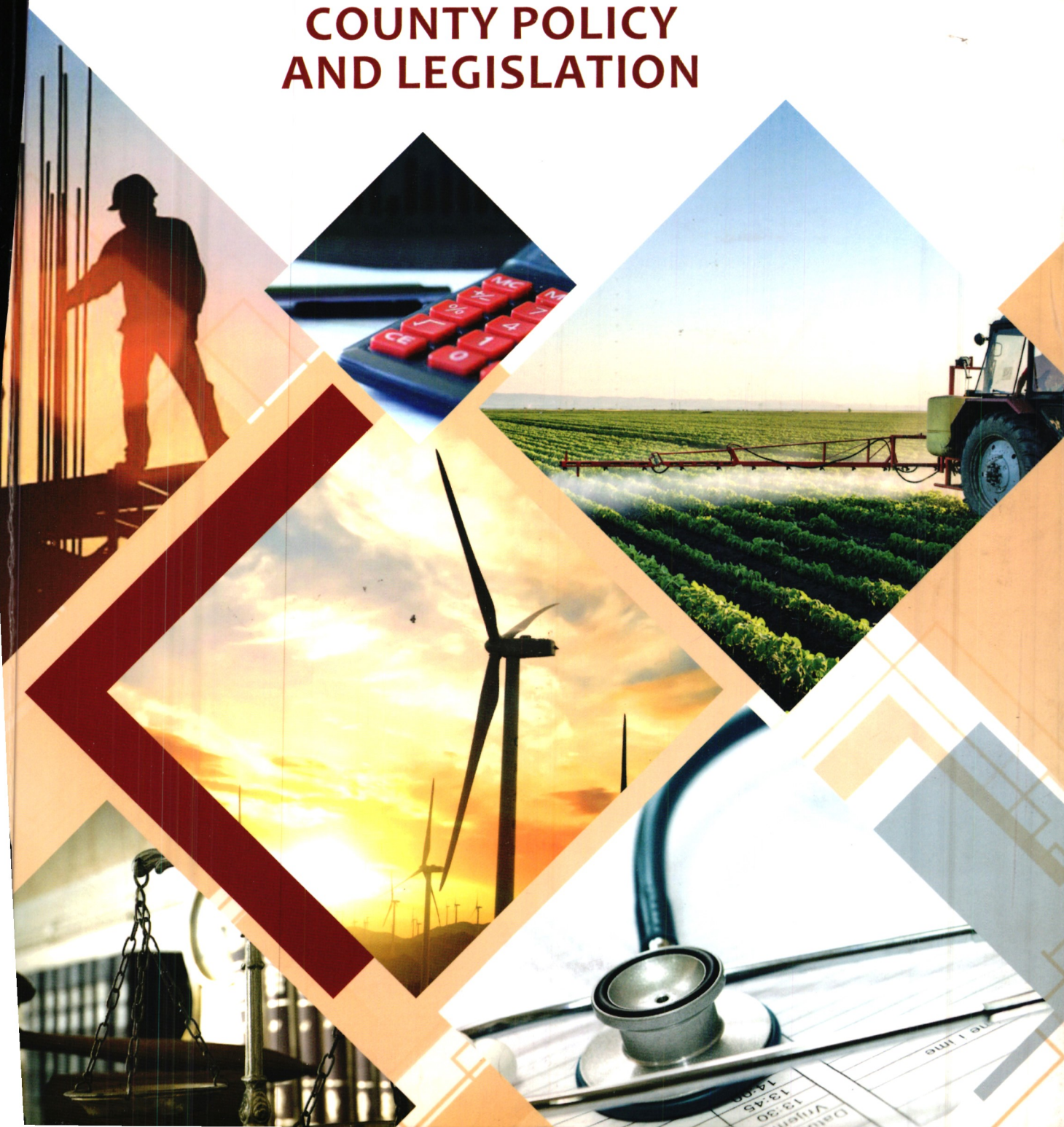




Council of Governors




REPORT ON THE AUDIT OF NATIONAL AND COUNTY POLICY AND LEGISLATION



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REPORT ON
THE AUDIT OF NATIONAL AND
COUNTY POLICY AND LEGISLATION

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Abbreviations & Acronyms

AHADI	Agile and Harmonized Assistance for Devolved Institutions
CARA	County Allocation of Revenue Act
CoG	Council of Governors
KLRC	Kenya Law Reform Commission
CARA	County Allocation of Revenue Act
SAGA	Semi Autonomous Government Agency
WDF	Ward Development Fund
ICT	Information and Communications Technology
NLP	National Land Policy
EPC	Export Promotion Council
PPA	Physical Planning Act
CIC	Commission for the Implementation of the Constitution
KENAS	Kenya Accreditation Service
CFSP	County Fiscal Strategy Paper
NFNSP	National Food Nutrition Security Policy
KHSSIP	Kenya Health Sector Strategic Investment Plan
CS	Cabinet Secretary
FMCA	Forest Management and Conservation Act
IDLO	International Development Law Organization
IGR	Intergovernmental Relations
IGRA	Intergovernmental Relations Act
IGRTC	Intergovernmental Relations Technical Committee
KARLO	Kenya Agricultural Research and Livestock Organization
KEPHIS	Kenya Plant Health Inspectorate Service
KLRC	Kenya Law Reform Commission
MTP	Medium Term Plan
NACADA	National Authority for the Campaign Against Drug Abuse
PFM	Public Finance Management
PFMA	Public Finance Management Act
RDA	Regional Development Authority
UNDP	United Nations development Programme
MDA	Ministries Departments Agencies

Foreword by Chairman, Council of Governors



In the year 2010, Kenya promulgated a new Constitution which introduced a two tier system of governance: the National Government and forty-seven (47) County Governments. The Fourth Schedule of the Constitution assigns thirty-five (35) functions to the National Government under part one (1) and fourteen (14) functions to County Governments under part two (2). Devolved functions primarily focus on service delivery to the citizens. County Governments have been bestowed with both legislative and executive authority to facilitate the performance of their functions and exercise of their powers.

It is however worth noting that despite the strides made in the country with respect to the devolved system of governance, existing and in force are still National laws that were enacted before the promulgation of the Constitution. Some of these laws undermine devolution by dint of the structures they had created and the powers they had conferred on various institutions, thereby impeding devolution's full implementation. On this premise, CoG and KLRC initiated the legal and policy audit aimed at scrutinizing National and County policies and laws with a view to establishing their alignment to the Constitution, specifically the devolved system of governance.

The study reveals that there are a myriad of National laws and policies that are not in tandem with the Constitution. Some of the key recommendations highlighted in the report are that some National laws need to be repealed while others require amendments in order to ensure conformity with the Constitution. For stakeholders to improve the policy and legislative environment that devolution operates in, they should read the report and collaborate in its implementation. This will ensure that both the National and County laws and policies conform to the letter and spirit of the Constitution, eventually leading to improved service delivery to the people of Kenya.

Thank you!

H.E. Hon. FCPA Wycliffe Ambetsa Oparanya, EGH, CGJ

Chairman, Council of Governors

Foreword by the Attorney General



This Report is the product of a study commissioned by the Council of Governors (CoG) and the Kenya Law Reform Commission (KLRC) across seven sectors, the key objectives of which were to audit the county government policies and legislation with the view of analysing their compliance with the Constitution, to audit all the national policy and legislation with a view of ascertaining the extent to which they conform to the devolved system of governance and to identify gaps and challenges and make recommendations for harmonization and alignment.

The sectors prioritized were Agriculture, Health, Natural Resource Management, Land and Physical Planning, Urban Development, Trade and Investment and Public Finance Management.

At this point in time, and while Kenya is still in transition from the old constitutional order to the new constitutional dispensation, it is clear from the Report that there are significant challenges around the extent of compliance with the laid down constitutional, legal and policy frameworks with respect to governance at both levels of government that need to be addressed. The Report provides the general trends that need to be tackled in the quest for compliance with the constitutional framework. Some of the notable findings include ambiguities in legislation, persistence of the old order in terms of laws, policies and practices across all sectors under review, inadequate consultation and cooperation between the two levels of government that can support and facilitate holistic development of laws and policies and a dearth of capacity to facilitate effective development of laws and policies that are clear, coherent, comprehensive and compliant with applicable constitutional provisions.

The Report has been enriched by the generous, earnest and thoughtful insights by sector experts through a peer review process. Further, the involvement of the stakeholders in reviewing the initial reports provided invaluable input in exploring together the serious topics that surround our common governance goal in addition to extensive discussion with the national and county government officials, civil society organizations, and representatives of the community-based organizations and networks that deal with sectoral governance issues.

As stated above, I wish to reiterate that this Report presents a comprehensive audit of the national and county legislation and policy approach and reveals the gaps and challenges that need immediate attention in the process of developing sufficient and responsive laws and policies that will actualize the devolved system of governance and the country's economic blue print, Vision 2030.

I wish to take this opportunity to sincerely thank the members of the team for their meritorious and sincere effort in writing this enlightening Report. My heartfelt gratitude also goes to the stakeholders and sector experts for their tireless efforts and enriching contribution and co-operation which led to the successful completion of the Report.

P. Kihara Kariuki

Attorney-General

Foreword by Chairperson, Kenya Law Reform Commission



Devolution is one of the hallmarks of the Constitution of Kenya, 2010. Devolution has not only improved the economic and social welfare of people in many places, (some of which were traditionally marginalised), but has, to a great extent, increased the democratic space in our country, since the people are now part of the decision-making processes. As a country, we have indeed overcome several challenges and milestones in a bid to make the devolution dream a reality.

The Kenya Law Reform Commission (KLRC) is established by the Kenya Law Reform Commission Act, No. 19 of 2013 and is mandated to keep under review all the law and recommend its reform by undertaking research and comparative studies relating to law reform as well as related legislative impact assessments. The Commission also provides advice, technical assistance and information to the national and county governments with regard to the reform or amendment of any branch of law. The execution of this mandate includes undertaking a detailed audit of all the existing pieces of legislation, policies and administrative procedures and harmonizing them with the Constitution.

The Council of Governors (CoG) conducted a baseline survey which revealed that most of the laws in respect of key devolved functions were largely not compliant with the Constitution of Kenya, and key devolution Articles including Articles 173, 174 and the Fourth Schedule to the Constitution which demarcates the functions to be undertaken by the national and county governments. As a consequence of the survey findings, the Commission in partnership with COG undertook an audit of the national and county policies and law across seven devolved sectors. The purpose of the audit was to analyse national and county policies and legislation to determine their compliance with the Constitution with particular reference to devolution.

The Audit Report is one among the initiatives that we hope will help policymakers and relevant institutions in their efforts to entrench devolution. The Report focuses on seven devolved sectors namely: Health, Public Finance Management, Agriculture, Trade and Investments, Land and Physical Planning, Urban Development and Natural Resource Management as provided in the Fourth Schedule to the Constitution.

The Report documents the findings of the audit process in the identified seven sectors. It provides an analysis of the national and county policies and legislation and identifies the gaps and challenges with these instruments of governance. It further outlines recommendations for harmonization and alignment which will inform the success of counties in implementing devolution and will ensure the achievement of the collective aspirations of Kenyans, given the critical role of devolution in our current dispensation. The publication of this Report is a culmination of a highly participatory and consultative process in line with the constitutional requirements of public and stakeholder participation and engagement.

Through this Report, the Commission and CoG will spearhead and undertake the proposed policy and legislative reforms in partnership with the relevant sector Ministries, Departments and Agencies (MDAs). The successful implementation of the Report therefore calls for a coherent and cross-sectoral approach and a coordinated response across all levels of government, private sector and other non-state actors. Towards this end, all MDAs at both levels of government are expected to work closely together to make the proposed recommendations a reality. Finally, in publishing this Report, the Commission and CoG reaffirm their unwavering commitment and support to ensure conformity with the Constitution and respect for devolution.

I would like to thank all those who contributed to the development of the Report and subsequent finalization in one way or the other.

Thank you very much.

Mbage Ng'ang'a

Chairman KLRC





Acknowledgements

The development and finalization of this Report benefited from the contribution of various institutions and individuals. Various stakeholders including Ministries, Departments and Agencies (MDAs) at both levels of Government, the Private Sector, Non-State Actors, Parliament and the Office of the Attorney-General were consulted and their views considered. The stakeholders interacted with the Draft Report and gave their practical position on the issues raised. We sincerely thank them all for their invaluable contribution.

The audit process that culminated into development and publication of this Report was made possible through the generous financial support of the United States International Development (USAID) through the Agile and Harmonized Assistance to devolved Institutions (AHADI) and the Danish International Development Agency (DANIDA) through the International Development Law Organization (IDLO), the United Nations Development Programme and the World Bank. We are forever grateful to Ms. Waceke Wachira, USAID-AHADI Chief of Party and Mr. Romualdo Mavedzenge, IDLO Kenya Country Director, and their respective committed teams for their patience especially during those times when processes slowed down.

We acknowledge the excellent work done by the core technical committee comprising Ms. Joan Onyango (KLRC), Ms. Rosemary Njaramba (CoG), Ms. Zipporah Muthama (CoG), Mr. Justice Gatuyu (KLRC), Ms. Mukami Kibaara (CoG) and Ms. Christabel Wekesa (KLRC) which laid the foundation for the development of this Report. The Technical Committee incorporated the Office of the Attorney General & Department of Justice, Senate, IGRTC and Ministry of Devolution and ASALs whose input we sincerely appreciate. It is through their enthusiasm, hard work and commitment that we credit the accomplishment of this mission. We especially thank the staff of KLRC and COG (the joint secretariat of the Technical Committee) for their dedication and tireless efforts in ensuring successful completion of this Report. Special mention must go to the KLRC Chairman, Mr. Mbage Ng'ang'a who at various points was personally involved in the audit process.

We commend Dr. Conrad Bosire and the team of sector consultants namely: Prof. Kameri Mbote, Dr. Collins Odote, Mr. Peter Wanyama, Mr. Gabriel Ndung'u, Ms. Catherine Mumma, Ms. Rhoda Njuguna, Mr. Peter Mwangi, CPA Paul Otsola, Mr. Victor Odhiambo and Dr. Wilson Songa, for the exhaustive research in the policy and legal frameworks. They worked tirelessly with the technical committee to constantly revise, edit and improve the contents of this publication. It is through this effort that we have this comprehensive Report.

Finally, we are indebted to the people of Kenya for according us the opportunity to serve and being the reason we continue to evaluate ourselves as a Country.

Thank you!

Ms. Jacqueline Mogeni, MBS
CEO, Council of Governors

Mr. Joash Dache, MBS
CEO/Secretary, KLRC

Council of County Governors

The Council of Governors (CoG) is a non-partisan organisation established under Section 19 of the Intergovernmental Relations Act (IGRA 2012). The Council of Governors comprises of the Governors of the forty-seven Counties. Main functions are the promotion of visionary leadership; sharing of best practices and; offer a collective voice on policy issues; promote inter-county consultations; encourage and initiate information sharing on the performance of county governments with regard to the execution of their functions; collective consultation on matters of interest to county governments.

CoG provides a mechanism for consultation amongst county governments, share information on performance of the counties in execution of their functions, facilitate capacity building for Governors, and consider reports from other intergovernmental forums on national and county interests amongst other functions. The vision of the Council of Governors is to have prosperous and democratic counties delivering services to every Kenyan.

Kenya Law Reform Commission

The Kenya Law Reform Commission (the Commission) is established by the Kenya Law Reform Commission Act, No. 19 of 2013 (the Act). Presidential assent was given on 14 January 2013 and the Act came into force on 25th January 2013. The Commission has a statutory and ongoing role of reviewing all the law of Kenya to ensure that it is modernized, relevant and harmonized with the Constitution of Kenya. Following the promulgation of the Constitution in 2010, the Commission has an additional mandate of preparing new legislation to give effect to the Constitution. The third mandate is found in the County Governments Act, No. 17 of 2012 which requires the Commission to assist the county governments in the development of their laws. This is also a requirement found in the Act.

The Act grants the Commission a body corporate status and the necessary autonomy to enable it discharge its mandate as envisaged under the Act. The Commission is wholly funded by the Government but welcomes support from its partners.

Before the enactment of the Act, the Commission operated as a Department within the Office of the Attorney-General before being moved administratively to the Ministry of Justice, National Cohesion and Constitutional Affairs in 2003.

Executive Summary

Introduction

The Council of Governors (CoG) and the Kenya Law Review Commission (KLRC) commissioned a study of law and policies across seven sectors with three main objectives:

- » To conduct an audit of County policies and legislation with a view to analysing their compliance with the Constitution;
- » To conduct an audit of all National policy and legislation with a view to examining to what extent they conform to the devolved system of governance; and
- » To identify the gaps and challenges in the above and propose remedies available for harmonization and alignment.

The seven sectors that were chosen for analysis are:

- » Health
- » Public Finance Management
- » Agriculture
- » Trade and Investments
- » Land and Physical Planning
- » Urban Development
- » Natural Resource Management

This report presents the findings from the seven sectors.

Methodology and approach to the Audit

First, the basis or anchor upon which the analysis was carried out is the Constitution of Kenya 2010. The thrust of the Constitution of Kenya 2010 was to disperse economic and political power from the centre to 47 county governments across the country. The constitutional framework upon which this dispersal is based formed the basis of analysis of the 7 sectors. The Constitution distributes responsibilities between the two levels of governments through the Fourth Schedule to the Constitution. The Constitution provided for a two phases of transition (2010-2013 and 2013-2015), to enable alignment of systems of to the two-tiered system of governance. The constitutional framework calls for a consultation and cooperation in the performance of functions between the two levels of government. To reify this constitutional framework, primary legislation, such as, the County Government Act and the Intergovernmental Relations Act were put in place to guide implementation of devolution. The constitutional, legal, and policy frameworks provided an anchor upon which the sectoral analyses were carried out. The main objective was to consider the extent of compliance with the laid down constitutional framework.

Secondly, using the normative (constitutional and legislative) yardstick above, the sectoral audit entailed a review of documentation (mainly legislation and policy documents) in the identified sectors. Accordingly, content analysis was carried out for laws, policies, administrative guidelines, sectoral plans, and cases that have come before court on various relevant matters. The products of this stage of the study were sectoral reports whose content was based on the review of documentation.

Thirdly, the initial drafts of the sectoral report were subjected to a peer review process, which involved sector experts. The peer reviewers provided a quality assurance check on the reports and provided feedback on gaps and areas for further research.

Finally, the study entailed involvement of stakeholders in the review of the initial reports based on inputs of stakeholders. Regional hearings were held to discuss the sectoral reports and one national stakeholders' forum to validate the sectoral reports. Participants at the stakeholders' forums included: national and county government officials from the respective sectors, civil society organisations, and representatives of community based organisations and networks that deal with sectoral governance issues.

Findings:

General Trends

- » **Ambiguities in the constitutional framework** need to be addressed in order to facilitate the development of coherent laws and policies across the sectors. While the Constitution provided for two transition phases (from 2010 to 2013 and 2013 to 2015) for unbundling and clarifying government competencies at the two levels, this goal was not achieved.
- » There is a **persistence of the old order** (laws, policies, and practices) across all the sectors reviewed. In all the sectors, the majority of the laws applicable pre-date the current Constitution and this means that the new roles of the county governments have not been taken into account in the text of these laws and policies.
- » There is space for clarification of the ambiguities above through consultation and cooperation between the two levels of government. However, another major finding is that there is **inadequate consultation and cooperation** between the two levels of government that can support and facilitate a holistic development of laws and policies at both levels of government. While formal structures exist, some of which are provided for by law and existing policies, they have not been used to clear the challenges of development of laws and policies for both levels.
- » In some instances, laws that are passed at the national level contradict each other and this reveals low levels of coordination, even among players within the same level of government. A glaring example of this is the contradictory and confusing provisions in the laws relating to land (see Chapter 5). A more effective mechanism of cooperation between the sectors and the levels of government can contribute to more harmonious legislation and policies.
- » Finally, the audit review reveals a dearth of capacity at both levels of government to facilitate the effective development of laws and policies that are clear, coherent, comprehensive and compliant with the applicable constitutional provisions. Accordingly, a major recommendation from this report is the systematic growing of capacity of national government sectoral bodies and the county departments to enhance the capacity to develop laws and policies that can actually facilitate the pursuit of the respective mandates without some of the challenges highlighted above.

Specific (sectoral) Trends, Findings, and Recommendations

Some of the specific findings from the sectoral analyses are pinpointed below.

Health

- » **All** the national laws and regulation relating to health should be urgently reviewed to align them to the Constitution. This will assist in facilitating better understanding and compliance by national and county staff with the devolved system of governance.
- » County governments need to put in place county implementation frameworks (County policies, laws, regulations, guidelines) for the health sector which will better guide county staff to deliver improved health services to the citizens. Specifically, county executives need

support with Legislative Drafting to enable them come up with sufficient and responsive Bills to actualize devolution .

- » The ongoing reviews of the **Health Act** should be carried out simultaneously with that of the **Public Health Act** with a view to repealing the **Public Health Act** and including its provisions in the **Health Act**.
- » There should be a harmonization of laws, policies, and regulations in order to ensure that fees and other charges paid for licensing/ regulating health facilities are not excessive. E.g. Amendments to the Kenya Medical Practitioners and Dentist Board regulations require counties to pay fees annually.
- » Any amendment bill on any of the reviewed laws that may be pending before parliament (e.g. the Miscellaneous Amendment Bills) should be reviewed to incorporate the recommendations of this audit and then subjected to public participation in line with the constitution.
- » The laws and legal notices establishing parastatals in the health sector should be reviewed and relevant inter-governmental consultations held on how the institutions with mandates that include county functions can be re-structured if they are not wound up.
- » The laws affecting the licencing and registration of health personnel need to be clarified to indicate the role of county governments in regard to health professionals noting that the regulation of professionals is a national government function while counties are employers of professionals and providers of licences to facilities that provide county health services. Furthermore, regulatory services should be decentralized in order to ensure effective supervision of health service provision across the country.
- » Now that the constitution contemplates the implementation of provision of ratified international treaties, it will be important for the drafters of laws at the national and county levels to factor these provisions in the laws.

Public Finance Management

- » A review of sector laws and policies should address the issue of the budget cycle during election years. Given that elections are held in August, it is necessary that the budget cycle begins earlier in the preceding financial year so as to ensure that the budget is passed before the August election.
- » Laws and policies should be revised to provide for a clearer and more certain process of public participation in the management of public finances
- » There is a need for certainty in the schedule of disbursements to counties. Delays in the disbursements occasion disruption of services and salary delays in counties
- » There should be a remedy to counties where there is a delay in the passing of the County Allocation of Revenue Act (CARA). It is suggested that counties should be allowed to access up to 50 percent of allocations where there is undue delay in finalising the CARA
- » Counties should develop regulations and measures to ensure adherence to county budget estimates and ceilings in actual county expenditure. There should be adherence to the County Fiscal Strategy Paper (CFSP) and the County Medium Term Plan (MTP)
- » The law should be amended to provide more time for the counties to digest the Budget Policy Statement as this is critical to the planning and budgeting for county resources
- » The proposed law on the Ward Development Fund should provide for a bottom-up planning and utilisation of the fund in order to make it a truly grassroot fund. The level or amount of fund should also be rationalised vis-à-vis the mainstream funding from the county governments.

Agriculture

- » While a number of laws have been repealed in the sector, a majority of the relevant legislation to the sector require an overhaul for compliance with the Constitution.
- » The Ministry in-charge of Agriculture has many institutions whose mandate overlaps with county governments. The recommendations of the 2013 Parastatal Taskforce should be reviewed and applied to the agricultural sector in order to restructure and rationalise the roles played by the numerous Semi-Autonomous and Autonomous Government Agencies in the Sector (SAGAs) in the sector.
- » Furthermore, there is a need to relook, in a holistic manner, the functions performed by the SAGAs vis-à-vis the role of counties in the Constitution. The Agriculture Sector is one of the sector whose functions are mainly devolved and performed at the county level and this should be reflected in the policy, legal and institutional arrangements of the sector.
- » Development of sector policies provides a space and opportunity for negotiating functional boundaries for concurrent function if any and achieving coherence in the sector. A number of policies have been proposed and these should be developed on the basis of consultation and cooperation.
- » It is important that all laws and policies are developed on the basis of Vision 2030, the country's economic blueprint as well be alive to devolution. This is especially important for agriculture, which is the country's largest economic sector.

Trade and Investments

- » The Trade Sector lacks a legislation that guides the development and growth of the sector with a view of bringing together all related trade legislations at the National level to central body that coordinates the implementation of the Trade Policy.
- » It is recommended that all the parastatal institutions established under Legal Notices (eg. Kenya Accreditation Service (KENAS) and Export Promotion Council (EPC) should be reviewed and be established under Acts of Parliament.
- » The Public Private Partnership Act, 2012 should be reviewed to ensure make it easier for both National and County Governments to finance huge infrastructural development projects.
- » Any Amendment Bill on any of the reviewed laws that are pending before Parliament (eg. Micro and Small Enterprises) Bill, (Senate bill No. 12 of 2015) should be reviewed to incorporate the recommendations of this audit and then subjected to public participation.
- » A number of key National legislation (eg. Special Economic Zones Act, 2015 and Export Processing Zones Act, Cap. 517) the responsible National Government agencies should work with County Governments to review the legislations in a view of providing the roles of each level of Government.
- » The majority of the National legislation do not cater for County Government representation in the Boards and Committee structures yet the legislation cover important trade and investment issues affecting Counties.
- » Any National Policies pending (eg. National Investment Policy) should be reviewed conform to the CoK, 2010 and then subjected to public participation.

Land and Physical Planning

- The Physical Planning Act requires a fundamental review in order to reflect the extensive post-2010 changes.

- » The Physical Planning Bill does not adequately reflect the changes brought by the current Constitution.
- » The Community Land Act does not reflect the roles of the county governments and the National Land Commission, yet these bodies have substantive roles to play in the administration of community lands.
- » Address the inconsistencies and contradictory provisions in the Land Registration Act, Community Land Act and the Land Adjudication Act

Urban Development

- » The National Land Policy (2009) should be reviewed to provide for the role of the National Land Commission and county government in urban land use planning and policy.
- » The National Urban Development Policy 2016 should be reviewed to incorporate provisions of Article 67 of the Constitution (the role of the National Land Commission). The policy should also have the input of the county governments .
- » The National Housing Policy should be reviewed to include devolution arrangements and specifically recognise the role of counties in substantive areas of policy implementation. Specific areas include: slums and informal settlements, rural housing, land use planning and management, estate management and maintenance, etc.
- » Similarly, the National Slum Upgrading and Prevention Policy should include the role of counties in ensuring proper human settlements and housing.
- » The National Spatial Plan (2015 – 2045) should be revised to incorporate constitutional arrangements regarding urban planning and development, especially as they relate to county governments and the role of the National Land Commission.
- » The Urban Areas and Cities Act should be reviewed to provide more clearly on the roles and limits of National Government, county government entities, and the National Land Commission on issues of urban planning and development.
- » The Urban Areas and Cities Act should provide for and facilitate, a in a clearer manner, inter-county planning and financial services.
- » The Physical Planning Act (PPA) of 1996 should be overhauled to take into account the existing governance arrangements and post-2010 regimes for physical planning .

Natural Resource Management

Forests: Forest Conservation and Management Act 2016

In the Forestry Sub-sector, the laws and policies should recognise the central role that counties play in conserving forests. The counties play an important role in the implementation of national policies and legislation and the legal framework governing this sub-sector should take the role of counties into consideration in the following areas:

- » **Benefit Sharing:** clear mechanism for benefit sharing of forest resources with the counties and the community.
- » **Charcoal:** Framework for sustainable charcoal regulation and alternative energy sources and livelihood mechanism.
- » **Chain of custody:** Develop a chain of custody for forest products from the community and private lands.
- » **Participation of counties in management of public forest:** Need for a framework of engaging Counties and communities in management of public forests.

Mining: Mining Act 2018

The Mining Act should be reviewed to provide for cooperation and consultation between the national government and county governments. Currently the 2016 Act provides for control rather than cooperation.

The land management aspects of mining should reflect the role of counties, especially in unregistered community lands. This is not given any recognition or treatment in the Act

- » There is a narrow Interpretation of the Article 62(1) (F) provides that minerals are vested in the national government. The Mining Act interpretation of this clause does not appreciate the fact that county governments and communities are critical stakeholders that have to buy in to a mining proposal. This narrow interpretation can be blamed for the short timelines provided to county governments and communities to object to the issuance of a mineral rights (license).
- » as well as a legislative framework that is biased towards large scale mining – to the detriment of counties and communities.
- » This has affected transparency and accountability of the provisions and institutions in the act. It has neglected artisanal and small-scale mining which have the potential of becoming large revenue sources for counties.
- » This neglect may result in serious environmental, health and safety concerns to citizen caused by concentrated artisanal mining which is poorly regulated.
- » Local content provisions in the act are investor driven and are not linked to development and capacity building plans of the counties.
- » The act suffers from an incomplete revenue management infrastructure and unclear fiscal regime.
- » Finally, counties not adequately engaged in regulation development and review. A lacuna was identified in the post legislative scrutiny mandate of the committee on delegated legislation in the National Parliament (National Assembly and Senate).
- » The mining act was developed without an approved policy to guide the sector. The policy has yet to be approved by the National Parliament which means this review was not based on a known policy baseline. To assist this process and ensure that international best practice inform the development of a financially beneficial and environmental sustainable extractive sector county governments must lobby National Government to develop and Parliament to approve an extractive sector policy that would guide extractive law which includes Mining.

Environment: The National Environmental Policy 2013 and EMCA 2015

The National Environmental Policy 2013 should be revised to incorporate the role of county governments in implementing national policies and standards as spelt out under Part 2 of the Fourth Schedule to the Constitution

- » Specific areas of involvement of county governments include:
 - Human settlements
 - Management of biodiversity
 - Energy use
 - o Efficiency and conservation
 - o Air quality

for implementing devolution) were expected to put in place essential systems to enable county governments to perform their functions.

The transition period provided an important opportunity to align governance structures and facilitate the full implementation of devolution. For instance, while the powers and functions of county governments are given through a scheme division of functions in the Fourth Schedule to the Constitution. There is a need for even a basic clarity of the nature and extent of national and county government responsibilities. There are two lists of functions in the Fourth Schedule: one for the national government, and the second for the county government. However, the Constitution also provides that functions that do not appear in any of the lists belong to the national government. Furthermore, the Constitution provides that functions that appear on both lists are concurrent and can be exercised by either level of government, subject to criteria provided under Article 191 of the Constitution.

First, the transition period was expected to provide clarity on the full extent of responsibilities as provided for in the general and vague scheme that is under the Fourth Schedule. Secondly, the two transition phases provided an opportunity to build the capacity of both levels of government to ensure the effective of handling of their respective mandates. Thirdly, the transition phase provided space for the re-alignment of institutions at both levels of government to reflect the new constitutional scheme of governance.

An important part of this restructuring is the policy and laws of both levels of government. Ideally, at the end of the second phase of transition, we should have had in place a comprehensive system of laws and policies that facilitate the constitutional mandate of both levels of government. However, as the subsequent chapters of this report demonstrate, challenges still abound. The report points to incompleteness of the transition as regards laws and policies across the different sectors examined. The seven sectors examined are: health, public finance, trade and investments, land and planning, urban development, and natural resource management.

1.2 Transition to County governance

The transition provisions in the Constitution put in place a number of measures to ensure a smooth transition to county governments. First, the Fifth Schedule to the Constitution provided a schedule of legislation that was to be enacted before the March 2013 election. These included laws on devolution and public finance. Secondly, the Constitution provided for the establishment of independent institutions to shepherd the implementation of devolution. The Transition Authority was established by enabling legislation.¹ The Constitution established the Commission for the Implementation of the Constitution (CIC) with a 5-year mandate (which commenced in January 2011) of overseeing the implementation of the Constitution, including laws and policies, for the first five years.

The TA's role was crucial; the body was tasked with clarifying national and county responsibilities², costing the functions,³ and building the capacity of national and county governments to undertake their responsibilities. The CIC, on the other hand, was tasked with vetting proposed legislation and policies to ensure compliance with the current constitutional dispensation.

However, at the end of the first transition phase, a number of laws and policies were not yet in place. Ideally, it was expected that the TA would have unbundled the Fourth Schedule and clarified the nature and extent of responsibilities for the two levels of government. In turn, this

1 Transition to Devolved Government Act (2012).

2 Section 7 (2) Transition to Devolved Government Act (2012).

3 Section 7 (2) (b).

1

INTRODUCTION

1.1 Background

The Constitution of Kenya, which was adopted in August 2010, introduced fundamental reforms to state and governance structures. At the core of this radical and fundamental restructuring is the devolved system of government, which comprises of the national government and 47 county governments that are established across the country. To each of these 47 devolved units, legislative and executive powers were devolved and vested in elected arms of government comprising the county assembly and the county executive. Indeed, Kenya's devolution has been termed as the most important post-World War II change in devolved governance after post-Franco reforms in Spain, and post-Apartheid South Africa.

In order to make concrete this two-level system of government, the Constitution guarantees resources, powers, and functions for the county governments. The Constitution provides for minimum revenue (15 percent of revenue collected nationally) to be provided to counties and lists functional areas, which county governments can exercise powers over. County governments are currently in their second term, after the August 2017 general election having gone through the first term from March 2013 to August 2017.

The objectives and purposes of devolved government are clearly set out in the 2010 Constitution. The 47 county governments are required to use their powers and resources to pursue development priorities of communities across the country. Furthermore, county governments are required to pursue development in accordance with democratically agreed priorities at the county level. The powers and resources devolved to counties are expected to facilitate national unity through recognition of local diversity. County government resources and powers have a potential to ensure socio-economic and political inclusion and thereby contribute to the consolidation of national unity. This extends to protection of minorities and marginalised communities in the counties. Finally, county governments are expected to pursue and ensure the democratic check and separation of powers to ensure accountability.

However, Kenya is emerging from a strongly centralised and unitary system of government, which as inherited from the colonial era. While there was a brief attempt (at independence) to introduce a regional system of government, commonly referred to as majimbo, the system did not last long and was dismantled shortly after its introduction. Kenya's governance structures have, therefore, always been centralised with no real devolution or sharing of powers between the centre and sub-national units.

Accordingly, the Constitution and enabling legislation provided for two phases of transition in order to put in place laws, policies, institutions, and systems to facilitate the effective implementation of devolution. The first phase commenced immediately after the promulgation of the Constitution in 2010, and lasted until March 2013 when the pioneer county governments came into place. The second phase commenced after the entry of the first county governments and lasted for three years, until March 2015. During this period, county governments (and institutions responsible



- o Noise control
- o Water and sanitation
- » EMCA to ensure effective engagement of counties in the review, supervision, monitoring and auditing of EIAs; and
- » Criteria should be provided in selection of County Environment Committee
- » EMCA is not clear on who facilitates the Committee
- » The Role of the County Environment Committee should be clear
- » The law should be clear on social safeguards

Water: Water Act 2016

The Water Act 2016 does not provide clearly for the division and alignment of functions between the national government and the county governments. The Act should be revised to incorporate the principles of devolution, clarify the relations between counties and water sector institutions, and the two levels of government .Specific issues/ roles of counties that should be clarified include: sanitation and water services, water resources management, etc.

- » The Establishment of the Water Sector Trust fund is procedural given all water funding should be channelled through the constitutional structures such as annual funding and equalisation funds.
- » Water Works Development Agencies and National Water Harvesting and Storage Authority would be taking over powers of the county governments to develop water works and infrastructure to deliver water and sanitation services, a function constitutionally assigned to the county governments. This includes the design, borrowing for financing and implementation of water works development. Secondly, county governments argue that the agencies proposed undermine the ability of county governments to establish cross county waterworks or projects through joint committees or authorities established by the counties. Article 189 (2) of the Constitution empowers counties to establish joint committees or authority to implement projects that are cross county in nature.
- » There is no representation of Counties Governments in the Water Service Regulatory Board(WASREB) although there is room for the regulatory board to work with the county governments in enforcing certain regulatory requirements including terms of service provision.
- » Water Resource Authority(WRA) being an agent of the National Government cannot coordinate the County Government this will take the powers of the county government in management of water resources, there is also no representation of the County Government on the WRA Board.
- » The Kenya Water Institute Act of 2001 should be revised to incorporate the water sector governance arrangements and specifically the role of counties .

would have laid a clear basis for legislative and policy frameworks at both levels of government, especially at the entry point of county governments.

While the laws on devolution that were specified in the Fifth Schedule were all enacted, the list did not contain all essential laws to facilitate county operations. Indeed, a number of laws, which are critical for sectoral operations were not included in the schedule or calendar of laws that were to be passed under the 5th schedule to the Constitution. Thus, county governments commenced operations in the various sectors without a clear and coherent national legal and policy framework.

The second phase of transition to devolution ended with the exit of the Transition Authority in March 2015, three years after the March 2013 general election. The objective of the second phase was to ensure that county governments have essential systems (including laws and policies) in place, to ensure service delivery and pursuit of devolution objectives. However, at the end of the second phase of transition, a number of issues (including laws and policies) remained unresolved.

First, the TA did not complete the process of unbundling powers and functions of the national and county governments, a fact that was acknowledged in the TA's exit report.⁴ In its June 2015 report, the TA noted the "slow review/ realignment of laws touching on devolved functions" and specifically "developing of a framework for to guide the analysis and performance of concurrent functions" as an outstanding issues as at the end of the term of the TA.⁵

The process of functional assignment is an important one as it offers a guiding framework for functions and powers for the two levels of Government. In terms of policy and legislative analysis, functional assists in:

- » The process of developing of policies and laws by the county governments that support implementation of their functions (devolved functions);
- » Reviewing of the constitutional conformity of existing laws within the national government;
- » Assessment of the policies and laws developed by the county government in regard to constitutional conformity and compliance with the devolved system of government; and
- » Identification of policy and legislative gaps that exists especially within county governments in the functional areas within their jurisdiction.

Accordingly, functional assignment and the corresponding legislative and executive powers forms a conceptual basis for determining constitutional compliance of policies and laws at the two levels of government. Moreover, this too facilitates to identify areas within the agricultural sector where county government have legislative and executive powers, but they are yet to engage in the process of policy formulation and enacting of the requisite legislation for devolved functions. Likewise, the framework supports the review of the exercise of executive powers in administering services as well as implementing laws; county laws or national government laws where there is a requirement of their implementation by the county governments.

While the TA transferred certain functions to counties via three gazette notices, components of the functions transferred were not clear and this still created a problem of ambiguity. An assessment of implementation of county functions, by the Commission for the Implementation of the Constitution (CIC) in August 2015, noted this particular issue. The CIC report observed that certain functions were "not being implemented by county governments because of lack of clarity"; the reported cited examples of betting control and licensing.⁶

4 Transition Authority, The Status of Transition to Devolved Government, 2014, at p.27

5 As above.

6 Commission for the Implementation of the Constitution, End Term Report, 122.

Accordingly, at the end of the final phase of transition, a lot of issues regarding realignment of laws and policies were left pending. Pending functions of the TA, at the end of its term, were transferred to the Intergovernmental Technical Relations Committee (IGRTC) as was provided for under section 12 (b) of the Intergovernmental Relations Act.

During this period, the Council of Governors undertook the first legal and policy audit of laws and policies in order to ascertain their compliance with the Constitution.⁷ In the first audit report, which was completed in April 2015, the CoG identified a number of gaps across 10 sub-sectors that were examined during the study:

- » Agriculture
- » Water and sanitation
- » Arid and Semi Arid Areas
- » Roads
- » Public Finance, Commerce, and Economic Affairs
- » Environment and Natural Resources Sector
- » Land and Urban Development
- » Education and Information Communications and Technology (ICT)
- » Health
- » Trade, Commerce and Investments.

In each of these sectors proposed and existing laws and policies were examined and sector-based recommendations proffered. Among the main concerns that ran across the sectors was the lack of adequate consultation between the national and county governments in the development of laws and policies of mutual concern. The institutional arrangement for collaboration and cooperation is weak or totally lacking and this created a disjointed policy-making process. The main proposal in the audit was the development of comprehensive sector plans that incorporate the views of both levels of government with regard to performance of functions, sharing of resources and responsibilities, and overall sector coordination and performance.⁸

1.3 Post-transition Phase: same challenges?

There is marked and substantial progress from the transition phase to the current phase (second term of county governments). Counties have developed and passed a number of laws and policies in various sectors. This is as a result of various capacity building measures that have led to the generally increased capacity of counties to develop laws and policies. Across the sectors examined, we have we have two broad categories of laws. First, there are laws that were passed before the promulgation of the current Constitution in August 2010. As the subsequent chapters will demonstrate, a bulk of the legislation examined in the seven sub-sectors precedes the current Constitution. While the Constitution provides that pre-2010 laws should be interpreted and applied in a manner that fits within the current constitutional dispensation,⁹ the fact that there are no express provisions that apply to the current set-up and the prevailing constitutional ambiguities have rendered this provision inoperative.

Secondly, there are laws that were passed after the promulgation of the Constitution. Within this second category, there are two further sub-categories of legislation. The first is laws that, although passed in post-2010, they were passed before the pioneer county governments came into place. Accordingly, the counties did not manage to make an input at the development stage

7 Council of Governors, 'Sectoral Policy and Legislative Analysis' (April 2015)

8 Council of Governors, 'Sectoral Policy and Legislative Analysis' (April 2015) p. 9.

9 Section 7, Fifth Schedule Constitution of Kenya 2010.

of these laws. Predictably, many of these laws have provisions that infringe on the powers and functions of county governments. The second sub-category is that of laws that were developed with the active participation of the county governments. While many of these laws have taken into account areas of shared jurisdiction between the two levels, there are a number that still have glaring gaps in terms of functional boundaries between the two levels of government.

The national government plays an important role in shaping policies in sectors. However, the development of policies is yet to be fully consultative. There are no proper structures for intergovernmental consultation in the development of policies by the national executive. Furthermore, there is no concrete avenue (except during public participation) through which counties are able to make their input in the development of national legislation. The end result is that, in some cases, we end up with national laws and policies that do not the constitutional threshold.

There are a number of laws and policies that require revision in order to align with the constitution. With regard to policies there are a number of policy documents that require revision, update, or a wholesome revision and introduction of new policies.

1.4 Cross-sectoral issues in Policy and Legislation

The Constitution of Kenya 2010 has impacted Kenya's legal and policy process in a substantial manner. First, under the previous dispensation, policy-making and law making was a centralised affair where the national executive and the unicameral legislature exercised exclusive powers over laws and policies. However, the Constitution has now carved out law and policy-making powers for the county level. However, this separation of responsibility stands alongside common constitutional goals and objectives that must be pursued harmoniously by the two levels of government. For instance, the principles and values enunciated under Article 10 of the Constitution bind all state institutions including the two levels of government. Furthermore, objectives and principles of devolved government that are listed under Articles 174 and 175 bind both levels of government.

These broad provisions translate to a need for a common and harmonious way of developing laws and policies that are applicable to the national and county levels respectively. Vision 2030 is the country's economic, social and political blueprint. It outlines the steps that the country intends to take in order to reach the desired level of economic, social and political development by the year 2030. Accordingly, the import of Vision 2030 is to lay a common basis for national and county policies and laws. The two levels of government are expected to (re)align their activities, development plans, and general governance processes towards realisation of the specific targets that have been put identified in Vision 2030. The overall goal of Vision 2030 is to make Kenya a newly industrialised country "middle income country providing high quality of life for all its citizens by the year 2030".¹⁰ The broad vision is broken down into three important components: the economic, social and political pillars that will lead to the achievement of the overall vision.

The objectives of devolved government clearly demonstrate that county governments play a central role with regard to the economic, social, and political development. Indeed, county governments are seen as important vehicles through which local development and delivery of essential services will be channelled. Ideally, the policy and law development process at both levels of government should have in place a coordination process where all plans, laws, and policies are aligned to Vision 2030.

Furthermore, the ideal position is that policies should inform the development of laws at both levels of government. In this regard, the National Government has a broad policy-making power.

10 Republic of Kenya 'Vision 2030' (2007) 1.

Accordingly, national policies and laws should provide a broad legal and policy framework for the development of county laws and policies. However, this has not always been the case. In many cases observed in the subsequent chapters, laws have been developed without the attendant policies at both levels of government. In other cases, policies and laws are developed without adequate consultation between the two levels of government. These issues happen across the sectors and the main challenges, which seem to appear across all the sectors, are briefly highlighted below.

Ambiguities in Implementation

Due to the incomplete transition highlighted above, national and county governments continue to perform functions without a clear division of responsibilities as envisaged in the Constitution. The area of concurrent functions (which can be performed by either level) for instance poses a challenge due to the uncertainty of the extent of responsibilities for counties in the shared areas.

Thus, there is confusion in national and county legislation and policy. There is a need for continuation and completion of the unbundling process in order to have clarity, as this will inform law and policy development across board. This can only be achieved through strengthened collaboration between the policy-making organs at the national and county levels.

While courts have stepped in and made pronouncements in cases or through advisories, the nature of court cases is that they do not engage in policy matters or make broad-based policies. Indeed, even where county governments have been vested certain functions through judicial determination, there is a need for broad-based policies and laws to facilitate sectoral coordination. Court cases are neither a comprehensive nor systematic ways of aligning policies and laws as this is best done through a collaborative approach by law and policy-making organs at both levels.

Inadequate consultation and cooperation

The Constitution places cooperation and consultation at the centre of the current constitutional dispensation. The only way that the two levels of government (with separate powers and resources) can pursue common constitutional objectives is through collaboration. The importance of this aspect is recognised under Article 6 (2) of the Constitution and given more substance under Article 189 of the Constitution. Counties are partners with the national government in the determination of functional boundaries. As such, the two levels of government should work closely in negotiating legal and policy frameworks.

In many of the main sectors, there are intergovernmental committees that are composed of the cabinet secretaries and the respective county executive committee members. There are many instances that county governments participate through these structures and give their inputs to laws. However, the input of counties is, in many instances, not taken when laws are finalised in Parliament. As a result, many national laws and policies are passed in a near unilateral manner. Yet, the Constitution is clear that both levels of government should consult on areas of mutual interest. The failure to give a practical effect to the concept of cooperation and consultation has affected the development of laws and policies.

Incomplete Transition and the persistence of the Pre-2010 Order

There are a number of laws and policies from the old order persist and continue in a number of sectors. The fundamental changes introduced by the Constitution require a policy, legal, and institutional restructuring in order to fit with the current constitutional precepts.

In many of the sectors, notably Agriculture, Health, Physical Planning, Trade and Investments, there are old laws that have not been revised to facilitate or reflect the new roles that county governments are playing in those sectors. In most of these cases, there has been no impetus

to revise the old laws and the persistence of the old order is evidenced by a number of laws with provisions that are unconstitutional. One of the major recommendations from this report is to have a specific review of all laws and policies in the identified sectors in order to ensure compliance with the current system of devolved governance.

Capacity

While there is growing capacity in counties, there is a constant and consistent need for capacity to match up the constitutional mandate that has been given to counties. Counties have a primary mandate to develop laws and policies to cover all areas allocated to them under the Constitution. While a number of laws have been developed, there is a mismatch between the legal and policy needs and the number of laws and policies currently in force in the counties.

Finally, laws and policies are only as useful as the matching capacities to ensure that counties are able to utilise laws and policies in order to provide concrete services and perform other functions. This calls for a holistic review of the capacity requirements of counties in order to ensure that once good laws and policies are development, they actually facilitate the achievement of the intended benefits to county governments.

2

HEALTH

2.1 Introduction

The devolved system of government substantially altered the structures and institutional arrangements for the provision of health services in the country. The Fourth Schedule, which allocates responsibilities between the two levels of government, vested the county governments with a core role of providing basic health services while national health policies, standard setting, technical support for capacity needs and national level health services (referred to as national health referral services) were retained at the national level. Prior to 2010, the local authorities played a dismal role in public health services with only 3 to 4 larger municipalities (out of the 175 former local authorities) offering some basic health services.

More importantly, the Constitution recognised, for the first time in Kenya’s constitutional history, the fundamental right to health. Article 43 (1) provides that “every person has a right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care”. Along with the right to health, the Constitution provides for the right to accessible and adequate housing, clean and safe water, and social security, among other social and economic rights. All of these rights support the broad realisation of the right to health.

The recognition of the right to health translates the provision of those rights to a duty of the national government and the county governments levels, in accordance with the framework that is set out under the Fourth Schedule to the Constitution and the relevant Transitional Authority gazette notice that unbundles the functions in the Fourth schedule. Furthermore, even before the promulgation of the Constitution, the Country had committed itself to various regional and international human rights instruments that required state parties to implement and facilitate the realisation of the right to health. Article 2 (6) of the Constitution provides that “any treaty or convention ratified by Kenya shall form part of Kenya under this Constitution”. Accordingly, realisation of the right to health is not only a constitutional imperative but also a realisation of Kenya’s external commitments to realise the right to health.

Table 1: Regional and International Instruments on the Right To Health

Provisions Of International Instruments	Key Focus
<p>Article 12 <i>The International Covenant on Economic, Social and Cultural Rights (ICESCR)</i></p>	<ul style="list-style-type: none"> Recognizes the right of everyone to the highest attainable standard of physical and mental health.
<p>Article 5 <i>The International Convention on the Elimination of racial Discrimination (ICERD)</i></p>	<ul style="list-style-type: none"> Provides for non-discrimination in the enjoyment of rights including the right to public health.

Table 1: Regional and International Instruments on the Right To Health

<p>Article 5 The International Convention on the Elimination of racial Discrimination (ICERD)</p>	<ul style="list-style-type: none"> ▪ Provides for non-discrimination in the enjoyment of rights including the right to public health.
<p>Articles 10 and 12 United Nations Convention on the Elimination of All forms of Discrimination Against Women (CEDAW)</p>	<ul style="list-style-type: none"> ▪ Shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.
<p>The African Charter on Human and People rights (Banjul Charter)</p>	<ul style="list-style-type: none"> ▪ Provides that every individual shall have the right to enjoy the best attainable state of physical and mental health.
<p>Article 14 The African Charter on the Rights and Welfare of the Child (ACRWC)</p>	<ul style="list-style-type: none"> ▪ Provides that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.
<p>Article 24 UN Convention on the Rights of the Child (CRC)</p>	<ul style="list-style-type: none"> ▪ Recognizes the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.
<p>Article 25 UN Convention on the Rights of Persons with Disability (CRPD)</p>	<ul style="list-style-type: none"> ▪ Provides for the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability.

Implementation of the health sector reforms, in view of the new constitutional framework, requires the alignment of laws and policies to the current constitutional order. As a result, there is a need for new laws at the county level and revised or new laws at the national level. Additionally, the redistribution of functions between the two levels affects the restructuring of institutions in the health sector. This audit reviews the laws and other legal instruments establishing these institutions to ensure that to the extent that they carry out functions that have been devolved, they will need to be restructured to ensure compliance with the constitution.

The Constitution of Kenya 2010 is, therefore the primary standard for guiding the audit of the policies and legislation on Health; it is expected that the actual drafting of the revised/ amended policies and laws following the recommendations from this audit, will take on board the other relevant technical issues concerning the sector.

To guide the implementation of laws and policies, the Transition Authority developed a framework for understanding, in a greater detail, the functions transferred to counties. This is contained in a gazette notice that was published in August 2013. The details of the various functions are provided in the table below.

Table 2: County Government Functions in the Health Sector

Function	Content of functions
County health facilities	<ul style="list-style-type: none"> • County hospitals • Sub-county hospitals • Rural health centres • Dispensaries • Rural health training and demonstration centres, • Rehabilitation and maintenance of county health facilities including: <ul style="list-style-type: none"> ○ maintenance of vehicles, ○ medical equipment and machinery, ○ Inspection and licensing of medical premises including reporting.
County health pharmacies	<p>Specifications, quantification, storage, distribution, dispensing and rational use of medical commodities Provided that until alternative intergovernmental arrangements are made, all counties shall procure medical commodities from the Kenya Medical Supplies Authority except where a particular commodity required by a county government is not available at the Kenya Medical Supplies Authority;</p>
Ambulance services	<ul style="list-style-type: none"> • Emergency response • Patient referral system
Promotion of primary healthcare	<ul style="list-style-type: none"> • health education, • health promotion, • community health services, • reproductive health, • child health, • tuberculosis, HIV, malaria, • school health program, • environmental health, • maternal health care, • immunization, • disease surveillance, • outreach services, • referral, • nutrition, • occupation safety, • food and water quality and safety, • disease screening, • hygiene and sanitation, • disease prevention and control, • ophthalmic services, • clinical services, • rehabilitation, • mental health, • laboratory services, • oral health,

Function	Content of functions
Promotion of primary healthcare	<ul style="list-style-type: none"> • disaster preparedness and disease outbreak services. • planning and monitoring, • health information system (data collection, collation, analysis and reporting), • supportive supervision, • patient and health facility records and inventories;
Licensing and control of undertakings that sell food to the public	<ul style="list-style-type: none"> • food safety and control;
enforcement of waste management policies, standards and regulations	<ul style="list-style-type: none"> • refuse removal (garbage): <ul style="list-style-type: none"> ○ provision of waste collection bins, ○ segregation of waste at source, ○ licensing of waste transportation; • refuse dumps including: <ul style="list-style-type: none"> ○ zoning waste operation areas, ○ conducting environmental impact assessment for the siting of dumps, ○ fencing of dumps, ○ controlling fires, ○ monitoring waste.
Veterinary services	<ul style="list-style-type: none"> • coordinate and oversee veterinary services including clinical services • artificial insemination, • reproductive health management

2.2 National Policies

The national government under the new constitution is charged with the responsibility of policies and strategies definition while counties are responsible for the implementation of the same to guide the health service delivery. Aligning policies to the new constitution is vital to guide the two levels of governments in achieving national priorities in order to avoiding policy implementation failure. Policies defines the action plan and identifies the responsibilities of each level of government in order to achieve the policy set objectives. Thus, failure to articulate the policies in relation to the implementation level creates confusion and duplication of functions leading to wasted resources.

Policies also define the resources both financial and human, required to implement the policy. Hence when a policy does not articulate the process of provision and the role of the level of government that is responsible, the priorities are not well financed or supported with necessary human resources for their implementation.

In addition, policy implementation may rely on development of new systems to facilitate the implementation of the planned priorities and unlock the foreseen progress accruing from the policy implementation. Furthermore, coordination between the two levels of government allows smooth implementation, follow up, and common understanding. When such systems are not put in place due to lack of policy or strategy clarity, the two levels of government do not have an idea of what the other is doing. This makes monitoring of achievements accruing from policies and strategies from a national level impossible. If results of a policy or strategy cannot be confirmed, then the policy is deemed failed.

The purpose of audit of the policies and strategies in the health sector has been to confirm the extent to which the policies are aligned to the new constitution and identifying areas that need to be addressed ensure the policies and strategies are aligned to achieve the set objectives thus avoiding policy/strategies failure. The audit examined the following policy documents.

National policies

- » Kenya Health Policy, 2014-2030
- » Kenya National e-Health Policy, 2016-2030
- » Health Information Systems Policy
- » The National Food and Nutrition Security Policy (NFNSP) - Kenya
- » Mental Health Policy, 2015 – 2030
- » HIV and AIDS Policy, (2009)
- » National Reproductive Health Policy: Enhancing Reproductive Health Status for all Kenyans, (2007)
- » Kenya Adolescent Reproductive Health and policy, 2015
- » National Maternal, Infant and Young Child Nutrition, Policy Guidelines, 2013.

Strategies

- » Transforming Health: Accelerating Attainment of Universal Health Coverage: Kenya Health Sector Strategic and investment Plan (KHSSPI) July, 2013 –2017
- » The Kenya National Strategic Plan on Tuberculosis, Leprosy and Lung Diseases, 2015 – 2018
- » Tobacco Control and Prevention Strategy Towards Tobacco Free Kenya, 2012 – 2017
- » Kenya National Strategy for the Prevention and Control of Non-Communicable Diseases, 2015 – 2020
- » The National Cancer Control Strategy, 2017 – 2022
- » Health Sector Human Resources Strategy, 2014-2018
- » Kenya Health Sector Referral Strategy, 2014–2018.

Detailed recommendations are provided in the tables. However generally, a number of policies require complete overhaul because they are out-dated. A number need to be reviewed to clearly define the role of counties as the implementing agencies. All policies and strategies require a plan for dissemination and domestication at county level to address the specific need of each county.

Table 3: A Review of the Applicable Health-Sector Policies Tabulated in a Matrix

Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>Kenya Health Policy, 2014-2030</p> <p>Objective:</p> <ol style="list-style-type: none"> 1. Eliminate communicable conditions 2. Halt and reverse the rising burden of non-communicable conditions 3. Reduce the burden of violence and injuries 4. Provide essential healthcare 5. Minimize exposure to health risk factors 6. Strengthen collaboration with private and other health-related sectors 	<ul style="list-style-type: none"> ▪ The policy complies with Devolution as it identifies the mandate of each level of government. ▪ However, it is not possible to confirm the level of implementation. ▪ There is also need to confirm the extent to which counties are aware of the policy and if they are using it. ▪ Also, it is important to establish the number of counties that have domesticated the policy to meet their unique needs and set up their priorities and investments. 	<ul style="list-style-type: none"> ▪ There are residue functions still under national government especially under the national parastatals and Sagas that need to be addressed. ▪ Such institutions include NACC, NHIF, all human resource responsible for registering and regulating human resource for health ▪ Except for KEMSA, all parastatals under the national government are not devolution compliant but they are undertaking county functions. Such organizations include NACC, the Kenya Blood Bank, Kenya Poisons Board, all bodies that register and regulate health workers. 	<ul style="list-style-type: none"> ▪ Need to review the policy at midterm to allow adjusting changes that have resulted due to deepening of devolution. ▪ Identify all parastatals that are undertaking county functions in contravention of the constitution and have them change to be inter-governmental institutions. Such parastatals include NHIF, NACC etc. ▪ All residue functions that are county functions that are performed at national levels need to be devolved.
		<ul style="list-style-type: none"> ▪ The policy is fully operationalized at national level ▪ Poor dissemination of the policy at county levels mean poor implementation due to lack of in depth understanding of objectives and orientation. ▪ It is not clear the number of counties that are aware of this policy and that have customized the policy to address issues that are unique to the counties. ▪ The policy proposes a universal health care with counties participating. 	

Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>Kenya National eHealth Policy, 2016-2030</p> <p>Towards attainment of the highest standard of health through adoption and use of ICT</p> <p>Objective:</p> <p>To create an enabling environment for the</p> <ul style="list-style-type: none"> ▪ Sustainable ▪ Adoption, ▪ Implementation and ▪ Efficient use of e-health products and services at all levels of health-care delivery in Kenya. 	<ul style="list-style-type: none"> ▪ The development of the policy included participation of both national and county governments. Participation of the counties is key because 95% of health care is provided at the county levels that would benefit from elaborate eHealth systems to improve health services. ▪ Given that eHealth policy cannot be implemented in isolation, this document is anchored on the policy frameworks provided by the Kenya Health Policy (2014 - 2030), Health Information Policy (2014 - 2030), and the ICT Policy 2006. ▪ Currently, over 35 counties have at least one eHealth project with Nairobi, Mombasa and Kisumu Counties taking the lion share of the projects. Comparatively, Peri - Urban Regions like Busia, Kakamega and Vihiga have a good number of eHealth projects while Counties in Arid and Semi - Arid Regions such as Turkana, Wajir, Garissa, Samburu, Marsabit and Mandera have the least number of eHealth systems and interventions. 	<p>This calls for reforming the NHIF to make it compliant with devolution but this is yet to be done.</p> <p>The policy is new as it was finalized in 2016.</p> <ul style="list-style-type: none"> ▪ To operationalize this policy and achieve intended objectives will require heavy investment both by the national and county levels. ▪ Need to define the role of fund raising because the level responsible is not clear. The policy seems to allocate this responsibility to national government yet counties also need to raise funds for county functions including for establishment of eHealth systems. ▪ The national government is lying cables establishing connectivity across towns including to hospital facilities. The role of the county in this regard will need to be clarified as it is not clear. 	<p>This being a new policy, there should be emphasis on dissemination so that counties can be clear on their roles and responsibilities especially on regulations of the systems that are already operational</p>

Table 3: A Review of the Applicable Health-Sector Policies Tabulated in a Matrix (Cont'd)

Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>Health Information Systems Policy Guides: The Health sector in</p> <ol style="list-style-type: none"> 1. Developing and 2. Implementing an information system capable of producing quality data and information. 	<ul style="list-style-type: none"> ▪ Over 35 countries are implementing eHealth but the ownership and implementation of the interventions/projects are by donor partners and Non-Governmental Organisations (NGOs) raising the issue of ownership and sustainability. ▪ The policy is meant to provide a regulatory framework that provides guidance on ownership of eHealth projects. This policy will minimize duplication and fragmentation of these interventions while increasing acceptability and sustainability of eHealth conventional healthcare sector. ▪ The policy includes institutional structures that include counties showing their role in the implementation of the policy. The national government role includes capacity development and standards. ▪ The policy is compliant to the extent that there exists a system that collects and collates the health information system. ▪ One system provides for standardization across the country with defined country indicators that generally show the health sector performance. 	<ul style="list-style-type: none"> ▪ Health information is collected from the lowest to the highest health facilities. Health facilities are divided between the National and County governments in accordance with each level of government mandate. 	<ul style="list-style-type: none"> ▪ Need to review the policy to align it to devolution. This will allow a two tier Health Information System (HIS) ▪ The two-tier would have overall indicators to demonstrate country's performance and progress on key health parameters that would also allow comparison with international health goals that the country has signed to:

Name of policy / Law

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3. To capture data that shows trends on the performance and progress towards achieving the health sector's objectives.
4. supports the availability of reliable and relevant health information, for planning and evidence-based decision on resource allocation for improved quality of health services countrywide.

Rationale / Concern: How to Ameliorate the Problem?

- Currently data is collected from dispensaries health centers, sub-county hospitals, county referral hospitals. The data is fed into the HIS and transmitted to the national Ministry of Health .
- The record officers are county officers but it is not clear which level of government is responsible for building their capacity, career development etc.
- The policy is inconsistent to the following extent:
 - The policy was developed before devolution with limited consultation of counties.
 - The Health Information Management Systems that existed before the current policy changed only in name to HIS. The system of data collection did not change: data is primarily collected at facility level and uploaded to the electronic system and transmitted to MOH with no management at county level. The indicators are the nationally defined indicators and there is no way of measuring county specific indicators if a county wanted to gather more detailed information through the same information system.
 - MOH has retained the management role of the data collected from the counties.

Recommendations

- The second tier/level would include county indicators to allow counties capture county specific data on priorities thus providing evidence for county decision making.
- A review would allocate responsibility on the management including analysis and use of the data and information collected at both levels of the government.
- Clarify the responsibility of each level on resource mobilization for system strengthening including human resource.

Table 3: A Review of the Applicable Health-Sector Policies Tabulated in a Matrix (Colin)

Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>The National Food and Nutrition Security Policy (NFNSP)</p> <p>Objective:</p> <ol style="list-style-type: none"> To achieve good nutrition for optimum health of all Kenyans. To increase the quantity and quality of food available, accessible and affordable to all Kenyans at all times. 	<ul style="list-style-type: none"> The policy is fully compliant with the constitution where agriculture sector is concerned. From an agriculture perspective, counties are responding with various interventions that will ensure they are food secure. From a health perspective, the operationalization is weak. The National Nutrition Action is centralized and all projects/interventions are vertically managed from the national level. 	<ul style="list-style-type: none"> The national has dictated the national indicators on which data is collected and counties cannot add any specific indicators that they would apply to their priorities or vary in terms of depth of the data collected. The MOH allocated itself the role of resource mobiliser for systems strengthening both for the human resource and the technology development. Counties thus have to take what the MOH prescribes. While this allows for standardized technological development across the country, it is not clear the level that is responsible for data collection tools- data collection is still done manually at county level facilities. 	<ul style="list-style-type: none"> The policy is still very relevant to the nutrition sector hence no need for review. The Action Plan operationalizing the policy at health sector need to let counties control their functions. The current Action Plan (2012 -2017) is contrary to the constitution and is implemented with little consultation /participation of counties. County involvement in developing future NNAP is emphasized. MOH must also let counties undertake those functions that are part of county functions.



Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
3. To protect vulnerable populations using innovative and cost-effective safety nets linked to long-term development.	<ul style="list-style-type: none">▪ The Policy is still very relevant and there are many sub-policies development addressing specific areas of intervention like the food fortification, breast milk substitutes. There are also guidelines developed under the strategic objectives that need to be disseminated and availed to counties for implementation.▪ The National Food and Nutrition Security Policy developed in 2011 is domiciled in Ministry of Agriculture but the Nutrition part is implemented by a number of Ministries including Ministry of Health for the specific nutrition interventions. At county level, the implementation of nutrition also takes a multi-sectoral approach that includes Ministries of Agriculture, Health, Education, Water and Social Protection.▪ The policy is operationalized both at national and county levels through the National Nutrition Action Plan that is implemented through the 13 Strategic Objectives.	For example, planning for nutrition commodities and procurement of the same is a county function.	

Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>Kenya Mental Health Policy, 2015 - 2030</p> <p>Towards Attaining the Highest Standard of Mental Health</p> <p>Objectives:</p> <ol style="list-style-type: none"> To strengthen effective leadership and governance for mental health. To ensure access to comprehensive, integrated and high quality, promotive, preventive, curative and rehabilitative mental health care services at all levels of healthcare. To implement strategies for promotion of mental health, prevention of mental disorders and substance use disorders. To strengthen mental health systems. 	<ul style="list-style-type: none"> Because nutrition has in the past taken an emergency perspective, counties that have emergency interventions especially the ASAL and Semi-ASAL Counties have greater operationalized policy by making nutrition a priority and increased investments unlike counties limited or no need for emergency response. The policy has limited compliance with constitution. The policy mentions the counties only once in reference to confirming the policy will be implemented at county health facilities. It does not elaborate on the how. Organization of mental health services should be in accordance with Schedule 4 of the Kenyan Constitution : The National Government shall be responsible for health policy, the national referral health facilities, capacity building and technical assistance to the counties and disaster management. The County Health Services shall be responsible for county mental health facilities, promotion and provision of comprehensive mental health care services at all levels, emergency services and an effective mental health referral system. 	<p>Compliant to the extent it is applicable to services provide by the national government.</p> <ul style="list-style-type: none"> County hospitals provided mental health services. But this is not recognized because the major referral hospital for mental health services is under the National Government where all specialists also operate from. The Board of Mental Health that the policy entrusts with the provision of the overall oversight in mental health is a national SAGA hence has no oversight over county mental health services. The policy is operationalized at National level because the largest Mental health facility is under the national Government. The level of implementation at county level is unknown. It is not also clear whether there has been dissemination of the policy and related guidelines at county level. 	<ul style="list-style-type: none"> The policy need to recognize that the bulk of mental health services are provided by both counties government. The policy mentions counties in passing but does not elaborate how the objectives would be implemented at county level or the collaboration between the two levels of governments would be enhanced. Kenya currently has inadequate data and information on the prevalence of Mental Health, Neurological and Substance Use (MNS) in Kenya. There is need to include key indicators for mental health to facilitate tracking services and prevalence levels. Need to integrate mental health with primary health care in order to broaden services, improve access to the services and reduce stigma.



Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
	<ul style="list-style-type: none">▪ The direct relationship between the national mental health services and the county mental health services shall be determined through the operational guidelines developed for this policy.		<ul style="list-style-type: none">▪ In order to achieve the objectives of this policy, a multi sectoral approach will be necessary. The key ministries include: Education, labour, security, correctional services, children services, planning, finance, legal justice system, industrialization, agriculture.▪ The policy proposes the amendment of the Mental Health Legislation to establish County Mental Health Councils that shall give oversight to mental health at county levels. There is need for broad based discussion to agree on functionality and implementation of the proposed councils vis-à-vis established county oversight roles on health provision.▪ Poor financing of mental health has contributed to lack of services. There is need to have a budget dedicated to mental health both at National and County levels. Availability of data mentioned above will facilitate evidence based planning and investments including for HR.▪ Counties need to confirm viability of establishing community health financing programmes to support mental health services.▪ Public private partnerships and voluntary private sector participation in provision of mental health services and financing need to be encouraged.

Table 3: A Review of the Applicable Health-Sector Policies Tabulated in a Matrix (Cont'd)

Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
HIV and AIDS Policy, (2009) Objective: 1. Setting Minimum Internal Requirements (MIR) for managing HIV and AIDS in the workplace; 2. Establishing and promoting programmes to ensure non-discrimination and non-stigmatization of the infected; 3. Contributing to national efforts to minimize the spread and mitigate against the impact of HIV and AIDS; 4. Ensuring adequate allocation of resources to HIV and AIDS interventions; 5. Guiding human resource managers and employees on their rights and obligations regarding HIV and AIDS.	Not compliant. It focuses on the ministry instead of addressing issues of HIV at Workplace in general and especially at county levels. Policy was developed before the new Constitution and devolution.	The entire policy is not compliant to constitution. It is implemented at national levels across all ministries even though it focus was the Ministry of Gender, Children and Social Development	<ul style="list-style-type: none"> ▪ Engage sectors that have mental health components to make targeted budgetary allocation to mental health services and programmes ▪ Develop a National strategic program on substance use prevention, treatment, care and rehabilitation. <p>(1) Need to review the policy to take into consideration changes and developments that have occurred since 2009 to address HIV/AIDS at workplace both at national and county levels.</p>

Name of policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>National Maternal, Infant and Young Child Nutrition Policy Guidelines, 2013</p> <p>Objectives:</p> <ol style="list-style-type: none"> To protect, promote and support exclusive breastfeeding for the first six months of a child's life and continued breastfeeding up to two years or beyond. To promote the timely introduction of appropriate, safe and adequate complementary foods at 6 months while continuing breastfeeding Support e-MTCT services while promoting optimal IYCF in HIV -exposed children for overall child survival Enhance optimal MIYCN in other exceptionally difficult circumstances To strengthen and accelerate family, community and health care support and mechanisms to achieve optimal MIYCN To support and enhance the provision of enabling environment for working mothers, fathers and other caregiver, both in formal and informal employment to provide optimal infant and young child nutrition To strengthen research, monitoring and evaluation systems to support policy guidance for MIYCN 	<ul style="list-style-type: none"> The policy is compliant with the constitution and in its implementation framework, the policy clearly defines responsibility of each levels of the government. <ol style="list-style-type: none"> National Level <ul style="list-style-type: none"> Provide leadership, guidance and coordination to all stakeholders providing MIYCN services. Give effect to the principles and regulatory framework of the Breast Milk Substitutes (Regulation and Control) Act, 2012 . County level <ul style="list-style-type: none"> Engage and provide oversight to CBOs, FBOs and NGOs operating in the community – strengthen coordination. Monitor the implementation of the policy across all health care levels. 	<p>To ensure standardized implementation across all counties, there is need to focus on dissemination of both the policy and guidelines and standards. There is also need to integrate the interventions of this policy with other programmes focusing on child health to achieve efficient and effective implementation.</p>	<ul style="list-style-type: none"> Need to disseminate the policy beyond the 23 ASAL and Semi-ASAL Counties. Need also to disseminate the guidelines and standards especially on breast milk substitutes. Seek to integrate the provision of this policy with maternal and child health for effective implementation.

Table 4: A Review of the Applicable Health-Sector Strategies Tabulated in a Matrix

Name of Policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>Transforming Health Accelerating Attainment of Universal Health Coverage Kenya Health Sector Strategic and Investment Plan (KHSSIP), July, 2013-2017</p> <p>Focus areas:</p> <ol style="list-style-type: none"> Increasing the numbers of KEPH interventions being provided across the Country (introduction of interventions as and where needed) Increasing the coverages of populations using the different KEPH interventions (scale up of intervention use) Reducing the household financial burden incurred at the point of access and utilization of KEPH services (reduce catastrophic health expenditures) 	<ul style="list-style-type: none"> The strategy is compliant with constitution. The implementation framework spells out each levels of government responsibilities. The strategy is operationalized at both levels of governance. However, the implementation of the strategy has been wanting as MOH has continued implementing county activities. For example, the maternity funds have been managed and disbursed by National MOH. The experience has been negative as counties have faced serious delays in disbursing the funds impacting negatively on service delivery. It is not clear how far the strategy has been disseminated to counties and aligned to counties' health investment plans. Some counties have moved ahead to establish financing schemes that cover their communities. Makeni is an example that is rolling a health care coverage for the poor. An example on unilateral decision from the planned investments areas under this strategy include the recently decision to have the maternity funds managed by NHIF. 	<p>The non-compliance comes with details of implementing the strategy especially under the UHC.</p> <ul style="list-style-type: none"> For UHC to succeed, counties need to understand the different methodologies and approaches that would ensure sustainability of UHC. What is its impact on counties expenditure framework - who pays for what? Time it would take for Counties to improve quality of care etc. 	<ul style="list-style-type: none"> The strategy has followed up on various investment areas identified in the MTP II. Since this strategy is coming to an end, it will be important that a new one is developed jointly with counties with a framework that ensures MOH does not continue to undertake county functions unless there is clear inter-governmental agreement. For activities delegated by either level of government, an inter-governmental agreement need to be drawn in accordance to inter-governmental relations Act.
		<p>While the decision is better than MOH managing the funds, there is need to ensure NHIF is an inter-governmental institution with counties, which are largest beneficiaries of NHIF services,</p>	

Table 4: A Review of the Applicable Health-Sector Strategies Tabulated in a Matrix (Cont'd)

Name of Policy / Law	Issues: Making the Argument Where is the Problem or Inconsistency?	Rationale / Concern: How to Ameliorate the Problem?	Recommendations
<p>The Kenya National Strategic Plan on Tuberculosis, Leprosy and Lung Diseases, 2015–2018</p> <p>Objectives:</p> <ol style="list-style-type: none"> Sustain the gains made over the past decade, in the context of a newly devolved health system Intensify efforts to find the “missing” cases of TB, leprosy and lung disease Reduce transmission of TB and leprosy Prevent active disease and morbidity Enhance the quality of care for chronic diseases 	<p>being members of its board to ensure they are part/influence the decision making process that impact on health services delivery at county level.</p> <ul style="list-style-type: none"> The strategy is fully compliant with the constitution. The strategy is meant to provide a smooth transition of TB management and control to county level in accordance with the constitution. The strategy identifies approaches for both national and county level in accordance with each level of government’s defined functions. The strategy implemented between 2014 and 2018 has prioritized smooth transition to the county-based systems of governance for the TB and Leprosy control programmes. This is to ensure gains made so far are not reversed as counties take up the responsibility of implementing TB and leprosy control programmes. The Strategy provide a number of approaches including articulating and documenting responsibilities for all TB activities between the two levels of government. 	<ul style="list-style-type: none"> The strategy is compliant. What need to be established is whether implementation has been undertaken as part of county functions egg inclusion of TB funds in county budgets, quantification and procurement of the nutrition commodities. Like the on - going strategy, the recommended strategy will need to include: <ul style="list-style-type: none"> Definition of financial and human resource commitments, including technical assistance and necessary commodity management support from central MOH Ensure the county and sub - county structures can support all designated activities: e.g. identify a TB and leprosy focal point for each level, take inventory and address any capacity building needs; and develop on -the-job tools and disseminate existing guidance to promote national standards . Ensure inclusion of TB and leprosy within county health plans Stakeholders mapping at all levels and all stakeholders are engaged in county planning Establish County -based centres of excellence, based on strong performance 	<ul style="list-style-type: none"> The strategy is ending in 2018. There is need to start the process of developing a new strategy to ensure there is continuity in management of TB and Leprosy control programmes. More importantly ensure continued case notification and procurement of essential commodities for TB management especially of the MDR TB by county facilities.