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REPORT OF THE WORKING GROUP ON SOCIO-ECONOMIC AUDIT OF THE CONSTITUTION OF KENYA, 2010

SEPTEMBER 2016

LIST OF ABBREVIATIONS AND ACRONYMS

BAC	Budget and Appropriations Committee
CAJ	Commission on Administrative Justice
CARPS	Capacity Assessment and Rationalisation of Public Services
CDF	Constituency Development Fund
CoB	Controller of Budget
CIOC	Constitutional Implementation Oversight Committee
CRA	Commission on Revenue Allocation
CARB	County Allocation of Revenue Bill
CKRC	Constitution of Kenya Review Commission
CoE	Committee of Experts
CIC	Commission for the Implementation of the Constitution
CORD	Coalition for Reforms and Democracy
DORB	Division of Revenue Bill
EACC	Ethics and Anti-Corruption Commission
GDP	Gross Domestic Product
JSC	Judicial Service Commission
KNHREC	Kenya National Human Rights and Equality Commission
KANU	Kenya African National Union
KADU	Kenya African Democratic Union
KPU	Kenya Peoples' Union
LSK	Law Society of Kenya
MoE	Ministry of Education
MLHUD	Ministry of Lands, Housing and Urban Development
NLC	National Land Commission
NCOP	National Council of Provinces
NSC	National Security Council
NSAC	National Security Advisory Council
NGEC	National Gender and Equality Commission
PFM	Public Finance Management
TSC	Teachers Service Commission
WG	Working Group

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Production of this audit report would not have been possible without the kind support of a number of people. We extend our gratitude to the National Assembly and specifically the Budget and Appropriations Committee under which the audit exercise was carried out. We also would also like to thank all stakeholders with whom we consulted during the period of collecting data for the report. They are many and it is difficult to mention them by name.

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We are grateful and appreciative to many others who provided support in one way or another. We acknowledge that there may be faults in this report. These are the faults of a human hand; they are inadvertent faults.

FOREWORD

On 26th February, 2014, the National Assembly through a resolution of the House established a Working Group (WG) to carry out a Socio-Economic Audit of the Constitution of Kenya 2010 under the auspices of the Auditor General. The team was subsequently gazetted on 15th August, 2014 and commenced its work soon thereafter.

The Terms of Reference for the Working Group (WG) were to:

(i) Assess the impact of the implementation of the Constitution to the nation's economy and in particular its public finances;

(ii) Make a rapid assessment of the impact of the implementation of the Constitution on public institutions;

(iii) Evaluate the social impact resulting from the implementation of the Constitution;

(iv) Make recommendations to the National Assembly on potential measures that could enhance prudent management of the country's public resources;

(v) Investigate, determine and advise on any matter related to, relevant, consequential or incidental to the foregoing; and

(vi) Consult as necessary with the National Assembly through the Budget and Appropriations Committee.

The audit has been carried out by reference to guidance contained in International Standards on Auditing. Those standards require, among other provisions, that the auditor shall obtain a full understanding of the requirements of the audit and agree on terms of engagement with the client at the outset. This work was properly planned, resourced and managed to ensure quality output.

The report is based on review of existing documentation, consultations with different stakeholders, as well as a national survey carried out in all the 47 counties. The Kenya National Bureau of Statistics provided support in terms of sampling and weighting of the data. Among the stakeholders consulted were experts involved in review of the Constitution, senior officials in the Judiciary, National Assembly, National Executive, independent institutions, county governments, leaders of political parties, and professional societies.

The findings show that the implementation of the Constitution is on course and that devolution is the centrepiece of the Constitution. The audit finds that devolution is delivering results in all counties and that, if implemented well, it has potential to address challenges of local development in all parts of the country.

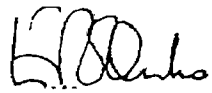
The audit reveals that there has been an increase in public spending and wage bill, but this is not attributable to the Constitution or implementation of devolution. The public concerns about the expensive nature of the Constitution are much the result of increasing wastage of public resources at both levels of government. The growth of public wage bill is certainly a matter of concern. It raises the need for the government at both levels to undertake austerity measures, including assisting redundant staff at the county and national level to exit the public service. This will ease the cost burden.

The values enshrined in the Constitution are rarely adhered to. Lack of prudence in use of public resources, lack of integrity among State officers and other public servants, and recruitment

practices that fail to reflect the regional and ethnic diversity of the country are clearly preventing the full realisation of the benefits of the Constitution.

Strict enforcement of the law and adherence to the letter and spirit of the Constitution will certainly address these challenges. In fact, effective implementation of the letter and spirit of the Constitution will build a collective sense of 'one nation-one people'; it will strengthen national cohesion.

Much has gone into this exercise, and I pay gratitude to the Budget and Appropriations Committee for their support towards the preparation of this report. I also thank members of the Working Group and the Secretariat for their commitment and hard work during the exercise.



Edward Ouko, C.B.S.

Chairman, Working Group on Socio-Economic Audit of the Constitution of Kenya 2010

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EXECUTIVE SUMMARY

Background and Introduction

1. On 26th February, 2014, the National Assembly through a resolution of the House established a Working Group (WG) to carry out a Socio-Economic Audit of the Constitution of Kenya 2010 under the auspices of the Auditor General.

2. The Terms of Reference for the Working Group (WG) included to:

   (a) Assess the impact of the implementation of the Constitution to the nation's economy and in particular its public finances;

   (b) Make a rapid assessment of the impact of the implementation of the Constitution on public institutions;

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   (e) Investigate, determine and advise on any matter related to, relevant, consequential or incidental to the foregoing; and

   (f) Consult as necessary the National Assembly through the Budget and Appropriations Committee.

3. The audit has been carried out by reference to guidance contained in International Standards on Auditing. Those standards require, among other provisions, that the auditor shall:

   (i) Obtain a full understanding of the requirements of the audit and agree on the terms of engagement with the client;

   (ii) Apply procedures such as planning, resourcing, organizing and managing the work to ensure the highest quality of audit report.

   (iii) Identify and mitigate risks that would prevent the auditor from achieving the objectives of the audit, i.e., responding to the Terms of Reference; and

   (iv) Obtain and document sufficient and reliable evidence to support audit conclusions.

4. The WG reviewed existing documentation and held meetings and consultations with various stakeholders. The WG also received and reviewed memoranda from some stakeholders. A national survey was carried out through face to face interviews in all the 47 counties. The Kenya National Bureau of Statistics provided support in terms of sampling and weighting of the data.

Summary of Findings

5. Kenya adopted a new Constitution in August 2010 with a view to building a new society and breaking away from the past. The values, principles, and objectives of governance in the Constitution codify the wishes of Kenyans in the current system of government. The Constitution provides an opportunity to address the challenge of inequities in development, poor governance, and service delivery.

6. The various provisions, combined, address the challenge of inequities in development, poor governance, and service delivery. The Constitution provides opportunities for better development and realization of the aspirations of the people.

7. The findings show good progress in implementation of the Constitution. Institutions envisaged under the Constitution are much in place today. County governments are well established. Through devolution, citizens are getting better services than before; many see devolution as the best development to have ever happened in Kenya since independence in 1963.

8. The Constitution is generally delivering as per expectation. There is improvement in the delivery of services especially at the county level. Health, agriculture, infrastructure, and Early Childhood Education are generally shown to have improved. The survey findings reveal a high level of satisfaction with devolution.

9. In the last three fiscal years, transfers to the County Governments have grown significantly in absolute terms. The transfers have increased from Ksh 195.7 billion in 2013/14 to Ksh. 272 billion in 2015/16. This represents a 40 per cent growth. Furthermore, a number of pre-devolution laws have been amended to accord with the Constitution. The National Treasury has also been supporting the counties to implement the PFA Act, under the National Capacity Building Framework (NCBF).

10. The provisions on public finance management require the governments at both the national and the county level to use resources in a responsible and accountable manner to achieve the objectives of the Constitution.

11. The audit reveals an increase in public expenditure and the wage bill, but this cannot be blamed on the implementation of the Constitution, and devolution in particular. The increase is the result of national development programmes by the national government. There is also wastage of public resources as evidenced by unprecedented increase in unsupported expenditure within the first one year of devolution. Furthermore, the county governments are carrying an unnecessary wage bill comprising inherited staff from the former local governments and central government, some of who are redundant.

12. The current number of counties and their boundaries as individual units works well with regional history and geography. Many (though not all) of the counties and the territorial area they occupy are home to not more than one ethnic group. Therefore, they are favourable for ethnic and social inclusion. The individual units also comprise population that is not too large and not too small to promote local democracy and delivery of quality basic services.

13. Preliminary analysis of the county budgets indicates that there is some cause for concern. The governance and administrative overhead of the counties is high, but this not because of the size of the counties. There is no evidence that the size of counties contributes to high governance and administrative overheads. The current number of counties is viable on basis of geography, demography, ethnic and social inclusion, and capacity to deliver quality services.

14. There is increased predictability in how public resources for development are distributed across the counties. Distribution of resources is no longer a subject of political leanings, discretion by any officer or institution. Every county is guaranteed a share of national revenue on an agreed criteria without political considerations. This is helping in building a sense of 'one nation one people'.

15. Many of the laws required to facilitate effective implementation of the Constitution have also been enacted. However, some of them are too weak to further the letter and spirit of the Constitution. Other critical laws such as the law to effect the gender principle are yet to be passed. Laws are also passed without a policy on which they should be anchored.

16. Both the National Assembly and the Senate have passed laws that tend to undermine the Constitution. The National Assembly has on several occasions passed laws that go against the text and spirit of the Constitution. The Constituency Development Fund (CDF) Act 2013, and some sections of the Security Bill, among others, have been publicly cited as some of the laws that failed to meet the constitutional threshold. Both laws (CDF and the security laws amendment) were eventually declared unconstitutional by the courts.

17. There is an increase in allocation of public funds to development. Both the national and the county governments are gradually aligning the budget with the Public Finance Management (PFM) Act. However, analysis of individual sectors shows that not all sectors meet this requirement. Recurrent expenditure takes the largest share of budget at the county. All the same, there is increased spending in development compared to pre-devolution period.

18. The Senate and the county governments lack clear structures for consultation and collaboration. Furthermore, there areno institutional arrangements to facilitate consultation between the county assemblies and the Senate, as well as between the Senate and the county governments.

19. The constitutional design of a directly elected Senate has inadvertently undermined the objective of enabling the Senate to scrutinize the national government's approach to and relationship with the county governments. Furthermore, there is no mechanism by which the county governments and their interests are adequately represented at the national level. Absence of such mechanisms has often led to conflicts between Senators and Governors, with each laying claim to representation of county issues.

20. There are also challenges in the interactions between the legislatures (National Parliament and the County Assemblies) and the Executive. The constitution anchors the presidential system of government but the practice is yet to align to the workings of the presidential system. As a result of this, there is the challenge of maintaining a balance between the oversight role of the legislature and the implementation role of the executive.

21. Budget making in an election year is also problematic. The Constitution provides for elections to be held in August of the election year, yet the budget should be finalised and presented during the month of June. This is the period of intense political campaigns. There is a risk of MPs and MCAs lacking sufficient time to review and pass the budgets. There is a risk that there will be delays in passing budgets during an election year.

22. There is absence of sufficient and meaningful public participation in making key decisions at both the national and county government level. Both levels of government are not providing sufficient and meaningful opportunities for people to effectively participate in decision making. This is happening in spite of various agencies providing civic education. . The low numbers of people who attest to being involved in making decisions of the National Government and county governments raises a need to re-think how participation is mobilized and the mechanisms of doing so.

Recommendations

(a) The policy on devolution and a legal framework on collaboration and cooperation between the Senate and the county governments should be developed as a matter of urgency.

(b) The number of counties should not be an immediate concern; Parliament, in consultation with the Council of Governors, should develop a legal framework to guide formation and operation of regional economic blocs.

(c) County governments should be allocated more resources for development, but this should be guided by criteria based on cost analysis of exclusive, concurrent and residual functions played by both levels of government.

Public Expenditure

33. Data to enable analysis of public expenditure are varied, even though the government is the source of the data. Nonetheless, there is evidence of an increasing public expenditure and wage bill. Much of this is attributable to increasing cost of national government development programmes. There is an upward movement of national government budget by almost two percentage points in 2015/16. This is the cause of the fiscal bulge.

34. Given the delivery-forecast nature of the Constitution, the recurrent expenditure of the counties, particularly the wage bill analysis, should consider distinguishing wages that relate directly to core service delivery (such as provision of health, education, agriculture, and water) being redefined, controlled, and accounted for specifically as service delivery expenditure in the future for socio-economic impact monitoring. Furthermore, the traditional definition of development and recurrent expenditure continues to inform accounting for expenditure, yet delivery of services under devolution is altering this approach.

35. There is also an unprecedented increase in 'unaccounted expenditure'. This has increased from 2% (Ksh 37 billion) of actual expenditure in 2012/13 to 5% (Ksh67 billion) of expenditure in 2013/14. This is a sign that public funds are not used in the right manner. This is what is fuelling public demands for prudence in use of public funds, and the general observation that the cost of running the government is high.

Recommendations

(a) The government, through the guidance of the Salaries and Remuneration Commission (SRC), should develop a clear policy to manage the public sector wage bill. This will ensure that public sector emoluments are managed and applied in a sustainable manner. The SRC should hold consultations with the Public Service Commission (PSC) and the County Public Service Boards on staffing levels, remuneration, and adoption of standards for public service at both the county and the national level.

(b) The Salaries and Remuneration Commission (SRC) should take measures to reduce and tightly cap allowances paid to State officers and other public officers. The reduction and cap should apply to MPs, MCAs, State officers and other public officers.

(c) The SRC should develop guidelines for Parliament to follow to ensure that no more than 60 per cent of the current gross pay for MPs, MCAs, and other State officers shall be paid as basic salary; and no more than 40 per cent of present gross pay for MPs, MCAs and other State officers shall constitute allowances.

(d) Restructuring public service should begin in earnest. Redundant staff at the county level should be assisted out of public service.

(e) Overlaps in the hiring of senior public sector officials (leading to duplicating roles) should be addressed through a comprehensive government policy. The policy should aim to establish a lean and efficient senior cadre in public service.

(f) The national government and county governments should undertake a 'value for money analysis' before engaging in projects that will require public expenditure. This should be done to ensure prudent public spending, effective resource allocation and use.

(g) The recurrent expenditure of the counties, particularly the wage bill analysis, should consider distinguishing wages that relate directly to core service delivery being redefined, controlled, and accounted for specifically as service delivery expenditure.

Budget Making

36. An election year provides a short window for preparing and presenting the budget to Parliament for approval. There is a risk that by June of an election year, MPs and MCAs may not get time for review of the budget. Delay in approving budget is a feature in some of the county assemblies. Such a delay can also affect the national Parliament. Further, the constitution requires that the Executive at both the County and the National Government level implement a balanced budget. However, there are instances where MPs and MCAs make amendments to the budget proposals without attention to balanced budget. This constrains the extent to which the Executive and the National Assembly in particular can implement the budget.

Recommendations

37. An amendment should be made to the PFM Act to provide for approval of budgets before dissolution of Parliament and the County Assemblies. The amendment should provide for the National Treasury to issue shortened timelines for the budget cycle during an election year. The budget making calendar in an election year should be brought forward preferably by three months i.e. by end of March every election year.

38. With regard to unbalanced budgets from the Parliament, it is recommended that the PFM Act be amended to provide for the National Treasury to prepare a memo and return to Parliament any unbalanced budget. The memo should explain the gaps and challenges.

39. The National Treasury should consult with the National Assembly to introduce a legislation to prevent disruption of services owing to delay in approval of the budget at the national and county level. The law should provide for the national and county treasuries to present a list of essential expenditures (to be approved by the legislatures at the budget debate stage) that need to continue in case of a delay in the approval of a budget by the legislatures. The list should also include mandatory items that have been paid over the years. The previous approved budget estimates only for these essential expenditure lines should be used in this regard.

40. The PFM Act and guidelines should be reviewed to allow County Governments negotiate for financial facility arrangements with public banks. This should be done to enable them to address liquidity problems such as lack of funds to pay salaries, which may arise out of delays in approval of salaries or general delays in disbursement of funds.

41. The Senate and the National Assembly should harmonise and regularise the calendar of appearances by Cabinet Secretaries/ministries before the respective sectoral committees;

and the parliament itself. They should develop a calendar of appearances so that the summonses are predictable and well timed. The county assemblies should similarly develop a calendar of engagement with the various sectors at the county level.

42. Further, it is important to streamline engagement between the ministries and the Parliament. The ministries should designate a parliamentary liaison person/desk to maintain contacts with the Parliament and parliamentary committees on a daily basis.

Public Participation

43. Very few county governments are providing opportunities for people to inform the decisions of the county governments (the County Executive and the County Assembly) despite civic education. This problem is also evident at the national level. The low numbers of people who attest to being involved in making decisions of their county governments raises a need to re-think how participation is mobilized and the mechanisms of doing so. This re-thinking should also aim at helping improve public participation at the national level.

Cooperation and Consultation

44. Conflicts and absence of dialogue between the two levels of government have not enabled entrenchment of the principles of cooperative government envisaged in the Constitution.The devolution structure, in particular, and the functional assignment design in the Fourth Schedule requires concerted efforts of cooperation and consultation in order to deliver on development objectives and service delivery.

45. The National Government has international commitments and reporting obligations for functions that have been assigned to county governments, and any sanctions for non-adherence would be to national rather than county governments. On the other hand, county governments bear the greatest responsibility for delivery of socio-economic rights provided for under Article 43 of the Constitution. The intersection of these rights with county government functions transforms them into binding obligations of the county governments.

Representation and Electoral System

46. The audit finds that Kenyans are over-represented. Kenya has more representatives (number of MPs, Senators and MCAs) compared with countries with similar population and size of economy. The number of MPs and Senators alone is above the global average.

47. Kenyan representatives are also some of the most highly paid MPs and MCAs in the world. They are paid even more than representatives in some of the advanced economies.

48. The number of MPs and MCAs is attributable to the electoral system of 'First-Past-the-Post'. The numbers will continue to grow over time if Kenya continues to use this electoral system. Moreover, Parliament is yet to adhere to the gender principle.

49. Parliament and a number of appointive bodies have failed to adhere to the gender principle as per the Constitution. With regard to Parliament, the electoral system, alongside many other factors, is partly responsible for the failure to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

50. The Senate and the county governments lack clear structures for consultation and collaboration. Further, the design of the Constitution with regard to the Senate does not enable the Senate to scrutinize the national government's approach to and relationship with the county governments. There is no institutional link between the Senate and the counties, and no mechanism by which the county governments can present their interests at the national level.

Recommendations

(a) Kenya should reduce the number of MPs and MCAs without compromising national values on diversity, protection of vulnerable groups, and the marginalised, and the equality principle regarding gender.

(b) Kenya should adopt Mixed Member Proportional Representation (MMPR) electoral system to ensure better representation of all Kenyans; and provide for meeting the implementation of the gender principle as per the Constitution.

(c) The law should also be reviewed to provide for a strong IEBC secretariat and a small number of electoral commissioners responsible for providing policy directions only.

(d) The Constitution should be amended to establish institutional arrangements to facilitate consultation between county assemblies and the Senate, as well as between the Senate and the county governments.

Judiciary

51. The Constitution has enhanced the political and financial independence of the Judiciary. This has facilitated unprecedented transformation of the Judiciary. However, financial independence continues to face challenges, particularly because the 'Judiciary Fund' has not been operationalised. Corruption in the Judiciary is also on the increase, and this is affecting the credibility of the institution and limiting people's access to justice.

Recommendations

(a) The JSC should develop a transparent criteria for undertaking lifestyle audit of Judicial officers and staff, and undertake the audit preferably after every three years.

(b) The membership of the National Council for Administrative Justice (NCAJ) should be expanded to include representatives of Parliament.

(c) It is recommended that the law be enacted by Parliament after consultations with the Judiciary to resource the Judiciary at an agreed per cent of the national revenue per annum in order to ensure that the Judiciary funding is predictable and adequate to carry out Judiciary functions.

(d) The Judiciary Fund provided for in the Constitution should also be operationalized.

Independent Commissions and Offices

52. Independent institutions and offices play an important role under the current Constitution. Some of the institutions and offices have taken over functions initially performed by central government institutions. There are instances where the functions tend to overlap or to cause confusion.

53. Independent institutions usually operate to restrain others from abuse of office. If they are not effectively resourced under the national budget, then they may not perform their roles in an effective manner.

Recommendations

(a) A comprehensive policy should be developed to guide vital areas of operations of these institutions, such as funding, independence, and clarity of functions.

(b) The membership of these institutions should be reduced to a minimum of three and a maximum of five.

(c) The budget for independent commissions and offices needs to be re-categorized as a budget sector and a transparent criteria for the sector allocation determined by Parliament.

Inclusion and National Cohesion

54. The audit reveals that the country has not adhered to the principles of diversity. Absence of inclusive politics is common at both the national and county level of governments.

55. Appointment to public positions in both county and national governments tends to create perceptions of exclusion among those whose leaders are not at the centre of power.

Recommendations

(a) The Public Service Commission should provide a policy guideline on how recruitments by the national executive and county governments should reflect regional and ethnic diversity.

(b) The Public Service Commission should initiate enactment of a law to sanction State officers who do not adhere to the policies to promote inclusivity and diversity on ethnic basis.

(c) The law on leadership and integrity should be reviewed to comply with the letter and spirit of the Constitution. EACC should implement an effective mechanism to operationalize the letter and spirit of Chapter 6 of the Constitution.

Provincial Administration

56. The restructuring of the former Provincial Administration is incomplete. Despite sentiments that the administration is already restructured, the fact that the Ministry of Interior felt the need to develop a policy to guide the process is evidence that there are pending issues regarding the restructuring.

Recommendation

57. The IGRTC (the successor to the TA) should convene a multi-agency committee to lead a consultative and participatory process to finalise the policy on restructuring of the provincial administration in line with constitutional requirements. The consultative process should include county governments as partners in the process.

National Security

58. While the current constitutional dispensation introduced a number of changes to the security sector, the audit has revealed a number of challenges. There is lack of effective coordination of security services and conflicts between agencies, despite frameworks to address ambiguities having been put in place. The sector also lacks a comprehensive policy to guide the overall sector operations.

Recommendations

(a) Steps should be taken to operationalize the National Security Advisory Council (NSAC) so as to ensure adequate technical and strategic support to the national security agencies.

(b) There is a need for an overarching security policy for the country to guide the sector's operations.

(c) The government should provide resources to the security sector for purposes of establishing innovative approaches of tackling modern and emerging security threats such as terrorism and cyber crimes.

PART I

CHAPTER ONE

INTRODUCTION

Background

1-1 Kenya adopted a new Constitution in August 2010. This Constitution fundamentally altered the structure of government and actual governance by introducing two levels of government - national and county level. The new Constitution also codifiedthe national values and principles of governance to guide the conduct of public affairs. At the heart of the constitutional reform was the desire to restore sovereignty to citizens by identifying the people of Kenya as the basis of all State and public power. Indeed, the spirit of these reforms is reflected in the National Values and Principles of Governance embedded in the Constitution. These include: the rule of law, democracy and participation of the people, human dignity, equity, social justice, sharing and devolution of power, good governance, integrity, transparency, and sustainable development.[2]The Constitution further provides that these values and principles must guide both the practice and interpretation of the Constitution, as they are binding on everyone.

1-2 The aspirations of the people of Kenya and the National Values and Principles of Governance have led to wide-ranging changes on State structures and the system of governance. The Constitution has provided for unprecedented checks and balances in the exercise of Executive powers. It has moved the country away from governance centred on an overbearing and highly centralised presidency towards democratic governance. To enhance public accountability, the Constitution has provided for relatively clearer separation of powers among all arms of government (Executive, Judiciary, and Legislature) and also between the two new levels of government. It also guarantees fundamental rights and freedoms by introducing a comprehensive Bill of Rights, which incorporates civil, political, economic, social and cultural rights.

1-3 The Constitution provides for national and county levels of government, which are distinct but inter-dependent. The county governments are established on the principle of devolution of power. They are required to conduct their mutual relations on the basis of cooperation and consultation. The Constitution also provides for a public financial system with the object of promoting an equitable society, including making special provisions for the development of marginalised groups and areas.

1-4 Implementation began immediately after the promulgation of the Constitution in 2010. Parliament passed laws to facilitate implementation. Most of the laws and institutions envisaged in the Constitution have been established at the national and county levels of government. There is, however, concern that a significant number of these laws would not pass the constitutionality test.

1-5 The national government has restructured and re-organised some of the public institutions in order to align them with the Constitution. The county governments were established immediately after the March 2013 general election. The county governments have been receiving the funds guaranteed under the Constitution to perform the required tasks. On the whole, during the transition, administrative and institutional arrangements have been put in place and resources committed to support the new system and structure of government.

[2]These are provided for in Article 10 of the Constitution of Kenya 2010.

1-6 The country has spent significant time, effort and resources to transition from the repealed Constitution to the Constitution of Kenya 2010. However, implementing a new Constitution is a process that takes time to show real impact. Therefore, some of the constitutional ideals, systems and structures, and benefits envisaged will take time to manifest. The drafters of the Constitution foresaw this at the outset. They underlined the need to stagger the application of some of the key provisions over varying periods of time in order to allow for a smooth transition from the old to the new order.

1-7 The new Constitution provides timelines for putting in place the enabling pieces of legislation.[3] The phased out timelines for making of various laws aimed at ensuring that the will of the Kenyan people, as expressed in the Constitution, is implemented with certainty and in a coherent manner. The Constitution and enabling legislation also provide for the establishment of institutions and bodies such as the parliamentary Constitutional Implementation Oversight Committee (CIOC), Commission on the Implementation of the Constitution (CIC), Commission on Revenue Allocation (CRA), and the Transition Authority (TA), among others, to facilitate the transition.[4]

1-8 Implementation continues to raise questions on costs accompanying the new institutions and public expenditure in general. There have been concerns about the impact of the Constitution on the economy and society in general.

1-9 The National Assembly, through the Budget and Appropriations Committee (BAC), made the decision to commission a socio-economic audit of the Constitution in order to assess the benefits from the implementation of the Constitution.

1-10 When the Working Group issued the interim audit report, some wondered whether it was not too early in the day to assess the impact. But it is prudent to undertake a preliminary assessment of the impact of a new Constitution so as to arrest challenges that would threaten full realization of its benefits. A review at the early stages of implementation is important in order to identify the challenges in implementation and opportunities to seize to realize the full benefits of the Constitution.

Terms of Reference for Audit

1-11 The National Assembly, through a resolution of the House made on 26th February, 2014, established a Working Group (WG) to carry out a Socio-Economic Audit of the Constitution of Kenya 2010 under the auspices of the Auditor General (Full Terms of Reference for the audit are attached as Annex 2 of this report).

1-12 The Terms of Reference for the audit required the Working Group to:

- Assess the impact of the implementation of the Constitution to the nation's economy and in particular its public finances;
- Make a rapid assessment of the impact of the implementation of the Constitution on public institutions;
- Evaluate the social impact resulting from the implementation of the Constitution;

[3]Fifth Schedule to the Constitution contains the phased timelines for these laws.
[4]The CIC wound up in December 2015 in line with the law. The TA wound up in March 2016 after the National Government declined to extend it tenure because the Inter-Government Technical Relations Committee was already established to carry out, among other things, the functions TA was carrying out.

- Make recommendations to the National Assembly on potential measures that could enhance prudent management of the country's public resources;

- Investigate, determine and advise on any matter related to, relevant, consequential or incidental to the foregoing; and

- Consult as necessary with the National Assembly through the Budget and Appropriations Committee.

Methodology and Approach

Audit framework

1-13 The audit was carried out by reference to guidance contained in the International Standards on Auditing.[5] Those standards require, among other provisions, that the auditor shall:

- Obtain a full understanding of the requirements of the audit and agree on the terms of engagement with the client;

- Apply procedures to ensure the highest quality of audit report. Those procedures include, but are not limited to planning, resourcing, organizing and managing the work;

- Identify risks to the assignment and perform audit work to respond to those risks. Risks refer to factors that prevent the auditor from achieving the objectives of the audit, i.e. responding to the Terms of Reference; and

- Obtain and document sufficient and reliable evidence to support audit conclusions.

Affirmation of Terms of Reference and key audit questions

1-14 To obtain a better understanding of the objectives of the audit, the WG held consultative meetings with the Budget and Appropriations Committee (BAC), the committee of the National Assembly mandated to facilitate the audit. As a result of those consultations, the WG and BAC agreed upon an interpretation of the Terms of Reference. The following key questions guided the interpretation and the audit in general:

- What were the wishes and aspirations of Kenyans that informed the calls for a new Constitution?

- Did the Constitution respond to those wishes and aspirations?

- What are the social, political and economic impacts of implementing the Constitution? Are these consistent with the objectives that the Constitution set out to achieve?

- Specifically, what has been the impact of implementing the Constitution on the national economy (public finances) and public institutions?

1-15 Framing the audit questions in this way helped to build consensus around the parameters that were used to assess the impact of the Constitution as required in the Terms of Reference. The impact of the Constitution is assessed by reference to what informed Kenyans' quest for a new constitutional order.

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[5] International Standards on Auditing (2012 edition).

Detailed audit approach

1-16 A secretariat was set up at the Auditor General's office to support the operations of the WG. Early in the audit, a review was conducted to assess available expertise and determine how gaps, if any, were to be filled. As a result, the WG adopted two approaches to ensure that sufficient relevant expertise was deployed on the audit. First, senior experts in various fields were hired on short term contracts to supplement the day to day capacity of WG members. Second, a panel of senior experts was set up to perform a peer review of the report before it was finalized. The list of experts and peer reviewers is attached as Annex 3 of this report.

1-17 Audit work comprised two main tasks: review of existing documentation, and meetings and consultations with various stakeholders. Matters arising were recorded, collated and documented in the audit report.

1-18 The WG held many consultations with different stakeholders. These included Senators, several committees of Parliament, and County Assembly Forums. The list of stakeholders consulted is attached as Annex 4 of this report.

1-19 Data from secondary sources complemented information gathered through consultations. The WG conducted extensive review of various documents relevant to the audit. These included the Constitution of Kenya 2010, reports on constitutional review processes, drafts of constitutions prepared during the last two decades, and reports prepared by various public institutions involved in implementing the Constitution. The list of documents reviewed is attached as Annex 5 of this report.

1-20 The WG consulted various stakeholders. These included the experts who were involved in the review of the Constitution, senior officials in the Judiciary, National Assembly, National Executive, independent institutions and constitutional commissions, the county governments, and leaders of political parties. The WG also reviewed memoranda and proposals for amendment of the Constitution made by various stakeholders. The list of memoranda reviewed from various stakeholders is attached as Annex 6 of this report.

1-21 The WG conducted a national survey in all the 47 counties with the assistance of the Kenya National Bureau of Statistics. The national survey collected information on people's views on implementation of the Constitution, impact on their lives, and the extent to which implementation is meeting their aspirations. The questionnaire was piloted in three counties (Machakos, Kiambu, and Nairobi) and revised to address the issues that emerged from the pilot phase. The revised/final questionnaire(Annex 7) was used for the national survey. The detailed methodology for the national survey is also attached as Annex 8.

1-22 The survey helped in getting the views of the public on the implementation of the Constitution, since the public is a key stakeholder in this audit. The principle of public participation is imperative in this audit. Views gathered are important in assessing the social, political, and economic impact of the Constitution.

Structure of the Report

1-23 This report presents the audit findings of the WG. The report comprises 15 chapters each of them focusing on the key issues/areas of the audit. After this introductory chapter, chapter two discusses what Kenyans wanted in a new Constitution. The chapter analyses the objectives of the constitutional review processes and answers to the question: "Why did Kenyans want a new Constitution?" Chapter three examines the text of the Constitution in relation to the wishes of the Kenyan people. This is aimed at finding out the extent to which the text meets the expectations of the Constitution review.

1-24 Chapter 4 analyses the implementation of the structures and systems of devolved government, while the next two chapters (chapters 5 and 6) analyse the impact on the new governance structures on service delivery and the economy. Chapters 7 to 11 examine the impact of the Constitution on institutions (the Legislature, the electoral system, the Judiciary, the Executive, and the independent commissions and offices). Chapter 12 evaluates the implementation of national values including integration and recognition of diversity and ethics in governance (including anti-corruption efforts). Chapter 13 analyses the implementation of the Bill of Rights while Chapter 14 discusses implementation of national security. Chapter 15, the last chapter, provides the conclusions and recommendations.

Considerations in Interpretation of the Report

1-25 Kenya today is in transition not only with respect to the institutions and systems created by the Constitution but also the movement from the old constitutional order to the new. The uncertainty, conflicts and tensions characterising the implementation point to the fact that the transition is not only about institutions but also transformation of society by adapting to a new culture and breaking away from the past. Indeed, during consultations on this audit, many people repeatedly noted that Kenyans need to change their behaviour and adopt the national values enshrined in the Constitution in order to realize its benefits. They emphasised that reducing wastage of public resources and enhancing prudence in use of public resources would lead to better and faster development of the society.

1-26 This suggests that the transition requires all Kenyans to change their attitudes, values, practices and mind-sets in order to realize the objectives of the Constitution. Development of a new constitutional culture will depend on the extent to which everyone – and not leaders alone – commits to its principles. Benefits will flow when there is genuine, collective and deliberate effort to transition to the new order.

1-27 The new constitutional dispensation seeks to transform a system built over time. As experience on reforms elsewhere has shown, change breeds resistance because some people are uncertain about the future. Because of this, some people prefer the *status quo*. Others may interpret their mandate in a narrow manner that leads to tension, conflict, and mistrust with others. In light of this, tension between the two levels of government and among public institutions is not unexpected. A lack of common understanding of and clarity on some of the provisions of the new Constitution is also contributing to tensions in relations among different institutions. Furthermore, some of the provisions were the subject of contestation during the review process.

1-28 The Constitution is being implemented as part of measures to address the challenges of inequities in development and other root causes of violence and perennial tensions that were being witnessed in the country. During the Constitution review process, various competing interests showed and shaped the review in many ways. Some provisions in the Constitution are the product of negotiations among political leaders whose interests were at variance with documented views of the majority of Kenyans. Some of the challenges of

implementation emanate from the fact that some provisions were the result of unsettled contestations.

1-29 This audit is taking place at the initial phase of the implementation of the Constitution while the transition period is still running, roles are being clarified, and many institutions are yet to operate at full capacity. The audit recognises that even with the desired political will and commitment to implement the new Constitution, the complexity involved in building institutions will pose a challenge. Thus, there is need for strong commitment to the national values and principles of governance to overcome these challenges.

CHAPTER TWO

WHY KENYANS WANTED A NEW CONSTITUTION

Introduction

2-1 The Constitution of Kenya 2010 was adopted as part of the long term measures to address the long-standing issues and other root causes of the violence witnessed in the country after the December 2007 election. International mediation ended the violence, but it was recognised that the violence was the result of long-standing issues that had not been addressed throughout the post-independence period. Parties in the mediation agreed to undertake fundamental constitutional reforms to address these issues. However, the debate on and demand for constitutional reform precedes this period.

2-2 Ordinary Kenyans did not play a significant role in the development of the independence Constitution. Political leaders representing various parties established along ethnic interests negotiated and assented to the final document without consultation with the ordinary people. Systematic amendments to the Constitution soon after independence further alienated the people from governance. The amendments concentrated State power and resources in the ruling elite. This led to a growing resentment of the *status quo* and laid the basis for demands for constitutional reforms. Economic and political liberalisation reforms at the beginning of the 1990s added to the momentum for comprehensive constitutional reforms. The common aspiration was to have a constitutional system where the will of the people was the basis of authority and exercise of public power.

Historical Context

2-3 Kenya's State structure and formal systems of governance are traceable to the onset of colonial rule; and in some regions to the pre-colonial period. The establishment of the colony took place alongside the consolidation of the 10-Mile Coastal Strip by the Sultan, a strip administered differently from the rest of Kenya. Although Kenya gained independence and full statehood in 1963, there was little change to the nature of State and governance structures. The colonial administrative set up was inherited without major alterations. This is in spite of the fact that the colonial institutional structures were alienated from the people. Further, a review of Kenya's political and governance history throughout colonial and post-colonial rule reveals that State and governance structures were alienated from the people.

2-4 The colonial system of governance was centralised and hierarchical. The ultimate power of the territory vested in the Colonial Secretary in London. The Commissioner of the Protectorate (and later Governor General) exercised unfettered governmental power over the territory, with his rule only subject to the State Secretaries in charge of colonies in London.[6] This colonial system left a legacy that endured through independence and into the post-independence Kenyan State. The most prominent manifestation of this legacy was the dominance of the Executive organ of power over all other spheres of governance and public life.

Independence period: Towards an all-powerful presidency

2-5 The independence Constitution provided for a semi-federal system of government (popularly known as *Majimbo*) composed of eight (8) regions and the Central

[6]See Yash Pal Ghai and Patrick McAuslan (1970),*Public Law and Political Change in Kenya*, pages 3-125 (Oxford University Press) for a detailed discussion on this subject.

Government; and a Senate to represent districts and protect and promote regional interests at the national level. With regard to the structure of the national Executive and the national Legislature, the Constitution created a Dominion Republic with the Queen of England as the Head of State, represented by the Governor General. The executive and legislative structures were modelled along the Westminster system, with the Prime Minister as Head of Government and a Member of Parliament.

2-6 There were two major parties at the time: the Kenya African National Union (KANU), mainly composed of the Kikuyu and Luo, and the Kenya African Democratic Union (KADU) composed of smaller ethnic communities. They both held differing views motivated by ethno-political considerations. KANU favoured a strong centralised system of government while KADU wanted a regional system of government, especially for the purpose of protecting numerically small groups. KANU accommodated KADU's proposal so as to prevent further delays in acceding to independence. The independence constitution thus provided for a *Majimbo* system of government and a bi-cameral legislature among other provisions to guarantee this system of government. KANU won the independence election. In turn, KANU's victory was interpreted as a rejection of regionalism.

2-7 The new government began to make amendments to the independence Constitution (see Annex 9 for chronology of amendments). The amendments also resulted in concentration of power in the Executive (the Presidency) and weakening of the principle of separation of powers, as well as checks and balances. The amendments resulted in creation of an 'imperial' Presidency, and subjugation of other organs of government under the Executive.

2-8 With increased powers, the Executive would distribute public resources to strengthen the culture of personal rule and attendant political networks.[7] Impunity deepened, and subversion of the rule of law and corruption increased without punishing the offenders.[8] Politicisation of development followed, and resources would be distributed on the basis of political considerations. State resources and opportunities were disproportionately directed to the home regions of successive presidents.[9]

Why Kenyans Wanted a New Constitutional Dispensation

2-9 Kenyans' desire for a new constitutional dispensation can be traced back to the effects of concentrating power in the Presidency. This resulted in increased abuse of office and a feeling that regional inequalities in development were the result of how power and resources were distributed by successive regimes. Several factors, therefore, combined to create the momentum for constitutional reforms.

Free exercise of democratic will

2-10 Concentration of power in the Presidency and the winding up of KADU in 1964 led to constrained political space. The government used institutions such as the provincial administration and the police, inherited from the colonial government, to intimidate and harass individuals who criticised the prevailing mode of governance. The government prevented formation of other political parties and, therefore, KANU remained the only

[7] Kanyinga K. (2009), "The legacy of the White Highlands: Land rights, ethnicity and the post-2007 elections violence in Kenya", *Journal of Contemporary African Studies*, 327-344.
[8] Martini M. (2012),"Kenya: Overview of corruption and anti-corruption' (U4 Expert Answer: Transparency International, Anti-corruption Resource Centre & CHR Michelsen Institute, 18 October 2012).
[9] Phrase used by researchers Duncan Okello and Kwame Owino, quoted by Mutunga C.J. in *Senate v National Assembly* [2014] eKLR at para. 168. See also Chege M. and Barkan J.D. (1989), "District focus and the politics of reallocation in Kenya", The *Journal of Modern African Studies*, 431-453.

party in operation for many years.[10] Political repression increased later on from the early 1980s following an attempted military coup.[11]

2-11 Although the country re-introduced multiparty elections in 1991, elections became a ritual as opposed to a channel through which the democratic voice of the people could be heard. Ironically, the re-introduction of multiparty politics coincided with the escalation of politically instigated ethnic violence. While ethnic conflict was not a new phenomenon in Kenya,[12] the 1992 presidential elections triggered violent ethnic conflicts in the Rift Valley and Coast regions, which were perceived as KANU strongholds. This was meant to intimidate communities into supporting the ruling party and the government, and also to disenfranchise the voters supporting the opposition in these areas.

2-12 Local Authorities, the only local democratic voice of the people, were also subordinated to the Central Government. The government did not give them adequate resources for their operations. This rendered them ineffective in service delivery.

2-13 From these experiences, it became clear that multiparty politics, without broader political reform, would not evolve democratic space. The State could still subvert democratic will even within the context of multiparty politics. Kenyans wanted to have institutions that were accountable to the public. They wanted repeal of repressive laws and a guarantee for protection of freedoms and rights. They wanted reforms in institutions such as the provincial administration and the police.

Strong, independent, accountable government organs and public institutions

2-14 The government weakened public institutions and arms of government that played the role of checking the Executive and presidential power. In 1986, a constitutional amendment removed the security of tenure for judges of the High Court and Court of Appeal.[13] During this period, Parliament and the Judiciary were subordinated to the Executive; they lacked independence. This prevented the Judiciary from effectively performing its role of checking the exercise of presidential power. Furthermore, this exacerbated abuse of office and heightened corruption in the public sector. It also led to increased exclusion of communities perceived to be opposed to the government.[14]

2-15 Kenyans wanted an independent Judiciary capable of exercising checks on other arms of government. Kenyans also wanted a Parliament that was independent from the Executive, and which independently controlled its calendar and activities. Along with these institutional reforms, Kenyans wanted political parties that reflected the diversity of the Kenyan people. They wanted political parties that would promote a political culture of democratic inclusion. Kenyans also wanted reforms to the electoral process and system to ensure fair, competent, and transparent management of elections.

Measures against corruption, political patronage and misuse of public resources

2-16 Over time, corruption in Kenya has increased. Major corruption scandals led to heavy losses of public resources. Public procurement processes were replete with corruption. However, individuals responsible for these public scandals went unpunished. This

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[10] In 1966, the opposition formed the Kenya People's Union (KPU) but this was banned in 1969 and its leaders detained.

[11] Ogot B.A. (1995),"The politics of populism", in Ogot B.A.and Ochieng' W.R. (eds),*Decolonization and Independence in Kenya* (1940-93), Eastern Africa series Athens: Ohio University Press, 187-213.

[12] Daniel Branch has documented instances where ethnic conflict was witnessed as early as immediately the *Majimbo* system was adopted. See Daniel Branch, *Kenya: Between Hope and Despair (1963-2011)* at p. 87.

[13] Constitution of Kenya (Amendment) Act No. 20 of 1986.

[14] Juma, L."Ethnic politics and the constitutional review process in Kenya (2001-2002)",*Tulsa Journal of Comparative and International Law*, 471-532.

deepened the culture of impunity because political patronage ensured those involved got the required protection.

2-17 Endemic corruption and political patronage prevented effective operation of public institutions. They could not effectively deliver public services, and because of this, many Kenyans wanted change rather than *status quo*. This added impetus for the clamour for comprehensive reforms.

Quest for inclusiveness

2-18 At independence in 1963, Kenya had huge disparities in regional development. The colonial administration had developed only areas suited for the settler economy and ignored the rest of the country. The first post-independence government, therefore, had a responsibility of addressing the socio-economic disparities that characterised the country.

2-19 Kenya's first development blueprint, *Sessional Paper No. 10 of 1965, African Socialism and its Application to Planning in Kenya,* underlined that public investment and development activity would be directed to areas of the country with "abundant natural resources, good land and rainfall, transport and power facilities, and people receptive to and active in development".[15] The consequence here was that areas that were previously excluded and therefore most needy would wait a little longer for development.

2-20 The areas suited for the colonial settler economy included the Central region and the Rift Valley. From the outset, disparities in development had an ethno-regional dimension because the regions are home to ethnic communities. The Sessional Paper implied, therefore, that resources would be more concentrated in these regions than elsewhere. The Central and the Rift Valley regions continued to receive high development expenditure.[16] Successive post-independence presidents also came from these regions. There were relatively more senior government officials in influential posts than from other regions.[17] These advantages gave the two regions relatively better infrastructure and basic social services than other parts of the country.

2-21 These inequities concretised the view that development of any particular region was associated with the regions' proximity to political power. This led to intense rivalry and competition for the Presidency, often resulting in ethnic conflicts of which the post-2007 election conflict was the most violent. The "First-Past-The-Post" electoral system, in which the 'winner-takes-all', aggravated the competition. Leaders would mobilize ethnic constituencies to outcompete each other. This in turn ethnicised electoral politics and polarised the country.

2-22 Inadequate inclusive development added to the grievances that triggered demands for comprehensive constitutional reforms. People wanted equitable distribution of resources, and equal opportunities for all citizens irrespective of where they came from. Kenyans increasingly recognised that national unity would be achieved if the government promoted inclusive development. They wanted a framework to promote inclusive politics so as to accommodate diversity. These would only be achieved through a comprehensive constitutional framework that comprised fundamental changes to not only the electoral system, but also to values of national leadership.

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[15] Republic of Kenya, "African Socialism and its Application to Planning in Kenya", Sessional Paper No. 10 of 1965), p.45.

[16] Ryan Briggs (2014), "Aiding and abetting: Project aid and ethnic politics in Kenya", *World Development*, 16: 194-205.

[17] Karuti Kanyinga (2013), "Ethnic politics in Kenya", in Ghai Y.P. and Cottrell J.G. (eds), *Ethnicity, Nationhood and Pluralism: Kenyan Perspectives*. Nairobi and Ottawa: Global Centre for Pluralism, Ottawa and Katiba Institute, Nairobi.

2-23 The quest for inclusiveness also touched on land and land-based resources. Although land was at the centre for the struggle for independence, there was a general disillusionment with the failure to undertake comprehensive land reforms after attaining independence. The market based policy of "willing buyer willing seller" and the settlement schemes that the government established for the land hungry groups were not adequate solutions to the land problems. As a result, issues of land rights continued to inform local regional conflicts. Indeed, the land question was at the heart of the ethnic-based clashes in 1992, 1997 and 2007 in parts of Rift Valley and Coast regions where grievances about land injustices have been most pronounced. These conflicts made Kenyans to hope for a lasting resolution of historical injustices related to land.

2-24 Inefficiencies in land management and administration added to the demands for reforms. People were demanding overhaul of land administration and management systems, and establishment of an independent institution that would ensure transparency, accountability and efficiency in land administration and management.

An efficient public service that delivers

2-25 Centralisation of power and resources undermined efficiency in the delivery of services. The centralised system of governance stifled service provision and led to a decline in service delivery. There were bureaucratic blockages and inefficiencies in the delivery of basic services. The government responded to this by increasing the offices of the central government ministries in the field. It increased the units under the provincial administration, and introduced specialised funds, and later the parliamentary constituency level structures. These multiple structures were intended to address the challenges of service delivery. However, they had the effect of contributing to further decline in service delivery by fragmenting efforts and resources at the local level. They did not adequately address the problem of inefficiency and inequities in service delivery.

Other issues that informed the search for a new constitution

2-26 Kenyans also wanted a change in the political culture. They wanted an end to the culture of impunity in which senior officials and other influential individuals were not held accountable for their actions. The demands for reforms, therefore, included a need to promote integrity, responsive and accountable political leadership, and good governance in general.

2-27 Ineffectiveness of State institutions such as the Immigration and the Police led to escalating cases of insecurity and the rise of organised criminal groups. Some of these groups comprised desperate and vulnerable youth hired by politicians to promote their parochial interests. Kenyans wanted an end to State ineffectiveness, and thus reforms that would lead to improvement of the economy to enable the State to provide resources to support youth empowerment, and address the problem of exclusion of women, persons with disabilities, and the youth from political and governance processes.

2-28 These issues, combined, added impetus to the demands for comprehensive constitutional reforms. Reviewing the Constitution became the main avenue through which Kenyans could pursue their aspirations.

CHAPTER THREE

THE CONSTITUTION AND RESPONSE TO KENYANS' ASPIRATIONS

Introduction

3-1 The preceding chapter shows that Kenyans wanted a break with the past. They wanted an end to inefficiencies in delivery of services. They wanted a responsive government and enhanced accountability and transparency in the conduct of public affairs. Importantly, Kenyans wanted equitable distribution of resources so as to address imbalances in development. These aspirations are captured in the national goals and values that the people wanted to be entrenched in the Constitution.

3-2 This chapter presents an overview of how the Constitution responded to the aspirations of Kenyans. The Constitution contains provisions for addressing the political, economic, and social aspirations that informed the push for a new constitutional dispensation.

Political Aspirations

3-3 Kenyans wanted recognition of their collective will as the source of public power and authority. They also wanted representative institutions to not only reflect their diversity but also their wishes. Beyond representation, the people wanted direct participation in decision making, and to be consulted in matters that affect them.

Restoration of peoples' sovereignty

3-4 The first article in the Constitution is about the sovereignty of the people. The Constitution recognizes the people as the ultimate source of sovereign power and the basis of exercise of State authority. The people can either exercise the power through democratically elected representatives or directly. All institutions exercising public power and authority are, as such, accountable to the people.

3-5 The Constitution provides that sovereign power is delegated to the three traditional arms of government (Executive, Legislature, and Judiciary), exercised at the national level and the county level. The three are also established as co-equal arms of government, exercising mandate on behalf of the Kenyan people. These institutions exercise the delegated power in furtherance of constitutional objectives. Where this is not the case, the Constitution provides for various channels through which the people's sovereignty can be restored. Importantly, the Constitution provides for national values and principles of governance binding everyone in the conduct of public affairs.

Democratic representation

3-6 The Constitution provides that Kenya is a sovereign and "multi-party democratic State". The provision insulates the country's democratic space by ensuring availability of political parties and other avenues through which Kenyans can participate in electing their representatives. Further, the Constitution provides for accommodation of diversity, enhanced inclusiveness and stresses the determination of the people to live in peace and unity as one indivisible sovereign nation. The Constitution also establishes several principles to guide the representation of the people. It underlines, among others, the importance of universal suffrage based on the aspirations for fair representation and equality of vote.

Guaranteed freedoms and rights

3-7 The Constitution contains a comprehensive, modern Bill of Rights encompassing all the three generations of human rights. The Bill is one of the cardinal pillars of the Kenyan State under the Constitution. It recognises the right of every citizen to make political choices, and this includes the right to choose leaders.

3-8 Enjoyment of the rights protected by the Constitution can only be limited by law and only to the extent that the law is "reasonable and justifiable in an open and democratic society". Even in situations where fundamental rights and freedoms can be limited, the Constitution provides the criteria for such limitation. The Bill also outlines the non-derogable rights such the right to fair trial and other internationally recognised absolute rights.

Democratic and participatory governance

3-9 The Constitution provides for avenues through which people can participate in decisions affecting them. It also recognises that people can exercise their collective sovereignty directly. Importantly, it embeds national values and principles of governance, which bind all State officials.

3-10 There are representative institutions at the national and county levels. These are established to exercise power on behalf of the people. These institutions are required to regularly consult the people to ensure that their views are taken into consideration in decision making. Indeed, public participation is entrenched as a constitutional principle that every institution or governance process must embrace. This is meant to ensure that people's views are integrated into various policies.

Economic Aspirations

3-11 The Constitution addresses Kenya's socio-economic challenges in a number of ways. It introduces devolution of power and establishes county level of government for this purpose. The objects of devolution, among others, include promoting social and economic development and provision of easily accessible services throughout the country. Devolution is also meant to ensure equitable sharing of national and local resources throughout the country.

3-12 The Constitution further provides for prudent use of public resources and outlines elaborate measures to promote equitable management of national resources and development. It also provides for affirmative action to redress past socio-economic exclusion and disparities in development. With regard to land management, the Constitution provides a broad framework for the management of land and land-based resources.

Equitable allocation of public resources and distribution of social-economic development

3-13 The Constitution provides principles of public finance management to address the concerns around socio-economic inequalities. It provides for equity in three main areas: (1) An equitable share of the burden of taxation; (2) sharing revenue raised equitably between the National Government and county governments; and (3) promoting equitable development in the country using public expenditure. The National Treasury, the Commission on Revenue Allocation (CRA), National Assembly and the Senate each have distinct roles in ensuring equitable sharing of revenue between National Government and

county governments. With respect to county revenue, the Senate is required to periodically set the criteria for equitable sharing of revenue allocated to counties.[18]

3-14 The Constitution provides for a minimum 15 percent of revenues collected nationally to be allocated to County Governments. In addition, county governments can levy some service charges and property taxes. The service delivery functions of county governments are set out in Part II of the Fourth Schedule. These are aimed at enhancing access to public services.[19]

3-15 Entrenchment of economic, social, and cultural rights in the Bill of Rights of the Constitution in an attempt to address the challenges of inequality.

Affirmative action in the allocation of resources

3-16 The Constitution further establishes the Equalization Fund with the objective of supporting development in the previously marginalised and neglected areas. It provides that 0.5 percent of revenue collected every year should be set aside for the provision of services in marginalised areas or communities. The Fund can either be used directly by the National Government to provide services, or administered through county governments.

3-17 Apart from the Equalization Fund, the Constitution provides that public procurement should be used to promote the interests of previously disadvantaged persons. The Constitution is specific that public procurement should create categories of preference in the allocation of government contracts, and priority should be given to categories of persons or groups previously disadvantaged by unfair competition or discrimination.

Public participation in public finance management

3-18 The Constitution emphasizes public participation in all processes that touch on public finance, including planning and budgeting at national and county levels. For example, the Commission on Revenue Allocation is established with the aim of enhancing the credibility and transparency of revenue allocation. While its main duty is to advise on sharing of revenue between the two levels of government as well as among counties, the open and participatory process through which the Commission carries out its functions facilitates the realization of the principles of public participation. Furthermore, the Constitution requires public procurement to be carried out in an open and transparent manner to enable public accountability in the use of resources.

Equitable access to land and land-based resources

3-19 The Constitution addresses the long-standing and systemic challenges in the land sector. Founding provisions on land in the Constitution recognize people as the collective owners of land in Kenya. In this regard, the Constitution provides that laws and policies should be enacted to ensure that local communities benefit from investments in property, and land in particular.

3-20 The principles of land policy are listed in the Constitution, and these include: equitable access to land, security of land rights, sustainable and productive management of land resources, transparent and cost effective administration of land, sound conservation and protection of ecologically sensitive areas, elimination of gender discrimination in law, customs and practices related to land and property in land, and encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution.

[18]Article 201 of the Constitution of Kenya 2010.
[19]Article 203(2) of the Constitution of Kenya 2010.

3-21 In order to remedy the inefficiencies in the management and administration of land in the country, the Constitution creates the National Land Commission whose primary duty is management of public land on behalf of both levels of government.[20]

National values and principles of governance (social aspirations)

3-22 The Constitution identifies the national values and principles of governance that broadly respond to the concerns that Kenyans expressed. The principles apply to all persons, especially the people who exercise authority under the Constitution. The intention behind the provisions is transformation of the Kenyan society to one based on these values and principles.

3-23 The framework of the Constitution includes provisions that are intended to consolidate national unity and social cohesion. The need for reconciliation and healing after the 2007/08 violence led to provisions that require the President to go beyond political or ethnic affiliation and be a unifying symbol for the people of Kenya by promoting and respecting the diversity of the people and communities of Kenya. Consequently, the structure and composition of the Cabinet and employment in public service are required to reflect the face of Kenya. The President is further required to ensure the protection of human rights and fundamental freedoms and the rule of law and report annually on progress made to Parliament.[21]

3-24 The Constitution contains provisions on affirmative action that are meant to enhance social cohesion and inclusiveness with regard to groups that were previously excluded, such as women, the youth, persons with disabilities, marginalised communities, and ethnic minorities. The Constitution thus seeks to ensure that all Kenyans participate in the affairs of the society, pursue their personal development, and realize their full potential.

Peoples' aspirations and the letter of the Constitution

3-25 The text of the Constitution broadly responds to Kenyans' social, political and economic aspirations and the concerns that people wished to see addressed in a new constitutional dispensation. The provisions align with the aspirations of the people. The Constitution generally addresses the issues that informed the struggles for democratic reforms.

3-26 It is noteworthy that during debates preceding the promulgation of the Constitution, it was acknowledged that the document responded to most of the aspirations of Kenyans. It was also recognised that the document had provisions that would be reviewed with time. The Constitution provides for consultation and cooperation in the performance of functions, and this can assist in the alignment of institutional roles for overall effectiveness in implementation.

3-27 The remaining sections of this report discuss the impact of the Constitution. The discussion highlights the challenges arising from the design and implementation. The audit makes several recommendations to enhance effective implementation.

[20]Articles 60-68 of the Constitution of Kenya 2010.
[21]Article 132 of the Constitution of Kenya 2010.

PART II

CHAPTER FOUR

DEVOLVED GOVERNANCE

Introduction

4-1 Chapter 2 of this report highlighted the reasons why Kenyans wanted a new Constitution. The discussion noted that Kenyans wanted equitable distribution of resources and access to better and efficient services. The chapter noted that the Constitution of Kenya2010addresses these expectations in many ways that include a devolved system of government. In this regard, the objects of devolution include promoting democratic and accountable exercise of power; promoting social and economic development; and providing proximate, easily accessible services throughout Kenya. The objects of devolution also include ensuring equitable sharing of national and local resources throughout Kenya.[22]

4-2 These objects show that devolved government in Kenya aims at addressing imbalances in development, promoting equitable allocation of public resources, and access to services. This is to be achieved through careful planning and sharing of revenue and resources collected nationally. The 47 counties cover all regions of the country, including areas that were previously neglected and marginalized. These are also the areas that have been lagging behind in development and provision of essential public services but are now covered by county governments.

4-3 This chapter discusses the workings of devolution and the challenges faced in implementation. The chapter aims to audit what has been done and whether this is inline with the people's expectations. The discussion also relates to the chapter on provision of basic services. The aim here is to find out whether there is any change in the delivery of basic services.

Context

4-4 The Constitution creates two levels of government, a National level and a County level. These are distinct but interdependent, and conduct their mutual relations on the basis of consultation and cooperation. The Constitution establishes 47 counties, which can only be increased or reduced through a constitutional amendment in a referendum. The Constitution further assigns each level of government its own powers and functions and establishes political structures and institutions for each level, to which the citizens elect their leaders.

4-5 At the county level, citizens can elect a County Assembly as a legislative arm and the County Governor who heads the County Executive. The differentiated structures are meant to enhance democratic accountability for decision making at the local level. County Executives and County Assemblies have power to plan locally, identify local priorities, legislate, budget and implement accordingly.

4-6 County Assemblies have oversight powers over County Executives and other county organs. The leadership and integrity principles outlined in Chapter Six of the Constitution and the values and principles of public service apply to county officials too. Shared institutions of the Auditor General and Controller of Budget also have oversight functions.

[22]Article 174 of the Constitution of Kenya 2010.

In their exercise of power, both County Executive and County Assembly are required to facilitate public participation or involvement of citizens.

4-7 The Constitution provides for transfer of resources to the devolved units in a fair and equitable manner. This is meant to ensure that previously neglected areas in the country would, through the counties, receive resources for development and provision of essential services. Kenyans expected that a devolved system would use resources in an efficient manner and deliver the benefits in a cost effective manner.

4-8 The county governments have been in place for slightly over three years since 2013. A clear picture on their cost effectiveness is yet to emerge. However, there is emerging evidence of positive results coupled with some challenges in different parts of the country. People are able to make certain observations based on what they have experienced thus far.

4-9 The findings from the national survey show that citizens have embraced devolution and that devolution is well embedded in people's lives three years on. When asked, 'what, if anything, does devolution mean to you', about 30 percent were of the view that devolution is about fair distribution and allocation of resources and services to the people. About one quarter of the respondents said it was about governance and representation being brought closer to people while 11 percent said it was about creation of counties. These sentiments are much in line with the objects of devolved government.

Table 4.1: What, if anything, does devolution mean to you?

	Percentages
Division and creation of counties and county governments	11.0
Governance and representation brought closer to the people	22.8
Development and change brought to the people	18.9
Fair distribution and allocation of resources and services to the people	29.5
Provision of resources and delegation of services/duties from the national government to the county government	9.7
Public participation	0.8
Empowerment and creation of jobs and opportunities	1.5
Tribalism, corruption, waste of resources and high cost of living	1.8
Implementation of the new Constitution	0.9
Other(s)	3.0

4-10 In all the counties, there is improvement in delivery of services, some of which have not been delivered in some of the counties in the last five decades of independence. Chapter 6, for instance, discusses the first ever delivery via caesarean in Mandera County. The national survey shows that over 50 percent of the respondents felt that there is a substantial improvement in service delivery with introduction of devolution. They report improvement in the provision of services such as agricultural extension services, provision of fertilizer and seeds, development of markets, and refurbishment and expansion of health facilities. These observations are confirmed in Chapter 6 of the report, which shows an incremental trend in the provision of services in health, education, and water and sanitation services.

4-11 Many Kenyans also think that county governments are performing better in the provision of these services than what obtained before devolution. About 45 percent of the respondents say that the Central Government performed generally poorly in providing

these services before devolution. The statistical analysis in Chapter 6 also shows evidence of increased access to these services in areas that were previously marginalised.

4-12 The Constitution devolved power and resources to enable Kenyans participate effectively in county governance and by that enhance their perception of political inclusion, the lack of which had led to conflict. Further, devolution aimed at giving powers of self-governance to the people and enhancing their participation in the exercise of public affairs and in making decisions affecting them.

4-13 However, the national survey reveals that ordinary people/communities have little influence over decisions by the national government or the counties. Over 40 per cent of the respondents felt that they have no influence at all over decisions made by the two levels of government. A small number of between 11-15 percent felt that they have "some" influence over the decisions taken by any of the two levels of government.

Table 4.2: How much influence does someone like you have in making national and county government decisions?

Level of influence	County Government (%)	National Government (%)
A lot	11.0	9.0
Some	17.0	15.0
A little	27.0	24.0
None at all	40.0	47.0
Refused to answer	0.4	0.5
Don't know	4.0	4.0

4-14 Although many people feel they do not have a lot of influence in making decisions at the two levels of government, many still feel that the two levels of government make decisions that reflect their needs. Many feel they can associate their needs to what the county and national governments are doing.

Table 4.3: To what extent do you feel that the decisions of the national government and the county government reflect your needs?

	County Government (%)	National Government (%)
Completely reflect my needs	6.0	7.0
To a large extent reflect my needs	19.0	17.0
Reflect my needs only in small areas	36.0	39.0
Almost never reflects my needs	19.0	17.0
Never reflects my needs	15.0	15.0
Refused to answer	0.4	0.5
Don't know	4.0	4.0

4-15 The county governments have not enhanced participation of the people as per the constitutional provisions in Article 10 and Article 174. The survey shows that 92 per cent of respondents have not participated in any county forums on budgets, making of laws, and in making of relevant laws and policies. Only 12 percent have participated in ward meetings, some of which the MCAs convene. But the problem is not with devolved government only. Many people also reported not to have been involved in Constituency Development Fund (CDF)-related activities.

4-16 On the whole, many people are not satisfied with the level of participation at the level of the county. It is apparent that County Governments have not put in place effective systems for mobilizing citizens to participate in decision making of county-related affairs.

4-17 Importantly, county governments (and in some cases, civil society organisations) are in some cases providing resources to support civic education. This is meant to equip citizens with or improve their skills to participate effectively in public affairs. It is also meant to broaden their awareness on their rights and obligations. On its own, however, civic education is not public participation; it is a means to enhancing public participation. This linkage appears to be missing.

4-18 Very few county governments are providing opportunities for people to inform the decisions of the county governments (the County Executive and the County Assembly) despite civic education. The low numbers of people who attest to being involved in making decisions of their county governments raises a need to re-think how participation is mobilised and the mechanisms of doing so. It is notable also that the problem of effective and meaningful participation is evident at the national level. Few people confirm having participated in informing choice of national government development projects.

Design of the Devolved Government Structure

4-19 In general terms, the constitutional design of devolution responds to the aspirations of Kenyans. The design establishes a governance structure that delivers resolution to the political, social and economic concerns of centralisation. However, there are some granular design aspects of the devolution governance structure that constrain the effective delivery of the vision. These include: the problem of unbundling of powers allocated to the two levels of government; the amount of revenue shared between the two levels of government; and management of finances, among other issues. Below is an audit of the key issues raised with regard to the structure and implementation of devolution.

Number of Counties

4-20 The Committee of Experts (CoE) who drafted the Constitution of Kenya 2010 arrived at 47 counties and two levels of government to balance between costs of running devolved units and regional representation.[23] The CoE sensed a "strong sentiment in favour of a two-level system of government".[24]

4-21 Concerns have been raised in public discussions on the cost-effectiveness of the current number of counties (47). There is concern that these are too many to be cost-effective. It is argued that this has increased the cost of implementation of the Constitution (the question of the cost of devolution and its economic impact has been considered in Chapter 6 of this report).

4-22 This notwithstanding, the design of 47 counties sought to trade off a regional level of government (whose core purpose is to constrain centralisation) and the benefits of small local government units (small enough to accommodate diversity at the lowest level).[25] This resulted in a modified composition of the two levels of government.[26]

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[23] The CoE had previously provided for three levels of government (national, regional, local) but reviewed this after people raised concern on costs to support the three-level system of devolution; and what would be the functions for the regions.

[24] See the final report of the Committee of Experts on Constitutional Review (2010), pp. 60-75.

[25] Kenya's devolved government structure is a departure from the common devolution system design that typically encompasses three levels of government – National, Regional and Local.

[26] See the final report of the Committee of Experts on Constitutional Review (2010), pp. 60-75.

4-23 The CoE justified the current structure by noting that it responded to the concerns of cost as well as the vaguely defined role of the regions. With the removal of regions, it was necessary to have larger units that could apply "checks and balances" against the centre. The CoE therefore reduced the 74 local units in the earlier drafts to the current 47 units. Furthermore, the 47 counties were based on the 1992 district boundaries that the courts recognized as the legitimate administrative units and boundaries.[27]

4-24 This audit also recognises that the current number of counties and their boundaries as individual units works well with regional history and geography. Many (though not all) of the counties and the territorial area they occupy are home to not more than one ethnic group. Many are made up of people who share a common history, undertake common economic activities, and speak the same language. On account of this, the county governments as presently constituted are favourable for ethnic and social inclusion. The individual units also comprise population that is not too large and not too small to promote local self-governance, democracy, and delivering quality basic services as envisaged under the Constitution.

4-25 Reducing the number or changing the size of counties will be a complex political exercise due to the politically emotive reactions that such a subject evokes in the Kenyan public. Rather than engage in the premature debate of changing the size and number of more counties, it would be more productive for implementation to capitalize on the strong public support for the current system of devolved governance and enhance effectiveness within the current structure.

4-26 The debate should focus on innovative ways of cooperating and working together among counties. Already, many county governments (such as those in the Western region, North Rift Region, and the Coastal region) are forming regional blocs to enhance the economic and development potential of their regions. This is an innovative approach of addressing the issue of number and size of counties.

National and County Government Functions Analysis and Transfer

4-27 The Fourth Schedule of the Constitution assigns functions to the two levels of government. The functions are categorised as exclusive, or the functions belonging to a particular level of government; concurrent functions, or those shared between the two levels; and residual functions, which are not identified with either level of government. The national government has the responsibility to undertake the residual functions. There are a number of problems relating to delineation of functions under the Fourth Schedule.

4-28 First, the Transitional Authority (TA) did not exhaust the unbundling of the functions. Thus, the Fourth Schedule requires further interpretation in order to clarify the specific functions for the National Government and county governments. Further, the functions should be effectively "unbundled" for the two levels of government to prevent confusion on which level of government is responsible for what. This failure to unbundle functions is causing friction between the two levels of government with regard to some functions. There are functions that the national government continues to carry out which county governments lay claim to. These include roads and infrastructure, gambling and betting control, management of water resources and water services, procurement in health services,outdoor advertising on roads, among others. In addition, concurrent functions have not been clarified, thereby increasing the conflicts between the two levels of government.[28]

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[27]See the final report of the Committee of Experts on Constitutional Review (2010), pp. 60-75.

[28] The TA report of June 2015 acknowledges that they have not been able to define and clarify what are the concurrent functions, and the management of these functions.

Summary of Implementation of the Transition to County Governance: The Legal Framework

The transitional provisions were put in place in the Constitution of Kenya 2010 in order to ensure a smooth transition to county governance without disruption of service delivery. The Constitution provided for a period of 3 years to ensure a smooth transition. In order to achieve this, Parliament passed the Transition to Devolved Governments Act that established the Transition Authority to oversee the transition and was given the following roles:

- Analysis of national and county functions and preparation of a comprehensive framework for the transfer of the functions
- Determine the resource needs for national and county functions
- Facilitate the development of the first county budgets and make recommendations on how ongoing projects touching on county functions were to be managed
- Audit assets and liabilities and prepare a framework for the transfer of the functions as well as propose measures for the effective management of assets at the national and county levels
- Determine the capacity needs of national and county governments and coordinate capacity building activities of both levels of government
- Develop a criteria for the transfer of powers and functions
- Audit the existing human resource at the national and county levels and propose the rationalisation and restructuring at both levels of government
- Submit monthly progress reports to the CIC on progress with the implementation of the functions

Implementation of the Transition Legal Framework

There was a delay of almost one year in the setting up of the Transition Authority. This meant that many of the activities that were to be performed by the TA before counties came into place (such as the audit of assets, liabilities, and human resources) were delayed and counties came into office with many of the preparatory activities not yet complete.

4-29 Secondly, the TA did not cost the functions for the two levels of government at the outset, yet resources follow functions. This failure to cost the functions continues to cause conflicts in the budgeting process and transfer of funds and functions. This has in turn continued to constrain the relations between the National Government and the county governments. The fact that resources follow functions, and that the costing for the functions was not done are at the centre of the conflicts over revenue sharing between the National Government and county governments. Arguably, the analysis and costing of functions would lay a basis for national and county planning and performance of functions.

4-30 In the absence of a comprehensive costing of functions, the Treasury relied on historical costs of functions to develop budget estimates. In early 2016, the TA developed in conjunction with the Commission on Revenue Allocation (CRA), a comprehensive costing of functions for five sectors only.[29] These are health, transport and infrastructure, agriculture including livestock and fisheries, water including environment and natural resource, and foreign affairs. The rest of the sectors are yet to be costed. The IGRTC, which

[29] Transition Authority, Commission on Revenue Allocation 'Costing of Government Functions' November 2015.

is the successor to the TA, has planned to complete the comprehensive costing exercise for the rest of the sectors.[30]

4-31 Thirdly, Kenya adopted a "big bang" approach to devolution at the very beginning. The Constitution envisaged a gradual/phased out transfer of functions to counties based on an assessment of readiness of counties.[31]However, the very first meeting of the National and County Co-ordination Summit decided to do away with the assessment of readiness of counties. The meeting agreed to adopt a "big bang" approach that saw powers transferred to counties. This did not allow for time to examine the capacity and resource needs or the level of preparedness in each county.

"Big Bang" Transfer of Functions

Soon after the March 2013 elections, the first Summit was held (attended by the President and Governors) where a settlement was reached that all functions due to counties would be transferred to the counties immediately. This agreement went against the intention of the legal framework that envisaged a gradual transfer of functions.

At the time of the announcement, the TA had not carried out an analysis of the national and county functions in the Fourth Schedule. The functions and resources that were to be transferred to counties were, thus, not clear. The TDGA provides that the criteria for the transfer of functions should include:

- Whether there is existing legislation concerning the function
- Whether there is a framework of service delivery in place
- An assessment of capacity to perform the function
- Arrangements for further decentralisation of the function
- Infrastructure and systems to perform the function
- An approved plan by the county on the performance of the functions

While the TA subsequently elaborated on the Fourth Schedule functions through legal notices, the big bang transfer had brought confusion to the process of analysis and transfer of functions.

4-32 Fourthly, the country did not successfully implement the "big-bang" approach. For example, twenty-nine (29) county governments appealed to the Senate for a transfer of powers and functions, which the court granted. [32] The counties plunged into implementation of functions without a thorough assessment of human resource needs and administrative competencies required to support the functions they took control of. This has had the effect of constraining the transition process. It is also responsible for human resource conflicts witnessed in the delivery of certain functions such as health.

4-33 Fifthly, citizens expectations overwhelmed the county governments at the beginning of devolution following the election of county governments. Citizens expected their counties to start offering much needed public services immediately after the elections in 2013. A phased/gradual transfer of functions could not match the immediate expectations of citizens; it could have prevented the counties from delivering promises to their electorate. Furthermore, transferring functions and resources asymmetrically could have perpetuated the very inequalities that the devolved system was meant to address, because poorer

[30] IGRTC, 'Strategic Plan 2016-2020' (2015).
[31] Section 15(2)(c) of the Sixth Schedule to the Constitution and sections 23 and 24 of the Transition to Devolved Government Act.
[32] *Council of County Governors v Attorney General and 3 others* (High Court of Kenya, Constitutional and Human Rights Division, Petition 472 of 2014).

counties could not have met the criteria for immediate transfer of functions. A political settlement between the President and the county governors, within the ambit of the Inter-Governmental Relations Act effected the transfer of all functions under the Sixth Schedule.

4-34 Sixthly, concurrent functions have engendered conflict and confusion in implementation of devolved functions. There are instances where the National Government, which is primarily assigned the policy-making and standards setting power while county governments also assigned implementation roles. In some cases, the county governments have allocated resources and implemented functions that could be exclusively National Government (e.g. education bursary programmes, and purchase of police vehicles).

4-35 As already mentioned, there is confusion on which level of government is responsible for what function even with regard to devolved functions. This is happening largely because of the failure to effectively unbundle functions. In the health sector, there has been confusion in the division of health functions between the National Government and county governments. One of the contentions in the sector has been whether Level 5 hospitals should be assigned to the National Government or county governments. This confusion led to a court case on the division of health functions between the two levels of government.[33] In the case, the court emphasized the need for resolving issues regarding division of functions through mutual consultation and cooperation.

Similarly, there is confusion and conflict in the water sector. The county governments are responsible for, among others, the 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] On the other hand, the National Government is responsible for the use of international waters and water resources.[36]

4-36 Finally, there is no national policy or sessional paper to guide implementation of devolution. Although soon after the adoption of the new Constitution, the then Ministry of Local Government developed a draft sessional paper to guide the implementation of devolution, the policy document has not been completed. The Commission for the Implementation of the Constitution (CIC) acknowledged the implications of the failure to develop a coherent policy on devolution. In its end term report of December 2015, CIC noted that there is an urgent need to finalise the policy, the analysis and costing of functions, and unbundling of concurrent functions before the end of the transition period.[37]

4-37 Some efforts have been made to address the confusion and potential risks ensuing from the unclear division of functions. Two inter-agency committees have completed analyses on duplication of functions in specific sectors, and the extent to which national government is performing county functions.[38] The findings and recommendations from these committees informed some of the sectoral agreements on division of functions, responsibilities and resources in sectors such as transport and infrastructure sector.

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[33] *Okiya Okoiti Omtata and another v The Attorney General and 6 others*, High Court of Kenya (Constitutional and Human Rights Division) Petition No. 593 of 2013.
[34]Section 11, Part II of the Fourth Schedule.
[35]Section 10, Part II of the Fourth Schedule.
[36]Section 2, Part 1 of the Fourth Schedule.
[37] CIC end term report, pp. 94-95.
[38]Report of Inter-Agency Task Force Appointed by the Cabinet Secretary to the National Treasury to determine the extent to which the National Government is performing functions that are assigned to County Governments under the Fourth Schedule of Constitution.

4-38 Furthermore, the National Government commissioned a Capacity Assessment and Rationalisation of the Public Service (CARPS) programme in 2015 whose findings also noted lack of logical conclusion of devolution of functions. The report noted, specifically, that the National Government was still performing, directly and indirectly, some of the devolved functions, and that county governments were also performing functions not devolved. There were also functions devolved but not fully operationalized.

General Performance of the TA during the Transition Period

By the time the TA left office (March 2016), a number of tasks bestowed on it by the TDGA had not been completed. These include: the analysis and unbundling of functions, costing of national and county functions, audit and verification of assets, among other functions. Undoubtedly, there are a number of functions that the TA was able to effectively undertake, such as facilitation of county take-overs, preparation of first budgets, procurement of initial facilities for counties, etc. However, many of the functions seen as critical to implementation were not complete by the time the TA left office. Efforts to extend the mandate of the TA beyond its third year were unsuccessful. Parliament opposed the suggestion to extend the term of the TA on grounds that the Inter-governmental Relations Technical Committee (IGRTC) that was envisaged to take over the remainder of functions had already been formed.

Among the challenges cited by the TA include:

- The initial delay in establishing the TA
- Grossly inadequate resources that could not support the performance of core functions
- High and unrealistic expectations about benefits from devolution that translated to pressure on the TA
- Political pressure to implement the big bang approach
- Subordination to the Ministry of Devolution and Planning, which exerted financial and institutional control over the operations of the TA
- Inadequate and slow flow of information from Ministries and other agencies of the National Government. This specifically limited access to information and data that could have facilitated crucial processes such as costing and analysis of functions

County Finance Management and Planning

4-39 The Constitution puts in place several measures to ensure prudence, fiscal discipline and accountability at both national and county level. This was in response to the demands of Kenyans for prudent management of public resources to ensure efficiency and effectiveness in service delivery.

4-40 Chapter Six of the Constitution, which outlines the principles of leadership and integrity, forms one of the distinct provisions that place on State and Public officers the requirement of ethics and integrity in the performance of their functions.

4-41 Article 212 aligns county borrowing to National Government guarantees. Article 226(5) of the Constitution further places a responsibility on all officers, including political officials to undertake their functions transparently and in an accountable manner by requiring that any direction or approval on the use of public funds that is contrary to law or instruction would render the official liable for any loss arising thereof and surcharge for such loss. The

provision specifically requires that the consequence is to apply whether the official remains in office or not.

Transparency and accountability

4-42 The Constitution has put in place mechanisms to secure transparency and accountability for county finance management. Article 225(2) provides for enactment of a public finance management legislation (now the Public Finance Management Act of 2012)to spell out the procedures, structures and responsibilities for financial control and management at both national and county level. Article 226(2) requires an accounting officer of a national public entity to be accountable to the National Assembly and the accounting officer of a county public entity to be accountable to the County Assembly, respectively. Articles 228 and 229 establish the shared offices of the Controller of Budget and Auditor General to sanction withdrawal of funds and audit their expenditure, respectively. The functions of these offices transcend the two levels of government.

4-43 The Constitution and enabling laws provide for the enforcement of transparency and accountability in the management of public resources. The capacity of counties to operate effective financial management systems, and adopt the principles of transparency and accountability in their operations has raised concern. The concern is particularly around the flagrant expenses of County Assemblies, misuse and misapplication of resources by County Executives, and non-adherence to public procurement laws.

4-44 Reports by the Auditor General also indict the county governments for the failure to prudently use public resources. The reports show where some county governments have failed to comply with the PFM Act, the Public Procurement and Disposal Act, and other fiscal responsibility principles. The reports also cite instances of misuse of funds through spending on foreign trips, and payments to non-existent entities. There are also unauthorized expenditures on car and house mortgage loans, and spending above budget lines in the fiscal years 2013/2014 and 2014/2015.

4-45 Waste in the use of public resources is reflected in people's perceptions about corruption in the counties. The national survey reveals that 80 percent of the respondents believe that corruption is rife in their respective county governments. And when asked in which areas corruption was rife, as many as 40 percent of them said it was in employment. Another 32 percent said it was in procurement and tender awards while ten (10)percent said it was in award of education bursaries.

Table 4.4: In what areas would you say corruption is rife in your county?

First Response	Overall (%)
Tender awards	32.0
Employment	40.0
Trade licensing	3.0
Scholarship and bursary awards	10.0
Health sector	4.0
Agricultural services	2.0
Other	5.0
No further reply	0.3
Refused to answer	0.3
Don't know	3.0

County borrowing and conditional grants

4-46 Unregulated borrowing by county governments can adversely affect macroeconomic stability. This concern is evident in the crafting of Article 212 of the Constitution, which deliberately entrenches National Government oversight over county borrowing through guarantees, and the incorporation of legislative approval procedures.

4-47 In general terms, National Government guarantee of loans by county governments is dependent on the fulfilment of some conditions including,*inter alia*, that the loans are for capital projects, the borrower demonstrates ability to repay the loan plus interest, parliamentary limits are not exceeded, and the financial position forecast of the borrower is satisfactory. The Cabinet Secretary in charge of the National Treasury is bound to ensure that he/she takes into consideration the equity between National Government interests and county government interests so as to ensure fairness in loan guarantees.

4-48 The PFM Act prohibits counties from borrowing for purposes of recurrent expenditure. In practice, however, some county governments borrow funds from local banks whenever they have a liquidity problem. Some borrow to pay salaries because of delays in disbursement of funds by the National Treasury.

4-49 The regulations and guidelines have been finalised but no county has borrowed yet under the PFM Act guidelines due to a moratorium on all borrowing by counties that was placed when the county governments got into office. Furthermore, some county governments inherited debts from the former local authorities. It is not clear how they will pay these debts. The IGRTC's comprehensive audit and verification of all assets and liabilities should aim at addressing this problem.

Conditional grants

4-50 The Constitution provides that the National Government can provide additional funding to counties in the form of conditional grants. As the name suggests, these funds are usually meant for a specified purpose and cannot be spent in any other way by counties.

4-51 Conditional grants play an important role as they fill specific resource gaps that ensure fulfilment of specific objectives. Conditional grants can, for instance, be used to ensure that counties provide certain services that are important for the achievement of national objectives. Examples of conditional grants in Kenya include: the grant given by the Ministry of Health to counties to facilitate free maternity services to women, and the special grant that is given to counties towards the support of Level 5 hospitals. Another type of conditional funds is the constitutional Equalisation Fund (created under the Constitution). This is meant to support provision of services in marginalised counties and enhance equitable access to services and development.

4-52 Conditional grants to the counties have grown exponentially. In 2014/15, the total conditional grants to counties amounted to Ksh 6.584 billions.[39] This figure increased by more than 100 percent in 2015/16 to Ksh 13.698 billion.[40] The number of conditional grants also increased from three to seven different conditional grants.

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[39] The conditional grant was composed of Ksh 1.85 billion for Level 5 hospitals, Ksh 4 billion for free maternity, and Ksh 0.734 billion DANIDA health grant.

[40] The additional conditional grants are contained in the Budgetary Policy Statement of 2015/16 and they are composed of: Level 5 hospitals grant of Ksh 2.06 billion, Ksh 4.6 billion for free maternity, Ksh 0.845 billion DANIDA health grant, Ksh 0.913 billion World Bank health grant, Ksh 1.98 billion for medical leasing, and Ksh 3.3 billion Road Maintenance Levy Fund (RMLF).

4-53 Currently, there is no policy or regulations to guide the provision of conditional funding to counties. There is no policy or clarity on the nature and level of funding. Some of the funds described as conditional grants are actually fully managed by the National Government on behalf of counties and do not, therefore, qualify as grants.[41]

4-54 Importantly, while the Constitution recognises conditional grants, there are no further provisions in the Public Finance Management Act on how conditional grants to counties should be applied or managed. This means that county governments are shouldering the additional burden of planning for and implementation of projects introduced with the support of conditional grants. This has the potential to steer the counties from their plans, or put them in a situation where they spread their human resource thin.

4-55 While conditional grants play an important role in the financing of counties, the unchecked expansion and growth of conditional grants has a potential to negate the autonomy of devolved units of government to plan and spend resources.[42] Excessive conditions in county spending (in the form of conditional grants) can erode the ability of devolved units to address and prioritise local needs.[43]

County own revenue

4-56 The primary source of revenue for the National Government and county governments is taxation. Article 202 provides that county governments may receive additional allocations either conditionally or unconditionally. Article 204 establishes an Equalization Fund, which is 0.5 per cent of total revenues raised annually to provide basic services to marginalized areas and to bring them to a level enjoyed by other parts of the nation.

4-57 Article 209(3) authorizes counties to collect property taxes, entertainment taxes and any other taxes authorized by an Act of Parliament, except the taxes that are collectable by National Government by virtue of Article 209(1). County governments may also impose charges on services they provide. The sources of revenue for the county governments are thus equitable shares of revenues raised nationally; own revenue collection; and borrowing, which must be guaranteed by the National Government.

4-58 According to the Institute of Certified Public Accountants of Kenya (ICPAK) 2014 Baseline Survey on Devolution in Kenya with respect to public finance management systems, 37 per cent of the counties sampled relied on single business permits as their core source of local revenue, 32 per cent relied on user-fees, with 31 per cent of them relying on property rates. The study found that counties were facing serious challenges on own revenue collection, with some counties collecting less than what the defunct local authorities, municipal and/or county councils used to collect when combined.

4-59 The Controller of Budget reports also show that county governments have not been meeting their targets on revenue collection. In 2013/14, they collected only 48.5 percent of the target. This improved to 67.0 per cent in 2014/5. The inability of counties to effectively collect own revenue, and inability to meet their own targets is clearly a challenge to effective devolution. It is, however, important to note that the abilities vary. This implies that the conditions for revenue collection have not improved in all the counties.

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[41] Jason Lakin (2015), "Division of Revenue Bill 2015: What questions should we ask?", International Budget Partnerships – Kenya.
[42] Jennie Litvack, Junaid Ahmad, and Richard Bird (1998), "Rethinking decentralization in developing countries". World Bank Sector Studies Series), pp. 12-13.
[43] ibid.

Table 4.5: Local revenue collection per counties per year against targets

Financial Year	Local revenue collected (Ksh billions)	% of annual local revenue target
2012/2013	6.8	-
2013/2014	26.3	48.5
2014/2015	33.9	67.2

Source: Office of the Controller of budget; Annual budget implementation review reports: 2012/2013, 2013/2014, 2014/2015

4-60 The challenge of own revenue collection is likely to result in further inequalities between counties, particularly if some counties are not efficient and effective in revenue collection measures, or if there is corruption and mismanagement of resources. There is need to institute greater demands for accountability and prudent use of resources at the county level. It also implies a need for county governments to put in place measures to guarantee increase in revenue generation.

4-61 Too much attention on equitable share of revenue has diverted focus on the counties' own revenue. There is silence on how counties can increase their own revenue. This has prevented a debate on how counties can mobilise more resources for development of their respective counties.

4-62 But there is also need to acknowledge that during the 2013/2014 period, the first year of operation of county governments, many formulated guidelines and passed laws to guide generation of own revenue. In some instances, residents protested against increased taxes and local leaders are alleged to have mobilized against these efforts. The county governments met high winds. In the midst of the politicised efforts, county governments glossed over the issue of how to improve efficiency in collection of revenue and how to prevent leakages associated with revenue collection.

4-63 An Interagency Working Committee has been formed to prepare an overarching policy/legal framework to support county governments' own-source revenue (OSR) enhancement. The Committee is tasked with developing a policy framework that will enhance and guide management of local revenue at the county level.[44]

Equitable share of revenue: Determining the sharable revenue

4-64 The Constitution provides that 'revenue raised nationally shall be shared equitably among the National Government and county governments'.[45] It is notable that allocations to the County Governments have increased in the last three years. In 2013/14,county governments received about Ksh190 billion. This increased to Ksh259.77 billion in the 2015/16 budget, showing an increase of about 36percent. It increased to Ksh 280 billion in the 2016/17 budget, representing an increase of 8 per cent from the 2015/16 budget.

4-65 Article 203 of the Constitution also provides that the amount allocated to the counties should be no less than 15 per cent. It provides that this is calculated on basis of the most recent audit account of revenue received, and as approved by Parliament. The most recent audit account has a two year time lag. On the basis of this audited account, county governments have been getting double the constitutional threshold of 15 per cent. The amount allocated in 2013/14 was 31 percent; 42 per cent in 2014/15; 33 per cent in 2015/16; and 30 per cent in 2016/17. But if the equitable share is based on total sharable

[44]Comments by the National Treasury on the Report of the Working Group on Socioeconomic Audit of the Constitution of Kenya, 2010.

[45] Both Articles 201(b)(ii) and 202(1).

revenue, then the county governments have been getting about 21 per cent of sharable revenue, per year on average, in the last four years.

4-66 The issue of how much should go to the county governments, nonetheless, remains a subject of debate. Some argue for amendment of the article that provides for not less than 15 per cent of the revenue to be equitably shared. Different groups, all keen to ensure that more than 15 per cent of the revenue reaches the county governments, have presented different proportions of the national revenue that should go to the county governments.

4-67 One point to make is that there will be no end to demands for more funds by the county governments. The service provision needs are endless but the resources are finite. All the parties have to recognise this as a challenge. The needs of county governments must be addressed with available resources. Similarly, the National Government must address national needs by balancing this with those of the county governments. However, discussions on how much should go to the counties should not be oblivious of the need to balance between national development priorities, the priorities of the two levels of government, the constrained resource and revenue base of the country, and the need not to overburden the country with loans or borrowing obligations. The country must strike a balance between these ends.

4-68 Article 203, on the other hand, establishes criteria to guide the determination of the equitable sharing of such revenue. However, questions have been raised on the meaning of 'national revenue subject to sharing between the National Government and the county governments'. For example, the national budget for 2014/15 was Ksh 1.8 trillion but the amount subjected to the vertical division of revenue was Ksh1.2 trillion. A total of Ksh 600 billion was not part of equitable sharing.

4-69 The National Government argues that borrowed money or grants earmarked for specific projects cannot be included in the vertical sharing. The government adds that the provision for debt repayment must be made before the balance is shared. It is also argued that money borrowed for national interest projects such as the Lamu Port—South Sudan-Ethiopia Transport (LAPSSET) corridor cannot be included in the vertical sharing of revenue raised nationally.

4-70 On the other hand, there are those who argue that it is the entire of the last audited and approved revenue that the government should share. They argue that the national audit of account is usually behind schedule by not less than three years. By the time the accounts are audited and approved, the actual size of revenue would be slightly more than the last two years. For this reason, they argue that equitable sharing should include all the revenue audited and approved.

4-71 Although the Commission on Revenue Allocation has provided a formula for this, the meaning of the revenue to be shared will remain a subject of debate as long as the counties continue demanding for more resources. Furthermore, the national interest projects are identified through processes that do not involve county governments. County governments should make input to the identification of national priorities and the specific role that the counties are to play in order to facilitate the pursuit of national priorities within their counties. Including county governments in planning and resourcing these projects will be one way of settling this debate.

4-72 The Constitution creates two levels of government that are distinct and interdependent. The existence of common constitutional goals and objectives implies harmony in the manner in which the two levels of government conduct their affairs, including a common vision on development objectives, national interests and priorities.

4-73 The National Government has an overall policymaking and regulatory function in virtually all sectors of county governance. However, this function can only be carried out effectively in consultation with counties, who have a duty to implement national policies and standards, but who similarly have autonomy in planning, budgeting and implementing county programmes.

4-74 There are concerns about inadequate cooperation and consultation between the two levels of government. The two governments did not adequately consult on development of national policies for devolved functions, and procurement of services to support implementation of devolved functions such as health and agriculture.

4-75 There is inadequate institutional interaction between the two levels of government. In 2015, consultations within the Summit were minimal and took place at the end of the year. Further, the Inter-Governmental Relations Technical Committee was established more after county governments were established. It is not yet fully functional and has not facilitated effective inter-governmental relations and harmony in the development of policy and planning. This may constrain the effort to align county plans to national development plans and vision. The County Governments Act, however, requires county development plans to be aligned with national priorities

National and county planning

4-76 The constitutional and legal provisions on cooperative county planning are well entrenched. So far, county governments have followed National Government guidelines in preparing their County Integrated Development Plans; the process was implemented for the first time in 2013/14. Integrated development planning should be evident in how national and county projects are being implemented. While the counties have attempted to follow the national planning frameworks (such as Vision 2030) in their activities, there is still some evidence of fragmentation. For instance, the continued implementation of CDF projects (despite a court ruling declaring the fund unconstitutional) is evidence of fragmented service delivery. Furthermore, counties are implementing Ward Development Funds and it is not clear whether such measures are aligned with the broader county development plans.

4-77 The County Executive is required under section 47 of the County Government Act to report on the implementation of county plans to the County Assembly. These reports should inform national reports on the realization of Vision 2030. For this reason, the relevant national government ministry should ensure harmonisation of national and county plans through a consultative process. This will ensure a common approach to realization of national priorities.

Urban areas

4-78 While the Constitution creates 47 counties across the country, Article 184 envisages a separate structure and framework for the management of urban areas. This is because the needs and services of urban areas differ significantly with those of rural areas. It was therefore important to think about the differentiated approaches to management of urban

and rural areas. Parliament passed the Urban Areas and Cities Act (UACA) to provide for the criteria for the establishment of cities (at least 500,000 people), municipalities (at least 250,000 people) and towns (at least 10,000 people).

4-79 However, the population threshold that is provided in the Act is high and leaves out many of the urban centres in Kenya from classification as municipalities. The Transition Authority led a process to amend the UACA in order to lower the threshold to practical levels so as to bring many of the middle level urban centres within the framework of the Act. Furthermore, the draft Urban policy is yet to be adopted.

Cooperation and Consultation

4-80 The Constitution requires consultation and cooperation between the two levels of government in the planning and performance of functions, the management of public finances, and making of laws, among other processes. Indeed, the Constitution envisages constant interaction between the two levels in order to ensure harmony in the implementation of the Constitution. This is also meant to ensure harmony in pursuance of common priorities at the national and county levels.

4-81 Both levels of government have not effectively adhered to the principle of cooperative government. This remains one of the main challenges in the implementation of devolution. The Senate and National Assembly contest over roles, mandates and procedures have resulted in an advisory opinion of the Supreme Court. There are other cases where disputes between different public institutions have ended up in the courts.

4-82 Inter-governmental relations are not good. They are fraught with suspicion. County Governments have voiced concern that the National Government is not fully supporting devolution. The National Government, on the other hand, regard the county governments as ungrateful and wasteful. These perceptions prevail despite the intergovernmental structures established under the Inter-Governmental Relations Act and Public Finance Management Act.

4-83 The county governments have filed court cases against the National Government on transfer of functions such as roads, the summoning of Governors, and the budget caps for county assemblies. In general, inter-governmental relations in Kenya devolution have been adversarial. Yet, cooperative devolved government requires that the society moves away from the adversarial approach to consultation, negotiation and consensus building approach.

4-84 The devolution structure, in particular, and the functional assignment design in the Fourth Schedule requires concerted efforts of cooperation and consultation in order to deliver on development objectives and service delivery. The National Government has international commitments and reporting obligations for functions that have been assigned to county governments, and any sanctions for non-adherence would be to National rather than county governments. On the other hand, county governments bear the greatest responsibility for delivery of socio-economic rights provided for under Article 43 of the Constitution. The intersection of these rights with county government functions transforms them into binding obligations of the county governments.

Senate and representation of counties at the national level

4-85 The primary role of the Senate as articulated in Article 96 of the Constitution is to "represent the counties, and serves to protect the interests of the counties and their governments". Consequently, the Senate is meant to be the eyes and the voice, and embody the wisdom and will of the counties.

4-86 The Senate is expected to exercise surveillance over the National Assembly's law-making power and ensure that public policy measures, regulations and legislation incorporate, promote and protect county interests. As a parliamentary forum, the Senate is the platform in which to scrutinize National Government obligations to counties and monitor the implementation of mandates and commitments in line with constitutional responsibilities.

4-87 The constitutional design of a directly elected Senate has inadvertently undermined the objective of enabling the Senate to scrutinize the national government's approach to and relationship with the county governments. Furthermore, there is no institutional link between the Senate and the counties. There is no mechanism by which the county governments and their interests are adequately represented at the national level. Absence of such mechanisms has often led to conflicts between Senators and Governors, with each laying claim to representation of county issues.

Conclusions and Recommendations

Public participation in decision making at the national and county levels

4-88 There is limited participation of the public in the making of decisions at both the county and the national level. In many instances, many people are confusing civic education with political participation. These are different.

4-89 It is recommended that Parliament, in consultation with the Ministry of Devolution and Planning, develop a comprehensive national policy and guidelines on participation for both the county government and the National Government.

4-90 On the basis of this policy, the national Parliament should develop the necessary pieces of legislation to support participation in devolution-related activities and processes.

4-91 The county government and the National Government should provide comprehensive guidelines and benchmarks to support participation. These should be issued alongside the policy on public participation.

Number and size of counties

4-92 Changing the number and size of counties will lead to deep politicisation of devolution and polarise the country along various lines. It is recommended that efforts be spent in ensuring that the current county governments are achieving their full potential, and that they are put into optimal use.

4-93 There is need to formulate relevant policies and legal frameworks to encourage and support economic integration among counties. This should not be left to gentleman's agreement.

4-94 A legal framework and principles should be developed to guide joint delivery of services through effective cooperation and inter-linkages between and among counties serving similar or adjacent geographical regions. This should address the argument that some county governments are too small to be economically viable.

Functions for county and national government

4-95 The Fourth Schedule is subject to multiple interpretations and a source of conflict between the county governments and the National Government with regard to who is in charge of certain aspects regarding the various functions.

4-96 It is highly recommended that the Sessional Paper on Devolution be finalized to clear ambiguities in the Constitution and the relevant laws in the functions of the two levels of government.

4-97 The proposed policy on devolution should provide for the following principles:

(i) Development of common and objective criteria for determining the content for each function based on the role and responsibilities of the relevant level of government in the Constitution;

(ii) Outline resource requirements, including the financial, human, infrastructure resources that incorporate prudent, responsible and most efficient use of the resource in line with the function, and avoiding duplication;

(iii) Setting benchmarks and standards for the performance of functions in order to ensure realization of constitutional objectives; and

(iv) Laying the principles for unbundling of functions for both levels of government. More importantly, it should address the delineation, verification, validation and valuation of national assets/liabilities, on one hand, and county assets/liabilities, on the other.

4-98 These principles should in turn guide the transfer of funds and resources for performance of functions.

4-99 The Transitional Authority and/or the Inter-Governmental Relations Technical Committee should facilitate the development of sub-sector policies for all devolved functions. The process to develop the policies must include the Council of Governors, alongside the relevant government ministries, and other stakeholders.

4-100 Unbundling of functions should immediately follow the development of sub-sector policies. Again, this should be developed in consultation with the Council of Governors, the relevant ministries, and other stakeholders.

Aligning expenditure to functions

4-101 Costing of functions was not effectively done at the beginning of devolution. For this reason, there is always debate on how much resources should be allocated to the county governments to carry out their functions.

4-102 It is recommended that respective National Government and county governments prepare their budget estimates in line with the division of functions to ensure that the budgets correspond to the functions for each level of government and to ensure that there is minimal overlap of functions. Similarly, the Controller of Budget should sanction withdrawals only after ensuring that such withdrawals are meant for the mandated functions and are in line with the Fourth Schedule as well as the framework of unbundled functions.

4-103 Given the delivery-forecast nature of the Constitution, the recurrent expenditure of the counties, particularly the wage bill analysis, should consider distinguishing wages that relate directly to devolved functions and in particular the core service delivery such as health, education, agriculture, and water being redefined, controlled and accounted for specifically as service delivery expenditure in the future for socio economic impact monitoring. This also implies a need to rethink the definition of recurrent and development expenditure under devolution. The definition of wage bill may need to change to accommodate those recruited to specifically provide services.

4-104 The Auditor General's review of expenditure should focus on the purpose for which expenditure was incurred and its jurisdictional propriety, and specifically whether the expenditure conforms to the division of functions/unbundled functions and whether expenditure has been applied lawfully and in an effective way.

4-106 All legislation emanating from National and County Assemblies should incorporate a schedule outlining the functions to be performed by each level of government. The legislation should define, to the lowest possible level, the functions for the area under legislation, indicating exclusive functions for the National Government and county government and concurrent functions.

County borrowing

4-107 There are no procedures and regulations to guide county borrowing, yet there are macroeconomic risks associated with excessive borrowing by counties. The Inter-Governmental Budget and Economic Council (IBEC)has developed a dráft policy to guide county borrowing. The draft should be subjected to consultation with the counties and adopted to assist in county borrowing.

4-108 Is also important to ensure that the process of approving county borrowing is objective and balanced. Furthermore, the framework for county borrowing should allow flexibility and accommodate county governments' innovation in design of borrowing instruments, while ensuring tight fiscal discipline by counties.[46]

Revenue collection

4-109 The county governments should explore various approaches and opportunities for increasing revenue collection. Automation of revenue collection systems is critical in this regard. Secondly, and where possible, county governments should use the revenue raising provisions within the County Government Act, such as establishing county corporations, to establish Special Purpose Vehicles (SPVs) for investment in order to raise additional revenue. Counties could also endeavour to offer competitive and professional services in core competence areas to raise additional revenue.

4-110 The Inter-Governmental Budget and Economic Council (IBEC) should initiate dialogue between county governments and the National Government to identify means by which to reward the county governments that demonstrate increases in own revenue and sanctionthose that perform poorly. The Senate and the National Assembly should thereafter legislate the recommended approaches in order to anchor them in law.

4-111 Relatedly, the National Government should have conditional grants to County Governments that are given to counties on the basis of enhancement of own revenue collection; this will incentivize the county governments to collect more internally.

[46]Institute of Economic Affairs, Economic and Administrative Implications of the Devolution Framework Established by the Constitution of Kenya. Nairobi: Institute of Economic Affairs.

4-112 The Commission for Revenue Allocation should conduct studies, in consultation with the Council of Governors and the National Government, on revenue potential of all counties. The study should seek to identify latent resources, establish potential revenue generating assets and identify means of maximising the use of existing resources.

Conditional grants

4-113 There is dire need for guidelines on the approach to and management of conditional grants given to counties by the National Government. The conditional grants should be determined and managed in a manner that not only preserves and recognises the autonomy of counties to plan and perform functions, but also in a manner that facilitates the achievement of commonly agreed objectives between the two levels.

4-114 The National Treasury, IBEC, Senate, and counties should develop a comprehensive policy on approach to the determination, disbursement and management of conditional grants that address the concerns above. The guidelines should address essential issues such as:

(i) Mutual planning between the two levels on the level and nature of conditional funding for each year;

(ii) Spending and reporting obligations of counties with respect to each conditional grant to counties;

(iii) Level of county autonomy and obligations in respect of each conditional grant; and

(iv) The integration of conditional grants in County Integrated Development Plans.

(v) Auditing of such grants.

4-115 With regard to the Equalization Fund, there is a need to ensure that the fund is used in accordance with the intended objective. In particular, the Fund should be used for the purpose of enhancing access to services in marginalised counties identified under the funding criteria. In this regard, it is important that the identified counties prepare and submit plans on how the fund will be used to bring services at par with the rest of the country. The National Government should retain an advisory role on the manner in which the fund is used so as to ensure the activities supported under the fund meet the set objective of promoting inclusive development in the target counties.

4-116 Additionally the county governments receiving the Fund should, where possible, inter-link their plans to collectively address their development challenges. The beneficiary county governments should also be providing reports on utilisation of the fund and progress made in achieving the objectives of the fund.

Consultation and cooperation

4-117 Conflicts have been a common feature of inter-governmental relations. There has been minimal dialogue on how to address the conflicts in their relations. This has undermined the principles of the cooperative government envisaged in the Constitution.

4-118 The IGRTC should be making a follow-up on resolutions made by the Summit; the body should also oversee the execution of the resolutions.

4-119 In judicial adjudication of disputes between the two levels of government, the courts should, as a priority, satisfy themselves through evidence that efforts are made by parties to enforce consultation and cooperation before approaching the courts. Surcharge of parties who undertake vexatious litigation using public funds before engaging in alternative dispute resolution should be considered.

4-120 There is need to develop joint House rules for the Senate and National Assembly to reinforce and concretise consultation and cooperation between the two houses. It is recommended that legislation expounding on the process of determining legislative roles of the two chambers (under Articles 110 and 113 of the Constitution) should provide for:

4-121 Clear procedures of ensuring that before any Bill is tabled in any of the two chambers, a joint process of determining whether the Bill affects counties or not is completed. There should be consensus by both Speakers on the nature of the Bill (whether the Bill affects counties or not) before debate on the Bill is commenced.

4-122 Specific timelines for consideration of legislation in either House, especially for critical Bills such as the Division of Revenue and County Allocation of Revenue bills.

4-123 The two chambers establishing a joint "tagging/filtering committee or committees" that can deliberate and advise the Speakers on the type and nature of every Bill tabled for debate in any of the chambers.

4-124 The Senate and the county governments lack clear structures for consultation and collaboration. The Constitution should be amended to provide for establishment of institutional arrangements to facilitate consultation between County Assemblies and the Senate, as well as between the Senate and the county governments.

Urban areas

4-125 Parliament should expedite the proposed amendments to the UACA in order to ensure that more urban areas across the country are brought within the national urban governance framework.

4-126 The draft policy on urban governance should be finalised and implemented in order to ensure effective management of services in urban areas across Kenya.

CHAPTER FIVE

THE IMPACT OF THE CONSTITUTION ON DELIVERY OF SOCIAL SERVICES

Introduction

5-1 Under the independence Constitution, basic social services – education; health; water – were in the hands of regional governments, a carry-over from the colonial administration's low attention to services specifically targeting human welfare improvements among the 'natives'.[47] The 1965 constitutional reforms that abolished regional governments also abolished their main source of revenue – the Graduated Personal Tax, thereby fiscally centering the delivery of social services in Nairobi, with implementation decentralized to either Local Governments or the Provincial Administration.[48] Into the 1990s, however, Local Government finances became unsustainable, undermining their provisioning of social services even as they accumulated debts, triggering a financing rescue package in the form of the Local Authority Transfer Fund in 1998.[49]

5-2 The early independence years had witnessed rapid improvements in human welfare indictors. However, centralization of social and indeed all public services soon encountered problems. Firstly, regional socio-economic inequalities meant unequal capacities to invest in provisioning infrastructure through community-based *harambee* effort.[50] Further, the politicised sharing of public resources, as well as the 1989 launch of cost-sharing/recovery meant that areas lacking political favour were denied essential services; and that access to social services would depend on household and community means.[51]

5-3 These realities greatly exacerbated inequalities, leading to demands for greater decentralized autonomy over public resources, which came with the new Constitution in 2010. In keeping with good practice, the Constitution not only made the two levels of government distinct but interdependent, but its Fourth Schedule also specified a basic division of functions between the two levels, and also provided a framework for sharing resources between the levels and across the 47 counties (Chapter 12). Importantly, the Constitution also devotes Chapter 4 to the Bill of Rights, including 'first generation' civil and political, and 'second generation' social, economic and cultural rights. The latter include health and water, which are largely the responsibility of county governments, and education which is largely a National Government function, alongside the management of all policy frameworks.

5-4 This chapter tracks the provision of selected social services over the period of transition into devolution, focusing on changes in facility numbers, and budget and personnel resources. The review period will often stretch to the 2010 adoption of the current Constitution, which should have elicited some changes in the management of public resources for social service delivery. However, the marked transformation in service delivery frameworks – given the Fourth Schedule's division of functions between the

[47] For example, see Chaiken, M.S. (1998), Primary health care initiatives in colonial Kenya. *World Development*, Vol. 26, No. 9: 1701-1717.

[48] This centralization was designed to curtail the risk of successful opposition regional governments undermining the aura of Kenyatta's KANU central government. See Jennifer Widner (1993), *The Rise of a Party-State in Kenya. From "Harambee!" to "Nyayo!"* University of California Press.

[49] The Fund was designed to supplement the financing of the services and facilities they are required to provide under the Local Government.

[50] See Miguel, Ted (1999), Ethnic Diversity, Mobility and School Funding: Theory and Evidence from Kenya. Department of Economics, Harvard University.

[51] See Mbugua J.K., Bloom, G. and Segall, M.M. (1995), Impact of user fees on vulnerable groups: The case of Kibwezi in rural Kenya. *Social Science and Medicine*, 41(6): 829-835.

National and county governments – should only be monitored since the March 2013 accession of county governments. Consequently, this review can at best cautiously gauge the impacts of *interventions* since the 2010 promulgation of the new Constitution, but much less can be said for the two year-old devolution era. Indeed, while social sector inputs and outputs can be measured immediately, the outcomes and impacts can often only be discerned in the medium to long term.

Changes in the Social Sector Budgets

5-6 The manner in which individual entities have interpreted the division of functions and the human and financial resources for their delivery between the two levels of government has made tracking a deeply complex process. County government budget sectors neither map those of the old centralized government, nor those of the present national government. Additionally, as illustrated for 10 counties for financial year (2014/15 (Table 5.1), budget reporting sectors are not the same across all county governments, making it difficult to isolate the exact allocation to and actual spending for the social sectors of interest, viz. education, health and water. Indeed, FY 2013/14 returns to OCOB did not provide such disaggregation, meaning it is not possible to review year on year data with which to assess the *impact* of devolution.

Table 5.1: Illustrating variations in county sector budget returns,2014/15

County	Education	Health	Water
Baringo	Education, Sports, Culture & Arts	Health	Water & Irrigation
Bomet	Education, Vocational Training, Youth & Sports	Health& Sanitation	Water& Irrigation
Bungoma	Education, Science, Sports & Youth Affairs	Health	Tourism, Forestry, Environment, Water& Natural Resources
Busia	Education& Vocational Training	Health& Sanitation	Water, Environment & Natural Resources
Elgeyo Marakwet	Education& Technical Training	Health Services	Water, Irrigation & Environment
Embu	Education, Science & Technology	Health Services; Level 5 Hospital	Lands, Water& Natural Resources
Garissa	Education, Youth & Polytechnics	Health	Water
Homa Bay	Education& ICT	Health Services	Water& Environment
Isiolo	Education& Youth	Health Services	Water& Environment
Kajiado	Education	Health	Water& Irrigation
Kakamega	Education, Science & Technology	Health Services	Environment, Natural Resources, Water& Forestry

Source: Office of Controller of Budget (2015).[52]

Trends in the Budgetary Allocations to the Health Sector

5-7 Table 5.2 presents the nominal national health budget allocations for 2005/06 to 2014/15 period, the total budget closing at 112.5 percent of the opening amount. The Recurrent budget closed at 59.0 percent higher than the opening level, but it is the Development budget that experiences a phenomenal change of 215 percent. The overall and disaggregated budgets grow year on year until 2012/13, after which they all fall sharply into 2013/14 in response to the new resource allocation framework that considers

[52]Office of Controller of Budget (2015), Annual County Budget Implementation Review, 2014/15. Nairobi: OCOB.

devolution. During the pre-devolution era, the public health share of government spending had stood at about 6 percent, despite a year 2000 commitment among African Union heads to ring-fence a 15 percent share for the sector. However, the table shows that health's recurrent/development budget structure has performed well against the Public Finance Management (PFM) Act's requirement at Section 15 (2) (a) that National and County budgets move in the medium term to allocate at least 30 percent of their resources to development spending. As the table shows (last column), the development budget's period average is 32 percent.

Table 5.2: Health budgets during the transition to devolution

	2005/06	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	Period change (%)
Recurrent (Ksh '000)	19,000	22,324	23,766	27,689	30,500	33,185	42,953	54,811	19,830	30,140	58.6
Percentage share	65.6	69.4	81.4	79.9	63.6	68.5	68.0	72.1	58.0	49.0	67.6
Development (Ksh '000)	9,943	9,832	5,430	6,947	17,435	15,226	20,246	21,217	14,374	31,350	215.3
Percentage share	34.4	30.6	18.6	20.1	36.4	31.5	32.0	27.9	42.0	51.0	32.4
Total	28,943	32,156	29,196	34,636	47,935	48,411	63,199	76,028	34,204	61,490	112.5

Source: Kenya National Bureau of Statistics (2015), Economic Survey

5-8 As noted above, the disaggregation of devolved budgets for comparison across sectors and counties is complicated, as shown in Table 5.1. However, a recent analysis based on 44 counties for which disaggregated data was available suggests that the health share of county spending is about 40 percent, compared to 14 percent for education. Beyond sectoral allocations, an equally important concern is what the money is actually spent on. There is evidence that county governments have invested – disproportionately, and even injudiciously,[53] for some analysts – in ambulances – leased or purchased outright – at the expense of other inputs.[54] Further analysis of budgets is undertaken in the following sections.

Trends in the Distribution of Health Facilities[55]

5-9 Table 5.3 presents the regional distribution of aggregate pre-devolution health facilities (dispensaries, health centres and hospitals) between 2008 and 2012. The data illustrate the inequities in distribution due to past policies that based facility availability on local communities' capacities to construct the same, which devolution initiatives should attempt to redress. Overall, aggregate facilities experienced a 35 percent change in numbers to 8,375 in 2012, the regional changes varying from 20 percent in Central and Coast provinces to 64 percent in Eastern Province.

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[53] Investment in ambulances suggests prioritization of facility-based emergency care, rather than home- or community-based preventive and promotive care.

[54] See 'Leasing of Ambulances by County Governments', at http://www.kenyaredcross.org/PDF/ambulancepressrelease.pdf Also see http://www.kenyaredcross.org/index.php/health-social-servicesboth accessed on 10-04-2016.

[55] The need exists for government ministries to officially map the distribution of service delivery under the Provincial Administration domains of the old Constitution to the county boundaries of Constitution (2010). Such an exercise would enable an accurate review of trend data between the two constitutional dispensations.

5-10 The inequalities in facility distribution are evident in the table below where, on average, Rift Valley had 26 per cent of all facilities for a 26 percent national population share, but North Eastern had 3.5 per cent of facilities for a 6 percent population share, while Western had 6 per cent against an 11 per cent population share. Inequity is further illustrated by comparative levels of access. While the Central region had 3,298 people per facility, the number stood above 9,000 per facility for North Eastern and Western provinces.

Table 5.3: Trends in health facilities in Kenya's regions

	2008	2009	2010	2011	2012	Average period facilities	Province population	Population per facility	Percentage share of...	
									Average period facilities	Total national population
Nairobi	387	406	423	505	562	457	3,138,369	6,873	6.3	8.1
Central	1,199	1,251	1,345	1,413	1,438	1,329	4,383,743	3,298	18.3	11.4
Coast	723	770	754	852	873	794	3,325,307	4,186	10.9	8.6
Eastern	942	1,106	1,256	1,441	1,548	1,259	5,668,123	4,504	17.3	14.7
North Eastern	198	232	264	278	291	253	2,310,757	9,148	3.5	6.0
Nyanza	716	773	745	932	965	826	5,442,711	6,588	11.4	14.1
Rift Valley	1,648	1,732	1,876	2,076	2,166	1,900	10,006,805	5,268	26.1	25.9
Western	377	426	457	509	532	460	4,34,282	9,418	6.3	11.2
Total	**6,190**	**6,696**	**7,111**	**8,006**	**8,375**	**7,276**	**38,610,097**	**5,307**	**100**	**100**

5-11 Table 5.4 shows that the total number of registered facilities as at 2013 was 9,249, up from 8,375 in 2012. The numbers show the dominance of public health facilities at 48 per cent of the total. However, the numbers also show the significance of the non-government sector's 'for-profit' and 'not-for-profit' service providers. The for-profit private institutions stride the spectrum from private clinics to large hospitals. The not-for-profit institutions are primarily the faith-based organizations (11%) and health sector NGOs (3%).

Table 5.4: Ownership of health facilities, 2013

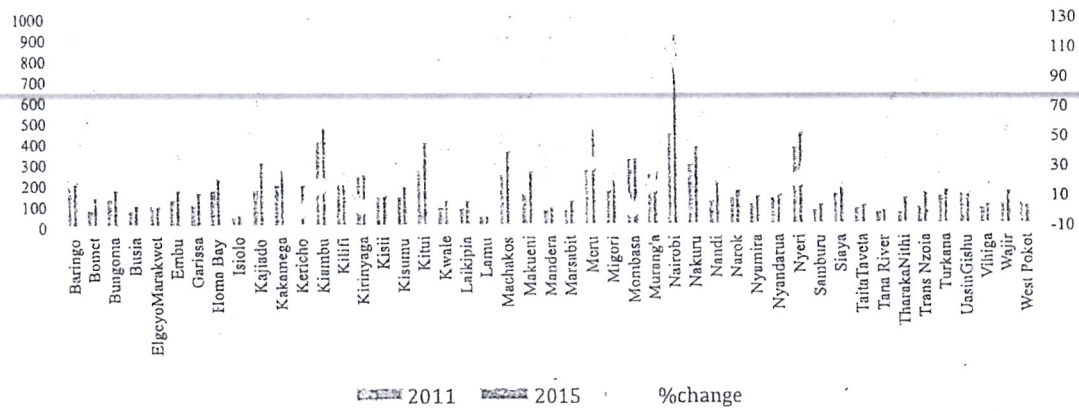
Owner	Numbers	Percent share
Ministry of Health	3,965	42.9
Other public institutions	438	4.7
Faith-based organisations	1,053	11.4
Private institutions and private practice	3,500	37.8
Non-Governmental Organisations	293	3.2
Totals	9,249	100.0

Source: Kenya National Bureau of Statistics (2015), Economic Survey

5-12 The Ministry of Health is currently developing an all-facility database that can help in tracking changes in the counties. However, Figure 5.1 shows the available data capturing

changes in county health facilities between 2011 and 2015. The raw data on which the figure is based show that facilities increased by about 35 percent during the era of Constitution (2010), but better data is required to distinguish the source of funding for the expansion.[56] The Ministry has had facility norms that have been widely ignored over the years.[57] As one would expect given unequal starting positions, and differing priorities, the changes in the numbers of facilities differed widely across the counties.

Figure 5.1: County distribution of aggregate health facilities, 2011 and 2015



Source: Ministry of Health, available at http://www.ehealth.or.ke/facilities/

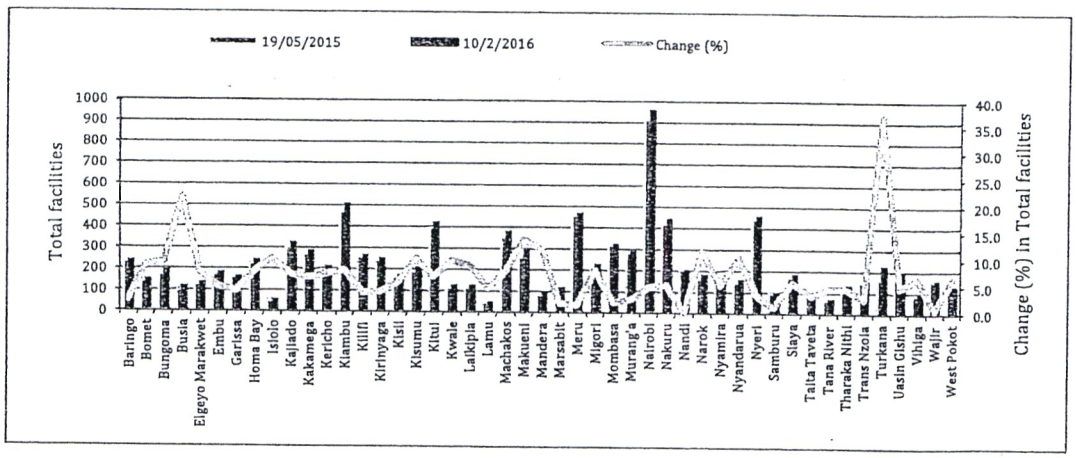
5-13 Figure 5.2 presents the absolute and percentage change in facilities between May 2015 and February 2016, based on the same data source as Figure 5.1. Overall, the change in facility numbers in that 7-month period is modest as expected. However, Turkana County now shows a sizeable increase in facility numbers, which translates to a change of about 37 percent. Busia also has a sizeable change of about 20 percent while Nandi has no change at all. It is notable that Turkana and Busia counties are in regions that had lowest numbers of health facilities as well as lowest accessibility. There has been a substantial increase in facilities and access into the devolution years. Given the Constitution's transfer of health to the counties, Turkana and Busia must now focus on redressing the inequities of Table 5.3, but need to rely heavily on ministry policy guidance, such as on personnel and facility norms.[58]

[56] For example, county governments may simply be operationalizing the many idle facilities already build by community *harambee*, Local Authority Trust Funds or Constituency Development Funds.

[57] The respective catchment populations for dispensaries, health centres and hospitals are 10,000, 30,000 and over 150,000, respectively. The disregard for these norms has been driven by the basis of facility expansion on community means.

[58] County government priorities often reflect a weak understanding of *cost-effective* health care delivery. For example, Figures 5.2 and 5.3 show some facility expansion for Kakamega and Vihiga counties, which have however invested heavily in leased Red Cross ambulances.

Figure 5.2: County facility numbers, May 2015 to February 2016



Source: Ministry of Health, available at http://www.ehealth.or.ke/facilities/The Distribution of Health Personnel

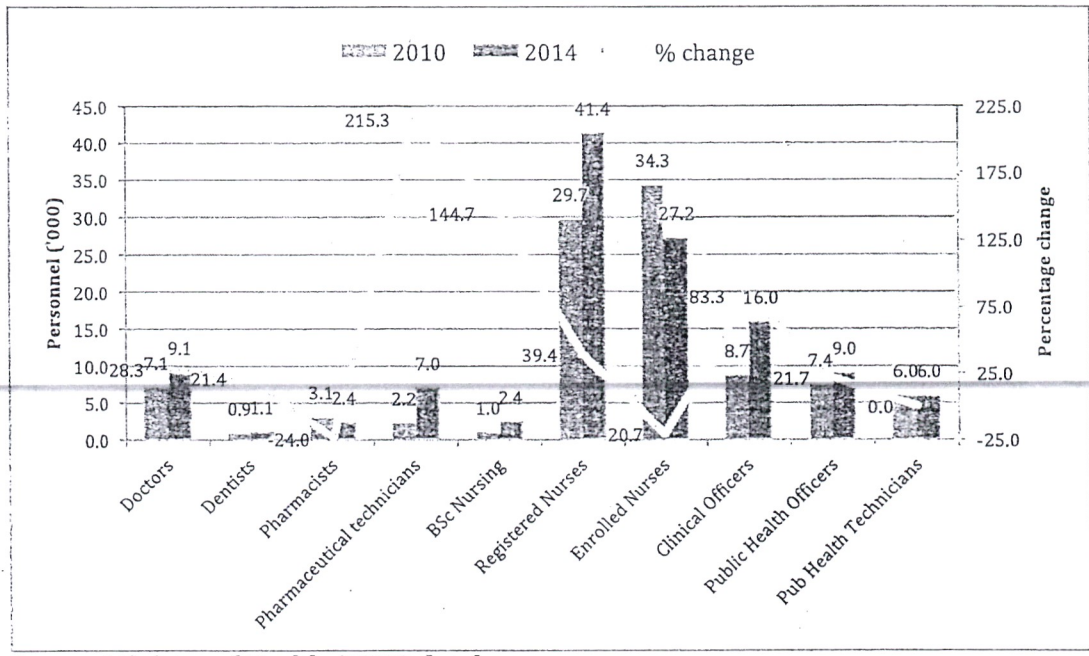
5-14 The distribution of government and non-government personnel by category across the regions is also an important concern, and reflects gross inequalities at various levels. Data from the government's *Economic Survey 2015* reports a total 58,532 health personnel in the country, 82 per cent of whom are in the government sector. Across the regions, Nairobi and Rift Valley alone account for respective 14 per cent and 22 per cent shares of all personnel compared to their respective 8 per cent and 26 per cent shares of the national population. However, while the government/non-government distribution for Nairobi is equal, the government accounts for 80 per cent of Rift Valley's health personnel. North Eastern region's share of aggregate personnel is a modest 2 per cent compared to its 6 per cent share of the national population.

5-15 For the country's 721 consultants, the public sector and Nairobi, respectively, accounts for 66 per cent and 43 per cent of them. Of the 3,344 BSc Nursing graduates, the government sector and Nairobi, respectively, account for 62 per cent and 65 per cent of the group. Of 2,721 Clinical Officers, 80 per cent are in government service, and 29 per cent work in Rift Valley while Nairobi accounts for 11 per cent. This certainly implies inequalities in the ratio of personnel to population in the different counties.[59]

5-16 While *Economic Survey* data lists some 20-odd cadres of medical personnel, Figure 5.3 looks at the changes in the numbers of 10 cadres during the 2010 to 2014 life of the new Constitution. The most outstanding feature of the data is the respective 24 per cent and 21 per cent decline in Pharmacist and Enrolled Nurse numbers. Conversely, the greatest gain was among the Pharmaceutical Technicians, and Registered Nurses and Clinical Officers also increased considerably.

[59] Some of the disparities are the result of history. 'Richer' regions have built more *harambee* (self-help) financed facilities, which the Ministry has staffed.

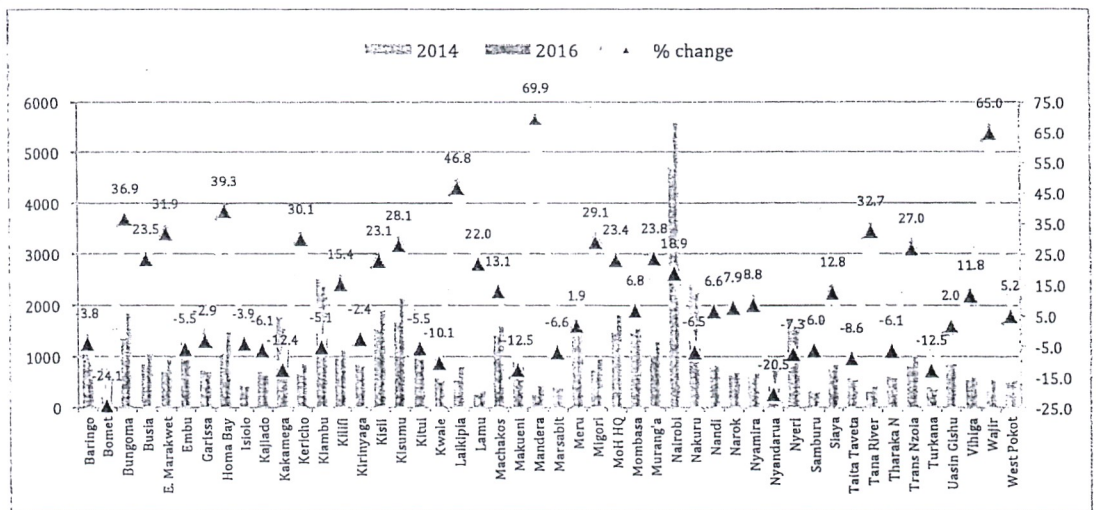
Figure 5.3: Change in employment by health cadres, 2010 to 2014



Source: Ministry of Health, iHRIS database

5-17 A review of the changes in aggregate county health staff is presented in Figure 5.4, with an overall increase in staff of 4,417. The counties whose staff numbers reduced over the period numbered 19, ranging from Isiolo's reduction of 17 to Kakamega's reduction of 220 personnel. Of the counties whose staff numbers increased, the range was from Uasin Gishu's 17 to Nairobi's 887. Given inequalities across the counties, the percentage changes were also quite remarkable. Mandera (70%) and Wajir (65%) had the highest growths, while Bomet (-24%) and Nyandarua (-20%) experienced the highest decline rates.

Figure 5.4: Change in aggregate health staff by county, 2010 to 2014

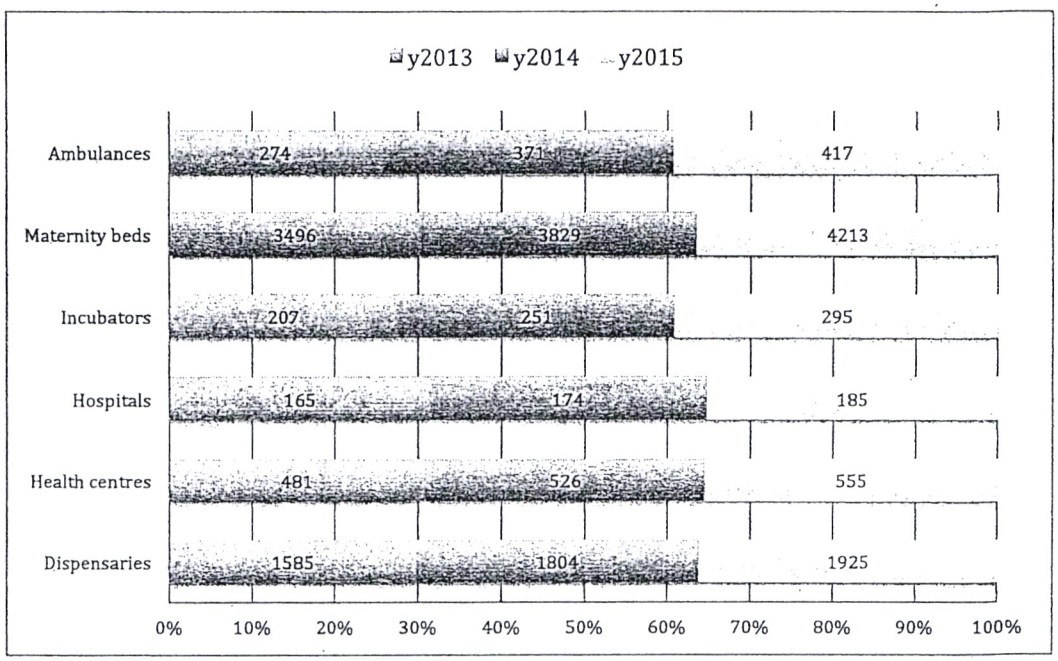


Source: Ministry of Health, iHRIS database

5-18 A review of health spending by counties shows an increase since 2013. Among the objectives of devolved government was to enhance access to basic services, especially in hitherto marginalized areas of the country. Mandera County, for instance, has had the first delivery by caesarean section in 50 years after independence. It has also significantly increased its health workforce, with nurse numbers growing from 51 to 175, representing a 243 percent change. Indeed, Figure 5.4 illustrates both Mandera's paucity of health staff, and its lead in staff expansion between 2010 and 2014.

5-19 Figure 5.5 shows considerable expansion in selected health sector resources between 2013 and 2015. While action on a decision to increase the number of ambulances, beds and incubators can be effected within the year of the decision,[60]this is not the case with facilities that take a number of years to construct and equip. Thus, construction of the facilities operationalised during Figure 5.5's fiscal years 2013 to 2015could have commenced several years before.[61] However, the close of the review period saw a doubling of ambulances, while incubators grew by 40 percent. Expansion in dispensaries (22%) exceeded that in health centres (15%) and hospitals (12%).

Figure 5.5: Expansion in selected county health service resources, 2013 to 2015



Source: Council of Governors, rapid assessment of county government performance (2015)

5-20 One of the most far-reaching health sector reforms since the promulgation of the Constitution 2010 was the June 2013 launch of the Free Maternal Services (FMS) programme, through which the government reimburses Ksh 2,500 to dispensaries and health centres, and Ksh5,000 to hospitals for each delivery undertaken.[62] Some data from

[60] Section 26 (3) (a) of the Public Procurement and Disposal Act requires that all procurement is drawn from an annual plan and must have an approved budget.

[61] Additionally, many county governments have simply operationalized Constituency Development Fund-built facilities that had been idle. See Nation Team, Dispensaries lying idle countrywide for lack of staff, tools and medicine. 2 June 2010, available at http://medicalkenya.co.ke/2010/06/dispensaries-lying-idle-countrywide-for-lack-of-staff-tools-and-medicine/ Accessed 20-04-2016.

[62] Ministry of Health (2015), Status on Implementation of Free Maternal Services (FMS) Programme in the Devolved Health System in Kenya: A Comprehensive Assessment Report, January 2015.

a 25-county Ministry of Health review of the programme are presented in Table 5.5. The data show that total deliveries rose 113 percent during the 2013 year FMS launch compared to 23 percent during the previous year. While normal deliveries share of total deliveries, and the share of caesareans remained much the same, it is significant that the shares of live births and babies discharged alive both rose. Meanwhile, *institutional* maternal mortality rate (MMR) halved to 124 in the three year period in which total deliveries rose by 160 percent.[63] Given a nationwide MMR of 372, the institutional rate of 124 underscores the need to strengthen the campaign for facility-based deliveries.

Table 5.5: Trends in maternity performance

		2011/12	2012/13	2013/14
Total deliveries		**328,569**	**699,615**	**851,946**
	...of which....			
	Percent share of normal deliveries	83	85	85
	Percent share of caesarians	13	13	12
	Percent share of live births	93.8	96.0	95.4
	Percent share of still births	7.3	4.4	4.0
	Percent share of pre-term/premature babies	3.3	2.6	2.8
	Percent share of babies discharged alive	91.9	94.4	94.8
	Percent share of neonatal deaths (in first 28 days of life)	1.6	1.2	1.3
Institutional Maternal Mortality Rate		215	136	124

Source: Ministry of Health (2015)

5-21 Table 5.5 points to great gains in maternal and child survival during the life of the FMS programme. However, 28 percent of the Ministry of Health's study respondents reported paying for various services, and 24 percent of facilities had not received reimbursements between January and June 2014. The respondents of another FMS study that focused on the Rift Valley Provincial Hospital pointed to many operational bottlenecks requiring immediate attention, including inadequate supplies (86%), inadequate funding (38%), staff shortage (92%), weakly motivated health workers (62%), overwhelming workload (89%) and abuse of services by clients (32%).[64]

Citizen Perceptions on Health Sector Performance

5-22 In the survey undertaken for this report, citizens perceive better working health sector institutions under devolution compared to the period before the reform, as shown in Table 5.6. Whereas in the pre-devolution era (before 2013), only 39 per cent of respondents perceived doctors to be 'always available' or just 'available', this perception rose to 62 per cent into the devolution era. For clinical officers, the change was from 42 percent to 66 per cent, while for nurses, it was from 54 percent to 74 per cent. While rural respondents perceived a greater availability of doctors than urban respondents before devolution, perceptions tallied across the divide into the devolution era. However, other data show that there were significant differences in perceptions across the regions; for example, perceived availability of nurses in North Eastern stood at 27 percent, compared to 40 percent for Nyanza, Western and Eastern regions.

[63]Note that nationwide MMR stands at 372.

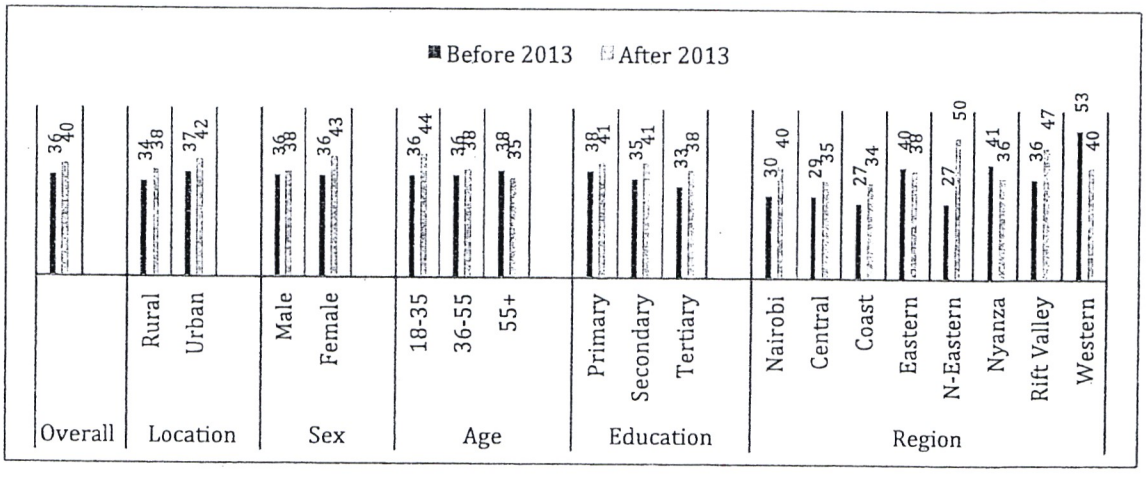
[64]See Wamalwa, E.W. (2015), Implementation challenges of free maternity services policy in Kenya: The health workers' perspective.*The Pan African Medical Journal*.2015;22:375.

Table 5.6: Comparing perceived availability of health personnel before devolution and into the devolution era

	Doctors		Clinical officers		Nurses	
	Before 2013	Since 2013	Before 2013	Since 2013	Before 2013	Since 2013
Always available (%)	5	12	5	12	10	19
Available (%)	34	50	37	54	44	55
Rarely available (%)	43	22	38	18	32	14
Never available (%)	9	7	8	6	5	3

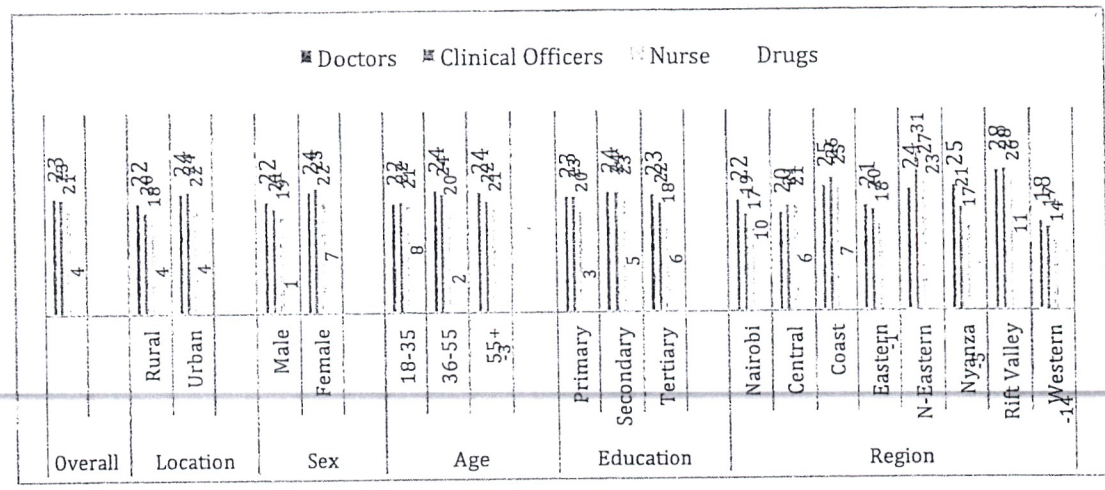
5-23 People's views on the availability of drugs have also improved into the devolution era, from 36 percent to 40 percent, as shown in Figure 5.6. The improvement was marginally greater for urban respondents and for female respondents. The greatest perceived improvement across the regions was North Eastern's 23 percent change, while a 13 percent decline was recorded for Western region.

Figure 5.6: Citizens' rating of the availability of drugs before and during the devolution era



5-25 Figure 5.7 summarizes the overall improvements in performance for doctors, clinical officers, nurses and drugs. Improvement was greatest among doctors, followed by clinical officers and nurses, and drugs were a very distant fourth. However, while drugs supplies improved by a large 23 percent for North Eastern, the change was negative for Eastern (-1%), Nyanza (-5%) and Western (-14%).

Figure 5.7: Overall performance for medical personnel and drugs



Education Sector

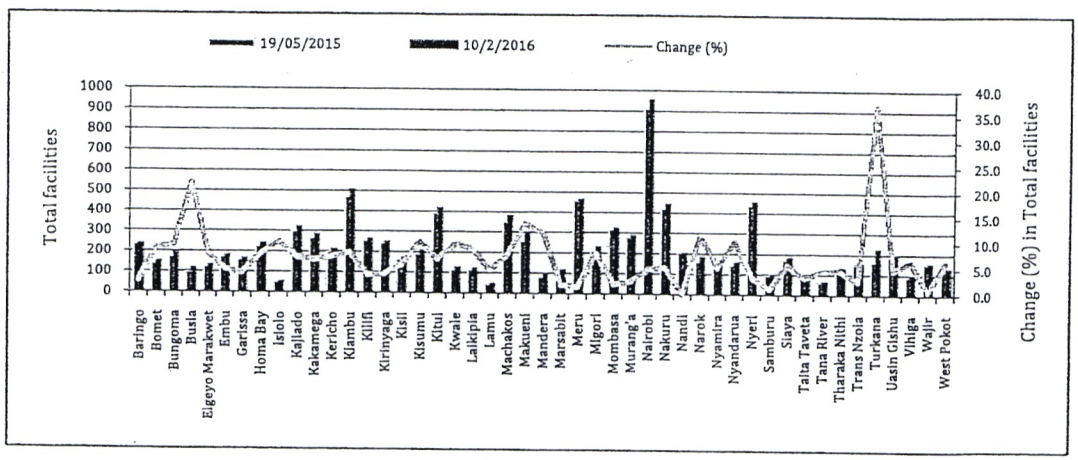
5-26 The constitutional changes since 2010 have redistributed education sector responsibilities between the two levels of government, Teachers Service Commission, and other sector institutions. The Constitution retains most education activities for the National Government, with county governments only allocated Pre-primary Education and Village Polytechnics. Important strides have been made over realization of the goals of the education sector, such as a renewed attention to Early Childhood Education and Development (ECDE), and improved investments in the realization of policy initiatives such as the Free Primary Education (FPE) and Free Day Secondary Education (FDSE) programmes. The rest of this section reviews education sector spending before considering sector outputs.

Education sector budgetary allocations

5-27 Table 5.7 shows nominal recurrent, development and total budgetary allocations to the education sector between 2005/06 and 2014/15. The change in the total budget in the five FYs between 2005/06 and the 2009/10 close of the old constitutional order was 67 percent, with the total budget increasing by 38 percent into the first years under the new Constitution. During the five years of the new Constitution, the change is a much larger 89 percent, suggesting greater commitment to the sector. The recurrent share of total spending has remained dominant, averaging about 90 percent for the whole review period. However, the development share has remained above 10 percent since 2010, but with a sharp initial drop in 2013/14 when some resources were directed to county governments. Despite the increment during the period, development budget's share remains well below the PFM Act's provision that at least 30 percent of the national and county budgets be dedicated to development spending in the medium term.[65]

[65] See Section 15 (2)(a) of the PFM Act. However, the failure of education's comparatively large share of the national budget to tend towards that 30 percent development share will likely undermine national attainment of the target.

Figure 5.2: County facility numbers, May 2015 to February 2016



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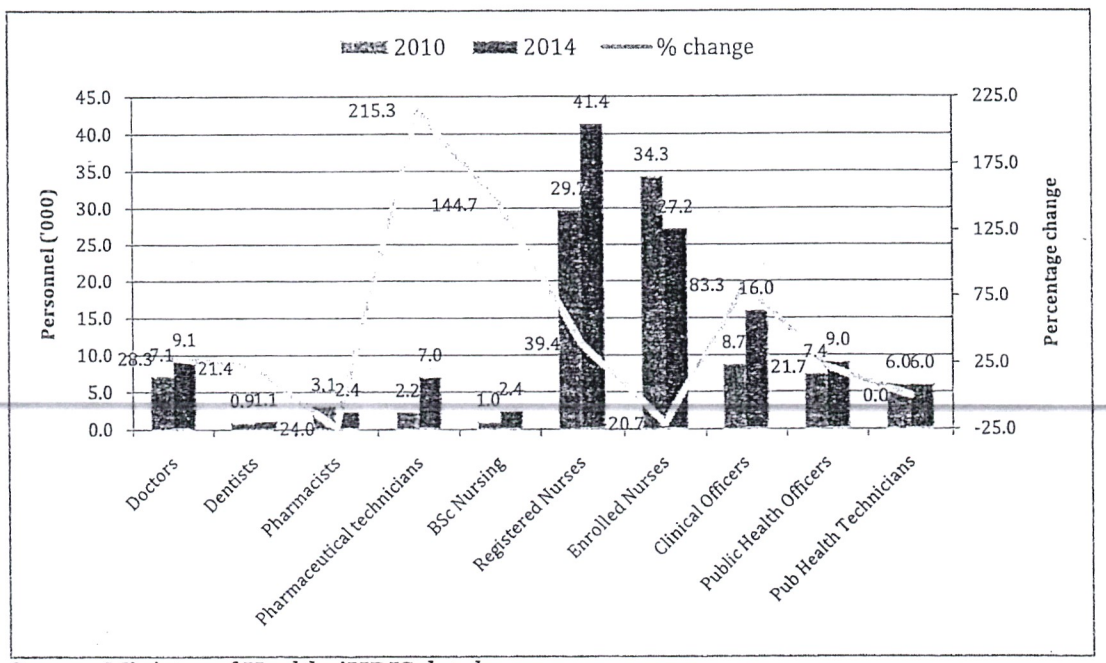

Source: Ministry of Health, iHRIS database

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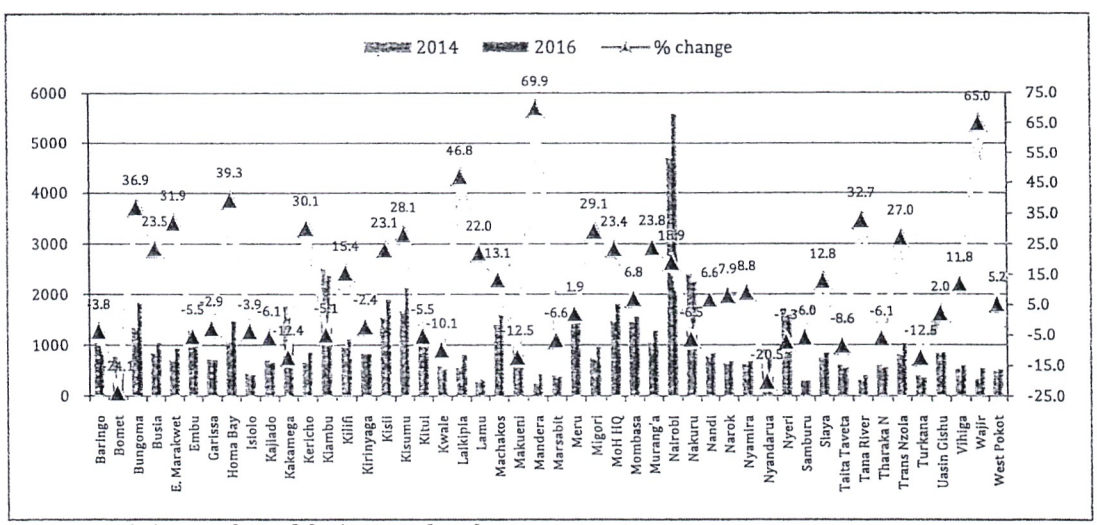

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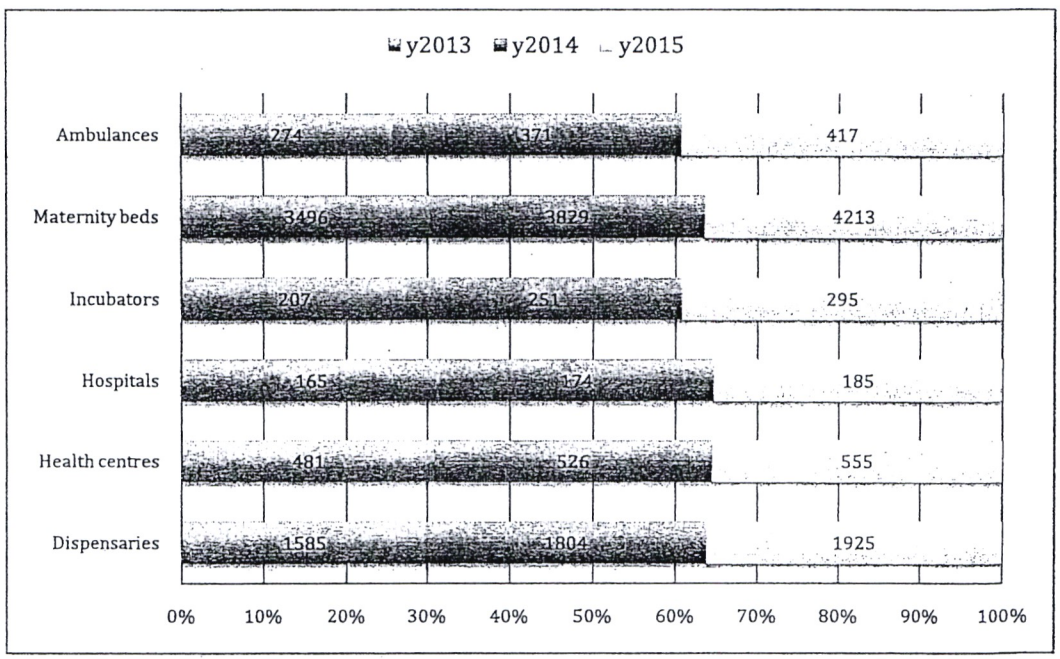
5-19 Figure 5.5 shows considerable expansion in selected health sector resources between 2013 and 2015. While action on a decision to increase the number of ambulances, beds and incubators can be effected within the year of the decision,[60]this is not the case with facilities that take a number of years to construct and equip. Thus, construction of the facilities operationalised during Figure 5.5's fiscal years 2013 to 2015could have commenced several years before.[61] However, the close of the review period saw a doubling of ambulances, while incubators grew by 40 percent. Expansion in dispensaries (22%) exceeded that in health centres (15%) and hospitals (12%).

Figure 5.5: Expansion in selected county health service resources, 2013 to 2015



Source: Council of Governors, rapid assessment of county government performance (2015)

5-20 One of the most far-reaching health sector reforms since the promulgation of the Constitution 2010 was the June 2013 launch of the Free Maternal Services (FMS) programme, through which the government reimburses Ksh 2,500 to dispensaries and health centres, and Ksh5,000 to hospitals for each delivery undertaken.[62] Some data from

[60] Section 26 (3) (a) of the Public Procurement and Disposal Act requires that all procurement is drawn from an annual plan and must have an approved budget.

[61] Additionally, many county governments have simply operationalized Constituency Development Fund-built facilities that had been idle. See Nation Team, Dispensaries lying idle countrywide for lack of staff, tools and medicine. 2 June 2010, available at http://medicalkenya.co.ke/2010/06/dispensaries-lying-idle-countrywide-for-lack-of-staff-tools-and-medicine/ Accessed 20-04-2016.

[62] Ministry of Health (2015), Status on Implementation of Free Maternal Services (FMS) Programme in the Devolved Health System in Kenya: A Comprehensive Assessment Report, January 2015.

a 25-county Ministry of Health review of the programme are presented in Table 5.5. The data show that total deliveries rose 113 percent during the 2013 year FMS launch compared to 23 percent during the previous year. While normal deliveries share of total deliveries, and the share of caesareans remained much the same, it is significant that the shares of live births and babies discharged alive both rose. Meanwhile, *institutional* maternal mortality rate (MMR) halved to 124 in the three year period in which total deliveries rose by 160 percent.[63] Given a nationwide MMR of 372, the institutional rate of 124 underscores the need to strengthen the campaign for facility-based deliveries.

Table 5.5: Trends in maternity performance

		2011/12	2012/13	2013/14
Total deliveries		328,569	699,615	851,946
	...of which....			
	Percent share of normal deliveries	83	85	85
	Percent share of caesarians	13	13	12
	Percent share of live births	93.8	96.0	95.4
	Percent share of still births	7.3	4.4	4.0
	Percent share of pre-term/premature babies	3.3	2.6	2.8
	Percent share of babies discharged alive	91.9	94.4	94.8
	Percent share of neonatal deaths (in first 28 days of life)	1.6	1.2	1.3
Institutional Maternal Mortality Rate		215	136	124

Source: Ministry of Health (2015)

5-21 Table 5.5 points to great gains in maternal and child survival during the life of the FMS programme. However, 28 percent of the Ministry of Health's study respondents reported paying for various services, and 24 percent of facilities had not received reimbursements between January and June 2014. The respondents of another FMS study that focused on the Rift Valley Provincial Hospital pointed to many operational bottlenecks requiring immediate attention, including inadequate supplies (86%), inadequate funding (38%), staff shortage (92%), weakly motivated health workers (62%), overwhelming workload (89%) and abuse of services by clients (32%).[64]

Citizen Perceptions on Health Sector Performance

5-22 In the survey undertaken for this report, citizens perceive better working health sector institutions under devolution compared to the period before the reform, as shown in Table 5.6. Whereas in the pre-devolution era (before 2013), only 39 per cent of respondents perceived doctors to be 'always available' or just 'available', this perception rose to 62 per cent into the devolution era. For clinical officers, the change was from 42 percent to 66 per cent, while for nurses, it was from 54 percent to 74 per cent. While rural respondents perceived a greater availability of doctors than urban respondents before devolution, perceptions tallied across the divide into the devolution era. However, other data show that there were significant differences in perceptions across the regions; for example, perceived availability of nurses in North Eastern stood at 27 percent, compared to 40 percent for Nyanza, Western and Eastern regions.

[63]Note that nationwide MMR stands at 372.

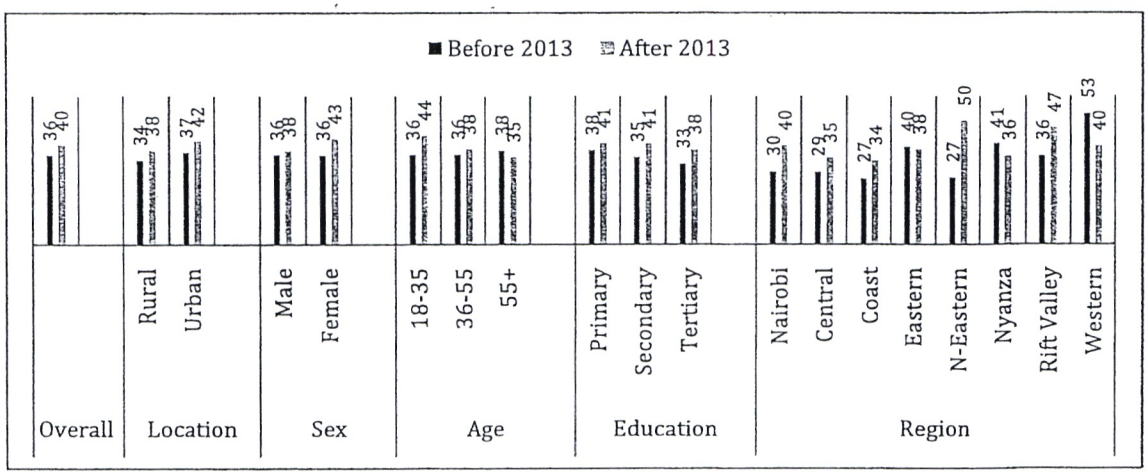
[64]See Wamalwa, E.W. (2015), Implementation challenges of free maternity services policy in Kenya: The health workers' perspective.*The Pan African Medical Journal*.2015;22:375.

Table 5.6: Comparing perceived availability of health personnel before devolution and into the devolution era

	Doctors		Clinical officers		Nurses	
	Before 2013	Since 2013	Before 2013	Since 2013	Before 2013	Since 2013
Always available (%)	5	12	5	12	10	19
Available (%)	34	50	37	54	44	55
Rarely available (%)	43	22	38	18	32	14
Never available (%)	9	7	8	6	5	3

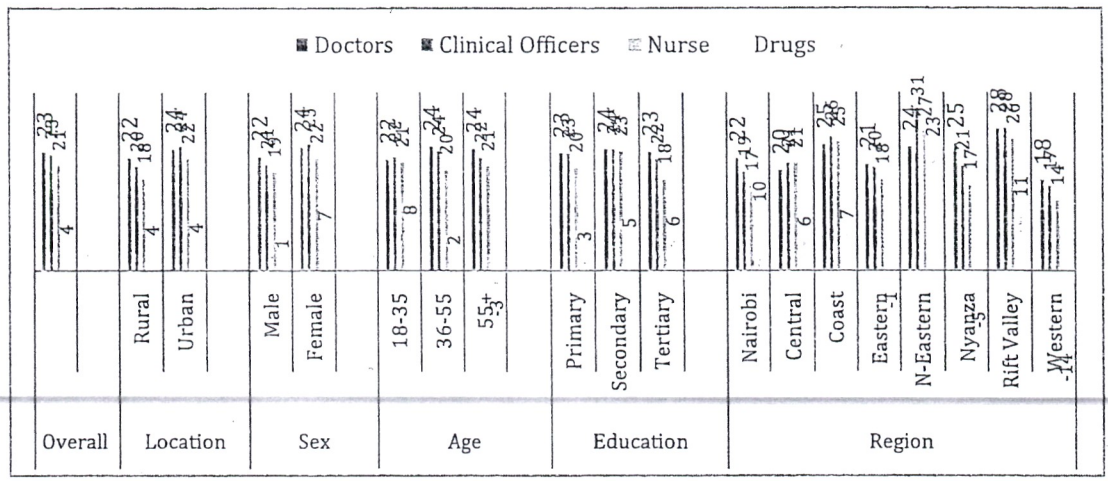
5-23 People's views on the availability of drugs have also improved into the devolution era, from 36 percent to 40 percent, as shown in Figure 5.6. The improvement was marginally greater for urban respondents and for female respondents. The greatest perceived improvement across the regions was North Eastern's 23 percent change, while a 13 percent decline was recorded for Western region.

Figure 5.6: Citizens' rating of the availability of drugs before and during the devolution era



5-25 Figure 5.7 summarizes the overall improvements in performance for doctors, clinical officers, nurses and drugs. Improvement was greatest among doctors, followed by clinical officers and nurses, and drugs were a very distant fourth. However, while drugs supplies improved by a large 23 percent for North Eastern, the change was negative for Eastern (-1%), Nyanza (-5%) and Western (-14%).

Figure 5.7: Overall performance for medical personnel and drugs



Education Sector

5-26 The constitutional changes since 2010 have redistributed education sector responsibilities between the two levels of government, Teachers Service Commission, and other sector institutions. The Constitution retains most education activities for the National Government, with county governments only allocated Pre-primary Education and Village Polytechnics. Important strides have been made over realization of the goals of the education sector, such as a renewed attention to Early Childhood Education and Development (ECDE), and improved investments in the realization of policy initiatives such as the Free Primary Education (FPE) and Free Day Secondary Education (FDSE) programmes. The rest of this section reviews education sector spending before considering sector outputs.

Education sector budgetary allocations

5-27 Table 5.7 shows nominal recurrent, development and total budgetary allocations to the education sector between 2005/06 and 2014/15. The change in the total budget in the five FYs between 2005/06 and the 2009/10 close of the old constitutional order was 67 percent, with the total budget increasing by 38 percent into the first years under the new Constitution. During the five years of the new Constitution, the change is a much larger 89 percent, suggesting greater commitment to the sector. The recurrent share of total spending has remained dominant, averaging about 90 percent for the whole review period. However, the development share has remained above 10 percent since 2010, but with a sharp initial drop in 2013/14 when some resources were directed to county governments. Despite the increment during the period, development budget's share remains well below the PFM Act's provision that at least 30 percent of the national and county budgets be dedicated to development spending in the medium term.[65]

[65] See Section 15 (2)(a) of the PFM Act. However, the failure of education's comparatively large share of the national budget to tend towards that 30 percent development share will likely undermine national attainment of the target.

Table 5.7: Education budget during the transition to devolution

	2005/06	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	Period change (%)
Recurrent (Ksh '000)	74,609	93,29	95,746	105,734	116,878	159,687	186,328	233,103	237,215	297,571	298.8
Percentage share	95.7	92.3	91.3	92.1	90.0	89.2	89.8	89.6	94.4	87.8	91.2
Development (Ksh '000)	3,330	7,836	9,095	9,021	13,049	19,313	21,132	27,020	13,998	41,508	1146.5
Percentage share	4.3	7.7	8.7	7.9	10.0	10.8	10.2	10.4	5.6	12.2	8.8
Total (Ksh '000)	77,939	101,132	104,841	114,755	129,927	179,000	207,460	260,123	251,213	339,079	335.1

Source: Kenya National Bureau of Statistics (2015), Economic Survey

5-28 Table 5.8 presents the nominal budgetary allocations to the sector and percentage shares of the various tiers of education, from 2005/06 to 2014/15. The total Ksh figure includes Ministry spending on administration at headquarters, which is however, omitted from the table's line items. The data show that the County level Pre-primary and Technical functions consistently received comparatively little resources, even if allocations are relative to service delivery costs and volumes. Allocations to primary and secondary education levels were erratic, respectively ending the review period with a surge and slump. University education also experienced a slump into the devolution era, but accounted for an increasingly large share of total spending.

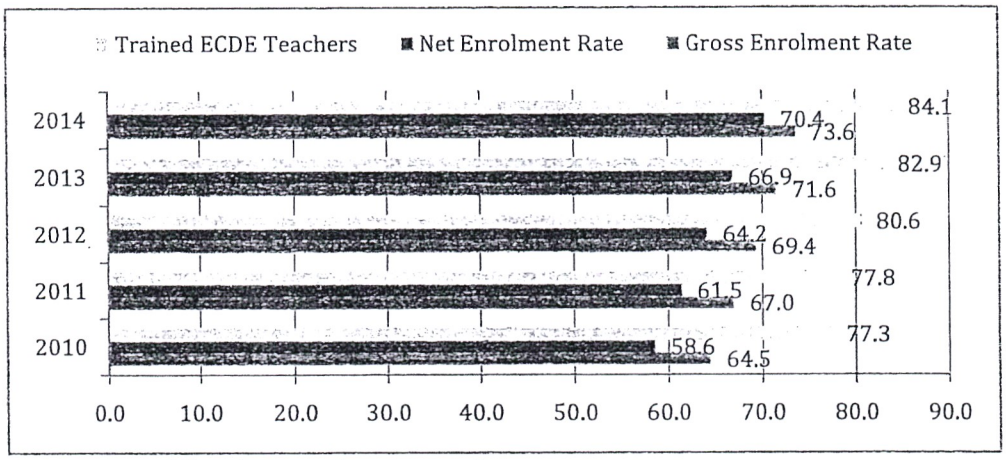
Table 5.8: Budgetary allocations (Ksh. million) and percentage shares by education level

	2005/06	2006/07	2007/08	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
Pre-primary	57	29	29	205	205	445	394	1,729	130	132
Primary	8,460	12,123	13,324	14,584	9,180	13,155	10,829	9,723	16,596	32,262
Secondary	3,064	15,168	8,175	15,372	16,204	3,026	19,198	25,076	22,803	14,957
Special	193	450	441	506	87	194	442	660	843	422
Teacher	322	257	207	920	260	5,599	8,275	1,686	608	992
Technical	1,476	2,697	2,891	5,227	3,958	3,022	7,138	7,633	2,536	7,783
University	12,373	14,821	11,635	14,867	19,904	20,596	34,381	50,388	36,880	136,609
Total	92,360	118,767	122,869	139,878	15,9214	179,000	207,459	260,122	251,213	339,080
Percent shares (%)										
Pre-primary	0.06	0.02	0.02	0.15	0.13	0.13	0.19	0.66	0.05	0.04
Primary	9.16	10.21	10.84	10.43	5.77	5.77	5.22	3.74	6.61	9.51
Secondary	3.32	12.77	6.65	10.99	10.18	10.18	9.25	9.64	9.08	4.41
Special	0.21	0.38	0.36	0.36	0.05	0.05	0.21	0.25	0.34	0.12
Teacher	0.35	0.22	0.17	0.66	0.16	0.16	3.99	0.65	0.24	0.29
Technical	1.60	2.27	2.35	3.74	2.49	2.49	3.44	2.93	1.01	2.30
University	13.40	12.48	9.47	10.63	12.50	12.50	16.57	19.37	14.68	40.29
Total	92,360	118,767	122,869	139,878	159,214	179,000	207,459	260,122	251,213	339,080

Source: Kenya National Bureau of Statistics (Various), Economic Survey

5-29 The Early Childhood Development Education (ECDE) enrolment rose from 1.7 million in 2008 to 2.7 by 2012, reflecting a rapid growth in the transition to the new Constitution. The county governments' oversight of ECDE has seen a consistent rise of facilities and resources in this sub-sector.[66] The number of children enrolling in ECDE centres across the country has increased by 812,225 since 2013,representing an increase of 47 percent for children who have access to ECDE.[67] Figure 5.8 shows the trends in the gross and net ECDE enrolment rates, which have both made considerable progress since 2010, but remain considerably below 100 percent.

Figure 5.8: ECDE enrolment rates and training of teachers, 2010 to 2014



Source: Republic of Kenya (2015: 113-4)

5-30 Counties have hired an additional 25,101 teachers, and 5,291 ECDE centres have been built, while another 235 have been rehabilitated.[68] The Ministry of Education, Science and Technology - MOEST (2014) shows that the overall total of teaches employed by county governments and the School Management Committee is 114,831 for ECDE. The pupil to teacher ratio in public ECDE centres stood at 1:31, while it stands at 1:21 in private schools. A concern is whether these burgeoning ECDE numbers can find places in primary schools.

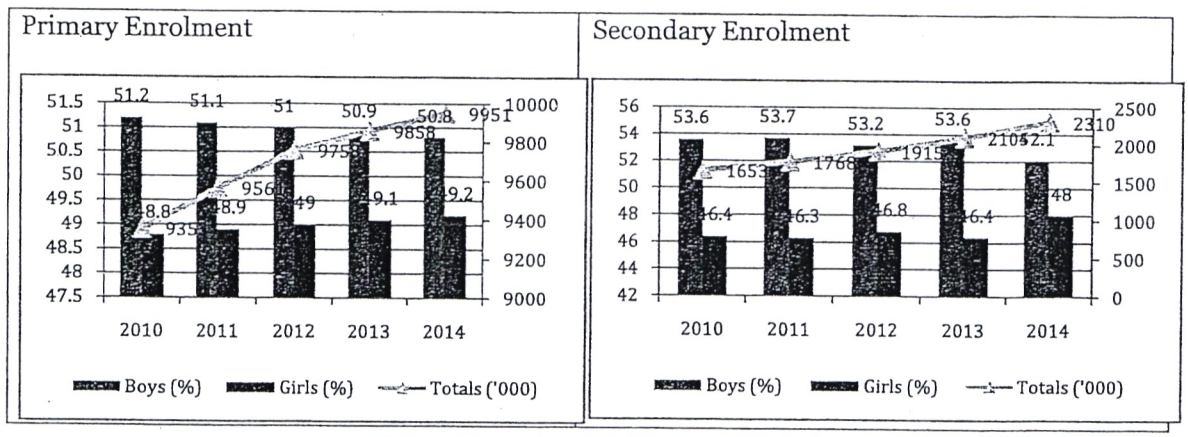
5-31 Figure 5.9 shows that both primary and secondary school enrolments rose consistently throughout the 2010-2014 transition into devolution. The enrolment gap between boys and girls at both levels also narrowed marginally. The levels of primary completion and of transition to secondary education, respectively, averaged 77 percent and 73 percent for the 2010 to 2014 period.

[66]Compared to the national allocation of Ksh 8 billion for 2014/15 (Table 5.8), the aggregate resources of the five counties with the highest allocations to education for the same year amounted to Ksh 6.7 billion. The dominance of development over recurrent allocations in several counties suggests infrastructure development: 90 percent of Turkana's Ksh1.5 billon education budget is set aside for development spending.

[67]Remarks by H.E. Kinuthia Mbugua on behalf of the Council of Governors during the official opening of The Second Deputy Governors' Leadership Conference. Available at http://cog.go.ke/index.php/newsmed/county-news/223-remarks-read-by-h-e-kinuthia-mbugua-during-the-official-opening-of-the-second-deputy-governors-leadership-conference Accessed 20-04-2016

[68] See preceding footnote.

Figure 5.9: Primary and secondary school enrolment, 2010 to 2014

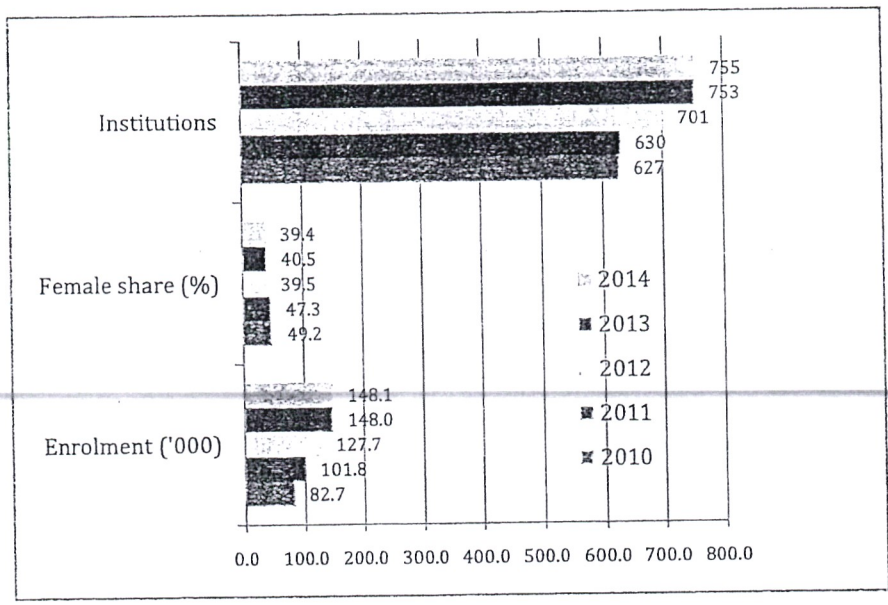


Source: Republic of Kenya (2015: 115-8)

5-32 Between 2010 and 2014, pre-primary teacher training colleges and primary teacher training colleges grew, respectively, by 19 and 34 to close at 140 and 267. Both college types were dominated by privately-owned institutions. The government-owned ones increased, respectively, by 5 and 3, in both cases remaining less than 20 percent of the total numbers.

5-33 There was a 20 percent growth in publicly-owned Technical, Vocational Education and Training (TVET) institutions from 627 to 755 as shown in Figure 5.10. Enrolment also rose consistently during the review period from 82,653 in 2010 to 148,142 in 2014. It is notable that the 2013 and 2014 enrolment levels were, respectively, 10.4 percent and 5.3 percent higher than the targets set by the Medium Term Plan II. These data include the Technical Universities of Kenya and Mombasa, as well as the Kisumu and Eldoret polytechnics whose aggregate enrolment ranged between 15,778 and 23,583, meaning the bulk of TVET enrolment is in technical training institutes, institutes of technology, and youth polytechnics. However, the data reflect a disturbing trend: the females' share of enrolment declined consistently from 49.2 percent in 2010 to 39.4 percent in 2014.

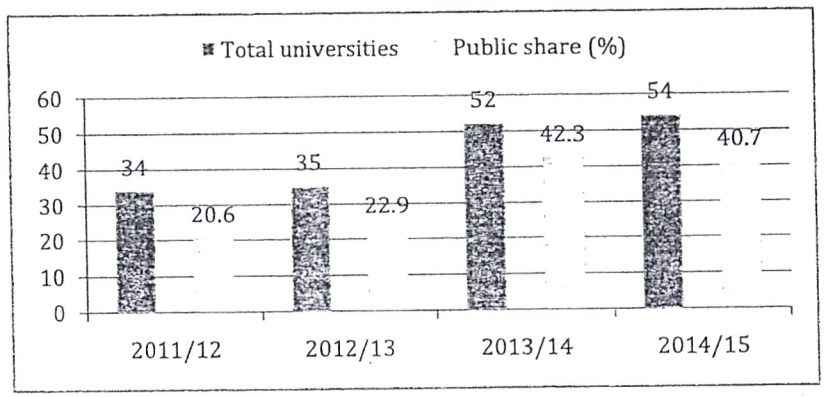
Figure 5.10: Trends in TVET enrolments



Source: Kenya National Bureau of Statistics (2015), Economic Survey

5-34 Despite completion and transition challenges after Form 4, demand for university education has driven growth in university institutions as reflected in Figure 5.11.The total number of universities grew by 54 percent during the reviewed period, in which the public university share of the total doubled after a remarkable surge in 2013/14, which was probably the result of granting university status to constituent colleges of the 8 public universities at the time, resulting in 22 public universities.

Figure 5.11: Expansion in private and public universities, 2011/12 to 2014/15

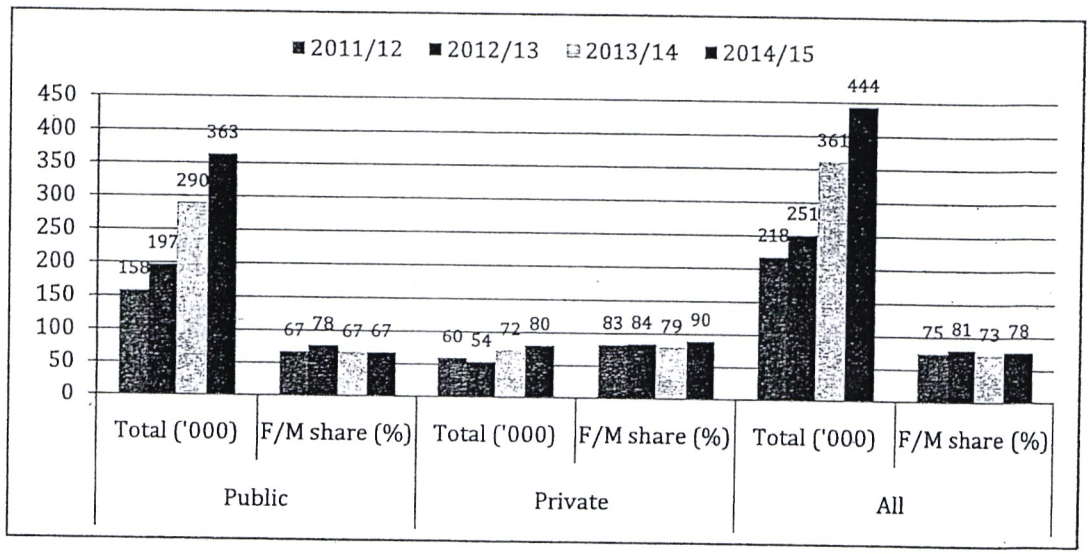


Source: Republic of Kenya (2015: 120)

5-35 Trends in private, public and total university enrolment from 2011/12 to 2014/15 are presented in Figure 5.12. Read together with Figure 5.11, the data suggest that public universities account for a rising share of total university students, from 72 percent in 2011/12 to 82 percent in 2014/15. The extent of comparative crowding would require an

analysis of departmental workloads against norms, which is beyond the scope of the current review. The data also reflect the male dominance of enrolment, which is marginally greater in the public universities, and erratic year on year.

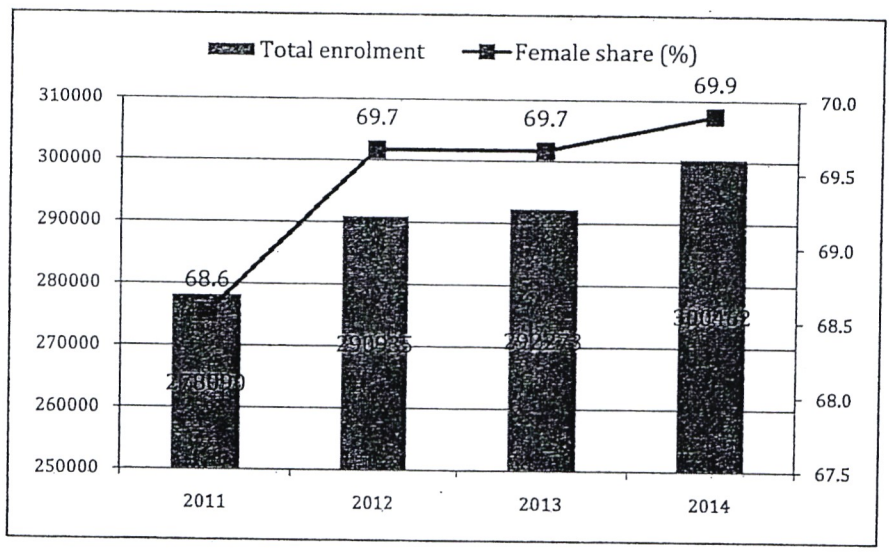
Figure 5.12: Public, private and total university enrolment by sex, 2011/12 to 2014/15



Source: Republic of Kenya (2015: 120)

5-36 Finally, adult education has made modest progress in the era of the new Constitution, with an 8 percent change that raises total enrolment from 278,090 in 2010 to 300,462 in 2014. Figure 5.13 shows that the most notable aspect of this sub-sector is its consistent domination by women.

Figure 5.13: Trends in adult education enrolment, 2010 to 2014



Source: Republic of Kenya (2015: 122)

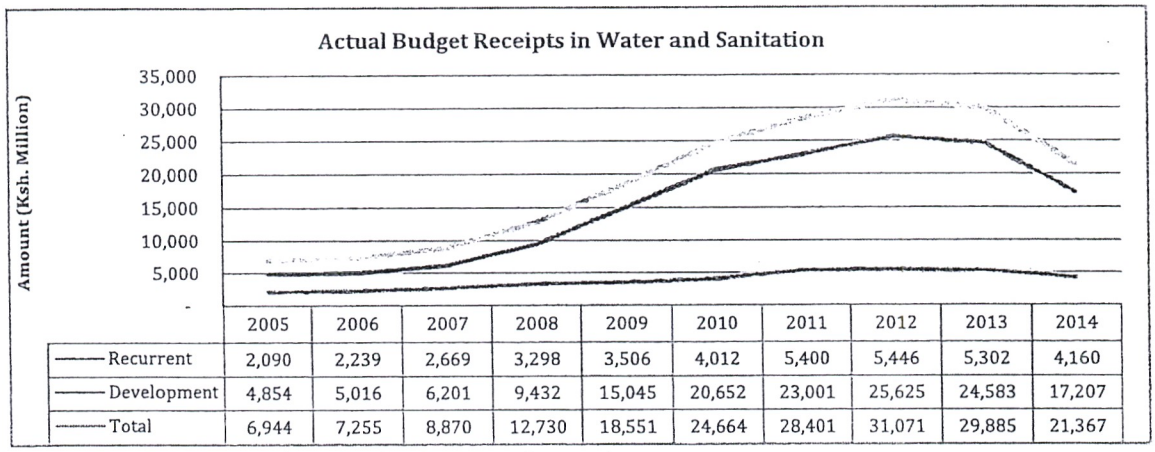
Water and Sanitation Sector

5-37 Under the Fourth Schedule of the Constitution, the National Government protects the environment and natural resources, provides water protection, secures sufficient residual water, and oversees hydraulic engineering and the safety of dams. In turn, county governments are responsible for water conservation (section 10), storm water management in built-up areas, and water and sanitation management (section 11).

5-38 The National Government has the additional role of developing policy and regulation for water resource management, while counties are responsible for implementing these policies. Various laws and policies regulate the water and sanitation sectors, and should be instrumental in transforming the water sector, as intended in the Constitution.[69]

5-39 The National Government's budget allocations to the water and sanitation sector shown in Figure 5.14 reflect rising resources since 2005,with a sharp increase between 2007 and 2012after which the resources fall to Ksh 21.4 billion in 2014. This implies that while the National Government budget allocation to the sector had continued growing in the early years of the new Constitution, the allocations have reduced since the advent of devolution, reflecting the transfer of some responsibilities to county governments. A notable feature of the budget resources is the domination of development spending since 2007, which suggests a large infrastructure expansion programme.

Figure 5.14: Actual budget resources for water and sanitation by national government



	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Recurrent	2,090	2,239	2,669	3,298	3,506	4,012	5,400	5,446	5,302	4,160
Development	4,854	5,016	6,201	9,432	15,045	20,652	23,001	25,625	24,583	17,207
Total	6,944	7,255	8,870	12,730	18,551	24,664	28,401	31,071	29,885	21,367

Source: Government of Kenya (2013, 2014 & 2015)

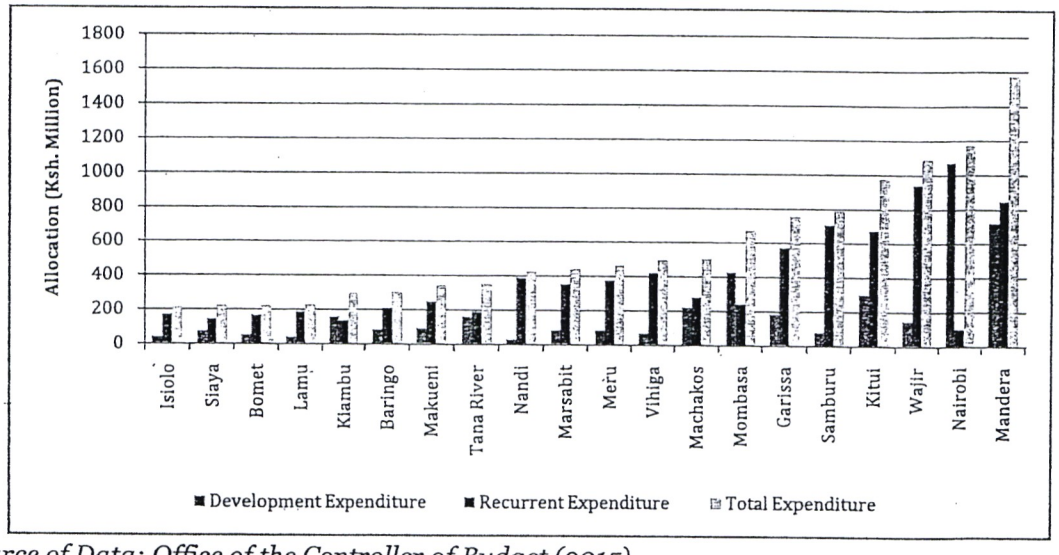
County Government Allocations

5-40 In 2014/2015 fiscal year, county governments allocated over Ksh14,366 billion to water and sanitation. Total spending on water and sanitation has grown consistently since 2007, with the amount for 2014/15 standing at Ksh 21.4 billion (Figure 5.14). The five counties allocating the highest absolute amounts to the sector were Mandera, Nairobi, Wajir, Kitui and Samburu, with the lowest allocation in the group being about Ksh 200 million, as shown in Figure 5.15. In contrast to the development spending focus of the National

[69]Key documents governing water management include Water Act of 2002; National Water Policy of 2012; County Government Act 2012; Urban Areas and Cities Act 2011; and Water Sector Strategic Plan (2012-2015). A progress review is carried in Reports on Water Sector Reforms (2002). Strategies for the sector include Integrated Water Resource Management; Sustainable Environment and Climate Resilience Mechanisms; and Productive Uses of Water by Adapting the Sector Wide Approach to Planning (SWAP).

Government (Figure 5.14), only 2 counties – the exclusively urban Nairobi and Mombasa counties – allocated a greater share of resources to development spending. Surprisingly, even water scarce counties such as Wajir, Samburu and Garissa allocated more to recurrent than development spending.

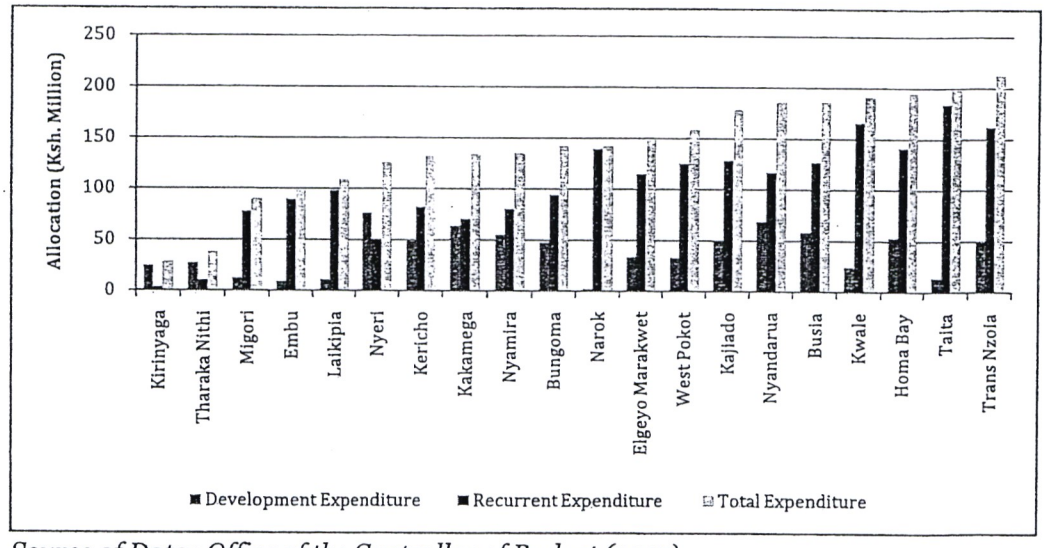
Figure5.15: Water and sanitation resources by the top 20 counties, 2014/15



Source of Data: Office of the Controller of Budget (2015)

5-41 Among the lowest allocations ranging between Ksh 25 million and Ksh 200 million were those of Kirinyaga, Tharaka Nithi, Migori, Embu and Laikipia, as reflected in Figure 5.16. Among these low allocation counties, recurrent allocations to manage existing services have been prioritized over development spending with which to invest in new operations, the exceptions being Kirinyaga, Tharaka Nithi and Nyeri.

Figure 5.16: Water and sanitation by counties - bottom 20 counties, 2014/15



Source of Data: Office of the Controller of Budget (2015)

5-42 National access to water and sanitation for 2014 is estimated at 53 percent and 69 percent, respectively, as shown in Table 5.9, which also provides various other sector performance indicators. While water coverage improved by 10 percent since 2010, sanitation managed a more impressive 25 percent change. Coverage by sewerage services is rated at 16 percent as at 2014. Water utilities have continued to lose over 40 percent of the water generated. The number of connections has been increasing, reaching 1.38 million by 2014, a 15 percent change during the era of the new Constitution. The sector employs over 9,000 people who are largely professionals in the water and sanitation sector, whose 2014 numbers are 17 percent higher than the 2010 level.

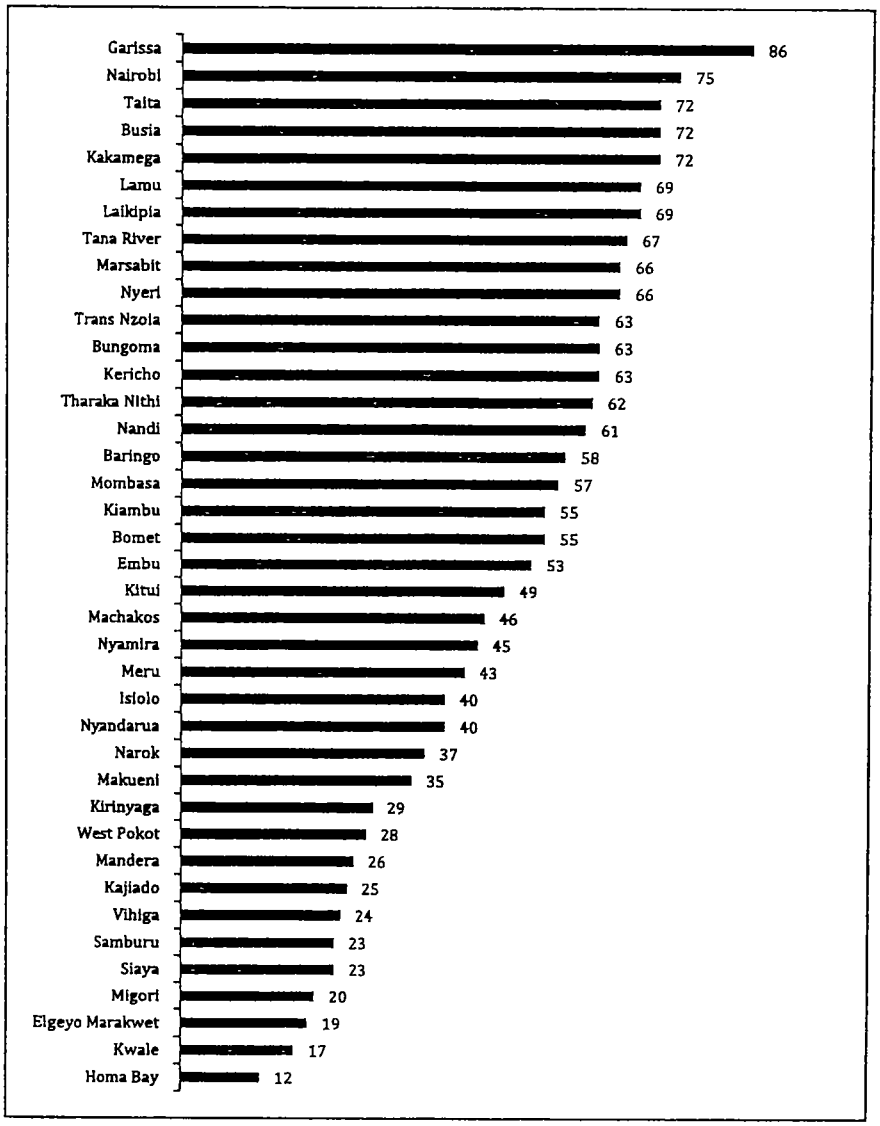
Table 5.9: Trends in key water management performance indicators, 2007 to 2014

Key Performance Indicators	2007	2008	2009	2010	2011	2012	2013	2014
Water coverage (%)	38	47	46	48	52	47	53	53
Sanitation coverage (%)	48	47	47	55	69	67	69	69
Sewerage coverage	-	-	-	15	19	21	17	16
Water Quality (Residual Chlorine) (%)	90	79	90	84	93	89	92	91
Non-revenue water (%)	45	47	49	45	51	54	43	42
Metering ratio (%)	86	82	83	82	74	80	87	89
Revenue collection efficiency (%)	80	86	83	82	87	86	85	93
O+M cost coverage (%)	132	133	97	109	107	112	113	100
Hours of supply	-	-	-	-	-	-	17	18
Staff productivity	-	-	-	-	7	7	7	7
Number of connections (million)			1.08	1.20	1.26	1.21	1.31	1.38
Production (000 m^3)	-	-	338	347	385	380	385	426
Turnover (Ksh billion)	-	-	7.25	9.6	12.2	13.1	15.3	15.7
Employment (staff)	-	-	6668	7808	7818	8435	8535	9104
Population in service area (million)	-	-	-	23.4	18.3	20.6	21.6	19.8
Data submission compliance (%)	47	59	62	87	96	99	99	92

Source: WASREB (2012, 2013, 2014 & 2015)

5-43 There is no trend data with which to assess county level water and sanitation progress over time. However, water coverage by water service providers (Water Utilities) shows that Garissa, Nairobi, Taita Taveta, Busia and Kakamega county utilities are the top 5 in terms of water coverage as shown in Figure 5.17. Conversely, Homa Bay, Kwale, Elgeyo Marakwet, Migori and Siaya counties have the bottom 5 utilities in terms of water coverage.

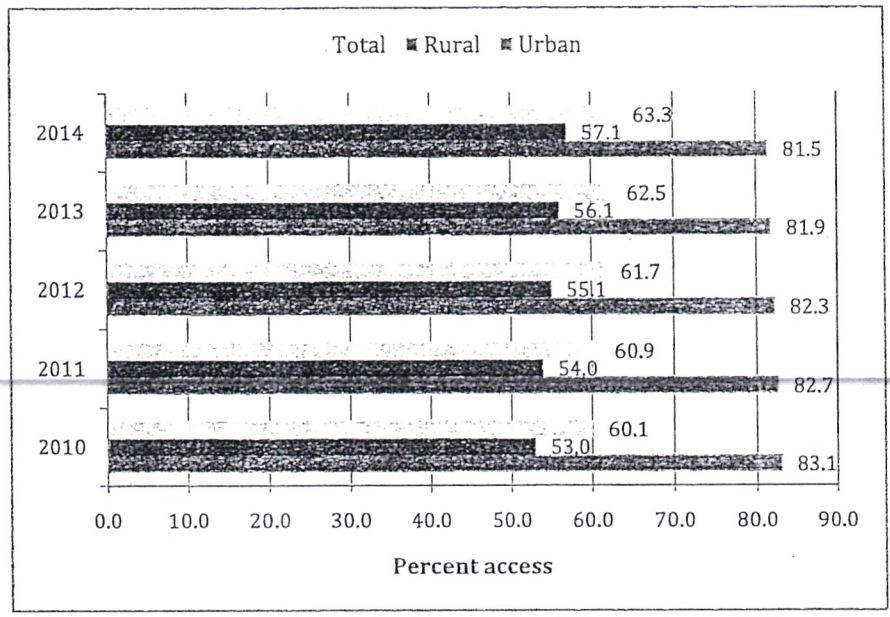
Figure 5.17: Percentage water coverage rates by county utilities



Source of data: WASREB (2014, 2015)

5-45 However, there is some trend data with which to evaluate regional progress in access to *improved* water sources – which is distinct from the water *coverage* data of Table 5.9. The data of Figure 5.18 shows that countrywide access to *improved* water sources has improved marginally during the era of the new Constitution, from a 60.1 percent coverage in 2010 to 63.3 percent in 2014. Given the growing aggregate water resources of Figure 5.14, this slow progress in access might reflect the focus on maintaining existing services rather than expanding outreach, suggested by the dominance of the recurrent budget in Figures 5.15 and 5.16. These data also show that urban access dominates rural access, but that urban access diminishes marginally as rural access grows by 4 percentage points.

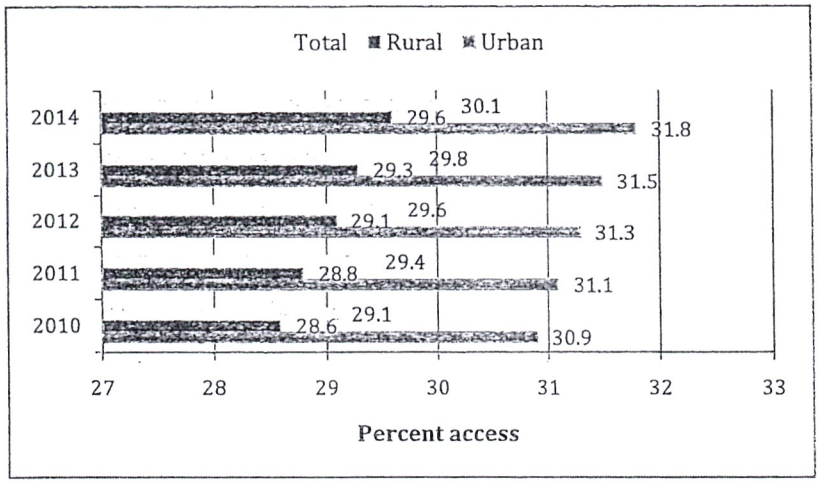
Figure 5.18: Rural, urban and total access to improved water sources, 2010 to 2014



Source: KIPPRA (2015: 128)[70]

5-46 Figure 5.19 provides data on access to *improved* sanitation, again as distinct from the sanitation *coverage* data of Table 5.9. National access improves marginally from 29.1 percent to 30.1 percent during 2010 to 2014. As one would expect, urban access was consistently greater than rural access, but both parameters improved only marginally during the review period, which again returns attention to the recurrent/development pattern of resource allocation.

Figure 5.19: Rural, urban and total access to improved sanitation facilities, 2010 to 2014

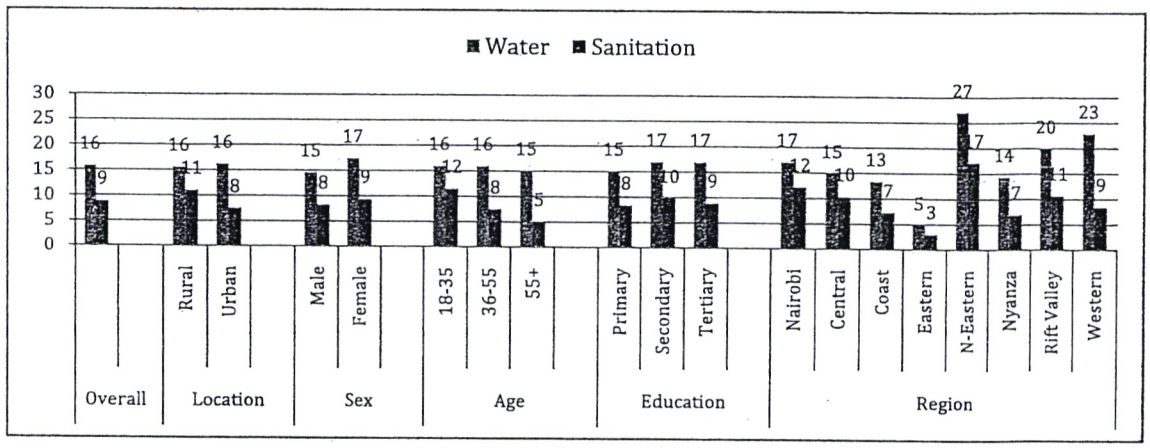


Source: KIPPRA (2015: 133)

[70]KIPPRA (2015), *Kenya Economic Report 2015: Empowering Youth through Decent and Productive Employment.* Nairobi: KIPPRA.

The survey undertaken for the current report explored perceptions on the status of water and sanitation services before and into devolution. Figure 5.20 reports the overall findings. Perceived improvement to water supply was 16 percent overall, compared to a 9 percent improvement to sanitation services. Perceived improvements to both water and sanitation were greatest in the North Eastern region, and lowest in Eastern region. Perceptions differed little on the basis of education attainments, but perceptions of improved sanitation reduced greatly with rising age. A smaller share of urban compared to rural respondents perceived improved sanitation.

Figure 5.20: Overall perceptions on improvements to water and sanitation services

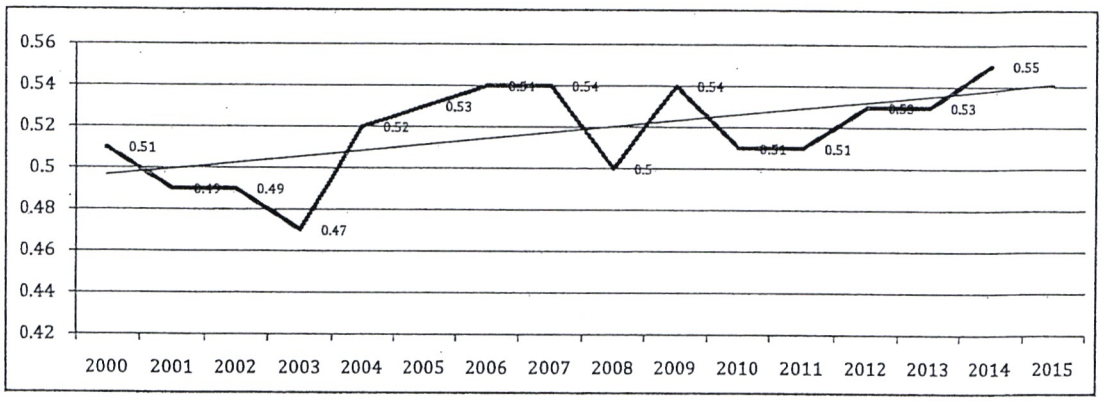


Human Development Index – Before and after Devolution

5-47 Most of the impacts of the expansion of basic services across the counties will only become evident in the medium to long term. Meanwhile, Kenya's HDI shows an improving trend since2010as shown in Figure 5.21. Kenya's HDI rose by 17 percent from 0.47 in 2003 (the lowest) to 0.548 in 2014. The average HDI for the period 2000-2014 was 0.517.

5-48 Low levels of HDI were recorded in 2002, 2003 and 2008; the HDI was above 0.50 for the other years. The low levels of HDI are attributable to poor economic performance during this period and the post-2007 election violence. Beginning 2012, the HDI has been on a steady growth from 0.525, 0.532 and 0.548 in 2012, 2013 and 2014, respectively.

Figure 5.21: Kenya HDI 2000-2015



Source: UNDP – Human Development Report (various issues)

5-49 Table 5.10 maps the performance of key components of HDI, namely: life expectancy, adult literacy, education enrolment and gender development indices for the period 2000-2015. Kenya has made significant progress in several socio-economic indicators, despite falling short of its Millennium Development Goals targets. Life Expectancy has been on a steady increase from 53 in 2000 to 61 in 2014.

Table 5.10: Human development Index 2000-2014

Indicator	Units	2000	2002	2004	2006	2008	2010	2012	2014
Human Development Index	Index	0.447	0.491	0.521	0.54	0.501	0.522	0.531	0.548
Life Expectancy	Years	53	53	54	56	58	60	61	62
Adult Literacy Rate	%	82.4	84.3	68.67	71.4	86.5	87	84	86
Education Gross Enrolment Index (primary, secondary, tertiary)	Index	51	53	60	60	64	63	61	66
Gender Related Development Index	Index	0.512	0.486	0.487	0.488	0.521	0.648	0.864	0.913
Poverty Index	%	37	37.8	34.6	30.8	30	30	29.2	28.5

Source: UNDP, World Bank (Economic Surveys, various)

5-50 Although Kenya is placed in the low human development category in the Human Development Report 2015, ranking 145th out of 188 countries, the country is close to medium human development threshold. For instance, the incidence of poverty declined from 53 percent in 1997 to 40 percent in 2014.Most indicators of human development show some important changes since 2013. Although this may not necessarily be attributable to implementation of the Constitution, it is worth underlining that improved implementation of devolution and, therefore, service delivery will lead to improved services for all.

5-51 Kenyans are already beginning to notice differences in the functions between the National and county governments. In the national survey, respondents were asked which level of government affected their lives most. The findings show that county governments have had more impact on the lives of citizens at the county level than the National Government as shown in Table 5.11 below.

Table 5.11: In your opinion, which level of government is positively affecting your life the most?

	Overall (%)	Urban (%)	Rural (%)
National government	32.0	35.0	31.0
County government	36.0	36.0	36.0
Both are the same	19.0	19.0	20.0
None of them	9.0	8.0	9.0
Refused to answer	0.1	-	0.2
Don't know	3.0	2.0	4.0
Total	100.0	100.0	100.0

5-52 Relatively more people feel the county government is affecting their lives than those who feel the same about the National Government, because the county governments are providing services at the local level. People are relating directly to the services that the county governments have offered in sectors such as health, education, water and improvement of local road networks.

5-53 There are more people in rural areas than in urban areas who think the county governments are impacting on their lives more. This is because delivery of services under the centralized government did not have as widespread impact as delivery of services by the county government.

5-54 This finding suggests that devolution is achieving one of the main objectives: to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya. As already argued in the chapter on devolution, there is evidence that devolution is gradually addressing the root causes of past grievances on distribution of national and local resources for development throughout the country by bringing services closer to people.

Conclusion and Recommendations

5-55 The aim of this chapter was to assess the effect or impact of public spending on the social sector. A major difficulty of attaining that objective is the varied maturation periods of social sector investments. Current outputs and outcomes might be the result of inputs made well beyond the period of interest. Secondly, some of the data necessary for the desired analysis is not readily available. Therefore, it is necessary to identify and collect appropriate data.

5-56 Provision of basic services has increased during the early period of devolution. The number of health facilities is expanding, and most counties have registered positive changes in the numbers and quality of services provided under the devolved system of government. But citizens suggest that while personnel has improved, drug supplies have not done as well.

5-57 Availability of medical personnel, including doctors and nurses, is generally noted to have improved after devolution. This is clearly addressing an important challenge in imbalances in development in line with the objects of devolution.

5-58 There are variations in how counties have provided basic services. This is expected given that they are beginning at different levels of development and, therefore, their prioritization will differ from one county government to another.

5-59 A major shortcoming in the health sector, however, is that there is a persisting high concentration of specialized medical personnel in Nairobi and other urban areas. There is need to review the existing staffing norms of the Ministry of Health and consequently enforce such norms. It is important that specialized personnel be deployed to other counties to serve in one or more counties. County governments should retrench non-essential staff inherited from the central government and the former local authorities in order to save resources to employ more health workers and other staff relevant for devolved functions.

CHAPTER SIX

IMPACT OF THE CONSTITUTION ON THE ECONOMY

Introduction

6-1 Devolving power and functions to 47 county governments, alongside establishment of several constitutional commissions and independent bodies, has led to concerns on the cost of implementing the Constitution of Kenya. It has been argued that the cost of implementing the Constitution of Kenya 2010 is too high, and that Kenya is running a very expensive government that will be difficult to maintain. Thus, there have been calls for constitutional amendments to 'reduce the size of government'.

6-2 Others argue that the benefits of using the Constitution to address inequities in resource distribution and imbalances in regional development outweigh the monetary costs of implementation. They point out that democratic governance cannot be measured in monetary terms.

6-3 This chapter presents an analysis of the impact of implementing the Constitution on the nation's economy. In interpreting the data and findings, it should be noted that implementation of the Constitution has been under way substantively for only three years; the first devolution budget was prepared for fiscal year 2013/14. The implication is that the effects of the Constitution have not fully worked their way through the economy. However, it is possible to determine the trajectory of impacts and respond accordingly.

6-4 To determine the impact of the Constitution on the economy, the audit sought to answer a number of questions in five parts as follows:

(ii) What impact has the Constitution had on overall public expenditure?

(iii) What impact has the Constitution had on the public wage bill? This question involved analyses of several facets of public expenditure, including size and cost of national executive, and restructuring and rationalization of the civil service, including the provincial administration.

(iv) What impact has implementation of devolved government had? This question involved analyses of whether more money is going to the grassroots, what sector priorities counties are spending money on, viability of counties, and whether citizens are getting value for money.

(v) What are the implications on public expenditure of implementing the new system of legislature?

(vi) What are the implications on public expenditure of operating the independent commissions and offices introduced under the Constitution?

Impact on Public Expenditure

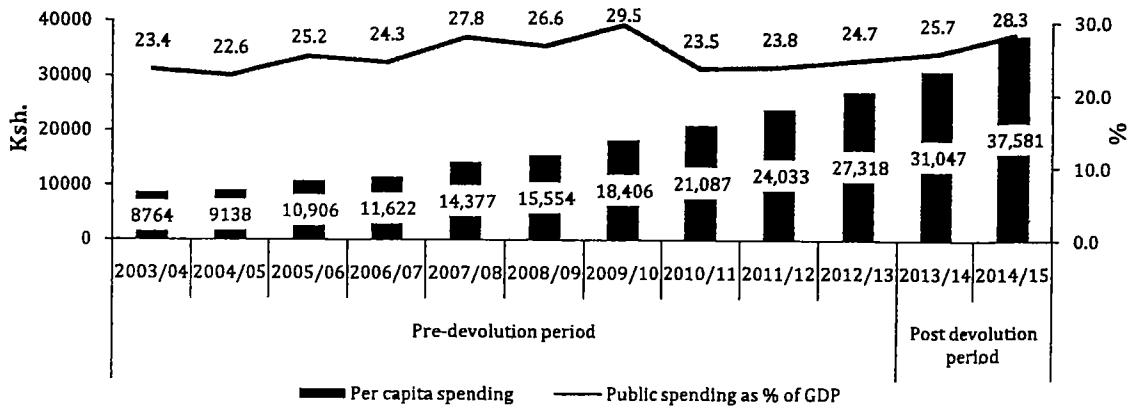
6-5 This section reviews the trend in government spending as a ratio of the rebased Gross Domestic Product (GDP), and per capita spending as indicators of the size of

government.[71]The analysis will help answer the question of whether Kenya is running a relatively expensive system of government compared to the system before the new Constitution. However, it is important to note that not every rise in expenditure is attributable to implementation of the Constitution. Prior to the new Constitution, Kenya witnessed unprecedented rise in expenditure owing to debt burden.

6-6 Two indicators are important in assessing the cost of running a government. These are: public/government spending as a percentage of GDP, and per capita spending. Public spending are the actual expenses that the government incurs to manage public affairs. The analysis compares this as a percentage of GDP because it is important to see whether the share of these expenses in relation to the size of the economy is increasing or decreasing. On the other hand, analysis of per capita spending helps to show how much, theoretically, the country is spending per person to provide Kenyans with public goods and services under the 2010 Constitution. This is again compared to spending per person by the government prior to the passing of the 2010 Constitution.

6-7 The review compares government spending as a ratio of GDP during the pre-devolution period (2003/04 to 2012/13) with the post-devolution (2013/14 to 2015/16) ratio. These trends are illustrated in Figure 6.1 to 6.3 below.

Figure 6.1: Public spending as a percentage of GDP, and per capita spending[72]



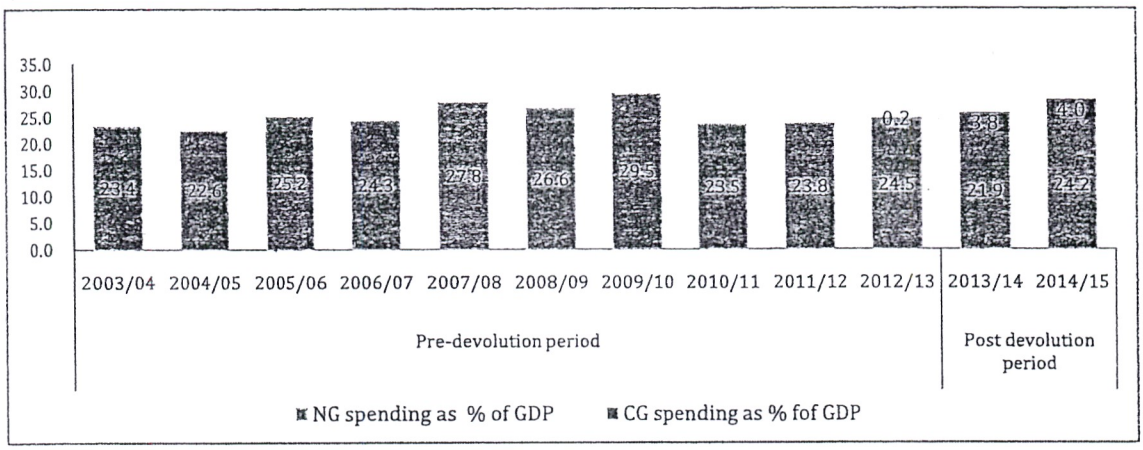
6-8 Public expenditure is on the rise; it has been increasing gradually every financial year from 2010/2011 when the new Constitution was promulgated. Public spending as a ratio of GDP in the pre-devolution period averaged 25.1 percent relative to 27 percent in the post-devolution period (Figure 6.2).[73] This implies an increase in average actual public spending ratio by almost 2 percentage points.

[71] Figures of rebased GDP series sourced from National Treasury, Quarterly Economic and Budgetary Review Fourth Quarter, 2014/15 period ending 30th June 2015, Annex 1 pp25.
[72]Republic of Kenya (August 2015), National Treasury Quarterly Economic and Budgetary Review Fourth Quarter, 2014/15 period ending 30th June 2015. Population figures are from various issues of KNBS Economic Survey.
[73] There is need to differentiate public/government expenditure (budget) from public spending. Public expenditure focuses on budget estimates while public spending focuses on actual spending. Often in the case of Kenya and due to constraints in the uptake of funds, public spending is invariably lower than public expenditure.

6-9 The pattern of spending remains similar to the period before devolution even though there are some slight variations in some of the financial years. In 2003/04, public spending was 23.4 percent of GDP. Until after the post-election violence of 2007/2008, public spending did not increase in a significant manner. It peaked to 29.5 percent in 2009/10 and fell sharply to 23.5 percent in 2010/11. This is the year Kenya promulgated a new Constitution. From then on, public spending has been increasing every financial year.

6-10 In the post-Constitution period, 2010/11 up until 2012/13, before the devolution period, public spending ratio increased from 23.5 percent to 24.7 percent in 2012/13.[74] It is important to note as shown in Figure 6.2 that prior to the first budgets under devolution in 2013/14, about 0.2percent of GDP was spent to lay ground for devolution.[75]

Figure 6.2: Public spending as a percentage of GDP[76]



6-11 In the post-devolution period, public spending increased considerably. It increased by 2.6 percentage points from 25.7 percent in 2013/14 to 28.3 percent in 2014/15 when the foundation for devolution was firming up.

6-12 Fiscal transfers to the counties, amounting to 4 percent of GDP on average, constituted part of the 25.7 percent and the 28.3 percent public spending ratios in 2013/14 and 2014/15, respectively. These are the first two fiscal years of implementing devolution.

6-13 Overall, there is evidence of an expanding size of government. This is evident both inthe two years preceding devolution and two years after. But though the cost of running the government under the 2010 Constitution increased, the increment was not significantly different from the previous period. One cannot, therefore, attribute this to implementation of the Constitution alone.

6-14 The size and cost of running the Government of Kenya compares favourably with others in the region. In fact, Kenya's is below the Sub-Saharan Africa average for the period 2009-2012, but above this average for the period 2013-2015. Comparatively, the size and cost of

[74]It is important to note that the real spending ratio must be lower owing to inflation that averaged 9.5 percent in the pre-devolution period and 6.3 percent in the post-devolution period.
[75]A small part of the 2012/13 Budget Estimates had allocation coded number 98 in the various Ministry, Department and Agencies votes meant for laying ground for the onset of devolved system of government.
[76]Republic of Kenya (August 2015) National Treasury Quarterly Economic and Budgetary Review Fourth Quarter, 2014/15 period ending 30th June 2015.

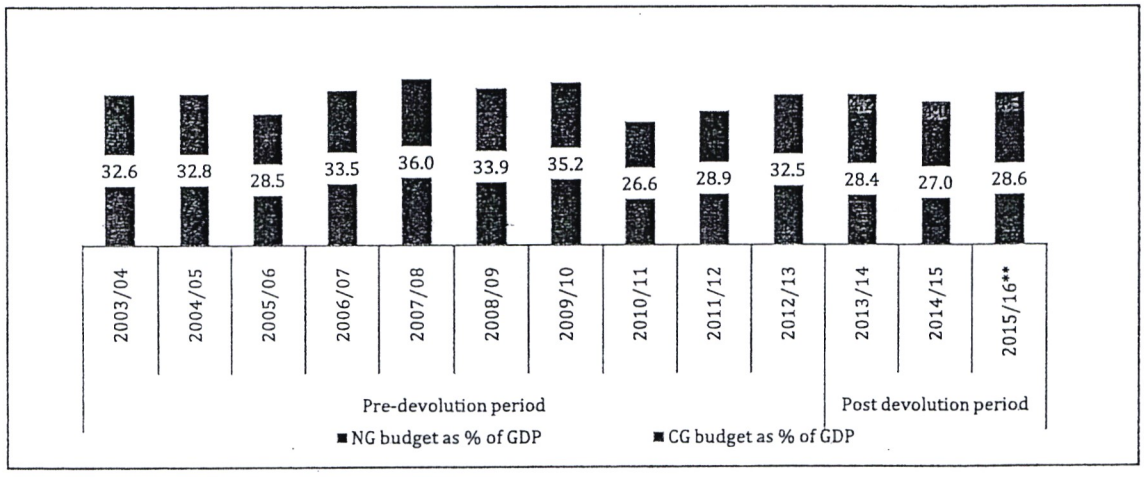
running the Government of Kenya (Table 6.1 [77]) is above that for Ethiopia, Uganda and Tanzania, but in the same range with that of Ghana and Rwanda.

Table 6.1: Government expenditure as a percentage of GDP in selected African countries[78]

	2009	2010	2011	2012	2013	2014	2015
Kenya	**23.1**	**24.2**	**23.6**	**24.2**	**25.5**	**27.0**	**28.5**
Ethiopia	17.1	18.5	18.2	16.6	17.8	17.7	18.6
Rwanda	23.9	25.9	26.5	25.9	27.6	27.7	25.7
Tanzania	20.2	20.2	19.1	19.8	19.4	18.0	19.1
Uganda	15.3	18.8	17.2	16.5	16.8	17.1	18.7
Ghana	23.5	26.1	26.5	30.7	27.8	29.3	25.6
Sub-Saharan Africa	***25.5***	***26***	***25.2***	***24.4***	***23.9***	***23.6***	***22.8***

6-15 The government expenditure/budget ratio, albeit higher than public spending ratios, has remained almost similar during pre- and post-devolution period.[79] Figure 6.3 below shows that the average government expenditure/budget ratio for the pre-devolution period is 31.7 percent compared to 31.8 percent for the first two financial years of the post-devolution period (both national and county governments).

Figure 6.3: Public budget as a percentage of GDP[80]



6-16 These averages mask some useful information. A look at the trend in the pre-devolution period reveals that between 2006/07 and 2009/10 the ratio of government/public budget (Figure 6.3) and actual public spending (Figure 6.2) increased significantly to a high of 35.2percent and 29.5percent, respectively. This is because the government adapted an expansionary budget policy to reverse the effect of global recession. Indeed, this is the

[77] It is also important to note that the figures for Kenya according to IMF are different from what is featured in the graph above.
[78] IMF (2015) World Economic and Financial Surveys. Regional Economic Outlook Sub-Saharan Africa: Dealing with the Gathering Clouds, Washington DC International pp 98.
[79] This refers to budget allocations, which are different from actual public spending.
[80] Expenditure data from the various issues of Estimates of Recurrent and Development Expenditure, GDP data sourced from Treasury Quarterly Budget and Economic Review –Fourth Quarter.

period when the government introduced the Economic Stimulus Package. The December 2007 general election and preparations for the referendum on the Constitution of Kenya2010, were done during the period. These partly explain the jump in public spending, which in turn led to increased borrowing. Naturally, the country had to return to the normal fiscal trend after the economy recovered. Thus, the ratio of public budget and actual spending to GDP dropped to 26.6percent and 23.5percent in 2010/11, respectively.

6-17 When government budget ratio for 2015/16 (Figure 6.3) is added into the ratios for the two prior financial years, the average increases marginally to 32.2 percent.[81]This implies that overall government budget ratio went up marginally by less than one percentage points in the post-devolution period.

6-18 In 2013/14, the first fiscal year of devolution, the ratios of both government budget increased to 32.6percent and public spending increased to 25.7percent, respectively. In 2014/15, the ratio of public spending to GDP was almost back to the peak reached during the pre-devolution period and stood at 28.3percent.This clearly implies that implementation of the Constitution and devolution may have had some impact on public spending.

6-19 A point to emphasis is that it is not the Constitution and devolution alone that have contributed to increased National Government spending ratio. The increase in spending from an average of 21.9 percent to 24.2 percent in the post-devolution period, followed by a corresponding increase in county government spending from an average of 3.8 percent to 4 percent over the same period, implies that other factors rather than devolution *per se* contributed to this increase. These include the National Government's development programmes. The National Government's investment in infrastructure development, such as the Standard Gauge Railway project (total development and lending budget increased by almost 50percent from 2013/14 to 2014/15); increasing debt and interest payment; and high wage bill; are the other drivers of rise in spending.[82] For example, interest rate payments increased by 3.0percent of GDP in 2015/16 compared to an average of 2.1 percent of GDP during 2006/07-2011/12 because of increased borrowing since 2012/13.[83]

6-20 This audit also focuses on how the size and cost of the national government has changed – or not changed - as a result of devolving functions to the county level. Theoretically, it is expected that devolving functions would shrink the cost and size of the National Government. But a closer examination of figures does not reveal this. Despite an increase in absolute terms of government budget from Ksh 1,454.9 billion in 2012/13 to 1,640.9 billion in 2013/14, the expenditure as a ratio of GDP was more or less the same, 32.5 percent *vis a vis* 32.6 percent. Of the total budget for 2013/14, county government portion accounted for 12.8 percent (Ksh 210 billion), which is equivalent to 4.2 percent of GDP.

6-21 On face value, there was minimal downward adjustment of National Government budget allocation. Instead, there is an upward movement by almost two percentage points in 2015/16. The increase in government budget ratio during the last three years of implementing devolution could be attributable to increase in transfer of funds to the counties by an average of 12.2 percent.

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[81] Take note that this ratio is based on projected GDP of Ksh 6,075.6 billion. As a result, this ratio has to be interpreted with this in mind.

[82]Republic of Kenya (August 2015) National Treasury Quarterly Economic and Budgetary Review Fourth Quarter, 2014/15 period ending 30th June 2015, pp 25 , Annex 1.

[83] World Bank (2016) Kenya Economic Update: *Kazi ni Kazi* Informal Should not be Normal, March 2016, Edition No. 14

6-22 The number of functions that have not been transferred could be contributing to this anomaly. Although some functions were transferred to county governments (especially those undertaken by defunct Local Authorities in 2013/14), followed by a second and third set of functions in 2014, there are number of other functions yet to be transferred.[84] For example, in 2014/15, the National Government was still implementing some functions on behalf of county governments. Indeed, some loans and grants financing devolved functions were still being performed by the National Government because the financing agreement signed with development partners did not allow for their transfer. Functions related to management of county roads, Water Services Boards, cultural activities and pubic entertainment and others are yet to be transferred.

6-23 But how much is the government spending to provide services to each Kenyan citizen today compared to the pre-devolution period? Is there a reason to worry?

6-24 Government spending per person with regard to provision of goods and services, as well as implementing the Constitution, has been on an upward trend. It increased from Ksh 8,764 per person per year (Ksh 730 per month) in 2003/14 to Ksh 37,581 (Ksh 3,132 per month) in 2014/15, about 4.3 times larger. The average growth rate of per capita government spending for the post-devolution period (17.3%) was higher than that for the pre-devolution (13.6%). This implies that more money was spent per capita by both the national and county governments in response to demand for public goods and services by every Kenyan citizen relative to the centralised government period.

6-25 There is one observation to make in this respect. Both the National Government budget and spending ratios to GDP increased in the post-constitution and indeed post-devolution periods. The same was noted of rising spending per capita in the post-devolution period. This suggests that the Constitution and implementation of devolution have had some impact on rising government budget and spending. But there are other factors contributing to this: debt payment, wage bill and increased development spending due to large infrastructure projects, including the SGR. Both the National Government and the county governments are cognisant of the rising cost of running the government. Indeed, in February 2016, the President and governors representing the county governments acknowledged and agreed to pursue austerity measures to tame government spending.[85]

Composition of Expenditure

6-26 Both the National Government and county governments are obligated to observe constitutional principles in use of public finances and overall management of public resources. These include using public money in a prudent and responsible way, and using public finance to promote an equitable society. In this respect, their respective Treasuries are individually responsible for ensuring they adhere to public finance principles and other statutory requirements.[86]One important requirement in this respect is allocation of at least 30 percent of National Government and county government expenditure to development.[87]

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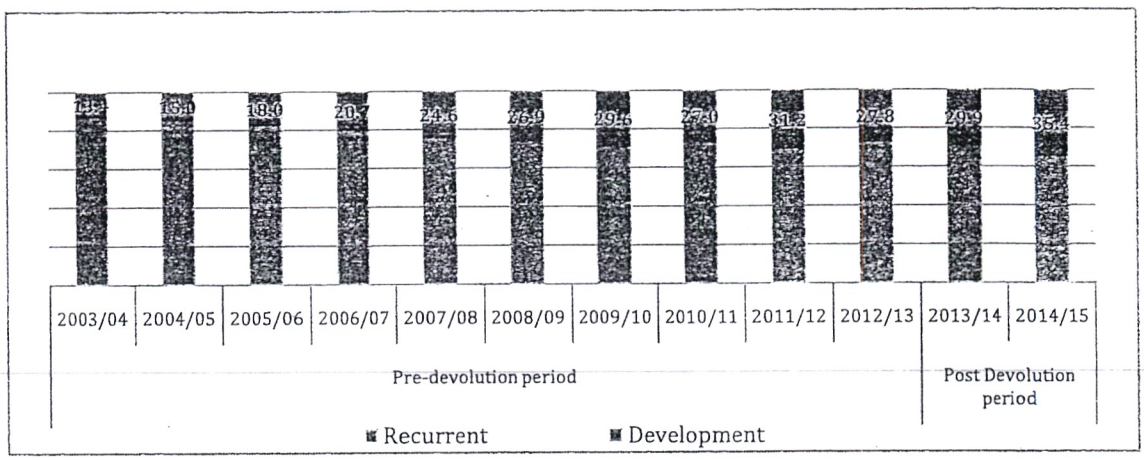
[84] Gazette Notice No. 16 of 1st February 2013; Legal Notices No. 137-183 of 9th August 2013 and Legal Notice 33 of 1st March 2014.

[85] Reported in the Budget Policy Statement 2016.

[86] Section 107 of the Public Finance Management Act (PFMAct), 2012.

[87] Section 15 (2)a of the PFMAct, 2012 and Section 26 (1) as of the Regulations (2015) to the PFMAct, 2012.

Figure 6.4: Recurrent and development spending as a percentage of national government spending[88]



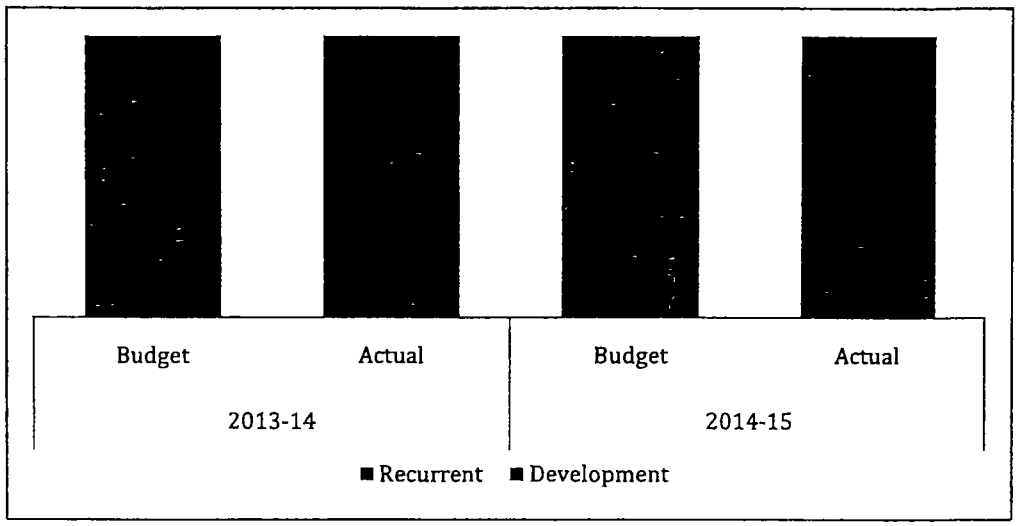
6.27 Figure 6.4 shows that the government has largely adhered to fiscal responsibility principles after the passing of the Constitution in 2010. Nonetheless, the National Government fell short of meeting the 30 percent development spending proportion in 2012/2013 as shown in Figure 6.4.

6.28 Figure 6.5 shows that county governments perform better in meeting the 30 percent development budget requirement. They allocate even more than 30 percent of their total budget for development budget. County governments allocated 42.8 percent of the budget to development in 2013/14 and 44.4 percent in 2014/15. As argued below, both levels are constrained to put more resources to development because high wage bill crowds out resources for capital investments in the budget.

6-29 Actual spending among many county governments in 2013/14, however, fell below the 30 percent threshold. County by county comparison shows that only 14 counties achieved the 30 percent threshold in 2013/14. In 2013/14, counties spent 21.6 per cent of their total spending in development projects compared to 35.1 per cent in 2014/15. Actual spending in development was lower due to constraints in absorption of funds. County governments attribute this to delays in release of funds and lengthy procurement processes. But the bigger problem is that county governments overstate their revenue forecast, and thus provide for a bigger proportion for development budget in order to comply with fiscal responsibility requirements. What they collect as own revenue is usually less than what they budget for.

[88]Republic of Kenya (August 2015) National Treasury Quarterly Economic and Budgetary Review Fourth Quarter, 2014/15 period ending 30th June 2015.

Figure 6.5: Development budget and spending as a percentage of total budget and spending in county governments[89]

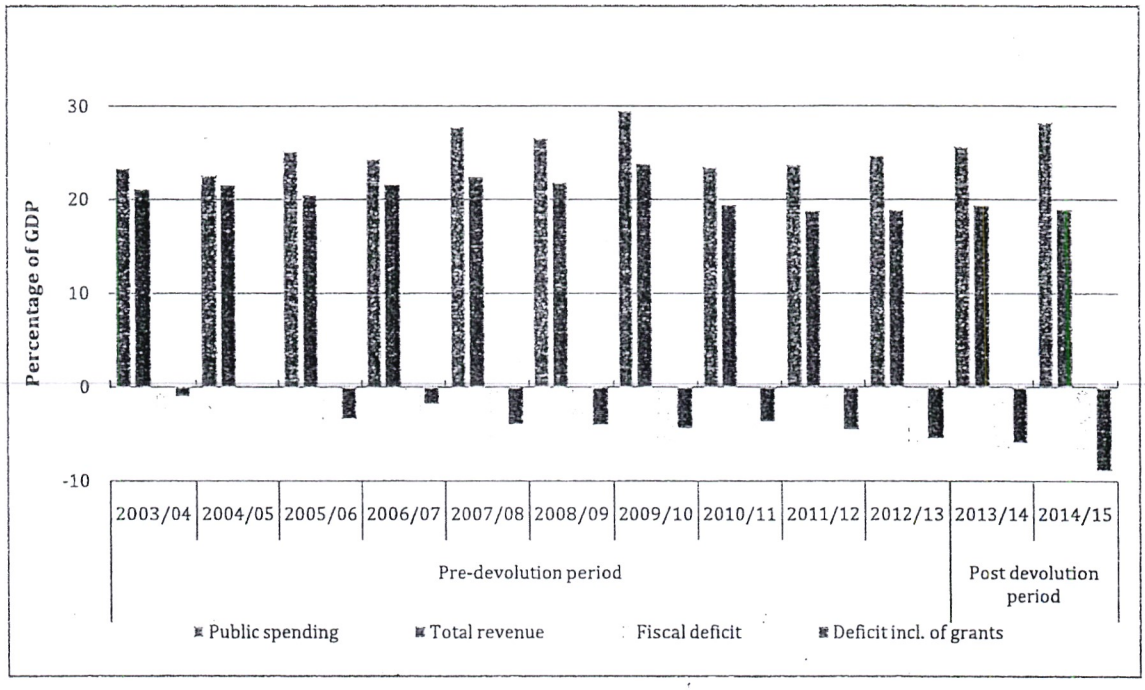


Growth of Public Expenditure and Revenue Performance

6-30 The extent to which the Constitution has impacted – or not impacted - on Kenya's fiscal position can be determined by comparing public expenditure and revenue ratios over the years. Figure 6.6 shows that expenditure ratios rose faster than revenue over the years. For example, a review of averages of revenue and expenditure ratios reveals that expenditure ratio was 1.2 times larger than the revenue in the pre-devolution period, and 1.4 times in the post-devolution period. This increased fiscal deficit from 5.9 percent of GDP in 2013/14 to 8.9 percent in 2014/15.

[89]Republic of Kenya Fourth Quarter County Governments Budget Implementation Review Report for 2013/14 and 2014/15.

Figure 6.6: Revenue, expenditure and fiscal deficit as a percentage of GDP



6-31 Increase in fiscal deficit clearly characterized the first two years of implementation of devolution. Without doubt, however, fiscal deficit featured in the pre-devolution period too, except that the post-devolution share has been higher. The main driver for this include spending on development infrastructure, among others. All the same, there is a need to put in place sound fiscal policies that will curb uncontrolled growth of the overall budget deficit.

Public Wage Bill

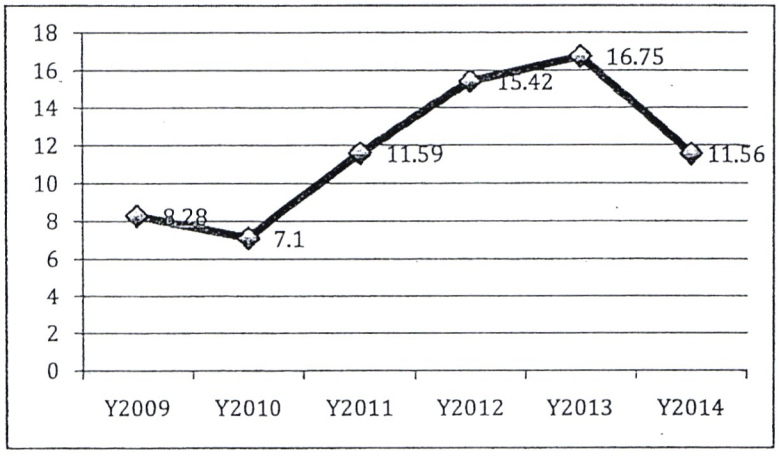
6-32 There has been debate about the affordability and sustainability of the public wage bill. The concern over what some see as the expansion of Government or increased costs of running the government on account of the Constitution informs much of this debate. The concern is that if the wage bill continues to rise, it will jeopardize macroeconomic stability and may result to borrowing to cover the deficit, which would lead to a huge fiscal burden.[90] There is also concern that a growing public wage bill will crowd out resources for development budget, and by that affect economic growth.[91]

6-33 The findings here show that, indeed, percentage growth of the public wage bill has been on the rise. The public wage bill rose by 15.42 per cent in 2012 and by 16.75 per cent in 2013. It dropped to 11.56 per cent in 2014. Between 2012 and 2014, the economy grew by an average of 5.2 per cent. The public wage bill, therefore, grew at a faster rate than the economy.

[90] Yagan S.C. (2014), The Sustainability and Macroeconomic Effects of the Public Sector Wage Bill in Kenya; KIPPRA DP/169/2014, Kenya Institute for Public Policy Research and Analysis; and Campo S.S,T. Ommaso G. and Mukherjee A. (1997). Government Employment and Pay in Global Perspective: A Selective Synthesis of International Facts, Policies and Experience.

[91] Ibid.

Figure 6.7: Per cent growth of public wage bill (2009-2014)



Source: Kenya National Bureau of Statistics (2015), Economic Survey

6-34 As a share of GDP, the total public wage bill shows no significant difference between the period before the passing of the Constitution and after the passing of the Constitution, including implementation of devolution. As a percent of GDP, the wage bill has been on a decline when compared to what obtained before the implementation of the Constitution. An increase is noted among the county governments. Total county governments wage bill increased almost five fold, from Ksh 12.5 billion in 2012 to Ksh 57.2 billion in 2013.

6-35 There are two key factors that have contributed to the rapid growth in public sector wages. First, there is an increase in hiring of personnel as demonstrated by the rising number of public sector workers from 596,600 in 2008 to 700,700 in 2013, representing 17.4 percent growth. Two, devolution saw a significant net addition of workforce, attributed to the fact that counties went into a recruitment drive in 2013/14.This, together with staff inherited from defunct local authorities and transfer of some staff from the National Government, resulted in a rise in staff at the counties from 37,700 in 2012 to 94,700 in 2013, accounting for 151 percent growth. This did not lead to corresponding decrease in the national government wage bill.

6-36 Furthermore, the county governments complain that they have a high wage bill because they inherited many from the former local authorities. Indeed, the National Government Capacity Assessment and Rationalization of the Public Service (CARPS) Programme report (2015) observes that demand for technical and professional personnel for service delivery, coupled with inherited staff, has lead to county governments having a significantly expanded public service workforce. Furthermore, some of the inherited staff negotiated better pay before transition to devolution. Their total emolument is higher than other employees doing similar work. Most affected are also the county governments that served as the headquarters of the former provinces. They inherited more staff than others and, therefore, have a relatively higher wage bill. All this means that the country is shouldering a huge wage bill for some skills that are overpriced. Some of the inherited staff are getting more than what the market can pay for their skills. Rationalizing salaries across the public sector is an appropriate solution but it is taking long to implement.

Table 6.2: Total public sector wage payment (KSh millions)[92]

	2008	Share (%)	2009	Share (%)	2010	Share (%)	2011	Share (%)	2012	Share (%)	2013	Share (%)	2014	Share (%)
National Government	50,741.6	23.6	57,891.3	24.9	64,220.7	25.8	73,171.9	26.3	88,728.8	27.6	79,009.4	21.1	84,981.0	20.3
Teachers Service Commission	77,191.6	35.9	79,699.6	34.2	87,844.9	35.2	101,859.7	36.6	115,276.7	35.9	130,427.4	34.8	145,407.0	34.8
Parastatal bodies	46,949.1	21.8	51,575.4	22.2	52,522.3	21.1	55,975.6	20.1	63,971.4	19.9	66,217.9	17.7	76,966.3	18.4
Majority control by the Government	29,860.4	13.9	32,802.7	14.1	33,405.0	13.4	35,601.4	12.8	40,686.8	12.7	42,115.6	11.2	48,951.7	11.7
County Governments	10,270.9	4.8	10,857.0	4.7	11,354.9	4.6	11,630.0	4.2	12,484.5	3.9	57,174.0	15.2	61,968.3	14.8
Total wage bill	**215,013.6**	100.0	**232,826.0**	100.0	**249,347.8**	100.0	**278,238.6**	100.0	**321,148.2**	100.0	**374,944.3**	100.0	**418,274.3**	100
GDP (Old series)	2077433		2273685		3169301.5		3725918.4		4261150.7		4730800.5		5357671.7	
Total wage bill as % of GDP	10.35		10.24		7.87		7.47		7.54		7.93		7.81	
Growth of public wage bill (%)			8.28	-	7.10	-	11.59	-	15.42	-	16.75	-	11.56	
Growth of NG wage bill (%)			14.09		10.93		13.94		21.26		(10.95)		7.56	
Growth of CG wage bill (%)			5.71		4.59		2.42		7.35		357.96		8.39	

Table 6.3: Wage employment in the public sector ('000)[93]

	2008	2009	2010	2011	2012	2013	2014
National Government	196.8	200.6	212	219.9	222.6	179	180.9
Teachers Service Commission	236.8	245.4	243	258.7	267.6	272.5	281.7
Parastatal bodies	82.4	84.4	84.8	86	90.6	92.5	93.5
Majority control by the Government	39.7	40.6	40.8	41.4	43.6	44.5	45
County Governments	40.9	41	39.2	37.3	37.7	94.7	99.6
Total public sector employees	596.6	612	619.8	643.3	662.1	683.2	700.7
Average wage earnings per employee (Ksh per annum)							
Private sector	369,068.7	384,721.6	392,563.1	407,477.7	425,142.6	500,065.8	537,681.1
Public sector	353,321.7	373,098.5	402,328.5	432,521.6	485,016	548,731.4	596,878.2

6-37 Thirdly, there is an increase in average wage earnings per public sector workers. Indeed, the public sector appears to pay more than the private sector. However, this comparison does not portray the true picture given that the composition and qualification of workers

[92] *Kenya National Bureau of Statistics (2015;2012), Economic Survey; and author's computation*

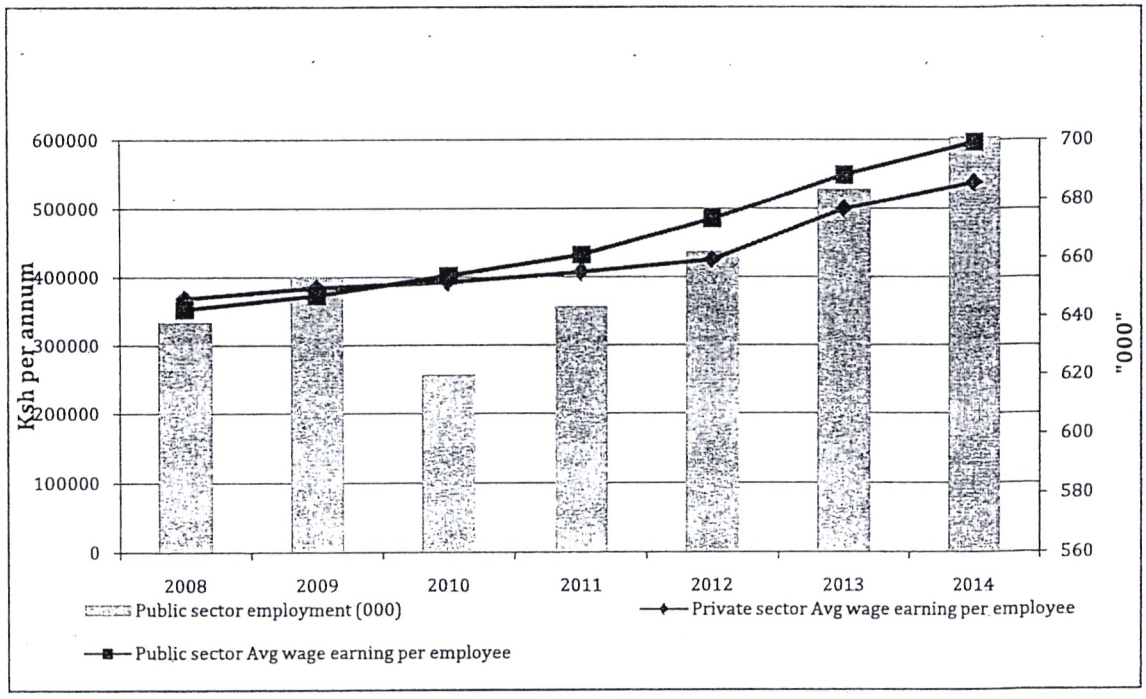
[93] *Kenya National Bureau of Statistics (2015;2012), Economic Survey*

from the two sectors is different. As seen from the table above, from 2010 onwards, the average nominal wages per public sector employee has not only increased but also overtaken the private sector. The peak of public sector growth earnings was at 12 percent and 13 percent in 2012 and 2013, respectively, the period of transition to devolution.

6-38 The huge disparities in earnings in the public sector are an issue of concern. The largest concentration of huge wages is at higher levels (high job groups) of the public service. The huge packages in emoluments at these levels are largely responsible for the growth in wage bill, post-devolution period.

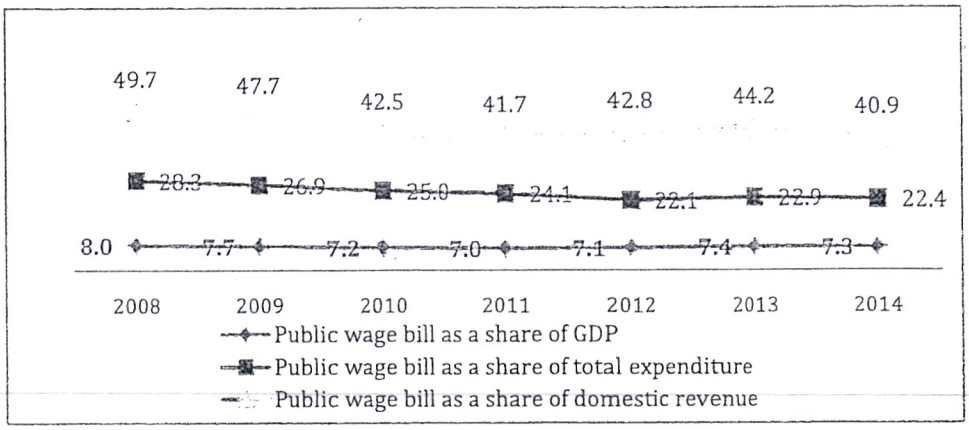
6-39 The average wages per public sector employee have been rising above the one for private sector employees, hence the reason the public sector has been attracting the number of employees seen in the table above.

Figure 6.8: Average wage earnings per employee in both private and public sector vis a vis number of public sector employees



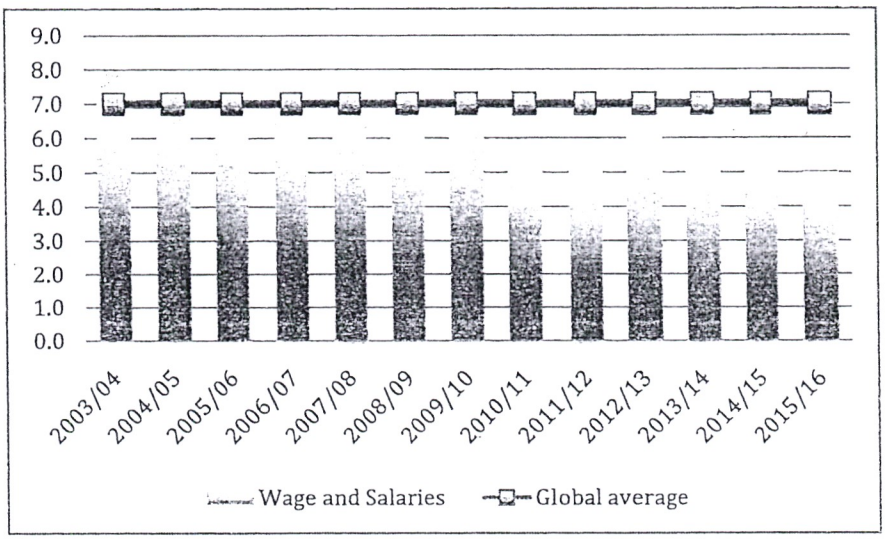
6-40 The public wage bill has declined as a ratio of GDP, total expenditure, and domestic revenue, albeit marginally. The period before the passing of the Constitution generally shows high share of GDP in respect of these indicators than after the implementation of the Constitution and devolution.

Figure 6.9: Public wage bill as a ratio of GDP, expenditure and revenue (%)[94]



6-41 Figure 6.10, using different data sources, also shows similar results – no impact on wage bill. The wage and salaries ratio in this figure varies slightly from those in Figure 6.9. All the same, both demonstrate that public wage bill has not changed in any negative manner because of devolution or because the new Constitution has meant increased size of National Government (This issue of data variations is of concern because it implies incoherence in national development planning).

Figure 6.10: Wage and salaries as % of GDP, 2003/4–2015/16



Source:Republic of Kenya (August 2015) National Treasury Quarterly Economic and Budgetary Review Fourth Quarter, FY 2014/15 Period Ending 30th June 2015; Republic of Kenya (August 2015) National Treasury Quarterly Economic and Budgetary Review First Quarter, FY 2015/16 Period Ending 30th September 2015

6-42 Kenya's wage bill as a share of GDP is generally higher than most of the East African states, but generally within the desired international threshold of 7 percent. However, any

[94]Public wage bill figures from Economic Survey 2012 and 2015, by the KNBS; Total expenditure from various issues of Estimates of Recurrent and Development Expenditure; Domestic revenue figures from various Budget Policy Statements.

further pressure on public wages will reverse this declining trend and expose the country to risks of macroeconomic instability. Nevertheless, there is need to note that using a substantial amount of revenue to pay off wage bill results in less resources for development. It means less money for use in delivery of services.

6-43 It is possible that the discussions on 'increasing costs and size of government' are associated with what some stakeholders perceive as increased number of constitutional commissions and independent institutions as well as increased number of technical/advisers in different State departments. There is need to ensure that the public wage bill does not increase in a manner that threatens macroeconomic stability. In this regard, the country should formulate a public sector wage policy to guide wage bill issues and management at the two levels of government.

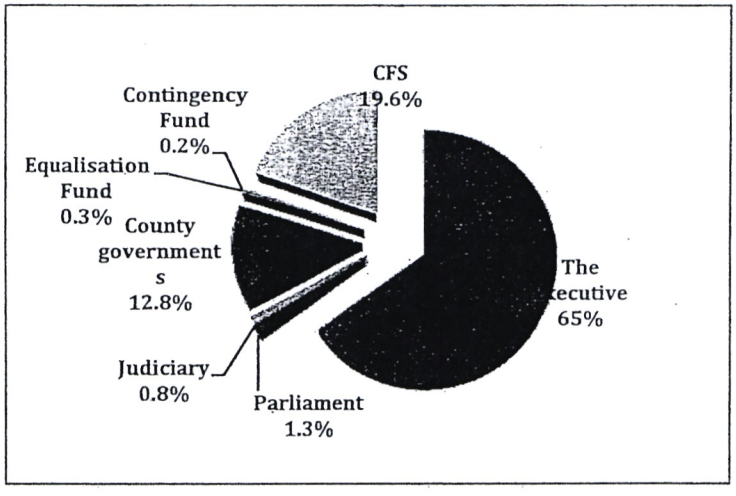
6-44 The definition of wage bill and analyses of wages, and analysis of development and recurrent expenditure patterns are yet to reflect the delivery-forecast nature of the new Constitution. The Constitution and the chapter on devolution in particular is focused on delivery of services. There is need to consider distinguishing wages that relate directly to core service delivery (such as provision of health, education, agriculture, and water) being redefined, controlled, and accounted for specifically as service delivery expenditure.

Size and Cost of the National Executive

6-45 Much of the country's attention on the size and cost of government has focused on the new structures and offices created by the Constitution. The implications on the National Government, which are just as significant, have not received as much attention.

6-46 The budget for the national executive constitutes the largest share of Kenya's budget. In 2015/16, it was about 65 percent of the national budget while the share of the county government was about 13 percent. The rest of the budget is shared among the two arms of government, Contingency Fund, Equalization Fund, and the Consolidated Fund Services (CFS) as shown in Figure 6.11 below.

Figure 6.11: Distribution of the national budget in 2015/16



6-47 The budget of the national executive (ministries, department, and agencies) has increased by 21 percent from Ksh 1,011 billion in 2013/14 to Ksh 1,461 billion in 2015/16. This translates to every Kenyan contributing, on average, slightly over Ksh 25,000 per annum or about Ksh2,083 per month to support the running of the national executive. On face value, this is a substantial increase considering that the National Government is not

engaged in delivery of all basic services. However, the actual cost can only be verified by costing of functions as assigned under Schedule 4 of the Constitution. The bigger problem is the debt burden, which is resulting from increased borrowing by the National Government in order to sustain its high spending on National Government development programmes.

6-48 As already noted, in terms of assignment of functions, with the exception of security, education and foreign affairs, the National Government is assigned policy and regulatory functions, while counties are assigned service delivery functions. There are also concurrent functions, notably infrastructure, where the National Government is responsible for national components while counties are responsible for local components.

6-49 The potential implications of these changes on the size, structure and cost of running the National Government are significant. By virtue of the principles of distinctness and interdependence espoused in the Constitution, the supervisory powers previously exercised by the National Government on local authorities have been abolished. In place of this we now have the Ministry of Planning and Devolution retaining some institutional infrastructure whose roles are to oversee the implementation of devolution and intergovernmental affairs.

6-50 Ministries whose functions were fully devolved, notably health and agriculture, contained administrative functions that should of necessity be rationalized. One of the largest headquarter functions in these ministries was personnel, as explained in the section on the public wage bill. These observations imply that the cost of running the national executive should be reducing. However, the central government budget in 2012/13 (year before devolution) was 32.5 percent of the GDP while in 2013/14 it was 28.4 percent for the national government and 4.0 percent for the counties, meaning that the total budget did not reduce *per se* but was shared between the two levels of government. As already noted, it is possible that this is because the National Government is exercising some functions that are the exclusive responsibility of the county governments.

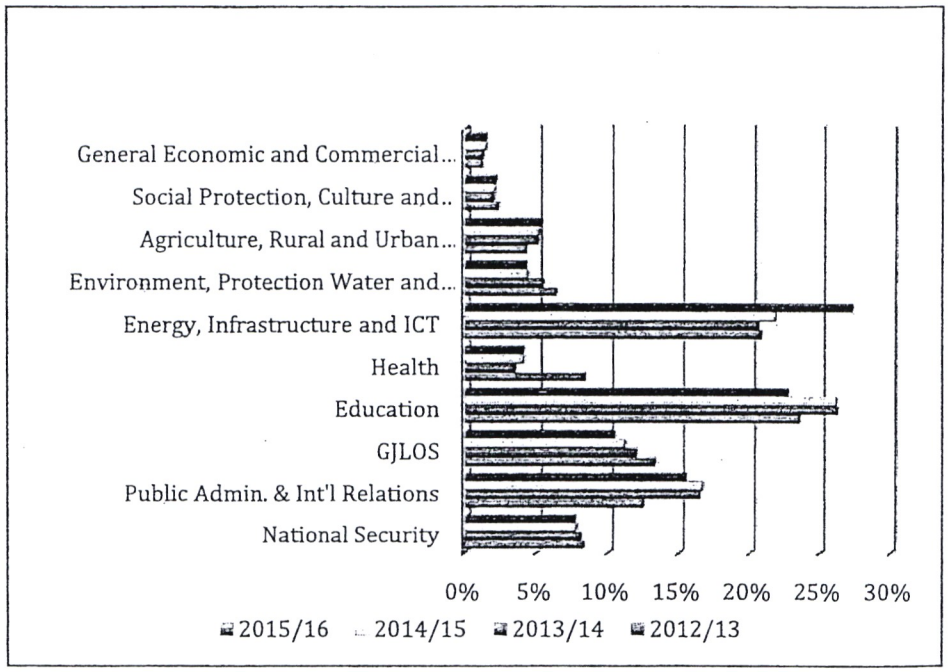
Expenditure Analysis for National Government

6-51 National government Ministries, Departments and Agencies (MDAs), Judiciary and Parliament spent a total of Ksh 1,406 billion for recurrent and development in 2014/15. The budget for the national government entities for the period 2013/14-2015/16 has grown at a faster rate (average growth rate of 20.6%) compared to the county governments' budget (average growth rate of 12.2%). This is despite the fact that most of the functions are devolved.

6-52 In 2012/13, the recurrent expenditure was Ksh 808.3 billion, which increased marginally in 2013/14 to Ksh 815 billion but rose sharply to Ksh 897 billion in 2014/15. This expenditure is projected to continue to increase, given that in 2015/16, the National Government estimates on recurrent is Ksh 1,017.5 billion, and this will increase further to Ksh 1,112 billion in 2016/17.

6-53 Development expenditure is projected at Ksh 705.6 billion in 2016/17. For the country to realize high and sustainable growth rates needed to achieve Vision 2030, then the National Government needs to implement deliberate measures to curb recurrent costs.

Figure 6.12: Sectoral expenditure as % of national government, 2012/13 – 2015/16



6-54 What are the sector priorities of the National Government post-devolution? As shown in Figure 6.12 above, the National Government has been spending more on energy, infrastructure and ICT. Education sector comes second in terms of sector expenditure, while public administration and international relations follows. Governance, justice, law and order sector ranks fourth in terms of national government spending.

Accountability for Public Funds

6-55 Article 201 of the Constitution emphasizes the need to use public funds in an accountable and responsible manner. The Constitution particularly emphasizes that 'public funds shall be used in a prudent and responsible way', and that 'financial management shall be responsible, and fiscal reporting clear'.

6-56 This audit finds that the National Government and the county governments are not fully complying with the letter and spirit of the Constitution in this regard. As noted above, there are county governments that have borrowed from commercial banks without the guarantee of the National Government as required by law. Two, some county governments are not developing balanced budgets; they overstate the revenue projections and get into the risks of over commitment. Some of the county governments are also falling short of their revenue estimates; they collect less than their projections. Combined, these trends are leading to increased fiscal deficit. Thirdly, some county governments are reportedly not paying suppliers of goods and services. This slows the pace of completion of development projects and, at the same time, constrains relations between the county governments and the local private sector players.

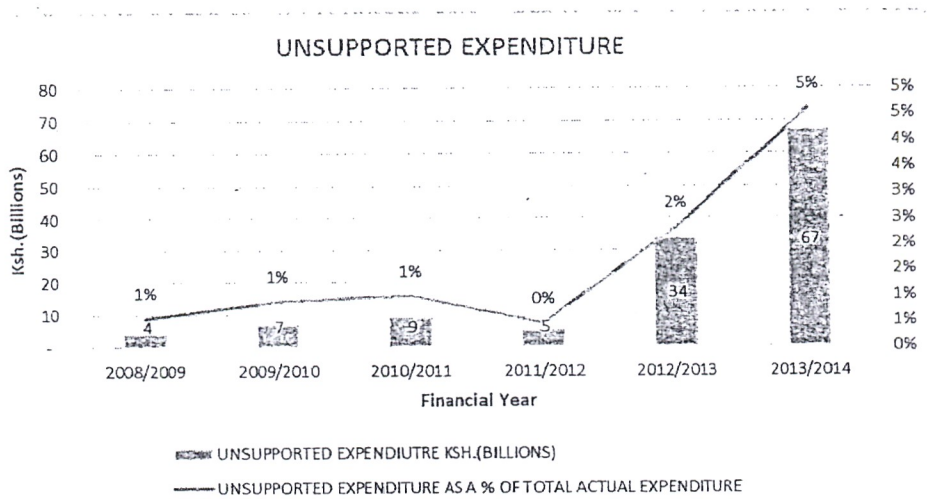
6-57 The National Government fails the financial accountability test too. There is increased wastage of public funds at the national level alongside growing evidence of grand corruption. This is evidenced especially by the following observation: Whenever the

government incurs an expenditure, the expense is supported with evidence demonstrating that the expenditure was incurred and in the right manner. The accounting could be in form of invoices, cash sale receipts, and delivery notes, among others. If the expenditure is not fully supported by appropriate evidence, then it is referred to as 'unaccounted' for expenditure.

6-58 Of concern is that 'unsupported' or 'unaccounted' expenditure has been on the increase, particularly during the first year of devolution. While only 2 percent (Ksh34 billion) of actual expenditure passed as unaccounted for expenditure in 2012/13, the amount increased to Ksh 67 billion or 5 percent in the year implementation of devolution began. Before this period, the total unaccounted expenditure was about 1 percent.

6-59 The absence of supporting documents for the expenditure incurred could be a sign that public funds are not used in the right manner. It could be that much of this was lost through corruption or general wastage of funds.

Figure 6.13: Unsupported expenditure



6-60 Similarly, implementation of devolution took place in tandem with an increase of 'over-expenditure'. This refers to instances where government agencies spend more than was budgeted for. The difference between the budget and the actual expenditure, which is more than the budget, is considered as over-expenditure.

6-61 During the year that marked the beginning of devolution, over expenditure increased in an anomalous manner from Ksh38 million in 2012/13 to Ksh25 billion in the 2013/14 period. This is again a case of government funds not being spent in the correct manner.

Impact of Devolved Government on the Economy: Is More Money Going to the Grassroots?

6-62 The Constitution makes specific provisions with respect to financial matters of counties. The impact of some of these provisions are summarized below.

6-63 The available data does not provide definitive evidence that more money is going to the grassroots under devolution than before. The equitable share for the year 2013/14 was Ksh 229 billion. The counterfactual suggests that under the old system, the National Government would have spent Ksh 125 billion on the devolved health and agriculture functions. Local authorities would have received a block transfer of Ksh 26 billion as

LATF, making for a total of Ksh 151.4 billion. This amounts to 66 percent of the equitable share. This leaves a residual Ksh 78 billion(Ksh 229-151.4 billion) from the equitable share for all the other devolved and shared functions. The residual translates to 34 percent of allocation to the county governments.

6-64 It seems that the share of national budget spent at the local level before devolution was slightly more than 34 percent. The review of various records by CRA shows that the share allocation to county governments was 41 per cent in 2011/2012. This declined to 36 per cent in 2012 2013. Allocation has been on downward trend; it is estimated at about 30 percent in 2016/2017. If, as is likely, the pre-devolution share spent at the local level was substantially higher than 34 percent, it would imply that the share of budget spent on devolved functions has reduced.

6-65 The previous chapter on devolution has pointed out that equitable share allocation to county governments, calculated on bases of most recent audited accounts of revenue and approved by Parliament, is generally about 35 percent on average. It is double the constitutional threshold of 15 percent. But it is double the threshold because the most recent audited account has a two year time lag. It is between 30 and 33 percent for most years except 2014/15 when the allocation was 42 percent. If the calculation is based on total sharable revenue, then the amount allocated to the county governments in the last four years is 21 percent on average.

6-66 The 6.4 provides an indicative analysis comparing the budget for the current year 2014/15 against a counterfactual of what it might have been under the old system. In terms of sectorial allocation, it was only possible to analyze health, agriculture and "other devolved" sectors lumped together, as agriculture and health are the only sectors where there is correspondence between county and national budget.

6-67 The counterfactual allocations are computed using the 2012/13 budget allocations for agriculture and health, and the estimates of the baseline cost of devolved functions published by the Commission on Revenue Allocation (CRA).The share of health and agriculture in the national budget were 6.5 percent and 3.8 percent, respectively, while the baseline costs were estimated at 78 percent and 64 percent, respectively (i.e. the devolved components accounted for 78% and 64% of the health and agriculture budgets, respectively). The analysis yields the following observations.

Table 6.4: Actual vs counterfactual budget comparison for 2014/15

		Totals	National	County
Health	Actual(2014/15 Budget)	114.1	47.4	66.7
	Counterfactual (2012/13 budget)	108.4	23.8	84.5
	Difference , %	5.7	23.6	(17.8)
Agriculture	Actual(2014/15 Budget)	59	36.2	22.8
	Counterfactual (2012/13 budget)	63.3	22.8	40.5
	Difference , %	(4.3)	13.4	(17.7)

Source: National Treasury. Budget Review and Outlook Paper 2014; and author's computations

Sectoral Priorities

6-68 After receiving their horizontal allocation of revenue through use of the revenue allocation formulae, county governments have the discretion to allocate the funds to the various sectors. Local needs and demands are expected to have informed the development of the County Integrated Development Plans (CIDPs), which provide a guide to budgeting and planning. Because of this discretion and play of local considerations, some functions get less or more than what they often received from the central government under the previously centralized system.

6-69 Importantly, in allocating revenue across the counties, the revenue sharing formula appears to favour some counties than others. The former marginalized counties come out more advantaged than others. Apparently, the counties that appear disadvantaged include mainly those in high population and major urban centres.

6-70 From a review of allocations to the two key sectors, that is agriculture and health, a more definitive conclusion can be drawn. The total health allocation is marginally higher by 5.3 percent than it would have been under the old system, but the agricultural allocation is 6.8 percent lower. However, given the assumptions, these differences are not significant. It is fair to say that devolution has not yet translated into substantial shifts in the overall sectoral composition. However, in terms of composition between devolved and national government, the change is significant.

6-71 The analysis suggests that the counties have allocated less to these functions than would have been spent on the devolved functions under the old system, while the National Government is spending significantly more than would have been the case. The National Government's health allocation is double the counterfactual, while the counties' allocation is 21 percent less. And the National Government's agricultural budget is 59 percent more while the county budgets are 44 percent less than the counterfactual.

6-72 This observation begs the question as to what the county priorities are. These are summarized in Table 6.5 below, which shows that health is the counties' top priority, accounting for 21 percent of the counties' budgets. There are, however, disparities across counties. Infrastructure is the top priority in a number of counties, including Mandera, Wajir, Tana River, Uasin Gishu and Nairobi, while water and agriculture are the top priorities in Garissa and Murang'a, respectively.

Table 6.5: County budget by sector, 2014/15, as % of budget

	Budget Share (%)	Highest (%)	Lowest (%)
Health	20.9	41.1	5.1
County Administration	15.9	55.5	4.1
Public Works, Transport, Infrastructure	13.2	28.2	1.1
County Assembly	10.5	33.5	4.8
Finance & Economic Planning	9.8	39.0	1.7
Education, ICT and Social Affairs*	9.4	24.5	2.9
Agriculture & Livestock Development	7.2	18.6	1.3
Water, Energy, Environment & Natural Resources	5.8	22.8	
Trade, Industry &Other Commercial	4.3	11.0	-
Physical Planning, Lands & Housing	3.1	8.3	
* Labour, Youth Affairs, Sports, Culture & Social Services			

Source: National Treasury

Economic and Administrative Viability of Counties

6-73 Concerns have been raised that 47 counties are too many, meaning that some of them may not be viable economic or administrative units.

6-74 With regard to economic viability of the county governments, there are several observations worth making. First, is the issue of economic viability. On this, it is worth mentioning that the architecture of the Constitution does not anticipate the counties to be economically distinct entities. The logic of equitable sharing of nationally raised revenue is that of an integrated national economy. The "equitable share" is predicated on the principle that an integrated economy will be bigger and in effect yield a larger revenue pool.

6-75 The history of marginalization of some counties underpins their under-development; it is not that these counties lack potential. This is why the one of the principal pillars of the Constitution focuses on redressing this. Therefore, the weak economic base, limited resources and inadequate capacity to exploit own resources, are not a good basis for judging the viability of the counties. Furthermore, local economies are dynamic. Prior to discovery of oil, Turkana would have ranked as one of the weakest counties in economic potential terms. But potential extraction of oil in the county has rapidly changed this profile.

6-76 Finally, inability of the Transition Authority to carry out assets and liability audits of resources transferred to the counties at the outset makes it impossible for one to accurately estimate the economic viability of the counties. Nonetheless, enhanced infrastructure development (i.e. roads, electricity and water supply) and economic investments will improve citizens welfare, human capital, own revenue collection and economic growth.

6-77 The second observation concerns 'administrative' viability of some county governments. Questions have been raised with regard to whether the county governments are too many to manage or to take care of given the size of Kenya's economy. The concern is that there is a certain minimum governance and administrative overhead that a county must have. If the county is too small, the administrative overhead will be too high, thus making the unit cost of goods and services provided by the county too expensive to bear.

6-78 The current number of counties and their boundaries as individual units works well with regional history and geography. Many (though not all) of the counties and the territorial area they occupy are home to not more than one ethnic group and are therefore favourable for ethnic and social inclusion. The individual units also comprise population that is not too large and not too small for purposes of promoting local democracy and delivering quality basic services.

6-79 A definitive conclusion on this would be premature, given that counties are still very new and they are still settling as sub-national units. Moreover, the counties inherited bloated structures from local authorities that will take time to rationalize. Preliminary analysis of the county budgets indicates that there is some cause for concern regarding the governance and administrative overhead of the counties, but it is not evident that this is related to the size of counties. The current number is viable on basis of geography, demography, ethnic and social inclusion, and capacity to deliver quality services.

6-80 On average "county administration" accounts for 16 percent of the counties' total budget for the year 2014/15.This is comparable to the national government's share of public administration budget, which was 16.7 percent. The average, however, masks wide disparities ranging from 4 percent to 55 percent. The higher figures do not seem plausible, and most likely represent a misclassification of expenditures. There are two counties with

administration budgets over 50 percent and another three whose administrative budgets are over 30 percent. Overall, 19 counties have administrative budgets of under 10 percent of the total, 15 counties have budgets between 10 percent and 20 percent and 8 counties have budgets between 20 percent and 30 percent.

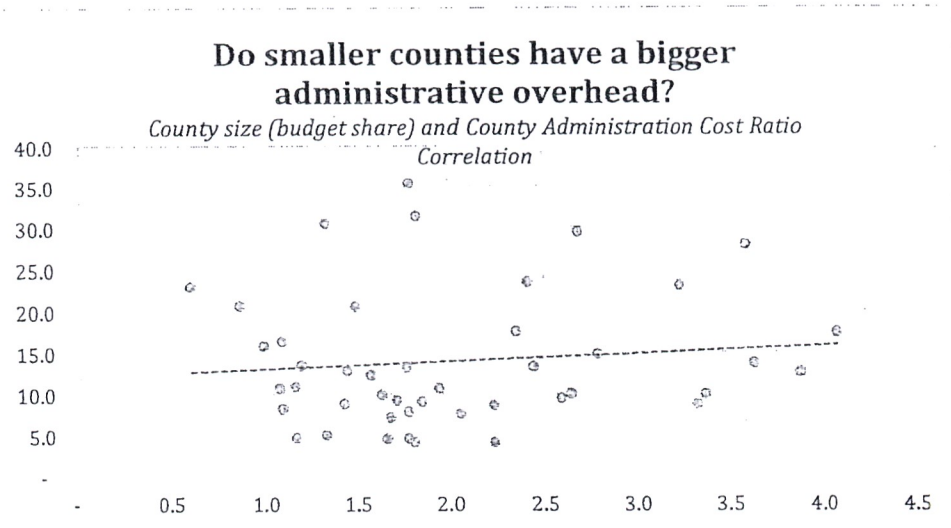
6-81 As indicated, it is not evident that smaller counties have a higher administrative overhead. This can be discerned from Figure 6.14 below, which plots county administration cost ratio against the county share of revenue, where the latter is a proxy of the size of county. There are two observations to note. First, the nearly flat trend line indicates no significant correlation between the two. If it were the case, the trend line would be sloping downwards from left to right. The second observation is that close to half the counties are clustered on the bottom left quadrant of the plot; that is, they are below average in both budget share and administrative cost ratio.

6-82 The county assemblies' budget accounts for 10.5 percent of the counties' outlays. This is much higher than the cost of the national Parliament at 1.4 percent. In 19 counties, the legislatures account for less than 10.0 percent of the budget in 19 counties, and other than one outlier at 33.5 percent; the rest are between 10.0 percent and 20.0 percent. While county comparatives are higher than the national legislature, from a unit cost perspective, the picture is quite different. The budget per county assembly member is Ksh 15.5 million, while the budget per national legislature member is more than three times at Ksh 55 million.

6-83 The county government system has enhanced transparency and social accountability where citizens are more aware and hold leaders responsible on the use of their resources.

6-84 The recent scale of expansion can be attributed to multiple sources of pressure, which are expected to prevail in the medium term. Fiscal pressure is emanating from the build-up of administrative expenses associated with the roll out of devolution, the necessity to enhance security expenditure, the commitment to sustain investments in roads and energy to reduce the infrastructure deficit and reduce the cost of doing business, the funding of new flagship projects in fulfillment of the Jubilee government's pre-election pledges, and the rising wage bill at both levels of government.

Figure 6.14: County administrative overheads



Source: National Treasury county budget data

Are Citizens Getting Value for Money?

6-85 This is a difficult question as it requires specific in-depth studies. It is even more difficult to answer for the counties given that they have only completed three years of budget execution. That said, there is anecdotal evidence on the performance of counties. On one hand, there is information indicating that the impact of devolution is being felt on the ground. This includes counties where people are seeing their first tarmac road; and expansion of health facilities and services. Press reports on county purchases of ambulances, both positive and negative, suggest that access to emergency medical services has expanded. Mandera County has been making news with irrigation, while Garissa County made news by building 21 maternity units in its first year of operation. Significant improvement in rural roads is reported throughout the country.

6-86 Though impressionistic, these reports suggest that citizens are getting value for money. This is all the more significant in light of the observation made above of no increase, and probably a reduction, in the proportion of budget spent on devolved functions. This would not be a new experience as it would be similar to the Constituency Development Fund (CDF) experience.

Value for Money Analysis

6-87 The Constitution of Kenya 2010 emphasizes the need for efficient and prudent public finance management. However, there is evidence that the two levels of government are not using public resources in a prudent and efficient manner. Inflated costs of public goods and services are prevalent in both county and national government. The Controller of Budget and the Auditor General reports can attest to these. Media reports for example from Bungoma County indicate a wheelbarrow costing more than Ksh 100,000!

6-88 According to a report released by PricewaterhouseCoopers (PwC), the rate of economic crimes in Kenya is 25 percent above the global average. In the year 2015 alone, economic crimes rose to 61 percent from 52 percent in 2014. The World Bank estimates that Kenya loses more than Ksh 600 billion each year on corruption.

6-89 Although citizen participation in county governments planning and budgeting is still weak, according to the perception survey, county governments, with the support of the central authorities and other partners, have deepened constitutional and legal provisions for transparency, accountability and public participation to improve public service delivery at local levels.

6-91 It is noteworthy that county governments leased equipment such as ambulances. However, there is no evidence of cost benefit analysis to inform the leasing arrangements that the county government venture into. Whether to lease ambulances or whether to improve more hospital facilities should be assessed before such decisions are made.

6-92 Similarly, the National Government leased Ksh 38 billion health equipment on behalf of the counties. While the two governments are meant to operate a cooperative government and engage in consultations, it is apparent that there was not significant coordination while leasing the equipment. The process, therefore, clearly negated the functional integrity, consultation and coordination principles.

6-93 In addition, no health economic assessment was carried out to inform the purchase, and all counties were treated like they had similar health challenges. The Parliamentary Committee on Health sounded an alarm during our stakeholder meeting that although counties were making payments, these equipment were not being used in most health care facilities; for example, more than six months after Machakos Hospital had set up an ICU

unit, no patient had used the facility due to lack of qualified staff. This was the trend in all the other facilities. The question is whether this lease gives value for money.

Economic Impact of Electoral Representation

6-95 There are concerns regarding the cost implications of the expansion of Parliament from a single Chamber with 222 members, including nominated members, to a bi-cameral Parliament with 418 members (Senators and National Assembly Members). The view that the earnings of Members of Parliament are exorbitant and out of proportion with the country's means motivates this thinking. In addition, there is the observation that Members of the County Assemblies also earn exorbitant wages far more than the economy can afford. In general, there are those who argue that that under the Constitution 2010, the Executive and the National Parliament have become too large and expensive to maintain.

6-96 In terms of representation, the current Parliament translates to an average of 120,000 constituents per MP and 100,500 including the Senate.[95] This is lower than the global average of 146,000 constituents per MP, but higher than the African average of 83,450 per MP. The global norm corresponds to a Parliament of 290, on average, and the African average of 500 members. Kenya's Parliament, both the National Assembly and the Senate, has 416 members. This number tends towards the African average and way above the global average. This suggests that Kenyans indeed are over-represented.

6-97 There are 47 County Assemblies; in total there are about 2,526 Members of County Assemblies, both elected and nominated. Kenya appears to be over-represented when compared to representation in countries with similar size of economy and population. Table 6.6 illustrates this situation. This should be interpreted with caution, bearing in mind that chambers in these countries perform different functions.

Table 6.6: Size of parliament in some countries comparable to Kenya in terms of population and GDP[96]

Country	Population size of each country	GDP	Representation	No. of Members/size of chamber
Kenya	**44.35**	**60.94**	**Senate**	**67**
			National Assembly	**349**
			Members of County Assembly	**2,526**
			total	**2640**
Ethiopia	99.39	55.61	Upper House	108
			Lower House	547
			Members of regional State Councils	1,989
			total	**2,644**
Nigeria	178.52	568.51	Upper House	109
			Lower House	360
			State legislators	978
			total	**1,447**
South Africa	54	350.09	National Council of Provinces	90

[95] UNDP/Inter Parliamentary Union, Global Parliamentary Report 2012.

[96] Includes the legislative organs that have functions similar to County Assemblies, but excludes equivalent of councillors in these other countries.

Country	Population size of each country	GDP	Representation	No. of Members/size of chamber
			National Assembly	400
			Provincial legislatures	430
			Total	**920**

6-98 In terms of cost, the budget for Parliament is about 2 percent of the national budget, against a global average of 0.57 percent (for countries with population of 10-50 million). This is more than three times the global average. Comparatively, Kenya's previous unicameral Parliament's budget (Ksh 10.2 billion in 2011/12) was 0.88 percent as a share of the national budget.[97]Again, this was slightly larger than the global average but lower than the current budget ratio.

6-99 Questions have also been raised with regard to the cost of Parliament, as well as emoluments for MPs, Senators, and MCAs. There are arguments that Kenyan MPs, for example, are overpaid while others argue that their pay is in line with global average.

6-100 With regard to the overall budget, the 2014/15 budget of Parliament at Ksh 23 billion translates to Ksh 55 million per member. The MPs salary amounts to only 12 percent of the budget.

Table 6.7: Cost of running Parliament[98]

Source			MPs & Senators/MCAs	Staff size	Budget (Kshmillion)	Approx. Unit cost (Ksh Million)
Staff number from Parliamentary Service Commission Strategic Plan 2008-2018	Pre-devolution-2011/12	Parliament	222	532	10,200	13.5
Estimate of staff number sourced from Parliament Officer from Officer working in Parliament	Post devolution-2014/15	Parliament	418	870	26,470	20.6
County Assembly staff include County Assembly Ward staff-From CRA		County Assembly	2249	8,500	31,245.7	2.9

6-101 Assessed from a different perspective, the cost of running the current Parliament per MP and staff based on budget 2014/15 figures is estimated at Ksh 20.6 million annually.[99] This is in essence considerably larger than Ksh 13.5 million needed to run Parliament in the pre-devolution period (on the basis of the 2011/12 budget. This on its own is an additional constraint to the wage bill.

6-102 Data on MPs pay in 29 countries recently published by *The Economist* shows large disparities between countries, ranging from US$ 200,000 in Australia to US$ 3,500 in Pakistan. Even in high income countries with comparable cost of living, disparities are quite large. The earnings of Australian MPs amount to double those

[97]Estimates of recurrent and development expenditure 2011/12.

[98] Budget figures sourced from the estimate of recurrent and development expenditure and Controller of Budget 4th Quarter report 2014/15 for the County Assembly estimated budgets.

[99] This is a simple and basic proxy for estimating the cost of running Parliament and County Assemblies relative to the pre-devolution period, without taking into consideration the different salary scales and other differential factors. This unit cost is compared with the one for the previous unicameral Parliament before the onset of devolution.

of Sweden (US$ 99,000 p.a.) and more than four times the pay of Spanish MPs (US$ 44,000).

6-103 Kenyan MPs rank 19th out of the 29 countries compared, with an annual salary of US$ 74,500 per annum (excluding allowances and other emoluments). However, this should be looked at in the context of the wide variance in cost of living, as well as the economic diversity of the countries in the sample. Table 6.8 provides a comparison of the developing countries in the sample, with the figures having been adjusted for cost of living differences using Purchasing Power Parity (PPP) exchange rates and are reported in Kenya shillings for ease of comparison.

6-104 As the table shows, Nigeria where MPs earn an equivalent of Ksh1.2 million a month is an outlier on the high end, while Pakistan, Bangladesh and Sri Lanka are outliers at the other end of the scale with very low pay for MPs. The norm would seem to be the range from Ghana at Ksh333,000 to Brazil at Ksh707,000. Kenya is in the middle of the pack. Based on this, we are inclined to conclude that the pay of MPs in Kenya is not out of line with international norms. In Ghana and India, which are fair comparators, MPs earn 60 percent and 25 percent, respectively, of what Kenyan MPs are paid.

Table 6.8: Comparison of MPs salaries in selected countries[100]

	MPs salary (Ksh/Month)	GDP per capita (US$)
Nigeria	1,180,480	3,006
Brazil	706,663	11,208
South Africa	649,403	6,886
Indonesia	605,013	3,475
Kenya	558,750	1,246
Thailand	364,583	5,779
Ghana	333,876	1,858
Malaysia	187,262	10,538
India	135,422	1,498
Sri Lanka	50,606	3,280
Pakistan	42,202	1,275
Bangladesh	41,147	958
Average	404,617	4,251

6-105 Notwithstanding these figures, emoluments for Kenya's MPs and MCAs are higher than comparators, considering that MPs and MCAs in Kenya get lucrative benefits. Combined, these benefits, if quantified as a monthly cost, would push the emoluments for MPs far above the basic salary of Ksh558,750.

6-106 Table 6.9 compares Kenya MPs' pay comprising only the basic salary, sitting allowance (Ksh 80,000 per month), and Special Duty Allowance of Ksh 150 per month (for those with special responsibilities). The analysis excludes mileage allowance, the medical scheme, and other benefits associated with MPs' and MCAs' pay (Although Special Duty Allowance is not paid to all, it stands as a proxy for these other allowances).

[100] *The Economist*, World Bank Economic Databases and authors computations

Table 6.9: Salary of legislatures in different countries compared to Kenya

Comparison based on GDP value		
Country	**GDP value (billion US$)**	**Annual basic salary and allowances (US$)**
Kenya	**60.94**	**90,585**
Croatia	57.11	35,038.08
Bulgaria	56.71	18,144[101]
Guatemala	58.83	36,000
Comparison based on GDP Purchasing Power Parity (PPP)		
Country	**GDP PPP (US$)**	**Annual basic salary and allowances (US$)**
Kenya	**2776.03**	**90,585**
Tanzania	2472.02	84,000[102]
Bangladesh	2991.33	2,886
Comparison based on population size		
Country	**Population size(million)**	**Annual salary and allowances (US$)**
Kenya	**43.00**	**90,585**
South Africa	54.00	70,273.784[103]
Myanmar	53.72	4,200
Spain	46.44	40,598.88

6-107 The allowances and benefits for the Kenyan MP include the following: accommodation and subsistence allowance; security; mileage allowance; medical scheme; retirement benefits; and special duty allowance for those with additional responsibilities. These suggest that Kenyan MPs are among the most highly paid in the world. Their comparators are paid less.

6-108 Put together, the cost of running a bicameral parliament, the overrepresentation of Kenyans, and the exorbitant allowances paid to Kenyan MPs are contributing to the rising wage bill. The allowances alone, in some instances, tend to go beyond the basic pay. This is in spite of the principle that the allowance paid to a State officer cannot be more than 40 percent of gross pay; and salaries cannot be more for 60 percent of gross pay. There is failure, therefore, of Parliament to strictly and effectively enforce the 60/40 percent proportional payment of basic salary and allowances for MPs. There is no enforcement of the principle that basic pay should not constitute more than 60 percent of gross pay and that no more than 40 percent of gross pay should constitute allowances. This is what is exerting pressure on the wage bill.

[101] Counseil De L'europe (2014), Greco Group of States against Corruption, Fourth Evaluation Report, Bulgaria. https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4%282014%297_Bulgaria_EN.pdf

[102] National Institute for Legislative Studies (2015), A cross country comparison. Nils.gov.ng/docs/ legislators-salaries-and-allowances.pdf

[103] Proclamation No. 11 (2016) by the President of the Republic of South Africa: Determination of Salaries and Allowances of Members of the National Assembly and Permanent Delegates to the National Council of Provinces http://www.gov.za/sites/www.gov.za/files/39750_pro11.pdf.

6-109 Public spending in Kenya has been on a gradual increase. Overall, there is evidence of an expanding size of government. The findings show that public expenditure as a share of GDP has risen during the implementation of the new Constitution and post-devolution periods. The driving factors go beyond the actual implementation of the Constitution and devolution. Spending has increased because of policy choices by both the Executive and the Legislature at both the national and county level. The drivers, in particular, include implementation of national government infrastructure programmes and rising debt payment, among others.

6-110 The percent growth of public wage bill is on increase; there is an increase in the hiring of personnel. During the last two years before implementation of the Constitution, growth of the public wage bill was 8.29 percent in 2009 and 8.29 percent in 2010. Growth increased to 11.59 percent in 2012 and 15.42 percent in 2013. It increased to 16.75 percent in 2014. However, the wage bill as a share of GDP has not significantly changed. However, Kenya's wage bill as a share of GDP is generally higher than most of the East African states, but generally within the desired international threshold of 7 percent. But there is need to ensure that public wage bill does not increase in a manner that threatens macroeconomic stability.

6-111 However, public sector wages are today higher than in the private sector; the public sector pays more than the private sector. But a close review of public sector wages shows higher concentration of large wages within the senior posts. Lower level posts are poorly remunerated. Concentration of high wages at the senior level of the public sector is occasioning unprecedented disparities in wages, thereby demoralizing staff in lower level positions.

6-112 The county governments perform better in meeting the 30 percent development budget requirement than the national government. Some of them allocate even more than 30 percent of their total budget for development budget.

6-113 Increase in fiscal deficit characterized the first two years of implementation of devolution. Without doubt, however, fiscal deficit featured in the pre-devolution period too, except that the post-devolution share has been higher.

6-114 In general, there are those who argue that that under the Constitution 2010, the Executive and the national Parliament have become too large and expensive to maintain. This audit confirms two things in this regard:

- There is increased wastage of public resources leading to increased expenditure. The amount of unsupported expenditure has been on the increase, particularly during the first year of devolution. It increased from 2 percent or Ksh 34 billion in 2012/13 to 5 percent or Ksh 67 billion in 2013/14. This is a sign that public funds are not used in the right manner; there is lack of prudence in use of public funds. It could be that much of this was lost through corruption or general wastage of funds.

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

6-115 The government should consider the following recommendations:

- The Kenya National Bureau of Statistics and other relevant agencies should keep regularly updated coherent datasets on the economy at both the county and national government level. This is critical now more than ever before, especially considering that these statistics are used in ensuring equitable allocation of resources, now and in the future.

- The Government, under the guidance of the Salaries and Remuneration Commission (SRC), should develop a clear policy to manage the public sector wage bill. This will ensure that public sector emoluments are managed and applied in a sustainable manner. The focus of attention should be on allowances paid to public servants. These present a large risk to public wage bill sustainability. The SRC should take measures to reduce and tightly cap these allowances.

- The allowances paid to state officers, including Members of Parliament and Members of County Assembly, similarly, should be reduced to lighten the burden on the public wage bill. The SRC should similarly take measures to reduce these allowances and other emoluments.

- Further, the SRC should develop guidelines for Parliament to follow to ensure that no more than 60 percent of the current gross pay for MPs shall be basic salary; and no more than 40 percent of present gross pay for MPs shall constitute allowances.

- Attempts to rationalise salaries within the public sector should be completed. The rationalisation efforts should seek to harmonise the salaries and address disparities within sectors, departments and agencies as well as inequalities between pay by different agencies.

- There is need for expenditure rationalisation; the governments at the county level and the national level should be spending on priority areas. These should be identified through proper planning, consultations and cooperation between the two levels of government.

- The county governments should be eased of the burden of carrying unnecessary wage bill inherited from former local authorities, and staff from the central government who are now undertaking the devolved functions. The Public Service Commission, the Salaries and Remuneration Commission, and the County Public Service Boards (through the Council of Governors) should develop and adopt public service standards and guide harmonisation of remuneration. They should also develop a strategy to implement the CARPS recommendation on restructuring and harmonisation of national and county human resources.

CHAPTER SEVEN

THE LEGISLATURE

Introduction

7-1 The Constitution acknowledges the people as the source of the legislative authority at the national and county levels. This recognition is in conformity with the national values and founding provisions of the Constitution, which place the sovereignty of the people at the centre of all public power. The two chambers of Parliament (the National Assembly and the Senate) and the County Assemblies have a primary mandate and duty to represent the sovereign will of the people and reflect the peoples' aspirations in their decisions.

7-2 The Constitution establishes and defines roles, membership and composition of the National Assembly and the Senate at the national level of government. It also establishes County Assemblies at the county government level, and delineates their roles, membership, and composition.

7-3 Of note is that the Constitution identifies the roles of Parliament and the County Assemblies to include representation of the people, legislation, and oversight. Parliament plays the role of oversight at the national level – overseeing the Executive - while County Assemblies oversee the County Executive.

7-4 It is not envisaged that the Legislature will play a role in executing government decisions and policies. Parliament and the County Assemblies oversee implementation of the policies and the laws.

7-5 Previously, the Executive dominated Parliament and undermined its independence in several ways. At the local level, the former local authorities (Councils) exercised some limited form of legislative powers (delegated legislative power). However, the Councils were not effective because the central government controlled them.

7-6 These challenges led to the demands for an accountable Parliament, and specifically a Parliament that is independent of the Executive and responsive to people's needs. The Constitution recognizes this need and establishes a Parliament with the mandate to exercise legislative authority independent of the Executive and control of any other institution.[104]

7-7 This chapter looks at the implementation of legislative power at the national and county levels, and the effectiveness of both Parliament and County Assemblies in representing the sovereignty of the people. The report also looks at how the views and expectations of the people are reflected in the implementation of the Constitution.

Structure and Functions of Parliament

7-8 The Constitution provides for a Parliament that responds to the aspirations of Kenyans. It establishes a Parliament that is separate from the Executive, under a pure presidential system of government. It is in control of its agenda and activities.

7-9 Furthermore, the Constitution provides for a bi-cameral Parliament: the National Assembly and the Senate in accordance with public views during the constitution making

[104]Article 94 (6) Constitution of Kenya 2010.

process.[105] Legislative power is now divided between the two chambers. Because of this, effective law making can only be possible with the appropriate cooperation, consultation, and linkages between the two houses that make up Parliament.

7-10 The role of oversight and representation is also divided between the two chambers. Their roles reflect the differentiated mandate. The structure, powers and functions of the Senate concern representing and safeguarding county interests. The primary role of the National Assembly is popular representation, which is summed up as representing the people of constituencies. An important weakness in the current structure of the national Parliament is that there is no single head of the two chambers. Both chambers are led by the respective Speakers, and the two chambers are perceived as co-equal chambers without any of them subjecting itself to the control of the other. This problem often leads to legislative gridlock and causes delays in passing of certain important bills.

Composition of the National Assembly

7-11 The National Assembly is composed of 349 Members of Parliament. This comprises 290 members elected from single member constituencies across the country. Additionally, there are 47 women representatives elected from each of the 47 counties and 12 members nominated to represent special interests - youth, persons with disabilities, and workers.

7-12 Some argue that this number is too big to debate in one chamber, particularly given the number of days that MPs attend Parliament and committee proceedings. The size alone is too big to allow for thorough debates. Indeed, the survey data shows that about one third of Kenyans think the MPs are too many.

7-13 Combined with the Senators (67) and over 2,200 MCAs, Kenya has over 2,600 representatives. This is a ratio of about one representative to about 16,000 Kenyans. This is raising questions as to whether Kenyans are over-represented. If one looks at both the county and national levels, then there is need to recognize the sentiments about over-representation.

7-14 The Constitution of Kenya 2010 retains the majoritarian system of elections (First-Past-the-Post or FPTP). However, during the constitutional review process, there were mixed views on the kind of electoral system that should be used. While some were in support of retention of the majoritarian system, others called for Proportional Representation (PR), where members of the National Assembly are elected through party lists as opposed to single member constituency system that is currently applied. Others recommended a representation system that has either both elements (FPTP and PR) or Mixed Member Proportional Representation (MMPR).

7-15 The CKRC had considered the merits of the current system of voting (majoritarian) against the proposals for alternative electoral systems. In its final report, the CKRC noted that an appropriate electoral system should have the following features:

An ideal electoral system should ensure or promote representation of the people and all major interests in a political system. The system operating in the framework of a republic should, therefore, be as inclusive as possible by making it possible for as many of the divergent interests and concerns as possible to be represented. Identifying these interests is critical to ensure no one interest group dominates the rest, as this would be unrepresentative and undemocratic.[106]

[105]CKRC Main Report (2005) 187.
[106]CKRC Main Report (2005) 165.

7-18 The CKRC considered the Kenyan context and identified a number of challenges with the majoritarian system. The challenges that were identified included: a lack of incentive for candidates to cooperate with their parties, ethnic voting patterns and ethnic considerations that lead to exclusion of smaller voter groups, gerrymandering of constituency boundaries to favour certain candidates, disadvantage to smaller parties, among other factors. While most of these challenges could still manifest in PR system in a different form, the focus on individual candidates and ethnicity, to the exclusion of other factors, led to favouring of larger parties and ethnic personalities who are perceived as strong politically.

7-19 However, this is not to suggest that the majoritarian system has no benefit at all. The system, for instance, encourages accountability since the candidates are directly accountable to their voters (as opposed to a political party). The CKRC, therefore, decided to recommend a balance between majoritarian and PR system of elections. The CKRC proposed that the then seats of Parliament (210 in number) be retained as FPTP and an additional 90 seats be created to be filled through a system of Proportional Representation. If this proposal could have been taken up, a part of the members would have been directly elected through the constituencies and a part of them through the party lists.[107]

7-20 The Constitution did not adopt any of the options presented during the constitutional review process (on mixed member or proportional representation), yet there is credible evidence that Proportional Representation System or Mixed Member Proportional Representation system is good for societies such as Kenya that are deeply divided along ethnic and other social lines. The 12 seats (out of a total of 349) left for nomination of special interest groups are hardly enough to accommodate the diversity of the Kenyan society. It is not adequate to represent the interests of all groups in a constituency. FPTP is also not good for national cohesion, because it encourages individuals (FPTP) to mobilise support along clan, religious and ethnic lines. It encourages parties to form on basis of these cleavages.

7-21 In the long term, Kenya should consider adopting either a pure PR system or a Mixed Member Proportional Representation System in order to allow all groups equitable chance of representation. The current system results in exclusion of certain groups, particularly those who do not support the winning individual. The proposed options will strengthen the institution of political parties and provide equal opportunities for all groups to be represented. This proposal will also allow for adequate and effective representation of 'Special Interests' than is the case at present.

Composition of the Senate

7-22 The Senate, unlike the National Assembly, is "a house of counties". Under Article 98 of the Constitution, county constituents directly elect Senators in a similar manner to governors. The Senate is expected to represent and promote the interests of counties at the national level. However, there are a number of issues that have emerged from the nature of functions bestowed on the Senate in relation to its structure.

7-23 Due to its territorial representation role (as opposed to popular representation), the Senate is composed of 47 elected members from each of the 47 counties and another 16 women members who are nominated on the basis of party strength. In addition, the Senate is composed of four other members representing the youth (2 members composed of one woman and one man) and persons with disabilities (also composed of one man and one woman).

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[107] CKRC Main Report (2005) 173-174.

7-24 This report acknowledges a number of concerns relating to the structure and composition of the Senate. The oversight role that is given to the Senate over the counties has created confusion and contributed to further disharmony between the counties and the Senate. This is in spite of a court ruling on the same issue.[108]Under Article 96 of the Constitution, the Senate is given power to oversight on national revenue allocated to county governments. It is not clear in the Constitution whether the Senate can exercise oversight over the County Executive in the same manner that the County Assembly does. These challenges exist due to the absence of a clear legal and policy framework.

7-25 Under section 33 of the County Government Act, the Senate has the power to approve impeachment of a Governor where a County Assembly has (with the concurrence of two-thirds of the County Assembly) supported a motion of impeachment of the Governor. However, it is important that the process of impeachment involves the voters in the county; it should not be hinged on the resolutions of the County Assembly and the Senate alone.

7-26 Combined, these challenges have constrained the effectiveness of the Senate. Almost half of Kenyans are not aware about the role and functions of the Senate. In the national survey, when asked 'in your view, what are the three key functions of elected Senator', 48 percent of the respondents said they did not know the role of the Senator. Twenty (20) percent indicated that they did not know the role of the National Assembly members. A majority of the respondents during the public survey did not seem to understand the role of the Senate. More than half of the respondents thought that effectiveness of senators and the Senate should be judged based on their development record. Over Sixty (60) percent of Kenyans felt that the Senate and senators lacked development consciousness.

7-27 These views notwithstanding, it bears stressing that Senate has an important role to play in the current constitutional governance context. The Senate has a responsibility to not only protect devolution but also further the interests of the county level of government at the national level. But the fact that many Kenyans do not know its functions and would prefer to have it abolished raises a need to re-think the role of the Senate as well as rethink how civic education on the Constitution and the institutions of governance is delivered in the country. The Senate itself and other institutions whose core functions are impacted by it should facilitate the performance of specified Senate functions, as well as deliver comprehensive civic education on the importance of the Senate in relation to devolution.

7-28 More importantly, the Senate should take further steps to understand its role, which is relatively new in the Kenyan context, and become more proactive in asserting its role within the national legislature. The country has minimal experience with bicameralism, since the Senate that was established under the independence Constitution did not last long. The current Senate, therefore, needs to not only take extra steps to build its legacy, but also ensure that the public understands its role and its contribution in the current constitutional dispensation.

Gender: Compliance with the "one-third rule"

7-29 The Constitution spells out aspirations of inclusivity in the legislative bodies. Through Article 81, the Constitution provides that not more than two thirds of members of elective public bodies shall be of the same gender. However, the Constitution is silent on how Parliament should meet this rule. Article 100 requires Parliament to enact legislation that would promote the representation in Parliament of women, persons with disabilities, the youth, ethnic and other minorities and marginalized communities.

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[108]See *International Legal Consultancy Group (ICLG) v The Senate and another* (High Court of Kenya at Nairobi, Constitutional Petition No. 74 of 2014).

7-30 Both the National Assembly and the Senate have not complied with the one-third rule. In 2013, just before the March General Election, the Supreme Court ruled that Article 81 should be achieved progressively and gave Parliament a timeline within which the formula for the realization of the provision should have been set.[109] Parliament, at the lapse of the period, sought a further extension of one year.

7-31 Policy proposals initially seemed to lean towards adopting the County Assemblies' approach which involves topping the number of elected representatives with nominees in order to ensure that at least one-third of the members are from one gender. This implies increasing the number of representatives until there is sufficient number to comply with the principle. This proposal was crafted into a constitutional amendment, the Constitution of Kenya (Amendment) Bill No. 4 of 2015. However, the National Assembly failed to garner the required minimum number of members of the National Assembly to pass the Bill in May 2016.

7-32 Despite these developments, the fact that this principle has not been adhered to in the National Assembly demonstrates lack of commitment by political leaders to address this problem. Adhering to the gender principle appears to be nobody's business. Political parties have themselves not seized upon this matter to show commitment to the Constitution. Articulation of this gender principle generally lacks leadership from within and outside Parliament. However, the public largely supports implementing the gender principle.

7-33 In the national survey, respondents were asked whether the implementation of the two-thirds gender principle was necessary. Slightly more than half of the respondents answered in the affirmative.

Table 7.1: Is the one-third gender rule necessary for development

	Overall (%)	Urban (%)	Rural (%)
Yes	**53**	52	53
Somehow	**13**	13	13
No	**25**	28	23
Refused to answer	**0**	0	0
Don't know	**9**	6	10
Total	**100**	100	100

7-34 It is noted here that a number of factors have led to the under-representation of women in Parliament and other representative bodies. The national survey specifically identified lack of leadership skills and qualities as the main reasons why some people would not elect a woman. It is important to appreciate that the perceptions of lack of leadership are driven by cultural prejudices inherent in a patriarchal society.

7-35 However, asked whether they could vote for women to the various elective positions in the Constitution, a clear majority of the respondents indicated that they could willingly vote for women candidates to the various elective positions, including the Presidency (59%); Governor (70%); Senator (72%); MP (78%) and MCA (82%).

[109]Supreme Court of Kenya, Advisory No. 2 of 2012.

7-36 As mentioned earlier, the challenge of representation of different groups maybe resolved through Proportional Representation or Mixed Member Proportion Representation. Parties would be compelled to submit lists that comply with this principle, as well as principles for promoting national cohesion.

7-37 It is proposed that the country considers amending the Constitution to provide for Mixed Member Proportional Representation (MMPR). This report has already noted the high number of representatives and the need to curb "over-representation" in legislative bodies. The MMPR electoral system has a greater potential to facilitate representation of diversity (including gender) and ensure a leaner parliament. It has potential to create an all inclusive society.

Law-making Function of Parliament

7-38 Parliament exercises its legislative power through Bills passed by the prescribed procedures and assented to by the President. This power is shared between the two Chambers. While the National Assembly debates and considers all laws generally, the Senate is restricted to laws that affect county governments. As a result, any law debated and passed in the National Assembly that concerns counties has to be referred to the Senate for debate and approval before the President can assent to it.

7-39 Laws affecting counties are defined in the Constitution as those which touch on functions allocated to counties in Part II of the Fourth Schedule to the Constitution, a Bill that relates to elections of members of a County Executive or Legislature, or any Bill that touches on the finances of county governments. All these laws must, as a constitutional requirement, be debated and passed by the Senate before presidential assent.

7-40 The National Assembly requires a higher threshold (two thirds) to overturn the decision of the Senate with regard to special Bills affecting counties. On the other hand, the National Assembly needs only a simple majority to overturn all other Bills (ordinary) affecting county governments. Furthermore, a Money Bill can only originate/be introduced in the National Assembly first before it can proceed to the Senate, if it affects counties. A Money Bill is defined as a Bill that deals with taxes (excluding county taxes), imposition of a charge on a public fund, borrowing or guaranteeing a loan and connected matters.[110]

7-41 The shared legislative functions between the National Assembly and the Senate have raised a number of challenges. There is lack of clear boundaries on the legislative role of the Senate and the National Assembly. This has led to the National Assembly making decisions that seem to undermine the legislative role of the Senate. There are instances where laws that clearly affect counties have not been referred to the Senate for debate and approval.[111]

7-42 In addition, there are laws that the Senate should have passed but the National Assembly passed them and the President assented to them. These may be cited as unconstitutional for flouting procedures. The two houses appear not to respect Article 110, which requires consultation between the Speakers of both Houses, before any House considers any Bill.

7-43 The conflict between the two houses has prevented consultations between the two houses. This has in turn led to either house challenging the enactment of some of the laws passed. But neither the Constitution nor enabling legislation has an elaborate procedure for

[110] Article 114 (3) Constitution of Kenya 2010.

[111] In 2013, the National Assembly by-passed the Senate and sent the Division of Revenue Bill (DORB) to the President for assent. Senate protested this move and sought advise from the Supreme Court. The Supreme Court held that the Senate has a duty to debate and approve the Bill before Presidential assent.

dealing with the question of what happens when the two Speakers cannot jointly resolve whether a Bill concerns county governments.

7-44 Article 113 provides for a Mediation Committee to be established to resolve disputes over the content of Bills. The process of mediation, however, is protracted and may compromise devolution. It may also lead to a constitutional crisis, especially if the Bills under mediation are the Division of Revenue, and County Allocation of Revenue Bills.

7-45 At the same time, the Constitution provides the procedure for processing of Bills. However, in certain circumstances, it does not outline the timeframe for considering Bills. The absence of a definite time by which one Chamber should finalise a Bill referred by another Chamber may lead to unnecessary delays in passing of such Bills, and by that affect implementation of critical decisions. Article 217, for example, stipulates that the Senate is to consider the basis for sharing revenue, but has no timeline for this consideration. Article 218 provides for the consideration and passing of the Division of Revenue and County Allocation of Revenue Bill, but provides no clarity on the timelines for its consideration. Under the Public Finance Management Act, time begins to run after Senate consideration.

7-46 The import of a delay on subsequent processes has constitutional implications. For example, a delay in the Senate's consideration of the basis for revenue sharing, or passing of the Division of Revenue and County Allocation of Revenue Bills, can result in a delay in the submission and consideration of estimates. This was the situation in2014/15, when a delay in the approval of the County Allocation of Revenue Act necessitated National Treasury bailout of counties that had not yet prepared budget estimates and County Appropriation Acts.

7-47 Both chambers have passed laws that tend to undermine the Constitution. The National Assembly has on several occasions passed laws that go against the text and spirit of the Constitution. The Public Audit Act 2015, the Constituency Development Fund (CDF) Act 2013 and some sections of the Security Bill are some of the laws that are criticized for failing to meet the constitutional threshold. Both laws (CDF and the Security laws amendment) were eventually declared unconstitutional by the courts.[112]

7-48 Kenyans associate Parliament with development even under the new Constitution. The public still associates MPs with undertaking of local development (as opposed to national legislative roles, representation, and oversight). The CDF was indeed initiated to facilitate MPs delivery of services and local development in general. This may explain the decision by Parliament to hold on to the fund.

7-49 The role MPs have played in development throughout Kenya's independence in the 1960s explains why both the public and MPs are keen to tag development on the role of MPs even under the reformed Constitution. In the national survey, 45 percent of the respondents thought "development" is a key role of the MP. Thirty one (31) percent of the respondents thought the key role of the MP is to bring and manage CDF.

7-50 Only 29 percent of the respondents thought that the MP's key function is to make national laws, while 39 percent noted that the key role of the MP is to represent constituents and speak on their behalf. It is thus clear that the public has not fully understood the roles of the MP under the new Constitution, especially in relation to local development and service delivery.

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[112]For the case of the CDF, *Institute of Social Accountability & and another v National Assembly & 4 others [2015] eKLR?*.The Court declared that the continued implementation of the fund as was originally designed and structured *"violates the doctrine of separation of powers between the executive and legislative functions"*.

Table 7.2: What are the three key functions of elected MP?

	Overall (%)	Urban (%)	Rural (%)
Legislation - making laws	29	34	25
Representation - listen to us and talk on our behalf	39	39	39
Oversight	16	17	15
Development	45	44	47
Budgeting	7	8	5
Security	8	9	7
Bringing or managing CDF	31	30	31
Other	1	0	2
Don't know	20	20	20

Multiple responses: Percentages do not add up to 100

7-51 The Senate too has attempted to develop legislation on issues that are clearly within the legislative mandate of county governments. The Senate introduced amendments to the County Governments Act that established County Development Boards. The Boards were to be established across the counties and were to be chaired by Senators, with County Governors as the vice-chairpersons. However, the Court declared the Boards unconstitutional on grounds that they threatened to infringe on county powers and functions.[113]

7-52 Furthermore, the Senate has no direct linkages with the County Assemblies and the County Executive. The absence of this linkage has created a lacuna, which has in turn resulted in tensions in relations between the Senate and the County Executive, among others. There is thus need for a national legal framework to establish mechanisms for collaboration and consultation between the County Assemblies, the Senate and the County Government.

Impact of the Pure Presidential System on Parliament

7-53 The pure presidential system of government adopted in the Constitution ensures a stricter separation of powers between the Executive and the Legislature. Under the pure presidential system, Parliament is independent, structurally and functionally, from the other two arms of government. Parliament is, therefore, expected to carry out its functions of law-making, oversight, budgeting, etc independently.

7-54 Inevitably, the President and the Cabinet Secretaries have to rely on MPs from the president's party/coalition to promote and champion executive priorities in Parliament. The nature or system of government requires deliberation, objectivity and consensus in carrying out the legislative mandate. It envisages Parliament working cohesively to push the legislative agenda at the national level. While there may be political party/coalition differences on issues that are before the house, the Constitution envisages that such differences can be resolved through political consultations and compromises.

7-55 However, the current practice is that numeric strength in either of the two chambers matters in mobilising for support in Parliament. This often leads to dominance of party

[113] Council of Governors and 3 others v Senate and 53 others [2015] eKLR.

interests rather than public interests. In the end, political party divisions and interests rather than national interests run supreme and prevent the passing of important public interest bills, especially if such bills do not have the support of the side commanding numeric strength.

7-56 It is important that the leading political coalitions transcend their party and partisan differences and promote public interest. Agreeing to compromise and developing a bi-partisan approach and adopting a collaborative and accommodative approach that embraces both political sides is good for the country. This will not only ensure smooth running of parliamentary business, but will also lay a basis for inclusive political and governance processes in the country. This will require the leadership of both sides in both chambers to have structured engagement during parliamentary sessions; constant consultations embedded in law will enable political groups to develop bipartisan spirit in Parliament.

7-57 Within Parliament, MPs and Senators are making efforts to understand how a presidential system works. But whenever they have difficulties submitting to the presidential system, they rapidly attempt to change the rules that govern the Legislature in parliamentary or hybrid system. This tends to weaken the learning curve regarding how the presidential system works. For instance, in late 2014, the National Assembly sought to amend its rules of procedure to provide for a "weekly question time" for Cabinet Secretaries, akin to the practice that was in the previous Parliament. The Executive argued against this[114] and the Commission for the Implementation of the Constitution also advised against it.[115]It was shelved.

7-58 Of concern is that both the Senate and the National Assembly summon members of the executive and in particular the Cabinet Secretaries and their Principal Secretaries quite often. The two chambers at times seek explanation on a similar issue from the same ministry but at different times; the two chambers do not synchronise their requests for explanation. The County Assemblies also summon their respective executives in an unpredictable manner. All this tends to constrain the time carrying out other tasks.

7-59 A point to emphasize then is that Parliament has adequate tools and processes (such as department committees and the power of summoning) to hold respective government agencies to account. These channels should be fully exploited as opposed to "resuscitating" practices that were buried with the old constitutional dispensation.

7-60 The role that Parliament played in the past with regard to the legislative development process has also changed substantially. Before 2010, ministers who also were Members of Parliament (MPs) championed government Bills in Parliament. This has changed under the new Constitution. Government Bills are now handled by Members of Parliament who are not part of the Executive. In this regard, there is a need to develop elaborate procedures that take into account the new structures and systems between the legislature and the Executive.

7-61 The Constitution establishes independent offices and commissions. Any Bills of law or amendments to laws concerning such institutions should, for purposes of safeguarding their independence, be dealt with through special procedures. While the national Executive should have its inputs and views considered in the development of such laws, proper measures should be taken to ensure that the Executive does not unduly control and influence the content of the Bill in a manner that undermines the institutions that are to be regulated by such laws. Parliament should also ensure that debates on such laws are

[114] Anthony Omuya, "Uhuru hits out at House teams over Cabinet summons", *Business Daily*, 7th November 2013.
[115] Commission for the Implementation of the Constitution (CIC), "CIC Press statement on the violation of the Constitution by Parliament", 2nd October 2014.

conducted in a bi-partisan manner that allows political sides to reach a compromise on the content of such laws.

Parliamentary Accountability, Leadership and Organisation

7-62 Parliament has full control of its own calendar and the manner in which it organises its structures and systems to ensure effective legislative business. The Constitution provides for leadership of the two Chambers. The overall leadership is by the respective Speakers, who are *ex officio* members of the respective Chambers. Parliament carries out its business through various committees established in the Senate and the National Assembly. The committees report to the respective full House on specific matters relevant to the roles of the committees.

7-63 The primary roles of Parliament are representation, oversight and law making. These roles require people with skills to conduct analysis to inform the law making process, as well as skills and competencies to distil views from the public and present them to Parliament. Educational qualifications of members sitting in committees, and in Parliament in general, are important because it can improve the quality of output of committees and Parliament in general.

7-64 In the national survey, members of the public were overwhelmingly supportive of minimum educational qualifications for Members of Parliament. Seventy-three (73) percent of the respondents recommended that an MP should have a minimum of a university degree. The respondents were equally supportive of similar qualifications for other categories (nominated seats) of membership of the National Assembly. Also, 68 percent want a Woman Representative to have a university degree. A Bill introduced in the National Assembly in 2015 seeks to introduce minimum educational qualifications for persons seeking to run for elective office.[116] The Bill proposes that persons who seek parliamentary elective office should have a minimum of a university degree and a person seeking an elective seat at the ward should have a minimum of a diploma.

Parliamentary Accountability

7-65 The electorate's right to recall their non-performing Member of Parliament is one of the means of ensuring accountability provided for under Article 104 of the Constitution. The Article does not, however, expressly provide grounds and procedures for effecting the right of recall, and instead through Sub-Article 2 vests the power to determine and set grounds against which they can be recalled on the very Members of Parliament.

7-66 Parliament, through the Elections Act of 2011 at section 45(3), sets out grounds and the procedures for recall. The timelines for an initiative to recall a representative and the provision for the courts to affirm grounds before the recall process can start make the recall process a complex and impractical procedure.

7-67 As presently provided, the law on recall is not serving the purpose of the Constitution. The law appears to make it difficult for voters to recall their representatives irrespective of the grounds they cite to recall.

County Assemblies

7-68 Article 177 of the Constitution provides for the composition of the County Assembly, comprising members elected by the registered voters of the wards, each ward constituting a single member constituency. It further provides for a number of special seat members

[116]Election Laws (Amendment) Bill 2015.

necessary to ensure that no more than two-thirds of the membership of the Assembly is of the same gender, and a number of seats for marginalized groups, including persons with disabilities and the youth.

7-69 The objective of this provision is to secure, through affirmative action, the participation of previously marginalized groups in local governance. In the March general election, a total of 1,450 Members of County Assemblies were elected across the country (composed of 1,370 men and only 80 women). Men comprised 95 percent of elected MCAs and this led to the nomination of 572 women to ensure compliance with the one-third-gender rule. A further 83 women were nominated as special representatives of other marginalized groups along with 97 men, bringing the total of MCAs to 2,222.

7-70 This has contributed to a disproportionately high number of nominated representatives. Isiolo County Assembly has 50 percent, Taita Taveta County Assembly has 43 percent, and Samburu County Assembly has 42 percent nominated Members of the County Assembly.

7-71 Some have argued that the gender special seats have increased the number of women in county representative structures. They point out that in some cases, the number of members nominated to fulfil the gender principle is equal to those elected to represent geographical wards. This weakens the collective voice of elected representatives, and therefore weakens the voice of voters who elected them.

7-72 Furthermore, the final number of MCAs is hard to determine until after an election because the number is determined by the gender composition of the elected MCAs. It may affect planning by the respective county assemblies and the cost of maintaining the assemblies may be uncertain.

7-73 As suggested earlier, the current majoritarian electoral system will continue providing high numbers of representatives. There is no immediate ceiling on the numbers of MCAs in this respect. It is also proposed that Kenya alters the electoral system to address this challenge in the County Assemblies.

County Assemblies' Legislative Role

7-74 Article 185 confers legislative authority to County Assemblies to pass laws that are necessary to facilitate the performance of county functions. The nature and extent of legislative power given to counties requires the counties to develop capacity to undertake their legislative role. Counties have several challenges.

7-75 First, counties lack adequate capacity to develop laws and policies for county governance. Legislation and policy development requires counties to have capacity for legislative and policy drafting, as well as adequate resources (human and financial) to ensure implementation. However, there is not enough technical expertise to support counties to develop quality laws and policies.

7-76 Secondly, counties have not been able to facilitate adequate public participation and consultation in the development of county laws. Whereas the Constitution emphasizes public participation, a number of laws from County Assemblies have elicited public outcry during implementation due to inadequate public participation when they were developed.

7-77 Thirdly, like the Senate and the National Assembly, counties have, in many instances, overstepped their legislative mandate. There are reported cases where counties have proposed taxing powers that go against the provisions of the Public Finance Management Act. There is also a growing trend to duplicate the CDF at the county level through

creation of Ward Development Funds that are under the political patronage of elected MCAs.

7-78 Some of these challenges are leading to dissatisfaction among members of the public with the work of MCAs. In the national survey, over half (52%) of the respondents were either very satisfied, or somewhat satisfied with the work of their MCAs. Forty (40) percent were either very dissatisfied or somewhat dissatisfied with the work of MCAs. The perception about effectiveness of MCAs could be improved if the capacity of county assemblies could be enhanced as discussed above.

Table 7.3: Level of satisfaction with the work of MCAs

	Overall (%)	Urban (%)	Rural (%)
Very satisfied	**16.0**	11.0	19.0
Somewhat satisfied	**36.0**	34.0	37.0
Somewhat dissatisfied	**16.0**	17.0	16.0
Very dissatisfied	**24.0**	27.0	22.0
Refused to answer	**0.2**	0.3	0.2
Don't know	**8.0**	10.0	7.0
Total	**100.0**	100.0	100.0

7-79 Furthermore, over half of Kenyans now want MCAs to have a university degree as minimum education qualifications. Twenty-two (22) percent recommended a college qualification. Another 16 percent called for a secondary level qualification while 1 percent recommended at least a primary school qualification.

Table 7.4: Minimum educational qualification for someone vying for MCA

	Overall (%)	Urban (%)	Rural (%)
University	**54.0**	52.0	55.0
College	**22.0**	24.0	21.0
Secondary	**16.0**	17.0	16.0
Primary	**1.0**	1.0	1.0
None	**4.0**	4.0	4.0
Refused	**0.2**	0.2	0.2
Don't know	**2.0**	2.0	2.0
Total	**100.0**	100.0	100.0

7-80 People also feel that they are not involved in decision making at the county level. In fact, the level of participation in county-related activities is very low. Ninety-three (93) percent indicated that they have never participated in the development of the county integrated plan, never been involved in the county budget development, and never been involved in the development of county policies and laws. Ninety (90) percent of the respondents indicated that they have never participated in ward development and that only 13 percent have ever participated in meetings convened by the MCA.

7-81 County Assembly administrative structures mirror those at the national level. There is a County Assembly Public Service Board, established under the County Government Act, which is in charge of establishing and abolishing offices in the County Assembly. The County Assembly Public Service Board also hires staff for the County Assemblies.

7-82 The executive arm of the counties also has a County Public Service Board. These two bodies are the equivalent of the Public Service Commission and the Parliamentary Service Commission at the national level. The principle of separation of powers may have led to the establishment of two separate bodies at the county level. However, there are some challenges emerging from these structures.

7-83 The membership and composition of the county assembly service boards does not facilitate professionalism and objectivity in the performance of its core functions. The boards are composed of the Speaker as chairperson, two members of the County Assembly (majority and minority leaders), a member of the public, and the Clerk who is the Secretary. Most of the members of these boards are involved in county politics by virtue of their position in the County Assembly structures. There is no space for professionalization of the board. In practice, the service boards for County Assemblies are spaces for sharing political spoils among the assembly members as opposed to an objective way of managing and addressing County Assembly needs.

Budget making

7-84 An emerging challenge to the budget cycle, as provided for in the PFMA, is the short period for national and county legislatures to operate during an election year. The Constitution provides that elections be held in the month of August of the election year. In line with this requirement, the national parliament and county assemblies dissolve at least three months to the general election to allow for campaigns and preparations. On the other hand, legislators are required to have passed their budgets by the end of the month of June. This presents a dilemma to the budget cycle. June is too close to August, the month of election, and therefore this may constrain effective participation of MPs and MCAs in budget making.

7-85 Furthermore, while the Constitution provides that Parliament should maintain a balanced budget when making changes to proposals by the National Treasury, there are many instances where Parliament has increased budget figures without reducing corresponding expenditures in other areas. This results in a budget deficit whose implementation becomes difficult. All the same, Parliament forwards the unbalanced budget to the Executive to implement. This often puts the National Treasury in difficulties of implementation.

Conclusion and Recommendations

Structure and functions of Parliament

7-86 The current electoral system (majoritarian/FPTP) is not adequate to ensure inclusivity at the national level. There is need to introduce (in the longer term) CKRC proposals for an electoral system that would effectively accommodate diversity and inclusivity (in all its forms) in the national Parliament. World over, the proportional representation system (PR) and MPR are usually advocated as devices to further national cohesion and unity through representation, because either of them ensures all votes count in the final composition of a representative body. CKRC indeed recommended this system to allow for fewer MPs.

7-87 Kenya should consider having a Mixed Member Proportional Representation system in line with CKRC proposal at the national and county level in order to ensure that all interests (gender, youth, persons with disabilities, marginalized and ethnic minorities and communities) are proportionally represented in Parliament.

7-88 It is proposed that the MPR system be adopted to achieve the gender principle. While there is a strong proposal to adopt a gender-top up of numbers akin to that of County Assemblies, a change of the current electoral system to a proportional representation would facilitate achievement of the gender threshold while managing the numbers.

7-89 The Senate and National Assembly should develop a joint framework (through rules or legislation) that can achieve broad-based cooperation and collaboration in the execution of mutual parliamentary functions. The rules/framework should prescribe in detail the legislative process. The two Chambers should develop joint rules that will guide areas of common interest such as the tagging or filtering of legislation, mediation in case of disputes, and specific joint committees on specific matters that affect both Houses.

7-90 While the Constitution provides that the two Speakers should make a decision on whether a Bill affects counties, the two Chambers could consider a "tagging committee" to advise both Speakers on the nature of any Bill that is tabled before either Chamber. Under the previous dispensation, the Attorney General was an *ex officio* Member of Parliament and this enabled the office to offer technical inputs, where necessary, in legislative development. However, the current system of government does not allow the Attorney General to be part of Parliament. This means that both chambers may have to jointly or separately source legal and technical expertise to assist in legislative development.

7-91 The Senate has done a review of laws that have already been passed. It is important that both Chambers make a decision on remedial measures to be taken in view of the Senate's concerns. Parliament should develop procedures to ensure that laws passed by either chamber are aligned with the Constitution. This may entail technical support from institutions such as the office of the Attorney General, the Kenya Law Reform Commission, and the Intergovernmental Legislative Liaison Office in the Office of the President.

Role of the Senate

7-92 It is clear that the direct election of Senators and Governors does not facilitate cooperation and cooperation. There is, therefore, need for enabling legislation to provide a framework for inter-linkages between the Senate and county governments, including the County Assemblies. The framework should address the following:

- Channels and avenues of ensuring that laws prepared by Senate are done in a cooperative and consultative manner with counties;
- A framework for general consultation and cooperation to ensure effective representation of county interests at the national level; and
- Clarification of the Senate oversight roles.

Role of Parliament in the Presidential system

7-93 There is a need to regularly expose legislators to the workings of a pure presidential system of government. This can be attained through training and other capacity development initiatives to assist them adjust to their changed role in the current system

and structure of government. This will prevent them from reverting to parliamentary system of government procedures whenever they find it hard to work through the presidential system.

7-94 There is also need to review the parliamentary procedures, including standing orders, to align them with the tenets of a presidential system. Specifically, the rules should prescribe the composition and role of committees, processes that will ensure political consensus building, etc. Specifically, Parliament should develop rules that will ensure that the integrity of laws concerning independent institutions and offices is maintained so as to enhance the independence of those institutions and offices.

Summons of cabinet secretaries by Parliament

7-95 To avoid the concerns raised by the Executive over concurrent and frequent summons by both chambers of Parliament, there is a need for a harmonised and regularised calendar of appearances by Cabinet Secretaries before the respective sectoral committees; and even before the parliament itself.

7-96 The Senate, National Assembly, and the County Assemblies should consider drawing an annual calendar of meetings with different ministries and parastatals so that the interactions and summons are predictable. Notification for such meetings should be given one month in advance of the meetings so that all parties can adequately prepare. The ministries should designate a liaison office/desk for daily interactions with the parliament to allow for effective planning and consultations.

7-97 Appearances can either be before joint committees from both chambers, or separately by each chamber depending on the issues to be dealt with. The summoning and arrangement of meetings should be done jointly between the Clerks of the two respective chambers and Cabinet Secretaries.

Political Parties and Political Participation

7-98 The Political Parties and Elections Acts are possible avenues for ensuring that persons of either gender are elected into the County Assemblies. Political parties should be encouraged to field more women candidates for elective positions, and funding can be used as an incentive to achieve this.

Right to Recall

7-99 The procedure makes it difficult and impractical to recall a Member of Parliament. Sections 45 to 48 of the Elections Act make it impossible to recall a Member of Parliament. A review of these provisions to conform with the intentions of the Constitution to hold peoples' representatives (Senators, MPs, and MCAs) accountable to the electorate is recommended.

County Assembly Effectiveness

7-100 There is need to raise the level of academic qualifications of members to be nominated/elected to County Assemblies in order to ensure that those elected are effective in analyzing legislation and policies, and undertaking their oversight and representation roles in an effective manner.

7-101 There is need for capacity (human and financial) to enable County Assemblies to retain technical skills to enable them carry out their technical work.

7-102 The government gazette at the national level should prioritise the publication of county legislation. Alternatively, county assemblies should be facilitated to have their own gazette notices as envisaged by law.

Budget making

7-103 An amendment should be made to the PFM Act to provide that in an election year, the Budget and Appropriation Acts should be approved before dissolution of Parliament. The amendment should provide for the National Treasury to issue shortened timelines for the budget cycle during an election year to specifically take into account the election date (August) and the dissolution of the legislatures prior to the election date. The budget finalisation should be brought forward preferably by three months so that the budget is presented to parliament during March every election year.

7-104 The law clearly states that budget proposals presented to the national and county legislatures should be balanced and the adjustments to the budget should also ensure a balance between the revenues and expenditures. Therefore, Parliament and the County Assemblies should adhere to the Constitution by ensuring that adjustments made to budgets by Parliament and the County Assemblies result in balanced budgets. In this regard, it is recommended that the PFM Act be amended to provide for the National Treasury to return to Parliament any unbalanced budget with a memo explaining the gaps and challenges.

7-105 There are instances where legislatures (including the county assemblies) are not able to pass budgets by the set timelines. This usually affects implementation of the budget. It is recommended that in order to avoid delays in funding of on-going or essential projects, a law should be introduced to allow for the national and county treasuries to present budget estimates on essential expenditures (to be approved by the legislatures at the budget debate stage) that need to continue where there is a delay in the approval of a budget by the legislatures. The previous approved budget lines for these essential expenditure should support such listed expenditure.

CHAPTER EIGHT

THE ELECTORAL SYSTEM AND REFORMS

Introduction

8-1 Kenya's system of governance is premised on democratic representation of the people. This is in recognition of the people as the ultimate source of all public power and authority. Representation and the electoral system, therefore, provide a means through which the will of the people can be reflected in the state and governance structures. The Constitution spells out the principles that govern the electoral system. These include: free exercise of political rights by all citizens, the one-third gender rule that ensures that every representative institution has at least one third of the opposite gender, fair representation of persons with disabilities, and universal suffrage based on aspiration for fair representation. The Constitution also emphasizes free and fair elections that entail: equal vote franchise, peaceful and transparent electoral process, and an impartial, competent and independent electoral body.

8-2 Electoral reforms featured in the constitution reform process; Kenyans wanted an electoral system that enhanced achievement of their democratic goals. The violence that followed the disputed presidential election results of 2007 was symptomatic of the poor management of elections and the electoral process generally. The Constitution and enabling legislation, such as the Elections Act 2011 and the Political Parties Act were meant to facilitate proper elections and general democratic governance. Effective representation of the people, calls for structures of representation to reflect the diversity of the people; responsive and highly accountable leaders, who translate people's aspirations into government agenda; and an electoral system designed in a manner that facilitates free and fair elections.

8-3 Political parties and political coalitions are the vehicles through which the power of democratic representation is sought. Political parties are, therefore, critical institutions in enhancing effectiveness in democratic representation processes.

8-4 This part analyses the institutions and processes established to ensure representation under the Constitution of Kenya 2010, and makes recommendations to enhance effective and democratic representation.

Management of Elections

Structure and Role of the Independent Electoral and Boundaries Commission (IEBC)

8-5 The IEBC has the critical task of ensuring that elections are free and fair. The IEBC, therefore, has the task of ensuring that the sovereign will of the people is reflected in the election results. This not only calls for competence in the management of the exercise and adequate resources to support the conduct of the exercise, but also credibility in the eyes of the aspirants and the voters who take part in the elections. One of the main causes of violence after the disputed presidential elections in 2007 was the perceived mismanagement of the elections. The Independent Review Commission (popularly known as the Kriegler Commission) made a number of recommendations regarding the structure and role of the electoral body.

8-6 The Independent Review Commission (IREC) called for the establishment of an independent, lean and efficient electoral commission. The IREC specifically called for a process where the President plays a nominal role in the appointment of members of the commission, and that this process should be grounded in some legal framework in order

to ensure certainty.[117] Article 88 of the Constitution now establishes the IEBC and spells out their mandate in managing the election in line with the general recommendations from the IREC above.

8-7 The IEBC is appointed by a 7-member selection panel comprising four persons nominated by the President and three other members each nominated by JSC, EACC and Association of Professional Societies of East Africa. The team has a responsibility to appoint the seven members of the commission. In carrying out their work, the members are expected to ensure that the composition of the commission represents the regional and ethnic diversity of the country as provided for in the Constitution.[118] After the 2007 post-election violence, an interim commission (the Interim Independent Boundaries and Electoral Commission) was put in place that presided over electoral processes such as the 2010 referendum. A permanent commission was later put in place. The IEBC presided over the General Election of 2013 and several other by-elections that have been held since the 2013 General Election.

8-8 While the Commission has managed a number of processes, including the March 2013 General Election, a number of challenges have arisen regarding the effectiveness of the Commission. First, issues have been raised regarding the number of members of the commission and their role in relation to the secretariat. There are seven commissioners serving on a full-time basis. Views have been expressed that the number of commissioners should be reduced and terms of service changed to part-time basis.[119]

8-9 The mode of appointment has also been flagged as an issue. The IREC recommended that the President, as a candidate in the elections, should not participate in the substantive selection or appointment of commissioners. While this led to the formation of the IEBC selection committee, there is a further concern that the President appoints four of the nominees who select the commissioners. There is a perception that the participation of the President in the nomination of the selecting panel may not guarantee the independence in the selection of commissioners. There is need for further discussions by Parliament and other stakeholders on how to ensure a transparent manner of selecting the commissioners.

8-10 There are also reported cases about corrupt practices in the IEBC. Former and serving members of the Commission are accused of receiving bribes from a British printing firm.[120] The British government has concluded investigations and prosecution of culprits who were involved in bribery in the UK, but Kenya is yet to take conclusive measures against the individuals who were implicated in the bribery scheme.

Concurrent National and County Elections

8-11 The Constitution provides that all elections at the national and county level should be held on the same day. Kenyan voters are, therefore, required to elect all the six representatives provided for in the Constitution (the President, the Senator, the Governor, Woman Representative, Member of County Assembly, and Member of the National Assembly).[121] One of the concerns that was expressed is that the six different types of votes that Kenyans were to cast on election day would confuse voters.

8-12 However, in the national survey that was conducted by the Working Group, the respondents were asked whether they had difficulties in voting during the March 2013 General Election. As many as 80 percent confirmed that they indeed voted in the election.

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[117] IREC (2008) PP. 49-50.
[118] Article 250 (4) Constitution of Kenya 2010.
[119] Jane Goin 'IEBC Commissioners defend full time jobs' *Capital News* 14 September 2015; John Ngirachu 'Team wants only three IEBC bosses', *Daily Nation* 25th March 2016.
[120] David Herbling 'How UK sleuths unearthed Kenya "Chickengate" Scandal', *Business Daily* 18th November 2014.
[121] Article 101, 136 of the Constitution of Kenya 2010.

Many also said that they had no problem voting for six candidates in the same polling station simultaneously. They generally found it easy to do so. When asked, about the experience in actual voting, over 70 percent said they did not have any problem. Only 22 said it was confusing.

Table 8.1: Ease of voting for six candidates

	Overall (%)	Urban (%)	Rural (%)
It was very easy to do so	41	42.60	40
It was just easy/no problem	31	28.50	33
It was difficult/confusing	22	23.00	22
It was extremely difficult for me	5	5.40	5
Refused to answer	0.10	0.12	0.10
Don't know	0.30	0.24	0.30
Total	100	100.00	100

8-13 An important point to make is that voters did not find it difficult on the queues. Close to 50 percent say that the queues were not long to make it difficult to vote. Importantly, over three quarters of Kenyans found their names in the voters roll very easily.

Table 8.2: General ease of voting

How much do you agree or disagree with the following ...A Concerning your experience with the last general election held in March 2013 ----It was very easy to vote			
	It was very easy to vote	It took long to vote - line was long	I did not find my name
	Overall (%)	Overall (%)	Overall (%)
Strongly agree	34	19	7.70
Agree	40	34	15.90
Disagree	19	33	47.30
Strongly Disagree	7	14	28.10

Securing the Right to Vote

8-14 The Constitution provides for and secures the right of every eligible person to vote. Accordingly, the electoral system should facilitate the people to exercise their right to freely choose their leaders and representatives. The Constitution specifically provides that administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election.

8-15 The Constitution provides that any person who meets the criteria to vote is eligible for registration (in one voting centre) as a voter. The Constitution further requires that administrative processes should facilitate, rather than deny, the right to vote. The process of voter registration has been faced with a number of challenges.

8-16 First, while the law provides for the continuous registration of voters, the Independent Electoral and Boundaries Commission (IEBC) has perennially raised concerns about lack of funds to ensure continuous registration. As a result, voter registration has typically been

done when the country is headed to an election. There is need to ensure and facilitate an ongoing voter registration process that allows voters to be registered at any time up to the elections.

8-17 Secondly, eligibility for registration as a voter is dependent on a person having a national identification card, and the duty to issue identification cards lies on other external institutions. There have been complaints in the past that delayed issuance of national identification cards has led to disenfranchisement of voters.

8-18 While the IEBC recognizes that even Kenyans in diaspora have a right and constitutional duty to take part in the elections, there should be reasonable and practical efforts and measures to progressively ensure the participation of Kenyans abroad in elections. The court further recognized this right in 2012[122] when it observed that the right to vote for Kenyan citizens residing abroad was to be realized progressively. IEBC only managed to make arrangements for Kenyan citizens in the East Africa region to participate in the 2013 elections as provided in Article 38(3) of the Constitution. There are several challenges, including resources and logistical arrangements, in ensuring the participation of all Kenyans abroad in elections. However, there should be plans and progressive measures to realise the same.

Tallying of Presidential Election Results and Determination of Election disputes

8-19 One of the general principles for the electoral system in the Constitution is that elections should be administered in an impartial, neutral, efficient, accurate and accountable manner. The Elections Act provides that the IEBC shall declare and publish elections results immediately and may announce provisional results. In the past, the IEBC has established a process of voter tallying that is composed of constituency-based tallying centres and the national tallying centre.

8-20 The process usually involves the transmission of votes from constituency-based tallying centres across the country to the national tallying centre in Nairobi for the final tallying and announcement of the presidential result. In the past, this has proved a challenge and raised controversy, with major political sides claiming rigging of elections during the tallying stage of election results.

8-21 The Constitution provides that a person may petition a presidential election result within 7 days of the announcement of the election results. The Supreme Court has a maximum of 14 days within which to hear and determine the dispute. Where the Court annuls the election, another election has to be held within the next 60 days. During the hearing of the presidential election petition arising from the 2013 General Election, the Supreme Court noted the rigid and relatively short timelines as one of the grounds for the rejection of a supplementary affidavit submitted by the candidate for the Coalition for Reforms and Democracy (CORD). Similarly, the election courts that were set up to determine matters related to the other election processes also cited time constraints as a challenge to the determination of disputes. A constitutional review initiative dubbed "Okoa Kenya" led by the CORD coalition has suggested a constitutional amendment that will allow the timeline to be extended from 14 days to 60 days.[123] Stakeholders in this process (Parliament, Judiciary, civil society institutions, general public, etc) should discuss appropriate timelines to within which presidential decisions should be settled.

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[122] Petition No. 331 of 2012.

[123] Clause 16, Bill for the Amendment of the Constitution of Kenya 2010 by popular initiative pursuant to Article 257(prepared by Committee of Experts, Okoa Kenya movement) 23 April 2015.

Political Parties

8-22 The Constitution establishes Kenya as a multi-party democratic state and recognizes the role of political parties in enhancing representative democracy. Political parties are required to be "national in character" and the Constitution prohibits formation of political parties along regional, ethnic or religious lines. Political parties are required to reflect diversity in their formation and are also required to observe the principles of good governance.

8-23 The desire for multiparty democracy was a critical factor in the agitation for constitutional review. Multi-partism was adopted in 1992. However, political parties did not live to the expectations of Kenyans as key institutions of governance. Criticisms have been levelled at them for abdicating their fundamental role of growing democracy and retreating to tribal machinations with no clear competing ideologies. At one point, it was alleged that all the existing political party manifestos were of the same form and character across the political divide.

8-24 The 2010 Constitution therefore seeks to transform political parties into progressive and viable institutions that advance democratic political organization and expression in the society. This is to be achieved through promotion of national unity, gender equality, democracy, integrity, and the rule of law as spelt out in Article 91. Accordingly, Article 92 provides for the establishment of a political parties fund in order to ensure that there is transparency and objectivity in political party funding. The Constitution sets out a number of key legislative frameworks to aid in the operationalization of key reforms that were aspired by Kenyans towards ensuring free and fair elections. The Political Parties Act 2011, Elections Act 2011 and the IEBC Act 2011 all set out regulatory mechanisms to ensure compliance to the aspirations of the Constitution.

8-25 However, the experience of the 2013 General Election still brings into the limelight challenges of the adequacy of the laws in cushioning democratic representation and electoral processes as per the wishes of Kenyans. In particular, concerns have been raised regarding many political parties in the country and their ability to facilitate democratic representation. The institutionalization of political parties, a key aspiration of Kenyans, is still viewed as a challenge in all political parties. Parties are yet to comply with the character and formation as spelt out in Article 10 of the Constitution.

8-26 The numerous legislative amendments that have been occasioned on the Election and Political Parties Acts as witnessed in the run up to the 2013 General Election are criticized for having loosened the grip which the Constitution intended to firm on political parties and electoral processes in enhancing democratic representation in the country. For instance, the original timelines for carrying out nomination exercise by any party were meant to prevent party-hopping that had become an order of the day in the country. However, a series of amendments saw the timelines sharply reduced, and this created a room for candidates to hop from one party to another.

8-27 In early 2016, Parliament proposed amendments to the Political Parties Act (The Political Parties (Amendment Bill) 2016) that will facilitate the dissolution and merger of political parties in between elections. It is clear that this amendment is motivated by actual events where parties that sponsored candidates to Parliament are being dissolved and merged into bigger coalitions as a political strategy for future elections. Such measures go against the constitutional spirit that envisages political parties to be strong and accountable institutions.

Conclusions and Recommendations

Structure and Role of the IEBC

8-28 Parliament should consider amendments to the IEBC Act in order to ensure a more transparent and accountable manner in which the membership of the IEBC can be constituted. Particularly, the role that the President plays in the nomination of 4 members of the selecting panel should be revisited to address the emerging concerns and perceptions about the independence of the IEBC.

8-29 Parliament should consider reducing the number of commissioners to a minimum of three and change the terms from full-time commissioners to part time commissioners.

8-30 Accountability systems at the Commission should be strengthened to ensure that members and staff are held accountable for their conduct.

Presidential Vote Tallying

8-31 Vote tallying and the process of final confirmation of election results should be devolved to the county level. Each of the 47 counties should have tallying centres where the votes will be counted, tallied and final results announced.

8-32 The national tallying centre should only be limited to totalling the final results of counties in order to determine the presidential election result.

Determination of Election Disputes

8-33 The Constitution should be amended to provide for adequate time to determine election disputes. The 14 days provided for in the Constitution proved to be grossly inadequate, and there is need to provide for an additional period for the resolution of such disputes. The length of time to be provided should be set after consultation with the political parties, the Judiciary, among other stakeholders.

Voter Registration and Participation in Elections

8-34 In order to address the challenges facing voter registration that were highlighted above, it is proposed that the updated population register that is established under the Kenya Citizen and Foreign National Management Service Act should be used as the voters' register for purposes of elections. Neither the Constitution nor the Elections Act pegs registration as a voter on the national identification card. This proposal will require an amendment to section 4(1) of the Elections Act, which creates a separate voters register.

8-35 Section 3 of the Election Act should be amended to clarify that while a passport may be used to vote in an election, it must be a valid passport as at the time of voting.

8-36 The IEBC needs to put in place measures that can reach Kenyans in diaspora to ensure that they effectively participate in the elections. The process may take time, but there is need to ensure that there is a progressive reach to Kenyans across the world. Furthermore, the process should be implemented in a consultative manner that ensures the involvement of the Kenyan communities abroad.

8-37 The IEBC should maintain and publicize an integrated register just before every general election in order to ensure transparency and accountability in the voting process as required under section 6 of the Elections Act 2012.

Political Parties

8-38 The Elections Act should be reviewed to provide for stringent compliance with Article 10 provisions of national values and principles in the organization and activities of political parties by designing strict sanctions for lack of compliance. Specifically, there should be a criteria based on Article 10 of the Constitution as a condition to assist political party funding. The funding limits and audit of the political parties need further stringent provisions.

8-39 Section 25(2) (b) of the Political Parties Act should be revised to provide for the actual number of women elected in Parliament and County Assemblies. This will become an incentive to political parties to invest in measures that increase the number of women in elective leadership positions. Finally, the appointment of the Registrar of Political Parties, which has been pending since the coming into effect of the Political Parties Act should be finalized to ensure full implementation of provisions in the Act. Political parties have not actively mobilized for the nomination of women candidates in their party primaries. The party nomination rules are still not favourable to women candidacy.

8-40 Parliament should reconsider the amendments proposed in early 2016 to allow dissolution and mergers of political parties and coalitions. Laws that allow Members of Parliament to join new parties/coalitions mid-stream go against constitutional provisions. Switching between parties (known as "party-hopping") is a practice that has long been frowned upon by the general public. The proposed amendments seem to institutionalise this practice and weaken political parties.

CHAPTER NINE

THE JUDICIARY

Introduction

9-1 Kenyans wanted a Judiciary that would be independent of the Executive and the Legislature. They wanted a Judiciary that would provide justice to all without discrimination. In the past, the Executive subordinated other arms of government. The Judiciary lacked independence and made decisions that tended to favour the Executive. Corruption also permeated different levels of the judicial system. The President appointed the Judges on the advice of Judicial Service Commission but the President had the prerogative to appoint a Chief Justice without the advise of the JSC. The process that the JSC used to identify, vet and recruit judges lacked transparency; it was neither transparent and competitive, nor based on clear criteria.[124]

9-2 The Judiciary also lacked financial independence. It lacked adequate resources for its operations. Importantly, with regard to budget, the Judiciary was treated as a department rather than a co-equal arm of the government. It often received funding through the relevant government ministries.

9-3 These shortcomings increasingly weakened the Judiciary. People's confidence in the courts considerably declined. According to the Constitution of Kenya Review Commission Report, the citizens had lost faith in the Judiciary's ability to dispense justice fairly, impartially and without fear.[125] By the time of making a new Constitution, Kenyans wanted a Judiciary that would promote the rule of law, accord justice to all without favour, and be independent of the Executive and other arms of government.

9-4 During the constitution review process, Kenyans argued for appointment of Judges on basis of merit and competence rather than political considerations. They wanted Judges who would treat people fairly and equally before the courts. Kenyans demanded an open, transparent and accountable way of appointing Judges.

9-5 The public also called for the simplification of court procedures and expeditious determination of cases. It was widely acknowledged that restoring confidence in the Judiciary entailed addressing the concerns that undermined people's confidence in the Judiciary.

Judicial Reforms under the Constitution of Kenya 2010

9-6 The Constitution introduces fundamental changes aimed at securing an independent Judiciary. The Constitution establishes a Judiciary that is a big departure from the past in terms of independence and provision of a framework to guide implementation and interpretation of the Constitution.[126] It provides at the outset that judicial authority is derived from the people, and vests in the courts and tribunals established under the Constitution. In this regard, the courts are required to interpret the Constitution and laws

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[124] Final Report of the Task Force on Judicial Reforms, Chaired by Justice William Ouko, July 2010.

[125] Report of the Advisory Panel of Eminent Commonwealth Judicial Experts (17th May 2002); Report of the Committee on the Administration of Justice (1998), popularly known as the "Kwach Report".

[126] Ben Sihanya (2011), "The Presidency and Public Authority in Kenya's New Constitutional Order," Constitution Working Paper Series No. 2, Nairobi: Society for International Development (SID) Eastern & Central Africa.

in a manner that protects and promotes the values, objectives and purposes of the Constitution.

9-7 The Constitution identifies the principles to guide the exercise of judicial authority. It provides that justice shall be done to all without regard to status, and that justice will be administered without regard to procedures and technicalities. Importantly, the Judiciary is required to promote and protect the principles of the Constitution. Alternative dispute resolution, including traditional dispute resolution, is underlined as a key element for promoting judicial authority. The Constitution clearly provides that judicial authority is for the purpose of ensuring justice to all.

9-8 In a break with the past, the Constitution secures the independence of the Judiciary in several ways. First, it explicitly provides that the Judiciary shall not be subject to direction or control of any person or authority. Secondly, the Constitution provides absolute immunity to all members of the Judiciary in respect of anything done or omitted in good faith in the course of their duties. Furthermore, the office of a Judge of a Superior Court shall not be abolished while there is a serving Judge.[127]

9-9 Third, it secures political independence of the Judiciary in limiting the role of the Executive in appointment of Judges. A Judicial Service Commission (JSC) is established through a relatively competitive and democratic process to promote and facilitate the independence of the Judiciary, as well as facilitate the efficient, effective, and transparent administration of justice.

9-10 The Constitution gives the JSC the responsibility to protect the sovereignty of the people and promote constitutionalism. In addition to recommending the appointment of Judges, the JSC recommends the terms and conditions of service for Judges and other judicial officers and judicial staff. It is also a disciplinary body and has power to investigate and take appropriate action against judicial officers. It advises on ways of improving the efficiency of administration of justice.

9-11 The Constitution entrenches financial independence of the Judiciary in several ways. First, it provides for the establishment of a Judiciary Fund. The Chief Registrar of the Judiciary administers the Fund. Article 173(1) establishes the Fund, while Article 173(5) requires Parliament to enact legislation to provide for the regulation of the Fund. By early 2016, Parliament had not passed the law to establish this Fund.

9-12 Second, the Constitution provides that the Judiciary prepares its own estimates of expenditure (budget) and submits to the National Assembly for approval. Once approved in the National Assembly, the expenditure of the Judiciary shall be a charge on the Consolidated Fund.[128] The funds are paid directly to the Judiciary Fund. This is meant to limit the extent to which any authority or person can control or compromise the Judiciary through negotiation on budget.

9-13 The adoption of a devolved system of government introduces a new dimension of judicial independence. The Judiciary must be independent not only from the Legislature and Executive but also from the two levels of government. For this reason, the Judiciary cannot be part of any one of the two levels of government, since it plays a major role in the determination of disputes between them.

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[127] It further provides that remuneration and benefits payable to Judges shall be directly charged on the Consolidated Fund. Similarly, the remuneration and benefits of a Judge, including retirement benefits cannot be varied to the disadvantage of a Judge while he or she is still serving.
[128] Article 173(4).

9-14 The Constitution has introduced a new structure of the court system comprising of superior courts and subordinate courts. The Superior Courts comprise of the Supreme Court, the Court of Appeal, the High Court and two Specialised Courts with equal status as the High Court to deal with matters of employment and labour relations; and matters on the environment and the use of and occupation of, and title to land. Subordinate courts comprise the Magistrates Courts, Kadhis Courts, Court Martials, and any other court or local tribunal established by an Act of Parliament. The Constitution sets the criteria and qualification for the appointment of Judges and Magistrates to the various courts.

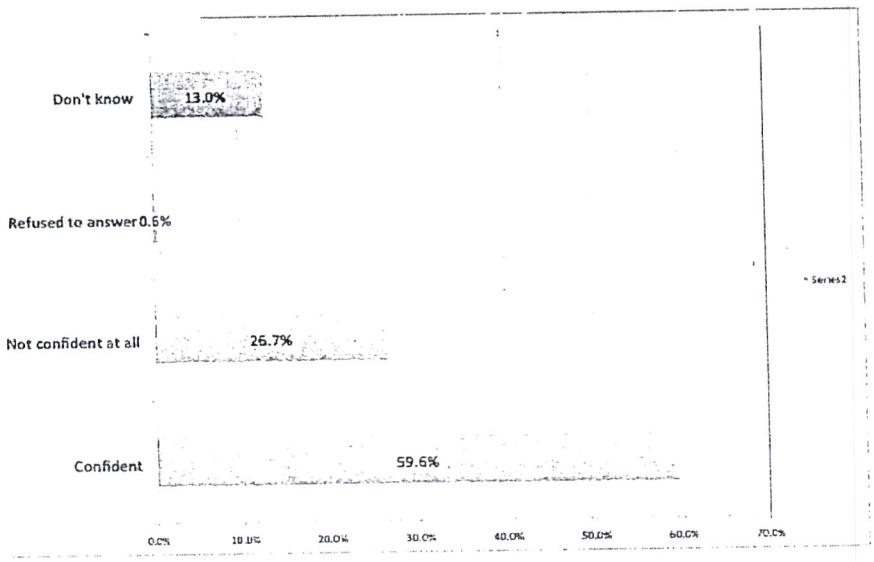
9-15 The transition provisions of the Constitution sought to rationalize the staff complement inherited from the old constitutional dispensation through a vetting mechanism, whose objective included releasing officers who were unfit to serve under the new constitutional dispensation. The vetting process was protected from further litigation by providing for the finality of the decision by the Vetting Board.

Implementation of Judicial Reforms

9-16 The Judiciary stands out as one institution that has substantially transformed. It has embraced the transformative vision of the Constitution and its new architecture. The Judiciary began by adopting a culture that fits with the expectations of Kenyans and the letter and spirit of the Constitution. This is evident from the relatively high number of people with confidence in the local courts, compared to those without confidence. It is also evidenced in the relatively large number of people who say that services in the courts have improved today compared to the period before the passing of the Constitution in 2010.

9-17 In the survey conducted across the country, respondents were asked: how much confidence do you have in your courts? About 60 percent said they had confidence in the courts. About one quarter (26.7%) or one in every four Kenyans has no confidence at all in courts. These responses are shown below.

Figure 9.1: How much confidence do you have in courts?



9-18 The survey also sought to know about the quality of services by the courts compared to the period before implementation of the new Constitution. When asked what they had to say about the services in the local courts, close to half (47%) felt the services were 'very good'

or 'somewhat good'. Another 28 percent think the services were either 'somewhat bad' or 'bad'. About one quarter could not tell whether services have improved or not, largely because many of them had not interacted with the courts in the last three years.

Table 9.1: Overall, what would you say about the quality of services in the courts today compared to the period before the enactment of the new Constitution?

	Before new Constitution (%)	After new Constitution (%)
Very good	2	8
Somewhat good	21	39
Somewhat bad	30	16
Very bad	20	12
Not applicable	1	1
Refused to answer	1	1
Don't know	25	23

9-19 In addition to these observations, it is notable that the number of court stations has substantively increased since the implementation of the new Constitution. By 2011, for instance, there were only 17 High Court stations in the country. These increased to 34 stations by end of 2015. The Judiciary has expanded the courts infrastructure to address gaps in distances travelled to court stations.

9-20 The Judicial Transformation Programme spearheaded by the Chief Justice has sought to enhance access to justice through the provision of additional courts across the country. It is notable that marginalised areas did not have court stations. People had to travel long distances to attend to cases and/or file cases in courts. This has considerably changed with the increased infrastructure.

9-21 Perhaps because of expansion of courts' infrastructure, three out of every four Kenyans or about 75 percent now say that the courts are within a distance of less than 30 kilometres from their home. In the national survey, respondents were asked: how far is the nearest court station from your residence? As many as 32 percent said the courts are less than 10 kilometres away and 25 percent said the courts were between 10-20 kilometres away. Only 24 percent said the courts are more than 30 kilometres away from their residence.

9-22 In addition to the achievements cited above, the Chief Justice has developed the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules. These have made the enforcement of the Bill of Rights easy. These have also been introduced in line with the requirement that the judicial authority be exercised in a manner that promotes the values of the Constitution.

9-23 The increased number of litigants prosecuting constitutional petitions or seeking the protection and promotion of human rights is testimony to the impact of the new Constitution. The courts, in their dispensation of justice, have sought to hear and determine disputes on their merits, and have focused less on process technicalities that often defeated justice. Results from the survey show that only a small number of people have experienced challenges of technicalities in the courts. However, 77 percent of the respondents did not have any contact with the courts in the last three years. Only less than 6 percent of Kenyans or members of their households said they had encountered problems with the courts because they were unable to pay necessary costs and legal fees, or they could not understand the legal processes and procedures.

9-24 The Judiciary has also increased the number of judicial officers. Recruitment of Judges and Magistrates, establishment of capacity building and training structures for judicial officers and staff, enhancement of terms and conditions of service, automation of key services, and adoption of performance management are on-going initiatives that have also contributed largely to access to justice in the country.

9-25 However, some challenges still exist. The vetting process of judicial officers revealed cases of corruption and general lack of integrity among some of the judicial officers. According to the survey, an overwhelming 74 percent of Kenyans believe that there is corruption in the judiciary today. Just about 13 percent of citizens were categorical that there is no corruption within the Judiciary.

9-26 When asked about the level of corruption in the judiciary before and after the new Constitution passed in 2010, 24 percent of Kenyans pointed out that corruption now is 'very high' compared to 22 percent who said it was high before the new Constitution. About 57 percent of citizens pointed out that corruption was either 'high or very high' before the new Constitution was passed compared to 52 percent who perceive it to be either 'high or very high' today. Indeed, the relatively minor difference in public perception of corruption within the Judiciary prior to the passing of the Constitution and now largely explains the numbers that have no confidence in the Judiciary. The significant number of Kenyans (27%) that have no confidence at all in their local courts reflects these concerns.

Table 9.2: How would you rate the level of corruption in the Judiciary before and after the new constitution passed in 2010?

	Before 2010 (%)	After 2010 (%)
Very High	22	24
High	35	28
Low	20	22
Very low	3	5
Refused to answer	1	1
Don't know	20	20

9-27 The growing allegation of corruption in the Judiciary impacts on people's trust in the Judiciary as an institution. While it is generally recognised that people's trust in the courts increased after the passing of the Constitution, the level of trust is on decline owing to these perceptions.

9-28 There are now many people who think the courts cannot give justice to all equally; there is a perception that courts favour people on basis of their stature. When asked whether they trust their local courts to deliver fair judgment on disputes involving a "powerful" and "an ordinary person", more than three quarters of respondents (78%) were emphatic the ordinary person would not get fair judgment.

9-29 On the other hand, a high number of Kenyans (71%) trust the local courts to deliver fair judgment on disputes between two ordinary people. This suggests an indictment on the part of the Judiciary with regard to the Constitution principle of ensuring that 'justice shall be done to all irrespective of status' in society.

Role of the President in the Appointment of Judges

9-30 Article 166 provides for appointment of Judges by the President on recommendation by the Judicial Service Commission. This provision has raised interpretation questions regarding the role of the President in the recruitment of Judges. There are those who argue that independence of the Judiciary prevents a situation where the President will have a significant role in appointment of Judges. To them, the role of the President is restricted to formal signing of the instruments of appointment of persons presented by the Judicial Service Commission. On the other hand, there are those who argue that the President retains a role in determining who becomes a Judge. In this view, the President can reject JSC's recommendation.

9-31 Interpretation of the role of the President needs to commence on the argument that the judicial authority vests in the courts, and that the JSC promotes and facilitates the independence of the Judiciary. Secondly, and as argued by some of the groups consulted for the purpose of this report, the composition of the JSC includes members directly appointed by the President and approved by the National Assembly. This secures the independence of the JSC and at the same time provides avenues for the views of the Executive on key JSC decisions.

9-32 The composition of the JSC includes judges and magistrates but excludes other judicial officers and staff. Judges and magistrates are well represented but the staff, who comprise about 80 percent of the total staff, are not directly represented in the JSC. They are not involved in making decisions on the judiciary yet they are very critical to the governance and administration of the Judiciary.

9-33 With regard to appointment of Judges, therefore, the Constitution provides for checks and balances to prevent abuse of the process by any person or authority. The Constitution prevents the President from originating candidates to be appointed as Judges. This has to await JSC recommendation.

9-34 The President can reject a recommended person and refer the matter back to the JSC to recommend an alternative person. The President cannot substitute the rejected person with a person of his own choice. In the case of the Chief Justice and the Deputy Chief Justice, the National Assembly can also decline to approve the persons appointed by the President. In such event, the matter must be referred back to the JSC to recommend other persons.

9-35 This interpretation is consistent with the approach in the United States of America where, with the approval of Congress, the President appoints Judges. The President nominates candidates for appointment as Judges while Congress vets and approves the persons for appointment. Under this system, Congress can reject a nominated person and refer the matter back to the President to nominate another person. Congress cannot itself substitute the rejected person with a person of its own choice. Thus, while Congress is denied the opportunity to originate names of persons to be appointed Judges, it can reject those nominated by the President.

9-36 These checks and balances ensure independence of the Judiciary. They prevent abuse of the process of appointment of Judges. But this lack of clarity in the role of the President in the appointment of Judges has had the consequence of delaying appointment of Judges. It has the potential to politicise the appointment process and by that weaken the checks and balances between the three arms of government. Indeed, in 2014, the JSC nominated 25 names for appointment as judges. The JSC forwarded these to the president for approval. After a delay by about six months, the President approved only 11 names from the list of 25. He said he was yet to make a decision on the others. The remaining 14 waited for more

than one year until May 2015 when the President approved their nomination and appointment.

Separation of Powers and Oversight

9-40 The separation of powers doctrine is at the centre of the Kenyan system of constitutionally divided and delegated duties to the three arms of government: the Executive, Judiciary, and Legislature. Its object is to prevent concentration of the power of essentially different arms of government in one hand.

9-41 The framers of the Kenyan Constitution carefully spelt out the independence of the three branches of government. At the same time, they provided for a system in which some powers should be shared: Parliament may pass laws, but the President can refer back, with reservations, any laws passed by Parliament; the President nominates certain public officials, but the National Assembly must approve the appointments; and laws passed by the Legislature as well as Executive actions are subject to judicial review.

9-42 The doctrine of separation of powers, though promoting the status of separate and distinct roles of the Executive, Legislature and Judiciary, is not mechanistic. Thus, the lines of demarcation between the three branches of government must be viewed in pragmatic terms because they foster cooperation.

9-43 Parliament and the Executive have raised concern over what they perceive as judicial interference. Parliament is concerned that the courts have ruled, in some instances, to halt parliamentary business on matters before the courts. On the other hand, the Executive is concerned about the use of judicial mechanisms to halt and/or delay Executive programmes through the issuance of ex-parte injunctions.

9-44 These concerns are typical of transitions. The country is still in the process of transition from the old constitutional order into the new constitutional dispensation. The new Constitution makes it clear that the country is under constitutional supremacy and the Constitution is determinatively interpreted and enforced by the Judiciary. However, the Judiciary must respect the doctrine of separation of powers too. It cannot abdicate its constitutional responsibility to interpret and enforce the Constitution and the principle of constitutional supremacy no matter what the challenges are.

9-45 The "independence of the Judiciary" does not mean isolation of the Judiciary by other arms of government or that it is exempt from scrutiny by other arms of government. Like all other public institutions, the Judiciary must be accountable to the public and for the general manner in which the courts serve the public. But the Judiciary has been pro-active in establishing dialogue with other arms of government. The National Council for Administration of Justice, Chaired by the Chief Justice (NCAJ), is the statutory body for this dialogue. However, Parliament is not represented at NCAJ because the JSC Act did not envisage representation of MPs, yet representation of MPs would be good for purpose of building trust between Parliament and other bodies and other arms of government.

Role and Jurisdiction of the Supreme Court

9-46 The Supreme Court was established as the final arbiter to determine legal issues of public importance, while developing jurisprudence in all branches of law. As the highest Court in the country, it is meant to play a key role in the interpretation of the Constitution. The Supreme Court is meant to provide guidance and direction about the meaning of the Constitution in order to avoid contradictory decisions by lower Courts.

9-47 However, the manner in which the Constitution confers jurisdiction upon the Supreme Court may not enable it to effectively play this role.[129] One major problem with the jurisdiction of the Supreme Court is that many matters concerning the interpretation of the Constitution can only reach the Supreme Court by way of appeals from the lower courts. Many parties may find it expensive to pursue their cases from the Magistrate's Courts through appeals in the High Court and the Court of Appeal up to the Supreme Court. What is required, therefore, is for the Supreme Court to pro-actively seize every opportunity and expand the jurisprudence, especially by continuous review of declarations by other courts (in other jurisdictions, these declarations by other courts do not take effect unless confirmed by the Supreme Court).[130]

9-48 Concerns have been expressed about the qualifications of Supreme Court Judges as provided for in Article 166(3) of the Constitution. There is concern that the technical requirements for appointment as Supreme Court Judge are not very sufficient for the Court's role in interpreting and implementing the Constitution in a progressive manner because they tend to emphasis on technical qualifications rather than ability and competence to deliver the jurisprudence expectations of the Court. To qualify for appointment as a Supreme Court Judge: a) persons must have at least fifteen years' experience as a superior court judge; or b) at least fifteen years' experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or c) held the qualifications mentioned in paragraphs (a) and (b) for a period amounting, in the aggregate, to fifteen years. This qualification is in addition to the requirements outlined in Article 166(2).

9-49 These concerns arise especially because the Supreme Court is meant to generate progressive jurisprudence. This is the court that makes progressive interpretation of the Constitution. It ensures effective embedding of the values and principles of governance in the practice of public affairs.

Specialized Courts

9-50 Article 162(2) establishes the Employment and Labour Relations Court and the Environment and Land Court as specialized courts with the status of the High Court. Article 165(5) excludes matters falling within the jurisdiction of the specialized courts from the High Court. The Employment and Labour Relations Court Act and the Environment and Land Court Act set out the jurisdiction of the specialized courts.

9-51 The manner in which the Constitution provides for the establishment of these specialized courts suggests that they are different from the High Court, although they have the status of the High Court. They thus fall outside its organizational purview and administrative arrangements, including requirements for transfer to other Divisions of the High Court. This has the potential of making a few Judges serve in these limited areas of law on a permanent basis. This could potentially undermine fair administration of justice. If such Judges were to become compromised by, for example, employers' organizations or the trade union organizations, other litigants may lose confidence in the specialized courts. Likewise, if the Judges develop a certain line of thought that may be wrong, the litigants

[129]The jurisdiction of the Supreme Court includes: Exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President; Exclusive original jurisdiction to provide an advisory opinion at the request of the National Government, any State organ, or any county government with respect to any matter concerning county government; Appellate jurisdiction to hear and determine appeals from the Court of Appeal and any other court or tribunal as prescribed by national legislation.

[130]The South African Constitution provides that although the High Court and the Supreme Court of Appeal have jurisdiction to interpret the Constitution and make declarations of invalidity, such declarations do not take effect unless confirmed by the Constitutional Court.

would be permanently stuck with such Judges, with no option for alternative views on the matters concerned.

Conclusion and Recommendations

Composition of the Judicial Service Commission

9.52 The JSC should develop transparent criteria for undertaking lifestyle audit of the Judicial officers and staff, and undertake the audit preferably after every three years. Continuous monitoring of conduct and behaviour of officers and staff will prevent consolidation of corruption and other malpractices.

9-53 Some members of the Judicial Service Commission are elected/appointed by institutions to serve in the Commission. These include the Law Society that elects two representatives (male and female), the Public Service Commission that nominates one person, and the President who appoints two persons (male and female) with the approval of the National Assembly. The institutions concerned should ensure that they put in place mechanisms and measures (including vetting) that will ensure that the persons nominated/elected are persons who are qualified and of the highest standards of integrity.

9-54 The composition of the JSC does not provide for administrative staff of the Judiciary, yet they provide core services and comprise about 80 percent of total staff. For purpose of promoting good governance and inclusive practises in the Judiciary, there is need to include staff representatives in the JSC. The numeric size and services they provide make it important for their inclusion in decision making processes on the running of the Judiciary.

9-55 The President makes appointment of 'public representatives' in the JSC. This is in addition to several others appointees of the executive arm who sit in the JSC. To ensure that the 'public representatives' articulate the interests of the public rather than the Executive, the representatives should be appointed through a competitive process, preferably through a panel set up for such recruitment.

9-56 To strengthen dialogue and trust among the three arms of government, it is recommended that the Judicial Service Commission Act be amended to allow for representation of a representative of Parliament in the National Council for Administration of Justice (NCAJ).

Appointment of Judges

9-57 There have been questions on whether the President has any role or not on the appointment of Judges. Amendment to the JS Act or other relevant law should be made to provide for the President to either appoint the candidates presented by JSC within a specified timeframe from the date of submission of names by JSC, or signify in writing the reason for rejection of any candidate.

9-58 The law should provide for the JSC to recommend alternative persons. It should also provide for the rejected person to seek redress for fair administrative action, if necessary, regarding the rejection.

Separation of Powers and Accountability of the Judiciary

9-59 To foster accountability and strengthen the adherence to the principles of separation of powers, it is recommended that there be established a distinction between judicial functions of the judiciary, and the JSC. The law must protect each from interference from the other.

Supreme Court and Making of Progressive Jurisprudence

9-60 A Constitutional amendment should be made to provide for the Supreme Court to hear and confirm all declarations of unconstitutionality by the High Court and the Court of

Appeal before these decisions take effect. The declarations should take effect only when confirmed by the Supreme Court.

9-61 It is recommended that the suitability of prospective candidates for the Supreme Court be assessed by reference to a range of clearly defined, transparent criteria covering the prospective nominee's legal ability, quality of character, personal and technical skills, and ability to develop progressive jurisprudence.

9-62 Progressive interpretation of the Constitution should take higher consideration in appointment of Judges for the Supreme Court. The Supreme Court should also have persons with a broader understanding of other disciplines other than law; the court should have a mixture of skills in order to promote codification of the constitutional values.

9-63 Access to the Supreme Court should be decentralised to enable people to file petitions in registries anywhere in the country. Although this requires making of an administrative decision, it is an issue that requires immediate priority given the need to ensure equitable access to the Court by all.

9-64 The period for the Supreme Court to hear and determine presidential petitions is too short to hear and determine complex matters. It is recommended that the period for the Supreme Court to hear presidential petition be extended to a maximum of 28 days, during which all matters should be heard and determined. This should apply to other election petitions in the other courts.

Specialized Courts

9-65 The law establishing the two specialized courts (Employment and Labour Relations Court and the Environment and Land Court) should be amended to eliminate categorisation of these courts and ensure that they are part of a single High Court of Kenya. Categorisation of these courts should be eliminated to allow other Judges in the High Court to serve in these courts and vice versa.

9-66 It is recommended that Judges of Employment and Labour Relations Court and the Environment and Land Court - the specialized courts - should be regarded in law and practice as part of the Judges of the High Court. They should be subject to deployment and transfer across the different Courts in the same manner that Judges of the High Court are deployed and transferred from one Division of the High Court to the other.

Judiciary Fund

9-67 The Bill on the establishment of the Judiciary Fund is yet to be enacted. The Judiciary continues to be exposed to power games in the budget making process, which impinges on its independence.

9-66 It is recommended that there be introduced a constitutional and/or statutory provision for resourcing the Judiciary based on the needs of the Judiciary. Parliament and the judiciary should consult and agree on a share of national budget that should be transferred to the Judiciary Fund for the judiciary to meet its development and recurrent expenditure needs and at the same time ensure independence of the Judiciary. Budget predictability, based on agreed funding levels, will enable the Judiciary to meet its capital and recurrent needs without anxieties that accompany uncertainty about inadequacy of funding.[131]

[131]The final report of the Task Force on Judicial Reforms chaired by Justice William Ouko in 2010 recommended that the Judiciary be allocated 2.5 per cent of annual budget to address development and recurrent needs. The task force recommended that this share be increased in future.

CHAPTER TEN

NATIONAL EXECUTIVE

Introduction

10-1 The popular demands for constitutional reforms emphasized the need to reform the national Executive. People demanded that the Executive be made more accountable and responsive to the public. People also demanded that the Executive be subjected to effective checks and balances, especially by other arms of government to prevent abuse of power. There was concern that the Executive had defeated the ends of the State by abusing executive powers and using the power vested in them without accountability.

10-2 The Constitution of Kenya 2010 fundamentally changes the structure and functions of the national Executive. The previous Constitution vested executive powers in the President. This, on its own, laid a basis for the personalization and abuse of presidential power. Indeed, the old Constitution explicitly provided that any person who held public office in Kenya did so at the pleasure of the President.[132]The old Constitution also vested State and public power and authority in the President (as opposed to the people). The Constitution did not subject the use of this power to elaborate checks and, therefore, how the President used this power led to authoritarian rule.

As already discussed in Chapter two, amendments to the independence Constitution weakened public institutions and subordinated other organs of government to the control of the Executive – and the President in particular.

10-3 The Constitution of Kenya 2010 introduces fundamental changes; executive power is now recognized as emanating from the people. The National Executive (which comprises of the President, Deputy President, and the Cabinet) is additionally required to reflect the diversity of the people of Kenya.

10-4 The Constitution also requires that the Executive exercise this power in a democratically accountable manner. It provides that executive authority derives from the people and shall be exercised in a manner that is compatible with the service of the people and for their well-being and benefit.

10-5 The structure and approach to executive power in the current Constitution does not allow personalisation of executive power, as was the case in the previous dispensation. The Constitution, for instance, provides that the President exercise executive authority with the assistance of the Deputy President and the Cabinet. Furthermore, there are multiple democratic checks and balances on the presidential power to prevent abuse of governmental power as was witnessed in the previous constitutional dispensation.

10-6 At the county government level, the Constitution vests Executive authority in the County Executive Committee, comprising the County Governor and the Deputy Governor, and the members who the Governor appoints with the approval of the County Assembly. These members are not members of the County Assembly. Membership in the County Assembly is distinct from membership in the County Executive. The Constitution provides for elaborate checks through the County Assembly, whose members are directly elected by county residents.

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[132]Section 24 of the repealed Constitution.

10-7 National executive powers are now exercised under a different form of government (pure presidential system of government). The President, Deputy President and the Cabinet Secretaries are not part of the Legislature as was the case in the past.

10-8 The vertical division of power between the national and county Government level meant a split in the executive powers between the national and the county levels of government. The change from a hybrid/parliamentary system of government to a pure presidential system, and the adoption of a two-level tier of government requires a fundamental change in the approach to and exercise of Executive functions at the national level.

10-9 The Constitution provides a framework of division of power and functions between the two levels of government through the Fourth Schedule. It allocates some of the functions that the national government performed to the counties (together with the corresponding human and financial resources).The Constitution specifically provides for the restructuring of the national government and its agencies, such as the Provincial Administration, to accord with the current dispensation.

10-10 The changes introduced by the Constitution required a change in not only the structures but also the manner in which the national executive relates with the other arms of government at the county level. Emerging practices show that implementation is work in progress, as most public institutions are transitioning from the previous institutional and political culture.

10-11 This chapter audits the national executive in relation to how the national executive has adapted to the new order. The discussion also highlights the key challenges and opportunities in regard to carrying out the various functions.

Structure and Functions of the National Executive

10-12 During the constitution review process, majority of Kenyans expressed support for a system of government that would promote accountability in the conduct of public affairs as well as a system that would promote efficient delivery of services.[133]Past control and dominance of the Executive in Parliament led to calls for removal of the Executive from Parliament. There was a perception that the presence of the President and the Cabinet in Parliament compromised the independence of the Legislature and undermined the principle of separation of powers.

10-13 The new Constitution requires a presidential candidate to garner 50 percent plus one of total cast votes and 25 percent of votes in at least half of the counties. While this requirement seeks to ensure that the person elected as President has broad national support, it could lay the basis for ethnic-based coalitions and counter-coalitions in a bid to capture the presidency, thereby polarizing the country into ethnic enclaves and consequently negating the national cohesion and integration initiatives.

10-14 Political leaders could be more inclined to form coalitions along ethno-regional lines, thereby deepening exclusion of groups outside the regional blocs forming the coalition. While the previous electoral competition for the control of the Executive led to deepening of exclusion of ethnic communities, the current practice as it evolves could create conditions for exclusion of ethnic regions; it could exclude broader constituencies than the previous system. The current intensity with which the political atmosphere is building as regards 2017 presidential elections is another manifestation of potential ethnic/regional polarisation.

[133] Public views during the constitution review process were in support of the creation of the position of Prime Minister as well as the direct election of the President. Previous constitutional drafts provided for a directly elected President and a Prime Minister who share executive powers.

10-15 The Constitution splits powers and functions between the two levels of government – the national and county governments. The National Executive is, on the one hand, responsible for the delivery of functions listed under Part 1 of the Fourth schedule. These include security, foreign affairs, courts, policymaking, monetary policy and macroeconomic stability, national economic planning, among other functions (See Fourth Schedule to the Constitution).

10-16 The county governments, on the other hand, are responsible for functions relating to delivery of services. These include services such as health, agriculture, country transport, early pre-primary education, and trade development and regulation.

10-17 With regard to sectors concerned with service delivery, the National Government has the mandate to develop policies, set national standards and regulations for the delivery of services, and build capacity of county governments to deliver the services.

10-18 The Constitution also provides for concurrent functions. These are functions shared between the national and county governments. Any other function that is not exclusive or concurrent is provided for as a function of the National Government.

10-19 The National Executive also shares some of the functions with independent institutions and offices established by the Constitution. These include institutions such as the Commission on Revenue Allocation, the National Land Commission, and the Controller of Budget.

10-20 The Constitution provides for a lean and efficient government in response to demands for a cost effective government. It sets the number of Cabinet Secretaries at a minimum of 14 and a maximum of 22.[134] However, the expected reduction in cost and bureaucracies in the government is not apparent as demonstrated in chapter six(economic impact) of this report. Most of the new ministries are a fusion of a number of old ministries.[135]

Effectiveness of the National Executive

10-21 The Constitution of Kenya 2010 envisaged a transition process for the National Executive that is deeply complex and requiring time, efforts and resources to implement. Specifically, the National Executive was required to align its ministries, agencies, and institutions with the governance structures in the Constitution. Some functions that were performed by ministries and other national government institutions (such as State corporations) were devolved to counties. This required a transition plan that would facilitate the implementation of the Constitution.

10-22 The audit sought to find out how people felt about the performance of the National Government in delivering certain services. About 70 percent of Kenyans rate as poor and very poor the performance of the National Government in regard to the fight against corruption as shown in Table 10.3. About 1 in every 4 Kenyans felt the government has performed very poorly in creating jobs. Over one third of the residents (37%) felt that the National Government has performed poorly and or very poorly in securing its citizens, while a majority (56%) noted that it had either done well or 'fair' in the provision of security.

10-23 However, there is considerably better rating in terms of provision of basic services. Kenyans rate the National Government relatively better in regard to provision of basic

[134] Article 152 (1) (d) of the Constitution of Kenya 2010.

[135] See the National Executive budget for 2012/2013 and 2013/2014.

services, including some of the devolved services. Over half of the respondents rated the National Government provision of health and education "well" and "fair".

Table 10.1: How would you rate the National Government performance in the following areas?

Sector	Very (%)	Well	Well (%)	Fair (%)	Poor (%)	Very poor (%)
Education	8		28	30	21	12
Healthcare	6		31	35	19	7
Creating of job opportunities	3		11	21	37	25
Security	5		25	32	22	15
Fight against corruption	2		7	15	31	41
Agriculture	3		17	28	27	13
Roads construction	8		26	29	19	13

10-24 When compared to how people view the performance of county governments, the survey reveals that county governments are perceived as performing better in service delivery than the National Government.

Table 10.2: How would you rate the county government performance in the following areas?

Sector	Very (%)	well	Well (%)	Fair (%)	Poor (%)	Very poor (%)
Early childhood education	8		29	32	19	9
Healthcare system	4		29	35	21	9
Creation of job opportunities	2		10	23	38	25
Security	4		23	34	24	14
Fighting corruption	1		6	18	32	38
Economic growth	1		12	37	29	15
Agricultural services	2		16	29	27	15
Safe drinking water	5		20	26	24	22
Water for irrigation and livestock	2		10	16	26	24
Sanitation	2		10	18	21	21

10-25 Kenyans view both the National Government and the county governments almost the same with regard to how the two levels reflect their needs. About one quarter feel that both governments reflect their needs, while about one third feel that both levels only reflect their needs in a small way.

10-26 The effectiveness of the National Government can be greatly improved if there is a comprehensive policy to guide service delivery and guide relations between the national and county governments. As already mentioned, absence of a sessional paper on devolution is leading to conflicts of attribution and lack of synergy in many instances.

10-27 The ambiguities in the division of functions (as noted in the chapter on devolved governance) is also affecting the performance of the National Government. A number of measures have been attempted to address these ambiguities since the inception of the county governments. Soon after promulgation of the Constitution in 2010, the then Ministry of Local Government constituted a taskforce that developed a comprehensive report on implementation of devolution, draft legislation, and draft policies to facilitate implementation. The policy drafts that were developed included a sessional paper on devolution, and a sessional paper on urban governance. While most of the proposed

laws were finally enacted into law,[136] none of the initial policy drafts has been completed and adopted.

10-28 In October 2013, a taskforce formed by the National Government on parastatal reforms completed a comprehensive report that advised on the transformation and reform of parastatals. This is a critical area of National Government transformation since there are a number of agencies that are said to be carrying out shared national and county functions. Some of these institutions have been in dispute with county governments over functional division. While recommendations from reports such as the report on parastatal reforms would have facilitated transition, the apparent unwillingness to engage with the recommendations only serves to derail National Government transition to current constitutional structures and systems of governance.

10-29 Unfortunately, this seems to be the case with virtually every other national policy. With very few exceptions, there is rarely any government policy that goes through the full process of development, adoption and effective implementation. This is an old practice that has continued into the current constitutional dispensation. The March 2015 draft devolution policy, for instance, states that the initial draft sessional paper that was prepared in 2012 guided the drafting of devolution laws.

10-30 The current draft (March 2015) has been revised to take into account the context of implementation from three main areas: institutional challenges, resource challenges, and inter-governmental relation challenges. For each of these areas, the draft policy provides measures that need to be undertaken to overcome the current challenges in implementation.

Restructuring of the Provincial Administration

10-31 The Constitution provides for the restructuring of the provincial administration. Section 17 of the Sixth Schedule provides that:"Within five years after the effective date, the National Government shall restructure the system of administration commonly known as the provincial administration to accord with and respect the system of devolved government established under this Constitution".

10-32 The Provincial Administration (PA) under the old order included uniformed officers and other officials deployed at the provincial, district, division, location and sub-location levels in line ministries. A uniform structure of the Provincial Administration was maintained throughout the country. The Administration was used for organising government activities along an hierarchically organised structure. Core ministries such as agriculture were organised in accordance with the levels of the Provincial administration. The Provincial Administration was under the Office of the President, specifically under the Permanent Secretary, Provincial Administration and National Security.

10-33 The hierarchical structure helped the centralised government to reach at the base of the society, up to the village level. The President appointed the Provincial Commissioners (PCs), District Commissioners (DCs) and other senior administrative staff. The DCs in turn supervised government work, including that of ministries at the district level. Below the district level, the District Officers, Chiefs and Sub-chiefs represented the PA and supervised government work at that level.[137]

[136] These include the Public Finance Management Act, County Governments Act, Intergovernmental Relations Act, among others.
[137]Chitere (2005), 21.

10-34 During the various phases of reviewing the Constitution, many Kenyans expressed the need to abolish the Provincial Administration.[138] This view was based on the history of repression using the Provincial Administration officers, right from the colonial days. Following such demands, the Committee of Experts drafting the 2010 Constitution provided for restructuring (as opposed to abolishing) of the Administration. There was observation that lower levels of the Administration, such as the Chiefs and Sub-chiefs were quite accessible to the people and, therefore, people found them relevant to their everyday lives.

10-35 This view is indeed confirmed in the survey conducted by the Working Group. When asked "...if you have a dispute, to whom do you go for help to solve the dispute?", 73 percent of the respondents said that they would go to the Chief/ Sub-chief or village elders. Very few people express the preference to turn to other officials, including elected officials.

Table 10.3: If you have a dispute, to whom do you go for help to solve the dispute?

	Overall (%)	Urban (%)	Rural (%)
Chief /Village elder/Sub-chief /Elders	**73.0**	67.0	76.0
MCA	**5.0**	5.0	6.0
Police	**8.0**	15.0	4.0
Sub-County Administrator	**1.0**	1.0	1.0
Ward Administrator	**2.0**	1.0	2.0
Other	**9.0**	9.0	10.0
RTA [DNR]	**0.2**	0.3	0.2
Don't know [DNR]	**2.0**	3.0	2.0
Total	**100.0**	100.0	100.0

10-36 The findings suggest that Chiefs and Assistant Chiefs are relevant to people at the local level. It is, therefore, important that the restructuring takes into account the role played by the lower levels of the Administration that are still perceived as vital for local level issues.

10-37 A report was submitted to Parliament by the Ministry of Interior and Coordination of National Government on the progress in the restructuring of the Provincial Administration. [139] The report cited the National Government Coordination Act (enacted in February 2013) as the principal legislation guiding the restructuring process. The report notes that the Act restructured the previous levels as follow:

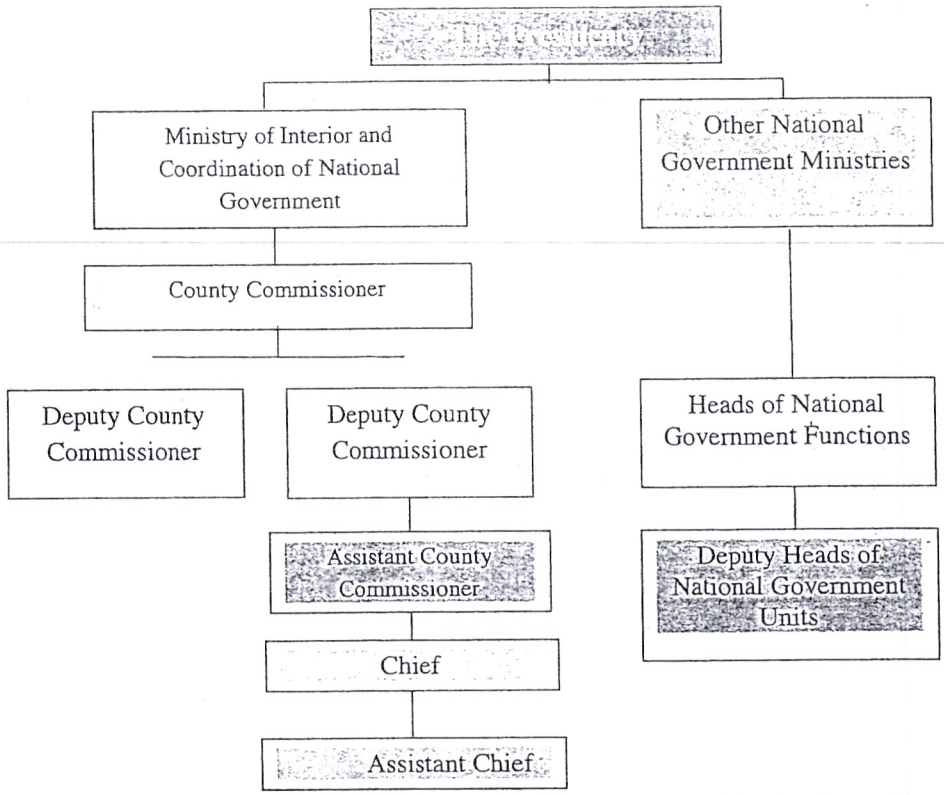
- County Commissioners were established at the county level
- District Commissioners in the former structure were made Assistant County Commissioners
- The lower levels (DOs, Chiefs and Sub-chiefs) were retained

[138]CKRC Final Report (2005) 242.

[139] Ministry of Interior and Coordination of National Government, Report submitted to Parliament on the progress on the implementation of Section 17 of the Sixth Schedule of the Constitution on the restructuring and transformation of the Provincial Administration.

- Regional Commissioners were created to coordinate National Government activities that straddle counties, akin to what was the function of the Provincial Commissioners (PCs) under the previous Constitution.

Figure 10.1: Restructured provincial administration



10-38 The report notes that officers of the former Provincial Administration (now referred to as National Government Administrative Officers) have three main roles: representing the President, coordinating national government service delivery, and management of security.

10-39 The roles given to the restructured Provincial Administration seem close to those that were given to the DCs, DOs and Chiefs. While the Provincial Administration (as restructured) plays an important role at the regional and county levels, there is concern that the restructuring process did not embrace public participation. It did not involve consultation and cooperation between the two levels of government. Neither were the relevant national government institutions and agencies adequately consulted.

10-40 Importantly, there was no policy to guide the restructuring process. A policy should have preceded the passing of the National Government Coordination Act, and should have involved broader participation, including public discussions.

10-41 Absence of a policy to guide this process has created new challenges. The National Government Coordination Act, for instance, vests the assets and liabilities of the former Provincial Administration in the National Government, yet the Transition to Devolved Government Act vested the authority to apportion assets and liabilities to the now defunct Transition Authority. Such an anomaly could have been addressed through a comprehensive policy that examines all aspects in relation to existing laws before the law is passed. Furthermore, it is envisaged that the Provincial Administration as

restructured will coordinate ministerial functions, but there are currently no formal communication channels (on sector issues) between the County Commissioners and the national ministries.[140] The County Commissioners report only to the Ministry of Interior, yet they are required to oversee implementation of National Government programmes in other ministries at the county level. There are no formally established linkages with other ministries.

10-42 In addition to the above, within the county level of government, there are no institutional structures for cooperation between the two structures of administration. For instance, at the ward level, the Ward Administrator and the Chief have no formal linkages. Neither are the Sub-county Administrators and the Assistant County Commissioners interlinked in any formal manner. This implies that the two structures of administration are operating in parallel. They often duplicate efforts especially in mobilising for public participation. Furthermore, relationships and cooperation are left to individual officers without any clear guidelines on how both should serve the public. In the end, there is wastage of efforts and resources at this level by the two structures of administration.

10-43 Due to the interconnected nature of national and county sectoral functions, there is need for structures of cooperation, consultation and cooperation to ensure coherence in the delivery of county and national government services. Importantly, there is need to establish an institutional mechanism that would bring the Provincial Administration and the two levels together at the general and sectoral level.

10-44 Beyond achieving efficiency and coordination, Provincial Administration restructuring will greatly assist to reduce the cost of resources (human and financial) that are inefficiently and/or wasted when running parallel and duplicating processes. The restructuring processes entail rationalising of functions between the two levels of government. Unnecessary costs incurred in maintaining excess human resources can be transferred to other agencies or the county governments. This will have a positive impact on national government expenditure.

Conclusion and Recommendations

Development of a Devolution Policy

10-45 Implementation of devolution has proceeded without a sessional paper; there is no overarching policy to guide the implementation of national executive functions, and to give interpretation to the devolved functions.

Consultation and Cooperation

10-46 Currently, there is no clear coordination and collaboration at the county level between institutions and departments serving the two levels of government. This could lead to wastage of resources and efforts, especially with regard to service delivery. There is need for strong and effective institutional structures to enhance consultation and cooperation both at the county and the national government.

10-47 The various structures provided for in enabling legislation, such as the Intergovernmental Relations Act, should be revitalised and resourced in an adequate manner to play this role.

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[140]Working Group on Socio-Economic Audit of the Constitution meeting with County Commissioners, Safari Park Hotel, Nairobi, on 14th October 2015.

10-48 County governors should activate and provide resources to support the County Intergovernmental Forums (CIFs) provided for under Section 54 of the County Government Act. The forums are composed of heads of departments of the national and county governments who are based at the county level. The CIFs are meant to be a coordination point for the national and county governments at the county level.

10-49 County and national governments should (with the facilitation of the IGRTC) develop principles of cooperation and consultation at all levels, including local level, especially at the ward and sub-county level.

Restructuring of the Provincial Administration

10-50 It is clear from the above analysis that the Provincial Administration restructuring process is not yet complete. Despite sentiments that the administration is already restructured, the fact that the Ministry of Interior felt the need to develop a policy to guide the process is evidence that there are pending issues regarding the restructuring. Undoubtedly, the restructuring process touches on a number of stakeholders beyond the National Government. These include the county governments, independent offices and institutions, the public who are consumers of national government services, among other stakeholders. It is important that the restructuring process, including the policy being developed, is subjected to broader consultation and participation. Furthermore, being a transition issue, there is a need for the IGRTC (the successor to the TA) to guide the process in a manner that not only ensures that the restructuring process is done in a constitutional manner, but also satisfies stakeholders to the process.

10-51 The Ministry of Interior and Coordination should facilitate the establishment of linkages and reporting structures between the sectoral ministries/departments at the county level and the national ministries for effective coordination of National Government services at the county level.

10-52 The national and county government should establish effective consultation and cooperation between the Provincial Administration, counties and sectoral ministries at the national level. The County Intergovernmental Forums envisaged under the County Governments Act can provide an appropriate avenue for such cooperation.

State Corporations and Parastatals

10-53 The role of State corporations requires further clarification especially with regard to devolved functions. The report of the Presidential Taskforce on Parastatal Reforms that was completed in October 2013 should be tabled in Parliament, debated, and adopted in order to inform the restructuring of State corporations. Moreover, sectoral Ministries should engage the corresponding county departments in discussing and coming up with functional boundaries of ministries, State corporations and county governments.

CHAPTER ELEVEN

CONSTITUTIONAL COMMISSIONS AND INDEPENDENT OFFICES

Introduction

11-1 The Constitution establishes independent commissions and offices with a primary objective of "protecting the sovereignty of the people", to ensure the observance of democratic values and principles by all institutions, and to promote constitutionalism. The very nature of the objectives and broad powers given to these institutions indicates that the institutions are to provide an extra layer of checks to ensure accountability.

11-2 Abuse of power in the past led to calls for formation of independent institutions and offices to promote the culture of accountability and help to ensure there are no excesses, partiality, discrimination, and other malpractices that characterised Kenya under the old order. More often than not, the Executive tended to make decisions on the basis of political considerations, particularly on issues such as electoral boundaries, prosecution of prominent and powerful individuals, public salaries and remuneration, and allocation of resources.[141]

11-3 The 2010 Constitution establishes independent institutions and offices and provides that they are not subject to the direction or control of any person on the manner in which they perform their functions. The Constitution requires Parliament to allocate adequate funds to independent institutions and offices to enable them to effectively discharge their respective mandates.

11-4 This section of the report examines how the independent institutions and offices have carried out their mandate. It also discusses the impact they have had on the society.

11-5 There are 10 independent commissions and two independent offices that are expressly listed in the Constitution. The 10 commissions are:

- Kenya National Commission on Human Rights and Equality Commission[142]
- National Land Commission
- Independent Electoral and Boundaries Commission
- Parliamentary Service Commission
- Judicial Service Commission
- Commission on Revenue Allocation
- Public Service Commission
- Salaries and Remuneration Commission
- Teachers Service Commission
- National Police Service Commission

11-6 The two independent offices listed in the Constitution are:

- Auditor General; and
- Controller of Budget

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[141] CKRC

[142] Later split into the National Gender and Equality Commission (NGEC) and Commission on Administrative Justice (CAJ).

11-7 The Constitution contemplates the formation of other independent institutions and offices. For instance, Article 79 provides for the establishment of an independent Ethics and Anti-corruption Commission via legislation with the same status, privileges and powers as the institutions listed above. Other institutions with similar powers but not listed in the Constitution include: Commission for the Implementation of the Constitution (CIC) that was established in the transition provisions of the Constitution; Independent Police Oversight Authority (IPOA); and Commission on Administrative Justice (CAJ) (all are created by national legislation).

11-8 There are special appointment procedures for members serving in independent institutions and offices that usually include approval by the National Assembly. Some institutions have special powers (such as investigations and requiring the production of evidence and summoning of witnesses).[143] The independent institutions and offices are required to submit periodic or special reports (upon request) to the President, National Assembly and the Senate.

11-9 The nature of mandate and responsibilities of the independent institutions and offices differ with each institution. Some of the institutions are purely oversight. They include the Kenya National Human Rights and Equality Commission that monitors implementation of human rights. Other institutions such as the National Land Commission share responsibilities of execution with the national government. The Teachers Service Commission also has a mandate to recruit and ensure quality control of teachers.

Challenges Facing Independent Commissions and Offices

11-10 Some challenges have emerged in implementation. First, the sharing of roles between the newly created institutions and the national government ministries and departments has introduced some vagueness in the division of roles and responsibilities. The confusion of roles, in some cases, extends to even older institutions that existed before 2010, such as the Teachers' Service Commission vis-à-vis the Ministry of Education.

11-11 Secondly, there is multiplicity of institutions performing related roles. This has led to duplication of roles. Thirdly, while the role to be performed by some of these institutions and offices is clear, the mandate is not marched with the capacity and resources required to perform the functions that are vested in the institutions.

11-12 Fourthly, the nature of the structure of some of the institutions, specifically the division of roles between the members or commissioners of the institutions and the secretariat, has introduced confusion in the performance of the functions of independent institutions. Lastly, there are concerns that rather than enhance effectiveness, some institutions are actually impeding the effectiveness.

11-13 Below is a discussion of each of these challenges in regard to particular institutions. Recommendations are also made on how best to address the challenges.

Lack of Clarity on Roles and Mandate of Constitutional Commissions and Ministries

National Land Commission and the Ministry of Lands, Housing and Urban Development

11-14 Conflict between the Ministry of Lands, Housing and Urban Development (MHULD) and the National Land Commission (NLC) over their respective mandates with respect to

[143] The National Land Commission, the Judicial Service Commission, the Kenya National Human Rights and Equality Commission, and the Auditor General have powers to issue summons to a witness to assist in their investigations.

administration of land matters threatens the administration and management of land-related matters in the land sector. During the constitution review process, Kenyans specifically called for the establishment of the NLC to oversee land management and administration. Among the other things that Kenyans wanted the NLC to address are: overseeing title registration, land tenure and change, efficient and optimal use of land, addressing historical land injustices, among other issues.[144] The NLC is mandated to manage land on behalf of the National and County Governments, recommend land policy, and measures to address historical injustices, among other functions.[145] Accordingly, all the constitutional drafts included provisions on a National Land Commission. The functions that are given by the Constitution to NLC generally reflect the wishes of Kenyans as captured in the reports of constituency hearings by the CKRC.[146]

11-15 The functions of the NLC are further spelt out in enabling legislation for the land sector that was enacted after 2010. The NLC Act (enacted in 2012), for instance, gives additional roles to the NLC. The Act provides that the NLC shall alienate public land (with consent of the respective level of government), hold and administer unregistered "trust land".[147] The NLC Act also vests in the Commission power to establish a land management information system, and to develop and encourage alternative dispute resolution to land conflicts.

11-16 The MLHUD is the national ministry in charge of the land sector at the national level. Accordingly, the Ministry is in charge of formulation of standards and regulation of land professionals. The MLHUD also has the responsibility of overall land policies, including review of sector performance. However, some of the functions that are vested in both the Ministry and the NLC overlap, thereby causing confusion between the two institutions. The institutions appear to have shared functions in policy making, registration of titles, developing and prescribing regulations, allocation of public land, reserving of public land, and establishment of settlement schemes.

11-17 The lack of clarity on the nature and extent of functions of the two institutions has led to clashes that have almost crippled the sector's operations. In 2014, the NLC approached the Supreme Court for an advisory opinion to clarify the responsibilities of the two institutions. While noting the vagueness of the constitutional framework, the Supreme Court asked the two parties, in its ruling delivered on 30th October 2014, to negotiate and reach a settlement on the performance of shared responsibilities in mutual manner.[148] The two institutions were given a 90-day period to divide their functions in a harmonious manner. The period granted by the Supreme Court expired without any amicable settlement.

11-18 The Supreme Court clarified that while the NLC was an independent institution from the National Government or any other authority, the Ministry and the NLC had functions that could not be performed in isolation. These functions require a joint execution and cooperation between the two bodies. Second, the Court noted that Parliament had created confusion by vesting identical functions between the two bodies. It recommended that Parliament and institutions such as the Kenya Law Reform Commission and the Office of the Attorney General propose amendments to correct the anomalies in the national legislation.[149] Third, the Supreme Court directed the Commission to formulate, in a

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[144] Final Report of the Constitution of Kenya Review Commission (2005) at p. 281.
[145] Article 67(2) of the Constitution of Kenya 2010.
[146] CKRC, Constituency public hearings report.
[147] The Constitution uses the phrase "community land" and the NLC Act uses the phrase "trust land", and this introduces further confusion.
[148] *National Land Commission v Attorney General and 5 others* (Supreme Court of Kenya, Reference No. 2 of 2014).
[149] Para. 212.

consultative manner, a "structured scheme of operations" that conforms to the Commission's mandate.[150]

Ministry of Education and the Teachers Service Commission

11-19 The Ministry of Education (MoE) and the Teachers Service Commission (TSC) have had conflicts over their mandate with regard to administration of teachers. Both share critical functions in the education sector. The role of the TSC is entrenched in the Constitution. The TSC is primarily in charge of teacher management in the education sector. Article 237 provides the TSC to register, recruit, assign, promote, transfer and discipline teachers.

11-20 The Ministry of Education also has an explicit role in the promotion of quality education and governance of schools. This implies an oversight role in the management of education institutions to ensure teachers deliver quality education, and that the boards of management of schools ensure effective management of the schools. However, the Ministry or the Cabinet Secretary for Education cannot control or direct the TSC towards any end because the TSC is a constitutional body. Thus, the Ministry may have challenges in promoting quality education were the TSC to pursue an obstinate determination to promote interests of teachers without consideration of quality education and improved governance of schools.

11-21 The Basic Education Act Regulations (2015) empower the Cabinet Secretary to require the replacement of the head of a basic education institution, where there has been an impropriety.[151] Additionally, the Principal Secretary of the Ministry of Education (as opposed to the TSC) is the accounting officer for the funds managed by head teachers; the Cabinet Secretary and the Ministry, therefore, have a role to play in the management of heads of institutions, who are also the accounting officers at the school level.

11-22 The entrenchment of the TSC as a constitutional commission arouses a need to rethink the relations between the Ministry and the TSC. The responsibility for each of them with respect to management of schools and teachers appears to lack clarity and/or coordination. While in the past the Ministry of Education did not have any direct role in teacher management, the new Public Service Commission (PSC) Regulations now require the Cabinet Secretary to be directly responsible for supervision of public servants in the line Ministry.[152]

11-23 This has led to poor coordination between the Ministry and the TSC. It is also leading to ineffective auditing of schools. Lack of good audit reports by the Ministry makes it difficult for the TSC to follow up on head teachers who mismanage schools or resources. Furthermore, the Ministry lacks the powers to discipline errant teachers.

11-24 These challenges raise the need to ensure closer coordination between the teachers' agency and the Ministry of Education. There is need to develop a joint county education coordination framework to enhance monitoring of both quality of education and the performance of teachers. This should include the TSC, ministry officials, and the quality assurance teams in every county.[153]

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[150] *National Land Commission v Attorney General and 5 others* (Supreme Court of Kenya, Reference No. 2 of 2014), Advisory opinion issued on 2 December 2015, at para. 10.
[151] Legal Notice No. 39 of 2015.
[152] Public Service Commission (2014), Policy on decentralisation of human resource management in the civil service (May 2014).
[153] Patrick Langat (2016), 'Education CS Fred Matiang'i says schools auditing system a great let-down', *Daily Nation*, 3 February 2016.

11-25 The Constitution gives the values and principles that should form the basis for policies and administration of public service. The values and policies include: high standards of professional ethics; efficiency and prudence in the use of public resources; equity in the provision of public services; public participation; accountability for decisions and actions taken; transparency; fair competition and merit in recruitment to the public service; representation of the diversity of the Kenyan people in the public service; and equal opportunities for training and enhancement of skills in the public service, including affirmative action measures. The principles and values of public service bind all State organs and public agencies at the national and county levels.

11-26 The problems that ailed the public service affected its effectiveness and compromised the role that it was to play. A number of public service reports in Kenya have detailed the challenges that have afflicted the public service in Kenya. These range from political interference and lack of independence of institutions to incompetence, corruption, and mismanagement of public resources, inefficiency in provision of services, and tribalism and nepotism.

11-27 The national Public Service Commission (PSC) is established as an independent national institution with all the powers and privileges of the independent institutions in the Constitution. The main functions of the PSC are to establish offices in the public service, recruit persons to those offices and exercise disciplinary measures. The mandate of the PSC does not, however, extend to State offices, diplomatic appointments and positions of service that are the mandate of other institutions such as the Parliamentary Service Commission, the Judicial Service Commission, Teachers Service Commission, the National Police Service Commission, and the County Public Service. The PSC is also in charge of developing human resource policies for the public sector, as well as evaluating how the public service is ensuring compliance with constitutional objectives.

11-28 While the Constitution envisages a separate service for each county, there is an emphasis that county government powers over public service have to be exercised subject to "a framework of uniform norms and standards prescribed by an Act of Parliament". In this regard, the PSC is required to "hear and determine appeals in respect of county governments' public service".

Ineffective Coordination between the Public Service Commission and County Public Service Boards

11-29 While the Constitution envisages a separate public service body for each county, there is an emphasis that county government powers over public service have to be exercised subject to "a framework of uniform norms and standards prescribed by an Act of Parliament". In this regard, the PSC is required to "hear and determine appeals in respect of county governments' public service". The transition to county governance (as elaborated in the chapter on devolved governance) affected the smooth transition and rationalization of roles between the national and county public service boards. In the initial stages, the PSC issued a transfer of power (as well as guidelines) to promote the staff transferred to county governments. Beyond these initial measures, there has been minimal contact between the County Public Service Boards and the national Public Service Commission.

11-30 Yet, the Constitution and enabling laws envisage working linkages between the national and county public service boards. For instance, there have been no policy measures or steps taken to ensure that the Public Service Commission oversees the recruitment practices of County Public Service Boards as envisaged in the Constitution. Further, Article 234 (2) (i) of the Constitution empowers the Public Service Commission to hear appeals from decisions of County Public Service Boards. Numerous employment-related

disputes at the county level are usually referred to the courts, yet these matters could have procedurally been handled through this appellate process before being taken to the courts.

Limited Capacity and Inadequate Resources

11-31 Among the most commonly cited challenges by the independent institutions and offices is the lack of adequate capacity (human, financial and institutional) to effectively carry out their functions. The annual reports of independent institutions almost always cite shortage of resources as a challenge to their effectiveness. Understandably, there is not enough in the government to satisfy all the resources of the independent institutions and offices. However, there is need to plan and prioritise resources available to the institutions and offices, and specifically paying regard to the nature of responsibility performed.

11-32 The Office of the Auditor General (OAG), for instance, is established with the primary role of ensuring accountability, efficiency and prudence in the use of public resources. The OAG is the functional instrument of Parliament in discharging the latter's overall oversight responsibility to Kenyans. In this regard, the 2010 Constitution gave the OAG independence in order to make it effective in its support to Parliament, with the mandate clearly spelt out under Article 229 (4). Accordingly, the Auditor General has a constitutional mandate to audit and report on the accounts of both the national and county governments, as well as all public institutions at the national and county levels. The role of the auditor also extends to the accounts of independent institutions and offices, the accounts of courts, Parliament (Senate and National Assembly) and even political parties.

11-33 In the performance of his or her mandate, the Auditor General is required to confirm whether the resources committed to these institutions have been applied lawfully and in an effective way. This requires additional audit work beyond the certification of accounts. The Auditor General is required to submit audit reports on National Government to Parliament and to County Assemblies for the county governments. County Assemblies and Parliament are required to take appropriate action after receiving reports from the Auditor General.

11-34 In order to ensure effectiveness, a number of measures need to be put in place to ensure that the Office of the Auditor General effectively delivers on its mandate. These measures include capacity and resources required to enable the office to discharge its functions, measures to guarantee independence of the Office of the Auditor General, and measures for implementing or ensuring compliance with the recommendations of the Auditor General.

Nature and Extent of Roles of Members and Staff of Independent Institutions

11-35 Commissioners or members who are in charge of the overall leadership and responsibilities of the institutions head the independent commissions. However, each of the institutions has a functioning secretariat usually headed by a Commission Secretary/Chief Executive Officer (CEO). In some cases, lack of a clear division of functions between the members/commissioners and the staff of the secretariat has led to conflicts that negatively impact on effectiveness. This has led to debates on whether there should be commissioners/members serving on a full-time basis. Suggestions have been made to have commissioners serve as a part-time policy making structure, and execution of mandate left to the secretariat.

Comprehensive Policy on Independent Institutions and Offices

11-36 While the objectives for the establishment of independent institutions and offices are clear, there appears to be a lot of ambiguities in the division of mandate and functions between the national government, counties, and the independent institutions and offices. Beyond the constitutional objectives and broad division of functions, there is need for a comprehensive policy framework that is specific to the structures, workings, and the general and specific roles of the independent institutions and offices. The policy framework should not only articulate the thinking and philosophy behind independent institutions and offices but should also elaborate on the broad functions and responsibilities of the various institutions and ministries. It should sketch out the nature of relations with the respective sector ministries and other related institutions.

11-37 The policy should, among other issues, address the following:

- Elaborate on the functions and roles to be performed by each of the independent institutions or office;
- Provide a detailed structure and manner of operations for the independent institutions and offices and the relevant ministries, and other agencies and departments in the same sector;
- Provide funding in a manner that enhances the independence of the institutions and offices. It is thus recommended that the independent commissions and offices be treated as a sector and a separate vote within the budget. In addition, it important to support the performance of core functions of these institutions through unconditional grants.
- Establish a mechanism for dialogue and collaboration as well as dispute resolution, and provide for joint collaboration in implementation of activities that promote synergy.

Clarification of Overlapping Roles and Relations

11-38 Some of the laws guiding the operations of the constitutional commissions and the independent offices should be revised to prevent conflict with the national government State departments (Ministries). This is particularly true of the National Land Commission and the Ministry of Lands, Housing and Development; and the Teachers Service Commission, and the Ministry of Education.

11-39 Development of these laws, however, should follow after formulation of the policy referred to above. The policy should enable development of a comprehensive scheme of operations in areas where the ministries and these other bodies share functions.

11-40 There must be established legal institutional structures for consultation and coordination of the education sector. This framework will enable the national government to oversee delivery of quality education and enhanced governance in schools without compromising the administration of teachers in schools.

Capacity, Resources and Effectiveness

11-41 The proposed policy should contain criteria for unconditional funding of constitutional commissions and independent offices. These criteria should take into account the nature

of functions of the institution or office, and the need to balance competing needs. In this regard, it is recommended that a percentage of the national budget be set aside for constitutional commissions and independent bodies. This will secure their independence and protect them from direct control of anyone else during the budget and planning processes.

11-42 Lastly, it is proposed that the national Parliament and the Senate should, through their respective committees, develop measures to implement the recommendations of reports by constitutional commissions and independent offices. That is, there is need to ensure that the reports and findings of independent institutions and offices are acted on by the agencies receiving them, and considering such reports.

CHAPTER TWELVE

SOCIAL IMPACT OF THE CONSTITUTION OF KENYA: LIVING THE NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE

Introduction

12-1 Article 10(2) of the Constitution of Kenya 2010 provides for national values and principles of governance. These include patriotism, national unity, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, integrity, transparency, and accountability. Importantly, these values bind all public officers and institutions, and all citizens. The values and principles of governance are intended to facilitate better governance, better utilisation of resources, and better services to the public.

12-2 The Constitution also identifies integrity as a core value. It underlines the importance of integrity in the conduct of public affairs and in the provision of services. Integrity requires individuals to have respect for the public office they hold. This requires all persons to conduct and carry themselves with respect in and outside the office they occupy. It also means that people engage in ethical conduct, take responsibility for their own actions, and provide quality services. This requires all persons also to be accountable and to respect the rule of law.

12-3 The preamble to the Constitution of Kenya 2010 explicitly identifies 'peace and unity' as guiding elements to which the Kenyan people have subscribed. Further, Article 10 identifies 'patriotism, and national unity' as some of the national values and principles of governance that bind all State organs, State officers, public officers, and all persons when applying or interpreting the Constitution. These principles are also expected to guide the implementation of public policy decisions.

12-4 Chapter Six of the Constitution identifies the responsibilities and guiding principles of leadership and integrity. The Constitution specifically provides that the authority assigned to a State officer 'is a public trust to be exercised in a manner that, *inter alia*, brings honour to the nation and dignity to the office, and promotes public confidence in the integrity of the office'. The Constitution requires that public service is self-less and based on public interest. It stresses honesty in the execution of public duties and accountability to the public for decisions and actions.

12-5 The values and principles underpinning the Constitution have led to many people pointing out that Kenya's constitution is one of the most progressive Constitutions in the world. The values are seen as enriching the role of the Constitution in building a better Kenya. The Constitution provides for these values because Kenyans clearly called for measures to address tribalism and corruption, and promote gender equality. Use of ethnicity to perpetuate personal interests, and use of public offices for self gain was seen as the main threat to national cohesion. Indeed, these factors contributed to cycles of violent ethnic and other communal conflicts that Kenya witnessed throughout the post-independence period. The Constitution thus establishes a clear framework to fighting ethnicity and corruption, in order to strengthen national unity.

12-6 These values are the pillars of a new society that the Constitution is seeking to build. However, since the passing of the new Constitution, media is replete with reports of leaders and ordinary citizens behaving in unethical manner. Media reports also show a society whose citizens do not comply with these values and principles.

12-7 This chapter reviews the extent to which Kenya has adhered to the principles that promote national unity and cohesion, as well as the extent to which we have adhered to the principles of leadership and integrity.

Constitution and Provisions on National Unity and Integrity

12-8 The Constitution of Kenya 2010 fundamentally altered the governance structure of the country by establishing two levels of government: the National and county governments. This has necessitated a transition from a centralized form of governance to a devolved governance structure. The new governance structure is still evolving, and various structures are implemented in varying degrees.

12-9 There are various provisions relevant to the social impact of this assignment. These include provisions on diversity and gender equity in public appointments. They also include provisions on leadership and integrity, and specifically provisions seeking to address the challenge of corruption in public office. These include the following:

(i) Provisions on promoting an inclusive society: To reflect regional and ethnic diversity in the public sector, the Constitution requires all appointments and recruitments to public offices to reflect regional and ethnic diversity of the people of Kenya. Article 130(2) requires the national Executive to reflect diversity, while Article 132 requires the President to promote respect for the diversity of the people and communities of Kenya. The Constitution also requires the government's recruitment policy to promote ethnic balance as per the aspirations of the Constitution, specifically Article 232 on Values and Principles of Public Service. The National Cohesion and Integration (NCIC) Act also prohibits any public establishment from having more than one third of its staff from the same ethnic community.

(ii) Promoting gender equity: The Constitution requires that no more than two-thirds of the members of elective and appointive bodies shall be from the same gender. This requires a minimum of 30 percent representation of either gender in the public sector. It also requires compliance by the National Government, parastatals, county governments and Cabinet as well as State departments.

(iii) Promoting integrity: Chapter Six pronounces the principles and responsibilities of public officers. It underlines ethics, honour and integrity as some of the values to guide service in the public sector. It also provides for a Commission to embed ethics in the public sector and fight corruption.

12-10 These provisions seek to promote an inclusive society by preventing social discrimination. The provisions also seek to promote gender equity and by that ensure that men and women have opportunities at all levels of the public sector.

12-11 The sections that follow review the extent to which the country has adhered to these provisions. The discussion pays particular attention to ethnicity and corruption.

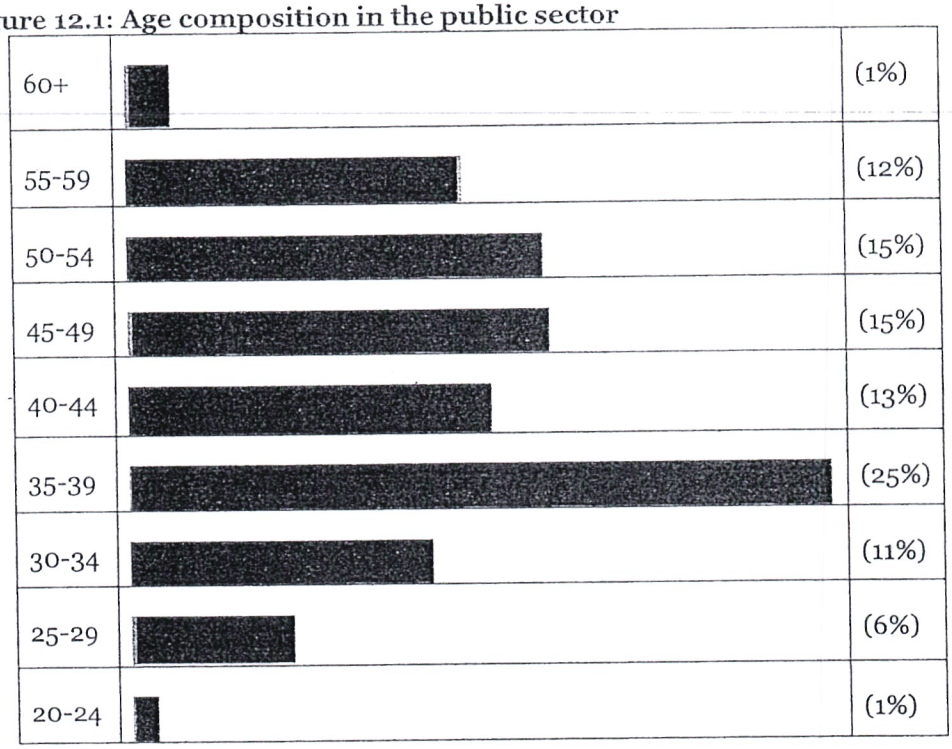
Composition of the Public Sector

Age Composition of the Public Sector

12-12 Kenya's public service is aged. The presence of the youth in the public sector is quite low compared to other age categories. The Public Service Commission's (PSC) Statutory

Report (2014)[154] on 168 Ministries, Departments and Agencies (MDAs) shows that public sector staff comprises only 18 percent youth or those between 20-34 years of age. A majority of staff, 56 percent, are below the age of 45 (Figure 12.1). However, only 7 percent are in the age category 20-29 years old. Therefore, the frequent freezes on employment do not augur well for effective succession management plans in the public sector. Although there is room for effective succession in higher age categories, the country may transition into a public service without a youthful cadre in the near future. Absence of critical numbers in the public sector limits the extent to which sectors can adequately articulate the views that resonate with the youth, who are a majority in the population.

Figure 12.1: Age composition in the public sector



Ethnic Representation in MDAs and Civil Service

12-13 Kikuyus and Kalenjins dominate the MDAs and the Civil Service (Table 12.1). Some ethnic communities are also unrepresented in either of the sectors (MDAs and Civil Service). These include the Galla, Konso, Galjeel and Leysan.

12-14 The Kalenjins and Kikuyus have relatively higher share of civil service jobs than their proportion share of the population. They also have relatively more people in the civil service than other groups. Others with more share of jobs than their size of population include the Kisii, Meru, and Embu.

12-15 Groups such as the Luhya, Luo, Miji Kenda, Maasai and the Turkana have relatively less share of civil service jobs than their proportion share of population. The Kamba

[154]Public Service Compliance with Values and Principles in Articles 10 and 232 of the Constitution, Evaluation Report 2014.

and many numerically small communities have proportions that are equal to their share of the population.

12-16 This suggests that inequalities in opportunities that sufficed before the passing of the new Constitution continue to obtain in the public sector. It is certainly early to expect the Constitution to have an immediate impact on provisions on equal opportunities, but there is a need to begin providing these opportunities to the underserved groups.

12-17 Addressing this challenge requires a conscientious adherence to the values and principles underpinning the public service under the Constitution. Laws have also been passed. Strict adherence to these laws will certainly impact on the inequalities at the national level.

Table 12.1: Ethnic representation in the MDAs and the Civil Service, 2014[155]

	Ethnic Groups	Number of Employees Reported (MDAs)	% of Total Employees in MDAs	Number of Employees Reported (Civil Service)	% of Total Employees in Civil Service	Ethnicity % Ratio in Population (2009 Census)
1	Kikuyu	21,567	23	21,206	24	17
2	Kalenjin	12,082	13	12,956	15	11
3	Luhya	11,487	12	10,252	12	14
4	Kamba	10,321	11	9,169	10	10
5	Luo	9,995	11	8,910	10	11
6	Kisii	6,652	7	6,817	8	6
7	Miji Kenda	5,823	6	2,772	3	5
8	Meru	3,815	4	5,024	6	4
9	Embu	1,780	2	1,564	2	1
10	Maasai	1,563	2	1,251	1	2
11	Taita -	1,375	1	1,313	1	1
	Taveta	476	1	83	0	0
12	Somali	1,751	2	2,530	3	6
13	Elmolo	899	1	5	0	0
14	Gosha	706	1	54	0	0
15	Borana	600	1	973	1	0
16	Turkana	384	0	712	1	3
17	Teso	345	0	669	1	1
18	Samburu	295	0	451	1	1

[1] *Source: Public Service Compliance with Values and Principles in Articles 10 and 232 of the Constitution Evaluation Report 2014*

There are many groups without numerically significant presence in the civil service. They have less than one per cent. There are also five other groups that are not present in the civil service.

[155]Public Service Compliance with Values and Principles in Articles 10 and 232 of the Constitution Evaluation Report 2014

Table 12.2: Ethnic groups under-represented in the civil service

	Ethnic Group	Number of Employees Reported (MDAs)	% of Total Employees in MDAs	Number of Employees Reported (Civil Service)	% of Total Employees in Civil Service	Ethnicity % Ratio in Population (2009 Census)
1	Mbere	271	0	436	0	0
2	Kuria	207	0	402	0	1
3	Swahili	448	0	300	0	0
4	Tharaka	191	0	152	0	0
5	Njemps	181	0	41	0	0
6	Kenyan Arab	146	0	40	0	0
7	Basuba	140	0	143	0	0
8	Gabra	136	0	5	0	0
9	Orma	135	0	141	0	0
10	Nubian Jomvu	119			0	-
11	Rendille	109	0	102	0	0
12	Kenyan European	84	0	1	0	0
13	Dasnach-Shangil	74	0		0	0
14	Burji	41	0	77	0	0
15	Kenyan Asian	25	0	12	0	0
16	Dorobo	26	0		0	0
17	Kore	14	0		0	-
18	Oromo	10	0		0	-
19	Sakuye	13	0		0	0
	Other Kenyans			322	0	
	TOTAL	94,286.00	100	88,885	100	
	Ethnic Groups Not found					
1	Galla	....	....			....
2	Konso	....	....			....
3	Galjeel	....	....			....
4	Leysan	....	....			....
5	Kenyan Americans	....	....			....

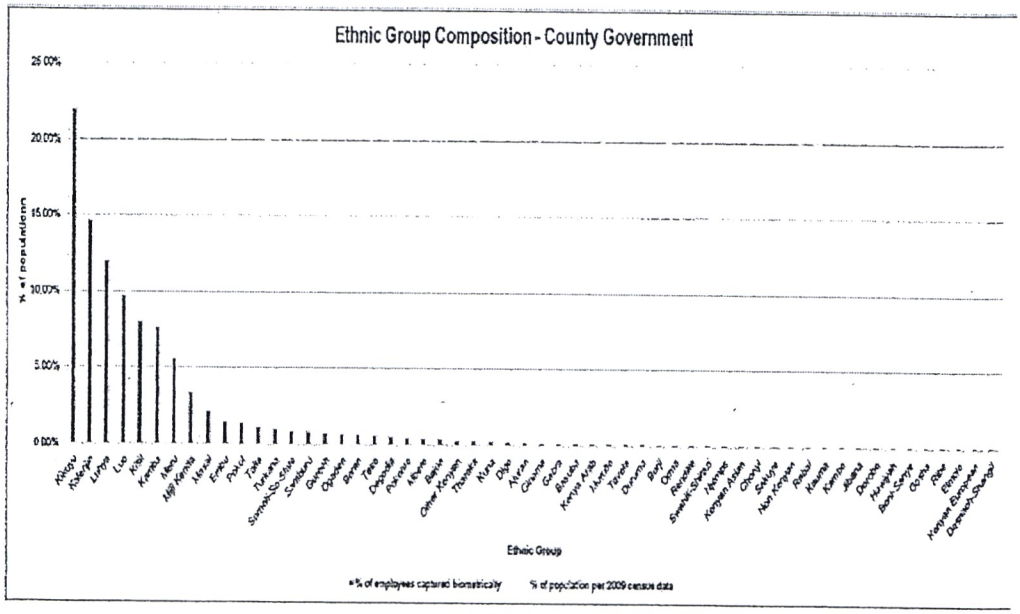
[1] *Source: Public Service Compliance with Values and Principles in Articles 10 and 232 of the Constitution Evaluation Report 2014*

Ethnic Representation in County Governments

12-18 Ethnic representation in the County Public Service is shown below (Table 12.3 and Figure 12.2). The Kikuyus constitute 5.5 percent above its proportion of the population

while the Kalenjin has an excess of 2.3 percent. Kalenjins and Kikuyus combined have 7.83 percentage points in excess of their proportion in the population, compared to 7.74 percentage points over-representation in the national government.

Figure 12.2: Ethnic composition in county governments[156]



Source: Inter-governmental Steering Committee for the Capacity Assessment and Rationalisation of the Public Service Programme Consolidated Report

Table 12.3: Ethnic groups whose representation in the counties' public service is equal/more than their share of national population

Ethnic Group	% of Employees Captured Biometrically	% of Population per 2009 Census data	Number of Employees	Over/under
Kikuyu	22.01	16.48	27,947	5.53
Kalenjin	14.66	12.36	18,623	2.30
Kisii	8.04	5.49	10,208	2.55
Meru	5.61	4.13	7,129	1.48
Maasai	2.20	2.09	2,797	0.11
Embu	1.50	0.81	1,899	0.69
Taita	1.11	0.68	1,407	0.43
Somoli-So-State	0.81	0.35	1,025	0.46
Samburu	0.80	0.59	1,014	0.21
Boran	0.69	0.40	882	0.29
Pokomo	0.44	0.24	564	0.20
Mbeere	0.43	0.42	540	0.01

[156] Source: Inter-governmental Steering Committee for the Capacity Assessment and Rationalisation of the Public Service Programme Consolidated Report.

Ethnic Group	% of Employees Captured Biometrically	% of Population per 2009 Census data	Number of Employees	Over/under
Bajun	0.41	0.17	519	0.24
Other Kenyan	0.33	0.00	423	0.33
Kenya Arab	0.16	0.10	200	0.06
Taveta	0.13	0.05	162	0.08
Burji	0.10	0.06	126	0.04
Njemps	0.08	0.01	106	0.07
Non Kenyan	0.03	0.00	34	0.03
Total	100.00	100.00	126,998	

Source: Inter-governmental Steering Committee for the Capacity Assessment and Rationalisation of the Public Service Programme Consolidated Report

12-19 The Kamba has the highest variance on the negative with 2 percentage points under-representation in the county governments compared to perfect representation in the public sector (Table 12.4).

Table 12.4: Groups whose share is county public service is less than their share of population

Ethnic Group	% of Employees Captured Biometrically	% of Population per 2009 Census Data	Number of Employees	Over/under
Luhya	11.97	13.28	15,198	-1.31
Luo	9.72	10.06	12,340	-0.34
Kamba	7.66	9.69	9,732	-2.03
Miji Kenda	3.42	4.88	4,337	-1.46
Pokot	1.44	1.57	1,832	-0.13
Turkana	1.00	2.46	1,274	-1.46
Gureeh	0.73	1.73	923	-1.00
Ogaden	0.72	1.55	917	-0.83
Teso	0.64	0.84	811	-0.20
Degodia	0.58	1.28	732	-0.70
Tharaka	0.33	0.44	421	-0.11
Kuria	0.31	0.65	391	-0.34
Digo	0.29	0.78	362	-0.49
Ajuran	0.26	0.44	331	-0.18
Giriama	0.20	1.87	255	-1.67
Gabra	0.17	0.22	221	-0.05
Basuba	0.17	0.35	214	-0.18
Murulle	0.16	0.44	199	-0.28
Duruma	0.12	0.99	156	-0.87
Orma	0.10	0.16	125	-0.06
Rendille	0.09	0.15	113	-0.06
Swahili-Shirazi	0.09	0.28	108	-0.19

Ethnic Group	% of Employees Captured Biometrically	% of Population per 2009 Census Data	Number of Employees	Over/under
Kenyan Asian	0.08	0.12	98	-0.04
Chonyi	0.06	0.37	75	-0.31
Sakuye	0.05	0.07	68	-0.02
Rabai	0.02	0.25	27	-0.23
Kauma	0.02	0.13	25	-0.11
Kambe	0.02	0.06	23	-0.04
Jibana	0.01	0.09	19	-0.08
Dorobo	0.01	0.09	17	-0.08
Hawiyah	0.01	0.14	15	-0.13
Boni-Sanye	0.01	0.02	11	-0.01
Gosha	0.01	0.05	9	-0.04
Ribe	0.00	0.04	6	-0.04
Elmolo	0.00	0.01	4	-0.01
Kenyan European	0.00	0.01	2	-0.01
Dasnach-Shangil	0.00	0.03	2	-0.03
Total	100.00	100.00	126,998	

[1] *Source: Inter-governmental Steering Committee for the Capacity Assessment and Rationalisation of the Public Service Programme Consolidated Report*

12-20 In 2014, the National Cohesion and Integration Commission (NCIC) carried out a study on how the County Governments adhered to the principles of public service. The Commission investigated the extent to which each county endeavored to recruit multi-ethnic staff. NCIC justified the study on argument that ethnic diversity is central in effective and efficient public service delivery.

12-21 The study revealed that many county governments contravened Section 65 of the County Government's Act, which requires that 'in selecting candidates for appointment, the County Public Service Board shall consider the need to ensure that at least 30 percent of the vacant posts at entry level are filled by candidates who are not from the dominant ethnic community in the county'.

12-22 Seventeen (17) counties (38%) had adhered to this requirement. They include counties in marginal and high potential regions, and include Laikipia, Migori, Trans Nzoia, Busia, Mandera, Garissa, Nakuru, Nairobi, Mombasa, Embu, and Tana River, among others.

Table 12.5: Counties that have complied with the law on inclusion and diversity

	County	Ethnic group with the highest number of staff	Percent
1	Laikipia	Kikuyu	67.4
2	Migori	Luo	65.1
3	Trans Nzoia	Luhya	63.1

	County	Ethnic group with the highest number of staff	Percent
4	Busia	Luhya	59.8
5	Garissa	Somali	56.8
6	Mandera	Gurreh	55.6
7	Embu	Embu	55.6
8	Narok	Maasai	55.4
9	Nakuru	Kikuyu	50.9
10	Lamu	Bajun	48.6
11	TaitaTaveta	Taita	47.8
12	Isiolo	Borana	45.8
13	Mombasa	Miji Kenda	39.6
14	Nairobi	Kikuyu	37.7
15	Tana River	Pokomo	29.2
16	Marsabit	Borana	28.0

12-23 Many county governments are not complying with the provisions on inclusivity and promotion of regional and ethnic diversity in Kenya. Thirty-one (31) counties or 62 percent have not complied with the principle of inclusion; they have hired 70 percent or more of staff from one ethnic community. They have hired invariably from the group that is numerically dominant in the county. NCIC noted that county governments are continuing to contravene the provisions of the law.

Table 12.6: Counties that do not comply with the law on inclusion and diversity

	County	Ethnic Group with highest numberin staff	Percent
1	Bomet	Kalenjin	97.9
2	Nyamira	Kisii	97.9
3	Kirinyaga	Kikuyu	97.8
4	ElgeyoMarakwet	Kalenjin	97.6
5	Kisii	Kisii	97.5
6	TharakaNithi	Tharaka	95.6
7	Kericho	Kalenjin	95.3
8	Murang'a	Kikuyu	95.2
9	UasinGishu	Kalenjin	94.4
10	Turkana	Turkana	93.4
11	Nyandarua	Kikuyu	93.0
12	Nandi	Kalenjin	92.9
13	Machakos	Kamba	92.9
14	Meru	Meru	92.6
15	Samburu	Samburu	92.2
16	Siaya	Luo	92.0
17	Makueni	Kamba	91.6
18	Homa Bay	Luo	91.1
19	Kitui	Kamba	90.8
20	West Pokot	Pokot	89.6

	County	Ethnic Group with highest numberin staff	Percent
21	Vihiga	Luhya	88.8
22	Nyeri	Kikuyu	88.0
23	Kisumu	Luo	82.3
24	Wajir	Somali	81.6
25	Kakamega	Luhya	81.2
26	Kwale	Mijikenda	79.9
27	Bungoma	Luhya	78.8
28	Kilifi	Mijikenda	77.0
29	Kajiado	Maasai	75.0
30	Kiambu	Kikuyu	74.4
31	Baringo	Kalenjin	70.0

12-24 The counties that have not complied with the legislative framework include those in marginal as well as those in high potential areas. Many are homogenous in ethnic composition, but this is no excuse for not adhering to the law that seeks to lay a foundation for national unity and cohesion. The fact that they all receive unconditional funding from revenue generated at national level is sufficient reason to compel them to comply.

Inequalities in Parastatals

12-25 Table 12.7 shows the composition of employees in parastatals in Kenya in 2011.[157] According to the data, the Kikuyus comprise the largest number of employees in parastatals (24.77%) followed by Kalenjins (17.15%). The two communities represent 41.92 percent of employees in the parastatals audited by the National Cohesion and Integration Commission (NCIC). The representation of these major communities is higher than their population ratio of 17.33 percent and 12.9 percent, based on the 2009 Kenya National Population and Housing Census.

Table12.7: Ethnic composition in parastatals in Kenya

	Ethnic Community	Total Population	Proportion (%) of National Population (as to Census 2009)	Numbers in Parastatals	% in Parastatals
1	Kikuyu	6,622,576	17.33	14,423	24.76
2	Kalenjin	4,929,469	12.9	9,990	17.15
3	Luhya	5,338,666	13.97	8,043	13.81
4	Luo	4,044,440	10.58	7,074	12.14
5	Kamba	3,893,157	10.19	5,205	8.94
6	Kisii	2,205,669	5.77	4,147	7.12
7	Meru	1,658,108	4.34	1,923	3.30
8	Miji Kenda	1,967,474	5.15	1,760	3.02
9	Kenyan Somali	2,388,732	6.25	919	1.58
10	Taita	273,519	0.72	875	1.50
11	Embu	324,092	0.85	743	1.28

[157]Ethnic Diversity Audit of Parastatals in Kenya 2011, Volume II (NCIC).

	Ethnic Community	Total Population	Proportion (%) of National Population (as to Census 2009)	Numbers in Parastatals	% in Parastatals
12	Maasai	841,622	2.20	706	1.21
13	Borana	161,399	0.42	337	0.58
14	Samburu	237,179	0.62	291	0.50
15	Teso	338,833	0.89	289	0.50
16	Turkana*	988,592	2.59	283	0.49
17	Swahili	110,614	0.29	226	0.39
18	Rendille	60,437	0.16	105	0.18
19	Kuria	260,401	0.68	98	0.17
20	Gabra	89,515	0.23	74	0.13
21	Mbeere	168,155	0.44	71	0.12
22	Nubi	15,463	0.04	30	0.05
23	Taveta	20,828	0.05	26	0.04
24	Burji	23,735	0.06	23	0.04
25	Kenyan Arabs	40,760	0.11	15	0.03
26	Kenyan Asians	46,782	0.12	8	0.01
27	Basuba	139,271	0.36	6	0.01
28	Kenyan Europeans	5,166	0.01	2	0.00
29	Other Kenyans	1,031,644	2.70	556	0.95
	Kenya Total	**38,221,132**	**100.00**	**58248**	**100.00**

Gender Representation in Parliament

Gender Representation in the National Assembly and the Senate

12-26 The Constitution provides for increased participation of women in political leadership by creating the position of County Women Representatives to increase their gender in Parliament. In the previous Parliament, elected women were only 8 per cent of the total elected members. There are now 63 women members in the National Assembly, with 47 elected as County Women Representatives while 16 are elected to represent their constituencies.[158] This number constitutes a mere 19 per cent of total members in the National Assembly, and thus Kenya is still a long way in meeting the two-third gender constitutional requirement.

Table 12.8: Gender representation in Parliament

Description	10th Parliament (2008-2013)	%	11th Parliament (2013-2014)	%	Senate	%
Elected male MPs	193	92	274	81	47	100
Elected women MPs	17	8	63	19	0	0
Total	210		337		47	

[158]Parliament of Kenya Website.

Gender Representation in the Cabinet

12-27 There are five female Cabinet Secretaries or 24 percent in the current Cabinet.[159] This is a slight improvement in terms of the proportion of women in Cabinet compared to the previous government, where women constituted only 13 percent in the Cabinet. However, this does not align with the constitutional principle of two-thirds gender rule.

12-28 On the other hand, the number of Principal Secretaries is at 13 out of 41, representing about 32 per cent and, therefore, in line with the constitutional requirement.

Table 12.9: Gender representation in the Cabinet

Description	2010	Percentage	2015	Percentage
Male	33	86.84	15	75.00
Female	5	13.16	5	25.00
Total	38	100.00	20	100.00

12-29 Meeting the constitutional principle of ensuring no more than two-thirds of appointive and elective posts are from one gender is possible. This is particularly true of appointive posts, but it requires conscientious commitment. It requires a deliberate effort to remind everyone that there is a progressive Constitution that requires a clear departure from the past, and this requires commitment from the appointing authorities.

Gender Representation in the Education Sector

12-30 For the first time in history, the number of girls in early childhood education has surpassed that of boys (Table 12.10).[160] More girls are going to secondary schools (48%) compared to boys (46%) in 2009. Primary schools have maintained near equal numbers of boys to girls.

12-31 However, technical colleges and universities still have fewer girls than boys. They register a higher number of male students, with females forming only 39 percent of the enrolment in technical colleges as compared to 48 percent in 2009. Male students in universities form 59 percent of the population compared to 61 percent in 2009.

Table 12.10: Gender representation in the education sector

Education level	Year	Male'000	Female'000	Total '000	Male (%)	Female (%)
ECDE	2009	1151.00	1096.30	2247.30	51	49
	2014	1476.40	1543.50	3019.90	49	51
Primary	2009	4722.80	4460.70	9183.50	51	49
	2014	5052.40	4898.40	9950.80	51	49
Secondary	2009	787.90	684.70	1472.60	54	46
	2014	1202.30	1107.60	2309.90	52	48
Technical	2009	42.04	38.94	80.98	52	48
	2014	89.77	58.38	148.14	61	39
University	2009	107.72	68.89	176.61	61	39
	2014	213.97	147.41	361.38	59	41

[159] Source: Parliament of Kenya Website.
[160] Ministry of Education, Science and Technology and UNICEF, Basic Education Statistical Booklet 2014, and Kenya National Bureau of Statistics (2015), Economic Survey.

Corruption Cases Handled by the Ethics and Anti-Corruption Commission

12-32 The number of cases handled by the Ethics and Anti-Corruption Commission (EACC) increased by 19.4 percent from 3,355 in 2012/13 to 4,006 in 2013/14 (Table 12.11). The number of corruption cases reported for investigation increased by 37.0 percent from 1,423 in 2012/13 to 1,950 in 2013/14. The EACC referred 681 cases to other investigative agencies in 2013/14 compared to 111 cases in the previous financial year and had 65 cases classified as pending, awaiting more information.[161]

12-33 The number of complaints referred to the right authorities dropped by 3.2 percent from 1,170 cases in 2012/13 to 1,132 in 2013/14. The number of cases forwarded to Office of the Director of Public Prosecution (ODPP) for action increased from 49 to 70.

Table 12.11: Corruption cases handled by EACC (2010 versus 2014)

Action taken	2009/10	2013/14
Corruption cases for investigation	1,796	1,950
Criminal cases referred to other investigative agencies	196	681
Cases forwarded to public service organization for administrative actions	813	841
Pending more information	59	65
Complainants advised on the right authority to report	2025	1132
Complainants advised to seek civil redress	950	0
No further action	179	178
Total	6,018	4,847
Cases forwarded to Attorney General (AG)/ODPP	104	70
Convictions	34	3

12-34 As shown above, the number of cases reported and being investigated has been increasing. However, the rate of convictions has been extremely low compared to the previous period. Yet, without convictions, the momentum for supporting anti-corruption war slackens.

12-35 The poor rate of convictions is a pointer to possibility of weak investigations. This raises the need to explore better ways to improve on investigations so as to have water tight evidence and, therefore, high levels of conviction. This way, the fight against corruption will certainly get public support.

Perceptions on Corruption

12-36 Many citizens (40.3%) feel that the government is performing very poorly in the fight against corruption.[162] Only a small percentage (1.6%) feels that the government is committed to the fight against corruption (Table 12.12).

12-37 Citizens living in urban areas are more dissatisfied with the government's fight on corruption (46.7%) compared to those living in rural areas. Young people below the age of 35 and working class have very negative perceptions on the government, and the fight against corruption.

[161] Kenya National Bureau of Statistics (2012; 2015), Economic Survey.

[162] Ethics and Anti-Corruption Report of 2014.

Table 12.12: Perceptions on corruption

			National government performance in fighting corruption							
			Very well	Well	Fair	Poor	Very poor	Refused to answer	Don't know	Total
Overall		Count	47	208	444	920	1199	8	149	2975
		%	1.6	7.0	14.9	30.9	40.3	0.3	5.0	100.0
Rural / Urban	Urban	Count	13	49	167	332	516	4	25	1106
		%	1.2	4.4	15.1	30.0	46.7	0.4	2.3	100.0
	Rural	Count	34	159	277	588	683	4	124	1869
		%	1.8	8.5	14.8	31.5	36.5	0.2	6.6	100.0
Age	18 - 35	Count	21	98	186	434	526	3	53	1321
		%	1.6	7.4	14.1	32.9	39.8	0.2	4.0	100.0
	36 - 55	Count	19	75	173	349	503	2	63	1184
		%	1.6	6.3	14.6	29.5	42.5	0.2	5.3%	100.0
	Above 55	Count	6	33	75	124	148	3	28	417
		%	1.4	7.9	18.0	29.7	35.5	0.7	6.7%	100.0

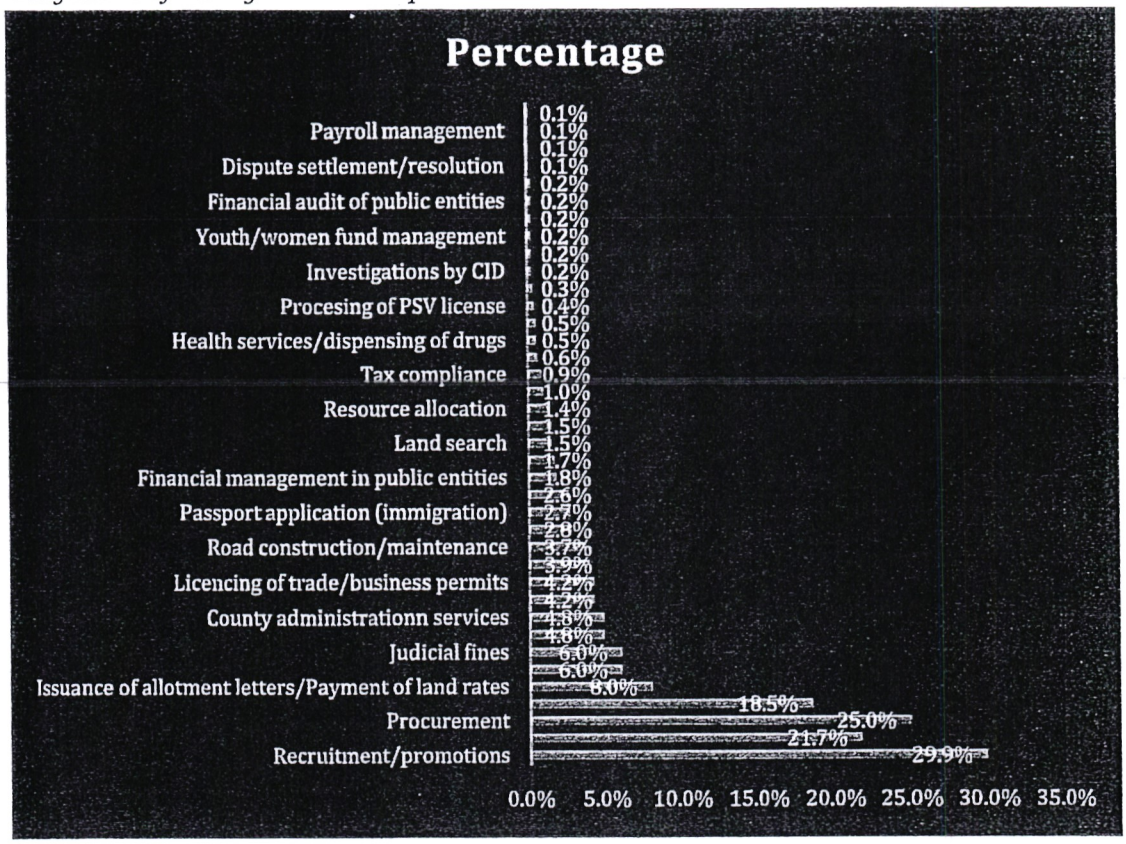
Corruption Prone Areas in Service Delivery

12-38 The areas prone to corruption in public service delivery include recruitment (29.9%), arbitrary arrest (27.4%), procurement procedures (25%) and issuance of allotment letters/payment of land rates (8.9%) (Figure 12.3).[163]

[163]Ethics and Anti-Corruption Commission, Corruption and Ethics Survey Report 2014.

Figure 12.3: Corruption prone areas

Magnitude of money lost in corruption



12-39 An analysis of bribery by public services/processes reveals that, on average, service seekers paid the largest amount of bribes amounting to Ksh 30,000 to seek funding from either CDF, County governments, Ministry of Agriculture, or youth funds. The other two leading services in terms of the average size of bribe paid are electricity connection services, and tax remittance services, with an average size of bribe of Ksh 18,333 and Ksh 16,909, respectively (Table 12.13 and 12.14).[164]

Table 12.13: Institutions and size of bribe

Ranking	Institution	Average Size of Bribe (Ksh)
1	Constituency Development Fund	20,067
2	Kenya Revenue Authority	14,671
3	Kenya Power and Lighting Company	13,350
4	County Transport/Ministry of Public	12,660
5	Judiciary	11,231
6	Ministry of Youth, Sports and Gender	10,000
7	County Government	8,100
8	Ministry of Interior and Co-ordination of National Government	7,667

[164]Ethics and Anti-Corruption Commission, Corruption and Ethics Survey Report 2014.

Ranking	Institution	Average Size of Bribe (Ksh)
9	Ministry of Lands	7,494
10	Kenya Police	4,556
11	Public Schools	4,500
12	Trade Development and Regulations	3,533
13	Kenya Film Classification Board	3,500
14	Ministry of Education	3,333
15	Lake Victoria North Water Services Board	2,000
16	Kenya Airports Authority	2,000
17	Public Hospitals	1,914
18	Public Health Department	1,883
19	Teachers Service Commission	1,700
20	Civil Registrar Office	1,462
21	Ministry of Agriculture, Livestock and	1,225
22	Registrar of Persons	1,215
23	Nanyuki Water and Sewerage Company	1,000
24	Nyeri Water and Sewerage Company	800
25	County Administrators	732
26	Public universities	500
27	Copyright Society of Kenya	500
28	County Veterinary Offices	500
29	National Environment Management	500
30	Kisumu Water and Sewerage Company	300
31	Nzoia Water and Sewerage Company	200
32	Narok Water and Sewerage Company	200

Table 12.14: Services and average size of bribes[165]

Ranking	Type of service	Average size of bribe (Ksh)
1	Seek funding (from CDF, County government, Ministry of Agriculture & Ministry of Youths)	30,000
2	Electricity /power connection	18,333
3	Tax remittances/file returns	16,909
4	Fraud in payment of power bills	14,200
5	Bursary application/follow up	10,333
6	Ante/post-natal services	9,400
7	Title deed application	7,441
8	Tender application/follow up	6,667
9	Bail out /pay bond	6,283
10	Renewal/application for passport	5,667

[165]Ethics and Anti-Corruption Commission, Corruption and Ethics Survey Report 2014.

Ranking	Type of service	Average size of bribe (Ksh)
11	Land search services	5,349
12	Approval for building plans	5,167
13	Court services/processes	4,750
14	Business permit/license application/renewal	4,693
15	Vehicle inspection services	4,667
16	Renewal of driving license	4,340
17	To pay land rates	4,083
18	Road construction	4,000
19	Report a case/incident	3,992
20	Employment	3,229
21	Application/collection of a PSV certificate	2,550
22	Death certificate	1,917
23	Garbage collection	1,500
24	Application/collection of birth certificate	1,219
25	Medication /treatment	1,214
26	Job transfer	1,000
27	Discharge a patient	1,000
28	ID card application/collection	887
29	Fraud on payment of water bill/ connection	814
30	Acquire meeting permit	800
31	KRA PIN application	733
32	Search for subsidized fertilizer	725
33	Application for certificate of good conduct	700

Corruption Magnitude in counties

12-40 On average, service seekers paid the largest amount of bribe amounting to Ksh 11,611 in Mombasa County to access public services.[166] The other two leading counties in terms of the average size of bribe paid are Embu County and Isiolo County, with an average size of bribe of Ksh 11,500 and Ksh 10,000, respectively. Table 12.15 presents varied average sizes of bribe paid in each county in order of the highest to the least amount of average size of bribe paid to access public services.

[166]Ethics and Anti-Corruption Commission, Corruption and Ethics Survey Report 2014.

Table 12.15: Ranking of counties in terms of size of bribe

Ranking	County code	Average size of bribe (Ksh)
1	Mombasa	11,611
2	Embu	11,500
3	Isiolo	10,000
4	Vihiga	8,600
5	Nyandarua	7,811
6	Nakuru	7,609
7	Machakos	7,295
8	Bungoma	7,221
9	Bomet	7,156
10	Nyeri	7,035
11	Marsabit	6,500
12	Murang'a	5,956
13	Kisii	5,830
14	Nandi	5,738
15	Wajir	5,500
16	Kilifi	5,473
17	Migori	5,283
18	Baringo	5,125
19	Trans Nzoia	5,102
20	Meru	4,595
21	Narok	3,963
22	Kakamega	3,909
23	Kajiado	3,743
24	Busia	3,614
25	Nairobi	3,124
26	Kwale	2,600
27	Siaya	2,575
28	Lamu	2,500
29	Makueni	2,464
30	Kiambu	2,333
31	UasinGishu	2,200
32	Laikipia	2,167
33	Kirinyaga	2,025
34	Kisumu	1,867
35	Kericho	1,586
36	Nyamira	1,580
37	West Pokot	1,313
38	TaitaTaveta	1,300

12-41 These findings attest to fading public confidence in the fight against corruption. The poor rate of conviction is adding to poor perception on the fight against corruption. As by some of the stakeholders, this poor progress in the fight against corruption is the result of poor investigations.

12-42 Notwithstanding the increase in the number of cases under investigation, there is low perception on the efforts to fight corruption. Kenyans are not confident that the government is doing enough. As already mentioned, this raises a need to rethink investigations and the prosecution processes. Only an increase in convictions of those prosecuted will make Kenyans believe in the government's efforts to fight corruption.

12-43 Corruption at the county level is on the increase as shown in the national survey. There is no sufficient evidence that the government has done enough to prosecute and ensure conviction of those involved. Again, only conviction of those involved in corruption at both the county and the national level will lead to increased support of the public.

Conclusion and Recommendations

12-44 These issues of social inclusion as well as the fight against corruption require collective effort to be successfully addressed. They require mobilization of the spirit of the nation and a conscientious commitment to depart from the past.

12-45 There is generally limited or poor adherence to the values and principles of governance that constitute the main pillar of building a strong Kenya. Public officers are often cited in breach of these values, but there are no sanctions for their behaviour. The failure to punish public officers and other persons who fail to live by these values has reduced the momentum for commitment to ethical and integrity principles. The Ethics and Anti-Corruption Commission should ready itself to implement ethics and ensure stronger commitment to principles of leadership and integrity by all persons in public office.

12-46 The national Executive and the County Governments should ensure that appointments to the county and national government strictly reflect the regional and ethnic diversity of Kenya. Heads of county and national government ministries and departments, as well as parastatals that do not show compliance with this requirement after a period of five years from the data of publication of the relevant legislation should be barred from holding public office.

12-47 The institutions of accountability and oversight, such as the national Parliament and the County Assemblies, should be holding the government to account every time there are new appointments made; they should review the extent to which such appointments reflect diversity.

12-48 It is imperative to constantly remind all political leaders that the future of the nation lies in how well the Constitution and the principles of inclusion are implemented. Continuing to ignore that Kenya is a diverse country that requires inclusion of everyone is detrimental to national cohesion.

CHAPTER THIRTEEN

BILL OF RIGHTS

Introduction

13-1 The agitation for a new constitution was largely driven by the need to address the violation of human rights. Human rights violations included detention without trials; extrajudicial killings including political assassinations; illegal dispossession of property including the grabbing of public land, and torture. Kenyans desired to establish a system of governance that would respect, promote, protect and implement fundamental rights and liberties.[167]

13-2 During the constitutional review process, people called for a more effective system for the protection of fundamental rights and freedoms. The people specifically called for protection against police harassment, and arbitrariness of public officials, especially Chiefs. The people called for improvement of prison conditions and more humane treatment of persons in police custody and penal institutions. Specifically, people called for an end to torture and an end to the delay of cases,which occasions injustice. People also called for freedom of information and specifically access to information that is in the custody of government. They also called for the protection of journalists.

13-3 Discrimination in access to vital resources such as land led to calls for land reforms to address issues of equity and ensure equal access to land and land-based resources, in addition to establishing mechanisms to address historical injustices related to land. They called for rights that would protect livelihoods, including free access to education, health care, better nutritional care and protection of the rights of persons with disability.

13-4 The people also called for an end to discrimination against minorities and prejudice to the public.[168] Discrimination was also rife in employment and specifically to minority groups. They called for a rights regime that could protect and conserve the environment and natural resources. The people also called for the protection and preservation of their cultures and cultural practices, including cultural sites.

Bill of Rights

13-5 The Constitution of Kenya 2010 has been praised as one of the best human rights charters.[169]Chapter Four of the Constitution sets in elaborate form the rights and liberties Kenyans are entitled to. The Constitution also states that "the Bill of Rights is an integral part of Kenya's democratic State and is the framework for social, economic and cultural policies' and that 'the Bill applies to all law and binds all State organs and all persons". There is unrestricted access to the courts, and this has facilitated various groups and individuals to access courts whenever they feel that their rights have been violated.[170] The court is also empowered in enforcing the Bill of Rights to give a variety

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[167] See summary of public presentations to the Constitution of Kenya Review Commission (CKRC) in the final report of the Constitution of Kenya Review Commission,2005 p. 111.

[168] CKRC Final Report 2005, at p. 111.

[169] See J.B Ojwang. *Ascendant Judiciary In East Africa*, Strathmore University Press,2013 and Kiwinda M , the Bill of Rights in PLO et al ,*The Constitution of Kenya Contemporary Readings*, Law Africa 2011.

[170] For example, in September 2011, Miloon Kothari, one of the world's foremost experts on housing rights, and a former UN Special Rapporteur on the Right to Adequate Housing, joined Kituo Cha Sheria's suit (Satrose Ayumba v Registered Trustees of Kenya Railways Retirement Benefits Scheme High Court of Kenya Constitutional Petition No. 65 of 2010) against the forced, inhumane evictions of people from Muthurwa Estate by the then City Council of Nairobi.

of remedies, including injunction, declaration, and invalidation of laws that limit freedoms in contravention of Article24; compensation and judicial review.

13-6 Furthermore, the Constitution now recognizes human rights treaties ratified by Kenya as part of Kenyan law.[171] There are recurring themes and provisions around human rights throughout the Constitution, including the founding provisions. These include provisions on sovereignty of the people that recognizes the inalienable right of the people to govern themselves,[172] cultural rights, national values and principles of governance, citizenship on the basis of gender equality, community land, among other provisions. These provisions are not contained under Chapter 4 but seek to reiterate the rights contained under the Bill of Rights. While the Bill of Rights creates a very enabling legal environment for human rights, the actualization of the rights remains a distant goal. Enabling policies, laws, institutions and resources are in many cases inadequate to realize the noble intentions of the Constitution.

Implementation of the Bill of Rights

13-7 Since the promulgation of the Constitution, considerable progress has been made in the implementation of human rights. Implementation measures taken so far include: the development and enactment of most of the legislation required under Schedule Five of the Constitution; development of key policies; setting up of critical institutions; and establishment of county governments. The Judiciary has also made important decisions on the implementation of the Constitution with regard to human rights.

13-8 Courts have the constitutional duty to protect and promote the realisation of fundamental rights and freedoms. Courts have generally demonstrated independence in the enforcement of the Bill of Rights and have, on many occasions, received objections by both the Executive and the Legislature. Among the specific pronouncements made on fundamental rights include the enforceability of social economic rights,[173] right to legal assistance for the indigent,[174] and the right of prisoners' to participate in elections.[175]

Civil and Political Rights

Access to Justice

13-9 Article 48 of the Constitution provides for access to justice for all persons, thereby imposing an obligation on the State to take necessary measures. Since the promulgation of the Constitution, there have been efforts across the justice sector to ensure the right of access to justice. This has been through the reforms in the Judiciary, police service reforms, and enactment of various policies and legislations. Institutions such as the Witness Protection Agency (WPA) and the Independent Police Oversight Authority (IPOA) have been set up to protect witnesses and investigate human rights violations by the police. Since its establishment, IPOA has received more than 1,700 complaints against the police. It has launched independent investigations that have led to prosecutions. Unfortunately, the Witness Protection Agency has suffered from

[171] Article 2(6) of the Constitution of Kenya.
[172] Which provides that sovereign powers belongs to the people and is only exercised by the state on delegation basis.
[173] In both *Mitu-bell Welfare Society v Attorney-General and 2others,Nairobi petition No.164 of 2011* and *SatroseAyuma&11 Others v The registered Trustees of the Kenya Railways Staff Retirement benefits Scheme & 2 others, Petition No.65 of 2010* on the issue of evictions in urban settlements the courts observed that social economic rights had crystallized and were not merely aspirations.
[174] *Swakka & 2 Others vs Republic* and *David Njoroge Macharia vs Republic.*
[175] See the decision in *Priscilla Nyokabi Kanyuavs AG and Another,High Court Constitutional Petition No.1 of 2010.*

inadequate funding and has largely been ineffective in the protection of witnesses, resulting in loss of lives[176]

13-40 The right to a fair hearing is now protected as a non-derogable right (Article 25). The National Council on Administration of Justice (NCAJ), which brings together all key stakeholders in the justice sector, has also been established to coordinate justice services and facilitate reforms. Important policies have also been developed by the judiciary to respond to the demands of the Constitution on human rights, including the Bail and Bond Policy Guidelines 2015 and the Sentencing Policy Guidelines 2016. The Judiciary has also enhanced access to justice through construction of more courts in places which were hitherto underserved. Courts have been constructed in Eastern, North Eastern and the Coast.[177]Efforts have also been made to develop a national legal aid framework. A national policy and legislation have been developed. The Legal Aid Bill has also been passed by the National Assembly and is (as of May 2015) being considered by the Senate.

Freedom of Information, Expression and the Media

13-41 These rights are provided for under Article 33, 34 and 35 of the Constitution, which also binds Kenya to regional and international human right instruments. Under the Constitution, the media enjoys freedom to inform the people without fear of victimization. The people also enjoy the freedom to express their views more freely. The government has occasionally interpreted laws to restrict press freedom, and officials often accuse the international media of publishing stories and engaging in activities that could incite violence.

13-42 In 2013, Parliament passed laws that could strengthen oversight measures[178] but the Kenya media owners and the Kenya Union of Journalists have challenged these laws and the Kenya Editors' Guild challenged the constitutionality of the laws in court. The government's response to media reports has been categorized by some observers as an 'authoritarian response' The KNCHR, however, notes that the government has not restricted access to internet or censored online content, and that 'there is no credible report that the government monitored private online communications without appropriate legal authority. Authorities, however, monitored websites for violations of hate speech laws'.

Economic and Social Cultural Rights

13-43 Economic and social rights are anchored under Article 43 of the Constitution. The promulgation of a new Constitution in 2010 set the platform for the realization of various fundamental economic and social rights, including education, social security, housing, hunger and health. These rights are subject to progressive realization, requiring that the State sets out mechanisms that ensure the realization of these rights, including policies and legislations that will actualize these rights. In one case[179] that concerned the right to health, the court held that the state was under duty to demonstrate the progressive steps and measures it has taken to guarantee the enjoyment of the right to health by the petitioner. In another case[180] that was determined two years after the Constitution was promulgated, the Court held that it

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[176] Agneta Imbaya and her daughter were killed in Bungoma after testifying against an accused person (https://iwpr.net/global-voices/big-questions-about-witness-protection-kenya). Some of the possible ICC witnesses are alleged to have been killed, including Meshack Yebei

[177] State of the Judiciary.

[178] *Media Council Act* and the *Kenya Information and Communications (Amendment) Act (KICA)*.

[179] *Mathew Okwanda v Minister for Health* [2013] eKLR.

[180] The case of *Mitu-Bell Welfare Society v Attorney General & 2 others*, Nairobi Petition No. 164 of 2011 (Unreported) at paragraph 53.

was no longer tenable for the State to simply state that there were no resources. The Constitution required the State to demonstrate the steps and measures taken to implement the rights, the court stated.

Right to Housing

13-44 In *William Musembi & 13 Others v. Moi Education Centre Co. Ltd & 3 Others*, the petitioners approached the court alleging violation, *inter alia*, of their right to housing guaranteed under Article 43 of the Constitution. The court held that the respondents did violate the petitioners' rights guaranteed under Articles 28, 29, 43, 53 and 57 of the Constitution. There are many similar cases where the courts have reached the same verdict of the violation of the right to housing and related rights.[181]

Right to Education

13-45 Article 43 of the Constitution provides that every person has the right to education. It incorporates the internationally accepted content of the right to education. Free primary education was introduced in 2003 as a policy driven by the government that was coming into power at the time but it was not a mandatory obligation of government until the new Constitution was promulgated. There has been tremendous improvement in access to basic education since 2010.Various policy, legal and administrative measures have been put in place to implement the constitutional obligation. One of the measures has been an increase in the budgetary allocations for education. The national framework for education and training was formulated in 2012 to align education to the Constitution of Kenya 2010 and the Kenya Vision 2030.[182] There are, however, various challenges that continue to face the realization of the right to education, including the quality of education, inclusive education, cost of education (secondary education and higher learning), and transition to secondary school.[183]

Right to Health

13-46 Article 43 (1) (a) of the Constitution provides that every person has the right to the highest attainable standard of health, which includes the right to reproductive health care services. It further provides that a person should not be denied emergency medical treatment and that the State should provide appropriate social security for persons who are unable to financially support themselves and their dependents. The provision of health services in Kenya is a devolved function that is executed by the county governments in line with the provisions of the Fourth Schedule of the Constitution.

13-47 There have been various steps towards the realization of the right to health, including the introduction of free maternal health care in 2013aimed at reducing child and maternal mortality rates, which have been unacceptably high. There are, however, challenges in accessing the right, including disputes between national government and county government, inadequate human and financial resources, and frequent industrial action by health workers.

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[181]The other cases where this was held are: *In the matter of the Principle of Gender Representation in the National Assembly and the Senate* SCK Advisory Opinion No. 2 of 2012 [2013]eKLR, *JefferIsaakKanu v Ministry of Justice, National Cohesion and Constitutional Affairs & 3 others,* Nairobi Petition 556 of 2012, *New Vision Kenya & 3 Others v Independent Electoral and Boundaries Commission & 4 Others,* Nairobi H. C. Constitutional Petition No.331 of 2012).

[182]file:///C:/Users/Research/Downloads/Policy%20Framework%20for%20Education,%202012%20(2).pdf

[183]The forth state of human rights report, KNCHR.
http://www.knchr.org/Portals/0/StateOfHumanRightsReports/4th%20SHR%20Report.pdf

Labour Rights

13-48 The Constitution accords workers with the right to fair remuneration, reasonable working conditions, right to go on strike, among others under Article 41. The Constitution has established a special labour and industrial relations court with the status of the High Court. This has strengthened the enforcement of workers' rights as was recently evident in the dispute between the Teachers Service Commission and the teachers' labour unions (KNUT and KUPPET) when the court played a critical role in support of the demands of the unions.

Group Rights

Children rights

13-49 The Constitution in Article 53 provides for all the internationally recognised rights of children and adopts the principles of the best interests of the child as paramount in all matters affecting children. Unfortunately, implementation of the constitutional provision is inadequate. Many children in need of care or in conflict with the law continue to suffer neglect and human rights abuses, including violence, drug abuse, sexual molestation, human trafficking and Female Genital mutilation (FGM).

Rights of persons with disabilities

13-50 The Constitution prohibits any form of discrimination against all persons, including persons with disabilities. The Government has committed to ensuring the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities, as is provided for under Article 54(2) of the Constitution. The Kenya National Commission on Human Rights as an independent monitoring body on the implementation of the Convention on Rights of Persons with disabilities (2011-2013) embarked on a monitoring exercise of counties to assess the status of rights of persons with disabilities in Kenya.[184]The report detailed the findings of the monitoring surveys conducted between November 2011 and December 2013. The survey targeted learning institutions, hospitals, law courts, local authorities, Disabled Persons Organizations (DPO's), homesteads of persons with disabilities, and offices where public services are offered. On social protection, the government has commendably instituted mechanisms to ensure social security for persons with disabilities through legislations such as the Social Assistance Act 2013 and policies on cash transfer system, which targets persons with severe disabilities. However, the coverage is still low at 94 persons with severe disabilities per constituency. The allocation of Ksh 2,000 per month is however meagre compared to the type of needs and inflation rate. With regard to access to justice, persons with disabilities continue to face a lot of challenges when seeking justice, with key obstacles being inaccessibility and exercise of legal capacity especially for persons with intellectual disability.

Gender and equality

13-51 The Constitution has contributed to galvanizing resources for Gender Equality and Women's Empowerment. New laws, policies and institutions geared towards addressing gender issues have been enacted.[185]The National Gender and Equality

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[184] KNHCR, From norm to practice: A status report on implementation of the rights of persons with disabilities in Kenya, 2014.

[185]The fourth state of human rights report, KNCHR.

Commission is empowered to spearhead processes to promote gender equality and freedom from discrimination (Article 27).

13-52 In Kenya, gender inequalities are manifested in terms of disparities in access to basic rights- access to and control of resources, employment, and political voice. The Constitution provides important affirmative action measures to ensure gender equity and equality in Kenya.

13-53 In the National Assembly, the Constitution has reserved 47 women seats for women and in the Senate 16. After the country's general election in March 2013, only 16 women were elected as MPs. Despite a progressive Constitution, women continue to face discrimination, and attempts to ensure that at least a third of Members of Parliament are women have faced considerable political and legal obstacles.[186]No woman was elected governor or senator. Nevertheless, the number of women in the eleventh Parliament has increased tremendously because of the affirmative action in the Constitution, which provides for County Women Representatives.

Challenges to Effective Realization of Human Rights

13-54 While there is general progress in the realization of human rights, there are several challenges that hinder the full and effective realization of human rights. The increase of terrorism related threats have led to increasingly aggressive measures by State agents to reduce the vulnerability of the country to terrorist attacks. Specific rights that have been threatened with infringement include: freedom of expression, movement, press freedom and freedom of association. In December 2015, Parliament passed a number of amendments to security-related laws that were meant to enhance counter-terrorism measures. However, some of the amendments passed by Parliament were subsequently challenged in court and declared unconstitutional.[187]

13-55 There were media reports and the Kenya National Commission on Human Rights reported extra-judicial killings of perceived radical Muslim clerics by State agents that were linked to counter-terrorism.[188] The government, however, denied the allegations, but no serious inquiry or investigations were conducted into the allegations. [189] Administrative measures to pre-empt terrorist attacks have also been severely criticized as being anti-human rights. These include shutting down of financial institutions[190] suspected of supporting terrorism, carrying out raids in premises and rounding up some citizens.

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[186] In advisory opinion No.2 of 2012, sought by the Attorney General, the supreme court advised that this constitutional requirement should be achieved progressively and various legislative efforts have not borne fruit to date.

[187] *Coalition for Reforms and Democracy (CORD) & 2 Others vs Republic of Kenya and Anor, High Court Constitutional Petition No. 628 of 2014.*The High court struck out some provisions of the Act. The government has appealed the ruling and sought stay in the Court of Appeal. The Court of Appeal declined the stay application. The appeal is pending.

[188] The issue of extrajudicial killings in Kenya came to light in December 2011 when a journalist from Al Jazeera network managed to interview a group of Anti-Terrorism Police Unit (ATPU) officers who confessed that they had been involved in the extra-judicial killings of over 500 people. Aljazeera report: http://www.aljazeera.com/video/africa/2014/12/kenya-police-admit-extrajudicial-killings-20141289413071973l.html, visited on 18/02/2016.

[189] There are allegations that the Kenyan police have murdered 21 Muslim clerics since 2012, see Human Rights Watch: http://www.hrw.org/news/2014/08/18/kenya-killings-disappearances-anti-terror-police (visited on 18/02/2016); see also See KNHCR's report titled the *'Error of Fighting Terror With Terror'*, Sept, 2015.

[190] The Inspector General of Police, Joseph K. Boinettvide Gazette Notice Vol. CXVII-NO. 36 of 7th April 2015 published a list of 85 entities suspected to be associated with Al-Shabaab, among them financial Institutions.

13-56 Poverty continues to deny many citizens their basic rights to dignity, privacy, food, clean water, health and education, among other rights. Inequalities among regions and gender compound the problem, with some sections of the community or gender suffering poverty disproportionately. A study by the Society for International Development (SID) paints a grim picture of inequality in Kenya. The study shows that Kenya's top 10 percent households control 42 percent of the total income while the bottom 10 percent control less than 1 percent of the income. The difference in life expectancy between two regions of the State (formerly Central and Nyanza provinces) is a glaring 16 years.[191] At times, the executive has appeared to disregard the rights of citizens and proceeded to breach constitutional rights, particularly in eviction cases, and this further affects the livelihoods of people negatively.

13-57 Furthermore, while social, economic and cultural rights are now constitutionalized, there is evidence that human rights violations still occur. The poor are still denied emergency medical attention[192] and detained in hospitals when unable to pay their bills. Despite free primary education, a sizeable number of children from poor families are still unable to access the benefits due to other charges that inhibit their access to education. Unemployment remains a major challenge despite the right to work provisions in the Constitution.[193]

13-58 Harmful cultural practices have also hindered the fulfilment of human rights. These include early marriages, disinheritance of women, and female genital mutilation justified on the basis of retrogressive cultural practices. While culture should be respected and promoted, it should not negate human rights. Human rights are also resisted when they threaten vested political interests, personal interest, sectoral interests but sometimes human rights abuses are the result of ignorance of the rights. The resistance often takes the form of unnecessary delays in the enactment of laws, development of policies, reform of institutions, or deliberate enactment of defective laws that seek to weaken the impact of the Constitution.[194]

13-59 Penal institutions are also overcrowded and lack basic amenities to ensure human rights of prisoners. Kenya has a total of 103 prisons and two borstal institutions. On average, the prisons hold between 50,000 and 55,000 prisoners against a recommended capacity of 16,000, leading to extreme overcrowding and inhuman living conditions for prisoners.

13-60 These challenges have substantially dampened the optimism of human rights stakeholders about the opportunity to use the Constitution to achieve the national goal of a human rights-respecting nation. There is need for the country to recommit itself to human rights by both word and action. The stakeholders also need to refocus on how to address these core challenges.

13-61 State funded civic education has been woefully inadequate and non-state actors lack the resources for an effective national civic education campaign.[195]

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[191] According to the Society for International Development (SID), 'Pulling apart: Facts and figures on inequality in Kenya', popular version (2004), available at http://www.sidint.net/docs/pullingapart-mini.pdf (accessed on 18 February 2016).

[192] The recent (October,2015) case of Alex Madaga who died in an ambulance after waiting for emergency treatment for 18 hours is a good example (*Daily Nation*, October9,2015).

[193] Unemployment disproportionately affects the youth.

[194] See Sihanya B, Constitutional Implementation in Kenya 2010-2015: Challenges and Prospects, FES Kenya Occasional Paper no.5

[195] See Commission on Implementation of the Constitution, 2013-2014 annual report p.51

Recommendations

13-62 The State should ratify all the optional protocols to the human rights instruments it is party to. Non-ratification of protocols has denied Kenyans the benefits of Article 2(6) of the Constitution of Kenya, which recognizes all treaties ratified by Kenya as part of the laws of Kenya.

13-63 Development of the enabling human rights policies, laws, regulations and institutions should be enhanced and fast-tracked. The Freedom of Information Act and other enabling legislation for human rights should be enacted urgently.

13-64 Enforcement of human rights should be strengthened through faithful implementation of pro-human rights policies, laws and programmes. Impunity for human rights violations should not be tolerated at any level.

13-65 Human rights institutions (HRIs) should be strengthened to ensure effective monitoring of human rights compliance, development of standards, punishment for violations and effective reporting. These institutions include KNCHR, NGEC, CAJ, IPOA, and EACC. Strengthening would take the form of adequate state funding, creation of consultation and collaboration mechanisms with the Executive and Legislature, public recommitment to human rights by the Executive, greater protection of human rights defenders and whistle-blowers, and State appreciation and recognition of the work of these bodies.

13-66 There should be greater focus and funding of pro-poor programmes, especially those that have the effect of reducing the cost of living, enhancing access to affordable education and health services, creating employment for the youth.

13-67 Reforms in the police service, DPP, EACC and prisons should be fast-tracked to ensure effective investigation of crimes particularly those affecting the poor and marginalized groups, such as domestic and sexual violence.

13-68 Reforms in the Judiciary should be supported to strengthen the Judiciary as the custodian of human rights and the Constitution. This includes respect and full compliance with court orders and adequate funding of the Judiciary.

13-69 Finally, there is need to enhance public participation in governance through State-supported civil education, freedom of the media and access to information.

CHAPTER FOURTEEN

NATIONAL SECURITY

Introduction

14-1 The various phases of the review of the Constitution identified reform of the security sector as an important issue. The history of the sector informed people's views on the need to reform various practices. Notably, Kenya's security sector has origins in the colonial situation. The administration of the security sector was defined in terms of consolidating the economic and political interests of the colonial administration, as well as the white settler areas, and keeping order in the African native reserves.

14-2 The colonial government established two separate internal security forces to pursue this narrow focus. The Kenya Police Force (initially with military roots) secured the colonial urban areas and installations. The Tribal Police kept peace, law and order in African native reserves. This ensured continued extraction of labour by force from the native reserves. The administration maintained the military structure to supplement the efforts of the police.

14-3 The post-independence government maintained this structure intact: the regular police secured urban areas, while the administrative police maintained law and order in the rural areas. There were concerns also that security officers abused rights of individuals without sanctions. Corruption in the police service and abuse of human rights by police officers continued or increased in tandem with increasing cases of insecurity. There were concerns too that influential politicians used police officers to serve their interests. In addition, people complained about lack of accountability in the security sector, including lack of knowledge on the operations of the army. These concerns fed into the demands for reforming the security sector during the constitutional review process. On the basis of these concerns, the CKRC recommended civilian accountability mechanisms in the management of police services.[196]

14-4 The post-2007 election violence mediation process also brought to light new challenges facing the policing authority. The National Taskforce (2008) established to study and make recommendations on Police Reforms (Ransley Commission) recognized the difficulties and complexities in the merging of Kenya's two police services, noting that there were sharply divided views for and against the merger of the two police units. The Taskforce subsequently advised against the immediate merger of the two police forces.[197] The Taskforce opted for retaining the two forces but also recommended the formation of a Police Commission to provide overall coordination for the entire police service. The Constitution of Kenya 2010 adopted this position by retaining the two services, and establishing the National Police Service Commission (NPSC).

14-5 The demand to have an accountable security sector informed the drafting of the provisions on security sector in the Constitution of Kenya 2010. In light of this, the Constitution requires the exercise of powers by institutions in the security sector to be in line with the letter and spirit of the Constitution.

14-6 This section examines the experience in implementing the security sector reforms under the Constitution. The discussion seeks to identify the progress and challenges that require attention.

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[196] CKRC Main Report, p. 250.
[197] Ransley Report, p. 228.

Security Sector under the Constitution of Kenya 2010

14-7 The Constitution provides that security agencies exercise their powers and functions in line with the Constitution. Accordingly, national security is subject to the authority of the Constitution and Parliament. This is a fundamental shift from the past when national security was at the behest of the ruling political elite. The Constitution requires the government to set national security objectives and policies and implement them in accordance with the broader constitutional objectives and purposes.

14-8 The Constitution further provides that national security shall be pursued in compliance with the law, democracy, human rights and fundamental freedoms. It requires the composition of the national security agencies to reflect the diversity of the Kenyan people, and that this be reflected in the execution of national security duties. In this regard, it provides that national security organs are subordinate to civilian authority.

14-9 At the apex of the institutional structure is the National Security Council chaired by the President and charged with the mandate of overall supervision of security agencies, and coordination of international and domestic security matters. The Council consists of representatives of the major security agencies and senior government officials from public sectors that are relevant to national security. The Council has a further duty of assessing the security situation in the country, recommending appropriate measures, and reporting to Parliament on measures to ensure state of security. The Council also approves the deployment of national forces outside Kenya and foreign forces inside Kenya.

14-10 The Constitution provides for three national security organs that operate under the National Security Council: the Kenya Defence Forces, the National Intelligence Service, and the National Police Service. These organs are required to operate in accordance with the principles and objectives of national security that are provided for in the Constitution.

14-11 The Kenya Defence Force consists of three service institutions: the Kenya Army, the Kenya Airforce, and the Kenya Navy. The Constitution establishes a Defence Council composed of persons from the three services and other representatives, including the Cabinet Secretary in charge of defence, who offer leadership to the Defence Force. The Defence Council is responsible for coordination and performance of functions prescribed by national legislation to the Defence Forces. The National Intelligence Service is established as one of the national security organs, and its primary purpose is to gather intelligence that is useful for the enhancement of national security in accordance with the Constitution.

14-12 The Constitution makes a number of changes to the Police Service. First, it separates the administrative and operational structures and systems of the Police Force. The Constitution establishes the office of the Inspector General of Police with the mandate to "exercise independent command over the National Police Service". There is also the National Police Service Commission (NPSC) with the responsibility to oversee recruitment of office holders in the service, to confirm appointments, to determine promotions and transfers, as well as exercise disciplinary control over members of the police force.

14-13 The Constitution provides that the National Police Service Commission should recruit, promote and transfer officers in the Service. The Commission is composed of a senior lawyer, two ex-police officers, three members of the public, the Inspector General, and the two Deputy Inspector Generals of Police.

14-15 The formation of the National Police Service Commission means that some of the functions that were initially performed solely by the former Commissioner of Police, through delegation by the Police Service Commission, have been vested in the

Commission. The Inspector General of Police is, on the other hand, appointed by the President with the approval of Parliament and has command and operational powers over the entire police service. The Inspector General works under the policy direction of the Cabinet Secretary responsible for police services.

14-16 While the Constitution provides for one police service under the command of the Inspector General of Police, the Constitution maintains the pre-2010 dual structure of the police consisting of the Kenya Police Service and the Administration Police Service. A Deputy Inspector General of police heads each of these two sections of the police service. Both are under the command of the Inspector General of Police, as the overall commander of the police service. This position of Inspector General unifies the police service and provides a centralised command position.

14-17 While the Inspector General of Police is under the policy direction of the responsible Cabinet Secretary, the Inspector General operates independently in the performance of his or her functions relating to investigations, and enforcement of the law. There are shared roles between the Inspector General and the National Police Service Commission related to the employment, assignment, promotion or suspension of a member of the National Police Service.

14-18 The Constitution lists grounds under which the Inspector General may be removed from office. The President may remove the Inspector General from office on grounds of serious violation of the Constitution, gross misconduct, incompetence, incapacity, or any other justifiable cause.

Effectiveness of the Security Sector Reforms

14-19 Problems relating to inadequate coordination and clarification of roles between institutions in the security sector have led to ineffectiveness of the security agencies. These problems are at two levels. First is poor coordination between the National Police Service and the Administration Police. The Constitution provides for a single police service, but retains two forces with distinct mandates: the Administration Police Service; and the Kenya Police Service. They share the mandate to provide assistance to the public, maintain law and order, and to protect life and property.

14-20 Notwithstanding the fact that the law is clear on the mandates of the two forces, there are those who are of the view that the two are poorly coordinated in provision of security services. There is the view that the Constitution should have merged the two rather than provide for two distinct forces under one command. Other people point out that there are administrative challenges of maintaining and operating the two forces.

14-21 The conflicts and competition play out more openly at the county level. The law provides for a County Commander in charge of the two units. The commander can be appointed from either force. To ensure internal coherence, the deputy is appointed from a force separate from that of the Commander. Some of the stakeholders pointed out that the two forces end up having split loyalty; some officers tend to be loyal to the commander appointed from their unit.

14-22 The two forces do not effectively coordinate at the county level, especially when providing the shared mandate. Indeed, consultations with many stakeholders reveal the challenges of coordination, with some pointing out that the County Commissioners, who coordinate security affairs at the county level, cannot hold any of these units to account. They resort to the argument that they are under a new constitutional order. This prevents effective coordination and discharge of police services at the county level.

14-23 It is notable that the two police units have different training and orientation that complement (rather than compete) each other. This also feeds into the challenge of harmonising the administration of the two forces; the Kenya Police Service often feels they have better experience than the Administration Police Service. In a consultation

meeting with county commissioners, there were examples given to the Working Group of how the Administration Police Service operates in areas where a Police Station is yet to be established. The consultations noted that the Administration Police provide a stop-gap measure in the provision of security/police services.

14-25 Second is the problem of coordination between the NPSC and the Inspector General of Police. At the outset, poor coordination between the two offices constrained effective operations of the police service. Although the law and regulations have addressed the ambiguity in the role and relations between the NPSC and the Inspector General of Police, operations by both offices continue to engender conflicts. The conflicts reflect lack of clarity on roles, mandate, and responsibilities of the National Police Service Commission and the Inspector General of Police. The NPSC is allocated certain administrative responsibilities for the Police Service while the Inspector General of Police has independent operational command over the two police units.

14-26 In the public discussions on the roles of the two offices, there are those who view the NPSC as weakening the effective control and command of Inspector General of Police. During consultations, some stakeholders held the view that some of the functions vested in the NPSC, such as promotions, transfers and disciplinary processes are essential tools for command. These are what the Inspector General of Police uses to maintain control, order and cohesion of the police service. It was argued that some of the challenges related to coordination were as a result of the weakening of the office of the Inspector General of Police.

14-27 There were other stakeholders who saw the NPSC as playing a critical role in policing in the country. The NPSC provides an avenue to ensure accountability in the use of police services and civilian control of the police force, in line with the expectations of Kenyans. The NPSC, together with other institutions such as the Independent Police Oversight Authority (IPOA) provide an accountability link in the police, the lack of which led to abuse of police powers and injustices meted on citizens by the police.

14-28 A major challenge regarding policing is continued failure of the security sector organs to account to the public. Thus far, IPOA has on its part strengthened oversight on police service by demanding that the police account for their actions. The Authority from the outset demanded that the policy put in place measures to promote a democratic policing culture by promoting accountability of the police to the public while providing policing services.

14-29 Some of the challenges that prevent successful transformation of the police into a democratic police service is the attitude of the police and declining confidence of the public in the police service itself. The police are yet to change their attitude and behaviour to align with the principles of democratic policing. They are not conversant with principles of accountability to the public and are generally not keen to ingrain this as a culture. On the other hand, there are fewer members of the public who report crime, for instance, to the police because they think their report will not be acted upon for various reasons. Others feel the police are corrupt and, therefore, will not act on their report if they do not pay a bribe. This notwithstanding, IPOA is beginning to challenge this culture of poor accountability within the police force.

14-30 Other security organs are yet to open up and operate in a transparent and accountable manner. There are no oversight institutions playing a similar role as IPOA on the operations of the Kenya Defence Forces, and the National Intelligence Service (NIS). Absence of an independent mechanism to hold them to account is certainly the result of the sensitive role they play in national security. Balancing between this role and promoting a democratic culture by which they can operate is certainly not an easy task. However, these are issues that a robust national security sector policy should address. Unfortunately, the policy is yet to be finalised for implementation.

14-31 An additional challenge is lack of coordination between the security sector organs and the national security institution. The Constitution envisages smooth and effective coordination of services between the multiple security sector agencies and institutions in the country, but this is lacking. Poor coordination constrains multi-agency security response to incidences that require rapid response. Some of the stakeholders mentioned, in particular, the unfortunate incidences of the terrorist attack on the Westgate Shopping Centre in September 2013. The multi-agency response, comprising the police services and the military, appeared to suffer from poor coordination. The military officers accidentally shot members of the police service.

14-32 The lack of a clear role for county governments in national security often caused conflicts when the county governments were setting up. While the Constitution vests police and general security services in the national government, the principle of consultation and cooperation calls for a coordinated approach to management of security between the two levels of government. Potential areas of cooperation include provision of resources for the police; enforcement of aspects of county laws that require police services; oversight and accountability of the police; among other areas of joint cooperation.

14-33 The Independent Police Oversight Authority Act provides for county policing oversight authorities that are overseen by county governments, and this creates one avenue for links between the two levels on security issues. In line with the need for coordination, the National Police Service Act establishes the County Policing Authorities as part of the devolved structures chaired by the county governors. They monitor crimes, set targets for performance of the police, and make recommendations to the county security committees.

Other Internal Security Challenges

14-34 There are various internal challenges in the security service that hamper the effective provision of security services. The above discussion has already identified the failure of security organs to be accountable and to operate in line with democratic principles. The security sector organs tend to operate with limited transparency and often cite the national security sensibilities as a need for not operating with transparency and accountability principles.

14-35 With regard to the police service, the challenges include inadequate facilities and equipment for use by the police, housing requirements, insurance, and other essential conditions necessary for effective discharge of police services. The Ransley Taskforce recommended comprehensive insurance covers for police officers, as well as progressive measures to ensure that housing and other welfare conditions of members of the police service are adequately catered for.

14-36 Furthermore, the training facilities for the police are seriously under-resourced, compared to the military that has many specialized training facilities. The Ransley Taskforce noted the gap in resourcing of police training and services, and recommended that resources be prioritized as opposed to more and more recruitments into the police force.[198]

14-37 The challenges in the national security sector are impacting on how people feel about their own safety. The national survey shows that over a half of the respondents (52%) either feared for their own personal security or the security of their families. The insecurity in the country has led to public concerns about the effectiveness of security institutions and the call for necessary reforms to curb both the internal and external threats to security in the country.

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[198] Ransley Report, p. 107-108.

Table 14.1: How often do you fear for your own personal safety or security or for that of your family?

	Urban (%)	Rural (%)	Overall (%)
All the time	26.0	19.0	22.0
Sometimes	36.0	27.0	30.0
Rarely	22.0	27.0	25.0
Never	15.0	26.0	22.0
Refused to answer	0.1	0.2	0.1
Don't know	0.3	0.5	0.4
Total	100.0	100.0	100.0

14-38 The national government has begun addressing these challenges in several ways. The government has acknowledged that the sector faces numerous challenges owing to poor allocation of resources. On account of this, the government has increased budgetary allocations to the security sector organs to meet development needs and address other human resource challenges in the sector. Notable in this regard is increased budgetary allocations in the recent past. Further, in 2014, the government provided medical insurance to police officers. In 2015, the government also made budgetary provisions for police housing and leasing of vehicles. In the 2015/16 budget, the government provided more funds to purchase of armoured cars, helicopters, and motorbikes. The government also provided funds for research. These provisions have been made with a view to improving the capacity of the police service and other security organs to address the problem of security in the country.

Conclusion and Recommendations

Development of a Policy on National Security

14-39 There are many challenges facing the security sector in Kenya today. Some of the problems are rooted in the disconnect between the law and what is in practice. Some of these challenges can be addressed through an elaborate security sector policy. The constitutional and legal ambiguities in the roles and mandate can be cleared through a policy framework that is developed with the participation of the various institutions and agencies.

14-40 The Constitution and the different policing sector laws have identified the roles and responsibilities of various actors. However, there are still challenges of coordination. Some of these have also been addressed through administrative interventions while others have been addressed through regulations. All the same, there is need for an overarching policy to sketch out details on how to prevent conflicts over mandate. Specifically, the National Security Policy will set the patterns of commitments to a plan of action outlined by the State, including the organizational infrastructure and actors critical to delivery of effective security to the citizens.

14-41 Among the specific issues that the National Security Policy will address include:

- Provide an overall policy, administrative, and institutional framework, which will provide a basis for other frameworks in specific areas, such as external security, internal security, etc.
- Provide guidance on sector re-alignment with the devolved government and governance and ensure that the security functions of the National Government accord

with the broader sector arrangements, as well as ensure that they are in line with principles for democratic policing.

- Provide direction with regard to the policy of decentralization of security structures, the role of County Policing Authorities, and broaden the approach to security in order to ensure that County Governments participate in the management of county security.
- Provide guidance on the restructuring of the police and the re-alignment of various elements of policing.
- Provide direction on a proper training for security officials on the comprehensive approach to security. The same should extend to security service providers that are outside the State security machinery.
- Provide a workable approach and direction towards realization of economic and social rights as per Article 43 of the Constitution in order to address underlying issues of insecurity.
- Other issues relevant to the delivery of the constitutional objectives with regard to national security.

14-42 Additionally, Parliament through legislation should resolve the conflict between the National Police Service Commission and the Inspector General of Police by defining clear distinct roles for each.

Role and Effectiveness of the National Security Council

14-43 The Constitution envisages the creation of infrastructure to support the National Security Council (NSC).The secretariat function is to be carried out by the National Security Advisory Committee (NSAC), which should have relevant resource persons to support the NSC and the NSAC. It should have the main responsibility of preparing and designing plans, monitoring and the provision of early warnings on matters of national security.

14-44 At the same time, Parliament should exert its oversight role to ensure that the security sector organs operate in line with principles of accountability and democratic order. Parliament should exercise its role to ensure that composition of the security sector organs reflects ethnic and regional diversity as required under the Constitution.

14-45 As part of its grand strategic role of aligning and coordinating instruments of power, NSC should lead the process of helping security institutions develop Standard Operating Procedures (SOPs) for joint operations, including the determination of lead agency, and best practices.

14-46 There are evolving forms of crimes and insecurity, such as cybercrimes and terrorism, that are borderless and require a different approach to security. The NSC should develop means of monitoring the local manifestations of emerging threats and appropriate responses.

Coordination of Police Services

14-47 The National Police Service Commission should develop guidelines on the performance of mandates that provide the Inspector General of Police with space to effectively control police operations; the guidelines should include matters that the Commission can delegate to the Inspector General. The guidelines should specifically include:

- A level of discretion to the Inspector General with powers to make decisions on transfers, promotions and discipline, subject to the NPSC's oversight or approval.

- The Inspector General of Police should be vested with a coordinating and lead role in the execution of decisions of the NPSC, so as to avoid conflict between the Inspector General and the NPSC.

PART V

CHAPTER FIFTEEN

CONCLUSION AND RECOMMENDATIONS

Conclusion

15-1 Kenyans adopted a new Constitution in August 2010 with a view to building a new society and breaking away from the past. The values, principles, and objectives of governance in the Constitution codify the wishes of Kenyans in the current system of government. The Constitution provides an opportunity to address the challenge of inequities in development, poor governance, and service delivery.

15-2 The various provisions, combined, address the root causes of violence and the perennial tensions that the country continuously witnessed around election time. The Constitution provides opportunities for better development and realization of aspirations of the people- a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.

15-3 It is noteworthy that the Constitution provides for how public resources will be used. The provisions on public finance management require the governments at both the national and the county level to use resources in a responsible and accountable manner. This underlines the need to use resources in a prudent manner and ensure that resources help in achieving the objective of the Constitution.

15-4 This audit has shown that public spending is on increase but this is not attributable to implementation of the Constitution. The policy choices by both the Executive and the Legislature have occasioned increased spending in certain sectors and, therefore, one cannot blame the Constitution as an expensive venture. The audit has found that wastage of resources is on the increase, judged on the basis of growing 'unsupported expenditure'.

Progress in Implementation

15-5 Various chapters in this report have evaluated and analysed the implementation process against the values and objects of the Constitution. An important finding is that the country has achieved important milestones in the last five years.

15-6 One, the Constitution is delivering better services through devolution. All the county governments have embarked on new development projects, often in line with the local needs. Some have provided services that have never been available to residents since independence in 1963. Also, citizens have access to relatively better services than in the past. The marginalised areas have resources for their own development as other parts of the country. Devolution is slowly achieving the promise of delivering equitable services in all corners of the country; it is addressing the challenges of imbalances in development in an unprecedented manner.

15-7 Two, the Constitution has dismantled the centralised powers of the Executive to a point where the Executive is checked by various institutions to prevent excesses and abuse of power. There are constitutional commissions and independent offices checking on the excesses of the Executive and also operating to prevent abuse of office by any person or

institutions. Parliament and the Judiciary are also independent and have clear powers to check on one another as well as check the Executive.

15-8 Three, there is predictability in allocation and disbursement of resources for development; allocation of resources is not subject to discretion of any person or institution. While political considerations, among other factors, determined allocation of resources and/or implementation of key development projects, the Constitution has established institutions to determine allocation of public resources. Furthermore, the unconditional grant of not less than 15 percent of national revenue given to the county governments is an insurance against possible politicisation of funding for development projects. The formula for allocation of resources drawn by the Commission for Revenue Allocation (CRA) plays an important role in preventing skewed allocation of resources.

15-9 Four, the Constitution has given real meaning to the principle of separation of powers. The Judiciary has both financial and political independence owing to the fact that it negotiates its own budget with Parliament rather than with the Executive. It has a strong internal organ for self governance. Parliament is independent too. Other governance institutions are also relatively better resourced and better in terms of independence compared to the past.

15-10 In the last three fiscal years, transfers to the county governments, in absolute terms, have grown significantly. The transfers have increased from Ksh 195.7 billion in 2013/14 to Ksh 272 billion in 2015/16. This represents a 40 percent growth. Furthermore, a number of pre-devolution laws have been amended to accord with the Constitution. The National Treasury has also been supporting the counties to implement the PFA Act, under the National Capacity Building Framework (NCBF).

Challenges of implementation

15-11 Implementation has not been smooth at all. There are tensions between various players and between the two levels of government. These challenges have prevented the full realisation of the objectives of the Constitution. They have generally constrained improvement of governance.

15-12 Devolution is itself the best development to take place in Kenya since independence in 1963. It is the main 'game changer' in Kenya today. But devolution is not realizing its full potential because of several challenges. These include limited utilization of funds, poor inter-governmental consultation and cooperation, and lack of meaningful participation by citizens in making critical decisions on county development programmes.

15-13 The inevitable conclusion from this report is that the governance culture, mind-set, attitudes and practices are yet to align with the Constitution. The envisaged 'break with the past' is yet to take place.

15-14 Yet, the Constitution was achieved at a great cost and pain of democratic struggles. The persons in key positions of public decision-making owe Kenyans the responsibility to translate the constitutional promise into actual benefits and better lives for all Kenyans. Any action or lack of action that runs contrary to the constitutional objectives is a betrayal of the efforts, sacrifices, and resources that were committed by Kenyans to give themselves a new Constitution and, therefore, a new and better life. There are many areas of implementation that have shown a real potential to negate the constitutional spirit. This report has identified them and made recommendations on how to strengthen implementation.

15-15 This audit has identified areas where there is constrained progress. It has also made recommendations for even better performance so that the citizens can see the actual benefits of this Constitution.

Public Expenditure and Lack of Accountability

15-16 The devolution and sharing of resources of resources among the 47 county governments, alongside establishment of new public offices, have led to observations that the Kenyan Constitution may be too expensive to implement. However, this audit finds no evidence to support the assertions that the implementation of the Constitution, alone, is responsible for increase in public expenditure. Although the public expenditure and spending are on the rise, and wage bill is on increase, implementation of the Constitution is not the only factor accounting for this increase. Partly responsible for this trend are the national government development projects, and the increasing size of government owing to recruitments at national and county level, and repayment of debts.

15-17 There is also a rise in unsupported expenditure and general wastage of public funds. There is an increase in "unsupported expenditure" as a percentage of total government expenditure by more than two-fold since 2010. Wastage is on increase yet the Constitution provides for principles of public finance management that require prudence, accountability, and public participation in the use of public resources..

15-18 Breach of ethics by public officers and corruption are on the rise. Reports by the Controller of Budgets, Ethics and Anti-Corruption Commission, and the Office of the Auditor General reveal declining standards of behaviour, wanton wastage of public funds, stealing, and other practices that do not accord with the letter and spirit of the Constitution.

15-19 Analysis of the public wage bill has revealed that the wage bill is on the rise but this is within sustainable limits. The increase in wage bill requires attention especially in regard to rationalisation of human resources at both the county and the national government levels. Indeed, the national government wage bill should not remain at the pre-devolution level because service delivery functions have been devolved. On the other hand, the county governments should not be compelled to shoulder the burden of a wage bill that owes much to unnecessary staffing inherited from the former local governments; they should not be compelled to retain personnel that they do not need.

15-20 There are challenges with regard to how Parliament and the County Assemblies summon members of the Executive to appear before the house committees. This constrains the calendar and time resources of the Executive. This also happens at the County level.

15-21 Budget making in an election year is also problematic. The Constitution provides for elections to be held in August of the election year, yet the budget should be finalised and presented during the month of June. This is the period of intense political campaigns. There is a risk of MPs lacking sufficient time to review and pass the budgets. There is a risk that there will be delays in passing budgets during an election year.

Policy Context and Institutional Governance

15-22 The provisions in the Constitution on governance and political processes require a new constitutional culture that is based on consultation and cooperation, democratic

governance, and accountability, among other values listed under Article 10 of the Constitution. This calls for a change of the governance and political culture in the country. The ambiguities in the Constitution and law require a careful review and development of policy measures before implementation.

15-23 This audit has noted a tendency of developing laws before formulating policies. However, the international best practise demonstrates that laws are developed to nurture and promote policies; policies come before the law is developed. The report has also identified the lack of clear, comprehensive and coherent policies as one of the greatest threats to the implementation of the Constitution.

15-24 It is noted here that a comprehensive policy that identifies all factors to be considered precede any laws, decisions or measures taken to implement the Constitution. The absence of such policies is leading to conflict, ineffectiveness, and plain confusion among many players. Some of the laws are passed without adequate consultations. In this regard, the institutions to facilitate consultation and cooperation between the two levels of government are not effectively used. Instances of inadequate consultation and cooperation include the restructuring of the provincial administration, and development of laws affecting counties at the national level.

15-25 The implementation of the Constitution has also witnessed instances of resistance to change: various sections of this report have cited a number of actions that subvert, rather than promote, the constitutional objectives. For instance, Parliament passed the Political Parties Act that seeks to re-introduce party hopping; Parliament also passed the CDF Act to provide development services alongside the devolved functions. The national Executive too has often ignored advice from institutions such as the former Commission for the Implementation of the Constitution (CIC) and assented to these laws.

Safeguarding the Sovereign Will of the People

15-26 The report has demonstrated the many instances of inadequate participation of the people. The survey conducted by the Working Group, whose findings are referred to at length in this report, reveal that a very small part of Kenyans feel involved in governance and in decision making at the two levels of government. This is an indictment of institutions required to ensure public consultation.

15-27 Importantly, the audit reveals that State officers and institutions are not strictly abiding by the various provisions of the Constitution. Both the county governments and the National Government have not pursued policies to promote national cohesion and unity; they have not been effective in ensuring that recruitment to public offices reflects regional and ethnic diversity of the country and the county, with regard to the county governments.

Summary of Recommendations

15-28 Many recommendations have been made at the end of each chapter of this report. This section, therefore, recapitulates on the main ones. Presented here is a summary of the key issues and the message that this report is passing with a view to improving implementation of the Constitution. The aim here is to ensure that there is effective implementation so that Kenyans can realize the full benefits of the Constitution.

Devolved Government

15-29 The preceding parts of this report have demonstrated how devolved government and governance have enhanced access to essential services. The audit has shown the initial

successes of the devolved system of government. However, the audit has identified a number of challenges and has made certain recommendations to enhance devolution. This section highlights some of the main recommendations.

Legislative

- There is a missing link between the Senate (representing and safeguarding county interests at the national level) and county governments. A law should be enacted to establish a formal link between the Senate and the county governments. This may take the form of quarterly meetings to review county issues and assess the representation role of the Senator at the national level.

- The success of devolution has occasioned demands for increased resources to the county governments in order to enable them provide more services. However, not all county governments are able to raise sufficient revenue to add to their budgets. It is recommended that costing analysis be undertaken for functions exclusive to the county governments, the national government, concurrent functions, and residual functions.

- It is further recommended that the costing analysis guide the decision on the amount of funds to be allocated to the county governments and the national government.

Policy

- Implementation of devolution has been going on without a comprehensive policy. This has resulted in conflicts and ineffectiveness in implementation. It is recommended that the policy on devolution be finalised to guide implementation. It is recommended that the government ministries, departments, parastatals and other agencies dealing with devolved functions and functions relevant to devolution should anchor their policies on the new devolution policy once it is launched.

- As a standard practice, both levels of government should ensure that comprehensive policies (that defines the issues that the law is to address) precede the making of all laws to be enacted. Furthermore, all public institutions at the national and county level should align their activities and processes with the policies made by both the national and the county governments.

Administrative/ institutional

- Not all county governments are devoting at least 30 percent of resources to development; the national government is also failing to devote 30 percent of the expenditure to development in some of the sectors. It is recommended that the National Government and county governments should adhere to the statutory requirement of ensuring that at least 30 percent of resources are dedicated to development expenditure as opposed to recurrent expenditure. The Controller of Budget should be more stringent in the enforcement of this requirement.

- The IGRTC should put in place measures to ensure that all resolutions by the Summit and other intergovernmental relations are implemented.

Impact of the Constitution on Delivery of Social Services

15-30 The division of roles in service provision between the national and county governments has led to improvement in service delivery. Areas that were poorly covered and marginalised have seen an improvement in provision of vital services in sectors such as education, health, and infrastructure. However, there is still a number of challenges in service delivery that have been highlighted in the chapter.

15-31 While there is a general increase in facilities and coverage of essential services, there is need to ensure that human resources are distributed equitably. Personnel offering specialised services and who are concentrated in Nairobi should be deployed to the counties where they can service one or more counties.

Impact of the Constitution on the economy

15-32 Implementation of the Constitution has corresponded with an increase in public expenditure/spending and an increase in unaccountability of public funds. Growth of wage bill is also on the rise, but the data on these varies from one source to another, yet this is the data used for planning and budgeting purposes.

- The Kenya National Bureau of Statistics and other relevant agencies should keep and regularly update coherent datasets on the economy at both the county and national government level.
- The Salaries and Remuneration Commission (SRC) should develop a clear policy to manage the public sector wage bill.
- SRC should take measures to reduce and tightly cap allowances paid to public officers, including State officers. It should take measures to reduce and tightly cap the allowances and other emoluments paid to Members of Parliament and Members of County Assembly.
- Attempts to rationalise salaries within the public sector should be completed and should address disparities within sectors, departments and agencies as well as inequalities between pay by different agencies.
- The county governments should retrench the staff that they do not require for certain services. The National Government should help them to shed off unnecessary staff.
- There is a need to have a legislation giving direction on budget making during an election year; the law should provide for a shorter time periodfor the national and county treasuries to prepare and present budgets. The amendment should provide for budget to be finalised and presented preferably during the month of March in an election year.
- A law should be introduced to allow the government (county and national) to support essential expenditure based on previous approved budgets whenever there is a delay in the passing of budgets. The list of such expenditure should be prepared and presented in the annual budget with a provision to support them at the level of previous approved budget awaiting the legislature to pass the budget. The list should include mandatory items that have been paid over the years.
- The list should also include items, which have potential to paralyse services if the budget is not approved in time. In this regard, the amendment should provide for County Governments to negotiate financial facility arrangements with public banks to allow them address short term liquidity problems when there is a delay in approval of budgets.

15-33 The Constitution has evolved several levels of representation of the people. A comparative analysis with comparators (in terms of population size, economy, geographical size and level of development) reveals that Kenyans are over-represented. The introduction of bicameralism (through establishing the National Assembly and the Senate) has also led to complications and conflicts in the general legislative process and on matters regarding oversight.

15-34 The electoral system of 'First Past the Post' has also prevented implementation of the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

15-35 To address these challenges, it is recommended that Kenya reduces the number of MPs and the MCAs without compromising national values on diversity, protection of vulnerable groups, and the marginalised, and the equality principle regarding gender. It is specifically recommended that:

- Kenya should adopt Mixed Member Proportional Representation (MMPR) electoral system to ensure better representation of all Kenyans, ethnic groups and regions, and special interests including women, persons with disabilities, youth, marginalised communities, and other groups,

- Kenya should reduce the number of representatives at the national and county level. The MMPR system will make it easier to reduce the numbers and manage the diversity. This will also make it possible to implement the gender principle as per the Constitution.

Administrative/ Institutional

15-36 The practice of the presidential system of government is yet to be institutionalised. Parliament should undertake regular trainings and other capacity building initiatives to help Members of Parliament effectively practise under the presidential system of government

Electoral Management

15-37 The chapter on electoral system and management has highlighted a number of areas that require attention. These include the need for efficient management of elections. In this regard, it is recommended that there be established a lean, efficient, transparent, and accountable body to manage elections in the country.

Judiciary

15-38 The Judiciary has undergone positive transformation under the current constitutional dispensation. However, it has also faced credibility challenges following allegations of corruption in the courts. The main recommendations are:

- The JSC should develop a transparent criteria for undertaking lifestyle audit of Judicial officers and staff, and undertake the audit preferably after every three years.

- The membership of the National Council for Administrative Justice (NCAJ) should be expanded to include representatives of Parliament.

- The membership of the Judicial Service Commission (JSC) should also be reconstituted to increase representation of administrative and other non-judicial staff working in the Judiciary.

- It is recommended that the law be enacted to resource the Judiciary at an agreed percent share of the national revenue per annum, in order to ensure that the Judiciary has predictable and adequate resources to carry out its functions.

- The Judiciary Fund provided for in the Constitution should also be operationalized.

- Membership of the Supreme Court should be opened to other disciplines other than law to allow for broader scope of making progressive jurisprudence.

National Executive

15-39 Important gains have been made at the national level in terms of implementation of the Constitution. The national Executive carries the burden of ensuring that institutional and governance processes at the national level are aligned to the Constitution. While there is good progress in some areas, there are still some challenges that need to be addressed. It is recommended that:

- A consultative process be initiated to further discuss the restructuring of the provincial administration. The restructuring process should be guided by the IGRTC and ensure that both levels of government are involved.

- Duplication of efforts and resources by both the county governments and the national government should be eliminated through improved coordination of national and county government services, especially at the county level. The IGRTC should develop guidelines to facilitate enhanced consultations and cooperation between the two levels of government in all sectors.

- The IGRTC should lead the process of clarifying concurrent functions between the two levels of government

National Values and Principles of Governance

15-40 The audit shows that there is limited adherence with the national values and principles of governance, as well as principles on integrity and leadership. The National Government and county governments have not been effective in enhancing regional and ethnic diversity in recruitments to public offices. This has had the effect of limiting the extent to which national cohesion and unity can be achieved.

15-41 The composition of the national government is skewed in favour of two communities, while the composition of the public service across some of the 47 counties shows dominance of the majority ethnic communities in counties. It is recommended that:

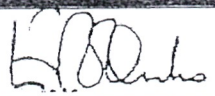
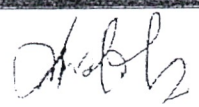
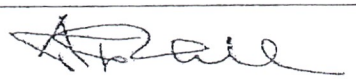
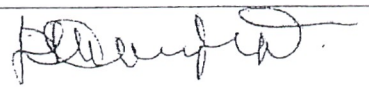
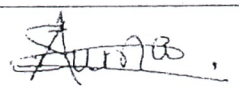
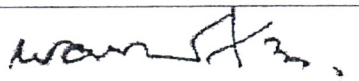
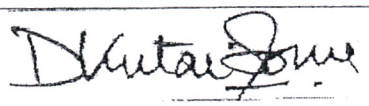
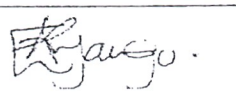
- Recruitment of civil servants caters for ethnic and regional balance as per the aspirations of the people of Kenya.

- At the county level, the counties should develop a recruitment policy to guide on the principles of ethnic and social inclusion to enable the county public service to reflect regional and ethnic diversity as per the requirement of the Constitution.

ANNEXES

Annex 1: SUBMISSION NOTE BY MEMBERS OF THE WORKING GROUP

This report is submitted by approval of the Members of the Working Group as follows:

Members	Signature
Chairman	
Edward Ouko, CBS	
Members	
Hon. Lady Justice Linnet Ndolo	
Dr. Abdirizak Nunow	
Prof. Karuti Kanyinga	
Susan Mang'eni	
Mwarapayo Wa-Mwachai, CBS	
Eng. Prof. David Kimutai Some	
Dr. Elizabeth Owiti	

Annex 2: GAZETTE NOTICE NO. 5618



THE KENYA GAZETTE

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15 August,2014

GAZETTE NOTICE NO. 5618

MEMBERS OF THE WORKING GROUP ON THE SOCIAL

ECONOMIC AUDIT OF THE CONSTITUTION

IT IS notified for the general information of the public that pursuant to the Resolution made by the National Assembly and dated the 26th February, 2014, establishing the Working Group on the Social Economic Audit of the Constitution, the following have been appointed as members:

Edward Ouko, Auditor-General—*(Chairperson);*

Members:

Lady Justice Linnet Ndolo

AbdirizakNunow (Dr.)

Susan Mang'eni

Mwarapayo A. Wa-Mwachai

Elizabeth Owiti (Dr.)

Erastus Wamugo

Julius Kipng'etich (Dr.)

Joint Secretaries:

Philip Kinisu—(*Head of Secretariat)*

Milcah Ondiek

Wanjiku Wakogi

The mandate of the Working Group is to—

(a) assess the impact of the implementation of the Constitution to the Nation's economy and in particular its public finances;

(b) make a rapid assessment of the impact of the implementation of the Constitution on public institutions;

(c) evaluate the social impact resulting from the implementation of the Constitution;

(d) make recommendations to the National Assembly on potential measures that could better enhance prudent management of the country's public resources; and

(e) investigate, determine and advise on any relevant matter consequential or incidental to the foregoing.

Reporting:

(a) The Working Group shall work under the Office of the Auditor-General and report to the National Assembly; and

(b) Shall regularly consult, where it deems necessary, the National Assembly through the Budget and Appropriations Committee.

Mode of Operation:

In performance of its mandate, the Working Group shall regulate its own procedure.

Duration:

The duration of the Working Group shall be a period of seven (7) months with effect from publication date of this notice.

Secretariat:

The Secretariat of the Working Group shall be at the Office of the Auditor-General, Anniversary Towers, University way, P.O. Box 30084-00100 Nairobi.

Costs:

The costs incurred by the Working Group, including but not restricted to facilitation and payment of allowance in respect of members and secretaries of the Working Group, shall be defrayed from Voted funds of the Parliamentary Service.

Dated the 11th August, 2014.

EDWARD R.O. OUKO,

Auditor-General

Annex 3: LIST OF EXPERTS AND PEER REVIEWERS

1. Prof. P.L.O. Lumumba
2. Kithinji Kiragu
3. Dr. Katumanga Musambayi
4. Dr. Mutakha Kangu
5. Major General Muhammed Hussein Ali (Rtd)
6. Dr. Mbui Wagacha
7. Dr. Adams Oloo
8. Dr. David Ndii
9. Dr. Conrad Bosire
10. John Mutua
11. Dr. Samuel Siringi
12. Dr. Othieno Nyanjom
13. Prof. Winnie Mitullah
14. Duncan Okello
15. Albert Mwenda
16. Kwame Owino
17. Waikwa Wanyoike
18. Dr. Mutuma Ruteere

Annex 4: STAKEHOLDER ENGAGEMENTS

List of Individual Stakeholders Consulted

1.	Hon. Raila Odinga	CORD Coalition Leader
2.	Hon. Kalonzo Musyoka	CORD Coalition Deputy Leader
3.	Hon. James Orengo	Senator, Siaya County
4.	Ms Atsango Chesoni	Executive Director Kenya Human Rights Commission
5.	Prof. Yash Pal Ghai	Director Katiba Institute
6.	Prof. P.L.O. Lumumba	Director, Kenya School of Law
7.	Hon. Abdikadir Mohammed	Advisor, Constitutional and Legal Affairs to the President
8.	Hon. Prof. Githu Muigai	Attorney General
9.	Hon. Mutava Musyimi	Chair, Budget and Appropriations Committee
10.	Hon. Aden Barre Duale	Majority Leader, National Assembly
11.	Hon. Francis Nyenze	Minority Leader, National Assembly
12.	Hon. Dr. Willy Mutunga	Chief Justice and Head of Judiciary
13.	Ms Anne Waiguru	Cabinet Secretary for Devolution and Planning
14.	MR Justin Bundi	Clerk of the National Assembly
15.	Hon. Isaac Ruto	Chairman Council of Governors
16.	Hon. Njoroge Baiya	Chairman Constitution Implementation Oversight Committee
17.	Hon. Jakoyo Midiwo	Deputy Minority Leader, National Assembly
18.	Kinuthia wa Mwangi	Chairman, Transition Authority
19.	Hon. Ekwe Ethuro	Speaker Senate

List of Consultation Forums Held With Various Stakeholders

1. County Assembly Majority and Minority Leaders and Select CECs N/Eastern Region
2. County Assembly Majority and Minority Leaders and Select CECs South Rift Region
3. County Assembly Majority and Minority Leaders and Select CECs North Rift Region
4. County Assembly Majority and Minority Leaders and Select CECs Western Region
5. County Assembly Majority and Minority Leaders and Select CECs Eastern Region
6. County Assembly Majority and Minority Leaders and Select CECs Nairobi County
7. County Assembly Majority and Minority Leaders and Select CECs Central Region
8. County Assembly Majority and Minority Leaders and Select CECs Coast Region
9. County Assembly Majority and Minority Leaders and Select CECs Nyanza Region
10. Chairpersons of Independent Offices and Constitutional Commissions
11. Parliamentary Committee on Agriculture, Livestock and Cooperatives
12. Parliamentary Committee on Education, Research and Technology
13. National Gender and Equality Commission
14. Association of Physically Disabled of Kenya
15. Commission on Administrative Justice
16. Central Organization of Trade Unions
17. Parliamentary Committee on Health
18. County Assemblies Speakers Forum
19. Commission on Revenue Allocation
20. Anglican Church of Kenya Bishops
21. Federation of Kenya Employers
22. County Commissioners
23. The National Treasury

Annex 5: LIST OF DOCUMENTS REVIEWED

1 Constitution of Kenya Review Commission (CKRC) 'The final report of the Constitution of Kenya Review Commission' (2005)

2 CKRC/ National Constitutional Conference (NCC) 'Verbatim report of plenary proceedings, presentation of the draft Bill, - Chapter Ten, 'Devolution of powers' held at the Bomas of Kenya on 22, 23 and 26 March 2003' (2003)

3 CKRC (2003a) 'Special working document for the National Constitutional Conference: Report on devolution of powers' (2003)

4 CKRC 'Report of the workshop on devolution of power and good governance' (2003)

5 Committee of Experts on Constitutional Review (CoE) 'The report of the Committee of Experts on Constitutional Review issued on the submission of the Revised Harmonized Draft Constitution to the Parliamentary Select Committee on Constitutional Review on 8 January 2010 (2010)

6 CoE 'Final report of the Committee of Experts on Constitutional Review' (2010)

7 Kenya National Dialogue and Reconciliation (KNDR) 'Longer Term Issues and Solutions-Constitutional Review' (4 March 2008)

8 NCIC 'Towards cohesion and unity in Kenya: ethnic diversity and audit of the civil service' (abridged version) (2010)

9 National Integration and Cohesion Commission (NCIC) 'Road to Cohesion (2012)

10 The Capacity Assessment and Rationalization of the Public Service (CARPS) report (2015)

11 OECD 'Lessons Learned on Donor Support to Decentralisation and Local Governance' (DAC

12 Parliament of Kenya (National Assembly) 'Report of the Parliamentary Select Committee on the Review of the Constitution of the Reviewed Harmonized Draft Constitution' (2010)

13 Republic of Kenya 'Study on the impact of the Local Authorities Service Delivery Action Plan' (Kenya Local Government Reform Programme (KLGRP)) (2007)

14 Republic of Kenya 'Report of the Commission of Inquiry into Post-Elections Violence' (CIPEV) (2008)

15 Republic of Kenya 'Report of the Independent Review Commission on the general elections held in Kenya on 27 December 2007' (Independent Review Commission (IREC) Nairobi: Government Printers (2008)

16 Republic of Kenya 'Report of the Commission of Inquiry on Local Authorities in Kenya: A strategy for local government reform in Kenya' (1995)

17 Republic of Kenya 'African socialism and its application to planning in Kenya' Sessional Paper No 10 of 1965

18 Republic of Kenya (Office of the Deputy Prime Minister and Ministry of Local Government) 'Final report of the Taskforce on Devolved Government: Developmental devolved government for effective and sustainable counties' (2011)

19 Republic of Kenya 'Sessional paper No. 1 of 1986 on economic management and renewed growth' (1986)

20 Republic of Kenya 'Report of the Commission of Inquiry: Public Service and Remuneration Commission 1970-71' (1971)

21 Republic of Kenya 'Report on devolved functions, structures and staffing for county governments' (Ministry of State for Public Service) (2012)

22 World Bank 'Navigating the storm, delivering the promise: With a Special Focus on Kenya's Momentous Devolution' (Kenya economic update) (2011b)

Constitutions and legislation

1 Constitution of Kenya 2010

2 Constitution of Kenya, Act No. 5 of 1969 (repealed)

Draft Constitutions

1 CKRC 'Report of the Constitution of Kenya Review Commission (volume two): The Draft Bill to amend the Constitution' (2001) (Ghai Draft)

2 CKRC/ National Constitutional Conference 'The Draft Constitution of Kenya 2004' (circulated to delegates and commissioners on 23 March 2004) Incorporating recommendations after verification by commission, adopted by the National Constitutional Conference on 15 March 2004 (Bomas Draft)

3 Republic of Kenya 'Proposed New Constitution of Kenya 2005 (Wako Draft)

4 CoE 'Harmonised Draft Constitution of Kenya' (17 November 2009)

5 CoE 'Revised Harmonised Draft Constitution of Kenya' (8 January 2010)

6 Republic of Kenya 'Proposed New Constitution of Kenya' (23 February 2010)

Legislation

1 Constitution of Kenya Review Act Cap 3A laws of Kenya

2 Public Finance Management Act No. 18 of 2012

3 Transition to Devolved Government Act No. 1 of 2012

4 County Governments Act No. 17 of 2012

5 Urban Areas and Cities Act No. 13 of 2012

6 County Government Public Finance Management Transition Act No. 18 of 2013

7 Intergovernmental Relations Act No. 2 of 2012

Annex 6: MEMORANDA RECEIVED

1. Commission on the Implementation of the Constitution
2. Independent Electoral and Boundaries Commission
3. Kenya Private Sector Alliance
4. Law Society of Kenya
5. Leader of Majority (National Assembly)
6. Central Organization of Trade Unions (COTU)
7. Supreme Council of Kenya Muslims (SUPKEM)
8. Commission on Administrative Justice

Annex 7: QUESTIONNAIRE FOR COUNTY LEVEL OF GOVERNMENT

A1	County		
A2	Constituency		
A3	Ward		
A4	Urban/Rural	Urban....1 Rural.....2	
A5	Date	Day__/Month__/2015	
A6	Sampling point		
A7	Start time		
A8	End time		
A9	Name of enumerator		
A10	Name of respondent		
A11	Phone number of respondent		
A12	Supervisor		
A13	Spot checker		
A14	Duration of residence		

Good morning/afternoon ...My name is ....I am from the Office of the Auditor General and we are conducting a survey about how people feel about a number of things that affect them in relation to the constitution 2010. Your answers will help the National Assembly to make important decisions based on the TORs for the Social Economic-Audit. There is no right or wrong answer.

BACKGROUND OF RESPONDENT

TICK OR CIRCLE AS APPROPRIATE THROUGHOUT THE QUESTIONNAIRE

B1	Sex	Male	1	
		Female	2	
B2	Age	18 - 35 years	1	
		35 - 44 years	2	
		45 - 54 years	3	
		55 - 64 years	4	
		65 years and above	5	
		RTA	98	
		Don't Know	99	
B3	Highest level of education the respondent has completed	No formal education	1	
		Primary school	2	
		Secondary school	3	
		High school (A-level)	4	
		Post-secondary (Vocational training, certificate or diploma)	5	
		University degree	6	
		Post-graduate degree	7	
		Others e.g. religious studies	8	
		RTA	98	
		Don't Know	99	
B4	What do you do for a living	Employed	1	
		Self employed	2	
		Unemployed	3	

		Student	4	
		Others	5	
B5	What is your religion	Catholic Protestant (ACK, PCEA, Methodist) SDA Muslim Hindu other	1 2 3 4 5 6	
B6	The number of years the respondent has lived in the area (county)	0 - 3 years	1	
		4 – 10 years	2	
		More than 10 years	3	
		RTA	98	
		Don't know	99	

General Questions

1. Thinking about things in Kenya today, are things going in the right direction or wrong direction?

Direction	**Code**
Right direction**(Go to Q 2)**	1
Wrong direction (**Go to Q 3**)	2
Some in right and some in wrong direction	3
RTA	98
Don't know	99

2. Why do you say that things are going in the right direction or some in the right direction? Kindly elaborate.

MULTIPLE RESPONSES, PICK THE FIRST THREE

Indicators	**1st response**	**(b) 2nd response**	**(c) 3rd response**
There is good leadership	1	1	1
Affordable life	2	2	2
Development is taking place (roads, water, health)	3	3	3
Cost of living is not high	4	4	4
There is peace/harmony	5	5	5
Others	6	6	6
RTA	98	98	98
Don't know	99	99	99

3. Why do you say that things are going in the wrong direction or some in the wrong direction? Kindly elaborate.

MULTIPLE RESPONSES, PICK THE FIRST THREE

Indicators	**(a) 1st response**	**(b) 2nd response**	**(c) 3rd response**
High cost of living	1	1	1
Corruption	2	2	2
Poor leadership	3	3	3
Tribalism	4	4	4

Unemployment	5	5	5
Insecurity	6	6	6
Others	7	7	7
RTA	98	98	98
Don't know	99	99	99

4. Thinking about your life today compared to three years ago, how would you describe your life?

Life situation/status	Code
Better	1
Same	2
Worse	3
RTA	98
Don't know	99

SECTION A: PERCEPTIONS ON REPRESENTATION

1. I am going to ask you about certain leadership posts and whether you know the names of the leaders in these positions. Do you know the name of the following? RECORD NAME AS MENTIONED BY THE RESPONDENT. **DO NOT CORRECT** THE RESPONDENT IF WRONG NAME IS MENTIONED.

Leadership position	Record Name	Code	Code		
		Right name	Wrong name	RTA	Don't know
Your MCA		1	2	98	99
Your Member of Parliament		1	2	98	99
Your County Women Representative		1	2	98	99
Your Senator		1	2	98	99
Your Governor		1	2	98	99

2. In Parliament and the County Assembly, there are members who are nominated by their parties to represent different interests. Please tell me the names of nominated leaders where applicable – **Record verbatim all the names in each case;**

a. Nominated MCAs in your county assembly.....
b. Nominated MPs .....
c. Nominated Senator .....

3. In your view what are the **three** key functions of **elected** MCA, MP, Women Representative and Senator?

Functions	Member of County Assembly	Member of Parliament – National Assembly (MP)	Women Representative	Senator
Legislation (Making laws)	1	1	1	1

Representation (Listen to us and speak on our behalf)	2	2	2	2
Oversight	3	3	3	3
Development	4	4	4	4
Budgeting	5	5	5	5
Security	6	6	6	6
Bringing or managing CDF	7	7	7	7
Other (specify):	8	8	8	8
RTA	98	98	98	98
Don't know	99	99	99	99

4. In your view what are the **three** key functions of **nominated** MCA, nominated MP and nominated Senator?

Functions	**Member of County Assembly**	**Member of Parliament**	**Women Representative**	**Senator**
Legislation (Making laws)	1	1	1	1
Representation (Listen to us and speak on our behalf)	2	2	2	2
Oversight	3	3	3	3
Development	4	4	4	4
Budgeting	5	5	5	5
Security	6	6	6	6
Bringing or managing CDF	7	7	7	7
Other (specify):	8	8	8	8
RTA	98	98	98	98
Don't know	99	99	99	99

5. I am now going to ask you about performance of the elected representatives. How would you rate the performance of your **elected** leaders -Governor, Deputy Governor, Senator, Women Representative, Member of Parliament (MP), and Member of County Assembly (MCA)?

Performance rate	**Governor**	**Deputy Governor**	**Senator**	**Women Rep**	**MP**	**MCA**
Very good	1	2	2	2	2	2
Good	2	3	3	3	3	3
Fair	3	4	4	4	4	4
Poor	4	5	5	5	5	5
Very Poor	5	6	6	6	6	6
RTA	98	98	98	98	98	98
Don't Know	99	99	99	99	99	99

6. How would you rate the performance of **nominated** leaders including Senator, Member of Parliament (MP) and Member of County Assembly (MCA)?

Performance rate	**Senator**	**MP**	**MCA**
Very good	1	1	1
Good	2	2	2
Fair	3	3	3
Bad	4	4	4
Very bad	5	5	5
RTA	98	98	98
Don't Know	99	99	99

7. Did you vote in the last general election – Yes/No. If NO proceed to 9

8. In the last general election held in March 2013, you elected six leaders at the same time in the same polling station. What was your experience with actual voting – the picking and marking of the ballots - inside the voting booth?

Voting experience	Code
It was very easy to do so	1
It was just easy/no problem	2
It was difficult/confusing	3
It was extremely difficult for me	4
Can't remember	5
RTA	98
Don't Know	99

9. Concerning your experience with the last general election held in March 2013, how much do you agree with the following?

Experience	Strongly	Agree	Disagree	Strongly Disagree
It was very easy to vote	1	1	1	1
I took too long to vote because the queue /line was long	2	2	2	2
I did not find my name easily	3	3	3	3
The election officials were not helpful	4	4	4	4
Can't remember	5	5	5	5
RTA	98	98	98	98
Don't Know	99	99	99	99

10. Do you think that education qualifications should be considered when electing leaders?

	Code
Yes	1
No	2
RTA	98
Don't know	99

11. In your view, what should be the minimum educational qualification for someone vying for the following positions? **SINGLE RESPONSE PER ELECTIVE POST**

	University	College	Secondary	Primary	None	RTA	Don't Know
President	1	2	3	4	5	98	99
Governor	1	2	3	4	5	98	99
Deputy Governor	1	2	3	4	5	98	99
Senator	1	2	3	4	5	98	99
Women Rep	1	2	3	4	5	98	99
MP	1	2	3	4	5	98	99
MCA	1	2	3	4	5	98	99

12. Now I am going to ask you about community problems. In the past 1 year, has your community had a problem in your area that they had to ask for help or cooperation to resolve it?

Yes	1
No (**SKIP TO QUESTION 15**)	2
Refused (**SKIP TO QUESTION 15**)	98
Don't know (**SKIP TO QUESTION 15**)	99

13. What kind of problem was it? **WRITE DOWN VERBATIM.**
Problem: _____

14. Whom did your community approach/ask to solve the problem? **MULTIPLE RESPONSES, CODE UPTO 3 RESPONSES**

	1st Approached	2nd Approached	3rd Approached
County office	1	1	1
County Commissioner	2	2	2
MCA	3	3	3
Police	4	4	4
Ward Administrator	5	5	5
CDF office/Member of Parliament	6	6	6
Women Representative's office	7	7	7
Church	8	8	8
Mosque	9	9	9
Temple	10	10	10
Non-government organization	11	11	11
Chief	12	12	12
Media	13	13	13
Others			
RTA	98	98	98
Don't Know	99	99	99

15. I am going to again ask about your satisfaction with the performance of the elected leaders. How satisfied or dissatisfied are you with the following:

Satisfaction rate	MCA	MP	Senator	Women Rep	Governor
Very satisfied	1		1	1	1
Somewhat satisfied	2		2	2	2
Somewhat dissatisfied	3		3	3	3
Very dissatisfied	4		4	4	4
RTA	98		98	98	98
Don't know	99		99	99	99

16. Which is the most effective way to communicate with your MP and MCA? READ LIST. **SINGLE RESPONSE**

	Member of Parliament	Member of County Assembly
Contact MP/MCA directly	1	1
Personal assistants	2	2

Middle men/Brokers	3	3
Telephone, SMS or Facebook	4	4
Relatives	5	5
Regular constituency/ward meetings	6	6
Associations/groups	7	7
Party activists	8	8
Others (Specify)_____	9	9
RTA	98	98
Don't Know	99	99

17. Now, I am going to ask you about a dispute between you and someone else. When you have a dispute to whom do you go for help to solve the dispute?

Officer	**Code**
Chief	1
MCA	2
Police	3
Sub-County Administrator	4
Ward Administrator	5
RTA	98
Don't know	99

18. In the last general elections, you directly elected a total of six representatives (leaders), the President, the Governor, the Senator, The Women Representative, the Member of National Assembly (MP) and the Ward Representative (MCA). What is your view on the total number directly elected leaders considering their roles?

Leaders		MCA	SENATOR	MP	GOVERNOR	Women Rep	Nominated Senator
There are few elected leaders	1	1	1	1	1	1	1
There are too many elected leaders	2	2	2	2	2	2	2
There are just enough elected leaders	3	3	3	3	3	3	3
RTA	98	98	98	98	98	98	98
Don't Know	99	99	99	99	99	99	99

19. How important is each of the following to you personally (V. Important, Important, Not Important, Not important at all)

Level of Importance	**MCA**	**SENATOR**	**MP**	**GOVERNOR**	**Women Rep**	**Nominated Senator**
very important	1	1	1	1	1	1
important	2	2	2	2	2	2
Not important	3	3	3	3	3	3
Not	4	4	4	4	4	4

important at all						
RTA	98	98	98	98	98	98
Don't know	99	99	99	99	99	99

20. What would be your preferred total number of the elective position? .....

21. If you were given a choice of doing away with some of the elected and nominated posts in Kenya today, which one would you recommend to do away with? (Tick as per mention).

Post	**Code**
MCA	1
Senate	2
MP	3
Women Representative	4
Nominated Senator	5
Nominated MCA	6
Nominated MP	7
Governor	8
Deputy Governor	9
RTA	98
Don't Know	99

22. Briefly give reasons for your answers in question 21?.....

SECTION B: PERCEPTIONS ON PROVISION OF SERVICES

Government Powers and Functions

23(a) what are the key functions of the **National Government**? PROBE FOR MULTIPLE RESPONSES **(RECORD UP TO THREE RESPONSES)**

Functions	Code
Foreign affairs, foreign policy and international trade	1
The use of international waters and water resources	2
Immigration and citizenship	3
The relationship between religion and state	4
Language policy and promotion of official and local languages	5
National defense and use of the national defense services	6
Police services	7
courts	8
National economic policy and planning	9
Monetary policy, currency and banking(including central banking, insurance and financial corporation)	10
National statistics and data on population, the economy and society generally	11
Intellectual property rights	12
Labour standards	13
Consumer protection, including standards for social security and professional pension plans	14
Educational policy, standards; curricular, examinations and the granting of the university charters	15
University, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions	16
Promotion of sports and sports education	17
Transport and communication	18
National public works	19
Housing policy	20
General principles of land planning and the coordination of planning by the counties	21
Protection of the environment and natural resources with a view to establishing a durable and sustainable system of development	22
National referral health facilities	23
Disaster management	24
Ancient and historical monuments of national importance	25
National elections	26
Healthy policy	27
Agricultural policy	28
Veterinary policy	29
Energy policy including electricity and gas reticulation and energy regulation	30
Capacity building and technical assistance to counties	31
Public investments	32
National betting, casinos and other forms of betting	33
Tourism policy and development	34

23 (b) what are the key functions of the **County Government**? PROBE FOR MULTIPLE RESPONSES **(RECORD UP TO THREE RESPONSES)**

Functions	**Code**
Agriculture	1
County health services	2
Control of pollution	3
Cultural activities and public entertainment	4
County transport, county roads and street lighting	5
Animal control and welfare	6
Trade development and regulation	7
County planning and development	8
Pre-primary education and village polytechnics	9
Implementation of specific national government policies on natural resources and environmental conservation	10
County public works and services	11
Firefighting services and disaster management	12
Control of drugs and phonography	13
Ensuring and coordinating the participation of communities in governance at the local level	14

24. (A) how well has the national government performed those functions (as identified by the respondent in question **23 a)**

Performance rate	**Code**
Very well	1
Well	2
poor	3
RTA	98
Don't know	99

24 (b) How well has the county government performed those functions (as identified by respondent in question **23 b)**

Performance rate	**Code**
Very well	1
well	2
poor	3
Very poor	4
RTA	98
Don't know	99

25. In your opinion which level of government is positively affecting your life most?

Level of Government	**Code**
National Government	1
County Government	2
Both are the same	3
None of them	4
RTA	98
Don't know	99

26. In terms of your leaders, whose actions affect your life most: the President of Kenya, the Governor of your County, the Deputy Governor of your County, your Senator, your Member of Parliament (MP), your Women Representative in National Assembly and the MCA? **SINGLE RESPONSE**

National Level

Leadership Position	Code
President	1
Deputy President	2
MP	3
Women Representative	4
RTA	98
Don't know	99

County Level

Leadership Position	Code
The Governor	1
The Deputy Governor	2
Member of County Assembly (MCA)	3
RTA	98
Don't know	99

The County Government is mandated to provide health care services, agricultural services and early childhood education, among others. I want you to compare the provision of these services before and after 2013.

27. In your opinion, how well is the county government performing in the provision of these services compared to before devolution;

Performance	Agricultural Extension services		Provision of Fertilizers		Provision of Seeds		Improving Markets	
	Before	After	Before	After	Before	After	Before	After
Very good	1	1	1	1	1	1	1	1
Good	2	2	2	2	2	2	2	2
Bad	3	3	3	3	3	3	3	3
Very bad	4	4	4	4	4	4	4	4
RTA	98	98	98	98	98	98	98	98
Don't Know	99	99	99	99	99	99	99	99

28. Have you visited a public health facility in the last one year? Yes/No

Response	Code
Yes	1
No	2
RTA	98
Don't know	99

29. In your opinion, how **available** are the following health professionals in the health facilities in your area **currently** compared to the period **before** the coming of the Devolution (2013)? Again they may not recall.

Availability	**Doctors**		**Clinical officers (COs)**		**Nurses**		**Laboratory technicians**	
	Before	After	Before	After	Before	After	Before	After
Always available	1	1	1	1	1	1	1	1
Available	2	2	2	2	2	2	2	2
Rarely available	3	3	3	3	3	3	3	3
Never available	4	4	4	4	4	4	4	4
Can't remember	5	5	5	5	5	5	5	5
RTA	98	98	98	98	98	98	98	98
Don't Know	99	99	99	99	99	99	99	99

30. In your opinion, how **well** do you rate the availability of drugs, in-patient care services, pediatric (children) services, maternity health services, emergency health services (ambulances) in your hospitals **currently** compared to the period **before** the coming of the County Government (2013)?

Availability rate	**Drugs**		**In-patient health services**		**Paediatric (children) services**		**Maternity health services**		**Emergency health services (Ambulances)**	
	Before	After	Before	After	Before	After	Before	After	Before	After
Very good	1	1	1	1	1	1	1	1	1	1
Good	2	2	2	2	2	2	2	2	2	2
poor	3	3	3	3	3	3	3	3	3	3
Very poor	4	4	4	4	4	4	4	4	4	4
RTA	98	98	98	98	98	98	98	98	98	98
Don't Know	99	99	99	99	99	99	99	99	99	99

31.In your opinion how satisfied/dissatisfied with the provision of the following services at present compared to the period before the introduction of the County Government (2013)?

Satisfaction rate	**Clean water for domestic use**		**Quality of sanitation (sewerage system)**		**Water for irrigation and /or livestock**	
	Before	After	Before	After	Before	After
Very satisfied	1	1	1	1	1	1
Satisfied	2	2	2	2	2	2
Not satisfied	3	3	3	3	3	3
Not satisfied at all	4	4	4	4	4	4
Not applicable	5	5	5	5	5	5
RTA	98	98	98	98	98	98
Don't Know	99	99	99	99	99	99

32. How do you access water for domestic use?

Source of water	Code
Piped water (tap water)	1
Spring/river water	2
Borehole water	3
Dam or pan water	4
Other (specify):	5
RTA	98
Don't Know	99

33. Have you ever heard of Constituency Development Fund (CDF)?

Response	Code
Yes	1
No (**SKIP TO QUESTION (38)**	2
RTA(**SKIP TO QUESTION (38)**	98
Don't know (**SKIP TO QUESTION (38)**	99

34. What are the projects that have been funded by the CDF in the area where you live? **(LIST UPTO THREE PROJECTS)**

Project	Code
Hospital/ dispensary construction and /maintenance	1
Classrooms construction and /maintenance	2
Roads construction and /maintenance	3
Streetlights	4
Education Bursary	5
Medical Bills/support	6
Water projects	7
Fencing of schools	8
Markets construction & maintenance	9
Public Toilets construction & maintenance	10
Others (specify).....	11
RTA (SKIP TO QUESTION 29)	98
Don't know (SKIP TO QUESTION 29)	99

35. In your opinion who benefits **most** from Constituency Development Fund (CDF)? **SINGLE RESPONSE**

CDF Beneficiaries	Code
Constituency members	1
The MP	2
The contractors	3
Friends of the MP	4
Relatives of the MP	5
CDF committee members	6
Relatives of CDF committee members	7
The youth	8
The women	9
Others (specify).....	10
RTA	98
Don't know	99

36. How much do you agree with the following statements?

CDF implementation	Strongly agree	agree	disagree	Strongly agree	Strongly disagree	RTA	Don't know
CDF projects are implemented ONLY in the areas favored by the MP	1	2	3	4	5	98	99
CDF Projects are implemented where there is real need	1	2	3	4	5	98	99
CDF projects do not benefit the area	1	2	3	4	5	98	99
CDF should be withdrawn because there is devolution	1	2	3	4	5	98	99
Committee members get individual gains from the CDF projects	1	2	3	4	5	98	99

37. How would you rate performance of Constituency Development Fund (CDF) in providing services to the area where you live?

Performance rate	Code
Very good	2
Good	3
Fair	4
Poor	5
Very poor	6
RTA	98
Don't Know	99

38. To what extent do you feel that the decisions of the National Government and the County Government reflect your needs? **Tell me for each level of government one by one.**

	National	County
Completely reflect my needs	1	1
To a large extent reflect my needs	2	2
Only in small areas	3	3
Almost never	4	4
Never	5	5
RTA	98	98
Don't Know	99	99

39. How much influence do you think someone like you has in making national and county governments' decisions? A lot, some, very little, none at all? Please tell me separately for each level of government.

Level of influence	National Government	County Government
A lot	1	1
Some	2	2
Very little	3	3
None at all	4	4
RTA	98	98
Don't know	99	99

SECTION C: PUBLIC PARTICIPATION

40. Have you ever participated in any of the following in the last one year?

	Yes	No (SKIP TO Q42)	RTA (SKIP TO Q42)	Don't know (SKIP TO Q42)
County forums on the budget	1	2	98	99
County integrated development plan	1	2	98	99
County Laws and Policies	1	2	98	99
Ward Development meetings	1	2	98	99
CDF project meetings	1	2	98	99
Meetings by MCA	1	2	98	99
Meetings by the MP	1	2	98	99
Meetings by the governor	1	2	98	99
Meetings by the Senator	1	2	98	99

41. I would like to know how satisfied you were with your participation in the various county meetings and activities. Tell me separately for each meeting and activity.

	County forums on the budget	**County integrated development plan**	**County Laws and Policies**	**Ward Development meetings**
Very satisfied	1	1	1	1
Somewhat satisfied	2	2	2	2
Somewhat dissatisfied	3	3	3	3
Very dissatisfied	4	4	4	4
RTA	98	98	98	98
Don't know	99	99	99	99

42. Have you ever heard of the word **Devolution**?

Response	**Code**
Yes	1
No (SKIP TO 42)	2
Refused (SKIP TO 42)	98
Don't know (SKIP TO 342)	99

43. What does **Devolution** mean to you?

WRITE VERBATIM:

_____

RTA	98
Don't know	99

44. Devolution involves transfer of functions and funding to the county governments from national government. Regarding poverty, some people have suggested that devolution will help reduce poverty levels. Do you agree or disagree? **Strongly** or **somewhat**?

Views on poverty reduction	**Code**
Agree strongly	1
Agree somewhat	2
Disagree somewhat	3
Disagree strongly	4
RTA	98
Don't know	99

45. Which of the following statements is closest to your views?

Views on Devolution	Code
Devolution will reduce poverty	1
Devolution cannot reduce poverty	2
Devolution is a waste of resources	3
RTA	98
Don't know	99

46. How much do you agree or disagree with the following views

Views on devolution	some extend	Great extend	RTA	Don't know
Devolution is positively changing my life in my county	1	2	98	99
Devolution is contributing to development in my areas	1	2	98	99
Devolution is positively changing the life of my community	1	2	98	98
I have seen things changing for the better because of devolution	1	2	98	98

SECTION D: SATISFACTION WITH THE GOVERNMENT

47. Are you satisfied with the functions of the National and county governments? Tell me separately for each.

Satisfaction rate	National Government	County Government
Very satisfied	1	1
Somewhat satisfied	2	2
Somewhat dissatisfied	3	3
Very dissatisfied	4	4
RTA	98	98
Don't know	99	99

48. Speaking of particular aspects of its work, how **WELL** would you rate the National Government in each of the following fields? **ASK FOR EACH QUESTION ON THE LIST**; how well do you think the national government is performing in the following areas?

Performance rate	Very well	well	Fair	poor	Very poor	RTA	Don't Know
Education	1	2	3	4	5	98	99
Healthcare system	1	2	3	4	5	98	99
Creation of job	1	2	3	4	5	98	99

opportunities							
Security	1	2	3	4	5	98	99
Fighting corruption	1	2	3	4	5	98	99
Economic growth	1	2	3	4	5	98	99
Agricultural services	1	2	3	4	5	98	99
Roads construction	1	2	3	4	5	98	99

49. Speaking of particular aspects of its work, how WELL would you rate the County Government in each of the following fields? **ASK FOR EACH QUESTION ON THE LIST** how well do you think the county government is performing in the following areas?

Performance rate	Very good job	Good job	Fair	Bad job	Very bad job	RTA	Don't Know
Early childhood education	1	2	3	4	5	98	99
Healthcare system	1	2	3	4	5	98	99
Creation of job opportunities	1	2	3	4	5	98	99
Security	1	2	3	4	5	98	99
Fighting corruption	1	2	3	4	5	98	99
Economic growth	1	2	3	4	5	98	99
Agricultural services	1	2	3	4	5	98	99
Safe drinking water	1	2	3	4	5	98	99
Water for irrigation and livestock	1	2	3	4	5	98	99
Sanitation (waste/ sewer management)	1	2	3	4	5	98	99

SECTION E: COUNTY SITUATION: RIGHT DIRECTION OR WRONG DIRECTION

50. Generally speaking, thinking about your county, do you think your county is heading in the right direction or the wrong direction?

Direction	Code
Right direction **(fill table 51)**	1
Wrong direction (**fill table 52**)	2
Some in right and some in wrong direction	3
RTA	98
Don't know	99

51. Why do you say that things are going in the right direction or some in the right direction? Kindly elaborate. **Take top three answers. MULTIPLE RESPONSES**

Indicators	1st response	(b) 2nd response	(c) 3rd response
Affordable cost of living	1	1	1
Good leadership	2	2	2
Infrastructure is built (Roads and electricity)	3	3	3
Schools built (access to schools/education is improving)	4	4	4
Drinking water supply is improving	5	5	5
Availability of water for irrigation is improving	6	6	6

Improved hospitals or access to health care	7	7	7
A lot of investment/foreign investment is coming	8	8	8
Increased security, theft, peace etc.	9	9	9
Overall positive progress	10	10	10
Other specify	11	11	11
Other specify:	12	12	12
Other specify:	13	13	13
RTA	98	98	98
Don't know	99	99	99

52. Why do you say that things are going in the wrong direction or some in the wrong direction? Kindly elaborate. **Take top three answers. MULTIPLE RESPONSES**

Indicators	**(a) 1st response**	**(b) 2nd response**	**(c) 3rd response**
High cost of living	1	1	1
corruption	2	2	2
Insecurity	3	3	3
Tribalism	4	4	4
Poor leadership	5	5	5
unemployment	6	6	6
Poor Infrastructure (Roads and electricity)	7	7	7
Access to schools/education is poor	8	8	8
Hospitals are in poor conditions or access to health care is poor	9	9	9
Overall negative progress	10	10	10
Other specify (to exhaust all possibilities)	11	11	11
RTA	98	98	98
Don't know	99	99	99

SECTION F: PERSONAL ECONOMIC ASSESSMENT AND SECURITY

53. Thinking about your own personal economic situation now compared to two years ago, would you say you are much better off, better off, much worse off or about the same?

Personal economic situation	**Code**
Much better off	1
Better off	2
About the same	3
Worse off	4
Much worse off	5
RTA	98
Don't know	99

54. How often do you fear for your own personal safety or security or for that of your family?

Frequency	**code**
Often,	1
Sometimes	2
Rarely	3
Never	4
RTA	98
Don't know	99

SECTION G: PERCEPTIONS ON CORRUPTION

55. Do you believe there is **Corruption** in your County?

Yes	1
No (**GO TO QUESTION 60**)	2
RTA (**GO TO QUESTION 60**)	98
Don't Know (DK) (**GO TO QUESTION 60**)	99

56. If your answer to Question 50 above is **Yes**, in what areas is corruption rife? CODE UPTO THREE RESPONSES

Sector	**Code**
Tender Awards	1
Employment	2
Trade Licensing	3
Scholarship and bursary awards	4
Health sector	5
Agricultural services	6
Others (specify):	7
RTA	98
Don't know	99

57. In your opinion, which of the following institutions at the County level would you say is most corrupt? **(SINGLE RESPONSE)**

County Levels	**Code**
Governor's office	1
County Executive	2
County Assembly	3
County Public Service Board	4
County Assembly Service Board	5
Ward Development Committee	6
Others (specify):	7
RTA	98
Don't know	99

58. Do you believe there is corruption in the National Government?

Response	Code
Yes	1
No (**GO TO QUESTION 60**)	2
RTA (**GO TO QUESTION 60**)	98
Don't Know (DK) (**GO TO QUESTION 60**)	99

59. In what areas do you think corruption is most prevalent? **CODE UPTO THREE RESPONSES**

Sector	**Code**
Tender Awards	1
Employment	2
Trade Licensing	3

Scholarship and bursary awards	4
Health sector	5
Agricultural services	6
Others (specify):	7
RTA	98
Don't know	99

H: PERCEPTIONS ON ACCESS TO JUSTICE

60. How far is the nearest court from your residence?

Distance from residence (in kilometres)	**Code**
Less than 10 km	1
10 km – 20 km	2
20 km – 30 km	3
More than 39 km	4
RTA	98
Don't Know	99

61. How much confidence do you have with your local courts?

Level of confidence	**Code**
Very confident	1
Confident	2
Somewhat confident	3
Not confident at all	4
RTA	98
Don't know	99

62. Do you trust your local courts to deliver fair judgment on the following disputes?

Dispute category	**Yes**	**No**	**RTA**	**Don't know**
Dispute between powerful person and an ordinary person	1	2	98	99
Dispute between two ordinary people	1	2	98	99
Dispute between the Government and powerful person	1	2	98	99

63. Do you believe there is corruption in the Judiciary system?

Yes	1
No	2
RTA	98
Don't Know	99

64. How would you rate the level of corruption in the Judiciary before the new constitution passed in 2010? What about after ?

Level of corruption	Before 2010	After 2010
Very High	1	1
High	2	2
Low	3	3
Very low	4	4
RTA	98	98
Don't Know	99	99

65. Did you or a member of your household, require services of the courts during the last 3 years?

Yes	1
No	2
RTA	98
Don't Know	99

66. If the answer to question 51 above is **YES** (1), what is your opinion on the quality of the services of the judiciary (the courts)?

Perception on service delivery by courts	Code
Very good	1
Somewhat good (fair)	2
Somewhat bad (poor)	3
Very bad	4
RTA	98
Don't know	99

THE GENDER QUESTION

67. Currently there's public debate on the implementation of two-thirds gender principle provided in the constitution, which requires that in an elective body, neither men nor women should form more than two thirds of its composition. In your opinion is this requirement necessary for the country's development?

Opinion	Code
Yes	1
Somehow	2
No	3
RTA	98
Don't Know (DK)	99

68. In your own opinion how do we achieve the gender principle in Parliament?.....

69. Given a chance would you elect a woman as your leader in any of the following positions?

Position	Yes	No	RTA	Don't Know
President	1	2	98	99
Governor	1	2	98	99
Deputy Governor	1	2	98	99

Senator	1	2	98	99
Women Rep	1	2	98	99
MP	1	2	98	99
MCA	1	2	98	99

70. If NO; give a reason(s)----------

71. Any other concern that the respondent may have and which is not covered by the questions above:

RECORD VERBATIM: .....

THANK YOU VERY MUCH FOR YOUR TIME AND ATTENTION

END

Annex 8: METHODOLOGY

OFFICE OF THE AUDITOR GENERAL

SOCIO-ECONOMIC SURVEY

SAMPLING, DATA MANAGEMENT AND ANALYSIS REPORT

Sampling: Design, Size and Allocation

The sampling process for the social and economic audit of the Kenya 2010 Constitution survey was done with the assistance of the Kenya National Bureau of Statistics (KNBS). The Bureau assigned a sampling specialist to provide technical support. The sample was drawn based on the latest census figures (2009).

The survey employed a representative cross-sectional sampling design based on a stratified multi-stage cluster sampling methodology. The goal was to ensure that every adult citizen had an equal and known chance of being selected for an interview. This was attained by strictly applying random selection methods at every stage of sampling and by applying sampling with probability proportionate to population size (PPPS). The survey was conducted at the household level targeting all citizens of voting age (18 years and above) within the households as potential respondents. The sample was drawn based on clusters—Enumeration Areas (EAs) that are the smallest units with targeted population data. In each EA, a total of 10 respondents were selected, translating to an overall sample of 3,000 cases. A randomly selected sample of 3,000 cases allows inferences to national adult populations with an average margin of sampling error of no more than plus or minus 2 percentage points at a confidence level of 95 percent. This constituted a total of 300 clusters (EAs) distributed across the 47 counties nationally and based on proportional population. Within each of the counties, the sample was further distributed proportionately across urban-rural divide. The complete sample drawn is presented in this annex.

Data Management and Analysis

The data management process used the Statistical Package for the Social Sciences (SPSS) as a comprehensive, user-friendly, computer-based tool for capturing data. The data was cleaned and presented in an SPSS template, with all values in the correct rows and columns. All open-ended or "other (specify)" verbatim responses were included in the dataset. Missing values were kept to an absolute minimum and were correctly coded and labelled with-1 = missing data. There were also no variables containing out-of-range values and no "system missing" ("." in SPSS) data. The data management team ensured that the data was internally consistent with all "linked" questions. A random sample of at least 25 percent of all questionnaires was also double entered by the team. The process of double entry for a random sample of at least 25 percent of the questionnaires yielded an impressive data entry error rate of only 0.58 percent.

A team of senior researchers and data managers oversaw the day-to-day data management of data entry and cleaning. The team provided close supervision to a team of data entry clerks. The entry and cleaning processes were undertaken within the OAG offices. It is instructive to note that data entry clerks participated in the field work training workshop to acquaint them with the survey tool. This was critical in ensuring fewer errors are likely to be made, but also making the data entry process more efficient. Prior to actual data entry, the data team reviewed each of the returns that came in to identify any potential red flags from the field. On conclusion of data entry and cleaning, the data was then forwarded to the KNBS for the application of weights. The data was then submitted to the OAG team upon conclusion of the weights application. It is

worth noting that the final data set comprised a total of 2,998 valid cases after two cases were dropped for incompleteness.[199]

To a larger extent, the TORs of the committee informed the analysis of the OAG survey. The analysis team generated a summary of results (SORs) tabulating frequencies and counts for every single variable in the tool. The SORs also had breakdowns cross-tabulated by rural-urban divide, gender, age cohorts, and other topical variations as requested by members of the committee. Advance analysis depicting relationships between and among variables were also undertaken based on individual requests by the members of the committee.

Detailed Sample by County

No.	County	Number of Enumeration Areas	Number of Interviews Done
1	Nairobi	29	288
2	Nyandarua	5	50
3	Nyeri	7	70
4	Kirinyaga	5	50
5	Murang'a	8	80
6	Kiambu	14	140
7	Mombasa	9	90
8	Kwale	5	50
9	Kilifi	7	70
10	Tana River	2	20
11	Lamu	2	20
12	TaitaTaveta	3	30
13	Marsabit	3	30
14	Isiolo	2	20
15	Meru	11	110
16	TharakaNithi	3	30
17	Embu	5	50
18	Kitui	7	70
19	Machakos	8	80
20	Makueni	7	70
21	Garissa	4	40
22	Wajir	4	40
23	Mandera	6	60
24	Siaya	7	70
25	Kisumu	7	70
26	Migori	6	60
27	Homa Bay	7	70
28	Kisii	7	70
29	Nyamira	5	50
30	Turkana	6	60
31	West Pokot	4	40

[199]The two dropped cases were interviews that were considered incomplete after respondents terminated interviews and were unable to continue even after interviewer efforts.

No.	County	Number of Enumeration Areas	Number of Interviews Done
32	Samburu	2	20
33	Trans Nzoia	5	50
34	Baringo	4	40
35	UasinGishu	7	70
36	ElgeyoMarakwet	3	30
37	Nandi	6	60
38	Laikipia	3	30
39	Nakuru	12	120
40	Narok	6	60
41	Kajiado	6	60
42	Kericho	5	50
43	Bomet	6	60
44	Kakamega	12	120
45	Vihiga	4	40
46	Bungoma	9	90
47	Busia	5	50
	Total		2,998

Annex 9: LIST OF CONSTITUTIONAL AMENDMENTS FROM INDEPENDENCE TO 2010

The Constitution of Kenya (Amendment) Act No 28 of 1964	• Made Kenya a Republic • Created office of the President and made him both Head of State and Government • Executive Authority of regional governments highly eroded • President to be elected by House of Representatives constituted as Electoral College
The Constitution of Kenya (Amendment) (No 2) Act No 38 of 1964	• Transfer of powers to alter regional boundaries from regional governments to Parliament • Independent sources of revenue to regions stopped, making them entirely dependent on Central Government • Regional Presidents designated as mere Chairmen • Appointing authority of Judges given absolutely the President's and requirement for consultation with at least 4 Regional presidents before appointing CJ removed • Ex-Officio MPs lost their voting power in National Assembly
The Constitution of Kenya (Amendment) Act No 14 of 1965	• Constitution amendment threshold reduced from 90% to 65% in Senate, and 75% to 65% in the National Assembly • Executive power of regions deleted completely • Abolished appeals to privy councils and Supreme Court replaced with High Court • Approval of Emergency increased from 7 to 21 days and threshold reduced from 65% to simple majority • Removed provisions concerning control of Agricultural land transactions from the Constitution
The Constitution of Kenya (Amendment) Act No 16 of 1966	• Required MPs who had not attended National Assembly for over 8 sittings or imprisoned for over 6 months to lose their seats • Minister in charge of citizenship given discretion to grant Citizenship to Commonwealth citizens residing in Kenya for over 6 months • Increased powers to rule by decree in North Eastern Province • National Youth Service included in disciplined forces
The Constitution of Kenya (Amendment) (No 2) Act No 17 of 1966	• Required for an MP to seek re-election upon defection to another party
The Constitution of Kenya	• Period of National Assembly review of

(Amendment) (No 3) Act No 18 of 1966	Emergency orders increased from 2 to 8 months • Greater and wider derogations of Fundamental right and freedoms permitted. Provision calling for reasonable justification for such derogations removed
The Constitution of Kenya (Amendment) (No 4) Act No 19 of 1966	• Dissolution of the Bicameral legislature to form a Unicameral Legislature comprising only the National Assembly • Increased constituencies by 41 to accommodate new MPs, formerly Senators of the Upper House • Quorum of National Assembly fixed at 30 • Speaker of National Assembly made Chair of ECK assisted by two Presidential appointees • References to Senate deleted and life of National Assembly extended to end in June 1970 instead of 1968
The Constitution of Kenya (Amendment) Act No 4 of 1967	• Meant to clear doubt over Section 42A (Turn Coat Rule) • Backdated the effect of the Fifth Amendment to 1963
The Constitution of Kenya (Amendment) Act No 16 of 1968	• Abolished Provincial Councils • Deleted from the constitution any references to the provincial and district boundaries
The Constitution of Kenya (Amendment) (No 2) Act No 16 of 1968	• Election of President made to be by Universal Suffrage • Every party required to nominate a Presidential Candidate • Ballot paper made to pair President and MP from same party • Independent candidates barred from contesting • Qualifications for presidency introduced • President empowered to appoint members of Parliamentary Service Commission and nominate 12 MPs • Altered provisions of presidential succession and removed parliamentary approval for state of emergency declaration
The Constitution of Kenya (Amendment) Act No 5 of 1969	• Consolidated all the Constitutional amendments as at February 1969 resulting in a revised Constitution for Kenya in one document which was declared to be the authentic document • Membership of ECK altered by making all members Presidential appointees
The Constitution of Kenya (Amendment) Act No 10 of 1974	• Reduced the age of voting from 21 to 18

The Constitution of Kenya (Amendment) Act No 5 of 1974	• Made Kiswahili one of the official languages of the National Assembly
The Constitution of Kenya (Amendment) Act No 1 of 1975	• Provided that all financial resolutions and written laws be presented to the House shall be written in English, and all other issues would be debated in Kiswahili • Extended the Presidential prerogative to include annulling disqualifications arising out of a ruling of the Elections Court (Ngei Amendment)
The Constitution of Kenya (Amendment) Act No 13 of 1977	• Established the Court of Appeal • Abolished the right to directly remit compensation for acquisition of property abroad without complying with foreign exchange regulations
The Constitution of Kenya (Amendment) Act No 1 of 1979	• Provided for use of English as an alternative Parliamentary language • Proficiency in Kiswahili made a prerequisite for qualification for people seeking parliamentary office
The Constitution of Kenya (Amendment) Act No 5 of 1979	• Specified period within which a civil servant must resign to seek office, 6 months prior to preliminary elections
The Constitution of Kenya (Amendment) Act No 7 of 1982	• Introduced Section 2A that changed Kenya from a *de facto* to *de jure* one party state making Kenya a one-party state by Law • Turn coat rule (Fifth Amendment) repealed • Definition of a Political Party deleted • Method of nominations for General Elections amended making them a preserve of KANU
The Constitution of Kenya (Amendment) Act No 6 of 1986	• Repealed Section 89 which provided for automatic Citizenship for people born in Kenya after Dec 1963. Henceforth, either of your parents must be Kenyan
The Constitution of Kenya (Amendment) Act No 14 of 1986	• Removed Security of Tenure of AG and Auditor & Controller General • Abolished office of Chief Secretary • Provided for a minimum of 168 and maximum of 188 Constituencies
The Constitution of Kenya (Amendment) Act No 20 of 1987	• Made all Capital offences non-bailable • Torture of Political prisoners entrenched in the Criminal Justice system
The Constitution of Kenya (Amendment) Act No 8 of 1988	• Legalized detention of Capital offenders for 14 days without trial allowing for time to torture • Removed security of tenure of Constitutional office Holders
The Constitution of Kenya (Amendment) Act No. 10 of 1991	• Returned the Security of tenure of Constitutional office Holders

	• Provided for a maximum of 210 and minimum of 188 Constituencies
The Constitution of Kenya (Amendment) Act No 12 of 1991	• Repealed Section 2A of the Constitution hence ending the *de jure* one-party rule in Kenya • The Turn Coat Rule (Fifth Amendment) was reintroduced
The Constitution of Kenya (Amendment) Act No. 6 of 1992	• Set the presidential term limit to two. • Provided that for one to be declared President, he/she must garner the majority votes in addition to attaining at least 25% of votes in five of the eight provinces.
The Constitution of Kenya (Amendment) Act No. 9 of 1997	• Provided framework for minimum constitutional reforms under the IPPG format.
The Constitution of Kenya (Amendment) Act No. 10 of 1997	• Introduced section 1A which effectively defined Kenya as a multi-party state. • Allowed the President to form government from members of other political parties. • Role of nominating members of parliament transferred to political parties. • Constitutional matters could be appealed at the Court of Appeal.
The Constitution of Kenya (Amendment) Act No. 3 of 1999	• Established the Parliamentary Service Commission and Parliamentary Service.
The Constitution of Kenya (Amendment) Act 2008	• Created the Grand Coalition government after the disputed 2007 elections. • Established the office of Prime Minister and two Deputy Prime Ministers.