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**LEGISLATIVE FRAMEWORK FOR THE NATIONAL AND
COUNTY BUDGET PROCESSES IN KENYA.¹**

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ABBREVIATIONS AND ACRONYMS

CARA	County Allocation of Revenue Act
CARB	County Allocation of Revenue Bill
CRA	Commission on Revenue Allocation
CS	Cabinet Secretary
DoRA	Division of Revenue Act
DoRB	Division of Revenue Bill
FY	Financial Year
NA	National Assembly
PFM Act	Public Finance Management Act

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1.0. INTRODUCTION

What is a budget? Different authors and dictionaries have provided various definitions. Below are a select few:

A budget can be defined as *a financial plan that includes calculating the revenues and expenses of the state, a social or economic organization for a determined period of time.*² According to the Oxford University Press Dictionary of Economics, *it is a statement of a government's planned receipts and expenditure for some future period, normally a year.*³

According to the Merriam-Webster Dictionary, a budget *'is a statement of the financial position of an administration (as of a nation) for a definite period of time-based on estimates of expenditures during the period and proposals for financing them.* It is also defined as *a plan for the coordination of resources and expenditures.*

Consequently, a country's budget sets out a country's financial plans, detailing what the government intends to spend, how and where it will be spent, and how the money to be spent will be raised over a specified period.

Kenya's budget process can be summarized into four key stages: ***Formulation, Approval, Implementation,*** and the ***Audit and Evaluation*** stage.

2.0. CONTEXT SETTING: THE NATIONAL AND A COUNTY BUDGET PROCESS IN KENYA

Following the introduction of a devolved system of governance and the devolution of functions under the Fourth Schedule of the Constitution, budgeting is necessary at both levels of government for the effective implementation of government functions and delivery of public services. The budget process at both levels is mainly guided by the Public Finance Management Act, 2012.

Of note, allocation of revenue to county governments is dependent on the Division of Revenue Bill (DoRB) which divides revenue between the National and County level government and the County Allocation of Revenue Bill (CARB) which prescribes the division of revenue among counties. When

² Todea, Nicolae & Calin, Anca. (2010). *The Budget, An Instrument or Planning.* Annals of the University of Oradea: Economic Science. 1.

³ Black, J., Hashimzade, N., & Myles, G. (2012). *A Dictionary of Economics.* Oxford university press.

the two Bills are assented to by the President they become the Division of Revenue Act (DoRA) and the County Allocation of Revenue Act (CARA).

Over the last two financial years, friction has characterized the two houses of Parliament over the DoRB. In FY 2019/2020, the National Assembly and the Senate disagreed on the allocation to the counties, with the National Assembly insisting on Kshs. 316.5 Billion while the Senate was hell-bent on Kshs. 335.67 Billion. Eventually, an agreement was reached through a second attempt at mediation as prescribed by Article 113 of the Constitution. Still, the issues were the subject of an Advisory Opinion by the Supreme Court.^{4 5} Despite the Advisory opinion by the Supreme Court, the situation played out again in FY 2020/2021, with the proposed third revenue sharing formula causing heated debate in Parliament.⁶

Besides Parliament, The Commission on Revenue Allocation (CRA) is also one of the key institutions in revenue sharing. CRA must submit its recommendations to Parliament by the 1 of January, which, although not binding, should be considered in discussions of the DoRB and the CARB, which are tabled before Parliament by the 15 of February.

The CRA has recently published its' recommendation of an allocation of Kshs. 370 billion (equivalent to 27.3% of the most recent audited and approved accounts of 2016/17) to counties in the FY 2022/2023. In making the recommendation, the CRA expressed concerns on the ability of the National government to meet its' fiscal deficit after the pegging of the county level allocation by the Division of Revenue Act, linking it to the growing debt. The CRA thus proposes that any projected revenue increases from the FY 2021/2022 be allocated to the national government to reduce the deficits.⁷

⁴ See Article by The Kenya Institute for Public Policy Research and Analysis (22.12.2019) titled, 'Revenue Sharing Stalemate between National Government and County Governments' available at <https://kippra.or.ke/revenue-sharing-stalemate-between-national-government-and-county-governments/> (accessed 20.11.2021)

⁵ See the case, *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae) [2020] eKLR* available <http://kenyalaw.org/caselaw/cases/view/195034/> (accessed 28.11.2021)

⁶ See Article by Business Daily (29.07.2020) titled, 'How Senate can end county revenue sharing stalemate' available at : <https://www.businessdailyafrica.com/bd/opinion-analysis/ideas-debate/how-senate-can-end-the-county-revenue-sharing-stalemate-2297182> (accessed 20.11.2021)

⁷ See Article by Ronald Ng'eno (10.11.2021) titled, 'Division of Revenue Recommendation between National and County Governments for The FY 2022/23' available at <https://cra.go.ke/2021/11/10/division-of-revenue-recommendation-between-national-and-county-governments-for-the-fy-2022-23/> (accessed 20.11.2021)

3.0. NATIONAL LEGISLATION CONCERNING THE BUDGET PROCESS IN KENYA

S/No.	Legislation/Regulations	Highlights Concerning the Budget Process	Remarks
1.	Constitution of Kenya, 2010	<ul style="list-style-type: none"> <li data-bbox="689 376 1610 632">i. Article 216 establishes the Commission on Revenue Allocation; whose mandate is to make recommendations concerning the basis for the equitable sharing of revenue raised by the national government; between the national and county governments, and among the county governments. <li data-bbox="689 708 1610 1015">ii. Article 220 - prescribes the form, content, and timing of budgets and prescribes the passing of national legislation that should provide for: the structure of the development plans and budgets of counties, the timelines of the tabling of the plans and budgets and the form and manner of consultation between the national and county governments. <li data-bbox="689 1129 1610 1334">iii. Article 221 - Provides that the CS should table the budget estimates before the National Assembly (NA) at least two months before the end of each financial year (13 day of June or as prescribed by legislation). 	The Judiciary (through the Chief Registrar) and the Parliamentary Service Commission also table their estimates (by the 30 of April). There is a need to engage in public participation and examine their priorities and how it considers WEE's objectives.

S/No.	Legislation/Regulations	Highlights Concerning the Budget Process	Remarks
		<ul style="list-style-type: none"> <li data-bbox="685 212 1610 467">iv. Article 221 - requires the establishment of a Committee (now the Budget and Appropriations Committee of the N.A) of Parliament that discusses and reviews the estimates before they are considered by Parliament. The Article provides for the Appropriation Bill and its content. <li data-bbox="685 544 1610 635">v. Article 222 - allows for appropriations from the Consolidated Fund where the Appropriation Act is yet to be assented to. <li data-bbox="685 711 1610 850">vi. Article 223 - provides for Supplementary Budgets Article 224, provides for the development of the County appropriation bills based on the Division of Revenue Bill. <li data-bbox="685 895 1610 1150">vii. Article 230 - establishes the Salaries and Remuneration Commission; whose role is to set and regularly review the remuneration and benefits of all State Officers and advise the national and county governments on that remuneration and benefits of all other public officers. 	
2.	The Public Finance Management Act (the PFM Act)	<p data-bbox="674 1201 1610 1289">The PFM Act is the main legislative framework on budgeting at both the National and County level.</p> <ul style="list-style-type: none"> <li data-bbox="701 1310 1610 1337">i. Establishment of the Parliamentary Budget Office (Section 9-10) 	

S/No.	Legislation/Regulations	Highlights Concerning the Budget Process	Remarks
		<ul style="list-style-type: none"> ii. Responsibilities of the National Treasury concerning the Budget Process (Section 25-27). iii. The National Government Budget Process (Section 35- 45). iv. Responsibilities of the County Governments concerning the County Budget Process (Section 117 -118). v. The County Government Budget Process (Section 125-Section 127). vi. Budget and Budget process for urban areas and cities (Section 175 -177). vii. Establishment of the Intergovernmental Budget and Economic Council (Section 187-188). viii. Public participation; development of Regulations to provide for participatory governance (Section 207). 	
3.	The Public Finance Management (PFM) Regulations - National Government and County Government, 2015	<ul style="list-style-type: none"> i. The PFM Regulations National Government: Regulations 31- 41 provides for the budget preparation process at the National level ii. The PFM Regulations County Government: Regulations 29 - 40 provide for the budget preparation at the County level 	

S/No.	Legislation/Regulations	Highlights Concerning the Budget Process	Remarks
4.	The County Government Act, 2012	<p>Provisions of the County Government Act that are relevant to the budgeting process include:</p> <ul style="list-style-type: none"> i. Principles of citizen participation in counties (Section 87) ii. Establishment of modalities and platforms for citizen participation (Section 91) iii. Principles of public communication and establishment of mechanisms to facilitate access to information (Section 93 - 97) iv. County Planning and the various plans required at the County level (Part IX of the Act) v. Types and purposes of County Plans (Section 107,108 - 115) 	
5.	The Commission on Revenue Allocation Act, 2011 and the Salaries and Remuneration Commission Act, 2011	<p>The two Acts are the constitutive Acts for the Commission on Revenue Allocation and the Salaries and Remuneration Commission.</p> <p>The Acts prescribe key issues relating to the Commissions' powers and their composition, administration, financials, etcetera.</p>	
6.	The County Public Participation Guidelines, 2016	<p>Although lacking legal force, the Guidelines developed in 2016 by the Ministry of Devolution and Planning and the Council of Governors provide a standard and point of reference for how counties should conduct public participation during the budget-making process.</p>	<p>Although public participation is a constitutional principle, it is yet to take root in practice.</p>

S/No.	Legislation/Regulations	Highlights Concerning the Budget Process	Remarks
			<p>Courts have made various pronouncements on the principles that should guide public participation.⁸</p> <p>However, the practice by most public entities continues to deprive citizens of meaningful engagement by denial of access to information, short timelines of engagement, and no clear mechanisms of feedback on how comments by citizens are considered.</p>
7.	The National Policy on Gender and Development, 2019	The Policy provides a detailed context analysis, identifying challenges and identifying the key priority actions and implementation plan.	<p>The Policy is relatively new, having only been launched in early 2021.⁹</p> <p>Consequently, it is essential to monitor how the various government departments are incorporating it in their planning</p>

⁸ See the Case of *Wilfred Manthi Musyoka v County Assembly of Machakos; Governor - County Government of Machakos & 2 others (Interested Parties) [2019] eKLR* available at <http://kenyalaw.org/caselaw/cases/view/167218/> (accessed 20.11.2021)

⁹ See Article by UN Kenya (06.04.2021) titled, 'Kenya launches long awaited national policy on Gender and Development' available at <https://www.genderinkenya.org/news/kenya-launches-long-awaited-national-policy-on-gender-and-development/> (accessed 28.11.2021)

4.0. RELEVANT CASE LAW

The role of the CRA in determining the allocations between the national and county levels of government and the ensuing frictions between the institutions involved has been the subject of a Supreme Court decision:

*Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae) [2020] eKLR - [Conflict in division of revenue between national and county governments]*¹⁰ This matter arose in the context of the stalemate between both houses of Parliament as well as the Executive on the amounts to be allocated to the County governments in the financial year 2019/2020 necessitating an advisory opinion from the apex court. The Supreme Court affirmed the position that the CRA's recommendations on revenue sharing between the national and county level governments is not binding on Parliament, although Parliament must consider the recommendations, they are just that - recommendations.

The Court also addressed the issue of what should happen in the instance the impasse between the National Assembly and the Senate persists to avert a paralysis of county functions. In this regard, the Court referenced the interim measures under Article 222 of the Constitution,¹¹ that provides for interim measures in a situation where the President has not assented to the Appropriations Act to avoid crippling the National Government. The Court thus determined that in such circumstances, an amount of 50% of the amounts allocated to counties in the Division of Revenue Act of the previous financial year. The Court further opined that where such stalemate persists, and the two houses fail to agree through the mediation process, the High Court may be petitioned to dissolve Parliament for failing to execute its mandate.

The Court also observed that the Courts are not the appropriate forum for setting timelines as to when the National Treasury must transfer the equitable share of revenue to counties; and Parliament cannot enact the Appropriation Act before the enactment of the Division of Revenue Act.

¹⁰ See the case of *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae) [2020] EKLK* available at <http://kenyalaw.org/caselaw/cases/view/195034/> (accessed 28.11.2021)

¹¹ Article 222, of the Constitution allows the National Assembly to authorize the use of money from the Consolidated Fund, where the Appropriation Act has not been assented to.

The Supreme Court agreed with the Court's finding in: *In the Matter of the 47 County Assemblies and Others; Petition No. 368 of 2014.*, Faced by the question as to whether the recommendations addressed to all the 47 County Assemblies and County Executives, by the Commission on Revenue Allocation were binding upon the former, *Lenaola J*, having extensively considered the applicable law on the subject matter held that:

"The import of these provisions (Article 218 (2)) is that a recommendation made by the 1st Respondent to the Senate is not binding, but for good order, reasons for a deviation must be given."

The Supreme Court agreed with Justice Lenaola's and observed that: *'We agree with this statement of the law save to add that, the non-binding nature of the Commission's recommendations is not limited to the Senate but is also applicable to the National Assembly, and indeed, to any other entity to which they may be directed.'*

J O O (also known as J M) v Attorney General & 6 others [2018] eKLR - [CRA recommendations are not binding]¹² : This case related to how the Petitioner, a woman in labour, was handled at the Bungoma County Referral Hospital, which resulted in her giving birth in the hospital floor and was followed by humiliation from the hospital staff who ordered her to carry her placenta and walk to the delivery room despite being weak and vulnerable. One of the issues for determination before the Court was whether there was a failure by the National and County Governments to establish necessary policy guidelines, and other measures to implement and monitor healthcare services and to allocate maximum available resources, and if so, whether such failure resulted in the infringement of the Petitioner's rights.

The Court observed that in light of recent reports on healthcare services in the country, the National and County Governments had not devoted adequate resources to healthcare services, had not put in place sufficient measures to implement, monitor, and provide minimum acceptable standards of healthcare, thus violating the Constitution and International instruments that the country had acceded to.

¹² See the Case of *J O O (also known as J M) v Attorney General & 6 others [2018] eKLR* <http://kenyalaw.org/caselaw/cases/view/150953/> available (accessed 04.12.2021)

5.0. CONCLUSIONS

Following the foregoing review of the legislative framework governing Kenya's national and county budget processes, there emerge two key conclusions:

Firstly, there is a need to assess what individual counties prioritize and the extent to which women empowerment is directly or indirectly considered. While the WEE Hub has already conducted an analysis of the 2020/2021 national budget for its responsiveness to WEE issues, a similar evaluation of a sample number of counties would be imperative to inform further interventions.

Secondly, there is also need to frame interventions against key policies on gender, such as the National Policy on Gender and Development, 2019 and the proposed National Women Economic Empowerment Policy¹³ to evaluate how the current county budgets are aligned the priorities therein.

6.0. RECOMMENDATIONS

The following four recommendations to the WEE Hub are proposed for further action towards ensuring a deeper and more cogent analysis of the legislative framework for the national and county budget processes insofar as they advance the cause of women's economic empowerment in Kenya:

Firstly, AWSC WEE Hub should identify counties that can focus on the Project and engage in a deeper analysis on what the counties have prioritized in their budgets. In this regard some of the questions for interrogation are: *To what extent have women's empowerment been considered? Which counties are leading in this regard? To what extent do women engage in the budgeting process? What factors have influenced or resulted in the prioritization of women's empowerment in different counties? Which counties can we engage before they finalize on the 2022/2023 budget towards meeting WEE Hub's objectives? Which issues should be prioritized in the context of the target counties?*

Secondly, AWSC WEE Hub should also review the extent to which Kenya's gender policies and commitments reflect in the budget priorities to identify gaps and challenges and develop key proposals for further advocacy.

¹³ The Policy is in the process of development by the Ministry of Public Service, Gender, Senior Citizens Affairs & Special Programmes.

Thirdly, it would also be imperative to engage with the other agencies that prepare separate budgets, that is, the Judiciary and the Parliamentary Service Commission, to evaluate the extent to which the gender priorities are considered.

Lastly, AWSC WEE Hub should also develop recommendations on law reforms that are necessary to facilitate a more gender responsive budget process, where gaps exist.