

**STATUS REPORT**

*On*

**IMPLEMENTATION AND REVIEW OF PROTOCOL ON PUBLICATION OF  
COUNTY LEGISLATION**

*Prepared for*

**KENYA LAW REFORM COMMISSION**

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*by*

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## **Executive Summary**

On 16<sup>th</sup> February 2015, The Attorney General wrote a letter on publication of County Bills. The letter, addressed to the Chairperson of the Kenya Law Reform Commission and the Government Printer, detailed the procedure to be followed in publication of County Bills in the Kenya Gazette. The Protocol captured in the letter required that Bills be passed to the Kenya Law Reform Commission (KLRC) to technically review and thereafter issue a certificate of clearance.

Despite its issuance, challenges continue to dog the process of publication. Counties raised concerns about the requirement of obtaining clearance from KLRC as this would offend the Constitutional requirement of devolution. Many counties, therefore, did not adhere to the provisions of the Protocol. In addition, delays continued to dog the publication process. Consequently, in June 2018, the Attorney General directed KLRC to review the Protocol.

As part of the review process, an assessment has been undertaken on the implementation process thus far, the roles of various stakeholders in the implementation process, the challenges faced, and comparative experiences from other countries.

The study reveals that although the rationale for development of a Protocol on publication of county legislation was the need to enhance clarity of procedure and efficiency in the publication process, the publication process continues to be dogged with numerous challenges. Legally, two problems arose. First, the legal basis on which the Protocol was developed is both unclear and questionable. Despite the provisions of the Constitution vesting legislative authority at the county level on County Assemblies, the Protocol attempted to require clearance from the KLRC, implying that exercising of this legislative authority was subject to oversight by KLRC. Secondly, controversies also surrounded the publication process arising from the implications of Section 25 of the County Government Act which seemed to suggest that county legislation could come into effect even if not published in the Kenya Gazette despite the clear provisions of Article 199 of the Constitution.

The assessment revealed several findings. First, the process of developing the Protocol did not generate sufficient buy in amongst the critical stakeholders. In addition, the Protocol was not widely circulated with the consequence that many stakeholders were either unaware of its existence or its contents. Secondly, there was consensus that the Protocol as drafted was inadequate to govern the process of publication of County Bills and required to be revised.

The publication process continued to suffer from several weaknesses both at the national and county level. At the national level, due to the interpretations from the Courts which had declared parts of Section 25 of the County Government Act unconstitutional and clarified that county legislation must be published in the Kenya Gazette to be effective, the performance of the Government Printer had implications for the publication process. The assessment revealed that the Government Printer continues to suffer from several weaknesses, including lack of a governing legislation, lack of documentation of procedures on publication of Bills and delays in publication of legislation. On the other hand, the publication of Bills by the Government printer was hampered by lack of adequate quality control on the Bills at the county level and turf wars between county assemblies and county executive on control over the publication process.

Based on the assessment, the study makes the following recommendations:

- A Protocol on the publication of County legislation should be developed in a consultative manner detailing the procedure on publication of County legislation. This should be followed by a Bill that deals with publication of legislation and thus guide the operations of the Government Printer. Kenya can borrow from the Ugandan Acts of Parliament Act, Chapter 2 of 2002.
- KLRC should not have the mandate of clearing Bills from counties for publication. Their role should be restricted to capacity building and technical assistance for counties as envisaged under the Kenya Law Reform Commission Act and the County Government Act.
- To enhance its capacity building support to counties, the KLRC should decentralize its services to the County level and enhance the capacity building that it organizes for County Attorneys, legal and technical staff at the County.

- The Instrument to be developed should also deal with procedure for publication of laws that come into force by operation of law, when the Governor does not sign within 7 days of passage of the Bill by the County Assembly.
- The Instrument should also borrow from the experience in the United Kingdom where there are detailed guidelines of the specifications of legislation and other notices to be published in the gazette to make publication process easy.
- The Instrument should provide that Velum Copies be printed by the County Printer, for counties with Printers, and for counties without printers, specify who ought to print the velum copies to avoid mischievous alterations to drafts after they have been passed by the County Assembly.
- Counties should undertake public ceremonial signing of Bills just as happens at the national level to avoid suspicion between the two arms.
- Counties should adopt the good practice of formulating policies before enactment of legislation.
- An officer at the county level should be designated to be responsible for quality control of Bills once enacted, to ensure basic issues of form and other aspects are addressed before submission for publication.
- There is need for a law to anchor the operations of the office of the Government Printer.
- The Government Printer should expedite process of decentralizing its services to better serve counties.
- Both national and county Governments should enhance collaboration between them to ensure harmony between County and National legislation.
- There is need for either amendment of the Revision of Laws Act or development of legislative framework on revision of county laws to address the process of revision of laws, to correct small errors and to produce amended Acts.

## **I. Introduction**

One of the transformative aspects of the 2010 Constitution was the introduction of devolution. Through it, power was dispersed vertically from the center to devolved units, named counties. Article 175 of the Constitution captures the essence of devolution. Its introduction was meant to ensure that the past complaints of inequality in development within the country were addressed. This would help promote unity and enhance a feeling of ownership by the citizenry.

To actualize the promise of devolution, legislative and executive authority was devolved, and finances allocated to counties to perform their constitutional mandate and exercise their powers. Of the three traditional arms of Government, only the Judiciary remained a purely national function.

The legislative authority of counties is vested in the County Assemblies, which have powers to pass laws to enable the counties to exercise their powers and perform their functions in each of the areas enumerated in the Fourth Schedule of the Constitution. The Schedule identifies fourteen functions for county governments, including agriculture; county health services; county transport; air and noise pollution; regulating cultural activities and public entertainment; trade development and regulation; animal control and welfare; county planning and development; pre-primary education and village polytechnics; county public works; firefighting and disaster management; coordinating participation of communities in local governance; and implementation of specific national government policies natural resources and environmental conservation. In each of these areas, county assemblies have the powers to enact legislation.

During the first phase of the implementation of devolution between 2013 and 2017, several challenges arose as counties started exercising their legislative mandate provided by the Constitution. Some of these challenges resulted in court action. The nature of the challenges varied but they all revolved around the process of enactment of laws, their publication and the role of various actors in that process. With a view to avoid the recurrence of these problems and to streamline the publication process, the Attorney General convened a series of consultative meetings amongst various actors in the National and County Government. These resulted in the development of a document to guide the publication process of county legislation.

Several years following its coming into force, The Attorney General desired to review the protocol to address some of the teething problems and improve its implementation. The Kenya Law Reform Commission, which was responsible for implementation of the Protocol, was directed by the Attorney General to spearhead that review. A consultant was consequently engaged for that task.

The Terms of Reference for the review noted that “*whereas the adoption of the protocol was intended to make publication of county legislation smooth and reduce the unwarranted disparities in procedure in various counties, this has not been the case.*” Consequently, the review was intended to ensure that the Protocol was amended to address the challenges in implementation. Towards this end, the consultant was expected to undertake the following tasks:

- a. Collect, review and analyze all the necessary information to fully understand the legal and administrative framework around publication of county legislation;
- b. review and analyze the international and national level approach to publication of county legislation;
- c. carry out stakeholder analysis and determine the roles and responsibilities of key players and institutions in the legislative process and propose recommendations to strengthen linkages between agencies;
- d. facilitate at the meetings of the Technical Committee (convened by KLRC) during the assignment; and
- e. report on the findings to the key stakeholders and Technical Committee to inform the next steps in the Revision of the Protocol on Publication of County Legislation.

This report captures the findings from the review and consultations with key stakeholders. The report is structured into six sections. Following this introductory section, Section two discusses the legal framework governing the publication of county legislation.

## **II. Legal Framework Governing Publication**

The rationale for the publication of county legislation is a constitutional one. The process of law-making concludes with the publication of the legislation in the

Gazette. Article 116 of the Constitution governs publication of national legislation. It provides that national legislation after being passed by Parliament and assented to by the President is to be published in the Gazette. In accordance with Article 116(1), the publication in the Kenya Gazette is to be undertaken within seven days of the assent of the Bill by the President. The clause details not just the requirement of publication but also the coming into effect of legislation. The commencement of legislation follows gazettment. Article 116(3) of the Constitution provides that once gazetted, the legislation will come into force within fourteen days of gazettment, unless the legislation specifies a different commencement date.

The operations of devolved governments were modeled along the national government in several respects. The idea was to ensure that the country does not reinvent the wheel in instances where there were already existing processes. In this modeling though, the Constitution sought to maintain harmony in operations within the country. The guiding principles were those in Article 6 of the Constitution which provide for distinctness and interdependence. While the two levels are different, they are required to cooperate with each other. This is evident from the provisions of the Constitution which not only require interlinkages but also similarity in procedures for certain issues. This latter rationale is evident from the provisions of Article 199 of the Constitution.

Article 199 of the Constitution deals with publication of county legislation. It provides that:

- “(1) County legislation does not take effect unless published in the Gazette.
- (2) National and county legislation may prescribe additional requirements in respect of the publication of county legislation.”

The Interpretation and application of the above article has been the subject of controversies that eventually resulted to the adoption of the Protocol that is the subject of this appraisal. The first level of challenge arose from the national legislation that was enacted to give effect to this provision. There are two levels of publication dealt with by the County Government Act. First is the need to publish(gazette) Bills once developed so that citizens can be aware of their provisions to aid the process of public participation. Secondly, is the publication of the Bill once assented to so that it comes



into force. The first publication is dealt with by Section 23 of the County Government Act, which provides that *“a Bill shall be published by including the Bill as a supplement in the county Gazette and the Kenya Gazette.”*

Section 25 of the County Government Act then provides for publication of county legislation after enactment, stipulating that county legislation is to be published within seven days of assent by the County Governor. However, unlike the provisions of Article 119(1) of the Constitution it requires that such publication is to take place in the county gazette in addition to publication in the Kenya Gazette. The more controversial provision is Section 25(2) of the County Government Act which deals with the coming into effect of county legislation. The section provides that *“Subject to subsection (3), the county assembly legislation shall come into force on the fourteenth day after its publication in the county Gazette and Kenya Gazette, whichever comes earlier, unless the legislation stipulates a different date on or time at which it shall come into force.”*

The key issues that have arisen as relates to the above provision is the fact that Section 25(2) suggests that county legislation should be published either in County or Kenya gazette for it to come into force. What happens when a law is not published in the Kenya gazette? What is the procedure for gazettelement? What is the legal consequence if a Bill is not published before being debated and passed by the County Assembly?

Kenyan Courts have dealt with these issues extensively. Two cases demonstrate the reasoning of the courts in relation to the above issues.

The First case is that of *Robert N Gakuru Versus County Government of Kiambu* (Constitutional Petition Number 603 of 2014). The Petitioners sought various orders whose import was to have the Kiambu County Finance Act quashed for violating the provisions of the County Government Act. The complaints related to lack of adequate public participation and failure to publish both the Bill as a Gazette Supplement as required by the Provisions of Section 23 of the County Government Act and further non-publication of the Bill following the assent by the County Governor as required by Section 25 of the County Government Act.

The court on determining the issue separated the legal implication of non-compliance with the provision of Section 23 from that of Section 25, both of the County

Government Act. In the court's view, non-compliance with Section 23 was not fatal. Relying on the reasoning from a Tanzanian case of *Catholic Diocese of Moshi vs. Attorney General [2000] 1 EA 25 (CAT)*, where the matter to be published was administrative and not legislative, the court held that the publication was merely to bring to the attention of the public its existence, failure to comply would not render the order ineffective. The court held that Section 23 of the County Government Act was of similar import. In the court's words:

*“Therefore, it is my view and I so hold that unless the instrument in question expressly provides that an instrument is only valid upon gazettment, the mere fact that the same was not gazetted before it came into force does not necessarily invalidate the same though the Court may well be entitled to suspend its operations until the same is gazetted. In my view, nothing turns upon non-compliance with section 23 aforesaid even if that contention is correct.”*

The court, however, held that publication under section 25 had legislative effect and required to be undertaken. The question then turned on whether non-compliance with Section 25 would render such law null and void. The court's position was that while it would not render it null and void, the law should not be implemented till it is gazetted. The court's reasoning was captured in the following words:

*“With respect to section 25 aforesaid, the provision is clear that once legislation is passed and assented to by the governor, the same is to be published in the county Gazette and Kenya Gazette within seven days of the assent. Pending such publication and the lapse of fourteen days after its publication in the county Gazette and Kenya Gazette, whichever comes earlier, unless the legislation stipulates a different date on or time at which it shall come into force. In otherwise pending compliance with the law, the operationalization of the legislation remains in abeyance though the same is not rendered null and void. It is my view therefore that the failure to comply with section 25 does not render the legislation unlawful though where a person proves that the legislation was prematurely implemented, a party may well be entitled to institute a suit for recovery of damages suffered as a result of such premature action.”*

The Second case just like the first above was determined by Justice Isaac Lenaola. In this second case, *James Gachere Kariuki and others versus AG and others eKLR 2017*, a complaint was filed relating to the process of publication and content of Kiambu County Alcoholic Drinks Control Act, 2013. The case eventually revolved around whether a county legislation must be published in the Kenya Gazette, county gazette or both. In determining the issue, the court first discussed the meaning of

gazette as used in Article 199 of the Constitution. It relied on the definition in Article 260 of the Constitution which defined a gazette as “the Kenya Gazette published by authority of the National Government or a supplement to the Kenya Gazette” to hold that county gazette and Kenya Gazette were different and further that the Constitution did not contemplate county gazette as the gazette for publication of county legislation under Article 199 of the Constitution. Instead, it required that such legislation be published in the Kenya Gazette for it to take effect.

Section 25 of the County Governments Act was contemplated by the Constitution, since the Constitution requires that national legislation may provide for additional measures regarding publication of County Legislation. The Court in *James Gachere* case above, held that these additional measures included the period within which the legislation would come into effect following publication, which the Act set at fourteen. However, the controversy arose regarding the provision that this could happen following publication in either the Kenya Gazette or county gazette, whichever came earlier. The Court having held that the County Gazette was not contemplated by the Constitution, to the extent that Section 25 of the County Government Act, included the words, *whichever comes earlier*, meaning that County legislation could come into operation following publication in the County gazette only, then section 25 was unconstitutional.

The Court having made the determination that the Act was not published in accordance with the Constitution was then required to determine the consequences of non-compliance with the Constitution. Just like in the earlier case discussed in this report, the Judge declined to strike down the legislation. Instead he gave the Attorney General three months to ensure that all Kiambu County Legislation which had not been published in the Kenya Gazette in accordance with article 199 of the Constitution be so gazetted. The judge explained his refusal to strike down the legislation, which offended the constitutional procedure on gazettelement, as follows:

*“I take the position that devolution being a new entrant into our Constitution, the implementation of its various visions therein is bound to be faced with several hitches. Some perceived challenges include what is now before me being the desire to fully operationalize the working of Counties by putting in place relevant legal safeguards in terms of legislation in a bid to ensure that Counties effectively perform the duties assigned to them under the Fourth Schedule of the Constitution. I therefore opine that it is in the interests of justice and for the public good, that the operations of Kiambu County are not brought to a standstill for*

*reasons of reliance on an ungazetted law. I say so well aware that all State organs, State officers, public officers and all persons are bound by the Constitution and as such the edicts of the Constitution must be observed at all times.”*

The issue of public participation has also been thorny in the country following the adoption of the 2010 Constitution. Article 10 of the Constitution makes public participation a critical aspect of the governance process in Kenya. Similar provisions underscoring public participation are contained in various other provisions of the Constitution. Despite these, there lacks clarity on the procedure of public participation and what constitutes adequate public participation. Courts have grappled with the question of adequacy of public participation in the legislative and policy process and sought to draw guidance from the south African case of *Doctors for Life International v Speaker of the National Assembly and Others [2006]*, where the court held that any law-making process that does not go through public participation is invalid. The duty of the legislature in public participation is two-fold. “The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided.” The court stated that what is important is that the modes of engagement provided by the legislature be reasonable.

However, what is reasonable public participation is subject to interpretation. In the case of *Amos Kiumo & others Versus Cabinet Secretary Interior & Others Petition Number 16 of 2013 HC Meru*, the High Court posed the following questions in demonstrating the lack of clarity on what constitutes adequate public participation.

*“There are issues which should be considered, for instance should all the residents be involved in order to satisfy the requirement for public participation? Can a baraza suffice? What if no one or few people turn up for a meeting called to satisfy this? If representation can do, what form should that representation take? All these are matters for consideration and determination.”*

The above is exacerbated in the legislative process by court decisions that seek to require public participation when the county assemblies are, for example changing

their standing orders. In the case of *Wilfred Manthi Musyoka v County Assembly of Machakos & 3 others (Interested Parties)*, eKLR (2019), the High Court held that changes that had been made to the standing orders were unconstitutional for not having been preceded by public participation. Even though county assemblies contest this issue, the decision raises the importance of public participation in the legislative process. However, the question of what adequate public participation is remains contentious. The High Court in the case of *Robert N. Gakuru & Others vs. The Governor Kiambu County & 3 Others Petition No. 532 of 2013* had stated that:

“In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. *It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1)(b) just like the South African position requires just that.*”

Providing guidance on public participation will help to improve the process of enactment of legislation and reduce some of the turf wars between the executive and legislature on who is responsible for public participation relating to proposed law at the county level.

### **III. Highlight and Assessment of the Protocol on Publication of County Legislation**

What is referred to as a Protocol on the publication of county legislation was captured in a letter by the Honourable Attorney General addressed to the Chairperson of the Kenya Law Reform Commission and the Government Printer. It sought to capture deliberations that had taken place between several agencies including those to whom it was addressed on the issue of publication of County Bills in the Kenya Gazette. Other players in this process and to whom the letter was copied included the Speaker of Senate, the Chairperson of the Transition Authority, the Chief Executive of the National Council for Law Reporting and the Chairperson of the Council of Governors.

The key highlights of the protocol to be followed in publication of county legislation included the following:

First, that the Kenyan Law Reform Commission would continue to provide technical support to Counties in preparation and drafting of Bills before publication and tabling for debate. Secondly, the Bill once passed by the County Assembly should be forwarded by the County Assembly Speaker to KLRC for technical evaluation. A copy of the same Bill would at the same time be forwarded to the Attorney General for information.

The third issue covered by the Protocol related to the role of KLRC once the Bill was submitted to them. KLRC was required to, within seven days of receipt of Bill, forward it back to the speaker with a certificate of clearance confirming that the Bill met the procedural and technical requirements. In addition, KLRC was to prepare and submit, at the same time, a memorandum with other considerations that KLRC required to be addressed before assent of the Bill. The above would form the basis of assent of the Bill by the Governor

. Stage four required that, once the Governor signed, he would forward the velum copy to the Government Printer with a certificate of clearance from KLRC. The Government Printer would then publish the Bill within fourteen days of receipt of the Bill.

In assessing the above provisions of the Protocol several questions ensue. Was this a protocol? Did the Attorney General have the powers to issue it? Was the procedure clear? Did KLRC have the legal mandate to do what was required of it?

Was the Protocol in accordance with the Constitution? Was the procedure followed?

The first issue is whether the document the Attorney General prepared was a protocol or not. This begs the question of what a protocol is? The main usage of the term protocol is evident in the law of treaties; to supplement the provisions of a Treaty. In this instance a protocol provides details that were either missing or only dealt with in a general manner in a treaty. Except for this it is of similar form as a treaty and is governed by the same rules. Under International Law, all treaties are governed by the Vienna Convention on the Law of Treaties. The Convention defines a treaty as “an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” From the definition, a Protocol is used in diplomatic processes, evidences agreement by parties following some negotiation and is signed by the parties.

In normal English language, a protocol refers to guidelines or a set of rules explaining the correct procedure to follow. It is in this latter meaning of a protocol as a system of rules that people should use to govern formal discussions and official situations. In this instance, it was developed as the record of discussions amongst several agencies on the procedure for publication of county legislation. However, the biggest challenge relates to the legal status of the Protocol developed by the Attorney General. Even in its basic usage, protocols require that its authenticity be confirmed. This happens through signing and confirmation of minutes. In this instance, the parties to the Protocol did not sign the document. The minutes of the meeting referred to whose contents it sought to capture were not available. The document, therefore, remained a unilateral communication from the Attorney General’s office. While the issue of streamlining publication of county legislation had been discussed, lack of agreement on how the process should be improved meant that the letter issued by the Attorney General on the publication process could not meet the threshold of a Protocol.

The second question revolved around the legal basis for the Protocol. The contents of the document did not refer to the legal provision on which it was anchored save for the reference to Section 5(3) of the County Governments Act as relates to the role of the Kenya Law Reform Commission. The Attorney General is

constitutionally the principal legal adviser of Government. The Constitution clearly provides that there are two levels of Government, national and county. In discharging his functions, the Attorney General is required to respect the autonomy of the two levels of government while promoting the cooperation and interdependence of the two levels.

The issuance of the Protocol raised the question on the powers of the Attorney General over county governments and over the publication process by the Government Printer.

Regarding the first, there remains contestation as to whether the Attorney General serves the national Government only. This has not been an idle debate. It has occupied legal discourse and inter-governmental relations between the two arms of government during the first phase of the implementation of devolution. Arguments have been made that the Attorney General is an appointee of the national government and serves their interests. These arguments may have been lent credence by the performance of the Attorney General during that period. In addition, Article 156(4)(b) of the Constitution reinforced this view when applied in the relations between the two arms of Government. The clause provides that the Attorney General is to represent the national government in any proceedings in court or other legal processes in which the national government is a party. Consequently, in cases that pitted that national government against the county Government, the Attorney General represented the national government. This led to the view that the Attorney General was not representative of the interests of County Governments.

While the practice may have supported this assertion, the law does not. The Attorney General is the principal legal adviser to Government. The Constitution recognizes that there are two levels of government. Consequently, the holder of this office should serve the interests of the entire country and of the two levels of government. In doing so, though, he must respect the distinct nature of the levels of Government. He cannot act as if counties are appendages of the national government, or are ministries, department and agencies within national government to which he issues instructions to on behalf of national government.



The relevant law that governs publication of legislation in the Kenya Gazette by the Government Printer is the Revision of the Laws Act (Cap 1). The Act defines the Laws of Kenya as including the Constitution, Acts of Parliament, subsidiary legislation and foreign legislation. The Act having been developed before the 2010 Constitution does not include County legislation in the definition of laws of Kenya. This is notwithstanding the fact that Article 260 of the Constitution that defines legislation, includes in the definition, laws passed by County Assemblies. This omission is critical in the assessment of the Protocol and the publication process by Government Printer of County Legislation.

The Revision of Laws Act provides for the publication of a Table of Contents and of Laws of Kenya. Section 6 of the Act provides that a separate Act booklet shall be printed for every Act of Parliament. The section provides that the Attorney General can deem it necessary to publish the legislation in more than one booklet. In addition, section 6(2) confirms that the publication in the Kenya Gazette is undertaken with the authority of the Attorney General. The Section provides that:

*“Every booklet shall contain on the front page thereof the expressions ‘Laws of Kenya’ and ‘Revised Edition ..... Printed and Published by the Government Printer Nairobi’ or ‘Printed and Published by ..... (name of Printer) with the Authority of the Attorney-General’, and on every other page thereof the expression ‘Rev’ ..... with the appropriate year of revision inserted in each case.”*

The above confirms that the Attorney General’s authority is required for the publication of Laws of Kenya in the Kenya Gazette. However, the non-inclusion of county legislation in the current Revision of Laws Act demonstrates the non-alignment of this Act to the Constitution.

The problem was exacerbated by the Attorney General’s assignment of powers to the KLRC to confirm that Bills passed by County Assemblies meet what the Protocol referred to as “substantive and procedural requirements” before publication. When KLRC were satisfied, they were expected to issue a certificate of clearance. This delegated power could only have been based on the powers under the Revision of Laws Act above. While not expressly stated so, the substantive and procedural requirements to be met can only have been constitutional provisions.

The lack of clarity on what these were and their non-inclusion in the Protocol made it difficult for counties to know what standards they should meet before the Bill can be published by The Government Printer. If it is the requirements that the Bills accord to the Constitution, then the Protocol was unconstitutional by vesting to KLRC powers it did not have.

Article 185 expressly provides that legislative authority of a County is vested in County Assemblies. County Assemblies are empowered to make laws on all the functions that are captured in the Fourth Schedule of the Constitution. It is thus clear that this Constitutional power vested in County Assemblies cannot be abrogated or limited by the Protocol. The attempt by the Attorney General to subject this power to “clearance” by the KLRC offends the Constitution. The Protocol was not explicit on how to deal with situations of non-compliance. Its provision on the issue were confusing. The Protocol required that a Bill be submitted to KLRC by the Speaker of the County Assembly before assent for technical evaluation. If KLRC were satisfied with the provisions of the Bill, they would issue the Speaker with a certificate of clearance. If they were dissatisfied, the Protocol required that they prepare a Memorandum detailing which aspects they believed should be amended. It is not clear from the Protocol what the Speaker would do with this Memorandum? Did the Protocol envisage that the Speaker would deal with it in similar fashion as that to the National Assembly from the President when he rejects a Bill and returns it to the National Assembly? If so, then the Bill was giving KLRC a role in the legislative process that was not contemplated by the Constitution, the County Governments Act or the Standing Orders of County Assemblies.

The Protocol seems to have acknowledged the difficulty with the above, providing in later provisions that when the Governor was in agreement with the KLRC, the Governor would return the Bill to the Speaker of the County Assembly in accordance with the provisions of Section 24 of the County Governments Act for further debate. Would the further debate be based on the memorandum from the KLRC or the County Governor? If the former, KLRC would be involved in legislation and challenging the constitutional mandate of county assemblies outside the constitution. On the other hand, when a Governor disagreed with the KLRC, the Protocol was silent on the procedure thereafter. In practice, the

Governors ended up ignoring KLRC memorandum. If the intention was to avoid publication of Bills that did not meet the Constitutional standards, this lacuna provided a loophole.

#### **IV. Experience from Key Agencies in Implementation of Protocol**

##### **a. KLRC**

The Kenya Law Reform Commission was at the centre of the implementation of the Protocol. It was mandated to issue certificates of clearance upon review of county Bills and to continue with technical support to counties in development of legislation and policies.

KLRC traced the genesis to the Protocol to the initial concern arising from the quality of county legislation and the procedure for publication of County legislation. KLRC's involvement traced back to controversy regarding publication of Isiolo County Finance Bill. The controversy pitted the County Assembly and the County Executive. KLRC was asked to and did prepare an opinion on the Isiolo case. This formed the basis for subsequent preparation of the Protocol.

The Attorney General took the view that since the Constitution required that County Bills by dint of Article 199 had to be published in the Gazette, as the officer responsible for publication in the Gazette, his office had to be satisfied of the legality and constitutionality of Bills being published in the Gazette.

The Attorney General, however, delegated the responsibility of verifying the Constitutionality of the County Bills to the Kenyan Law Reform Commission, a Commission established under the Kenya Law Reform Commission Act, 2013. The delegation to the Commission was for historical reasons. KLRC had been engaged in providing support to Counties on legislation since the advent of devolution. They had, therefore developed close working relationships with counties, making it easier to be responsible for implementation of the protocol. In addition, when the County Governments Act was enacted, Section 5(3) of the County Government Act provided that County Governments could seek support of KLRC in the development or reform of county legislation. In addition, the Kenya Law Reform Commission Act empowered KLRC to provide capacity building and technical assistance to national and county

governments in the areas of development of the law, law reform or amendments of laws. It is instructive to note that several Counties had already engaged with KLRC in development of their legislation.

When the AG included this technical capacity building and support as part of the Protocol, it was a natural restatement of what was already happening as that was recognized and captured in the County Governments Act and in the Kenya Law Reform Commission Act. However, the requirement for evaluation of laws already passed by county assemblies for purposes of issuance of certificate of clearance was objected to by counties. In the view of KLRC, these objections were justified. The Council of Governors (COG) also took on KLRC and accused it of attempting to undermine COG, which was not an accurate assessment of the situation.

The AG, however, disregarded the complaints from COG on the basis that there continued to be a lot of litigation relating to publication of County legislation. The situation required to be streamlined to avoid the continued litigation.

In the implementation process, challenges arose. KLRC was uncomfortable with issuing clearance certificates as this put them in a situation where they were acting as prefects of counties. In addition, it had the potential of jeopardizing the positive relationship they had developed with counties and the technical support they continued to provide to county governments as a result. KLRC saw their core mandate in the process as being to support counties through technical assistance and capacity building in legislative drafting and law reform. The controversy around publication of county legislation threatened to derail this since at some point even when counties were ready to co-operate with KLRC in the process, COG advised against it.

In some instances, the County Executive used the Protocol when convenient to sort out differences with County Assemblies. When they were unhappy with a Bill passed by their County Assemblies, they would seek the opinion of KLRC and use the resulting memorandum as a basis for refusing to assent to Bill and referring it back to County Assembly. However, when they had no such complaints, they would not refer to the Bill to KLRC.

In KLRC's assessment, the Protocol was ineffective since it was not achieving the desired results. Nobody owned the Protocol making its implementation weak. The process leading to its adoption was not accompanied by adequate participation and

buy-in by key stakeholders. KLRC had been treading very carefully in the implementation process, fearing the backlash from counties. For Bills brought to it, it had just been stamping and writing on the face of the Bill, “approved for Publication.”

It proposed that the requirement for a certificate once a Bill had been passed be done away with. It would thus only review Bills as part of its capacity building mandate and not for clearance. Other proposals made by KLRC were as follows:

- Clarify the role of Ministry of Interior and AG in the publication process
- Governors should be encouraged to send Bills to KLRC but not compelled
- There is need for a protocol, since the current document was just a letter
- Necessary to determine who sends Bill from the County to the Government Printer
- Need for a third person to verify the contents of a Bill to ensure quality once enacted and avoid elementary errors.

#### **b. Attorney General’s Office**

The Attorney General’s office justified the delegation of responsibility to verify county legislation to the KLRC before publication to the provision of the County Government’s Act which gives KLRC the role of assisting counties in drafting legislation. Delegation to KLRC was done because at national level, publication is just a formality. Real work is to be done by counties themselves. They developed the Protocol in response to issues that were a challenge in implementation of devolution.

In their view, initially every county was to have a County Gazette managed by the Government Printer, but this was never operationalized. Their involvement in the publication process was due to their legal responsibility over the Kenya Gazette. In addition, the Attorney General had issued a circular on what it required from ministries relating to legislation and publication at the national level.

At the national level, the Attorney General’s office indicated that they get involved in pre-publication process by reviewing velum copies of Bills based on proceedings, vote and velum copy from the speaker’s office. In case they identify discrepancies, they point this out to the Speaker’s office who has responsibility for making changes since power to correct typographical or formal errors under standing

orders belongs to the Speaker. The speaker then formally forwards the Bill to the President for signature. After signature, the Attorney General submits the Bill to the Government Printer for publication.

The above process should, in the view of the Attorney General, be similar at the county Level. Drafting and rectification should be performed by a drafting office just like the AG's but there lacks capacity at the county level to do so.

On the County Printer's Bill, The Attorney General lauded its provisions as the existence of County Printers would ease pressure on the Government Printer and help reduce backlog. County Printers would publish at county level and Government Printer will only do second level publication.

The AG also pointed out that drafting challenges at the County level persist. Consequently, there is need to train drafters on legislative drafting to deal with shortage and ensure standardization.

### **c. Government Printer**

Discussions with the Government Printer revealed that they are at the center of the challenges relating to the publication process of county legislation. They continue to experience frustrations with the current process and are also blamed by the Counties for the inefficiencies in the system. They are therefore desirous of improvements in the process as this will enable them deliver on their mandate in publishing county legislation to the satisfaction of all parties concerned.

They traced the genesis of the development of the Protocol to a 2015 meeting involving NCLR, Senate, AG and COG aimed at streamlining the publication process. At that meeting, suggestions were made that County legislation be passed through KLRC before submission to Government Printer for publication. The aim was to avoid past court cases regarding publication of county legislation. The Government Printer had even been visited by investigators from DCI on the issue of publication of county legislation. The Isiolo case led to the development of the Protocol, since in that case, changes had been made to Bill illegally on the way to Government Printer for publication.

Some of the problems witnessed included illegal changes to Bills on the way to Government Printer, variance between soft and hard copies of legislation submitted to Government Printer and Bills signed by the wrong person. They recalled an instance when a Finance Bill was signed by the executive as opposed to the relevant Committee within the County Assembly.

While the protocol was to streamline the process of publication, it was resisted by the COG who were against reference to KLRC before the legislation from counties could be published. Government Printer also argued that the Protocol was not properly drafted. They raised this concern with the Attorney General's office, but their concerns were overruled.

The Protocol faced implementation challenges following the resistance from COG. Some counties even refused to send their bills to KLRC. They therefore brought their Bills directly to the Government Printer for publication without a stamp from KLRC and insisted on having the same published. Government Printer was in the middle of this controversy and eventually went ahead to publish these in spite of the fact that the Protocol required clearance from the KLRC.

The Government Printer developed a procedure for publications of county legislation and even designated an officer to be responsible for requests from Counties. The procedure for publication at the Government Printer involved the following stages:

- Bills and other legislative instruments come from counties go to the Deputy Government Printer
- Deputy Government Printer marks it to officer in charge of authentication for advice
- The Authentication Officer confirms that the Bill has met the requirements for publication
- Once satisfied the authentication officer stamps on the Bill
- Authenticated version goes to Deputy Government Printer who authorizes publication
- Authorized version goes to production department and is then published.

During the authentication stage, the officer is expected to confirm the following:

- If the Governor has signed
- If the Bill is dated
- If the dates link with the timelines in the Constitution
- Whether there is a certificate for production from Speaker
- If there is a velum copy with memorandum and objects
- If there is a forwarding letter attached from the County
- Existence of a delegation of responsibility by Government Printer to deputy Government Printer to approve.

The procedure that was agreed on for publication of county legislation was lifted from the procedure at the national level and was agreed upon at a meeting convened by the Transition Authority. In the Government Printer's view, the continued teething problems could be attributed to the fact that counties were still relatively new. The challenges included the fact that letters publishing Bills were coming from the Clerk yet for published Acts they had to come from the executive. There were also inconsistencies on how to treat car loans and mortgages with some counties preparing regulations to operationalize them while others developed Bills. In certain instances, county assemblies passed laws only for the executive to stay with them for long, sometimes even for a year before bringing them to the Government Printer for publication. The Government Printer, in such instances faced challenges of which date to give to the Act, since it was passed a year before it was submitted for publication.

The challenges arise from the fact that there currently exists no written document on what is required from counties after the law is passed in the assembly. With transition elections, even more challenges erupt with laws signed by former Governors but not yet published. Others wanted that Bills which were not signed by previous Governors to be published. Counties also argue that they have their own attorneys as a Government and cannot be micromanaged by the AG. Once they pay, they demand that the Government Printer publish their legislation without any further reference to the Attorney General.

The turf wars between the legislature and the executive especially in relation to appropriation Bills also affected the publication process since both the County Executive Committee (CEC) member for Finance and the County Assembly sought to



have the upper hand on who would forward a Bill to the Government Printer for publication.

Government Printer provided a shortcut on how to deal with velum copies. They provided inserts so that the counties could print themselves and take to the governor to sign unlike national level where the velum is printed by the Government Printer. For some counties they only print cover and back. The problem was that the Governor had the chance to manipulate the content in such cases. To avoid this, they recommended that county assemblies should prepare velum and counter-sign every page before it goes to the Governor. The counter-signed Bill is what should be submitted to Government Printer for publication.

The question of the role of the Attorney General and the Ministry of Interior was also raised with the Government Printer who indicated that they seek the approval of both on controversial issues. In such cases, they would raise their concerns with the Ministry of Interior who then liaises with Attorney General. Based on the advice from the AG, the Ministry then informs the Government Printer on the next cause of action. Question that this raises though is on the implications of such an approach to intergovernmental relations where county laws are concerned. The lack of legislative framework on the establishment and operations of the Government Printer further complicates the decision-making process.

The Government Printer was of the view that it is not necessary to have County Printers. In their view, a Bill for the establishment of County Printers, and which has since been passed by Senate and referred to the National Assembly, is unnecessary. This is because publication in County Printers, while required by the County Governments Act, is not contemplated by the Constitution. In their view what is required is for the Government printer to have regional offices, an issue they were already dealing with.

Issues they required to be addressed included the provision of a database of signatories by counties to enable the Government Printer verify the authenticity of signatures of documents when they receive them; adherence to timelines in both the County Governments Act and the Public Finance Management Act by counties in enacting legislation so as to avoid last minute rush and pressure on the Government Printer.

On their part, the Government Printer was creating a digital platform so that counties do not have to physically come to Nairobi. They can submit their Bills in soft copy for publication. However, challenges with soft copies will have to be addressed. They recalled instances when soft copies did not match hard copies and when some soft copies became hard to modify or format due to programs used to develop them at county level.

Revision of the Protocol would help address some of the problems they continue to face in the publication of county legislation and help ensure that there are standard forms for delivery of Bills to them for publication, addressing such details as font size.

#### **d. COG**

The Council of Governors were of the view that there existed no Protocol on publication of county legislation. All that existed was a letter from the Attorney General requiring counties to submit their legislation to KLRC for technical input before publication. Secondly, the lack of an office of County Attorney hampered the quality control of legislation as there was no place for Bills to go to for review before they are sent for publication. COG suggested that the provisions of Article 260 of the Constitution defining Gazette should be read together with Article 6 of the Constitution on the distinctness of the two levels of Government.

In their view, the process of publication of county legislation is currently unclear. Consequently, amendments to the Protocol should result in clarity of the process to unlock the current difficulties and delays that counties face in efforts to publish their legislation.

The COG also underscored the exclusivity of county functions, pointing out that in areas where county governments have exclusive mandate, national government should not legislate. As a result, county laws in these areas were as good as national laws so the debate about county laws being inferior to national laws should not arise.

The COG also suggested that there was need for an officer in the AG's office to be charged with the responsibility of reviewing Bills from counties before they are published. This is because there are currently challenges of ensuring that laws passed by counties are aligned to the constitution and avoid duplicating national legislation. The efforts to have an office of County Attorney Act is commendable. Currently some counties have passed a law seeking to establish the office of County Attorney. Some

have legal advisors and others have a director of legal services. The preferred approach is for every county to have a County Attorney who is the equivalent of the solicitor general at the national level. They pointed out that while the Attorney General can advocate for both national and county Governments, in practice, he has been acting largely for national government.

They lauded the support provided to counties by the KLRC in development of laws but argued that section 5(3) of the County Governments Act was optional to be applied by counties when they needed the help from KLRC. It cannot be relied on to make the KLRC supervise them in their law-making mandate. However, the technical assistance was needed as counties still lacked requisite skills. This was evident from the poor quality of laws that continue to come from counties. They admitted that due to competition between the executive and assemblies at the county level, some legislation ended up being a cut and paste job. In addition, there was no comparable office at the COG secretariat which could provide that help to counties. To serve counties even better, the capacity of KLRC also required to be built.

They pointed out that KLRC had no constitutional mandate to test constitutionality of a legislation passed by the county assemblies. Only courts could do so. Unfortunately, the country did not have a constitutional court, like some countries, where one could go to test the constitutionality of proposed legislation. One, therefore, had to wait till the laws had been enacted. This was true even for national level legislation.

Currently, once laws have been passed, there is a tug of war between the executive and the legislature as to who would take them to the Government Printer for publication. There is no clarity as to whose responsibility this is, something that the Protocol has to address. They suggested that this should be the duty of the County Attorney.

They pointed out that the Government Printer would still have a role even after the Office of the County Printers Bill became law since county gazette would not be not adequate. It is necessary to have county Bills published on a national platform too so that everybody can see what is emanating from county level.

COG argued that there was no provision that empowers the Government Printer or AG to refuse to publish county legislation. All that they do is to delay the

publication process. The greatest problem in their view was the national government view of county legislation. This is because in certain instances counties may desire to achieve things that national government have been unable to achieve, for example universal health care. The AG is thus forced to act as a gatekeeper for national government.

They were concerned about delays by Government Printer and argued that although the Protocol provided that Government Printer cannot take more than 21 days before publishing county laws, the Protocol was insufficient. It was necessary to develop either regulations or a law. They also suggested research to determine how much delay Government Printer have occasioned when Bills are taken to them from counties.

The COG also suggested that there was need to address how to deal with errors occasioned by counties as long as they were not errors of substance. In cases of errors of typographical nature, they suggested that these be dealt with either by KLRC or a technical committee of the COG which can then correct these mistakes before publication.

They also decried the fact that although the Constitution set a timeline of 5 years for enactment of laws to implement various provisions of the Constitution, no timeline was set for functions vested in county governments. Consequently, if an audit was undertaken it would emerge that no county had passed laws for all its functions. In addition, counties do not have the habit of formulating policies before enacting legislation. This challenge meant that several laws proposed and eventually passed by counties lack policy rationale and coherence.

In addition, they suggested that there be clarity on who should have final responsibility for quality control of county legislation before they are forwarded for publication. Timelines should also be set for such quality control to avoid delays.

They were also of the view that the role of KLRC of assessing quality of legislation should be separated from the process of publication. In this way KLRC could still assess constitutionality but submit their advisory to the Governor for his consideration. Should the Governor agree with them, he would refer the Bill back to the County Assembly. But if he disagrees then the he would assent the Bill and the

Government Printer would have to publish the Bill. Anybody dissatisfied with the Bill could then contest the law in Court.

COG proposed that the Executive submit assented laws to Government Printer for publication. The Assembly should only deal with Bills and those laws that Governor refuses to assent to within 14 days and does not refer to the county assembly.

#### **e. County Attorneys**

The County Attorneys were of the view that publication of county legislation is marred by several challenges starting from the development stage of Bills. While good practice requires that legislation be preceded by policies, at the county level there lacked policies that underpinned the development of Bills. Therefore, most Bills are developed without any policy consideration or clarity. This affects the quality of the Bills being developed as there lacks consensus on the policy problem the Bills sought to solve.

The second problem related to the procedure for development of legislation. There is no standard process for legislating and publication of county legislation. There are also no standards on which stakeholders to consult. Consequently, although public participation is a constitutional requirement and courts have held that public participation is an essential part of law making at the county level, there is no uniformity on how the public participation should be undertaken. Consequently, some legislation can go through all the stages of law-making including public participation in one day, raising the concern about the quality of the processes.

The relationship between the executive and county assemblies is characterized by mistrust, which affects the process of legislation and publication of Bills. There have been some instances where some members of the county executive have colluded to change the bills before publications. The result is that Speakers and Governors each want to have the final say on the Bill that goes to the Printer for publication to avoid the other changing the content of the bill once enacted by the Assembly and assented to by the Governor.

County Attorneys also pointed out that there still lacks technical capacity at the county level to draft laws, resulting in poor quality of laws drafted and passed by

County Assemblies. For that reason, they opined that the efforts to amend the Protocol on publication of County legislation should also extend to support to improve the content and consequently quality of legislation being drafted and enacted at the county level.

They also complained of delays in actual publication by Government Printer and from counties. Counties sometimes delayed paying the Government Printer to publish their legislation. The delay arose from county processes of availing the requisite finances. On finances, the other challenge was that while the publication process was a responsibility of the assembly, when the assemblies lacked resources, county executives took over the publication process. In addition, the protocol on publication was cumbersome and presented complexities in an already challenging process. Thus, it was simply ignored by counties.

County Attorneys also pointed to the poor relationship between the county attorney's office and the office of the AG. Subsequently, there was no adequate consultations between the two offices. Consultations, they pointed out could obviate some of the challenges in the publication process of county legislation.

Their recommendations were—

- There was need for research on instances when presumption of gazettelement can be made both at county and national level.
- Both KLRC and NCLR should decentralize their operations to better serve counties
- There was need for a consultative process to review the protocol to ensure buy-in
- Although County Printers Bill had not mentioned the linkage with the Attorney General, this was necessary.
- KLRC should not only develop a protocol describing the standardized Kenyan style of legislative drafting but also train county attorneys on the same for uniformity and standardization of legislation.
- KLRC should come up with mechanisms as well as a checklist setting out guidelines on the requirements county bills should meet before they are enacted into law.

- The county attorneys should organize sessions with the county executive to brief and sensitize them on the existing county acts and bills.
- KLRC should coordinate with county attorneys in order to audit and review all county legislation and propose amendments and repeal of the existing bad laws.
- County attorneys should guide county assemblies and the executive in evaluating and analyzing the substance and rationale of legislation before they are passed or published.
- The provision in the County Governments Act which provides for a 7-day timeline for the assent of bills by the governor, should be amended to 14 days since counties lacked the capacity to comply with the present timeline.
- The roles of county assemblies, county attorneys and the executive in the development, publication and dissemination of county legislation should be clearly defined to avoid conflicts and overlap of their mandates.
- County assemblies, with the assistance of county attorneys, should come up with legislation establishing an independent body mandated to undertake quality control of bills.

#### **f. County Speakers**

County Speakers were categorical that the Standings orders of county assemblies were largely based on and borrowed from procedures in the National Assembly. These do not envisage the involvement of KLRC as stipulated in the Protocol. In addition, counties had never engaged with the Protocol on publication of County legislation. The process that led to the publication of the Protocol did not involve County Speakers or county assemblies. Consequently, none of them relied on it. In fact, very few had even seen the Protocol before the review process commenced. The Protocol was neither copied to speakers nor to the County Assemblies Forum.

The Speakers argued that politics largely influenced the legislative process at the county level, and this negatively impacts on the publication process. Furthermore, there is lack of a standard procedure for lawmaking and publication of legislation at the county level. They suggested that KLRC should only be given copies of legislation after they have been passed as part of their law-reform mandate and not for purposes

of issuing a certificate of clearance. They also urged for fast-tracking of the policy and legislation to govern and standardize public participation.

Counties were expected to have a County Gazette to publish their notices, Bills, Acts and policies to guide the legislative process. However, no county has their own county printer. As a result, counties have had to rely on the Government Printer for all their publication needs. However, the Government Printer seemed ill-suited to take up the work from counties. They have particularly been overwhelmed with money Bills. Since they are a national level institution, the Government Printer has invariably given preference to the national government. This has led to bottlenecks in printing county legislation. The result was creating a fertile ground for corruption. The other consequence was that some Bills ended up not being published. Governors assented to Bills but they never got published. Such Bills faced implementation challenges, since they are not Acts according to the Constitution. They decried the fact the current Protocol had failed to provide the procedure on publication of Bills not assented to by the Governor.

The Speakers also discussed a challenge with the current practice where counties picked all the copies of their laws once published by the Government Printer leaving no copy at the Government Printer, a practice that hindered access to information. While the issue of accounting was raised as the obstacle on the basis that one needed to take back all the copies they had ordered, several speakers retorted that this could not be a reason for not leaving the Government Printer with some copies.

County Speakers also suggested that it was necessary to rethink the current arrangement where the head of the legal department at the county level is the County Attorney and doubles up as the one responsible for quality control. They were also in favour of the Office of the County Printers Bill as it would enhance access to information.

The Speakers suggested that the Protocol should be treated as if it did not exist and a fresh process for developing an acceptable protocol be commenced. On process of publication, they suggested that once passed by Assembly, the Speaker should sign the velum copy and send it to the Governor for signature. Once signed it should be returned to the Speaker who should then forward it to the Governor Printer. The



Government Printer should in the short-term dedicate a department to handle business from counties. In the long-term Government Printer should decentralize.

The Speakers also recommended that KLRC be more involved in pre-publication scrutiny of Bills to avoid uninformed Bills emanating from county assemblies. KLRC should assist counties to develop laws that are consistent with the Constitution and avoid conflict of laws between national and county level. They should also assist counties in formulating policies that can then be converted to legislation.

On NCLR, they suggested that NCLR should be more engaged with county legislation. A Speaker, for example, reported that they have not seen a grey book on devolution. In addition, there is need for a centralized depository of county legislations.

Other recommendations that were made by the speakers, included:

- KLRC should either embed their drafters in every County to assist in quality legislative drafting or cluster counties into groups and assign a drafter for every group of counties for similar technical assistance in legislative drafting.
- The process of the publication of county legislation should be spearheaded by County assemblies and not the executive.
- The Government Printer should serve both levels of Governments equally and without discrimination. To achieve this, it also needs to decentralize its services.
- KLRC needs to train the Judiciary so that they appreciate the place of county laws in the legislative hierarchy and thus better appreciate them.
- Speakers acknowledged the role KLRC plays in assisting the county Governments and suggested that it conducts capacity building at least four (4) times a year with both the legislative and executive arms.

#### **g. County Clerks**

County Clerks were against the formulation of the Office of the County Printer Bill to establish county Printers. In their view, this would not solve the problem relating to publication of County legislation since the Constitution required that the legislation would only take effect after publication in the Kenya Gazette. In their view, the solution was to decentralize the operations of the Government Printer.

They raised the concern with the delays in publication of county legislation by the Government Printer. In addition, they accused the Government Printer of favouritism and corruption, stating that staff had to part with money for their Bills to be published in time.

At the county level, the process was also affected by several challenges. One such challenge was lack of systematic process of conducting public participation. In certain instances, the office of the Clerk led public participation without involvement of the legal department which drafted Bills hence poor response to public concerns on Bills. The Bills by most members of county assemblies were also drafted without any meaningful research. They consequently were shallow and often conflicted with existing legislation at the national level and sometimes offended the Constitution. In some counties, the County Assembly took over the publication of assented laws from the executive to avoid possibility of the content being tampered with after assent.

They Clerks suggested that the Protocol should address and require policy formulation to precede any law-making process. They also suggested that the KLRC should be involved in the initial stages of the law-making process only to avoid interference in the County Assembly's law-making role.

They lauded the model laws prepared by KLRC which were useful to and were relied on by most counties in developing laws at the county level.

#### **h. National Council for Law Reporting**

The National Council for Law Reporting has the statutory mandate to publish Kenya Law Reports comprising of judgements and rulings of superior courts of record. In addition, through Legal Notice No. 29 of 2009, the Attorney General delegated the mandate to publish the laws of Kenya to them. Therefore, they act as a repository of and publicize critical legal documents online. In this vein they have been providing Bills, published Acts, Policies, Gazette notices and other relevant materials on their website. They, consequently, have a role to play in the publication process of Bills.

NCLR had been engaging with counties in the discharge of their mandate. The current engagement though was neither anchored in policy or legislation. Instead, it was based on the practical need to publicize legislation generated by counties. NCLR reached out to Counties to sensitize them on the importance of publicizing their legislation on a national platform.

NCLR recognized that all legislation come into force on publication in the Kenya Gazette. They consequently developed a close working relationship with the Government Printer from where they sourced all legislation which have been published for upload and hosting on the NCLR website. However, for county legislation a problem developed which forced NCLR to reach directly to counties. Although initially NCLR would receive copies of the published Bills from Government printer, after some time counties stopped forwarding their Bills to Government Printer or when they did, the number of copies printed were too few and the counties took all of them on publication. Consequently, nobody had access to the published copies as none remained with the Government Printer.

To deal with the challenge, NCLR reached out to county assemblies or county attorneys to access the published legislation. The process revealed that there was no uniformity on the custodian of legislation at the County level.

The access from Counties was based on mutual understanding by counties as part of NCLR's efforts to ensure access to information under Article 35 of the Constitution which requires that public information be published and publicized. In addition to this, NCLR relies on Article 260 of the Constitution which defines legislation to include laws passed by County Assemblies.

On the Protocol, the Council recalled the process of its development, since it was involved in the initial stages. However, the process lost steam due to disagreements. NCLR was involved in the initial process to develop the protocol. However, misunderstanding arose from the view by national government that all legislation being taken to Government Printer for publication needed to pass through the AG's office with KLRC checking unconstitutionality. Counties rejected this requirement on the basis that this was akin to being micro-managed by the national government. The national government's concern was with constitutionality of Bills and poor drafting by counties. However, counties were suspicious of the Attorney General's intentions, since they saw him and the office as part of national government.

In publishing Bills and Acts, NCLR ensures that it gets the official copies from the Government Printer to guarantee authenticity. It only publishes them after they have been published in the Kenya Gazette. It recalled the experience during the Constitutional review process when allegations were raised about provisions being

sneaked to the draft of the Constitution for publication before the referendum. There was disparity between these copies and the ones that the Committee of Experts who had prepared the Constitution had submitted directly to newspapers for publication and mass circulation. The velum copies used to come from the AG's office but now they are from the Speaker's office.

In addition to publishing and publicizing legislation, NCLR had also undertaken analysis of legislation and in instances where they have detected anomalies, they raise these with both the KLRC and the Attorney General's office. Their analysis had revealed instances where counties have published two laws with the same Act number making it difficult to cite. In certain instances, counties amend legislation yet the section being amended did not exist. These mistakes also occurred occasionally at the national level. The power of revision of laws was also weak at the county level with the result that even after amendments, the amended Act was never published and publicly available.

The challenge of delays has also affected the process of publication. Many counties reported delays by Government Printer to publish their Bills. NCLR recalled two instances where the delays led the counties to outsource the publishing of their bills. NCLR had to communicate with the counties to authenticate their legislation before they could publicize them on the NCLR website.

NCLR was happy with the provisions in the Office of the County Printer Bill, 2018 which requires that the County Printer makes available to the NCLR issues of the gazette. This would make the access of Bills, legislation and other notices to the NCLR easier and a legal obligation. It also lauded the provision that county legislation can also be in electronic form and that such electronic form would have the same legal effect as a physical form. In NCLR's opinion, the requirement that County legislation must be published in the Kenya Gazette before coming into force may be impractical in future hence the need for some flexibility so that the publication by the Government printer becomes an additional and not primary requirement. County Printer should therefore be allowed to publish and share copy with the Government Printer either as a repository or for second publication. To ensure that this happens, the Supreme Court should be approached for an advisory opinion to vacate the decision by the High Court interpreting Article 199 of the Constitution and requiring that all county legislation must be published in the Kenya Gazette to take effect.

On proposals for the future, NCLR made the following suggestions:

- Popularization of electronic printing including by counties and provision of legal backing for both electronic and manual printing
- Empower counties to undertake review and updating of legislation by themselves
- Amend the Revision of the Laws Act to capture County legislation
- Need to link the responsibility for publication with that of revision of laws following amendments, an issue which NCLR does for national legislation but not county laws
- Need to clarify where the official repository of county legislation will be.
- Make it compulsory for counties to submit published laws to NCLR
- Need to avoid instances where county laws are gazetted but not printed or printed but not gazetted
- There is need for a legislation governing the operations of and procedure at Government Printer
- While there are timelines for publication, there should be provision on the consequence of disregard of the stipulated timelines especially by Government Printer
- The revised Protocol on publication should clarify the link between gazette and publication and include a flow-chart on the publication process.

#### **i. IGRTC**

The Intergovernmental Relations Technical Committee is established under the Inter-Governmental Relations Act with the mandate of facilitating the activities of and implementing the decisions of the Summit and the Council of Governors. It is also the successor of the Transition Authority. In practice though, it has focused mainly on implementing the resolutions of and supporting the meeting of the Summit, since the Council of Governors has its own secretariat, that preceded the IGRTC.

Its main function that is relevant to the publication of county legislation was the work geared towards promoting the amicable resolution of disputes through use of Alternative Dispute Resolution. Towards this end, IGRTC has been supporting the development of rules and guidelines on use of ADR to resolve inter-governmental

disputes for adoption by the summit. These will help reduce the number of cases that go to courts between national and county governments. Some of these disputes relate to publication of county laws.

The Committee raised concern with delays by Government Printer to publish Bills from counties. The implications of this especially for time-sensitive Bills like County appropriation laws was that some ended up being published well after the period for implementation had elapsed.

The Committee also raised concern on the reasons for the delay by Government printer. They argued against the concerns of unconstitutionality of Bills, holding that even if such Bills were unconstitutional, the Government printer had no authority to stop the publication of such Bills. They can only be holding back such Bills for ulterior motives.

On unconstitutionality, IGRTC opined that it was important that there be a body to deal with both Bills that were unconstitutional and those that were in conflict with national legislation. That way, the publication process would help to identify such laws and ensure the conflicts are addressed much earlier to avoid unnecessary disputes that would end up in litigation. In IGRTC's view the situation was even more dire in relation to functions that are yet to be unbundled making the conflicts between national and county legislation in such areas even more acute.

Other proposals made by IGTRC included the need to increase capacity support to counties on drafting of legislation; standardization of laws drafted at the county level; and consideration to inclusion of a provision in the Protocol to have IGRTC step in to resolve disputes relating to legislative powers of counties and national level.

In addition, IGRTC pointed out that in practice the Attorney General was supporting and providing advice to both the national and county governments on legal and constitutional issues.

## **V. Comparative Experience from Other Regions**

### **a. South Africa**

In South Africa, the process of legislative making either begins with a white paper or a green paper. A green paper is drafted in the Ministry or department dealing with the

issue in order to show the way that it is thinking on a particular policy. It is then published so that anyone who is interested can give comments, suggestions and ideas. A white paper on the other hand is a broad government policy. It may be drafted by the relevant government department or by a team commissioned by the ministry. Time for input and comments is also provided and parliament may also send back the policy to the relevant ministry for further discussion or further decision.

A bill can either be introduced by; a minister (national) or a Member of the Executive Committee(provincial), Member of parliament (private member bill) or a (Member of Provincial Legislature) MPL or by a committee. Bills are published in the Government Gazette.

There are two types of bills at the provincial level; money bills and other bills. The procedure for each of the bills differs. For bills other than money bills, an ordinary bill is introduced in the provincial legislature and it is referred to the relevant standing committee. For public participation, public hearings may be conducted, or the standing committee may invite interested parties to make written submissions to the committee. The committee considers that bill and may make amendments to it, after considerations by the committee; a report to with recommendations on the bill is submitted to the House. A debate takes places on the bill in the House and if there is a majority of votes in favor of the bill, the bill is passed.

For Money bills, only an MEC responsible for finance can introduce a money bill to the House. The bill is referred to the committees of finance for discussion for a maximum of seven working days. After the discussion, the committee submits a report to the House. The committee is not allowed to propose any amendments to the bill.

Once passed, the Bill goes to the premier of the province for signature and then becomes a provincial Act. The provincial Act must be published promptly and takes effect when published or by a date determined by the Act.

There is both a national gazette and provincial gazette in South Africa.

## **2. Germany**

Germany has a bicameral parliament. The two chambers are the Bundestag (Federal Diet or lower house) and the Bundesrat (Federal Council or upper house).

Both chambers can initiate legislation, and most bills must be approved by both chambers, as well as the executive branch, before becoming law.

Before a bill is deliberated in the Bundestag, it must be presented to the president of the German Bundesrat, then registered and printed by the administration. It is then distributed to all members of both houses and submitted for plenary. During the first reading, the bill is designated to one or several committees that are to prepare it for second reading. The committee then conducts detailed work on the legislation and invites experts and holds public hearings. The committee submits a report to the Bundestag and its recommendations form a basis for the second reading. During the second reading, the members of the Bundestag may move for amendments of the bill which then form part of the bill if accepted. Voting is done in the third reading.

The federal government must present all legislative initiatives first to the Bundesrat; only thereafter can a proposal be passed to the Bundestag. It is through the Bundestrart that the Lander are involved in shaping legislation. The Bundesrat's rights to participate in the legislative process are provided for. The Bundesrat cannot amend legislation passed by the Bundestag, however, if they disagree with legislation, they can move for the formation of a mediation committee. The committee is made up of equal numbers of the members from both houses. For bills that touch on Financial and administrative competencies of the Lander, the consent of the Bundesrat is compulsory.

Once an Act has been adopted, it goes through several stages before entry into force. First, it is printed and transmitted to the Federal Chancellor and the competent federal minister, who countersign it.

The Federal President then receives the Act for signing into law. It is at this stage that they examine whether the Act is in conformity with the constitution and whether it is free of any material contraventions of the Basic Law of Germany. Once satisfied, they sign the Act into law and orders that it be published in Federal Law Gazette. According to the *Verkündigung und Bekanntmachungsgesetz* known as the Promulgation and Official Notice Act, the federal gazette itself is published by the Ministry of Justice<sup>1</sup>

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<sup>1</sup> Section 1 (1)



The federal process is covered by article 82 of the constitution. The president of the Bundestrat sends it to the federal president for signing. The Bundestrat bills are published in the state gazette after being signed into law by the president of Bundestrat. The Ministry of Justice at the state level is also in charge of ensuring that the bills are published. The Ministry has special interest in ensuring the publication process goes through, failure to which the bill would fail to become legally binding.

## **b. USA**

The legislative branch of federal government that makes laws is the US congress. The US congress is made up of two legislative chambers; the US Senate and the House of representatives. To begin with, bills are either drafted by members of the congress, executive branch or outside groups. However, only members can introduce the Bill to either chamber. On introduction, the Bill is assigned to a committee whose role is to conduct research, discuss and suggest amendments to the Bill. Once a bill has been voted upon favorably by a committee, the Bill is referred to the senate for a vote. In the meantime, the House of representatives is responsible for introducing and voting on a companion Bill of its own. Just like at the senate, the Bill is assigned to a committee and may or not bear the same name as its companion at the senate. At times there are differences between the two versions. As a result, both houses call for a conference committee that helps in negotiating and resolving the differences. When both parties reach an agreement, the bill is sent to both chambers for final voting. If the bill passes, it is sent to the president for assent. The president may decline and send it back with objections within 10 days.

There are generally three steps in the federal publication process. First, the initial publication as a slip law, secondly the collection of public law number into the United states Statute at large and finally the codification in the United States Code. Once a bill becomes an act, it is first published in a form of a 'slip law' by the Office of the Federal Registrar (OFR) as a part of the Federal Registrar Publication system (FDSys). In this form, the law is published by itself in an unbound pamphlet. Information contained in the slip law includes the bill number, the public or private law number, and date of enactment, editorial notes giving citations for the laws cited

and the legislative history of the bill. Slip laws can be found at Government Printing Office's Federal Digital System.

The United States Statute at Large is prepared by the OFR at the end of each congressional session. This includes all the laws (private and public) that have been passed during that session. The list also includes resolutions, proposed amendments to the constitution and proclamations by the president. The US Statute at large can be found on the FDSys website and are organized chronologically.

The final process is for the new laws to be integrated into the pre-existing body of law known as United States Code. The code organizes the laws by subject and each subject is assigned its own title. Since 1934, the code has been published every year. The code can be found both online and in print. The Office of the Law Revision Counsel (OLRC) of the House of representative is mandated to publish the final version of the United States code. The OLRC publishes the code in its website.

The US government printer (GPO) was established by congress in 1860 and is responsible for printing all congressional documents. The printing Act of 1895 later revised public printing and established the roles of the GPO. Proposed legislation is published by the GPO as separate house and senate resolutions and bills. Traditionally, the GPO had to distribute the printed copies nationally to libraries but nowadays the GPO offers Pdf versions online.

The fifty states are separate sovereigns with their own state governments, courts and legislatures. State legislatures make the laws in each state. State courts may review these laws and remove them if they think they do not agree with the state's constitution. The process of making law in each of the states is very similar to the federal process except for minor discrepancies.

Generally, a legislator introduces a bill which is assigned to a specific committee. The committee deliberates and calls for public hearing and comments. The committee can then either reject or pass the bill with or without amendments. After approval by the committee, the bill goes for second reading where it is discussed and debated by the whole chamber. The bill then goes to the third reading where it is voted on. If it passes, it goes to the other chamber for same process. If the bills differ, a conference committee is called upon to reconcile the differences. Once this is resolved, it is sent to the governor for signing.

### **c. The UK**

Generally, bills must be agreed upon by both Houses of parliament and receive royal consent from the Queen before they become acts of parliament. Before drafting of a Bill, the relevant department develops a policy based on collected and evaluated evidence. The relevant policy committee must agree on the policy content of the bill before drafting instructions are sent to the parliamentary counsel. The committee must also take note of any amendments that present a significant change on the policy. The parliamentary counsel must draft the bills based on instructions from the relevant department. The parliamentary counsel works closely with the Bill team and departmental lawyers. As part of pre-legislative scrutiny, the Departmental legal advisors prepare a legal issues memorandum that sets out among other things, the bill's compatibility with other laws. The department is also in charge of identifying the implications of their proposed legislation for devolved administration and where necessary seek their consent and ensure they understand the issues presented in the Bill.

In addition, the department must also identify the implications on crown dependencies and where necessary seek their approval. Other considerations include the requirement of the Queen's and Prince of Wales consent, tax and expenditure implications and implications to parliament in terms of areas of law affected and conduct an impact assessment. For quality control, the Parliamentary counsels have the obligation to ensure that the proposed legislation meets their criteria of good law. They may consult with the leader of the House of Commons and the Attorney General where they have questions about the quality of the legislation.

Royal assent and when the bill becomes law does not complete the task of the Bill's team. In this regard, the team must budget for the active post-royal assent. The Bill team has to ensure the Act is published and publicized. Any other form of publicity required is also the mandate of the Bill team. In addition, secondary legislation may be required to be presented and laid before parliament. Furthermore, where the legislation has significant effect on business or the third sector, the Bill has to ensure that legislation guidance is published 12 weeks before the coming into force of the regulation. The Bill team may also publish leaflets and circulars for publicity.

The National Archives is the official archive and publisher of the UK government. It is also responsible for The Gazette, which is the UK's official public records and comprises of three publications; the London, Edinburgh and Belfast Gazette. Publication of the Gazette was from 1989 to 1996 published by Her Majesty's stationery office. In 1996 it was privatized and is currently published by the private sector under government supervision. The publication is governed by a contract with the private publishing company. The contract is detailed and seeks to make the process of publication clear and transparent. It is important that the contract even includes specifications of all the things that are submitted to the printer for publication.

#### **d. UGANDA**

For Uganda, the ministry involved approaches the cabinet through a cabinet memorandum for approval on the principles of the proposed legislation. The cabinet may approve or reject the bill or approve it subject to amendments. The First Parliamentary Counsel is permitted to go ahead and draft the bill without Cabinet approval if the Attorney General or solicitor general approve so. Like the UK position, the office of the parliamentary counsel is in charge of drafting the bill. The Ministry concerned covers the costs of printing and publishing and printing the draft bill for circulation.

On cabinet approval, the office of the First parliamentary counsel incorporates the amendments made by the cabinet and the approval of the relevant minister by signature. The First Parliamentary Counsel authorizes the Government Printer, the Uganda Printing and Publishing Corporation (UPPC) to print and publish the Bill in the Uganda Gazette. After publication, the ministry involved supplies copies to parliament for use by parliamentarians.

The Office of the first parliamentary counsel is also in charge of quality control. The office issues a certificate of compliance that the bill has been drafted in accordance with the approved standards and principles.

Once the Bill is passed into law, the clerk to parliament presents the Bill for signing to the president. Parliament is in charge of the printing of copies to be signed into law and publication of the Act in the national Gazette.

Uganda has a specific legislation, the Uganda Commencement Act, which provides for the commencement of Acts of Parliament and the procedure following the passage of bills. The Act requires the Clerk to send the passed Bill to the Government Printer who will publish ten velum copies. The clerk is then required to compare and correct any typographical errors, misprints and wrong references; compare the copies with the text of the bill as passed; and if he finds the Bill to be correct, sign each copy of the Bill and certify that he has compared it and found them accurate and then submit it to the President for signature. After signature, the Government Printer is then to publish the Act. Importantly the Act also deals with publication of legislation which comes into effect by operation of law without the President having assented to them. In such instances, it is again table in Parliament and if passed by a two-thirds majority, the speaker issues a certificate signifying compliance with the Constitution before such Act can come into operation and be published.

## **VI. Findings and Recommendations**

### **a. Findings**

The review of the Protocol and its implementation has revealed several findings. First the current Protocol does not meet the requirements of a protocol. It was drafted by the Attorney General following a meeting convened by parliament where stakeholders present believed they were not adequately consulted. In addition, Article 185 vests legislative authority on County Assemblies in matters captured by 4th Schedule. While the intention of the certificate of clearance was to ensure that counties provided proof of adherence to the publication process and thus assist the GP to ascertain the authenticity present to them, it offends the constitutional architecture of devolution and role of county assemblies. KLRC and AG's office as principal agencies responsible for certificate issuance and implementation of Protocol, concede to this unconstitutionality. Some contents of the document are however useful, including the provision of capacity building by KLRC to counties.

Despite the challenges with the Protocol, the Constitution expressly stipulates that publication is imperative for county legislation to take effect. This has also been confirmed by numerous court judgements. The review has demonstrated that there continues to be confusion on the publication process. Both Counties and Government

Printer complain of challenges in the process. There is no documentation on the procedure at Government printer for public guidance or guidance of counties.

The lack of procedure is compounded by lack of legal anchorage of the Government Printer and its operations. Its operations are administrative. The role of the Ministry of interior in the operations of the government Printer in issuing directives that sometimes result in delay in publication of county legislation offends the constitutional integrity and functions of County Governments.

Counties still have capacity challenges in developing and drafting quality Bills. County Governments are permitted by S. 5(3) of County Government Act to seek assistance of the Kenya Law Reform Commission in development and reform of County Legislation and should take more advantage of this support. The poor quality of county legislation is exacerbated by lack of local and comprehensive training for drafters and lack of policy guidance preceding development of Bills.

The publication process also lacks quality checks at the county level. First the process is over-politicized as a result of tension and turf wars between the legislative and executive branches. This results in delays and mischief. There is also lack of a designated office to undertake quality control which could correct basic errors before publication. The result has been embarrassing mistakes like having Acts from the same county with same numbers.

The Attorney General as chief legal adviser plays a critical quality control role in publication of national legislation. There currently lacks an equivalent support at the county level. The Office of the County Attorney Bill which has been passed by the Senate and forwarded to the National Assembly would help to institutionalize the office of the County Attorney and provide for its role in revision of laws and liaison with Attorney General. It should also capture its involvement in quality control as part of the publication process of Bills passed by Counties.

Chapter one of the Laws of Kenya on Revision of Laws empowers the Attorney General with the responsibility of publication of legislation. The Act, however, does not envisage County laws since it was passed pre-2010.

The National Council for Law Reporting plays an important role in publicizing legislation and gazette notices. Its role has been hampered with regards to county legislation due to the challenges in the publication process of county legislation. The

Office of the County Printer Bill requires the County Printers to make available copies of the county gazette to the National Council for Law Reporting.

The Office of County Printer Bill, 2018 seeks to establish county printers in every county. It also provides for the printing and publication of a county gazette in each county. The county gazette will be a gazette published by the authority of the county government. Clause 5 provides that the county printer shall print and publish county documents and advise the county executive on all matters appertaining printing and publication of county documents. The bill also provides for co-ordination and liaison with the office of the government printer. In performing its functions under section 5, the county printer shall coordinate and liaise with the office of the government printer and shall ensure that there is no duplication in the printing and publication of documents. The Bill has been passed by the Senate and is pending before the National Assembly.

#### **b. Recommendations**

Based on the review the report makes the following recommendations:

1. It is necessary to develop a comprehensive instrument on publication of County legislation. The instrument should initially take the form of guidelines which will be subsequently published in the gazette.
2. The instrument to be developed should spell out steps in the publication process after passage of the Bill at county level and the procedure at the Government Printer.
3. In developing a new instrument, the Kenya Law Reform Commission should maintain its role of offering capacity building and technical assistance to counties as envisaged under the County Government Act and the Kenya Law Reform Commission Act.
4. The process of developing and launching the new instrument(protocol) should be consultative and participatory to enhance buy in and guarantee its successful implementation through regional hearings to disseminate the report and sensitize them on the draft guidelines.
5. The Instrument should deal with procedure for publication of laws that come into force without signature of the County Governor following expiry of 7 days since passage of the Bill by the County Assembly.

6. The Instrument should also borrow from the UK experience where there are detailed guidelines of the specifications of legislation and other notices to be published in the gazette to make publication process easy.
7. The Instrument should provide that Velum Copies be printed by the County Printer, for counties with Printers, to avoid changes to drafts after they have been passed by the Assembly. A template vellum should be annexed to the guidelines for guidance purposes.
8. Counties should undertake public ceremonial signing of Bills just as happens at the national level to avoid suspicion.
9. Counties should adopt the good practice of formulating policies before enactment of legislation.
10. An officer at the County level should be designated to be responsible for quality control of Bills before enactment, to ensure basic issues of form and other aspects are addressed before submission for publication. This can be the role of the County Attorney under the County Attorney Bill, once the Bill is enacted into law.
11. There is need for a law to anchor the operations of the office of the Government Printer.
12. The Government Printer should expedite process of decentralizing its services to better serve counties.
13. Both national and county Governments should enhance collaboration between them to ensure harmony between County and National legislation.
14. There is need for either amendment of the Revision of Laws Act (Cap 1) or development of a legislative framework on revision of county laws to address the process of revision of laws, to correct small errors and to produce amended Acts.
15. The Kenya Law Reform Commission and the should decentralize its services to the county level.
16. The Kenya Law Reform Commission and National Council for Law Reporting should enhance their technical assistance and capacity building support to counties on areas of legislative drafting, law reform and law revision.