ICPAK POSITION PAPER ON CONSTITUTIONAL REVIEW, STATE OF THE ECONOMY, ACCOUNTABILITY AND DEVOLUTION

February 2019

About ICPAK

The Institute of Certified Public Accountants of Kenya (ICPAK) is a statutory body established under the Accountants Act, 1977 (repealed in 2008) to regulate and develop the accountancy profession in Kenya. ICPAK serves as the umbrella body that oversees the activities of qualified and registered Certified Public Accountants (CPAs) in Kenya.

ICPAK holds membership in the international accountancy organizations such as International Federation of Accountants (IFAC) and Pan African Federation of Accountants (PAFA) and in this respect is bound by code of ethics, set of obligations and standards laid down by the bodies.

The Council of the Institute is comprised of the following members:

1. **FCPA Julius Mwatu - Chairman**
2. CPA Denish Osodo - Vice Chairman
3. FCPA Pius Nduatih - Representing KASNEB
4. FCPA Wycliffe Shamiah - Representing the CMA
5. CPA Rose Mwaura - Member
6. CPA Anne Wangeci - Member
7. CPA Samuel Okello - Member
8. CPA Nyaega Obare - Member
9. CPA Susan Oyatsi - Member
10. CPA Geoffrey Malombe - Representing the National Treasury
11. Ms. Damaris Kimosop - Representing user of accounting information
12. CPA Edwin Makori - CEO and Secretary to Council

ICPAK's Strategic Plan for Period 2019-2021

The Council of the Institute approved a new Strategic Plan for the Period 2019 – 2021. The New Strategic Plan is premised on four Pillars (thematic areas) namely:

1. Accountancy Development and Regulation,
2. Positioning for Influence
3. Institutional Sustainability,
4. Enhanced Customer Experience

Background

The Institute supports the Building Bridges Initiative as established by Gazette Notice No. 5154 dated 24th May 2018, out of the Joint Communique which was signed between H.E the President Uhuru Kenyatta and the former Prime Minister Rt. Hon. Raila Odinga. This platform offers an opportunity to all Kenyans to share their proposals on the future of this great country.

In August 2010, Kenya promulgated the Constitution that introduced significant changes to its state and governance structures. The Constitution established two levels of government, namely; the National and County Government, which are distinct and inter-dependent, and which shall conduct their mutual relations based on consultation and cooperation.

Alongside the division of roles between the national and county governments, the Constitution addressed the financing of the functions of the two levels of government towards an equitable society based on openness, accountability and public participation in financial matters. The Constitution further introduces fiscal independence in the budget process where the three arms of government, that is the Judiciary, Executive and Legislature prepare individual budgets unlike in the past.

The Institute has compiled proposals on the debate to review the Constitution, state of the economy, accountability and prudent management of resources and implementation of devolution in Kenya as illustrated in Table 1 below.

Table 1: Constitutional review, Devolution, Accountability and Economy

Issue		Chapter/Article of the Constitution	Issues Arising (ICPAK Perspective)	Proposals	Justification and best practice
	Separation of Powers	Chapter 8 – Legislature Article 95 and 96 on the establishment of Parliament, role of the National Assembly, Senate, Chapter 9- Executive	According to the Constitution, Article 95 (4) (b) the National Assembly appropriates funds for expenditure by the national government and other State organs and, (c) exercises oversight over national revenue and its expenditure. Article 96 states that the Senate will allocate and exercise oversight over the national revenue allocated to County governments. Recently, the legislature (Parliament and County Assemblies) have assumed certain executive functions with enactment of laws to manage implementation of funds such ▪ National Government Affirmative Action Fund (NGAA Legal Notice No.24 of the Public Finance Management Act, 2012 ▪ National Government Constituencies Development Fund (NG-CDF) formerly	In Kenya, the principle of separation of powers is recognized as a permanent and indispensable feature of our governance structure. This is manifested horizontally through the relationship of the legislature, executive and the judiciary. To further strengthen this principle, we propose (i) Amend Article 95(4) to clearly define the role National Assembly in budget appropriation for the national government (ii) We need to make a decision on whether to strictly adhere to the separation of powers (like the US or have the executive and legislature intertwined- UK) (iii) Consider alignment all funding and initiatives at the local level to the County Integrated Development Plan as envisioned by the County Government Act, 2012	Clear separation of powers is essential for effective oversight by the legislature The US Constitution adheres closely to the separation of powers. Article I grant powers to the legislature; article II gives executive power to the President; and article III creates an independent judiciary. In the UK, and other common law jurisdictions, the executive and legislature are closely entwined. The Prime Minister and a majority of his or her ministers are Members of Parliament and sit in the House of Commons. The executive is therefore present at the heart of Parliament.

	Issue	Chapter/Article of the Constitution	Issues Arising (ICPAK Perspective)	Proposals	Justification and best practice
			Constituencies Development Fund (CDF) ▪ Clamor and proposals by County Governments to establish the Ward Development Fund The Concern is whether these funds and other initiatives are incorporated in the County Integrated Development Plans (CIDPs)		
	Public Financial Management: Role of the Legislature in Budget making	Chapter 12 on Public Finance Chapter 8 on Legislature Article 250 (12) (a) and (b)	This is closely related to separation of powers especially on the aspect of fiscal parity. The following issues arise: (i) To what extent does the legislature influence the budget proposals? (ii) What capacity does the Executive have in dealing with any or perceived legislative excesses? (iii) What are the checks and balances in the budget making and oversight Since 2013, the country has witnessed near stalemates in County Governments on budget making and approval due to friction and conflict between the County Assemblies and the Executive. This has in some	We need to define the extent of interaction between the Executive and the Legislature in the budget-making process	According to Werner (2004), With regard to the scope of legislative authority, there are three categories of influence over budgeting: 1. **Budget-making legislatures** have the capacity to amend or reject the budget proposals of the executive and to substitute one of their own (Sweden, United States). 2. **Budget-influencing legislatures** can amend or reject executive budget proposals but lack the capacity to formulate their own independent budgets (Italy, Netherlands). The amending power is often constrained as well: many legislatures may cut but not add to executive budgets, while

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		cases paralyzed business including delayed approval of budgets- Makueni(2013-2017), Nakuru(2013-2017),Embu and Kitui Counties among many other counties		others may add as long as they find offsetting cuts. 3. **Legislatures with little or no budget role** lack the capacity to reject or amend executive proposals in any substantive way, largely for fear of prompting the fall of the government (United Kingdom)
Financial Autonomy of Independent Offices	The Constitution establishes the Controller of Budget and Auditor General as the two independent offices, Article 228, Article 229 and Chapter 15	These offices are inadequately funded to effectively discharge their mandates. For instance, In Kenya, the Auditor General Office's annual budget estimates are prepared and submitted to the Cabinet Secretary responsible for finance who then submits to the National Assembly estimates of the revenue and expenditure of the National government This arrangement undermines the OAG's absolute independence given that the National Treasury is an entity subject to its statutory audit. To assure independence, there is need for the Public Audit law to provide for direct submission of Auditor General's annual budget estimates to the National Assembly.	Ring-fence the funding and independence of the independence offices to enable them deliver on their mandates without interference. Consider Auditor General Office submitting its estimates of the revenue and expenditure directly to the National Assembly	This will guarantee financial autonomy and ultimately functional autonomy of KENAO In United Kingdom, The United Kingdom National Audit Office (NAO) presents its budget to an all-party Public Accounts Commission. The membership of the Commission includes the Chairman of the Public Accounts Committee, the Leader of the House of Commons, and seven other members of the House, appointed by it. The NAO prepares an estimate of its expenses annually. The Commission examines this estimate and lays it before the House of Commons with such modifications as it sees fit. The Commission 4 is required to take into consideration any advice given by the Public Accounts Committee and the Treasury.

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			The same scenario applies to the Controller of Budget's Office		
	Strengthen governance and integrity structures	Chapter 6 of the Constitution	Kenya has an elaborate legal architecture on integrity and accountability. This ranges from the Constitutional provisions on leadership and integrity to other numerous related pieces of legislation on public finance management, integrity, bribery and accountability. Nevertheless, we continue to witness myriad cases of financial misappropriation and the numerous reported scandals involving both the public and private entities. According to EACC (2016), the government of Kenya loses one third of the national budget to corruption. Equally, the Auditor General and Controller of Budget Reports have pointed out lapses in accountability of public resources.	Amend the law and provisions on public finance management, anti-money laundering, leadership and integrity to include: ▪ Total blacklisting to public positions for persons culpable ▪ Strengthen asset recovery mechanism, including repatriation of assets ▪ Adopt of technology to map, track and recover stolen funds and assets ▪ Involve accountants as expert witnesses and forensic experts in financial related scandals	This will protect public resources from plunder and misuse. Moreover, these interventions are in line with continental efforts outlined in AUs Agenda 2063 and global initiatives such is the United Nations Convention Against Corruption, which entered into force on 14 December 2005.
	Public Participation and Role of Professiona	Articles 10, 201, 196 among others have given provisions on Public Participation. It is even a national value and principle	The country is still grappling with developing practical principles and practices on public participation.	▪ Define public participation in clear and comprehensive terms. ▪ Develop a nationwide policy and legislation on public participation	Studies have shown that Public participation is important in promoting transparency and accountability in financial matters

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<tr><th colspan="2">Issue</th><th>Chapter/Article of the Constitution</th><th>Issues Arising (ICPAK Perspective)</th><th>Proposals</th><th>Justification and best practice</th></tr>
<tr><td></td><td>l bodies in governance /public financial manageme nt</td><td></td><td>Since the promulgation of the Constitution, implementation of public participation is still a mirage.</td><td>

Allocate sufficient resources for public participation
Strictly implement Article 35 of the Constitution and Access to Information Act 2016 to guarantee effective public participation for accountable governance, planning and development.
</td><td>which can positively impact on the economy.

For instance, according to International Budget Partnerships (IBP) transparency and public participation can help shine the light on leakages and improve efficiency in public expenditures. In addition, fiscal transparency and participation can foster equity by matching national resources with national priorities.</td></tr>
<tr><td></td><td>Division of Revenue and significance of audited Financial Statements</td><td>Article 203(3) grants National Assembly the mandate to receive and approve most recent audited accounts of revenue for purposes of revenue share</td><td>The Institute notes with concern that for the past three years, the Division of Revenue Act (DORA) has used FY 2013/14 audited accounts as the basis for equitable share!

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<tr><th>Division of Revenue Act (DORA)</th><th>Audited Financial Statements</th></tr>
<tr><td>DORA 2016</td><td>935, 653 million</td></tr>
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Therefore, the use of 2013/14 figures affect fairness and equity in the revenue share. This disadvantage county</td><td>

The most recent should be a timeline not more than two years from the current financial year (FY $t \leq t-2$)
where t is the current financial year
As we commence the process of revenue share FY 2019/2020, National Treasury and Commission on Revenue Allocation (CRA) should use the most recent audited financial statements as the basis for revenue allocation. The latest audited accounts cover the fiscal year 2016/17.
National Assembly should consider, expedite scrutiny and adoption of these reports from
</td><td>This will foster fairness in revenue share.</td></tr>
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			governments given that any surplus accrues to the national government.	the Auditor General. This will enable revenue share to rely on the most recent and approved financial statements.	
	Pending Bills	Though this is not a constitutional matter, its effects permeate the entire spectrum of the economy.	According to the Auditor General Reports, there has been an increase in pending bills in the recent times. The table below illustrates the increase for the national government. <table><tr><th>Financial Year</th><th>Total</th></tr><tr><td>2013/14</td><td>16,638,164,142</td></tr><tr><td>2014/15</td><td>43,212,107,778</td></tr><tr><td>2015/16</td><td>20, 472,313,203</td></tr></table>	▪ Agencies should be obligated to move fully to accrual accounting ▪ Deal with late exchequer releases	Globally, under cash accounting, transactions are recognized only when the associated cash is received or paid, and economic events are not reported if there is no immediate exchange of cash. Accrual accounting therefore offers several benefits: ▪ accrual-based fiscal reports provide a more comprehensive view of the government's financial performance and the cost of government activities; ▪ help focus greater attention on the part of policymakers and the public on the acquisition, disposal, and management of government assets, liabilities, and contingent liabilities ▪ by consolidating not only central government ministries and agencies but all institutional units under government control, accrual accounts provide a more complete picture of the financial position of the public sector as a whole; ▪ by reporting stocks and flows within an integrated accounting

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					framework based on internationally-accepted standards such as IPSAS, accrual accounting can improve the reliability and integrity of government financial data
	Delay in Exchequer Releases	This is a public finance management matter. The delay in exchequer releases has negative affected absorption of development funds.	It has been singled out since FY 2013/15 by the Controller of Budget that, among other factors, delay in disbursement of funds to spending units by the exchequer is the major cause of low absorption. For instance, during the Annual report of FY 2015/16, the total exchequer releases towards development expenditure totaled Kshs. 110.4 billion representing 14.3% of the annual net estimates. This is a low percentage considering that at half year, total exchequer releases towards development expenditure should be approximately 50% of the annual net estimates. This in essence has led to huge pending bills at both levels of government.	To curb delays in the release of the disbursement of the equitable share of revenue raised nationally, the County Treasury should liaise with the National Treasury to ensure that funds allocated to the County are released in a timely manner.	This will improve absorption of funds and deal partly with the issue of pending bills.

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Revenue generation through enactment of the Finance and Appropriations Bill	Article 221 of the Constitution Section 39 and 41 of Public Finance Management Act 2012	**Article 221 of the Constitution stipulates that** (1)At least two months before the end of each financial year, the Cabinet Secretary responsible for finance shall submit to the National Assembly estimates of the revenue and expenditure of the national government for the next financial year to be tabled in the National Assembly. However, provisions of the Public Finance Management Act 2012 provide that budget estimates, Appropriation Bill and any other relevant Bills, except the Finance Bill, required to implement the budget to be assented to by the 30th June each year. Under sec 41, the Finance Bill is assented to **NOT later than ninety** days after passing the Appropriation Bill. In the past, the CS National Treasury has relied on the Provisional Collection of Duties and Taxes Act to collect taxes before enactment of the Finance Bill. However, the Courts having declared that the Provisional	The Institute recommends the repealing of Sec 41 of PFMA and the amendment of Sec 39(1) to read The National Assembly shall consider the budget estimates of the national government, including those of Parliament and the Judiciary, with a view to approving them, with or without amendments, in time for the Appropriation Bill Finance Bill and, any other relevant Bills required to implement the budget to be assented to by the 30th June each year	Cognizant that the Constitution anticipated that the budget constitutes revenue and expenditure. In the absence of the PCTDA and the order, the Courts having declared it unconstitutional, the CS would not have the mandate to collect taxes prior to the enactment of the Finance Act. The window for public participation should be used to discuss both the expenditure and revenue together. To manage public expenditure.

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		Collection of Taxes and Duties Order, 2018 (Legal Notice No. 128 of 21st June 2018) is unconstitutional and, therefore, invalid, null and void. This will create a lacuna and pose challenges in revenue raising that could further exacerbate debt and lead to increase in borrowing to finance the budget		

Concerns on the Cost of Representation

According to the Working Group (WG) to carry out a Socio-Economic Audit of the Constitution of Kenya 2010 , the budget for Parliament is about 2% of the national budget, against a global average of 0.57% (for countries with population of 10-50 million). This is more than three times the global average. Comparatively, Kenya's previous unicameral Parliament's budget (Ksh 10.2 billion in 2011/12) was 0.88% as a share of the national budget.

The report further points out the fact that Kenyans are over-represented. Members of Parliament (national level) and Members of County Assemblies (County level) combined, represent Kenyans and play the role of oversight and making legislation, in addition to representation. Kenyan MPs and MCAs are also overpaid. Emoluments for Kenya's MPs and MCAs are higher than those of comparator countries, especially when benefits are included.

It is imperative that this be assessed in light of the burden it portends to the citizens and necessary arrangements made to cushion the citizens against high cost of living, which they already experience. The facts as demonstrated below should give a clear perspective of what it means to the citizens;

1. There are concerns regarding the cost implications of the expansion of Parliament from a single Chamber with 222 members, including nominated members, to a bi-cameral Parliament with 418 members (Senators and National Assembly Members).

2. In terms of representation, the current Parliament translates to an average of 120,000 constituents per MP and 100,500 including the Senate.95 This is lower than the global average of 146,000 constituents per MP, but higher than the African average of 83,450 per MP.

3. The global norm corresponds to a Parliament of 290, on average, and the African average of 500 members.

4. Kenya's Parliament, both the National Assembly and the Senate, has 416 members. This number tends towards the African average and way above the global average. This suggests that Kenyans indeed are over-represented.

5. There are 47 County Assemblies; in total there are about 2,526 Members of County Assemblies, both elected and nominated. Kenya appears to be over-represented when compared to representation in countries with similar size of economy and population as illustrated in the table below;

Figure 1: Comparatives: Representation

Country	Population size of each country	GDP	Representation	No. of Members/Size of chamber
Kenya	44.35	60.94	Senate	67
			National Assembly	349
			Members of County Assembly	2,526
			Total	**2640**
Ethiopia	99.39	55.61	Upper House	108
			Lower House	547
			Members of regional State Councils	1989
			Total	**2644**
Nigeria	178.52	568.51	Upper House	109
			Lower House	**547**
			State legislators	**978**
			Total	**1,447**
South Africa	54	350.09	**National Council of Provinces**	**90**
			National Assembly	**400**
			Provincial legislatures	**430**
			Total	**920**

Source: Report by the Working Group on Social- Economic Audit of the Constitution.

The Institute therefore submits that the issues highlighted are salient and weighty enough to warrant amendments that would ease the burden on the taxpayer. However, the Institute feels that the current economic factors prevalent in Kenya are not favorable for a plebiscite. The Institute welcomes other means to effect the changes that would be cost-effective and not negatively impact on our economy.