EYE ON COUNTY ASSEMBLIES

A study on the Performance of County Assemblies' Oversight Functions, a Decade Later

WHY THE SUCCESS OF DEVOLUTION DEPENDS ON THEM

November, 2024

MZALENDO

LIST OF ABBREVIATIONS

ADP	Annual Development Plan
CPAC	Senate County Public Accounts Committee
CBK	Central Bank of Kenya
CIDP	County Integrated Development Plan
CAF	County Assemblies Forum
CPST	Centre for Parliamentary Studies and Training
CBTS	County Budgetary Transparency Survey
CRA	Commission on Revenue Allocation
IFMIS	Integrated Financial Management Information System
IPPD	Integrated Payroll and Personnel Database
ICPAK	Institute of Certified Accountants of Kenya
OAG	Office of the Auditor General
OSR	Own Source Revenue
OCOB	Office of the Controller of Budget
MCA	Member of County Assembly
PEFA	Public Expenditure and Financial Accountability
PBB	Programme Based Budget
SDD	State Department of Devolution
SOCATT	Society of Clerks at the Table
TA	Transition Authority
WDF	Ward Development Fund

FOREWORD

The principle of accountability in governance is at the core of the Constitution of Kenya 2010, including the devolved system of government comprising the executive and legislative arms of county governments across the country. The principle of devolving power and abandonment of the centralised system of government received universal support by all Kenyans during the constitutional review process. Indeed, and as the Constitution of Kenya Review Commission noted in its final report, there is no single view that opposed the devolution or sharing power from the centre.

At the same time, Kenyans called for accountability for the manner in which powers that would be exercised, both at the national and local levels. With regard to the county level, county assemblies were seen as the appropriate institutions to check the exercise of power and ensure the entrenchment of oversight and accountability in the devolved system of government.

While the county executives have taken the centre-stage in national debates regarding the implementation of devolution, the effectiveness of county assemblies in carrying out oversight and ensuring accountability has not received equal prominence. County assemblies have gradually grown their capacities to exercise their functions since 2013 and have made important strides in performance of their roles.

However, county assemblies have also faced structural and systemic challenges in the performance of their roles and functions. This report presents findings from an assessment of the oversight role of county assemblies. While the report notes the progress that county assemblies have made over the last decade, it also highlights the challenges that county assemblies have faced, as well as recommendations to improve their effectiveness.

Mzalendo Trust has been at the forefront of advocating for effective legislatures and continuous improvement of parliamentary and legislative performance. This assessment forms part of the efforts and contribution by Mzalendo Trust to development of capable legislatures at the national and county levels in Kenya.

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Finally, we thank Dr. Conrad Bosire, the consultant, who led the assessment and the writing of this report.

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EXECUTIVE SUMMARY

This report evaluates the implementation of the oversight function in the county assemblies since the entry of county governments in March 2013. County governments inherited the administrative structures and facilities that belonged to the defunct local authorities that existed in the pre-2010 era. However, the role of county assemblies, including that of oversight, differed fundamentally from the former local authorities as it mirrors the legislature at the national level. Therefore, county assemblies had to build institutional structures and capacities to reflect their role under the 2010 Constitution.

While counties have made steady and important strides in building infrastructure and capacities necessary for the discharge of their functions, a number of factors have negatively impacted on their effectiveness.

These include:

- The incomplete transition to devolved governance, including the completion of transfer of functions and resources to county governments
- Inadequate and vague frameworks on the role of county assemblies in oversight vis-à-vis the Senate at the national level
- Weak cooperation and linkages between the county assemblies and national agencies whose role is relevant to the oversight work of counties
- National and county-level politics that shape the effectiveness of county assemblies in oversight work

The report has examined, in detail, how the above identified factors serve to influence oversight of county assemblies, mostly in a negative manner. While these factors are common to all county assemblies, the manner of manifestation of these challenges is not uniform and the unique aspects of the county assemblies have also been discussed.
The report has assessed the performance of oversight role by county assemblies in four specific aspects, namely:

- Oversight in planning, budgeting, and implementation (including audit)
- Development of legal and policy frameworks to facilitate oversight
- Facilitation of public participation in oversight
- Cooperation between assemblies, the Senate, and other agencies in oversight

In each of the four areas of assessment, the report describes the current status, patterns and trends, as well as the emerging issues that have relevance to the oversight role of the assemblies. Next, the report has assessed and analysed the challenges that county assemblies face in the pursuance of their oversight role. These challenges have been deduced from the preceding parts of the report and they include:

- Weak institutional capacity of county assemblies
- Incoherence and disjointed capacity enhancement and training of county assemblies
- Inadequate resources to support and facilitate oversight
- Lack of financial autonomy and financial independence of county assemblies
- Weak cooperation between county assemblies and the Senate and other national agencies relevant to county assembly oversight
- Uncertainty in the legal and policy frameworks on the nature and scope of role of the assembly vis-à-vis the Senate with regard to oversight

For each of the above challenges, the report has identified recommendations to address the challenges and improve the effectiveness of county assembly oversight as below:
Weak capacity of county assemblies

- Undertake technical capacity needs for county assemblies vis-à-vis available skills in all county assemblies
- Undertake discussions with the Senate and other national agencies on addressing the capacity gaps
- Undertake capacity needs assessment at the start of every term of assembly
- Develop capacity development programme appropriate for the identified needs of members

Incoherent capacity building and training

- Develop uniform standards for training of members and staff of county assemblies in consultation with CPST, SOCATT, CAF, etc.
- Standards to cover curriculum, trainers, etc.
- Engage the Senate and other national agencies on the necessary resources to provide training

Inadequate resources to support oversight

- Engage the Senate and other relevant agencies on the adequacy of resources
- Mobilise resources for training
- Build partnerships with training institutions and relevant agencies at the national level to train and build capacity

Lack of financial autonomy and independence of the county assembly from the executive

- Expedite the enactment of the County Public Finance Laws (Amendment) Bill, 2023
- Engage the Senate and relevant national agencies on rules to guarantee the independent operations of county assemblies
- Engage the Salaries and Remuneration Commission and other national agencies on fair remuneration of MCAs to enhance their independence

Weak cooperation and linkages in oversight

- Engage the Senate to develop rules of regular engagement with assemblies for purposes of cooperation and enhancing oversight (different from audit sessions)
- Develop a joint framework (national law) to guide the relationship between the Senate and the County assemblies in oversight matters
- Engage the Senate for the development of a framework (legal and policy) to guide interaction between national institutions and county assemblies on oversight matters
- Develop a framework to guide systematic oversight of national bodies by the Senate focusing on how the institutions are facilitating counties

Uncertain and inadequate framework to support oversight

- Review the current laws that support and identify the required interventions to address the gaps identified
- Senate to develop the required frameworks to address gaps
- Review the current county laws and rules that support and identify the required interventions to address the gaps identified
- County assembly to develop the required frameworks to address gaps

Chapter One

INTRODUCTION

1.1 Introduction

This report provides the findings from the assessment of county assembly oversight in Kenya. The assignment entailed a review of the structures, processes, and practices aimed at facilitating oversight of the county executive by the county assembly. Specifically, the report reviewed the successes and challenges in structures and effectiveness of oversight, as well as recommendations to enhance effectiveness in the 47 county assemblies across the country.

The Constitution and enabling legislative provisions, from which the county assemblies draw their oversight mandate, contain specific roles that are collectively the oversight function that is vested in the assemblies. Oversight, in the general context of legislatures, may be defined as:

> *[T]he informal and formal, watchful, strategic and structured scrutiny exercised by legislatures, including Parliament, in respect of the implementation of laws, the application of the budget, and the strict observance of statutes and the Constitution. In addition, and most importantly, it entails overseeing the effective management of government departments by individual members of the relevant executive authority in pursuit of improved service delivery for the achievement of a better quality of life for all people.*[1]

County assembly oversight, thus, generally entails the careful and systematic monitoring of activities of the county executive with the aim and purpose of ensuring that plans and policies proposed by the executive and approved by the assembly are implemented in accordance with the law and laid out plans. In concrete terms, county assemblies will ensure plans for service delivery and development are actually implemented in a manner that leads to the intended outcomes.[2]

If well designed, pursued, and implemented, oversight may not only ensure transparency and accountability in the manner in which the county executive operates, but would also contribute to enhanced efficiency in the use of public resources and the optimal delivery of services, effective participation of citizenry in governance, and overall development and advancement in the counties. In practical terms, oversight may entail the prevention of illegal or irregular activities or conduct, such as corruption and wastage, that may affect the achievement of intended plans. Effective oversight can promote transparency and accountability which will in turn, enhance public trust in public institutions and governance processes.[3]

There are external and internal factors and processes that have a direct and indirect impact on the oversight role of county assemblies and which define the environment in which county assemblies operate and, ultimately the effectiveness of oversight. Specific examples include:

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1. South African Legislatures' Secretaries' Association, 'Oversight Model of the South African Legislative Sector' at p.8.
2. Jeconia Okello Abonyo et al.; Saudi J. Humanities Soc. Sci.; Vol-2, Iss-5(May, 2017):385-392, 'Influence of Political Parties' Affiliations on County Assemblies' exercise of Oversight authority over County government in Kenya: A case study of Makueni County Assembly'
3. SOCATT-Kenya, 'Model County Assembly Committee Manual' (January 2018), p. 3. p.16.

- Capacity and preparedness of county assemblies to carry out their oversight function;
- The effectiveness of current capacity building programmes in county assemblies;
- The resources availed for oversight vis-à-vis the nature of work involved; and
- Cooperation at the county level and with external institutions in the pursuit of the oversight function, among other issues.

1.2 Background to the assignment

The three traditional functions associated with legislatures: representation; law-making; and oversight, are well reflected in the constitutional roles of the county assemblies. The Constitution states that legislative authority is vested in and exercised by the county assembly. In this regard, the county assembly may make laws necessary for the effective functioning of the county government.[4] With specific regard to oversight, the Constitution states that "the county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other agencies or institutions within the county."[5] Additionally, the Constitution states that county assemblies may receive and approve plans and policies of the county government related to the management and exploitation of the county's resources, and the development and management of infrastructure and institutions.[6]

The County Governments Act, enacted in 2012, fleshes out further functions of the county assemblies.[7] Specified oversight roles under the Act include:

- the vetting of appointed nominees in accordance with the applicable law;
- approval of the budget and expenditure of the county government;
- enactment of necessary legislation to facilitate financial management;
- approve county borrowing;
- approve county development, among other functions prescribed by or under any legislation.[8]

County assemblies have made progress in terms of putting in place structures and systems, as well as the gradual development of capacity to undertake the oversight function and other mandates since March 2013. Progress achieved includes: establishing basic institutional structures and systems to enable county legislatures to carry out their core responsibilities, the enactment of laws, rules, and policies at the county level, public participation in county government processes, pursuit of development and service delivery priorities of people, among other successes.

However, the county assemblies have also faced a myriad of challenges, ranging from: inadequate capacity of members and technical teams to effectively undertake oversight, insufficient resources to facilitate oversight, weak or uncertain national legal and policy framework to effectuate oversight, political influence that undermines oversight and accountability, the financial independence of county assemblies to pursue and achieve accountability in county governance, among other factors.

The current 47 county assemblies are the third generation (2022-2027), coming after the previous two county assembly terms (2013-2017 and 2017-2022).

4. Article 185 (2) and (3) Constitution of Kenya, 2010.
5. Article 185 (3) Constitution of Kenya, 2010.
6. Article 185 (4) Constitution of Kenya, 2010.
7. Section 8, County Governments Act, 2012.
8. Section 8 (1) (a) to (f) County Governments Act, 2012.

County assemblies, unlike the national legislature with a long history of existence, are relatively young, having commenced their operations since March 2013. As the report demonstrates, assemblies faced initial challenges of capacity and structures to carry out oversight. However, county assemblies have since gradually built their capacities to carry out functions amidst many persistent and systemic challenges.

1.3 Methodology and approach to the assignment

Information and data provided in this report was mainly gathered through an extensive desk review of literature that is relevant to the oversight work of county assemblies. The reports of individual county assemblies, as well as other documents emanating from the assemblies provided valuable and direct evidence of the work that county assemblies are undertaking. Equally, reports from national agencies such as the Office of Controller of Budget, the Office of the Auditor General, the Commission on Revenue Allocation, Senate Committees, and intergovernmental associations such as the Society of Clerks at the Table (SOCATT) and the County Assemblies Forum (CAF), among others, provided both aggregated and county specific information regarding accountability and governance at the county level. The report also relied on numerous scholarly articles and opinions on oversight in county assemblies, among other groups of literature that were consulted during preparation of the report.

Additional information was obtained through interviews with the current and former leadership (clerk and speakers) and officials of county assemblies, officers of national government agencies, civil society representatives involved in county governance, and governance experts. A total of ten county assemblies were covered during the research, which included physical visits to the county assemblies of Bomet, Siaya, Bungoma, and Elgeyo Marakwet. Phone and virtual interviews were conducted with current and former officials of the county assemblies of Migori, Kiambu, Kitui, Kajiado, Nakuru, and Mombasa County Assemblies. The consultant has also carried out interviews with officials and heads of legislative intergovernmental relations bodies (CAF and SOCATT) as well as representatives of civil society involved in accountability and oversight in county governance. A member of the Senate and officials from the Senate Secretariat, CRA, OCOB, and National Treasury were also interviewed as part of the assignment.

1.4 Structure of the report

Chapter 2 of the report evaluates the implementation of county assembly structures and systems to facilitate oversight as well as the current status. Chapter 3 of the report evaluates the implementation of specific areas of county oversight while providing the successes and challenges. Chapter 4 analyses the challenges that emerge from the structures and activities of county assembly oversight while Chapter 5 provides recommendations to address the identified challenges and to improve and enhance county assembly oversight.

Chapter Two

COUNTY ASSEMBLY OVERSIGHT STRUCTURES, CONTEXT, AND EFFECTIVENESS

2.1 Introduction

This chapter evaluates the county assembly structures and processes in place to support oversight, and the context in which the assemblies operate, and their overall impact on effectiveness of oversight. The institutional and political environment in which county assemblies operate has an inevitable impact on both the quality and quantity of oversight work that is done by any particular assembly. These factors, which are both external and inherent to the county assemblies, shape the manner in which county assemblies approach their oversight role, and eventually the overall effectiveness.

First, the chapter describes the county assembly structures and processes and how they facilitate county assembly oversight. Secondly, the chapter evaluates the factors and context that defines and shapes oversight work at the county assembly. In both areas, the chapter refers to evidence and examples from the last ten years of the existence of county assemblies.

2.2 County assembly structures

County assembly structures and institutional processes mirror those of the national parliament (Senate and the National Assembly) and indeed other legislatures around the world. In terms of membership, a county assembly is composed of elected members from wards, nominated members representing special categories, and the speaker who is an ex officio member. Number of members differs from one county assembly to the other.

The county assembly administration is headed by the clerk to the county assembly, who is appointed by the County Assembly Service Board (CASB) with the approval of the county assembly.[9] The clerk is the accounting officer of the county legislature and oversees the administration of the county assembly and supervises members of staff of a county assembly. The County Governments Act establishes the CASB, which is vested with the responsibility to establish and abolish offices and administrative structures the county assembly service. CASB consists of the speaker as the chairperson, the leaders of the minority and majority parties, and a county resident.[10] The size of county assembly staff differs from one assembly to the next and is determined through a process that considers the number of MCAs in a county assembly, among other factors.

With regard structures for oversight work, county assemblies carry out their oversight work through the plenary, or "committee of the whole house" as popularly known; this means the county assembly conducts its business as the entire membership through sittings of all members. However, a lot of business in the county assembly, including the bulk of oversight work, is carried out through committees of the county assembly. Indeed, around the world, "committees are the ideal forum for democratic decision-making. They are defined as small, interacting, face-to-face groups that are durable, institutionalized and confronted with a continuous flow of decisions"[11]

9. Section 13, County Governments Act.
10. Section 12 County Governments Act.
11. Bernhad Miller and Christian Stecker, 'Consensus by default? Interaction of government and opposition parties in the

The main advantage of committees is that they assist in managing workload by enabling [a county assembly] to perform numerous activities, simultaneously and expeditiously, which would otherwise have overwhelmed entire chamber.[12]

Furthermore, where specific members have expertise in a particular area or sector, strategic placement in committees enables members to make optimal contributions in the business of the assembly, including oversight. For instance, MCAs who are engineers or accountants can make effective contribution to a roads committee of the budget, or the finance committee, respectively.

Typically, county assembly committees: review legislation, review and approve budget and expenditure of the executive, and carry out scrutiny of policies, plans, and activities of the county executive. Where necessary, committees of the assembly carry out investigation and can summon members of the executive to provide information. County assemblies are also required by law to vet appointees of the executive through committees. Committees also offer a platform for public participation and consultation.[13] Eventually, business that is processed by committees is tabled in the county assembly through reports that are debated and a vote is taken by the plenary.

In this regard, county assembly oversight structures and operations are provided for in the Constitution, the County Governments Act (which is the primary legislation that guides the assembly's operations) and other relevant laws, Standing Orders of the County Assembly, and other relevant rules. While the national frameworks are common to all the 47 county assemblies, each assembly has developed and adapted its own rules to guide concrete processes of oversight.

Furthermore, while there are common basic structures and processes, as provided for in the law, in all the 47 county assemblies, the prevailing political and institutional environment differs from one county to the other. This is, in turn, determined by various external and internal factors as discussed below.

2.3 The context of county assembly oversight and its impact on effectiveness

There are a number of factors that shape the implementation of structures and processes aimed at giving effect to county assembly functions, including oversight. These include factors such as transition from the previous constitutional order to the current system; vague legal and policy frameworks specifically on the boundary of oversight work between the Senate and the county assembly; weak cooperation between the county assemblies and the Senate and other national agencies; and the prevailing political context in the respective county assemblies. The impact that these factors have on oversight are briefly discussed below.

Incomplete and ongoing transition

While the transition from the pre-2010 constitutional order to devolved governance was scheduled to end in March 2015,[14] the process is incomplete and ongoing, and this negatively impacted on oversight county assembly oversight. First, as a result of incomplete transfer of functions, there is no clear and comprehensive scope of functions that a county

committees of the German Bundestag' German Politics, Vol.17, No.3, September 2008, pp.305– 322

12. The Senate, 'Handbook on operations of Committees' at p. 3.

13. SOCATT-Kenya, 'Model County Assembly Committee Manual' (January 2018), p. 3. p.3.

14. With the exit of the Transition Authority, three years after the entry of the first county governments, as per section 2 of the Transition to Devolved Government Act, 2012.

government is in charge of as this is bound to change as a result of the ongoing transfer. As a result, county governments are not able to effectively evaluate the plans and budgets of the county executive, based on the basis of a full understanding of what the county executive is responsible for delivering.

In this regard, the Intergovernmental Relations Technical Committee (IGRTC), which was tasked with completing the transfer of functions between the two levels, gazetted a comprehensive list of functions that were to be transferred to county governments via a gazette notice published in November 2027.[15] However, the notice was abruptly withdrawn a few days later,[16] purportedly to allow further consultation. This has brought uncertainty on the oversight process as county assemblies do not have the full and detailed scope of functions which they can use as a basis to evaluate county government plans, budgets, and policies.

More importantly, during interviews, respondents from county assemblies indicated that the ongoing consultation process on transfer of functions, led by IGRTC, is dominated by the county executive with a minimal to no role for assemblies in the process.[17] The absence of county assemblies from such a process that seeks to shape and define the scope of responsibilities between the two levels of government places county assemblies at a disadvantage as their input is absent from this crucial process. As direct representatives of the people, there is a need to incorporate views of county assemblies and ensure their participation in the deliberations that lead to carving out the responsibilities of county governments. This will further prepare the assemblies to play an effective oversight role.
Some of the IGRTC-led processes will lead to adoption of new laws and policies at the county level and the role of county assemblies is critical in the adoption of such laws and policies. Furthermore, the oversight role of the assemblies would be enhanced where the assemblies participate in a process that defines the scope of the responsibilities of the executive.

Lack of clarity on the oversight role of the Senate and county assemblies

The Constitution appears to share the role of oversight at the county level between the Senate, and the county assemblies. While Article 185 (3) vests the general oversight role in the county assembly, Article 96 (2) provides that the Senate shall exercise oversight on national revenue allocated to county governments.[18] The extent of the oversight role of the Senate is not clear though. The law requires the Auditor General to table county government audit reports in Parliament or county assemblies.[19] In practice, the Auditor General simultaneously tables county government audit reports in the Senate and the county assemblies.

The ambiguity in the roles of the Senate and county assemblies has brought considerable confusion to the oversight process. The Senate County Public Accounts Committee usually evaluates county government audit reports in the same manner that county assemblies would, thus creating a potential for duplication of oversight work. On the other hand, county governors have contested the powers of the Senate to summon them to answer to audit queries and the matter proceeded all the way to the Supreme Court.

15. Gazette Notice No. 16170 (Special Gazette Notice) dated 27 November 2023.
16. Vide Gazette notice No.16780 dated 8 December 2023.
17. Interviews with key respondent engaged in the IGRTC-led process of transferring of functions and officials of county assemblies.
18. Article 96 (3) Constitution of Kenya, 2010.
19. Section 32, Public Audit Act, 2015.

In the case of Senate v Council of County Governors & 6 others,[20] the Supreme Court attempted to clarify the nature of the respective roles of the Senate and the county assembly. The Court noted that while the words in the Constitution seem to exclude the oversight role of the Senate from locally generated revenue, a holistic reading of the functions of the Senate leads to the inevitable conclusion that both the Senate and the county assemblies can play oversight function on both the revenues generated nationally as well as the locally generated revenues.[21]

In its judgment, the apex court also noted that it is impossible to separate different streams of revenue, which are deposited in the County Revenue Fund and budgeted and planned for together.[22] In this regard, the Supreme Court added that the role of the county assembly is to play "first tier" oversight while the role of the Senate it to play "second tier" oversight. The Supreme Court, however, did not define what entails the first and second tiers of oversight.

Most of the respondents were generally in agreement that the county assemblies should have a role in "primary oversight" with the Senate playing a residual or "secondary oversight."[23] However, the fine boundary between the two kinds of oversight was not clear. Some respondents noted that the Senate should restrict itself to review of matters that the county assembly either refers to the Senate, or matters which the assembly is not able to address, and leave the county assemblies to address the rest of the general and detailed oversight issues at the county assembly level.[24]

However, most respondents were also in agreement that the Senate plays an important role. For instance, governors rarely attend county assembly committees where oversight issues are discussed and the Senate provides a forum to hold governors accountable.[25] The Senate also plays a legitimate oversight role with regard to county assembly audit queries and especially where the assembly is not responsive.[26] A case was mentioned where a county assembly clerk who was supposed to appear before a county assembly committee on audit issues failed to do so, and it did not help matters that the clerk is the one to sign such summons.[27] Indeed, the Senate County Public Accounts Committee has routinely highlighted issues of accountability in both the assemblies and the executive.[28]

Furthermore, there is no doubt that the Senate has better facilitation and capacity to carry out oversight, compared to county assemblies. Typically, Senate CPAC Sessions are attended by officials from the Office of Controller of Budget, the National Treasury, the Auditor General and any other agency that the Committee may wish to summon. The attendance by these institutions makes the oversight role more effective as there are discussions on audit issues raised and other accountability questions. However, the sessions typically delve into what can be characterized as the realm of primary or first tier oversight.

20. Petition 24 & 27 of 2019 (Consolidated)) [2022] KESC 57 (KLR) (7 October 2022) (Judgment).
21. At paras 59-60.
22. At para 60.
23. Interviews with county assembly officials.
24. Interview with key respondent.
25. Interview with key respondent.
26. Interview with key respondent.
27. Interview with County Assembly official.
28. See for instance Senate CPAC Committee sessions on Nairobi County Assembly and Executive

The Senators delve into issues of county government projects, expenditures, and specific audit queries raised with respect to county finances, in the same manner as would a county assembly committee. Respondents noted that the Senate oversight sessions attract a lot of public and media attention compared to county assembly sessions,[29] and this creates a perception that county assemblies may not be doing their part yet a lot of work goes on in county assemblies away from the media.

The Senate routinely invites county assemblies to participate in committee sessions. County assemblies provide input on the current status of projects and follow-ups on audit queries raised. The Senate also sees the participation of county assemblies as important for building the capacity of the former in oversight matters.[30] In media reports of April 2024, the chair of the Senate County Public Accounts Committee called for radical proposals to restructure the oversight in county governments. The chair noted that county assemblies have a conflict of interest when it comes to oversight over county assembly funds. According to the media reports, the chair observed that county assemblies should not have exclusive oversight powers over all funds and expenditures at the county assembly primarily because of conflict of interest as well as inadequate capacity of the assemblies. Specifically, the chair proposed that the Senate should play an oversight role in all funds from County Revenue Fund and the Emergency Fund (which are established by national law) while county assemblies should exercise oversight on funds established by county laws, and provided examples such as liquor fund regulations, bursary funds, and other funds that operate under county legislation.[31] The observations of the chair were based on the Committee's findings of the poor state of affairs at the Nairobi County Assembly, which made the Committee chair to cast doubt on the ability of the assembly to effectively play oversight on the county executive.[32]

However, the proposal to limit the county assembly oversight over the County Revenue Fund, as reported by the media, may effectively deprive the county assembly off its constitutional mandate to oversee the executive. Indeed, the County Government is required to deposit all revenue it generates to the CRF, including the funds created by county legislation. Furthermore, the such a proposal runs counter to the general position, as pronounced by the Supreme Court, that county assemblies have a primary mandate to oversight county governments.

The concern raised by the chair of the Senate CPAC regarding the capacity and will of assemblies to play their oversight remains valid. However, it is doubtful whether the takeover of the primary oversight role of the Senate is practical or lawful. There are 96 main county entities (composed of the county executive and the county assembly) to be audited and this is besides the special funds and other entities in the county level that expend water resources and are audited (for example water companies and county corporations). Instead of denying county assemblies their role, the Senate may seek to address the current challenges in oversight through means that recognize the lead role and mandate that county assemblies have in the area of oversight.

29. Interview with key respondent.
30. As per communications from the Senate to county assemblies inviting them to committee sessions.
31. Collins Omulo, 'Clash looms as senators out to trim MCAs' oversight role' Nation Monday 15, April 2024 https://nation.africa/kenya/counties/clash-looms-as-senators-out-to-trim-mcas-oversight-role-4590774
32. Collins Omulo, 'Clash looms as senators out to trim MCAs' oversight role' Nation Monday 15, April 2024 https://nation.africa/kenya/counties/clash-looms-as-senators-out-to-trim-mcas-oversight-role-4590774

These may include: growing the capacity of county assemblies to undertake oversight and ensuring that county assemblies are facilitated (through budgets and appropriate national legal frameworks and policies) to effectively carry out this role, addressing systemic issues that hinder effective county assembly oversight, and ensuring that the relevant national agencies facilitate county assembly oversight processes, among other measures. This will be very much in line with the Senate's direct constitutional mandate as the protector and representative of county government interests.

The Senate has attempted to provide for a framework for its oversight role in the counties. In the third Senate (2017-2022), the Senate introduced the County Assembly Oversight and Accountability Bill, 2021[33] which sought to provide clarity to the oversight role of the Senate and county assembly structures for oversight. The Bill lapsed in the last Senate but has been reintroduced as the County Oversight and Accountability Bill 2024, and is under consideration by the Fourth Senate. While the Bill proposes the establishment of structures of oversight and public participation and accountability at the county level, including structures under the control of senators, it does not provide clarity on the relationship between the Senate or senators on the one hand and the county assemblies or members of the county assembly on the other.

The Senate has also attempted to establish County Development Boards, which were to be chaired by senators and were meant to scrutinize budgets and policies before the county assembly process. However, the boards were declared unconstitutional for fettering the legislative and oversight autonomy of county assemblies.[34] There was also an unsuccessful attempt to establish a Senate Oversight Fund that was to be used by senators to carry out oversight work in their respective counties.

Cooperation between county assemblies, the Senate and other relevant agencies

Effective county assembly oversight is dependent on cooperation between assemblies and the relevant national agencies in a manner that facilitates the flow of timely, regular, and up to date information to assist county assemblies carry out oversight. National agencies that should be in regular contact with the assemblies on matters of oversight include: the Office of the Controller of Budget (OCOB) with regard to budgets and expenditure approvals, the Central Bank and National Treasury with regard to actual disbursements and payments from the County Revenue Fund, the Ethics and Anti- Corruption Commission (EACC) with regard to issues of ethics and integrity, and the Office of the Auditor General with regard to county government audit reports. The role of these institutions is critical and at the core of the oversight function of any county assembly.

Indeed, unlike the Senate where these agencies are constantly represented or present during sessions of the Senate CPAC, county assemblies do not have such a benefit and it is critical that there is information flow on particular issues that the county assemblies and committees are interested in following up. Furthermore, critical issues that indirectly affect oversight, such as the capping of number of committees and staff ceilings (both of which are in practice set by the CRA) require regular consultation with the county assemblies.

However, the respondents from the county assemblies raised a number of issues regarding the manner in which these agencies interact with the county assemblies. First, interactions between county assemblies and the Senate are mainly limited to activities such as visits to counties by Senate committees during their missions or activities such as "Senate

33. Published on 22 March, 2021.
34. Senate and two others v Council of Governors and 54 others (2022) eKLR.

Mashinani" when the Senate holds its sessions in the counties, or where assemblies are invited to the Senate either to attend sessions with the county executive or when audit reports of the assembly are being discussed.[35]

The nature and extent of the respective oversight roles of the Senate and county assemblies and how both can enhance synergy and effectiveness in oversight is not entirely clear. During the interviews, key respondents from the county assemblies noted that the work of the Senator in the county was not clear and that in some cases, senators rarely paid a visit to the assembly to find out the issues and challenges in the assembly. During the constitutional review process, there was a proposal to make the Senator an ex officio member of the assembly with reporting obligations to the assembly on steps that the Senate is taking to strengthen and promote the autonomy and interests of county assemblies.[36] However, this provision was omitted form the final constitutional text. Nevertheless, elected Senators routinely address their respective assemblies, albeit on an ad hoc basis; by August 2024, 12 senators had made addresses to their home county assemblies.[37]

Secondly, while there is some interaction between the assemblies and CRA, OCOB, and OAG, all respondents indicated that there is more that could be done to enhance oversight role of county assemblies. One respondent indicated that there is a prevailing perception that the OCOB is an agency that deals primarily with the county executive (county treasuries) and has minimal to do with the assemblies, especially since approval of county assembly expenditure is made through the county executive. However, the role that OCOB performs (approval of county expenditure) is critical to the oversight role of the county assemblies. Many of the respondents cited a lack of information on approved expenditures to enable follow up.[38] Sometimes, reports from OCOB and the Auditor General contain information that is too general in a manner that does enable oversight. Furthermore, audit reports are tabled long after the doubtful expenditures are made (sometimes after the exit of a county administration) and this minimizes any possible remedial measures that would have been taken. Furthermore, county assemblies noted that there is virtually no contact with the CBK, yet the latter manages the County Revenue Fund where withdrawals are made by the executive.

Finally, the CRA has capped the number of committees that a county assembly can have as well as the number of members of staff of a county assembly. While this is an important policy intervention, many of the respondents noted that the factors and criteria that inform the numbers should be developed in consultation with county assemblies, and that they should be expanded to look at other factors beyond just the number of members of county assemblies. One respondent noted that regardless of size of the assembly, all county assemblies perform the same functions and need the same number of technical teams to carry out processes such as budget development and associated processes as well as implementation.[39] Furthermore, the number of county assembly members may increase with different election cycles but there is usually no corresponding increase of the capping of the staff establishment in the assembly.[40]

35. Interviews with county assembly speakers, clerks, and officials.
36. Committee of Experts, 'Harmonised Draft Constitution' (201o).
37. Per official communication from the Senate (5 August 2024).
38. Interviews with speakers, clerks, and officials of county assemblies.
39. Interview with county assembly officials.
40. Interview with county assembly officials.

Some respondents noted that these issues have been brought to the attention of the national agencies and while the concerns are appreciated, there is usually slow or no response in terms of the changes requested.[41] County assemblies have also faced frustration where the county executives deliberately withhold information from assemblies or fail to comply with orders or decisions of the assembly. While the Constitution bestows upon the assembly powers similar to the High Court, to summon any person to appear before it and to give evidence, there are no stipulated enforcement measures where a person does not honour the summons.[42] In some cases, county assemblies have approached the ODPP for possible prosecution of individuals who fail to honour summons or comply with county assembly orders. However, the lack of a clear framework for the enforcement of county assembly decisions has proved a challenge. Reports made to the EACC by county assemblies too also take long to get a response or traction.

There is a demonstrable need to develop a framework and culture of communication and structured linkages between the county assemblies and the different national institutions whose mandate is core and relevant to the oversight role of county assemblies. This may include the development of a national and legal framework to facilitate such cooperation and interaction between the assemblies and institutions at the national level. While the Senate has taken the measure and effort of inviting county assemblies to committee sessions, there is a need to take further steps to ensure that county assembly processes are also well facilitated to assist them carry out effective oversight.

Political factors in county assembly oversight

While county assemblies are vested with the duty of ensuring accountability in governance at the county level, MCAs are politicians and are, thus, not immune from national or county-level politics of the day. Partisan politics often percolate into oversight and accountability matters, with the inevitable effect that oversight and accountability are minimized as politics take centre-stage.

Most respondents indicated that in counties where the governor and the majority of county assembly members come from the same party or coalition of parties, party interests tend to override issues of oversight at the county assembly.[43] Even where the leadership of critical committees such as Public Accounts Committees and Public Investments Committees are chaired by members from the opposition, the committees have majorities from the dominant parties. Legitimate questions regarding expenditure and other audit queries tend to be overlooked by the assemblies and downplayed.[44] Some respondents indicated that there are cases where the technical teams of the assembly analyse and identify issues for follow-up with the executive. However, these are not followed through (mainly for political reasons) and this is then blamed on "capacity of members" and other reasons that camouflage the actual reason oversight and accountability is abandoned.[45]

In county assemblies where there is a substantial mix of political parties, with the opposition controlling a number of county assembly seats, there is usually a semblance of active oversight and accountability.

41. Interview with county assembly officials.
42. Article 195, Constitution of Kenya 2010.
43. Interview with county assembly officials.
44. Interview with county assembly officials.
45. Interview with a key respondent from the county assembly.

County assembly committees have a stronger voice and are able to follow up on issues from the executive.[46] As a result, there tends to be greater scrutiny of decisions such nominees for appointment, budgetary proposals of the executive and the legislative and policy proposals that are usually tabled in the county assembly.[47]

However, there are more factors than just party-belonging that shape the politics of oversight and accountability at the county level. Even where the governor and the members of the county assembly come from the same party, intra-party and personality differences have also tended to show up and are a factor in the oversight and accountability processes. A good example is the political bickering between a serving governor and their deputy (who are usually from the same political party or side) and which sometimes ends up in "politically engineered" impeachment motions in the county assembly[48] clothed as accountability.

Furthermore, beyond party politics, respondents noted that the county executive, in some cases, has little regard for the role of the assembly, mainly due to the fact that there are no consequences for failing to honour summons or comply with orders of the assembly. The county assembly, as mentioned earlier, lack means to sanction such behaviour from the executive; the use of impeachment and other accountability tools are weakened through politicisation and compromise.[49] Respondents cited the relatively poor remuneration and conditions of service of MCAs, control of Own Source Revenue (OSR) by the executive, and the dangling of the carrot of the Ward Development Fund, as points of vulnerability for the county assembly as against the executive.[50]

The factors above create a culture of impunity in the county executive, which manifest in the form of failure to honour county assembly summons, failure to report regularly to the assembly, and a failure to provide vital information to assist in oversight and accountability in the county assembly, among other means. In the end, there is a sense of frustration and resignation among members and officials of county assemblies that intend to pursue legitimate oversight in county governance.

2.4 Implementation of county assembly structures and processes

County assembly structures and systems play an important facilitate role that enables members of the assemblies to play their oversight role, either in plenary, committees, or even individually. County assemblies started from the scratch in March 2013 after the general election that saw the first generation of members of county assemblies elected to office. The Transition Authority coordinated the establishment of the very first county assembly structures and systems.

County governments inherited the basic institutional facilities that belonged to the former local authorities (including human resources) and used this as a basis to develop the structures and systems envisaged under the current constitutional dispensation. However, the institutional facilities and capacities that existed in the pre-2010 period proved to be inadequate for the kind and scope of responsibilities that the assemblies were to undertake. As a result, county assemblies have continuously improved their institutional facilities and administrative systems to match with their mandate, including oversight.

46. Interview with a county assembly official.
47. Interview with county assembly clerks
48. Interview with a key respondent.
49. Interview with county assembly officials.
50. Interview with speakers, clerks, and members of county assemblies.

This section evaluates the implementation of systems and structures in the assemblies and their effectiveness in relation to oversight.

County assembly administration and service

The Transition Authority (TA) coordinated the establishment of the structures of county assemblies after the March 2013 election that ushered the county governments. Initial preparations included the selection and training of the very first clerks of county assemblies, on an interim basis, who oversaw the first sittings and business of county assemblies such as the swearing in of MCAs and election of speakers. The TA also purchased the hansard and other equipment that was necessary for the assemblies. The TA was allocated KES 3.2 Billion to assist in the refurbishment of offices and facilities for county assembly facilities in all the 47 counties.[51]

County transition coordinators who were sent to the county governments by the TA assisted in laying down administrative, financial, human resource, ICT, procurement and other institutional systems that enabled commencement of business in the assembly and the executive.[52] The TA also coordinated the induction training for the speakers and the MCAs.[53] Parliamentary staff at the national level assisted the TA in the preparation of the first standing orders that were used by county assemblies before they developed their own. The TA also developed regulations and rules of conduct for the county assemblies.[54] County governments, including the assembly and the executive, inherited staff who served under the defunct local authorities, as well as national government staff who were transferred from national ministries to the county governments. In 2013, the total number of county government staff in all the 47 county governments was 102, 653 and comprised of nearly 30 percent (32, 237) of staff from the defunct local authorities, and 70, 146 (almost 70 percent) of national government staff.[55]

Among the challenges that county governments faced with the staff that was inherited from the former local authorities included: irregular recruitment, over-age staff that were serving beyond retirement age, critical shortage of professionals and low level of qualifications, and staff that were unaccounted for or not assigned roles.[56] During interviews, key respondents noted that inherited staff from the former local authorities have reduced the space for county assemblies to hire qualified staff (due to the large existing numbers) and that there is a general mismatch of skills required and those available in the existing county assembly workforce.[57] This situation has contributed to current capacity gaps in the county assemblies. The county governments that are most hit with this kind of crisis are those that were provincial capitals in the pre-2010 governance structures. These areas hosted county hosted large numbers of central government and local authority staff as they operated as regional capitals, and the county governments in these areas inherited these numbers from March 2013.[58]

51. Transition Authority 'Annual Report July 2012 – June 2013', p. 21.
52. Transition Authority 'Annual Report July 2012 – June 2013', p. 22.
53. Transition Authority 'Annual Report July 2012 – June 2013', p. 27-28.
54. Transition Authority 'Annual Report July 2012 – June 2013', p. 27-28.
55. Transition Authority, 'Human Resource Audit Report for staff of firmer local authorities and devolved functions' (2013), p. 5.
56. Transition Authority, 'Human Resource Audit Report for staff of the former local authorities and devolved functions' (2013), p. 12-13.
57. Interview with CAF officials, speakers, and county assembly clerks.
58. Interview with clerks and officials of county assemblies.

During the transition to county governance, the TA transition teams apportioned the former local authorities' staff between the two arms of government. Employees were given a chance to choose where to serve between the assembly and the executive and most key staff chose to work with the executive, thus further disadvantaging the assemblies.[59]

CASBs have also hired additional staff. Following concerns that CASB's were over-hiring county assembly staff on top of the existing numbers, the Senate, through the Senate Finance and Budget Committee, recommended the setting of staff establishment and capping of numbers in county assembly staff.[60] While staff establishments and capping of numbers per county assemblies were put in place by the CRA, pursuant to the Senate recommendations, there is no uniform compliance with the staff establishment and capping. According to data analysis from county assemblies recruit high numbers of staff in: Administrative and Human Resource Support Services, Directors, Sergeant at arms, commissionaires, wardens, accounting services, and staff in the clerks and speakers' offices.

During the Financial Year 2023/ 2024, county assemblies cited deficits in staff capacity and numbers and requested the Senate Budget and Finance Committee for an upward revision of numbers in order to allow for recruitment of more staff. However, the Senate called for a staffing needs assessment between the CRA and the County Assemblies Forum so as to inform any changes required.

During interviews, county assembly clerks and officials complained that the current criteria of determining the staff establishment and capping of numbers, which is pegged on the number of MCAs in a county assembly, disadvantaged county assemblies that had smaller numbers of members. One respondent noted that the nature and scale of work undertaken by a county assembly, including oversight, is basically the same for the smallest and largest county assembly[61] and noted that there was no justification for limiting the numbers of staff, based solely on the number of MCAs. The respondent added that the capping of staff numbers based on the number of MCAs only works with the number of members of staff attached to each member and should not be extended to the county assembly generally.

County assembly committees

As noted earlier, the design and operations of county assembly committees may make the whole difference in the effectiveness of county assembly oversight. This is because the bulk of detailed and routine oversight work is carried out through committees of the legislature due to their smaller numbers, investigatory mandate, and flexibility in the manner they carry out their work compared to the plenary or committee of the whole house.

Ideally, the design of county assemblies (numbers and functional scope) should consider the full range of county government functions and the need to ensure balanced or optimal representation of all sectors of the county assembly (political parties, gender, experience and professional diversity, etc.)

Initially, there was no specific binding or non-binding criteria that county assemblies were required to adhere to when coming up with numbers of county assembly committees. Each county assembly w0uld, thus, determine its own committees and the size of those committees.

59. Interview with a key respondent.
60. Report of the Standing Committee of Finance and Budget if the Senate (May 2018).
61. Interview with key respondent.

Data submitted by county assemblies shows that there is variance in the number and size of committees and there is no rationalization in terms of the size of the county assembly. Committee numbers range from 27 to nine and there are discrepancies in the size of the committees. In early 2024, the Commission on Revenue Allocation (CRA) issued a circular capping the number of county assembly committees at 18 per assembly.[62] However, assemblies are yet to comply.

Currently, the naming and mandate of the committees vary from one assembly to the other. As a result, some of the functions under the Fourth Schedule may have been left out in the coverage of county assembly committee work. The Commission recommends that design of county assembly committees should mirror the functions assigned to the county governments under the Fourth Schedule. County government functions that are not explicitly mentioned in committee work, include: control of air pollution, noise pollution and other public nuisance, and outdoor advertisement; animal control and welfare; county public works and services, and; control of drugs and pornography.[63] However, it is also possible for existing committees to rationalize these functions within the scope of their activities, for instance, pollution may fall under the environmental committee, and county public works may fall under the infrastructure committee, etc.

Table showing the County Assembly details (MCAs, committees, establishment and number of members of staff per county)

County	No. of MCA's	No. CA committees	CA Establishment	No. of Staff
Baringo	46	24	146	120
Bomet	39	21	150	71
Bungoma	63	24		
Busia	54	18		
Elgeyo Marakwet	33	18	79	75
Embu	31	24	100	97
Garissa	49	23	195	169
Homa Bay	55	22		
Isiolo	18	12		
Kajiado	42	20	113	88
Kakamega	90	20	118	85
Kericho	48	24	103	99
Kiambu	89	23	96	96
Kilifi	55	23		
Kirinyaga	33	24	105	90
Kisii	71	20	213	137
Kisumu	47	21		
Kitui	55	22	100	85
Kwale	31	22	-	-
Laikipia	22	18	81	81
Lamu	19	13		
Machakos	61	27		
Makueni	49	22		

62. According to clerks of assemblies interviewed during the assignment.
63. CRA Report.

County	No. of MCA's	No. CA committees	CA Establishment	No. of Staff
Mandera	50	22		
Marsabit	33	21	102	102
Meru	69	27	115	87
Migori	60	27		
Mombasa	42	21		
Murang'a	48	17	100	93
Nairobi City	124	26	274	194
Nakuru	83	23		
Nandi	45	21	88	80
Narok	50	21		
Nyamira	37	20		
Nyandarua	42	19[64]		
Nyeri	42	21	97	62
Samburu	26	15		
Siaya	43	23	101	84
Taita Taveta	33	23		
Tana River	27	19		
Tharaka Nithi	24	19	187	71
Trans Nzoia	40	22		
Turkana	48	21		
Uasin Gishu	45	28	137	108
Vihiga	37	24	74	88
Wajir	46	21		
West Pokot	33	18		

Source: *Data compiled from Office of Controller of Budget, the Commission on Revenue Allocation (staff establishment and numbers are as at June 2023) and interviews with county assembly respondents*

Individual facilitation of members of county assemblies

Apart from the plenary and committees where members carry out their oversight work collectively, the individual responsibilities of MCAs play a critical role and are indeed the building blocks to the oversight role of the assembly. The specific roles of the MCA spelt out in the County Governments Act[65] show the critical role that MCAs should play, at the individual level, in order to ensure effective oversight and other roles of the assembly. Specific roles of the MCA are: maintaining close contact and consulting with the electorate on issues that are under consideration in the assembly; present views and opinions of the electorate in the county assembly; attend sessions of the assembly and committees; and to extend their professional knowledge, experience, and specialized knowledge to any matter or issue under consideration by a county assembly.

The above responsibilities vested in the MCA call for facilitation of the stated roles in order to enable a member to perform their functions effectively.

64. Number obtained from a count of committees of the official county assembly website, https://nyandaruaassembly.go.ke/ (accessed 27 March 2024).
65 Section 9, County Governments Act, 2012.

Such facilitation may include: physical offices in the wards and facilitation of movement in order to enable the MCA to interact with the electorate, personal staff to assist the MCA in research and consultation, and general logistical, technical, and administrative support. Again, the nature of facilitation that is given to members of county assemblies differs from one county assembly to the next. In Siaya County, the Assembly has built offices for MCAs in all the wards in the county[66] while in other counties, the assembly provides the members with moneys for rental space in the counties. With regard to personal staff, the Salaries and Remuneration Commission (SRC) has capped the facilitation at KES 91,000;[67] county assemblies hire and pay "partisan staff" that work under the MCA. The preference on who is hired is determined by the MCA.

During interviews with clerks of county assemblies, they reported a number of challenges with the facilitation of individual members. First, the positions of "partisan staff" are, in practice, used to reward supporters, with little regard to their professional skills, experience, or technical capacity to serve; which has an inevitable impact on the quality of work.[68] Secondly, frequent change of the "partisan staff" has led to complexities in their management from a human resource administration perspective. Some county assemblies have resorted to providing the MCAs with the budget and allowing them to hire and pay directly as part of the MCA's monthly benefits.[69]

2.5 Assessment of the implementation of county assembly oversight structures

County assemblies were confronted with initial challenges at the beginning of devolution. County assemblies had to build their systems from the scratch and this meant that it would take time before the processes and systems settled and became efficient. The first annual report of the Office of the Controller of Budget (FY 2013/ 14) highlighted key challenges in county governance that pointed to a weakness in the governance and oversight systems at the county assembly. The challenges highlighted by the Controller of Budget included: lack of use of the integrated financial information management system by county governments, low absorption of development funds, lack internal audit units and committees, frequent budget revisions, and a lack of budget monitoring, evaluation and reporting framework, among other challenges.[70]

Furthermore, while the absorption rates of the county assembly recurrent budgets were high, the OCOB raised concerns about foreign trips on benchmarking missions that consumed the bulk of budgets that would otherwise have been put to regular use in oversight activities and other processes.[71] These challenges above in the initial period of devolution point, in part, to the transition challenges that county assemblies experienced during this early period and how it impacted on oversight.

However, despite the teething problems in the county assemblies, assessments done in the early years reveal a number of positive steps with regard to oversight and other functions of the assemblies. An assessment by the former of Commission for the Implementation of the Constitution (CIC) in August 2015 revealed that:

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66. Interview with clerk of the county assembly.

67. As per interviews with clerks of county assemblies.

68. Interview with county assembly clerks.

69. Interview with clerks of county assemblies.

70. Office of the Controller of Budget, 'Annual Budget Implementation Review Report 2013/14: County Governments' (August 2014) pp. 195-199.

71. Office of the Controller of Budget, 'Annual Budget Implementation Review Report 2013/14: County Governments' (August 2014) pp. 198-199.

79 percent of the county assemblies had facilitated public attendance of hearings through public galleries; 81 percent of assemblies were actively receiving and considering public petitions to county assemblies; 77 percent were holding regular public consultations, and 81 percent of assemblies were issuing regular press adverts on various issues and processes related to county assembly business.[72]

While county assemblies had established the initial systems, facilitated training of members and committees, and had begun their regular oversight activities, they experienced a number of challenges specific to oversight. The CIC noted that county assemblies experienced challenges of: poor reports from the executive, inadequate funding to support oversight activities such as visits to wards, political wrangling that led to impeachment of members of County Executive Committees, and a lack of financial autonomy for the county assemblies.[73] Other challenges highlighted earlier related to the capacity of members and the secretariat to effectively engage in oversight processes, especially those of a technical nature such as budget and planning, audit, among others.

Ideally, committees of legislatures should have an able, adequate, and effective secretariat composed of technical officers with the right skills and experience to enable the committee navigate through its oversight responsibility. The technical officers that support legislative committee may include communications professionals to assist in providing teams with information and disseminating oversight-related information, a coordinator to assist in planning activities of the committee and keeping track of the performance and gaps, and a researcher to assist in digging information relevant to the committee's work, among other persons. However, for the various reasons that have been discussed, county assemblies are not able to retain such expertise to assist in the carrying out of committee work.

Finally, while there is a legitimate basis of setting minimum standards in the running and management county assembly affairs, such as staff ceilings, numbers of committees, number of members of staff per MCA, and other conditions, there are concerns that there are minimal consultations between agencies such as CRA and the county assemblies. Many respondents felt that the current ceilings set on expenditure, staff numbers, and committee numbers, do not consider the realities of the different county assemblies.[74]

2.6 Conclusion

While county assemblies had to build institutions from the scratch, they have made great progress in terms of establishing structures and systems to assist in carrying out county assembly oversight. Despite this progress persistent challenges that continue to cast a shadow over the county assemblies' effectiveness. However, measures taken to address these challenges should be done in consultation with and participation of the county assemblies. This will ensure that county assemblies have structures and systems that respond to their individual contexts and actually enhance their oversight functions and all other responsibilities of the county assemblies. The next chapter evaluates specific processes and channels of county assembly oversight, challenges, and effectiveness.

72. Constitution for the Implementation of the Constitution (CIC), 'Sustaining the momentum: Assessment of implementation of the transferred functions to the county governments' (August 2015) p.116.
73. Constitution for the Implementation of the Constitution (CIC), 'Sustaining the momentum: Assessment of implementation of the transferred functions to the county governments' (August 2015) p.114.
74. Interview with county assembly officials.

Chapter Three

COUNTY ASSEMBLY PERFORMANCE IN OVERSIGHT: FINDINGS FROM 2013 – 2024

3.1 Introduction

This chapter evaluates specific or concrete areas of county assembly oversight and the effectiveness, challenges, and opportunities to ensure accountability through oversight. Global studies on the general performance of legislatures in oversight and accountability reveal a less than satisfactory pattern in the effectiveness of legislatures generally, especially in developing countries where "legislative accountability of government agencies mainly remains ineffective."[75] The 2020 Global Report on Public Financial Management states that "legislative scrutiny is relatively weak on average" and that legislatures perform better in budget scrutiny than in the scrutiny of audits.[76] Similar concerns are mentioned in the PEFA Kenya country assessment of 2022.[77]

Many of the challenges related to the structures and systems that support the work of county assemblies, such as resources and capacity to facilitate oversight are common underlying challenges, especially for legislatures in the "developing country context." However, challenges of oversight transcend technical capabilities to undertake oversight, and extend to issues of even political will to seek accountability from public institutions.
This chapter evaluates implementation of oversight through five elements, which provide a general picture of the status of oversight in county assemblies: planning, budget-making and implementation including county audit oversight; legislative and regulatory frameworks for oversight, public participation in oversight; and, cooperation in oversight between the county assemblies and the Senate, and other national agencies whose mandate is relevant to effectiveness of oversight at the county level. In each of these five elements, the successes, challenges, and emerging issues are discussed and highlighted. The chapter concludes with analysis of the challenges identified in the preceding sections.

3.2 Oversight in planning and budget-making and implementation

The Public Finance Management Act spells out the detailed role of county assemblies in county budget and finances which range from debate and approval of planning documents that inform the budget documents of the county government, the approval of the budget, and monitoring of the implementation of the budget. The county executive is required to develop the County Integrated Development Plan (CIDP), which is a five-year plan that guides activities and decision-making in counties including the fiscal policies and the county budget.

The documents in public finance management are: the budget circular that gives critical dates in the planning and budget process; the annual development plan that provides for medium targets drawn from the CIDP; the County Fiscal Strategy Paper (CFSP) which provides broad strategic priorities and policy goals of the county; the County Budget Review Outlook Paper (CBROP) which provides an updated economic forecast from the CFSP,

75. Mbate, Michael (2023) 'Can parliamentary sanctions strengthen local political accountability? Evidence from Kenya', in: Faguet, Jean-Paul and Pal, Sarmistha (eds) Decentralised Governance: Crafting Effective Democracies Around the World, London: LSE Press, pp. 209–231, p.210. https://doi.org/10.31389/lsepress.dlg.h License: CC BY 4.

76. PEFA 2020, p.107

77. PEFA, 'Kenya Public Expenditure and Financial Accountability Assessment Report (2022), p. 132.

the actual budget estimates, in a programme based (PBB) budget format that show the total detailed planned expenditure and programmes for the county government; the Finance Bill which details the revenue raising means of the county, and the Appropriation Bill that authorizes expenditure from the County Revenue Fund.[78]

County assemblies are required to scrutinize each of the documents through the relevant committee in charge of planning, budget and finance, and to ensure that the content is in accordance with what is expected in the law before the documents are tabled for before the entire assembly for final debate and approval.[79] In the initial years of devolved governance, both the county executive (County Treasury) and the Planning, Budget, and Finance Committees of the assemblies did not fully comply with the provisions of the Public Finance Management Act, which led to conflict and confusion in the passing of documents.[80] More fundamentally the lack of congruence between the plans and budgets affected development plans as the expenditure and plans were not aligned required by the law.[81] County assemblies were also accused of adjusting budgets without adhering to provisions that called for corresponding adjustments, and ended up creating conflicts with the executive and interfering with smooth budget execution.[82]

After the approval of the budget, the Committee responsible for budget, finance and planning is required to monitor the execution of the budget. This is in order to ensure that county government expenditure is in accordance with the policies and plans approved by the county assembly. However, the effective performance of this role is only possible where the County Treasury submits regular reports on expenditure and budget execution.[83] In turn, county assemblies should review the reports in a timely manner and provide recommendations to ensure effective implementation.[84]

During interviews, county assembly clerks and speakers noted that in many cases, the county executive is not forthcoming with information related to expenditure, which ends up hindering effective monitoring of budget implementation.[85] County assemblies feel powerless as there is no compliance enforcement of recommendations of county assemblies and in many cases, the county executive ignore committee reports without consequence on the part of county officials.[86] Indeed, county assembly leadership feel that the county executive is more accountable and responsive to oversight queries to the Senate committees more than the county assembly.[87] This is evidenced by the fact that in some cases, information not shared with the county assembly is readily shared with the Senate.[88]

There are a few recorded exceptions where the county executive readily cooperates and complies with the requirements of the assembly.

78. Section 125-186 of the Public Finance Management Act, 2012.

79. World Bank, 'County Assembly oversight and the legislative process' in Realising the devolution dividend in Kenya through cohesive Public Finance Management and Public Participation at the county level: challenges, lessons learned and recommendations' (A review of relationships and roles of the County Executive and the County Assembly), August 2017, p. 7.

80. World Bank (August 2017) p.2.

81. World Bank (August 2017) p.2.

82. World Bank (August 2017) p.5.

83. World Bank (August 2017) p.8.

84. World Bank (August 2017) p.8.

85. Interview with speakers and county assembly official in Bomet and Elgeyo Marakwet.

86. Interview with key respondent.

87. Interview with key respondent.

88. Interview with key respondent.

In cases or contexts where there is a harmonious relationship, respondents indicated that there is commitment from the top in the executive and the assembly to ensure that systems, including oversight, flow.[89] Some county assemblies have also sought to enforce their decisions through channels such as prosecutions, but there is no clear framework to facilitate such means.[90]

In its reports on county audits, the Senate County Public Accounts Committee notes a number of recurring issues in the management of county public finances. The reports identify the common and recurring issues as: non-adherence to budget ceilings in votes and sub-votes leading to over-utilization and under-utilization of appropriated funds;[91] payments being made outside the Integrated Finance Management Information System (IFMIS) which is against the PFM Act, breaching of rules regarding use of imprest, no updated asset registers, weak systems of own revenue collection and control, weak payroll management and payment outside the Integrated Payroll and Personnel Database (IPPD) system.[92]

Other challenges identified in the management of public finances by the county executive include the uncontrolled growth of pending over the years, which is evidence of overspending against the law. A report of the International Budget Partnership (IBP) indicates that outstanding pending bills grew from KES 38 Billion in June 2015 to KES. 153 Billion as of June 2022, which the report attributed to poor budget implementation.[93] The IBP-Kenya has observed in its report that the average absorption rate of county governments in FY 2021/2022 was 80 percent in 2022/ 2023, which was a slight increase from the previous year that was 75 percent. However, county government performed poorly in absorption of development funds, which remained at about an average of 50 percent,[94] and this hinders the expansion of service delivery and the growth of pending bills as earlier indicated. Other challenges included a underperformance in collection of Own Source Revenue (OSR) and an attendant of lack of transparency in reporting collection; 95 percent of the Annual Development Plans (ADPs) in 2021/2022 Financial Year did not provide information on performance in collection of local revenue.[95]

The above trends in planning and budgeting, and execution, reveal a systemic failure by county governments to adhere to laws and regulations on public finance management.

Furthermore, the persistence of these challenges also demonstrates the general inability of county assemblies, which mandated to oversee the activities of the county executive, to perform their core obligation of checking the county executive.

89. Interview with leadership and officials of assemblies.
90. Interview with key respondent.
91. Senate (Thirteenth Parliament) 'Report of the Senate Public Accounts Committee on the consideration of the report of the Auditor General on the financial statements of Tharaka Nithi, Homa Bay, Kakamega, Kirinyaga, Makueni, Meru, Bomet, Murang'a, Nandi, Nyamira, Nyeri, Siaya, Vihiga, Wajir, and Samburu County Executives for the Financial Year 2019/2020' (February 2024) at p. 8.
92. Senate (Thirteenth Parliament) 'Report of the Senate Public Accounts Committee on the consideration of the report of the Auditor General on the financial statements of Tharaka Nithi, Homa Bay, Kakamega, Kirinyaga, Makueni, Meru, Bomet, Murang'a, Nandi, Nyamira, Nyeri, Siaya, Vihiga, Wajir, and Samburu County Executives for the Financial Year 2019/2020' (February 2024) at p. 9.
93. International Budget Partnership-Kenya, 'Kenya's County Budget Transparency Survey 2022' (May 2023), p. 10.
94. International Budget Partnership-Kenya, 'Kenya's County Budget Transparency Survey 2022' (May 2023), p. 10. The report indicates that "in FY 2021/22, counties were allocated Kshs. 193.5 billion for development but only utilized Kshs. 98.5 billion at the end of the year representing about 50 percent."
95. International Budget Partnership-Kenya, 'Kenya's County Budget Transparency Survey 2022' (May 2023), p. 39.

County governments are required to prepare and submit annual financial reports to the Office of the Auditor General under the Public Finance Management Act.[96] The Auditor General is, in turn, required to audit the financial reports of the county governments and make a finding whether funds were spent in accordance with the law and effectively. The Auditor General is required to table audit reports in the county assemblies and the Senate, which reports are then considered by the respective legislative bodies and appropriate recommendations provided. The reports confirm the systemic challenges in the management of county finances, which has raised concerns among stakeholders such as the country's accountants' body, the Institute of Certified Public Accountants of Kenya (ICPAK). ICPAK has noted that even counties that had clean audits in the past did not maintain the trend and this requires an analysis of the root cause.[97]

Status of audit reports from Financial Year 2017/18 to 2022/23

	2017/18	2018/19	2019/20	2020/21	2021/22	2022/23
Unqualified	2	0	0	0	0	0
Qualified	30	38	41	42	35	41
Adverse	8	6	5	5	11	6
Disclaimer	6	1	1	0	0	0

Key

Unqualified: The books of accounts and underlying records agree with the financial statements and no material misstatements were found.

Qualified: Financial transactions were recorded and are to a large extent in agreement with the underlying records, except for noted cases of material misstatements; the issues though material, are not widespread or persistent.

Adverse: The financial statements exhibit significant misstatement with the underlying accounting. The problems are widespread, persistent and require considerable interventions by the Management to rectify records.

Disclaimer: The financial statements exhibit serious and significant misstatements that may arise from inadequate information, limitation of scope, inadequacy or lack of proper records such that the auditor is not able to form an informed opinion on the financial operations.

***Source:** ICPAK, 2024.*

The Auditor General's report of the finances of the county executive of Nairobi reveal the same challenges as those identified in the previous years by the Senate and the Auditor General. In the year ending June 2023, the Auditor General, for instance, noted that Nairobi County had over-committed the total budget by 7.7 Billion, over and above the approved budget of 39.6 Billion, bringing the actual committed total expenditure to KES. 47.1 Billion.[98]

The Auditor General also noted a failure to provide regular reports (financial and non-financial) to the county assembly as required by the law, failure to follow public sector accounting standards, non-compliance with procurement laws and failure to attach evidence of expenditure, as well as failure to remit statutory deductions amounting to KES. 1.75 Billion.[99]

96. Section 115 and 167 of the Public Finance Management Act, 2012.
97. ICPAK, 'Press statement on the Senate Public Accounts Committee review of the Auditor General's report on county governments' (24 April 2024), para. 9.
98. Office of the Auditor General, 'Report of the Auditor General on County Executive of Nairobi City County for the Year ending 30 June 2023' p.6.
99. Office of the Auditor General, 'Report of the Auditor General on County Executive of Nairobi City County for the Year

During interviews, respondents raised a number of issues regarding the audit process and challenges in use of the audit reports to hold the county executive to account. First, audit reports relate to expenditure of the past year. In many cases, where audit reports raise issues of accountability, it is too late for the county assembly to make any remedial interventions that can prevent loss of funds. Some respondents also raised issues about inadequacy of information in the reports. Specifically, the information in the reports is too general to enable a follow-up on specific issues with the executive. Other respondents cited delays in providing of additional information as a challenge to the oversight process at the county level.

Similar general challenges have been identified with the finances of county assemblies, which have prompted proposals by the Senate CPAC to carry out oversight on county assemblies due to issues of conflict of interest.[100]

3.3 Legislative and regulatory frameworks for oversight

County assembly oversight is facilitated through effective frameworks (laws, policies, rules and standing orders, etc) that guide the manner of operation. These include the County Governments Act which provides the specific oversight roles as discussed earlier, the Public Finance Management Act, and the Public Audit Act, which, as discussed earlier, lay down procedures in the oversight of county public finance management and accountability. The Constitution and enabling legislation lay down the primary framework for conducting oversight and related processes. Beyond these laws, specific rules are required to guide concrete areas of oversight in the assemblies. These include the standing orders and rules of the county assemblies, practices adopted in the assemblies, as well as administrative practices to guide in oversight and other county assembly processes.

In the initial stage, county assemblies adopted model county assembly standing orders that were prepared under the auspices of the Transition Authority and the initial standing orders mirrored those of the legislature at the national level. Many counties still have these initial standing orders as their house rules. However, many other county assemblies have revised the rules to suit their contexts.

In the Bomet County Assembly, the Clerk and the legal team have revised the Standing Orders to provide for "Question and Answer" sessions where members of the executive will regularly attend sessions of the plenary to answer questions and issues raised by members. Previously, the Standing Orders and rules did not have a method or forum for regular interaction between the plenary and the executive. On many occasions, members of the executive who were summoned to the assembly did honour summons and the assembly felt that scheduled attendance will create opportunity for both arms to regularly meet and address oversight.[101]

While county assemblies may introduce frameworks and rules to support their oversight roles, critical factors in their effectiveness also depends on national laws and policies. Accordingly, reform of national laws remains equally if not more important for the effective oversight of county assemblies. In all interviews that were conducted with county assembly officials, the lack of financial independence was constantly identified as the top challenge in oversight. During the Second National Symposium on Intergovernmental Relations in

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ending 30 June 2023' p.15.

100. Collins Omulo, 'Clash looms as senators out to trim MCAs' oversight role' Nation Monday 15, April 2024 https://nation.africa/kenya/counties/clash-looms-as-senators-out-to-trim-mcas-oversight-role-4590774 Published on 22 March, 2021.

101. Interview with county assembly clerk, Bomet County.

March 2024, it was resolved that, "... the county assemblies be given independence and resource autonomy to effectively discharge their mandate."[102] Public Finance Management Act to establish a County Assembly Fund, separate from the County Revenue Fund for the independent administration by county assemblies.[103] While the County Assembly Services Act establishes a County Assembly Fund,[104] the Act does not give the necessary protections to enable the financial independence and autonomy of the assemblies.[105] However, the amendment is yet to be passed and is now at the second reading in the Senate.[106] light of day in Parliament.

A dispute between the County Assembly of Machakos and the County Executive illustrates this particular point on the financial independence of the County Assembly. The County Executive withheld funds that were due to the Assembly on the basis that the latter was misusing and misappropriating resources, thereby paralysing business of the Assembly. The County Assembly sued the Executive[107] for withholding funds due to it. In its judgement, the Court held that there was no basis in law for the executive to withhold funds or stop withdrawals by the assembly once necessary approvals have been given by OCOB. The Court clarified that the executive's role with regard to county assembly finances was merely facilitative and that it had no authority to question the manner or intended use of the funds by the assembly. The Court clarified that these were functions vested in the Office of the Auditor General and the Senate and thus issued orders for the immediate release of the funds.

In the absences of a legal framework to secure the financial independence of assemblies, county assemblies have resorted to arrangements to guarantee the flow of finances to the assemblies. In Mombasa and Bungoma County Assemblies, the legislatures and executives have developed a working arrangement where with every disbursement, a percentage of the funds disbursed are released to the assembly to enable it to operate.[108] The success of this arrangement is dependent on the leadership of the assembly and the executive, and on the goodwill to see the assembly continue to perform its functions. In Mombasa, the first term of the county government saw acrimony between the two arms of government, however, in subsequent terms, the governor, the speaker, and the county assembly clerk sat and agreed on a formula to ensure that county assembly programmes were not disrupted.

Thus, where the assembly faces financial challenges, it is usually due to the delay of disbursements from the national level and not as a result of the actions of the executive.[109] It is critical that beyond agreements between the assembly and executive regarding releases to the former, there is actual goodwill, especially on the part of the executive.

102. Para. 21, 'Communique of the Second Intergovernmental Relations Symposium held from 4-6 March 2024, at the Sawela Lodge, Nakuru County (6th March 2024). https://igrtc.go.ke/views/img/pressreleases/The%202ND%20IGR%20Symposium%202024%20Communique/COMMUNIQUE%20FINAL%20(1).pdf

103. Vide the County Public Finance Laws (Amendment) Bill, 2023 that is meant to give financial independence to county assemblies.

104. County Assembly Services Act, Act No. 24 of 2017.

105. Established under section 34 of the County Assembly Services Act (2017)

106.http://www.parliament.go.ke/sites/default/files/2024-03/BILLS%20TRACKER%20UPDATED%20AS%20AT%2022.03.2024.pdf

107. County Assembly of Machakos v Governor of Machakos County and 4 others, High Court of Kenya at Machakos, Constitutional Petition No. 17 of 2017.

108. Interviews with the County Assembly clerks.

109. Interview with the Clerk, County Assembly of Mombasa.

Indeed, there are many occasions where county assemblies were denied resources on the basis of "more urgent priorities" by the executive, despite existence of cash disbursement schedules and due approvals from the OCOB. It, thus, ultimately boils down to leadership and commitment by the two arms of government.

3.4 Public participation in county assembly oversight

The involvement of the citizenry in governance processes is a core constitutional requirement. The Constitution provides that all power and authority is to be exercised in accordance with the will of the people. In turn, the will of the people can only be ascertained through consultation and participation of the people. County assemblies exercise delegated power on behalf of the people and are thus required to seek the views of the people. Indeed, oversight, which basically seeks to check the exercise of power of the executive should be carried out with the voice of the people.

It is in the above context that county assemblies are required to ensure public participation in all county governance processes, including oversight.[110] Indeed, it is a requirement under the County Governments Act that members of county assemblies not only consult with their constituents in their wards, but also present the views of the people in deliberations and decision-making in the county assembly.

Planning, budgeting, and execution all have major implications for the delivery of services and development. Thus, the citizens have a primary stake in these processes and their outcomes. The county assembly's oversight function and its effectiveness is, therefore, of great relevant and interest to the public. In order to ensure the effective involvement of citizens in these processes, county assemblies have put in place mechanisms to ensure the involvement of the public. At the national level, there are laws, policies, and frameworks to guide public participation. These include: The Constitution, the County Governments Act, the Public Finance Management Act, the Urban Areas and Cities Act, among other laws. There are also draft public participation policy documents (policy drafts and guidelines) at the national level that seek to guide the process of public consultation and participation. At the county level, county assemblies have enacted frameworks and approved policies aimed at ensuring county public participation, in accordance with requirements of the law. Research on the internet reveals that 21 counties have enacted laws to guide public participation, 13 counties have developed Bills to guide public participation, while 4 counties are yet to develop Bills or pass laws on public participation.[111] However, it is also the case that all counties, without exception, carry out public participation and consultation in matters such as planning, budgeting, and law-making. County assemblies routinely carry out public participation exercises in processes such as deliberation of plans and budgets of the county government, consideration of proposed laws, impeachment of county governors and deputy county governors, among other county assembly business.

Experiences have shaped how assemblies conduct their business of consultation with the public. While county assemblies and the executive initially started with separate processes of public participation in oversight, the World Bank notes that joint consultative forums during planning and budget processes have enabled and facilitated a more effective process of incorporating peoples' views in the plans and budgets of the county governments.[112]

110. Article 191 (1) Constitution of Kenya 2010.

111. Internet research carried out on 20 May 2024.

112. World Bank, 'County Assembly oversight and the legislative process' in Realising the devolution dividend in Kenya through cohesive Public Finance Management and Public Participation at the county level: challenges, lessons learned and recommendations' (A review of relationships and roles of the County Executive and the County Assembly), August 2017, p. 23.

Joint sessions were also identified as improving relations between the two arms of county government [113] and avoid unnecessary confusion and competition on issues related to planning and finances between the assembly and the executive.[114]

Provision of timely and accessible information is critical for effective public participation. Some counties, such as Makueni County have developed materials to assist the public in participating in county government budgeting and planning process.[115] The publication of key budget documents is important for engagement with the public as it provides the people an opportunity to evaluate priorities and come up with informed choices. As IBP-Kenya states:

> *Effective public participation is dependent on, among other things, comprehensive budget information in the budget documents provided by the respective county governments before the public participation forums. Even if citizens are empowered, they will engage from an uninformed point of view if the government does not provide information to engage. This is why even as the capacity of citizens is strengthened, there is more demand for more disaggregated budget information which government should provide.*[116]

IBP-Kenya carries out an annual County Budget Transparency Survey (CBTS), which evaluates the level of transparency in publishing key budget documents in every financial year. The CBTS report of 2022 states that counties, generally, are more transparent in the formulation stage of budgets and plans than at the implementation stage[117] but also noted that there is a general incremental trend of "embracing budget transparency".[118]

The CBTS report of 2022 ranked West Pokot County as the most transparent, mainly based on key budget documents availed on their websites. Other counties in the top-five were Makueni, Kwale, Kitui, and Nyeri. All the five counties (except Kwale) published all the ten key budget documents.[119] However, only Nyeri County has remained the most consistent in publishing all the key budget documents.[120] Among counties that were ranked to be the least transparent in terms of sharing budget documents (zero documents shared online) included: Kajiado, Isiolo, Wajir, and Migori County Governments.[121] The CBTS report further notes that while 33 counties published approved programme based budgets, none provided interactive features on their websites so as to receive public information and feedback.[122]

113. World Bank, 'County Assembly oversight and the legislative process' in Realising the devolution dividend in Kenya through cohesive Public Finance Management and Public Participation at the county level: challenges, lessons learned and recommendations' (A review of relationships and roles of the County Executive and the County Assembly), August 2017, p.24.
114. World Bank, 'County Assembly oversight and the legislative process' in Realising the devolution dividend in Kenya through cohesive Public Finance Management and Public Participation at the county level: challenges, lessons learned and recommendations' (A review of relationships and roles of the County Executive and the County Assembly), August 2017, 24.
115. World Bank, 'County Assembly oversight and the legislative process' in Realising the devolution dividend in Kenya through cohesive Public Finance Management and Public Participation at the county level: challenges, lessons learned and recommendations' (A review of relationships and roles of the County Executive and the County Assembly), August 2017, p.9.
116. International Budget Partnership-Kenya, 'Kenya's County Budget Transparency Survey 2022' (May 2023), p. 28.
117. International Budget Partnership-Kenya, 'Kenya's County Budget Transparency Survey 2022' (May 2023), p. 10.
118. International Budget Partnership-Kenya, 'Kenya's County Budget Transparency Survey 2022' (May 2023), p. 14.
119. County Budget Review Outlook Paper, Programme Based Budget ...
120. International Budget Partnership-Kenya, 'Kenya's County Budget Transparency Survey 2022' (May 2023), p. 16.
121. International Budget Partnership-Kenya, 'Kenya's County Budget Transparency Survey 2022' (May 2023), p. 16.
122. International Budget Partnership-Kenya, 'Kenya's County Budget Transparency Survey 2022' (May 2023), p. 45.

Beyond robust sharing of information for public access and consumption, county assemblies and executives have taken various steps to enhance public participation and involvement in governance processes. The most common of these steps is partnership between the county assembly and non-state actors and community-based organisations, which are aimed at enhancing public participation and feedback on various processes.[123] Kisumu County Assembly has established a formal partnership with civil society organisations to enhance civil education on the assembly's roles as well as channelling feedback for the assembly, including on oversight matters.[124] Digital and online spaces for public participation have also offered a quick and easy way of reaching members of the public as a means of dissemination as well as interacting with and seeking views of the members of the public. County governments have also adopted various models of community-led public management of projects and sustainability, which has not only enabled members of the communities to share views on projects but also to take active roles in the management of projects.[125]

3.5 Cooperation in county assembly oversight processes

Effective collaboration and cooperation between the assemblies and executives is critical to success of the oversight function. The relationship between the assemblies and executives in many counties is characterised by fear and suspicion and hostility to any efforts aimed playing oversight. This hostile culture is manifested through the withholding of information from the assembly, failure to honour summons or invitations to committees, frustrating access to resources, amongst other challenges mentioned. On the other hand, county executives have sometimes reported interference and intimidation in their work as a result of hostile relationships with the assembly.

A culture of cooperation between the assembly and the executive can facilitate the performance of the respective functions of each arm of county government. For instance, in order to make the planning and budget oversight function effective, the World Bank has advised that county treasuries should put in place mechanisms that will enable regular briefing to the county assembly in order to allow for in-depth understanding of budget implementation. This will make formal sessions, such as approval of finance documents, during the budget approval, more effective.[126] In Bungoma County, informal Kamkunji between the leadership of the county assembly and county executive departments, under the co-leadership of the governor and the speaker, have helped ensure a smooth oversight process on the part of the county assembly.[127]

Equally or more important is the nature of relationship and linkages that the Senate should have with county assemblies. As earlier mentioned, there are both internal and external factors that influence the outcome of oversight process. The Senate, as the protector of county interests, should ensure that the county assemblies have an enabling environment to pursue oversight and other functions of the assembly.

123. https://nairobi.go.ke/nairobi-county-launches-collaborative-effort-to-develop-comprehensive-status-report-on-public-participation-and-civic-education/

124. https://kisumuassembly.go.ke/?p=6350

125. Council of Governors, 'Devolution in Kenya: a journey from centralised to devolved governance under the Constitution of Kenya 2010' (August 2023) p. 127.

126. World Bank, 'County Assembly oversight and the legislative process' in Realising the devolution dividend in Kenya through cohesive Public Finance Management and Public Participation at the county level: challenges, lessons learned and recommendations' (A review of relationships and roles of the County Executive and the County Assembly), August 2017, p. 7.

127. Interview with Principal Clerk Assistant, Bungoma County.

Indeed, while the Senate has a dual role of oversight over county governments and protecting the autonomy and interests of county governments, a balance has to be struck between carrying out oversight and ensuring that county governments are strengthened and facilitated by the Senate to carry out their functions. With regard to oversight, cooperation between the county assemblies and the Senate can help define their respective functional boundaries in oversight that enables overall effectiveness of both legislative bodies. During interviews, the leadership and officials of the Senate noted that interactions with the Senate are limited to invitations to Senate committee sessions to shed light or to respond to audit issues. Furthermore, many respondents felt that while the Senate was more effective in oversight, the nature and approach of Senate committees was largely a duplication of the role of the assemblies.[128]

Yet, regular and formal linkages between the Senate and assemblies collectively and individually can facilitate the identification of strategies that can enhance county assembly oversight. This may include: provision of more resources, capacity building, addressing gaps through legislative framework. The Senate can develop a legal framework to facilitate effectiveness; a case in point is the amendment that was introduced in the Senate to create a County Assembly Fund, separate from management by the executive, in order to enhance the financial autonomy of the assemblies.[129]

Streamlining of the roles of the OCOB, National Treasury, CRA, SRC, and other national agencies, and playing national-level oversight to ensure that these institutions are consultative in their approach to assemblies, that necessary institutional links are forged with assemblies and that frameworks and protocols for sharing oversight information with county assemblies are developed and implemented.[130]

During interviews, the clerks and officials of county assemblies noted that there was a need for up to date information on the budget approval from OCOB and the withdrawals from the County Revenue Fund, so as to enable the county assembly to keep check of budget implementation.[131] The Senate has a direct constitutional and legal mandate to ensure that the National Treasury, CBK, CRA, OCOB, SRC and other national agencies play a facilitative role to enhance the oversight function at the county level.

During interviews, officials of county assemblies raised concerns about lack of critical information for oversight, and some of the information is with the relevant national agencies, such as the expenditure approvals from OCOB, the withdrawals from the CRF, among other vital information. The Senate has a duty to propose policies and laws that can ensure this nature of information is availed to assemblies in a structured manner.

3.6 Conclusion

The structures and systems put in place to support county assembly functions, including oversight, play a determining role on the effectiveness of a county assembly. However, the manner in which specific processes or county assembly oversight activities are carried out equally determine such effectiveness.

128. Interview with county assembly clerk, Siaya County and Bungoma.
129. County Public Finance Laws (Amendment) Bill, 2023.
130. Conrad Bosire, 'Interpreting the power of the Kenyan Senate to oversee National Revenue allocated to the county governments: building a constitutionally tenable approach' Africa Journal of Comparative Constitutional Law, Vol. 2017, No.1
131 Interview with clerk of county assembly, Bomet County.

There are major challenges in the exercise of oversight in planning and budgeting processes as well as execution or implementation of plans at the county level.

While county assemblies and the national legislature have put in place the basic frameworks to support oversight, there are gaps that have been identified that hinder effectiveness. While county assemblies can easily address internal structures and processes, changes to laws and policies at the national level taker a longer a time and oversight is thus affected. Structures and processes of involvement of the public in oversight are ever improving. However, there are challenges such as resources as well as coordination of involvement that continue to hinder effective inclusion. While effective cooperation and linkages within the assembly and between the assembly and the Senate and other national agencies can enhance facilitation and effectiveness, there are generally weak links that need to be addressed through concrete frameworks fostering such relationships in the process of oversight.

The next chapter pulls together and analyses the challenges that generally faces county assemblies in their pursuit of effective oversight.

Chapter Four

ANALYSIS OF THE CHALLENGES IN COUNTY ASSEMBLY OVERSIGHT

4.1 Introduction

The previous chapters have dealt with structures and processes of oversight role in county assemblies and the challenges in the implementation of the structures. The previous chapters have also evaluated the implementation of oversight and the challenges that county assemblies have faced in carrying out oversight. The challenges that county assemblies face relate to internal processes as well as external factors that define the effectiveness of oversight, but whose solution or management lies outside the assembly. Internal factors relate to issues such as deficiencies in assembly rules while external factors relate to issues such as deficiencies in national frameworks and policies whose control lies with institutions at the national level.

This chapter analyses and pulls together the different kinds of challenges that hinder oversight work. The main challenges discussed in this chapter include: capacity of the county assemblies to undertake oversight especially in technical areas; capacity building and training; resources to support and facilitate oversight; independence of county assemblies to carry out oversight; and weak cooperation at the county government and with the national level, and a lack of enforcement and resolutions, among other factors.

4.2 Inadequate capacity of county assemblies

The factors that have contributed to inadequate capacity of assemblies are various and range from historical to systemic issues that affect all county assemblies. First county assemblies inherited staff from the former authorities that did not have the technical capacity that was expected of county assemblies under the current constitutional dispensation. The constitutional framework envisaged powerful subnational legislatures but the existent capacity at the time did not complement this kind of structure. Subsequently, assemblies have hired staff but are yet to achieve the desired capacities.

The nature of work that MCAs are expected to play in oversight and other legislative functions are highly technical. While supporting staff may assist the membership to analyse budget documents and policies, there are residual skills required to effectively carry out this work. Court decisions annulled statutory provisions that sought to put minimum educational qualifications for elective posts and this has, in the opinion of some respondents, led to low capacity in the assemblies. There is generally a high turnover of MCAs and while this effectuates the democratic choice of voters, it sometimes rids the assemblies of membership that has some experience in oversight. However, election cycles are a reality and other measures should be taken to grow the capacity and experience of fresh members of assemblies.

4.3 Incoherent capacity building and training

While there are efforts to progressively grow the capacity of members of county assemblies and teams serving in the assemblies, these measures are beset with a number of challenges. First, while the training needs and skills required are known, there is no coherent process of growing the capacity of members and teams in the assemblies.

As a result, each assembly engages its own trainers and develops training programmes for its own members. There is usually no assurance that the kind of trainers brought and content of training is relevant to the needs of the assembly.

While intergovernmental bodies such as SOCATT and CAF develop curricula and also train their members, the resources are limited and often not sustainable to ensure progressive and comprehensive training and capacity building. Even programmes by the Senate, such as the County Legislative Assistance Programme (CLAP) that are coordinated by the Senate Research Office are not adequate to cover the technical teams.

Resources for the training of members of assemblies and technical teams are, perhaps, the greatest challenge in capacity building. Partnership between the Centre for Parliamentary Studies and Training (CPST) provided the most viable route for standardised and sustainable training for county assemblies. However, lack of resources led to pending bills at the institute and stoppage of the training programmes.[132]

4.4 Inadequate resources to support oversight

Inadequacy of resources to support county assembly oversight was consistently mentioned as a major factor that hinders oversight processes. The resources that are allocated to county assemblies are hardly enough to facilitate the activities of committees such as visits to projects across the county, committee sittings, hire of additional staff, and even facilitation of individual MCAs in their wards. As a result, assemblies have to limit their work. In many instances, Senate departmental committees are able to perform better oversight in the county than the MCAs due to their superior facilitation and technical capacity.

Other resource issues that have affected oversight business include the late exchequer releases that end up disrupting scheduled work. The scrapping of plenary sitting allowances by the CRA has also affected quorum and attendance during plenary days. In some counties that are geographically vast, denial of such allowances has put a squeeze on the MCAs who have to dig to their pockets to attend sittings. In one county assembly, plenary sittings had to be made to coincide with committee days (which attract allowances) in order to secure quorum and attendance.[133]

4.5 Inadequate and vague legal frameworks to support oversight

The lack of clarity in law and policy applicable to oversight has negatively affected oversight in county assemblies. The most prominent of these is the nature of role of the Senate vis-à-vis that of county assemblies in county government oversight. The Senate has played a dominant role in this area, mainly because of the resources and authority to summon or compel the attendance of county executives, including governors. The impact is that county assemblies have remained largely invisible in the oversight process.

Even more critically, the Senate and assemblies have not had an opportunity to jointly define rules of engagement with regard to their respective roles. There are also critical legislative and policy gaps at the national level that need to be filled through interventions of the Senate but which remain unattended as the Senate concentrates its efforts and energy in reviewing the 96 audit reports of the county executive and assemblies in each financial year.

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132. Interview with key respondent (Lorna Losem, Ag. CEO, County Assemblies Forum).
133. Interview with a clerk of a county assembly.

Finally, counties that have tried to play their oversight role have faced major hurdles such as a lack of means to enforce their decisions or compel compliance, especially of the assembly. Clarification of applicable frameworks and policies, especially at the national level, will address many of these challenges in the county assemblies.

4.6 Lack of independence of the county assembly

The lack of independence of county assemblies has also emerged as a major issue in the performance of oversight. Basically, many respondents from county assemblies noted that it is difficult to hold to account the executive which is in charge of county assembly finances. The county assembly budget is usually deposited in the County Revenue Fund (CRF), which is under the direct control and management of the governor, CEC-Finance and the Chief Officer Finance. There are numerous reported cases where MCAs have to beg for resources and there are reported instances where the executive frustrates the assembly by denying it access to resources.

Furthermore, the county executive controls the Own Source Revenue (OSR) which, although the law requires that should be deposited in the CRF is usually held by the executive and used to compromise members of the county assembly. In some cases, the OSR is used to give incentives to members of the assembly, especially during "dry periods" when there are no exchequer releases.[134]

Additionally, the terms and conditions of service of MCAs, including the remuneration and benefits that are given to the Office of the MCA, do not enhance the stature and independence of the office and this affects the oversight work that an individual MCA is required to carry out. Some respondents were of the view that this creates a weak point that the executive sometimes exploits by compromising oversight.

4.7 Weak cooperation and interlinkages in oversight

Productive and effective interlinkages between county assemblies and the Senate as well as institutions such as CRA, CBK, OCOB, SRC, can greatly improve county assembly oversight. This can be through provision of timely and detailed information for action, and facilitating the enforcement and compliance of decisions of the assembly. However, there is generally weak cooperation between the county assembly and the county executive (with the exception of a few county governments).

During the constitutional review process, the Harmonised Draft Constitution had proposed that senators should be ex-officio members of county assemblies with a duty to report regularly on relevant matters to county assemblies. However, and for unrecorded reasons, this provision was done away with in the final draft.

Furthermore, except for one or two counties, there is no culture of cooperation between the executive and the assembly, outside of the formal processes such as budget approval and legislation making. This is despite the need for a robust working relationship between the two arms of government at the county level in order to work towards common goals.

4.8 Conclusion

The challenges and encumbrances that hinder county assembly oversight are systemic and structural, and are sustained by internal and external factors. The solutions to these challenges lie in identifying and addressing their root causes.

134. Interview with key respondent.

As a starting each of the challenges discussed above, especially those that require external intervention, form part of a mandate of an institution, office, or agency at the national level. Identifying necessary interventions and where such responsibility lies is a first step in addressing the root causes of the challenges identified. Ultimately, though, the Senator as the primary protector and representative of county government interests should provide fundamental guidance in addressing the challenges facing county assemblies. The next chapter recommends action to be taken to overcome these challenges and to improve county assembly oversight.

Chapter Five

RECOMMENDATIONS

5.1 Introduction

This chapter provides recommended actions to address the challenges and issues that have been identified in this report as negatively county assembly oversight. The recommendations are provided in a tabular form and identify the broad challenges, the specific challenges within each broad area, and the recommended action to address those challenges.

5.2 Issues and specific recommendations

(see table next page)

Table: Issues and specific recommendations

No	Area of concern	Specific issue	Recommended action
1.	Weak capacity of county assemblies	Inadequate technical capacity to support oversight processes in the assembly	- Undertake technical capacity needs for county assemblies vis-à-vis available skills in all county assemblies - Undertake discussions with the Senate and other national agencies on addressing the capacity gaps
		Inadequate capacity of members of county assemblies	- Undertake capacity needs assessment at the start of every term of assembly - Develop capacity development programme appropriate for the identified needs of members
2.	Incoherent capacity building and training	Uncoordinated training and capacity development programmes for members and county assembly technical teams	- Develop uniform standards for training of members and staff of county assemblies in consultation with CPST, SOCATT, CAF, etc. - Standards to cover curriculum, trainers, etc.
3.		Inadequate resources for training	- Engage the Senate and other national agencies on the necessary resources to provide training
4.	Inadequate resources to support oversight	Inadequate budget for county assembly oversight processes	- Engage the Senate and other relevant agencies on the adequacy of resources - Mobilise resources for training - Build partnerships with training institutions and relevant agencies at the national level to train and build capacity
5.	Lack of independence of county assemblies	Dependence on the county executive for county assembly finances	- Expedite the enactment of the County Public Finance Laws (Amendment) Bill, 2023 - Engage the Senate and relevant national agencies on rules to guarantee the independent operations of county assemblies
6.		Terms and conditions of service of MCAs	- Engage the Salaries and Remuneration Commission and other national agencies on fair remuneration of MCAs to enhance their independence

No	Area of concern	Specific issue	Recommended action
7.	Weak cooperation and linkages in oversight	Weak or non-existent linkages between assemblies and the Senate	- Engage the Senate to develop rules of regular engagement with assemblies for purposes of cooperation and enhancing oversight (different from audit sessions) - Develop a joint framework (national law) to guide the relationship between the Senate and the County assemblies in oversight matters
8.		Weak or non-existent cooperation with relevant national agencies	- Engage the Senate for the development of a framework (legal and policy) to guide interaction between national institutions and county assemblies on oversight matters - Develop a framework to guide systematic oversight of national bodies by the Senate focusing on how the institutions are facilitating counties
9.	Uncertain and inadequate framework to support oversight	Inadequate laws and policies at the national level to support	- Review the current laws that support and identify the required interventions to address the gaps identified - Senate to develop the required frameworks to address gaps
10.		Inadequate laws and policies at the county level to address oversight	- Review the current county laws and rules that support and identify the required interventions to address the gaps identified - County assembly to develop the required frameworks to address gaps


Turkana
Mandera
Marsabit
Wajir
Samburu
Isiolo
Laikipia
Meru
Garissa
Narok
Kitui
Kajiado
Kilifi
Taita-Taveta
Kwale