
3. Is the expense unforeseen? Any expense that could (or should) have reasonably been foreseen should not be approved.
 - a. Does the expense represent ‘business as usual’? If the expense is something that is considered to be normal operational spending (including personnel), the ability of the ministry in question to manage their budget is in question, and the funding should not generally be approved.
 - b. Is the expense something ‘demand- driven’ and outside the control of the ministry? If the expense is for something outside the control of the ministry, this is generally more likely to be approved. However, care should be taken in determining if the ministry should have been able to control the particular expenditure.
 4. Have there been offsetting savings proposed? All new spending proposals should contain offsetting savings to fund them. Ideally, these should match the years of expenditure. If there is no offset, this does not preclude a proposal from being approved, but a strong case needs to be made for diverting future funding away from other priorities in current or future budgets.

Programme based budgeting

The PFMA required both the national and the county governments to shift to program-based budgets (PBB) starting the 2014/15 financial year. Generally, program-based budgets organize the budget around objectives rather than inputs. A PBB presents a set of programs and (usually) subprograms with clear policy objectives. Each program has a set of indicators, which measure whether objectives are being achieved, and time-bound targets, which are related to each indicator and measure progress toward achieving these objectives.

Program Based Budgeting (PBB) in Kenya was mainly introduced and designed to support Public Finance Management (PFM) reforms by enhancing performance management and accountability. Additionally, it was meant to serve the purpose of bringing forth a stronger link



between the annual budget and policy objectives whilst also improving transparency and access to budget information. The mainstay of PBB is the facilitation of the flow and quality of information that in a fundamental way forms the basis for resource allocation, decision making and the creation of an apt environment and mechanisms that strengthen the Public Finance Management framework.


It was also to enabling a stronger linkage between the annual budget and policy objectives, and improving transparency and accessibility of information. The aims of PBB are to mainly facilitate the flow and quality of information so as to provide a healthy basis for resource allocation decision making and to create the right environment and mechanisms that will strengthen the improved PFM.

Unfortunately, the implementation of PBB at both the national and county level is not without challenges even though the challenges are much more pronounced at the county level. The county governments (with little exception of the national government) have largely formulated PBB budgets that are not transparently linked to service delivery and performance. The concern therefore is that the shift to PBB has not been defined by qualitative information at their level. Others have resorted to producing line budgets and PBB budgets at the same time.

On balance, Kenya's shift to PBB has made more information available. However, it also reduced the level of information available on wage costs and external funding. The narrative, indicators, and targets are still weak. In many cases, the sub-program breakdown does not allow a reader to fully understand what a sub-program does or how it uses public money to achieve specific objectives.⁹

The county governments have been hard hit with this shift for it is clear that they are still grappling in the dark in the hope of finding their way and abiding with the legal requirement upon which the shift to PBB is predicated. As with all transition, a shift from line item budgeting to PBB requires considerable input and involvement on the part of the involved institution. It must be supported by an understanding

9. IBP Guide: Improving Program Based Budgeting in Kenya (Jason Lakin and Vivian Magero) June 2015



of the old budget format, the new budget format, and the definitive components of an effective transition which include designing programmes, programme objectives, indicators and targets that are reasonable and achievable.

In a number of counties, rather than develop programmes with clear objectives, majority of them have developed programmes that are actually a thin gloss demarcating recurrent and development spending. It does not help that the programs are defined with generic narratives that are ideally not helpful including the fact that some of the indicators and targets that these counties conceptualize are incapable of measurement.


Therefore, there is need for technical assistance to the counties to help them transition from a line-item budget methodology to a properly undertaken PBB approach as is required under the law. The capacity should ideally, (though not exclusively) concentrate on the following issues:

Planning and the Medium-Term Expenditure Framework (MTEF) for purposes of enhancing the county government's understanding and proficiency in the application of MTEF in their budgeting processes.

Program-based budgeting: There is need to impart the county officers with the knowledge and skills that are critical for purposes of them being able to prepare their respective budgets by programs in tandem with the ideals of Program Based Budgeting.

Ward Development Fund

Just like the CDF, Members of the County Assemblies also want the establishment of the Ward Development Fund at the County level. Part of the arguments that they have proffered in support of their claims is that their constituents view them as agents of development and are therefore expected to contribute to and deliver on community projects within their political enclaves. To this end and taking into consideration the principle of public participation as a core value of the 2010 Constitution, the MCA's are thus expected to engage and support communities to identify, discuss and prioritize their needs including



orienting or satisfying these needs through localized development processes.


The WDF in a very large way parallels the CDF at the national level and one of the principal arguments that have been advanced against their establishment revolves around the principle of separation of powers. That notwithstanding, there are a number of institutional and procedural safeguards that can be inbuilt into the WDF processes in a manner that ultimately respects the notion of separation of powers both in principle and in practice.

Ideally speaking, the arguments in favor of the WDF make sense and are not to be trashed. It is an irrefutable fact that the clamor for the WDF is precipitated by the desire to implement specific priority projects that have been identified by the residents of a particular ward as being quite germane to their wellbeing. Based on the arguments that have generally been floated, the primary purpose of the WDF is to support the construction and maintenance of small-scale infrastructure and development projects within the wards.

Some of these projects could include things like cattle dips, water projects or their maintenance, access roads inter alia. To this end, it is expected that the county governments sets aside some monies for such projects over and above the development planning that it engages in.

Going by global practices and also considering our burgeoning system of fiscal decentralization, the WDF is largely premised on the following objectives which include the need to:

- » improve the socio-economic status of rural people,
- » encourage people's participation in, and contribution to, community development at the lowest level possible, and in this case the ward level.
- » enable people to become more responsible for creating their own future.
- » The Key Determinants of these local levels projects include:
 - » projects supporting economic development,
 - » projects supporting social development
 - » projects that do not exceed the allocated budget,

- 
- » projects that are in line with the rules and regulations upon which the WDF should already be defined and pegged, and
 - » projects that can be implemented within a fiscal year without the need for unnecessary spill overs into subsequent financial years.


With respect to project identification as a significant component of the WDF process, it must not be forgotten that the fund will always remain too small to be spread across the vast number of priority areas at the local level. It is possible that the funds shall mostly be used to fund rural infrastructure projects such bridges, drainage and water provision, and small connecting roads between villages.

Making the WDF work

An enabling legal, regulatory and policy frameworks are the key elements that are critical to a properly functioning WDF framework. It has been argued that laws and other regulatory instruments pertaining to the management of the WDF can hamper its success or delivery if poorly designed or executed. In a nutshell, A strong WDF regulatory framework is an important ingredient for the success of development programs.

Planning under the WDF should adopt a bottom-up approach. Generally, “bottom-up” or community-led development planning refers to putting community members at the center of development planning, through their views, and helping define the development course for their area, in line with their own views, expectations and plans. It is tailored to the local context and directly addresses the needs of communities. Therefore, the community must be involved throughout the development process from participating in deciding what is needed, how they want to achieve it, how they will implement it, to benefiting from the results of achieving it.

Thus, and in the spirit of the bottom up approach to development, it is crucial that the project priorities at the local level be integrated with the overall planning at the county level. If this is lacking, then such kind of priorities remain nothing other than a consolidated shopping list of local need and wants with very little evidence of strategic planning. Further, it must also be appreciated that WDF’s wherever



they are set up, are meant to compliment county planning and not to overlap or replace county planning which if otherwise not considered may potentially undermine, marginalize or duplicate the role of county governments in development planning. We must be careful to state that WDF is not a replacement for county planning and within its implementation, we must also not come up with a system that inordinately becomes expensive, unnecessary and burdensome to the county government.


Additionally, even though the projects that are implemented under the WDF are small in stature or nature, WDF should not be expended on a myriad of small, diverse projects that are largely of no long-term impact to the county development needs. This is the danger of a fragmented approach to development planning wherein projects of very little utility to the advancement of the county development needs are implemented by their droves.

Consequently, these identified priorities must be aggregated and incorporated into the county plans in such manner that ultimately ensures that county planning espouses local needs and priorities. Also, considering the size of the WDF and the small-time nature of the projects that it seeks to implement, it is of utmost importance that the following considerations are borne in mind when undertaking both project planning and implementation. It is useful that;


The projects under WDF to be implemented and concluded within the given particular financial year that they have been planned for.

Ensuring that the funds that are allocated for these projects as under the budget are not in any way diverted or allocated to other projects. This also serves the purpose of minimizing or altogether eradicating the instances of incomplete or stalled projects due to funds limitations.

Taking the foregoing into account, it therefore means that WDF must be preceded by a good measure of integrated local (ward level) and county planning measures. In this regard, county governments as part of making financing the WDF initiatives must also consider the following objectives and purposes into considerations as they undertake planning.

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- i. Provide a simple but integrated framework for integration of these local level priority projects into annual county development plans and to the extent that it is feasible, into the County Integrated Development Plans.
 - ii. Provide appropriate linkage and harmony between county development planning, local priorities and the county budgeting process including the aspect of project financing that comes with it. This is to ensure requisite funding for these projects as anticipated under the planning initiative.
 - iii. Provide for the development of a Monitoring and Evaluation strategy for purposes of implementation/actualization follow ups especially within the financial year. It is useful if such an initiative is preceded by a work plan that to the extent possible, captures the project implementation cycle.
 - iv. Though it may be a controversial matter, to the extent that the local circumstances warrant, it may be both practical and of value for the counties to undertake broad-based linkages between projects that are crosscutting in nature when looked at from the perspective of two or more wards. This is because;
 - a. Some of these projects may not be confined and implemented wholly within the geographical confines of a select ward but may be across wards. This is a possibility that the counties ought not to run away from and as such there should be room for its incorporation into development planning processes and frameworks.
 - b. It may also be a tool that is available for purposes of being able to limit possible instances of project duplication by intending to undertake programs within the ward that are already being undertaken within the larger county development planning processes.
 - i. Provide for a communication and feedback strategy especially to the members of the public who are the key stakeholders within the service delivery prism.

It is also essential to place a funding cap on the WDF as a way of ensuring that it does not increase exponentially to the point of undermining related albeit significant development concerns of the county. Also, it is viewed that funding caps are instrumental in curbing the possi-




ble orientation of the funds towards funding political patronage. We must also be cautious to the extent that we do not assign insignificant amounts to WDF to the extent that the amounts become quite small and consequently being insignificant to deliver on substantial development projects.

Just like its predecessor the CDF, it is also vital that the WDF is based on a redistribution or equalization formula for fund allocation amongst the wards that at a minimum, considers population and poverty rates, inter alia. This would result in a more horizontally balanced distribution of the funds in the sense that it appreciates and considers the disparities that exist between the wards and in some cases in a very profound manner. It may also be useful to set aside a portion of the WDF to cover the operation/recurrent costs associated with its administration so that the full impact of the project's costs is internalized at the local level.

The guidelines of the Office of the Controller of Budget (OCOB) (No.26 of 2014) have helped the counties to establish the Fund while adhering to established laws. Basically, these guidelines spoke to the following issues:

- » The County Executive shall formulate the Bill or Regulations to operationalize and administrate the Ward Development Fund.
- » The Ward Development Fund shall only come into operation upon approval of the Bill or Regulations by the County Assembly.
- » Only the County Executive shall manage the Fund and Implement projects and programmes financed by the Fund. In the principle of separation of powers, MCAs shall not take part in this function.
- » Public participation is critical. County residents should identify priority projects that the Ward Development Fund should finance.
- » The MCAs shall monitor and play oversight on the appropriation of the Fund and the implementation of projects financed by the Fund. They shall also mobilize residents to identify priority projects for the Fund to finance.



Although the MCA's retain decision-making power in terms of being able to mobilize and prioritize projects at the ward level, project implementation and fund management remain outside of their control. This is in line with the doctrine of separation of powers. Consequently, a proper WDF law should:

- » Stipulate clear guidelines for fund management.
- » Be very specific on the allocation and usage of funds that it designates for expenditure at ward level.
- » Be very clear on the roles of both the executive and the legislature in project identification and implementation as a way of thwarting any breaches of the principle of separation of powers.
- » Stipulate a very clear financial reporting framework within it for purposes of both financial and public accountability.
- » Provide for Public Participation.

Table 4 Review of the Ward Fund Act in a tabulated matrix

Clause	Concerns on Bill	Possible solutions
3- Principle objects of the Bill		
Provides mechanisms for identification of projects in Wards	Interferes with the planning process in the Ward set out in the COK, the CGA and the PFMA	Integrate the WDF process in the County planning process
promote the decentralization of functions and provision of services by county governments to the extent that it is efficient and practicable pursuant to Article 176 of the Constitution;	Though Constitutionally and statutorily expected to further decentralize as the case may be, this remains a county decision including the modalities of implementing article 176 of the Constitution.	Review this portion of the bill.
to ensure equitable sharing of resources within the county;	The bill cannot purport to ensure this objective simply because the sharing of resources at the county level is a product of both planning and budgeting at the county level.	Review this portion of the bill by making equitable sharing of resources an expectation and not ensuring the same.
(f) provide a framework for the participation of residents in each county with respect to the application resources and the identification and implementation of projects through monies obtained from the resources allocated.	Public Participation is a county function and the framework for the conduct of public participation is largely provided for within the respective laws on public participation that a majority of the county governments have passed.	It may be useful for the bill to require the conduct of public participation without necessarily providing a framework for the conduct of the same.
5(1). Establishes a Fund in each County	Under Art 116 and Section of PFMA the creation of public funds in the County is the responsibility of CEC and CA of County	Oblige the CGs to establish a Fund in accordance with PFMA for the stated purpose
5(2)(a). Allocates 8% of revenue to the Fund	Considering the relatively low amounts of discretionary revenue available to CGs, this figure could starve County of development funds outside this framework	Reduce the percentage allocation OR make the amount a percentage of Development Expenditure

Clause	Concerns on Bill	Possible solutions
5(3) The COB prohibited from releasing Funds without complying with WDFFA	Creates bar to exercise of constitutional powers of the COB without constitutional foundation.	Align with other compliance issues under PFMA. It would be useful if the provision read; “No withdrawals shall be made out of the fund without the approval of the CoB”.
6. Creates a disbursement process managed by WDF Board	Creates a fund management framework outside the COK, CGA and PFMA framework	Process would have to be managed under existing County framework with CA oversight to ensure compliance
7(1), 13. Creates an account for monies under WDF	Opening of accounts and management thereof is provided for under PFMA	Law can mandate CEC to open account under the PFMA framework
7(2) (3) and Clause 13. Provides for signatories of accounts outside the CG framework	Interferes with powers of CGs under the COK, CGA and PFMA	The management of monies for projects can be carried out within existing CG framework with CA oversight to ensure compliance
8(1) Provides for equal allocation between wards	The Bill proposes equal sharing of funds which is in-equitable	Create a formula for sharing that recognises inter-ward differentials.
12 (c) The Auditor-General shall submit a report under subsection (1) to the Senate for consideration.	The section responds to the need for Audit but provides for the Auditor to submit the report to the senate. A Critical Question that arises; Why report to the Senate to the exclusion of the County Assembly and with respect to a county fund? This is irregular and runs contra to the need for the county assemblies to equally provide oversight over county funds.	It is important that the Section adheres to the provision of Section 116 of the PFMA on the administration and reporting with respect to county funds, at the county level.

Clause	Concerns on Bill	Possible solutions
13. Opening of Ward Accounts for each of the Ward in a county.	<p>The account opening process ought to adhere to the process set out under section 119 of the PFMA.</p> <p>Also, the opening of accounts in commercial banks is a highly regulated affair at present.</p>	Review the section.
17 (c). Composition of the Board	<p>What is the relevance of competitive recruitment under the subsection including the involvement of the County Public Service Board?</p> <p>It unnecessarily lengthens the process especially when the section requires that the ideals of gender and special interests be factored into the recruitment process.</p>	Provide for the procedure for selection and appointment into office based on suitability without necessarily involving the County Public Service Board.
24. Projects to be in respect of county government functions.	<p>This section could do with greater specificity on the nature and type of projects that can be undertaken courtesy of the fund as intended to be established.</p> <p>As it stands, the only qualification is that the project falls within the realm of county functions and that it must be community based. This might be insufficient considering the fact that the fund might not be having lots of funds at its disposal.</p>	Review the section to provide with greater certainty/specificity as to the kind of projects that can be funded out of these funds.
25. Project Account	<p>The account opening process ought to adhere to the process set out under section 119 of the PFMA.</p> <p>Also, the opening of accounts in commercial banks is a highly regulated affair at present.</p>	Review the section.

Clause	Concerns on Bill	Possible solutions
<p>35 (1). Identification and Submission of Project Proposals</p> <p>“The Committee shall be responsible for the identification of projects to be funded under this Act, including joint projects with other wards and stalled projects, and shall prepare a list of projects proposed to be implemented in the ward projects submission form prescribed in the Third Schedule.</p>	<p>The element of public participation as a crucial component to the process of identifying projects to be implemented courtesy of this fund is lacking.</p>	<p>Review and incorporate public participation as a requirement that defines the need for this fund’s existence.</p> <p>Based on the fact that the Fund seeks to address/deal with community-based projects, then it is vital that public participation be infused as a critical component of the process.</p>

Public Audit Act 2015


Generally, this Act establishes the Office of the Auditor General which office comprises the Auditor General as its statutory head and all other staff appointed by the Auditor-General. In tandem with article 229 of the Constitution, the Act provides for the manner in which the Auditor-General audits and reports on the accounts of any entity that is funded from public funds at both levels of government.

On this law and for purposes of the legal audit, we were guided by the High Court decision in Petition No. 288 of 2016¹⁰ which declared the controversial amendments to the Public Audit Act (2015), as unconstitutional. The amendments largely undermined the functional independence of the office of the Auditor General. Consequently, and based on the court’s declaration of the said amendments as unconstitutional, it was therefore not worthwhile discussing the same for they have no force in law.

Public Procurement and Disposal Act, 2015

Basically, this is an ACT of Parliament aimed at giving effect to article 227 of the Constitution to provide procedures for efficient public procurement and assets disposal by public entities at both the national and county level. Essentially, the Act was passed for purposes of implementing and giving greater prominence and clarity to article 227 of the Constitution. It must also be borne in mind that the current Act is largely a framework legislation, and therefore, quite a lot of its implementation is left to regulations for purposes of giving it greater effect. Unfortunately, to date, the much-needed regulations as mentioned above, are yet to be enacted into law hence the reliance on 2005 regulations that do not largely comport with the new constitutional and legislative

¹⁰ High Court of Kenya (Milimani) – Transparency International vs The Attorney General and Two others (Interested Parties).



order occasioned by the promulgation of the 2010 Constitution. This is highly unprocedural and thus ought to be remedied at the earliest. The national treasury ought to ensure that the regulations are laid before Parliament and passed for purposes of better management of Procurement and Assets Disposal at the public level.

Article 203 on National Interest (for purposes of national revenue sharing)

The term national interest in article 203(1) refers to a set of policies, goals, priorities, and resultant programs which have fiscal implications and which benefit the country as a whole.

The list of the National Interest policies and priorities that the country undertakes over a period of time ought to be agreed upon through a consultative process (preferably through an intergovernmental process) that includes the county governments since these programs have implications on the funding of the functions of the county governments. Such a process

These national interest policies and priorities once agreed should clearly be set out either in the National development plan Or the Medium-Term Expenditure Framework or such other document that clearly outlines these policy priorities and the timelines for their implementation.

The level of funding necessary to accomplish those “national interest” policies and priorities should be determined through the process outlined in the Public Finance Management Act which involves the Intergovernmental Budget and Economic Council.

In summary, the possible criteria for the evaluation of National Interest may include;

- » Projects/Programs that are critical to achievements of country’s economic development objectives
- » Projects/Programs that potentially have a significant impact of social well-being of citizens.
- » Anchored in the Vision 2030 and the Medium-Term Plans.
- » Have significant resource investment requirements

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- » Are in line with the Fiscal Responsibility Principles under the law.

Public Debt and other Obligations


What are our debt obligations and how does the same impact on resources to be shared? The Constitution under article 214 (2) defines Public Debt to mean all financial obligations attendant to loans raised or guaranteed and securities issued or guaranteed by the national government. Loan repayments are also an obligation that cannot be overlooked and from a Public debt perspective, these loans are both domestic and external, create a national obligation and relate to borrowings done by both the National and County Governments. Provisions for debt repayment must be made in the National Budget including the debts that have been guaranteed by the national government for and on behalf of the county governments. The level of public debt has direct implications on revenue allocation to the county governments and on the borrowing component, out of the total debt ceiling, available to the county governments.

Other obligations

National obligations refer to those obligations that the National government may have and which affect the entire country. Excluded from this criterion are those obligations that arise as part of the National government's functions. The obligations that are outside the National government functions would include for example the funding of the cost of shared institutions including the Judiciary, Parliament, constitutional commissions, and the cost of other national obligations, which do not directly relate to the functions under Schedule IV including expenditure on pensions. In line with this, it would be prudent for full disclosure of these other obligations by the national treasury.

The needs of National Government

There is Need for an objective Criterion for determining these needs of the national government and related costs of implementation. This mainly stems from the responsibilities and functions that are assigned the national government under the fourth schedule. The distinction between National Government Obligations and National Interest may



at times be blurred in the sense that the national government may run functions, which are largely national in nature. The Constitution requires that the needs of the national government be determined through “objective criteria”; this phrase is intended to avoid the national government or indeed the County governments being the judge of the expenditure needed to finance their functions meaning that each level of government must exercise prudence in financing its functions and its developmental needs for purposes of revenue sharing under the Constitution. The CRA and other transitional management institutions are vital institutions that ought to be consulted as part of realizing this requirement under the Constitution.

The ability of counties to perform functions allocated to them

The schedule equally lays out the functions of the county governments to the extent that they are entrusted with the task of service delivery and adequate resources ought to be provided for purposes of financing those functions. Therefore, even as National Interest activities are identified and agreed on, it is important that the counties are not starved of resources that are critical to their proper functioning including service delivery.

Flexibility in response to emergencies

The Constitution allocates to both National and County government the function of disaster management, which incorporates the management of emergencies at a national or county level and to this end, there is the expectation that both levels of government shall set aside funds to deal with emergencies that arise within their enclaves.

Weighting criteria

The Constitution does not define how the criteria in Article 203(1) are to be weighted against each other, though it is vital that each of the criteria must be balanced against others noting however that there are some like public debt and other national obligations that require mandatory funding. But care must however be taken to ensure that even the mandatory obligations do not prejudice only one level of government but consider the other criteria.

County Planning


At the core of the development initiatives pursued by the county governments, lies planning and budgeting. It cannot therefore be gainsaid that proper planning and budgeting is an instrumental exercise that goes to the core of the abilities of the county governments to deliver on their respective functions and responsibilities including service delivery.

Currently, the County Government Act and the PFMA provide for a robust legal framework that defines the entails of planning and budgeting at the county level. Specifically, the County Government Act demands that public funds not to be spent outside of a planning framework. It also provides for the formulation of several plans that ultimately impact the budget process. Some of the plans that are provided for and governed by the County Government Act include the County Integrated Development Plan and the 10 years sector plans.

On the other hand, the PFMA in furtherance of the provision of article 220(2) of the Constitution also calls for the formulation of Annual Development Plans as part of the county budget process.

The specific plans that the law addresses itself are as follows:

- » Guidelines on ten-year Sector Plans (SPs) and five-year County Integrated Development Plans (CIDPs);
- » The SPs and CIDPs;
- » The Medium-Term Expenditure Framework (MTEF) sector reports;
- » The MTEF related documents including the Budget Preparation Circular (BPC), Annual Development Plan (ADP), County Budget Review and Outlook Paper (CBROP), the Fiscal Strategy Paper (FSP) and the Programme Based Estimates (PBEs)
- » The Appropriation Act;
- » The Finance Act;
- » The relevant revenue laws; and
- » Regulations and circulars.




The foregoing notwithstanding, there are still difficulties that are still being experienced at the county level within the aegis of planning. These difficulties and experiences are as discussed below:

Gaps in the overall planning framework

Generally, the CGA and the PFMA provide guidance on planning, budgeting and budget execution at the county government level. The overall legal framework has the following gaps.

First, while the CGA provides for a process flow for county planning; there is no requirement of such planning to flow from the Vision 2030 or the national development blue print in force at a given time for that matter. This requirement is necessary with regard to the flow of the PEM cycle. It should be recalled that the Vision 2030 defines the development priorities for Kenya and it would therefore remain important that the planning framework in the county governments must clearly address those priorities and with regard to the Fourth Schedule of the Constitution. Under the Political Pillar of the Vision, it was already envisioned (pre 2010) that Kenya would adopt a democratic decentralisation process with substantial devolution in policy making, public resource management and revenue sharing through devolved funds. So, it remains inevitable for the CGA to address planning at the county governments from the Visions 2030 priorities.

Secondly, the PFMA requires county governments to develop ADPs on annual basis. Seemingly, this then becomes the start of the MTEF process for county governments. During the first five years of devolution, county governments initiated their MTEF process from the ADP. This approach did not fully address the PEM cycle required linkages. The PFMA does not provide for establishment of Sector Working Groups (SWGs) as basis of guiding the sector approach to MTEF. However, regulation 30 of the Public Finance Management (County Governments) Regulations, 2015 (PFMCGR), provide that SWGs should submit sector reports to the county treasury in January. Not having SWGs in place and emphasis of a sector approach to the MTEF process yet another gap that has resulted in poor linkages between planning and budgeting. The MTEF sector reports ought to be done latest in September of the N year followed by the ADP, CBROP, FSP and PBEs.



Thirdly, as regards budget execution, section 17(6) of the PFMA provides for quarterly disbursement of resources to county governments in the spirit of Article 219 of the Constitution that requires timely funding of devolved functions. Regulation 43 PFMCGR acknowledges that cash requirements have to be made on quarterly basis in that regard. This however is not the practice and flow of resources funding devolved functions is extremely constrained and subjected to many other conditions that actually negate Article 219 of the Constitution. This has further resulted in challenges in budget execution leading to pending bills and stalled projects.


Guidelines on Sector Plans and County Integrated Development Plans

Under the Political Pillar of the Vision, it was already envisioned (pre 2010) that Kenya would adopt a democratic decentralisation process with substantial devolution in policy making, public resource management and revenue sharing through devolved funds. It was envisaged in the Second Medium Term Plan (MTP II) that county governments would play a pivotal role in planning and implementation of projects and programmes of that MTP and the Vision 2030 through the preparation and implementation of SPs and CIDPs.

The National Government through the Ministry of Devolution and Planning (MoDP) would then develop guidelines for county governments to develop the SPs and CIDPs. However, no guidelines were developed to guide county governments in preparation of SPs as was for the CIDPs.

Upon review of the CIDP guidelines the following gaps and deficiencies were noted with regard to overall compliance and conformity with the Constitution and accompanying legal framework:

- » The guidelines were prepared with regard to the provisions of the Constitution and the CGA. However, there was no deliberate provision in the guidelines how the format of the CIDPs would respond to the Vision's Foundations of National Transformation and the three Pillars: Economic, Social and Political. Mere mention of Vision 2030 does not amount to responding to the economic blue print.
- » The guidelines provided for a lengthy approach to contents of the CIDPs that resulted in bulky documents that were not



largely followed during the first five years of devolution. The resultant documents were not readable and information would not flow in line with what was envisaged in Vision 2030.


The Medium Term Expenditure Framework

Review of the county PFM policies and legislations revealed that county governments prepare the requisite documents to guide the MTEF from the BPCs, ADPs, CBROPs, FSPs and PBEs. At each of MTEF stages policy documents are generated for onward approval by the respective executives and assemblies. Evidently, the MTEF processes are undergone for compliance purposes without regard to the required PEM linkages. As pointed out earlier, the PFMA does not provide deliberately for an MTEF sector approach despite the passing mention in the PFMCGR. Emphasis remains necessary to have a sector MTEF approach beginning with MTEF sector reports that form basis of the subsequent MTEF process. The general gap in the MTEF policy documents is that they are not linked and the ultimate PBEs do not build on the basis of the MTEF processes.

Budget implementation laws

In order to implement the budget, the appropriations law must be legislated. The audit revealed that county governments have the Appropriations Acts enacted to implement the respective budgets accordingly.

Another law that gives effect to the budget is the Finance Act. At this stage the audit revealed two main gaps: the content and applicability of the Finance Acts. The Finance Act is annual fiscal law that determines multiple provisions regarding the own sources of revenue the county government expects to collect in a fiscal year. The law principally provides for amendments of rates on existing revenue laws. Therefore, county governments are expected to have in place revenue laws prior to Finance Acts. The audit revealed that some county governments prepare Finance Acts yet they do not have in place revenue laws; yet other county governments refer to the revenue laws as Finance Acts. It was also noted that some county governments amended previous Finance Acts using current Finance Acts.



Article 209 (3) of the Constitution provides that a county may impose of property taxes, entertainment taxes and any other tax that may be authorised by an Act of Parliament. They also impose charges on the services they provide. To give effect to this, county governments have passed various laws in that regard that form basis of annual Finance Acts.

Making County planning more effective

The following issues should be addressed as identified during the audit of county legislations and policies:

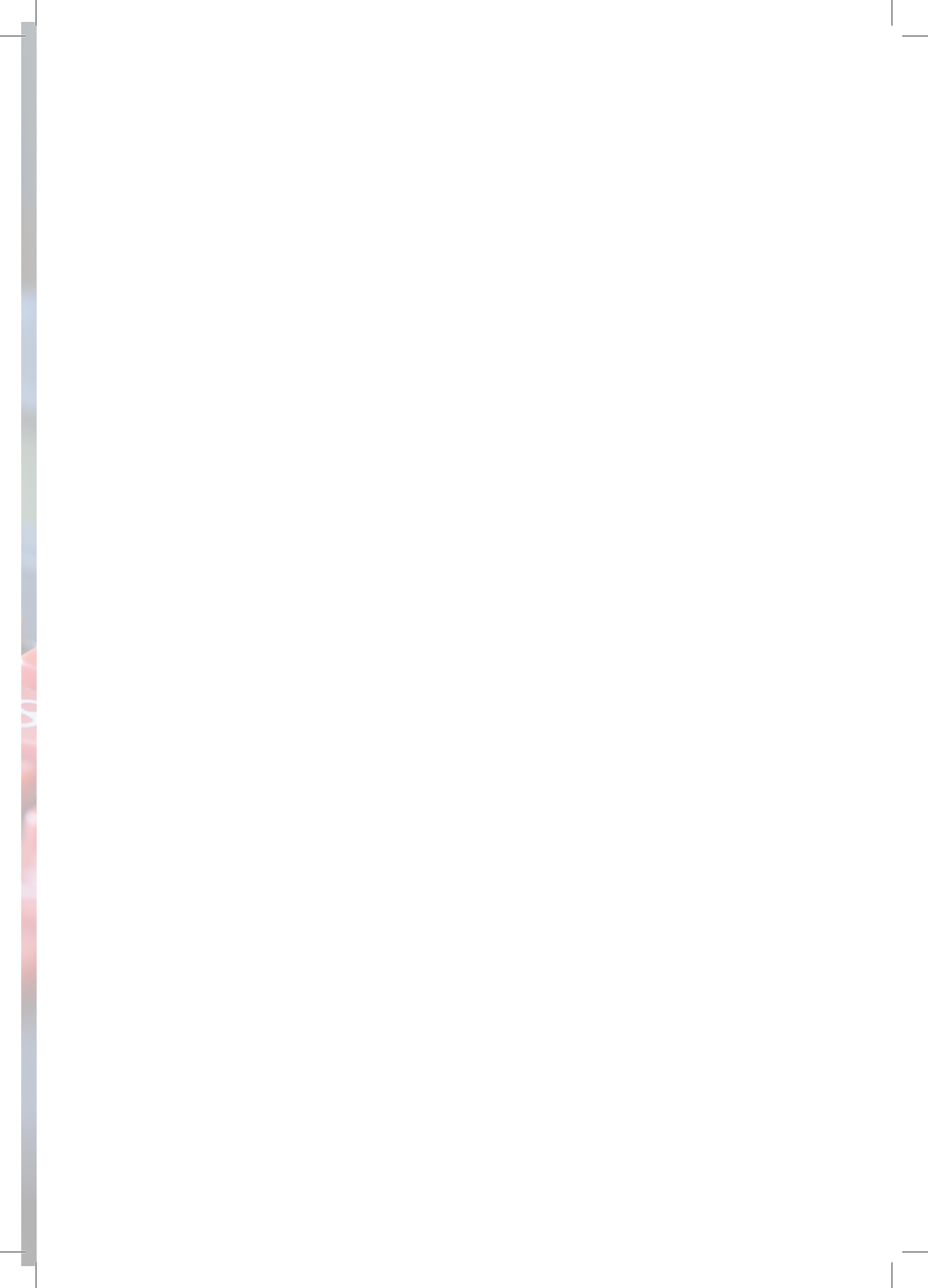
- » Despite the fact that the guidelines recognise that the Vision 2030 should be implemented through MTPs at the National Government and CIDPs at the County Government levels, there is no deliberate direction to have the CIDPs flow in the same format as MTPs with regard to addressing the Vision 2030 Foundations of National Transformation and its three Pillars; Economic; Social and Political.
- » The CGA does not make deliberate reference to Vision 2030 as the starting point for planning by the county governments.
- » The PFMA does not provide for sector approach to the MTEF process such that the MTEF sector reports would then form basis of the subsequent processes of preparing the ADPs, CBROPs, FSPs and PBEs.
- » Some county governments have not appreciated that they need to legislate revenue laws prior as basis of annual Finance Acts.
- » The implementation of the PFMA with regard to Section 17 (6) and the subsequent provisions in the County Allocation of Revenue Acts (CARAs) in that regard should not be optional in view of Article 219 of the Constitution.
- » Guidelines for SPs and CIDPs should be revised and subjected to peer review in bid to afford county governments clear planning frameworks that address the Nation's development blue print
- » Necessary amendments to the CGA and PFMA should be initiated to allow linkages between the planning and expenditure frameworks.

- » There is need to sensitise county governments to develop revenue laws pursuant to Article 209 of the Constitution and those laws will form basis of what Finance Acts ought to be.

5. Main conclusions and recommendations

- » A review of sector laws and policies should address the issue of the budget cycle during election years. Given that elections are held in August, it is necessary that the budget cycle begins earlier in the preceding financial year so as to ensure that the budget is passed before the August election.
- » Laws and policies should be revised to provide for a clearer and more certain process of public participation in the management of public finances
- » There is a need for certainty in the schedule of disbursements to counties. Delays in the disbursements occasion disruption of services and salary delays in counties
- » There should be a remedy to counties where there is a delay in the passing of the County Allocation of Revenue Act (CARA). It is suggested that counties should be allowed to access up to 50 percent of allocations where there is undue delay in finalising the CARA
- » Counties should develop regulations and measures to ensure adherence to county budget estimates and ceilings in actual county expenditure. There should be adherence to the County Fiscal Strategy Paper (CFSP) and the County Medium Term Plan (MTP)
- » The law should be amended to provide more time for the counties to digest the Budget Policy Statement as this is critical to the planning and budgeting for county resources
- » The proposed law on the Ward Development Fund should provide for a bottom-up planning and utilisation of the fund in order to make it a truly grassroot fund. The level or amount of fund should also be rationalised vis-à-vis the mainstream funding from the county governments.







Council of Governors



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