

## **THE KENYA LAW REFORM COMMISSION**

# **REPORT ON AUDIT AND PRIORITIZATION OF LEGISLATION FOR CONFORMITY WITH THE CONSTITUTION OF KENYA, 2010**

**FEBRUARY, 2014**

### **Background Information**

The Constitution of Kenya (2010) lays down the foundations for a wide array of institutional and legal reforms. The objective of these reforms, to be realized through constitutional implementation, is to consolidate the rule of law, democracy, human rights and good governance.<sup>1</sup> In order to meet this objective, the Constitution establishes a framework for constitutional implementation through the enactment of legislation, judicial review of existing legislation and purposive interpretation. Another key aspect of the legislative and policy medium contemplated by the Constitution is the review and harmonization of existing laws, which continue being in force, to ensure their conformity with the new constitutional dispensation.

In addition to drafting new legislation and reviewing existing legislation as mandated by the Constitution of Kenya and statutory law, the Kenya Law Reform Commission, KLRC commissioned an audit and review of all Laws of Kenya including those specifically bordering on access to justice with a view to revising them and drafting new legislation necessary to ensure their conformity with the Constitution and specifically with the new devolved system set out in the Constitution. This audit will include legislation expressly in the programme for enactment under the Fifth Schedule of the Constitution and other legislation implied in the general architecture and normative scheme of the Constitution.

This report is a result of that consultancy.

The Kenya Law Reform Commission (KLRC), (hereinafter the Commission) is established by the Kenya Law Reform Commission Act No. 19 of 2013. The Commission is the lead Agency tasked with the responsibility of legislative development and review in the Country. The overarching mandate of the Commission as set out in section 6 of the of the Act and include to keep under review all law and recommend its reform. In this regard the Commission shall

(a) keep under review all the law and recommend its reform to ensure—

- i. that the law conforms to the letter and spirit of the Constitution;
- ii. that the law systematically develops in compliance with the values and principles enshrined in the Constitution;
- iii. that the law is, among others, consistent, harmonized, just, simple, accessible, modern and cost-effective in application;
- iv. the respect for and observance of treaty obligations in relation to international instruments that constitute part of the law of Kenya by virtue of Article 2(5) and (6) of the Constitution;
- v. keep the public informed of review or proposed reviews of any laws; and
- vi. keep an updated date of all laws passed and reviewed by Parliament;

(b) work with the Attorney-General and the Commission for the Implementation of the Constitution in preparing for tabling, in Parliament, the legislation and administrative procedures required to implement the Constitution;

(c) provide advice technical assistance and information to the national and county governments with regard to the reform or amendment of a branch of the law;

(d) upon request or on its own motion, undertake research and comparative studies relating to law reform;

(e) formulate and implement programmes, plans and actions for the effective reform of laws and administrative procedures at national and county government levels;

- (f) consult and collaborate with State and non-State organs, departments or agencies in the formulation of legislation to give effect to the social, economic and political policies for the time being in force;
- (g) formulate, by means of draft Bills or otherwise, any proposals for reform of national or county government legislation;
- (h) upon request or on its own motion, advise the national or county governments on the review and reform of their legislation;
- (i) undertake public education on matters relating to law reform; and
- (j) perform such other functions as may be prescribed by the Constitution and any other written law.

The Constitution of Kenya (2010) expands the mandate of the Commission under Article 10 of the Constitution, which enjoins public participation in the law making and policy formulation process and Section 5(6) (b) of the Sixth Schedule which requires the Commission for the Implementation of the Constitution (CIC) to coordinate with the Commission and the Attorney-General in preparing for tabling in Parliament legislation required to implement the Constitution. In addition, there is an express and implied mandate to audit all the existing legislation and harmonize them with the Constitution.

*The Commission's Mandate to Audit, Review and Draft Legislation*

The Constitution of Kenya (2010) establishes a new institutional and normative framework for governance. However, it preserves, for purposes of legal continuity, the laws antecedent, subject to review, rationalisation, harmonization or interpretation with the adaptations necessary to ensure conformity with the Constitution.<sup>2</sup> In light of its statutory mandate to keep under review all the law of Kenya to ensure its systematic development and its constitutional mandate under Section 5(6) (b) of the Sixth Schedule to prepare legislation for the implementation of the Constitution, the Commission has a lead role to play in the process of auditing, reviewing and

drafting legislation to ensure conformity with and implementation of the Constitution of Kenya (2010).

In pursuance of its mandate, the Commission will undertake the preparation of legislation based on the constitutional timelines and thematic areas outlined in the Fifth Schedule of the Constitution. In addition to the general category of other unspecified legislation required by the Constitution,<sup>3</sup> within 5 years, the Commission will now undertake an audit of all other legislation, with a view to review, rationalisation or harmonization to ensure conformity with the Constitution. Where there is no legislation, the Commission will make draft legislative proposals in consultation with the Attorney General, line Ministries, Departments and Agencies and other stakeholders.

### **Objective and Purpose of the Audit**

The overall objective of the Audit is to facilitate the full implementation of the Constitution and to ensure the laws of Kenya are responsive to social, economic and political development to achieve Vision 2030 which aims to make Kenya a newly industrialised middle income country providing a high quality of life for all its citizens by the year 2030.

This report contains detailed audit of existing laws for review the new laws to be developed and enacted and any other relevant recommendations.

## **OVERVIEW AND THEMATIC ANALYSIS OF THE PROVISIONS OF THE CONSTITUTION OF KENYA (2010)**

### **Introduction and objective of section**

This section of the report seeks to review the provisions of the Constitution of Kenya (2010), in order to enable a technical audit of all the legislation required for enactment under the Fifth Schedule as well as any other legislation contemplated under the Constitution but not outlined under the Fifth Schedule. It also contains the literature review and analysis on the thematic areas implied by the legislation and policies including but not limited to past or ongoing reports of commissions of inquiry, task forces and committees as well as comparative, transnational and international legal experiences.

The 27<sup>th</sup> August 2010 and 27<sup>th</sup> August 2015 is a critical transition period following the promulgation of the Kenya Constitution 2010. During this period, Kenya is expected to enact necessary and consequential legislation not only in accordance with the transitional provisions of the Constitution but also in order to fully align the entire statute book to the Constitution. The

legislative agenda include aligning antecedent legislation to conform to the new constitutional framework.

Whereas the transitional provisions provides for an expansive list of legislation required to give effect to the Constitution, it is important to undertake a comprehensive review of the Constitution, analyse its core themes, and assess the legislative actions required for its full implementation.

The Kenya Law Reform Commission is among the institutions required to facilitate the legislative programme emanating from the Constitution. As an autonomous institution under the Justice Department, the KLRC is required to coordinate with the Commission for the Implementation of the Constitution and the Attorney General's office in preparing for tabling in Parliament, the legislation required to implement the Constitution.<sup>1</sup> This task underlines the Commission's mandate to "keep under review all the laws of Kenya to ensure its systematic development and reform, including in particular the integration, unification and codification of the law, elimination of anomalies, the repeal of obsolete and unnecessary enactments and generally its simplification and modernization."

The legal reform and development mandate of the Commission is essential to the legislative agenda envisaged under Schedule Six of the Constitution. To advise on this process, the Commission has initiated the process to audit, review and to make specific legislative proposals which will facilitate the full implementation of the Constitution. The Commission's primary focus in undertaking this review is to ensure rationalization and harmonization of the law. This process will be informed by a consultative phase which will ensure that proposed legislation give effect to policy choices which is the function of multiple organs of government. The consultative phase will also seek to engender necessary public participation in policy and legislative reform.

## **Background**

Kenya is a success story in enacting a new Constitution in peace time after over twenty years of agitation. The long struggle for constitutional reforms spawns the painstaking challenge of consequential statutory reforms to align existing laws and institutions to the Constitution. The constitution of Kenya has been described as among the "most progressive and modern." It is applauded as normative, declares and protects fundamental human rights, establishes strong state institutions, devolves power between the national and county governments, and contains a strong accountability framework for management of public resources and public administration.

## **Thematic Area #1: CONSTITUTIONAL FOUNDATIONS:**

The former constitution was seen as primarily a stipulation of supreme law in the traditional sense. It was perceived to emphasize the coercive nature of law rather than its underlying norms;

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<sup>1</sup> Constitution of Kenya, Sch. Six s. 5((6)(b)

it established state institutions, provided for their functions but contained limited opportunities to hold them to account. It gave limited attention to the soft issues of nation building, relegated the protection of individual rights, and through numerous amendments, weakened the accountability structure.

The Constitution of Kenya 2010, on the other hand is value laden. In the first chapter, it declares sovereignty of the people and supremacy of the Constitution as the inseparable norms upon which the objectives of nation-building and state-building are founded. It asserts the Kenyan position in the ranks of civilized nations by giving direct effect to “the general rules of international law”.<sup>2</sup> According to the Constitution, state power is delegated power: first divided between two interdependent levels of government; and within each of the two levels, separated among distinct but coordinate state organs with intrinsic checks and balances.

### **The Challenges of Nation Building**

The constitution, in laying a strong normative foundation, grapples with the problem of nation-building. It recognizes the heritage of diversity of Kenyan people, the need to deliberately create a national identity and strive at common vision. The strong focus on nation building recognizes the underlying issues of the Kenyan society. The independence movement was galvanized by the rejection of economic and social organization based on racial differences under the colonial government. In our times, ethnicity and lack of accountability are seen as the clear manifestations of differences. At some future date, religion or geographical imbalance or perhaps labour disparities, income and class differences could become more prominent.

The challenges to nation-building were reflected under the Agenda Four of the National Dialogue and Reconciliation initiative. The critical issues included:

#### **Ethnicity**

Ethnicity has been a subject of Kenyan politics since independence. While it gets the most prominent expression during electoral periods, its effects underlie the general social and political organization. Like in many African states, the question of support and security is the crux of the matter in any attempt to understand modern African tribalism as an on-going adaptive process.

The constitution takes a deliberate attempt to recognize Kenya’s diverse heritage, provides for the preservation of culture and promotion of languages. The vision of this nation-building scheme is that good governance and economic progress will necessarily widen the planes of association thereby creating other binding common interests which are independent of tribal affiliation. In this sense the positive elements of identity complemented through wider sphere of interaction should serve to counteract negative cleavages and facilitate true integration. This challenge runs through the Constitution and should inform the legislative development.

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<sup>2</sup> Constitution of Kenya, Art. 2(5)

## **Geographical Imbalances**

Geographical imbalance is a persistent cause of tension in respect to economic development in Kenya. The Constitution makes a deliberate step to provide for devolution of power and resources and recognizes historical regional. The Constitution therefore has a clear agenda to mainstream marginalized groups and areas in national planning. The Constitution goes further to establish a framework affirmative action.

Any proposed legislation and policy must therefore integrate measures envisaged in the Constitution. The Agenda #4 of the National Dialogue and Reconciliation premised nation building to greater devolution of resources to diminish the effects of profound imbalances. Increased development will facilitate the feeling of national belonging and objects of nation-building.

## **Employment and Class Disparities:**

The labour movement and class disparities were central issues in Kenya's fight for independence. The signs of dissatisfaction in employment and class disparities are manifest through the labour strikes. The World Bank's Social Analysis report (2006) makes a direct link between lack of employment and social disparity to the level of crime. The reports find that Kenya ranks among the top in Africa in terms of violent crimes. The National Dialogue and Reconciliation agenda found unemployment of youth to be a major driver of the 2007/08 Post Election violence.

Employment and social justice is therefore a critical constitutional agenda. Social justice is provided under the equality and non-discrimination provision in Article 27, the labour relations under Article 41 and economic and social rights under Article 43. These rights are stated in positive language with further obligations on the state to take steps to ensure their enjoyment. National or county legislation, policy and planning must therefore seek to give effect to this fundamental constitutional subject.

## **Essentials of State Building**

The Constitution complements the foundation for nation building with a framework to build a democratic state with effective institutions subject to constitutionalism. The clear essentials for this framework under the broad areas include the following:

- **Constitutionalism:** the preambular parts of each institution created under the Constitution outlines objectives which invariably restate that state power is delegated shall be exercised under the Constitution. These principles and the values expressed under the Constitution should be given effect in legislative reform.

- **International Legitimacy:** The Constitution provides for direct effect of rules of international law. This is a broad statement which encompasses ratified instruments and customary international law.
- **Political Legitimacy:** the sovereignty of the people is preserved under the Constitution. The Constitution extends locus to enforce its contravention to all persons. The principles of representation and the electoral framework are connected to the Bill of Rights to buttress political legitimacy.
- **Devolution of power:** devolution is a conceptual and fundamental principle under the Constitution. Its implementation therefore extends to all public policy.
- **Separation of Powers; and Checks and Balances:** While each state organ is brought under the check of the Constitution, separation of powers and protection of individual rights shall be prominent to counterbalance and check the exercise of public authority.
- **Public Service, administrative justice and anti-corruption:** the Constitution places high standards of integrity and duty on public officials. The national values, Chapter Six on ethics and integrity, and principles of public service under Article 232 represent pervasive norms in the Constitution. These principles are expected to guide development of policy and legislation in the national and county governments.
- **National security:** National authority represents the most coercive power of the state. The Constitution upholds national interest and democratic civilian authority. It is therefore essential to assess the legislation and institutional framework for national authority. While national authority is a necessary function of the state, it is not insulated from constitutional check.
- **Rule of law and independence of the Judiciary:** independence of the judiciary is central to the constitutional structure. The courts will be instrumental in giving effect to the new constitutional order and facilitate building of a culture of the rule of law. Proposed legislation should preserve and facilitate the judicial function.

### **Foundational Legislation**

Under this theme, the law reform agenda will focus on legislations which have implications on the hierarchy of laws; interdependent relations between the two levels of government; separate but coordinate relations among the organs of national and county government; individual and the state; citizenship and culture; national values and state accountability; regional and international commitments. These will include the following:



- a. The Judicature Act;
- b. The General Provisions and Interpretation Act;
- c. Legislation domesticating international instruments;
- d. EAC and other regional legal instruments;
- e. Aspects of the Judicature Act;
- f. Legislation on diversity, language and culture;
- g. Legislation describing Kenya's territory or county boundaries.

## **Thematic Area #2: The Bill of Rights**

The Kenyan Bill of Rights is among the most elaborate. It is normative in foundation, comprehensive in scope and self-enforcing in application. The "Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies." The Constitution merely declares and guarantees rights which are inherent in every individual. The Constitution provides a framework to consolidate the past efforts on the struggle for protection of human rights and mainstream a rights based approach to governance.

In the recent past, Kenya has had significant events with the implication on protection of human rights. Kenya has also made significant progress in the protection of individual rights. The reintroduction of multiparty politics and greater freedom of the media and other political and civil rights heralded a new era in the protection of human rights. Kenya also established institutional framework to protect human rights and has domesticated major international instruments.

Summary of the implication of the Bill of Rights on national legislation:

2. The Bill of Rights has direct applicability and applies to "all law and binds all state organs and all persons". All legislation, whether governing the vertical relations between the state and the individual; or the civil relations among persons, must conform to the Bill of Rights.
3. The Bill of Rights is maximalist; therefore, the rights which are not expressly enumerated are not excluded.
4. New Bills should have express provisions of the extent to which they affect the Bill of Rights. It is also important that proposers of any Bills should state in the Memorandum of Objects and Reasons, the extent to which the legislation shall affect the Bill of Rights.
5. Where a proposed legislation seeks to limit the enjoyment of the Bill of Rights, this must be expressly stated by identifying the right to be limited, the extent of the limitation and justification based on the proportionality standard stipulated in the Constitution.

6. Where a proposed legislation is intended to give effect to any of the rights which are expected to be realized progressively, such legislation must seek to give effect to the Bill of Rights the greatest extent at the earliest opportunity, taking into consideration the proportionality standards.
7. All legislation and public policy must mainstream protection of the vulnerable groups identified in the Constitution including: women, older members of society, persons with disability, children, youth, members of minority or marginalized communities, and members of particular religious or cultural communities.
8. International instruments of human rights have direct application in Kenya to the extent that they are not inconsistent with the express provisions of the Constitution.

### **Implementation of the Bill of Rights**

Implementation of the Bill of Rights is a function of legislative, policy, institutional, administrative and judicial action. The Bill of Rights is pervasive and will be used a measure of legitimacy of all action of public bodies as well as civil relations among all persons. Persons exercising public functions are special duty bearers in implementing the Bill of Rights. Persons claiming rights have corresponding responsibility to respect the enjoyment of the Bill of Rights and defend general contravention of the Constitution. The Constitution sets up a broad mechanism for the protection of the Bill of Rights:

- Enforceability of the Bill of Rights in the courts;
- Obligation to develop specific legislation under various aspects of the Bill of Rights including: diversity; non-discrimination; freedom of the media; administrative justice; consumer protection; labour relations; family; criminal justice rights and rights of persons under custody; and establishment of oversight independent commissions envisaged under Article 59 of the Constitution.
- Mainstreaming the Bill of Rights in all other legislations including legislation on elections; diversity; public service; public finance; land and environment; citizenship.
- Obligation on the Chief Justice to enact rules for the enforcement of the Bill of Rights.

### **Thematic Area # 3: Land and Natural Resources**

Prior to the adoption of the Constitution in 2010, the Kenyan Government adopted the National Land Policy (NLP). Land has been a major source of controversy as a key economic resource and a sensitive political tool. Expansion of the economy has increased opportunity for land use and commercial value of land. However, this has also intensified the pressure and controversy surrounding land ownership, use and management as the key economic driver in Kenya. Land is therefore seen as a major cause of ethnic tensions. Under the former Constitution, the legislations on land were seen as unhelpfully complex and piecemeal.

The NLP traced the origins of the controversies surrounding the land question and identified a legacy of historical, political and economic factors with direct bearing on the Kenya's present situation and implications on the vision for better management of land. The NLP found that while it was expected that transfer of power from colonial authorities to indigenous elites would lead to fundamental restructuring of the legacy of land in the interest of persons and community with legitimate claims, this did not materialize and the result was a "general re-entrenchment and continuity of colonial land policies, laws and administrative structure."

NLP proceeds to outline the contemporary manifestations of the land problems and their social, economic and political impact.

The Constitution states the overarching policy that Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable in accordance with the following principles:

- (a) Equitable access to land;
- (b) Security of land rights;
- (c) Sustainable and productive management of land resources;
- (d) Transparent and cost effective administration of land;
- (e) Sound conservation and protection of ecologically sensitive areas;
- (f) Elimination of gender discrimination in law, customs and practices related to land property in land; and
- (g) Encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution.

The Constitution envisages that the principles outlined shall be implemented through a national land policy developed and reviewed regularly by the national government and through

legislation. The Committee of Experts (COE) benefited from the draft National Land Policy and therefore the recommendations contained in the NLP are generally incorporated in the Constitution. The Constitution envisaged overhaul of the legislation respecting land. Schedule Six made specific provision for the following legislation:

- Community land;
- Regulation of land use and property rights;
- Legislation on land including registration, land administration; alienability; transferability;
- Establishment of the National Land Commission;
- Establishment of a specialist land and environment court with comparative competence as the High Court.

### **Protection of the Environment under the Constitution**

The Constitution is very progressive in respect to environmental protection. It entrenches environmental rights under the Bill of Rights and makes specific provisions under Articles 69 – 72. It also envisages specific legislation under the framework set out under the Constitution. Fundamental, Article 42 sets out the right to clean and healthy environment which includes the obligation to sustain environmental protection for future generations and to fulfil obligations relating to the environment. The obligations for environmental protection are stipulated under Article 69 of the Constitution and may be classified under three broad areas:

- Sustainable environmental management;
- Obligations relating to minimum tree cover;
- Obligations relating to intellectual property and indigenous knowledge;
- Public participation in environmental management;
- Environmental policy and monitoring;
- Environmental integrity and enforcement of environmental rights.

The Constitution necessitates comprehensive policy and legislative reforms regarding environment and natural resource management. Specific legislation to implement the constitutional provisions on the environment include:

- Legislation concerning agreements relating to natural resources;
- Legislation concerning the environment.

The policy reform will necessarily require additional legislative intervention on other areas. The process of audit of laws in this area must collaborate with on-going policy reforms to ensure that legislation achieve intended objectives and are rationalized. Specific areas of focus include the following:

- Exploitation of natural resources including minerals; water resources; forests; wildlife; petroleum resources among others.
- Review of existing treaty obligations concerning environment.
- Sustainability of the environment including participation by local communities.
- The intellectual property rights of local communities.
- Protection of biodiversity.

#### **Thematic Area #4: Elections**

Elections were necessarily a major driver for the clamour for Constitutional reforms. The institutional failure following the disputed 2007 General Elections was indeed a major turning point on the Kenyan Constitutional moment. The Constitutional and legal framework governing elections was therefore a critical target for reform. The report of the Independent Review Commission on the General Elections held on 27<sup>th</sup> December 2007 (IREC Report) provided the comprehensive policy statement upon which the Constitutional provisions are founded. The clear objectives of constitutional, legal and institutional reforms can be summarized as follows:

- Establishing an electoral framework founded on human rights and generally recognized principles of representation to secure substantive and procedural legitimacy;
- Establishing an enabling legal environment for political competition and fairness;
- Establishing an independent and effective institutions to manage the electoral process;
- Creating effective mechanism for electoral dispute resolution;
- Taking positive steps to promote gender and national diversity;

## **Thematic Area #5: Legislative Authority**

When Kenya ratified the Constitution, she shifted from a hybrid state structure which was had prominent elements of a parliamentary system to what can simply be referred to as a constitutional democracy with clearer separation of powers. Under the Constitution, legislative authority is delegated sovereign power to be exercised by a bi-cameral national parliament and the legislative assemblies in the county governments. This section primarily addresses the national legislative authority.

Legislative authority derives from the nature and composition of parliament. It manifests the diversity of the nation, represents the will of the people, and exercises their sovereignty. The House speaker of the first independence parliament, Mr. Slade described the functions of parliament as threefold: the first is that of making laws. The second is that of raising money by taxes and the expenditure of that money by the Government. The third function of Parliament is known as “the critical function” or oversight function that is the right and indeed the duty of Parliament, to whom the Government is answerable, to seek explanations from Government, and to criticize and advise the government. Under our constitutional democracy, parliamentary authority is preemptory as to the first two functions to the extent that its actions are consistent with the Constitution. In respect to the third function, parliamentary authority is advisory unless expressly elevated by the constitution as in the case of emergency powers.

Parliament shall exercise its legislative power through Bills passed by Parliament and assented to by the President.

To exercise its functions effectively the following areas must be aligned through legislation to facilitate the authority of parliament as a collegiate institution and safeguard the necessary independence of individual members:

- Parliamentary Service;
- Parliamentary powers and privileges;
- Legislation on public financial management including revenue allocation to the counties;
- Standing orders of the National Assembly, the Senate and county legislatures;
- Legislation and rules regarding power to summon government officials, documents and records;
- Rules regarding relationship between the two houses and dispute resolution;

- Legislation and rules regarding relationship with County Legislative Assemblies.

### **Thematic Area#6: Executive Authority and National Administration**

It is widely believed that the Executive authority is the most fundamentally recast under the Constitution. This true to the extent that the executive is viewed in relation to the other organs of government and the extent to which power has been divided between the two levels of government or limited by the Constitution and the law or counterbalanced by other organs of state. However, general framework for coordination of the national administration is largely sustained.

The national executive of the Republic comprises the President, the Deputy President and the Cabinet. The President is the Head of State and Government exercises the executive authority of the Republic, with the assistance of the Deputy President and Cabinet Secretaries in accordance with the Constitution.

### **Thematic Area #7: Devolution of Power and County Governments**

Devolution of power is among the fundamental concepts upon which the Kenyan constitutional democracy is premised. It is expressed in the foundation of the state in Chapter One of the Constitution, as national value under Article 10, and cuts cross other areas. The constitution also dedicates a specific chapter respecting the establishment of the county governments. It is therefore important to appreciate devolution as a concept that runs through the constitutional framework. Seen in this light, devolution is a critical measure of the faithful implementation of the entire Constitution. Laws enacted and institutions established under the constitution should therefore mainstream the objectives of devolution.

The objects of devolution under the Constitution<sup>3</sup> are:

- a) To promote democratic and accountable exercise of power;
- b) To foster national unity by recognizing diversity;
- c) To give powers of self-governance to the people and enhance the participation of the people in the exercise of powers of the state and in the making decisions affecting them;
- d) To recognize the right of communities to manage their own affairs and to further their development;
- e) To protect and promote the interests and rights of minorities and marginalized;

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<sup>3</sup> Art 174

- f) To promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;
- g) To ensure equitable sharing of national and local resources throughout Kenya;
- h) To facilitate the decentralization of State organs, their functions and services, from the capital of Kenya; and
- i) To enhance checks and balances and the separation of powers.

The objectives outlined above demonstrate that devolution as a concept has as much to do with establishment of effective county governments, as the working of the Constitution in its entirety. The Implementing devolution as a concept is therefore a function of each legislative instrument. It is also important that that in establishing state institutions, there should be a deliberate purpose of animating the concept of devolution. This agenda will involve enacting the legislation necessary to support the establishment and operations of the county governments and assessing the extent to which other legislation should be aligned to facilitate devolution as a fundamental constitutional concept.

**Legislation required supporting the establishment and operations of County Governments**

The report of the Task Force on Devolved Government published in 2011 provided a comprehensive analysis of the legislative agenda required to implement devolution. The bulk of these legislation has been enacted. They include—

Urban Areas and Cities Act, 2011	Art 184	To provide for classification, governance and management of urban areas and cities; to provide for the criteria of establishing urban areas, to provide for the principle of governance and participation of residents and for connected purposes
Transition to Devolved Government Act (No 1 of 2012)	Section 15, Sixth Schedule	To provide a framework for the transition to devolved government pursuant to section 15 of the Sixth Schedule to the Constitution, and for connected purposes.
Intergovernmental Relations	Art 6	To establish a framework for consultation and co-



Act (No. 2 of 2012)	and 189	operation between the national and county governments and amongst county governments; to establish mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6 and 189 of the Constitution, and for connected purposes
County Government Act (No. 17 of 2012)	Chapter 11	To give effect to Chapter Eleven of the Constitution; to provide for county governments' powers, functions and responsibilities to deliver services and
Public Finance Management Act (No. 18 of 2012)	Chapter 12	To provide for the effective management of public finances by the national and county governments; the oversight responsibility of Parliament and county assemblies; the different responsibilities of government entities and other bodies, and for
National Government Co-ordination Act (No. 1 of 2013)	Art 131 and 132	To establish an administrative and institutional framework for co-ordination of national government functions at the national and county levels of governance; to give effect to Articles 131(1) (b) and 132 (3) (b) of the Constitution
Transition County Allocation of Revenue Act (NO. 6 of 2013)	Sch. 6	To provide for allocations for wages and administration costs for the county executive and county assemblies for the period March to June, 2013 and the responsibilities of national and county governments in relation thereto and for connected purposes
Transition County Appropriation Act (No. 7 of 2013)	Sch. 6	To authorize the issue of a sum of money out of the relevant County Revenue Fund and its application towards the service of the year ending on the 30th June, 2013 and to appropriate that sum for certain respective county public services and purposes
Basic Education Act (No. 14 of 2013)	Article 53	To give effect to Article 53 of the Constitution and other enabling provisions; to promote and regulate free and compulsory basic education.


### **Thematic Area 8: The Judicial Authority**

The Judiciary attracted considerable criticism and was largely seen to embody the failure in the rule of law under the former constitutional order. It was subject to numerous task forces which consistently revealed systemic institutional weaknesses, perception of subservience to the executive and structural flaws. The series of inquiries also revealed manifest elements of institutional problems which included poor funding, lack of transparency in recruitment, incompetence, derogation of judicial independence or security of tenure of its officials, corruption and lack of accountability. For the public, the perceived effects of the problems in the judiciary were an inaccessible institution emasculated by the executive, largely out of touch with the society and working to preserve class differences.

The latest account of the institutional and policy reforms in the Judiciary is outlined in the Report of the Task Force on Judicial Reforms published in July 2010. The Task Force, appointed in 2008 was mandated to:

- Consider and recommend the expansion, functions and independence of the Judicial Service Commission;
- To consider and advise on a competitive process for the recruitment of Judges;
- To consider and advise on the financial autonomy and accountability of the Judiciary;
- To consider the nature and necessity or otherwise of Regulations under Section 68(3) of the Constitution of Kenya;
- To review and finalize the Judicial Service Bill;
- To consider and advise on ways of dealing with corruption or perceived corruption in the Judiciary;
- To consider any other measures necessary to strengthen and enhance the performance of the Judiciary in the short term and long term.

The Task Force had opportunity to make presentations to the Parliamentary Select Committee on the Review of the Constitution. This ensured that the provisions of the Constitution benefited from the policy considerations by the Task Force.

It is not surprising therefore that the Judiciary is perhaps the subject of the most robust provisions in the Constitution. The Constitution provided for replacement of the Chief Justice; overhaul of the Judicial Service Commission; mandatory vetting of all judicial officers; a new

framework of competitive appointment of judicial officers; establishment of the supreme court; expanded resource base through the judicial service fund and creation of specialist courts.

The most fundamental is the declaration of the principles for the exercise of judicial authority. Judicial Authority is derived from the people and vests in and shall be exercised by, the courts and tribunals established under the Constitution. In exercising their judicial authority, the courts are to be guided by the principles set out under Article 159(1) of the Constitution. The Constitution also preserves the role of the courts in ensuring constitutionalism by expanding locus for enforcing any contravention to all persons. The Constitution promotes alternative and traditional ways of resolving disputes.

The legislative agenda under the Chapter Ten of the constitution concerning the Judiciary concern the following aspects:

- Judicial Service Commission;
- Vetting of Judges and Magistrates
- Operationalization of the Supreme Court;
- Operationalization of the specialist divisions of the High Court;
- Review of the Judicature Act to expand the Court of Appeal and the High Court;
- Review of legislation, regulations and rules of procedure including the rules on Criminal Justice; civil procedure; Election Petitions; Enforcement of the Bill of Rights

### **Thematic Area 9: Public Financial Management and Accountability**

Management of public finance has been consistently identified as a critical cause of Kenya's governance problems. The key elements of inefficient financial governance were considered as centralized planning and distribution of resources, inequity in development, corruption, limited revenue, burdensome debt, lack of public participation and poor investment in social and capital infrastructure. Whereas, Kenya has made remarkable economic progress in the last ten years, these factors continue to buttress perception of inequity which threatens nation building and undermines the greater economic potential.

The National Dialogue and Reconciliation identified regional inequity as great risk to nation building. The Constitution provides a foundation for prudence, equity and accountability in the management of national resources. The Constitution provides for mandatory fiscal devolution, affirmative action to correct historical imbalances, public participation in financial management and greater accountability. To achieve the rights based agenda of the Constitution, the government must invest in social protection. The government must also sustain Kenya's economic progress through capital investments. The constitutional framework therefore provides a foundation for achieving the national vision 2030.

Chapter twelve of the Constitution on Public Finance is therefore a critical anchor to the national social, economic and political framework. Chapter Twelve stipulates the following guiding principles in respect to “all aspects of public finance in the Republic”:

- Openness and accountability, including public participation;
- Promotion of equitable society and in particular:
  - To fairly share the burden of taxation;
  - To equitably share revenue raised nationally among national and county governments; and
  - To ensure that public expenditure promotes development of the country including making special provision for marginalized groups and areas;
- Ensuring that public resources and public debt are shared equitably between present and future generations;
- Ensure prudential and responsible use of public money;
- Responsible financial management and fiscal reporting.

## **Essential Elements of PFM under the Constitution**

### **Devolution of resources**

The Constitution provides for financial management at the national level and establishes 47 Counties as decentralized units. Public revenue and expenditures shall be organized under one of the several funds established in accordance with the Constitution and legislation.

### **The National Budget Process**

Collection of national revenue and appropriation of public funds shall be in accordance with the budget process. The budget process provides for public participation and approval by parliament. As critical national policy document, the budget must give effect to the provisions of the Constitution. The principles outlined in Chapter Twelve are overarching pillars of public finance.

### **Revenue Policy and Public Debt**

The competence to raise revenue is divided between the national and county governments to be exercised in accordance with legislation. Public debt, under the Constitution means all financial obligations attendant to loans raised or guaranteed and securities issued or guaranteed by the national government. Parliament may through legislation, prescribe the terms on which the national government may borrow and impose reporting requirements. County borrowing is only

permitted upon a guarantee by the national government and subject to approval by the county government's assembly. Adequate care should be taken through legislation to diminish the effects of the debt burden, ensure accountability and responsibility in satisfying debt obligations.

### **Financial Management and Control**

The Constitution provides a framework and institutional arrangement for financial management and control. The legislative and oversight competence of the senate, the national assembly and county assemblies have implication on financial management and control. The Constitution envisages that Parliament shall through legislation provide for establishment, function and responsibilities of the national treasury. Parliament is required to enact legislation to provide a framework for public procurement, financial reporting and auditing of public funds.

### **Institutional Framework for PFM:**

Public finance is central to the governance framework under the Constitution. It is not surprising therefore that the Constitution provides a comprehensive institutional framework to facilitate management and accountability. The central institutions will be the national and county executives. Critical complementary and oversight roles are given to other institutions. These will include parliament, county assemblies, the Commission on Revenue Allocation, Salaries and Remuneration Commission, the Auditor General and the Controller of Budget. The Constitution envisages further legislation which governs provisions for the collection of national and county revenue; and establishment of the national and county funds. The Constitution also provides for specific functions and corresponding sanctions in respect to financial management including withholding of funds if relevant factors apply and accountability by accounting officers. Given the multiplicity of functions and institutions, it is important that legislation under this chapter engender necessary clarity and is developed with adequate consultation.

### **Regulation of Financial Services**

The regulatory function in respect to the monetary policy, price stability, issuing the legal tender and related functions is conferred on the Central Bank of Kenya. The Constitution safeguards the independence of the Central Bank and provides for legislation to provide for its composition, powers, functions, and operations.

Related regulatory functions in respect to financial services which include insurance, banking, capital markets, and national pension are currently the function of disparate legislations and institutions. Laws and institutions governing this area require review and alignment to facilitate the achievement of the objectives under the constitution and goals expressed in the national vision 2030.

### **Thematic Area 10: National Security**

National security is central to the Constitutional framework. National integrity including protection of the Kenyan borders is fundamental to state building. Maintaining internal peace is critical in sustaining the social, economic and political progress. Establishing a strong foundation for national security was therefore a key factor in designing the Kenyan constitution. The Constitutional design process takes important lessons from the Kenyan history. The lessons regarding weaknesses in the management of national security are particularly prominent during electoral process. The 2007/08 Post Election Violence exposed serious weaknesses particularly concerning internal security.

The Report of the Commission of Inquiry into the Post Election Violence (Cipev Report) provided a comprehensive account of the political and institutional sensitivities around national security. National security provides the state with a powerful coercive authority. It is therefore important that the legal and institutional framework serve to underscore the overriding civilian authority and the rule of law. Chapter fourteen of the Constitution is based on this premise.

Under Article 238, National Security is the protection against internal and external threats to Kenya's territorial integrity and sovereignty, its people, their rights, freedoms, property, peace, stability and prosperity, and other national interests. The principles for the promotion and guarantee of national security include:

- a) National security is subject to the authority of the Constitution and Parliament;
- b) Compliance with the law and with utmost respect to the rule of law, democracy, human rights and fundamental freedoms;
- c) National security organs must respect the diverse culture of the communities within Kenya; and
- d) Recruitment by national security organs shall reflect the diversity of the Kenyan people in equitable proportions.
- e) Political neutrality: specifically the constitution prohibits national security organs from furthering any political cause of prejudicing a legitimate political interest;
- f) National security organs are subordinate to civilian authority.

### **Policy reform to implement the Constitution**

Following the enactment of the Constitution, the several departments of government undertook a proactive review of policy under their remit. The policy documents generated through these

processes were intended to ground legislative agenda. Several committees have published their reports with specific legislative proposals which have formed the basis of legislation. The process of review and audit of laws should be informed by the policy statements approved by the specific departments. In some instances, further consultations will be required to rationalize and harmonize legislation. As is the norm a consultative process will be necessary in order to approximate legislative needs and instruct the drafting process in each particular case. The following are among the Commissions or ministerial committees established:

<b>Task Force/Ministerial Committee</b>	<b>Mandate</b>
Task Force on Devolved Government	To make recommendations in respect to devolved government. Task Force concluded its work
Task Force on National Values and Principles	Make recommendations on national values, national unity, ethics and leadership
Ministerial Committee on Public Finance	To review legislation required to implement the provisions of the Constitution on public finance and make proposals.
Task Force on Immigration	To make recommendation on consolidation of legislation and alignment to policy in respect to immigration
Realignment of Education Sector	Analyse the Education system to the Constitution and achievement of Vision 2030
Land Reforms	To make recommendations on legislation and alignment of land policy to the Constitution
Police Reform Implementation Oversight Committee (Naikuni Committee)	To oversee implementation of the police reforms following recommendations of Waki Commission, Ransley Commission and the Constitution
Ministerial Committee on Environmental Reforms	To facilitate policy and legislative reforms to align environmental protection to the Constitution.

Task force on Power of Mercy	Facilitate stakeholder consultations regarding operations of power of mercy
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**Tabulation of Necessary Legislation requiring enactment under the Constitution**

SUBJECT MATTER OF LEGISLATION	EXPECTED CONTENTS OF THE LEGISLATION AND CONSTITUTIONAL REQUIREMENTS AND RECOMMENDATION
<b>Publication of the Laws of Kenya-Both the National Legislation and the county legislation.</b>	Currently the constitution requires the publication of the laws of Kenya both in the Kenya Gazette and in the county gazettes. Most counties have no established physical structures to generate their own county gazettes and the national government printer would need to be anchored in a legal framework that would take care of the general statutory framework.
<b>Legislation on Culture</b>	<p>Article 11 of the Constitution provides a framework for the recognition of culture as the foundation of the nation and the cumulative civilization of the people of Kenya. The provision requires Parliament to enact a law to give further effect to the Article 11. The envisaged legislation will also ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage and to protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.</p> <p><b>Recommendation:</b> This may require a new legislation. The matters proposed as the subject of the proposed law may be included in the existing legislation, namely, the Industrial property Act and the Kenya Plant Varieties Act.</p>
<b>Enforcement of the Bill of Rights</b>	The entire legislative framework of Kenya will need to be reworked so that it embodies the Bill of rights. Hitherto, informally recognized rights and fundamental freedoms have now been included as formal expectations of the citizens of Kenya and all who may find themselves within its borders. There is therefore a plethora of legislation that will have to be prepared in order to give effect to the full meaning of the Bill of rights.



	<p><b>ARTICE 24</b></p> <p>Of particular significance is article 24 of the Constitution that seeks to give guidance the issue of limitation of rights and derogation thereof.</p> <p>The full effect of the derogation/limitation clauses in the Constitution is that legislation must be in place in order to avoid undesirable consequences brought about by failure to extend limitation of the Bill of rights to deserving cases. The recent High Court ruling that the members of the police force have the right to form a trade union is a case in point.</p> <p><i>In his ruling Mr Justice Makau said police officers will not be allowed to call or participate in any strike pursuant to section 47 (3) of the National Police Service Act of 2011 (NPSA) or any other law.He gave the Attorney-General four months to amend the statutory provisions and lay down a legislative framework to enforce the ruling. The legislative framework, Mr Justice Makau directed, should strictly comply with Article 24 of the Constitution.</i></p> <p><b>Recommendation:</b></p> <p><i>Most existing legislation will be reviewed so as to embody the requirement of Article 24 in cases where such legislation by their regulatory nature prohibit certain actions and entitlements of the people.</i></p>
<p><b>Legislation on Freedom of the Media</b></p>	<p>Article 34 requires the development of legislation to give full effect to the freedom of the Media. This Bill will provide for the establishment of an independent body free from government, political or commercial control which shall be tasked with the responsibility of setting media standards and regulating monitoring compliance with the set standards. Composition of the body should reflect the interests of all sections of the society. This legislation is already in place, namely, the Media Council. The body is however controlled by the media and the membership may need to be reviewed so that it becomes more independent of the media itself.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in</i></p>

	<i>consultation with the stakeholders.</i>
<b>Legislation on Freedom of Information</b>	<p>The Freedom of Information Bill is meant to provide a facilitative environment for the realization of the right to information as granted in Article 35 of the constitution. A freedom of information law allows for the full or partial disclosure of previously unreleased information and documents controlled by the government. The law will aim at defining agency records that are subject to disclosure, outline mandatory procedures for disclosures and sets out information protected from disclosures. A FoI Bill should provide for voluntary disclosures and administrative and legal channels through which the right to information can be realized. A bill has been prepared in this regard with the participation of the civil society.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
<b>Consumer Protection Bill</b>	<p>Article 46 of the Constitution grants consumer rights to all persons and it include the right to goods and services of reasonable quality, to information necessary for consumers to gain full benefit from goods and services, to the protection of their health, safety and economic interests; and to compensation for loss or injury arising from defects in goods and services. The Bills is to provide a regulatory framework within which these consumer rights can be enjoyed and regulated. It will also provide for further consumer protection and fair, honest and descent advertising.</p> <p><b>Recommendation:</b></p> <p><i>This Bill has been done and passed into an Act of Parliament.</i></p>
<b>Fair Hearing – Article 50</b>	<p>Article 50 recognizes the right to fair hearing. This right is available to parties in any dispute whether before a judicial or a quasi judicial body. The right requires that any person who has a dispute that can be resolved by the application of the law to have that dispute decided in a fair and public hearing before a court or any other independent and impartial tribunal or body. The article grants protection to accused persons facing</p>

	<p>trial, the manner of acquisition and admission of evidence in their trial.</p> <p>A trial process must give justice not only to the accused person but to the victims as well. This Bill will provide a framework, where possible, an avenue for victim compensation.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
<p><b>Rights of persons detained, held in custody or detained</b></p>	<p>Article 51 grants rights for persons detained or held in custody. The Bill will set out basic requirements for detention and the condition upon which such persons can be held or detained. The Bill will internalize international standards for detention and treatment of persons held in custody. It should also provide the procedure through which detained persons can petition for an order of habeas corpus.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
<p><b>Legislation on Enforcement of Bill of Rights by Subordinate Courts</b></p>	<p>Article 23 (2) require Parliament to enact a legislation to in appropriate cases give subordinate courts jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights. The Constitution grants a very comprehensive set of rights to all persons and it is important that sufficient mechanisms are put in place for redress in the event of violation or infringement. Primary jurisdiction of enforcing the Bill of Rights is vested in the High Court but recognizing accessibility to the High Court challenges, the Constitution further provides an avenue for expanding jurisdiction to subordinate courts as well on enforcement issues to be determined in the envisaged legislation. The Bill will identify circumstances when the subordinate courts will have jurisdiction in enforcing fundamental rights, the procedure of invoking the court’s jurisdiction, parties who can institute proceedings and the right of appeal if any and to which forum.</p> <p><b>Recommendation:</b></p>

	<p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
<p><b>Legislation on the Right to Fair Administrative Action</b></p>	<p>This Bill will give effect to the right to fair administrative action granted in Article 47 of the Constitution. Specifically it will aim at realizing the right of everyone to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The proposed Bill should also provide for a process of review of administrative action by court and where possible an independent and impartial tribunal. This law will equally seek to promote efficient administration by public agencies exercising executive functions.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
<p><b>Legal Aid</b></p>	<p>The development of this Bill is necessary under the provisions of Article 48 on the right to access to justice and Article 159 of the Constitution which requires that justice should be accessible to all irrespective of their status. The Bill will provide a framework through which the state can provide legal aid to persons who deserve but cannot afford the costs attendant to pursuing their claims in court. The Bill will provide for the establishing an agency to coordinate the provision of the service, set criteria for support, and identify the modes of support that can be accorded to persons who qualify for legal aid and funding of the legal aid scheme.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
	<p><b>FAMILY LAW</b></p>
<p><b>Marriage</b></p>	<p>Article 45 of the Constitution requires the enactment of a Marriage law. This law is aimed at regulating the process through which parties contract a marriage, competency to contract a marriage, legal regimes under which a marriage can be contracted and the rights and responsibilities of parties in a</p>

	<p>marriage. The Bill will aim to strengthen the institution of marriage and the rights which parties to such union acquire and enjoy during the subsistence of the marriage. It shall also provide for the manner in which or the grounds upon which a marriage can be dissolved.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
<p><b>Matrimonial Property</b></p>	<p>This law should be enacted in furtherance of Article 45 of the constitution. It aims at providing an understanding of property acquired during a marriage, their ownership during the marriage and in the event of dissolution of the marriage. Matrimonial property regime regulates the handling of property acquired in a marriage and the mode of disposal or sharing of the property upon dissolution of the marriage, the rights and responsibilities of parties at the point of dissolution of a marriage.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
	<p><b>LAND AND ENVIRONMENT LEGISLATION</b></p>
<p><b>Legislation on environment</b></p>	<p>This law will be developed to give full effect to the provisions of Articles 69, 70 and 71 of the Constitution. The law will address issues of sustainable exploitation, utilization, management and conservation of the environment, natural resources, equitable sharing of accruing benefits; provide a platform for achieving a tree cover of ten percent of the land area of Kenya; protection and enhancement of intellectual property in and indigenous knowledge of biodiversity and genetic resources of communities; provide for public participation in the management and protection of the environment; protection of genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the</p>

	<p>environment; utilization of the environment and natural resources for the benefit of the people of Kenya.</p> <p>The laws required to give full effect to the provisions of the constitution may be more than one piece of legislation due to the diversity of the areas to be covered. It is our proposal that several pieces of legislation be developed as opposed to an omnibus law. Amongst the proposed Bills will be the Mining Bill, Water Resources Bill, Energy and Petroleum Bill, Forestry and Wildlife Bill.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
<p><b>Community Land Bill</b></p>	<p>The Bill will regulate the manner of identification of community land, its beneficiaries, the management and administration of community land. The Bill will also address historical challenges in the administration and tenure of community and the manner of disposal of community land specify the nature and rights of members of each community individually and collectively.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
<p><b>Legislation on land generally</b></p>	<p>Articles 65 (4), 66(2) and 68 of the Constitution require Parliament to enact specific laws to give effect to identified provisions of the constitution. The Land Act has been enacted to address some of the identified provisions in the constitution. However, the Act does not exhaustively deal with the issues that require legislation in the land sector. Areas which still require legislation include further provision on land holding by non-citizens, legislation to regulate the maximum and minimum acreages of land ownership, and Legislation to provide Investment in land to benefit local communities and their economies.</p> <p><b>Recommendation:</b></p>

	<i>Policy to be generated by the relevant departments in consultation with the stakeholders</i>
	<b>REPRESENTATION AND THE ELECTORAL SYSTEM</b>
<b>Representation of Marginalized and Special groups</b>	<p>Article 100 of the Constitution requires Parliament to enact a law to promote the representation of identified special groups including women, persons with disabilities, youth, ethnic and other minorities and marginalized groups. This law will come up with a framework within which members of the identified groups can be represented in elective public offices.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
<b>Campaign Finance</b>	<p>Article 88 requires the IEBC to regulate the amount of money used in political and candidate campaigns. The Bill will provide a regulatory framework on sources of campaign funds, accountability for the same, propose limits of individual or corporate contribution, address conflict of interest. Its aim will be to ensure that illicit money is not pumped into political campaigns and also to avoid incidences of political players becoming hostage to commercial interest through disclosure mechanisms.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
	<b>PUBLIC SERVICE AND COUNTY LEGISLATION</b>
<b>Legislation on Values and Principles of Public Service</b>	<p>This is provided for under article 232 of the Constitution. The Bill will provide an operating framework for the values and principles of public service some of which are set out in Article 232 of the Constitution. Amongst the principles and values to be further legislated on in the Bill include; high standards of professional ethics, efficient, effective and economic use of resources, responsive prompt effective</p>

	<p>impartial and equitable provision of services, people participation, accountability for administrative acts, transparency and public information, representation of the diversity of Kenya’s communities, inclusion and equal opportunity for men and women, members of all ethnic groups and persons with disabilities.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
<p><b>County Governments Uniform Norms and Standards of Staffing Legislation</b></p>	<p>This law is required by dint of Article 235 of the Constitution. The Bill will provide a framework of uniform norms and standards for county government staffing. It shall provide for the mode of establishing and abolishing offices in the county public service, appointment of persons to hold or act in those offices and confirming appointments, and exercising disciplinary control over and removing persons holding or acting in those offices.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
	<p><b>FINANCIAL SECTOR</b></p>
<p><b>Public Procurement and Asset Disposal Bill</b></p>	<p>Article 227(2) requires the development of the Public Procurement and Asset Disposal law to regulate the national and county government procurement processes and asset disposals. The envisaged Bill will provide a framework within which policies relating to procurement and asset disposal shall be implemented. It should also cover categories of preference in allocation of contracts, protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination, sanctions and penalties against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation, and sanctions or penalties against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices.</p>



	<p><b>Recommendation:</b></p> <p><i>Current legislation provides for the procedures in procurement mainly with a focus on integrity fair competition and value for money for the State and its institutions. There would be need for amendments to include elements set out in the Constitution. These are affirmative action and value for money.</i></p>
<b>Controller of Budget</b>	<p>The Constitution in Article 228 establishes the Office of Controller of Budget tasked with the primary responsibility of overseeing the implementation of the budgets of the national and county governments by authorizing withdrawals from public funds. Good governance practice requires that an Act of Parliament provides an operating framework for the Office other than just relying on the general constitutional provisions establishing the Office. The Bill will set up the organization of the Office of Controller of Budget; specify its departments or directorates, provide for its funds and accountability, access to information and reporting mechanisms.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
<b>Central Bank of Kenya</b>	<p>Article 231 Constitution provides that an Act of Parliament shall provide for the composition, powers, functions and operations of the Central Bank of Kenya. The Central Bank is tasked with the responsibility of formulating monetary policy, promoting price stability, issuing currency and performing other functions which an Act of Parliament confers. The Bill will be the constitutive law of the Central Bank of Kenya. It will be a repealing legislation to the existing Act to bring it in line with the new values and principles enunciated in the constitution.</p>
	<b>SECURITY SECTOR LEGISLATION</b>
<b>Legislation to establish other Police Services</b>	<p>Article 247 of the constitution provides that Parliament may enact legislation establishing other police services under the supervision of the National Police Service and the command of the Inspector General of the Service. The development of this legislation is not mandatory on Parliament but discretionary. The invocation of this provision is dependent on an identified</p>

	<p>need by security agencies or consumers that further police services beyond the two already provided for in the constitution. Other police services envisaged include the services to serve to county governments.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
<p><b>Private Security Industries Bill</b></p>	<p>Article 239 of the Constitution vests matters of security on the national security organs. However, there are other security service providers in the private sector who under the provisions of Article 239 (4) must operate within the ambit of an Act of Parliament to be legal. This law will provide for a regulatory framework for private security service providers and their linkage with the national security organs.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
<p><b>Coroner's Service Bill</b></p>	<p>The Bill will be developed in furtherance of Article 245 of the Constitution dealing with national policing and security. The Bill will aim at establishing the National Coroners Service, model forensic medical services into coronial system and to prescribe the functions and powers of coroners. The aim of the Bill will be to enhance national security and provide a framework for integration of forensic policing and medicine into crime prevention and fighting.</p> <p><b>Recommendation:</b></p> <p><i>Policy to be generated by the relevant departments in consultation with the stakeholders.</i></p>
<p><b>Energy Bill</b></p>	<p>This Bill will repeal the Energy Act, the Petroleum Exploration and Exploitation Act and the Geothermal Resources Act. The aim of the Bill will be to realign the Energy Sector with the constitution. Issues to consider will include benefit sharing with local communities in resource exploitation and local content in resource</p>

	sourcing for materials and services.
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**Existing Laws Requiring Amendments to Conform to the Constitution**

At the time of promulgation of the Constitution on the 27th August 2010, there was an existing

<b>ACT OF PARLIAMENT/RELEVANT LAW</b>	<b>RELEVANT PROVISION OF THE CONSTITUTION AND BASIS FOR AMENDMENT</b>	<b>STATUS</b>
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legal order replete with several Acts of Parliament made under the authority of the then constitution. The new constitution being a a fundamental departure from the former constitution naturally offends some of the provisions of the statutes enacted under the authority of the former constitution. Article 2 (4) Constitution however provides that any law, including customary law, that is inconsistent with the constitution is void to the extent of the inconsistency, and any act or omission in contravention of the constitution is void. The import of this provision is that statutes enacted under the former constitution can only continue to apply to the extent that they are not inconsistent with the present constitution. This position is further buttressed by the provision of Section 7(1) of the sixth schedule to the constitution which provides that all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the constitution.

This provision requires a review of legislation existing as at the promulgation date to determine their conformity with the constitution and where appropriate amendments proposed to bring them into conformity with the Constitution.

**TABLE**

<p><b>Interpretation and General Provisions Act.</b></p>	<p>The Constitution of Kenya 2010 has made it necessary to review certain general legislative an administrative legislative framework so tt these are brought on board. These are:</p> <p><i>(a) The Interpretation and General Provisions Act-This Act provides for the definition of words and phrases that are commonly used in legislation. For harmony in the statute book these terms are defined so that there is often no need to further define them n the respective areas turtles where they may appear. General administrative provisions are also set out in the Act.</i></p> <p><i>(b) The Revision of the Laws legislation: With the change in the Constitutional law making process, this function that was under the Office of the Attorney General, should be reviewed so as to enable other new actors like Parliament participate in the law revision exercise.</i></p>	
<p><b>National Emblems and Flags Act</b></p>	<p>This Act will have to be reviewed to protect the county flags and other symbols. The situation as is means that these symbols are not protected form abuse or other forms of misuse. Theoritically, it is possible for the county legislations to make provision for these but it would be prudent to provided for the protection of these in national legislation so that the protective cover is uniform throughout the republic. There may also be need for a uniform national legislation as to the use of the flags and</p>	

	other symbols.	
<b>Government Proceedings Act (Cap. 40)</b>	<p>This Act which was enacted in 1958 deserves a look not just to align it with the Constitution of Kenya, 2010, but also to make it relevant to the modern day realities in government and communication.</p> <p>In its long title the Act is indicated that the objective of the Act is <i>to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government.</i></p>	
<b>State Corporations Act</b>	<p>The State Corporations Act is meant to make provision for the establishment of state corporations: for control and regulation of state corporations; and for connected purposes. The Act vests discretionary powers on the Minister in the administration of State Corporations and constitution of their managing bodies. This can be discerned from a reading of section 4 of the Act. Section 3 gives the President the power to constitute state corporations.</p> <p>The administration of state corporations will need to be aligned to the Constitution so that there may be distinguished national state corporations and county corporations.</p> <p>The provisions of the Act, should be evaluated against the values and</p>	

	<p>principles of the public service conflict with its the constitutional values and principles of governance set out in Article 10 of the Constitution and Article 132 (4) on establishing offices in the public service. The constitution requires amongst other things public participation and inclusivity which the Act does not integrate in the administration of State Corporation</p>	
<b>The Criminal Procedure Act.</b>	<p>This will have to be ligned to the Bill of rights and to take cognizance of the need for speedy and expeditious trials as expected under the Judiciary Chapter in the Constitution.</p>	
<b>The Penal Code</b>	<p>Offences related to certain matters like state secrecy have to be redefined. If not these should be addressed by applying the principle set out in Article 24 of the Bill of rights concernening limitation of rights.</p>	
<b>Persons with Disabilities Act</b>	<p>The Act aims to provide for the rights and rehabilitation of persons with disabilities; to achieve equalization of opportunities for persons with disabilities; to establish the National Council for Persons with Disabilities and connected purposes.</p> <p>Article 54 of the Constitution provides that a person with any disability is entitled to be treated with dignity and respect and to be addressed in a manner that is not demeaning; to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the</p>	

	<p>person; to reasonable access to all places, public transport and information; to use sign language, Braille or other appropriate means of communication and to access materials and devices to overcome constraints arising from the person's disability. Sub article (2) requires the state to ensure progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.</p> <p>The Persons with Disabilities Act need to be amended to streamline it with the constitutional provisions on persons with disabilities and to also provide specific mechanisms through which the disabled can be integrated in society and the rights accorded to them in the constitution are protected and realized.</p>	
<p><b>Children Act</b></p>	<p>The Children Act is an of Parliament meant to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children and to further provide for the administration of children's institutions and to give effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and connected purposes. The Act was developed in the year 2001.</p> <p>Article 53 of the Constitution makes provision for the rights of children and</p>	

	<p>specifically grants the right to a name and nationality from birth, free and compulsory basic education, basic shelter and health care, to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment and hazardous or exploitative labor, parental care and protection, which includes equal responsibility of the mother and father to provide for the child whether they are married to each other or not, not to be detained, except as a measure of last resort and when detained to be held for the shortest appropriate period of time and separate from adults and in conditions that take account of the child's sex and age. The Act further requires that the child's best interests are of paramount importance in every matter concerning the child.</p> <p>The Children Act will need to be amended to bring within its purview the positive advancements on children rights that the constitution has granted in Article 53. These provisions need to be integrated within the Act which will provide a framework within which they shall be realized.</p>	
<p><b>Public Health Act</b></p>	<p>The Act is meant to provide a framework for securing and maintaining health in the Republic. The Act recognizes the role played by municipalities in controlling and maintaining health standards within their jurisdictions and in the general health regulations in the country.</p> <p>Article 43 of the Constitution grants</p>	



	<p>health related rights which include the right to the highest attainable standard of health, which includes the right to healthcare services including reproductive health care. It further grants the right to emergency medical treatment to all persons.</p> <p>The Fourth Schedule vests county governments with responsibility over county health services and in particular county health facilities and pharmacies, ambulance services, promotion of primary health care, cemeteries, funeral parlors and crematoria, refuse removal, refuse dumps and solid waste disposal.</p> <p>The Public Health Act needs an amendment to first recognize the role county governments are to play in maintenance of county health and identified areas in the Fourth Schedule of the Constitution. The Act should also provide a facilitative framework through which people can realize the health related rights granted in Article 43 of the Constitution and giving directions for the realization of the right to emergency health services and the reproductive health rights.</p>	
<p><b>Pharmacy and Poisons Act</b></p>	<p>The Act is meant to make better provision for the control of the profession of pharmacy and the trade in drugs and poisons. The Act centralizes control of the profession and trade in drugs and poisons as a national controlled initiative.</p> <p>The Fourth Schedule gives counties the mandate to control county health services</p>	

	<p>and pharmacies. Counties therefore have a role to play in the regulation and control of drugs and poisons in the counties. An amendment of the Act will aim at mainstreaming the role of counties in regulating trade in drugs and poisons within the counties.</p>	
<p><b>National Social Security Fund</b></p>	<p>The Act is meant to establish a National Social Security Fund; to provide for contributions to and the payment of benefits out of the Fund; and for matters connected therewith and incidental thereto. The Act provides a regulatory framework for the Fund, membership to the fund, contributions to the Fund and benefits.</p> <p>Article 43 Constitution grants the right to social security and article 43 (3) further provides that the State shall provide appropriate social security to persons who are unable to support themselves and their dependants.</p> <p>The NSSF Act anchors on a compulsory contributory social security scheme while Article 43 (3) requires provision of social security to persons who cannot afford and their dependants.</p> <p>The NSSF Act is to be amended to regulate how the realization of appropriate social security provision to persons who cannot afford can be achieved.</p>	
<p><b>Law of Succession Act</b></p>	<p>The Act is meant to define and consolidate the law relating to interstate and testamentary succession and the administration of estates of deceased</p>	

	<p>persons and related matters. The Act regulates matters of inheritance, administration of the estate of deceased persons, identifies classes of beneficiaries and the process of liquidating the estate of a deceased.</p> <p>Article 45 of the Constitution recognizes the family as the natural and fundamental unit of society and the necessary basis of social order. The article further grants all parties to marriage equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. Article 45(4) directs Parliament to enact a law that recognizes any system of personal and family law under any tradition or adhered to by persons professing a particular religion. An amendment of the Law of Succession Act will aim at streamlining it with the constitution and incorporating the provisions of the Constitution within the Act.</p>	
<p><b>Kenya Information and Communication Act</b></p>	<p>The Act is meant to provide for the establishment of the Communications Commission of Kenya, facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce to provide for the transfer of the functions, powers, assets and liabilities of the Kenya Posts and Telecommunication Corporation to the Commission, the Telkom Kenya Limited and the Postal Corporation of Kenya, and connected purposes. The Act in essence provides a regulatory</p>	

	<p>framework for broadcast media and telecommunication.</p> <p>Article 34 of the Constitution provides that broadcasting and other electronic media have freedom of establishment subject only to licensing procedures that are necessary to regulate the airwaves and other forms of signal distribution. The provision further requires broadcast media to be independent of control by government, political interests or commercial interests. An amendment of the Kenya Information and Communication Act will aim at integrating the above cited constitutional provisions within the Act. The regulatory framework of the Act must reflect the constitutional standards of regulation of broadcast media.</p>	
<p><b>Public Order Act</b></p>	<p>The Act regulates maintenance of order in public places and seeks to control public gatherings, processions and demonstrations through notification police requirements to the police.</p> <p>Article 37 of the Constitution grants the right to every person to peaceably and unarmed, to assemble, to demonstrate, to picket and to present petitions to public authorities. This right can only be restricted in terms of the provisions of Article 24 of the Constitution and that restriction must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The Act requires a review to ensure that its limitations on the rights granted under Article 37 are not</p>	

	unreasonably restricted.	
<b>Evidence Act</b>	<p>The Act provides a framework through which evidence is admitted into court proceedings both civil and criminal trials.</p> <p>Article 50 of the constitution grants the right to a fair hearing whose particulars relevant to admissibility of evidence include the right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence, the right to adduce and challenge evidence, the right to refuse to give self-incriminating evidence. Further article 50 (4) provides that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.</p> <p>An amendment to the Law of Evidence Act will seek to reflect the stated constitution provisions on admissibility of evidence in the course of proceedings. The object of such amendment will be to achieve the right to a fair hearing as stipulated in the Article 50 constitution.</p>	
<b>Criminal Procedure Code</b>	<p>The Act makes provision for the procedure to be followed in criminal trials and proceedings. The Act sets out the criminal trial process from the time of arrest, arraignment in court, plea taking, bail bond requirements, trial, and examination of witnesses, to sentencing.</p> <p>Article 50(2) provides the rights of every</p>	

	<p>accused persons to a fair trial which include the right to, amongst others, be presumed innocent until the contrary is proved, to be informed of the charge, with sufficient detail to answer it, to have adequate time and facilities to prepare a defense, to a public trial before a court established under the Constitution, to have the trial begin and conclude without unreasonable delay, to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed, to choose and be represented by an advocate be informed of this right promptly, to have an advocate assigned to the accused person by the State and at State expense if substantial injustice would otherwise result and to be informed of this right promptly, to remain silent and not to testify during the proceedings, if convicted to appeal to or apply for review by a higher court as prescribed by law, to be given a copy of the proceedings.</p> <p>The Criminal Procedure Code will have to be amended to reflect the rights granted to accused persons in the constitution during the trial process and the manner in which criminal proceedings are expected to be undertaken.</p>	
Public Private Partnerships Act	Public Private Partnerships Act should be reviewed to align it with the new county structures. This will facilitate county engagements in Public Private Partnership ventures.	

Physical Planning Act	The Act should be reviewed to guide counties on how to prepare their County Spatial Plans.	
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<b>Legislation required</b>	<b>Time frame</b>	<b>Lead Agency</b>
Legislation on Culture	5 years	Ministry responsible for culture
Legislation on Freedom of the Media	3 years	Ministry responsible for information
Legislation on Freedom of Information	5 years	Ministry responsible for information
Consumer Protection legislation	4 years	Ministry responsible for Trade
Fair Hearing Bill	4 years	Attorney General
Rights of Persons detained, held in custody or detained	4 years	Attorney General
Legislation on Enforcement of the Bill of Rights by subordinate courts	5 years	Attorney General/ Judiciary
Legislation on the Right to fair administrative action	4 years	Attorney General
Legal Aid Bill	5 years	Attorney General
Marriage Bill	5 years	Attorney General
Matrimonial Property Bill	5 years	Attorney General
Legislation on environment	4 years	Ministry responsible for environment
Community Land Bill	5 years	Ministry of Land



Legislation on Land	5 years	Ministry of Land
Representation of Marginalized and Special Groups	5 years	IEBC/ Attorney General
Campaign Finance Bill	5 years	IEBC
Legislation on Values and Principles of Public Service	4 years	Attorney General/ Public Service Commission/ Commission on Administrative Justice
County Governments Uniform Norms and Standards of Staffing legislation	5 years	Directorate of Personnel Management
Public Procurement and Asset Disposal Bill	4 years	Treasury
Controller of Budget Bill	5 years	Office of Controller of Budget
Central Bank of Kenya Bill	5 years	Central Bank of Kenya
Legislation to establish other police services	5 years	National Police Service Commission
Private Security Industries Bill	5 years	National Police Service Commission
Coroner's Services Bill	5 years	National Police Service Commission

**Existing Laws requiring amendments**

State Corporations Act	5 years	Attorney General
Person's with Disability Act	5 years	Attorney General
Children's Act	5 years	Ministry responsible for Children Affairs
Public Health Act	5 years	Ministry of Health
Pharmacy and Poisons Act	5 years	Ministry of Health
National Social Security Fund Acct	5 years	Board of Trustees, National Social Security Fund
Law of Succession Act	5 years	Attorney General
Kenya Information and Communication Act	3 years	Ministry responsible for Information
Public Order Act		Attorney General
Evidence Act	4 years	Attorney General
Criminal Procedure Code	4 years	Attorney General