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SECTORAL POLICY AND LEGISLATIVE ANALYSIS

In collaboration with the United Nations Development Programme

APRIL 2015

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Table of contents

List of abbreviations v
Foreword vi
Acknowledgements vii
Executive Summary viii
1 Introduction and background 1
2 General constitutional, legal, and policy framework for implementation of devolution 2
2.1 The constitutional framework and context of implementation 2
2.2 Legal and policy framework for implementation 4
3 Review of sectors: laws, policies and institutions 5
3.1 Intergovernmental Relations (IGR) 5
3.1.1 The constitutional framework for Intergovernmental Relations 5
3.1.2 The legal and institutional framework for IGR 6
3.1.3 Analysis of implementation and emerging sector issues 7
3.1.4 Policy and legislative recommendations 9
3.2 Agriculture Sector 10
3.2.1 County government functions in the Agricultural Sector 10
3.2.2 Implementation of devolution in the Agriculture Sector 13
3.2.3 Review of implementation and emerging sector issues 14
3.2.4 Policy and legislative recommendations 15
3.3 Water and Sanitation Sector 16
3.3.1 The Water Sector and the Fourth Schedule 17
3.3.2 Implementation of devolution in the Water and Sanitation Sector 19
3.3.3 Proposals for legal, policy and institutional reforms 20
3.4 Arid and semi-arid areas 21
3.4.1 The Constitutional framework and relevance to ASAL areas 23
3.4.2 Policy and legislative framework for ASAL areas 24
3.4.3 Policy and legislative reforms 24
3.5 The Roads Sector 25
3.5.1 Implementation of devolution in the Roads Sub-Sector 26
3.5.2 Policy and legislative proposals 27
3.6 Public finance, Commerce and Economic Affairs 28
3.6.1 The constitutional and legal framework for county public finance management 28
3.6.2 Implementation of county public finance framework 28
3.6.3 Emerging issues in implementation of the public finance management framework 29
3.7 Environment and Natural Resources Sector 30

3.7.1 Climate Change Bill, 2014 31
3.7.2 The Forest Conservation and Management Bill, 2014 32
3.7.3 Forest Policy 2014 32
3.7.4 The Mining Bill, No.8 2014 34
3.7.5 Mining Policy Framework in Kenya 35
3.7.6 Proposed Amendments to EMCA 36
3.8 Land and Urban Development Sector 37
3.8.1 Physical Planning Bill, 2014 37
3.8.2 The Community Land Bill 2013 38
3.9 Education and ICT 38
3.9.1 Medium Term Expenditure Framework 39
3.9.2 Teachers Service Commission Act, 2012 39
3.9.3 Basic Education Act, 2013 40
3.9.4 Youth Polytechnics at National and County Level 41
3.9.5 Science, Technology and Innovation Act, 2013 42
3.10 Health Sector 42
3.10.1 Kenya Medical Supplies Authority (KEMSA) Amendment Bill, 2013 and Kenya Medical Supplies Authority Act, 2013 43
3.10.2 Pharmacy and Poisons (Amendment Bill) 2014 43
3.10.3 The Alcoholic Drinks Control (Amendment) Bill 2014 43
3.10.4 Diabetes Management Bill 2014 44
3.10.5 Physiotherapist Bill 2013 44
3.10.6 Mental Health Care Bill 2012 44
3.10.6 Kenya National AIDS Authority Bill 2014 44
3.11 Trade, Commerce and Investments Sector 44
3.11.1 Value Added Tax Act 45
3.11.2 Consumer Protection Act 45
3.11.3 Scrap Metal Bill 46
3.11.4 County Industrial Bill 2014 46
3.11.5 Policy Framework for Regulation of Corporative Societies 47
3.12 Human Resource/ County Public Service 47
4 Concluding analysis and general recommendations 47
4.1 Institutionalisation of effective intergovernmental relations 48
4.2 Policy and legal framework alignment 48
4.3 Clarity of roles and relations between institutions 49
5 Annexes 50

List of abbreviations

CoG	Council of Governors
TDGA	Transition to Devolved Government Act
TA	Transition Authority
CIC	Commission on Implementation of the Constitution
IGR	Intergovernmental Relations
IGRA	Intergovernmental Relations Act (2012)
IGRTC	Intergovernmental Relations Technical Committee
PFMA	Public Finance Management Act
IBEC	Intergovernmental Budget and Economic Council
GDP	Gross Domestic Product
ASAL	Arid and Semi-Arid Lands
GIC	Government Investments Corporation
ADC	Agricultural Development Corporation
KALRO	Kenya Agricultural and Livestock Research Organisation
AFFA	Agricultural, Fisheries and Food Authority
CDPS	Crop Development Promotion Service
KEPHIS	Kenya Plant Health Inspectorate Service
IEA	Institute of Economic Affairs
WSB	Water Service Board
WASREB	Water Services Regulatory Board
WSP	Water Service Board
RMLF	Road Levy Maintenance Fund
KURA	Kenya Urban Roads Authority
KeRRA	Kenya Rural Roads Authority
KeNHA	Kenya National Highways Authority
KENTRA	Kenya National Trunk Roads Authority

FOREWORD

The Council of Governors, as the forum for consultation amongst County Governments, brings together all the County Executive Committee Members (CECMs) who are in charge of implementation of the devolved functions. The CECMs have formed sectoral committees that ensure service delivery in all counties is harmonized by, among others, proposing uniform legislation in specific sectors, sharing best practices and capacity building. The committees have also been active in engaging the National Government through established intergovernmental sectoral forums.

The Sectoral Forums of the County Governments under the auspices of the Council of Governors, met in Safari Park Hotel Nairobi between 4th and 6th June 2014 to consider policy and legislative proposals under their respective sectors with implications on devolution. The focus of the consultative forums was to make recommendations for better policy, legislative and institutional alignment. The forum appreciated the normative foundation of the devolved system of government under Article 6(2) of the Constitution which provides that the two levels of government are distinct but inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation. In realizing the objects of devolution under Article 174 of the Constitution, regular consultations based on good faith are inevitable. The format of the forum was thematic discussions under the County Sector Forums.

From the June 2014 consultative meeting, memoranda were generated and sent to Parliament with proposed amendments on Bills and Acts of Parliament that had failed to recognize the role of County Governments. It is from this report that the Legislative Baseline was conceptualized. This Report is expected to harmonize legislation and policy and ensure that the same is reflective of devolution.

The Council of Governors notes that in line with the spirit of consultation, it is critical that the National Government and County Governments continually dialogue in the formulation of laws and policies. Legislation developed must recognize the role of County Governments and must further respect the functional integrity of the Counties. We must be vigilant so that devolved functions are not clawed back; and their implementation must not be allowed to be stagnated by retrogressive laws and policies. The Consultative Conference of June 2014 revealed that it is important for CECMs to engage National Government and its agencies in a bid to ensuring that the transition to devolved governance is seamless.

We gratefully acknowledge Ms. Nardos Bekele-Thomas on behalf of the United Nations Development Programme (UNDP) as our funding partners, for the technical and financial support availed to see to the successful development of this Report. As we progress into the third year of transition, our focus should be to consolidate the strides made in devolution and confront the remaining challenges. Our commitment is to the Constitution and to the Kenyan people.

His Excellency Isaac Ruto, EGH

Chairman
Council of Governors

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The Council of Governors wishes to present the Legislative Baseline Report. This Report is a product of the technical input of the consultants, Dr. Conrad Bosire and Anne Nderi Gitonga, who were a key resource in its development.

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Finally, the Council of Governors appreciates the support of the Secretariat staff who assisted and facilitated the process that has seen the final publication of this Report.

Jacqueline Mogeni

Acting Chief Executive Officer
Council of Governors

EXECUTIVE SUMMARY

The Sectoral Forums of the County Governments under the auspices of the Council of Governors met in Nairobi in June 2014 to consider policy and legislative proposals under their respective sectors with implications on devolution. The focus of the consultative forums was to make recommendations for better policy, legislative and institutional alignment. Accordingly, the Council of Governors commissioned a comprehensive review of its multi-sectorial report alongside other reports emanating from the National Government relating to similar sectors in the County Governments with a view of identifying gaps and proposing appropriate legislative, policy and administrative interventions. The review also covered national legislations impacting on devolution and an audit of national institutions carrying out County Government functions.

The conceptual justification for this review was the need to ensure that devolution of power which has long been advanced as a means of managing Kenya's ethnic diversity and the failures of the centralized State was applied in the manner in which it was intended by the Constitution. Devolution was thought to be a credible means for searching for democratic constitutionalism and the panacea to Kenya's governance problems characterized by concentration of power in the presidency and centralized institutions without appropriate checks on those powers. A cardinal principle underpinning devolution is the need to decentralize administrative, financial and political power to the local level in order to enhance the efficiency and effectiveness of government. A decentralized government allows greater citizen participation in local development and permits the government to respond quickly to local needs.

The transfer of powers to sub-national governments increases public sector efficiency, thus promoting economic development. Especially in the case of a nation with heterogeneous regions, decentralization officials are in a better position to meet local demands, decentralization authorities are much better informed regarding local needs, and can provide the economically-efficient quantity and quality of public goods. Decentralization brings the government closer to the people so that local officials are better informed on the local needs, and are thus more capable to provide the optimal mix of local policies. This increase in efficiency contributes to economic growth.

While the governments at the national and county levels are distinct and inter-dependent, the two levels of government are required to conduct their mutual relations on the basis of consultation and cooperation. The report therefore recommends measures to ensure effective cooperation and consultation between the national and county governments in the performance of their functions while ensuring that national policies and legislative measures do not duplicate or undermine legitimate mandate of county governments.

The report analysed the constitutional, legal, policy, and institutional frameworks that are either in place or are currently being negotiated by the two levels of government and recommends the realignment of laws, policies and institutions to conform to the devolution framework. The report also discusses the issues and factors influencing implementation of devolution and makes practical recommendations for legal, policy, and administrative measures to ensure the full implementation of the devolved system of government as envisaged in the Constitution.

1 Introduction and background

The Constitution of Kenya introduces fundamental changes to the country's governance structure. At the core of the current constitutional system is the devolved system of government comprising of the national government and 47 county governments across the country. The overall objective behind the devolved system of government is to dismantle the hitherto centralised system by dispersing powers and resources. The objectives of devolving power and resources are clearly articulated under article 174 of Constitution. While implementation of the devolved system of government entered an important phase with Kenya's March 2013 elections (actual establishment of county government institutions), the process of implementing the Constitution started much earlier (soon after August 2010). Accordingly, a number of national laws concerning counties were already in place long before March 2013.

Separate existence of the two levels is guaranteed through constitutional apportionment of powers and resources between the two levels.[1] The operating constitutional principle, however, requires governments between and within the two levels of government to operate harmoniously. Indeed, the existence of a common constitutional purpose that binds all governmental institutions, devolved or not, lays the basis for harmony between national and county governments. The (common) national values in article 10 of the Constitution, objectives and principles for devolution, principles of public finance management, public service, and leadership and integrity, etc imply a harmonious pursuit of a common constitutional purpose.

It is in the above context that county governments have come together under the umbrella of Council of Governors (CoG) to ensure effective cooperation and consultation in the performance of their functions. It is in further pursuance of this cooperation and consultation that representatives from the 47 county governments held sectoral-based consultative forums between 4 and 5 June 2014. The aim of the three day workshop was to interrogate proposed national policy and legislative measures with the aim of ensuring that county space is respected and recognised by national government processes.

The overall objective of this exercise is to ensure that county governments (and the national government) put in place laws, policies, and other arrangements that will facilitate achievement or realisation of the objectives of devolved government. The broad purpose that devolution is meant to pursue is captured in the objectives of devolution (article 174) which include:

- equitable development and delivery of services and distribution of national resources
- dismantling the centralisation by ensuring democratic participation and overall accountability, and;
- recognition and accommodation of diversity (for purposes of national unity) as well as protection of minorities and marginalised communities, among other particular objectives.

The Constitution provides for a procedure (including timelines) for passing laws that will restructure of public institutions and the entire governance system to align with the Constitution.[2] Across all the major sectors, the Constitution has made an attempt to divide powers and functions between the national level and the county governments. The national and county government powers are contained in Parts 1 and 2 of the Fourth Schedule to the Constitution respectively. Accordingly, the Constitution provides that both the national and county levels will exercise legislative and executive powers over their respective areas as provided for in the Fourth Schedule.

1 Article 186, Constitution of Kenya 2010
2 Sixth Schedule, Constitution of Kenya 2010

There are various ongoing efforts to (re)align laws, policies and institutions into the new constitutional order. While there is a general process of implementation of the devolved system of government, ultimately, there will be a sector-specific approach to the implementation process as county governance takes root. This report scans across the major sectors of service delivery:

- Intergovernmental relations
- Agriculture
- Water and sanitation
- Arid and Semi-Arid Lands
- Roads and Energy
- Public Finance and Economic Affairs
- Environment and Natural Resources
- Forest conservation and management
- Education
- Health
- Trade, commerce and investments
- Human Resource and County Public Service

In each of the sectors mentioned above, this report analyses the constitutional, legal, policy, and institutional frameworks that are either in place or are currently being negotiated by the two levels of government and other institutions. The country is in transition to county governance and the process just under 2 years. There are a number of factors that are influencing the pace of implementation. This report discusses the issues and factors influencing implementation and makes legal, policy, as well as practical proposals to ensure the full implementation of the devolved system of government as envisaged in the Constitution.

General constitutional, legal, and policy framework for implementation of devolution

2

Before delving into the specific sectors, it is important to review the general context and frameworks (constitutional, legal, and institutional) that various sectoral laws, policies and strategies are currently being developed or implemented. These general frameworks both inform and influence the pace and nature of implementation of the devolved system of government. While it is important to review sector-based approaches, the general context within which sectoral approaches are being implemented depend on the general context and approach to the devolved system of government.

2.1 The constitutional framework and context of implementation

The Constitution of Kenya 2010 forms the basic framework for the implementation of the devolved system of government. Article 1 of the Constitution recognises the people as the source of the functions, powers, and resources located at the national and county levels. Accordingly, county governance is, as recognised in the Constitution, an exercise of people's sovereignty and which is shared between the two

levels of government. This is a radical departure from the previous constitutional dispensation where the former local authorities were subordinated and subjugated to central government departments. The courts have noted the fundamental restructuring of the state and governance structures through devolution thus:

> **Devolution has brought in a new structure of governance and it cannot be compared with the local authorities system as we knew it under the Repealed Constitution. County governments under the Constitution, 2010 have now been elevated to the level of semi-autonomous governments with inter-dependence with the national government.**[3]

Therefore, it is important that every legislative, policy or institutional and administrative arrangements proposed by both levels of government are given this approach. The Constitution follows up this recognition with a division of functions between the national and county levels. The Constitution gives the specific power of county governments with regard to their roles and functions. Articles 183 and 185 of the Constitution spell out the executive and legislative powers of the county governments respectively. Accordingly, the county assembly has power to "make any laws that are necessary for or incidental to, the effective performance of the function and exercise of the powers of the county government under the Fourth Schedule". On the other hand, the county executive has the responsibility of implementing, first, county legislation and, secondly, national legislation, with the county. These two broad powers represent the main channels through which county governments can claim their constitutional space.

However, effective county governance is also dependent on how the national government is reorganised and restructured in order to reflect the constitutional structures provided for in the Constitution. While the structures envisaged in the Constitution are easy to understand, the actual process of implementation is fraught with many challenges. First, the political and institutional culture of centralised governance, built over 50 years, seems to frustrate efforts to pave way for county governance. Centralised governance ensured that public resources and institutions were concentrated at the centre, and most of them at the expense of local democratic institutions such as the former local authorities. It is this trend that the Constitution seeks to reverse. However, political and institutional resistance to transfer functions (and accompanying resources) is manifesting itself in almost all the major sectors (as will be discussed later below). A report in the Nairobi Law Monthly notes that:

> **"There are, still, national ministries, state corporations and parastatals the same way they were before the General Election yet the only function they are left with is to coordinate the national policy in consultation with county governments to ensure standardization through inspection".**[4]

Secondly, while the constitutional intention to disperse powers and resources to county governments is clearly stated in the general and specific provisions in the Constitution, interpretation of the text of the Constitution has led to ambiguities and contested meanings of the constitutional framework. This has led to conflicts on various aspects of implementation of devolved government, many of which have ended up in courts and some of which have given useful guidance with regard to the direction of the implementation of the devolved system of government. However, the unfortunate part is that anti-devolution forces operate in and thrive in constitutional ambiguity.

3 Okiya Okoiti Omtata and another v The Attorney General and 6 others(PetitionNo. 593 of 2013), at para. 83
4 Discosta David 'Devolution: A litany of betrayal amid self-interests' Nairobi Law Monthly Vol. 5 Issue No. 10 (October 2014) at p.30.

In the face of the challenges mentioned above, only a detailed discussion and analysis of crucial sectors of service delivery will pave way for an effective implementation of the constitutional framework. This report delves into each specific sector and identifies factors and issues affecting implementation and makes practical suggestions on how such issues are or should be dealt with under the overarching constitutional framework.

2.2 Legal and policy framework for implementation

Recognising the complexities involved in the implementation of devolution, Parliament enacted the Transition to Devolved Government Act (TDGA) specifically to implement the transitional provisions discussed above.[5] The overall purpose of the TDGA is to ensure a coordinated transition to devolved governance. In particular, the Act is meant to facilitate the transfer of functions as provided in the Constitution, provide mechanisms to ensure effective monitoring of the transition by the CIC and other relevant bodies. The TDGA is also meant to provide mechanisms for assessing national and local institutions (assets, liabilities, human resources) to enable effective transition, and also to ensure continued capacity building at the national and county levels in order to ensure effective devolved governance.[6]

The Transition Authority (TA) was established to coordinate the transition to devolved government and to particularly oversee the realisation of the objectives set out in the TDGA.[7] Accordingly, the TA established a functional framework to facilitate the comprehensive and effective transfer of functions to national and county governments as provided for in the Fourth Schedule.[8] The TA is also expected to analyse and clarify the Fourth Schedule to the Constitution (including resource requirements) and facilitate the transfer of those functions to the respective levels. The TA also has a duty to analyse and rationalise (transfer where necessary) the assets, liabilities and human resource at the national and county level in view of the new system and to make recommendations for their effective management at the national and county levels.[9]

However, there is not yet a comprehensive framework for the analysis and clarification of national and county government functions, despite this being a requirement in the TDGA. Furthermore, and as a consequence, there is no commonly agreed basis for budgeting at national and county government levels. A 2014 report of the Commission on Implementation of the Constitution (CIC) states that:

> **The functional analysis contemplated in the Constitution is necessary as it is the basis for the development of plans, accurate budgets and spending decisions. It is a critical process in the realization of equitable development provided for under Articles 10, 174, 201 of the Constitution... functional analysis is therefore intended to clarify what a function is in the context of devolution, including its components so that the level of government which a function has been assigned understand it and allocate resources to perform it. The analysis is therefore necessary because a number of functions listed in the Fourth Schedule are broadly presented. The analysis is particularly important for the purpose of avoiding disputes and duplication of resources.[10]**

5 The long title to the Act states that the TDGA is to: "to provide for a framework for the transition to devolved government pursuant to section 15 of the Sixth Schedule to the Constitution".
6 Section 3 TDGA.
7 Section 5 TDGA.
8 Section 24 TDGA.
9 Section 7 (2)(e) to (i) TDGA.
10 Commission on Implementation of the Constitution 'From Strides to Steps: Assessment of the Implementation of the System of Devolved Government' June 2014, at p. 32.

In October 2012, the TA developed a comprehensive framework of functional analysis which preceded the transfer of functions. However, there was no common understanding of the costs of county government functions when the first budget under the devolved system of government was prepared by the National Treasury.

In the face of the above uncertainties, it became necessary for county governments to start discussions and analysis of the constitutional and legal framework in order to have a common understanding of their role in implementation. While some progress has been made across various sectors in terms of achieving cohesion in policy and implementation, it is important that these gains are consolidated into a report that will form the position of county governments. The next part below reviews each of the specific sectors and identifies the county space and makes proposals on how county governments can take up their role in the respective sectors.

3 Review of sectors: laws, policies and institutions

Despite the general constitutional and legal framework and institutional policies discussed above, there are sectoral developments which continue to define space for county governments in service delivery. This section analyses the laws, policies and other arrangements made to identify issues and make recommendations for more effective sector governance and to specifically ensure that the envisaged role of county governments is realised. Accordingly, in each of the sectors discussed in this report, sector-background information is discussed. The current and future factors informing the implementation of devolved governance are also discussed. More importantly, the current of proposed legislative and policy measures from the national level (and county levels) are also discussed. Lastly, the existing or contemplated policy and legislative measures make the basis for sector-based policy and legislative recommendations. Beyond proposals for policy and legal reforms, the report also makes practical proposals in order to ensure that county governance us anchored in each of the sectors discussed.

3.1 Intergovernmental Relations (IGR)

While national and county governments are established as separate tiers of government, the operating constitutional principle requires the two levels of government to operate harmoniously. Indeed, the existence of a common constitutional purpose, as stated earlier, lays the basis for harmony between national and county governments. More specifically, one of the founding provisions in the Constitution of Kenya 2010 clearly states that governments at both levels are "distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation" (Art. 6 (2)). This principle is buttressed by specific provisions in the Constitution which provide both generally and concretely for institutional interaction between the two levels of government and the between the county governments.

3.1.1 The constitutional framework for Intergovernmental Relations

Article 189 of the Constitution contains the specific principles and provisions for IGR which enhance the broad constitutional principle of consultation and cooperation. The requirement to cooperate and consult implies the pursuit of common goals. The principle discourages unilateral action by either level of government which may hurt achievement of the set common goals and objectives. Consultation and

cooperation extends to sharing of information and coordination of policies and administration and enhancing capacity. Beyond sharing of information, consultation and cooperation may actually require the joint execution of mandate for overall effectiveness and this is recognised in the Constitution through the provision that allows formation of joint bodies for execution of joint mandates.[11]

Apart from institutional interaction through IGR, the Constitution provides for "support to county governments" where the national government can constitutionally intervene in county government affairs. Situations where national government is permitted to intervene include: where a county government is not performing its functions, or where a county government fails to operate the financial management system prescribed in national legislation.[12] However, there are constitutionally and statutorily defined procedures and pre-requisites before these provisions can be activated. The national government can only take up the functions of a county if necessary and for necessary measures only. There must be a notice to the target county of the intended measures and the national government must take measures to ensure that the county government resumes full responsibility of its functions. Furthermore, the Senate can, at any time, bring an end to the intervention.[13] Further conditions to commence and manage an intervention are spelt out in the County Government Act.[14]

3.1.2 The legal and institutional framework for IGR

Pursuant to article 189(3) and (4) of the Constitution, Parliament, in 2012, enacted the Intergovernmental Relations Act (IGRA). The IGRA can be termed as the substantive enabling framework for IGR as it is wholly dedicated to institutionalisation and operationalisation of IGR. However, there are also various proposed or existing national laws that have established IGR structures specific to the sector or areas that the laws govern. There are also IGR bodies that have been facilitated or established administratively at the national government (mainly through the Ministry of Devolution and Planning). An appropriate example here is the committee that was established to carry out an audit of the public service.

The IGRA is specifically meant to "establish a framework for consultation and co-operation between the national and county governments and amongst county governments".[15] It is important to note that the Act was passed in 2012, before county governments were elected into office. Accordingly, at the time of the passing of the Act, there was no basis for mutual consultation and cooperation as county governments were not yet in place. While it was important to have structures in place to enable IGR to start off after county government elections, there is need for flexibility in the implementation of IGR so as to ensure that the county voice informs the development and practice of IGR.

The IGRA establishes three main structures: the National and County and Government Coordinating Summit (composed of the president and the governors), the Council of Governors (composed of all the governors), and the Intergovernmental Relations Technical Committee (IGRTC). The Summit is "the apex body of intergovernmental relations" while the Council forms the apex of horizontal intergovernmental relations.[16] The Committee, on the other hand is, as the name suggests, a technical body to be composed of persons with skills and experience in IGR. The IGRTC is established independently of the two levels of government and intended to manage IGR generally and specifically manage the activities of the Summit and the Council.

11 Article 189 (2) CoK 2010.
12 Article 190 CoK 2010.
13 Article 190 (5).
14 Section 121 County Government Act.
15 Long title to the IGRA.
16 Section 7(1) IGRA.

Apart from the IGRA several other laws have established (or proposed to establish) structures of IGR. However, these structures are at different levels and paces of implementation or operationalisation. The County Government Act establishes the County Intergovernmental Forum (CIF) which brings together all heads of national government departments at the county level and the county executive to coordinate and manage IGR at the county level.[17] The same provision also envisages other county level IGR fora that may be formed on a sectoral basis.

The Public Finance Management Act (PFMA) establishes the Intergovernmental Budget and Economic Council (IBEC) with the mandate of carrying out fiscal IGR between the two levels of government.[18] The IBEC has a wide membership that cuts across counties, the three arms of national government and independent institutions involved in different aspects of public finance management. Specifically, the IBEC is chaired by the deputy president and composed of the cabinet secretary in charge of finance, all the 47 members of county executive in charge of finance, representatives from the Commission on Revenue Allocation, Judicial Service Commission, Parliamentary Service Commission, chairperson of the Council of Governors, and the cabinet secretary in charge of IGR.

The IBEC plays an important role as it forms a basis for intergovernmental consultation in important processes such as the development of national and county budgets. The IBEC provides an important reference point if Parliament needs to consult in order to make adjustments to proposed national budget. Furthermore, the National Treasury can also consult with the IBEC when developing budget proposals. The presence of the IBEC can address some of the intergovernmental tensions and potential conflicts over budgets and budgeting powers.

Other legislative IGR frameworks are contained in various laws that govern the different sectors. Various structures have been proposed in sectors such as Water, Health, Agriculture, etc but are at different levels of implementation. Apart from the national law establishing IGR structures, there are IGR structures established by administrative action or practice. At the initial stages, the TA coordinated various sectoral committees to assist in the development and management of sector transition. Specific duties included: analysis and unbundling of functions, advising on institutional transformation, transfer of assets and liabilities, etc. However, in most of these teams, there was no actual representation of county governments since most of these teams began their work before the March 2013 elections.

Lastly, there are structures (both at the vertical and horizontal levels) that are being formed through evolving practice. Indeed, national and county governments have formed important sector-based committees and other IGR structures to agree on transition to county governance. The IGRA recognises that further structures can be formed and this is important as it allows IGR structures to form and flourish based on mutual need for the structures.

3.1.3 Analysis of implementation and emerging sector issues

Soon after the March 2013 elections, the Summit met to address major issues which were emerging during implementation. Thus, while county governments were not in place when some of IGR structures were developed, their provision in statute provided an important basis to set the process going soon after the elections. Apart from the Summit, the Council of Governors also formed an important platform for agreement on common issues affecting counties and adopting a uniform stand as county governments. The Summit and the CoG are important IGR structures that have laid a basis for discussion and agreement on major issues affecting the two levels of government. The CoG has made a proposal to have the Summit and the Council entrenched as constitutional bodies under the constitutional provisions which require structures for cooperation and consultation.

17 Section 54 IGRA.
18 Section 187 PFMA.

While the Summit and the CoG have been operationalised and are carrying out their envisaged functions, other structures relevant to IGR have not been operationalised. The IGRTC which has the role of executing decisions of the Summit and the Council and is in charge of managing activities of the two apex bodies has not been established. Currently, the business of the Summit is managed through the Council of Governors Secretariat (from the county side) and the presidency and respective ministries (from the national government side). There is therefore a need on further deliberations regarding the management of IGR (including the establishment, structuring, facilitation, and functioning of the IGRTC). More importantly, both the Constitution and enabling legislation (including the IGRA) allow the formation of more IGR structures. Such flexibility is important in view of the dynamic nature and evolving practices of IGR between the national and county levels.

An emerging major concern of county governments is the development of national laws and policies which affect counties without the effective consultation of county governments. The Constitution is clear that governmental functions that affect either level should be carried out in the spirit of consultation and cooperation, without which, implementation will be met with challenges and lack of proper coordination. This is even more urgent where proposed laws have a substantial impact on the finances and functioning of county governments.

At the national level, the Senate has a primary constitutional mandate to safeguard and promote the interests of county governments. However, effective promotion and protection of county government interests is only possible if the Senate understands the interests of county governments. In turn, understanding county government interests inevitably translates to effective consultation and cooperation with county governments in order to understand both the challenges and opportunities that require legislative intervention at the national level.

Some of the recent laws passed by Parliament (with the cooperation of the Senate) do reflect the strategic role that Senate should play in the national legislative process (see Annex 1 for specific laws). For instance, both chambers supported the amendment to the County Government Act which saw the establishment of county development boards. The CoG position is that these boards have a potential to infringe on the functions of county organs and should be repealed. The CoG has approached the courts to declare this law unconstitutional.

The need for institutional linkages between the Senate and the county governments was recognised by the Committee of Experts (CoE).[19] While the CoE had proposed to have senators attend county assembly discussions, this was not included in the final text of the Constitution. Accordingly, the Senate and county governments will have to develop ingenious ways of ensuring effective relations between the two institutions. However, such mechanisms must consider and respect the functional integrity and mutual respect between the two levels of government as clearly stated in the Constitution.[20]

As the analysis of the different sectors will show, the executive organs at the national and county levels have made significant progress in terms of establishment of IGR structures across vital sectors. The flexibility in the formation of IGR structures has allowed different sectors to come up with committees and IGR structures that suit the sector's transition arrangements and dynamics. However, a number of laws, upon which the practice of IGR should be anchored, have not been passed. These include sectors such as water and sanitation, health, etc. where there are neither laws nor policy clarification on important issues.

19 Committee of Experts on Constitutional Review 'Final Report' (2011) p. 92.
20 Article 189.

3.1.4 Policy and legislative recommendations

The Constitution provides an important basis for a robust system of IGR to be developed between the national and county governments. Furthermore, laws that have been passed, thus far, have implemented the spirit of cooperation and consultation. However, the actual implementation of relations between national and county governments has been varied. In some areas, such as the operationalisation of the Summit and the Council of Governors, a lot of progress has been achieved. However, the entire process of implementation of IGR is yet to be complete and some of the provisions in national legislation remain unimplemented as earlier pointed out. This section makes legislative and policy recommendations in order to ensure an effective system and development of principles that can enable effective interaction between the two levels of government:

a). National government:

Inevitably, the national level of government is a key player in the effectiveness of IGR. Many of the functions which county governments are to perform are, during this period of transition, currently being managed through national government institutions. Accordingly, it is important for national government institutions to participate in the negotiation of the transition process. Furthermore, cooperation and consultation with county government on proposed policies and laws which affect county governments will greatly enhance the effectiveness of laws that are passed at the national level.

- Jointly develop and initiate systems to discuss upcoming national policies and legislation that will have an impact on county governments
- Enhance IGR by jointly developing (with county governments) the nature and extent of functions of the existing or planned IGR structures
- Develop jointly (with county governments) comprehensive sectoral-based plans which will explain how functions, institutions, and resources will be divided between the two levels (including timelines)

b). County governments:

While national government will play a critical role in ensuring effective IGR, county governments have an even greater responsibility in enhancing their effectiveness through cooperation with each other. A 2012 World Bank study of devolution in Kenya states that, "coordination and decision-making will be complicated by the sheer number of counties, and creative approaches will be required to ensure that the coordination bodies can still make decisions effectively".[21] Ghai and Cottrell also observe that the number of counties requires county governments to work together and present a "united stand" for overall effectiveness.[22] Accordingly, the 47 county governments have to develop general and particular mechanisms and systems to enable effective cooperation that will lay a basis for effectiveness. As mentioned earlier, the Constitution has provided space and opportunity for county governments to develop structures (from ad hoc to even permanent ones such as authorities) to allow them to effectively carry out their functions.

Soon after the elections, county governors came together under the body of the CoG and this has formed an important basis for horizontal cooperation. The CoG, as earlier indicated, became an important platform for addressing the major issues which underlay the implementation of devolution. It was through the CoG, for instance, that an agreement was reached with national government to have functions devolved to county governments without the gradual (county by county) basis for transferring powers and functions. Beyond the forum of governors, the Council (through the coordination of the Council Secretariat) has formed

21 World Bank "Devolution without disruption: pathways to a successful Kenya" (2012) p.128.
22 Ghai YP & Cottrell JG Kenya's Constitution: An Instrument for Change (2011) p. 134.

various committees (based on sectors) to assist in collectively pushing the county agenda. However, there are a number of steps that need to be agreed and covered between county governments in order to ensure that overall county effectiveness is secured and sustained. The following steps remain important in order to ensure effective horizontal cooperation among counties:

- Development of a common framework, approach and principles in the management of IGR with the national government. While counties and national government have developed sectoral committees with the national government (usually composed of the CECs in charge of the sector and the Cabinet Secretary). However, the structure and nature of extent of functions needs to be clarified and clear rules of operations and relations between vertical and horizontal IGR structures established.
- While the Council of Governors has negotiated and agreed the major structures of operation between the counties (including the setting up of the Secretariat), it is important that cooperation moves to specific and technical areas of cooperation in service delivery across sectors. However, this is only possible if the general rules, approaches and principles are agreed under the auspices of county governments.
- As sectoral-based negotiations with national government take place, it will be critical for county governments to consider the clustering of counties and possible execution of mandates jointly. For example, in important sectors (as the sectoral sections reveal) including the water and health sectors where services and infrastructure cross county boundaries. In order to effectively take up these functions, counties will have to develop effective mechanisms of management of these functions in order to achieve overall effectiveness in service delivery.

3.2 Agriculture Sector

Agriculture is arguably the most important sector to Kenya's economy and development generally. Being the largest contributor to the country's GDP (at 24 percent), and the largest employer covering 74 percent of employment, it is definitely one of the sectors whose progress will very much impact Kenya's general progress. Accordingly, any changes to the sector are likely to impact greatly on a greater section of the Kenyan society whose livelihoods and sustenance depends on this sector. Specific areas of impact include: health, food security, poverty incidence levels and general quality of life.

3.2.1 County government functions in the Agricultural Sector

The World Bank observes that Agriculture is one of the sectors whose functions have been substantially devolved to county governments. The Fourth Schedule divides the functions in the Sector as below:

National government	County government
• Agricultural policy • Veterinary policy (including regulation of the profession)	• Crop and animal husbandry • Livestock sale yards • County abattoirs • Plant and animal disease control; and • Fisheries

Source: Constitution of Kenya, 2010 (Fourth Schedule)

While the functions allocated to county governments are generally stated in the county list, it is clear that county governments are in charge of the bulk of agricultural services. Accordingly, the laws, policies, and institutional reforms commenced at the national level should reflect this fundamental re-arrangement of the Agricultural Sector. Being one of the sectors that the former local authorities did not have a substantial function to perform, the transition to county governance was bound to take a longer period than in other sectors such as water and sanitation where the direct service providers were companies wholly owned by the former local authorities. Indeed, in the first Legal Notice of the Transition Authority, no major function in the Agriculture Sector was transferred to county governments. Only two minor functions, which were performed by the former local authorities, were handed over to counties immediately after the March 2014 elections (livestock sale yards, and county abattoirs/ slaughter houses).[23]

The bulk of the functions the functions in the Agriculture sector were postponed. The TA made a major step in the second notice of transfer of functions. The TA not only further transferred powers and functions in the Agriculture Sector but also elaborated the functions that are stated in the Fourth Schedule in general terms. The TA broke down the functions of the county governments as captured below.

No	County function	Detail	Comment
1.	Crop husbandry	• provision of agricultural r extension services and farmer advisory services • development and implementation of food security programmes in the county • construction of grain storage facilities • enforcement of standards and regulations on agricultural input and produce • availing farm inputs (seeds, and other planting material) • soil and water conservation programmes for agriculture • promoting market access • provision of infrastructure to promote agricultural production and marketing • enhancing affordable credit and insurance packages for farmers • management of training centres • land development services (construction of water pans, etc) • formulation and review of county-specific policies • Developing and enacting legislation • Implementation of relevant national legislation and policies • Management of agricultural training centres and agricultural mechanisation all post-poned for six months (from August 2013) to enable the Transition Authority to put in place their mechanisms for their transfer	Management of agricultural training centres and agricultural mechanisation all post-poned for six months (from August 2013) to enable the Transition Authority to put in place their mechanisms for their transfer

23 Legal Notice No. 16 of 2013.

2.	Animal husbandry	Livestock extension services to deliver animal husbandry technologies to livestock farmers and pastoralists through: • Farm demonstrations • Farmer field schools • Agricultural shows • Individual farm visits • Farmer training centres • Barazas • Farmer tours • Posters/ brochures and leaflets	All functions exhaustively transferred
3.	Plant and animal disease control	• Communal dipping and spraying operations and vaccination campaigns • Control of plant pests, diseases and noxious weeds	All functions exhaustively transferred
4.	Fisheries	• Fisheries extension services • Upscaling seaweed, fin fish and crustacean culture • County fish seed bulking units • On farm trials • Fish health certification • Development and maintenance of fish landing stations and jetties, fish auction centres and fish landing fees • Demarcation of all fish breeding areas and fencing of fish landing stations • Fish trade licensing and fish movement permits • Collection of fish production statistics • Enforcement of fisheries regulations and compliance with management measures • Implementation of fisheries policy • Management measures and regulation and limiting access to fishing • Fisheries monitoring, control and surveillance • Zonation for aquaculture-county specific disease control	All functions exhaustively transferred

Source: Legal Notice No. 137 to 182 of 2013 (Transition Authority: 'Transfer of Functions)

The Transition Authority's Legal Notice confirmed that county governments were indeed in charge of a wide range of services in the agricultural sector. The Legal Notice was released six months after the county governments came into office in 2013. As earlier stated, the transition to devolved governance framework that is provided for under the TDGA provides a basis for determining functions that county governments are currently in charge of.

Accordingly, the gazettement of the TA notice should have been followed by implementation of a comprehensive framework negotiated between the Ministry, departments and agencies in charge of agriculture at the national level and county governments. Indeed, the gazettement of the transfer of agricultural functions to counties should have been preceded by an analysis and common understanding

on how to transition the agricultural sector to county governance. No such analysis and common understanding was reached before the August 2013 gazettement. Additionally, while the TA elaborated the details of functions of county governments under the Fourth Schedule, there is not yet a comprehensive costing of functions in order to understand the resources that are transferrable to county governments.

In the pre-2010 constitutional dispensation, the agricultural sector was highly centralised with many departments and agencies in the sector managed under different ministries. An April 2013 study[24] of the sector indicated that agriculture was managed under at least 10 sub-sectors:

- Crops sub-sector (industrial and food)
- Horticulture sub-sector
- Livestock sub-sector
- Fisheries sub-sector
- Land
- Water sub-sector
- Cooperatives and marketing sub-sector
- Environment and natural resources sub-sector
- Regional development; and
- Development of Arid and semi-arid areas (ASAL)

The fact that the above sub-sectors fell under different ministries makes the transition to a consolidated and harmonious sub-sector for the county governments a complicated process. However, in the Sector's transition, the Fourth Schedule and the direction given by the TA with regard to the Sector should guide the transition in the Sector.

3.2.2. Implementation of devolution in the Agriculture Sector

Following the functional framework described above, it was expected that extensive institutional, budget and administrative realignment will be taken at the national level. Indeed, as part of the reorganisation of national government structures. There are a number of institutions and agencies at the national level which continue to provide some or part of the functions that are now transferred to county governments. There are major recommendations and steps that have been proposed at the national level with regard to the Agricultural sector institutions. First, the Agriculture, Fisheries and Food Authority Act (AFFA), the sector's national legal framework was passed in 2013. The comments and position of the CoG on the law are discussed later below. With regard to institutional reorganisation, the AFFA sought to merge a number of sector institutions which are discussed below. However, there was also the "Presidential Taskforce on Parastatal Reforms" which also made several recommendations on agricultural sector institutions. A summary of the AFFA position on the institutions and the recommendations of the presidential taskforce are given below:

No	Sector institution	Policy position (Legislation and policy recommendation)
1.	The Agricultural Finance Corporation	Presidential taskforce recommended the merging with other public financing authorities to form the Kenya Development Bank (Taskforce report p. 146)
2.	The Pest Control Products Board	Function transferred to Agriculture, Fisheries and Food Authority
3.	The National Cereals and Produce Board	Presidential taskforce recommended transfer of function to Government Investment Corporation (GIC) and the function of strategic grain reserve transferred to an appropriate national body

24 Muriu AR & Biwott H 'Agricultural Sector functional analysis: A policy regulatory and legislative perspective (2013) p. 1.

4.	Nyayo Tea Zones Development Corporation	Merged to the GIC and other regulatory functions transferred to national bodies
5.	Agricultural Development Corporation	Taskforce recommended the operationalisation of Land Limited (the paper company which owns land on behalf of ADC).
6.	South Nyanza Sugar Company	To be governed under GIC
7.	Nzoia Sugar Company	To be governed under GIC
8.	Chemilil Sugar Company	To be governed under GIC
9.	Kenya Coconut Development Authority	Function transferred to AFFA
10.	Cotton Development Authority	Function transferred to AFFA
11.	Agro-Chemical and Food Company	Function transferred to AFFA
12.	Muhoroni Sugar Company	To be governed under the GIC
13.	New Kenya Cooperative Creameries	To be governed by national government entities
14.	Sisal Board of Kenya	Function transferred to AFFA
15.	Kenya Agricultural Research Institute (KARI)	Proposed to be merged to form part of Kenya Agricultural Research and Livestock Organisation (KALRO)
16.	Kenya Plant and Health Inspectorate (KEPHIS)	Taskforce recommended its continuation as a separate institution
17.	Pyrethrum Board of Kenya	Merged to form AFFA
18.	Kenya Sugar Research Foundation	To merge to form part of KALRO
19.	Kenya Seed Company	Merged under AFFA
20.	Coffee Board of Kenya	Presidential taskforce: Regulatory function transferred to AFFA and promotion of and development functions transferred to the proposed Crops Development and Promotion Service (CDPS)
21.	Coffee Research Foundation	Merged to form part of KALRO
22.	Horticultural Crops Development Authority	Transfer regulatory function to AFFA and the development and promotion service to the CDPS
23.	Tea Board of Kenya	Transfer regulatory function to AFFA and the development and promotion service to the CDPS
24.	Tea Research Foundation	To merge to form part of KALRO
25.	Bukura Agricultural College	No specific recommendation
26.	Coffee Development Fund	Dissolve and transfer function to the Agricultural Development Cooperation
27.	Kenya Sugar Development Fund	No specific recommendation
28.	Sacco Societies Regulation Authority	To be merged to a Financial Supervisory Council

Source: Report of the Presidential Taskforce on Parastatal Reform (October 2014)

3.2.3 Review of implementation and emerging sector issues

While extensive thinking has taken place with regard to reorganisation of the public institutions generally and the agricultural sector in particular, it is clear that the place and role of county governance did not feature strongly. A review of the processes that informed the institutional restructuring proposed above also shows that there was either no representation of county interests or the county voice was not given adequate

consideration. For instance, the Presidential Taskforce had no representation of county governments in its composition. The membership was mainly drawn from national government institutions.[25] While it is appreciated that the team's core mandate was to advise national government, the core mandate of the Taskforce and its recommendations have a heavy bearing on county government functions. It was therefore prudent to include representatives of county government for proper deliberation.

The absence of county governments is noticeable in the approach that the presidential taskforce took on agricultural sector institutions. The team took little or no consideration of the fact that majority of the functions performed by the 28 Agriculture sector functions were devolved functions under the Fourth Schedule and as determined by the TA. In fact, one gets the feeling that the Taskforce never addressed itself to the content of the TA Gazette Notice which was published in August 2013, months before the Taskforce Report was published. Similarly, views presented by county governments during the development and enactment of the AFFA were not considered. As a result, the AFFA (whose content are discussed below) did not adequately capture the views of county governments.The trend of ignoring county views in significant sector processes such as development of legislation and institutional reforms and restructuring does not augur well with the spirit of consultation and cooperation that is emphasised in the Constitution.

Budget rationalisation, in view of devolved functions, has not happened, even as late as the 2014/15 budgetary allocations. Many of the agricultural sector agencies have retained their budget votes with minimal adjustments.[26] The total sector budget remains unaffected at kshs. 23.9 billion with the largest spending item being "Crop development and management which accounts for 44 percent of the total sector expenditure. The irony is that this function (or at least the direct service provision) has been devolved to county governments and transferred to counties by the TA in the August 2013 notice highlighted above. County governments, on the other hand, continue to budget for and perform functions transferred by the TA. However, it is important that sector negotiations are initiated and comprehensive review of the sector's restructuring and functioning carried out.

3.2.4 Policy and legislative recommendations

The CoG group that reviewed the agriculture sector laws reviewed six pieces of legislation. These included: the Pyrethrum Act (2013), the Veterinary Professionals and Paraprofessionals Act (2011), the Agriculture, Fisheries and Food Authority (2013), the Fertilizers and Animal Foodstuffs Act (2012), the Kenya Plant and Health Inspectorate Act (KEPHIS), and the Kenya Agricultural and Livestock Research Act (2013). A summary of the specific comments and views is available at the Annex 2. There were four main concerns that were raised by the sectoral committee. First, there is a pattern of non-inclusion of county views in the preparation of sector legislation. The county views were ignored in important national legal framework such as the AFFA. Secondly, a number of laws passed had provisions which had potential to infringe on county powers and functions, as a result of vaguely and generally stated provisions. Thirdly, where bodies and structures were established with a mandate that may involve both levels of government, there was a consistent pattern of excluding counties from the composition of such bodies. Fourthly, there are cases where the national government passed substantive laws where the county had clear legislative mandate. An appropriate example here is the Fertilizers and Animal Foodstuffs Act (2012) which has substantive provisions that relate to an area that falls within the legislative competence of county governments.

Apart from the laws developed above (most sector legislation is already enacted above), there is need for review of the policy framework in the Sector. The Agriculture Sector Development Strategy (2010-2020) is the main policy framework for county governments. However, the policy was developed before the

25 Presidential Taskforce on Parastatal Reform (October 2014) pp. vi-vii.
26 Institute of Economic Affairs (IEA) 'Budget 2014/15: Balancing Financing Concerns while responding to spending inefficiencies' (2014) at pp. 12-13.

current Constitution came into being. While there are objectives that could be retained as sector objectives in the current period, the policy paper needs serious alignment with the institutional restructuring and the apportionment of responsibilities between the national and county levels. For instance, the Policy still makes reference to the former districts under the Provincial Administration as the sub-national focal points for delivery of services. The need to review the Policy has also been raised in the IEA's review of the 2014/15 Budget thus:

> **With the onset of devolution, operations of the agriculture sector have changed significantly with a number of functions, largely service delivery-oriented functions such as provision of extension service devolved to counties. As such, there is need to realign the Agricultural Sector Development Strategy 2010-2020 to this reality. Secondly, overall the policies in the agriculture sector should reflect the elaborate mechanisms for consultation and collaboration between the two levels of government to facilitate smooth public service delivery.**[27]

More importantly, it appears that even assuming that there is a proper legislative and policy framework in place, the actual implementation process may not reflect the content of legislation and policy. Accordingly, effective transition will depend on how seriously national level actors and county governments discuss and agree on the approach to and operation of the sector. Certainly, there is a lot of reorganisation that needs to be implemented but this is possible if there is mutual respect and effective cooperation is making policy clarifications in the sector. The following main recommendations will assist in the Sector's effective transition to devolved government:

- The current IGR structures between counties and national government should be expanded and the nature of responsibilities clearly defined to include planning committees that will oversee the full implementation of devolution in the Agriculture. These structures will deal with budget, functional, and institutional rationalisation, and policy (re)alignment in the Sector.
- There is need to have a forum between the CoG and committees of parliament (Senate and National Assembly) to address the concerns raised on the sector legislation which is already in force.
- The IGR Committees should isolate sector issues that can be channelled to the Council of Governors and to the Summit for further action (e.g. concerns regarding the proposed parastatal restructuring)
- Counties to develop joint frameworks for managing functions of cross county nature under article 189 (2) of the Constitution
- Clear definition of IGR stuctures, level and nature of functions, and apportining planning roles for each of the committees, e.g. budget rationalisation, institutional rationalisation, functional rationalisation, etc.

3.3 Water and Sanitation Sector

The Constitution introduces fundamental changes to the water and sanitation sector. The thrust of the constitutional provisions is to place county governments at the centre of delivery of water and sanitation services with national government largely retaining policy formulation and regulation of the water and sanitation sector. The national government also has substantive roles in water resources management. The

27 As above

Constitution guarantees the right to water and obligates the government to ensure that every person has access to safe and adequate quantities of water and a further right to reasonable standards of sanitation. Secondly, the Constitution lists specific functions in the Fourth Schedule whose effective performance will ensure proper water and sanitation services to the citizenry.

Flowing from the obligation to provide water and sanitation services is the Fourth Schedule which attempts to allocate differentiated responsibilities between the national and county levels in the water sector but with the common overall objective of ensuring effective realisation of the right to water and sanitation. While the national government has an overall policy-making and regulation power over the sector, county governments have a specific responsibility to implement national policies and ensure the actual delivery of water and sanitation services. This section of the paper discusses the constitutional framework and its implication on the sector governance.

3.3.1 The Water Sector and the Fourth Schedule

Through the Fourth Schedule, the Constitution provides guidance and a basis through which policies and laws, institutional and administrative measures will be undertaken to ensure the effective realisation of the right to water and sanitation.The national government is responsible for: the use of international waters and water resources.[28] The national government is also in charge of protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, water protection, securing sufficient residual water, hydraulic engineering and safety of dams.[29] Other national government functions that may be relevant to the water and sanitation sector include: capacity building and technical assistance to county governments,[30] national public works,[31] and public investment.[32]

In this regard, the national government has a duty to ensure that county governments follow national policies and set standards to ensure equity, quality, and other important objectives and goals in the provision of water and sanitation services. The World Bank captures the role of the national government in the Water and Sanitation sector thus:

> **The constitutionally guaranteed right to water provides a strong basis for regulating delivery of services, especially to ensure that this right is progressively realised over time. The national government therefore has the responsibility to set minimum national standards and to monitor the following:**
>
> - **Allocation of funding to the sector and the effective use of funds**
> - **Adherence to minimum standards by providers of water services; and**
> - **Provision of water services within the service area, and progress towards meeting constitutional right to water**[33]

Unlike water and sanitation services (where national government role is limited to policy and national regulation), the Constitution grants the national government broader powers than just policy formulation. The Fourth Schedule mandates the national government to not only set policies relating to environmental protection but also engage in environmental protection that specifically includes "water protection, securing sufficient residual water, hydraulic engineering and the safety of dams". The national government thus has both policy/ regulation powers as well as some implementation powers in the management and conservation of water resources.

28 Section 2, Part 1 of the Fourth Schedule.
29Section 22, Part 1 of the Fourth Schedule.
30 Section 32, Part 1 of the Fourth Schedule
31 Section 19, Part 1 of the Fourth Schedule.
32 Section 33, Part 1 of the Fourth Schedule.
33 World Bank 'Devolution in Kenya: Opportunities and challenges for the water sector' (2013) 4.

On the other hand, Part 2 of the Fourth Schedule provides that county governments are responsible for county public works and services, including: storm water management systems in built-up areas and water and sanitation services.[34] The county governments are also responsible for implementation of specific national government policies on natural resources and environmental conservation, including "soil and water conservation".[35]

It is thus clear that county governments have the constitutional mandate to deliver water and sanitation services. The duty of county governments to deliver water and sanitations services, in turn, extends to a range of activities which lead to the actual provision of water and sanitation services. County governments, thus, have the primary duty of delivering water and sanitation services. Among the specific functions in the delivery of water and sanitation services include:

- Development of water and sanitation works to enable the supply and delivery of water sanitation services within the respective counties
- Provision of the actual water and sanitation services (either directly or through county agencies)

Other water sector functions of the counties include:

- Build storm water management systems
- Implement water conservation projects

While it is clear from the Fourth Schedule that the national government has extensive powers over water resources management, water storage, and catchment protection, the Constitution also envisages a role for county governments. Specifically, counties have a duty to implement national government policies related to water conservation.[36] This particular provision means that county governments generally have powers to implement "county level" activities related to water resource management. This assertion is supported by the constitutional provision which requires activities that can be performed effectively at the county level to be left to county governments.[37] Specific examples here include: protection of springs and smaller water bodies at the county. Given that county governments have constitutional powers to coordinate the participation of communities in governance,[38] all activities by Water Resources Users Associations (WRUAs) should be coordinated under county governments. Accordingly, the functions and structures of WARMA must be rationalised to reflect the role and powers of county governments in water resources management.

No	National government function	County government function
1.	• The use of international waters and water resources • National public works • Housing policy • Protection of the environment and natural resources with a view of establishing a durable and sustainable system of development, including, in particular - (a) water protection, securing sufficient residual water, hydraulic engineering and safety of dams; • Capacity building and technical assistance to the counties	• County public works and services, including (a) storm water management in built-up areas; and (b) water and sanitation services • Implementation of specific national government policies on natural resources, including - (a) soil and water conservation • County planning and development, including (a) housing

34 Section 11, Part II of the Fourth Schedule.
35 Section 10, Part II of the Fourth Schedule.
36 Section 10 (a), Part II of the Fourth Schedule.
37 Article 187 (1) (a).
38 Section 14, Part II of the Fourth Schedule.

3.3.2 Implementation of devolution in the Water and Sanitation Sector

In the water and sanitation sector, the constitutional framework is being implemented in the background of water sector reforms that were commenced in 2002. The thrust of water sector reforms was to separate policy-making, water resources management, and provision of water and sanitation services. While policy-making and overall sector coordination was left to the Ministry, water resources management was vested in the outgoing Water Resources Management Authority (WARMA). Regulation of water and sanitation services was vested in the outgoing Water Services Regulatory Board (WASREB). The Water Act 2002 also introduced 8 regional Water Service Boards (WSBs) whose main function was asset development and to monitor Water Service Providers (WSPs). While the former local authorities managed water and sanitation services in the pre-2002 period, the water sector reforms separated the management and provision of water and sanitation services from the former local authorities. This function was vested in WSPs which were formed as water and sanitation companies that were wholly owned by the former local authorities. The introduction of WSPs resulted in the "ring-fencing" of water and sanitation revenues from the former local authorities.

While this resulted in a sharp drop in water and sanitation revenues for the former local authorities, there were many other benefits from the reforms which included: greater public participation in water resources management and water and sanitation services, and ploughing back of water and sanitation revenues for the maintenance and expansion of water and sanitation services. Other benefits included: sector modernisation including attracting of professionals to enhance the quality services, and growth in sector funding which has grown to almost 20 times and some increment of the sector's contribution to GDP growth since 2002. It is imperative that these gains are preserved.

The Transition Authority in its first Legal Notice issued in February 2013 transferred "storm water management in built-up areas" to county governments.[39] This meant that all public works across the 47 counties related to storm water management were to be transferred to county governments immediately after the March 2013 elections. In the second Legal Notice on transfer of functions to county governments, issued on 9 August 2013,[40] the TA transferred to county governments two important functions in the water sector under the general area of "county public works and services". First, the TA transferred public works which were described as including "designing, documentation, post contracting, project management of construction and maintenance of public buildings and other infrastructural services" and the construction of foot bridges.[41]

Secondly, the TA transferred water and sanitation services to county governments. This function was broken down into further specific functions which include "rural water and sanitation services, provision of water and sanitation service in small and medium towns without formal service providers, water harvesting (specific to counties), urban water and sanitation services with formal service provision including water, sanitation and sewerage companies".[42] However, the TA excluded "Water Service Boards, Water Services Regulatory Board and Water Resources Management Authority". However, the Legal Notice did not clarify whether the exclusion of the WSBs was as a transitory measure or that counties are excluded from taking over WSBs.

The core mandate of the 8 regional-based Water Services Boards (WSBs) is "asset development in order to progressively increase water and sanitation coverage".[43] This entails relevant project planning and maintaining as well as monitoring and supervising water service providers who sign "Service Provision

39 Legal Notice No. 16 of 2013.
40 Legal Notice 137 to 183 of 2013 (Kenya Gazette Supplement No. 116).
41 Section 10 (a) of Legal Notice 137 to 183 of 2013 (Kenya Gazette Supplement No. 116).
42Section 10 (b) of Legal Notice 137 to 183 of 2013 (Kenya Gazette Supplement No. 116).
43 Water Services Regulatory Board (WASREB) 'Impact 2013: A performance review of Kenya's water services sector 2011-2012' (Issue no. 6) (2013) p.

Agreements" with the water boards.[44] It is clear that the main functions performed by the WSBs are devolved to county governments since water and sanitation works as well as the provision of water and sanitation services are county government functions as discussed above. Indeed, the World Bank has noted that while there may be a justification for retaining WSBs or creating a single national body to take over the functions of WSBs, such an arrangement may be challenged for unconstitutionality.[45] The other option, as proposed by the World Bank is to have the functions of WSBs devolved to county governments and this is "necessary to meet constitutional requirements".[46]

While the lack of capacity may be used an excuse to delay the transfer of WSBs, it is important to remember that the national government has a responsibility to assist in building the technical capacity of county governments. Therefore, rather than deny counties these functions, it is prudent to enter into discussions on how capacity gaps can be addressed to enable county governments to take up their functions.

3.3.3 Water and Sanitation Sector Legal and Policy reforms

The policy was developed in 2012 and seeks to provide guidance on the sector's transition after the adoption of the Constitution of Kenya 2010. The draft policy paper calls for review of the existing water resources and water services strategies which were prepared before the Constitution of Kenya 2010. The strategy papers should be reviewed to take into account of the changed context.[47] The policy lays down the general principles of water resources management and water services. More importantly, the draft policy paper provides guiding principles in areas/ spheres of the sector's governance which include: water resource management, provision of water services, institutional arrangements, financial arrangements, and cross-cutting issues.

The draft policy identifies the Constitution of Kenya as the guiding point in all areas of the sector's governance. Accordingly, all measures should be geared towards fulfilment of the right to water as mentioned in the Constitution. The draft policy calls for participation in water resource management and provision of water services. The draft also calls for equitable distribution of water and sanitation services and specifically targeting rural and urban areas where there is no adequate coverage. With regard to the institutional framework, the policy is emphatic that water services should be devolved/ decentralised and that institutions should optimise self-financing.[48] The draft policy also emphasises accountability in the sector's governance as well as efficiency and operational autonomy.

However, there is no attempt in the policy to shed light on the nature of functions that the two levels of government will carry out in the water sector. Neither does the draft policy suggest a criteria or factors that can be used to arrive at a distinction between national and county government functions. Secondly, there is no guidance in the policy document with regard to institutional reorganisation and reorientation in view of the current constitutional dispensation. The draft policy was prepared in 2012, before the county governments came into being, and this may explain these important gaps in the policy document. However, the Water Bill 2014 was developed after county governments are in place.

The Water Bill (2014) is the proposed legislative framework for the Sector and is currently going through parliamentary debate. It is, thus,important that the Bill is developed through consultation with county governments and stakeholders. A reading of the current Bill (2014) raises many concerns regarding the powers and functions of county governments in the water sector. There is no evidence that the 2014 Bill was prepared with the consultation or involvement of county governments and the public. Many proposals in

44 As above.
45 World Bank-Kenya (Water and Sanitation Programme) 'Devolution in Kenya: Opportunities and challenges in the water sector' (September 2013) p. 3.
46 As above.
47 Republic of Kenya 'Draft of the National Water Policy 2012' March 2012 (2012) 17.
48 Republic of Kenya 'Draft of the National Water Policy 2012' March 2012 (2012) 18.

the Bill have disregarded the constitutional powers of county governments and created national government institutions that may end up taking over county government functions in the water sector. The main concerns in the Water Bill 2014 include:

- A proposal to take away the power of counties to implement county public works and develop projects for the provision of water and sanitation services and vest the same in national agencies
- A proposal to take away the power of counties to supervise and coordinate the activities of WSPs and vest the same in a national regulatory commission
- The Bill does not recognise the power of county governments to establish joint committees or authorities to implement cross-county waterworks and cross county water supply and sanitation services
- The Bill proposes to establish a Water Sector Trust Fund whose objectives and functions seem to directly conflict with the duty of county governments to expand the provision of water and sanitations services to marginalised areas (see detailed comments on the Bill in Annex 1)

3.3.4 Proposals for legal, policy and institutional reforms

The section above has explored the constitutional framework and the proposed legal, policy and institutional framework for transition in the water sector. The gaps and challenges in the Constitution and proposed laws and policies have also been identified. It is important that these gaps are addressed in order to ensure effective provision of water and sanitation services. The following are some of the specific recommendations to ensure legal and policy alignment in the Water and Sanitation sector:

- The draft Water Policy (2012) should be revised to ensure the following issues are adequately addressed:
  - County governments (which were not in place when the draft policy was prepared) are consulted and their views taken on board
  - The policy should develop a policy and institutional approach or guidelines and factors to be considered in the clarification of national and county government functions in the Water and Sanitation sector
  - The policy paper should engage (from a policy position) the institutional (re)orientation in the Water and Sanitation sector in view of the current Constitution. Specifically, the draft policy paper should provide specific guidelines on the nature and number of institutions should be established at the national and county levels. This should also include a discussion on issues such as: resources (human and financial), number of institutions and the nature of relations between national and county institutions in the Water and Sanitation sector
  - The policy paper should also develop a position (from a policy position) on how the transition in the sector will be implemented. This will entail a position on how to deal with current and future projects and plans that need to be transferred and the timeline for such transfer, manner of transfer, etc.

- The Water Bill 2014 should be revised to incorporate the specific amendments suggested in the preceding parts and Annex 1 of this report. The Water Bill is meant to provide a national legal framework within which national and county governments will exercise their functions. Accordingly:
  - The Bill should be withdrawn/ revised to address the specific concerns raised above
  - County governments should be actively involved in the finalisation of the Bill

- The Bill will greatly affect the functions of county governments in the water sector. It is thus important that the Bill is debated and passed at the National Assembly and the Senate (The Bill is currently noted as not concerning county governments and this means that it may not be sent to the Senate after being passed in the National Assembly)

- Both national and county governments, as well as all the Water and Sanitation Sector institutions should make a deliberate effort to ensure public participation and consultation in all the major decisions and process that may have a significant impact on the sector. This is especially important in this transition period when there is uncertainty and major decisions require to be taken, some of which will impact on delivery of water and sanitation services.
- Like other sectors proposed above, the vertical and horizontal structures of IGR in the Water and Sanitation Sector need to be more nuanced, nature and extent of roles, and relationships defined. The water sector is one of the sectors where clustering of counties and joint execution of mandates for services which cross county boundaries need to be jointly managed. The Presidential Taskforce, when discussing the future of WSBs made the following comment:

> **Water service boards by design operate across county boundaries where they are licensed to provide water services. Due to their coverage and indivisibility, the Boards cannot be transferred to any county in the area covered. There is, however, scope for the transfer of the Boards to the counties served as joint authorities under article 189 (2) of the Constitution that provides for cooperation between the two levels of government through joint committees and authorities. It is therefore recommended that in respect of [WSBs], the national government and county governments hold consultations on the future of [WSBs] and how they will be managed.**[49]

The recommendation above from the Presidential Taskforce implies the need for effective IGR structures that will discuss the transition of the water sector. While some progress has been made in terms of the transfer of water service providers to counties, not much progress has been achieved with regard to the WSBs. There is, as mentioned above, evidence of resistance by the national level to the idea of transfer of WSBs to county governments. There is need for effective Water Sector IGR Structures to guide transition to county governance.

Beyond having a common understanding of the respective roles and functions in the water sector, there is need for a clear sector transition plan and the roles of the respective joint structures, as well as individual county governments, in implementing the sectoral transition plan. The transition plan will contain all the necessary details to ensure that county governments assume their full powers and functions at the end of the transition period. The issues that the joint transition plans will cover include:

- The status and details of ongoing and future development projects and plans
- The transfer of resources for performance of water sector functions
- Transfer and/ or rationalisation of staff and human resources between national and county governments in the sector
- The specific transitory roles of current water sector institutions
- Clear timelines for the transfer of functions, resources and other capacities to county governments
- Any other issues that are necessary for the effective sectoral transition to county governments[50]

49 Report of the Presidential Taskforce on Parastatal Reforms (2013) pp 98-99.
50 See Annex 2 for further details of the proposed transition structures in the Water Sector.

3.4 Arid and semi-arid areas

A large part of the country (to the Northern and Eastern sides mainly) has an arid and semi-arid land and climate. Over 70 percent of the 47 counties are in areas classified as "arid". This area, however, accounts for slightly over one third of Kenya's total population of 40 million. The Arid and Semi Arid Lands (ASAL) are an important focus for the country in general due to historical factors as well as the nature of the region. The ASAL areas have historically been excluded from development and public services due to deliberate policies of the colonial and post-colonial regimes. Fertile areas with stable rainfall patterns in the country were chosen for white settlement by the colonial government. Accordingly, development and public services were concentrated in these settled areas.

Inevitably, settler economic activity also concentrated around these areas. At independence, the socio-economic disparities in the country were evident. However, rather than deal with these disparities, the independence government made a deliberate choice, via Sessional Paper No. 10 of 1965, to concentrate its economic investments and development activity in areas of the country with "abundant natural resources, good land and rainfall, transport and power facilities, and people receptive to and active in development".[51]

The colonial era legacies and post-independence policy decisions further excluded ASAL areas from development and access to vital public services. The disparities in development across counties is evident and it is clear that counties have started at different levels with the counties in ASAL areas (majority in the country) being the most disadvantaged. For instance, it is only with the onset of the devolved system of government that Wajir County has celebrated its first 25 kilometre tarred road![52] The story is the same with regard to access to basic services such as health, education, social development, etc where ASAL counties are generally underserved than the rest of the country.[53]

Apart from current challenges due to past deliberate exclusion, ASAL areas, as a result of their physical and climate patterns face a number of challenges. These include drought during the dry season and flooding during high rainfall seasons. Furthermore, the scarcity of land and other resources (including water) have led to communal conflicts and insecurity in the ASAL region. These circumstances have led to the need for a special focus on ASAL areas as an important part of devolved governance.

3.4.1 The Constitutional framework and relevance to ASAL areas

The objectives of devolved in the Constitution are explicit that one of the core objectives of devolved governance in Kenya is to "protect and promote the interests and rights of minorities and marginalised communities" and further "ensure the equitable distribution and sharing of resources throughout Kenya".[54] The devolved system of government ensures that there is an equitable distribution of resources collected nationally so as to ensure that there is fair distribution of resources and ASAL areas are prioritised. The formula for sharing of revenue has been described as "highly redistributive"and has ensured that special factors in ASAL areas (land coverage, scarce population, poverty rates) are factored in the design of county shares. The World Bank notes that some counties in ASAL areas have received more than 1000 percent funding more than they used to receive under the development programmes of the previous Constitution.[55]

51 African Socialism and its application to Planning in Kenya' (1965) p.45.
52 Discosta David 'Devolution: A litany of betrayal amid self-interests' Nairobi Law Monthly Vol. 5 Issue No. 10 (October 2014) at p.29
53 World Bank 2011 report
54 Article 174 (e) and (g).
55 World Bank (2012) pp 101-102.

The powers given to county governments across vital development and service delivery sectors have potential to ensure that challenges facing ASAL areas are addressed. Indeed, county governments have wide ranging powers over critical sectors such as infrastructure, health, education among other sectors. Therefore, the sectoral challenges raised in this report need to be addressed in order to address the issues prevalent in the ASAL counties.

The Fourth Schedule lists the powers and functions (for national and county governments) that are generally relevant to addressing issues in the ASAL region. National government is in charge of "national economic policy and planning" and "disaster management" among other relevant functions. On the other hand, county governments are in charge of "fire fighting services and disaster management". Accordingly, the two levels of government have functions in the same area of disaster management. The function of "fire fighting and disaster management was immediately transferred to county governments after the March 2013 elections; it was one of the functions that county governments could immediately assume soon after getting into office. However, no clarity has, so far, been given on the nature and extent of county government functions and how the same relates to that of the national government. This is especially important areas such as disaster management where county governments in the ASAL areas need to plan their resources effectively in order to prepare for challenges such as droughts, floods and related challenges.

3.4.2 Policy and legislative framework for ASAL areas

The CoG Committee that dealt with the issue of ASAL during the sectoral meetings in June 2014 discussed two Bills on disaster management: The Disaster Risk Management Bill (2013) and the National Drought Management Bill (2013). The former Bill was hurriedly drafted and presented to Parliament without proper stakeholder consultation. The Bill was presented to the Senate in early 2014 where it was agreed that the Bill should be returned and reviewed before debate on the Bill can commence. The Bill will provide an important basis for county governments through laying out the national legal framework. It is therefore important that the process of reviewing is started and that county governments and other critical stakeholders (such as Red Cross and other humanitarian organisations) are included in the deliberations and finalisation of the Bill.

The National Drought Management Bill is pending before Parliament. The Bill, however, does not make any mention of the nature of functions and relations between the two levels of government. The Bill does not resolve the constitutional ambiguities in the Fourth Schedule that are discussed above. On the other hand, there is not yet any policy framework in place that can guide the development of the laws governing this sector. A representative of Kenya Red Cross noted during the June Sectoral forums that a policy for disaster risk management was drafted in 2009 and has remained untouched since. It is important that these laws and policy are finalised (with consultation of counties) in order to ensure overall preparedness of disaster and general development of ASAL areas where most of the activities in this area are likely to be directed.

3.4.3 Policy and legislative reforms

It is clear that progress in ASAL counties will depend on effectiveness across many sectors whose services are critical to the region's development. Accordingly, all the sectoral recommendations discussed herein remain urgent for ASAL counties which have lots of ground to gain before it can compete with other counties in non-ASAL areas. An important part of this progress is the affirmative action measures that have been put in place. In the Constitution, the Equalisation Fund has been set up to enhance the provision of basic services (water, health, education, etc) to marginalised areas, most of which fall in ASAL areas. However, concerns emerged in Parliament that the National Treasury has no developed regulations which will guide

how the Fund is disbursed and managed. As a result, not a single cent of the funds has been disbursed to deserving counties due to lack of regulation. It is important that these rules are finalised to enable the moneys to be sent to regions where the fund can be used to complement efforts of county governments to enhance the delivery of essential services.

Furthermore, the area of disaster management seems to have a general lag in the development of the institutional and policy framework. It is important that a post-2010 policy and legal framework is developed to guide the sector. In the Draft 2009 Policy document, there were proposals to have a comprehensive framework.[56] This may have formed the basis for the development of the two Bills discussed above. However, like all other sectors, there is need for proper IGR structures where functional boundaries will be agreed between the two levels of government and complemented by effective implementation.

3.5 The Roads Sector

The Constitution divides roles in the Roads and Energy Sectors between the national and county governments. While the roles of Roads and Energy development were previously centralised, the Constitution now provides that both levels of government will play a substantial role in the development, expansion and maintenance of road and energy infrastructure. In the Roads Sector, the Fourth Schedule to the Constitution provides that county governments are responsible for: county roads, street lighting, traffic and parking, public road transport; and ferries and harbours (excluding the regulation of international and national shipping and matters related thereto). On the other hand, the national government is in charge of transport and communications, including, in particular: road traffic, the construction and operation of national trunk roads, and standards for the construction and maintenance of other roads by counties.

Prior to the current constitutional dispensation, the entire roads function was handled by national level institutions. In 1992, a national Roads Conference made a number of proposals for more efficient development and maintenance of road infrastructure. This led to the establishment of the Road Maintenance Levy (RMLF). The Fund became the main source of funds for the maintenance and expansion of the road network in the country. In 1999, the Kenya Roads Board was formed. In order to consolidate the developments in the Roads Sector, the Kenya Roads Act was passed in 2007. The Act established three main bodies: the Kenya National Highways Authority (KeNHA), The Kenya Urban Roads Authority (KURA) and the Kenya Rural Roads Authority (KeRRA). KeNHA, KURA, and KeRRA were to develop and maintain national highways and international roads, urban roads, and rural roads across the country respectively.

A number of sector institutions were also established with various roles:

- Roads Ministry: policy formulation and coordination, standard setting and maintenance, land use management, review of sector plans, registration and regulation of sector professionals, regulation of construction industry, capacity building, research and development, mechanical and transport services
- Kenya Roads Board: managing the Roads Maintenance Levy Fund
- Roads Department: technical and support services to the sector institutions
- KeNHA: A, B, and C class roads
- KURA: all roads in urban areas except those classified as national roads and belonging to KeNHA
- KeRRA: Class D and E roads and unclassified rural roads
- Kenya Wildlife Services: Maintenance of all roads in national parks and national reserves

56 Draft National Policy for Disaster Management in Kenya (2009) pp. 28-29.

However, the role of roads maintenance was also shared with other agencies: the local authorities, Ministry of Sports and Youth Affairs, Ministry of Nairobi Metropolitan, and Constituency Roads Committees.

Road classification	Description
CLASS A	International trunk roads linking centre of international importance and crossing international borders and international ports
CLASS B	National Trunk Roads linking nationally important centres to each other or to higher roads
CLASS C	Primary roads linking provincially important centres to each other or to higher roads
CLASS D	Secondary roads linking locally important centres to each other, to more important centres or to higher class roads

The Draft Policy on the Roads Sub-Sector (developed in September 2012) notes that there is a total of 160,886 kms of road network in the country; 61,946 kms of this is classified while 98,940 remains unclassified.

3.5.1 Implementation of devolution in the Roads Sub-Sector

In September 2012, the Ministry developed a Draft Roads Policy which was meant to guide the realignment of the Sector to the Constitution. The Draft Policy borrowed from Sessional Paper No. 5 of 2006 on the "Development and Management of the Roads Sub-Sector for Sustainable Growth". In line with the Constitution, the Policy sought to revise the classification of roads to the two recognised categories in the Fourth Schedule: trunk roads and county roads. In place of the pre-2010 institutional structures, the 2012 Policy proposed the following institutions:

- State Department in charge of policy formulation and standard setting
- A company that will carry out construction of national trunk roads (Kenya National Trunk Roads Authority (KENTRA))
- A body that will manage funds for the roads sector (Roads Fund)
- County roads transferred to county governments

The Draft Roads Policy provided proposals that could enable the smooth transition to county governance in the Sector. In the February 2013 Legal Notice, the TA transferred "access roads, street lighting, and traffic and parking" to counties. Accordingly, county governments were to assume the performance of these functions immediately after the March 2013 elections. Later in August 2013, the TA transferred "county roads including roads linking to all sub-county headquarters and minor roads linking markets and administrative centres excluding roads being managed by [KURA, KeRRA, KWS, and Kenya Forestry Service]". The Legal Notice by the TA was not clear at all on the roads that were transferred to county governments.

Ongoing negotiations between the Council of Governors and the Ministry in charge of Roads have made some progress on the division of responsibilities in the Roads Sector. In the Kenya Roads Bill 2014, the national government proposes to take charge of Class A, B and C roads while Class D and E Roads (using the classification discussed above) are left to the county governments. The Transition Authority has also made the same general proposal.[57] While the proposals by the Ministry purports to follow the suggestions in the 2012 Draft Policy, the actual classification as proposed goes against the current proposals in the Kenya Roads Bill 2014. The Constitution is clear that roads should be divided into national and county roads. Therefore, only roads of national importance are under the national government (essentially Class A, B and C) and the rest of the roads transferred to county governments as envisaged under the Fourth Schedule to the Constitution.

57 Transition Authority 'Report on the Classification of Roads to the National and County Governments' (August 2013) p.13.

The Ministry has proposed a sharing of revenue of roads revenue as follows: KeNHA (40 percent), KeRRA (32 percent), Constituency Roads Committees (24 percent) and the Ministry (10 percent). The National Assembly has, through the House Committee on Roads, rejected this proposal and specifically opposed the county share proposed in the Bill.[58] During the Committee hearing, the Committee has apparently called for a review of the Bill (to remove the county government share) before the Bill is tabled in the chamber. It is important that the constitutional framework guides discussions on the transition in the Sector. While existing sector institutions may have done commendable work in the previous constitutional dispensation, it is of ultimate importance that the institutions and its structure, systems, and processes are aligned to the new Constitution.

At the core of the new constitutional dispensation is the county government space that has been created to enable the sub-national level to play a role in local development. It is not lost to us that the current concentration of resources and powers in national government institutions was as a result of past centralisation processes that chose to ignore the space of the former local authorities in roads development and maintenance. Roads which were maintained by the former local authorities were gradually wrestled away and the function vested in central government-funded programmes and the constituency level. In a 2002 report, the World Bank noted that maintenance of local roads was transferred to district departments, constituency committees and other central government channels without proper capacity considerations. This led to inefficiency, fragmentation and duplication of efforts and resources in the Roads Sector.[59] It is this inefficiency that the Constitution sought to address.

The general sectoral-based division of functions between the two levels of government seeks to give some order and cohesion in the provision and maintenance of roads infrastructure. Indeed, the two levels of government share constitutional powers in the Roads Sub-Sector. Accordingly, any other existing or proposed mechanisms for the building or maintenance of roads must follow this constitutional scheme of power division. The House Committee on Roads of the National Assembly, and indeed the entire Parliament including the Senate must make reference to the constitutional framework when taking positions in important issues and processes such as this. The Constitution seeks to change the status quo in governance across major sectors. A conscious step must be taken to give effect to this constitutional objective rather than frustrate it.

3.5.2 Policy and legislative proposals

The Roads Sector is one of the important sectors that support development in Kenya. The Draft Policy of 2012 notes that almost 93 percent of passenger and goods traffic is attributable to road transport in Kenya. It is, therefore, of absolute importance that every effort is made to improve the road network in the country through expansion of roads and maintenance of the existing roads. The following policy proposals will ensure the Sector's smooth transition:

- Finalise the Draft Policy on Roads (2012) (in consultation with county governments) so that it can provide a basis for further discussions and proposals for the transition in the Sub-sector.
- Revise the current Roads Bill (2014) in accordance with the policy proposals that were made in 2012 when the 2012 Draft Policy on Roads was prepared
- National and county governments should have properly defined IGR structures with clear mandates and relationships in order to take care of short term and long term issues in the sector.

58 Igadwah Lynet 'House team rejects roads classification Bill' Business Daily 23 November 2014
59 World Bank 'Kenya: An assessment of local service delivery and local governments in Kenya' (2002).

This will ensure that aspects such as planning, budgeting, transfer of functions and resources, and policy formulation and coordination are carried out smoothly in the Sector

- The Senate should actively take up debates in the Sector and consider the county government position in the debates on the Roads Sector
- County governments should develop joint frameworks and systems to manage "county roads" that may require a joint execution for purposes of overall efficiency

3.6 Public finance, Commerce and Economic Affairs

Along with the division of powers and functions between the two levels of government, the Constitution provides measures through which county governments can have access to resources that will enable them to perform their functions. This is through both own locally generated revenues as well as transfers from revenue raised nationally. These provisions are meant to ensure that resources are available to county governments for the pursuit of the stated objectives of the devolved system of government.

The principles of public finance management in the Constitution capture both the essence and objectives of devolving resources to the county level. The general objectives of devolution of resources resonate with the objectives of devolution under article 174 of the Constitution. To this end, the principles of public finance emphasise equity, efficiency, transparency and accountability, and optimal allocation and use of resources generally.[60]

3.6.1 The constitutional and legal framework for county public finance management

The Constitution provides that county governments are entitled to a constitutional minimum of 15 percent of all revenue that is collected nationally. The equitable share is meant to enable county governments to perform devolved (and transferred) functions at the county level. The Public Finance Management Act (PFMA) provides the national legal framework under which county finances are to be managed. The Act provides for the institutional and administrative framework, financial systems, and accountability at both national and county levels. The Act also provides for intergovernmental fiscal relations to ensure proper relations between the two levels of government. The PFMA provides for the county finance planning and budgeting process as envisaged in the Constitution. The Act also provides for accountability systems between the county government and national level.

3.6.2 Implementation of county public finance framework

County governments are in the third finance year of implementation of the constitutional and legal framework for county finances discussed above. In the last financial year, counties received a total of Kshs. 261.1 billion from the national share.[61] The allocations to county governments have been slightly above the minimum allocation that is guaranteed in the Constitution. The effectiveness of county governments in implementing the financial framework has been varied. First, county governments had to start their finance management systems from the scratch after the March 2013 elections. Initial challenges included developing the requisite systems and putting in place capacities to ensure accountability systems for the use of finances. This was necessary in order to access finances at the national level.

60 Article 201, Constitution of Kenya 2010.
61 Office of the Controller of Budget 'Annual County Budget Implementation Review Report' (August 2014) p. 3.

Secondly, clear roles for institutional actors in public finance have not been settled, and as a result, there was confusion on reporting and accountability relationships. This most visible example of the lack of clarity is the accountability relationship envisaged under article 96 for the Senate and the accountability role that county assemblies with regards to general county finances at the county level.

Nevertheless, county governments have been able to make significant progress in the management of finances. The Annual Report of the Controller of Budget for the last financial year (2013/ 2014) indicates that there is a general progress on many fronts with regard to the management of county finances. County governments were able to generate locally a total of 26.3 billion shillings which accounted for 11.7 percent of the total county finances in the period.[62] While a majority of counties (43 out of 47) were unable to meet their local revenue collection targets, other counties were able to surpass their targets, there is incremental progress in terms of strengthening capacity to collect local revenue and ensure optimal use of the local resource base.

3.6.3 Emerging issues in implementation of the public finance management framework

First, there is no clarity of responsibilities and the nature and extent of those responsibilities in public finance management. The Constitution establishes general roles for bodies such as the National Treasury, the Senate, the Controller of Budget, and the county assemblies without fine clarity on the specific roles and responsibilities. This has led to confusion and conflict of roles. However, the roles and responsibilities of the various institutions have to be understood within the general principles that are laid out in the Constitution. Among the main causes of confusion of roles is the nature and extent of the Senate's oversight mandate over the finances of county governments.

Article 96 of the Constitution provides that the Senate exercises oversight over the revenue allocated to counties while article 185 (3) empowers county assemblies to exercise oversight over the county executive. While these roles appear generally similar, the Senate's oversight role is limited to the equitable share. The Senate has no power to oversight the county level on other finances such as: loans, grants, and locally generated revenue. County assemblies, on the other hand, have unlimited oversight power subject to the separation of executive and legislative power at the county level. Therefore, it is clear that there was no intention to establish duplicate roles between the county assemblies and the Senate. Thus, while article 96(3) gives powers of oversight without any indication of how this is to be done, this must be read in the light of the specific mandate given to the Senate. It is important that the respective roles are clarified through cooperation and consultation as opposed to the confrontational means that are often adopted.

The Senate, in exercise of its oversight mandate has proposed that recurrent expenditure for county governments should be capped at 40 percent and capital expenditure capped at 60 percent. The proposal is via an amendment to a provision in the PFMA which puts the minimum for capital expenditure at 30 percent of the whole budget.[63] While the intention of this provision is well intended (to ensure that funds are applied to development purposes), a number of factors make this proposal impractical. First county governments are in the process of assessing and improving their capacity. This inevitably translates to a short to medium term increase in recurrent budgets as counties seek the optimum resources they require in order to achieve developmental effectiveness.

Secondly, county governments find themselves in the complexities of the challenges of the transition period and this has had an inevitable impact on their recurrent expenditure. For instance, county governments

62 Office of the Controller of Budget 'Annual County Budget Implementation Review Report' (August 2014) p. 3.
63 Section 107.

have had to shoulder the expenses of staff that was formerly under national government. In the 2013/14 financial year, the Controller of Budget reports that counties had to cater for a total of 24.2 billion shillings out of the total county share for national government staff "performing devolved functions".[64] In some cases, some of the staff formerly in the national government were transferred to counties without proper rationalisation and this has led to excessive recurrent costs.

Even with the challenges above, there was some improvement in the use of funds set as aside for capital and development. Many counties were able to spend half of their development funds under challenging circumstances. There is an incremental trend with regard to absorption of funds meant for development at the county level. It is inevitable that recurrent expenditure is bound to rise in the initial stage of take-off for counties. Therefore, proposal by the Senate that at least 40 percent should be set aside for development may be impractical. The proper step is to assess the county by county expenditure and set gradual steps towards acquiring overall fiscal efficiency and proper management of resources at the county level.

County governments have also experienced delays in the release of moneys from the National Treasury and thereby occasioning disruption of normal county business. In this regard, it is prudent that once the Division of Revenue Bill and the County Allocation of Revenue Bill are passed that at least a fraction of the money is released to counties to ensure non-disruption of services due to the delay in the passing of the Appropriation Bills and other administrative delays.

3.7 Environment and Natural Resources Sector

The Constitution of Kenya 2010, provides the overall legal framework to ensure for government responses to the challenges of climate change and related environmental problems. The promotion and protection of the country's natural environment and the rights of Kenyan citizens to access and enjoy a healthy natural environment is one of the key provisions contained in the Bill of Rights section of the country's Constitution. In respect of the environment, the State's obligations include—

a). ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
b). work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
c). protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
d). encourage public participation in the management, protection and conservation of the environment;
e). protect genetic resources and biological diversity;
f). establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
g). eliminate processes and activities that are likely to endanger the environment; and
h). Utilize the environment and natural resources for the benefit of the people of Kenya.

The Constitution further requires every person to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. The Constitution now recognizes judicial enforcement of environmental rights. Article 70 provides that if a person alleges that a right to a clean and healthy environment has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

64 Office of the Controller of Budget 'Annual County Budget Implementation Review Report' (August 2014) p. 5

Juxtaposed against environmental protection and the rights to a healthy environment contained in the Constitution, are other developmental rights, for example those pertaining to the right to adequate housing and the provision of basic services such as water and other essential services including health care.

3.7.1 Climate Change Bill, 2014

Climate change occurs to a large and measurable extent through the production of warming gases called greenhouse gases and, simultaneously, through the depletion of the ozone layer.[65] These two sources of climate change are interlinked: the depletion of the ozone layer is in itself a major contributing factor to global warming, and greenhouse gases contribute to causing ozone layer depletion. Another factor contributing to climate change is the degradation or elimination of forests which act as carbon sinks and, thus, reduce greenhouse gases. The reduction of these sinks is caused mainly by deforestation and air pollution, the latter manifesting itself as acid rain that destroys forests. The consequences are serious threats to human life, health, property and freedom of action.

In terms of national policies and strategies for combating adverse effects of climate change, the Constitution of Kenya 2010, provides an overall legal framework for government responses to the challenges of climate change and related environmental problems. The promotion and protection of the country's natural environment and the rights of Kenyan citizens to access and enjoy a healthy natural environment is one of the key provisions contained in the Bill of Rights section of the country's Constitution.

For instance, Article 42 provides that every person has the right to a clean and healthy environment, which includes the right—

1. to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and
2. to have obligations relating to the environment fulfilled under Article 70.

The Climate Change Bill 2014 seeks to provide for the legal and institutional framework for the mitigation and adaption to the effects of climate change; to facilitate and enhance response to climate change; to provide for the guidance and measures to achieve low carbon climate resilient development and for connected purposes.

While the enactment of climate change law is timely, the implementation of such legislation need to take consideration the county government structures. The functions under the legislation should be clearly demarcated to provide for policy formulation at the National Government level while implementation should be at the County level.

Legislative Recommendations

Section 2 of the Bill should define the County Executive member in charge Environment Water and Natural Resources. The Ministry in charge, should be the Ministry of Environment, Water and Natural Resources. Section 3(2) is superfluous and should be deleted all together.

The duplication of functions in Section 5 should be avoided. The National Council's role should be Policy Formulation and Advisory while for the County it should be Implementation. Section 7 should include 'Polluter pays principle and pre-cautionary principle' under the Guiding Principles. In terms of composition of the Board of the Council provided for under Section 8, it is proposed that the Board of

65 The ozone layer, which lies within the earth's atmosphere, filters sunlight and thereby protects the earth from ultraviolet radiation. The degradation or loss of this protection has a long-term, irreversible effect on human health and agriculture.

the Council should only have 11 members. The Board should have only one civil society organization representative responsible for co-ordination of climate change at national level. The university slot should be open to all universities in Kenya dealing with issues on Climate Change. The Council of Governors should have two governors or their designees as their representatives.

The duties relating to climate change under Section 22 should be amended to read: 'Guidance to National Government, County Government and private entities.' The Bill should also state the individuals or institutions carrying out the monitoring and investigation. The implementation of delegated legislation at the county level should include, mainstreaming and integrating climate change mechanisms in the CIDP; designating a CEC member to be in charge of Climate Change; establishing County Climate Change Committees; and requiring county governments to submit a report on the implementation of climate change plans for review and debate at the end of the financial year.

Whereas the Bill defers the formulation and coordination of national and county climate change action plans, strategies and policies to the Council, it is advisable that a comprehensive, coherent, and coordinated framework for implementing such policies be provided for in the Bill. For instance, the manner and level of integration of climate change action plans into the educational curricula is not clear. The Bill ought to provide specifically for county training institutes to provide courses on climate change to boost local capacity for raising public awareness and participation.

The Bill should establish an environmental duty of care upon businesses and require them to take ownership of their role and collaborate efficiently with county governments to develop effective responses. Business stakeholders are crucial in determining best industry practices, incentives to "go green" and how to promote partnership agreements for combined funding and rewards and incentives for best practices.

The Bill should eradicate language and access to information barriers. Important government documents that require discussion are available only in English. This puts local communities at a disadvantage as they have to grasp complex issues in a language they do not understand. The Bill should require county governments to ensure information is cascaded in a language widely spoken by local communities in the county. The Bill should also provide for the establishment of a comprehensive and publicly available source of information on national and county governments implementation of climate change policies.

The Bill should also provide for direct community involvement in climate change action plan. This proposal has been endorsed in the United States where the Obama administration has established Local Community Taskforce to help in removing barriers to community participation, support local preparedness and resilience- building efforts and boost local efforts in environmental protection.

3.7.2 The Forest Conservation and Management Bill, 2014

The Bill proposes a legislative framework to provide for the establishment, development and sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of the country.

3.7.3 Forest Policy 2014

This Policy proposes a broad range of measures and actions responding to the challenges faced by the forest sector. It is based upon the views and expert opinion of those participants drawn from the public and private sector, and civil society organizations. A number of strategic initiatives have been introduced to improve and develop the forest resource base; integrate good governance, transparency, and accountability, equity

and poverty reduction into the forest. It also presents the issues and the policy recommendations that have been identified, analyzed and debated by the stakeholders. It will provide the basis upon which the on-going governance, administrative and legislative reform process will be continued. It seeks to balance the needs of the people of Kenya with opportunities for sustainable forest conservation, management and utilization. It is also particularly informed by the Constitution, national land policy, Transition to Devolved Government Act, 2012, Inter-governmental Relations Act, 2012, Land Act, 2012 as well as the National Climate Change Response Strategy, which underscores forestry's unique role in both climate change mitigation and adaptation.

The main features of the revised policy framework for forest conservation and sustainable management include:

a). The enactment of a revised forests law to implement this policy.
b). The mainstreaming of forest conservation and management into national land use systems.
c). Clear division of responsibilities between public sector institutions where Ministry responsible for forestry provides an oversight role in national forest policy formulation, and regulatory function of the sector, thereby allowing Kenya Forest Service to focus on the management of forests on public land, and the role of the County governments in implementing national policies, County forest programmes including the delivery of forest extension services to communities, farmers and private land owners, and management of forests other than those under Kenya Forest Service.
d). The devolution of community forest conservation and management, implementation of national forest policies and strategies, deepening of community participation in forest management by the strengthening of community forestry associations, and the introduction of benefit-sharing arrangements.
e). The preparation of a national strategy to increase and maintain forest and tree cover to at least 10% of the total land area and for the rehabilitation and restoration of degraded forest ecosystems, and the establishment of a national forest resource monitoring system. Status of the Forests and Forest Resource Assessment reports will be published on a regular basis.
f). The adoption of an ecosystem approach for the management of forests, and recognition of customary rights and user rights to support sustainable forest management and conservation.
g). The establishment of national programmes to support community forest management and afforestation/reforestation on community and private land.
h). The preparation of national standards for forest management and utilization, and the development of codes of conduct for professional forestry associations.
i). The introduction of a chain-of-custody system for timber and wood products, and legal origin and compliance certificates for exporters of timber and wood products. This Forest Policy provides a framework for improved forest governance, resource allocation, partnerships and collaboration with the state and non-state actors to enable the sector contribute in meeting the country's growth and poverty alleviation goals within a sustainable environment.

Legislative Recommendations

The guiding principles for implementation of the proposed legislation as provided for in Section 4 should require the counties sharing the natural resource to cooperate and collaborate in the management', to the statement. Similarly, Section 7 that provides for the functions of the Kenya Forest Service should require the collaboration with the county government, particularly, at Section 7 (c). Further, the functions of the Service should include establishing the Forest Practices Code to provide for the sustainable management of forests on any land subject to forest operations; and to provide security of long-term forestry use for landowners.

In the composition of the Board, under Section 8, the CoG should have at least one member to represent the Counties. In terms of powers of the Board, Section 10 should include roles of both the national and county governments, as policy making and implementation, respectively.

Both the Service and the Board should work with the existing county government structures to encourage indigenous participation in the forest industry and contribute to the overall sustainable development of indigenous land and communities, addressing areas such as natural resource management, business development, cultural heritage, education, employment and training.

The functions of the forest conservation committee under Section 20 3(a) should be redrafted to include advising the Board and County Government. The Committee should also provide guidance for improved cross-jurisdictional coordination, and support collaborative action by county and national government. This will help to raise awareness and increase community participation in forest management through county planning forums and networks.

The provision for conservation and management of forests under Section 31(3) should redrafted to provide clarity as to what amounts to a county forest and what amounts to a community forest. Similarly, the wording of Section 32 (1) should be changed to provide that 'all public forests in Kenya are vested in the state in trust for the people of Kenya'.

Concession on public and community forests provided for under Section 45 should not be granted without the consent of the county government. In terms of Section 55 providing for incentives: County governments should develop programs to encourage investment to improve management of private and community forests. In particular, extension programs encourage private-sector and community participation in natural resource management activities through education, technology transfer and support programs.

3.7.4 The Mining Act of 2014

The Act gives effect to Articles 60, 62 (1)(f), 66(2), 69 and 71 of the Constitution in so far as they apply to minerals; provide for prospecting, mining, processing, refining, treatment, transport and any dealings in minerals and for related purposes. The Act reassigns functions of the National Land Commission to the Cabinet Secretary in charge of the Ministry of Lands. Under this Act, the Cabinet Secretary exercises wide powers in determining the issuance of licensing, prospecting, revenue collection and the formula for benefits sharing without having to consult with the County Governments and the National Land Commission.

Section 8(1) provides for the rights of pre-emption of all strategic minerals raised, won or obtained within the territory of Kenya before they are sold. The role of the County Government herein should be defined. Sections 13 and 14 resign constitutional functions of the National Land Commission to the Cabinet Secretary. The Cabinet Secretary should designate any area of land to be an area reserved exclusively for small and large scale mining operations, respectively, upon the approval of the National Land Commission and concurrence of the County Government.

Section 38: Compulsory acquisition of land for prospecting and mining by the Cabinet Secretary should be done only upon approval by the National Land Commission. The Act should provide for just adequate and prompt compensation taking into consideration among others, market rate, disruption of economic activities, and disturbance.

Section 95(1): The Cabinet Secretary to enter into an agreement with the holder of a mining or prospecting licence for, among other things, community development plans. This section should provide

for consultation with the county government. Section 156 (1): the benefits sharing formula between the holder of a mineral right, the state, county, and local community should be clear and declared openly.

Corporate social responsibility should not be presented to appear as favors, rather as legal obligations that they are and to which the mining companies must respect and implement.

Finally the Act has failed to address some of the challenges that have accelerated the undermining and underutilization of these natural resources which include;

- Lack of adequate and up to date regulations addressing the plight of key stakeholders such as communities in mineral rich areas.
- Lack of cohesive policies relating to land reclamation on land that has been exhausted of minerals.
- Poor trade and foreign investment attrition policies into the country in the mineral industry.
- Poor eviction, compensation or resettlement and general land policies concerning land rich in minerals.

3.7.5 Mining Policy Framework in Kenya

The relevant policy framework for mining in Kenya is the National Minerals and Mining Policy (Final Draft) of 2010 which has a number of broad objectives relevant to optimal exploration and mining. The policy was developed with the aim of creating an overarching framework for managing Kenya's mineral resources. The ultimate aim is to facilitate the establishment of a vibrant mining sector which can attract substantial investment for research, exploration and exploitation of mineral resources. The objectives of the policy are, inter alia, to put in place a simple, stable, predictable, efficient and unified regulatory framework and mitigate the adverse social and environmental impacts of mineral development. Key strategies to be employed include ensuring a socially acceptable balance between the positive and negative impacts of mining on the physical and human environment; ensure compliance of mineral sector activities with relevant environment, health and safety legislation; promote best mining practices to ensure that mine closure plans and post-mining phases from integral part of planning stage; develop in liaison with relevant institutions specific regulation for mining operations in environmentally sensitive areas such as forests reserves, nature reserves and national parks.

Recommendations

To achieve optimum exploitation the following recommendations are made with regard to legal, policy and institutional framework regarding exploration and mining in Kenya. There is need to:-

a). Review the Kenyan legal and policy framework on exploration and mining to incorporate and realize the constitutional principles on natural resources management as espoused under the new Constitution of Kenya. The New Constitution Articles 69 and 70 sets out principles to guide the exploitation of natural resources which must inform the reform of law in the coal exploration and exploitation sector.

b). Undertake stakeholder consultation to ensure the resultant exploration and exploitation law expressly provides for measures to provide security to investors and safeguard the community by ensuring environmental sustainability of coal exploration in Kenya. In this regard, it is important to also put in place mechanisms for continued review of the law and policy top ensure it is up to date and the industry remains competitive.

c). There is need to include clear provisions on environmental impact assessment and environmental audit on coal exploration and exploitation projects and also devise clear legal guidelines on how to address issues touching on environmental conservation and preservation during coal exploration and exploitation.

d). In terms of policy reforms, there is need to adopt a clear framework on how the national government should devolve the management of resources to the county government without limiting or watering down its sovereignty on natural resources. Further, it is incumbent to institute a policy framework geared at ensuring optimum regulation the country's resources contribute to early achievement of poverty eradication and create lasting value to society.

e). Further, it is necessary to adopt a minimalist government intervention approach in exploration and exploitation. The essence of this approach is restricting the role of the government strictly to regulatory and policy-making roles without giving it an opportunity to participate in the market as a commercial player. As such, the private sector is given a free hand to innovate the best approaches to steer the industry forward.

f). The policy framework for exploration and exploitation adopted should be as strong as possible clearly outlining the objectives and goals of the government for the industry and how to achieve them. Additionally, in re-establishing the institutional framework with the discovery of commercially viable coal, it is incumbent to ensure the county government is fully engaged in exploration licensing and management as this offers a rare opportunity to infuse public participation in coal resources development in Kenya.

g). The policy framework needs to primarily address exploration and commercial aspects of the exploration and exploitation, whilst meeting social and economic objectives. In this regard, the mining policy should seek to ensure good stewardship of coal resources whilst encouraging commercial interests. The exploitation of coal resources should occur within a framework that maximizes the wealth from these resources and one that ensures economic sustainability after the resources are exhausted so as to meet the Constitutional objective of using our natural resources and the environment sustainably for the benefit of future generations.

h). Further, the policy to guide national involvement in the development of coal resources whilst focusing on the protection of the environment. Most important, such policy should promote the occupational health and safeties of persons engaged in mining operations and develop and implement effective monitoring and enforcement strategies to secure compliance. There is, also, need to ensure the policy specifically addresses the interests of the local community that is affected by exploration and exploitation activities to ensure they draw maximum benefits from the investment as is reasonably possible.

i). As for institution, there is need to put in place a single competent authority with an exclusive mandate to implement government mining policy. This authority should have intergovernmental (county and national) and inter-ministerial linkages to license, contract and supervise coal mining operations.

3.7.6 Proposed Amendments to Environmental Management and Coordination Act (EMCA)

The Environmental Management and Coordination Act[66] (EMCA) address environmental matters relevant to sustainable mineral exploration and exploitation in Kenya by making provisions relevant to regulation of environmental issues arising during exploration and extraction of minerals in Kenya. In the first place, the Act establishes national environmental principles to provide guidance and coherence to good environmental management[67]. The Act also makes provisions dealing with issues that cut across all sectors of environmental protection and management including environmental policy, environmental planning, protection and conservation of the environment.[68]

66 The Environmental Management and Coordination Act (EMCA), Act No. 8 of 1999
67 EMCA, Section 3.
68 EMCA, section 3.

EMCA provides for the duty to safeguard and enhance the environment[69]. In other words, every person entitled to enjoy the right to a clean and healthy environment has a duty to protect the environment and promote sustainable development. This, in essence, is important in that it binds the government and foreign investors seeking to explore or exploit coal in Kenya to protect the environment. The Act compels the government to ensure that all natural resource exploitation agreements it enters into safeguard and protect the environment of Kenya.

However, there are proposed amendments to the Act to bring it into conformity with the current system of devolved government. The Environmental Management and Coordination (Amendment) Bill 2014 seeks to include the county governments in the management of the environment within the county.[70]

3.8 Land and Urban Development Sector

While the Physical Planning Bill, 2014 is a devolved function under the Constitution, the Bill extends the powers of the National Land Commission and overreaches the mandate of the County Government. Members made detailed recommendations to revise the two Bills as outlined below.

3.8.1 Physical Planning Bill, 2014

The Bill proposes replace the Physical Planning Act, 1996 and provides for the enactment of a legal framework for the planning, use, management, regulation and development of land. The National Government should limit itself to the powers allocated to it under the Fourth Schedule of the Constitution and not infringe or violate the supreme law of the Country.

In the interpretive Section 2 of the Bill, the meaning of County Executive Committee Member responsible for physical planning is not clear. The meaning should be included in the interpretation clause so as not to undermine the authority of the County Government. The term 'development control' should be replaced by 'land use management' or 'development management'.

Section 3 that provides for objectives should include the provision for a framework for equitable and sustainable use, planning and management of land as anther objective. Section 4 should be revised to align the provisions of conflict of law with Article 191 of the Constitution. Section 6 extends the mandate of the National Land Commission. The roles of the National Land Commission should be limited to oversight.

The National Physical Planning Council should broadened to include the chairpersons of committees of the Council of Governors, including, Land Committee, Environmental and Natural Resources Committee, Infrastructure Committee, and the Legal Affairs Committee. The functions of the Council should include promoting effective coordination of physical and sectorial planning in the framework of National and County Development Policies, and facilitating the mobilization of adequate resources for the preparation land implementation of physical development plans, policies and strategies.

A new provision should be inserted to provide for the role of the CEC member responsible for planning. The CEC member shall be responsible for formulating county and urban development policies, standards and guidelines with the approval of the County Executive Committee and thereafter for supervising their implementation. Section 111 (B) should be reviewed. The era of regions is long gone and therefore the regional physical plans have no place in the current Constitutional dispensation. This part should be re-named 'Inter-County Spatial Development Plans.'

69 EMCA, section 3(1).
70 Environmental Management and Coordination (Amendment) Bill, 2014.

The initiation of a regional Physical Development Plan provided for under Section 35 should be the responsibility of the county governments involved and should be at their sole discretion. This Section should be reviewed so as not to cede power to the General Director. The use of the term "regional physical planning" should be replaced with the term "inter-county physical development plan."

3.8.2 The Community Land Bill 2013

Section 4 (2) should be deleted and replaced by 'pursuant to Article 66 of the Constitution, the state in consultation with the county governments may regulate use of community in the interest of public order, public morality, public health or land use planning.'

Section 4(3) should be reviewed to require the commission, in consultation with county governments, shall ensure the process of documenting, mapping and developing an inventory of community land shall be transparent, equitable, cost effective and participatory."

Section 35(4) should be amended to include obligation to consult with County Government. The commission shall, in consultation with the county government in considering a plan submitted to it under this section, comply with the relevant law relating to development planning.

3.9 Education and ICT

Education is the backbone of a developing country, and Kenya has recognized this to be the key to building a progressive and self-sufficient Kenya. Since independence in 1963, the Kenyan government has passed various pieces of legislation that – on paper- rival those of certain developed nations. These laws include free primary education which has led to a boost in enrolment from 5.9 million to 7.2 million pupils and, also as of 2013, have led to the allocation of funds for secondary school tuition.

According to UNESCO (2008), the education sector takes up 30% of the government expenditure, the largest share of the annual budget, which shows the government to be stressing the importance of education and taking its proposed policies during election seriously. Although university fees are considerably high, the universities in Kenya such as Nairobi University and Kenyatta University, which housed one of the most renowned research centres in Africa during the 1970's and 1980's, host students from all over the continent – especially East Africa. This has led Kenya to become a hub for tertiary education in Africa.

The government push for free primary education in 2003 had been monumental as citizens were previously stuck in a poverty cycle due to the lack of social mobility within the country – especially in the shanty towns. Now, there is a chance for people from all walks of life to grow up and become qualified. Although there was a boost in enrolment, the government's short-sightedness did not expect the large rise in pupils. The result was disastrous as school in cities away from the capital, such as Mombasa, faced a dearth of the basic educational tools, such as books and the safety of the school buildings were compromised due to the large rise in enrolments.

In addition, although primary education is free, it is not compulsory to attend. This means that children from the poorer shanty towns are often pressured by their families to work rather than attending school. The opportunity cost for them is the loss in income, which however minimal nominally, could make a substantial difference for a family on or near the poverty line. Currently, 6% of the 8,000 children are not attending primary school. This 6% for the most part is engaged in child labour. In the case for secondary

education, while it is free, there are many additional costs that make it unaffordable for families. Many children in rural areas and shanty towns cannot afford school uniform and books that are not provided by their school nor their parents. Thus, they are pushed to either looking for other means to make money or quitting school altogether. On the other hand, children that live in urban areas, especially in Nairobi, can capitalise on the relative financial security of their families and can, therefore, afford to both stay in education and attend much better state schools.

The disparities between rich and poor within Kenya is evident as in many other developing nation. However, Kenya has the chance to create a more equal opportunity society. For this, it needs a better policy for education rather than piece-meal policies. This needs to begins with an economic plan that continues its inclusive policies, mobilises young Kenyans into demanding education for themselves and reformation of all schools – urban or rural.

3.9.1 Medium Term Expenditure Framework

The current MTEF makes far reaching recommendations regarding the Education Sector. Urgent steps are necessary to align it to the devolved system of government. A working group should be established comprising two representatives from all the sectors. The working group should develop a tool to be used to collect information from all counties relating to issues raised from the relevant Acts.

The policy should clarify the functions of the County Government and other stakeholders. The exclusion of the County Governments was because they were not in place at the development of the policy. At the county level, the Ministry of Education has been included in the constitution and vision 2030. In order to achieve its goals and objectives, the sector will implement sevenprogrammes at the national and county level during the 2013/14/15/16 MTEF period.

There is need to develop vision, mission and strategic objectives for the ministry of education at county level, replace local authority with county government. The role remains the same, and edit the number to include new universities. One Public University per county.

In relation to access to education it is assumed that facilities in the county should include: Youth polytechnic – per ward; TTI/TTC per sub county; National Polytechnic per county; Public University per county, County Governments shall employ at least the following ratios for the three levels: Baby class 20:1; Middle class 25:1; Level three 30:1; and Training of ECDE TVS, County governments to provide infrastructure for basic education mainstreaming and promoting subsector in terms of developing and providing transition.

3.9.2 Teachers Service Commission Act, 2012

The major concern related to recruitment of teachers for Pre-primary which is a devolved function. There is a case in court currently fronted by Kenya National Union of Teachers (KNUT) against the Teachers Service Commission (TSC). KNUT argues that it is the mandate of TSC to recruit all teachers including those of ECDE. KNUT further argues that County Governments are irregularly recruiting ECD teachers. The Council of Governors have since been enjoined as Respondents in the case. However, this confusion has only served to deepen the controversy surrounding ECDE.

3.9.3 Basic Education Act, 2013

The Basic Education Act, 2013 was enacted to give effect to Article 53 of the Constitution and other enabling provisions; to promote and regulate free and compulsory basic education; to provide for accreditation, registration, governance and management of institutions of basic education; to provide for the establishment of the National Education Board, the Education Standards and Quality Assurance Commission, and the County Education Board and for connected purposes.

The Members recognized that pre-primary education is an exclusive function of the County Government and should be properly defined and removed from the ambit of the Teachers Service Commission. Particular concern is that the Legal Framework does not recognize county government and should be substantially revised to align it to the devolved system to ensure efficiency and decentralization. The county government should have a board that will cover the functions that are devolved to the county government, that is, ECDE and Youth Polytechnics. There should also be clearer definition of pre-primary education.

Recommendations

In order to continue providing quality education and training services, the national and county governments will need to implement the following recommendations:

Firstly, County Governments should fast-track the expansion and enhancement of investment in ECDE programmes and employment of ECDE teachers by counties.

Secondly, the national government in conjunction with the County Governments should provide funds for development and improvement of Physical infrastructure at all levels of education. There should be expansion of physical facilities in all schools especially in urban slum areas and ASALs. In some schools, feeder schools at ECDE for lower primary in the difficult areas/locations should be established to address regional disparity in disadvantaged regions and be provided for.

Thirdly, establish at least one boarding school and a mobile school in each constituency in ASAL districts to address the infrastructure challenge, reduction of regional and gender disparity and demand for education among migratory pastoralist's communities. The sector requires providing teachers to these schools. In order to expand, access and improve Adult and Continuing Education, there is need to construct additional centers and create conducive learning and teaching environment and appropriate furniture in ACE centers to respond to the needs of the youths and adult learners.

Fourthly, build and equip curriculum resource center which will include laboratories for sciences and languages and material development workshops. There is need to facilitate full implementation of existing policies on Special Needs Education, enhance governance and accountability to reduce resource leakages, and revise capitation for ECDE, primary and secondary schools levels.

Fifthly, expedite approval of teacher staffing norms. Cost effective staffing measures include implementation of the differentiated staffing norms at ECDE level for a PTR of 20:1 baby class, 25:1 middle class and 30:1 level three at primary level allowing for a PTR of 45:1 in high potential areas and 25:1 in rural ASAL areas; raising secondary school average teaching load from 18 hours to 20 hours a week; retaining some of the underutilized teachers across schools as appropriate and planning a lower limit on class size for optional subjects and considering various options from retaining and redeploying below the cutoff teaching load level. The national and county Government should consider recruiting at least 20,000 annually for the next five (5) years to mitigate the shortage.

3.9.4 Youth Polytechnics at National and County Level

Youth training at youth polytechnics is inextricably attached to corresponding employment opportunities. The Kenyan labour market is one that is characterized by inadequate employment opportunities against a large and growing population of unemployed people especially the youth. It is dual in nature, presenting a small formal sector alongside a large informal sector. Youth with primary education are in formal employment (4%), informal employment (54%), students (14%) and unemployed (14%). Those with secondary education are in: formal employment (12%), informal employment (40%), students (26%), and unemployed (15%). While those with tertiary education are in: formal employment (31%), informal employment (9%), and unemployed (8%).[71]

The national government needs to partner with county governments and develop a comprehensive, coherent and coordinated approach towards ameliorating the many challenges facing the youth while seeking employment. The national government must take cognizant of the ballooning number of employment seekers vis-à-vis the shrinking employment opportunities. Other pertinent issues include lack of requisite skills sought by industry due to mismatch of Technical and Vocational Education and Training (TVET) acquired skills and industry expectation; and poor access to information on available opportunities. Other measures are: gender and cultural biases; ethnicity and corruption; unfavorable geographical distribution of jobs; and limited career guidance. Job seekers cite limited financial resources, lack of relevant skills and experience as major obstacles.

Recommendations

Firstly, the government should promote training in fast growing sectors that have potential for creating many jobs in the formal sector. These include the telecommunication, electronics and computers (TEC), machinery, automobile and mechanization (MAM) industries.

Secondly, the national government in collaboration with the county government should establish and maintain up-to-date labour market information or a national skills inventory. Such inventory would contain labour market data such as distribution of skills; the types and levels of skills supplied by the education and training institutions; the skill levels available in the economy; the skill needs by industry; and the trend variations in the skills needs by industry.

Thirdly, labour laws should be reviewed to better govern employment in the different sectors of the economy to ensure that gender parity is observed. Labour laws should also be more considerate and give a balance between work and family life. Employment policies need to be designed with a focus on gender as this will reduce the rates of female youth unemployment in the country.

Fourthly, both county and national governments should come up with a strategy that will link up the youth with employment opportunities for instance by setting up a resume bank in the institutions of higher learning and from the pool of resumes prospective employers could pick their desired candidates and hire them after they graduate.

Fifthly, TVET institutions should establish career centers where students can learn about their aptitudes and interests, course offerings and make comparisons with market demands. Such programs should also help students on job related experiences- job search, writing vitas, and preparing for interviews.

71 Kenya Country Report for the 2014 Ministerial Conference on Youth EmploymentAbidjan, Côte d'Ivoire, 21-23 July, 2014.

3.9.5 Science, Technology and Innovation Act, 2013

Section 4 provides for the objective of the Commission to include the advising both levels of government in matter related thereto. Section 5 provides for the establishment of the Commission. The Act does not recognize the existence of the county government. It is recommended that two representatives from county government should be part of the Board.

Section 29 provides for the functions of the Agency to include the institutionalization of linkages among various stakeholders including: the private sector, the two levels of government and other actors in the system. The agency shall for purposes of its functions under this Act establish offices with the involvement of counties with the purpose of tapping into the potentials of the said counties as it may deem necessary.

ICT as a tool has played a great role in the economic empowerment and job creation of the youth. Youth work in business process outsourcing (BPO) as customer care agents, data entry clerks, transcribers and online researchers. Outside the BPOs, youth work as cyber café attendants and mobile phone and computer technicians. On mobile based agricultural support and market research, youth are involved mainly in the production side and work with planting, crop management, parking, mechanics and driving.

Science and Technology, and specifically, ICT has been used as a tool for great innovations and economic empowerment for the youth. Youth have been involved in the creation of applications that have improved business transactions and transformed lives. Services such as Safaricom's mobile money transfer (M-Pesa), mobile banking (M-Kesho) and information on agricultural produce markets (411 Get It) have greatly benefited from youth innovation and also increased job opportunities for youths as the demand for services increase.

Recommendations for promoting innovation and employment creation

The Constitution of Kenya 2010 has enshrined youth access to quality education and training as a basic right. The national government, in collaboration with county governments, should formulate and implement policies that:

i. Make the curriculum relevant; assuring quality of learning outcomes and equitable access to education and training.
ii. Expand opportunities through construction of more institutions and expanding existing ones.
iii. Encourage private participation in financing education and training for those who are able.
iv. Rebrand TVET to make it more attractive to youth through implementation of a competence based curriculum.
v. Integrate ICT in education and training.
vi. Provide equipment to technical institutions.
vii. Enact laws to establish the Kenya Qualification Framework.

3.10 Health Sector

The Bills in this sector invariably seek to establish authorities to administer specific functions. In many respects, it is important to secure representation of county officials in the regulatory bodies. Clear coordination roles should also be provided for the County Government.

3.10.1 Kenya Medical Supplies Authority (KEMSA) Amendment Bill, 2013 and Kenya Medical Supplies Authority Act, 2013

The Bill seeks to amend the Kenya Medical Supplies Authority Act, No.20 of 2013, so as to make some necessary changes needed to bring the Act in tandem with the functions of the devolved governments. The Bill seeks to expand the membership of the Authority to include persons. The Bill also makes proposals for coordination between the County Governments and the Authority including procurement or warehouses at the counties to facilitate distribution of medical supplies and agreements for transfer of particular functions of the County Governments to the National Government.

It is recommended that a structured framework for procurement and supply of medical supplies should be developed that sustains KEMSA as a supply Authority to the Counties but providing the opportunities for Counties to procure through other alternatives. Where procurement agencies opt for any of the permissible alternatives to KEMSA they should be obligated to use the numerous government quality control labs to ensure the quality of the drugs in accordance with the provisions of Section 19 (g) of the Act.

In regard to Section 4 (e) of the Bill, KEMSA should provide support to the County governments on the drawing rights only where necessary. Section 5(e) should come from the professional bodies (LSK, ICPAC, ICPS and KPPB). In regards to Section 6, there is need to escalate the representation to 50%. The terms of appointment by the Cabinet Secretary under Section 6(e), should be reviewed to allow the CoG to nominate those persons for appointment which should be through a competitive recruitment process and later gazetted.

3.10.2 Pharmacy and Poisons (Amendment Bill) 2014

The purpose of the Bill is to make some necessary changes to the Pharmacy and Poisons Act by, among other things, transforming the Pharmacy and Poisons Board into an effective and semi-autonomous poisons Authority and creating more punitive penalties relating to the offences under the Act.

The Bill should be recast to be more representative and include membership by a person representing the Counties. Participants also recommended powers of the County Government to include inspection in accordance with the standards set by the national government.

Section 3A (a) should be revised to read: 'advise the national and county government agencies in all matters relating to the safety, packaging and distribution of medicines'. Section 3(j) should be revised to separate the functions of licensing professionals and premises and allocate the same to the relevant government. Inspection function should also be separated. There should be provision on the inspection to be delegated and done by the county governments in accordance with the standards set by the national government in the main Act. Section 3(r) should read: 'advice the Cabinet Secretary and Governors on matters relating to control, authorization and registration of medicinal substances.'

3.10.3 The Alcoholic Drinks Control (Amendment) Bill 2014

The Bill seeks to amend the Alcoholic Drinks Control Act 2010. The forum considered the proposed amendments and made recommendations to align the Act in tandem with the devolved functions. Specific recommendations include the following:

Section 5(e) should be revised to provide for support and assistance to county governments in implementation of national standards and policies technical support and capacity building. Section 6A

(1) should be revised in accordance with Article 207 of the Constitution, that provides that a County Government may establish a County Alcoholic Drinks Control Fund.

In the fifth schedule an omnibus statement to be included at the bottom of the list to read- (10) National Public Health Laboratories (11) any other laboratory that may be approved from time to time by the Cabinet Secretary.

3.10.4 Diabetes Management Bill 2014

The object of the Bill is to provide a legal framework for prevention, treatment and control of diabetes. The Bill also seeks to reduce type 2 diabetes by addressing the lifestyle that people live and create awareness about the causes and methods of prevention. The law should provide authority for policy development, regulation, capacity building, research, and procurement of commodities. Other functions relating to the implementation of the Act should be reserved to the County Government.Adequate consultations on the Bill should be undertaken between the County Governments and the National Assembly before enactment.

3.10.5 Physiotherapist Bill 2013

The Physiotherapist Bill 213 proposes a legislative framework for the training, registration and licensing of physiotherapists, to regulate their practice, to provide for the establishment, powers and functions of the Physiotherapy Council of Kenya. The members felt the Bill properly provides for regulation of the profession as a national function.

Section 4(1) be revised to read 'the object and purpose for which the Council is established is to exercise general supervision and control over the training and practice of physiotherapists in Kenya and to advise the National and County governments in relation to all aspects thereof.' Section 4 (2) (j) revised to read 'cause to be published in the Kenya and County Gazette every calendar year or such other period as may be prescribed, the names of all registered physiotherapists.'

3.10.6 Mental Health Care Bill 2012

The Bill proposed a legislative framework to provide for the care, treatment and rehabilitation of persons with mental illness; to provide for the procedures for admission, treatment and general management of persons with mental illnesses; and to provide for the establishment of the Mental Health Care Board.

Section 51(b) should be revised to provide for advice and make recommendations to the National and County governments on the state of mental health and mental health care facilities. Section 51 (e) should be revised to provide for technical and capacity building where necessary in the administration of mental health facilities to provide.

A new section should be included to provide for membership, which includes a county representative appointed by the Council of Governors, and a legal practitioner to be appointed by the Law Society of Kenya and should be a person with experience in human rights or medical issues.

3.10.7 Kenya National AIDS Authority Bill 2014

The objective of this Act is to provide a legal framework for the establishment, powers and functions of the Kenya National AIDS Authority; The Authority is established as a successor to the National AIDS Control Council. In its current state the National Aids Control Council is a State Corporation established vide the National AIDS Control Council Order published in legal Notice No 170 of 1999.

While the regulatory function is suitably provided as a National Government function, it is that the County governments be represented on the Board because it's a shared epidemic eliciting shared functions. This would give emphasis of AIDS prevention as a national priority and providing a framework for administrative and financial decentralization.

3.11 Trade, Commerce and Investments Sector

3.11.1 Value Added Tax Act

The VAT Act 2013 aims at reviewing and updating the law relating to value added tax and provide for the imposition of value added tax on supplies made in, or imported into Kenya. It is also aimed at simplifying the taxation system and generating additional internal revenues to reduce public sector deficits, curb inflation and finance the development of infrastructure in Kenya.

Under the Act, basic commodities are defined as the essential goods that support life and the desire would be to link these goods to what social scientists would define as the goods meeting the basic core needs. Given the diverse nature of the people of Kenya, it may not be tenable to prescribe a conclusive list of the basic commodities. The Act should be amended so that the Cabinet Secretary Finance be empowered to prescribe the commodities to be considered as basic commodities. The defined basic commodities would then be taxed at zero rates to accrue cost savings to consumers.

3.11.2 Consumer Protection Act

The Act provides for the protection of the consumer, prevent unfair trade practices in consumer transactions and to provide for matters connected with and incidental thereto. The Act was enacted hot in the heels of Article 46 of the Constitution of Kenya, which recognizes the rights of consumer in various respects. The consumers for instance have the right to goods and services of reasonable quality. They are also entitled to the information necessary to enable them obtain full benefit from goods and services in addition to having their health, safety and economic interests protected. The consumers are also entitle to compensation in case of they suffer losses or injuries of any kind arising from the use of goods and services. Article 46(3) of the Constitution covers goods and services offered by public and private persons as well. It therefore obligates both the government agencies and private entities to observe the principles of consumer protection.

However, whereas the participants were generally in support of the Act, they observed the Act and recommended as follows. First, Act makes provisions relating to several different agencies for example the role of the banks, the role of KBS, among others, which brings about the likelihood of conflict. As such, the Act should be considered for amendment in order to iron out such problems. Additionally, it lacks a clear framework for regulating banks' lending rates calling for the establishment of a clear framework in order to ensure that consumers of bank services are not hurt by banks. Another fundamental issue with the Act is that it falls short of clarifying the role of county government in the consumer protection. Counties are as much a level of government as is the national government making critical for the county governments

to have a clearly identifiable role to play in this regard. What is more, consumer protection is all about the quality of the goods and service that a person is sold.

Unfortunately, the Act fails to focus on setting quality standards necessary for the adequate protection of the consumer. Consumers deserve quality goods and service not only for purposes of their health but also for the purposes of economic interest: value for money in other words. In this regard therefore, the participants recommended that the Act should be revised to improve the regulations on quality of goods and services, prohibit false advertising, and safeguard the consumer against misleading information about goods. As such, the ban on internet advertising should be extended to cover advertising and gaming on television and as a general policy, the products being advertised should complement the actual product to protect the public.

3.11.3 Scrap Metal Bill

The major purpose of the Bill is to make provision for the regulation of dealings in scrap metal as well as provide for the creation of a Scrap Metal Council. The scrap metal trade has since occupied a very important place in the economy of Kenya. With the introduction of the devolved system of the government, it is inevitable to incorporate those provisions necessary to bring the proposed legal framework into conformity with the Constitution and in particular, the county governments. This is important not only for reason of providing the counties with a source of income but also to get the county governments on board to assist in the fight against vandalism of metal rails found in roads, railway lines, bill boards, among others. To be true, the Report pointed out that the Bill should be drafted in consultation with County Governments. Specific recommendations included the following:

Firstly, the Bill should accommodate infrastructures in both levels of government by respecting County roles in licensing. In doing so, the Bill should require the licenses to be issued at the County Level with a record of scrap metal dealers. In addition, it should consider business components in the Counties.

Secondly, the provision of export is to be a priority to enable implementation. Thirdly, the Bill should be amended to include provisions on the protection of private property. Such provisions may include disclosure of source of scrap metal before sale. What is more, the Bill should provide records of collected scrap metal and stiffer penalties created to deter abuse. Again, Export should not only be dealing with Cabinet Secretary of Finance but should also include Foreign Affairs. With regard to vandalism of telecommunication posts, special provisions for telecommunication equipment ought to be legislated on.

3.11.4 County Industrial Bill 2014

The Bill aims at establishing the County Industrial Development Board and to promote and facilitate economic growth through industrial development in all counties, and for connected purposes. Interplay between county government and national development. Relationship with county development board Bill should have a clear framework for cooperation with the county development board.

As regards the Bill, there is too much power delegated to the executive and national County Public Secretaries. The role of Cabinet Secretaries should be reduced as the Bill has a focus on counties. The creation of a County Industrialization Committee and a Constituency Industrialization Committee which are very similar roles would lead to a duplication of functions, leads to duplication of functions including oversight and implementation between the executive and members of the legislature. This also has a negative effect on the economy. The Bill should include the private sector due to the interest of the

Private Sector on industrial matters. The entire Bill needs to be /redrafted reworked to avoid multiple errors contained in the Bill; the creation of too many committees, clarify the role of the Cabinet Secretary on Industrialization and develop a clear policy framework to inform the Bill.

3.11.5 Policy Framework for Regulation of Corporative Societies

The constitution assigns to Counties, the function to develop regulations on trade development which includes cooperative societies. Section 7 of the Fourth Schedule of the Constitution explicitly states that trade and development regulation is a function exclusively reserved for County Governments. The policy should be prioritized to inform development of a Counties law that will provide a framework seeks to guide the development of appropriate laws and policies to augment the cooperative sector in the Counties.[72]

3.12 Human Resource/ County Public Service

The Generic Organizational Structures and Grading Structures for County Governments and the Capacity Assessment and Rationalization of the Public Service (CARPS) policy documents.A human resource policy is desirable to ensure uniformity in human resource areas of counties. The role of the PSC should be left to appeals with regard to staff/ labor issues. Counties must work with the SRC in development of salary scales for counties. A comprehensive Capacity Needs Assessment should be done as well as an appraisal. The Transition Authority and Counties have the responsibility of capacity building of staff. This should be included in the proposed policy.

4 Concluding analysis and general recommendations

This report has highlighted the various issues and factors that continue influencing (both positively and negatively), the implementation of implementation across the major sector of public service delivery. In each of the sector, the emerging issues of implementation and the proposed and existing legislative frameworks were discussed with appropriate recommendations and steps proposed. It is important that each of these factors is addressed to ensure effective implementation of the devolved system of government.

County governments are well into the second year of implementation of devolution. While county governments had to deal with a lot of challenges in the initial process of setting up governance systems, reports emerging from institutions such as the Controller of Budget and the Commission on Implementation of the Constitution point to the conclusion that counties have began to take steady strides in implementation of the devolved system of government. However, this does not mean that the challenges inherent in the transition process to county governance have been eliminated. Many issues (a number of them basic) are yet to be put in place in order to ensure that both levels of government have a common understanding and an agreed framework on how to pave way for county governance in the political and governance space. The recommendations in this report are covered under four main areas:

72 file:///C:/Users/user/Downloads/KEPSA%20Weekly%20Legislative%20Bulletin%20%20No%20%2011.pdf Accessed on November 21, 2014.

4.1 Institutionalisation of effective intergovernmental relations

Across the major sectors that have been discussed in this report, it is clear that there is need for an effective system of intergovernmental relations. The lack of a proper system of intergovernmental consultation and cooperation has led to development of policies and laws that lead to challenges in implementation. It is clear that constitutional ambiguities in many vital areas have led to contested meanings of different provisions in the Constitution. In turn, this has led to wide-ranging conflicts in the implementation of the devolved system of government. Accordingly, the only way in which these conflicts can be solved is to develop effective structures of consultation and define the nature and extent of roles for these structures. The second major step is to identify the issues which impede effective implementation of the devolved system of government and attempt a common understanding and framework for the two levels of government in a bid to ensure harmony in implementation.

On other hand, while county governments are in the process of setting up structures, it is important to realise at this stage the need for the formation of joint frameworks and systems to assist in the performance of functions which require the highest levels of horizontal cooperation. Examples here include regional health facilities and the water and sanitation institutions that are to be devolved counties but there are no proper systems for joint management of these institutions and the services that the offer. The following specific recommendations will assist in the effective implementation of the devolved system of government.

- Review of the evolving practice of IGR and identification of gaps (in terms of structures and roles performed) and establish more effective structures and functioning of IGR.
- The structures proposed will establish the different levels and roles of IGR for more effectiveness and relationship between the different structures
- The IGR structures will be agreed between the counties and the national government. This will ensure that there is a common understanding of the mandate of these institutions. In the case of county governments, then Council of Governors can be used to develop frameworks for inter-county institutions
- The IGR structures will inevitably have a sectoral dimension in order to address sector-specific issues which will impact on sector deliver of issues

4.2 Policy and legal framework alignment

The formation of effective IG structures will set a basis for broad-based alignment of the proposed and existing policy and legal frameworks. It is clear from the analysis above that there is divergence between practice and what is contained in the Constitution (and sometimes in the Policies and laws put in place to implement devolution). Policy and legal framework is based on a common understanding of the Constitution. It has been proposed that in each of the sectors, there should be structures to manage the transition to county governance. However, this is only possible where such structures have been given clearly defined roles. Among the steps that should be taken are as follows:

- A lot of discussions have taken place under the auspices of the Council of Governors. For instance, the June Sectoral meetings identified a number of sector issues, all of which have been captured in the various section of this report. Thus, the first step is for county governments to present their positions on the major issues underpinning transition generally and sectors in particular.
- There should be developed a joint plan of transition to county governance, agreed and negotiated by the two levels of government. The plans will target the sectors' legislative and policy frameworks for revision and realignment.

- County governments should also, in each sector, identify the issues that require policy and legislative interventions by county governments. There are various issues that counties will need to consider in claiming county legislative and policy space:
  - The nature of the sector at issue; some sectors will require, as earlier stated, joint frameworks for performance of functions and the joint execution of mandates.
  - The sector's priorities and level of legislative and policy responses required. Depending on the nature of services offered and the existing national frameworks, the counties will have to agree the nature and extent of policy-making that will be required.
  - Beyond constitutional provisions, there should be a critical analysis of the pace and attitude to implementation of functions. Accordingly, where there is resistance to devolution by national actors, county governments may consider expanding their space through courts or more intensive pressure on national government to pave way for county governments.

4.3 Clarity of roles and relations between institutions

While the Constitution created a number of institutions to enhance accountability and effectiveness, the inevitable impact is that there is less clarity on the nature of roles and relations between the multiple institutions. In the previous constitutional dispensation, powers and functions were concentrated in central government institutions. The devolved government moves away from this by creating different institutions at different levels to perform related functions and this has created the current complexities. Accordingly, part of the role for the IGR structures and the policy and legislative alignment process is to clarify roles for the different institutions. In this way, the nature of the Senate's responsibilities will be clarified to end the current confusion.

The IGR structures should endeavour to clarify the place and role of major institutions in each of the major sectors. This will eliminate duplication and inefficiencies between the two levels. The content of the mandate of institutions will be agreed between the two levels

The identified roles of the institutions and structures should form the basis for the structuring of IGR. This is because institutions can only make decisions on issues where they have constitutional powers to make such decisions.

5. Annexes

Annex 1: Summary of Sector deliberations on laws/ Bills:

1. Intergovernmental relations

No	National Law/ Bill	Provision	Comments of IGR Committee	Proposed action
1.	Intergovernmental Relations (Amendment) Bill 2014	Introduction of a Council of County Deputy Governors Introduction of a Council of County Assemblies	The formation of a forum of deputy governors is unjustified and creates impression of a conflict between governors and their deputies. Deputy Governors represent Governors in the absence of the latter in IGR forums.	Withdraw amendment Bill
2.	County Government (Amendment) Act 2014	The Amendment Act establishes county development boards chaired by senators to scrutinise county budgets and plans and make recommendations before they are tabled in the county assemblies	This law offends the concept of separation of powers and has potential to undermine the oversight mandate of county assemblies as well as relationship between county governments and Senate.	The law should be repealed. The Council of Governors has challenged the constitutionality of this law.
3.	County Government (Amendment) Bill 2014	The Bill seeks to establish the office of the deputy speaker of the county assembly, The Bill also seeks to establish a substantive portfolio for a county governor	The IGR Committee noted that it was necessary to institutionalise the office of the deputy speaker of the county assembly and supported the amendment The Committee members supported the amendment while others suggested that the deputy governor, because of his/ her stature, should be given the role of coordinating government functions instead of a portfolio.	The role of the deputy governor should be discussed in more depth by the CoG (including deputy governors) and their agreed roles crafted into specific legislative proposals.
4.	Constituency Development Fund Act 2013	The Act retains the fund that was first introduced in 2003 to assist in local service delivery and development at the parliamentary constituency level	The Committee noted that the constitutionality of this legislation is being challenged in courts.	The Council awaits the Court verdict on this law.

5.	The Constitution of Kenya (Amendment) No. 2 Bill of 2013	The Bill makes provision for the administration of the Equalization Fund.	The Bill did not clearly provide for mechanisms of managing the Equalisation Fund. The Committee observed that the Equalisation Fund is meant to fund functions which fall under the county governments such as water, health, roads, etc in marginalised areas. The committee was of the view that these funds are, thus, properly channelled to county governments.	The Amendment should be revised to state clearly that the Equalisation Fund will be administered through county governments. The regulations to operationalise the fund which are long overdue should be finalised (in consultation with county governments).
6.	The Private Security Regulation Bill 2013	The Bill seeks to provide a statutory framework for the regulation of the private security industry and to provide for a framework for cooperation with national security organs	The relationship between private security and county governments is not highlighted in the Bill. The county governments have a role to play in the regulation of aspects of private security which are not mentioned in the Bill at all. Representatives from the Council of Governors should be included in the Private Security Regulatory Authority	The Bill should be revised to incorporate the comments of the IGR Committee. The revision of the Bill should be done in consultation with county governments.
7.	The National Flag, Emblems and Names (Amendment) Act 2014	The Amendment Act lists officers who fly the national flag on their motor vehicles and it excluded county governors.	The committee felt that exclusion of governors from national flags is a deliberate move to undermine county governments, and by extension, the idea of devolution of state power.	The Amendment Act should be repealed. The Council of Governors is challenging the constitutionality of the Act.

8.	Statute Law (Miscellaneous Amendment) Bill, 2014	Contains various amendments to the following laws: The Cancer Prevention and Control Act The National Transport and Safety Authority Act The National Authority for the Campaign Against Alcohol and Drug Abuse (Act No. 14 of 2012) Sports Act 2013 The Prevention, Protection and Assistance of IDPs and Affected Communities Act, 2013 The National Honours Act	The Committee was largely satisfied with the contents of the proposed amendments	Proposed amendments to carry on
9.	Order of Precedence Bill 2013	The Bill seeks to provide for precedence of public officers	The committee recommended that governors should come immediately after the president in the order of precedence since they head a level of government that shares sovereignty with the national level.	The Bill should be withdrawn.
10.	Alcoholic Drinks Control (Amendment) Bill	The Bill seeks to align the parent Act to the Constitution of Kenya 2010 and address other challenges in the implementation of the parent Act.	The Committee was generally agreeable to the view the proposition that national government will provisionally issue liquor licenses until county governments put in place mechanisms to issue and regulate the trade in liquor. Outdoor advertising falls under county governments. The committee recommended that regulation of outdoor advertising of alcohol is a county function and national government can issue regulations and standards which the county government can enforce.	The Bill should be revised to recognise the power of county government to control outdoor advertising of alcohol, subject to nationally set standards. Revenue from liquor licensing and its regulation falls under county governments

11.	The Government Proceedings (Amendment) Bill 2014	The Amendment seeks to extend the same protection afforded to national government to county governments where the latter are the subject of legal proceedings.	The Committee was agreeable to both the spirit and content of the proposed amendment	The Bill should be enacted as proposed.
12.	Executive Order No. 3 of May 15 2014	The Executive Order provides for "The Framework for strengthening the delivery of national government functions at the county level" and establishes the National Government Service Delivery Committee	The committee members felt that there should be a comprehensive and consultative structuring of national and county government structuring at the county level. While the national government has autonomy to decide its own structures of delivery of national government services at the county level, members felt that the Executive Order made the county commissioners too powerful (for instance, by allowing them to override decisions of the Coordination Committee). Exercise of such power has potential to disrupt harmonious relationships with county government structures.	There is need for a comprehensive review of national and county government structures (especially at the county level). This should be inclusive and participative.

2. Agriculture

No	National Law/ Bill	Provision	Comments of IGR Committee	Proposed action
1.	Pyrethrum Act, No 22 of 2013	Provides for the development, regulation, and promotion of the pyrethrum industry Establishes the Pyrethrum Regulatory Authority	The Act should be amended to provide that coordination of stakeholders should be done jointly with county governments Extension services (reflected in s. 4 (f) is a county government and should be deleted.	The Act should be amended accordingly.

2.	The Veterinary Professionals and paraprofessionals Act 2011	Makes provision for training, regulating and licensing veterinary surgeons and paraprofessionals	Section 4 (1) should be amended to include county representation in the membership of the regulatory board Recognise the power of the county government to oversee the provision of services. Incorporate provisions which will enhance community and public participation.	The Act should be amended to address identified concerns.
3.	Agriculture, Fisheries and Food Authority Act (2013)	The Act is the substantive national legal framework for the Agricultural Sector (excluding livestock)	Previous calls for review of various parts of the Act have not been acted upon County governments will develop their own legislative and policy frameworks that will address their sector issues.	Renegotiation of the Act in view of county inputs.
4.	Fertilisers and Animal Foodstuffs Act (2012)	The Act intends to regulate the importation, manufacture and sale of agricultural fertilisers and foodstuffs.	While national government has a policy/ regulatory role as well as control of international trade, it does not warrant the passing of a national legislation. Provisions of this Bill have potential to infringe on the power of counties with regard to control of food and fertiliser production.	Repeal Act.
5.	Kenya Plant Health Inspectorate (KEPHIS)	The Act establishes a regulatory body for the protection of plants, seeds and plant varieties and agricultural produce.	The composition of the KEPHIS Board should be revised to include county representation.	Amend the Act accordingly.

3. Water and Sanitation Sector

No.	Provisions of the Water Bill 2014	Comments of the Water Sectoral Committee	Proposed action
1.	**Clause 8 of the Water Bill 2014** does not make a clear distinction between "national water works" and county works" in respect water and sanitation and introduces confusing definitions that have the risk of possible infringement into county powers. Yet, this distinction is important as it provides a basis for the exercise of national and county government powers respectively.	National public water works should only be gazetted as such only after consultation with county governments/ the Council of Governors A general criteria of national public water works should be developed to make a distinction between national and county functions "Water works for bulk distribution and provision of water services" is a county function and should be excluded from the definition of water works	Amend Bill to address the CoG concerns
2.	**Clauses 10, 23,24, 27 of the Water Bill 2014** provide for water resource management as an exclusive national government function by: An exclusively national government regulator for water resources (Water Resources Regulatory Authority) Having exclusive powers to collect and utilise water use fees Weak representation of county governments in the regional water resources management committees (only two representatives in the Basin resources committees) Exclusive national government control and management of local participation in water resources management (management of Water Resources Users Associations (WRUAs))	Water resources management is a concurrent function between the two levels of government. Counties have express constitutional powers to: implement specific national government policies in natural resources management including soil and water conservation) coordinate and management local community participation in governance including water resources management Proposals for amendment: The Bill should provide for apportionment/ sharing of water user fees between national and county governments All county governments within a particular basin region must be represented in the respective basin region committee County governments should control and management the activities of WRUAs that operate within county governments while the national-based authority can manage the activities of cross-county WRUAs	Amend Bill to address the CoG concerns

3.	**Clauses 63 to 67 and Clause 150 of the Water Bill 2014** seek to retain some functions related to water and sanitation services in the national government by: Establishing water works boards which are national agencies and are intended to be the successors to the current Water Service Boards (WSBs) established under the Water Act 2002 The water works boards (to be established through a criteria to be developed by the cabinet secretary in consultation with stakeholders) will be in charge of vaguely defined "national public water works for water services" Retaining" cross-county water and sanitation services" as a national government function Providing water service providers as holders of water and sanitation assets on behalf of the public	County governments are exclusively mandated to provide water and sanitation services. The 47 county governments will develop joint structures and plans to cater for cross-county water and sanitation services. Accordingly: Any provision in the Bill purporting to place any kind of provision of water and sanitation services in national government agencies should be deleted. The current WSBs should operate on a transitional basis and a plan should be put in place to ensure that all their current functions (including assets, liabilities, etc) are handed over to either individual county governments or joint institutions that will be formed to manage cross-county provision of water and sanitation services County governments are the holders of water and sanitation assets on behalf of the public and will enter into service provision agreements with the respective water service providers The national government can be the legal custodian of cross-county water and sanitation assets due to their cross-county nature. However, the management, use, and plans of expansion of cross-county water and sanitation assets will be performed by Cross-County Water Services Authorities (CCWSAs)	Delete entire section

4.	**Clauses 70, 72, 73, 74, 75, 76, 78, 80, 81, 82, 83, 84, 85, 86, 91, 92, 93, 94, 95, 96, 97, 98, 99 and 104 of the Water Bill 2014** do recognise the powers of county governments to regulate water service providers but seek to shrink the said county powers by: Vesting the proposed Water Services Regulatory Authority powers to directly regulate and inspect water service providers Empowering the Authority to provide accreditation to water service providers Vesting the power to cancel a licence of a water service provider in the Authority Generally ignoring the county governments are directing all regulatory policies to water services providers directly Approving tariffs prepared by water service providers	The power to provide water and sanitation services and the decision to provide the services through water service providers is the constitutional power of county governments Water service providers are agents of county governments and counties, thus, have powers to accredit/ licence and generally regulate water service providers in accordance with national guidelines and standards The National Authority can only set tariff guidelines for water and sanitation services. Approval of the same is the power of county governments as recognised in the County Government Act and the Public Finance Management Act	Amend Bill to address concerns
5.	**Clauses 28-33 and 63-67 of the Water Bill 2014** seek to establish parallel national government agencies for water works by: Establishing a National Water Harvesting and Storage Authority exclusively in charge of national water works for water storage Establishing separate water works boards to carry out vaguely defined "national water works for water services"	All water and sanitation works (as mentioned above) are the exclusive power of county governments There should be established one national agency responsible for the construction of all national works in the water sector that are of strategic and national importance	Amend Bill
6.	**Clauses 111-116 of the Water Bill 2014** seek to establish a Water Sector Trust Fund (WSTF) that has no clear sources of funds and whose mandate may conflict with the core mandate of county governments: The WSTF mandate is to carry out pro-poor financing of water and sanitation services in marginalised/ commercially unviable rural and urban areas. A mandate that is expressly given to county governments and additionally recognised under clause 92 of the Bill The WSTF is to source its funds from: parliamentary appropriations, the Equalisation Fund, contributions from county governments and donations or other moneys payable under the Act	The core mandate of the WSTF (as provided for in the Bill) may conflict with that of county governments but this may be resolved through consultation between the Fund and the county governments The WSTF should not source its funds from the Equalisation Fund or from county contributions Any funding arrangements that may require county governments to provide commitment funding to projects funded by the WSTF can be recognised in the Bill	Amend Bill

Annex 2: Proposal for institutional restructuring in the Water and Sanitation Sector

No	Proposed structure	Composition	Mandate/ responsibility
1.	**Water Services Transition Committees** (Based on the current seven regional water services arrangements; coverage of the current WSBs)	• The CEC's in charge of water and sanitation services in the respective cluster counties • Representatives of the cluster counties (finance, public service, planning, person in charge of Water Service Providers (WSPs) at the WSB, etc) • The CEOs of the respective WSBs • Heads of finance human resource, planning, etc. from the respective WSBs • Representative from the Water Services Regulatory Board (WASREB) • A representative of the national government ministry in charge of water services • The CECs who are members of the committee will elect, from among themselves, a chairperson of the Transition Committee • The Transition Committees will operate for a period of 6 months from the period of commencement of the Water Bill 2014 Cluster counties/ WSBs are as below: Athi Region Water Services Transition Committee Athi Water Services Board Nairobi, Kiambu, Machakos, Kajiado, Makueni Tana Region Water Services Transition Committee Tana Water Services Board Nyeri, Murang'a, Embu, Meru, Kitui	• Developing a Transition Plan for the Water services (finances, human resources, institutional re-arrangements, the phasing out of the WSBs, ascertaining the status of ongoing and future projects and plans by the WSBs) • Recommendations on the nature and extent of joint permanent authority to be formed in the region to take care of cross-county water and sanitation services • Making practical proposals for the implementation of the envisaged legal framework for the sector in the region • Any other roles that are necessary to ensure smooth transition of water services in the respective regions

		Coast Region Water Services Transition Committee Coast Water Services Board Kwale, Taita Taveta, Kilifi, Mombasa, Lamu, Tana River Rift Valley Region Water Services Transition Committee Narok, Elgeyo-Marakwet, West Pokot, Turkana, Nakuru, Nyandarua, Baringo Lake Victoria North Region Water Services Transition Committee Lake Victoria North Water Services Board Vihiga, Kakamega, Busia, Bungoma, Trans-Nzoia, Uasin Gishu, Samburu Lake Victoria South Region Water Services Transition Committee Lake Victoria South Water Services Board Kisumu, Siaya, Homa Bay, Migori, Kisii, Nyamira, Bomet, Narok, Nandi	

2.	**Cross-County Water Services Forum**	Successors to the Water Services Transition Committees. Composition as above (after the dissolution and winding up of the WSBs)	• Propose inter-county dispute resolution mechanisms
			• Propose joint financing models or mechanisms for cross-county water and sanitation services
			• The forum will be the point of intergovernmental relations relating to cross-county water and sanitation services with the national government and between the member county governments
			• Develop Cross-County Water Services Authorities to take over the cross-county water and sanitation services. The structure, functions and resources of the joint authorities will be agreed by cluster counties. The following transition measures shall be implemented:
			  ◦ The current CEO of the WSB will be the acting CEO of the CCWSA until the board recruits a CEO
			  ◦ The staff of the WSBs shall serve for the CCWSA on an interim basis until rationalisation of staff for the Authority

3.	**Water Resources Transition Committees**	• CECs in charge of water resources management in the cluster counties • A representative of the national government ministry in charge of water resources • Regional offices of WRMA or their successors in title	• Developing a Transition Plan for water resources to enable national and county governments to take up their respective roles in the management of water resources management • Identify and classify Water Resources Users Associations that will fall under county governments and those that will be under the control of the WRMA (or its successor) in the regions. • Develop rules and regulations for the management of cross-county WRUAs
4.	**Intergovernmental Forum on Water Resources/ Water Basin Committees**	• Successors of the Water Resources Transition Committees and the will play the envisaged role of the Basin Committees in the Water Bill 2014	• Perform same roles as that of the Water Resources Management Transition Committees but on a permanent basis
5.	**Water and Sanitation Sector IGR Committee**	• Cabinet Secretary in charge of water affairs • CECs in charge of water affairs from all the 47 counties	• This will be the top-most sectoral IGR forum and all the other structures suggested below will report their activities to Water Sector IGR Committee (already exists)

Annex 3: Bills

Bills Covered in the Report

1. Alcoholic Drinks Control (Amendment) Bill

The bill is in its second reading in parliament.

2. Climate Change Bill 2014

The bill is in its second reading in parliament.

3. Constituency Development Fund Act 2013: *The Act was repealed by the judgement of Lenaola J, Ngugi J, and Majanja J in the court case -Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR. The judges declared the Act unconstitutional and invalid on 20th February 2015, but they suspended the order of invalidity for 12 months from the date of judgment.*
4. County Government (Amendment) Act 2014

The bill is in its second reading in Parliament.

5. County Industrial Development Bill 2014

The bill is in its first reading in parliament.

6. Diabetes Management Bill 2014

The bill is in its first reading in parliament..

7. Draft Policy on the Roads Subsector

The national treasury had invited general and specific comments on the Draft by 4th February, 2015. The National treasury is still finalizing the document before seeking Cabinet Approval.

8. EMCA Proposed Amendments

Published 2014

9. Intergovernmental Relations (Amendment) Bill 2014

The bill is in its third reading in parliament.

10. Order of Precedence Bill 2014: *It is already passed by the national assembly and is awaiting presidential asset.*
11. The Mining Bill 2014: *The bill was passed by the national assembly and forwarded to the president for assent. The president returned it to the senate for review.*
12. Physiotherapist Bill 2013: *The Bill has already been passed into law.*

Scrap Metal Bill: The Bill has already been enacted into law. The Scrap Metal Act No. 1 of 2015 was assented on 7th January 2015 and commenced on 23rd January 2015.

The following bills are still being discussed in parliament:

13. Kenya Medical Supplies Authority (KEMSA) Amendment Bill, 2013 and Kenya Medical Supplies Authority Act, 2013.
14. Kenya National AIDS Authority Bill 2014
15. Kenya Roads Bill 2014
16. Mental Health Care Bill 2012
17. National Drought Management Bill
18. Pharmacy and Poisons (Amendment Bill) 2014
19. Physical Planning Bill, 2014
20. Statute Law (Miscellaneous Amendment) Bill, 2014
21. The Alcoholic Drinks Control (Amendment) Bill 2014
22. The Community Land Bill 2013
23. The Constitution of Kenya (Amendment) No. 2 Bill of 2013
24. The Disaster Risk management Bill
25. The Environmental Management and Coordination (Amendment) Bill 2014
26. The Forest Conservation and Management Bill, 2014

27. The Government Proceedings (Amendment) Bill 2014
28. The Private Security Regulation Bill 2013
29. Water Bill 2014

Excluded Bills

1. Public procurement and Asset Disposal Bill:

The principle objective of this bill is to give effect to Article 227 of the Constitution, which requires procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes.

The public procurement and asset disposal bill, 2014 fails to recognize County Governments as independent constitutional Governments. As much as county Governments are public entities and procuring entities, it is important to note that they are constitutional governments and should be treated as such. This Bill makes provisions that apply across all public entities which include County Governments. We find such provisions unconstitutional in as much as they purport to apply to County governments without any modifications to suit the County Governments. We recommend a review of the provisions on compliance which tend to make county Governments answerable to organs of the National Government.

2. Public Audit Bill 2014: The bill is not contentious.
3. The Employment (Amendment) Bill 2014: The bill is not contentious, but it will affect the employment policies of County Public Service Boards.
4. The Special Economic Zones Bill 2015: The purpose of the bill is to provide for the establishment of special economic zones for the promotion and facilitation of global and local investors. The bill fails to recognize counties as governments. It does not provide for consultation with county governments when the Cabinet Secretary is gazetting special economic zones.
5. The Constitution of Kenya (Amendment) Bill 2015: The purpose of the bill is to change the election date from the second Tuesday in August to the third Monday in December. It affects counties as it amends Article 177 on the election of county assembly members and Article 180 on the election of the county governor and deputy governor.
6. The Public Finance Management Amendment Bill 2015: The Bill has various contentious clauses that are contemptuous of the spirit of devolution. For instance, under the current Act only the County Assembly's approval is required in the declaration of a county government entity. The Bill adds an extra tier of parliamentary approval.
7. The National Youth Employment Authority Bill, 2015: The Bill provides for the establishment of the National Youth Employment Authority and gives effects to Articles 55 (c) and 56 (c). One of the objects is to facilitate increased employment of the youth in the county government and county government entities.
8. The County Assemblies Powers and Privileges Bill, 2014: The Bill provides for the powers, privileges and immunities of county assemblies, their committees and members. The Bill is not contentious as it gives effect to Article 196(3) of the Constitution that provides that Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members.
9. The Reproductive Health Care Bill: The Bill provides for the recognition of reproductive rights and connected purposes. The Bill is not contentious.
10. The Public Appointments (County Assemblies Approval Bill) 2014: The main objective of this bill is to provide a legislative framework through which nominees for appointment to public offices, for which the approval of a County Assembly is required under the Constitution or any other law, are vetted and approved for appointment by the County Assemblies. The Bill is not contentious.

11. The parliamentary Service (Amendment) Bill 2014: The Bill proposes the creation of committees to promote the efficiency of the Parliamentary Service Commission in delivering services to the National Assembly and the Senate and, in turn, promotes the oversight role played by the Senate over the counties. The Bill is not contentious.
12. The Potato Produce and Marketing Bill 2014: The Bill establishes the National Potato Council which is mandated to implement the provisions of the Act, in particular to promote production, standardized packaging and regulation of the marketing of both seed and ware potatoes. It also establishes the County Potato Committee which is to operate under the guidance and direction of the Council. Agriculture is fully devolved therefore counties should play a more pronounced role. The Bill diminishes the role counties should play in the production and marketing regulation of potatoes.
13. The Food Security Bill 2014: The object is to provide a framework and mechanisms for the coordinated implementation of the national policy, programmes and plans on food security by the county governments.
14. The County Retirement Scheme Bill, 2014: The principal object of this Bill is to establish the County Retirement Scheme as a mandatory Scheme for "all County Government Officers; provide for the establishment of the Scheme's Board of Trustees and provide for the Scheme's management and administration. The bill is not contentious.
15. The County Assembly Services Bill 2014: The principal object of this Bill is to establish a legal framework for County Assembly Service Board which is established by the County governments Act, 20l2. This is intended to enhance the independence autonomy of the County Assembly from the County Executive to improve the oversight role of the Assembly over the Executive. The Bill is not contentious.
16. The Public Fundraising Appeals Bill, 2014: The principal object of this Bill is to provide for the establishment of regulatory mechanisms at the national and county levels which oversee the conduct of fundraising appeals.
17. The National Police Service (Amendment) Bill 2014: the Bill provides for improved facilitation and compensation for police reservists in recognition of the fact that county governments require enhanced security to execute functions.
18. The Universities (Amendment) Bill 2014: The principal object of this bill is to amend the Universities Act, No. 42 of 2012, so as to provide for liaison and coordination between the Commission for University Education and the county governments on matters of provision of university education at the county level of government. The Bill also proposes the establishment of public universities in each of the counties.
19. The County Early Childhood Education Bill, 2014: The principal object of this Bill is to provide a framework for the implementation of early childhood education by the county government in line with its functions as set out under the Fourth Schedule of the Constitution.
    The bill addresses the disputes raised in *Petition 127 of 2014: Kenya National Union of Teachers v The Honorable Attorney General; The Cabinet Secretary for Education; The Teachers'* Service Commission; and the Council of Governors as an interested party, particularly the claim that that the recruitment and employment of Early Childhood Education teachers by County Governments is unconstitutional. The bill has various contentious issues. Legislating on early childhood education is a preserve of the County governments as espoused by paragraph 9 of Part 2 of the Fourth Schedule of the Constitution. Passage of this Bill would undermine devolution as it will be taking away a legislative preserve of the Counties. Further, setting up a national framework will deny counties the flexibility necessary to address local issues unique to each county. The Bill has given the County Education Boards the power to register, deregister and regulate early education service providers, a function that should be conducted by a body established by each county and which is cognizant of local education issues unlike County Education Boards which are national government apparatus. Therefore, the Senate should not purport to exercise legislative powers over areas reserved for county assemblies.

20. The County Hall of Fame Bill, 2014: The purpose of the Bill is to provide an avenue by which exceptional persons in each County are recognized and honored by their Counties. The Bill is not contentious.
21. The Natural resources (Benefit Sharing) Bill, 2014: The principal purpose of this Bill is to provide a legislative framework for the establishment and enforcement of a system of benefit sharing in resource exploitation between resource exploiters, the national government, county governments and local communities and to establish the Natural Resources Benefits Sharing Authority. The Bill is vague on the precise formula of sharing between national governments and county governments.
22. Office of the County Printer Bill, 2014: The principal object of this Bill is to establish the office of the county printer in each of the forty-seven counties. The establishment of this office is necessitated by the provisions of the County Governments Act, 2012 which makes reference to publication of Bills, Acts and other documentation in a "county gazette".
23. The Senior citizens Care ad protection Bill 2014: The Bill imposes some obligations on counties with regard to the care and protection of senior citizens. The care of senior citizens is a duty of the national government under section 14 of Part 1 of the Fourth Schedule.
24. The Business Registration Service Bill: The principle object of this Bill is to establish the Business Registration Service to ensure effective administration of the laws relating to the incorporation, registration, operation and management of companies, partnerships and firms, the laws relating to individuals and corporations carrying on business under a business name. The bill is anti-devolution as it fails to recognize the role county governments play in the issuance of business permits and trade licences pursuant to section 7 of Part 2 of the Fourth Schedule.
25. The Traffic Amendment Bill 2014: The principal object of this Bill is to amend the Traffic Act (Cap. 403) to make provision for the safety of children on roads around learning institutions or when using school transport. The Bill purports that it does not affect counties but it ought to since section 5 of Part 2 of the Fourth Schedule mandates county governments with county traffic and parking.
26. The Basic Education (Amendment) Bill 2014: The bill proposes to include members of parliament to the membership of county education boards. County assembly members ought to have membership rights. The bill also establishes sub-county education boards. It proposes to amend the Act to enable private school to follow different curriculums and not necessarily one approved curriculum. This will discriminate and disadvantage students in public schools.
27. The Fisheries Management and Development Bill, 2014; The Bill is contemptuous of the constitutional mandate given to counties over fisheries per Section 1 (e) of the Fourth Schedule of the Constitution. The proposed board of the Kenya Fisheries Service does not have representatives from county governments. The proposed Fish Marketing Authority does not have representative from county governments. In the memorandum of objects, the bill purports to be a bill not concerning county governments. We recommend that the bill undergo thorough and comprehensive review of all clauses as it is substantially unconstitutional.
28. The Traditional Health Practitioners Bill: The principal object this Bill is to provide for the training and licensing of traditional health practitioners, so as to regulate their practice. The bill purports to be a bill not concerning county governments yet county health services are a mandate of county governments.
29. The Statute Law Miscellaneous (Amendments) Bill 2014: The Bill proposes to amend the Public Financial Management Act, 2012 to require parliamentary approval prior to the declaration of a county corporation or other body to be a county government entity. The proposal should be rescinded as the sole approval of county assemblies suffices.
30. The in-Vitro Fertilization Bill 2014: The Bill purports to be a bill not affecting counties. However, county health is a function of county governments and they are in charge of level 4 and level 5 hospitals. The bill should provide for the role of county governments in in-vitro fertilization. The proposed Authority under the bill should contain a member represent the interests of county

governments. Clauses 5(f) and 39(1) of the Bill, in which the In-Vitro Fertilization Authority has been empowered to grant, vary, suspend and revoke licenses, are encroaching on the constitutional preserve of county governments. Clause 26, 42, 43, 45 and 47 of the Bill should be amended by replacing "Authority" with "County Governments". Licensing should be left to county governments

31. The public Service (Values and Principles) Bill, 2014: The principal object of the Bill is to give effect to the provisions of Article 232 of the Constitution regarding the values and principles of public service. The Bill is not contentious.
32. The Health Bill 2014: The Bill does not acknowledge that it is counties that should legislate on health service providers operating at the county level. It is ironic to expect the county governments to be in charge of all health facilities but limit the vital function of licensing. To allow the national government to take over other county healthy institutions in future, the First Schedule allows the Director General to upgrade facilities from Level 2-5. Such discretion is open to risk of abuse such as taking over well performing institutions into which counties have begun pouring resources. Clauses 25(b),(c) and 26 do not respect the functional and institutional integrity of the county governments by seeking to deny them management of Level 5 hospitals at present and possibly others in future through unilateral upgrade of existing county facilities.

We recommend that the above clauses be amended to bring them in line with Articles 6(2) and 189(1) of the Constitution.

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