STRENGTHENING THE MANAGEMENT OF DEVOLVED FUNDS IN KENYA: BRIDGING THE GAP BETWEEN LAW AND PRACTICE AT THE COUNTIES

By

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DECLARATION

I, NELSON MANDELA NDALILA do hereby declare that this is my original work and has not been submitted and is not currently being submitted for any award in any other University and all the sources of information used have been duly acknowledged.

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DATED…………………….………………..2016

This paper has been submitted for examination with my approval as University Supervisor.

MR. JACKSON BETT

DATED……………………….………………..2016

UNIVERSITY OF NAIROBI

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DEDICATION

I dedicate this study to all Kenyans, whose desire is to see the full realization of the promise of devolution. I specifically dedicate the study to all the stakeholders, who firmly believe in the capability of devolution to improve lives and have directed their efforts towards realizing this goal.

LIST OF ABBREVIATIONS

ALDEV	African Land Development Board
APTF	Anti-Poverty Trust Fund
BPS	Budget Policy Statement
CBEF	County Budget and Economic Forum
CBROP	County Budget Review and Outlook Paper
CDF	Constituency Development Fund
CEC	County Executive Committee
CG	County Government
CIDP	County Integrated Development Plan
CoB	Controller of Budget
CRF	County Revenue Fund
DDC	District Development Committee
DDO	District Development Officer
DDP	District Development Program
DFRD	District Focus for Rural Development
DFRDS	District Focus for Rural Development Studies
FPE	Free Primary Education
FSP	Fiscal Strategy Paper
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome
IMF	International Monetary Fund
IFMIS	Integrated Financial Management System
KANU	Kenya African National Union
KENAO	Kenya National Audit Office
KRA	Kenya Revenue Authority
LASDAP	Local Authority Service Delivery Action Plan
LATF	Local Authority Transfer Fund
MP	Member of Parliament
MTDS	Medium Term Debt Management Strategy
NARC	National Alliance Rainbow Coalition

NCCK	National Council of Churches
OECD	Organization for Economic Cooperation and Development
PEC	Poverty Eradication Commission
PFM	Public Finance Management
PPB	Planning Programme Budgeting
PSASB	Public Sector Accounting Standards Board
RDF	Rural Development Fund
REPLF	Rural Programme Levy Fund
RMLF	Road Maintenance Levy Fund
SGRTF	Strategic Grain Reserve Trust Fund
SRDP	Special Rural Development Program
TISA	The Institute for Social Accountability
USAID	United States Agency for International Development
WEF	Women Enterprise Fund
WSB	Water Service Board
WSTF	Water Services Trust Fund

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CHAPTER ONE: BACKGROUND TO FINANCIAL DEVOLUTION IN KENYA

1.1 Introduction

The Constitution of Kenya 2010 (Constitution) set the overall guidelines for the management of public funds, requiring: that financial matters be handled transparently and with accountability; that public finance system promotes equity; that resources are shared equitably between present and future generations; that public funds be applied in a prudent and responsible way; and that financial management be responsible, and fiscal reporting clear.[1]

A prudent financial management system is important in ensuring that public participation, transparency and accountability are entrenched as a means of improving accountability, equity and inclusiveness of government and service delivery.[2] It is on the basis of these targets, outlined by the Constitution, that this study seeks to examine the Public Finance Management (PFM) Act in light of devolved units of governance in Kenya.

The PFM Act was enacted in 2012 after cumulative years of planning, delays and unnecessary loss of public funds by the government to ensure that management of public funds at both national and county levels of government is in accordance with the principles set out in the Constitution. PFM Act seeks to ensure that the public officers who are given the responsibility of managing public finances are accountable to the public for the management of those finances through Parliament and County Assemblies.[3]

The core areas covered in the PFM Act are: macro-fiscal policy making; budgeting; treasury management and budget execution; accounting, reporting and audit; and the powers and functions of public officers within the government framework. This study restricts itself to county public finance management institutions, which include: county assemblies; county executive committees; county treasuries; county executive member for finance; accounting officers for county governments; receivers and collectors of revenue for county governments; boards of cities and municipalities; and the county budget and economic forum.

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[1] The Constitution of Kenya 2010, arts 201(a), (b), (c), (d), and (e) (Constitution).
[2] Christopher Finch and Annette Omolo, 'Kenya Devolution: Building Public Participation in Kenya's Devolved Government' (2015) Kenya School of Government, Centre for Devolution Studies, Working Paper 1/2015, 7 – 8.
[3] Public Finance Management Act 2012, ss 3(a) and (b) (PFM Act).

Based on constitutional and political perspectives, the history of public finance management can be looked at in four phases: The President Kenyatta regime; the President Moi regime; President Kibaki regime; and the new Constitutional era.

The Kenyatta era began as soon as Kenya attained her independence from the United Kingdom in 1963. Public sector financial management powers were divided among the three arms of government – the executive, the parliament, and the judiciary. The executive however accumulated more influence that the latter two. Under the strong Kenyatta presidency, the executive led the budgetary process and as the 1963 Constitution barred the parliament from introducing money bills, or making amendments increase taxes or public expenditure.[4] The regime of the time gave the executive and the elite maximum control of public resources. The Treasury became the lead public financial management organ under the direction of the presidency. Senior public servants exerted strong influence on technical and policy issues and in assuming control over all public financial resources of the country.

President Moi era saw a slight improvement on public financial management. During this time the parliament was allowed to approve taxes, rates and expenditure proposals as a formality since members of parliament who opposed finance bills would be reprimanded.[5] While the treasury took a lead role in finance management, there was the systematic erosion of the Office of the Controller and Auditor General arising from the transfers of key officers. Gross abuse of public offices and mismanagement of public finances culminated in mega scandals that rocked the country during President Moi tenure.[6]

When the Kibaki regime assumed power in 2003, Kenya was already reeling from public finance scandals such as the Goldenberg and the Kroll report, and later on the Anglo-Leasing, before the completion of his first term in office.[7] These scandals led to the initiation of key reforms which aimed at improving public sector financial management and fiscal transparency. The

[4] Micah Nyamita and Elijah Wekesa, 'A Review of Economic Status and Public Sector Financial management Reforms in Kenya' (2015) 1 (1) Journal of Economics and Public Finance www.scholink.org/ojs/index.php/jepf accessed 8 July 2016.
[5] Ibid.
[6] Ibid.
[7] Xan Rice, 'The looting of Kenya' *The Guardian* (Nairobi, 2007) https://www.theguardian.com/world/2007/aug/31/kenya.topstories3 accessed 10 October 2016; David Ndii, 'Moi did it with Goldenberg, Kibaki Anglo Leasing now NYS is shaping up for Uhuru' *Daily Nation* (Nairobi, 2015) http://www.nation.co.ke/oped/Opinion/NYS-Corruption-Scandal-Uhuru-Kenyatta/440808-2793252-ip1qbf/index.html accessed 10 October 2016.

Government Financial Management Act 2004 was enacted to address urgent public financial management accounting issues, by introducing accrual-based reporting system.[8] The enactment of the Public Procurement Act 2003 and the Public Audit Act 2003 saw the establishment of modern procurement standards and the independent National Audit office.[9] The Kibaki regime introduced strengthened monthly expenditure return process which improved in reporting on government agencies and the monthly expenditure return process. Treasury implemented strict limitations to tax expenditures through tightened legal frameworks and improved controls at the Kenya Revenue Authority (KRA), improved cash management and strengthening accountability within government units by reducing the power of the treasury to make budgetary changes. Notable administrative reforms implemented during this period included the outlawing of political fund-raising events, establishment of a code of conduct for ministers, simplified licensing regimes for businesses and the introduction of performance contracting.[10] These changes were incorporated in the Fiscal Management Act 2009, ultimately finding its way in the Constitution.

The Constitution introduced a raft of changes, which included: fiscal decentralization, with county governments deciding how to spend their revenues; establishment of the Senate and county legislatures as important institutions on matters county public sector finance; and the further weakening the functions of the Treasury in financial management.[11] The Constitution established independent constitutional offices by separating Controller and Auditor General Office[12] into Controller of Budget[13] and Auditor General[14]. The mandate of the Controller of Budget was extended to supervising budget implementation and reporting to Parliament every four months.[15]

[8] Accrual form of reporting was introduced to account for funds that spill over from one accounting year to another. The term ‘accrual’ was entrenched by the Government Financial Management Act at Sections 3(3), 26, 3(a), 34(2); the term also appears in the subsidiary legislations governing the operation of the Act, such as The Government Financial Management (Hospital Management Services) Regulation 2009.
[9] Public Audit Act 2003, s 34.
[10] Micah Nyamita and Elijah Wekesa (n 4).
[11] Ibid.
[12] Constitution of Kenya 1963 (as amended to 2008), s 105.
[13] Constitution, art 228.
[14] Ibid, art 229.
[15] Constitution, art 228 (4) and (6); Public Audit Act 2015, s 32.

The PFM Act was enacted to comply with the constitutional requirement for the enactment of a financial management system required to give effect to Chapter twelve of the Constitution,[16] and to establish a fool-proof system that will promote accountability of the government officers engaged in the management of public finances. Low levels of public participation in the previous legal regimes led to misallocations and other inefficiencies. Pressure was on the government to ensure that a PFM Act, having transparency provisions, was enacted because fiscal transparency attracts cheaper credit and lowers the levels of corruption. The International Monetary Fund (IMF) stressed that transparency in public finance systems and practices is an important predictor of a country's fiscal credibility.[17]

The process of drafting and enacting the PFM Act started in earnest in 2010, after the promulgation of the Constitution. It was introduced as a Bill in the National Assembly on 29th February 2012 by then Acting Minister for Finance, Robinson Githae, and headed for presidential assent on 27th June 2012.

The Bill elicited a lot of hope among Kenyans. Both ordinary citizens and the Kenyan elite felt that PFM Bill will entrench international best practices, that corruption, inefficiencies and misappropriation of public funds leading to the loss of public resources will not continue. Like all Kenyans the Minister of Finance, Githae, expressed optimism on the Bill. On 13th March 2012, during the second reading of the Public Financial Management Bill, he said:

> Lastly, Mr. Temporary Deputy Speaker, Sir, the Cabinet memo that was attached to the Bill was signed both by myself and the Deputy Prime Minister and Minister for Local Government showing that the issues that were between the Treasury and the Ministry of Local Government had been sorted out. This is the best Public Financial Management Bill I have ever come across. You cannot get something better than this. It incorporates the best practices in all the jurisdictions in the universe. Therefore, it is my appeal to hon. Members of this august House to approve it. I would like to request the Deputy Prime Minister and Minister for Local Government to second.[18]

Upon signing the PFM Bill, the East African Centre for Law and Justice lauded President Mwai Kibaki, stating 'the Bill was out to promote transparency and accountability in the management of public finances at the National Government and County Government, overseeing the

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[16] Ibid, 5th sch.

[17] ICPAK, *Public Finance Building Blocks for Devolution: A Baseline Survey on Devolution in Kenya with Respect to Public Financial management Systems – One Year On* (ICPAK 2014) 21.

[18] *Kenya National Assembly Official Record (Hansard)* (2012) 51 https://books.google.co.ke/books?id=vtovmrK0bA8C&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q=public%20financial%20management&f=false accessed 29 February 2016.

Parliament and county assemblies including the different responsibilities of government entities and other bodies.'[19]

The euphoria was welcome, and understandably so, because for the first time in Kenya, the PFM framework required that the process of budgetary planning, approval, and execution be devolved. Devolution of financial management made public participation critical and mandatory.[20] Counties were given autonomy and responsibility for managing their finances – a departure from the previous regime where Local Authority Funds were allocated and planned for by the central government.[21] The PFM Act requires openness and accountability in the management of these funds.

As the PFM Act is critical in ensuring the success of devolution, drafters of the Act were keenly aware of the challenges that devolution will face, and set systems in place to safeguard or mitigate the effects of future challenges. To maintain distinctness and interdependence of the both arms of government, the Act requires that each level of government maintain their day-to-day operations and management of finances.[22] Each level of government is expected to formulate, plan, implement and report on their budgets and plans without interference with other government. The Act mirrors institutional structures at the national government to the county government. With regard to financial management at county level, functions are well spread among the county assembly (which mirrors the national assembly), county executive committee (which mirrors the cabinet), county treasuries (which mirror the national treasury) and county government (which mirrors the national government).

The county assembly: provides overall oversight over public finances at the county government level; reviews the Fiscal Strategy Paper (FSP) and makes recommendations to the county executive committee; approves the establishment of other county public funds; approves the budget estimates for county government, urban areas and cities; monitors budgets and public finances and related matters; reviews and approves the annual budget estimates for the county

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[19] East African Center for Law & Justice, 'New Bills Assented by the President' (*East African Center for Law & Justice*, 26 July 2012) para 5 http://eaclj.org/legislation/17-legislation-feature-articles/25-new-bills-assented-by-the-president.html accessed 29 February 2016.
[20] PFM Act, s 207; Society for International Development, *Public Finance Reforms in Kenya: Issue & Relevance under the Context of Devolution* (Society for International Development 2012) 25.
[21] Local Government Act Cap 265 Laws of Kenya, s 213.
[22] PFM Act, pts iii and iv.

government; approves Fiscal Strategy paper and the County Budget Review and Outlook paper (C-BROP); and has powers to establish a county emergency fund but with approval of county executive committee. These functions closely resemble the functions performed by the national assembly in regard to the management of the finances of the national government.[23]

The County executive committee is responsible for: reviewing and approving the annual budget estimates for the county government; approving the Fiscal Strategy Paper and the County Budget Review and Outlook Paper; and has powers to establish a county emergency fund with approval of the county assembly.[24]

The county treasuries perform roles that resemble the national treasury at the county level. The county treasury: manages the county government budget process; is the head of county treasury and oversees the formulation of economic policies; may at the request of cabinet secretary stop transfers of funds to a county government entity for serious material breach or persistent material breaches; prepares annual budget estimates for county governments and coordinates the preparation and implementation of county government (CG) budget; has overall responsibility for economic affairs at the county government; enforces fiscal responsibility principles at the county government; and prepares Fiscal Strategy Paper as the integrated development plan for the county government.[25]

As is the case with the national government, the county government accounting officers are responsible for money appropriated by county government. The accounting officers for county government entities are designated by the county executive member responsible for finance and are accountable to the county assembly for financial management. They ensure that public resources are used lawfully, effectively and efficiently. While designated by the county executive committee member for finance, the receivers of county government revenue are responsible for receiving and accounting for county government revenue. The county executive committee member of finance may appoint KRA as collector of county government revenue.[26]

The Act has provisions for accountability, openness, public participation, promoting equitable development, equitable sharing of revenue and tax burden, to ensure prudent and responsible use

[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Ibid.

of public resources, responsible fiscal management and clear financial reporting, and promoting equitable sharing of debt burden and benefits between current and future generations.[27]

The PFM Act consolidated many public finance management laws into one PFM law. The enactment of the PFM Act subsequently repealed: the Government Financial Management Act 2004; the Internal Loans Act; the Fiscal Management Act 2009; the External Loans Act; Contingencies Fund and County Emergency Funds Act 2011; and the National Government Loans Guarantee Act 2011.[28]

In ensuring the international best practices are entrenched, the Act requires extensive public consultations in counties, within/outside government, among the citizenry, from local and international experts on public finance management. It codified many public finance laws into one legislation while basing its policy framework within the five essential areas of a good public finance system, which include: macro-fiscal policy making; budgeting; treasury management; execution, accounting, reporting and auditing; and the allocation of roles and responsibilities within the financial governance framework.[29]

The PFM Act serves to ensure that county and national government manage their finances in accordance with the principles laid out in Article 201 of the Constitution, while ensuring that the responsible public finance officers account to the public through county assemblies and the Parliament respectively.[30] The Act clarified the roles and responsibilities of stakeholders in public finance and set budget calendar with clear deadlines. The Single Treasury Account introduced by the Act plays an important role on public finance management with far reaching ramifications.

1.2 Statement of the Problem

As noted by the Auditor-General through the numerous reports on mismanagement of public funds in the counties, and through reports by non-governmental organizations detailing loss of funds at Kenya counties, including numerous scandals involving mismanagement of public funds covered by the Kenyan media,[31] questions abound whether the PFM Act is adequate in ensuring

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[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] Moses Njagi and Roselyne Obala, 'Audit Reveals "misuse of Public Funds" in Counties' *The Standard Newspaper* (Nairobi, 17 July 2015) http://www.standardmedia.co.ke/article/2000169528/audit-reveals-misuse-of-

prudent management of public finances at the counties.[32] While numerous theories and explanation attempt to explain and address the causes of public funds mismanagement, one of the key areas to consider in the legislative capacity of the PFM Act. Is the Act adequate in establishing prudent management practices at the counties, and are there gaps in the implementation process?

This study in addressing the root causes of fund mismanagement, even after the enactment of the PFM Act, considers various other jurisdictions having a similar form of governance. And proposes legal, institutional and policy reforms to address the challenge of mismanagement of devolved funds.

1.3 Objectives of the Study

1.3.1 Generic Objectives

The main objective is to identify weaknesses and strengths of financial devolution management under the PFM Act and best practices to address the weakness in order to achieve accountability and equitable distribution of resources.

1.3.2 Specific Objectives

This study has three core objectives:

i) To review the historical evolution of the laws governing public finance management of devolved funds in the post-independent Kenya;

ii) To examine the financial devolution management under the PFM Act with a view to identifying loopholes and testing the efficiency of the Act;

iii) To identify and analyze cases of international best practice with a view to benchmarking and assessing the adequacy of the Kenyan model; and

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public-funds-in-counties?articleID=2000169528&story_title=audit-reveals-misuse-of-public-funds-in-counties&pageNo=2accessed 28 February 2016; Raphael Wanjala, 'Uproar as Bungoma Spends Sh1m on 10 Wheelbarrows - VIDEO - Daily Nation' *Daily Nation* (Nairobi, 9 September 2015) paras 1–3 http://www.nation.co.ke/counties/Uproar-Bungoma-Sh1m-wheelbarrows/-/1107872/2863512/-/ub0xy0/-/index.html accessed 28 February 2016; Brian Wasuna, 'Busia Governor Sues EACC to Recover Seized Items' [2015] *Business Daily* Para 6 http://www.businessdailyafrica.com/Busia-governor-sues-EACC-to-recover-seized-items/-/539546/2864456/-/5wehb6/-/index.html accessed 28 February 2016; Agnes Aboo, 'Meru County Govt Buys Sh7.8m Hospital Curtains' *Daily Nation* (Nairobi, 22 September 2015) paras 1–3 http://www.nation.co.ke/counties/meru/Meru-hospital-curtains/-/1183302/2880716/-/xmoyjw/-/index.html accessed 28 February 2016; Editorial, 'Stop brazen theft of funds in Counties' *Daily Nation* (Nairobi, 13 July 2016) http://www.nation.co.ke/oped/Editorial/stop-brazen-theft-of-funds-in-counties/-/440804/3293640/-/o1h8vbz/-/index.html accessed 28 February 2016.

[32] Editorial, 'Rectify Historical Injustices' *Daily Nation* (Nairobi, 3 November 2005) 8.

iv) To identify lessons that Kenya can learn from the form of financial devolution management in the selected countries.

1.4 Research Questions

This study addresses the following questions:

i) What lessons can be learned from Kenya's experience in the management of public finances in previous devolved funds and their importance in understanding Kenya's present finance laws?

ii) Is the PFM Act adequate in establishing sound public finance practice at the counties?

iii) What lessons can Kenya learn from the forms of financial devolution management established South Africa, Nigeria, United States of America and Canada and how this can be used to reform the Kenyan system?

iv) What reforms can be made towards attaining prudent financial management in Kenya counties under the public financial management system provided by the PFM Act?

1.5 Research Hypothesis

This study is based on the following assumptions:

i) Effective public finance management in Kenya counties is curtailed by loopholes and weaknesses in the PFM Act;

ii) Comparative parallels drawn from the management of devolved public finances in South Africa, Nigeria, United States of America and Canada is helpful in addressing financial devolution challenges in Kenya counties; and

iii) The challenges facing public finance management in Kenya counties can be addressed through legal, institutional and policy reforms.

1.6 Literature Review

The literature review provides the background and justification of this research by reviewing the available literature while identifying gaps and distortions that exist on the topic of public finance management in devolved units in Kenya. While a comprehensive review of existing literature is covered in the subsequent chapters of the study, this section provides an overview of the available literature in an indicative manner.

1.6.1 Public Finance under the Constitution of Kenya

Njeri Kirira analyses the public finance management framework in Kenya under the Constitution. He discusses how the Kenya's history influenced the current constitutional provisions, having categorized the periods into Kenyatta, Moi, Kibaki, and the framework under the current dispensation. Kirira highlights the important role of Parliament as a watchdog over public funds – a departure from the previous regimes when the Parliament had no role (Kenyatta years) in public finance management, and when the role of Parliament was relegated to approving the Finance Bills as presented to it by the executive. He goes further to compare the Kenyan model to Indonesia, South Africa and Uganda as examples of countries having decentralized structures of financial management. Kirira highlights the constitutional bodies created, including: the commission for revenue allocation which functions to review allocation criteria for counties in Kenya and to share the revenue based among the counties; the Salaries and Remuneration Commission; and reviews the roles of the Central bank of Kenya in the current fiscal environment. Kirira provides an overview of how the financial management framework works at the constitutional level.[33] The author does not review the specific legislation that gives life to the financial management framework. This study complements the work done by Kirira as it addresses itself to the questions of the PFM Act – the legislation enacted to give effect to the constitutional provisions.

Maurice Okumu writes to address the inequitable distribution of resources in Kenya with emphasis on constitutional transformation in distribution of financial resources following the promulgation of the Constitution. He analyzes devolution as a tool that meant to address resource imbalance which exists in Kenya. He compares the Kenya model to South Africa, Nigeria and Canada in his attempt to reform the Kenya system to attain equitable distribution of resources. Okumu finds that in order to address the challenge of inequality, there is need to simplify and clarify financial and fiscal decentralization processes. The simplicity can be attained by; first, integrating county and national development priorities and goals; second, enhancing good governance and democracy on the basis of the most efficient, representative, and cost efficient decentralization model for the country; third, by safeguarding separation of powers and autonomy of the county and national governments; fourth, entrenching effective mechanisms for

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[33] Njeri Kirira, 'Public Finance under Kenya's new Constitution' Society for International Development SID Constitution Working Paper Series No. 5 <http://www.sidint.net/sites/www.sidint.net/files/docs/WP5.pdf> accessed 23rd November 2015.

fund audit other than monitoring and evaluation within the decentralized framework; and lastly, to ensure the decentralization framework protects, streamlines, and enshrines public participation in the management of public funds.[34] Okumu does not question the efficacy of the enabling statutory provisions that give life to decentralization. While the principles of devolution are outlined in the Constitution, there is much left to the statutes in managing the devolved funds. This study focuses on how the PFM Act works to promote the principles enshrined Constitution, and attempts to address the imbalance existing between the Constitution and the Act.

1.6.2 Impact of Fiscal Decentralization

Andres Rodriguez-Pose and Anne Kriojer examine fiscal decentralization and its impact on economic growth. They caution that devolved economic systems may carry negative implications if not implemented properly due to significant institutional barriers. They argue that for devolution to work, a lot needs to be done other than just devolving power and resources. Fiscal policies should be tailored to local preferences to achieve optimal result in public finance management within the decentralized units.[35] This analysis is helpful in predicting the effects of decentralization in the Kenyan economic environment. However, as all environments are unique, the projections made by the authors may not necessarily be true for the Kenyan-African situation. This study, while benefiting immensely from the contributions made by the authors, faces the challenge of coming up with a predictive and corrective model for the Kenyan decentralized system in order to promote economic growth and development. In addition, as the Kenyan form of devolution is a fairly new phenomenon, much cannot be deduced from the available literature, except through direct study of the effects on economic growth.

John Bamidele examines the impact of fiscal decentralization on public service delivery in Nigeria. He argues that despite fiscal decentralization, Nigeria has not realized its expectations of enhanced service delivery. State governments have failed to deliver effective, qualitative and affordable public services to her citizens owing to corruption and mismanagement of public

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[34] Maurice Okumu, 'Financial Devolution under the Constitution of Kenya 2010' (LL.M thesis, University of Nairobi 2013).

[35] Andres Rodriguez-Pose and Anne Kroijer, 'Fiscal Decentralization and Economic Growth in Central and Eastern Europe' (London School Economics Discussion Paper Series. <http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper12.pdf>accesseed 23rd November 2013.

financial resources.[36] Bamidele assertions are essential for this study because one of the reasons for devolved power structure is to enhance service delivery. He points us on the path that Nigeria followed, and on that which Nigeria did not follow, in attaining enhanced service delivery as the goal of devolution. However, because his study focused on the Nigerian reality, there is need to find the Kenyan reality. This study is essential in finding the place of devolution in service delivery at the county level in Kenya.

Odd-Helge Fjeldstad considers the debates that faced policy makers in Bangladesh, whether developing countries should move from highly centralized unitary state to the devolved system. He notes that there is no agreement among scholars as to the empirical evidence that devolution increases or reduces effectiveness in supplying public goods. He further states that although devolution may bring certain number of advantages, it equally comes along with its own set of disadvantages. Devolution can be credited to giving locals tailor made public goods, and allows for greater public participation in leadership roles such as policy and decision making. Devolution may be used as a tool to counter totalitarian systems of governance by promoting democratic principles. Devolution improves the flow of finances, allowing many people to participate in the economic process of the country. It is easy to conclude that, from the foregoing, devolution is critical in economic growth and development. However, devolution is also seen as an ill that destabilizes a country. It may lead to devolution of corruption and exploitation of the masses. Because of devolution, the masses may face more exploitation by corrupt cartels that exist in most developing nations. Fjeldstad notes that devolution creates distinct areas of influence that could be seen to counter waves of nationalism. Masses could identify with the devolved governments, which operate at the tribal or community level, and therefore work against the interests of a united country. He notes that devolution comes with high administrative and compliance costs. The resources that could be pumped into development activities are channeled to offsetting the cost of devolution.[37] Kenya, as a developing country, benefits greatly from this analysis by Fjeldstad. This study also uses Fjeldstad's analysis in finding the Kenyan voice in a devolved financial structure. This study is important, as an

[36] John Bamidele, 'Analysis of Fiscal Decentralization and Public Service Delivery in Nigeria' Vol. 6 No. 9 2015 ISSN 2222-1700 (Paper) ISSN 2222-2855 (Online) Journal of Economics and Sustainable Development <www.iiste.org> accessed 24th November 2015.

[37] Odd-Helge Fjeldstad, 'Fiscal decentralization in Developing Countries Lessons for Bangladesh' CMI BRIEF <http://www.cmi.no/publications/file/5125-fiscal-decentralisation-in-developing-countries.pdf> accessed 23rd November 2015.

addition to what has been done by Fjeldstad, because the analysis by Fjeldstad cannot be applied directly to the Kenyan situation. In order to understand the challenges Kenya faces in implementing financial management reforms at the county level, this independent study was necessary.

Claudius Dziobek, Carlos Gutierrez and Phebby Kufa measured the levels of fiscal decentralization in Europe. They argue that devolved units in Europe have a stabilizing effect in the long run. While immediate impacts of devolution cannot be inferred, the levels of economic development and economic stability of countries that have a devolved financial system far outweighs countries that do not have devolved financial systems. They further examined the impact of fiscal decentralization on the efficiency of public service delivery. They argue that fiscal decentralization improves service delivery but that it should be supplemented by conducive political and social environment.[38] The authors give hope to the Kenyan situation because the devolved system is still at its infancy. That once mature, a devolved financial system in Kenya may yield similar results to what has been attained in the European countries. A Kenyan study of its devolved units is necessary to benchmark and measure whether the financial system within the devolved framework in Kenya is headed toward the goal of economic stabilization.

1.6.3 Fiscal Accountability of Devolved Units

Paul Smoke examines financial accountability in devolved units. He warns that although much has been written about devolution and its potential for improving public service, fiscal decentralization comes with its own share of concerns. He argues that local governments should put in place local technical and governance capacity.[39] This analysis is instrumental in reviewing the PFM Act framework. Kenyan law[40] gives the county government legal responsibility to manage finances allocated from national government through the county treasuries. The responsibilities of the treasury in the counties are outlined in sections 109-117 of the PFM Act. The county government is required to submit financial reports to the Auditor General for accountability purposes. This is in regard to the utilization of the Emergency Fund, among other

[38] Claudia Dziobek, Carlos Gutierrez and Phebby Kufa, 'Measuring Fiscal Decentralization – Exploring the IMF's Databases' IMF Working Paper Series <https://www.imf.org/external/pubs/ft/wp/2011/wp11126.pdf> accessed 23rd November 2015.

[39] Paul Smoke, 'Accountability and Service Delivery in Decentralizing Environments: Understanding Context and Strategically Advancing Reform' <http://www.oecd.org/dac/governancepeace/governance/docs/Governance%20Notebook%202.6%20Smoke.pdf> accessed 24th November 2015.

[40] PFM Act, pt iv.

funds, created by the county executive committee with the approval of the county assembly. The Emergency Fund is in respect to urgent and unforeseen need for expenditure arises. The analysis by Smoke is essential in establishing and allocating financial responsibility. However, he concedes that there is no consensus about how such funds are accounted. This study, while appreciating the available literature on accountability, also seeks ways to make the Kenyan system accountable in order to prevent mismanagement of financial resources in counties.

1.6.4 Challenges of Fiscal Devolution

Jonathan Dunn and Deborah Wetzel discuss the challenges that countries undergoing fiscal devolution face. They argue that decentralization of financial resources is not an easy task, and that while these countries may put an elaborate legal framework to tackle foreseeable challenges, implementation is the often the difficult part. They propose that the transition should be handled carefully while checking on corruption and mismanagement of resources while decentralization structures are being put in place.[41] This was attested by the Kenyan situation, where despite the existence of the Transitional Authority to streamline devolution process, officials took advantage of the yet to be established county structures to abuse and mismanage financial resources meant for the benefit of the public.[42]

Charles Collins and Andrew Green examine the negative effects of fiscal decentralization. They argue that mismanagement of public finances at the grassroots level could lead to higher degrees of corruption and leakage of resources than is experienced when the governance system is centralized.[43] They argue that bureaucratic structures created by the devolved systems lead to inefficiencies in the system. Fiscal decentralization, they argue, makes it easier for corrupt government officials to capitalize on the weaknesses of the system to steal funds meant for public use.

This study, in analyzing the challenges facing devolution, and in coming up with possible solutions to strengthen devolution at the counties, applies the reviews on the challenges of fiscal

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[41] Jonathan Dunn and Deborah Wetzel, 'Fiscal Decentralization in Former Socialist Economies: Progress and Prospects' Washington DC: National Tax Association 2001 Proceedings of the Ninety-Second Annual Conference on Taxation 242-50.

[42] Kirira Njeru, 'Public Financial Management in a County: What Leaders Should Know' *The Star* (Nairobi, 2013) http://www.the-star.co.ke/news/2013/06/08/public-financial-management-in-a-county-what-leaders-should-know_c783333 accessed 2 March 2016.

[43] Charles Collins and Andrew Green, 'Decentralization and Primary Health Care: Some negative Implications in Developing countries' (1994) 24 (3) International Journal of Health Services 459-75.

decentralization, and explores other unique problems that can be said to be uniquely Kenyan in character.

1.6.5 Causes of Financial Mismanagement in Kenya Counties

Despite having the best PFM law in independent Kenya, reports of financial impropriety in the counties are numerous. Different authors have attempted an explanation of the causes of financial mismanagement.

First, it has been argued that counties have inadequate qualified and experience human personnel to implement the structures set in place by the PFM Act.[44] Second, the county infrastructure was not well established, this allowed for the greedy county officials to take advantage of gaps and loopholes in the implementation process to mismanage the public funds.[45] Third, it has been argued that contrary to the requirement of public participation in the PFM Act, most counties are yet to develop guidelines to give effect to this provision. Some of the guidelines developed by counties are unconstitutional.[46] In *Robert Gakuru & Another v Governor Kiambu County & 3 others*[47], Kiambu residents successfully challenged the passing of the Kiambu Finance Bill on grounds that there was no effective public participation. Fourth, there is poor coordination of financial services between the counties and the national governments. While the PFM Act set up the Intergovernmental Budget and Economic Council to resolve disputes resulting within the two-tier government, the council has not been effective in addressing the challenges.[48] Fifth, some scholars argue that the legislative framework set by the PFM Act falls short of international best practices. Lakin argues that the Act does not require the government to produce an expansive set of budget documents, which have been outlined in the IMF's code of Good Practices on Fiscal Transparency and the OECD's Best Practices for Fiscal Transparency. He notes that the Act, while setting out financial the calendar, does not specify when budget estimates and reports should be made public.[49]

[44]Kirira Njeru, 'Public Financial Management in a County: What Leaders Should Know' (n 42).
[45] Ibid.
[46]Christopher Finch and Annette Omolo (n 2).
[47] [2013] eKLR. Petition Number 532 of 2013.
[48] Christopher Finch and Annette Omolo (n 2).
[49] Jason Lakin, 'Now the Public Finance Law Is in Place, We Need Full Disclosure at Every Level' *the East African* (Nairobi, 11 August 2012) Paras 4–12 http://www.www.theeastafrican.co.ke/OpEd/comment/Now-the-public-finance-law-is-in-place/-/434750/1477278/-/vmdnxc/-/index.html accessed 28 February 2016.

This study empirically analyses the causes of mismanagement of funds in Kenya's counties and proposes recommendations, and therefore goes beyond what the authors have theorized, and giving practical scenarios and solutions.

1.7 Justification of the Study

This study is important as it comes at a time when devolution of power and resources from the national government to the county governments is taking shape. Counties are striving to put in place structures and institutions necessary to ensure the success of devolution. This study is important as it assesses the progress made by the county governments in complying with the provisions set out in the PFM Act, and whether the Act is in its current form, is able to steer the country towards the goal of prudent public financial management at the county level.

While assessing the PFM Act for strengths and weaknesses, this study compares the lessons Kenya can learn from the countries having established and tested financial decentralization framework and it seeks to apply those lessons to the Kenyan situation.

Furthermore, not much has been done by scholars in assessing the effectiveness of the PFM Act. There is not enough literature in the area of public finance at the county level. This study will add knowledge to this important area, and contribute towards policy and legislative reforms.

1.8 Theoretical Framework

Public Finance Theory

This study will be guided by the theory of public finance by Richard and Peggy Musgrave. This theory breaks down governmental economic activity into three parts: the distribution of goods and services; the allocation of resources; and the stabilization of the economy.[50]

The allocation of resources function answers the question of how government should spend its resources. Musgrave classifies goods as public goods, private goods, and merit goods. Musgrave explains that governments should provide public goods because private markets cannot be relied upon to provide public goods. Government intervention in the provision of private goods is discouraged because these goods can be adequately provided for by private markets.[51] Merit goods are goods provided by the government cheaply because the government wants to

[50] James Buchanan, 'The Theory of Public Finance', (1960) Vol 26:3 Southern Economic Journal 234-38 http://www.jstor.org/stable/pdf/1054956.pdf?_=1468319903312 accessed 12 July 2016.
[51] Ibid.

encourage their consumption. Merit goods include subsidized housing, education, and healthcare. Musgrave advocates for the provision of merit goods in cases where private provision of these goods does not augur with public policy and is disadvantageous to a section of the citizenry. This function is best left to local governments which can easily and adequately provided tailored goods for their population.[52]

The second role of the government is to stabilize the economy. Musgrave argued that capitalistic economic systems do not automatically generate full employment and stable prices. He argued that governments should deliberately pursue stabilization policies. He argued that high levels of unemployment might persist unless governments employ deliberate fiscal and monetary action. This function is best left to the national governments.[53]

Lastly, governments undertake distributive function. Musgrave argues that governments ought to redistribute income: from the rich to the poor. He argues that governments should show more generosity to the poor, through higher benefits or progressive tax regimes, meaning that the government should place a higher tax burden on the rich. The degree of how much redistribution should happen, he states, is left for the political process to decide. In the absence of redistributive mechanisms, market failure will result as the majority of people will not be able to purchase basic goods and services they need for their survival.[54]

Musgrave's theory of public finance justifies the role governments play in the economic process. This theory explains that governments should engage themselves in the economic process to uplift for the general good of the masses. Government interventions, as outlined above, are important in stabilization of the economy, allocation of resources, and redistribution of incomes.

This study uses the public finance theory to analyze the role counties play in the distribution of goods and services, allocation of government resources and the stabilization of the economies at the county level, and how this translates into a better fiscal position for the country.

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[52] *Encyclopaedia Britannica Online*, 'Government Economic Policy', (2016) https://www.britannica.com/topic/government-economic-policy accessed 12 July 2016.

[53] Ibid.

[54] Ibid.

Traditional Theory of Fiscal Decentralization

This study will rely on the traditional theory of fiscal decentralization by Wallace Oates. In his 1977 book '*The Political Economy of Fiscal decentralization*', Oates lays the basis for fiscal decentralization by arguing that a strong but limited federal government and state governments will provide the best opportunity for protection and responsiveness to the citizens.[55] He defines fiscal decentralization as 'the devolution by central government to local governments of specific functions with the administrative authority and fiscal revenue to perform those functions.'[56]

He cites three basic reasons for decentralization: central governments are finding it impossible to meet all competing needs for various constituencies and prefer to build local capacity and delegate these responsibilities to them; central governments and looking to regional and local governments to assist them in economic development strategies; and regional and local leaders are demanding more autonomy and want taxation and spending responsibilities.[57]

He states that national governments are best placed in managing the overall economic activity. Macro-economic functions should be assigned to national governments while micro-economic functions to regional and local governments. Regional and local governments are best placed to adapt to the unique preferences and circumstances of the populations.[58] This increases potential gains from decentralized services. Decentralization may encourage experimentation and innovation as regional governments are free to adopt new approaches to public policy.

Based on traditional theory of fiscal decentralization, central governments ought to cede part their authority to local governments in to increase efficiency. The local governments are able to broaden the tax base and provide services that are not easy to provide within the central government framework.[59] This study uses this theory to investigate and apportion functions to the central and county governments in Kenya. A critique of the PFM Act based on this theory

[55] James Kee, 'Fiscal Decentralization: Theory as Reform' George Washington University Working Paper, 3 https://www.gwu.edu/~clai/working_papers/James%20Kee%20Fiscal%20Decentralization%20paper%202003.pdf accessed 12 July 2016.

[56] Ibid.

[57] Wallace Oates, 'On the Theory and Practice of Fiscal Decentralization' (2006) IFIR Working Paper No. 2006-05 http://www.ifigr.org/publication/ifir_working_papers/IFIR-WP-2006-05.pdf accessed 12 July 2016.

[58] Ibid.

[59] Ibid.

will provide details on the efficiency of the Kenyan framework for devolution of financial resources.

Economic Efficiency Theory of Fiscal Decentralization

This study will focus on the economic efficiency theory of fiscal decentralization. The theory was adduced by Andres Rodriguez and Adala Bwire. They argue that devolution of finances lead to economic dividends.[60]

Decentralized are more stable and can respond easily to changes in the needs of the governed. When compared to centralized systems, devolved systems have greater autonomous power in tailoring local preferences to generate innovation in the provision of policies and public services. They argue that devolved power structures encourage greater public participation, and is instrumental in holding the governing elite responsible and accountable.[61]

However, in the absence of properly instituted structures, devolution leads to wastage of public resources through corruption. It is the duty of the central government to ensure that the legal and physical infrastructure is in place to prevent the loss of funds through devolution.[62] The systems in place include: regular compliance audits of the procedures and processes within the local governments; and strict punishment of those who fail to follow the legal regimes governing devolution.[63]

This study will rely on this theory to assess what the government has done, and what it ought to do to promote devolution as the key to economic growth. The theory will be helpful in critiquing the PFM Act framework.

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[60] Andres Rodriguez-Pose and Adala Bwire, *The economic (in)efficiency of Devolution* (London School of Economics 2003) <http://www.lse.ac.uk/geographyandenvironment/research/researchpapers/rp86.pdf> accessed 28th November 2015.
[61] Ibid.
[62] Ibid.
[63] Ibid.

1.9 Research Methodology: Design, Methods and Techniques

1.9.1 Primary Sources

This study will be conducted through the analysis of various legal instruments both nationally and internationally including, the Kenya Constitution, the various Acts of Kenyan Parliament and from other jurisdictions such as South Africa, Nigeria, Canada and United States of America as well as Bills and the relevant international legal instruments.

1.9.2 Secondary Sources

This research is also guided by various secondary sources such as books by notable authors, articles from peer-reviewed journals, reports by credible commissions, newspaper articles, publications and other internet sources.

1.10 Limitations of the Study

Not so much has been written about the PFM Act in Kenya, especially in the context of devolved governance. This may be attributed to the fact that devolution is still at its infancy in Kenya. This lack of adequate in-depth scholarly reviews and publications means that the research will be denied sources of information and perspectives from other authors. The inadequate literature will limit the depth of comparative analysis readers will have otherwise enjoyed.

1.11 Organization of the Study

This study will be organized into five chapters:

Chapter One: Background to Financial Devolution under the PFM Act

This chapter gives a brief introduction to the subject, the theoretical framework underlying this research, justification for the research, research objectives, research questions, research methodology, literature review and statement of the problem.

Chapter Two: The Evolution of Devolved Funds in Kenya

This chapter will outline and highlight the historical evolution of the devolved funds under different political regimes in Kenya.

Chapter Three: The Framework and Challenges Facing Financial Devolution Management in Kenya Counties

This chapter will outline, highlight and analyze the key features of, and the challenges facing the form of financial devolution management in counties provided under the PFM Act 2012.

Chapter Four: Analysis of Financial Devolution Management in South Africa, Nigeria, United States and Canada

This chapter examines financial devolution management in South Africa, Nigeria, United States of America and Canada with a view to comparing with the Kenyan model to draw lessons of what can be applied in the Kenya context.

Chapter Five: Conclusion and Recommendations

This chapter contains conclusions deduced from the study and proposes recommendations by the researcher on the financial devolution management in Kenya. It also analyses the hypothesis in line with the findings of the study.

1.12 Conclusion

This chapter gives an introduction to the subject, statement of the problem, theoretical framework underlying this research, justification for the research, research objectives, research questions, research methodology, literature review and the limitations of the study. Chapter Two discusses the historical evolution of devolved funds under different political regimes in Kenya.

CHAPTER TWO: THE EVOLUTION OF DEVOLVED FUNDS IN KENYA

2.1 Introduction

Attempts at decentralizing funds to Kenya natives in colonial period started formally in 1927 after the enactment of the Asiatic Widow and Orphans Pensions Fund of 1927. The fund provided compensation for Asian widows of former civil servants of Asiatic origin who died while in office. The Act was to undergo a transformation in 1966 in the newly independent country under President Jomo Kenyatta.

Native Africans in colonial Kenya were not engaged in active economic processes up until the Swynnerton Plan of 1954. Commercial production of agricultural products – Kenya's main export earner – was concentrated among the European settler community. The Africans were laborers on the large scale European farms.[64] Agitation for independence and the native African desire to engage in commercial production saw the settler communities, led by Governor Evelyn Baring, accede to a plan by Roger Swynnerton, to allow for the creation of the African middle-class (African landowners). The African landowners were given titles to land and trained on modern commercial farming techniques. Under the five year plan, Africans accessed credit using titles to land as security. The colonial government gave loans and grants through the African Land Development Board (ALDEV) amounting to UK 5 million pounds.[65] United States International Co-operative Development (later USAID) and banks also engaged in funding Africans under the Plan. More credit became available for Africans between 1959 to 1960 through African District Councils and cooperative societies.[66] This marked the first attempt at decentralizing funds to the native African in Kenya. The happenings in colonial Kenya in 1950s informed the declaration of the state of emergency and heavily influenced power bargains that were acutely captured by the 1963 Independence Constitution.

This chapter analyzes the historical evolution of devolved funds through different periods in Kenya. The periods are divided into: the Independence Constitution Period (1963); the Jomo

[64] Anne Thurston, Smallholder Agriculture in Colonial Kenya: The Official Mind and the Swynnerton Plan (Cambridge African Monographs 8, African Studies Centre 1987).
[65] Ibid, 73.
[66] Ibid, 126 – 27.

Kenyatta Presidency (1964 – 1978); the Daniel Moi Presidency (1979 – 2002); the Mwai Kibaki Presidency (2003 – 2010);[67] and the New Constitutional Dispensation Era (from 2010).

2.2 The Independence Constitution Period (1963 – 1964)

Kenya was divided into 7 regions and Nairobi area at independence.[68] Each region had a Regional Assembly and was headed by a President who was to be elected from among the members of the Regional Assembly. The Regional Assembly composed of elected and specially elected members.[69] Whereas Regional Assemblies had power to make laws governing the regions under their control, executive authority vested on the Finance and Establishments committee of each region.[70] This committee reported to the Regional Assembly.

Regional governments had powers to raise their own revenue.[71] In addition, they were entitled to distributions from the central government.[72] These monies were to be used by the regional authorities in exercising their mandate under the Constitution and other enabling statutes enacted by the Senate or the National Assembly. Use of the funds in the regions was guided by Enactments of Regional Assemblies in each region.

The process leading up to the formation of the Independence Constitution was long and arduous. The journey started in London in the Lancaster House Conferences and finalized in Nairobi. Despite being the symbol of independent Kenya, constitutional formation process did not take into account the wishes of Kenyans. Locally, this meant that the Constitution lacked legitimacy. Many saw it as an imposition of the views of the colonial rulers in the new country.[73]

The Constitution established a Westminster form of Government. The prime Minister was appointed by the Governor General from amongst the members of the House of Representatives.[74] The withdrawal of monies from the consolidated fund was to be sanctioned by

[67] Although Mwai Kibaki was President in Kenya between the years 2003 – 2013, for the purposes of this study I have classified the period 2003 – 2010 as Mwai Kibaki era and the period after 2010 as the new constitutional dispensation era.
[68] Kenya Constitution 1963 (Independence Constitution) s 91.
[69] Ibid, s 98.
[70] Ibid, ss 102 – 20.
[71] Ibid, s 130.
[72] Ibid, s 131; s 137 – 56.
[73] Macharia Nderitu, Ivy Wasike, Thuita Guandaru, Dorothy Momanyi, Jane Kwamboka and Joseph Irungu 'The Independence Constitution: The Constitutional History in Kenya before 1963' in Stephen Ndegwa, Patrick Mwangi, Henry Owuor and Iris Karanja (eds), *History of Constitution making in Kenya* (1st Printing 2012, Media Development Association & Konrad Adenauer Foundation, 2012) 1 – 7.
[74] Ibid, 7.

the House of Representatives, which drew membership from across country.[75] This was envisaged to foster accountability and promote representative democracy. The Constitution ensured that government officers from the executive would account to the House of Representatives. This idea was replicated in the regions, where withdrawals from the regional fund by the Finance and Establishments Committee had to be sanctioned through laws passed in the regional assemblies.[76]

The monies spent by the Finance and Establishments committee was subject to audits by the Controller and Auditor General who satisfied himself that withdrawals were duly authorized and applied to the specific functions outlined by the Constitution and the relevant laws.[77]

Reports made by the Controller and Auditor General regarding the use of public funds and the regions was handed to the Finance and Establishments Committee. This committee was mandated to table the report for consideration by the Regional Assembly.[78] This is seen as attempts by the drafters of the independent Constitution to ensure accountability on the part of the Committee is upheld. By reporting back to the Regional Assembly, the Constitution was keen on ensuring that public monies is spent in a transparent manner by the elected representatives. The Controller and Auditor General served to ensure that responsible financial management is exercised while maintaining clear and truthful fiscal reports. The Assembly was designed to serve the oversight role of monitoring and supervision.

The independence Constitution did not provide for budgetary processes. It required that regional authorities to come up with laws governing all financial management process.[79] Having established the laws necessary for financial management processes at the different levels of government, government regulations did not provide for public participation in the budgetary process. Preparation and presentation of budget proposals to the citizenry was done by the

[75] Kenya Constitution 1963 (n 68) s 122.
[76] Ibid, ss 129 – 136.
[77] Ibid.
[78] Ibid.
[79] Ibid.

executive arm of government.[80] The views of ordinary Kenyans were not taken into account. Kenyans, felt they were spectators in the governance process.[81]

By sanctioning the decentralization of financial resources, the Constitution was keen on promoting equity in all regions of the country. All regions were allocated monies by the central government, and they also had the power to pass laws allowing them to raise additional revenues for development purposes.

The independence Constitution however failed to ensure that specific and necessary provisions with regard to equity are entrenched. Throughout the 61 years of Kenya's colonialism, the Africans were oppressed and did not enjoy the fruit of the labour. Africans were working on European farms.[82]

By failing to allow positive discrimination in favor of Africans, the independent Constitution, together with the financial laws on decentralization of resources, supported the existing oppressive hierarchical structure of Europeans, Asians, while classifying Africans as third rate citizens in their own country.[83] Colonialism allowed Europeans to acquire large tracts of land from African families. The most affected were those who lived in the white highlands. Africans were forcefully migrated to colonial reserves and villages to allow for Settler activities. Africans were later to regroup and form alliances which campaigned against colonial domination by the Settlers.[84] The independence Constitution did not provide a way for compensating those who lost their lands and economic activities during the colonial encounter. The Swynnerton Plan worked to aggravate this injustice as the colonial administration sought to allocate land to those Africans who had largely collaborated with the Colonial rule.[85] Ideally, the regional authorities, with support from the central government, ought to have worked out a way, and codified into law, a system that would addresses the previous injustices meted upon the natives by colonial

[80] Samuel Njuguna and Phylis Makau 'the Parliamentary Budget Oversight in Kenya: Analysis of the Framework and Practices since 1963 to Date' (2009) Institute of Economic Affairs Research Paper Series No 19, 8 – 15.
[81] Ibid.
[82] Anne Thurston (n 64).
[83] Ibid.
[84] Ibid.
[85] Ibid.

authorities. The failure to address this resulted in the perennial land conflicts that often characterize modern Kenya.[86]

The Constitution relegated the financial functions to the House of Representatives and Regional Assemblies. It required that these institutions pass laws to govern financial activities within the country. Whereas this is laudable, delegation of most functions to the parliament proved cInstead the postcolonial regime worked to dismantle the constitutional structures even before they were established. The ruling party at that time, Kenya African National Union (KANU), with leadership of Jomo Kenyatta and Oginga Odinga, embarked on a political process to change the Constitution after Kenya became a Republic.[87]

Amendments by successive regimes did away with the decentralized structure of power put in place by the independent Constitution. This was seen by numerous scholars as an attempt by the Kenyatta regime to consolidate power.[88] The regime first introduced an amendment to the Constitution to establish the office of the Vice President in 1964.[89] The Vice President was to be appointed from elected members of the House of Representatives. The government repealed constitutional provisions that empowered regions to levy independent regional taxes.[90] This made regions fully dependent on grants from the central government, consequently weakening the regional governments. This amendment is widely interpreted as Kenyatta's desire to centralize power.

In 1966, the Kenyatta regime successfully sponsored an amendment through Parliament establishing a unicameral legislature by abolishing the Senate.[91] The Senate and House of Representatives was merged into the National Assembly. Kenya now had one house. The Senate, whose responsibility was the protection of the interests of the regions, was scrapped. The

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[86] Takashi Yamano and Klaus Deininger, 'Land Conflicts in Kenya: Cause, Impacts, and Resolutions Foundation for Advanced Studies' (National Graduate Institute for Policy Studies and the World Bank FASID Discussion Paper 2005).
[87] Macharia Nderitu, Ivy Wasike, Thuita Guandaru, Dorothy Momanyi, Jane Kwambkoka and Joseph Irungu 'The Constitution Evolution Between 1963 and 1982' in Stephen Ndegwa, Patrick Mwangi, Henry Owuor and Iris Karanja (eds), *History of Constitution making in Kenya* (n 73) 11 – 18. See also Abraham Muriu, 'Decentralization, Citizen Participation and Local Public service Delivery: A Study on the Nature and Influence of Citizen Participation on Decentralized Service Delivery in Kenya' (Universitatsverlag Potsdam, 2013) 25 – 31.
[88] Ibid.
[89] Constitution of Kenya (Amendment) Act No. 28 of 1964.
[90] Constitution of Kenya (Amendment) Act No. 38 of 1964.
[91] Constitution of Kenya (Amendment) Act No. 40 of 1966.

Kenyatta administration inferred that the National Assembly could effectively represent the interests of the regions.

The regime removed the final traces of regionalism in 1968. This was by repealing all past laws of regional assemblies, abolishing the Provincial Councils, and deleting from the Constitution all references to district and provincial boundaries.[92] The amendment made Kenya a centralized state, with most powers concentrated on the presidency, who became the sole appointee of heads of government ministries and departments through successive constitutional amendments. [93] The presidency harnessed immense powers from the constitutional amendments, robbing the Parliament its role, while empowering itself. By 1966, the president could lawfully order detention of any person without trial at his own discretion.

The changes marked the erosion of balance of power principles from what had been one of the best Constitutions in Africa. The consolidation of power is often weakly explain as the government desire to prevent the country from sliding into civil war as had been the case in neighboring countries.[94] By 1964 Kenya was already at war, battling the Somali Separatist Movement (the Shifta) who wanted the part of Northern Kenya hosting the Kenyan-Somali people to secede and become part of the larger Somalia.[95] In addition, there were warnings that the coastal region desired to form an independent state, separate from inland Kenya.[96] Some scholars argue that the desire by the coastal people to separate from Kenya was fomented by the regime's grip on power, rather than causing it.[97]

The constitutional amendments, unfortunately, marked the death of the regionally decentralized financial management system in the young country.

2.3 The Jomo Kenyatta Presidency (1964 – 1979)

The Jomo Kenyatta Presidency lasted fifteen years after 1979. A number of decentralized funds were instituted during this period. During this time, Kenya's independent blueprint for

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[92] Constitution of Kenya (Amendment) Act No. 16 of 1968.
[93] See Constitution of Kenya (Amendment) Act No. 14 of 1965; Constitution of Kenya (Amendment) Act No. 17 of 1966; Constitution of Kenya (Amendment) Act No. 18 of 1966; Constitution of Kenya (Amendment) Act No. 45 of 1968; Constitution of Kenya (Amendment) Act No. 5 of 1969; Constitution of Kenya (Amendment) Act No. 14 of 1975.
[94] Kenya Transitional Justice Network, *Summary: Truth Justice and Reconciliation Commission Report* (2013).
[95] Ibid.
[96] Justin Willis and George Gona, 'Pwani C Kenya? Memory, Documents and Secessionist Politics in Coastal Kenya' (2012) African Affairs 112/446, Oxford University Press on behalf of Royal African Society 48.
[97] Ibid.

development, Sessional Paper No. 10 of 1965 proposed decentralization as the means to achieve economic development.[98] It proposed that resources from high potential areas that generate surplus be redistributed to low potential areas as a strategy for nationwide poverty reduction.[99] The paper explained that to achieve equitable distribution of resources, which is necessary for economic development and poverty reduction, economic gains need to be shared throughout the country. The paper provided a basis for the various decentralized funding regimes in the post-colonial Kenya.

During the Kenyatta regime, decentralized funds included: the District Development Grant Program in 1966; the Special Rural Development Program of 1967 to 1974; Rural Development Fund; District Development Planning of 1971; and the Asiatic Widows and Orphans Pensions Fund.[100]

2.3.1 Special Rural Development Program of 1967 to 1974

Special Rural Development Program (SRDP) was funded by six donor powers from 1967 – 74. It sought to formulate local plans for rural development and was spread over six administrative divisions located in six different districts.[101] Donor governments pooled resources and insisted on being in control of the projects. Special Rural Development Program conducted its activities on a pilot basis, with an intention of rolling the plan throughout the country pending the success of the program on the pilot basis. SRDP was a reaction to a report published in March 1966 by National Council of Churches (NCCK) drawing attention to the potentially explosive problem of youth unemployment. The activities involved training farmers, construction of rural roads and providing an infrastructure for employing the many unemployed young men in Kenya.[102]

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98 Ibid.

99 Republic of Kenya, 'African Socialism and its Application to Planning in Kenya' (1965).

100 Ibid.

101 Joel Barkan and Michael Chege, 'District Focus and the Politics of Reallocation in Kenya' (1989) Vol 27 No 3 Journal of Modern African Studies (Cambridge University Press) 431, 440 – 41 http://www.jstor.org/stable/161101 accessed 13 July 2016. See also Kenya Human Rights Commission and Social and Public Accountability Network, *Harmonization of Decentralized Development in Kenya: Towards Alignment, Citizen Engagement and Enhanced Accountability* (December 2010 version) 14 – 15; ICPAK, 'Position Paper on the Impact of Decentralized Funds in Kenya' (September 2014) 4.

102 Zaki Ergas, 'Kenya's Special Rural Development Program (SRDP): Was It Really a failure?' (1982) Vol 17 No 1 Journal of Developing Areas (College of Business, Tennesse State University) 51 http://www.jstor.org/stable/4191090 accessed 16 July 2016.

The SRDP was billed as a failure and was phased out and incorporated as part of the District Development Program in 1975. Despite the shortcomings, SRDP led to important administrative changes and provided an institutional base for the District Focus for Rural Development a decade later.

The program led to the establishment of the District Development Committee (DDC) in Kenya's 40 administrative districts to plan for rural development (these districts, in addition to others not yet created, later became counties under the Constitution of 2010). It led to the development of the Rural Development Fund (RDF) by the central government as a commitment to provide grants to district authorities for development of projects, such as the construction of community centres, feeder roads and water supplies, health centres, and creation of income generating activities that were identified by residents. SRDP led to the creation of the position of District Development Officer (DDO), who oversaw the DDC and coordinated government funded projects.[103] Districts were designated as the basic unit for rural development after SRDP.

The SRDP obtained information from the residents on prioritized development projects. Due to the high level of local public participation, success was recorded during implementation stage.[104] And for a long time, this the SRDP formed the basis for engagement between the government and the local communities.[105]

However, the programme unsuccessfully worked towards bridging the gap between the rich and poor divide by prioritizing the rural areas over urban centres. The failure of the project was not because of the well intentioned and planned approach, but because of responsible financial management challenges.[106]

The donors undertook to develop the rural areas by themselves but did not have adequate knowledge of the workings of the rural population. It was difficult for them to anticipate changes and respond adequately. Their refusal to engage the central government in the development activities was partly because they felt corruption and mismanagement of resources was rampant, and the fact that the central government did not share similar intents with donor countries

[103] Joel Barkan and Michael Chege (n 101) 441.
[104] Ibid.
[105] Ibid.
[106] Ibid.

regarding the development of rural areas.[107] The central government had, for some time, chosen to focus its development activities on high performance areas while investing minimally on places with low potential.[108]

While activities under the programme were carried out transparently, and the successful projects replicated on a larger scale, failure of SRDP could have resulted from staffing challenges. The available staff could not competently manage all areas covered by the programme.[109] This resulted to minimal monitoring and supervision at the local level. In a number of instances, staff had to be seconded from donor countries to fill the staffing gaps.[110]

2.3.2 The Rural Development Fund

The structures left upon the winding up of the SRDP programme was used in the implementation of the Rural Development Fund (RDP). The SRDP provided the government with a way to work out rural development in a practical way. The RDP marked the first attempt by the post-colonial government at developing rural Kenya.

Under the RDF, the government undertook development projects which had been identified through the SRDP. Funds were channeled to each of the 40 administrative districts and were managed by the District Development Committee. Each division in the districts had a Development Officer to monitor implementation of the projects. Like the SRDP, the selected projects had input from the locals and elected leaders. This went a long way towards developing the once neglected rural areas.[111]

Management of financial resources was questionable as not all funds could be accounted for. The massive loss of government resources through corruption and lack of a clear financial reporting framework made it difficult to hold officers accountable for the lost resources.[112]

The District Development Committee did not meet frequently. There was no clear system of meetings to conduct oversight role. The committee met infrequently, despite the fact that they were paid to supervise the projects in their designated areas.[113]

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[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Ibid.
[111] Ibid.
[112] Ibid.

The government funding also faced bureaucratic challenges. Approval of RDF projects took a long time, and in some cases, planned projects were not implemented.

2.3.3 The Asiatic Widows and Orphans Pensions Fund

Although the Asian Widows and Orphans Pension fund was initially created in 1927 under the Asian Widows and Orphans Pension Ordinance,[114] it underwent fundamental transformations in 1966 under the Kenyatta administration to its current structure. The Act underwent numerous amendments since its inception, modifying and giving the Minister in charge and the President authority under the fund.

This fund was created to benefit widows and orphans of Asian civil servants who worked in Kenya but died in the course of duty, or upon their retirement. The fund is currently being wound up as it is closed to new entrants. The last entrants were registered on 1st May 1942.[115]

The Asian officers were required to contribute five percent of their annual salary towards the fund. The obligation to contribute ceased upon their attaining the age of fifty-five years. The fund is under the management of a board appointed by the President, and chaired by the Minister. Annual accounts of the fund are audited by the Auditor General, who certifies the correctness of the financial statements.

Upon the death or retirement of the officer, the dependents (wives and children) were entitled to receive a monthly sum from their fund to cater for their upkeep.[116]

The fund, maintained by the government, is discriminatory because it bars other citizens from becoming contributories to the fund. To qualify for membership, one had to be an Asian male civil servant. The strict criteria meant that women and people of African or European descent could not join the fund. The fund was also closed to Asian males who had not attained the age of thirty-five years.

The making of the rules regarding the management of the fund does not comply with democratic principles. The rules of the fund state that the board will be in charge of the fund, and is audited

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[113] Ibid.
[114] The ordinance having commenced on 22nd October 1927 was subsequently assented to as an Act of the Kenya Parliament on 15th July 1961.
[115] Asian Widows and Orphans Pension Act No. 20 of 1927.
[116] Ibid.

by the Auditor General.[117] The contributories could not engage in the decision making activities of the firm, such as through the annual general meetings.

The requirement that accounts of the fund be audited means that the management can be held accountable for loss of funds. Investment decisions were made in a prudent and responsible way, while maintaining clear reporting for investments undertaken.

This fund, although run by the government in a decentralized manner, has for a long time regarded as a dead fund because it is closed to new membership. Amounts in the fund accounts are used to maintain the living dependents of those officers who once worked with the Government of Kenya.[118]

2.4 The Daniel Moi Presidency (1978 – 2002)

During the leadership of Daniel Moi from 1978 to 2002, Kenya experienced the greatest leap of decentralization of funds from the central government in recent history.

During this tenure, decentralized funds included: the District Focus for Rural Development of 1983; the Rural Electrification Fund of 1983; the Medical Supplies Fund of 1984; Prison Industries Revolving Fund; Petroleum Development Fund of 1991; Petroleum Development Levy Fund of 1991; Prison Farm Revolving Fund of 1992; Rural Enterprise Fund of 1992; Bursary Fund of 1993; Road Levy Fund of 1993; Agricultural Information Centre Revolving Fund of 1993; Kenya Local Government Reform Program of 1995; Rural Electrification Fund of 1998; Local Authority Transfer Fund of 1998; HIV/AIDS Fund of 1999; Poverty Eradication Revolving Fund of 1999; Strategic Grain Reserve Trust Fund of 2002; and Water Services Trust Fund of 2002.[119]

2.4.1 The District Focus for Rural Development of 1983

The Moi government decentralized its development activities to the districts of Kenya through the adoption of District Focus for Rural Development Studies (DFRDS).

The implementers of DFRD had five objectives: they sought to broaden the base of development by moving decision making on planning and management of projects close to the point of

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[117] Ibid.
[118] Parliamentary Budget Office, *Fund Accounts in Kenya: Managing Complexities of Public Financial Management* (Parliamentary Service Commission, May 2011) 8.
[119] Ibid.

implementation; they wanted to mobilize and utilize local resources; they aimed at encouraging local participation to improve problem identification; to increase coordination and allow for easy sharing of development resources between development partners at the district level; and to remove delays in decision making and quicken project implementation.[120]

This strategy made districts the focal point for development. Districts had autonomy and could set their own priorities. The responsibility for identification, planning and implementation of district projects shifted from the ministry headquarters to districts. District Development Committees (DDC) took charge of development activities under the guidance and supervision of the District Development Officer (DDO).[121]

The challenge facing DFRD was political and bureaucratic control. Members of Parliament (MPs) shifted their attention from the line ministries in charge and focused on the funds allocated to the districts for development.[122] This led to an increase in corrupt activities. The structure at the districts remained hierarchical, highly centralized and vertically fragmented, which did not allow for desirable levels of public participation.

Kenyans still did not participate in the planning for development activities at the district level. It was noted that only a few Kenyans, mainly from the upper classes of the various districts, showed interest in participating in the development activities.[123]

The structures set by the DFRD processes played an important role in ensuring districts could meet emergency requirements that arose without the direct involvement of the central government.

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[120] Joel Barkan and Michael Chege (n 101) 431; Kenya Human Rights Commission and Social and Public Accountability Network, *Harmonization of Decentralized Development in Kenya: Towards Alignment, Citizen Engagement and Enhanced Accountability* (December 2010 version) 15 – 17; David Ndii, 'Decentralization in Kenya: Background Note' (September 2010) 4; Ben Chekwanda, 'Financial Impact of Devolved Funds on Economic Growth in Kenya' (MBA Thesis, Kabarak University 2014) 18 – 20.
[121] Ibid.
[122] Ibid.
[123] Ibid.

2.4.2 The Rural Electrification Programme of 1983 and Rural Electrification Fund of 1998

These were created to support rural electrification programs. The funds were collected from the Rural Programme Levy Fund (REPLF).[124] Owing to administrative challenges and the limited availability of funds from the government, the fund failed to power the rural areas of Kenya as had earlier been envisaged. Justice Karanjah, in *Kenya Power and Lighting Company Limited v Charles Obegi Ogeta*,[125] noted that the programme roles overlapped with those of Kenya Power and Lighting Company Limited, and occasioned losses and an inability to hold any of the two separate bodies, having similar mandates, responsible and accountable for losses.

2.4.3 Petroleum Development Fund and Petroleum Development Levy Fund of 1991

The Petroleum Development Fund was established by Petroleum Development Fund Act[126] with the purpose of developing common facilities for testing or distribution of oil products and for matters concerning developments in the oil industry.[127]

The Petroleum Development Levy Fund, also established by the Petroleum Development Act of 1991, was meant to finance programmes necessary to supply fuel to areas inadequately served by oil marketing companies and to cater for expenses that may arose as a result of developments in the petroleum industry.[128]

The Parliamentary Budget Committee recommended consolidation of the two fund accounts to prevent duplication of duties and loss of government revenue.[129] Petroleum products become expensive because of the instances of double-taxation for the same service while creating loopholes for corrupt officials to get away with government monies.[130]

2.4.4 Prison Industries Revolving Fund of 1987 and Prison Farm Revolving Fund of 1992

Prison Industries Revolving Fund was established under the Exchequer and Audit Act[131] by the Treasury and came into force on 1st July 1987. The purpose of the fund was to: rehabilitate and

[124] Parliamentary Budget Office (n 118) 13 – 14.
[125] [2016] eKLR.
[126] No. 4 of 1991.
[127] Parliamentary Budget Office (n 118) 10.
[128] Ibid, 11.
[129] Ibid, 14.
[130] Ibid.
[131] Section 32 (1).

train inmates and prisoners; to procure raw materials, implements, plants and equipment required for production; and to offer for sale the finished products in the market.

The Prisons Farm Revolving Fund was established under the Exchequers and Audit Act and came into operation on 1st July 1992.[132] Its purpose was to provide funds required for running and development of prison farms, and for rehabilitation and training of inmates and prisoners. Although these funds were created separately, they served nearly the same role,[133] and led to the duplication of duties in carrying out government functions.

2.4.5 Road Maintenance Levy Fund of 1993

The Road Maintenance Levy Fund (RMLF) provided for the management of roads in all parts of the country. The fund was established by the Road Maintenance Levy Fund 1993. The proceeds from the fuel levy maintenance charge are paid into Kenya Roads Board Fund.[134]

The Kenya Roads Board was created in 1999 to oversee the RMLF. The Board oversees the road network and coordinates development, maintenance and rehabilitation of the roads. The Board recommends to the government road user charges, levies, penalties, or any sums to be collected and paid into the RMLF.

In allocating the funds: 60% of the annual allocation to the fund goes to primary, national trunk and international roads; 24% is allocated to secondary roads; and 16% to rural roads. The allocation to rural roads is divided equally among constituencies within a district and is managed by the district road committees.[135]

A judicial review case filed before Justice Korir noted that there were losses of RMLF finances through theft by staff, such as by issuing payments without supporting documentation, like payment vouchers.[136] This worked to weaken the operation of the fund.

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[132] Parliamentary Budget Office (n 118) 12.
[133] Ibid.
[134] Center for Governance and Development, *National Devolved Funds Report: Institutional Structures and Procedures* (April 2007).
[135] Chris Owalla, *Management of Devolved Funds: A Case Study of Kisumu Municipality* (Community Initiative Action Group – Kenya and Ufadhili Trust, 2007).
[136] Republic v Permanent Secretary Office of the Deputy Prime Minister and Ministy of Local Government and 2 others Ex-Parte John Mutinda Kunga (Jr Application 141 of 2011) [2013]eKLR.

2.4.6 Water Services Trust Fund

Water Services Trust Fund (WSTF) was established as a body corporate under the Water Act 2002. The Trust deed was drawn up by the Minister for Water and Irrigation and was registered on 10th May 2004.[137]

Under Section 83 of the Water Act 2002, WSTF is mandated to mobilize resources and provide financial assistance towards capital financing of water and sanitation services in areas that lack adequate water services, especially those areas with poor and disadvantaged people. The fund receives financial assistance from development partners, government budgetary allocation, civil society organizations, Kenyan citizens and the private sector.[138]

WSTF in collaboration with Water Service Boards (WSBs) identifies projects to be funded based on: the Central Bureau of Statistics Geographic Dimensions of Well-Being in Kenya Report; access to quality water services; infrastructural investment in water and sanitation; and sanitation coverage levels.[139]

2.4.7 The Strategic Grain Reserve Trust Fund

The Strategic Grain Reserve Trust Fund (SGRTF), established under Legal Notice No. 55 of April 2001, came into force on 1st April 2002. The Fund serves to provide a strategic reserve of grain in cash equivalent and physical stock. The absence of a regulatory framework guiding the business relationship between SGRTF and National Cereals and Produce Board (NCPB) means that charges, commissions and fees levied by NCPB cannot be confirmed as charged to the assets of the Strategic Grain Reserve Trust Fund.[140]

However, mismanagement of strategic grain reserves and fund was well noted by Justice Musinga in *Erad Supplies and General Contractors Limited v National Cereals and Produce Board.*[141]

[137] Ibid.
[138] Center for Governance and Development (n 134) 31 – 35.
[139] Ibid.
[140] Parliamentary Budget Office (n 118) 13.
[141] [2012] eKLR.

2.4.8 Poverty Eradication Revolving Fund of 1999

Poverty Eradication Commission (PEC) was established in April 1999 and charged with the responsibility of coordinating efforts of stakeholders in undertaking advocacy for the poor and fighting poverty.[142]

PEC produced a work plan to achieve its objects. The main components of the work plan were: budgeting and financing poverty reduction initiatives in districts; implementation of the Charter for Social Integration; resource mobilization through Anti-Poverty Trust Funds (APTF) and government budgetary allocation; advocacy; publicity and campaigns of the national poverty eradication plan; training of civil servants and civil society in poverty assessment and solutions; and establishment of monitoring and evaluation systems for reviews of benchmarks and assessing progress made with regard to poverty alleviation.[143]

The pilot activities of PEC were carried out under the District Focus for Rural Development Structures. The strategy works uses the existing District Development Committees to identify needs and projects at village, sub-location, and location level for the purpose of providing funding for economic activities necessary in the strategy of poverty alleviation.[144]

In Phares Omondi Okech and 3 others v Victory Construction Company Limited and Kisumu Water and another,[145] Justice Kibunja noted that the poverty eradication programmes laid out under the PEC did not achieve their capacity, and most were not clothed with the capacity to sue, and could not therefore, enforce their rights against offenders.

2.4.9 Local Authority Transfer Fund of 1998

The Local Authority Transfer Fund (LATF) was established under the Local Authority Transfer Act in 1998, which and came into effect on 10 June 1999. LATF main objective was to provide incentives and resources to enable local authorities to supplement the financing of services and facilities were required to provide under the Local Government Act.[146] The fund was initially allocated 2% of the national income, but gradually expanded to 5% by 2010.

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[142] Ibid.
[143] Center for Governance and Development (n 134) 17 – 30.
[144] Ibid.
[145] [2015]eKLR.
[146] Local Authority Trust Fund Act 1998.

Specifically, the fund was to enable local authorities improve on: debt resolution; financial management; and local service delivery.

Local authorities would pass an annual budget, which after approval by the Minister of Local Government, will be partly funded through the LATF programme under the national budget.

To ensure that funds were allocated in a transparent, predictable and fair manner: a basic minimum sum of Kshs. 1.5 million was allocated to each local authorities; 60% was allocated relative to the population of each local authority; and the remaining amount allocated based on the relative urban population.[147]

To qualify for funding, each local authority was mandated to: provide a statement of debtors and creditors with explanation of how they were reducing their debts; statement of receipts, payments and balances; revenue enhancement plan outlining how the local authority intended to mobilize resources and increase revenue; a copy of the set of accounts submitted to the Controller and Auditor General for audit; and the Local Authority Service Delivery Action Plan (LASDAP) documenting that the local authority used a public participatory approach in identifying 3-year programme of activities and projects linked to the proposed budget.[148]

The LATF faced numerous challenges, including the non-payment of suppliers, and lack of accountability on the accounting officers, among others. One such case involved the Nairobi City area where the funds in the authority were not released to clear a debt amounting to Kshs. 31,333,689.83 in furtherance of a court order. In all cases, the town clerk and chief officers were not equally held to account.[149]

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[147] Center for Governance and Development (n 134) 42 – 47; Chris Owalla (n 135) 5; Kenya Human Rights Commission and Social and Public Accountability Network, *Harmonization of Decentralized Development in Kenya: Towards Alignment, Citizen Engagement and Enhanced Accountability* (December 2010 version) 33 – 44; Parliamentary Budget Office (n 188) 6 – 8.
[148] Ibid.
[149] Wachira Nderitu, Ngugi & Company Advocates v Town Clerk, City Council of Nairobi [2013] eKLR.

2.5 The Mwai Kibaki Presidency (2002 – 2010)

Mwai Kibaki took office as President of Kenya from December 2002 to March 2013. Important institutional reforms occurred during the Kibaki presidency, including the ushering of the Constitution in 2010.

Under his tenure, Kibaki oversaw the establishment of a number of decentralized funds for economic development and social accountability purposes. The funds included: the Constituency Development Fund of 2003; the Free Primary Education Fund of 2003; the Secondary Schools Education Bursary Fund of 2003; the Civil Servants Housing Scheme of 2004; the Disability Fund of 2004; the Women Enterprise Fund of 2006; and the Economic Stimulus Package of 2009.

2.5.1 Constituency Development Fund of 2003

The Constituency Development Fund (CDF) was viewed as a strategic driver of socio-economic development and regeneration within Kenya. This development initiative targeted constituencies by devolving resources to the grassroots to meet socio-economic objectives which were previously managed by the central government. CDF aimed to finance projects that had immediate socio-economic impact: to improve lives; for general development purposes; and to alleviate poverty.

CDF was established through the CDF Act 2003.[150] The fund was administered by an officer under the direction of the National Management Committee, comprising of annual budgetary allocation of 2.5% of the government revenue and any other monies that accrued or was received by the National committee. Expenditure under the fund was subject to a ministerial approval, and was in respect to the provisions of the Act.

The Act established four committees to manage the fund at various levels: the National Management Committee and the National Constituency Development Fund Committee at the national level; and the District Projects Committee and the Constituencies Development Committee at the grassroots.[151]

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[150] Kenya Gazette Supplement No. 107 (Act No. 11) of 9th January 2004; Ben Chekwanda, 'Financial Impact of Devolved Funds on Economic Growth in Kenya' (MBA Thesis, Kabarak University 2014) 22 – 23.
[151] Ibid.

The Constituencies Fund Committee considers proposals submitted from constituencies and recommends to the clerk of the National Assembly for implementation. The clerk submits the proposals and includes in the printed estimates. The committee oversees the implementation of the Act and oversees policy framework and legislative issues in relation to the Fund.

The District Projects Committees for every district coordinates implementation of projects financed by the fund within the districts. The committee required a quorum of at least one half of the membership to transact business and met at least once every three months.

Projects to be funded were settled on upon discussions with constituency members. The constituencies were encouraged to initiate and maintain a project committee for each project under consideration. The head of the project committee was held responsible for the project implemented under his watch.[152]

Despite the success of CDF, the fund faced a number of challenges. First, some projects had governance problems. Some people who were allocated money to run projects did not have the skill required to carry out projects to completion.[153] Second, some projects were never fully implemented. This arose as some projects were abandoned before completion; and was often occasioned by a change in Member of Parliament in the constituency.[154] Third, there was the challenge of monitoring and evaluation. Some projects failed because the project committee failed to see the project through to completion and by not offering effective supervision services. Lastly, the application of the fund was not always efficient and effective. There are reports showing how the CDF monies were mismanaged, misappropriated or lost through corruption.[155] It did not therefore come as a surprise when in the 2015 judgment of Petition 71 of 2013 before the Constitutional and Human Rights Court at Nairobi, in a case filed by the Institute of Social Accountability against the National Assembly, the Senate, the Attorney General, and the CDF Fund Board, Justices Isaac Lenaola, Mumbi Ngugi, and David Majanja declared CDF unconstitutional.[156]

[152] Center for Governance and Development (n 134) 11 – 16.
[153] Chris Owalla (n 135) 28.
[154] Ibid 12. A picture of a section of an incomplete classroom at Usoma Primary School, Kisumu County, which was being built by CDF (2003/2004).
[155] Ibid 29.
[156] Ibid.

2.5.2 Free Primary Education Fund of 2003

Free Primary Education (FPE) was unveiled by the NARC administration in January 2003. The programme allowed children in public primary schools to access education by providing instructional materials and meeting the general purpose expenses for school going children.

Prior to the initiation of the programme, instructional materials for public schools were centrally procured from government funded publishing houses. The central procurement systems had its shortcomings and led to inconsistencies as some schools did not get materials they needed.[157]

Under FPE, public primary schools were required to operate two accounts. One account was for the instructional materials (in which the government deposited Kshs 650 per pupil) and the general purpose account (in which the government deposited Kshs 370 per pupil). The general purpose account was meant to support daily operational activities within the school while the instructional materials was meant to support purchases such as textbooks, exercise books, registers, carts, wall maps, supplementary reading and reference materials.[158]

Teachers and the school committee members were required to attend seminars and visit the Local Teacher Advisory Centers to seek more information and to exchange books with other schools to promote learning. Consultation among schools was emphasized as schools were able to borrow books copies and sample of instructional materials that they did not have.[159]

The task of determining the school supplier was for the school committee. To qualify as a supplier, one required: a bank account; a company registration certificate and a trade license; permanent premises; and at least three years' experience in selling stationery or books. Schools were mandated to obtain quotations from at least three suppliers.[160]

The Fund continues in operation, with basic education being made free and compulsory.[161] FPE was largely hailed as a success because of its participatory approach in the management of

[157] Center for Governance and Development (n 134) 39 – 43; Kenya Human Rights Commission and Social and Public Accountability Network, *Harmonization of Decentralized Development in Kenya: Towards Alignment, Citizen Engagement and Enhanced Accountability* (December 2010 version) 51 – 53; Wilfred Nyangena, George Misati and Daniel Naburi, How are our Monies Spent: The Public Expenditure Review in eight Constituencies (Action Aid 2010) 46.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161] Basic Education Act 2013. This Act was enacted pursuant to Article 53 of the Constitution of Kenya 2010.

school funds. Schools were required to form a committee that made decisions on the management of funds deposited in their accounts. The management committee was headed by the head teacher, while the monitoring team was headed by the deputy head teacher of the participating school. The schools were given the allowance of choosing to purchase books that they felt was most needed. This meant that the school administration was free to consult and determine what they purchased, and what they borrowed from neighboring institutions.

The fund management demanded accountability. The school committee responsible for purchases was separate from the committee that monitored and supervised the use of the resources. Separation of duties allowed for independence and encouraged transparency in the management of school funds. Despite delays in the disbursement of funds, and instances of misappropriation of resources, the part success of this fund led to its expansion to secondary schools, where the government undertook to offset some amounts from the tuition fee charged to secondary school students.

2.5.3 The Women Enterprise Fund of 2006

Women Enterprise Fund (WEF) was officially launched in 2007 after being conceived by the government in 2006. The fund aimed to empower women economically through loans. The loans were advanced through constituency women enterprise scheme and other financial intermediaries such as banks. The initial capital allocated for the fund was Kshs. 1 billion.[162]

A research done on WEF in Eldoret Kenya found that the fund had a positive effect on women's and household incomes. Improved access to credit occasioned by WEF led to better education for children, healthier nutrition for the family, and more household assets. Families with access to this credit recorded a higher standard of living than those without.[163]

The report notes that businesses with access to WEF were higher performing than those without.[164] Women were able to use the funds to purchase additional stock for use in their businesses. This led to an increase in the instances of successful women in business. The availability of funds played a role in bridging the gender gap between men and women.

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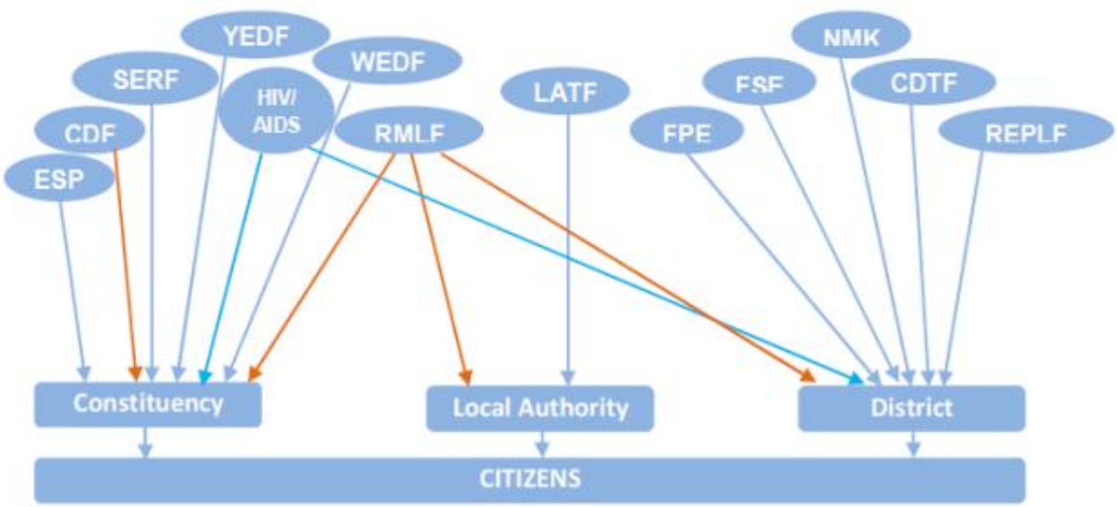
[162] Parliamentary Budget Office (n 118) 5 – 6.

[163] Gideon Omwono, Dick Oyugi and Wanza Munithya 'Effect of Women Enterprise Fund Loan on Women Entrepreneurs: A Survey of Small and Medium Enterprises in Eldoret Town, Kenya (2015) Vol 6 No 12 International Journal of Business and Social Science 72, 83.

[164] Ibid.

The report further notes that social welfare of women in general improved. Women were able to engage in social activities. Previously, most women did not engage in social activities because the lacked funds and were looking for ways to supplement their incomes.[165]

Recommendations were put forth to make the fund more successful. The recommendations included: lowering interest rates on loans; reduction of loan processing time and giving of individual loans; lowering the amount of savings required for one can access the loans; change the loan repayment cycle from weekly to monthly; and increasing the amount of loans granted to women borrowers.[166]



A framework showing the classification of devolved funds in postcolonial Kenya (Source: Institute of economic Affairs cited in TISA Proposal to task force on devolution)

[165] Ibid.
[166] Ibid, 84.

2.6 The New Constitutional Dispensation (From 2010)

The Constitution 2010 ushered the era of devolved governance. County governments were established and were tasked with carrying out certain constitutional duties.[167] The National Government was constitutionally mandated to share part of its revenue with the County Governments.

The LATF programme became defunct with local governments and with the initiation of the devolved form of governance at county level. In addition to the newly created Uwezo Fund and the Equalization Fund for Persons with Disabilities[168] all the other funds launched by previous administrations were still being implemented after the promulgation of the Constitution. The funds faced a similar problem related to mismanagement of finances

2.7 Conclusion

This chapter discusses the historical evolution of devolved funds since 1963 under the political leadership of the Presidents Kenyatta, Moi and Mwai Kibaki, to the promulgation of the Constitution in 2010.

The foregoing discussion notes that despite the many devolved funds that existed throughout the different regimes, most did not achieve their intended goal of stemming poverty and countering rural urban migration. Most of the devolved funds did not have their anticipated effect owing to mismanagement. The enactment of the PFM Act in 2012 hoped to deal with all financial mismanagement. The few cases of successful management of devolved funds, as noted through this chapter, indicate that through proper laws, policies, institutions and governance framework, devolution of resources is likely to have a positive impact on the lives of Kenyans.

Kenya's dalliance with devolved funds led her to adopt a devolved form of constitutional governance in an attempt to firmly entrench financial devolution and guarantee its success. Chapter three examines the management of devolved funds at the counties in Kenya under the PFM Act 2012, and whether the Act has indeed reined in on the mismanagement of public financial resources.

[167] The distribution and division of duties between the National and County Governments are outlined in the Fouth Schedule to the Constitution.

[168] Uwezo Fund was launched through Legal Notice No 21 of the PFM Act, 2014; Equalization Fund for Persons with Disabilities was launched though the 2013 amendment to Persons with Disability Act (No 14 of 2003).

Chapter three considers the financial devolution framework in Kenya counties as laid out by the Constitution, the PFM Act and the challenges counties experienced in the administration of public resources.

CHAPTER THREE: THE FRAMEWORK AND CHALLENGES FACING FINANCIAL DEVOLUTION MANAGEMENT IN KENYA COUNTIES

3.1 Introduction

Financial devolution was firmly entrenched in Kenya's legal structure as a way of empowering and developing rural communities and to contain rural-urban migration. Devolution, as envisaged in the Constitution of Kenya 2010, marked the culmination of several years of piecemeal devolution since Kenya's independence. Because this move was unprecedented in the country's history, it carried a lot of promise and hope for leaders and the citizenry.

The structure and operation of the County Governments is outlined in the Constitution and the County Government Act. The National Government is mandated to ensure that counties are funded yearly. These funds are to be used by counties in a prudent manner in carrying out their responsibilities.

The management of public funds at county level has been outlined in various legislations. Article 201 of the Constitution lays down the basic financial management principles. These principles include: openness; accountability; equity; public participation in financial matters; prudence; and responsible use of public resources, in addition to responsible financial management.

The PFM Act outlines fiscal responsibilities for county governments while the Public Finance Management (County Government) Regulations is designed to action the various requirements of the PFM Act. These regulations give guidance on: the maintenance of records on revenue collected as well as spending authorizations at the appropriation and funds-release levels; recording all transactions when they take place, applying the requisite controls, posting them to the relevant account and maintaining a list of transactions and associated data for control and audit; maintaining ledger controls to monitor and control actual expenditure and receipts against budget and warrant controls; and reporting on monthly, quarterly and annual basis.

This chapter is based on the PFM cycle, and the analysis of county government performance followed key public finance indicators. The indicators include: formulation of plans and budgets; the execution of budgets; accounting and reporting of financial transactions; and internal and external audits, oversight and scrutiny of plans, budgets and reports. This chapter further analyzed how counties manage their revenues, debts; and procure goods and services, and if these processes were in line with the principles of public finance, as laid out in the PFM Act.

3.2 Planning Process

The PFM cycle starts with the planning process. The planning function is coordinated by the Planning Units at the counties. The planning process is to be in alignment with national priorities. Plans form the basis for budgeting and spending within the county.

Planning is the logical organization of activities towards the achievement of county government objectives, while budgeting is the financial representation of this plan. Effective planning and allocation of resources is critical because the demand of public goods always exceed the supply. The Constitution provides that national legislation shall prescribe: the structure of development plans and budgets of counties; when the plans and budgets of counties shall be tabled in the county assemblies; and the form and manner of consultation between the national and county governments in the preparation of plans and budgets.[169] The PFM Act mandates county governments to prepare development plans and cash flow projections for the next financial year.[170] These form the background for budgetary allocations.

The County Government Act further requires counties to develop the Five Year County Integrated Development Plan, the Ten Year County Sectoral Plan, County Spatial Plans and Cities and Urban Areas Plans. Section 126 of the Public Finance Management Act requires county governments to prepare Integrated Development Plans which reflect strategic priorities for the medium term and a description of how county governments are responding to changes in financial and economic environment. The development plan creates projects and expenditure items on which the annual budget is derived. [171] Section 36 of the Urban Areas and Cities Act emphasizes on the need for Five Year Integrated Development Plan and the need to align county budgeting to this plan. The Intergovernmental Relations Act establishes the National and County Government Coordinating Summit to provide inclusive and participatory governance and to promote accountability to the electorate in decision making. The Intergovernmental Relations Act further establishes the Council of County Governors to provide a forum for consultation and planning among county governments.

[169] Constitution of Kenya 2010, art 220 (2).
[170] PFM Act, ss 126 – 127.
[171] Chrispine Oduor, *Handbook on County Planning, County Budgeting and Social Accountability* (Institute of Economic Affairs) 15.

The PFM Act outlines fiscal responsibilities for planning in county governments, in particular, the need: to ensure that recurrent expenditure does not exceed total revenue; at least 30 percent of the budgetary allocation is for development purposes during the medium term; to maintain expenditure on wages and benefits within the set limits; to ensure that all borrowings are used to finance development activities; to maintain sustainable debt levels; to ensure tax rates and bases are predictable; and to practice fiscal prudence.

The planning processes, in spite of the clear provisions in the PFM Act, where it is entrenched as a tool for ensuring harmony between national, county and sub-county units, and to facilitate the development of a well-balanced system to ensure productive use of scarce resources, has not lived to its promise.[172]

County governments have faced a number of challenges with regard to the development of plans, including: failure by to develop and institutionalize planning processes at all levels of government; plans are not based on realistic expectations concerning future availability of resources; failure to create capacity to manage public private interface and to leverage private sector activities in meeting public objectives; plans are not flexible and are not revisited periodically as circumstances change; planning is not based on sound information on current expenditure trends in addressing short, medium and long term issues; and the failure to reflect issues identified during the planning stage on the budget.

3.2.1 Failure to develop and institutionalize planning processes at all levels of government

Plans need to be developed and institutionalized across all levels of the county government in order to facilitate the development of a well-balanced system and ensure prudent utilization of resources to create harmony in development across the area under the county government. The different levels of planning envisaged by county government legislations was to factor settlements with populations of at least two thousand residents[173], towns, municipalities, cities, sub-county units, ward units and village units.

[172] Ibid.
[173] Urban Areas and Cities Act, s 36(3).

However, as noted by the Auditor-General, sampled counties of Murang'a[174], Laikipa[175], Makueni[176] and Busia[177] did not develop the county plans to this effect. The Controller of Budget noted contrary to section 155 (5) of the PFM Act, Makueni County failed to prepare the debt management strategy plan and ensure it is approved by the county assembly.[178] Nairobi County equally failed to get the assembly's approval of its debt management strategy plan, designed to manage the outstanding liabilities.[179]

3.2.2 Plans not based on realistic expectations concerning future availability of resources

Because plans are an important step in budget preparation, it is important that plans are based on realistic expectations on future resources availability for them to be executable. Plans that do not take into account accurate revenue inflows become unreliable, unrealistic, and are likely to render the budgeting process useless. This ultimately devalues effective planning and budgetary processes.

In analyzing the planned and actual figures for Turkana County, the Controller of Budget noted a huge disparity. The county planned to raise local revenues to the tune of two hundred million shillings, but managed eighty-four million six hundred thousand shillings. This represented a forty-two percentage of the annual target. [180] Vihiga County equally approved a plan targeting to raise one billion shillings from local sources, but managed to raise ninety-five one hundred and eighty million shillings.[181] The Auditor General also this problem with Kericho County, where the county budgeted to collect six-hundred and thirty million shillings but it managed to collect

[174] Auditor-General, *Report of the Auditor-General on the Financial Operations of Muranga County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 7.
[175] Auditor-General, *Report of the Auditor-General on the Financial Operations of Laikipia County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 6.
[176] Auditor-General, *Report of the Auditor-General on the Financial Operations of Makueni County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 3.
[177] Auditor-General, *Report of the Auditor-General on the Financial Operations of Busia County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 7.
[178] Office of the Controller of Budget, *County Governments Budget Implementation Review Report: First Nine Months Financial Year 2015 – 16* (Republic of Kenya May 2016) 181.
[179] Office of the Controller of Budget, *Annual County Budget Implementation Review Report Financial Year 2014 – 15* (Republic of Kenya August 2015) 189.
[180] Office of the Controller of Budget (n 178) 315 – 321.
[181] Ibid, 329.

three hundred and sixty, resulting in a significant under-collection of revenue.[182] This means that those counties did not have sufficient funds to enable them implement their budgets.

3.2.3 Failure to create capacity to manage public-private interface and leverage private sector activities in meeting public objectives

Partnerships between the public and private sectors are important for a streamlined development of counties without strain on public resources. Such partnerships allow organizations of interest to invest in public activities that are likely to yield returns in the future, thereby freeing up government's funds into providing services that cannot be easily met through private enterprise.

This challenge of fostering public private partnerships was pronounced in counties like Kitui where county government officers were not trained and inducted into what their role in the development and execution of work plans and public-private partnerships was.[183] Nakuru County, on the other hand, could not develop these partnerships as it lacked critical records like the asset register.[184] The asset registers are critical in the development of plans and fostering partnerships with private entities. Narok was equally hampered by county's failure to embrace the use of Information and Communication Technology in its operation.[185]

3.2.4 Planning not based on sound information on current expenditure trends in addressing short, medium and long-term issues

The County Government Act requires counties to come up with plans, which then form basis for appropriating public funds, and the plans ought to integrate economic, physical, social, environmental and spatial measures, and to be based on sound information on current expenditure trends in order to address short, medium and long-term issues affecting counties.[186]

The County Assembly of Migori spent upwards of Kshs. 2,000,000 on foreign trips by members of the county assembly to Rwanda, Uganda and Canada, yet details as to the benefit of those

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[182] Auditor-General, *Report of the Auditor-General on the Financial Operations of Kericho County Executive for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 4 – 5.
[183] Auditor-General, *Report of the Auditor-General on the Financial Operations of Kitui County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 4.
[184] Auditor-General, *Report of the Auditor-General on the Financial Operations of Nakuru County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 12.
[185] Auditor-General, *Report of the Auditor-General on the Financial Operations of Narok County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 10.
[186] County Government Act ss 104 (1) and (2) (a).

trips, and reasons why those destinations were selected was not clear from the planning documents, nor was this information availed after the trip.[187] Inasmuch as the trips are essential for benchmarking and obtaining important information that can benefit the county, these benefits ought to be outlined in the planning documents, including how that expenditure will be used in addressing challenges faced by the county. Similarly, in Wajir County, there were unsupported daily subsistence allowances of work carried out by a committee of the County Assembly.[188] However the allowances were not planned for, and neither was the program of work availed for audit to support the expenditure. It is difficult to deduce how these programs, especially when supporting documentation is not availed, will address challenges faced by the county.

3.2.5 Failure to reflect issues identified on the planning stage in the budget

The County Government Act provides that County plans shall form the basis for all budgeting and spending in the county.[189] All issues identified at the planning stage ought to be reflected in the annual budgets to guide, harmonize and facilitate development within the county. This further ensures harmony between national, county and sub-county spatial requirements, and integrates issues identified during the planning stage to harmonize development and develop urban and rural areas as integrated areas of economic and social activity.

Although Kajiado County Assembly planned for a training assessment required for county government staff,[190] it failed to include in its budget. Whereas the training was offered, the trainers were not prequalified during the period under review as this activity had not been included in the budgetary proposals. In Kisumu County, because plans were not followed consistently, they were not captured in the budget for the financial period under review.[191] In

[187] Auditor-General, *Report of the Auditor-General on the Financial Operations of Migori County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 15 – 6.
[188] Auditor-General, *Report of the Auditor-General on the Financial Operations of Wajir County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 5.
[189] County Government Act s 107 (2).
[190] Auditor-General, *Report of the Auditor-General on the Financial Operations of Kajiado County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 10 – 1.
[191] Auditor-General, *Report of the Auditor-General on the Financial Operations of Kisumu County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 11.

Mandera County, the county assembly did not prepare procurement plans, and did confirm that planned expenditures were budgeted for.[192]

3.2.5 Failure to bring all stakeholders on board during the planning stage

It is important to bring all stakeholders on board during the planning stage because successful planning requires implementation stretching over a period that extends beyond the life of one democratically elected administration. The Act provides that planning should serve as a basis for engagement between county governments, the citizenry, and other stakeholders and interest groups.[193] The Act further provides that plans should promote public participation, requiring non-state actors to be incorporated in the planning processes by all authorities.[194] The Act makes citizen participation mandatory during the planning stage.[195]

In contravention to the provisions above, county governments actively locked out citizens out of decision making in a number of ways. In Wajir County, despite protest notes to the County Finance Executive by civil societies, on the basis that the notice given for a budget planning forum was short, the executive committee meeting still went on, without regard to the fact that interest groups in the county were not in attendance.[196] Further, most counties are yet to develop policies and laws that should guide public participation.[197] A survey conducted by Twaweza East Africa noted that only 19 percent of citizens participated in meetings organized by county administrations.[198] County executives and members of the assembly also avoid scrutiny by the public and interest groups.

3.3 Budgeting

The policy document that informs county government budgets is the County Fiscal Strategy Paper. The County Treasury is to align the County Fiscal Strategy paper to the wider national goals set out in Medium Term Expenditure Framework, the national objectives in the Budget Policy Statement (BPS) and Vision 2030. The process aims to ensure sustainable economic growth through prudent management of resources.

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192 Auditor-General, *Report of the Auditor-General on the Financial Operations of Mandera County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 11.
193 County Government Act, s 102 (i).
194 Ibid, s 104 (4).
195 Ibid, s 106 (4).
196 Kennedy Kimanthi, Daily Nation, 'Counties lock citizens out of key decisions' April 22 2016.
197 Ibid.
198 Ibid.

The PFM Act identifies stages for the county budget process as covering: the development of County Integrated Development Plan (CIDP) which is to include long term and medium term plans; planning and establishing financial and economic priorities for the county over medium term; the preparation of the County Budget Review and Outlook Paper (CBROP) and the debt policy document to provide input in setting fiscal and economic priorities for the county; the making of an overall estimation of the county government's revenues and expenditures; the adoption of the County Fiscal Strategy Paper; the preparation of budget estimates for the county government and submitting them to the county assembly; approval of estimates by the county assembly; the enactment of an appropriation law and other laws required to implement the county government budget; the implementation of the county government's budget and accounting for, and evaluating the county government's budgeted revenues and expenditures; and to account, monitor and evaluate.[199] The Act emphasizes that public participation is mandatory throughout the budgeting process.[200]

The counties encountered a number of challenges during this process: some county budgets did not reflect the overall economic policy, both in focus and scale; budgets were not accurate, informative and comprehensive, and failed to encompass all government revenues and expenditures; budgets were not based on a medium to long-term framework; preparation of budgets did not follow a participatory and transparent approach; the budget cycle did not provide for informed discussions by county assemblies; comprehensive information on the budget and its out-turn was not widely available within a reasonable time to inform debates; and there was no monitoring of progress during and after the budgetary process.

3.3.1 Failure of county budgets to reflect the overall economic policy

County budgets need to reflect the overall economic policy. This includes: an analysis and an explanation of revenue policy, including planned changes to taxes and policies affecting revenues; a statement of deficit and debt policy, including an analysis of county debt sustainability; an expenditure policy, including expenditure priorities, aggregate expenditure intentions; an explanation of fiscal policies in relation to fiscal responsibility principles and any temporary measure to be implemented to ensure compliance; and an analysis of the consistency

[199] PFM Act, ss 117 – 8; ss 125 – 36.
[200] Ibid, s 137.

of the updated fiscal strategies with previous fiscal strategies, providing an explanation for any significant changes.[201] All these ensures that county spending, through its budget statement, is aligned with the national economic policy in any given fiscal period.

As noted by the Controller of Budget, Kisumu County prepared and enforced finance laws that were not consistent with the national economic policy and were in contravention with the Constitution, the PFM Act and the PFM (County Government) Regulations.[202] Likewise Kwale County failed to operationalize the County Public Fund in line with the economic policy under the Act.[203] Kajiado County failed to implement its finance policy because of legal challenges it faced, thereby affecting budget implementation.[204] Large commitments by the County Government of Nakuru, which exceeded its budgetary allocations, made it difficult for the county to carry out its economic policy role.[205] In Vihiga County, important county departments, such as Transport and Infrastructure department, did not feature in the budget and the economic outlook paper despite having implemented projects during the fiscal year.[206]

3.3.2 Budgets not accurate, informative and comprehensive

Budgets must encompass all government revenues and expenditures. The County Government Finance Regulations makes it mandatory for counties to estimate revenue and expenditure items and factor them into the county government budget.[207] Budget estimates are to be examined by the internal audit departments to ensure accuracy and comprehensiveness. The regulations make it an offence to provide budgetary information that is misleading or incorrect.[208]

Garissa County Assembly incurred certain capital expenditures without the authority of planning documents and the budget.[209] Kakamega County assembly provided budget estimates that were not realistic and accurate as required by the Government Financial Orders. Out of a budgeted expenditure amounting to four hundred and ninety-one million, four hundrend and seventeen

[201] PFM (County Government) Regulations, Legal Notice No 35 of 2015 s 27.
[202] Office of the Controller of Budget (n 178) 138 – 9.
[203] Ibid, 153.
[204] Office of the Controller of Budget (n 179) 77.
[205] Ibid, 195.
[206] Ibid, 266.
[207] PFM (County Government) Regulations, Legal Notice No 35 of 2015 s 31.
[208] Ibid, s 33 (3).
[209] Auditor-General, *Report of the Auditor-General on the Financial Operations of Garissa County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 3 – 4.

thousand and seventy two shillings, the assembly only managed to spend two hundred sixty-eight million, eight hundred and twenty seven and one shillings.[210] Isiolo County likewise recorded low revenue collection, which stood at 23.8 percent of the annual target, thereby challenging the reliability of the budget and of the planning documents.[211] Likewise Isiolo County, Nandi County set unrealistic revenue targets for the financial period under review.[212]

The approved budget for development expenditure in Meru County, which was uploaded to the county system and used by officers, varied from the budget approved by the County Assembly.[213]

3.3.3 Budgets not based on medium to long-term framework

To enhance predictability in departmental allocations and create a positive impact on planning and execution within the government, annual and multi-year budgets should be based on medium to long term framework. The Act requires that over the medium term, county budgets should allocate a minimum of 30 percent of the budget to development expenditure.[214]

Kiambu County, as noted by the Controller of Budget, failed to allocate 30 percent of the County budget to development expenditure.[215] This went against the medium and long-term framework established for counties.

3.3.4 Budgets not participatory and transparent

Budget preparation process includes all stakeholders, civil society, private sector, and county assembly public hearings, as well as full and open media coverage. The PFM Act makes it mandatory, during the budgetary process, for the county treasury to seek and take into account the views of: the Commission on Revenue Allocation; the public; any interested persons or groups; and any other forum that has been established by legislation.[216] The budget document

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[210] Auditor-General, *Report of the Auditor-General on the Financial Operations of Kakamega County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 6 – 7.
[211] Office of the Controller of Budget (n 178) 82.
[212] Office of the Controller of Budget (n 179) 199 – 200.
[213] Ibid, 202.
[214] PFM Act, s 107 (2) (b).
[215] Office of the Controller of Budget (n 179) 94.
[216] PFM Act, s 117 (5).

should be circulated as widely as possible, for the public and interested persons, including publishing it on the county treasury website.[217]

In spite of the above provisions, Kilifi County, Marsabit County and Siaya County failed to establish the County Budget and Economic Forum (CBEF) to provide a means of consultation between the County Government, stakeholders and the public on matters relating to budgets and financial management.[218] Although the CBEF was established in Kirinyaga County and Uasin Gishu County, they were inactive during the period under review.[219]

3.3.5 Budget cycle did not provide sufficient time for informed discussions by stakeholders and the county assembly

Comprehensive information on the budget and it's out-turn should be widely available within a reasonable time to inform debate by stakeholders and members of county assembly. Delays in submitting budgetary documents, such as the CBEF to the county assembly, means that the budgetary timeline is undermined, and proper consultations will not be conducted within the envisaged statutory period.

Baringo County, Busia County and Machakos County failed to adhere to these budgetary timelines by delaying to approve budget policy documents such as the ADP, CFSP and CBROP.[220] Embu County,[221] Nyamira County[222] and Turkana County[223] equally failed to approve supplementary budgets on time to correct inconsistencies in the preceding year as well as capture emerging issues during the budget implementation process, and to facilitate the smooth implementation of activities started during the previous financial years.

3.3.6 Poor monitoring of progress during and after budgetary process

The budgetary process is focused on enduring better incomes, rather than inputs. It is therefore imperative for the progress to be monitored to ensure that any divergence or changes to the budget is captured and corrected during the next budget cycle. Monitoring of budgets also

[217] PFM (County Government) Regulations, Legal Notice No 35 of 2015, s 30 (5).
[218] Office of the Controller of Budget (n 178) 117 – 8; 160; 286.
[219] Ibid, 124 – 5; 328.
[220] Ibid, 30; 50; 168.
[221] Ibid, 63.
[222] Office of the Controller of Budget (n 179) 210.
[223] Ibid, 256 – 7.

ensures that financial transactions undertaken during the period have been budgeted for, and are in line with national economic and fiscal policy and county objectives.

Contrary to section 155(5) of the PFM Act 2012, Laikipia County, Lamu County, Machakos County, Makueni County, Migori County, Nyamira County, Nyandarua County, and Siaya County failed to establish an internal audit committee and to institute monitoring and evaluation teams to oversee implementation of the budgeted development projects.[224]

3.4 Revenue Collection

Whereas County Governments are entitled to a share of the national revenue from the central government, article 209 of the Constitution empowers counties to raise their own revenues in the form of taxes and charges. County governments may impose entertainment and property taxes, and any other taxes that they are authorized to impose. Taxes imposed by counties must however not be prejudicial to economic activities across counties, national economic policies or the mobility of capital, labor, goods or services. The revenue raised is to finance county activities.

In the financial year 2013 – 14 counties cumulatively raised revenue of Kshs. 26.3 billion in local revenue. This accounts for 48.5 percent of the annual target in that financial year.[225] In the financial year 2014 – 15 counties generated Kshs. 33.85 billion, translating to 67.2 percent of annual revenue target.[226]

The reports for the two years indicate that counties consistently failed to meet their local revenue targets. This cripples the effective working of county governments. Locally generated revenue is important in financing county budgets.

The specific rules governing the collection of county government revenue are outlined in sections 157 – 61 of the PFM Act. These rules may point us to some of reasons why counties failed to meet their revenue targets.

[224] Office of the Controller of Budget (n 178) 160; 167; 174; 181; 208; 257; 264; 286.
[225] Office of the Controller of Budget, *Annual County Budget Implementation Review Report Financial Year 2013 – 14* (Republic of Kenya August 2014) 3 – 4.
[226] Office of the Controller of Budget (n 179) 3 – 5.

3.4.1 Inappropriate tax policy for counties

Kakamega, a county in rural Kenya, managed to raise 11.6 percent of its annual target revenue[227] while Nairobi, a city county, raised 63 percent of its annual target.[228] This wide discrepancy in rates between the city counties and the rural counties is attributable to the fact that existing tax policy empowers counties to levy taxes that are favorable to city establishments rather than rural areas. Not much entertainment and property tax can be raised in rural areas.

The legal regime currently allows counties to operate entertainment taxes and property taxes. While these taxes may be favorable for the cities, counties in the rural areas are disadvantaged as they may be unable to raise much in these taxes. Ideally, counties should be allowed to determine their own tax policies. This will enable them take advantage of the prevailing economic activities in their areas of operation. This is because different regions have varied needs. No two counties are the same.

3.4.2 Poor coordination between tax policy and administration departments

The Controller of Budget (CoB) noted that Nairobi County persistently utilized locally collected revenue at source.[229] While in Kitui County, the report noted that the department of Health and Sanitation spent revenue collected before having it deposited in the County Revenue Fund (CRF).[230] Other counties that failed to deposit all revenue collected are Kisii County[231], Kisumu County[232], and Makueni County[233].

The PFM Act stipulates that the County Treasury for each county government should ensure that all monies raised or received by the government is paid into the CRF. In the cases outlined, the provisions of the Act were not complied with. No action was taken against the respective County Treasurers and the Act is not also specific on the consequences of the failure to abide by the provisions of section 109.

[227] Office of the Controller of Budget (n 225) 64 – 68.
[228] Ibid, 132 – 135.
[229] Office of the Controller of Budget (n 179) 185 – 190.
[230] Ibid, 122.
[231] Ibid, 110.
[232] Ibid, 116 – 117.
[233] Ibid, 149 – 151.

3.4.3 Legal and human capital empowerment of tax administration department

A study of Nakuru County revealed that counties continually face human resource challenges in the administration of its duties. There may not be sufficient resources to attract and keep competent staff, as well as offer the existing continuous employees training and development.[234] While the PFM Act empowers the County Executive Committee (CEC) member for finance to designate persons as receivers and collectors of county government revenue, it does not provide for the number of persons that should be appointed. This may result in the appointment of few receivers and revenue collectors, leading to low levels of revenue collection. The Act does not also provide for continuous training of the members of the tax administration department to enhance and upgrade their skill of revenue collection.

Further, the PFM Act has not empowered county governments to take legal action in cases where county residents refuse or default in paying rent and rates. The provisions for recourse in the cases of non-payment would have made the collection of revenue easier and faster than it currently is.

3.4.4 Adequate systems and data for accurate forecasting

In the financial year 2013 – 14 Bungoma, Nairobi and Nyeri counties projected to raise annual local revenue of Kshs. 2.7 billion, 15.9 billion and Kshs. 479 million respectively.[235] In the succeeding financial year 2014 – 15 the same counties projected to raise Kshs. 1 billion, Kshs. 13 billion and Kshs. 1.3 billion. Under the same economic environment, such huge discrepancies in the projected amounts are usually indicative of underlying systemic weaknesses that relate to forecasting.

The Auditor-General, while reporting on the under collection of local revenue in Bungoma County, noted 'estimated collections in the approved budget should be realistic and achievable. …the county faces the risk of failure to meet expenditure needs.'[236]

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[234] Peter Cheruiyot and Josephat Kwasira, 'An Assessment of Devolving Human Resource Function in Kenya: A Case Study of Nakuru County' (2013) Vol 3 Issue 4 IJHRMR 61.
[235] Office of the Controller of Budget (n 225).
[236] Auditor-General, *Report of the Auditor-General on the Financial Operations of Bungoma County Executive for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 4.

While sections 125 – 36 of the PFM Act require counties to make annual projections of the locally generated revenue, it does not provide counties the necessary systems and data to ensure accurate forecasting. There may not be enough data to guarantee purposeful forecasting. This makes statutory forecasting weak and unreliable. Out-turns of the local revenue forecasts often lead to the destabilization of the entire fiscal framework.

3.4.5 Transparency, predictability and fairness in tax administration

The collection of revenue in some counties is not transparent, predictable and fair. In Busia County the Department of Land, Survey and Mapping did not remit the revenue it collected. Scrutiny of the counterfoil receipt books also revealed that revenue collectors and receivers did not surrender receipt books.[237] In Homa Bay County the officer in charge of County revenue failed to maintain a cashbook for revenue, making it difficult to ascertain the revenue collected, banked and accounted for in accordance with PFM Act.[238] Best practice demands that the responsible officer maintains cashbooks and carries out regular bank reconciliations for transparency, predictability and fairness in the administration. The County Executive officer of finance had also failed to appoint a County Receiver of Revenue. This caused an embedded conflict of interest in duties, and lack of transparency.

Whereas the PFM Act outlines the requirement that accounts are to be maintained in a transparent, predictable and open manner, the statute does not impose penalty on officers who do not adhere to these requirements. Lack of accountability leads to the spiraling effect of corruption in the counties.

3.4.6 Full and timely accounting for government revenues and receipts

The CoB noted that some counties could not account for all revenue collected. Kisii County budgeted to raise Kshs. 630 million in local revenue the financial year 2014 – 15 but only managed a paltry Kshs. 296.77 million.[239] Kisumu County budgeted to raise Kshs 1.50 billion

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[237] Auditor-General, *Report of the Auditor-General on the Financial Operations of Busia County Executive for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 2 – 3.
[238] Auditor-General, *Report of the Auditor-General on the Financial Operations of Homa Bay County Executive for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 7.
[239] Office of the Controller of Budget (n 179) 105 – 110.

but only managed Kshs. 970.90 million during the same financial year.[240] In both of cases, county revenue officers could not account for the revenue they raised.

While the PFM Act creates the offence of failure to pay into government bank account monies entrusted or received by officers on behalf of the government, this section has not been enforced in the face of financial irregularities.[241]

3.5 Debt Management

County governments are empowered to borrow on condition that the national government guarantees those loans and with approval of the county assembly.[242] The PFM Act provides that county government borrowings shall only be used for financing development expenditure and shall be maintained at sustainable levels.[243] With a cumulative debt of Kshs. 37.46 billion including Kshs. 15.9 billion debt for recurrent expenditure, counties borrowed in an untamed manner and without the requisite approval of the national government.[244] In the 2014 – 15 financial year four counties borrowed a total of Kshs. 1.9 billion. Nairobi was the largest borrower at 300 million. Counties argued that failure by the national government to remit funds on time forced them to revert to borrowing in order to finance recurrent expenditure.[245]

The challenges counties faced with regard to public debt included: unsustainable public debt; undefined, unclear and unsustainable deficit target for short, medium and long term; lack of prudential guidelines to manage contingent liabilities; borrowings that leveraged county budgets above the approved limits; accumulation of arrears; failure to manage cash wisely across the public sector; lack of transparency and predictability in funding; borrowings which did not enhance liquidity and maintain a full year yield; and failure to ensure capital expenditure is supported over long term by recurrent budget allocations.

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[240] Ibid, 111 – 117.
[241] PFM Act, s 197 (g).
[242] Constitution of Kenya 2010, art 212.
[243] PFM Act, s 107 (2).
[244] Gideon Keter, 'Control rising county debts of Sh37.4bn, Senators told' *The Star* (Nairobi, 18 March 2016).
[245] Anzetse Were, 'Untamed county debt pile-up must be re-examined' *Business Daily* (Nairobi, 7 February 2016) http://www.businessdailyafrica.com/Opinion-and-Analysis/Untamed-county-debt-pile-up-must-be-re-examined/-/539548/3066184/-/7jd841z/-/index.html accessed 22 July 22, 2016.

3.5.1 Unsustainable public debt

The IMF notes that the overall public debts remain sustainable as long as county authorities implement their medium term Fiscal Consolidation Plans. However, some counties reported unsustainable increase in public debts. Nakuru County recorded an increase of Kshs. 1.5 billion in debt in nine months. The CoB noted that the county government failed to explain the rise in pending bills from Kshs. 2.4 billion to Kshs. 3.95 billion.[246] This rise in debt is unsustainable and affects the sustainability of the county's economic prospects in the current and future generations.

Despite Nakuru County's compliance with the requirement of PFM Act in coming up with the Medium Term Debt Management Strategy (MTDS), which stated in part 'sustainability of debt is a key fiscal responsibility principle and the 2015 MTDS will among other issues deal with sustainability of county debt',[247] the county did not abide by the principles therein. This resulted in debts levels that spiraled out of control.

3.5.2 Unclear and unsustainable deficit target for short, medium and long term

These targets are a fiscal control tool to promote strong and sustainable growth and reduce poverty. The short term debt plans should focus on macroeconomic stabilization – for example expanding spending to stimulate an ailing economy. The longer term plans should be used to foster sustainable growth or reduce poverty through deliberate actions such as development activities – for example improving infrastructure or education.[248] Counties in Kenya are required to establish the Medium Term Debt Management Strategy[249] and to borrow for development purposes only. This provision undermines the need for counties to borrow to finance recurrent expenditure. It also does not allow for county governments to play a role in fiscal management.

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[246] Office of the Controller of Budget, (n 129) 229 – 236; Steve Mkawale and Patrick Kibet, 'Nakuru County's debt rises by Sh1.5b in nine months' *The Standard* (Nairobi, 20 July 2016).
[247] County Treasury, Medium term Debt Management Strategy Paper (County Government of Nakuru February 2015) 14 – 15.
[248] Mark Horton and Asmaa El-Ganaiany 'Fiscal Policy: Taking and Giving Away' (Finance and Development, IMF 2012) http://www.imf.org/external/pubs/ft/fandd/basics/fiscpol.htm accessed 22 July 2016.
[249] PFM Act, s 107 (d); PFM Act s 123.

The limiting provision on strategy and use of borrowed finances has seen counties borrow to finance recurrent expenditure in violation of the law. Auditor General notes that Trans Nzoia County borrowed to finance its recurrent expenditure through bank overdrafts which stood at Kshs. 100 million at 6 May 2014. The County had no set limits for borrowing.[250] Nairobi County was also paying for a Kshs. 5 billion loan obtained from Equity Bank. The loan was primarily for catering for statutory debts rather than for development expenditure as was envisaged by the Medium Term Strategy Paper and the PFM Act.[251]

3.5.3 Lack of prudential guidelines to manage liabilities

While the Constitution requires that borrowings by the county government be guaranteed by the national government, this has not happened in practice. County governments borrowed unabated and without national government approval.[252] A guideline on how borrowings by county governments through the security of the national government ought to be conducted has not been implemented.

The PFM Act has not laid out the rules for conditions and process of guarantee by national government. This has left the national government without control of county government borrowings. The lack of guidelines also means that the national government could arbitrarily deny the county governments the contract of guarantee. A direct result of this has been that county governments obtained most of their loans from existing commercial banks, whose cost of borrowing is exceptionally high and unsustainable, for the government goals of ensuring an optimal fiscal system.[253]

3.5.4 Accumulation of arrears

Some counties failed to pay bills they incurred more than two financial years earlier. Nandi County, for instance had pending bills amounting to Ksh 29.5 million incurred in the financial

[250] Auditor-General, *Report of the Auditor-General on the Financial Operations of Trans Nzoia County Executive for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 12 – 13.
[251] Auditor-General, *Report of the Auditor-General on the Financial Operations of Nairobi County Executive for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 27 – 28.
[252] Anzetse Were (n 245).
[253] Auditor-General, *Report of the Auditor-General on the Financial Operations of Nairobi County Executive for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 27 – 28.

year 2011 – 12 and stood unpaid as at 30 June 2014.[254] Nakuru County carried forward bills totaling to Kshs. 1.3 billion for the year 2013 – 14 to the year 2014 – 15 without offering a satisfactory explanation for not settling those bills within the year.[255]

The recommended practice is that county governments settle their bills as soon as they arise. Failure to pay the supplies on time often results on legal action against the government. This eventually bloats the county government spending, leaving less of the budget towards development goals.

3.5.5 Lack of predictability and transparency in funding

Predictability and transparency in funding is based on the premise that the effectiveness of debt funding instruments can be strengthened if instruments of policy and goals are known to the public and if authorities in counties make a credible commitment to funding them. Transparency also enhances good governance through greater accountability of county treasuries and other county institutions involved in debt management. This makes the cost of funding lower and enhances the economic performance of counties.

The Auditor-General could not ascertain the authenticity of a debt amounting to 120 million because of inadequate records and lack of a consistent policy on creditors with justification for pending bills.[256]Bills amounting to Kshs. 228 million could also not be verified in Laikipia County. The bills were not supported with concrete verifiable details on the suppliers and creditors. This was occasioned by the failure to maintain accurate and complete records by the government.[257]

3.5.6 Failure to ensure capital expenditure is supported in the long run by recurrent budget allocations

Capital expenditure is the developmental expenses against which public debts are charged. Annual budgetary allocations ought to devote a percentage of its resources towards development.

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[254] Auditor-General, *Report of the Auditor-General on the Financial Operations of Nandi County Executive for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 7.
[255] Auditor-General, *Report of the Auditor-General on the Financial Operations of Nakuru County Executive for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 9.
[256] Auditor-General, *Report of the Auditor-General on the Financial Operations of Nyeri County Executive for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 17.
[257] Auditor-General, *Report of the Auditor-General on the Financial Operations of Laikipia County Executive for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 22.

Towards this end the PFM Act provides that current government recurrent expenditures should not exceed its total revenue.[258] It provides that a minimum of thirty percent of the county government annual budget is to be allocated for development purpose.[259] However for a number of counties, this provision was not adhered to.

In the financial year 2014 – 15, out of Kshs. 2.49 billion availed to Embu County, a sum of Kshs. 2.18 billion was spent on recurrent activities whereas Kshs. 312.64 million on development activities. The development expenditure represents thirteen percent of the total expenditure.[260]

This case was replayed in Makueni County which out of the Kshs. 3.42 billion released in the first nine months of the financial year 2014 – 15, spent Kshs. 742.44 million on development activities. This represents a twenty-one percent application of funds for development purposes.[261]

3.6 Accounting and Reporting

County Governments have four main sources of revenue: exchequer releases; funds from development partners; own generated revenues; and borrowings.

Article 202 (1) of the Constitution mandates the national government to share equitably the revenue raised nationally among national and county governments. County governments may also be given additional allocations from the national share of revenue, either conditionally or unconditionally. The minimum amount of funds released to county governments by national government is determined by computing 15 percent of the revenue collection amount in the audited accounts of the previous year. Counties raise their own revenue from rates and other charges. These charges include levies, user fees and charges outlined under Article 209 (3) of the Constitution. These charges and levies may reviewed annually through the County Finance Act prepared by the County Executive member for Finance and approved by the county assembly. Counties are also eligible to receive funds from development partners in the form of grants. The grants from development partners are typically often earmarked for specific projects and programmes that are aligned with national priorities and county government plans. County governments are allowed to borrow, pursuant to Article 212 of the Constitution, on condition that

[258] PFM Act, s 106 (2) (a).
[259] PFM Act, s 106 (2) (b).
[260] Office of the Controller of Budget (n 178) 56 – 63.
[261] Ibid, 174 – 181.

those loans are guaranteed by the national government and have been approved by the County Assembly. Amounts borrowed should only be used to meet development expenditure, and such borrowings should not exceed 20 percent of the county government's most recent audited revenues.

County governments incur recurrent and development expenditure all through the year. Recurrent expenditure are incurred the day to day operations, such as: employee compensation; payments for goods and services; direct charges; and interest on capital assets. Development expenditure are incurred during the acquisition of assets, and are also associated with development outcomes, which are not necessarily identified with tangible assets, such as investing in better teaching material and teachers to have a better informed, knowledgeable and productive population.

Sections 122, 124, 158, 163, 164 and 166 of the PFM Act demand quarterly and annual reports. County governments are obliged to generate monthly management reports in order to facilitate stewardship. These accounts are to be submitted to the county treasury, with copies to the Controller of Budget and Auditor General by the 10th day of every month. These monthly and quarterly reports are to be in accordance with forms designed and prescribed by the Public Sector Accounting Standards Board (PSASB). Financial reporting is done by the county assemblies, county treasuries, and all annual financial statements, including budget execution reports, are prepared as prescribed by PSASB.

In meeting these requirements, counties have faced a number of challenges. These include: failure to ensure good performance and value for money in government operations, by cutting down on government cost and wastage; the accounting and reporting models did not allow for development of capacity, in training modern public finance management techniques; office of the accountant-general was not properly resourced and funded to fulfill its function; government expenditure was not accounted for in a timely manner and significant deviations from budget estimates were not investigated; and clear rules regarding the format, frequency and timing of financial and operational reporting and clear reporting standards were not established and entrenched.

3.6.1 Failure to ensure good performance and value for money in government operations

Accounting and reporting is particularly useful for entities because it provides way to reduce wastage by cutting down on costs. Accounting and reporting should, essentially, be cost saving and lead to optimal utilization of available resources. This was not the case in some counties, as accounting systems failed to reasonably provide the means for the county governments to cut on costs and engage in optimal, prudent spending.

The untimely remittance a conditional grant by the Kisumu County Government to the Jaramogi Oginga Odinga Teaching and Referral Hospital was occasioned by lapses in the accounting and reporting system, leading to wastage and loss of resources at the health facility.[262] Failure to release funds as scheduled led to difficulty in the implementation of an approved budgets.[263] Mombasa County equally failed to implement its budget owing to delayed disbursement of funds for intended projects.[264]

3.6.2 Staff capacity challenges to effectively carry out scheduled tasks

Having the right number of staff, who are qualified in running the accounting and reporting department, is important in ensuring that this department carries out its duties. This includes the continual training of staff to ensure they are in line with and implement best practice at their areas of operations. One of the ways counties can ensure that the staff are well trained include offering competitive remuneration packages to attract and retain top staff, programmed training of the available staff, and consistent hiring of staff to replace those who leave the department.

Garissa County did not have designated administrators for established county funds, such as the Bursary Fund, thereby rendering accounting and administration of funds difficult.[265] This situation was replayed in Kilifi and Nyandarua counties.[266] Isiolo County did not have designated

[262] Office of the Controller of Budget (n 179) 117.
[263] Ibid, 134.
[264] Ibid, 178 – 9.
[265] Ibid, 61.
[266] Office of the Controller of Budget (n 179) 100; 216.

departmental accounting officers,[267] while Kericho County lacked the human resource necessary to operate the Integrated Financial Management System (IFMIS).[268]

3.6.3 Office of the County Accountant-General not properly resourced and funded to fulfill its function

The office of the Accountant-General was established under the Government Management Act but continues in existence under the section 11 (2) PFM Act as an office under the National Treasury. The work of the Accountant-General is to check all government spending, and works closely with the Internal Auditor-General to ensure that government funds are not misappropriated. Since the National Treasury is still mandated to release funds meant for the counties, it is their duty to ensure that all compliance requirements set down by law are met before funds are released. This office is no longer given prominence under the PFM Act and cannot therefore extend its supervisory role to counties.

This occasioned common lapses within counties that would otherwise not exist. For example Kericho, Murang'a, and Narok counties failed to maintain vote books for their accounting transactions.[269] Lamu County failed to use the approved exchequer issue on expenditure items as per expenditure schedule[270] while Migori County made requisitions that were not based on departmental work plans to enable proper implementation of the budget.[271] These lapses could be corrected by funding and allowing the office of the Accountant-General extend its supervisory jurisdiction to counties that are not compliant to the PFM system.

3.6.4 County Government expenditure not accounted for in a timely manner

County government expenditures were not accounted for in a timely manner and an investigation of significant variations from the budget estimates was not conducted. This important accounting and reporting tool is meant to improve and entrench accountability in accounting and reporting processes. It serves to reduce wastage of government resources and cut costs.

[267] Ibid, 71 – 2.
[268] Ibid, 88 – 9.
[269] Office of the Controller of Budget (n 179) 89; 184; 205.
[270] Ibid, 140.
[271] Ibid, 167 – 8.

The intermittent use of IFMIS in Trans-Nzoia County, and continual use of the manual system of accounting, undermines the concept of timely reporting expected from the county units.[272] Delays in the submission of quarterly reports to the Controller of Budget, delays in the finalization and approval of supplementary budgets, and delays in the disbursement of budgeted funds towards project implementation in Wajir County were all linked to the failure by the County Assembly to adopt IFMIS in processing the financial transactions.[273]

3.6.5 Clear rules regarding the format, frequency and timing of financial and operational reporting and clear reporting standards not established and entrenched

While the PFM Act and the accompanying regulations have outlined the financial reports required, and have specified the time and frequency of such reports, the county governments are yet to establish and entrench these rules as part of their day to day operations. This has led to preventable lapses in reporting and failure to hold county government officers to accountable for wastage of public resources.

The failure by Turkana County to submit financial reports to the Controller of Budget on time is an example.[274] This oversight leads to the lack of accountability on the part of the county officers and makes it difficult for Auditors to hold the officers accountable. Kirinyaga County Treasury maintained incomplete book of accounts.[275] It was observed that this was caused by the concurrent use of manual accounting and IFMIS system, both of which failed to produce ledger accounts, trial balances, statutory control reports, detailed head item analysis and expenditure statements. Failure to produce these crucial documents makes it difficult to hold officers accountable.

3.7 Internal and External Auditing and County Assembly Oversight

Internal auditing is an independent, objective assurance and consulting activity designed to add value and improve an organization’s operations. Internal auditing strengthens organizational internal controls. The County Government Internal Audit department serves to report on: the adequacy and effectiveness of county government internal control system; the adequacy and

[272] Office of the Controller of Budget (n 178) 314.
[273] Ibid, 343.
[274] Ibid, 321.
[275] Auditor-General, *Report of the Auditor-General on the Financial Operations of Kirinyaga County Executive for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015)14.

effectiveness of the CG entity risk management; the adequacy and effectiveness of the governance process; and the likely causes of systemic weaknesses observed.

The PFM Act requires that internal audit planning be carried out on the basis of risk assessment and be set out in a three-year strategic plan, the basis of which annual internal audit activity plans are developed. The internal audit component relates to: the control environment; risk assessment; control activities; information and communication; and monitoring.

The Kenya National Audit Office (KENAO) is charged with the responsibility of undertaking external audits in accordance with international standards on Auditing. KENAO serves to: give a disclaimer, adverse, qualified or unqualified opinion; draws attention of users of financial statements to matters that if not attended to may form part of audit opinion; and to highlight any special investigations undertaken during the year and their outcome. The Auditor-General is empowered under the Public Audit Act to conduct special audits as he may deem necessary, which include: performance audits; certification audits; forensic audit; environmental audit; and budgetary process audit.

The County Assembly Accounts and Investment Committee is charged with the responsibility of examining county government accounts, particularly reports on appropriations granted by the county assembly to meet public expenditure, and to follow up on reports issued by KENAO.

The Constitution envisaged public involvement in county financial oversight. Key activities involved obtaining public participation in budgetary processes and public involvement in validating audit and financial reports by county assemblies and the Public Investment and Accounts Committees of county assemblies. County governments are mandated to make public the documents availed once these are approved by county assemblies within 7 days. Availing documents to the public includes: publishing in a newspaper or other publication of general circulation in Kenya; posting documents on the internet on the national or county government website; and publishing documents in any medium meant for free access by the public.

The auditing and oversight function of the county governments has faced a number of challenges. These range from the lack of monitoring and evaluation units and committees; internal audit functions which are not effective and do not comply with generally accepted auditing standards with regards to staffing, planning, and reporting; parliamentary oversight committees did not get financial reports in good time to scrutinize them; the public at the counties were not afforded effective mechanisms of redress through the office of the ombudsman or similar channel for settlement of complaints without having to rely on the courts; and failure to rope in the media and civil society as public finance management stakeholder institutions and encouraging them to play a role in bringing to light failures and successes of the public finance management.

3.7.1 Lack of monitoring and evaluation units and committees

Monitoring of public finance management systems at the county level plays the important role of ensuring the government entities comply with the PFM Act and enabling regulations and guaranteeing effective management of funds in an efficient and transparent manner, while providing for proper accountability of expenditure items.[276] The evaluation units play the role of determining eligibility and feasibility of projects entered into by county governments. They conduct economic analysis, feasibility studies, and test whether projects have met all fiscal responsibility principles and any other requirements that may have been published in the Gazette by the Cabinet Secretary.[277]

These organs, despite playing such an important role in the management of public funds, were missing or unable to carry out their function in a number of counties. The Controller of Budget noted that Trans Nzoia County failed to set up a monitoring and evaluation team to assess the quality of projects implemented.[278] Vihiga and West Pokot counties are noted to have failed in establishing internal audit committees, contrary to section 155(5) of the PFM Act.[279] Other counties which had earlier failed to establish the internal audit committees include: Kakamega County; Bungoma County; Trans Nzoia County; and Embu County.[280] A weak internal audit function was noted in Garissa County.[281]

3.7.2 Internal audit functions are not effective and do not comply with generally accepted auditing standards with regards to staffing, planning, and reporting

[276] PFM Act, s 104 (1) (k).
[277] Legal Notice No 35 of 2015, s. 181.
[278] Office of the Controller of Budget (n 178) 314.
[279] Ibid, 336; 350.
[280] Office of the Controller of Budget (n 179) 83; 38; 251; 56.
[281] Ibid, 60 – 1.

Internal audit function should be given complete autonomy and be properly staffed, planned and given a clear reporting framework in order to carry out their task of: ensuring all spending is within the budgetary provisions; ensuring there is dual control in the processing of transactions; ensuring timely reconciliation of accounts; ensuring sanctions for non-compliance are defined and applied; ensuring effective systems for managing physical and financial assets are developed; and ensuring adequate management reporting systems are in place.

Baringo, Bungoma, Homa Bay, and Kisii counties faced the problem of over-expenditure and some spent amounts were not captured within the cash-flow projects because of an inefficient internal audit function.[282] Busia, Bomet and Bungoma counties lacked the controls necessary in processing financial transactions.[283] There was no timely reconciliation of accounts for control and monitoring purposes in Elgeyo Marakwet, Homa Bay, and Kakamega counties.[284] Kajiado County did not enforce sanctions for non-compliance with the set laws.[285] Systems for maintaining assets were lacking in counties, such as internal audit manual and charter in Bungoma County;[286] and asset registers in Garissa and Kakamega counties.[287] Some counties lacked management reporting systems, such as Garissa County, which lacked policy documents[288] and Kakamega County, which did not maintain records for assets used in the county management.[289]

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[282] Ibid, 26; 38; 66 – 6; 110.

[283] Auditor-General, *Report of the Auditor-General on the Financial Operations of Busia County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 5; Auditor-General, *Report of the Auditor-General on the Financial Operations of Bungoma County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 5; Auditor-General, *Report of the Auditor-General on the Financial Operations of Bomet County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 5.

[284] Auditor-General, *Report of the Auditor-General on the Financial Operations of Elgeyo Marakwet County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 8; Auditor-General, *Report of the Auditor-General on the Financial Operations of Homa Bay County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 5; Auditor-General, *Report of the Auditor-General on the Financial Operations of Kakamega County Executive for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 19.

[285] Auditor-General, *Report of the Auditor-General on the Financial Operations of Kajiado County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 14 – 5.

[286] Auditor-General, *Report of the Auditor-General on the Financial Operations of Bungoma County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 6.

[287] Auditor-General, *Report of the Auditor-General on the Financial Operations of Garissa County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 10; Auditor-General, *Report of the Auditor-General on the Financial Operations of Kakamega County Executive for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 16.

[288] Auditor-General, *Report of the Auditor-General on the Financial Operations of Garissa County Assembly for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 9.

[289] Auditor-General, *Report of the Auditor-General on the Financial Operations of Kakamega County Executive for the Period 1 July 2013 to 30 June 2014* (Republic of Kenya 2015) 9 – 10.

3.7.3 The County Assembly oversight committees do not get the financial reports in good time to enable them scrutinize them

Whereas the county assemblies are charged with the responsibility of overseeing operations in the county, and checking the excesses of county executives, these assemblies need to get financial reports in good time to enable them discharge this function. Delays in submitting financial reports to county assemblies mean that the assemblies will not have suffient time to scrutinize the reports and hold the responsible officers to account.

This delay was noted in Turkana[290] and Bungoma[291] counties, and which prevented effective oversight of reports. Wajir[292] and Trans Nzoia[293] counties equally failed to deliver books of account and reports for analysis to the oversight bodies. Bomet and Embu counties failed to deliver their financial reports for analysis.[294]

3.7.4 The public at the counties not afforded effective mechanisms of redress through the office of the ombudsman or similar channel for settlement of complaints without having to rely on the courts

One of the bars to effective county administration has been legal tussles. Members of the public have often gone to court to complain against and block county laws and policies. This often delayed the working of county officials, and effectively denied residents proper service delivery. Residents resorted to court litigation because there lacked an effective out-of-court mechanism, such as an efficient office of the ombudsman, at the county level.

One such case was filed at the High Court in Nairobi which sought to declare the Kiambu Finance Act 2013 illegal and unconstitutional for want of public participation during the drafting stages.[295] Whereas this case was finally dispensed with, a lot resources and time had been consumed during the legal tussle. Kiambu County could not, for some time, levy its constitutionally mandated rates, levies and charges because of this case, which was subsisting in Court at the time. Similarly, the Nairobi City County Finance Act 2013 was challenged by

[290] Office of the Controller of Budget (n 178) 321.
[291] Office of the Controller of Budget (n 179) 38.
[292] Office of the Controller of Budget (n 178) 343.
[293] Office of the Controller of Budget (n 179) 51 – 2.
[294] Ibid, 38; 55.
[295] Robert Gakuru & Others v The Governor Kiambu County & 3 Others [2014] eKLR.

petitioners who wanted it declared unconstitutional for lack of public participation.[296] The petitioners challenged the legality of taxes, fees, and other charges levied by the County Government. Since this matter could be easily and reasonably resolved through out-of-court procedures, it unnecessarily occasioned loss of taxes during the time which the case was pending in court.

3.7.5 Failure to rope in the media and civil society as public finance management stakeholder institution and encouraged to play a role in bringing to light failures and successes of public financial management

The media and civil society, often regarded as the fourth estate, have become an indispensable tool for the running of 21st century democracies. Indeed the media and civil society bring to light practices that would otherwise go unnoticed. Severally have members of the fourth estate unearthed corrupt scandals, and brought down authoritarian rule. It is therefore imperative, for the purposes of accountability and publicity, to ensure that the media and civil society is aware of all dealings in county governments. In furtherance to this, the Constitution prohibits the county assemblies from prohibiting or excluding the public, or any media from its sittings[297] and requires that public participation be the cornerstone of all county dealings.

In practice, nevertheless, cases abound where the media is blocked, stifled or given short notice to meetings in an attempt to cripple their attendance. The county government of Kisii, for instance, blocked the access of *Standard Media*, one of the leading media houses in Kenya, after a corrupt scheme by the county government was brought to light by the media house.[298] The Nandi County government is also noted to have undermined the principles of devolution by curtailing the public participation, and the freedom of the media and civil society.[299]

[296] Saccos Union Ltd & 25 Others v City of Nairobi Government & 3 Others (Civil Appeal No 42 of 2015).
[297] Constitution of Kenya, art 196 (2) (2).
[298] Gisesa Nyambega, 'Kisii County blocks Standard website after reporting graft allegation' *The Standard Newspaper* (Nairobi, June 17 2015) accessed http://www.standardmedia.co.ke/article/2000166019/kisii-county-blocks-standard-website-after-reporting-graft-allegations 24 October 2016.
[299] Churchill Suba, 'County governments undermining devolution' *The Standard Newspaper* (Nairobi, 4 February 2016) http://www.standardmedia.co.ke/article/2000190441/county-governments-undermining-devolution accessed 24 October 2016.

There are a number of cases however, where coverage by the media, in county governments, led to better public participation and inclusivity in the management of county resources.[300]

3.8 Conclusion

This chapter has analyzed the challenges facing prudent management of public funds in Kenya counties. While there are adequate laws and regulations to support devolution, these laws and regulations are often overlooked. This has led to the massive loss of resources at the counties as witnessed on several accounts.

Without the entrenchment of prudent financial management and best practices of the world, Kenya's promise of devolution is unlikely to live up to its expectation. More needs to be done to ensure counties comply with the set laws, and to provide a system of ensuring that these laws are reflective of what is happening on the ground.

Chapter Four considers financial devolution management in Nigeria, South Africa, Canada, and the United States of America, countries which have had the experience of devolution for a longer period than Kenya. It is from these countries that this study attempts to draw lessons for Kenya in the effective, and prudent management of devolved funds.

[300] Daniel Iberi, 'Print Media Coverage of County Governance in Kenya: A Context Analysis of the Daily Nation and Standard Newspapers' (M.A thesis, University of Nairobi 2014).

CHAPTER FOUR: ANALYSIS OF FINANCIAL DEVOLUTION MANAGEMENT IN SELECTED COUNTRIES

4.1 Introduction

Chapter four considered the various challenges county governments faced in entrenching a devolved system of governance where wastage and pilferage of public resources are not the norm. As noted earlier, despite having a well-developed legal framework to manage devolved funds, mismanagement of resources continued unabated.

This chapter considers other jurisdictions of the world – jurisdictions which have a devolved system of financial management – in the quest to obtain answers to the Kenyan problem. The countries under consideration are: South Africa; Nigeria; the United States of America; and Canada.

South Africa was selected for this comparative analysis because it has one of the leading public planning and budgeting frameworks, including those of its devolved units, and was recently ranked the best in the world.[301] Nigeria's long history as leading African economy, and notably has the most decentralized system of public financial management in Africa made it indispensable to use in comparison to the Kenyan framework.[302] The contribution from Nigeria features revenue collection and management and debt administration. The long history of the United States of America with federalism and the devolution of public funds to counties, coupled with the fact that the United States has the largest economy in the world,[303] made it an interesting case to use in analyzing Kenya's accounting and reporting framework. Canada's devolution framework is historically similar to what Kenya had in the independence Constitution, having notable achievements with regards to auditing and oversight function in the world,[304] makes the Canadian framework important in light of reviewing Kenya's public finance framework on auditing and oversight functions of devolved units.

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[301] International Budget Partnership 'Open Budget Survey' (IBP, 2011) http://www.internationalbudget.org/opening-budgets/open-budget-initiative/open-budget-survey/ accessed 9 October 2016; Ray Maota and Mary Alexander 'South Africa's budget most transparent in the world' (Media Club South Africa, 2 March 2011) http://www.mediaclubsouthafrica.com/democracy/2238-sa-budget accessed 9 October 2016.

[302] BBC News 'Nigeria becomes Africa biggest economy (BBC News 6 April 2014) http://www.bbc.com/news/business-26913497 accessed 9 October 2016; Stuti Khemani, 'Fiscal Federalism and Service Delivery in Nigeria: The Role of States and Local Governments' (Prepared for the Nigerian PER Steering Committee, 24 July 2001).

[303] Central Intelligence Agency, 'The World Factbook' (2016) https://www.cia.gov/library/publications/the-world-factbook/geos/us.html accessed 9 October 2016.

[304] Vinod Sahgal, 'Audit and Legislative Oversight: Developing Country Perspective' (6th Global Forum on Reinventing Government, 22 May 2005).

4.2 South Africa

South Africa is a constitutional democracy having a three-tier government structure. The national, provincial and local level of government all possess executive and legislative authority within their own spheres. These levels of government are described by the South African Constitution as 'distinctive, interdependent and interrelated'.[305]

The national government is made up of three branches: the legislature, executive, and judiciary. The President is the Head of State and Head of the executive arm of Government. The legislature is made of the National Assembly and National Council of Provinces, which are headed by speakers of the respective houses. The judiciary is composed of the Constitutional Court, the Supreme Court and the High Court at the national level, and is headed by the Chief Justice. The Constitution is the supreme law in South Africa.[306]

There are provincial governments in South Africa, covering the nine provinces, and forming the second layer of government above the municipalities. The provincial governments have a parliamentary system of governance, where the executive is accountable to and is dependent on the legislature. Members of the legislature are elected by the people on the basis of proportional representation. They in turn elect one of their own to head the executive arm as the Premier. The Premier appoints his cabinet from members of the legislature to administer various departments in the provincial administration. The Constitution stipulates that provincial and national governments should work on a principle of cooperative governance. This means the different layers of government must coordinate their legislations and actions, as well as establishing rules for resolving conflicts between the different administrations. Provincial legislatures may adopt and define their own Constitutions, separate from the national government constitutional structure, even though this is not a necessity as the national Constitution provides a framework for provincial administration.[307]

The local government consists of municipalities. Municipalities are governed by municipal councils, which are elected after every five years. The Constitution provides three categories of municipalities: metropolitan municipalities, district municipalities, and local municipalities. Municipalities form the next layer of governance below the provinces.

[305] Constitution of the Republic of South Africa 1996, Chapter 3.
[306] Ibid.
[307] Ibid.

South Africa has an advanced system of cooperative planning and budgeting among the different layers of governance. Public finance management is South Africa is multi-faceted, covering: budget and budgetary processes; taxation and collection of revenue; the use of the tax income to achieve developmental and fiscal purposes at the different layers of government; and sustained government expenditure as a means of returning tax money into the national economy.

The principles of planning and budgeting are anchored on: publicizing the main stages of planning and budgetary processes; ensuring that budgets and plans are understandable to all citizens; ensuring budgets are comprehensive, covering all incomes and expenditures, and reflecting all government activities; ensuring budgets are accurate as possible; and ensuring that appropriations in the budget are authorized for a definite period of time, and any unused appropriation lapses at the end of the financial period or is re-appropriated for another use. These principles reflect the elements of good financial governance and contain ethos of democracy, such as transparency, accountability, responsiveness and participatory.

4.2.1 Planning

For planning purposes, all funds are paid into the National Revenue Fund, and can only be withdrawn by an appropriation of an Act of Parliament, or as direct charge of sums secured.[308] The monies are divided equitably among the national, provincial and local governments. This division of funds takes into account: national interest; debts and other obligations; needs and interests of the governments; fiscal capacity and efficiency; development needs; and economic disparities within and among the provinces.[309]

Planning at the provincial government level is designed to create certainty in the financial environment. The projections, are by law, required to be credible and certain about resources at their disposal. This includes detecting and anticipating fiscal problems before they occur to prevent market unsustainability and ensure affordability for every citizen. The political decision makers, led by the provincial cabinet committees, come up with plans and lay them before the

[308] Ibid, art 213.
[309] Hans Falkena and William Kok, *The Mechanics of the South African financial system: financial institutions, instruments, and markets* (Johannesburg, Macmillan South Africa 1984).

provincial assemblies. Short, medium, and long-term sectoral plans are used as instruments for translating expenditure targets into allocation for agencies and programmes.[310]

Planning Programme Budgeting (PPB), also referred to as Program Based Budgeting, associated with budget officers at the provincial system, places importance on management as a supervisory function, and centralizes planning. This system integrates budgeting formulation with Keynesian economic concept as it attempts to predict the effect of government spending on the economy. It integrates systems-wide planning with budgeting, and places effort in developing and using new information sources and technologies to bring quantitative and objective analysis of public policy making.[311]

The PPB approach is critiqued on the basis that it tends to force decisions up the hierarchy of governance because of its insistence on goal clarification, planning, scientific and systematic approach to decision making.[312] This has a negative impact of centralizing financial management at the provinces, and ultimately undermine democratic governance and autonomy of officers.

4.2.2 Budgeting Processes

Budgets are prepared at the national, provincial and municipal level in a manner designed to promote transparency, accountability and effective management of resources. This is done through legislations at the different arms of government. The budgets contain: estimates of revenue, capital and recurrent expenditure; proposal for financing expected deficits that arise during the financial period; and details of borrowing and other forms of public liability that will increase public debt.[313] Compliance with the budgets is enforced by the legislative arm of government.

Budgets are adopted from duly constituted legislatures, bound by democratic principles. Once agreed to, spending and revenue plans are carried out as enacted. In the event of changes during the fiscal year, the legislative authorities are required to revise the estimates. Information on the municipal, provincial and national government are made available to the public, with the media having the freedom to query all government records for each administrative unit.

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[310] Ibid.
[311] Ibid.
[312] Ibid.
[313] Thorsten Beck, *Financing Africa: through the crisis and beyond* (Washington DC, World Bank 2011).

The making of the budgets is based on publicly expressed preference. Administrative units are mandated to collect information on the preferences of the constituents for resource allocation and capital expenditure.[314]

Budgets take a long-term approach, rather than single-year engagements. This is an attempt to avoid structural deficits by ensuring that budget spending brings in sufficient revenues to match the expenditure. It is a major concern for administrations to use non-recurrent revenue to finance recurrent expenditure.

Emphasis is placed on budget timelines. Adherence to budget timelines is a tool for effective government performance and financial management. Failure to adopt budgets at the start of the year promotes inefficiency by creating uncertainty.

Audit capacity is enhanced to ensure accountability. Audit reports are delivered to the relevant assembly. A pre-audit exists to guard and entrench controls that prevent overspending during planning and budgeting. Post- audits report on how monies were applied, after the fact, what the monies was spent for and what the result of that spending is.

South Africa, as well as many OECD countries, is recording a gradual shift from cash accounting towards accrual accounting.[315] Budgeting and financial management under an accrual system is crucial in promoting accountability when implemented and applied contextually. The accrual method of accounting has a comparatively improved system of accounting, including financial techniques and asset management, than cash based accounting.

4.2.3 Lessons for Kenya

Kenya's devolution model is still highly dependent on the centralized governance structure. By allowing complete autonomy of the counties, through empowering county assemblies, executives and creation of public offices at the county level, the planning function will be enhanced and standardized.

Like South Africa, adopting the planning performance budgeting at the counties, will devise an effective tool for overseeing and monitoring effective financial management. It will ensure economy in the use of its limited resources and efficiency in output delivery.

[314] Ibid.
[315] Ibid.

The making of budgets can should be bound up with public participation. This involves presenting evidence of direct involvement and active participation by the electorate on how they want the public funds to be applied. This should be done within a specific timeline, and enhanced by the active participation of the media and civil society.

To rid inefficiencies and wastage of resources, planning and budgeting can be aligned to the accrual system of accounting. This provides an effective way of managing assets and liabilities, and preventing theft of public resources, owing to the difficulty of using the cash based system to track assets and liabilities incurred in previous years.

4.3 Nigeria

Nigeria has a three tier governance structure, consisting of the Federal Government, 36 State Governments and Local Government Councils. The Constitution of Nigeria provides for the management of public resources at the Federal Government level under Sections 80 – 89 by: establishing the Consolidated Revenue Fund; requiring authorization of expenditure from the Consolidated Fund; requiring for authorization of expenditures in default appropriations; creation of the contingencies fund; setting the remuneration package of the President and other officers; providing for an audit of public accounts; creation of the office of the Auditor-General and providing for the procedure for his appointment; securing the tenure of the Auditor-General; and empowering the Auditor-General to conduct investigations and collect of evidence on financial misappropriations.[316]

At the State level, the Constitution of Nigeria provides for similar powers under Sections 120 – 129. This includes the appointment of an Auditor-General of the State, and empowering him to conduct investigations within the State, while ensuring that he has security of tenure. The legislature is the constitutional device that acts as a watchdog for public funds. The legislature controls the process of appropriation; the actual expenditure; and exercises post-appropriation control of budgeting.[317] The National Assembly is the legislative arm at the Federal level, whereas the State House of Assemblies exercise control within each respective State.[318]

Financial laws in Nigeria are purposed to: control public expenditure by ensuring prudent use and management of financial resources by the governments; to entrench market confidence in

[316] Azikiwe Nnamdi, *Nigerian government and administration* (Benin City, Nigeria Trust Publications 2001).
[317] Ibid.
[318] Ibid.

country's financial system; to ensure financial stability by contributing directly to the protection and stabilization of the economy; to improve corporate governance; to secure an appropriate degree of protection for consumers of goods and services in the country; and to prevent and control financial crimes.[319]

4.3.1 Revenue Collection and Management

For the purpose of revenue collection, the Federal Executive comes up with annual targets, which are broken down into monthly collection targets, and include measures to be taken to combat fraud and tax evasion, to be tabled before the National Assembly. Such proposals must be submitted at least 30 days before the deadline to allow for study and scrutiny the public, civil society and members of the Assembly.[320]

The Federal Government maintains 'the Federation Account' into which all revenues collected by the Federal Government are paid. The presidents tables before the National Assembly proposals for revenue reallocation to the States and Local Government Councils, taking into account the population, equity, internal revenue generation by States, land mass, land terrain and population density.

The State Governments maintain 'the State Joint Local Government Account' into which allocations to the Local Government Councils are paid. The distribution of moneys paid into the Local Government Account is determined by a formula prescribed by the House of Assembly of the State.

All revenues received by State Governments are paid into the Consolidated Revenue Fund of the State.[321] Money cannot be withdrawn from the Fund except to meet expenditure charged by the Constitution or an Act of the State House of Assembly. Withdrawal of funds may also be authorized by appropriation and supplementary appropriation laws. The State House of Assembly must prescribe the manner which funds are to be withdrawn. In the event that the respective appropriation bill in respect of a financial year has not been passed into law at the beginning of the year, the Governor may authorize withdrawals from the Consolidated Fund for purposes of meeting expenditure necessary to carry on the services of the government for a

[319] Ibid.
[320] Akpan Olori, *Local government administration in Nigeria* (Lagos Stainless Impressions 2004).
[321] Constitution of Nigeria, s 120.

period of less than six month or until the appropriation bill becomes operational. The emergency withdrawals by the Governor have a ceiling, and all monies so withdrawn must be accounted for to the House of Assembly.

Each State has an Auditor-General who reviews the public accounts of the State government, and of State offices and courts. The reports by the Auditor-General are submitted to the House of Assembly of the State concerned. The Auditor-General is given access to all books of accounts, records, returns and documents relating to public accounts. The Auditor-General conducts periodic checks of all government bodies and submits his report to the House of Assembly. The House of Assembly thereafter refers the report for consideration by the public accounts committee.

In exercising these functions, the Auditor-General of the State is not subject to direction or control of any person or authority.

4.3.2 Debt Management

Nigeria's Constitution provides for external borrowing under Section 80. The Constitution does not outline whether such borrowing should be external or internal. However, there are a number of statutes enacted to regulate borrowing by the Federal and State Governments. The External Debt Management Act, enacted in 2003 established the Debt Management Office. Under the Act, debt management was placed under the portfolio of the Vice President and the Ministers of Finance of the Governments. The Act charges all debt and guarantees to the Consolidated Revenue Fund of the Federation, and by implication, barring any legal basis for the Government to refuse to satisfy debt obligations that have fallen due. The Debt Management Office, at the Federal and State government level, is empowered to request that debt obligations that have fallen due be included in the budget for the financial year.[322]

The State Governments are also empowered to give loans. These loans must be authorized by the House of Assembly of the State. Upon such repayments, the receipts are included as part of the Consolidated Revenue Fund. Spending and withdrawing of funds from the Consolidated Fund is not authorized merely by a resolution of the House of Assembly. If the House of Assembly is convinced of the request for funds, it must pass a separate Appropriations or Supplementary

[322] Ibid.

Appropriation Act for that purpose.[323] This provision serves to regulate fiscal indiscipline by State executive officers.

4.3.3 Lessons for Kenya

There is complete separation of governance in Nigeria. The Federal Systems are separate from the State Governments, each of these possessing complete autonomy. This means that officers from the Federal Government, either at the executive or legislature, cannot demand the performance of activities or control the affairs of the States.

Offices at the Federal Government level are also to be found at the State, for example the Auditor-General and the Accountant-General. These offices are at both the State and Federal Government, and each have compete autonomy from each other. They are not under the control of any office. This situation is unlike Kenya, where there is one office of an Auditor-General, and Accountant-General, serving both the National and County Governments. This lack of independence could, at times, result in compromise, or in overwork, ultimately reducing the quality of work and efficiency of the offices. The offices of the Auditor-General and the Accountant-General ought to be free from all forms of control by other persons or authorities. This autonomy should to be guaranteed by the Constitution.

State Governments in Nigeria are responsible for determining allocations to the Local Government Councils. The Federal Government deposits sums into the State Government Accounts, which then distributes them to the respective Local Governments on the strength of an appropriation law. This situation is unlike Kenya, where the National Government controls allocation of funds to the Constituencies. Ideally, in order to promote accountability and transparency, funds should be deposited into the County Government Accounts, which then subdivides the funds to the different constituencies and local governments using a need-based approach.

For effective debt management, all debts of the county should be charged to the County Revenue Fund and the National Government Fund. The counties should be mandated by law to ensure that debt obligations are factored into the budget for the respective fiscal year before any other allocation is made.

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[323] Ibid, s 80.

County Governments should be allowed to lend money to credible persons and authorities provided such monies are secured, and with the necessary approval of County Assembly in order to raise revenue. Currently, surplus monies are deposited into the fixed deposit accounts with commercial banks, whose yields are not competitive.

4.4 United States of America

The United States of America has a three tier form of government, consisting of the Federal government, State governments, and County administrations. Power in the United States is shared between Federal and State governments. The Federal government consists of three arms of government, creating the idea of checks and balances, important in sustaining a democratic rule. The Congress makes laws. The President is the head of State and head of Government. He also nominates judges to the Supreme Court. The Supreme Court has powers to invalidate laws passed by the Congress that it deems unconstitutional. The Congress consists of the House of Representatives and the Senate.[324]

The State governments tend to have the most influence on people's daily lives as the Federal government can only exercise power that has been delegated to it by the States. The States raise revenue through taxes and bonds. Each State has its own Constitution and a different mode of governance and code of laws. There are often great differences between the law and practice between States concerning issues such as education, health, crime, and property amongst others. The highest elected official in a State is the Governor. The States have State legislature that are bicameral (only the State of Nebraska has a unicameral legislature). Each state has its own court and judicial system.[325]

The responsibility for local governance lies with the state, and typically, with the towns, city, county boards, fire management districts, water management districts, library districts and other government units that make laws affecting their area of jurisdiction. The highest elected official in the town or city is the mayor. Towns operate in a democratic manner and some have the power to levy their own taxes and raise revenues as per the State law.[326]

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[324] Constitution of the United States of America, art 1.
[325] Ibid.
[326] Ibid.

4.4.1 Accounting and reporting

At the Federal level, the Government Accountability Office provides evaluation, auditing, and investigative functions for the United States Congress. Government Accountability Office is a supreme institution of the Federal government, often obtaining requests and directions for investigations, and reports to Congress. It is headed by the Auditor-General, or the Comptroller-General, and provides an audit of the Federal accounts of the United States of America. This office establishes audit standards for government programs, organizations, functions, and activities, and other non-governmental organizations. The standards are referred to as 'the Generally Accepted Government Auditing Standards', and are to be followed by auditors and audit firms when required to do so by regulation, law, agreement, policy, or contract.[327]

Most States adopt the accounting and auditing standards set by the Government Accountability Office. They are not under obligation to follow these rules and standards, but are guided by the State regulations and laws, which often require compliance to these standards. This means that there is no interference between the levels of governance. The Auditor General office and the Accountant General Office, and their equivalents, report to the State legislature, which conducts inquiry into the financial dealings of the State executive.[328]

4.4.2 Lessons for Kenya

The United States provides an effective way which the Kenya national audit office can maintain control of finances and ensure adherence to national standards without interfering with the working and independence of relevant county offices. Using the approach presented in the United States analysis, the national government could work to set the generally accepted standards for accounting and reporting, and allocate the responsibility of ensuring these standards are upheld to the county legislatures, assisted by county audit offices.

Independent county audit and accounting offices should be established as the investigative arms of the county legislatures, and ought to be given power to impose punishment, including the recovery of funds that is mismanaged or misappropriated.

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[327] Robert Ebel and Petersen John, *The Oxford handbook of state and local government finance* (New York Oxford University Press 2012).
[328] Ibid.

4.5 Canada

Canada has three levels of government, consisting the Federal government, Provincial and Territorial governments and the Municipal or Local governments. The Federal government is responsible for the general affairs and matters that affect the whole country, such as immigration, citizenship, trade with other countries and national defense.[329] The Federal government is made up of: the Queen of Canada (Elizabeth II) as its head of State, the Governor General represents the Queen and carries on the duties as head of State; the House of Commons, composed of Members of Parliament, is responsible for making Canada's laws, the leader of the House of Commons becomes the Prime minister; and the Prime minister is the head of the Canadian Government. The Prime minister chooses Members of Parliament to serve as ministers in the Cabinet. The Senate is composed of senators who review laws from the House of Commons. The Prime minister chooses senators.[330]

The Provincial government is made of the Lieutenant Governor, who represents the Queen, and the Legislative Assembly, which is responsible for making laws. Under the Canadian Constitution, the Provincial government: provides fundamental social services such as health, education, welfare; controls civil and property rights; and exercises power over local government.[331]

The Municipal government is composed of mayors and council members, chosen by residents. They discuss budget, service and administrative issues and are instrumental in coming up with policies for the government. Municipalities are part of the larger regional government.[332]

The Provincial government is responsible for hundreds of billions of dollars. The Provinces raise their own revenue, as well as receive transfers from the Federal government. Key forms of Federal transfers include payments under the Equalization Program, Canada Health Transfer and Canada Social Transfer.[333]

[329] Eugene Forsey, *How Canadians govern themselves* (Ottawa Library of Parliament 2005).
[330] Ibid.
[331] Ibid.
[332] Ibid.
[333] Ibid.

4.5.1 Auditing and Oversight

Financial management is largely a federal responsibility in Canada. However, each level of government is responsible for the management of its finances in order to carry out constitutional responsibilities. Each province has an independent audit officer, often referred to as a Comptroller General or Auditor General. This office holds the provincial and territorial governments accountable for the administration of public funds. The office regularly reviews government finances to ensure that proper accounting practices and systems are entrenched and to guarantee residents value for money. The provincial audit offices report to legislatures at the province, and enjoy significant independence from the provincial government in order to ensure fairness and impartiality in auditing.[334]

Finance and economic policies, before being implemented, require approval from provincial governments. The legislature has a committee to oversee the government and ensure policies and priorities are properly implemented.

4.5.2 Lessons for Kenya

The county governments in Kenya are largely dependent on the national audit office. There are no independent audit offices in the counties to investigate financial priorities at that local level. Since the Kenya's national audit office serves the national government and all county governments, including state bodies and agencies, it would be more efficient to adopt the Canadian model by establishing independent county audit offices. These audit offices need to be free from the influence of the national and county governments.

4.6 Conclusion

Kenya's road to financial devolution marked the first step towards equity and fair resource allocation. As demonstrated from the comparative analysis, Kenya needs to do much more in coming up with laws that promote efficient utilization of public resources. Goodwill and responsibility on the part of political office holders and those occupying county and national government executive position is paramount. This analysis presented throughout this chapter is an important benchmark in guiding the country towards prudent utilization of resources.

[334] Ibid.

Based on the historical study presented, an analysis of existing practice, and the benchmark with key countries of the world having a similar structure to Kenya, chapter five concludes the study and outlines recommendations that this study wishes to have implemented.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

While the current form of constitutional devolution represents a great achievement for the Kenyan electorate – by ensuring that government services and resources are as closest to the citizenry as possible – it has also opened the door to an unprecedented loss of public resources at a massive scale, throughout the country, and in ways not witnessed before in Kenya's postcolonial history.

The enactment of the PFM Act was a milestone that marked a major attempt at managing public funds towards the core principles of good public finance systems, which include transparency, accountability, public participation and prudent use of resources. This study has addressed itself to: a historical analysis of the management of devolved funds, an analysis of the county financial management system, while drawing comparative parallels with key jurisdictions in order to address challenges facing Kenya's public finance management. The study proposes legal, institutional and policy reforms to effect changes towards proper funds management at the counties.

Chapter one gave an introduction to the PFM framework, and the problems facing management of public funds at the counties. There was need to ensure that devolution is entrenched, and the necessary legislative framework put in place to ensure that the core objective of devolution is attained.

Chapter two considered devolved funds which were instituted in the previous constitutional order, under different administrations. These funds faced a number of institutional challenges, characterized by fund multiplicity, overlaps and mismanagement. There was little clarity on the establishment and application of devolved funds, which were often considered tools for personal political advancement, and most of these funds did not serve their intended role.

Chapter three considered the current framework, which suffers ills similar to those under the previous constitutional order. These include: lack of clarity in the objectives of devolved funds at the counties; inefficient utilization of resources; low levels of public participation; conflicting and overlap of roles between national and county governments; little knowledge of the working and management of devolved funds; corruption and theft of public funds; and the use of public resources for political patronage. It is clear that the letter and the spirit of the Act is often overlooked and ignored. In some instances, the Act is itself unable to address itself to these challenges. This means that the Kenyan citizen and taxpayers are robbed, and that the elite continues to extort and lord over those whom they should serve.

Chapter five concludes the study and proposes legal, institutional and policy reforms in addressing challenges in the management of devolved public funds at the counties.

Based on the findings of this study, whereas it true that the PFM Act has loopholes and weaknesses that hinder is operational effectiveness in the management of public funds at the counties, the implementation of the existing framework as laid out by the PFM Act is also wanting, and these have contributed greatly to the loss and mismanagement of public funds in Kenya's devolved units.

In addressing these challenges, both in the PFM Act's framework for counties and in the implementation of the law, lessons garnered from the comparative analysis of the Kenyan devolved funds model with those of South Africa, Nigeria, Canada and United States of America are helpful.

Legal, institutional and policy reforms are important, and will be instrumental in addressing the challenges faced by Kenya's devolved units in order to attain prudent public financial management.

In summary, the shortcomings in the implementation process, coupled with implementation challenges of the existing PFM framework are to blame for the mismanagement of funds that has been witnessed in the recent past. The devolution history in Kenya, and comparative analysis with leading jurisdictions have yielded possible recommendations on laws, institutions, and policies of devolution, which promote responsible financial management.

5.2 Recommendations

Lessons learnt from the analysis of the South African, Nigerian, American, Canadian and the United States of America models are indispensable in the resolution of problems faced by Kenya. It is on this basis that this research advocates for a number of cross-cutting reforms.

The comparative analysis carried out indicates that reforms in the different facets of public financial management at the counties requires concerted effort. This means that all stakeholders in the devolution process should be subjected to frequent, uniform, and well-coordinated civic education programmes. These programmes will raise the level of awareness of the citizenry, taxpayers, civil society, the media, and all county officials with regards to the management of public funds at the county level. The PFM Act should provide for these programmes, not on a voluntary basis, but as part of compulsory capacity building in strengthening funds management.

In addition, based on the case studies of Nigeria, the United States, and South Africa, the strengthening of county units as independent entities from the national government is important. National government offices and those at county level should be autonomous to allow for proper functioning of county offices, free from interference by the national government. Amendments to the PFM Act are therefore necessary in order to make county officers fully accountable to the respective county assemblies, rather than to the Cabinet Secretary of Finance through ministerial directions and regulations. The jurisdiction and powers of the Cabinet Secretary could be, and should be, limited to the affairs of the national government. The Cabinet Secretary could, however publish guidelines, standards, and recommendations that could be adopted by the county executives and county assemblies on a voluntary basis for prudent management of resources.

Additional recommendations are in respect to: planning; budgeting; revenue management; debt management; accounting and reporting; and auditing and oversight.

Planning

As noted from the South African comparative analysis, a number of reforms should be implemented to improve planning processes at the counties in Kenya. The main planning documents at the county government level are: the County Integrated Development Plans, Annual Development Plans, Budget Review and Outlook Papers, and the Budget Estimates.

The PFM Act should be amended to insist on transparency and justification for decisions at the planning stage. Planning documents should contain reasons for decisions. These must be clear, detailed and information-driven to permit discussion with members of the public, and even facilitate disagreements. Public participation at planning level should be assessed based on the quality of reasons and the justification given for the plans made.

In coming up with the plans, the PFM Act should mandate the county assemblies and executives to work together in coming up with equitable systems for allocation of funds, laying out principles and measures for the fund divisions. County plans should not focus more on equality, but rather on equitable allocation of resources, in the face of gaping inequalities and apparent disparities between county subunits. The PFM Act should provide for greater oversight in distribution of resources by assemblies to ensure that the distribution criteria is well justified and clear, both at formulation and implementation. The Act should also require that strategic plans by county departments provide details on mechanisms to ensure equitable distribution of resources within the county.

The County Budgets and Economic Forum is a lever in the county planning process. To ensure that public participation is well twined with quality of work output, there is need to make a number of reforms. The PFM Act should provide for continual training of the members of the CBEF in order to develop capacity. The trainings should be based on the specific needs of each CBEF in a participating county. In selecting members for the CBEF, the Act should require that members having knowledge and awareness about planning and budgeting in economic matters are given priority to ensure successful public participation mechanism.

The PFM Act should be amended, with respect to the CBEF, to ensure that: public consultations are open to the most diverse spectrum of taxpayers and citizens without discrimination; the public consultations have specific purposes and are clear; safeguards should be put in place to ensure that consultative forums are not dominated by a politician, organized interest, or political group; venues and timelines for consultation be made known at least two weeks before the actual event; public participation in planning and budgetary processes occur at all stages in financial management; budget documents and plans should contain summaries and narrative explanation of figures and tables; and there should be a feedback mechanism so that citizens know whether their inputs were received, and whether or why they were or were not incorporated in the relevant budgets and plans.

Budgeting

Based on the South African analysis, key reforms with regards to budgeting, as outlined here, are important in ensuring that Kenya's budgeting processes are among the leading in the world and operate at optimal capacity. While the PFM Act explains and provides for, in detail, the process and stages of budgeting, this law can be made more efficient in a number of ways:

The PFM Act should define the term 'publicise'. Whereas the Act states that documents must be made public 'through national or local media', this should be amended to clarify that all documents, pertaining county finance management should published through the national media, in addition to the local county media. The law should clarify that all documents, in order to meet the threshold of 'publication', must be available in the library, county government offices, and online.

The law provides for budget documents which contain a timeframe for release and publication, but some critical documents are not required to be released within a set timeframe. For example, while the law mandates the publication of Budget Estimates, and supplementary budgets, it does not specify when they should be made public. The PFM Act should be amended to require that documents are published, within, say seven working days, after their release.

The PFM Act should require that the County Fiscal Strategy Paper, a pre-budget statement, be made available to county residents before being adopted by the county assembly, and require that the public reacts to the CFSP before the debate is finalised. This is to avoid any situation where the county assembly debates and passes the CFSP without public participation.

The International Monetary Fund Code of Good Practices on Fiscal Transparency, and the Best Practices guideline for Fiscal Transparency by OECD recommend that governments produce expansive set of documents not captured within the PFM Act. These include a Mid-Year Review of Budget Performance and a Citizens Budget (a simplified form of the budget). In compliance with international best practice principles, the PFM Act should be amended to compel counties come up with these documents.

The PFM Act should define the structure of all documents and ensure that they are publicly available for all. The documents should be prepared with a clear simple language for the general public. The law should be amended to require that all these documents are published on the county government website and the national treasury website, as well as being physically available at county government offices. Budget documents should be available at all offices, including ward and sub-county offices, to facilitate accessibility.

Planning Programme Budgeting, also referred to as Program Based Budgeting, is a requirement in line with international best practices. Whereas the PFM Act requires that counties move from line budgeting to PPB, there is little information available on how to prepare, and how interpret these budgets. The PFM Act should be amended to allow for a more transparent PPB, with specific shift of focus from inputs into the system, to outputs. These entail: detailing programs with clear objectives; use of indicators, targets and timelines in the budget; allowing subprograms for further disaggregation; providing information on personnel costs; including information on appropriations in aid, and external funding; and providing a link between the PPB and the administrative classification of the line items. Government officials should be trained on how to prepare a PPB, and citizens taught how to read these budgets. The Act should provide for PPB formats that allows for transparency and ease of access for more and better information on public finance at the counties.

Revenue management

The reform of the revenue management framework at the counties greatly borrows from what Nigeria has achieved over its long experience with public finance devolution and federalism. These reforms, adopted for the Kenyan framework, are outlined here.

The PFM Act provides that county governments may appoint KRA as their tax collection agent. To facilitate efficient collection of revenue, the provision should mandate KRA to second tax agents to all counties, whose work will be to facilitate the collection of county government taxes and have them deposited into the consolidated County Revenue Fund. This will inevitably reduce cases of lack of accountability in revenue collection, and ensure proper documentation of the deposits is available. This secondment of staff should also allow for training of county staff on international and national best practices of tax collection, which should be in line with the economic and fiscal policies underpinning development in the county.

The current revenue sharing formula between county and national government uses a basic headcount to estimate demand for services in an area, and uses this for division of funds. The Act should be amended to require the usage of data related to specific county services like agriculture, health, and education in order to accurately assess population needs for services. The revenue formula should allow for the investing on the basis of the level of infrastructural development to allow for the less-developed and traditionally marginalized counties catch up with the more developed counties.

The PFM Act should also consider the capacity of counties to raise own revenues. Some counties, especially those in city establishments, have many ways of raising revenue as opposed to counties in the rural areas which have few tax points. The subdivision of funds, including timely release of funds, should take into account the ease and ability to raise own funds in the absence of any other source of revenue. This means that counties with higher revenue raising capacity can be, and should be allocated comparatively less amounts of money, in proportional terms, to those counties whose power to raise own revenue is limited.

To further improve the capacity of raising revenue, legislation can provide for an incentivised system where counties that make greater effort in increasing their revenue are rewarded more on the basis of national allocations, while those which do not make effort receive less. This works to increase accountability in the collection and recording of county revenues.

The calculation of revenues for counties should be based on multiple transfers rather than a single formula system. Multiple transfer system all year round will reduce and even prevent instances where activities at the counties are grounded for failure or delay by the national government in disbursing funds meant for counties. The transfers can be classified based on: expenditure transfers (those transfers meant to fund the ongoing costs of services); infrastructural transfers (to fund infrastructural developments in historically marginalized counties for redistributive purposes and to allow less developed counties catch up with their more developed counterparts); and a capacity and effort transfer (an incentivised system targeting prudent management and application of public funds with the counties).

Debt management

Based on lessons learned from debt management systems in Nigeria's public finance system at devolved centres, a number of reforms outlined here will improve the Kenyan experience with debt administration.

The PFM Act subjects counties to extreme conditions of borrowing, which include: borrowing only for development purposes; with approval of the county assembly; and with the national government guaranteeing. It should be noted that even the national government borrowing is not severely curtailed by such requirements. The national government can borrow on the recommendation of the Cabinet Secretary for Finance, and without any approvals from the national assembly or other organs. This has made it difficult for county governments to engage in borrowing that would otherwise be beneficial to the county. Some county governments overlooked the strict borrowing provisions and went ahead to engage in borrowing. An amendment of the PFM Act is therefore necessary to liberalize the borrowing process, by removing the requirement that the national government guarantees the loans, and that county assemblies approve loans beforehand. County executive should be given power to borrow, and all such borrowings should be charged to the County Revenue Fund.

The PFM Act should be amended to allow county governments lend surplus monies, provided all repayments are paid into the County Revenue Fund. Currently, the Act only allows for the depositing of surplus funds into deposit earning accounts with commercial banks. Deposit earning accounts do not offer competitive rates and value for money, hence the need and desire to liberalize the law by allowing county governments extend credit in the event of surpluses.

Accounting and reporting

The analysis of the accounting and reporting framework of the United States of America, in individual states and at the counties, give a compelling case for reforming the Kenyan framework. These reforms are outlined here.

While there has been the movement of accounting systems from manual to electronic, this change is not provided for, in the PFM Act. The Act should be amended to allow, and mandate the use of electronic system of accounting and reporting. The current system in use is IFMIS, however this system is not wholesomely adopted as some counties still rely on manual systems.

The training of staff on the use of IFMIS and other electronic accounting and reporting systems should be regularised and consistent. To ensure compliance with the real-time electronic systems, daily, weekly, and monthly reports should be produced under statutory authority – for the public, auditors and the county assembly to exercise its oversight function.

The PFM Act should provide for a complete shift from cash based system of accountancy to accrual system in all county government financial affairs. Under the cash based system, transactions are recognized when cash is paid or received and economic events are not recorded and reported if there is no exchange of cash, making government accounts less financially transparent, and lacking in integrity and accountability. Accrual accounting offers additional benefits over the cash based accounting from the point of view of financial management, accountability and transparency in a number of ways: accrual system recognizes the economic flow of events, at the time which they occur, as well as when cash payments and receipts are made; while cash accounting typically account only for the cash holdings on assets and liabilities, accrual system allows for the recording and valuation of all stocks of assets and liabilities, which are thereafter included in the balance sheets; the accrual system enhances the monitoring of liabilities, including contingent liabilities; and allows for the consolidation of all entities under governmental control.

The PFM Act should provide for a statutory and mandatory training of county leaders on their roles in public finance management. The training should be periodic and done on a rotational basis for each county. This means that at any time, officers from the counties should be undergoing financial management training, after which they are replaced with other officers from the counties. This will allow for the smooth operation of county affairs, while enhancing the skill of the officers, for better service delivery and value for money to county citizens and taxpayers.

Auditing and oversight

The lessons learned from the Canadian auditing and oversight functions are important in reforming the Kenyan devolved system to its optimal capacity. These reforms are outlined here.

The PFM Act does not require the publication of county audit reports, until after they are released by the Auditor-General. The law should be amended to require regular and consistent publication of audit reports, say, after every three months, and to ensure that the publication of these reports highlight follow-up actions, or the lack thereof, in adverse audit findings. This will bring public pressure sufficient to action wayward county officers that are repeatedly flagged for poor performance by the Auditor.

The PFM Act should be amended to create independent Auditor-General Offices at every county. Auditing is the cornerstone of every prudent financial system. While the national audit office does a lot in auditing government accounts – which include accounts of the national government, state agencies, and state corporations – the sheer volume of accounts to be audited by the national office means that the staff are overstretched. This explains the delays in releasing annual audited reports for government entities, including county governments. To promote efficiency, independent county offices of the auditor general need to be established. These should be accountable to the respective county assemblies. And their reports used as a basis for allocation of funds and functions in within the county government departments.

The audit reports are released on an annual basis. A year is quite long to keep a financial entity on track and to ensure accountability and public pressure. The PFM Act should, in addition to creating independent auditor general offices at the counties, require that the county audit offices produces audit reports on a quarterly basis. This means that an audit of county government accounts should be available after every three month period. This will inevitably increase the accountability of county officers responsible in financial management.

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