Realizing the Devolution Dividend in Kenya through Cohesive Public Finance Management and Public Participation at County Level

CHALLENGES, LESSONS LEARNED AND RECOMMENDATIONS

A Review of Relationships and Roles of the County Executive and County Assembly

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Acknowledgements

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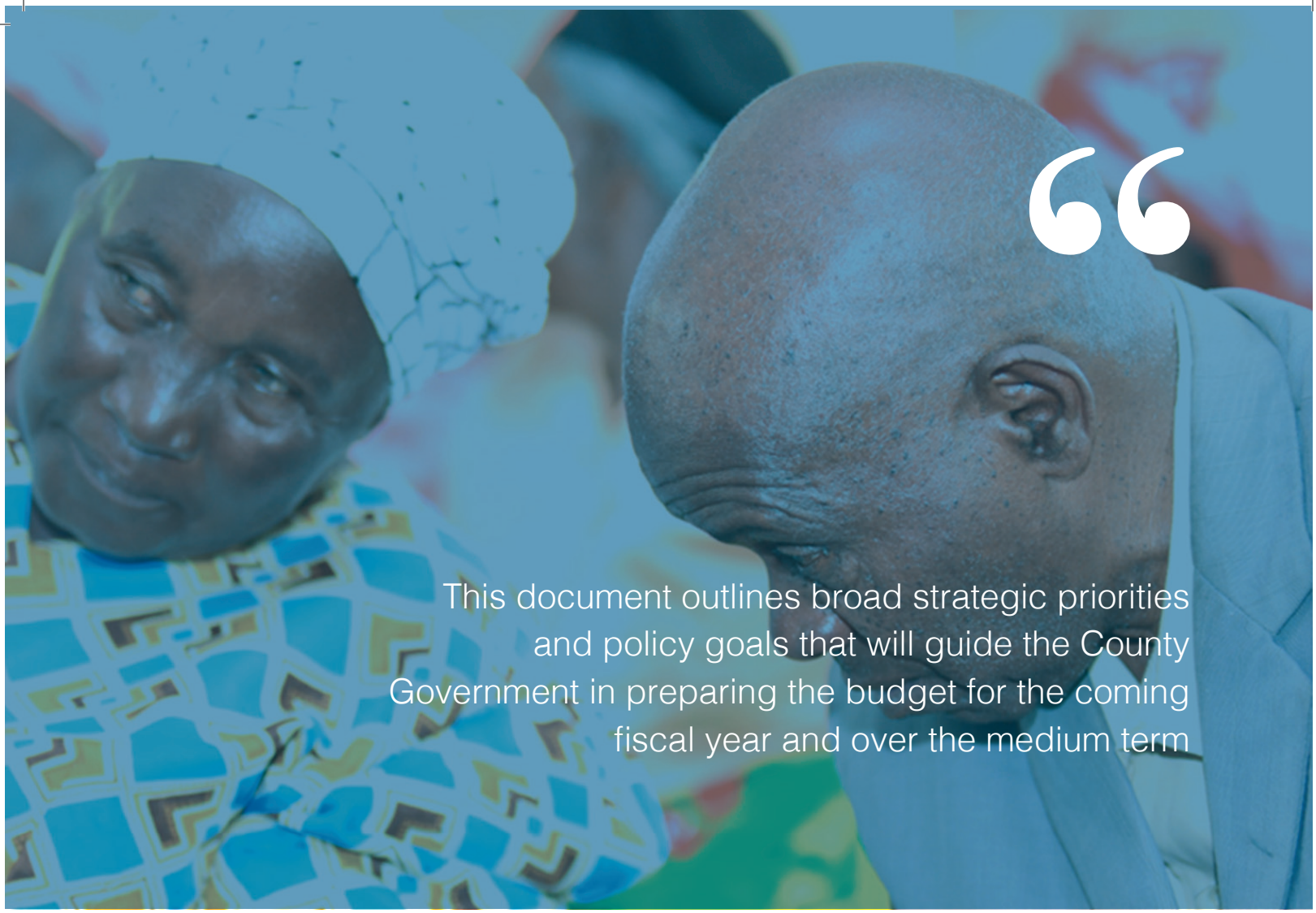


Abbreviations

ADPs	Annual Development Plans
CBROP	County Budget Review and Outlook Paper
CFSP	County Fiscal Strategy Paper
CGA	County Government Act
CIDPs	County Integrated Development Plans
CEC	County Executive Committee
CoG	Council of Governors
KADP	Kenya Accountable Devolution Program
KSG	Kenya School of Government
MCAs	Members of County Assemblies
PFM	Public Finance Management

Executive Summary

This report covers four areas that had been identified by County officers from both the County Executive and the County Assembly as areas that have brought conflict and disharmony in Counties. These issues and challenges cut across Public Finance Management (PFM), public participation, functions and powers of the County actors and formed the basis for capacity building and training intervention that was provided through the Council of Governors (CoG) and Kenya School of Government (KSG) with the support from the Kenya Accountable Devolution Program (KADP).

This brief report highlights the issues and challenges identified in four thematic areas and then provides the identified good practices and lessons learned that can be considered and implemented by County Governments.

The first chapter discusses the PFM legal framework with reference to the fundamental processes of planning, budgeting, revenue, expenditure, and financial reporting and relates these to identified areas of conflict that are experienced while executing various PFM processes. The chapter also makes corresponding recommendations for good PFM practices in Counties.

The second chapter highlights the challenges that County Governments have experienced in rolling out public participation and provides conceptual clarification and examples of good practices.

The third chapter highlights areas that were recurring areas of misunderstanding and misinterpretation with regard to the Constitution and legislative framework on devolution (especially relating to functions and powers of the County Executive and County Assembly). Further, it articulates the Constitutional framework and interpretations of key provisions covering those areas of concern to facilitate common understanding that would help reduce recurring operational disharmony and conflicts.

The fourth chapter highlights challenges that the County assemblies experience while executing their responsibilities with regard to fiscal matters and suggests good practices that should address these.

This report is intended to be a simple, practical, go-to reference resource for County Executives and County Assemblies on common challenges that they experience while executing their roles and responsibilities and suggests good practices that can help them navigate through the challenges.

CHAPTER 1

PUBLIC FINANCE MANAGEMENT CHALLENGES AND GOOD PRACTICES

Introduction

1. There is a comprehensive legal and regulatory framework governing the operations of County Governments in place in Kenya. The period 2013 to 2017 was the first medium-term expenditure period for County Governments. During this period, it was expected that the County Governments would put much of their efforts and resources toward establishment of structures to conform to the Constitution and devolution laws. In addition to the establishment of these structures, County Governments were also expected to render services to citizens. The act of balancing between establishing functional County Government structures and delivering services to citizens remains a delicate one, often giving rise to non-compliance with the requirements of the legal framework. In addition to this, the Constitution and the devolution laws are still relatively new and actors at both the County Assemblies and County Executive are still in the process of understanding them through capacity building activities to enhance their implementation.

2. Chapter 12 of the Constitution and the Public Finance Management (PFM) Act provides for matters of public finance. The conflicts between the County Executive and County Assemblies with regard to exercise of their specific roles relating to fiscal matters did not seem to be resolved even as the first medium term (2013–2017) was coming to an end. The conflicts between the two arms of County Government caused a crisis – ultimately affecting the delivery of services to the citizens.

Legislative Frameworks, Practices and Challenges

3. The County Medium-Term Plans and Expenditure Framework. Planning is the first step in the cycle of PFM processes. Article 220 (2) of the Constitution and Sections 108 to 109 of the County Goverments Act (CGA) and Section 126 of the PFM Act specify the requirements of the County Integrated Development Plans (CIDPs) and the Annual Development Plans (ADPs), respectively. The CGA lays down the mandatory requirements that should be adhered to while developing the five-year CIDPs while the PFM Act provides for the mandatory requirements for ADPs. It is fundamental to recall that the ADPs are prepared on an annual basis as actual extracts of the Medium-Term Expenditure Framework and CIDPs. Therefore, the ADPs keep the CIDPs in motion over the five-year medium-term period by way of informing the annual budgeting process. The legal framework allows for medium-term reviews of the CIDPs such that the plans can be changed to reflect the actual reality of the expected outputs over the five-year medium-term period.

Challenges with regard to medium-term plans and expenditure framework:

i. During this first medium-term period, it was noted that many County Treasuries and the County Assembly Committees (responsible for fiscal matters) had limited knowledge of the legal framework. While preparing and passing the medium-term plan documents, some Counties only partially complied with the legal requirements. This led to conflicts at the stages of preparing and passing of fundamental medium-term plan documents.

ii. The lack of consistency in various critical medium-term plan documents prepared by the County Executive starting from the ADP, and County Fiscal Strategy Paper (CFSP), to Budget Estimates would lead to discordant development vision, plans, and budgets. At the same time, County Assemblies would use their mandate and powers of approval to influence (and in some instances compel) the County Executive to include projects in the ADPs that were not aligned with the CIDPs before approvals are granted.

iii. Another challenge noted was the need for fulfilment of requirements of Article 201 of the Constitution with regard to public participation on the CIDPs and ADPs. There was lack of clarity on whose functional responsibility it was to ensure sufficient public participation in the planning process. It emerged that the County Executive would ensure public participation on the plans and once these plans were forwarded to the Assembly, the relevant County Assembly Committees would also go to the public, however not necessarily for consultation and validation, but rather to provide a forum to criticize and invalidate the contents of the medium-term plans thus causing hostile relationships between the two arms.

In summary, the challenges and experiences identified included the following:

i. Presentation of the ADPs and CIDPs without a checklist confirming full compliance with the legal frameworks governing the planning process led to miscommunication at the very least and noncompliance at the worst.

ii. Preparation of ADPs outside the scope of the CIDPs.

iii. Members of County Assemblies (MCAs) compelling the County Executive to include projects in the ADPs that are not in the CIDP scope and pressing it as condition before providing approvals for the ADPs.

iv. Conflict between the two arms with regard to their role in public participation of both the CIDPs and the ADPs.

v. Lack of clarity on whether (and when) the ADPs should be subjected to public participation process.

4. The Budget Preparation Circular. Section 128 of the PFM Act requires the County Treasury to issue the Budget Preparation Circular to all County Government entities including the County Assembly. This circular sets out the guidelines to be followed in the budget process and should be issued not later than August 30, each year. Within it, the CEC Member for Finance provides details related to the schedule, key policy issues, processes, format and documents.

Challenge:

The circular plays a pivotal role in providing overall guidance to the budget process. However, it has been noted that some Counties may not have placed sufficient attention to detail when preparing this circular which has caused challenges with implementation of budget activities and enforcement by County Treasuries.

5. The County Budget Review and Outlook Paper (CBROP) is a requirement of Section 118 of the PFM Act. This document details of the fiscal performance in the previous year compared to the budgeted appropriation for that year. The CBROP therefore is a technical source of empirical information necessary to be fed into the budget process of a coming fiscal year. The PFM Act specifies mandatory requirements that should be adhered to while preparing and passing the CBROP; the use of the verb 'shall' in that section of the PFM Act implies that every requirement therein should be adhered to. Development of the CBROP is one of the fundamental stages of the budget process that affords the two arms of County Government an opportunity to factually assess the previous year's performance as an input into the coming fiscal year budget so that there is consistency in budget estimates across the five-year medium-term period.[1]

Challenge:

Some County Executives have not been complying with all the mandatory requirements under Section 188 of the PFM Act, one of them being the requirement on publishing and publicizing the CBROP to allow the public an opportunity to understand actual budget performance. The lapse in publishing and publicizing the CBROP leads to negative perceptions by the County Assembly and the public that the County Executive is deliberately not being transparent, thus resulting in discordant working relations.

6. The CFSP is a requirement of Section 117 of the PFM Act. This document outlines broad strategic priorities and policy goals that will guide the County Government in preparing the budget for the coming fiscal year and over the medium term. The County Treasury has the mandatory requirement under that section of the PFM Act to prepare the document and submit it to the County Assembly for approval. The PFM Act specifies other mandatory requirements that should be adhered to while preparing and passing the CFSP. The use of the verb 'shall' in section of the PFM Act implies that every requirement therein should be adhered to.

1 Section 2 of the PFM Act defines "publish" (in relation to a document) as: (a) making it known through newspapers or other publication of general circulation in a County (b) in libraries or offices of County Governments and (c) posting the document on the internet. The PFM Act defines then defines "publicize" (in relation to a document) as making the document known to the public through the national or local media: (a) details on the general nature of the document and (b) how and where it may be accessed and read by the public.

Challenges:

(a) Even though County Treasuries have been preparing the CFSP and submitting them to the County Assemblies, conflicts arise when the County Executive's broad strategic objectives are significantly altered by the County Assembly. On the other hand, the County Assembly sometimes finds it necessary to modify the document when they find that there is no clear link between the CFSP strategic priorities and those in the other documents in the budget process such as the CIDP, ADP, CBROP, and annual budget estimates.

(b) Failure to publish and publicize the CFSP denies the public on information regarding the strategic priorities the County Government is pursuing. While Section 117 of the PFM Act specifies that there should be public participation for collection of views on the broad strategic priorities, it was observed that public participation frameworks are not fully established in some Counties, resulting in the two arms of government having conflicts with regard to how and whose mandate it is to facilitate public participation.

7. The Budget Estimates. Following the Budget Preparation Circular, CBROP and CFSP, the County Treasuries are expected to prepare the Budget Estimates of the coming fiscal year. The schedule and guidelines issued through the Budget Preparation Circular should be adhered to as mandatory requirement in Section 128 of the PFM Act. During the submission of the budget estimates, the County Treasuries should attach all the following budget documents: the CIDP, ADP, CBROP, and CFSP. This is a mandatory requirement in Section 129 (2) (a) of the PFM Act.

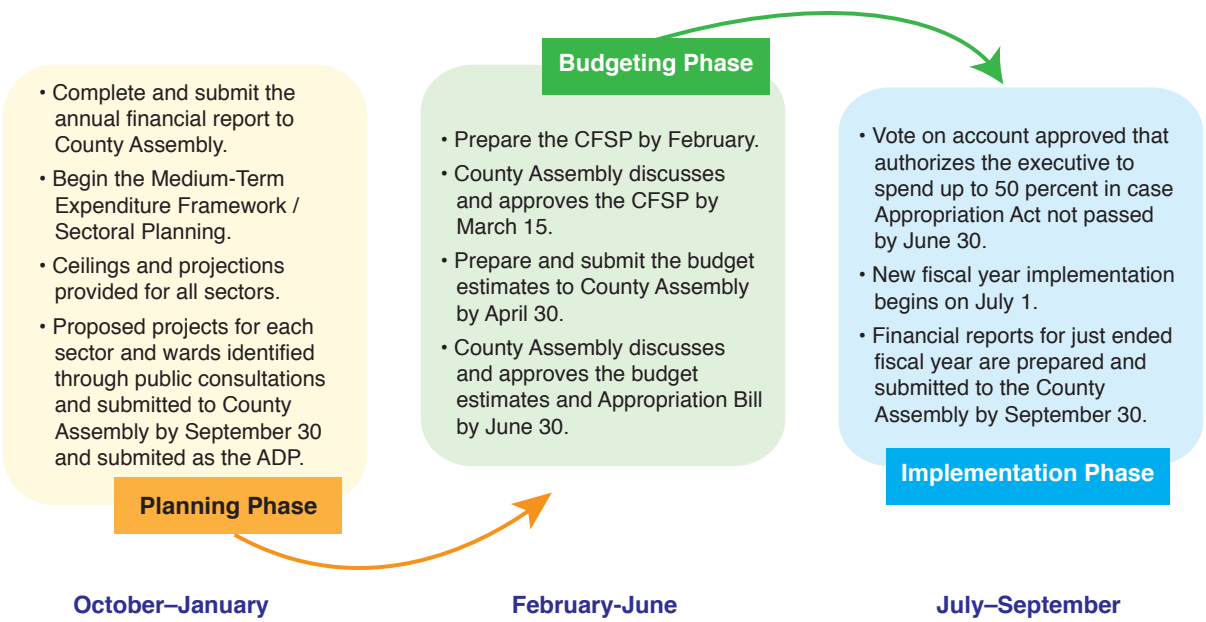


Figure 1: Budget Cycle

Challenge:

It was observed that the County Executive in some Counties submits the budget estimates without linking them to the preceding documents that have been approved and should inform the budget estimates (e.g. CFSP, ADP etc.). Similarly, County Assemblies revise budgets without proper recourse to approved limits and strategic priorities that form the basis of medium-term plans and expenditure framework which results in conflicts between the two arms, in many cases significantly derailing the entire budgeting process of County Governments (ultimately affecting service delivery).

8. Budget Implementation Circular. The County Executive receives the authority to spend once the Appropriation Bill is enacted by the County Assembly and signed by the County Governor (Appropriation Act). Section 104 of the PFM Act outlines responsibilities of the County Treasury as overseeing monitoring, evaluating, and overseeing management of public finances and economic affairs of the County Government. The specific responsibilities are many. For instance, in Sections 104 (1) (c) (i) (k) and (n) and 107 of the PFM Act, the County Treasury has responsibilities regarding regulating how expenditure is incurred. The County Treasury does this through coordinating implementation of the budget, ensuring proper management and control of expenditures, accounting and reporting on the effective and efficient use of budgetary resources, ensuring that all County Governments entities comply with the PFM Act, and by issuing circulars with respect to financial matters.

9. The County Treasury is also charged with the responsibility of ensuring full enforcement of the fiscal responsibility principles in Section 107 of the PFM Act. To ensure all these responsibilities are met, the County Treasury issues a Budget Implementation Circular following the Appropriation Act. The implementation circular is elaborate and gives guidance to the County Government Accounting Officers on the expenditure protocol to ensure full compliance with the Constitution and the PFM Act. The circular could solve many of the unclear operational issues that result in serious conflicts between the two arms of County Governments.

10. Expenditure and financial reporting responsibilities are vested in the County Accounting Officers under guidance of the County Treasury. Section 148 of the PFM Act requires the County Executive Committee (CEC) member responsible for finance to designate, in writing, Accounting Officers for the County Government and its entities. The designated Accounting Officers have specific responsibilities outlined in Section 149 of the PFM Act. The Accounting Officers are required to fully comply with the Constitution and PFM Act, including adherence to the guidelines by the County Treasury. Expenditure and financial reporting is a requirement of both the Constitution and the PFM Act. The Accounting Officers have these responsibilities elaborately explained in Sections 151, 152, 153, and 154 for expenditure purposes and 163, 164, 165, 166, 167, and 168 for reporting purposes.

11. Compliance with mandatory requirements in law that provide for planning and budgeting processes. The County Treasuries and the County Assembly Committees should understand their roles as required in law and fully comply with each requirement while executing their roles. Both the County Executive and the County Assembly are charged with various responsibilities for the development of and ensuring adherence to policies of the County Governments and should therefore work together in good faith and in the spirit of cooperation and collaboration. Further, through the principle of cooperative governance as envisaged in the Constitution, the two arms should resolve differences at the committee stages without necessarily exploiting each other's weaknesses in public, hampering service delivery and eroding public confidence in various county processes.

12. The activities described in the following paragraphs are proposed as simple good practices that Counties can adhere to:

13. Medium-term planning and budgeting. The County Treasury, while submitting the CIDP or ADP to the relevant County Assembly Committee, should include a declaration of full compliance in the form of a checklist confirming the fulfilment of all the requirements (section by section), of both the CGA and the PFM Act. This includes the County planning process, in Sections 108 to 109 of the CGA and Section 126 of the PFM Act. This is aimed at demonstrating that the CIDPs and ADPs comply with the requirements of the legal framework. The County Treasury should submit this compliance checklist to the responsible CEC before the submission to the County Assembly. Similarly, the County Assembly should confirm that the responsible CEC has ensured compliance with the law using the checklist before submitting these documents Committee responsible for fiscal planning and subsequently to the entire House (assembly) for approval.

14. To ensure amicable working relations between the County Treasuries and County Assemblies, the former should allocate sufficient time to brief various Committees on the contents of the CIDP, ADP, budget estimates, and other planning and budget documents. This engagement should be held informally (via *Kamkunji*). Differences should be ironed out at this stage before the County Assembly Committee independently convenes to look at the documents and before commitment to the entire House for approval.

15. With regard to public participation, both arms of Government should (whenever possible), hold joint sessions or at least ensure observer status to members of the different arms so that when decisions are being made by a different arm, their decisions will be informed by their independent observation of the public participation and citizen voice. This way, the County Assembly may avoid duplicating the process of going to the public with the same issues and should use the public participation for validation consideration of new issues. Also, joint public forums will reduce suspicion. When MCAs are involved throughout the process, they oversee the process in real time and the process may also minimize the overall cost of public participation.

16. Budgeting process.

i. The Budget Preparation Circular should be prepared in full cognizance of the provisions of Section 128 of the PFM Act and full reference made to it at every stage of the County Government budgeting process.

ii. The County Treasuries, while submitting either the CBROP, CFSP, or budget estimates to the relevant County Assembly Committees should include a declaration of full compliance in the form of a checklist e.g. compliance with Sections 117 and 118 for the CFSP and CBROP and Sections 128, 129, and 130 for budget estimates. This is aimed at demonstrating that the budget documents comply with legal requirements. The County Treasury is required to submit these compliance checklists for every budget document appropriately to the responsible CEC before the submission to the County Assembly.

iii. On the other hand, the relevant County Assembly Committees responsible for fiscal planning and budget and appropriations should carry out a compliance check against the requirements of the legal framework on a section by section basis. These compliance audits should be undertaken before the budget documents are committed for discussion by the relevant committee and subsequently to the entire House for approval. All the budget documents discussed above are requirements of the law and the laws specify that requirements are mandatory.

iv. The County Treasuries should develop mechanisms for thoroughly briefing the County Assembly Committees responsible for fiscal planning and budget and appropriations on the contents of the budget documents as and when they fall due. This affords the County Assembly Committees an opportunity for in-depth understanding of the budget documents. This engagement is proposed to be held informally between the two levels. Differences and unclear contents should be ironed out at this stage before the relevant County Assembly Committee independently convenes to look at the documents before committing them to the entire House for approval.

17. The budget estimates submitted to the County Assembly should fulfil the requirements of Section 129 (2) (a) of the PFM Act. The County Treasury should prepare a budget file containing all the previously approved budget documents as supporting documents to the budget estimates. The filing should be done sequentially from the CIDP, Budget Preparation Circular, ADP, CBROP, CFSP, budget estimates, and explanation by the County Treasury demonstrating how each of the planning and budget documents feed into each other, ultimately how they ultimately relate to the budget estimates submitted.

18. With regard to implementation and reporting:

i. The County Treasury should designate Accounting Officers pursuant to Section 148 of the PFM Act;

ii. The County Treasury should ensure they issue the Budget Implementation Circular to all Accounting Officers of the County Government and its entities;

iii. All County Accounting Officers should comply with the Budget Implementation Circular and all sections of the PFM Act governing expenditure and financial reporting;

iv. The County Treasury should ensure that quarterly and annual financial reports are consolidated and submitted to the relevant County Assembly Committee within the required timelines without fail;

v. The quarterly and annual financial reports should be published and publicized as required by both the Constitution and the PFM Act. Members of the public may give comments on the reports and the County Treasury should keep records of the comments and the feedback provided to the public. The comments of both the County Assembly and the public on quarterly and annual reports should be incorporated in the CBROP and the entire budget process of the coming fiscal year;

vi. The County Assembly on the other hand should ensure that they receive the quarterly and annual financial statements and discuss them and give recommendations on the progress of budget implementations; and

vii. While preparing the quarterly and annual financial reports, the PFM Act requires incorporation of both financial and non-financial indicators. These reports therefore should demonstrate how the actual performance at both quarterly and annual levels is in tandem with the overall County medium-term plan and expenditure framework. There should be evidence of how the CIDP, ADP, CBROP, CFSP, and budget estimates compare with the actual performance.

19. In conclusion, adherence to the laws— (that is, effective implementation of the PFM Act in planning, budgeting, expenditure, and financial reporting)—will significantly reduce the conflicts and mistrust between the two arms of the County Government and facilitate harmonious working relationships that are necessary towards the goal of service delivery.

CHAPTER 2

PUBLIC PARTICIPATION IN BUDGETING PROCESSES

Introduction

20. **Public participation is a process by which public concerns, needs, and values are incorporated into government decision-making.** Governments should foster public participation in public policy development, public service delivery, and public accountability. The public should be involved in processes and institutions that contribute to public decision making.

21. **To effectively roll out public participation, public officials need to have conceptual clarification of what public participation is and what it entails.** Public participation goes beyond sharing strategic documents in circumstances where the public is passive and not involved in a two-way communication process with the Government.

22. **There are many County Government innovations with regard to rolling out public participation.** However, the manner in which public participation promotes citizens' involvement, influences decision-making and the levels of success in achieving the core objectives of these participatory processes, varies from County to County – remaining elusive and unsatisfactory in some Counties.

Overview of the Challenges

23. **The challenges that Counties experienced while implementing public participation included lack of conceptual clarity on public participation; and limitations in institutional design, structures, and plans necessary for operational success.** This resulted in secondary challenges which included tokenism and elite capture (especially by the political class); political rivalry and hijacking of meetings for other issues; and lack of access to information. This was further complicated by poor awareness among citizens on public participation processes; inadequate time allocation for meaningful engagement and low mobilization. Lastly, there was little consolidation or documentation of decisions made during the public participation forums which complicated the tracking process. Table 1 provides a summary of these challenges.

Table 1: Summary of Challenges Experienced in Public Participation

Institutional and Structural	Process	External Aspects
Lack of policies and regulations, or guidelines. County Governments need to develop policies and regulations to operationalize national laws.	Meeting notices are not timely. Documents are not provided early for public review and input.	Political rivalry may lead to unruly meetings.
Function are not well-designated. Lack of consistency in County officials charged with managing public participation: in some it is the County Administrator, while in others it is the County Public Participation Directors assisted by Ward Public Participation Officers. It results in poor coordination and facilitation.	Meeting notices are not timely. Documents are not provided early for public review and input.	Low awareness among the public on public finance and administration issues.
Lack of facilitation expertise which results in: dominance by the elite; inadequate space for public views and decision-making; low inclusivity since minorities and the marginalized are not given opportunity to share their input.	Inadequate time (2-3 hours per session) to provide adequate opportunity for the public to express their views and to make decisions.	

25. To operationalize the existing Constitutional and legislative framework, there was need for the County Governments to prepare regulations and guidelines on public participation. Prior to the development of County Public Participation Guidelines (issued by the Ministry of Devolution and Planning), most Counties had not enacted regulations or developed guidelines that provided practical steps and approaches that are institutionally and contextually defined. The regulations and guidelines would have helped Counties effectively communicate, to all County departments and across the two arms, the required standards and processes for engagement to achieve effective public participation.

26. Regulations and guidelines on public participation should articulate key elements for effective public participation. These: include (a) having clear objectives; (b) identifying the appropriate audiences; (c) ensuring quality dialogue; (d) ensuring adequacy in the number of citizens and stakeholders engaged (adequate representation and diversity); (e) accessibility of information before, during, and after the public participation process; (f) timeliness of notices of the meetings, the dialogues, and decision making; (g) clear decision-making opportunities and power to citizens; and (h) documentation and feedback to the citizen on the decisions and implementation. Figure 2 provides a schema of the eight key elements of effective public participation.

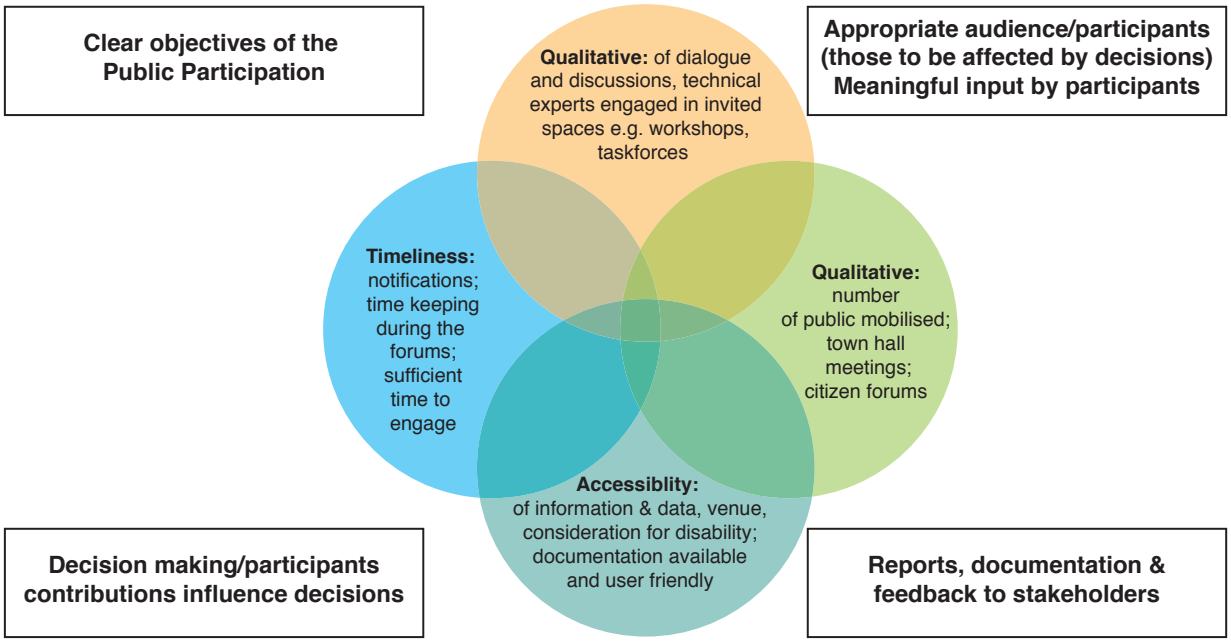


Figure 2: Key Elements of Effective Public Participation

27. Continuous monitoring of the performance of Counties against these key elements of effective public participation can facilitate continuous improvement of public participation institutional design and processes for Counties to achieve the intended benefits. An ad hoc self-assessment carried out with County Executive and County Assembly officials against these eight elements during several workshops indicated that the performance of most Counties was average or below average in achieving effective public participation. Aspects to do with quality of engagement were found to have been poorly achieved, mainly due to poor mobilization and sharing of information in a timely manner and in user-friendly formats.

28. While most Counties focused only on public participation during the budgeting process, participation should occur across all sectors and at all the stages of the policy cycle. There are four main stages of participation in a policy cycle: preference revelation, policy formulation, policy implementation, and monitoring and accountability. The preference revelation stage focuses on identification of needs, values, and concerns; policy formulation is key in ensuring public involvement in determination of priorities and sectors; policy implementation relates to public involvement in implementation of policy decisions in service delivery, development projects and interventions; and finally, the public should be involved in monitoring and accountability through formal government or nongovernment processes. Table 2 indicates the different public participation mechanisms used during the four stages of the policy cycle.

Table 2: Public Participation Methodologies in the Four Stages of Policy Cycle

Stages of Participation	Components	Components
Preference revelation	Identification of needs, concerns, values	Public forums, surveys
Policy formulation	Determination of priorities, sectors, and interventions	Public forums, stakeholders' forums, strategic meetings
Policy implementation	Development projects and interventions; service delivery	Project management Committees; partnerships, working groups
Monitoring and accountability	Reports (progress, narrative, financial); monitoring and evaluations; performance evaluations; audits	Public expenditure reviews, social audit tools, for example, citizen report cards, community score cards

29. Some Counties were more successful in translating the laws, policies, and guidelines into effective public participation, which resulted in community views shaping policies and implementation. Makueni County is an example of a County that was successful in developing a public participation framework, policy handbook, and public participation manual. Makueni County has established offices and structures that facilitate civic education and public participation. Under the CEC responsible for Devolution and public Service, there are officers employed to carry out civic education and Public Participation, referred to as Civic Education and Public Participation Officers.

30. Figure 3 is an example of the Makueni County public participation framework and a brief explanation of how it has been rolled out.

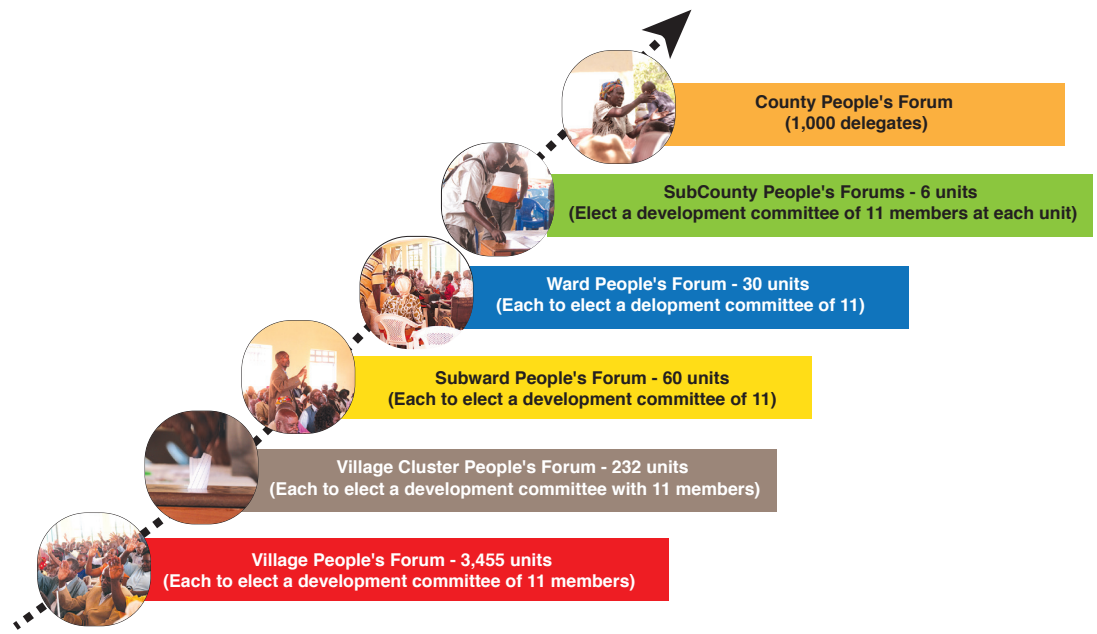


Figure 3: Schema of the Makueni County Public Participation Process

31. Makueni County starts its public participation process from the village, to village clusters, to sub ward, to ward, then followed by the County People's Forum. In total, 3,868 forums are held during the budgeting process. The first two levels of engagement at village and village clusters—mobilization and public forums—are handled by village elders (traditional structures) who have been trained and commissioned to carry out the forums.

32. Table 3 shows the target population and number of public forums at the various devolved levels, from February to April, during the budget making process in Makueni.

Table 3: Public Forums at Various Devolved Levels in Makueni County

Devolved Level of Participation	Number of Forums	Approximate Target Population
Total Villages	3,455	345,500
Total Village Clusters	315	37,800
Total Sub wards	60	7,200
Total Wards	30	3,600
Sub Counties	6	900
Nairobi (diaspora)	1	150
County People's Forum	1	1,000
Total number of public forums for budgeting process	3,868	396,150

33. This level of engagement is estimated to reach at least one-third of the citizens of Makueni County and to provide them with power of voice and decision making.[1]

34. Counties should develop a Public Participation framework which articulates the policy and plan while providing practical guidelines. When developing regulations, guidelines, or the framework for public participation, Counties need to ensure that they follow these key steps:

1. Clearly define the decision required and the scope of public participation.
2. Identify and understand the primary audiences and stakeholders—those who are affected and how they should be approached.
3. Define the management approach of the public participation process.
4. Determine financial resources for the public participation process.
5. Facilitate and document the public participation process as designed.
6. Evaluate public participation and apply the lessons learned.

1 The population of Makueni County is estimated at around 900,000.

35. These six aspects are further elaborated in the following paragraphs:

36. **Defining the decisions and scope of public participation entails describing the objectives and scope of the participation and setting expectations around the levels of participation.** It is important to describe the decisions that are to be made. To define the scope, timing and resource factors are key elements that influence the type and level of public participation. The scope of public participation may be defined through various levels of public involvement. At the lowest level, the scope or nature of engagement is passive and unidirectional, where the public remains voiceless. Figure 4 provides the four levels of participation, information being the lowest and empowerment the highest.

37. **A full understanding of the primary audiences and stakeholders is a vital and a multi-step process.** It begins with identifying those that are affected by, interested in, or who can influence the decision. This is followed by articulating the nature of their interest coupled with the effect of the decision on them; and concludes with determining their capacity and willingness to contribute. County Governments have mostly defined the audiences and stakeholders through mapping the communities along the administrative and political boundaries such as wards and sub-county; identifying the stakeholders representing various interest such as businesses, religious affiliations, and self-help and welfare groups is also important. Once the audiences are defined, appropriate methodology and approach for engagement should be used.

38. **Defining the management approach of the public participation determines whether the implementation is successful or not.** A clearly documented public participation plan is important in ensuring its successful completion. The management structure for the public participation exercise should have the capacity to successfully deliver while defining clear responsibilities for achieving the objectives. The approach needs to have appropriate leadership and should be endorsed by senior management. The scale and complexity of the public participation exercise determines the length and detail of the documentation. However, the underlying aims remain the same—to clearly and adequately document a plan of action so that departments and agencies can be held accountable for achieving clearly stated and appropriate public participation objectives.

39. **Financing public participation process should also be defined in the policy, planning, and budget documents.** It is important to define and set aside adequate resources to deliver on the objectives of the public participation exercise. On average, County Governments have been spending between KSh 10 million and 25 million[2] on the public participation processes. Democratic and people processes are not cheap, and the benefits of this investment are important in strengthening citizenship. In addition to public sector resources, other actors such as civil society and private sector may also be involved in financing public consultations and may be good partners to County Governments. This, however, can only emerge if the County Government is keen to strategically build partnerships with non-state actors.

2 Based on feedback from over 40 Counties that participated in the Council of Governors training workshop.

40. It is important to facilitate, document and implement public participation as intended. Most of the plans fail on execution and therefore rolling out of the public participation plans effectively will determine the level of success. This entails setting the governance and management structure for delivering the objectives of the public participation. There is a need to define how mobilization is done and with what tools to ensure inclusivity. Mass mobilization using mobile cell phone platforms, public address systems, and daily newspapers should be augmented with targeted invitations to stakeholders through letters, announcements in religious institutions, and business associations. Transport for people with disability and translation and interpretation services are some of the considerations to ensure inclusivity. This defines quantitative aspects of public participation—the numbers of those involved and their classification along gender, age, differently abled (disability), and regional representation. Developing a stakeholders' directory goes a long way in institutionalizing the mobilization process. The time required for notices and the process should be well defined. The timelines including key milestones for getting stakeholder inputs and feedback on how these influenced decisions is important. Documentation of the process is also important. The County needs to determine how the documentation will be done as well as whether this should be done verbatim or present a summary of the discussions.

41. Regular monitoring and evaluation of public participation and application of the lessons learned will strengthen public participation processes. The parameters that could form the monitoring framework include:

a. Objectives set and public participation mechanisms or methodology set to achieve them;
b. Quality of public participation which may be assessed using levels of participation from information and consultations to empowerment where lower levels are ranked lower;
c. Quantity aspects of public participation e.g. cover measurements on the numbers of participants and their diversity against gender, age, regions. This component could also assess the mechanisms and tools used to mobilize the public to determine the numbers reached and their responses;
d. Accessibility (information - user-friendly, disability, venue);
e. Timeliness (notices, duration, adequacy);
f. Decision-making (level of decision-making);
g. Documentation (verbatim, decisions/memorandum); and
h. Responsiveness and feedback mechanism.

42. The progressive engagement of the public moves the County Government to a point where the public is viewed as a true partner and mechanisms for engagement allow the public to set the agenda and participate in decision making. In this context, the public participation mechanisms are institutionalized and the County Governments engage the public in the highest level of involvement.

43. Figure 4 provides the different elements in the different levels of public engagement and table 4 provides more details on the differences in objectives, elements, and results of the different levels of public involvement.

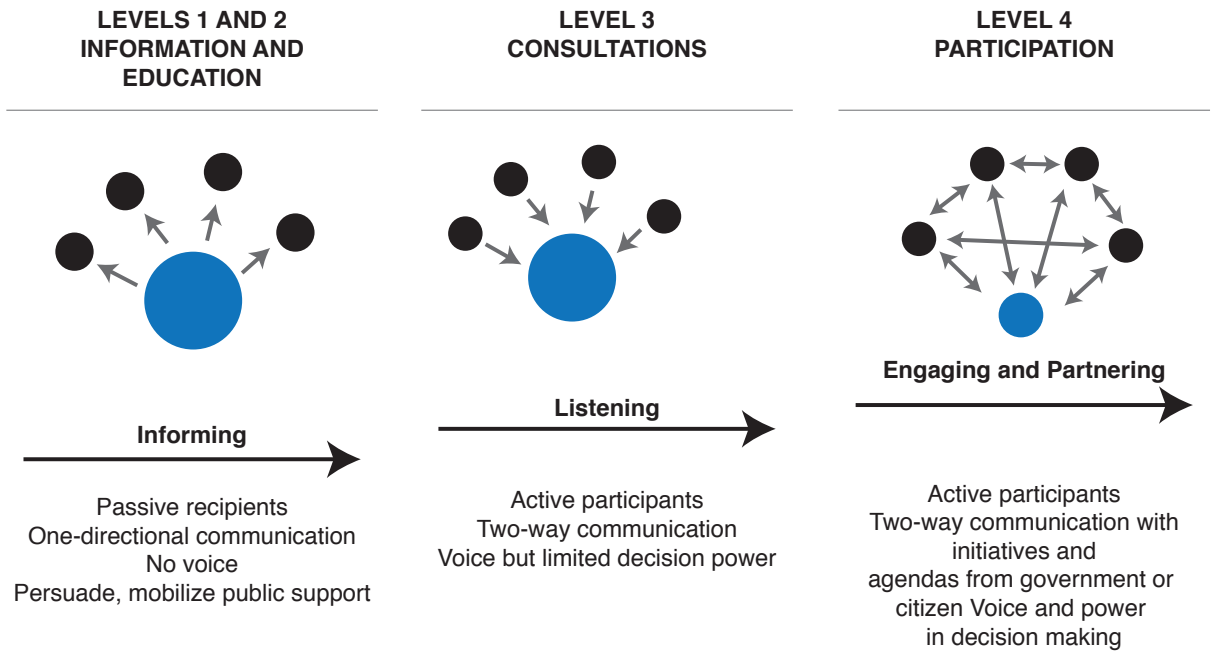
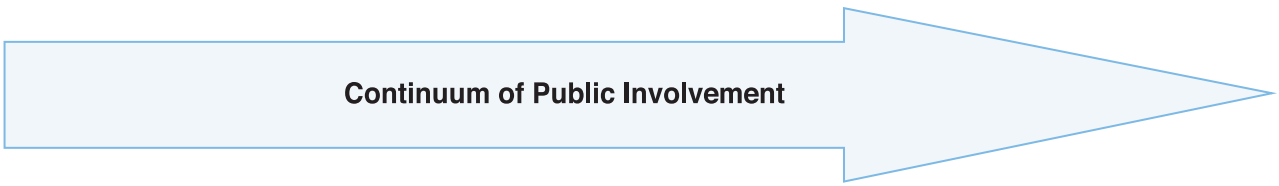


Figure 4: Levels of Public Involvement

44. In conclusion, County Governments have in the last four years grappled with institutional designs, incentive structures, and social mobilization for public participation. A lot of progress and innovations have been realized but many challenges remain. The innovations differ in many ways across the Counties due to capacity challenges, contextual and cultural differences, leadership persuasion and vision on public participation and citizen engagement. These lessons need to be adopted across all Counties.

Table 4: Public Involvement Continuum

Public Involvement Continuum	Public Education	Public Consultations	Public Participation
Purpose: To make the public aware of the comprehensive planning project. **Pledge to the public:** We will keep you informed. **Example methods:** Direct mail, news releases and mass media, displays, and exhibits. **Elements/results:** - Unilateral announcement by authorities; - No room for response by others; - People are told what will happen or has happened.	**Purpose:** To provide the public with balanced and objective information to assist them in better understanding the Government processes. **Pledge to the public:** We will try to help you understand. **Example methods:** Public education meetings, websites, newsletters. **Elements/results:** - Organized education forums or workshops; - Complex issues may require long-term approach rather than one-off training workshops.	**Purpose:** To obtain public feedback on issues, alternatives, and/or decisions. **Pledge to the public:** We will provide a variety of opportunities for your input and will provide feedback on how the public input was used in the planning process. **Example methods:** Open houses, public hearings, visual preference surveys, opinion surveys, focus groups. **Elements/results:** - Participants are consulted; - Views are noted; - Problem definition and solutions may be modified; - No obligation to accept participants' views.	**Purpose:** To work directly with the public throughout the process to ensure that public issues and concerns are consistently understood and considered. **Pledge to the public:** We will work with you to ensure that your concerns are directly reflected in the alternatives developed and provide feedback on how public input influenced decisions. **Example methods:** Visioning, citizen planning Committees. **Elements/results:** - People participate in joint analysis of options; - Consensus building and participatory decision making; - Formation or strengthening of local groups occurs.



CHAPTER 3

DEFINING THE FUNCTIONS AND POWERS IN DEVOLUTION

Introduction

45. In the first four years under the new Constitutional dispensation, there have been conflicts between various County Government players relating to the discharge of their functions. Preliminary investigations indicated that the operational discord was partly due to a lack of understanding by the players and stakeholders.

46. This chapter highlights the recurring areas of misunderstanding and misinterpretation with regard to the Constitution and legislative frameworks on devolution, especially on functions and powers. Further, it articulates the Constitutional framework and interpretations of key provisions covering those areas of concern to facilitate common understanding that would help reduce recurring operational disharmony and conflicts.

Practices, Challenges, and Lessons Learned

47. Levels of Government are allocated financial resources to deliver services and goods within their constitutionally — and legally assigned functional areas. However, one of the major areas in which there is serious lack of clarity is that of functional assignment, which leads to players straying into the functional domain of others. The policy objectives of devolution can only be effectively achieved if there is clear distinction in assignment and functional responsibilities and powers.

48. Although the Constitution sometimes uses the terms 'functions' and 'powers' separately and at other times interchangeably, a clear distinction exists between functions and powers. On the one hand, functions are the specific goals or purposes comprising goods and services which governments provide. Functions comprise tasks or responsibilities of government which are identified by demarcated areas of state activity called functional areas. They refer to the different subjects with respect to which the levels of government have responsibility to exercise powers or authority to provide services or goods. The subject areas may be identified as health, agriculture, education, housing, or foreign affairs. On the other hand, powers are the legal authority of the government to act or take certain actions to achieve Government functional goals. They are tools in the hands of the government for performing functions. For instance, for County Governments to perform their health functions, they may require policy formulation powers to formulate County policy on County health facilities and pharmacies, legislative powers to translate the policy into County law, and executive powers to administer and implement that law.

49. **Different powers over a specific functional area can be assigned to different levels of government either exclusively or concurrently.** Such powers demarcate and limit the scope of operation in the functional area for which a level of government has responsibility. Thus, while there may be many common or concurrent functional areas, the powers in these areas need not be concurrent—they can be either exclusive or concurrent. Because of this, it is possible for each of the two levels of government to be responsible for different powers with respect to the same functional area.

50. **The main source of original powers and functions is Article 186 and the Fourth Schedule (of the Constitution), which establishes two lists of functional areas for the two levels of government.** These listed functional areas often lack clarity and overlap in several respects. The Fourth Schedule does not explicitly specify which functions and powers are exclusive to each government and which are concurrent. The assignment of functions and powers by Article 186 recognizes three categories of functions and powers: the exclusive, concurrent, and residual. Furthermore, Article 186(4) confers upon Parliament seemingly expansive legislative powers: "For greater certainty, Parliament may legislate for the Republic on any matter." This provision gives rise to several questions which both Parliament and the County Governments should endeavor to answer when exercising their powers.

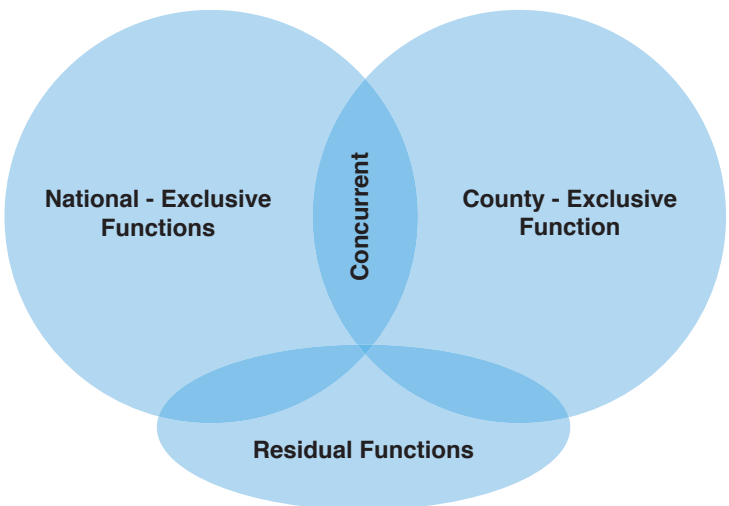


Figure 5: Functional Assignments Schema

51. **The success of devolution will largely depend on how these provisions on powers and functions are interpreted to determine:** (a) the definition, content, and contours of the functional areas assigned to each level of government; (b) the meaning and extent of the legislative powers conferred upon Parliament by Article 186(4); (c) the exclusive functions and powers of each level; (d) the concurrent functions and powers as well as the distinction between them and the issues of functional overlap and interdependence; and (e) the residual functions and powers assigned to the National Government. Furthermore, the recognition of concurrency

presupposes conflict of laws whose resolution should be determined. In terms of Article 186 and the Fourth Schedule, the main County Government functional areas are agriculture, health, environment, cultural and entertainment activities, transport, trade, planning, land and housing, water and sanitation, preprimary education and polytechnics, firefighting, and disaster management. It is with respect to these functional areas that the exercise of fiscal powers by County treasuries and County Assembly Committees that are responsible for fiscal matters should be focused.

52. In determining all these matters, it should be appreciated that not all the Constitutional functions and powers of the two levels of government are derived from Article 186—other functions and powers are derived from other provisions of the Constitution which should be considered together with Article 186. For instance, some original powers and functions over land are derived from the chapter on land, which vests public land in both the National and County Governments.

53. Powers and functions over lower levels of government are derived from Article 176 (2), which empowers County Governments to decentralize their functions and provisions of their services to lower levels. This has been interpreted as envisaging a possible creation of further decentralized units as a competency of the County Government. However, such decentralization with respect to cities and urban areas can only be done within the framework i.e. the national legislation enacted in terms of Article 184 of the Constitution.

54. The exercise of the taxation powers of the County Governments has been a source of serious tensions and conflicts not only between the County Executives and County Assemblies but also between County Governments and Parliament. Although Article 209(2)(c) empowers Parliament to identify other viable taxes and through legislation authorize County Governments to impose them as sources of own revenue, so far, Parliament and County assemblies have not significantly exercised this power to expand the own-revenue sources of County Governments.

55. The Constitution establishes a cooperative system of devolved government. National and County Governments are distinct and interdependent and should conduct their mutual relations on the basis of consultation and cooperation. However, one major reason for the lack of operational harmony with regard to fiscal matters is the fact that although the Constitution prescribes cooperative governance and cooperative intergovernmental relations, the experience of the past four years shows that there is the impression that the distinct nature of the levels of government connotes a measure of relative autonomy on the part of each level without accountability. Inherent in the system is a natural 'tension' between the relative autonomy of a level of government on the one hand and the pursuit of a coherent Government for Kenya (through intergovernmental relations and collaboration on the other). Similarly, the separation of powers between the County Executive and the County Assembly also introduces a natural tension between the two arms of government. While Article 6(2) of the Constitution establishes the system, Article 189 sets out the principles of cooperative government and intergovernmental relations which both levels of government are required to adhere to.

56. The importance of cooperative governance as the key to the effective functioning of the devolved system cannot be overemphasized. The principles of cooperative governance should apply even to intra-county relations between the County Executives and County assemblies. County Treasuries and relevant County Assembly Committees should therefore commit themselves to the principles of cooperative government while they discharge their functions.

57. In conclusion, for all the National and County Government actors to handle these matters effectively and harmoniously, a well-executed capacity-building program that targets both levels of Government is essential. Devolution is not restricted to County Governments but refers to a system that involves both national and County Governments. Therefore, capacity building should not only target County Governments but also leaders at the national level of Government. The National Government has the responsibility for and makes decisions on many aspects of policy that affect County Governments. For this reason, National Government officials urgently need capacity building on devolution to gain a better appreciation of the required changes to streamline operations at both national and County levels. Joint training sessions for both national and County Government officials would be one way of addressing the operational dissonance in fiscal matters.

58. Furthermore, frequent changes taking place in the County Executive and legislative arms necessitate regular training. Related to this is the fact that there is yet another transition after the 2017 general elections. As with every election, there will be some new officials elected at all levels — Governors, Senators, MCAs, and members of County Executive Committees — who will need to be trained in the legal framework and processes surrounding PFM and public participation.

CHAPTER 4

COUNTY ASSEMBLY OVERSIGHT AND THE LEGISLATIVE PROCESS

Introduction

59. The County Assembly process is defined as all means through which the County Assembly executes and accomplishes the mandate legally vested in it and generally, all governance issues and matters requiring the input of the County Assembly.

60. In the first electoral cycle under the new Constitutional dispensation, the County assemblies experienced challenges in executing their fiscal management responsibilities as they had limited lacked knowledge of the guiding principles in County Assembly processes. This chapter highlights the challenges identified by County Assemblies while executing their responsibilities with regard to fiscal matters and suggests good practices that can address them.

Challenges, Good Practices, and Lessons Learned

61. Public participation is one area that seems to be the least understood. There are also perceptions that there are difficulties in measuring its efficiency and effectiveness, and facilitating it. The County Assembly processes promoted the notion that the County Executives and the County Assemblies should each carry out their independent Public Participation. Nevertheless, a few County Governments (for instance, West Pokot) had come to an understanding that certain public participation processes relating to plans and budgets could be facilitated jointly by the County Executive and the County Assembly members to achieve effectiveness both in listening to citizens' voice and providing oversight of the process by the MCAs. Joint public forums for the CFSPs in February and budget estimates in April of each year minimized conflicts and disharmony between the County Executive and relevant County Assembly Committees. This also reduced public fatigue from too many similar meetings which produced different results.

62. It was observed that when the MCAs participated in the public forums organized by the County Executive in good faith, they would play an important role of providing objective information on the previously approved projects and strategic insight on their ward development needs as ward representatives. However, their input would be considered as information to facilitate citizen decision-making and not as final suggestions for the projects. Therefore, MCAs have been playing a key role in ensuring effective participation, especially when they ensure the public is well informed and they do not use the opportunity to just placate their political supporters or rivals.

63. Furthermore, joint budget public forums held by County Treasuries and with the participation of the County Assembly Committees responsible for fiscal matters were found to have provided opportunity for improving the intra-county relations between the two arms of government. It was noted that when MCAs engage in the public forums held by the County Executive, it did not imply that they reneged on the separation of powers principle or they reduced the checks and balance in the budgeting process. Rather, it was noted that the MCAs ensured ongoing (real-time) oversight in the process of public participation and improved the County Executive and County Assembly working relationship and engagement in good faith.

64. The limited capacity of some of the County Assemblies may have undermined the general operation of the County Governments. Some of the legislative Bills generated in the Assembly were identified as exact copies of existing legislations or from other County Assemblies and were not well adopted or contextualized to the specific County needs. Therefore, the County Assemblies should establish aligned think tanks, and professional bodies that would study and offer technical input to their legislative processes.

65. Finally, in most Counties, the relationship between the County Assembly and the County Executive Committee is strained and haphazard despite the clearly stated Constitutional and legal framework. Once of the most common reasons for this was circumstances where in most cases, the County Executives were perceived to deliberately respond late or give insufficient justification for failure to turn up when invited by select Committees to respond to issues of implementation of policies, programs and accountability. For the county governance to be effective and efficient, the County Executive needs to proactively and in adherence to statutory requirements provide the needed reports and feedback to queries by the County Assembly. One of the ways provided in the law is Section 54 of the CGA, by which the CEC is expected to create a County forum, bringing together all leaders to determine the status of the County governance and make decisions on the way forward.